

CAUSE NO. 48292

RENE FFRENCH, JOHN RICHARD	§	IN THE DISTRICT COURT
DIAL, AND STUART BRUCE SORGEN,	§	
INDIVIDUALLY AND AS	§	
REPRESENTATIVES FOR	§	
WINDERMERE OAKS WATER SUPPLY	§	
CORPORATION	§	
INTERVENOR PLAINTIFFS	§	
	§	
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, AND	§	
DOROTHY TAYLOR,	§	
DEFENDANTS	§	BURNET COUNTY, TEXAS

**DEFENDANTS WINDERMERE OAKS WATER SUPPLY CORPORATION
DIRECTORS WILLIAM EARNEST, THOMAS MICHAEL MADDEN, DANA MARTIN,
ROBERT MEBANE, PATRICK MULLIGAN, JOE GIMENEZ, DAVID BERTINO,
MIKE NELSON, AND DOROTHY TAYLOR’S REPLY IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER**

Defendants Windermere Oaks Water Supply Corporation (“WOWSC”) Directors William Earnest, Thomas Michael Madden, Dana Martin, Robert Mebane, Patrick Mulligan, Joe Gimenez, David Bertino, Mike Nelson, and Dorothy Taylor (“Directors”) file this Reply in Support of Motion for Protective Order (“Motion”) and respectfully show the Court the following.

I. PLAINTIFFS’ RESPONSE IS FILLED WITH MISREPRESENTATIONS

Plaintiffs’ response to the Motion is replete with falsehoods, easily disproved by the evidence. Right out of the gate, the misrepresentations start on page two of the response and continue throughout, including:

- There is a serious dispute about whether Director Martin engaged in misconduct. WOWSC sent one demand letter to Friendship Homes and Hangars (“Friendship Homes”) regarding the land sale and thereafter resolved its complaint satisfactorily upon receipt of additional compensation and other consideration. Further, the value of the land WOWSC sold to Friendship Homes is not undisputed but is a matter of opinion, and no opinion placed the outlandish value on that land sold to Friendship Homes of “\$1 million or more” as alleged by Plaintiffs.
- Plaintiffs repeatedly mischaracterize the Directors as “elected officials,” but they are unpaid volunteer members on the board of directors of a small, non-profit, corporation, the WOWSC. The Directors were not elected by the public at large but by the members of the 254-member WOWSC.
- Plaintiffs exaggerate the Public Utility Commission’s interest in WOWSC, which has essentially thrown out most of the ratepayers’ first effort (an effort that the Plaintiffs in this suit openly led) to persuade it to look into WOWSC’s business management decisions. *See* TEX. PUBS UTILS. COMM’N, *Ratepayers Appeal of the Decision by Windermere Oaks Water Supply Corp. to Change Water & Sewer Rates*, Docket No. 50788, SOAH Docket No. 473-20-4071.WS, 2020 WL 4202136 (July 16, 2020) (preliminary order).
- Plaintiffs falsely suggest that “these circumstances” have garnered the interest of the Texas Commission on Environmental Quality and the media as well. This is false. WOWSC has received no negative “interest” from the TCEQ or the media.
- Plaintiffs complain that the Directors “have not been honest” with member of the WOWSC since 2016 and are distributing “propaganda vilifying Plaintiffs.” The communications Plaintiffs attached to their response speak for themselves. They show the Directors have tried to honestly keep the membership informed about everything that is going on with regards to costs and prospects for rate increases as directly related to defending lawsuits. Plaintiffs’ duplicity is obvious—they accuse the Directors on the one hand of not being truthful by remaining quiet, and on the other hand of distributing propaganda when truthfully communicating information.
- In direct contravention of language in the Motion, Plaintiffs say that the Directors “complain about video deposition ‘clips,’ but omit to mention that Plaintiffs took down the ‘clips’ voluntarily and have agreed that only the full video depositions are now or will be made available.” In fact, the Directors acknowledged that very thing: “The Plaintiffs have since agreed to remove altered versions of the video depositions and replace them with the complete video depositions, which is a step in the right direction.” Motion at 3.

- Plaintiffs’ statement that it was WOWSC’s own insurer that accused the Directors of “organized criminal activity” is categorically false. Rather, the insurance company, *based on a review of the Petition filed by Plaintiffs* (which is what an insurer must do in evaluating coverage of a claim arising from a lawsuit), reserved its right to limit coverage based on a pleaded illegal act of not including an agenda item in violation of the Texas Open Meetings Act. That is a far cry from an insurer making an accusation of organized criminal activity. *See* Exhibit E attached hereto. WOWSC provided this reservation of rights letter to the Plaintiffs’ ally in this litigation, Danny Flunker, back in June 2019 in response to his request under the Public Information Act.
- Plaintiffs’ assertion that the Directors’ counsel did not confer concerning the Motion and proposed order is flatly and undeniably false. The Directors’ counsel exchanged emails with Plaintiffs’ counsel for over a month regarding the video deposition postings and provided the draft agreed protective order attached as Exhibit 2 to Plaintiffs’ response. That draft contains the same paragraph on video postings as in the Directors’ proposed order, plus additional items that Directors’ counsel removed. *Compare* Motion Exhibit A at 2 *with* Response Exhibit 2 at 7, ¶ 11. As the attached emails show, Directors’ counsel provided the draft agreed protective order in June 2020, to which Plaintiffs’ counsel refused to agree and refused to not post unedited video depositions on the internet. *See* Exhibit F attached hereto. On July 17, 2020, the Directors’ counsel emailed Plaintiffs’ counsel that, “[*W*e feel we have no choice but seeking a limited protective order seeking removal of videos from the internet, while still allowing your clients to share deposition transcripts or videos by other means with members of the WOWSC. I will list you as opposed.” *Id.* at 5 (emphasis added). The substance of the Motion and proposed order are the same issues discussed between counsel and to which Plaintiffs’ counsel never agreed. The Directors’ counsel was not required to share the Motion itself prior to filing but only to make “a reasonable effort ... to resolve the dispute without the necessity of court intervention,” which counsel irrefutably did. TEX. R. CIV. P. 191.2.
- Plaintiffs’ emphatic assertion that not one instance of harassment or the threats to Director Gimenez “was *ever* mentioned to the undersigned prior to filing of this Motion” (emphasis in original) is similarly belied by emails wherein the Directors’ counsel advised Plaintiffs’ counsel before filing the Motion: “*Also, Mr. Gimenez received a written threat of violence directly referencing his video deposition on You Tube.*” Ex. F at 5 (emphasis added). Likewise, the posted threat on Director Gimenez’s Facebook page was not made “more than 3 months ago” and the Directors did not sit on it “for months,” but was made only a week before the Motion. *See* Motion Exhibit D (showing comment was made “4 days ago”). It was Gimenez’s own posting of a video of his dogs chasing geese that was made months prior.

