PUC DOCKET NO. 50788
SOAH DOCKET NO. 473-20-4071.WS

RATEPAYERS APPEAL OF THE DECISION BY WINDERMERE OAKS WATER SUPPLY CORPORATION TO CHANGE WATER AND SEWER RATES	**§**	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

WINDERMERE OAKS WATER SUPPLY CORPORATION'S OBJECTIONS TO RATEPAYERS' FIRST REQUEST FOR INFORMATION

Windermere Oaks Water Supply Corporation (WOWSC), by and through its attorneys of record, files these Objections to Ratepayers' First Request for Information (RFI) to WOWSC, and would respectfully show as follows:

I. PROCEDURAL HISTORY

Ratepayers of WOWSC (Ratepayers) served their First RFI to WOWSC on August 26, 2020. Pursuant to 16 Tex. Admin. Code (TAC) §§ 22.144(d) and 22.4(a), these objections are timely filed within 10 calendar days of WOWSC's receipt of the RFI. Counsel for WOWSC has attempted to confer with Ratepayers' Representatives to conduct good faith negotiations, but as of the filing deadline have failed to resolve the issues. While WOWSC will continue to negotiate with Ratepayers regarding these and any future objections, WOWSC files these objections for preservation of its legal rights under the established procedures. To the extent any agreement is subsequently reached, WOWSC will withdraw such objection.

II. OBJECTIONS

WOWSC objects to the following RFIs:

RATEPAYERS RFI 1-1: Produce all TRWA Water Rate Studies/Rate Analysis/Rate Assistance documents for the years 2017, 2018 and 2019 completed by TRWA including but not limited to a copy of the final report, any notes taken during meetings and any email correspondence.

Objections:

WOWSC objects to this request because (1) it does not identify with reasonable particularity the information, documents or material sought, (2) it would require WOWSC to

create a document not in existence, and therefore, not within WOWSC's possession, and (3) creating a document to respond would be unduly burdensome and expensive.

Under the Commission's rules at 16 TAC § 22.144(b)(1) and the Texas Rules of Civil Procedure 196.1, discovery requests must identify with reasonable particularity the information, documents of material sought.[1] Ratepayers request documents related to the Texas Rural Water Association (TRWA) Water Rate Studies/Rate Analysis/Rate Assistance, but then ask vaguely for "any email correspondence," without specifying any further who the emails must be to or from. Such a request is broad and vague, and is not described with reasonable particularity in order for WOWSC to accurately respond. Ratepayers' request burdens WOWSC with expending unnecessary time and expense to respond.

Additionally, WOWSC objects to this request because it would require WOWSC to create a document not in existence, and therefore, not within WOWSC's possession, and creating a document to respond would be unduly burdensome and expensive.

A party is not required to produce a document or tangible thing unless it is within the party's possession, custody, or control.[2] A document that does not exist is not within a party's "possession, custody, or control."[3] Therefore, parties cannot be forced to create documents that do not exist for the sole purpose of complying with a discovery request.[4] Ratepayers have requested TRWA Water Rate Studies/Rate Analysis/Rate Assistance documents, however, TRWA's rate study for WOWSC is for a combined water and wastewater rate. TRWA has not prepared a separate study or analysis for water or wastewater, alone. Because the requested

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[1] *See also In re TIG Ins. Co*., 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, no pet.).

[2] Tex. R. Civ. Proc. 192.3(b); 16 TAC § 22.141(a); *see also In Re Methodist Primary Care Group*, 553 S.W.3d 709, 722 (Tex. App.—Houston [14th Dist.] 2018).

[3] *Colonial Pipeline Co.*, 968 S.W.2d at 942 (Tex. 1998).

[4] *See McKinney v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 772 S.W.2d 72, 73 n.2 (Tex. 1989); *In re Jacobs*, 300 S.W.3d 35, 46–47 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding [mand. dism'd]); *In re Guzman*, 19 S.W.3d 522, 525 (Tex. App.—Corpus Christi 2000, orig. proceeding) (citing Tex. R. Civ. Proc. 192.3(b)).

document does not exist, it is not within WOWSC's possession, and WOWSC should not be required to respond to Ratepayers' request.

Lastly, the Commission's rules and the Texas Rules of Civil Procedure both recognize objections on the grounds of over breadth and burdensomeness. Specifically, the Commission's rules permit the presiding officer to limit discovery requests to protect a party from an undue burden.[5] Similarly, the Texas Rules of Civil Procedure state that "discovery should be limited if it is determined that the burden or expense of the proposed discovery outweighs its likely benefit,"[6] and that discovery should be limited "to protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights."[7] Because TRWA has prepared a combined water and wastewater rate study for WOWSC, and not separate water and sewer rate studies, WOWSC should not be required to undergo the cost and burden of producing water and sewer rate studies solely for the purpose of responding to Ratepayers' RFI.

Notwithstanding these objections, WOWSC will provide the combined water and sewer rate sheet prepared by TRWA.

RATEPAYERS RFI 1-2: Produce all TRWA Wastewater Rate Studies/Rate Analysis/Rate Assistance documents for the years 2017, 2018 and 2019 completed by TRWA including but not limited to a copy of the final report, any notes taken during meetings and any email correspondence.

Objections:

WOWSC objects to this request because (1) it does not identify with reasonable particularity the information, documents or material sought, (2) it would require WOWSC to

[5] 16 TAC § 22.142(a)(1)(D).

[6] Tex. R. Civ. Proc. 192.4(b).

[7] Tex. R. Civ. Proc. 192.6(b).

create a document not in existence, and therefore, not within WOWSC's possession, and (3) creating a document to respond would be unduly burdensome and expensive.

Under the Commission's rules at 16 TAC § 22.144(b)(1) and the Texas Rules of Civil Procedure 196.1, discovery requests must identify with reasonable particularity the information, documents of material sought.[8] Ratepayers ask for documents related to the TRWA Water Rate Studies/Rate Analysis/Rate Assistance, but then ask vaguely for "any email correspondence," without specifying any further who the emails must be to or from. Such a request is broad and vague, and is not described with reasonable particularity in order for WOWSC to accurately respond. Ratepayers' request burdens WOWSC with expending unnecessary time and expense to respond.

Additionally, WOWSC objects to this request because it would require WOWSC to create a document not in existence, and therefore, not within WOWSC's possession, and creating a document to respond would be unduly burdensome and expensive.

A party is not required to produce a document or tangible thing unless it is within the party's possession, custody, or control.[9] A document that does not exist is not within a party's "possession, custody, or control."[10] Therefore, parties cannot be forced to create documents that do not exist for the sole purpose of complying with a discovery request.[11] Ratepayers have requested TRWA Wastewater Rate Studies/Rate Analysis/Rate Assistance documents, however, TRWA's rate study for WOWSC is for a combined water and wastewater rate. TRWA has not prepared a separate study or analysis for water or wastewater, alone. Because the requested

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[8] *See also In re TIG Ins. Co*., 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, no pet.).

[9] Tex. R. Civ. Proc. 192.3(b); 16 TAC § 22.141(a); *see also In Re Methodist Primary Care Group*, 553 S.W.3d 709, 722 (Tex. App.—Houston [14th Dist.] 2018).

[10] *Colonial Pipeline Co.*, 968 S.W.2d at 942 (Tex. 1998).

[11] *See McKinney v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 772 S.W.2d 72, 73 n.2 (Tex. 1989); *In re Jacobs*, 300 S.W.3d 35, 46–47 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding [mand. dism'd]); *In re Guzman*, 19 S.W.3d 522, 525 (Tex. App.—Corpus Christi 2000, orig. proceeding) (citing Tex. R. Civ. Proc. 192.3(b)).

document does not exist, it is not within WOWSC's possession, and WOWSC should not be required to respond to Ratepayers' request.

Lastly, the Commission's rules and the Texas Rules of Civil Procedure both recognize objections on the grounds of over breadth and burdensomeness. Specifically, the Commission's rules permit the presiding officer to limit discovery requests to protect a party from an undue burden.[12] Similarly, the Texas Rules of Civil Procedure state that "discovery should be limited if it is determined that the burden or expense of the proposed discovery outweighs its likely benefit,"[13] and that discovery should be limited "to protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights."[14] Because TRWA has prepared a combined water and wastewater rate study for WOWSC, and not separate water and sewer rate studies, WOWSC should not be required to undergo the cost and burden of producing water and sewer rate studies solely for the purpose of responding to Ratepayers' RFI.

Notwithstanding these objections, WOWSC will provide the combined water and sewer rate studies prepared by TRWA.

RATEPAYERS RFI 1-3: Admit or Deny the current base water rate and base sewer rates charged by the Corporation would substantially decrease if the 2019 legal fees totaling $169,000 or more were not included in the Rate Study/Rate Analysis performed by TRWA.

Objections:

WOWSC objects to this request because it does not identify with reasonable particularity the information, documents or material sought, as required by the Commission's rules at 16 TAC § 22.144(b)(1) and the Texas Rules of Civil Procedure 196.1.[15] Ratepayers ask vaguely for

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[12] 16 TAC § 22.142(a)(1)(D).

[13] Tex. R. Civ. Proc. 192.4(b).

[14] Tex. R. Civ. Proc. 192.6(b).

[15] *See also In re TIG Ins. Co*., 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, no pet.).

WOWSC to admit or deny whether base rates would "substantially decrease," if legal fees were not included in the rate study/rate analysis performed by TRWA. The term "substantially decreased" is undefined and vague, and calls for a subjective response. Therefore, WOWSC should be relieved of responding to such a vague request.

Additionally, WOWSC objects to this request because it is meant for the purpose of harassing WOWSC. Under 16 TAC § 22.142(a)(1)(A): "[t]he presiding officer may issue an order limiting discovery requests for . . . protection of a party or other person from undue burden, unnecessary expense, harassment or annoyance." Ratepayers' vague request for admission does not call for any sort of substantive response, but is meant for the purpose of harassing WOWSC about the amount of legal fees included in WOWSC's rate study. The amount of legal fees is already listed in Ratepayers' request and they are asking WOWSC to provide an opinion on the vague question of what would constitute "substantially decrease."

RATEPAYERS RFI 1-7: Provide total billing for 2019 legal expenses.

Objections:

WOWSC objects to this request because it does not identify with reasonable particularity the information, documents, or material sought, as required by the Commission's rules at 16 TAC § 22.144(b)(1) and the Texas Rules of Civil Procedure 196.1.[16] Ratepayers request documents regarding the WOWSC's "total billing for 2019 legal expenses," without specifying whether they mean: (1) the amount of 2019 legal expenses billed by legal counsel; or (2) the amount of 2019 legal expenses actually paid to legal counsel; and (3) whether they are seeking amounts incurred by legal counsel in 2019 or amounts paid to legal counsel in 2019. Such a request is broad and vague, and is not described with reasonable particularity in order for WOWSC to accurately respond. Ratepayers' request burdens WOWSC with expending unnecessary time and expense to respond.

[16] *See also In re TIG Ins. Co*., 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, no pet.).

RATEPAYERS RFI 1-9: Please provide all unredacted attorney invoices for the years 2018 and 2019.

Objections:

WOWSC objects to this request because the entries in the legal invoices from the years 2018 and 2019 (Legal Invoices) are privileged pursuant to Rule 503 of the Texas Rules of Evidence (TRE 503) and Rule 192.5 of the Texas Rules of Civil Procedure (TRCP 192.5). Specifically, TRE 503, and TRCP 192.5 allow a client to withhold information contained in a legal invoice pursuant to the attorney-client and the work product privileges. Ratepayers request "unredacted attorney invoices for the years 2018 and 2019." The responsive documents are the same or similar documents that are the subject of: (1) Public Information Act (PIA) requests to WOWSC from WOWSC ratepayers; and (2) ongoing litigation brought by WOWSC ratepayers regarding alleged violations of the Texas Open Meetings Act by WOWSC. The Attorney General of Texas (AG) has determined these same documents are almost entirely privileged and not required to be disclosed, and has proposed a settlement to WOWSC on those grounds to dispose of the appeal currently pending in Travis County District Court. Requiring WOWSC to provide unredacted attorney invoices in this proceeding would undermine the pending settlement agreement between WOWSC and the AG regarding the PIA requests[17] for the same Legal Invoices and substantially impact ongoing litigation in Burnet County District Court adverse to several of the Petitioners in this case.[18]

Pursuant to 16 TAC § 22.104(d)(2), within two working days of this objection, WOWSC will provide an index of each document for which it is claiming privilege.

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[17] *See* Tex. Att'y Gen. Op. No. OR2020-17442 (2020) (attached as Exhibit A); *see also* Tex. Att'y Gen. Op. No. OR2019-22667 (2019) (attached as Exhibit B).

[18] *Rene French, et al. v. Friendship Homes & Hangars, LLC, et al.*, No. 48292, Third Amended Original Petition (33rd Dist. Ct., Burnet County, Tex., Aug. 24, 2020) (attached as Exhibit C).

a. Background

Ratepayer Representatives are attempting to use this rate appeal in front of the Public Utility Commission to seek documents that (1) relate to underlying, ongoing litigation between WOWSC and some of its ratepayers, and (2) are the subject of a pending settlement agreement in Travis County District Court. Since 2018, two lawsuits have been filed against the WOWSC. Both suits are substantially related and involve the sale of real property by WOWSC in 2016, and while one suit was resolved in WOWSC's favor, with any further appeal denied review by the Supreme Court, the same plaintiffs filed a second suit over the same issues that remains ongoing. In the ongoing suit and in the context of multiple PIA requests made by WOWSC members closely related to Petitioners, WOWSC applied privileges under TRE and TRCP over the information within the legal invoices, as such information reveals the litigation strategy and mental impressions of WOWSC's attorneys regarding the matters in dispute.

The first lawsuit was filed by an entity known as TOMA Integrity, Inc. (TOMA), alleging various violations of the Texas Open Meetings Act against WOWSC regarding the sale of a piece of real property. The Supreme Court denied TOMA's review on appeal. Then, three of the principals of TOMA subsequently filed another suit against WOWSC and its directors, challenging the same real property sale. That second, subsequent litigation is ongoing. Mr. Daniel "Danny" Flunker, who was once a registered principal of TOMA, has submitted multiple PIA requests to WOWSC, regarding legal invoices from March 7, 2018 to April 24, 2020. WOWSC asked the Attorney General of Texas (AG) for a decision on whether WOWSC was required to publicly disclose the 2018 and 2019 legal invoices.[19] WOWSC argued that information within the documents responsive to Mr. Flunker's PIA requests are allowed to be withheld from disclosure pursuant to Texas Government Code (TGC) § 552.022(b), as well as pursuant to the privileges provided in TRE 503 and TRCP 192.5. In its Rulings, the Attorney

[19] *See* Letter from Attorney for WOWSC, J. Troupe Brewer, to Ken Paxton, Attorney General, Office of the Attorney General of Texas (Jun. 12, 2019) (attached as Exhibit D).

General held that certain, limited parts of time entries may be withheld and redacted under the asserted privileges.[20]

Mr. Flunker has subsequently served over 30 PIA requests to WOWSC since March 2019. Importantly, Mrs. Patti Flunker is one of the two named Ratepayer Representatives. Ms. Patti Flunker is related by marriage to and/or is a member of the same household as Mr. Danny Flunker, the individual who made the PIA requests to WOWSC, mentioned above. The information responsive to the Ratepayers' RFI is directly related to the ongoing legal proceeding, and the same subject of Mr. Flunker's PIA requests. The Ratepayers, especially in light of the personal marital and business connections between and among the Ratepayer Representatives and a former principal of TOMA, should not be allowed to use the Public Utility Commission's rate appeal process as a means of circumventing the discovery process under Texas law or as a means of exposing privileged information of WOWSC that could jeopardize its position during the pendency of ongoing litigation and proposed settlement agreement.

Because the AG has proposed a settlement agreement acknowledging that most all of the information contained within WOWSC's 2018 and 2019 legal invoices are protected by both the attorney work product and attorney-client privileges, WOWSC objects to Ratepayers' RFI, and seeks to withhold those time entries in their entirety for the reasons stated herein or, in the very least, all time entries directly containing or reflecting attorney-client communications, as well as all entries pertaining to legal services performed in relation to the ongoing litigation involving WOWSC.

Alternatively, because of the sensitive nature of the requested documents, WOWSC requests that the ALJ review the documents *in camera*, without disclosing the information to Ratepayers.

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[20] *See* Exhibits A and B.

b. Argument

The Legal Invoices requested by Ratepayers contain time entry descriptions for legal services rendered to WOWSC, detailing the work product, strategies, actions, etc. of WOWSC's legal counsel, as well as communications between WOWSC and its attorneys. This information in turn reflects the mental impressions, opinions, conclusions, and legal theories of WOWSC's legal counsel both in anticipation of and during litigation. Therefore, WOWSC asserts the attorney-client privilege, under TRE 503, and the work product privilege, under TRCP 192.5.

c. Attorney-Client Privilege under Texas Rule of Evidence 503

Under TRE 503, a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client. As WOWSC illustrated in its briefing to the AG and Travis County District Court, in order to withhold such information from disclosure under TRE 503, the AG established a test requiring a governmental body to:

> (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication;
> (2) identify the parties involved in the communication; and
> (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client.[21]

If a governmental entity can demonstrate the satisfaction of all three factors, the information is privileged and confidential under Rule 503 and may be withheld from disclosure.

