CAUSE NO. 48292

RENE FFRENCH,	§	**IN THE DISTRICT COURT**
Intervenor Plaintiff	§	
	§	
JOHN RICHARD DIAL,	§	
Intervenor Plaintiff	§	
	§	
STUART BRUCE SORGEN,	§	
Intervenor Plaintiff	§	
	§	
And AS REPRESENTATIVES FOR	§	
WINDERMERE OAKS WATER	§	
SUPPLY CORPORATION	§	
	§	
v.	§	**33RD JUDICIAL DISTRICT**
	§	
FRIENDSHIP HOMES & HANGARS,	§	
LLC, WINDERMERE OAKS WATER	§	
SUPPLY CORPORATION, AND ITS	§	
DIRECTORS WILLIAM EARNEST;	§	
THOMAS MICHAEL MADDEN;	§	
DANA MARTIN; ROBERT MEBANE;	§	
PATRICK MULLIGAN; JOE	§	
GIMENEZ; DAVID BERTINO; MIKE	§	
NELSON; DOROTHY TAYLOR; AND	§	
NORMAN MORSE,	§	
Defendants.	§	**BURNET COUNTY, TEXAS**

DEFENDANTS WINDERMERE OAKS WATER SUPPLY CORPORATION'S AND ITS DIRECTORS' JOINT REPLY TO PLAINTIFFS' CONSOLIDATED RESPONSE TO MATTERS SET FOR SUBMISSION JANUARY 30, 2020 AND MOTION TO STRIKE LATE-FILED "SUPPLEMENT"

Defendant Windermere Oaks Water Supply Corporation ("WOWSC") and WOWSC's former and current Directors William Earnest, Thomas Michael Madden, Dana Martin, Robert Mebane, Patrick Mulligan, Joe Gimenez, David Bertino, Mike Nelson, Dorothy Taylor, and Norman Morse ("Directors") file this their Joint Reply to Plaintiffs' Consolidated Response to Matters Set for Submission January 30, 2020 and Motion to Strike Late-Filed "Supplement" as follows:

I.
EXECUTIVE SUMMARY

Plaintiffs cannot and do not refute the fundamental assertion of Defendants' Joint Amended Motion to Dismiss—that Plaintiffs only have limited statutory standing to bring claims against the WOWSC and its current and former directors. Plaintiffs' response devotes considerable space to citations to inapplicable authority and discussion of the underlying merits (which are not implicated by Defendants' motions). However, Defendants' motions are premised on basic principles of Texas law, without any need to inquire into the purported merits of Plaintiffs' claims, and can be summarized as follows:

- **Rule 91a motion and Plea to the Jurisdiction as to lack of "representative" standing**: Defendants' motions do not assert that Plaintiffs don't have representative standing under Texas Business Organizations Code section 20.002(c)(2) to bring an *ultra vires* claim; instead, the law is clear that Plaintiffs have no representative standing *outside* of the limited standing created by section 20.002(c)(2) to bring claims against officers and directors. Plaintiffs nonetheless assert broad representative standing to bring other claims, but those claims should be dismissed.

- **Rule 91a motion and Plea to the Jurisdiction as to lack of standing by Plaintiffs to bring any individual claims against the Directors:** While Plaintiffs may have section 20.002(c)(2) *representative* standing to bring an *ultra vires* claim against the Directors, they do not have standing for any claims (including tort claims for damages) in an *individual* capacity against the Directors.

- **Plea to the Jurisdiction as to lack of standing based on WOWSC being a "cooperative:"** Plaintiffs' individual claims purport to arise out of some sort of alleged status as members of a cooperative. But a Water Code Chapter 67 water supply corporation ("WSC") incorporated under the Texas Non-Profit Corporations Act (that is, *not* under the Texas Cooperative Act) is not a cooperative as created and incorporated under Texas law. And, even it if was, its members still would not have standing to assert any of the individual claims at issue here. No Texas court has ever held that members of a Chapter 67 non-profit WSC are members of a "cooperative" with individual standing to sue a WSC and/or its Directors, and there is no support in Texas law for such a holding. This Court should not be the first to do so.

- **Rule 91a motion to dismiss claim for attorney's fees:** Texas is an "American Rule" state—attorneys' fees are only recoverable as allowed by statute or contract. No applicable

statute or contract provides for the recovery of attorneys' fees here, and the specifically pleaded claim for such fees should be dismissed.

