

CAUSE NO. 48292

RENE FFRENCH,	§	IN THE DISTRICT COURT
<i>Intervenor Plaintiff</i>	§	
	§	
JOHN RICHARD DIAL,	§	
<i>Intervenor Plaintiff</i>	§	
	§	
STUART BRUCE SORGEN,	§	
<i>Intervenor Plaintiff</i>	§	
	§	
<i>And AS REPRESENTATIVES FOR</i>	§	
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,	§	
<i>Defendants.</i>	§	BURNET COUNTY, TEXAS

**DEFENDANTS WINDERMERE OAKS WATER SUPPLY CORPORATION’S
AND ITS DIRECTORS’ JOINT MOTION TO DISMISS UNDER RULE 91a;
FIRST AMENDED JOINT BRIEF IN SUPPORT OF THEIR
PLEAS TO THE JURISDICTION;
AND FIRST AMENDED JOINT MOTION FOR SUMMARY JUDGMENT**

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 Motion to Dismiss Under Rule 91a; First Amended Joint Brief in Support of their Pleas to the Jurisdiction; and First Amended Joint Motion for Summary Judgment as follows:

I.
EXECUTIVE SUMMARY

This lawsuit is the continuation of a multi-year personal vendetta by a small group of disgruntled members of a non-profit water supply corporation (“WSC”). This minority of members is free to appear and speak at public meetings of the WOWSC board. They are also free to vote for candidates of their choice to be on the board. They are *not* free to abuse WOWSC and every community member who has stepped up to serve on WOWSC’s *volunteer board* through groundless litigation.

This is not the first lawsuit Plaintiffs have brought regarding the 2016 land sale they seek to set aside in this case. Plaintiffs already brought a suit to set aside the land sale through their litigation entity—and this Court (and later the court of appeals and Texas Supreme Court) refused to set aside the transaction. Now they seek a second bite at the same apple in this new lawsuit, predicated on theories of “standing” that do not exist under Texas law. Meanwhile, even though Plaintiffs lack standing and are precluded by the prior litigation from bringing many of their claims, they are using this suit as a Trojan horse to subject WOWSC and its former and current Directors to abusive and overreaching discovery, much of which ranges far afield from even the pleaded claims.

The 254-member WOWSC is spending tens of thousands of dollars defending itself from these spurious claims and extensive discovery. Its Directors are being subjected to public abuse and harassment, often using the discovery products supposedly necessary for this litigation. Members of the WOWSC board have received personal threats over this litigation and depositions in this case have been posted on the internet within hours of their release in order to harass and

berate the Directors.¹ Not sated with simply seeking to undo the land sale, they have even brought claims against former and current Directors, asserting entitlement from these volunteer Directors' own pockets to over a million in damages. Enough is enough. The scope of this case needs to be limited to the very limited permissible and appropriate claims.

First, several of the standing theories Plaintiffs espouse in their live pleading fail. Defendants now seek dismissal of claims deriving from such standing via Rule 91a motion to dismiss and pleas to the jurisdiction.

- Plaintiffs do not have standing to assert any “shareholder representative suit” claims. There is no such thing as a shareholder representative claim regarding a non-profit corporation. With a narrow exception for a true *ultra vires* claim, all claims asserted as being made in a “representative” capacity must be dismissed. This would include all of Plaintiffs’ common law claims.
- Plaintiffs lack standing to bring any individual (non-representative) claims against the Directors.
- Plaintiffs do not have any standing as members of a “cooperative” because the Windermere Oaks Water Supply Corporation is just what its name says—a water supply *corporation*, not a cooperative. Under Texas law, not only is this WSC not a cooperative, it is prohibited from being a cooperative. All claims based on non-existent standing as a member of a “cooperative” must be dismissed for want of jurisdiction. This would include any claim seeking damages for Plaintiffs or WOWSC members.
- Plaintiffs have not asserted any claim allowing for recovery of attorneys’ fees. Thus, their attorneys’ fees claim should be dismissed.

Second, as explained, Plaintiffs are trying to relitigate a matter that *has already been litigated*—the land sale transaction that occurred in 2016. The Plaintiffs in this case, through an entity created for the purpose of litigation, filed suit seeking to void that transaction in 2017. They lost that suit, as this Court denied them that relief. Now they are trying to get the exact same relief on alternate grounds. They are even conducting repeated discovery as to those same issues. But

¹ See, e.g., <https://www.youtube.com/channel/UC72wOtVmSuCHRTRQeWlTTw>.

res judicata or collateral estoppel prevents that. Plaintiffs already had their day in court seeking to void that transaction. It does not matter if they did or did not assert all possible grounds or causes that might have entitled them to that relief—they complained about the transaction and sought the relief, and the question has been fully and finally adjudicated. Additionally, to the extent that they had claims against any individual directors related to the 2016 land transaction, they could have been raised in that lawsuit, barring those claims as well. Therefore, WOWSC and the Directors file this motion for summary judgment on their affirmative defenses of res judicata or collateral estoppel. That motion should be granted and all claims against any party based on the 2016 land sale transaction should be dismissed.²

II.
EVIDENCE IN SUPPORT OF PLEA TO THE JURISDICTION
AND SUMMARY JUDGMENT

WOWSC and Former Directors submit the following evidence in support of their motion for summary judgment and brief in support of their pleas to the jurisdiction:

- Exhibit 1: Windermere Oaks Water Supply Corporation, Articles of Incorporation
- Exhibit 2: Declaration of Joe Gimenez
- Exhibit A: Windermere Oaks Water Supply Corporation, By-laws
- Exhibit 3: Intervenor / Plaintiffs' Original Petition in Intervention
- Exhibit 4: TOMA Inc. First Amended Petition
- Exhibit 5: TOMA Integrity Inc., Certificate of Formation
- Exhibit 6: Final Judgment TOMA Integrity, Inc. v. Windermere Oaks Water Supply Corporation

² WOWSC and the Directors have other defensive matters they can raise, and there are other jurisdictional defects that may need to be addressed. But in light of the 49-page Second Amended Petition filed by Plaintiffs and continued abusive discovery, the most efficient and effective way to deal with this case is to address the biggest defects first, particularly those that do not require any additional fact finding or evidence, and then deal with the small pieces that might be left in later filings.