The Legal Invoices were prepared and reviewed exclusively by WOWSC attorneys or attorney representatives and mailed to the attention of a WOWSC Board member, and furthermore were not intended to be made available to anyone outside WOWSC representatives, all of whom are "clients" or "client representatives" for the purpose of the TRE 503 attorney-client privilege. The Legal Invoices were communications sent by an attorney or the attorney's representative in their capacity as legal counsel to WOWSC, and this sort of routine

[21] Op. Tex. Att'y Gen. No. OR2011-12797 (2011).

invoicing is certainly for the facilitation of legal services to WOWSC. No waiver of this privilege has occurred at any time regarding these documents, and the confidential nature of the information therein has thus been preserved. The nature of the services provided are readily apparent by the documents themselves, as the Legal Invoices and time entry narratives within describe the legal services provided to WOWSC and serve as a summary thereof for the purposes of understanding the associated costs of legal representation and, more importantly, to keep the client and its representatives up to date on the most recent work done by legal counsel especially considering the ongoing litigation with TOMA.

All elements of the test for applicability of the TRE 503 privilege are satisfied. The Legal Invoices and specifically the time entry narratives and work descriptions are "communications" from legal counsel to WOWSC. At no time whatsoever were these invoices or their contents shared with anyone beyond WOWSC representatives and WOWSC's legal counsel, and thus the confidentiality of these invoices among attorneys, attorney representatives, clients, and client representatives has been preserved. The information at issue does not fall within any of the exceptions to the attorney-client privilege provided by TRE 503(d) and the privilege has not otherwise been waived by WOWSC. Therefore, WOWSC claims that all time entry narratives and work descriptions contained in the invoices responsive to Ratepayers' RFI are excepted from discovery pursuant to the attorney-client privilege provided in Rule 503 of the Texas Rules of Evidence.

d. Work Product Privilege under Rule 192.5 of the Texas Rules of Civil Procedure

Under TRCP 192.5, "work product" is defined as:

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys,

> consultants, sureties, indemnitors, insurers, employees, or agents.[22]

"Core" work product is defined as "the work product of an attorney or an attorney representative that contains the attorney's or the attorney representative's mental impressions, opinions, conclusions, or legal theories."[23]

To withhold information pursuant to the work product privilege under Rule 192.5, a party must demonstrate that the information at issue was: (1) either material prepared or mental impressions developed during trial or in anticipation of litigation by or for a party or a party's representatives, or a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives; and (2) consists of the "mental impressions, opinions, conclusions, or legal theories" of an attorney or that attorney's representative.[24]

The AG found that a large portion of the time entries on WOWSC's Legal Invoices was protected as core work product privilege, and other information noncore work product was not privileged.[25] However, recently, the Sixth Court of Appeals held that, within information subject to TGC § 552.022 (categories of public information), noncore work product, as described in TRCP 192.5, is subject to the same mandatory withholding requirement as core work product.[26] Therefore, all information in the invoices encompassing "work product" is subject to the privilege provided by TRCP 192.5.

The Legal Invoices and the information contained therein cover a period during which litigation was not only anticipated, it was active and ongoing throughout the date range specified by Ratepayers' RFI. Mr. Les Romo represented WOWSC prior to representation by Lloyd Gosselink Rochelle & Townsend (Lloyd Gosselink). Mr. Romo's representation of WOWSC

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[22] Tex. R. Civ. Proc. 192.5(a).

[23] Tex. R. Civ. Proc. 192.5(b)(1).

[24] Tex. R. Civ. Proc. 192.5(a) & (b)(1); *see also* Tex. Att'y Gen. ORD-677 (2002).

[25] *See* Exhibits A and B.

[26] *Paxton v. City of Dall.*, No. 06-18-00095-CV, 2019 WL 2119644, at *9-10 (Tex. App.—Texarkana May 15, 2019, pet. denied) (mem. op.).

and his corresponding responsive invoices during that time frame easily satisfy the "during trial or anticipation of litigation" element of the test for Rule 192.5 application. Additionally, litigation was active at the time WOWSC engaged Lloyd Gosselink, and that same or closely-related litigation has been ongoing throughout Lloyd Gosselink's representation of WOWSC and remains pending to date.

Information contained in the Legal Invoices is protected by the work-product privilege because the documents embody communications from attorneys and attorney representatives to the client, WOWSC and its representatives, that further reflect the applicable legal theories, opinions, mental impressions, and conclusions of legal counsel for WOWSC.[27] Those communications, particularly the time entry and work description narratives in the Legal Invoices, frequently summarize and detail those mental impressions, legal theories, opinions, and conclusions of WOWSC's legal counsel on numerous areas of law—often specifically regarding the ongoing litigation with TOMA.

As a whole, this confidential information reveals the internal strategy of WOWSC and its legal counsel regarding the lawsuits and surrounding related issues. These Legal Invoices *themselves* are communications, as are the individual time entries and work description narratives contained therein, as they are sent to WOWSC to convey a sufficient description of legal work performed previously as well as ongoing tasks and assignments, and are intended to facilitate the provision of legal services in that regard. The invoices are sent to and reviewed by *only* WOWSC representatives and those communications remain confidential as they are kept in WOWSC's records and legal counsel's files without dissemination outside of those parties. Although the Legal Invoices may reference certain other communications within the narratives of time entries or work descriptions, the narratives *themselves* constitute communications between attorneys and attorney representatives and WOWSC.

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[27] *See* Tex. R. Civ. Proc. 192.5(a) & (b)(1).

Under the guidance and rulings of the Sixth Court of Appeals and the AG himself, WOWSC respectfully requests to withhold the entirety of information within the Legal Invoices to which the work-product privilege applies pursuant to Rule 192.5—specifically any invoice of Mr. Romo or Lloyd Gosselink containing references to either: (1) the litigation with TOMA and the ongoing litigation in Burnet County; or (2) any work product, meetings, research topics, issues, or communications regarding the same. All of these references are either communications made in anticipation of and/or during litigation that reflect legal counsel's mental impressions, theories, conclusions, and opinions regarding the suit, material prepared or mental impressions developed in anticipation of and/or during litigation that indicate legal counsel's mental impressions, theories, conclusions, and opinions regarding the suit, or both.

Requiring WOWSC to provide these attorney invoices in this rate appeal proceeding before the Commission would carry dangerous policy implications. Potential plaintiffs in state or federal courts could easily circumvent statutory rules on procedure and privilege that govern the discovery process by participating in a proceeding before an administrative agency and requesting legal invoices from a governmental entity with whom the requestor is currently involved in litigation in state court, thereby gaining invaluable insight to the strategies, legal theories, mental impressions, and conclusions of a governmental entity's legal counsel during the litigation.

Therefore, pursuant to TRCP 192.5, WOWSC requests the ALJ rule that WOWSC is relieved from responding to Ratepayers' RFI because the Legal Invoices requested are excepted from disclosure under the work product privilege.

e. Conclusion

For the foregoing reasons, WOWSC respectfully requests the ALJ relieve WOWSC of responding to Ratepayers' request for legal invoices pursuant to the privileges provided by Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure, and their disclosure would undermine the AG's opinions and active litigation. WOWSC will provide an index of the privileged documents within two working days of this objection.

Alternatively, because of the sensitive nature of the requested documents, WOWSC requests that the ALJ review the documents *in camera*, without disclosing the information to Ratepayers.

f. Index of privileged documents

Under 16 TAC § 22.144(d)(2), a party may object on the basis that the response is protected under the attorney client privilege, as long as the party provides within two working days of the objections, an index that lists, for each document: the date and title of the document; the preparer or custodian of the information; to whom the document was sent and from whom it was received; and the privilege(s) or exemption(s) that is claimed. WOWSC will submit an index of privileged documents within two working days of these objections.

RATEPAYERS RFI 1-12: Provide a current list of all property the Corporation owns and that is reasonably necessary for and used in the operation of the corporation:

(A) to acquire, treat, store, transport, sell, or distribute water; or

(B) to provide wastewater service and is under active construction or other physical preparation for future use and

(C) provide a list of all property the Corporation owns that is not applicable to (A) and (B).

Objections:

WOWSC objects to this request because it would require WOWSC to create a document not in existence, and therefore, not within WOWSC's possession, and creating a document to respond would be unduly burdensome and expensive.

A party is not required to produce a document or tangible thing unless it is within the party's possession, custody, or control.[28] A document that does not exist is not within a party's "possession, custody, or control."[29] Therefore, parties cannot be forced to create documents that

[28] Tex. R. Civ. Proc. 192.3(b); 16 TAC § 22.141(a); *see also In Re Methodist Primary Care Group*, 553 S.W.3d 709, 722 (Tex. App.—Houston [14th Dist.] 2018).

[29] *Colonial Pipeline Co.*, 968 S.W.2d at 942 (Tex. 1998).

do not exist for the sole purpose of complying with a discovery request.[30] Because the requested document does not exist, it is not within WOWSC's possession, and WOWSC should not be required to respond to Ratepayers' request.

Additionally, the Commission's rules and the Texas Rules of Civil Procedure both recognize objections on the grounds of over breadth and burdensomeness. Specifically, the Commission's rules permit the presiding officer to limit discovery requests to protect a party from an undue burden.[31] Similarly, the Texas Rules of Civil Procedure state that "discovery should be limited if it is determined that the burden or expense of the proposed discovery outweighs its likely benefit,"[32] and that discovery should be limited "to protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights."[33]

Ratepayers' RFI requests a document that does not exist. Creating this document would require WOWSC to expend considerable time and resources, and would result in an expensive, undue burden on WOWSC.

III. PRAYER

WHEREFORE, PREMISES CONSIDERED, WOWSC requests these objections be sustained and WOWSC be relieved of responding to these RFIs. WOWSC also requests any other relief to which it may show itself justly entitled.

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[30] *See McKinney v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 772 S.W.2d 72, 73 n.2 (Tex. 1989); *In re Jacobs*, 300 S.W.3d 35, 46–47 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding [mand. dism'd]); *In re Guzman*, 19 S.W.3d 522, 525 (Tex. App.—Corpus Christi 2000, orig. proceeding) (citing Tex. R. Civ. Proc. 192.3(b)).

[31] 16 TAC § 22.142(a)(1)(D).

[32] Tex. R. Civ. Proc. 192.4(b).

[33] Tex. R. Civ. Proc. 192.6(b).

Respectfully submitted,

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ATTORNEYS FOR WINDERMERE OAKS WATER SUPPLY CORPORATION

CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on September 8, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

JAMIE L. MAULDIN

3870/04/8116085

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 14, 2020

Mr. Troupe Brewer
Counsel for the Windermere Oaks Water Supply Corporation
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
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OR2020-17442

Dear Mr. Brewer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 834912.

The Windermere Oaks Water Supply Corporation (the "corporation"), which you represent, received a request for attorney fee bills for deposition training and preparation for corporation directors. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

You state some of the requested information relates to litigation. *See Windermere Oaks Water Supply Corp. v. Paxton*, No. D-1-GN-19-006219 (201st Dist. Ct., Travis County., Tex.). The lawsuit concerns a previous request for some of the information at issue, in response to which this office issued Open Records Letter No. 2019-22667 (2019). In Open Records Letter No. 2019-22667, we determined the corporation may withhold the information we marked pursuant to rule 503 of the Texas Rules of Evidence but must release the remaining information. In response to Open Records Letter No. 2019-22667, the corporation filed the referenced lawsuit against out office challenging the ruling, which is pending. Accordingly, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. However, we will consider your arguments against disclosure of the submitted information, which was not at issue in the previous ruling.

We note, and you acknowledge, the submitted information consists of attorney fee bills that are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16)

provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[,]" unless the information is confidential under the Act or other law. Gov't Code § 522.022(a)(16). Although the corporation raises section 552.107 of the Government Code for the attorney fee bills, this exception is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the corporation may not withhold the information subject to section 552.022(a)(16) under section 552.107. The Texas Supreme Court has held, however, the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence and attorney work product privilege claim under rule 192.5 of the Texas Rules of Civil Procedure for the submitted fee bills.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. Rule 192.5 defines work product as

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.* 192.5; Open Records Decision 677 at 6-8 (2002). In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

> a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You contend the submitted information constitutes attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. You state this information was created in

anticipation of litigation. You further state this information reflects attorneys' mental impressions, conclusions, or legal theories. Having considered the submitted arguments and reviewed the information at issue, we conclude some of the information at issue, which we marked, constitutes privileged attorney work product that may be withheld under rule 192.5. Accordingly, the corporation may withhold the information we marked under Texas Rule of Civil Procedure 192.5.[1] However, we find you have not demonstrated the remaining information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that was developed in anticipation of litigation or for trial. We therefore conclude the corporation may not withhold the remaining information at issue under Texas Rule of Civil Procedure 192.5.

Texas Rule of Evidence 503(b)(1) provides the following:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
>
> > (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
> >
> > (B) between the client's lawyer and the lawyer's representative;
> >
> > (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
> >
> > (D) between the client's representatives or between the client and the client's representative; or
> >
> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the

[1] As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You state the remaining information in the attorney fee bills contains communications between the corporation and attorneys of the corporation that were made for the purpose of facilitating the rendition of professional legal services to the corporation. However, upon review, we find you have not demonstrated the remaining information at issue constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Thus, the corporation may not withhold the remaining information on that basis.

In summary, the corporation may withhold the information we marked under Texas Rule of Civil Procedure 192.5. The corporation must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Emily Kunst
Assistant Attorney General
Open Records Division

EK/be

Ref: ID# 834912

Enc. Submitted documents

c: Requestor
(w/o enclosures)

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 15, 2019

Mr. J Troupe Brewer
Counsel for Windermere Oaks Water Supply Corporation
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701

OR2019-22667

Dear Mr. Brewer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 781033.

The Windermere Oaks Water Supply Corporation (the "corporation"), which you represent, received a request for specified legal invoices. You claim the submitted information privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note, and you acknowledge, the submitted information consists of attorney fee bills that are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege" unless the information is expressly confidential under the Act or other law. *Id.* § 552.022(a)(16). The Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the submitted attorney fee bills.

Texas Rule of Evidence 503(b)(1) provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
>
> > (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
> >
> > (B) between the client's lawyer and the lawyer's representative;
> >
> > (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
> >
> > (D) between the client's representatives or between the client and the client's representative; or
> >
> > (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Id. 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert the submitted attorney fee bills must be withheld in their entireties under rule 503. However, section 552.022(a)(16) of the Government Code provides information "that is in a bill for attorney's fees" is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(l6)), 589 (1991)

(information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice). Accordingly, the corporation may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503.

Additionally, you assert portions of the submitted fee bills should be withheld under rule 503. You state the submitted fee bills include privileged attorney-client communications between the corporation and its outside counsel that were made in furtherance of the rendition of professional legal services to the corporation. You also state these communications were intended to be, and have remained, confidential. Based on these representations and our review of the information at issue, we find you have established the information we have marked constitutes privileged attorney-client communications under rule 503. Thus, the corporation may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, upon review, we find some of the remaining information has been shared with individuals you have not demonstrated are privileged parties. We also note an entry stating a memorandum or an email was prepared or drafted does not demonstrate the document was communicated to the client. Therefore, we find you have failed to demonstrate the remaining information consists of privileged attorney-client communications. Thus, the corporation may not withhold any portion of the remaining information under rule 503.

We next address Texas Rule of Civil Procedure 192.5 for the remaining attorney fee bills. Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. See ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. Id.

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." Id. at 204. The second part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the

exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You claim the remaining information consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, however, we find you have not demonstrated the information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that were developed in anticipation of litigation or for trial. We therefore conclude the corporation may not withhold any of the remaining information under Texas Rule of Civil Procedure 192.5.

In summary, the corporation may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. The corporation must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Paige Lay

Paige Lay
Assistant Attorney General
Open Records Division

PL/eb

Ref: ID# 781033

Enc. Submitted documents

c: Requestor
(w/o enclosures)

CAUSE NO. 48292

RENE FFRENCH, JOHN RICHARD DIAL and STUART BRUCE SORGEN,	§	IN THE DISTRICT COURT
Intervenor Plaintiffs,	§	
vs.	§	BURNET COUNTY, TEXAS
FRIENDSHIP HOMES & HANGARS, LLC, WINDERMERE OAKS WATER SUPPLY CORPORATION, and its Directors WILLIAM EARNEST, THOMAS MICHAEL MADDEN, DANA MARTIN, ROBERT MEBANE, and PATRICK MULLIGAN,	§	
Defendants.	§	33rd JUDICIAL DISTRICT

THIRD AMENDED ORIGINAL PETITION

(Including Request to Enjoin or Set Aside Actions in Furtherance of "Amended and Superseding Agreement Regarding Sale of Piper Lane Property" and Request to Enforce a Constructive Trust and Other Equitable Relief)

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW LAWRENCE RENE FFRENCH, JR., JOHN RICHARD DIAL and STUART BRUCE SORGEN, each as a Member Owner of the assets and revenues the water supply and sewer service cooperative operated through the instrumentality known as WINDERMERE OAKS WATER SUPPLY CORPORATION ("WSC") and as a representative pursuant to Section 20.002(c)(2), Tex. Bus. Orgs. Code, as Plaintiffs, file this Third Amended Original Petition complaining of FRIENDSHIP HOMES & HANGARS, LLC ("FHH"), and DANA MARTIN, WILLIAM EARNEST, THOMAS MICHAEL MADDEN, ROBERT MEBANE, PATRICK MULLIGAN, JOE GIMENEZ, MIKE NELSON and DOROTHY TAYLOR, in their official capacities as current or

former Directors and/or Officers of the WSC and in their individual capacities (collectively, the "Director Defendants"), and JOHANN and MICHAEL MAIR, as owners (but not bona fide purchasers) of a portion of the property at issue herein. As has always been the case, the WSC entity is a party defendant herein solely to ensure that the property wrongfully diverted or encumbered or its value is restored to the rightful owners and not for the purpose of seeking money damages from the WSC or its Member Owners. Plaintiffs would show the Court as follows:

I.