- **Motion for summary judgment on all claims related to the Original Transaction:** Plaintiffs, through their litigation entity, already brought claims to void the Original Transaction. Under the doctrines of res judicata and collateral estoppel, they cannot now get a second bite at the apple in this case. These doctrines preclude claims that were brought or could have been brought in the original suit. Claims related to the Original Transaction are barred.

After granting these motions, what claims will be left?

- *Ultra vires* claims against WOWSC: a limited statutory *ultra vires* claim found in Texas Business Organizations Code section 20.002(c)(1), that is (1) a claim by a "member" (2) "against the corporation" (3) "to enjoin the performance of an act or the transfer of property by or to the corporation." Tex. Bus. Orgs. Code § 20.002(c)(1). Additionally, if the Court grants Defendants' summary judgment motion on res judicata or collateral estoppel, only *ultra vires* claims against WOWSC related to the New Transaction in 2019 (and other appurtenant acts) would remain.

- *Ultra vires* claims against the Director Defendants: a limited statutory *ultra vires* claim found in Texas Business Organizations Code section 20.002(c)(2) that is (1) "a claim by the corporation" (2) "through members in a representative suit" (3) "against an officer or director or former officer or director of the corporation for exceeding that person's authority." Tex. Bus. Orgs. Code § 20.002(c)(2). Additionally, if the Court grants Defendants' summary judgment motion on res judicata or collateral estoppel, only *ultra vires* claims related to the New Transaction in 2019 (and other appurtenant acts) would remain. Therefore, all claims against former Directors not involved in the New Transaction (i.e., Thomas Michael Madden, Dana Martin, Robert Mebane, Patrick Mulligan, David Bertino, and Norman Morse) would need to be dismissed.

- A limited claim under Chapter 22 subchapter J of the Texas Business Organizations Code to determine the validity or effectiveness of any corporate act or ratification.

To be clear, even those remaining claims do not have merit. But to the extent that any such claims as to any specific corporate acts remain after the Court rules on these motions, Defendants will either move to dismiss such claims as may be appropriate, or WOWSC may simply present the alleged invalid acts to its members for ratification pursuant to Chapter 22 subchapter J of the Texas Business Organizations Code. That is, to remove any ambiguity or question as to authorization, WOWSC may simply present such matters to its members and, let the people decide.

II.
ARGUMENT

A. Defendants' Rule 91a motions comply with the rule.

Plaintiffs claim Defendants' 91(a) motions are not timely because "Plaintiffs first pleaded their standing as representatives of the WSC under Section 20.002" and "standing as individuals under Section 20.002" "on May 14, 2019 in their Original Petition in Intervention." (Pls.' Consol. Resp. to Pleas and Mots. Set for Sub. at 10, 14.) Defendants agree that these earlier-pleaded limited statutory claims under section 20.002 are not subject to 91(a) motions and explicitly did *not* bring any motions seeking to dismiss those claims. (*See* Defs.' WOWSC and its Dirs. Joint Mot. to Dism. Under Rule 91a; 1st Am. Joint Br. in Supp. of their Pleas to the Juris.; & 1st Am. Joint Mot. for Summ. Judgm. at 7, 10, 12, 15, 17 n.8, 29.) But those were the *only* two claims brought in the May 14, 2019 petition, as acknowledged by Defendants in their motion: Plaintiffs "originally brought only two claims: [a] claim . . . under Texas Business Organizations Code section 20.002(c)(1) . . . and [a] purported representative claim under Texas Business Organizations Code section 20.002(c)(2)." (Defs.' Joint Mot. at 6.) These claims are not the subject of any 91a motion presently before the court. (Defs.' Joint Mot. at 10, 29.)

All other causes of action, including all causes of action subject to the 91(a) motions before the Court, were first pleaded on November 4, 2019 in Plaintiffs' First Amended Original Petition. Defendants filed their 91(a) motion on December 23, 2019, within the 60 days required by Rule 91a. (*See* Defs.' Joint Mot. at 31.); *See* Tex. R. Civ. P. 91a. All of Defendants' 91(a) motions are therefore timely.[1]

[1] Page three of Plaintiffs' Consolidated Response also characterizes Defendant's Plea to the Jurisdiction on WOWSC's cooperative status as a "91a Motion fails to comply with Rule 91a.2" without any further elaboration. (Pls.' Consol. Resp. at 3.) To be clear, Defendants' motion as to the lack of standing based on the WOWSC being a cooperative is presented *only* as a plea to the jurisdiction, not as a Rule 91a motion. (*See* Defs.' Joint Mot. at 8, 17 n.8.)