- Exhibit 7: Memorandum opinion, TOMA Integrity, Inc. v. Windermere Oaks Water Supply
- Exhibit 8: Order, Texas Supreme Court, Denied Petition for Review
- Exhibit 9: Deposition of Joe Gimenez taken November 19, 2019

III. FACTUAL BACKGROUND

Plaintiffs/Intervenors Rene Ffrench, John Richard Dial, and Stuart Bruce Sorgen’s (“Plaintiffs”) filed their Second Amended Original Petition on November 5, 2019. (Pl.’s 2nd Am. Pet at pg. 9.) All Plaintiffs are members of the Windermere Oaks Water Supply Corporation. (Pl.’s 2nd Am. Pet at 3.01–3.04.) WOWSC is organized under chapter 67 of the Texas Water Code and is a water supply corporation. (Pl.’s 2nd Am. Pet at 6.01–6.02.) Under Chapter 67 of the Texas Water Code, the Texas Non-Profit Corporation Act applies to WOWSC. (Pl.’s 2nd Am. Pet at 6.11.)

There are two transactions primarily at issue in this lawsuit. The first is a 2016 transaction involving the sale of land to Friendship Homes and Hangers (the “Original Transaction”). (Pl.’s 2nd Am. Pet at pg. 24–30.) The second is a 2019 transaction involving a mediated settlement agreement between WOWSC and Friendship Homes and Hangers (“FHH”) that was subsequently approved by the current WOWSC board (the “New Transaction”). The core of Plaintiffs’ complaint is that WOWSC purportedly sold the land in 2016 to an entity owned by a director for less money than they believe it was worth.

In December 2017, TOMA Integrity Inc.—a litigation entity comprised of the Plaintiffs—sued WOWSC alleging a Texas Open Meetings Act (“TOMA”) violation and sought to “declare void the action the WOWSC Board took on December 19, 2015 to sell WOWSC property.” (Exs. 4 and 5.) In its November 2018 final judgment, this Court agreed a TOMA violation had occurred,

but refused to void the Original Transaction. (Ex. 6.) The court of appeals affirmed this Court's judgment in June 2019 and the Texas Supreme Court recently denied Plaintiffs' Petition for Review. (Exs. 7 and 8.)

Dissatisfied with this Court's judgment, in May 2019, the Plaintiffs sought a second bite at the apple by filing their Original Petition in Intervention against WOWSC, former Directors Earnest, Madden, Martin, Mebane, and Mulligan, and FHH, again seeking to set aside the Original Transaction but under new theories.³ They originally brought only two claims:

- A claim by the individual Plaintiffs as WOWSC members against WOWSC under Texas Business Organizations Code section 20.002(c)(1) to set aside and enjoin the Original Transaction; and
- A purported representative claim on behalf of WOWSC against the then-named Directors under Texas Business Organizations Code section 20.002(c)(2), seeking to set aside and enjoin the Original Transaction.

WOWSC, the then-named Directors, and FHH all answered and filed pleas to the jurisdiction. In the meantime, WOWSC and FHH entered into a mediated settlement agreement of potential disputes between them. At a lengthy open meeting, WOWSC's board voted to approve an amended and superseding agreement between WOWSC and FHH related to the Original Transaction. The Defendants subsequently filed motions for summary judgment and briefs in support of their pleas to the jurisdiction, seeking dismissal of Plaintiffs' claims on several bases.

In response, Plaintiffs upped the ante by filing their First Amended Petition on November 4, 2019 and their Second Amended Petition on November 5, 2019.⁴ Plaintiffs' live pleading—their Second Amended Petition—increases the harassment against WOWSC and its Directors

³ The current Plaintiffs/Intervenors intervened in a suit that was originally filed by different plaintiffs (who are no longer parties to this case) and that was originally brought only against defendant Friendship Homes & Hangars, LLC. That is, the Plaintiffs/Intervenors and WOWSC and the Director defendants only became parties to this case after the May 2019 intervention.

⁴ The First Amended Petition and Second Amended Petition are substantively the same.

exponentially. Rather than simply seeking to set aside the Original Transaction with an *ultra vires* claim, Plaintiffs now seek to set aside the New Transaction too, have brought common law breach of fiduciary duty and constructive fraud claims, and seek millions in damages (including exemplary damages) against WOWSC's past and present volunteer Directors related to these transactions. Plaintiffs even seek to prevent WOWSC from indemnifying these Directors' litigation costs in defending against Plaintiffs' baseless and harassing claims. The Plaintiffs go so far as to make the unfounded accusations that the Directors committed felonies, even implying in discovery requests that the Directors took bribes, which is flatly false. *See, e.g.*, (Pl. 2nd Am. Pet at 9.04.) The Court should bear in mind that at its core, this entire dispute concerns the Plaintiffs' unhappiness that WOWSC sold land for what they believe was not enough money.