Discovery Control Plan

1.01 Discovery is intended to be conducted under Level 3, pursuant to Rule 190.4, Texas Rules of Civil Procedure. Plaintiffs' counsel has prepared and has circulated to all current parties a proposed order in an effort to develop an agreed discovery control plan tailored to the circumstances of this specific suit. No agreement has yet been reached.

II.

The Context of This Dispute

This lawsuit is about redress for financial and other misconduct by local elected officials and about restoring honesty, integrity and accountability to the Board of the Windermere Oaks Water Supply Corporation. No one seriously disputes there has been misconduct involving former Director Dana Martin and her alter ego Friendship Homes and Hangars.[1] No one seriously disputes these acts and omissions have cost the WSC

[1] See legal analysis prepared by the WSC's own attorneys attached hereto as Exhibit 1 and incorporated herein.

membership $1 million or more in land and cash. Rate hikes and fee increases have been the result. Everyone is anxious to learn why a water supply corporation that had surplus land worth over $1 million in 2016 has placed itself and its Member Owners into such financial jeopardy.

While the "why" remains a mystery, the "how" does not. Pursuant to the governing documents, the WSC has "no power to engage in activities or use its assets in a manner not in furtherance of the legitimate purposes of a water supply cooperative or sewer service cooperative as recognized by 1434a and Internal Revenue Code 501(c)(12)(A)." Martin herself admits the WSC does not have the power to transfer its property for less than fair market value:

> Q. Okay. How about selling surplus property at a third of its fair market value? Would that be in furtherance of the legitimate business of a water supply or sewer service cooperative?
>
> A. The selling of property for less than its worth would not be in furtherance of it. Correct.

Martin, Dana, (Page 36:7 to 36:15)

In 2015-2016 the WSC exceeded its powers and the Director Defendants on the Board exceeded their authority and breached their duties by transferring land to Martin for pennies on the dollar. The immediate loss to the WSC was in the range of $1 million. In 2019 the Director Defendants on the Board caused the WSC to multiply the loss by approving a "settlement agreement" with Martin and her alter ego FHH that left the 2016 fire sale transaction largely intact and gave Martin even more valuable WSC property for no consideration. Hundreds of thousands more WSC dollars have been wasted on legal fees with absolutely nothing to show for it. Martin, on the other hand,

has already pocketed more than $80,000 in profits that should have gone to the WSC and its Member Owners.

III.

Parties

3.01 Plaintiff Lawrence Rene Ffrench, Jr. ("Ffrench") is a resident of Travis County, Texas. Ffrench is and was at all times relevant hereto recognized as a Member and Customer of the WSC. The last three digits of his driver's license number are 768. The last three digits of his social security number are 866.

3.02 Plaintiff John Richard Dial ("Dial") is a resident of Burnet County, Texas. Dial is and was at all times relevant hereto recognized as a Member and Customer of the WSC. The last three digits of his driver's license number are 446. The last three digits of his social security number are 924.

3.03 Plaintiff Stuart Bruce Sorgen ("Sorgen") is a resident of Burnet County, Texas. Sorgen is and was at all times relevant hereto recognized as a Member and Customer of the WSC. The last three digits of his driver's license number are 560. The last three digits of his social security number are 492.

3.04 As and to the extent necessary or appropriate to recover the Member Owners' property and/or to prevent further waste and misappropriation of the Member Owners' assets, Ffrench, Dial and Sorgen also appear herein as representatives of the WSC, pursuant to Section 20.002(c)(2), Tex. Bus. Orgs. Code, and as members with voting rights pursuant to Section 22.512, Tex. Bus. Orgs. Code.

3.05 Friendship Homes & Hangars, LLC ("FHH") is a Texas limited liability company owned or controlled by Defendant Martin and was and remains her alter ego. FHH has appeared and has answered herein.

3.06 Dana Martin ("Martin") is a former Director of the WSC who has appeared and has answered herein. Martin has improperly benefitted from illegal and unfair interested-director transactions and is personally accountable to the WSC and its Member Owners for the full financial and other loss associated with the events giving rise to this lawsuit. Martin has appeared and has answered herein.

3.07 Defendants William Earnest, Thomas Michael Madden, Robert Mebane and Patrick Mulligan (sometimes collectively referred to herein as the "2016 Board") were Directors along with Martin on the WSC Board of Directors that orchestrated and carried out the March 2016 fire sale transaction and thereafter spent WSC funds to protect Martin and themselves. Each of these Defendants has accepted illegal distributions of WSC funds to pay the cost associated with defending such wrongful conduct. Each of these Defendants is personally accountable to the WSC and its Member Owners for the full amount of such illegal distributions of cooperative funds and for the full financial and other loss associated with March 2016 fire sale transaction. Each has appeared and has answered herein.

3.09 Earnest, Gimenez, Nelson and Taylor (sometimes collectively referred to herein as the "2019 Board") have voted to leave the 2016 fire sale transaction intact and to give away even more valuable WSC property to the extreme disadvantage of the Member Owners. They have also spent WSC funds to protect Martin and themselves. Each of these Defendants has accepted distributions of WSC funds to pay the cost associated with defending such wrongful conduct. As a result of the acts and omissions

of these Defendants, the WSC and its Member Owners have been dispossessed of hundreds of thousands in property and value and will be dispossessed of even more, and their collectively owned resources continue to be used against their interests. Each has appeared and has answered herein.

3.10 In its capacity as nominal respondent herein, the WSC has appeared and has answered. However, there is not now nor has there ever been anything for the WSC to expend legal fees to "defend" in this lawsuit. Plaintiffs do not, nor have they ever, sought monetary relief from the WSC and its Member Owners. They seek only to return to the WSC and its Member Owners property and money that rightfully belong to them.

3.11 Defendants Johann and Michael Mair are the current owners (but not bona fide purchasers) of a portion of the WSC property misappropriated by Martin and the 2016 Board. Their current whereabouts are unknown; that information is being sought through the discovery process and they will be served as soon as it is obtained.

IV.

Jurisdiction

4.01 Plaintiffs' claims are within the jurisdictional limits of the Court.

4.02 Plaintiffs plead their claims and causes of action independently and in the alternative, making no election whatsoever as to any claims and/or remedies and seeking the full recovery to which they may show themselves and the WSC and its other Member Owners entitled under applicable law and principles of equity.

4.03 Plaintiffs bring this lawsuit to correct the consequences of the WSC's *ultra* vires acts and the acts and omissions of the WSC/Member Owners' unfaithful fiduciaries and their affiliates and to restore and prevent further waste of their scarce valuable

resources. Should money damages be necessary to restore the WSC and its Member Owners, the individual wrongdoers, and not the Member Owners, must account for such losses. As specifically required by Rule 47, Plaintiffs plead verbatim the following language of that Rule concerning recovery of monetary relief against the WSC's unfaithful fiduciaries: "(4) monetary relief over $1,000,000." This lawsuit seeks no financial recovery from the WSC or its Member Owners, but only from the individuals who perpetrated the loss.

4.04 The individual Director Defendants did not act in good faith, with ordinary care or in a manner reasonably believed to be in the best interest of the WSC and its Member Owners. Accordingly, they are not statutorily shielded from liability herein and are not entitled to by indemnified.

4.05 Plaintiffs have standing because (i) they seek to recover damages for wrongs done to them individually where the wrongdoers have violated duties arising from contract or otherwise, and owing directly by them to the Plaintiffs, (ii) they are WSC Members seeking under §20.002 to enjoin or annul the performance of an act or the transfer of property by or to the WSC that is *ultra vires*; (iii) they are WSC Members bringing a representative suit under §20.002 against current and former officers and directors of the WSC; and (iv) they are WSC Members bringing suit under §22.516 for a declaration that any purported ratification of the 2016 fire sale transaction is not effective and/or for measures to remedy or avoid harm to any person substantially and adversely affected by a ratification. As owners in cotenancy of the property at issue in this lawsuit and/or pursuant to Chapter 20, Plaintiffs are entitled to receive a full recovery for the benefit of all Member Owners.

4.06 The business judgment rule does not affect Plaintiffs' recovery in this case because (i) the acts and omissions alleged herein resulted from *ultra vires* acts, fraud and/or self-dealing, were grossly negligent, constituted an abdication by the individual Director Defendants of their responsibilities or otherwise were not within the exercise of their discretion and judgment, therefore the rule is inapplicable; (ii) there is no presumption of lawfulness in connection with the individual Defendants' acts and omissions alleged herein; (iii) the acts and omissions alleged herein involve assets or property (including causes of action) the WSC holds and manages as an agent, to whom the business judgment rule does not apply; and (iv) the acts and omissions alleged herein were not within the honest exercise of the individual Director Defendants' business judgment and discretion.

4.07 This case is not moot. To the extent the 2019 Board purports to have independently approved the transfer of the 2 platted hangar lots for pennies on the dollar, the transfer of the 0.5151 acres that comprise Piper Lane for no additional consideration and/or the omission of an adequate taxiway and setbacks to protect the value of the remainder tract, they have caused the WSC to act *ultra vires* and have perpetuated an enormous loss to the WSC and its Member Owners. They have personal liability for such loss; this lawsuit seeks recovery for same. The 2019 Board did not, and did not have the power to, ratify any contract of sale with Friendship, the 2016 transfer of 2 platted hangar lots or the omission of an adequate taxiway and setbacks for the remainder tract because such acts and transactions were *ultra vires*, fraudulent and otherwise tainted by self-dealing or other misconduct; this lawsuit seeks recovery for same. The 2019 Board had a nondiscretionary duty to unwind the illegal performance

and to avoid making matters exponentially worse by giving Martin even more valuable WSC property for no consideration at all; this lawsuit seeks recovery for such defalcation. The individual Director Defendants have personal liability for all damage incurred as a result of the 2016 fire sale and the Board's acts and omissions since that time; they cannot avoid that liability via a "settlement" with Martin made in the name of the Cooperative during the pendency of this lawsuit.

V.

Venue

5.01 Venue is appropriate in Burnet County, Texas because the WSC and most of the individual Defendants reside in Burnet County and all or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in such County.

VI.

Factual Background

A. Ownership of the Assets and Revenues of a Cooperative is Vested in its Member Owners.

6.01. The WSC is organized under Chapter 67 of the Texas Water Code as the instrumentality that operates the Windermere Oaks water supply and sewer service cooperative ("Cooperative"). The Cooperative is Member-owned and Member-controlled and enables the Member Owners to provide themselves with service pursuant to Certificates Number 12011 and 20662 (collectively, the "CCN") within the service area described in the CCN. Membership in the Cooperative is a condition of eligibility to become a Customer. Plaintiffs are Members in the Cooperative.

6.02. Chapter 67 is the special statute that allows the Cooperative to be incorporated for the purpose of providing water supply and/or sewer service on a

cooperative basis. Pursuant to Section 67.003(a), "[t]hree or more individuals who are citizens of this state may form a corporation by making an application to the secretary of state in the same manner as provided by law for an application for a private corporation." The Texas Non-Profit Corporation Act applies to the extent it does not conflict with Chapter 67. § 67.004, Tex. Water Code.

6.03. Under Chapter 67, the WSC has only the powers necessary to carry out the purposes for which it is incorporated. See, e.g., §§ 67.009 and 67.011. Pursuant to its governing documents, the WSC's powers are further limited; it has the powers invested in a water supply or sewer service corporation by art. 1434a (now Chapter 67) that are not inconsistent with IRC § 501(c)(12) governing utility cooperatives and "like organizations." As a result, the WSC does not possess any powers a 501(c)(12) cooperative or "like organization" cannot exercise.

6.04. The WSC's powers are also expressly limited in recognition of its function as an agency/instrumentality. Both the certificate of formation and the bylaws provide that the WSC has no power to engage in activities or use assets in a manner that is not in furtherance of the legitimate business of a "water supply cooperative" or "sewer service cooperative" under I.R.C. § 501(c)(12)(A). See Articles, art. 6; Bylaws, art. 5 § 3.

6.05. A cooperative under § 501(c)(12) is a unique form of business enterprise. Unlike a typical corporate enterprise, in which investors own an entity that in turn owns the means of production, in a cooperative the Member Owners acquire and own the means of production used to provide themselves with goods or services. The assets used in the enterprise and the profit those assets generate are owned by the Member Owners, not in proportion to their ownership of capital (i.e., their membership) but in proportion to their level of involvement in the enterprise, or patronage. The cooperative operates at

cost and its patrons obtain the services for the lowest possible price; revenues belong to the Member Owners and excess revenues must be returned or credited to the Member Owners annually.

6.06. Pursuant to Section 67.008 of the Code, if the cooperative's governing documents provide that all profits of the corporation will be paid annually to political subdivisions, private corporations, or other persons that have transacted business with the corporation during the previous year, then the distribution is mandatory subject only to unpaid indebtedness and allocations to a reasonable sinking fund for maintenance, etc. The WSC's Articles of Incorporation (art. 6) and Bylaws) so provide:

> "[a]ll profits arising from the operations of the business of the Corporation shall be annually paid out to the cities, towns, counties, other political subdivisions, private corporations and other persons who have during the past year transacted business with the Corporation, in direct proportion t the amount of business so transacted; . . ." [2]

6.07. A cooperative under § 501(c)(12) must keep records of account reflecting each Member Owner's ownership interest in the assets and revenues of the enterprise so that, upon dissolution, the remaining assets may be distributed to the Member Owners who own them.[3] The WSC's governing documents (Bylaws, art. 5, § 2) include such a provision:

> "Upon discontinuance of the Corporation by dissolution or otherwise, *all residual assets* of the Corporation remaining after payment of lawful indebtedness of the Corporation or *return of excess profits to members* shall be *distributed* among the members and former members *in direct proportion to the amount of their patronage* with the Corporation . . .." (emphasis added)

[2] By statute, a Texas cooperative cannot pay dividends while it has outstanding debt. However, the Cooperative's obligation to pay dividends to the Member Owners when there is no outstanding debt is nondiscretionary.

[3] The WSC's records of account have been requested through formal discovery. Since each Member Owner's Member Ownership interest is based on patronage, the amount of each Member Owner's interest is unique. It appears the WSC may not keep the required records of account.

6.08. To take advantage of a Texas state ad valorem tax exemption, the governing documents also provide that the Member Owners will in turn distribute the assets received in dissolution to a charitable entity. The IRS and the tax courts have concluded, however, that such a provision does not divest or impair the Member Owners' ownership interest while the Cooperative is in operation.

6.09. Excess revenues may be retained in a reserve for reasonable needs of the enterprise, but retained earnings are still owned by the Member Owners and must be allocated to each Member Owner's account in the cooperative's records. The WSC's governing documents include these provisions. See Articles art. 6 and Bylaws art 5 § 1.

6.10. A cooperative under § 501(c)(12) is typically operated through an instrumentality, such as an association, a corporation or an LLC, for the benefit of the Member Owners. The instrumentality is authorized to hold and operate the assets of the enterprise in pursuit of the cooperative purposes for benefit of the Member Owners but not otherwise. The instrumentality collects the revenues as a conduit for the Member Owners. As stated above, however, the instrumentality does not own the means or proceeds of production. That the assets and revenues of the cooperative enterprise are owned by the Member Owners and not by the business entity that operates them is considered one of the "basic and distinguishing" features of a cooperative enterprise.

6.11. Likewise, a nonprofit corporate instrumentality such as the WSC is not a financial stakeholder in the cooperative enterprise. It is prohibited by law from earning a profit for its own benefit. As both a legal and practical matter, it cannot operate at a loss; the Member Owners are required to make up any shortfall through increases in rates and fees, assessments or otherwise. This further illustrates why the Directors'

duties vis-à-vis the Cooperative enterprise and the assets used to operate it run to the Member Owners, and not to the entity.

6.12. A cooperative under § 501(c)(12) must be democratically controlled. The Member Owners themselves must periodically assemble in democratically controlled meetings where each Member Owner has one vote regardless of the number of memberships owned. In a cooperative enterprise, the Member Owners deal personally with matters affecting the conduct of the cooperative. The WSC's governing documents include such provisions. See Articles art. 7; Bylaws art. 7.

6.13. Democratically elected Member Owners manage the affairs of a cooperative enterprise as its Board of Directors. The WSC's governing documents include such provisions. The Board has a legal duty to the Member Owners to preserve and maintain the Cooperative assets in proper working order, to upgrade them as needed, to use them efficiently in furtherance of the purposes of the enterprise, to prevent or avoid waste and to secure the highest price obtainable for assets that are no longer needed for Cooperative purposes.[4]

6.14. The WSC's governing documents provide that the WSC has no power to use or dispose of the Member Owners' assets prior to dissolution in any manner or for any purpose other than to operate a water and sewer Cooperative for the benefit of the Member Owners. [5] The WSC Board has no power to authorize or approve any prohibited use or disposition of a Cooperative asset.

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[4] These duties are the same even if it is finally determined that the Directors' duties are owed to the instrumentality, rather than to the Member Owners.