Plaintiffs also argue that Defendants' 91(a) motions fail to identify each challenged cause of action and fail to state to the reasons each has no basis in law or fact, without providing any particular explanation or discussion. In any case, Defendants' motion does so—both in great detail at the beginning and end of the motion (Defs.' Joint Mot. at 3, 7 and 28), as well as in detail in each individual section (Defs.' Joint Mot. at 8, 9, 11, 14, 15, 21 and 22.) To the extent there was any confusion about whether Plaintiffs pleaded a certain cause of action, Defendants indicated as such. (*See, e.g.*, Defs.' Joint Mot. at 8 n.5.)

B. Plaintiffs impermissibly include broad "representative" claims under the guise of the limited section 20.002(c)(2) representative standing.

Defendants' 91(a) motion and Plea to the Jurisdiction on representative standing seek to dismiss any common law representative claims **outside** of a narrow section 20.002(c)(2) claim. (*See* Defs.' Joint Mot. at 10, 12, 13, 29.)[2] These motions are necessary because Plaintiffs' pleading of section 20.002 claims conflates purported "representative" claims with claims by "owners," and references damages in the context of pleading a claim in Plaintiffs' purported "representative" capacity. (*See, e.g.,* Pl.'s 2nd Am. Pet. at 3.04, 7.01, and 7.10.)

Plaintiffs' response discusses standing based only on section 20.002(c)(2), but, problematically, some of the claims Plaintiffs point to as being "within the purview of the statue" are not. (*See* Pls.' Consol. Resp. at 13.) The claims at issue are outside the scope of a section 20.002(c)(2) representative claim against the directors (and indeed implicate representative standing against WOWSC) and request common-law damages not contemplated by the statue. For example, Plaintiffs cite their Second Amended Petition at 7.06, 7.07, 7.10, 7.17 and 7.29 "by way

[2] Again, Defendants do not contest that Plaintiffs may have representative standing to bring a section 20.002(c)(2) statutory *ultra vires* claim that is (1) "a claim by the corporation" (2) "through members in a representative suit" (3) "against an officer or director or former officer or director of the corporation for exceeding that person's authority." Tex. Bus. Orgs. Code § 20.002(c)(2). But that narrow mechanism is the *only* mechanism by which Plaintiffs may have standing to assert claims in a representative capacity.

of example" of their standing under section 20.002(c)(2). (Pls.' Consol. Resp. at 13.) Those sections, however, allege claims beyond the narrow scope of section 20.002(c)(2). For example:

> 7.10 Any transfer of Piper Lane (and any other of the Owners' property) to Martin must be enjoined (or, if already done, must be annulled or canceled) and unencumbered title must be confirmed in the WSC's Owners. Alternatively, the Owners should recover from their unfaithful fiduciaries all amounts required to make them whole.
>
> . . .
>
> 7.17 All of these transfers and transactions must be enjoined or, if already done, must be annulled or canceled, and all distributed funds and unencumbered title to property must be returned to the WSC's Owners. Alternatively, the Owners should recover from their unfaithful fiduciaries all amounts required to make them whole.

(Plaintiffs' 2nd. Am. Pet. at 7.10, 7.17.)

These claims go beyond the scope of section 20.002(c)(2) *ultra vires* claims against the directors (for example, by seeking money damages for purported breaches of fiduciary duty) and demonstrate the necessity of Defendants' motions to dismiss purported representative claims beyond the scope of the statute.

It is well-settled by Texas courts that representative standing does not otherwise exist with respect to Texas non-profit corporations.[3] *See Tran v. Hoang*, 481 S.W.3d 313, 316 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Flores v. Star Cab Co-op. Ass'n, Inc.*, No. 07–06–0306–CV, 2008 WL 3980762, at *7 (Tex. App.—Amarillo Aug. 28, 2008, pet. denied); *Garcia v. Communities in Sch. of Brazoria Cty., Inc.*, No. CV H-18-4558, 2019 WL 2420079, at *10 (S.D. Tex. June 10, 2019). Therefore, any claims made in a "representative" capacity outside a true

[3] Even the single case cited by Plaintiffs in their improper and untimely Supplement, recognizes this proposition: "The Court notes that at times courts apply general corporate law to Texas nonprofit corporations. However, given the *Flores* court's definitive (and fairly recent) statements regarding the inapplicability of corporate law governing for-profit corporations to nonprofit corporations, specifically the derivative suit mechanism, this Court declines to find that members of nonprofit corporations are limited to derivative suits in order to assert claims based on harms done to the corporation." *Bridgewater v. Double Diamond-Del., Inc.*, No. 3:09-CV-1758-B ECF, 2011 WL 1671021, at *7 (N.D. Tex. Apr. 29, 2011).

section 20.002(c)(2) *ultra vires* claim against the directors—including claims for common-law damages—should be dismissed, as Plaintiffs do not have representative standing to bring such claims.