II. DIRECTORS HAVE MET THEIR BURDEN TO OBTAIN PROTECTION

In any event, the Directors have shown demonstrable injury sufficient to obtain a protective order, including specific instances of harassment by virtue of internet postings of their video depositions. *See* TEX. R. CIV. P. 192.6. Their proposed protective order is narrow and tailored to that harm. Accordingly, this Court should exercise its broad discretion to enter the proposed protective order to protect the Directors from harassment. *See id.*; *Eurecat US, Inc. v. Marklund*, 527 S.W.3d 367, 376 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

The Directors established with evidence that they have received threats of bodily harm and harassing letters and emails, and that the postings of the deposition videos online were accompanied by defamatory comments. *See* Motion at 3-7 and links to websites therein; *see also id.* Exhibits B, D. Director Gimenez received a threat on his You Tube page just weeks ago directly related to the internet postings. *See id.* Exhibit D. And Director Taylor, before her own anticipated deposition in this matter, received several harassing emails from Danny Flunker in June and July 2020, copying Plaintiffs and others, consistently including the number of views of Gimenez’s deposition testimony and directing her to view the public comments that “may be offensive.” *See* Exhibit G attached hereto (containing some of those emails). Danny Flunker (who is a corporate member of the Plaintiffs’ litigation entity in their previous suit against WOWSC regarding the land transaction, TOMA Integrity, Inc.), Pattie Flunker, and Mark McDonald are acting on Plaintiffs’ behalf by proxy in this matter—essentially doing some of their “dirty work” for them. As Mr. Flunker himself acknowledges, harassing comments about Director Gimenez have been made on the websites where Gimenez’s video is posted. *See id.* Additionally, Plaintiffs are using social media (such as Facebook) to post depositions with harassing commentary. *See* <https://www.facebook.com/IntegrityNow1/>. These facts alone are sufficient to justify the proposed protective order.

Moreover, Plaintiffs' arguments and cited authority miss the mark. Directors are not complaining that the *taking* of their depositions is harassing, and they allege far more than "embarrassment" or harm to their "reputation" by the video postings (Response at 7). Directors do not seek to prohibit Plaintiffs from taking or even videotaping their depositions but complain only about Plaintiffs publicly posting their video testimony online and egging on members of the public to harass and threaten them. Such postings are in direct contravention of Texas law that depositions may only be used "in the same proceeding in which it was taken." TEX. R. CIV. P. 203.6(b).

Masinga v. Whittington, which addresses only objections to the videotaping of a deposition, is inapposite (Response at 10-11). Likewise, Plaintiffs' cited federal caselaw that parties "may generally" do what they want with discovery materials as long as it is "something legal" applies federal civil procedure rules and does not answer this question under Texas law (*id.* at 6). And even if Plaintiffs could broadly use deposition videos despite Rule 203.6, that right is not limitless. Rule 192.6 affords courts the ability to set limits on how litigants can use discovery once it is obtained, which is exactly what Directors ask this Court to do. TEX. R. CIV. P. 192.6(b)(5) ("To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice[.]") To be clear, Directors do not contend that the deposition videos should not be privately shared with WOWSC members; they ask, in the interest of justice, for protection from them being shared on a public forum, which has led to harassment and threats.

Plaintiffs are also wrong that Rule 192.6 does not apply here and that Directors must instead seek to seal the depositions as court records under Rule 76a at this time (Response at 11-12). No "matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government" are at issue in this lawsuit. TEX.

R. CIV. P. 76a(2)(c). Plaintiffs' claims in this lawsuit allege purported ultra vires acts by the Directors concerning the sale of land privately owned by WOWSC, a non-profit corporation (that is not a government entity). This lawsuit is of no concern to anyone outside the 254 individual members of the WOWSC. The depositions do not qualify as unfiled court records. *See id.*

Additionally, this Court should reject Plaintiffs' attempt at attaching the video depositions of Directors Gimenez, Martin, and Mebane to their response in an effort to create a "gotcha" argument that the depositions are now court records. Though "a person may file discovery materials ... in opposition to a motion," *id.* R. 191.4(c)(2), such materials otherwise "must not be filed," *id.* R. 191.4(a). Plaintiffs state they filed the video depositions "to facilitate the Court's determination of this Motion" (Response at 12), but the Motion to prohibit public posting has nothing to do with the content of the deposition testimony. Nor do Plaintiffs cite to that testimony or direct this Court's attention to any testimony as proof that Directors have failed their burden. They merely blatantly attempt to exploit Rule 76a(2) and other rules to try make these depositions qualify as court records by attaching them. Accordingly, Directors request this Court strike those depositions and treat them as being unfiled.

Continuing their pattern of deception, Plaintiffs misrepresent throughout their response that the issues in this case are matters of "public concern" and "strong public interest" (*id.* at 8-11, 13). Again, WOWSC is a 254-member, private non-profit corporation serving a small community, not the larger public. As described above, the Directors are volunteers who serve as members of a board of directors without compensation; they are not at-large publicly elected, paid political officials, or high-profile public figures as Plaintiffs make them out to be (*see id.* at 8-11, 13, 15). They, quite simply, are not public/governmental officials. Unlike in *Morrow v. City of Tenaha* relied on by Plaintiffs (*id.* at 8-10), the Directors are not mayors or law enforcement officers

complaining about mere embarrassment and WOWSC is not a political subdivision of this state; and the Directors have supported their Motion with evidence. Additionally, as to Plaintiffs' argument about freedom of information laws (*id.* at 8), the proposed order does not seek to remove or restrict WOWSC board meeting recordings that are online and subject to the Texas Open Meetings Act. It only seeks to restrict public posting of video depositions taken as part of discovery in this lawsuit.