IV. PROCEDURAL POSTURE OF THIS BRIEF AND MOTION

This filing does not raise all of the applicable bases for dismissing Plaintiffs' claims in this case. Rather, it raises the bases that (1) afford the widest relief and (2) can be decided without the need for any further discovery or evidence. That is, the matters raised either can be decided based entirely upon the pleadings, or by consideration of basic factual evidence that requires no further development. The matters raised in this filing are as follows:

- **Rule 91a motion and Plea to the Jurisdiction as to lack of “representative” standing:** This matter is a simple question of law. Either members of a non-profit corporation have standing to assert derivative/representative claims, or they do not. With a narrow exception for a true *ultra vires* claim (which, as will be explained in subsequent filings, Plaintiffs have not asserted), the answer is they do not. This Court should conclude that Plaintiffs

lack standing to bring any of their claims that are not true *ultra vires* claims on a representative basis.⁵

- **Rule 91a motion and Plea to the Jurisdiction as to lack of standing by Plaintiffs to bring any claims against the Directors:** Plaintiffs lack standing as a matter of law to bring any claims in an individual capacity against the Directors.⁶
- **Plea to the Jurisdiction as to lack of standing based on WOWSC being a “cooperative:”** Regardless of any acts allegedly committed by the entity or its board members, 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 as a creature of Texas law. This Court should confirm that WOWSC, a Water Code Chapter 67 non-profit WSC, is not a cooperative.
- **Rule 91a motion to dismiss claim for attorney’s fees:** Plaintiffs have not alleged any claim authorizing recovery of attorney’s fees as a matter of law.

⁵ Plaintiffs’ pleading appears to conflate purported “derivative” claims with claims by “owners,” and references damages in the context of pleading a claim in their “representative” capacity (see, e.g., Pl.’s 2nd Am. Pet at 3.04, 7.01, and 7.10). If that is what Plaintiffs are pleading – that their purported representative/derivative claims are brought in some individual capacity beyond the confines of Tex. Bus. Orgs. Code § 20.002(c)(2), and/or that they are entitled to recover damages pursuant to such claims (that is, that the derivative claims include common law claims for the recovery of damages) – then this section of Defendants’ motion should be deemed a Rule 91a motion to dismiss such claims, as such claims are not recognized by Texas law. If, on the other hand, Plaintiffs disclaim any such claims, this section of Defendants’ motion should be deemed Rule 91 special exceptions, asking that the court require Plaintiffs to more specifically and clearly plead their claims so as to clarify that Plaintiffs do not assert any claim in a representative capacity other than the specific, narrow capacity allowed by Section 20.002(c)(2).

⁶ As with the purported representative/derivative claims addressed above, Plaintiffs’ claims in their live Petition, particularly against the Directors, appear to be predicated, at least in part, on some manner of individual standing. To the extent that such standing is based on their purported status as “owners” of a cooperative, the lack of that standing is addressed in section V.B.3. of this pleading, below. To the extent that Plaintiffs claim any other individual standing, either to bring common-law claims or *ultra vires* claims against the Directors, the relief sought in section V.B.2. is identical to that sought in section V.B.1.: either as a Rule 91a motion to dismiss claims against the Directors predicated on that individual standing, or Rule 91 special exceptions asking that the Court require Plaintiffs to replead with specificity so as to clarify that they are not asserting any claims against the Directors in their individual capacity

- **Motion for Summary Judgment on res judicata/collateral estoppel:** This motion can be decided based on the pleadings in this case and the established record of the prior case. Plaintiffs sought to void the 2016 transaction in prior litigation. Thus, they are precluded from bringing any claims they brought or could have brought in the prior case. This includes any claim for damages related to and/or seeking to set aside the 2016 transaction. The Court should grant summary judgment for all of the Plaintiffs' claims challenging the 2016 transaction.

To be clear, WOWSC and the Directors have several other jurisdictional and similar defensive matters that they have pleaded (or will be pleading) and even briefed. For example, WOWSC and the Directors further contend that (1) the actions of the WOWSC board in a non-Chapter 22 ratification of the 2016 transaction moots any further dispute of the 2016 transaction; (2) the acts complained of constitute at most a breach of fiduciary duty claim (which Plaintiffs do not have standing to bring) and cannot support an *ultra vires* claim; and (3) the remaining "*ultra vires*" claims asserted (that the board failed to take action to get the property back, and that the board cannot pay the legal defense costs of current and former directors) either do not state an actual *ultra vires* claim, or should be dismissed by summary judgment pursuant to a clear record demonstrating, for example, that the board followed all statutory requirements for the payment of current and former director defense costs. The Directors also have several additional defenses available to them that have been or will be presented as motions to the Court. However, counsel for Plaintiffs has made it clear that pursuit of such defenses in the near-term will subject Defendants to further burdensome and expensive (and ultimately pointless) discovery.

Therefore, WOWSC and the Directors at this time are moving forward only with the pleas and motions listed in the bullet-point list above, which pleas and motions can be decided upon the existing pleadings and evidence. Once this Court grants those pleas and motions, WOWSC and the Directors will later present the remaining defensive matters to the extent that it remains necessary, in the interest of economy of both time and money.

In sum, this motion addresses (1) any general “representative” or “derivative” claims based on Plaintiffs’ status as individual members, including breach of fiduciary duty and constructive fraud, (2) any claims for damages or otherwise based on WOWSC’s alleged status as a cooperative, and (3) any claims pertaining to the validity of the Original Transaction including unauthorized conveyance of property, *ultra vires* use of assets, adverse transaction, and failure to rescind the Original Transaction. Should the court the grant relief requested by WOWSC and its Directors, only three narrow avenues of relief would remain for Plaintiffs.

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

V.

JOINT MOTION TO DISMISS UNDER RULE 91a AND FIRST AMENDED JOINT BRIEF IN SUPPORT OF PLEAS TO THE JURISDICTION

A. Legal Standards.

1. Motion to Dismiss under Rule 91a because a claim lacks a basis in law or in fact.

Texas Rule of Civil Procedure 91a authorizes the Court to dismiss a cause of action that is without a basis in law or in fact. Tex. R. Civ. P. 91a.1. A claim has no basis in law “if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.” *Id.*; *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). Texas courts have observed that a cause of action has no

basis in law where the petition alleges insufficient facts to demonstrate a viable, legally cognizable right to relief. *See DeVoll v. Demonbreun*, No. 04–14–00116–CV, 2014 WL 7440314, at *3 (Tex. App.—San Antonio Dec. 31, 2014, no pet.) (“Because DeVoll did not allege facts demonstrating reliance or harm, his fraud claim has no basis in law.”); *Drake v. Chase Bank*, No. 02–13–00340–CV, 2014 WL 6493411, at *1 (Tex. App.—Fort Worth Nov. 20, 2014, no pet.) (“Drake pleaded no underlying claim or facts that would support an award of damages for harm to his credit. . . . Thus, Drake’s harm-to-credit claim has no basis in law.”).