C. Plaintiffs lack standing to bring *any* individual claim against any of the Directors.

As explained above, Plaintiffs lack standing to bring any representative claim on behalf of WOWSC against the Directors except a true statutory *ultra vires* claim under Texas Business Organizations Code section 20.002(c)(2)— which, as demonstrated above and will, as necessary, be demonstrated in subsequent filings, Plaintiffs have failed to bring. Lacking representative standing, Plaintiffs claim that they nonetheless have *individual* standing to bring their pleaded claims against the Directors. Under settled Texas case law, they do not.

Plaintiffs ignore the plethora of case law directly holding that shareholders and members of a corporation do ***not*** have standing to bring individual claims against Directors under the circumstances Plaintiffs allege here. A corporate shareholder cannot recover damages personally for a wrong done to the corporation, even though he may be injured by that wrong. *E.g.*, *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990); *Flores v. Star Cab Co-Operative Ass'n, Inc.*, No. 07-06-0306-CV, 2008 WL 3980762, at *3 (Tex. App.—Amarillo Aug. 28, 2008, pet. denied); *Myer v. Cuevas*, 119 S.W.3d 830, 834 (Tex. App.—San Antonio 2003, no pet.); *Mitchell v. LaFlamme*, 60 S.W.3d 123, 128 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The reason for this rule is to prevent "a multiplicity of suits by the various stockholders and to bar a subsequent suit by the corporation," and to ensure that any damages recovered are available for the corporation's creditors, for distribution to shareholders, and for any other purpose that directors may lawfully determine. *Wingate*, 795 S.W.2d at 719 (quoting *Mass. v. Davis*, 168 S.W.2d 216, 221 (Tex. 1942)).

Plaintiffs' complaints here are ***precisely*** the types of claimed "wrongs" to a corporation where a shareholder or member lacks standing—even though Plaintiffs allege they have been injured by the wrong. *See Wingate*, 795 S.W.2d at 719. Plaintiffs claim some of the Directors mismanaged WOWSC by purportedly selling a parcel of land for less than Plaintiffs believe it was worth. (Pls.' Consol. Resp. at 17–21.) Plaintiffs claim as damage WOWSC's continuing indebtedness (they speculate that WOWSC could have retired debt if it had sold the land for more) and that WOWSC did not pay refunds to members because of the continuing debt. *See id.* If Plaintiffs have standing to bring these claims, then presumably *any* of WOWSC's hundreds of members could likewise bring a "multiplicity" of claims against the Directors—claims which clearly belong to the WOWSC, not the members. *Wingate*, 795 S.W.2d at 719. This is squarely what the rule is intended to prevent.

Undeterred by black-letter law confirming their lack of standing, Plaintiffs attempt to craft out of whole cloth various other "theories" for individual standing. First, Plaintiffs claim they pleaded particularized injury because they purportedly "own" WOWSC assets. Even if true (which it is not), shareholders "own" for-profit corporations as well. That rule is the same when an entity is a non-profit corporation or a co-op (which WOWSC is not); in either case, the same prohibition applies. *See Flores*, 2008 WL 3980762, at *3 (applying the rule and holding that absent any individual injury, members of the co-op at issue did not have standing to recover damages for injury done to the corporation). Just as a shareholder who receives fewer dividends and loses stock value lacks standing to sue corporate directors, Plaintiffs, as WOWSC members, likewise lack standing to bring claims directly against the Directors.[4] Plaintiffs have pleaded no individualized,

[4] As explained in WOWSC and the Directors' Joint Amended Motion to Dismiss and for Summary Judgment, in terms of an *ultra vires* claim, Plaintiffs may only bring an individual claim (that is, a claim asserted as a "member") against WOWSC—not its Directors. *See* Tex. Bus. Orgs. Code § 20.002(c)(1). In terms of common law tort claims like breach of fiduciary duty, these claims against the Directors belong to

particularized injury to them ***personally***—only wrongs to the WOWSC that they speculatively claim impacts the rates paid by and refunds potentially provided to WOWSC members as a whole.[5]