[5] The WSC may not actually qualify for exemption under § 501(c)(12) because of the way its Boards do business. By way of example, the current and prior Boards have caused the WSC to collect "stand-by fees" from non-patrons. These fees amount to more than 15% of the WSC's total annual income and likely do not constitute "patronage-sourced income." Those Boards have nevertheless reported the WSC as a tax-exempt entity. The powers of the WSC and its Board are limited regardless how it actually does business.

6.15. Pursuant to Section 67.004, Tex. Water Code, the Texas Non-Profit Corporation Act ("Non-Profit Act") applies to the WSC to the extent it does not conflict with the provisions of Chapter 67 or the WSC's governing documents. Accordingly, the Non-Profit Act's prohibition on the payment of dividends does not apply to the restoration of excess revenues to the Member Owners.

6.16. In the alternative, the WSC owns the assets (including revenues) of the cooperative enterprise.

B. *Management of the Cooperative Assets by the Board of Directors*

6.17. The Cooperative's operations and assets are managed by a Board of Directors elected by and from the Member Owners. Day to day operations are carried out by Officers elected by the Board from among its Directors. At all times relevant hereto, the Board was comprised of five (5) Directors. The WSC's Officers included the President, Vice President and Secretary-Treasurer.

6.18. The Directors and Officers have the fiduciary duties of an agent/manager. The Non-Profit Act requires that each Director and Officer shall discharge these duties in good faith, with ordinary care, and in a manner reasonably believed to be in the best interest of the Member Owners of the Cooperative enterprise.[6]

6.19. The Board can "act" only by public vote at a lawful open meeting at which a quorum is present. Under Texas law, all Board meetings must be held in compliance with the Texas Open Meetings Act ("TOMA"). Notice of all regular and special Board meetings must be posted in accordance with TOMA.

[6] Plaintiffs believe these duties are owned directly to the Member Owners due to their ownership of the assets and revenues of the enterprise. Alternatively, these duties are owed to the WSC on whose behalf this representative suit is brought.

6.20. The Secretary-Treasurer has a duty to cause TOMA-compliant notices to be posted for all Board meetings, to attend all Board meetings and to create a complete and accurate record of all votes and actions. Once approved by the Board, those records become permanent records of the WSC and are required to be maintained as such.

C. *Limitations on Power to Convey Cooperative Real Property*

6.21. Under the WSC's governing document and Chapter 67, the power to convey real property interests held in WSC's name is expressly limited to furtherance of the interests of the Cooperative enterprise. The Board has no power to approve or effectuate any conveyance that is contrary to this expressed limitation. In particular, the Board has no power to give away a valuable Cooperative asset or to transfer it for a fraction (or none) of its market value. To the contrary, in keeping with its agency/managerial role the Board has a duty to secure the highest price obtainable for assets that are no longer needed for Cooperative purposes.

6.22. Under the Non-Profit Act, the power to convey real property interests in the WSC's name is triggered only when such conveyance is authorized by "appropriate resolution" of the Board. The Board can only approve or adopt a resolution by majority vote at a duly noticed open meeting in compliance with the WSC's governing documents and applicable law.

6.23. The Directors have no power to authorize, approve or acquiesce in any conveyance of real property or other transaction that is adverse to the interests of the Member Owners or to the purpose of the enterprise. A transfer of surplus property for a fraction of (or none of) its market value for the financial benefit of a sitting Director is an excellent example of an adverse transaction.

6.24. Any transaction between the organization and a sitting Director is presumptively adverse. The Board has the power to authorize such a transaction only by valid Board action upon fulfillment of several special conditions. Such special conditions include the Board's receipt of full disclosure by the interested Director and a determination by a majority of disinterested Directors made in good faith that the transaction is fair to the organization and is in the organization's best interests. The WSC's conflict-of-interest document for 2016 imposes the additional condition that the minutes of the Board meeting at which action is taken must reflect the interested Director's disclosure and a statement that the Board was aware of the conflict of interest and nevertheless decided the transaction was fair to the WSC and was in the WSC's best interests.

6.25. The Member Owners have the right, and its Directors have the duty, to rescind any unlawful approval and to prevent and/or annul any conveyance or transaction made pursuant to such unlawful approval. Directors who unreasonably delay or refuse to take such steps breach their duty to act with ordinary care and in a manner reasonably believed to be in the best interest of the enterprise. Such misconduct, however, does not estop the WSC or its Member Owners from recovering their property or its value.

D. *Limitation on Power to Fund Defense Costs for Unfaithful Fiduciaries.*

6.26. The Board has no power under the WSC's governing documents to indemnify a current or former Director or Officer or to advance or reimburse attorneys' fees or other expenses incurred by current or former Director or Officer who is named as a party in a legal proceeding.

6.27. The Non-Profit Act confers limited authority for the WSC Board to advance or reimburse reasonable expenses incurred by a current or former Director or Officer who is named as a party in a proceeding in advance of final disposition of the case, but only upon strict compliance with the requirements of that Section.

6.28. Litigation expenses were advanced to the 2016 Board without compliance with such requirements. Litigation expenses have also been advanced to the 2019 Board. None of the Director Defendants has met the standards for indemnification, therefore none is entitled to receive advancement of litigation expenses.

E. *The Ultra Vires and Otherwise Illegal Actions.*

1. *WSC Fiduciaries Acknowledge Duty to Obtain Highest Possible Price for Airport Tract.*

6.29. In 2013, the Board voted to upgrade the WSC's wastewater treatment facilities and to relocate them from an approximately 10-acre tract within the Spicewood Airport community (the "Airport Tract"). As reflected by the minutes from the August 13, 2013 meeting, the Directors agreed unanimously that relocating the facilities to an area east of Exeter Road would free the valuable Airport Tract for sale, which was considered the "highest and best use" of the Tract. The sale of the 10-acre Airport Tract in a single transaction was identified as one of the key components for funding the upgraded wastewater treatment plant improvements and other Cooperative needs.[7]

6.30. The Airport Tract was indeed very attractive real estate. At that time, the Spicewood Airport featured a well maintained 4,185' x 30' asphalt runway with fueling and maintenance service available onsite. The Airport Tract was within a highly developed gated airport community where hangar lots were in demand. The Airport

[7] The current Directors readily acknowledged this at the October 26, 2019 meeting.

Tract was one of the few vacant areas available within the airport and its size made the Airport Tract amenable to subdivision into multiple smaller hangar lots. The Airport Tract was surrounded by restricted aviation properties including well maintained hangars of relatively new construction. By virtue of the WSC's ownership of Piper Lane, the Airport Tract had ready access to the airstrip via over 500 feet of paved taxiway frontage providing aircraft access to every part of the Tract. The Airport Tract is not encumbered by the Windermere Airport restrictions that govern the lots surrounding it or by the requirements and regulations of the Spicewood Pilots Association. Accordingly, purchasers could have ready access to and enjoyment of the many benefits and amenities of the airport, including the runway, without the financial burden of membership fees, impact fees, assessments and other obligations attendant to membership in the Pilots' Association.[8]

6.31. The 2013 Board committed to the Member Owners that the Airport Tract would be sold as a whole for the best possible price and the proceeds would be used to defray the cost of the new facilities and for other Cooperative purposes. Following the August 2013 meeting, the Directors (including Mulligan, Earnest and Madden) claim to have gathered deeds and other records in preparation to engage a real estate professional to market the Airport Tract. At the Board's February 18, 2014 meeting, Defendant Mulligan was directed to obtain a survey and appraisal of the land to be sold. They apparently did none of these things.

6.32. No Board ever listed or advertised the Airport Tract or otherwise marketed the Tract. It is claimed that Mebane had casual conversations with a couple of

[8] The Board acknowledged at the October 26, 2019 special meeting that this provided a clear marketing advantage for the Airport Tract.

unidentified "real estate people" concerning the possible value of the tract, but the Board never actually advertised or marketed the Airport Tract for sale to the highest bidder.

6.33. Around this same time Martin, regarded as the most active real estate agents in the Spicewood Airport area and one of the owners of Windermere Airport, LLC ("Windermere"), put together a proposal for Windermere's purchase a 0.558-acre tract within the airport from the Windermere Oaks Property Member Owners' Association ("POA") at "fair market value." Martin's "fair market value" offer price was based on a recent sale of a 1.415-acre tract to be developed into hangars on Cessna Lane for $185,000, or $3.00 per square foot. At this value, the price for the 3.8 acres she later acquired would have been almost a half million dollars, or more than twice what she paid.

6.34. For quite some time, POA members had used a 30,000 square foot portion of the Airport Tract (the "Storage Tract") for storage of boats and other items. As a stand-alone parcel in its then current condition, the Storage Tract was not particularly desirable as a hangar site. By email dated April 3, 2014, Taylor notified Mebane of the Board's vote to market the Airport Tract as single parcel and requested that the POA items be removed. She expressly acknowledged the Board's "fiduciary responsibility to our members," which prohibited the Board from taking any action that would "compromise our ability to obtain the 'best' offer from any potential buyer."[9]

6.35. In late 2014, the TCEQ approved the WSC's Closure Plan for the old WWTP.[10] This should have cleared the way for prompt and aggressive marketing and

[9] Taylor acknowledged these matters during the October 26, 2019 meeting.
[10] The Board hinted at the October 26, 2019 special meeting that they recently discovered the closure may have been mishandled and that there may be residual problems on the Airport Tract. None of them has

market value sale of the Airport Tract. However, no Board ever followed through with any listing or other marketing.

2. Martin Joins the WSC Board.

6.36. Martin was elected to the WSC's Board in 2015. Shortly thereafter, she made use of her positions of authority as a co-Member Owner of Windermere and as a WSC Director to orchestrate the sale of Tract G, a Cooperative-owned hangar property across from the Airport Tract. The nominal grantee in the transaction was The Anne McClure Whidden Trust, an entity with which Martin regularly did business.[11] The WSC's 2015 Form 990 reported receipt of $95,000 in gross sale proceeds from this transaction, which equates to a sale price of $12.75 per square foot.[12] At this amount, Martin should have been required to pay $2,110,482 for the 3.8 acres she later acquired.

6.37. There is no record the Board ever voted on, or even considered, any transaction involving Tract G. That topic does not appear to have been included on any posted notice or agenda or in any of the Board minutes. While the deed appears to have been signed by Defendant Mebane as WSC President, there is not (and never has been) any Board resolution purporting to authorize any conveyance of Tract G.

6.38. Martin has testified she learned from Director Earnest that Tract G would be sold and the price the Board was considering and used that inside information to acquire Tract G for the benefit of her business affiliate, or perhaps for her own benefit.

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ever shared that information with the Member Owners. It does not appear to have influenced decision-making in 2016 or thereafter.

[11] Martin personally benefitted from this transaction and from the subsequent sale of Tract G in the form of real estate commissions. She received the first commission while she was on the Board.

[12] At the October 26, 2019 special meeting, the Board acknowledged the $95,000 sale of the hangar lot across the street from the Airport Tract in May 2015, just 6 months before it claims to have approved the Martin contract.

6.39. Thereafter, Martin was again involved with efforts by the POA to purchase the Storage Tract. The POA's proposed price was around $20,000 - $25,000.00, or in the range of $0.66 - $0.83 per square foot. The minutes of the Board's July 16, 2015 meeting reflect that the Directors (including Martin, Mebane, Earnest, Madden and Mulligan) discussed the POA's offer in executive session but that no action was taken at that meeting. The POA's offer does not appear to have been included on any posted notice or meeting agenda. It is not mentioned in any other Board minutes. So far as Plaintiffs are aware, the Board rejected the POA's offer.

3. *Martin and Her Allies Orchestrate Secret Fire Sale Involving 3.8 Acres*

6.40. At some point thereafter, it appears Martin presented the other Directors with a document entitled "Appraisal of Real Property" prepared by Jim H. Hinton II and covering the Airport Tract (the "Purported Appraisal"). In his January 25, 2019 demand letter, the Board's attorney referred to the Purported Appraisal as "fraudulent." And indeed it was.

6.41. The Purported Appraisal did not claim to state a value for the Airport Tract as of September 2015, when Hinton signed it and presumably gave it to Martin, or as of March 2016, when Martin obtained the premier portion of the WSC's most valuable disposable asset for pennies on the dollar. The "effective date" of Hinton's "value conclusion" was September 1, 2014, a full year before Hinton prepared and signed it.

6.42. The Highest and Best Use Analysis within the Purported Appraisal claimed that the Airport Tract "lends itself to single family residential use." With her experience in the local real estate market, Martin was well aware that hangar lots were worth far more than the residential properties Hinton had relied upon.

6.43. In light of the market data of which the Board was actually aware, together with the glaring frailties of the Purported Appraisal, it is inconceivable that any of the Directors could have considered the Purported Appraisal to be a reliable estimate of the fair market value of the Airport Tract or any portion thereof in February or March 2016. After years of litigation in which it was waved around, the Board acknowledged during the October 26, 2019 special meeting that none of the Directors gave attention to the Purported Appraisal.

6.44. At the October 26, 2019 special meeting, some of the Directors confirmed that the 2016 Board made no use of the Purported Appraisal, yet Martin herself signed a WSC check to Hinton for $600.00.

6.45. The Purported Appraisal certainly conferred no benefit on the WSC or its Member Owners. If the Purported Appraisal benefitted anyone, it was sitting Director Martin who specialized in transactions involving real estate in and around the Spicewood Airport and was looking to acquire valuable aviation properties for next to nothing.

6.46. Martin thereafter claimed that at the time she made her "offer" the Airport Tract had been marketed to "many" prospective purchasers and that the WSC received "many" offers to purchase. The Purported Appraisal reflects that as of its September 2015 preparation date the Airport Tract had never been listed or professionally marketed. No real estate professional was ever engaged to market the Tract, nor was it ever listed or marketed for sale. There is no record of "many," or any, offers or negotiations involving the Airport Tract aside from the rejected POA offer on the Storage Tract.

6.47. Discovery has revealed that Director Mulligan was aware of, and advised other Board members, of at least some of the glaring deficiencies of the Hinton appraisal and that it was not a valid reflection of the fair market value of the tract.

4. *Martin Orchestrates a Fire Sale and the Board Makes It Happen*

6.48. For at least the second time since accepting a position of trust and confidence as a member of WSC's Board of Directors, Martin was at the center of a proposed transaction involving a conveyance of Cooperative property owned by the Member Owners. This time, however, Martin was involved as both seller (in her capacity as WSC fiduciary) and purchaser (for her own personal financial gain).

6.49. According to Martin, Defendant Mebane (then Board President) decided all by himself that the Airport Tract should not be sold as a single parcel, as the Board had planned for years. She claims Mebane determined the Board should dispose of the most valuable and desirable 3.8 acres of the Airport Tract with all of the Airport Tract's frontage along the Piper Lane taxiway to a sitting WSC Director for a fraction of its market value. The WSC's general counsel, Mark Zeppa, was apparently excluded from the whole transaction.

6.50. Martin also claims the March 2016 fire sale transaction was "negotiated," and that she made a "good faith" offer to purchase which was countered by the other Directors. The Board's records are devoid of any such negotiations. Martin has testified that she developed her "good faith" offer based on inside information she possessed as a Director concerning (i) what Mebane, who was not familiar with sales in the Spicewood Airport, thought the property might bring, and (ii) the amount of cash required to refinance the Cooperative's debt, which was not then due or payable.

6.51. The so-called "disinterested Directors" were the very Directors who had unanimously acknowledged the Board's fiduciary duty to market the Airport Tract as a whole to obtain the "best possible offer" and who were – or certainly should have been -- well-aware the WSC had recently conveyed a comparable airport property for $12.75 per square foot. None of the Directors disclosed to the Member Owners before the Board's December 19, 2015 meeting that they intended to authorize the piecemeal transfer of the premier portion of the Airport Tract and all of the taxiway frontage for a small fraction of the $12.75/SF sales price comparable WSC airport property had recently commanded.

6.52. The proposed transaction was never mentioned as a discussion or action item on any posted meeting agenda for any Board meeting. Instead, based on the minutes, the Board raised the topic out of the blue at its regular meeting on December 19, 2015. The minutes reflect that after a 5-minute executive session Defendants Mebane, Madden and Mulligan (Defendant Earnest shown as being absent from that meeting) unanimously voted to accept an offer from FHH, which did not exist, to carve off the highly desirable frontage and separate the remainder of the Airport Tract from all taxiway access for a "net price" of $200,000, or $1.19 per square foot.[13] There was no "appropriate resolution," or any resolution at all, approved by the Board.

[13] Martin now claims that she was to have received 4.3 acres for $200,000, or a price of $1.04 per square foot. The "Proposed Amended and Superseding Agreement" contemplates that the WSC will transfer to Martin "a certain .5151 acre +/- portion/tract that was included in the sales contract but not deeded." As discussed more fully below, if the Board approved any transaction, it did not the transfer of Piper Lane. There still is no "appropriate resolution" authorizing such transfer. Moreover, Martin, a sophisticated real estate professional with years of experience with property within the Spicewood Airport and the person who platted the property before the March 2016 closing, cannot credibly claim that a mistake was made in the conveyance.

6.53. Nor did the Board fulfill the special conditions that would have been required to trigger the power to approve an interested Director transaction. The minutes of the December 19, 2015 Board meeting did not reflect either (i) the interested Director's full disclosure of her interest in all aspects of the transaction or (ii) a statement that the Board was aware of the conflict of interest and nevertheless decided the transaction was fair to the Member Owners and was in their best interests. Indeed, there is no record of any kind that a majority of disinterested Directors (if there were any) actually made a determination at any time that the fire sale transaction was fair to the Member Owners and was in their best interests.