2. Plea to the Jurisdiction challenging Subject Matter Jurisdiction.

The subject-matter jurisdiction of a trial court may be challenged through a plea to the jurisdiction. *See Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). Standing is implicit in the concept of subject matter jurisdiction. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). In ruling on a plea to the jurisdiction the trial court should consider relevant evidence on jurisdictional facts when necessary to resolve subject matter jurisdiction issues. *Miranda*, 133 S.W.3d at 227. Plaintiffs have the initial burden of alleging facts that affirmatively demonstrate the trial court’s jurisdiction to hear the cause. *Id.* Whether Plaintiffs have met this burden is a question of law. *Id.*

B. Argument.

Plaintiffs bring several tort claims in either their individual or “representative” capacity. There is no basis for either such status in connection with the Plaintiffs’ purported claims, and all such claims reliant on such status are thus non-jurisdictional for lack of standing. WOWSC and the Directors move to dismiss those claims under Rule 91a and/or a plea to the jurisdiction, as described below.

- 1. With a narrow exception for a true *ultra vires* claim (which, as will be explained in subsequent filings, Plaintiffs have not brought), members of non-profit corporations do not have standing to bring representative proceedings.**

Plaintiffs lack standing to bring any common law representative claims outside of the narrow statutory claim (1) challenging an act or transfer as beyond the scope of the purpose of an organization or inconsistent with an express limitation of authority of a director (2) against the Directors for purportedly exceeding their authority under Texas Business Organizations Code section 20.002(c)(2). It is well settled that representative standing does not otherwise exist with respect to Texas non-profit corporations. *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). WOWSC is a non-profit corporation incorporated under the Non-Profit Corporation Act. (Ex. 1.) Unlike shareholders of a for-profit corporation, members of Texas non-profit corporations cannot assert a representative claim on behalf of the non-profit corporation.

Generally, an individual *for-profit shareholder* does not have an individual cause of action for a wrong done to the corporation. But when specific statutory criteria are met, a representative suit allows a *shareholder* to step into the shoes of a corporation and sue on its behalf. *Webre v. Sneed*, 358 S.W.3d 322, 329–30 (Tex. App.—Houston [1st Dist.] 2011), *aff'd*, 465 S.W.3d 169 (Tex. 2015) (emphasis added). But there is no such representative standing for Texas non-profit corporations. *Tran*, 481 S.W.3d at 316; *Flores v. Star Cab Co-op. Ass'n, Inc.*, 07–06–0306–CV, 2008 WL 3980762, at *7 (Tex. App.—Amarillo Aug. 28, 2008, pet. denied) (holding plaintiff members lacked standing to bring derivative lawsuit on behalf of the corporation because statutes providing derivative standing to shareholders of for-profit corporations did not apply to members

of nonprofit corporations, who were not shareholders, and statutes governing nonprofit organizations did not confer membership standing to sue on behalf of the nonprofit).

Chapter 21 of the Texas Business Organization Code governs for-profit corporations, while Chapter 22 governs non-profit corporations. Derivative suits are creatures created by specific statutory provisions, and Texas law permits shareholders of *for-profit* corporations to bring derivative suits, within strict parameters, under Business Organizations Code sections 21.551–21.563. *See* Tex. Bus. Orgs. Code §§ 21.551–21.563; *Tran*, 481 S.W.3d at 316. Section 21.552 of the Business Organizations Code outlines the circumstances in which a *shareholder* of a *for-profit* corporation has standing to bring a representative suit.⁷ In contrast, no parallel provision confers this status upon the members of a nonprofit who are not otherwise authorized to sue by the organization itself. *Tran*, 481 S.W.3d at 316.

WOWSC is a non-profit corporation governed under Chapter 22 of the Business Organizations Code, not Chapter 21. Chapter 22 neither independently provides for derivative proceedings, nor does it have an analog to Chapter 21 to permit members to bring a representative suit. Indeed, by their nature, non-profit corporations have *members*, not shareholders, who thus lack representative standing. *See* Tex. Bus. Orgs. Code § 1.002 (53)(B). Accordingly, Plaintiffs lack standing to bring any representative claims, or claims that belong to WOWSC outside of the narrow statutory grant of representative standing for *ultra vires* acts found in Texas Business Organizations Code section 20.002(c)(2). Thus, Plaintiffs’ common law claims brought on a

⁷ Shareholder is defined as (A) the person in whose name shares issued by a for-profit corporation, professional corporation, or real estate investment trust are registered in the share transfer records maintained by or on behalf of the for-profit corporation, professional corporation, or real estate investment trust; or (B) the beneficial owner of shares issued by a for-profit corporation, whose shares are held in a voting trust or by a nominee on the beneficial owner's behalf, to the extent of the rights granted by a nominee statement on file with the for-profit corporation in accordance with Sections 21.201(b) and (c). Tex. Bus. Orgs. Code § 1.002 (81)(A), (B).

purported representative basis (including breach of fiduciary duty, fraud, and joint and several liability claims against the Directors) should be dismissed.