Second, Plaintiffs claim the Directors somehow owe them special duties creating standing. Again, not true. A shareholder may recover damages "for wrongs done to him individually where the wrongdoer violates a duty arising from contract or otherwise, and owing directly by him to the stockholder." *Wingate*, 795 S.W.2d at 719 (citations omitted). Plaintiffs point to no contract here, nor any duty owed directly to them ***individually***. "[T]o recover individually, a stockholder must prove a ***personal*** cause of action and ***personal*** injury." *Id.* (emphasis added). None of the Plaintiffs have alleged personal injury, such as breach of a contract that was entered between a Director and a Plaintiff or any special fiduciary duty owed personally to a Plaintiff by the Directors. *Myer*, 119 S.W.3d at 836. Plaintiffs also do not have an individualized property interest, such as did the owner of mineral rights in *Glover v. Union Pacific*, which would provide them standing to bring their claims against the Directors. 187 S.W.3d 201, 209 (Tex. App.—Texarkana 2006, pet. denied).[6]

WOWSC, not its members. *See, e.g.*, *La Ventana Ranch Owners' Ass'n v. Davis*, 363 S.W.3d 632, 836 (Tex. App.—Austin 2011, no pet.); *Myer v. Cuevas*, 119 S.W.3d 830, 836 (Tex. App.—San Antonio 2003, no pet.); *Faour v. Faour*, 789 S.W.2d 620, 621-22 (Tex. App.—Texarkana 1990, writ denied).

[5] Incidentally, Plaintiffs' claim that members are entitled to refunds or dividends is completely false under the WOWSC corporate documents. The WOWSC articles of incorporation and bylaws provide that no dividends or income shall be distributed to WOWSC members. (Defs.' Joint Mot. at Exh. 1, p. 2; Exh. 2, p. 2.) Plaintiffs' claims are, in general, highly speculative and attenuated. They seem to claim that if only WOWSC had sold the land for more money, then WOWSC *might* have issued dividends to its members—notwithstanding corporate document prohibitions on issuing dividends. Plaintiffs' claim to personal injury makes no sense.

[6] If this Court were to conclude that Plaintiffs have a property interest in WOWSC that would somehow entitle them to bring claims, as they seem to allege, then it would presumably be necessary for all 250+ members of the WOWSC to be joined in this suit to afford complete relief and prevent multiple suits based on the same alleged injury to property owned jointly. *Myer*, 119 S.W.3d at 834–35. This is, obviously, an absurd result in the corporate context. The prohibition against shareholder standing to bring individual claims against Directors, like the claims Plaintiffs have brought here, avoids this absurd result. Plaintiffs do not have a property interest in WOWSC. They are simply members of WOWSC, a non-profit water supply corporation.

Third, Plaintiffs incorrectly claim that Plaintiffs can individually sue in tort against the Directors. The cases Plaintiffs rely on once more concerned situations where a shareholder suffered ***particularized*** harm. For instance, individual shareholders have been permitted to sue when a corporation, with active participation by certain directors, converted that specific shareholder's stock by refusing to issue a stock certificate the shareholder paid for. *See Earthmans, Inc. v. Earthmans*, 526 S.W.2d 192, 206 (Tex. Civ. App.—1975, no writ); *Bower v. Yellow Cab Co.*, 13 S.W.2d 708, (Tex. Civ. App.—El Paso 1929, writ ref'd). And the other tort cases relied on by Plaintiffs do ***not*** concern shareholder or member standing. They instead stand for the unremarkable proposition that, for example, a company employee can be held liable to an individual for fraud when the employee fraudulently induces that individual to buy business assets. *See Gore v. Scotland Golf, Inc.*, 136 S.W.3d 26, 32 (Tex. App.—San Antonio 2003, pet. denied); *see also Dixon v. State*, 808 S.W.2d 721, (Tex. App.—Austin 1991, writ dism'd w.o.j.) (corporate president could be jointly and severally liable with company to State of Texas for converting tax monies). Plaintiffs make no claim (and certainly not a legitimate claim) that ***they*** are the direct, individualized victims of any tort such as fraud.[7]

Fourth, Plaintiffs' attempt to shoehorn agency principles into this dispute is futile, and the cases they cite have no bearing on standing. In *Dixon v. State*, the court of appeals observed that a corporate officer who commingles and converts trust funds of another can be individually liable for breaching the fiduciary duty owned by the corporation as agent to the principle. 808 S.W.2d 721, 723 (Tex. App.—Austin 1991, writ dism'd w.o.j.). In *Julian v. Patel* (a personal injury suit),