The proposed order would not prohibit the sharing of deposition transcripts or even videos with WOWSC members through means other than public posting. In this regard, Plaintiffs deceitfully claim only WOWSC's members have watched the video depositions—but those videos are available to the world, not just the members. It is unknown who is watching them. And to reach the figures of 3,000 and 10,000 views, as Plaintiffs claim the videos have been viewed by only WOWSC members (*id.* at 13-14), would mean that some or all of the 254 members would have to be watching those videos repeatedly. As Plaintiffs cannot confine the YouTube and other public video postings to only WOWSC members, they are allowing and fomenting cyberbullying well beyond the membership borders of WOWSC. Plaintiffs' postings could also taint a potential jury pool in this case. Further, as detailed in the Motion, these postings *do* violate YouTube's policies, notwithstanding Plaintiffs' claim otherwise (*id.* at 15-16). *See* Motion at 6 & Exhibit C.

As to Plaintiffs' allegation that the Directors have provided “no evidence” of cyberbullying (Response at 14), nothing could be further from the truth. The threat of harm to Director Gimenez made on his Facebook page is not “stale” but was made just *one week* before the Motion was filed. *See* Motion Exhibit D. Mr. Flunker's June and July emails to Director Taylor, sent before her own deposition in this matter, further show how he is using the video depositions and their views on YouTube to harass her. *See* Exhibit G. And as previously noted, many of the postings of the video

were accompanied by defamatory comments about the Directors. *See* Motion at 6-7. Surely Plaintiffs are not suggesting this is appropriate behavior that should be permitted to continue.

In conclusion, (1) the Directors are not seeking to remove WOWSC board meeting recordings that are online and subject to the open meetings act, (2) the depositions are not public records, (3) the proposed order does not prohibit the sharing of deposition transcripts or even deposition videos with WOWSC members through non-internet/non-posting means, and (4) the Directors are being harassed by the postings and other forms of communications—and indeed, the postings are part of a broader pattern of harassment. Directors have met their burden to show that the proposed narrowly-tailored protective order is needed to limit the harassment they are experiencing.

III. THE PROPOSED ORDER IS ENFORCEABLE

Plaintiffs are incorrect that the presumption contained in the protective order is not enforceable under Texas law. This Court has broad authority to dictate the conditions on which depositions may be undertaken and used. “To protect the movant from ... harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may—among other things—order that ... the discovery be undertaken only ... upon such terms and conditions ... directed by the court.” TEX. R. CIV. P. 192.6(b)(4). Protections provided by the court under this rule are not “sanctions,” as Plaintiffs contend, and need not meet the due process requirements for sanctions. But regardless, the order would, in fact, be “just” under due process standards. *See TransAm. Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (“Whether the imposition of sanctions is just is measured by two standards. First, there must be a direct relationship between the offensive conduct and the sanctions imposed. This

means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. Second, just sanctions must not be excessive.”).

As Plaintiffs acknowledge, the proposed presumption that a deposition was publicly posted by the opposing party is a rebuttable, “burden-shifting” provision, and this Court retains the power to ultimately determine the issue. Such burden-shifting is common in protective orders, such as when challenging confidential designations. *See, e.g., In re Brookfield Infrastructure Grp., LLC*, No. 13-17-00486-CV, 2018 WL 1725467, at *12 (Tex. App.—Corpus Christi Apr. 9, 2018, orig. proceeding) (mem. op.) (“Under the protective order, issues pertaining to confidentiality or trade secrets for specific documents should be submitted to the trial court for determination.”); *Clear Channel Commc’ns, Inc. v. United Servs. Auto Assoc.*, 195 S.W.3d 129, 137 (Tex. App.—San Antonio 2006, no pet.) (“The protective order provides a procedure that parties may use to challenge a confidential designation. ... The designating party must then ‘move the court for an order preserving the designated status’ of the document.”). Similar burden-shifting applies when a party resists discovery based on privilege. TEX. R. CIV. P. 193.3.

A presumption is nothing more than a rule for the guidance of the trial court in locating the burden of production at a particular time. *Texas A & M Univ. v. Chambers*, 31 S.W.3d 780, 783–84 (Tex. App.—Austin 2000, pet. denied). Once evidence contradicting the presumption is produced, the presumption disappears. *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993). The proposed presumption applies equally to Plaintiffs and all Defendants in this matter. The protective order is narrowly tailored to mitigate harassment and ensure a fair trial and strikes an appropriate balance here. It is not “unjust.”

PRAYER

Defendants Windermere Oaks Water Supply Corporation Directors William Earnest, Thomas Michael Madden, Dana Martin, Robert Mebane, Patrick Mulligan, Joe Gimenez, David Bertino, Mike Nelson, and Dorothy Taylor respectfully request the Court to grant their Motion for Protective Order and enter the proposed Protective Order or, alternatively, enter a Protective Order granting the alternative relief requested in the Motion. The Directors further seek such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

By: /s/ Shelby O'Brien

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PATRICK MULLIGAN, JOE GIMINEZ,
DAVID BERTINO, MIKE NELSON, AND
DOROTHY TAYLOR**

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2020, a true and correct copy of the foregoing was served electronically, via e-file Texas, on all counsel of record:

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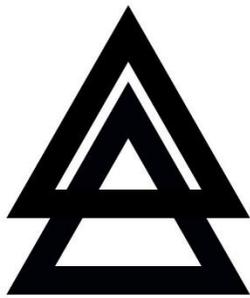
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/s/ Shelby O'Brien

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Exhibit E



APR CLAIMS

January 30, 2018

VIA EMAIL and CERTIFIED MAIL, RRR TO:

Ms. Dorothy Taylor
President
Windermere Oaks Water Supply
Box 279
Spicewood, Texas 78669

Re: Insured: Windermere Oaks Water Supply Corporation
Insurer: Allied World Specialty Insurance Company
Date of Loss: 10/28/2016
Policy #: 5105-0460-03
Policy Period: 3/17/2016 TO 3/17/2017
Limit of Ins.: \$5,000
Subject: TOMA Integrity, Inc. vs Windermere Oaks Water Supply Corp.
Claim #: 2017001776

RESERVATION OF RIGHTS

Dear Ms Taylor

As a member of the Allied World group of insurance companies, the Insurer named in the caption above will be referred to in this letter as “Allied World.” Allied World issued a Commercial WaterPlus Package Policy to Windermere Oaks Water Supply Corporation (hereinafter “WOWSC”) under policy number 5105-0460-0, which includes Public Official and Management Liability with Employment Practices and Employee Benefits Coverage Form (Claims-Made) (the “POML Coverage Section”) for the Policy Period of March 17, 2016 through March 17, 2017 (the “Policy”).¹ Allied World has requested and authorized its Third Party Administrator, Network Adjusters, Inc., to evaluate the above-captioned matter on its behalf. Accordingly, this correspondence shall provide Allied World’s supplemental coverage position under the Policy in connection with the mandamus pleading filed in Texas State Court styled, *TOMA Integrity, Inc. vs Windermere Oaks Water Supply Corporation*.