2. Plaintiffs lack individual standing to bring any claims against the Directors.

There is also no basis for the Plaintiffs to bring individual claims against the Directors, including their *ultra vires* claims. First, Plaintiffs' common law claims belong to WOWSC and Plaintiffs do not have standing to bring claims on behalf of WOWSC. Second, there is no statutory basis for Plaintiffs bringing, in an *individual* capacity, *ultra vires* claims against the Directors. Finally, Plaintiffs cannot show any particularized injury distinct from that suffered by the general public to support standing.

First, board members of Texas non-profits corporations do not owe fiduciary duties to the individual members as a matter of well-settled Texas law. Non-profit board members' fiduciary duty is owed only to the corporation as a whole. *Petty v. Portofino Council of Coowners, Inc.*, 702 F.Supp.2d 721 (S.D. Tex. 2010) (holding condominium unit owners failed to establish claim against council of co-owners for breach of fiduciary duty); *Harris v. Spires Council of Co-Owners*, 981 S.W.2d 892, 898 (Tex. App.—Houston 1998) (concluding co-owner association did not have individual fiduciary duty to co-owner simply because co-owner was resident and member of co-owner association); *La Ventana Ranch Owners' Ass'n v. Davis*, 363 S.W.3d 632, 642-46 (Tex. App.—Austin 2011, no pet.) (holding that elected members of HOA committee did not owe fiduciary duties to individual homeowners); *Myer v. Cuevas*, 119 S.W.3d 830, 836 (Tex. App.—San Antonio 2003, no pet.) (“[T]he right to proceed against an officer or former officer of a corporation for breaching a fiduciary duty owed to the corporation belongs to the corporation itself . . . We therefore hold that Myer lacks standing to sue for breach of fiduciary duty, and the trial court properly dismissed his claim.”). Therefore, any claims for breach of fiduciary duty belong

to WOWSC and not to its members, such as Plaintiffs. As established above, Plaintiffs do not have representative standing to bring such claims. Additionally, they lack individual standing to bring those claims.

As Plaintiffs point out, their constructive fraud claim is similarly based on “breaches of legal or equitable duty” and “occurs when a party violates a fiduciary duty or breaches a confidential relationship.” (Pl.’s 2nd Am. Pet at 7.37.) Thus, just as Plaintiffs lack standing to bring a breach of fiduciary duty claim against the Directors, they also lack standing to bring a constructive fraud claim based on purported breach of fiduciary duty or confidential relationship. WOWSC directors owe duties to WOWSC, not WOWSC members. Plaintiffs cannot assert breaches of duties that were not owed to them as the basis for constructive fraud claims. Therefore, any individual or representative claims or claims belonging to WOWSC, like breach of fiduciary duty and constructive fraud, should be dismissed.

Second, an *ultra vires* claim against a corporation or its directors is a statutory creation. *See* Tex. Bus. Orgs. Code § 20.002. Under the statute, only three types of *ultra vires* claims can be brought: (1) a claim by a member against the corporation to enjoin the performance of an act or the transfer of property; (2) a claim by the corporation, acting directly or through... members in a representative suit, against an officer or director or former officer or director of the corporation for exceeding that person’s authority; or (3) a claim by the attorney general under certain circumstances. *Id.* § 20.002(c). The statute provides no basis for members of a corporation to directly assert an *ultra vires* claim against a director—this claim solely belongs to the corporation or members in a representative suit under that statute. Thus, Plaintiffs lack standing to bring their *ultra vires* claims against the Directors in an individual capacity.

Third, Plaintiffs cannot show any particularized injury distinct from that suffered by the general public to support standing to bring any individual claim. *See, e.g., Glover v. Union Pac. R.R.*, 187 S.W.3d 201, 209 (Tex. App.—Texarkana 2006, pet. denied). Plaintiffs have not alleged and cannot show that any Director has committed any act that caused them particularized injury. Plaintiffs, as members of WOWSC, likewise have no standing to recover personally on any of their causes of action under well-settled law since any purported harm was to the corporation. *See, e.g., El T. Mexican Restaurants, Inc. v. Bacon*, 921 S.W.2d 247, 251 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Mitchell v. LaFlamme*, 60 S.W.3d 123, 128 (Tex. App.—Houston [14th Dist.] 2000, no pet.). And as explained below, because WOWSC is not a cooperative as Plaintiffs allege, they have no standing to recover damages for themselves or other members when any assets belong to WOWSC, which under its bylaws and articles of incorporation does not even have the authority to disburse assets to members.

Because Plaintiffs lack standing to bring any individual claims against the Directors, all of Plaintiffs' individual claims against the Directors should be dismissed.

3. WOWSC is not a cooperative under Texas law; it is a Water Code Chapter 67 non-profit WSC.

a. Plaintiffs' pleading admits that WOWSC is a non-profit corporation.

Plaintiffs assert that they have some manner of individual standing to bring claims, including claims for damages, based on an incorrect and inconsistent assertion that WOWSC is a

cooperative.⁸ It is not. Plaintiffs' live pleading admits that WOWSC is "organized under Chapter 67 of the Water Code" and that "the Texas Non-Profit Corporation Act applies to WOWSC." (Pl.'s 2nd Am. Pet at 3.01, 6.11.) Chapter 67 reads in part "to the extent it does not conflict with this chapter, the Texas Non-Profit Corporation Act . . . applies to a corporation created under...this chapter." Tex. Water Code § 67.004. WOWSC is incorporated under the Texas Non-Profit Corporation Act and thus is subject to the Act—a fact the Plaintiffs dance around but ultimately admit. (Pl.'s 2nd Am. Pet at 6.02.) Notably, Plaintiffs assert standing under Business Organizations Code sections 20.002 and 22.512.⁹ (Pl.'s 2nd Am. Pet at 4.05.) In other words, Plaintiffs claim to have standing under the Non-Profit Corporations Act and other Acts governing corporations. Thus, by Plaintiffs' own admissions in their pleadings, this Court should conclude WOWSC is a non-profit corporation rather than a cooperative.

b. Plaintiffs are judicially estopped from arguing WOWSC is a cooperative.