[7] As explained in WOWSC and the Directors' Joint Amended Motion to Dismiss and for Summary Judgment, the only common law tort claims Plaintiffs have brought are a breach of fiduciary duty claim and a constructive fraud claim that is entirely based on alleged "breaches of legal or equitable duty" and "occurs when a party violates a fiduciary duty or breaches a confidential relationship." (Pls.' 2nd. Am. Pet. at 7.37.) Plaintiffs have not asserted (nor can they assert, given what they factually allege) a claim such as conversion or fraudulent inducement.

the court observed that a corporate officer or agent can be liable to others, including other company employees, for his or her own negligence. No. 06-01-00128-CV, 2002 WL 1300016, (Tex. App.—Texarkana Jun. 14, 2002, no pet.). These cases do not concern or address the standing of individual members of a corporation to bring claims against corporate directors when they have not suffered a ***personal*** injury. *Wingate*, 795 S.W.2d at 719. And certainly, Plaintiffs, as WOWSC members, are not "agents" of WOWSC, and they cite no case supporting this odd assertion.

Finally, in their untimely and irrelevant Supplemental Response (which WOWSC and the Directors hereby move to strike), Plaintiffs refer to an unpublished, non-binding federal district court opinion in which the court allowed individual members of a property owners association (POA) to bring individual claims for breach of fiduciary duty against a developer and certain of its officers. *Bridgewater v. Double Diamond-Del., Inc.*, No. 3:09-CV-1758-B, 2011 WL 1671021, at *8 (N.D. Tex. Apr. 29, 2011). That was a factually unusual case in which a developer developed a resort, created a POA for the resort, held captive the resort's POA by tactics such as filing lawsuits against any resident who challenged the structure, and then, by agreement with the POA, had the right to break any ties of the POA board. *Id.* at *1. Some residents filed a class action suit against the developer and some of its officers who also sat on the POA board, alleging RICO violations and breach of fiduciary duty related to assessments that were used to generate revenue for the developer. *Id.* at *2. The court stated the individuals had demonstrated individual injury, allowing them to bring a breach of fiduciary duty claim against the officers. *Id.* at *8. The court also stated that because the individuals could not bring derivative claims for injuries to the POA under the Texas Non-Profit Corporations Act, and because the developer held captive the POA board which prevented the POA from bringing claims, the individuals could bring this claim. *Id.*

Bridgewater is an outlier. As the federal court acknowledged in a footnote, Texas courts have reached the opposite result. *See, e.g.*, *Myer*, 119 S.W.3d at 836; *Wingate*, 795 S.W.2d at 719. In any event, unlike in *Bridgewater*, it is untrue here that the Plaintiffs have no procedural avenue. They have brought direct claims against WOWSC and representative claims against the Directors under Texas Business Organizations Code Section 20.002(c). WOWSC and the Directors have not challenged their standing to bring those claims (though WOWSC and the Directors maintain these claims are substantively invalid and are also barred by res judicata and collateral estoppel). Additionally, *Bridgewater* is obviously factually unique because of the highly unusual agreement (even contractual) between the POA and developer. Here, in contrast, Plaintiffs are free to run for the WOWSC Board. Plaintiffs do not allege anything unfair or illegitimate about the WOWSC Board elections. Their view is simply a minority view among the members of WOWSC. This Court should not be persuaded by the highly unusual situation in *Bridgewater*—which is also an outlier case that is inconsistent with Texas Supreme Court precedent and all Texas authority on the matter.

Plaintiffs have pleaded no particularized harm that would enable them to bring individual claims against the Directors. This Court should dismiss ***all*** claims brought against the Directors in the Plaintiffs' individual capacity.

D. WOWSC is not a cooperative under Texas law, and in any case, such status would not provide Plaintiffs individual standing in this case.

Under Texas law, for an entity to operate as a cooperative in Texas, that entity must be incorporated under Chapter 251 of the Texas Business Organizations Code ("the Texas Cooperative Association Act"). *See* Tex. Att'y Gen. Op. No. DM-479; *See* Tex. Bus. Orgs. Code §§ 251.00–251.452. Plaintiffs' individual claims purport to arise out of some sort of alleged status

as members of a cooperative.[8] But the law in Texas is as cited in Defendants' Plea to the Jurisdiction: a Water Code Chapter 67 water supply corporation incorporated under the Texas Non-Profit Corporations Act (that is, not under the Texas Cooperative Act) is not a cooperative as created and incorporated under Texas law. Plaintiffs have not shown and cannot show that under Texas law, the WOWSC is a cooperative so as to possibly provide them standing to assert common law claims or damages derived from some ownership interest.[9]

Plaintiffs' extensive discussion of federal tax law is both incorrect[10] and does not have any bearing on Texas law, under which all claims in this suit have been asserted. Under Texas law,

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[8] In spite of the plain language of their Petition, Plaintiffs argue in their Response that "Plaintiffs do not base any aspect of standing on whether the WSC is or is not a cooperative" yet in the same section claim to have "standing to seek redress for violation/invasion of these interests" with "these interests" being those created by and dependent upon their assertion that WOWSC is a cooperative. (Pls.' Consol. Resp. at 21, 26.)