6.54. Not one of the so-called "disinterested Directors" has ever explained how it could possibly be fair to the Member Owners to allow an interested Director (or anyone else, for that matter) to acquire the prime portion of the Airport Tract having 100% of the aircraft access for any price lower than the $12.75 per square foot price received for Tract G, a comparable hangar lot, just a few months earlier. Martin herself has admitted that the property she acquired could readily be divided into no less than 7 lots comparable to Tract G having a minimum combined value of $2,110,482.00. There had been numerous sales of property in and around the Spicewood Airport prior to the 2016 fire sale; all were for more, most for much more, than the $200,000 Martin paid.

6.55. It appears someone prepared a contract document for the conveyance of an unspecified "4.3+ acres on Piper Lane," but as discussed below that was not the transaction Martin's cronies on the Board purported to approved. Mebane, who signed the contract, testified the land to be conveyed did not include Piper Lane. There was never any contract for "4.3+ acres including Piper Lane." At the time Mebane purportedly signed the contract, the named buyer FHH did not exist.

6.56. Prior to closing, and at WSC expense, Martin subdivided the land she intended would be conveyed into two platted hangar lots. Mebane, as WSC President, signed Martin's subdivision plat on March 3, 2016. The plat was approved and recorded on March 8, 2016.[14] The plat Martin prepared and processed, and Mebane signed on behalf of the WSC, failed to reserve a taxiway for the remainder of the Airport Tract.

6.57. There are no references in agendas or minutes for subsequent Board meetings to any further consideration of a land transfer to Martin or to the adoption of any resolution authorizing any such transaction. The posted records of the Board do not reflect any resolution adopted by the Board in connection with a land transfer to Martin.

6.58. Nevertheless, on or about March 13, 2016, Defendants Mebane and Madden executed and delivered a document (hereinafter, the "Sham Resolution") in which they "certified," as President and Secretary of the WSC, respectively, that the resolution stated therein was "an accurate reproduction of the one made" by the Board and was "legally adopted on the date of the [February 22, 2016] meeting of the Board of Directors, which was called and held in accordance with the law and the bylaws of the corporation, at which a quorum was present." The Sham Resolution described the property to be conveyed as 2 platted hangar lots by reference to the recorded plat, not as unplatted acreage.

6.59. The posted agenda for the February 22, 2016 meeting did not mention any proposed sale to Martin or the adoption of a resolution to authorize any sale. The minutes for the Board's February 22, 2016 meeting were unanimously approved as a

[14] A true and correct copy of the recorded plat is attached as ***Exhibit 2***.

complete and accurate record of the Board's actions at its February 22, 2016 meeting. They reflect that Mebane, Martin, Madden, Mulligan and Earnest were present. They do not reflect any discussion, much less approval, of a resolution or any other authorization for a sale of any property to anyone, let alone an interested Director or her nonexistent affiliate. Despite exhaustive requests under the Texas Public Information Act ("TPIA"), Defendants have produced no contemporaneous record reflecting that any resolution was actually adopted, at the February 22, 2016 meeting or any other time.

6.60. Mebane also executed two deeds, each of which purported to convey one platted hangar lot to FHH. Copies of these deeds are attached as *Exhibit 3*. The Anne McClure Whidden Trust, which had purchased Tract G for $12.75 per square foot, was involved in the transaction as a purchase money lender. The documents suggest that the purchase was funded entirely with loan proceeds. Whether and to what extent Martin has ever invested her own resources in this transaction is not yet known and will be learned through discovery.

6.61. Martin had formed FHH only a few days earlier solely for the purpose of taking title to the land to be conveyed by the WSC. The limited discovery to date indicates Martin is the sole principal, manager and beneficiary of the activities of FHH and that she has at all times exercised full and complete control over the entity. Martin previously used FHH as a d/b/a under which she did business. Public records indicate Martin is still using FHH as a d/b/a to conduct her personal business operations.[15] Martin has refused to respond to discovery concerning FHH's financial transactions. She testified, however, that prior to the formation of FHH she maintained a bank

[15] See, for example, deed attached as Exhibit 6.

account for the d/b/a and that she simply continued to use her personal funds in that account to finance FHH's operations after the LLC was formed. Martin has not disclosed any source of funds for FHH other than her personal funds. To the extent FHH has received other funds, those have been comingled with Martin's personal funds.

5. *Bank Financing Did Not Make Them Do It*

6.62. For some time, the 2016 Board claimed that some or all the proceeds from Martin's acquisition of the hangar lots were used to make a required balloon payment on the WSC's existing debt. Martin and other have suggested from time to time that the WSC might not have made its debt service obligation except by the illegal March 2016 transaction.

6.63. It has become clear, however, that no balloon or other extraordinary debt payment was due. To the contrary, the prior Board had negotiated and approved the financing then in place just a year or so earlier and it apparently had terms very favorable to the WSC. There is some indication that the 2016 Board (or some of them) were looking into refinancing that debt in the fall of 2015 and that the would-be lender required that the existing debt be paid down significantly. Martin claims to have calculated her "good faith" offer based on this inside information. There is no indication, however, that those efforts were in furtherance of the legitimate business of the Cooperative enterprise.

6.64. Had the WSC's fiduciaries on the 2016 Board followed through on the plan to market the Airport Tract as a whole and sell it for the highest possible price, the WSC could have retired all of its outstanding debt in March 2016 and had a tidy sum left over to pay additional facilities costs, to acquire and/or upgrade equipment required to provide the Cooperative services in compliance with applicable laws and regulations, to

establish or increase the reserve fund set aside for future system upgrades and improvements and to meet any number of other Cooperative needs.

6.65. Instead, the WSC and its Member Owners collectively sustained an immediate loss of $500,000 in cash when the most desirable part of the Airport Tract with all of the taxiway frontage, worth at least $700,000 at the time, was conveyed to an interested Director for a "net price" of $200,000. In addition, the remainder tract was rendered unmarketable and its value instantly diminished by $640,000 when the Cooperative's fiduciaries separated it from all taxiway access and failed to create or secure an adequate alternative.

6. *The Fire Sale Included a Free Right of Refusal for Martin*

6.66. In the March 2016 transaction, Mebane, acting as WSC President, executed and delivered a Right of First Refusal ("ROFR") granting Martin an exclusive preferential purchase right covering the remainder tract for a stated term of 20 years. A copy of the illegal and unauthorized ROFR, which was also signed by Martin as sole Manager of the newly created FHH, is attached as *Exhibit 4*. Not even the Sham Resolution mentions the ROFR. The WSC and its Member Owners received nothing in exchange for it.

6.67. As a result of the "settlement agreement," Martin will extinguish the illegal ROFR. That was not much of a concession, as Martin would never have been able to enforce a preferential purchase rights obtained for no consideration in breach of her fiduciary duty as WSC Director. Nevertheless, the WSC and its Member Owners have still suffered damage in the form of years of expense and lost opportunities related to the remainder tract. The 2019 Board's "settlement" doesn't provide any recovery for those damages.

F. *Martin Capitalizes on the Fire Sale While the Member Owners Struggle*

6.68. Martin later replatted the hangar lots to create a third hangar lot. By deed dated April 3, 2017, Martin, as sole Manager of FHH, conveyed the southeastern 1.25 acres (then platted as "Tract H2-A") to Johann and Michael Mair. A copy of the deed from Martin to Mair is attached as *Exhibit 5*.

6.69. The Mair deed reflects that Martin's business associate The Anne McClure Whidden Trust made a $100,000 purchase money loan in connection with the Mair sale. The total purchase price is not yet known. At a sales price of only $100,000, however, Martin realized a profit in excess of $80,000 within a short time and with little or no expense. That value should have gone to the WSC and its Member Owners.

6.70. The WSC still has most of the debt that was outstanding in 2016 and has incurred additional debt to pay expenses that could and should have been covered by the proceeds from the sale of the Airport Tract. The Board has struggled with strategies to restructure the debt; the 2019 Board does not seem to appreciate that the WSC is not permitted to have outstanding debt just because it can. The Board postponed needed repairs and the acquisition of a generator and other equipment needed to provide the Cooperative services and to remain in compliance with applicable regulations. At the same time, the Board has raised rates, service fees and membership fees. The Board also appears to have allowed the Cooperative to become financially dependent on the extremely questionable practice of collecting standby fees from non-patrons.

G. *New Board Receives Unequivocal Confirmation of Misconduct and Unfairness*

6.71. In 2018, the composition of the Board changed. The newly constituted Board appears to have commissioned a legitimate investigation into the legality of the March 2016 transaction. It also engaged the MAI appraisers at Bolton Real Estate to

perform a professional forensic appraisal to analyze the financial impact of the fire sale. Bolton's report confirmed that the Member Owners sustained an immediate loss of more than $1,000,000, not counting what Martin should have paid for the ROFR she obtained for free.

6.72. As stated above, the analysis of the WSC's legal counsel confirmed that the March 2016 fire sale was unauthorized, improper and unfair to the WSC and its Member Owners and involved breaches of fiduciary duty and other misconduct by Directors.

6.73. The newly constituted Board determined that its fiduciary duties required prompt efforts to recover the misappropriated property or to otherwise make the Member Owners whole by pursuing "all available avenues of relief." The Board directed the WSC's counsel to send a demand letter to counsel for Martin and FHH. The demand letter outlined numerous unauthorized and illegal acts that precipitated the fire sale and explained how it was unfair to the Cooperative enterprise and its Member Owners. A copy of such demand letter is attached as ***Exhibit 1***.

G. *The WSC's Fiduciaries Fail the Member Owners, Again*

6.74. There was another Director election in 2019. Some of the elected Directors resigned thereafter.

6.75. As discussed above, the 2019 Board purported to "modify" the 2016 fire sale transaction but they did not require that Martin pay fair market value for the property she had acquired in 2016 and for no consideration at all they gave her property neither they nor the 2016 Board authorized a resolution to transfer. They purported to release the WSC's claims against Martin and FHH for no consideration.

6.76. From and after the March 2016 fire sale, the legitimate business of this Cooperative has been continuously compromised as a result of the acts and omissions of

the agents responsible for managing the assets it uses to operate. The 2019 Board made it worse. Nevertheless, the 2019 Board has expended WSC resources to defend the *ultra vires* acts of the WSC and the misconduct of the Director Defendants. They had neither statutory nor organizational power to use Cooperative resources in that manner. Even if they had the power to do it, using the assets of the victims to provide a defense for the unfaithful fiduciaries who harmed them would be wrong by any standard.

VII.

Ultra Vires Actions

Plaintiffs reallege and incorporate by reference all the foregoing allegations in connection with each and every cause of action alleged herein.

7.01 Pursuant to Section 20.002(c), Tex. Bus. Orgs. Code, an act that is beyond the scope of the WSC's powers or inconsistent with a limitation on the authority of a Director to act may be enjoined, set aside or otherwise challenged (i) by an Member Owner in a proceeding for an injunction or to set aside the act, or (ii) by an Member Owner in a representative suit against current and/or former Directors for exceeding their authority. The procedure and relief for redress of *ultra vires* acts is the same for non-profit organizations as for organizations that operate for profit.

7.02 By statute (§22.501(2)) and common law, *ultra vires* acts cannot be ratified or "re-approved." Pursuant to §22.512, the Court has broad, but nonexclusive, powers to declare any purported ratification ineffective as to an action that is not within the powers of the Board in the first instance.

7.03 The WSC 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 cooperative or sewer service cooperative as recognized by 1434a and Internal Revenue

Code 501(c)(12)(A)." The transfer of surplus property for pennies on the dollar or for no consideration at all and the damaging of property retained by the WSC are not in furtherance of the legitimate business of a water supply or sewer service cooperative.

7.04 The Cooperative has power to convey real property in its name only when "authorized by appropriate resolution of the board of directors." The Sham Resolution is a fraud. According to the testimony, the Sham Resolution was prepared by the title company so the transaction could be closed. No such resolution was ever acted on at all and there is certainly no Board record to suggest it was. It certainly was not acted on at the February 22, 2016 meeting, as the plat (which is referenced in the Sham Resolution by recording information) was not recorded until weeks later. If any action was ever taken on the Sham Resolution or any other resolution purporting to approve a transaction with interested Director Martin, the Board is estopped by the minutes it approved and placed in the WSC's records to claim that such action occurred.

7.05 The Sham Resolution is not an "appropriate resolution of the board of directors," and thus conferred no power to convey the platted hangar lots. The Sham Resolution does not even mention Piper Lane or any other acreage. The Sham Resolution does not purport to authorize the encumbrance of the remainder tract by the granting of the ROFR. The Mairs are Martin's business affiliates. On information and belief they are not bona fide purchasers. All such conveyances must be annulled or canceled and unencumbered legal title must be confirmed in the WSC for the benefit of its Member Owners.

7.06 The WSC's Board has power to act only by majority vote with a quorum present at an open meeting that complies with TOMA. It has already been determined that action (if any was taken) on the fire sale transfer to Martin at the February 22, 2016

meeting was in violation of TOMA. Accordingly, none of the actions taken during that meeting constitute actions of the Board of Directors. The conveyance of the platted hangar lots and the granting of the ROFR were inconsistent with express limitations on the Board's authority.

7.07 The Board's power was further limited in these circumstances because the conveyance of the platted hangar lots, the granting of the ROFR and, because it was made retroactive, the giveaway of 0.5151 acres comprising Piper Lane were interested Director transactions. As discussed above, the Directors' authority to approve and implement a transaction between Martin and the WSC is conditioned on compliance with several requirements. None of these requirements was satisfied or fulfilled in connection with the adoption of the Sham Resolution or any other action purporting to approve the conveyance of the platted hangar lots, Piper Lane or the granting of the ROFR to Martin or to an entity she owned and controlled. There are no bona fide purchasers acting in good faith and without notice, therefore such transactions must be annulled or canceled and unencumbered title must be confirmed in the WSC for the benefit of its Member Owners. Alternatively, the WSC and its Member Owners should recover from their unfaithful fiduciaries all amounts required to make them whole.

7.08 Further, the WSC did not have the power to transfer Piper Lane to Martin in 2016 because such transfer was not in furtherance of the legitimate business of the Cooperative. The Cooperative never approved the transfer of Piper Lane to Martin and was never obligated to make any such transfer. Martin did not make a mistake when she obtained deeds to 2 platted hangar lots and not to the portion of Tract H that included Piper Lane (which she herself platted), therefore no "correction deed" is warranted. The entire fire sale transaction was grossly unfair and illegal separate and

apart from any transfer of Piper Lane; to transfer Piper Lane for no consideration now just makes a very, very unfair situation worse.

7.09 The assets of the cooperative are owned in common by the Member Owners or, alternatively, by the WSC. The WSC holds nominal title to the commonly owned assets and is authorized to use them to operate the enterprise but for no other purpose. The WSC has no power to use or dispose of the assets in a manner that is not in furtherance of its legitimate business as a water and sewer service Cooperative.

7.10 An integral part of the business of a Cooperative is to make maximally productive use of the assets it manages to provide services to those who own them. The WSC and its Board have no power to stockpile marketable assets that are no longer needed for Cooperative operations. Those assets must be sold for the highest possible price and the proceeds used for Cooperative purposes or distributed/allocated to the Member Owners as provided in the governing documents. These duties are non-discretionary.

7.11 Waste of a Cooperative asset does not further the operation of the Cooperative enterprise. Accordingly, waste is not within the powers of the WSC or its Board.

7.12 Had the Airport Tract been properly marketed and sold for what it was worth in March 2016, the WSC and its Member Owners would have netted well over $1,000,000. They could have extinguished the outstanding debt, acquired needed equipment, made a healthy allocation to the reserve fund and received a respectable dividend, all in furtherance of the legitimate business of a water supply and sewer service Cooperative. Instead, the Cooperative's unfaithful fiduciaries caused the WSC to give away valuable property interests for next to nothing, devalued other property

interests, and now have acted to keep those losses largely intact and to make it worse by giving away the Piper Lane taxiway. The Member Owners have been burdened with unnecessary debt service and higher rates and fees, and the Cooperative still doesn't have needed equipment and facilities. The WSC and its Board have no power to manage the Cooperative's assets in this manner.

7.13 The WSC and its Board have no power to apply Cooperative resources to prevent the recovery of property wrongfully transferred or to pay defense costs for the wrongdoers.

7.14 The WSC and its Board have no power to release or compromise the WSC's right to relief, whether direct or derivative, against its unfaithful fiduciaries or FHH for no consideration. Any release that purports to or is intended to have such effect is *ultra vires*.

7.15 The Directors have no power to authorize or approve a transaction that is adverse to the WSC. The WSC should have been $1,300,000 or more to the good from a sale of the Airport Tract. The Directors may not have known precisely how damaging the 2016 fire sale would be, but they had more than enough information before them to know that Martin's $200,000 "net price" was nowhere near the price received from the sale of Tract G, a comparable hangar lot right across the street. Meeting minutes reflect the Board's awareness of the importance of proper taxiway access, yet they land-locked the remainder tract for aircraft purposes. Burdening the remainder tract with a ROFR for which nothing was paid was outrageous by any standard. The 2016 Board had a duty to vigorously market the Airport Tract and to achieve the best price available. None of them reasonably believed in good faith and in the exercise of reasonable care that a fire

sale of the Cooperative's "nest egg" was in the best interests of the WSC and its Member Owners.