We have reviewed the information provided to us along with the relevant provisions of the Policy and completed our coverage investigation. As will be explained in greater detail below, Allied World has

¹ The Policy’s other Coverage Parts – Property Coverage, Commercial Crime Coverage, and Commercial General Liability – are inapplicable to this matter, as this loss does not trigger the Insuring Agreements of those Coverage Parts.

determined that the Policy will provide a maximum of \$5,000 in “defense expenses” under Coverage B of the Policy’s POML Coverage Section.

This correspondence is directed to you in your capacity as an authorized representative of the above-named Insured for insurance coverage purposes. To the extent that you are not acting on behalf of the Insured with respect to insurance matters, we request that you direct a copy of this letter to the appropriate representative and advise the undersigned accordingly.

To assist you in understanding this coverage analysis, we suggest that you review the Policy along with this letter. This letter does not modify any of the terms and conditions of the Policy. Allied World must reserve its right to decline or limit coverage should any of the exclusions, endorsements, or any other provision of the Policy prove to be applicable.

SUMMARY OF ALLEGATIONS

The summary of facts that follows is based upon the allegations contained within the documents and information received to date. We recognize that those allegations are unsubstantiated at this time, and nothing in this letter is intended to suggest or imply that they have any legal or factual merit.

This matter was originally submitted to us on January 24, 2017, though it was reported as “Record Only.” The issue at that time was that, during a Board meeting of the entity, two (2) individuals took issue with the entire Board, upon learning that the Board had sold WOWSC property to a Board member. There was a petition before the Board for their removal of the individual who purchased the property. An analysis was made under both the General Liability Coverage part and the Public Officials Management Liability Policy for a coverage grant. The matter was disclaimed under both coverage parts in a letter to you dated March 22, 2017. This current matter is premised as a derivative claim thereof from the prior claim as to a violation of the Texas Open Meetings Act.

The Petition

A Mandamus pleading was filed as Plaintiff’s Original Petition for Mandamus and Discovery Requests in 33rd District Court, Burnet County, under Cause No. 47531 (the “Petition”). This Petition seeks equitable and injunctive relief to void the action and decisions that the Windermere Oaks Water Supply Corporation (WOWSC) to sell a parcel of WOWSC property to a Board member. Plaintiff TOMA Integrity, Inc. filed the Petition against WOWSC in seeking to enforce the application of the Texas Open Meetings Act (TOMA.). The Petition contains One Count for Mandamus/Injunctive Relief.

SUMMARY OF COVERAGE

We direct your attention to certain terms and conditions in the policy of insurance issued by Allied World that have affected coverage in this matter. As you know, the Policy is comprised of multiple coverage parts. Due to the nature of the underlying facts and allegations made therein and based upon the information received to date, it is Allied World’s position that analysis of this matter is properly conducted under Insuring Agreement (B) the POML Coverage Section of the Policy. We expressly note that the Commercial General Liability Coverage Section is inapplicable because the Petition does not allege “bodily injury” or “property damage” caused by an “occurrence” or “personal and advertising injury” caused by an offense and, therefore, the insuring agreement for the Commercial General Liability Coverage Section is not met. We further note that coverage under Insuring Agreement (A) of the POML Coverage Section is inapplicable, because the Petition

does not seek “damages”, defined to mean monetary damages, arising out of a “claim” for a “wrongful act”. If you disagree, or would like us to review this matter under any other coverage section, please contact me.

Please note that the following observations concerning coverage are based on the information presently available, and may be subject to change in the event Allied World becomes aware of additional information.

We direct your attention to the PUBLIC OFFICIALS AND MANAGEMENT LIABILITY COVERAGE FORM WA-PO 00006 00 (03/12), a part of your Policy which states in pertinent part:

SECTION I. – COVERAGES

C. COVERAGE B. INSURING AGREEMENT – DEFENSE EXPENSES FOR INJUNCTIVE RELIEF

1. We will pay those reasonable sums the insured incurs as “defense expenses” to defend against an action for “injunctive relief” because of a “wrongful act,” an “employment practices” offense, or an offense in the “administration” of your “employee benefit plans” to which this insurance applies.

However:

- a. The amount we will pay for “defense expenses” is limited as described in **SECTION IV. – LIMITS OF INSURANCE**; and
- b. We have no obligation to arrange for or provide the defense for any action for “injunctive relief.”

No other obligation or liability to pay sums or perform acts or services is covered.

2. This insurance applies only if:
- a. The action seeking “injunctive relief” is brought in a legally authorized court or agency of the United States, any of its states or commonwealths, or any governmental subdivision of any of them;
 - b. Such action is filed during the policy period; and
 - c. The insured:
 - (1) First notifies us as soon as practicable after retaining counsel to respond to such action but in no case later than 60 days after the end of the policy period; and
 - (2) Is reasonably expedient in requesting us to reimburse any “defense expenses” incurred.

SECTION II. – EXCLUSIONS

This insurance does not apply under either **Coverage A** or **Coverage B** to:

5. Attorney’s Fees and Court Costs

Any award of court costs or attorney’s fees which arises out of an action for “injunctive relief”

19. Violation of Law

“Damages,” “defense expenses,” costs or loss arising from an insured’s willful violation of any federal, state, or local law, rule, or regulation.

27. Profit, Advantage or Remuneration

Any “Damages,” “defense expenses,” costs or loss based upon or attributable to the insured gaining any profit, advantage or remuneration to which the insured is not legally entitled.

SECTION VIII. – DEFINITIONS

3. “Claim” means:

- a. written notice, from any party, that it is their intention to hold the insured responsible for “damages” arising out of a “wrongful act” of offence by the insured;*
- b. a civil proceeding in which “damages” arising out of an offence or “wrongful act” to which this insurance applies are alleged;*
- c. an arbitration proceeding in which “damages” arising out of an offence or “wrongful act” to which this insurance applies are claimed and to which the insured must submit or does submit with our consent;*
- d. any other civil alternative dispute resolution proceeding in which “damages” arising out of an offence or “wrongful act” to which this insurance applies are claimed and to which the insured submits with our consent; or*
- e. a formal proceeding or investigation with the Equal Employment Opportunity Commission, or with an equivalent state or local agency.*

A “claim” does not mean any ethical conduct review or enforcement action, or disciplinary review or enforcement action.