[9] In fact, even if WOWSC *were* a cooperative, Plaintiffs *still* would not have standing to assert their individual claims. The rule restricting individual claims by members against a cooperative is the same as it is for corporations and their shareholders—the only claim for which an individual might have standing is one in which he suffers a unique and individual injury, not a purported injury that is common to all members/shareholders. *See Flores*, 2008 WL 3980762, at *3 (Plaintiffs sued cooperative formed under the Texas Cooperative Association Act asserting individual claims; the court found such claims could not succeed because absent individual injury to a specific plaintiff, that plaintiff cannot recover damages for an injury done solely to the entity, even though the members of the cooperative may ultimately suffer injury by the alleged wrong) *citing Wingate v. Hajhik*, 795 S.W.2d 717, 719 (Tex. 1990).

[10] For example, upon review, *Puget Sound Plywood, Inc. v. Commissioner of Internal Revenue*, 44 T.C. 305 (1965) is just a lengthy examination of how a particular cooperative was subject to tax laws; it does not stand for the proposition that "all 501(c)(12) tax exempt entities must be organized and must operate on a cooperative basis in accordance with the applicable regulations and common law" as Plaintiffs cite it for. (Pls.' Consol. Resp. at 23.)

Additionally, Plaintiffs' reading of 501(c)(12) for the proposition that any entity subject to 501(c)(12) is necessarily a "cooperative" under Texas law clashes with the plain language of section 501(c)(12) itself. For example, 501(c)(12) applies to "[b]enevolent life insurance associations of a purely local character," (that is, not necessarily a "cooperative" either by name or operative law) and "mutual ditch or irrigation companies" (also not necessarily a cooperative). 26 U.S.C.A. § 501 (C)(12)(A). Finally, after listing a variety of entities to which it applies, section 501(c)(12) then states generally that it applies to "like organizations." 26 U.S.C.A. § 501 (C)(12)(A). The provision contains no language of exclusivity with respect to cooperatives. Federal tax law does not transform a Water Code Chapter 67 non-profit water supply corporation into a cooperative under Texas law (just as it does not transform a Texas LLC into a partnership, even though such LLC may file as a partnership with the IRS), and even if it could, section 501(c)(12) certainly does not do so.

no Texas court or any other authority, to Defendants' knowledge, has ever held that members of a Chapter 67 non-profit WSC are actually members of a "cooperative" imbued with some sort of individual standing to sue a WSC and/or its Directors. This Court should not be the first to do so.

E. Res judicata and collateral estoppel bar Plaintiff's claims to void or recover damages related to the Original Transaction.

Plaintiffs argue that Texas law on res judicata is as simple as "res judicata does not bar a second suit based on a different cause of action" and attempts to characterize all of their claims as either *ultra vires* (many of which are not actually statutory *ultra vires* claims) or as "unrelated" to the TOMA claims. (Pls.' Consol. Resp. at 13, Exh. 9.) In fact, res judicata applies to all claims "which, through the exercise of diligence, ***could have been litigated in a prior suit***." *Hallco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 58 (Tex. 2006) (emphasis added). Here, Plaintiffs are not just actively attempting to relitigate the same transaction as the prior suit but trying to adjudicate the same legal question that they raised in the prior lawsuit. Plaintiffs are relitigating the compliance of the Original Transaction with the Open Meetings Act, down to seeking the same relief (voiding the transaction) that they were denied in that case. Plaintiffs' live pleading specifically seeks to void the conveyance of property on the stated basis that the board violated TOMA. (*See* Pl.'s 2nd Am. Pet 7.05, 7.10.) To the extent that Plaintiffs are attempting to use the TOMA violation as a basis for this new suit to void the Original Transaction, Plaintiffs are barred by res judicata and collateral estoppel (meeting both the "essential to the claim" res judicata standard and "essential to the judgment" collateral estoppel standard). In addition, all claims related to the voiding of the Original Transaction could have and should have been brought in the prior suit and are barred by res judicata or collateral estoppel.