Plaintiffs also are judicially estopped from now arguing that WOWSC is a cooperative; Plaintiffs, through their litigation entity, fully litigated, to the Texas Supreme Court, a case based on the Texas Open Meetings Act ("TOMA"), which applies to Water Code Chapter 67 water supply corporations, but does not apply to Business Organizations Code Chapter 251 cooperatives. (Exs. 4 and 8.); *see* Section VI, *infra*. That is, Plaintiffs have taken and maintained the position

⁸ While WOWSC and Directors believe that Plaintiffs' claims relying on the incorrect assertion that WOWSC is a cooperative can be dismissed as a matter of law on the pleadings, in the interest of fully briefing the matter to the Court, Defendants also are attaching some evidence (i.e., WOWSC's by-laws and articles of incorporation), which means that Rule 91a is not an available mechanism. *See* Tex. R. Civ. P. 91a.6. Thus, this section is presented only as an evidentiary plea to the jurisdiction rather than jointly as a Rule 91a motion to dismiss. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 2 (Tex. 2004) (holding in ruling on a plea to the jurisdiction the trial court should consider relevant evidence on jurisdictional facts when necessary to resolve subject matter jurisdiction issues).

⁹ Section 20 of the Texas Business Organizations Code applies to both for-profit and non-profit corporations while section 22 applies only to non-profit corporations.

that WOWSC is a Chapter 67 water supply corporation—not a cooperative or any other type of entity not subject to TOMA—and they are therefore judicially estopped from now taking an inconsistent position.¹⁰

TOMA applies to water supply corporations; it does not apply to cooperatives. TOMA confers standing onto interested persons to bring an action for mandamus or injunction against a “government body” to prevent or reverse a violation or threatened violation of TOMA. Tex. Gov't Code § 551.142; *see also id.* § 551.001(3)(K) (listing the government bodies to which TOMA applies, including “the governing body of a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code.”). Plaintiffs cannot now claim to have standing as members of a separate mutually exclusive type of entity in this case. *See Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 643 (Tex. 2009). (“Judicial estoppel precludes a party who successfully maintains a position in one proceeding from afterwards adopting a clearly inconsistent position in another proceeding to obtain an unfair advantage.”). Under Texas law, as shown below, an entity cannot be both a non-profit corporation and a cooperative.

c. WOWSC is incorporated as a water supply corporation under the Non-Profit Corporations Act, not as a cooperative.

WOWSC is incorporated as a Water Code Chapter 67 water supply corporation under the Non-Profit Corporations Act, not as a Business Organizations Code Chapter 251 cooperative. (Ex. A at 2.) Texas Law provides a singular path for a non-profit entity to be cooperative: to incorporate under Chapter 251 of the Texas Business Organizations Code (“the Texas Cooperative Association Act”). *See* Tex. Bus. Orgs. Code §§ 251.00–251.452. The Attorney General of Texas has assessed

¹⁰ This suit is also the basis for WOWSC’s defense of res judicata, addressed below.

this specific issue. In Opinion No. DM-479 the Attorney General answered the question of “whether a corporation that intend to operate as a cooperative may incorporate under Texas Non-Profit Act or must the corporation incorporate under the Cooperative Association Act.” Tex. Att’y Gen. Op. Nos. DM-479. The Attorney General concluded that “such a corporation must incorporate under the cooperative act.” *Id.* In other words, in Texas, if an entity wants to function as a non-profit for a cooperative purpose, the entity *must* incorporate under the Texas Cooperative Association Act—not the Texas Non-Profit Corporation Act (or any other mechanism). Indeed, it is a *crime* for WOWSC or *anyone else* to claim WOWSC is a cooperative when it has not incorporated under the Texas Cooperative Association Act. Tex. Bus. Orgs. Code § 251.452(a) (“Only a cooperative association governed by this chapter, a group organized on a cooperative basis under another law of this state, or a foreign entity operating on a cooperative basis and authorized to do business in this state may use the term “cooperative” or any abbreviation or derivation of the term “cooperative” as part of its business name or represent itself, in advertising or otherwise, as conducting business on a cooperative basis.”); Tex. Bus. Orgs. Code § 251.452(b) (“A person commits an offense if the person violates Subsection (a). An offense under this subsection is a misdemeanor”). Plaintiffs have not pleaded, nor can they plead, that WOWSC is incorporated under the Texas Cooperative Association Act.

WOWSC’s articles of incorporation state that they are made “pursuant to provisions of the Texas Non-profit cooperations act.” (Ex. 1 at 3.) The by-laws dictate that “the corporation is a non-profit, member owned, member controlled water supply and sewer corporation incorporated under the provisions and definitions of Tex. Rev. Cit. Stat. Art 1434a [now Texas Water Code Chapter 67] and the Texas Non-Profit Business Corporations Act.” (Ex. A at 2.) Notably, there is no mention of the Cooperative Associations Act at all. In addition, unlike a cooperative, the by-

laws also dictate that “no dividends shall ever be paid upon the membership of the Corporation... no income of the Corporation may be distributed to members, directors or officers in these roles.” (Ex. A at 3.) As the Plaintiffs point out, a cooperative “is required to distribute or allocate excess revenues (i.e., excess of revenue, including capital gains, over expenses) annually to the Owners who own them.” (Pl.’s 2nd Am. Pet at 6.11.); *see* Tex. Bus. Orgs. Code § 251.001 (providing for the distribution of net savings to member patrons). In fact, in Plaintiffs’ now superseded Original Petition in Intervention in this case, they admitted that “Defendant WOWSC is a Texas nonprofit corporation and a water supply corporation.” (Ex. 3 at 4.) WOWSC is not a cooperative, nor does it operate as one pursuant to its by-laws.