5. “Damages” means monetary damages

6. “Defense expenses” means reasonable and necessary fees or expenses incurred by or on behalf of the insured for:

- a. Legal fees charged by the insured’s attorney;*
- b. Court costs;*
- c. Expert witnesses; and*
- d. The cost of court bonds, but we do not have to furnish these bonds.*

“Defense expenses” do not include:

- (1) Any salaries, charges or fees for any insured, insured’s “volunteer workers” or “employees,” or former “volunteer workers” or “employees”; or*
- (2) Any expenses other than a., b., c. and d. above.*

12. “Injunctive relief” means equitable relief sought through a demand for the issuance of a permanent, preliminary or temporary injunction, restraining order, or similar prohibitive writ against an insured, or order for specific performance by an insured.

25. “Wrongful act” means any actual or alleged error, act, omission, neglect, misfeasance, nonfeasance, or breach of duty, including violation of any civil rights law, by any insured in the discharge of their duties for the Named Insured, individually or collectively, that results directly but unexpectedly and unintentionally in “damages” to others.

Based on the foregoing Policy language, and our review of the materials received, the Petition constitutes an action for “injunctive relief” because of a “wrongful act” against an insured during the policy period.

According to the Policy’s Declarations, the Policy’s POML Coverage Section provides \$5,000 Limit of Insurance for Each Action for Injunctive Relief under Coverage (B). Pursuant to Section IV, Paragraph (2) of the Policy’s POML Coverage Section, the Aggregate Limit of Insurance set forth in the Declarations for Coverage (B) applies to all “defense expenses” arising out of all actions for “injunctive relief”. Pursuant to Section IV, Paragraph (4), subject to the Aggregate Limit of Insurance, the “Each Action for Injunctive Relief” Limit of Insurance is the most we will pay under Coverage (B) for all “defense expenses” arising out of a single action for “injunctive relief”.

Although Allied World has determined that Insuring Agreement (B) responds to this matter, certain provisions in the Policy’s POML Coverage Section may also apply to bar or limit coverage for this action. Without intending to be exhaustive or exclusive, Allied World takes this opportunity to briefly identify some of these provisions.

First, in the Petition, Plaintiff seeks equitable and injunctive relief to void the action and decisions that the Windermere Oaks Water Supply Corporation (WOWSC) to sell a parcel of WOWSC property to a Board member. Plaintiff TOMA Integrity, Inc. filed the Petition against WOWSC in seeking to enforce the application of the Texas Open Meetings Act (TOMA.). According to Section II of the Policy’s POML Coverage Section Exclusion (27), this insurance does not apply under Coverage (B) to “damages,” “defense expense,” costs or loss based upon or attributable to the insured gaining any profit, advantage or remuneration to which the insured is not legally entitled. Because the action for “injunctive relief” is alleged to be based upon or attributable to profit, the insured gaining any profit, advantage or remuneration to which the insured is not legally entitled, this matter falls within the scope of Exclusion (27) and, therefore, Allied World respectfully reserves its rights to limit coverage for this matter pursuant to Exclusion (27).

Second, according to Section II of the Policy’s POML Coverage Section, Exclusion (19), this insurance does not apply under Coverage (B) to “damages,” “defense expense,” cost or loss arising from an insured’s willful violation of any federal, state, or local law, rule or regulation. In this matter, Plaintiff asserts violations of TOMA. Given the allegations, Allied World further reserves its rights to limit coverage to the extent the insured willfully violated any federal, state, or local law, rule or regulation.

Third, we note that the Petition seeks attorney’s fees. According to Section II of the Policy’s POML Coverage Section, Exclusion (5), this insurance does not apply under Coverage (B) to any award of court cost or attorney’s fees which arises out of an action for “injunctive relief”. Allied World expressly disclaims coverage for any award of attorney’s fees which arise out of the Petition.

Lastly, in addition to the foregoing, Allied World continues to reserve its rights, remedies, and defenses, including, without limitation, its right to disclaim or limit coverage as this matter continues to evolve, to the extent that:

1. the parties involved are not insureds;
2. this matter does not involve “wrongful acts”;
3. any amounts incurred in connection with do not constitute covered or insurable “damages” or “defense expenses”; and

4. this matter involves covered and uncovered matters or parties.

Please note that Section VI, Condition (6) of the Policy's POML Coverage Section provides that if other valid and collectible insurance is available to the insured for a loss or "defense expenses" we cover under this Coverage Form, this insurance is excess over any of the other insurance and its deductible or self-insured retention provisions, whether primary, excess, contingent or on any other basis. Accordingly, please advise as soon as possible if there are any other insurance carriers that have been placed on notice of this matter. In addition, please forward us copies of any and all other coverage letters issued by any other insurance carrier(s) in connection with this "claim." Allied World expressly reserves its rights related to other insurance.

RESERVATION OF RIGHTS

Based on the above, Allied World will provide coverage for the Petition under a Reservation of Rights. As outlined above, the coverage afforded under Coverage B of the Policy's POML Coverage Section is limited to \$5,000 in "defense expenses". This means that Allied World will pay up to a maximum of \$5,000 in "defense expenses" incurred in connection with the Petition.

Allied World's coverage position addressed herein is based upon the facts currently known, and Allied World will consider and evaluate any additional information you may present to it which you believe to be relevant to its coverage determination.

Please understand that this letter is not intended to provide an exhaustive review of all Policy terms, conditions and exclusions and Allied World expressly reserves its right to rely upon and enforce additional Policy terms when appropriate. Allied World may revise its coverage position and raise any other coverage issues or coverage defenses without prejudice, waiver or estoppel. Furthermore, this letter does not constitute a waiver of any policy provisions or defenses available to Allied World. Allied World expressly reserves all of its rights and defenses under the Policy and applicable law. Additionally, Allied World reserves the right to seek a determination in a court of law regarding any issues of coverage discussed herein as well as those not raised by this letter, but of which Allied World may subsequently become aware.

If you have any questions or concerns regarding Allied World's coverage position or anything stated herein, or if you have additional information which you believe may affect Allied World's coverage position, please do not hesitate to contact the undersigned at 303 221 9676 or by email pflynn@networkadjusters.com

Sincerely,

Pete Flynn

Network Adjusters, Inc.