7.16 The Directors' expenditure of Cooperative resources to prevent the Member Owners from recovering their loss and to pay defense costs for the wrongdoers who occasioned the loss is adverse to the Member Owners and the Cooperative purposes. It is beyond the Board's power to approve and the WSC's power to perform.

7.17 The October 2019 "Amended and Superseding Agreement" is adverse to the Member Owners and the Cooperative purposes. It is beyond the Board's power to approve and the WSC's power to perform.

7.18 The Board has no power to approve, and the WSC has no power to pay or reimburse, attorneys' fees or other litigation expenses incurred by a Director in advance of final disposition of the proceeding except in strict compliance with the requirements of Section 8.104 of the Non-Profit Act. Any other payment or reimbursement is *ultra vires*.

7.19 The WSC advanced litigation expenses to at least the 2016 Board, and perhaps also to the 2019 Board without the written affirmation or the written undertaking that Section requires. Further, none of these Directors *can* fulfill the conditions precedent in Section 8.104.

7.20 The Board had – and continues to have -- a nondiscretionary duty to rescind the illegal Sham Resolution, to annul the 2016 Martin/FHH fire sale and recover from those who caused or participated in the transaction all loss and damage the WSC and its Member Owners sustained as a result. This applies where, as here, the Directors themselves are accountable for the damage.

7.21 The Board has a nondiscretionary duty to rescind its approval of the "Amended and Superseding Agreement" and to annul any and all transfers, agreements and other acts taken in furtherance thereof.

7.22 The Directors' refusal or failure to perform such nondiscretionary duty is defalcation, which constitutes willful or intentional misconduct and a breach of each Director's duties to the WSC and its Member Owners and is beyond the scope of their authority. The undisputed facts, Martin's clear conflict of interest and enormous personal financial benefit, the clearly fraudulent Sham Resolution and the uncontroverted opinions of the WSC's own professionals conclusively establish the Directors' liability for such breach.

7.23 The Director Defendants have no authority to engage in breaches of fiduciary duty, constructive fraud or other misconduct, and such acts and omissions confer no lawful authority. As they have acknowledged in the past, the Director Defendants stand in a fiduciary capacity vis-à-vis the WSC and its Member Owners. In particular, they act as agents in connection with their management of property held in the name of the WSC for the benefit of the Member Owners. As such, the Directors' actions must be fair and equitable to the WSC and its Member Owners, the Directors must make reasonable use of the confidence placed in them, they must act in utmost good faith and exercise the most scrupulous honesty, they must place the interests of the WSC and its Member Owners ahead of their own interests and not use the advantage of their position to gain any benefit for themselves at the expense of the WSC or its Member Owners, and they must fully and fairly disclosed all important information to the WSC and its Member Owners.

7.24 From the moment she got on the Board, Martin engaged in a pattern of misconduct involving the property of the WSC and its Member Owners that breached her fiduciary duties; these are summarized above. This misconduct culminated with her acquisition of valuable platted hangar lots for pennies on the dollar, platting shenanigans that land-locked the remainder of the Airport Tract and her acceptance of a ROFR that would enable her to capitalize on the loss to the WSC and its Member Owners. Thereafter, she accepted illegal disbursements of Cooperative funds to defend her against the consequences of her misconduct. When the Board made demand on her in January 2019 to return what she had misappropriated in her fiduciary capacity, she refused. She still refuses to return the property to the WSC. Instead, she has received even more valuable airport property for no consideration.

7.25 Both the 2016 Board and the 2019 Board likewise breached their fiduciary duties by participating in such transactions. Plaintiffs believe Defendant Earnest has participated (or expects to participate) in the benefits of Martin's misconduct.

7.26 Constructive fraud encompasses those breaches of legal or equitable duty that the law condemns as "fraudulent" merely because they tend to deceive others, violate confidences, or cause injury to public interests, the actor's mental state being immaterial. It does not require an intent to defraud. Constructive fraud occurs when a party violates a fiduciary duty or breaches a confidential relationship.

7.27 The 2016 Board engaged in constructive fraud when it caused the WSC to transfer valuable WSC property to Martin and FHH for pennies on the dollar. Martin participated in and received benefits of the fraud. Her knowledge of the fraud is imputed to FHH, which also received the benefits of the fraud.

7.28 Mebane and Madden engaged in constructive fraud by signing the Sham Resolution, which was never approved by the Board. Martin had knowledge of the fraud and she and FHH received the benefits of such fraud.

7.29 The 2019 Board engaged in constructive fraud when it approved and caused the WSC to implement the "Amending and Superseding Agreement" leaving the 2016 fire sale largely intact and giving Martin even more valuable airport property for no consideration. Martin had knowledge of the fraud and she and FHH benefitted from the fraud.

7.30 Pursuant to Sections 20.002(c)(1) and (d), Tex. Bus. Orgs. Code, Plaintiffs seek to enjoin or set aside the 2016 fire sale transaction, the "Amended and Superseding Agreement" and all transactions made pursuant to such Agreement, and the WSC's advancement of litigation expenses to the Director Defendants.

7.31 Section 20.002(d) authorizes the annulment of these transactions without fault on the part of FHH. However, FHH has engaged (or is deemed to have engaged) in misconduct herein. FHH is liable for the consequences of such misconduct and is barred by the doctrine of unclean hands and by the statute of limitations from seeking restoration of the amount paid in connection with the transactions.

7.32 Pursuant to Section 20.002(c)(2), Tex. Bus. Orgs. Code, Plaintiffs seek judgment on behalf of WSC against the Director Defendants for all loss and injury to the WSC and its Member Owners not restored pursuant to Sections 20.002(c)(1) and (d).

7.33 The WSC and its Member Owners are entitled to confirmation and enforcement of a constructive trust as and to the platted hangar lots transferred in 2016 and all other of their property transferred to or for the benefit of Martin. As and to the extent necessary, they plead for an offset for all amounts and benefits received by

Martin or FHH in connection with the wrongfully acquired property, including, without limitation, the $100,000 or more received from the Mairs.

VIII.

Friendship Homes & Hangars

8.01 Plaintiffs reallege and incorporate by reference all the foregoing allegations.

8.02 FHH is liable for the acts and omissions of Martin because it is her alter ego. Reverse veil piercing seeks to impose liability on an entity for the acts and omissions of another, usually its principal. Reverse veil piercing is appropriate (1) where a corporation is organized and operated as a mere tool or business conduit of another; and (2) there is such "unity between corporation and individual that the separateness of the corporation has ceased" and holding only the corporation or individual liable would result in injustice. Section 21.244, Bus. Orgs. Code, does not apply to reverse veil piercing.

8.03 FHH was organized just a few days prior to closing solely for the purpose of taking title to two platted hangar lots and otherwise completing the 2016 fire sale transaction for Martin's exclusive benefit. At all times prior to then, FHH was a d/b/a of Martin used to conduct her personal business. According to Martin, the source of the funds used by FHH is a bank account comprised of Martin's personal funds derived from her use of FHH as a d/b/a. That is, all the funds used by FHH – including any "consideration" paid in the 2016 fire sale – are/were Martin's personal funds or are/were comingled with Martin's personal funds. Even after the LLC was formed, Martin has continued to use FHH as a d/b/a to conduct her personal business. See deed attached as ***Exhibit 5***. FHH is a mere tool or conduit of Martin.

8.04 There never has been any separateness between Martin and FHH. FHH inserted into the transaction before FHH even existed so the 2016 Board could announce the transaction without disclosing that the WSC's valuable land was about to be transferred for the benefit of sitting Director Martin. Allowing FHH to retain its ill-gotten gains by separating it from Martin now would result in injustice. Even now, FHH portrays itself as just an innocent purchaser of property. The circumstances, however, belie such allegation.

8.05 Plaintiffs have sought discovery concerning the separateness, if any, of FHH and Martin. Both Martin and FHH have steadfastly refused to comply with such requests.

8.06 In the alternative, FHH is liable for the misconduct of the Director Defendants described above because it had knowledge of such misconduct and participated in it or accepted the benefits of it.

8.07 Martin is the sole principal and at all times acted as the agent of FHH. In the scope of her agency for FHH (to the extent it existed), Martin breached her legal duties by orchestrating a low-ball purchase price for valuable WSC property obtained on the basis of inside information she acquired as a sitting Director. The 2016 Board breached its legal duties by purporting to approve and implement such offer. Also in the scope of her agency for FHH, in October 2019 Martin secured additional valuable WSC property for no consideration, purportedly on the strength of the 2016 transaction. Martin had knowledge of all aspects of the 2016 fire sale and the 2019 "settlement," and knowledge that those transactions were beyond the authority of the Board to approve and beyond the power of the WSC to implement. Such knowledge is imputed to FHH. By virtue of its knowing participation in these transactions, FHH acquired nominal title

to more than 4 acres of valuable airport property for pennies on the dollar and has already realized a substantial profit that rightfully belongs to the WSC and its Member Owners.

8.08 In the further alternative, the Director Defendants and FHH are coconspirators. The 2016 Board agreed with FHH to cause the WSC to transfer title to valuable airport property to FHH for pennies on the dollar, to grant a free preemptive purchase right and to landlock the remainder tract by not reserving a taxiway easement across the land conveyed. The 2019 Board agreed with FHH to leave the 2016 fire sale transaction largely intact and to transfer additional valuable WSC land to WSC for no consideration. Each transaction was beyond the authority of the Board to approve and beyond the power of the WSC to implement, and therefore these agreements and the object they sought to accomplish were illegal. FHH was aware of this and nevertheless entered into and performed the agreements. The WSC and its Member Owners have thereby been injured.

IX.

Exemplary Damages

9.01 Plaintiffs reallege and incorporate by reference all the foregoing allegations.

9.02 Exemplary damages may be awarded if there is clear and convincing evidence that the harm caused results from: "(1) fraud; (2) malice; or (3) wilful act or omission …" See Tex. Civ. Prac. & Rem. Code Ann. § 41.003.

9.03 The 2016 Board and FHH behaved with malice in participating with each other to transfer valuable Cooperative assets and rights for the benefit of a sitting Director in 2016 and for very little consideration in 2016. The 2019 Board and FHH

behaved with malic in participating with each other to transfer more valuable WSC land for Martin's benefit and to relinquish other valuable rights in 2019. Their actions, when viewed objectively from the standpoint of the Defendant Directors and FHH at the time of such actions and their acts of civil conspiracy, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to the WSC and its Member Owners. The Defendant Directors and FHH had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights of the WSC and its Member Owners. Exemplary damages are necessary to serve as a punishment and as a deterrent for others who may be inclined to engage in the same conduct.

9.04 The limitation on recovery set forth in § 41.008 does not apply because Plaintiffs seek recovery of exemplary damages based on conduct described as a felony in Penal Code § 32.45 (misapplication of fiduciary property) that was committed knowingly or intentionally.

X.

Application Under Section 22.512

10.01 Pursuant to Section 22.512(b), Tex. Bus. Orgs. Code, Plaintiffs request that the Court declare that the 2019 Board's purported ratification of one or more of the defective corporate acts described herein[16] is invalid and ineffective.

10.02 As discussed above, the defective corporate acts described herein cannot be ratified.

XI.

[16] Plaintiffs are unable to plead these matters with more specificity at this time because the WSC President who orchestrated the 2019 "settlement" was unable to identify which defective acts he believes the 2019 Board purported to ratify.

Attorneys' Fees

11.01 Plaintiffs seek recovery of Plaintiffs' reasonable and necessary attorneys' fees and other expenses associated with this litigation as permitted in connection with their request for declaratory relief under Chapter 22 or otherwise by applicable law.

XII.

Conditions Precedent

12.01 All conditions precedent to Plaintiffs' right to recover herein have occurred or have been fulfilled.

WHEREFORE, premises considered, Plaintiffs respectfully pray that upon final trial Plaintiffs have judgment as aforesaid and such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been sent via electronic service to all lead counsel of record on this 24th day of August 2020.

/s/ *Kathryn E. Allen*
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January 25, 2019

Via Email: *mollym@abdmlaw.com*
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Re: Friendship Homes & Hangars, LLC purchase of real property interests from Windermere Oaks Water Supply Corporation

Dear Molly,

I am writing to you on behalf of my client, the Windermere Oaks Water Supply Corporation ("WOWSC") in connection with real property transactions by Friendship Homes & Hangars, LLC ("Friendship Homes") relating to approximately 10.85 acres of property located on Piper Lane in Spicewood, Texas ("the property"). This letter is sent to you as counsel for Dana Martin and Friendship Homes as a matter of professional courtesy; if you contend that it should be addressed directly to Ms. Martin and/or Friendship Homes, please let me know and we will re-send it as instructed.

As you know, by a contract for sale dated January 19, 2015, closing in early 2016, and continuing until final addendum on February 16, 2017, Friendship Homes purportedly acquired two separate real property interests from WOWSC: 1) title in fee simple to approximately 3.86 acres along the west side of Piper Lane, in Spicewood, Texas, and 2) a "right of first refusal" to purchase an additional approximately 7.01 acres immediately to the west of the purchased property (collectively, "the transactions"). The total price paid by Friendship Homes to WOWSC for both interests was $203,000.

The circumstances surrounding the transactions are problematic for several reasons.

Self-interested transaction: First and foremost, the managing member of Friendship Homes is Dana Martin. At all times relevant to the transactions, Ms. Martin also was a member of the board of the seller, WOWSC. While she purportedly recused herself from the ultimate vote on a portion of the transaction on December 19, 2015, at all times she remained a member of the board, and by virtue of that office had a fiduciary duty and a duty of loyalty to WOWSC, which requires that there be no conflict between duty and self-interest.

Actions taken in violation of the Texas Open Meetings Act: As a WOWSC Board member, Ms. Martin is charged with knowledge of the requirements of the Texas Open Meetings Act, and knowing that the meeting notice for the December 19, 2015 meeting was legally insufficient, did not speak up or note for the remainder of the Board that the meeting notice did not meet the requisite legal standard. Instead, she allowed her self-interest to be paramount, so that the meeting could go forward and she could enter into a contract for sale of the property. Further, Ms. Martin was surely aware that the purported "right of first refusal" was not mentioned in the meeting notice, and thus could not be considered or acted upon by the WOWSC Board at that meeting without violating the Texas Open Meetings Act. Again, Ms. Martin allowed her self-interest to be paramount, so that the meeting could go forward and she could obtain that right of first refusal, paying no additional consideration for that real property interest. These matters have been litigated, and are the subject of a final judgment in Cause No. 47531, *TOMA Integrity, Inc. v. Windermere Oaks Water Supply Corporation*, in the 33rd District Court of Burnet County, Texas.

Actions regarding improper appraisal: Prior to the transactions, on information and belief, Ms. Martin worked with Jim Hinton to present what was purported to be an objective appraisal of the property to the WOWSC Board ("the Hinton appraisal") on or about September 1, 2015. This was done so that the WOWSC Board could consider the market value of the property and determine whether to sell the property, and under what price and other terms such transaction should be conducted.

The Hinton appraisal represented that it was intended to comply with all applicable rules and standards, and that its conclusion as to value was to be based on the "Highest and Best Use." The Hinton appraisal concluded that the present use of the property was "vacant land," and further concluded that remained the "highest and best use" for the property. The three comparable properties that were analyzed to determine the open market valuation were likewise "vacant land" properties.

Importantly, the property was (and still is) located amidst multiple hangar facilities at a private airport, Spicewood Airport, and had significant frontage on a taxiway for Spicewood Airport. In such circumstances, and considering the factors of legal permissibility, physical possibility, financial feasibility, and maximum

productivity, the actual highest and best use of the property is for division into multiple airport hangar lots, not simply to be used as "vacant land." Notably, the Hinton appraisal did not take into account any comparable sales of hangar lots in the area. Its improper characterization of the highest and best use of the property, and selection of comparable properties consistent with that improper characterization, resulted in a significant under-valuation of the property. Upon information and belief, these defects violate applicable USPAP standards and render the Hinton appraisal fraudulent, and it was presented to fraudulently induce the WOWSC Board into taking action contrary to the best interests of WOWSC.

The WOWSC Board received the Hinton appraisal for the purpose of evaluating and conducting a potential sale of the property. On information and belief, Ms. Martin was aware of this purpose and intended use when the Hinton appraisal was provided to WOWSC. Also on information and belief, Ms. Martin conferred with Mr. Hinton regarding the appraisal before it was submitted to the WOWSC Board, knew that the actual market value of the property was well above the value presented in the Hinton appraisal, and failed to disclose that information to the WOWSC Board. Upon further information and belief, she was aware that the most likely buyer of the property was an enterprise that she had yet to form, Friendship Homes.

The resulting improper and unfair transactions: In reliance on the appraisal, the WOWSC Board elected to sell approximately 3.86 acres of the property for a price of $203,000 to Ms. Martin's enterprise, Friendship Homes, realizing a value of just over $52,000 per acre. In reality, based on the proper highest and best use of airport hangar lots, the value of the 3.86 acres of the property sold was $700,000, yielding a true value of approximately $181,000 per acre. In addition, in further reliance on the under-valuation of the property contained in the appraisal, the WOWSC Board also transferred a "right of first refusal" to Ms. Martin's enterprise for the remaining 7.01 acres of the property for no additional consideration, with that transaction being completed on February 16, 2017.