Plaintiffs rely on WOWSC’s election of federal tax-exempt status under Internal Revenue Code section 501(C)(12)(A) in claiming that WOWSC is a cooperative. (Pl.’s 2nd Am. Pet at 6.02.) Section 501(C)(12)(A) conveys tax exempt status on:

“Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses.”

26 U.S.C.A. § 501 (C)(12)(A). Of course, even if an election of status under federal tax law created some sort of different entity status under Texas law (it does not), the language of that section is in no way exclusive to cooperatives. Rather, it provides a laundry list of types of entities, and even adds a generic “or like organizations,” meaning that its applicability is anything but exclusive to cooperatives. Plainly, simply electing tax-exempt under section 501(C)(12)(A) has no bearing on whether an entity is a cooperative.

Indeed, the act of electing *federal* tax-exempt status under this provision does not convert WOWSC into a cooperative under *Texas* law. Electing a tax category different from a Texas entity’s incorporation status is commonplace. For example, Texas entities incorporated as Limited

Liability Companies may elect to be treated as partnerships for tax purposes under tax law. *SJ Med. Ctr., L.L.C. v. Estahbanati*, 418 S.W.3d 867, 873 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The election of a different tax status does not turn an entity into the tax-elected class of entity. *Estahbanati*, 418 S.W.3d 874 (holding that an LLC electing partnership status for tax purposes did not allow it to be sued as a “partnership” for medical negligence under Texas Tort Claims Act).

In addition, Texas courts have held that the inclusion of Internal Revenue Code provisions within bylaws cannot create a separate cause of action for violations of regulations promulgated under the Internal Revenue Code. *See Alpert v. Riley*, 274 S.W.3d 277, 293 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (holding that there can be no private cause of action for alleged violations of regulations promulgated under the Internal Revenue Code except against the U.S. Government because the tax code’s administrative remedies were intended by Congress to be an exclusive enforcement scheme); *Sam Houston Elec. Coop., Inc. v. Berry*, 582 S.W.3d 282, 290 (Tex. App.—Beaumont 2017, no pet.). WOWSC cannot be transformed from the Water Code Chapter 67 non-profit corporation it was created as into a cooperative, for the purposes of member standing or otherwise, simply by electing to be classified as a “like organization” for tax purposes, nor can a reference to a federal tax code provision in its by-laws create a separate cause of action for the Plaintiffs.

Plaintiffs have not shown, nor can they show, that WOWSC is a cooperative. It is not; it is a Water Code Chapter 67 non-profit corporation, as Plaintiffs admit. Plaintiffs claim to be co-owners of the property at issue as a basis for both standing and damages based on the premise that WOWSC is a cooperative. Any standing or claims for damages based on the premise WOWSC is a cooperative and Plaintiffs are somehow entitled to or have an individual interest in WOWSC’s

assets should be dismissed for want of jurisdiction. Therefore, WOWSC and the Directors move to dismiss all claims against WOWSC and the Directors related to standing, damages, or otherwise that plaintiffs have asserted or would assert according to WOWSC's alleged status as a cooperative.

3. Plaintiffs' claims cannot support attorneys' fees.

Plaintiffs have not pleaded nor can they plead a claim that supports attorneys' fees. Attorneys' fees are recoverable only when there is an explicit contractual or statutory basis for recovery; 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). None of the claims brought by Plaintiffs allow for recovery of attorneys' fees. *See, e.g.*, Tex. Bus. Orgs. Code §§ 20.002(c), 22.512. Therefore, Plaintiffs' claim for attorneys' fees should be dismissed pursuant to Rule 91a as it has no basis in law or fact.

**VI.
FIRST AMENDED JOINT TRADITIONAL
MOTION FOR SUMMARY JUDGMENT**

WOWSC and the Directors incorporate by reference all above paragraphs as if set out herein. Even if this Court were to determine it has jurisdiction over Plaintiffs' claims addressed above, all claims pertaining to the Original Transaction (and particularly those challenging its validity, seeking to void it, etc.) are barred by the doctrine of res judicata or collateral estoppel. As such, subject to their motions to dismiss and pleas to the jurisdiction, WOWSC and the Directors jointly move for summary judgment on the grounds that res judicata or collateral estoppel bar Plaintiffs' claims against WOWSC and the Directors pertaining to the Original Transaction because Plaintiffs could have or should have brought all the claims pertaining to that transaction in the prior litigation.

A. Summary Judgment Standard.

A party moving for a traditional motion for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true and every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.* at 549.

B. Res Judicata and Collateral Estoppel.

In December 2017, TOMA Integrity Inc. sued WOWSC alleging a TOMA violation and sought to “reverse the violation of the TOMA public-notice section 551.041 and declare void the action the WOWSC Board took on December 19, 2015 to sell WOWSC property,” further asserting that because “TOMA Integrity, Inc. was created by residents or ratepayers of WOWSC . . . TOMA Integrity, Inc. has associational standing.” (Ex. 4 at 6.) TOMA Inc. was not formed and granted associational standing by just any ratepayers, but by *the same* ratepayers who are now Plaintiffs in this suit. TOMA Integrity, Inc. is a Texas non-profit corporation filed on December 11, 2017 and has four principals on record: Richard Dial, Lawrence Ffrench, S. Bruce Sorgen and Daniel Flunker. (Ex. 5.) Three of these four principals are the Plaintiffs in this new lawsuit. Additionally, the original suit was filed against WOWSC and complained about the same transaction at issue in the instant suit. Plaintiffs have already brought a lawsuit adjudicating the same transaction at issue in this suit seeking effectively identical relief. Therefore all of their claims pertaining to the Original Transaction in this case are barred by res judicata or collateral estoppel.

1. Res judicata bars Plaintiffs' claims pertaining to the Original Transaction.

The doctrine of res judicata, or claim preclusion, requires the satisfaction of three elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) the same parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action.” *Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 86 (Tex. 2008). All three elements have been met.