"Any person who knowingly presents a false or fraudulent claim for the payment of a loss is guilty of a crime and may be subject to fines and confinement in state prison."

cc: Allied Public Risk, LLC
4700 North Front Street, Suite 200
Harrisburg, PA 17110

Sandy Batchelor (via email only)
AIA Insurance Agency, Inc.
sbatchelor@aiaagency.com

Exhibit F

From: [Shelby O'Brien](#)
To: [kathryn allen](#); [Molly Mitchell](#); [Jose de la Fuente](#)
Subject: Proposed protective order
Date: Monday, June 15, 2020 12:45:24 PM
Attachments: [Protective Order 6.15.20.docx](#)
[image001.jpg](#)

All – Attached is a proposed agreed protective order for this case. Kappy, I think my proposal regarding video depositions is a fair one. It allows your clients to distribute to members as they see fit, but prohibits any person from posting videos on the internet, which is completely unnecessary, harassing, and abusive. Please let me know your thoughts.

Thanks - Shelby

Shelby O'Brien
Board Certified – Civil Appellate Law – Texas Board of Legal Specialization
ENOCH **K**EVER PLLC
7600 N. Capital of Texas Hwy, Building B, Suite 200
Austin, Texas 78731
(512) 615-1225 *Direct*
sobrien@enochkever.com
www.enochkever.com



From: kathryn.allen
To: Shelby O'Brien; Molly Mitchell; Jose de la Fuente
Subject: Re: Proposed protective order
Date: Wednesday, June 17, 2020 5:15:03 PM
Attachments: [Outlook-1520361946.png](#)

CAUTION: This email originated from outside of the organization. Do not open links/attachments unless you recognize the sender and know the content is safe.

Shelby -

My clients will not agree not to post unedited video depositions on the internet. I thought I had been clear about that. These are matters of considerable public interest within this community and involve the actions of elected officials. If you have legal authority suggesting that it would be appropriate for a court to order what you are requesting, please send it along so that I can consider it and counsel further with my clients. I have found no such authority.

Thank you.



The Law Office of Kathryn E. Allen, PLLC
114 W. 7th Street, Suite 1100
Austin, Texas 78701
***o.* (512) 495-1400**
***m.* (512) 422-5541**
***f.* (512) 499-0094**
kallen@keallenlaw.com

This electronic communication (including any attached material) may contain privileged and/or confidential information. If you are not an intended recipient of this communication, please be advised that any disclosure, dissemination, distribution, copying, or other use of this communication or any attached material is strictly prohibited. If you have received this communication in error, please notify the sender immediately by reply e-mail and promptly destroy all electronic and printed copies of this communication and any attached material.

From: Shelby O'Brien <sobrien@enochkever.com>
Sent: Monday, June 15, 2020 12:45 PM
To: kathryn.allen <kallen@keallenlaw.com>; Molly Mitchell <mollym@abdmlaw.com>; Jose de la Fuente <jdelafuente@lglawfirm.com>
Subject: Proposed protective order

All – Attached is a proposed agreed protective order for this case. Kappy, I think my proposal regarding video depositions is a fair one. It allows your clients to distribute to members as they see fit, but prohibits any person from posting videos on the internet, which is completely unnecessary,

harassing, and abusive. Please let me know your thoughts.

Thanks - Shelby

Shelby O'Brien

Board Certified – Civil Appellate Law – Texas Board of Legal Specialization

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Austin, Texas 78731

(512) 615-1225 *Direct*

sobrien@enochkever.com

www.enochkever.com



From: [kathryn.allen](#)
To: [Shelby O'Brien](#)
Subject: Video
Date: Friday, June 19, 2020 1:22:09 PM

CAUTION: This email originated from outside of the organization. Do not open links/attachments unless you recognize the sender and know the content is safe.

I'm not going to persuade my group they cannot put on YouTube.

Sent from my iPhone - please pardon the errors and abbreviations

From: [Shelby O'Brien](#)
To: [kathryn.allen](#)
Subject: RE: Exhibits from prior depositions
Date: Friday, July 17, 2020 9:14:58 AM
Attachments: [image001.jpg](#)
[image002.png](#)

Kappy, can you confirm your plan with the exhibits? Are you sending exhibit binders to my office? I'm not there, but I can arrange for an assistant to feed ex the binders to Mr. Earnest and Mr. Mulligan when we get them. I'm thinking I would need them today to get them over to them on time. Neither gentleman is in Austin. Please note my new address below.

Also, Mr. Gimenez received a written threat of violence directly referencing his video deposition on YouTube. As such, we feel we have no choice but seeking a limited protective order seeking removal of videos from the internet, while still allowing your clients to share deposition transcripts or videos by other means with members of the WOWSC. I will list you as opposed.

Thanks – Shelby

Shelby O'Brien
Board Certified – Civil Appellate Law – Texas Board of Legal Specialization
ENOCH **K**EVER PLLC
7600 N. Capital of Texas Hwy, Building B, Suite 200
Austin, Texas 78731
(512) 615-1225 *Direct*
sobrien@enochkever.com
www.enochkever.com



From: kathryn.allen <kallen@keallenlaw.com>
Sent: Wednesday, July 15, 2020 2:44 PM
To: Shelby O'Brien <sobrien@enochkever.com>
Subject: Exhibits from prior depositions

CAUTION: This email originated from outside of the organization. Do not open links/attachments unless you recognize the sender and know the content is safe.

Shelby -

Managing exhibits during a Zoom deposition is more than a bit cumbersome. I'd like to be

sure Mr. Mulligan and Mr. Earnest each have copies of the exhibits from the prior depositions prior to the time for his deposition. What is the best way to facilitate that?

Thank you.



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114 W. 7th Street, Suite 1100

Austin, Texas 78701

o. (512) 495-1400

m. (512) 422-5541

f. (512) 499-0094

kallen@keallenlaw.com

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From: [Shelby O'Brien](#)
To: [kathryn.allen](#)
Subject: RE: No. 48292; Ffrench, et al. v. Windermere Oaks Water Supply Corporation, et al. - Motion for Protective Order
Date: Friday, July 17, 2020 3:36:41 PM
Attachments: [image001.png](#)
[image002.jpg](#)

You have had the language in this order many times before, and the bottom line is your clients are not willing to refrain from posting deposition videos on the internet. That is the substance of the motion and order, but it is your call if you want to try spinning things differently – and I believe inaccurately from your email below – to the court. At this point, my clients are being threatened, so we are seeking protection.