Thus, as a result, the WOWSC Board at the very least sold property with a proper market value of $700,000 for a price of $203,000, a difference of $497,000. As a result of the actions related to the Hinton appraisal, material facts as to the transaction were not disclosed to, and upon information and belief, purposefully concealed from, the WOWSC Board. The resulting transaction, being for a price significantly lower than the proper market value at the time, was not fair to WOWSC. The circumstances above would constitute a breach of Ms. Martin's fiduciary duty to WOWSC as a member of the WOWSC Board. Further, to the extent that the actions of Ms. Martin and Friendship Homes relating to the Hinton appraisal were committed in concert with and with the knowledge of Mr. Hinton, they may give rise to an action for civil conspiracy.

Finally, pursuant to the Unimproved Property Contract and as consideration for the transactions, Friendship Homes agreed to grant a 50-foot easement to run from Piper Lane to the west property line of the 3.86 acres that Friendship Homes acquired in fee simple. An inspection of the Burnet County property records finds no such valid and enforceable easement that has been created or granted to WOWSC, indicating that Friendship Homes has failed to perform this contract obligation. The absence of such easement significantly reduces the value of the remaining property. This works to Friendship Homes' significant advantage; absent an easement, the current market value of the remaining property is quite low, and if WOWSC attempts to sell it for its current reduced market value, Friendship Homes can execute its right of first refusal and acquire that portion of the property for a fraction of its potential value. Friendship Homes can then extend an easement through the property it currently owns, which will dramatically increase the value of the remaining property. Thus, by virtue of actions solely within Ms. Martin's and Friendship Homes' control, they will realize a significant appreciation in value on the property which value properly belongs to WOWSC.

This letter is the WOWSC's Board's notice and demand that you 1) preserve all documents, correspondence, records, and communications (including emails, text messages, and phone records) that you have had with Mr. Hinton or with any past or current member of the WOWSC Board regarding the property, the Hinton appraisal, or the transactions, and 2) to meet and confer promptly with WOWSC through its legal counsel to discuss WOWSC's claims against Ms. Martin and Friendship Homes, and a proper resolution thereof.

Please reply in writing indicating that you understand WOWSC's demands and will preserve all information described above, and will agree to meet and confer with WOWSC through its legal counsel within the next thirty days. In the event that you fail to do so, WOWSC will have no choice but to pursue all available avenues of relief, including pursuing litigation against Ms. Martin and Friendship Homes.

We look forward to your prompt response to this correspondence.

Sincerely,

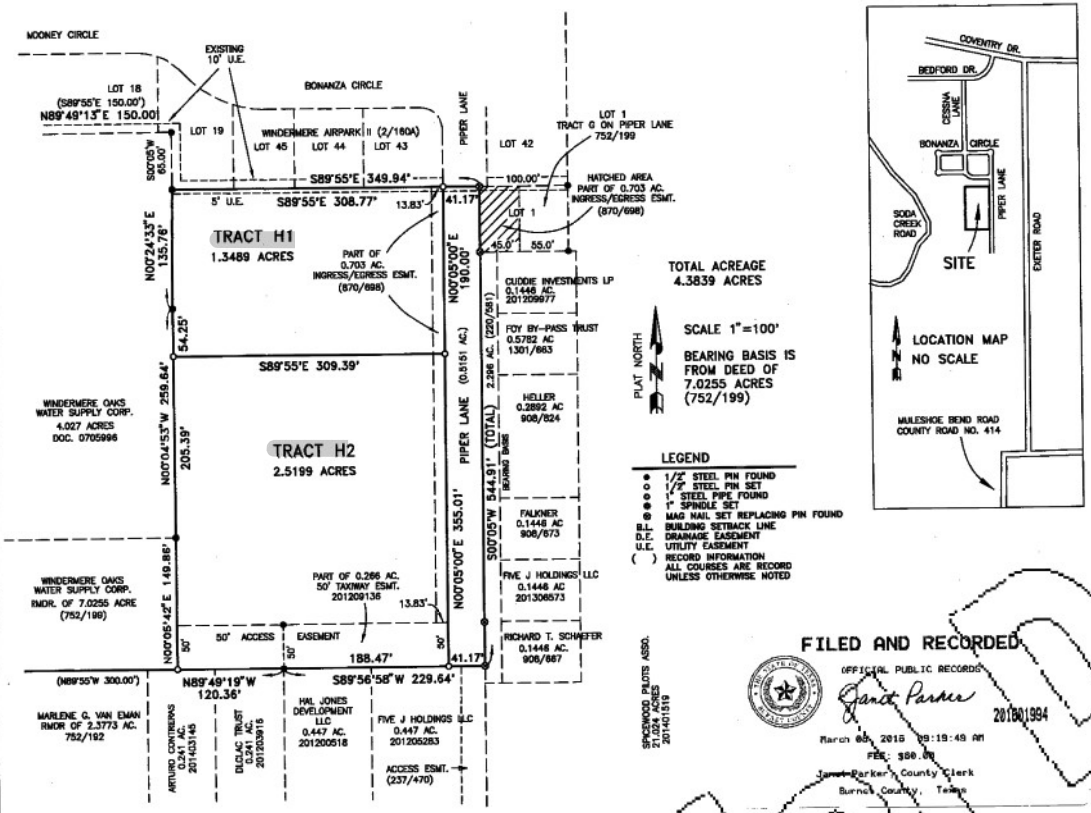
Jose E. de la Fuente

JEF:cad

PLAT 201601994
2 PGS

TRACT H ON PIPER LANE

4.3839 ACRES OUT OF THE MARIA SALINAS SURVEY NO. 17, BURNET COUNTY, TEXAS



STATE OF TEXAS: COUNTY OF BURNET: KNOW ALL MEN BY THESE PRESENTS:

That Windermere Oaks Water Supply Corporation (WOWSC), being the owner of 4.3839 acres of land (more or less) out of the Maria Salinas Survey No. 17, Burnet County, Texas, part of a 7.0255 acre tract conveyed to WOWSC by deed recorded in Volume 752, Page 199, Burnet County Deed Records, does hereby dedicate this plat of said 4.3839 acres as shown hereon, and does hereby adopt this plat to be known as "TRACT H ON PIPER LANE" as the official plat on same, acting by and through WOWSC President, Robert Mebane.

WITNESS MY HAND this 3 day of MARCH 2016.

Robert Mebane, President
424 Coventry Road
Spicewood, TX 78669

STATE OF TEXAS: COUNTY OF BURNET:

Before me, the undersigned Notary Public in and for said County and State, on this day personally appeared Robert Mebane, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged that she executed same for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 2nd day of March 2016.

Notary Public in and for the State of Texas

KARR GIBSON
Notary ID # 2553294
My Commission Expires
March 20, 2020

STATE OF TEXAS: COUNTY OF BURNET:

The attached plat of a 4.3839 acre portion of the Maria Salinas Survey No. 17, Burnet County, Texas, known as "TRACT H ON PIPER LANE" was found to comply with the statutes and laws of the State of Texas and was approved for filing thereof in the Plat Records of Burnet County, Texas.

TO CERTIFY WHICH, the undersigned as County Judge of Burnet County, Texas, this _____ day of _____, 2016.

James Oakley, County Judge, Burnet County, Texas

ATTEST: _____
Janet Parker, County Clerk, Burnet County, Texas

STATE OF TEXAS: COUNTY OF BURNET:

I, Janet Parker, County Clerk of County Court of said County, do hereby certify that the foregoing instrument with Certificate of Authentication was filed for record on this _____ day of _____ 2016, at _____ o'clock ___M. in Volume _____ Page _____ of the Burnet County Plat Records.

WITNESS MY HAND AND OFFICIAL SEAL this _____ day of _____ 2016:

_____
Janet Parker, County Clerk, Burnet County, Texas

FILED AND RECORDED
OFFICIAL PUBLIC RECORDS
Janet Parker
201601994
March 08, 2016 09:19:49 AM
FEE: $80.00
Janet Parker, County Clerk
Burnet County, Texas

STATE OF TEXAS: COUNTY OF BURNET:

The attached plat to be known as "TRACT H ON PIPER LANE" was found to comply with the statutes and laws of the State of Texas and was approved for filing in the Plat Records of Burnet County, Texas.

TO CERTIFY WHICH, THE UNDERSIGNED AS COUNTY JUDGE OF BURNET COUNTY, TEXAS

THIS 8th DAY OF March 2016

APPROVED BY:

Joe Don Dockery, County Commissioner, Precinct 4, Burnet County, Texas

James Oakley, County Judge, Burnet County, Texas

STATE OF TEXAS: COUNTY OF BURNET:

I, Stuart Watson, a Registered Professional Land Surveyor in the State of Texas, do hereby certify that this plat of "TRACT H ON PIPER LANE" was prepared from an actual survey made on the ground under my supervision, and that said plat is a true and correct representation of same as I located its component parts on the ground.

WITNESS MY HAND AND OFFICIAL SEAL this 23 day of FEBRUARY 2016:

STATE OF TEXAS REGISTERED STUART W. WATSON 4550 PROFESSIONAL LAND SURVEYOR

WATSON-SURVEYING
9501 CAPITAL OF TEXAS HWY.
SUITE 303 AUSTIN TX 78759
346-8566 FAX 346-8568

Stuart Watson, R.P.L.S. No. 4550

NOTES:

1. EACH DWELLING CONSTRUCTED OR PLACED ON THIS SUBDIVISION SHALL BE CONNECTED TO A SEWAGE AND WASTEWATER DISPOSAL FACILITY MEETING THE SPECIFICATIONS AND REQUIREMENTS OF THE STATE HEALTH DEPARTMENT.
2. CENTRAL WATER AND CENTRAL SEWER IS PROVIDED BY WINDERMERE OAKS WATER SUPPLY CORPORATION. THE COUNTY SHALL NOT BE RESPONSIBLE FOR THE QUANTITY OR QUALITY OF A RELIABLE WATER SOURCE.
3. GARBAGE PICKUP IS AVAILABLE BY A COMMERCIAL FIRM.
4. IN APPROVAL OF THIS PLAT BY THE COMMISSIONER'S COURT OF BURNET COUNTY, TEXAS, IT IS UNDERSTOOD THAT BUILDING AND MAINTENANCE OF ALL STREETS, ROADS AND OTHER PUBLIC THOROUGHFARES DELINEATED AND SHOWN ON THIS PLAT, AND BRIDGES AND CULVERTS NECESSARY TO BE CONSTRUCTED OR PLACED IN SUCH STREETS, ROADS AND OTHER THOROUGHFARES OR IN CONNECTION THEREWITH SHALL BE THE RESPONSIBILITY OF THE PROPERTY OWNERS OR DEVELOPERS OF THE TRACT OF LAND COVERED BY THIS PLAT ACCORDING TO THE PLANS AND SPECIFICATIONS PRESCRIBED BY THE COMMISSIONER'S COURT OF BURNET COUNTY, TEXAS. THE COUNTY SHALL NOT ACCEPT ALL OR A PORTION OF THE ROADS IN THIS SUBDIVISION FOR MAINTENANCE.
5. THIS PLAT WAS PREPARED IN CONFORMANCE WITH THE BURNET COUNTY SUBDIVISION REGULATIONS DATED JANUARY 28, 2002.
6. THIS TRACT IS NOT WITHIN THE 100-YEAR FLOODPLAIN AS SHOWN ON THE FEDERAL FLOOD INSURANCE RATE MAP NO. 48053C 0705 F, DATED 3-15-2012.
7. LCRA DEVELOPMENT PLAT NOTE: ALL PROPERTY HEREIN IS SUBJECT TO THE LOWER COLORADO RIVER AUTHORITY'S HIGHLAND LAKES WATERSHED ORDINANCE. WRITTEN NOTIFICATION AND/OR PERMITS ARE REQUIRED PRIOR TO COMMENCING ANY DEVELOPMENT ACTIVITIES. CONTACT LCRA WATERSHED MANAGEMENT AT 1-800-776-5272, EXTENSION 2324 FOR MORE INFORMATION.
8. BURNET COUNTY IS NOT OBLIGATED TO ISSUE BUILDING OR OTHER ON-SITE PERMITS FOR ANY RESIDENTIAL DWELLING CONSTRUCTED OR PLACED IN THIS SUBDIVISION UNTIL A T.E.C.Q. CERTIFIED POTABLE WATER TREATMENT PLANT WITH SUFFICIENT CAPACITY TO MEET THE DEMANDS OF THIS SUBDIVISION IS IN PLACE, OPERABLE AND APPROVED BY T.C.E.Q. FOR THE PROVISION OF POTABLE WATER DELIVERY.
9. NO PORTION OF THIS SUBDIVISION LIES WITHIN THE EXTRATERRITORIAL JURISDICTION OF A MUNICIPALITY.
10. ELECTRICAL SERVICE WILL BE PROVIDED BY PEDERNALES ELECTRIC COOP.
11. TELEPHONE SERVICE WILL BE PROVIDED BY VERIZON.

Exhibit 2

Exhibit C

2 pgs 201604126
D

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

37112/STC

WARRANTY DEED

DATE: March 11, 2016

GRANTOR: WINDERMERE OAKS WATER SUPPLY CORPORATION, A Texas Corporation,

GRANTOR'S MAILING ADDRESS: 424 COVENTRY RD., SPICEWOOD, TX, 78669

GRANTEE: FRIENDSHIP HOMES & HANGARS, LLC

GRANTEE'S MAILING ADDRESS: 424 COVENTRY ROAD, SPICEWOOD, TX, 78669

CONSIDERATION: TEN AND NO/100 ($10.00) DOLLARS, and other valuable consideration paid to Grantor, and the receipt of which is hereby duly acknowledged and for which no lien either express or implied is herein retained, has granted sold and conveyed by these presents does hereby grant, sell and convey to the grantee all of the following tracts or parcels of land, to-wit:

PROPERTY (including any improvements): Being Tract H1, of Tract H on Piper Lane, a subdivision in Burnet County, Texas, according to the Plat recorded in Clerk's Document No. 201601994, Official Public Records of Burnet County, Texas.

RESERVATIONS FROM AND EXCEPTIONS TO CONVEYANCE AND WARRANTY:
1. The property shall not be used for any type of helicopter use.
2. Any and all restrictions, covenants, conditions, assessments, reservations and easements, if any, relating to the hereinabove described property, but only to the extent they are still in effect, shown of record in the herein mentioned County and State, and to all zoning laws, regulations and ordinances of municipal and/or other governmental authorities, if any, but only to the extent that they are still in effect, relating to the herein

1

Exhibit 3

described property.

Grantor, for the consideration and subject to the reservations from and exceptions to conveyance and warranty, grants, sells, and conveys to Grantee the property, together with all and singular the rights and appurtenances thereto in any wise belonging, to have and hold it to Grantee, Grantee's heirs, executors, administrators, successors, or assigns forever. Grantor binds Grantor and Grantor's heirs, executors, administrators, and successors to warrant and forever defend all and singular the property to Grantee and Grantee's heirs, executors, administrators, successors and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the reservations from and exceptions to conveyance and warranty.

When the context requires, singular nouns and pronouns include the plural.

WINDERMERE OAKS WATER SUPPLY CORPORATION
A Texas Corporation,

By: Robert Mebane, President

STATE OF TEXAS

COUNTY OF BURNET

This instrument was acknowledged before me on the 22 day of March, 2016, by Robert Mebane, President of WINDERMERE OAKS WATER SUPPLY CORPORATION, a Texas Corporation.

KARRI GIBSON
Notary ID # 2553294
My Commission Expires
March 20, 2020

Notary Public, State of Texas

2

FILED AND RECORDED
OFFICIAL PUBLIC RECORDS

Janet Parker, County Clerk
Burnet County Texas
5/4/2016 4:08:36 PM
FEE: $20.00 201604126
D

D 201602256

2 PGS

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS - YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

GF NO. 37112 STC

WARRANTY DEED WITH VENDOR'S LIEN
(Vendor's Lien Reserved and Assigned to Third Party Lender)

THE STATE OF TEXAS §
§ KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF BURNET §

THAT THE UNDERSIGNED, WINDERMERE OAKS WATER SUPPLY CORPORATION, a Texas Corporation, hereinafter called "Grantor", whether one or more, for and in consideration of the sum of TEN DOLLARS ($10.00) and other valuable consideration to the undersigned in hand paid by the Grantee herein named, the receipt of which is hereby acknowledged, and the further consideration of the execution and delivery by the Grantee of that one certain promissory note of even date herewith in the principal sum of Two Hundred Thousand and 00/100 ($200,000.00) Dollars, payable to the order of ANNE MCCLURE WHIDDEN TRUST, as therein specified, providing for acceleration of maturity and for attorney's fees, the payment of which note is secured by the vendor's lien herein retained, and is additionally secured by a deed of trust of even date herewith to MARK E. MCCLURE, TRUSTEE, has GRANTED, SOLD AND CONVEYED, and by these presents does GRANT, SELL AND CONVEY unto FRIENDSHIP HOMES & HANGARS, LLC, herein referred to as the "Grantee", whether one or more, the real property described as follows, to-wit:

Being Tract H2, of Tract H on Piper Lane, a subdivision in Burnet County, Texas, according to the Plat recorded in Clerk's Document No. 201601994, Official Public Records of Burnet County, Texas.

This conveyance, however, is made and accepted subject to:
1. The Property shall be not used for any type of helicopter use.
2. Grantor retains a Fifty Foot (50') access easement over and across the West Property Line of Tract H2 as shown by plat recorded in Clerk's Document No. 201601994, Official Public Records of Burnet County, Texas.
3. Any and all restrictions, encumbrances, easements, covenants and conditions, if any, relating to the hereinabove described property as the same are filed for record in the County Clerk's Office of Burnet County, Texas.

TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Grantee, Grantee's heirs, executors, administrators, successors and/or assigns forever; and Grantor does hereby bind Grantor and Grantor's heirs, executors, administrators, successors and/or assigns to WARRANT AND FOREVER DEFEND all and singular the said premises unto the said Grantee, Grantee's heirs, executors, administrators, successors and/or assigns, against every person whomsoever claiming or to claim the same or any part thereof.

But it is expressly agreed that the Vendor's Lien, as well as Superior Title in and to the above described premises, is retained against the above described property, premises and improvements until the above described note and all interest thereon are fully paid according to the face, tenor, effect and reading thereof, when this Deed shall become absolute. That ANNE MCCLURE WHIDDEN TRUST ("Lender"), at the instance and request of the Grantee herein, having advanced and paid in cash to the Grantor herein that portion of the purchase price of the herein described property as is evidenced by the hereinabove described Note, the Vendor's Lien, together with the Superior Title to said property, is retained herein for the benefit of said Lender and the same are hereby TRANSFERRED AND ASSIGNED to said Lender, its successors and assigns.

EXECUTED this 11th day of March, 2016.

WINDERMERE OAKS WATER SUPPLY CORPORATION
a Texas Corporation

By: Robert Mebane, President

Grantee's Address:
424 COVENTRY ROAD
SPICEWOOD, TX 78669

STATE OF TEXAS

COUNTY OF BURNET

The foregoing instrument was acknowledged before me on the 13th day of March, 2016, by Robert Mebane, President of Windermere Oaks Water Supply Corporation, a Texas Corporation.

KARRI GIBSON
Notary ID # 2553294
My Commission Expires
March 20, 2020

NOTARY PUBLIC, STATE OF TEXAS

FILED AND RECORDED

OFFICIAL PUBLIC RECORDS

201602256

March 14, 2016 03:49:01 PM

FEE: $20.00

Janet Parker, County Clerk

Burnet County, Texas

OPTION AND RIGHT OF FIRST REFUSAL AGREEMENT

THE STATE OF TEXAS

COUNTY OF BURNET

KNOW ALL MEN BY THESE PRESENTS:

This agreement is entered, executed and made this 10th day of March, 2016, at Marble Falls, Burnet County, Texas by Windermere Oaks Water Supply Corporation, Grantor and Friendship Homes & Hangars, LLC, Grantee.

WHEREAS, Grantor is the owner of certain real property located in Burnet County, Texas, hereinafter referred to as "the property" and being described as follows:

Tract I: Being the remainder of the 7.0255 acres tract located in the Maria Salinas Survey No. 17, in Burnet County, Texas, currently owned by Windermere Oaks Water Supply Corporation.

Tract II: Being a 4.027 acres tract located in the Maria Salinas Survey No. 17, in Burnet County, Texas, currently owned by Windermere Oaks Water Supply Corporation.

WHEREAS, Grantor has agreed and wishes to grant to Grantee a exclusive right of first refusal in connection with the hereinabove described real property, without Grantee becoming obligated to purchase said property;

THEREFORE IT IS AGREED AS FOLLOWS:

1. In consideration of Ten Dollars ($10.00) and other valuable consideration, the receipt of which is hereby acknowledged, Grantor hereby grants to Grantee the exclusive right and option of first refusal in the event Grantor, his heirs or assigns ever sells the property described herein.

2. In the event Grantor, his heirs or assigns should enter into any agreement or contract to sell part or all of the property herein described, Grantor shall notify Grantee, his heirs or assigns in writing by certified mail, to the address shown for Grantee hereinafter, or to such address as Grantee may designate to Grantor in writing, the complete terms and conditions of the agreement or contract of sale. Grantee shall have 10 days from receipt of such notice of sale, to advise Grantor if Grantee elects to exercise this exclusive right of first refusal. In the event Grantee elects to exercise his rights herein, Grantee shall notify Grantor by certified mail within the said 10 day period, and shall then proceed to close the transaction under the terms and conditions of the existing agreement or contract of sale. Should the Grantee elect not to exercise his first right of refusal, he shall so notify Grantor, and Grantor shall thereafter be free to proceed under the terms and conditions of the original offer of purchase and have no further obligations under this agreement to Grantee. In the event Grantee fails to advise Grantor of his intentions within the 10 day period, Grantee shall be deemed to have waived all rights under this agreement, and Grantor shall have no further obligations to Grantee and may proceed to close the transaction without any further notice or obligation to Grantee.

3. Grantor and Grantee agree to record a memorandum of this agreement in the Official Public Records of Burnet County, Texas. The intent of this agreement is to grant Grantee

[redacted]

the right and option to purchase the property should Grantor ever decide to sell or transfer same.

4. This right of first refusal shall remain in effect so long as Grantor, his successors or assigns shall hold title to the herein described real property, or at the end of 20 years from the date hereof, whichever shall first occur.

EXECUTED THIS 10th DAY OF MARCH, 2016.

Windermere Oaks Water Supply Corporation

Robert Mebane, President, Grantor

Friendship Homes & Hangars, LLC

Dana Martin, Manager, Grantee

STATE OF TEXAS
COUNTY OF BURNET

This instrument was acknowledged before me on the 13th day of March, 2016 by ~~Robert Mebane, President of Windermere~~ Oaks Water Supply Corporation.

KARRI GIBSON
Notary ID # 2553294
My Commission Expires
March 20, 2020

Notary Public, State of Texas

STATE OF TEXAS
COUNTY OF BURNET

This instrument was acknowledged before me on the 13th day of March, 2016 by Dana Martin, Manager of Friendship Homes & Hangars, LLC.

KARRI GIBSON
Notary ID # 2553294
My Commission Expires
March 20, 2020

Notary Public, State of Texas

EXHIBIT P-3

3 pgs
D

201703209

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS - YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

GF NO. 38818 STC

WARRANTY DEED WITH VENDOR'S LIEN
(Vendor's Lien Reserved and Assigned to Third Party Lender)

THE STATE OF TEXAS §
§ KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF BURNET §

THAT THE UNDERSIGNED, FRIENDSHIP HOMES & HANGARS, LLC, a Texas limited liability company, hereinafter called "Grantor", whether one or more, for and in consideration of the sum of TEN DOLLARS ($10.00) and other valuable consideration to the undersigned in hand paid by the Grantee herein named, the receipt of which is hereby acknowledged, and the further consideration of the execution and delivery by the Grantee of that one certain promissory note of even date herewith in the principal sum of One Hundred Thousand and 00/100 ($100,000.00) Dollars, payable to the order of THE ANNE MCCLURE WHIDDEN TRUST, as therein specified, providing for acceleration of maturity and for attorney's fees, the payment of which note is secured by the vendor's lien herein retained, and is additionally secured by a deed of trust of even date herewith to MARK MCCLURE, TRUSTEE, has GRANTED, SOLD AND CONVEYED, and by these presents does GRANT, SELL AND CONVEY unto JOHANN MAIR and MICHAEL MAIR, herein referred to as the "Grantee", whether one or more, the real property described as follows, to-wit:

Being Tract H2-A, Replat of Tract H1 and H2, Tract H on Piper Lane, a subdivision in Burnet County, Texas, according to the Plat recorded in Clerk's Document No. 201700783, Official Public Records of Burnet County, Texas.

Grantor reserves unto itself, its successors and/or assigns the right to use the Non-exclusive road and taxiway easement over and across Tract H2-A.

Grantee, its successors and assigns are obligated to pay all Class "A" dues and Assessments in the Spicewood Pilot's Association, Inc., a Texas non-profit Corporation, including enforcement of Class "B" Membership on Grantee's tenants. Membership in the Spicewood Pilot's Association entitles members the easement of enjoyment as well as an easement of ingress and egress in, to and over Spicewood Pilot's Association Common Area and Facilities. Furthermore, no helicopters shall ever be allowed to be kept or used on said property being purchased.

This conveyance is made and accepted subject to any and all restrictions, encumbrances, easements, covenants and conditions, if any, relating to the hereinabove described property as the same are filed for record in the County Clerk's Office of Burnet County, Texas.

TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Grantee, Grantee's heirs, executors,

administrators, successors and/or assigns forever; and Grantor does hereby bind Grantor and Grantor's heirs, executors, administrators, successors and/or assigns to WARRANT AND FOREVER DEFEND all and singular the said premises unto the said Grantee, Grantee's heirs, executors, administrators, successors and/or assigns, against every person whomsoever claiming or to claim the same or any part thereof.

But it is expressly agreed that the Vendor's Lien, as well as Superior Title in and to the above described premises, is retained against the above described property, premises and improvements until the above described note and all interest thereon are fully paid according to the face, tenor, effect and reading thereof, when this Deed shall become absolute. That THE ANNE MCCLURE WHIDDEN TRUST ("Lender"), at the instance and request of the Grantee herein, having advanced and paid in cash to the Grantor herein that portion of the purchase price of the herein described property as is evidenced by the hereinabove described Note, the Vendor's Lien, together with the Superior Title to said property, is retained herein for the benefit of said Lender and the same are hereby TRANSFERRED AND ASSIGNED to said Lender, its successors and assigns.

EXECUTED this 3rd day of April, 2017.

FRIENDSHIP HOMES & HANGARS, LLC
a Texas limited liability company,

Dana Martin, Manager

Grantee's Address:
3710 MASTER COURT
LEAGUE CITY, TX 77573

STATE OF TEXAS

COUNTY OF Brazoria

The foregoing instrument was acknowledged before me on the 3rd day of April, 2017, by Dana Martin, Manager of Friendship Homes & Hangars, LLC., a Texas limited liability company.

T. WHITMAN
NOTARY PUBLIC
STATE OF TEXAS
ID # 5716941
My Comm. Expires 08-03-2017

NOTARY PUBLIC, STATE OF TEXAS

FILED AND RECORDED
OFFICIAL PUBLIC RECORDS

Janet Parker

Janet Parker, County Clerk
Burnet County Texas
4/3/2017 3:53:01 PM
FEE: $20.00 201703209

3 pgs
D

201907744

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

41998 STC

WARRANTY DEED

DATE: July 25, 2019

GRANTOR: DANA J. MARTIN D/B/A FRIENDSHIP HOMES & HANGERS, LLC, a Texas limited liability company

GRANTOR'S MAILING ADDRESS: 205 COVENTRY ROAD, SPICEWOOD, TX, 78669

GRANTEE: BUTLER HOMES OF TEXAS LLC and 14504 INVESTMENTS LLC

GRANTEE'S MAILING ADDRESS: 208 WATERFALL CT., COLLEYVILLE, TX, 76034-8234

CONSIDERATION: TEN AND NO/100 ($10.00) DOLLARS, and other valuable consideration paid to Grantor, and the receipt of which is hereby duly acknowledged and for which no lien either express or implied is herein retained, has granted sold and conveyed by these presents does hereby grant, sell and convey to the grantee all of the following tracts or parcels of land, to-wit:

PROPERTY (including any improvements):

Tract I: Being Lot No. K3118, Horseshoe Bay South Plat K3.1, a subdivision in Burnet County, Texas, as shown on plat recorded in Volume 2, Page 146, Plat Records of Burnet County, Texas.

Tract II: Being Lot No. K6018, Horseshoe Bay South Plat K6.1, a subdivision in Burnet County, Texas, as shown on plat recorded in Volume 3, Page 18, Plat Records of Burnet County, Texas.

RESERVATIONS FROM AND EXCEPTIONS TO CONVEYANCE AND WARRANTY:

This conveyance is made subject to any and all restrictions, covenants, conditions,

Exhibit 5

assessments, reservations and easements, if any, relating to the hereinabove described property, but only to the extent they are still in effect, shown of record in the herein mentioned County and State, and to all zoning laws, regulations and ordinances of municipal and/or other governmental authorities, if any, but only to the extent that they are still in effect, relating to the herein described property.

Grantor, for the consideration and subject to the reservations from and exceptions to conveyance and warranty, grants, sells, and conveys to Grantee the property, together with all and singular the rights and appurtenances thereto in any wise belonging, to have and hold it to Grantee, Grantee's heirs, executors, administrators, successors, or assigns forever. Grantor binds Grantor and Grantor's heirs, executors, administrators, and successors to warrant and forever defend all and singular the property to Grantee and Grantee's heirs, executors, administrators, successors and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the reservations from and exceptions to conveyance and warranty.

When the context requires, singular nouns and pronouns include the plural.

EXECUTED THE 25 DAY OF JULY, 2019, TO BE EFFECTIVE JULY 25, 2019.

DANA J. MARTIN D/B/A
FRIENDSHIP HOMES & HANGERS, LLC
a Texas limited liability company

Dana J. Martin, Individually and as President of
FRIENDSHIP HOMES & HANGERS, LLC

STATE OF TEXAS

COUNTY OF BURNET

This instrument was acknowledged before me on the 25 day of July, 2019, by DANA J. MARTIN, Individually and as President of FRIENDSHIP HOMES & HANGERS, LLC, a Texas limited liability company.

K WILLIAMS
Notary Public, State of Texas
Comm. Expires 05-29-2020
Notary ID 12900360-1

Notary Public, State of Texas

FILED AND RECORDED
OFFICIAL PUBLIC RECORDS

Janet Parker

Janet Parker, County Clerk
Burnet County Texas
7/25/2019 4:13:39 PM
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June 12, 2019

VIA HAND DELIVERY

The Honorable Ken Paxton
Office of the Attorney General
Open Records Division
209 W. 14th Street, Suite 600
Austin, Texas 78701

Re: Request for Attorney General Decision Pursuant to Texas Government Code § 552.301 on behalf of the Windermere Oaks Water Supply Corporation

Dear Attorney General Paxton:

Our firm represents the Windermere Oaks Water Supply Corporation ("WOWSC"), which is a non-profit water supply corporation operating under Chapter 67 of the Texas Water Code that provides retail water utility service to customers in Burnet County, Texas. On May 28, 2019 and after WOWSC's business hours, Mr. Danny Flunker (the "Requestor") sent an e-mail to the Board President of WOWSC requesting certain information pursuant to the Texas Public Information Act (the "Act"). Mr. Flunker's request was officially received and processed by WOWSC the following morning on May 29, 2019. A copy of the Requestor's May 29, 2019 request is enclosed as **Exhibit A**. WOWSC seeks a decision from your office pursuant to Texas Government Code § 552.301 as to whether it must produce public information in response to the May 29, 2019 request that is excepted from disclosure by Texas Government Code §§ 552.022 and 552.101, as well as pursuant to Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure.

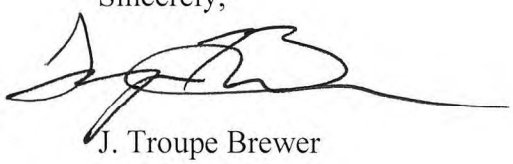
Texas Government Code § 552.022 identifies certain documents that are categorically "public information" and not excepted from disclosure unless otherwise "made confidential under this chapter or other law." Tex. Gov't Code § 552.022(a). The Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" as contemplated by §552.022, and thus information that would otherwise be public pursuant to §552.022 may be withheld from disclosure pursuant to certain privileges established in the Texas Rules of Evidence and the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001); *see also* Tex. Att'y Gen ORD 677 (2002) ("[t]hus, a governmental body may assert Rule 192.5 to withhold section 552.022 information"). Therefore, WOWSC requests a determination that information within responsive documents to which Rule 503 of the Texas Rules of Evidence (pertaining to the attorney-client privilege) and Rule 192.5 of the Texas Rules of Civil Procedure (pertaining to the work product privilege) apply need not be disclosed to the Requestor.

Texas Government Code § 552.101 excepts from public disclosure information "considered to be confidential by law, either constitutional, statutory, or by judicial decision." Tex. Gov't Code § 552.101. Certain documents responsive to the May 29, 2019 request include information relating to settlement discussions and negotiations, documents which may be confidential by law and thus subject to the exception under Section 552.101. WOWSC requests a determination that information within the responsive documents to which Section 552.101 is applicable need not be disclosed to the Requestor.

Pursuant to Texas Government Code § 552.301(e), WOWSC will provide to your office, not later than the fifteenth business day from the date the District received the May 29, 2019 request, the following materials: written comments outlining the reasons why the stated exceptions apply and a copy of the specific information requested or representative samples of such information.

Should you have any questions concerning this request for decision, please contact me at the above number. Thank you for your attention to this matter.

Sincerely,



J. Troupe Brewer

Enclosure

cc via email: Mr. Danny Flunker
dflunker@gmail.com

Mr. Joe Gimenez, Board President
Windermere Oaks Water Supply Corporation

Mr. Michael A. Gershon *of the firm*

Exhibit A

From: Mister Flunker <dflunker@gmail.com>
Sent: Tuesday, May 28, 2019 5:36 PM
To: joe gimenez
Cc: Norman Morse; Brownsandniners; David A Bertino Jr; Bill Earnest; Mike Gershon; Hannah Ging
Subject: PIA 5/28/19

Joe

I am requesting per the PIA, copies of all legal invoices from 3/7/18 to todays date, that is all invoices of all work done by Les Romo and Lloyd Goosling for WOWSC.

Do you understand this request?

Danny

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As the Texas Constitution states, "All political power is inherent in the people," and that means a free government should work for the people, not the other way around.