Plaintiffs' secondary argument that a non-profit entity (TOMA Inc.) founded by, controlled by and consisting entirely of, the Plaintiffs in this suit is not in privity with those same Plaintiffs

is both contrary to the law on privity cited in Defendants' motion and would lead to absurd outcomes. If the proposition Plaintiffs argue were true, then any person could form an entity for the purpose of asserting a claim, lose that case, and then re-file the same claim as individuals. The law on privity establishes that such a path is not permitted, and the second claim is barred.[11] Additionally, claims against Directors who served on the Board and made decisions for WOWSC related to the Original Transaction are undisputedly in privity with WOWSC because WOWSC is managed by its Board. (Defs.' Joint Mot., Exh. 1 at 3, Exh. 2-A at 6.)

F. Plaintiffs' claims cannot support attorneys' fees.

Texas law is unambiguous—attorneys' fees are recoverable only when there is an explicit contractual or statutory basis for recovery. *MBM Financial Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 669 (Tex. 2009) ("Texas has long followed the 'American Rule' prohibiting fee awards unless specifically provided by contract or statute."). Here, there is no such contract, there is no such statute, and the "necessary statutory basis for an award of attorney's fees may not be supplied by implication." *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 804 (Tex. 1974); *see also Tex. Dep't of Human Servs. v. Methodist Retirement Servs.*, Inc., 763 S.W.2d 613, 614 (Tex. App. 1989, no writ). Therefore, Plaintiffs' specifically pleaded claim for attorneys' fees should be dismissed because Plaintiffs have not pleaded nor can they plead a claim that would provide for an award of attorneys' fees under Texas law.

G. Response to Irrelevant Factual Assertions in Plaintiffs' Supplemental Response.

WOWSC and the Directors move to strike the Plaintiffs' irrelevant and untimely Supplemental Response, filed after the deadline for Plaintiffs' response in this Court's scheduling

[11] Plaintiffs' judicial estoppel argument (based on WOWSC's contention in the earlier case that the court did not have jurisdiction) is also meritless. Judicial estoppel only applies when a party asserts a position and that position prevails at trial. *Thompson v. Cont'l Airlines*, 18 S.W.3d 701, 704 n.2 (Tex. App.—San Antonio 2000, no pet.). This Court exercised jurisdiction over the TOMA case.

order.[12] But to the extent the Court chooses to consider any part of the Supplemental Response, WOWSC and the Directors briefly respond.

The Supplemental Response is replete with what can only be described as conspiracy theories. It contains pages of factual assertions unsupported by evidence—and, indeed, there is no evidence to support what Plaintiffs appear to be suggesting. Certainly, and most importantly to the Court in the present context, the Supplemental Response is irrelevant to the standing and other legal challenges WOWSC and the Directors have brought in their Joint Amended Motion to Dismiss. Plaintiffs' only apparent purpose in filing the Supplemental Response is to continue their disparagement and defamation of almost every member of this small community who voluntarily served on the Board. It is telling that the land Plaintiffs claim former Director Bill Earnest recently bought does not even appear to be the land at issue in this lawsuit. It takes supposition upon supposition—the type of paranoia upon which conspiracy theories are based—to characterize as sinister Bill Earnest's alleged recent purchase of unrelated land.

This Court should be offended by Plaintiffs' irrelevant and unsupported "Supplement." The Supplement provides a glimpse, though, of the relentless harassment WOWSC and its Directors face on a daily basis, compounded by duplicative, seriatim lawsuits that are causing WOWSC and its volunteer Directors debilitating financial hardship. This needs to stop. The Court should grant WOWSC's and the Directors' Joint Amended Motion.

[12] Defendants further note for the Court that at p. 10 of the untimely Supplement, Plaintiffs' counsel represents that she conferred with counsel for Defendants and circulated a draft of the motion prior to filing. No such conference occurred, and Defendants did not receive any draft before it was filed. The first time Defendants saw the Supplement was when it was filed, the day before Defendants' replies were due to be sent to the court.

III.
CONCLUSION AND PRAYER

Defendants' motions are timely, specific and based on principles of settled Texas law—void of any merits questions. Fundamentally, Plaintiffs cannot and do not refute the fundamental underpinning of Defendants' Joint Amended Motion—that Plaintiffs have only limited statutory standing to bring claims against the WOWSC and its current and former directors. This case needs to be confined to the narrow claims that Plaintiffs have standing to bring and that have not already litigated. Granting Defendants' motion will accomplish that task, and Defendants therefore respectfully ask the Court to grant their motions in full, and for any and all other relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following attorneys via the Court's electronic filing case management system and electronic mail on this 30th day of January, 2020:

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