From: kathryn.allen <kallen@keallenlaw.com>
Sent: Friday, July 17, 2020 3:26 PM
To: Shelby O'Brien <sobrien@enochkever.com>
Subject: Re: No. 48292; Ffrench, et al. v. Windermere Oaks Water Supply Corporation, et al. - Motion for Protective Order

CAUTION: This email originated from outside of the organization. Do not open links/attachments unless you recognize the sender and know the content is safe.

The last draft protective order you sent was considerably broader. I wrote back saying that I would agree to a protective order regarding depo cuts, but can find no record that you ever sent the order you've now asked the court to enter. If you did, I wouldn't want to say that you didn't. That's all.



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From: Shelby O'Brien <sobrien@enochkever.com>
Sent: Friday, July 17, 2020 3:24 PM
To: kathryn allen <kallen@keallenlaw.com>
Subject: RE: No. 48292; Ffrench, et al. v. Windermere Oaks Water Supply Corporation, et al. - Motion for Protective Order

Yes, I have sent you draft protective orders previously with my proposed language included. I did not send you the actual draft motion. I am not familiar with any requirement to give you a copy of a draft motion before filing, and we have conferred many times about the relief requested in the motion. I took out the lengthy confidentiality provisions because I agree with your previous email that it is unlikely much will be confidential in this case.

From: kathryn allen <kallen@keallenlaw.com>
Sent: Friday, July 17, 2020 3:15 PM
To: Shelby O'Brien <sobrien@enochkever.com>
Subject: Re: No. 48292; Ffrench, et al. v. Windermere Oaks Water Supply Corporation, et al. - Motion for Protective Order

CAUTION: This email originated from outside of the organization. Do not open links/attachments unless you recognize the sender and know the content is safe.

Shelby -

I have no record that you sent this to me for review. Did you?



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From: Shelby O'Brien <sobrien@enochkever.com>

Sent: Friday, July 17, 2020 11:24 AM

To: MargaretGMirabal@gmail.com <MargaretGMirabal@gmail.com>

Cc: Lisa Bell <33coordinator@gmail.com>; kathryn allen <kallen@keallenlaw.com>; Jose de la Fuente <jdela Fuente@lglawfirm.com>; Molly Mitchell <mollym@abdmlaw.com>; Laci Lindsey <llindsey@enochkever.com>

Subject: No. 48292; Ffrench, et al. v. Windermere Oaks Water Supply Corporation, et al. - Motion for Protective Order

Dear Judge Mirabal – Please see the attached Motion for Protective Order filed by the Directors in the above-captioned cause today. We will reach out to Ms. Bell regarding hearing availability. Thank you – Shelby O’Brien

Shelby O’Brien

Board Certified – Civil Appellate Law – Texas Board of Legal Specialization

ENOCH KEVER PLLC

7600 N. Capital of Texas Hwy, Building B, Suite 200

Austin, Texas 78731

(512) 615-1225 *Direct*

sobrien@enochkever.com

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EK_logo



Exhibit G

From: Mister Flunker <dflunker@gmail.com>
Date: June 9, 2020 at 7:14:37 PM EDT
To: Dorothy Taylor <dtaylor27@me.com>
Cc: Michele Christenson <michele@peacocksplumage.com>, Josie Fuller <josiefuller1@gmail.com>, John Otwell <otwell78@gmail.com>, John Nigh <jwnigh@gmail.com>, Skip Johnson <skip4johnson@gmail.com>, Lawrence Ffrench <lrfrench@gmail.com>, Dick Dial <jrdial@hal-pc.org>, Bruce W Sorgen <Ssorgen@msn.com>, Bill Benker <wbenker@gmail.com>, Bill Stein <wp_stein@yahoo.com>, "88R Bill n Kay. L. C. Billingsley CFII" <lcbaviation@hotmail.com>, Beth Burdett <bethburdett52@gmail.com>, Mike Burdett <mikeburdett51@gmail.com>, Mark McDonald <markmc@nctv.com>, ERF Customer <wylievol@tstar.net>
Subject: WOWSC Letter to Greg Wheeler

Dorothy Taylor,

We are now privy to the draft letter (attached) you (Dorothy came up with a great idea) sent to Greg Wheeler once again **blaming the good guys**. It appears from Mr Wheelers message on his check (Thanks Dana and Joe) you wasted your time and our money sending that out. Mr Wheeler is just another member you have ignored.

A paltry 26% of the members wanted Gimenez removed, you didn't listen and spent \$15k! A paltry 20% of the members filed a rate appeal with the PUC, you didn't listen? Every now and then you should step out of the WOWSC crony filled echo chamber and listen to the members you purport to serve.

All we can do is shine the light on the issues.

Regards

Gimenez UNCUT deposition 788 views with 277 hours of viewing, please read the comments.

<https://www.youtube.com/watch?v=RIMGyB6C8ZE>

2 attachments

Your channel has gotten 15,331 views so far

Views	Watch Time (hours)	Subscribers
15.3K	785.5	+31

image.png
17K

 **Emails regarding Customer Letters about rates.pdf**
143K

From: Mister Flunker <dfunker@gmail.com>
Subject: Re: WOWSC Letter to Greg Wheeler
Date: June 10, 2020 at 7:26:12 AM CDT
To: Dorothy Taylor <dtaylor27@me.com>

Ms Taylor

There is no putting this genie back in the bottle, 20 more hours of viewing since yesterday.

"Three things cannot be long hidden: the sun, the moon, and the truth." Buddha

Your channel has gotten 15,405 views so far

Views	Watch time (hours)	Subscribers
15.4K	804.7	+31

https://www.youtube.com/watch?v=tW8ZY_X_b8

On Tue, Jun 9, 2020 at 6:14 PM Mister Flunker <dfunker@gmail.com> wrote:

Dorothy Taylor,

We are now privy to the draft letter (attached) you (Dorothy came up with a great idea) sent to Greg Wheeler once again **blaming the good guys**. It appears from Mr Wheelers message on his check (Thanks Dana and Joe) you wasted your time and our money sending that out. Mr Wheeler is just another member you have ignored.

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Views 15.3K	Watch time (hours) 785.5	Subscribers +31
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<https://www.youtube.com/watch?v=RIMGyB6C8ZE>

From: Mister Flunker <dfunker@gmail.com>
Subject: Re: WOWSC Letter to Greg Wheeler
Date: July 12, 2020 at 10:58:05 PM CDT
To: Dorothy Taylor <dtaylor27@me.com>
Cc: Michele Christenson <michele@peacocksplumage.com>, Josie Fuller <josiefuller1@gmail.com>, John Otwell <otwell78@gmail.com>, John Nigh <jwnigh@gmail.com>, Skip Johnson <skip4johnson@gmail.com>, Lawrence Ffrench <lrfrench@gmail.com>, Dick Dial <jrdial@hal-pc.org>, Bruce W Sorgen <Ssorgen@msn.com>, Bill Benker <wbenker@gmail.com>, Bill Stein <wp_stein@yahoo.com>, "88R Bill n Kay. L. C. Billingsley CFII" <lcbaviation@hotmail.com>, Beth Burdett <bethburdett52@gmail.com>, Mike Burdett <mikeburdett51@gmail.com>, Mark McDonald <markmc@nctv.com>, ERF Customer <wylievol@tstar.net>, earlmiller02 <earlmiller02@comcast.net>, Mark Carpenter <mcarpenter@customhomesofaustin.com>, Glynis Davis <gjhdavis@hotmail.com>, Bobby Dee <bobby.dee@sbcglobal.net>, Skip Presley <skippresley@yahoo.com>, Janice <Janice_Coons@hotmail.com>, Ranett Metz <Ranett4@yahoo.com>, Ex Parte Van Eman <robbve@gmail.com>, Carl Friedsam <scfriedsam@mdtlaw.com>, Anita Dismuke <anita.hillcountryliving@gmail.com>, bmetzgerc4@gmail.com, johndcoker@gmail.com, Tom/Sherry Mudder <sherrytommudder@hotmail.com>

All,

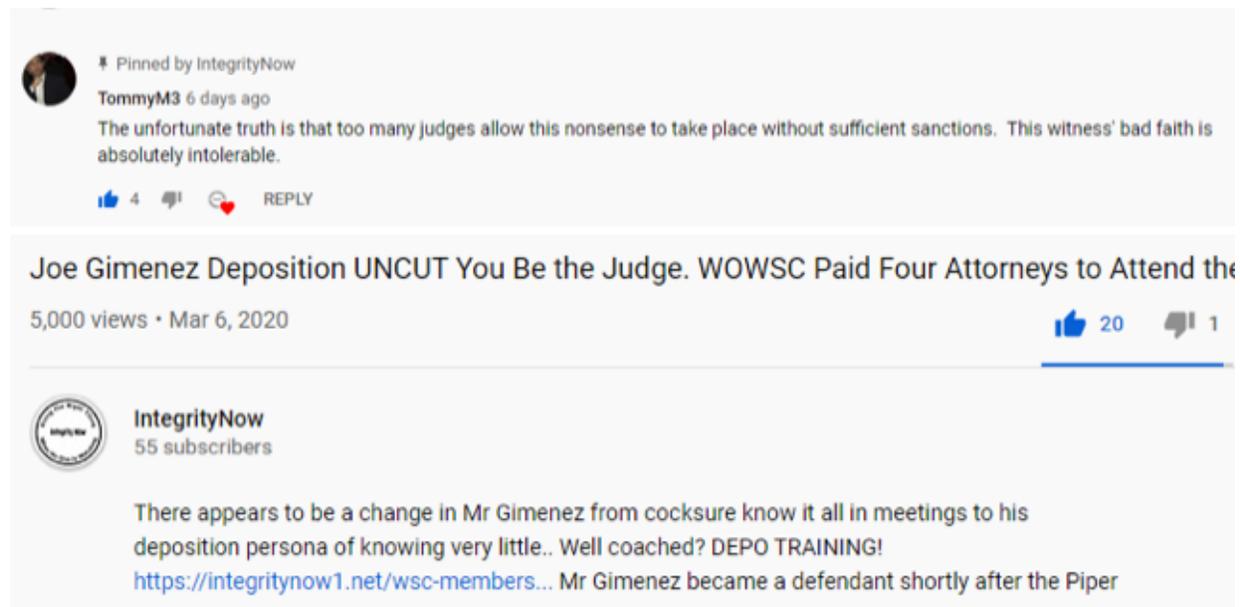
This is nothing short of amazing, 5000 views/1400 hours of viewing! Please feel free to share this with other members.

I ask every one of our members to watch this video and make a decision as to whether or not they think Joe Gimenez is being honest, thus far most believe he is being dishonest. The comments (and they may be offensive to some) speak for themselves. Part three of Mr Gimenez deposition clearly shows that Piper Lane (what the board gave away 10/26/2019) was NOT part of the original deal (H1 and H2-Not Piper Lane) were the only plat's purported to be conveyed in the

board's resolution. Now all we have to do is ask why the WOWSC board gave away Piper Lane for \$0 and never tried to get the lost \$500,000 from Ms Martin as they raised our rates and astounding 71%.

Warmest regards,

Danny



The screenshot shows a YouTube video interface. At the top, a video title is partially visible: "Joe Gimenez Deposition UNCUT You Be the Judge. WOWSC Paid Four Attorneys to Attend the". Below the title, it says "5,000 views · Mar 6, 2020". On the right side, there are icons for likes (20) and replies (1). A pinned comment is visible, stating "Pinned by IntegrityNow" and "TommyM3 6 days ago". The comment text reads: "The unfortunate truth is that too many judges allow this nonsense to take place without sufficient sanctions. This witness' bad faith is absolutely intolerable." Below the comment are icons for likes (4), replies, and a heart icon, followed by the word "REPLY". Below the video player area, the channel name "IntegrityNow" is shown with "55 subscribers". The channel description reads: "There appears to be a change in Mr Gimenez from cocksure know it all in meetings to his deposition persona of knowing very little.. Well coached? DEPO TRAINING! <https://integritynow1.net/wsc-members...> Mr Gimenez became a defendant shortly after the Piper".

|

www.youtube.com/watch?v=RIMGyB6C8ZE

On Tue, Jun 9, 2020 at 6:14 PM Mister Flunker <dflunker@gmail.com> wrote:
Dorothy Taylor,

We are now privy to the draft letter (attached) you (Dorothy came up with a great idea) sent to Greg Wheeler once again **blaming the good guys**. It appears from Mr Wheelers message on his check (Thanks Dana and Joe) you wasted your time and our money sending that out. Mr Wheeler is just another member you have ignored.

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