First, the trial court entered a final judgment adjudicating this transaction on November 13, 2018. (Ex. 6.) That decision was upheld by the appellate court and the Texas Supreme Court has denied review.¹¹ (Exs. 7 and 8.)

Second, the same parties are present in both this suit and the TOMA suit. To the extent the parties TOMA Integrity Inc. and Plaintiffs are not literally the same entity, the doctrine of res judicata still applies based on privity of the parties. Generally, a person is not bound by the judgment in a suit unless s/he was a party. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). However, res judicata can still apply where a person is in privity with a party in the prior matter. *Id.* at 652–53. Privity can exist where: 1) person can control an action even if they are parties to it; 2) their interests can be represented by a party to the action; or 3) they can be successors in interest. *Id.* at 653. As the sole directors and members of a corporation, Plaintiffs were in privity with TOMA Integrity Inc. Additionally, WOWSC was the defendant in the TOMA suit. The former Directors at the time of the Original Transaction were similarly in privity because they were the directors at WOWSC when the Original Transaction was entered into and were

¹¹ Defendants WOWSC and Directors request that the Court take judicial notice of the entirety of the prior TOMA proceeding.

acting on behalf of WOWSC.¹² Plaintiffs similarly cannot attack the current and former Directors for failing to do what the court declined to do—void the transaction.¹³ To the extent Plaintiffs seek to either void the transaction or make some claim against later Directors for not later voiding that transaction, Plaintiffs are barred by res judicata.

Third, and most importantly, all of the claims in this suit pertaining to the Original Transaction were raised or should have been raised in the prior suit. Res judicata applies to 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). The doctrine functions to prevent needless, repetitive litigation, and in doing so, “advance [s] the interest[s] of the litigants (who must pay for each suit), the courts (who must try each suit), and the public (who must provide jurors and administration for each suit).” *Id.* at 58 (quoting *Schneider Nat'l Carriers, Inc., v. Bates*, 147 S.W.3d 264, 278 (Tex. 2004)). These Plaintiffs have already litigated the Original Transaction to final judgment.

Notably, Plaintiffs are not just actively attempting to relitigate the same transaction as the prior suit but are even continuing to try 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 seeks to void the conveyance of property based on the premise that the board violated TOMA:

¹² Per Plaintiffs’ pleading, these Directors were Robert Mebane, Thomas Michael Madden, and Patrick Mulligan. (Pl.’s 2nd Am. Pet at 6.46.) Dana Martin and William Earnest did not participate in the vote on the Original Transaction. (*Id.*)

¹³ These later Directors include David Bertino and Norman Morse, both of whom are no longer on the Board, and current Directors Joe Gimenez, William Earnest (who has rejoined the Board), Mike Nelson, and Dorothy Taylor. (Pl.’s 2nd Am. Pet at 3.09-3.14.)

The WSC's Board has power to act only by majority vote with a quorum present at an open meeting that complies with TOMA. It has already been determined that action (if any was taken) on the fire sale transfer to Martin at the February 22, 2016 meeting was in violation of TOMA. Accordingly, none of the actions taken during that meeting constitute actions of the Board of Directors.

(Pl.'s 2nd Am. Pet 7.05.)

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.

(Pl.'s 2nd Am. Pet 7.10.)

In discovery, Plaintiffs have also asked about documents and whether or not they were created in violation of TOMA at the same meeting at issue in the prior suit. (Ex 9 at 175-176.) The appropriate time to bring any and all claims pertaining to the Original Transaction—either the entering into the Original Transaction or any decision not to attempt to void the Original Transaction—was in the prior suit. Therefore, all of Plaintiffs' claims related to the Original Transaction are barred by res judicata.

2. Alternatively, collateral estoppel bars Plaintiffs' claims pertaining to the Original Transaction.

Even if the Court were to conclude res judicata does not apply or does not require dismissal of all of Plaintiffs' claims relating to the Original Transaction, collateral estoppel would bar all of Plaintiffs' claims relating to or arising out of the Original Transaction. Collateral estoppel prevents relitigation of particular issues already resolved in a prior suit, regardless of whether or not the second suit is based on the same cause of action. *Barr v. Resolution Tr. Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 629 (Tex. 1992); *Reagan Nat'l Advertising of Austin, Inc. v. City of Austin*, 498 S.W.3d 236, 243 (Tex. App.—Austin 2016, pet. denied). “In order to invoke the doctrine of collateral estoppel, a party must establish ‘(1) the facts sought to be litigated in the first action

were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action.” *Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990). As with res judicata, there is no mutuality of parties requirement—“it is only necessary that the party against whom the plea of collateral estoppel is being asserted be a party or in privity with a party in the prior litigation.” *Id.*

In the TOMA action, Plaintiffs, through their entity, TOMA Integrity Inc., sought to “reverse the violation of the TOMA public-notice section 551.041 and declare void the action the WOWSC Board took on December 19, 2015 to sell WOWSC property.” (Ex. 4 at 7.) The entire case was about the circumstances of the board’s approval of that transaction. (Ex. 4 at 4.) Plaintiffs were denied the relief they sought. Plaintiffs could have asserted any number of claims relating to the Original Transaction, attacking it on any applicable basis. *See, e.g. Chisholm Trail SUD Stakeholders Grp. v. Chisholm Trail Special Util. Dist.*, No. 03-16-00214-CV, 2017 WL 2062258, at *2, *11 n.4 (Tex. App. May 11, 2017), review denied (Oct. 27, 2017) (Plaintiff attacked a public entity transaction on the basis of TOMA violations, *ultra vires* conduct and sought declaratory and injunctive relief under the Uniform Declaratory Judgments Act). They chose not to, instead placing all of their hopes on the TOMA mechanism

Now, Plaintiffs would attack the same transaction, relitigate the same facts and issues, and seek similar relief in the instant suit, albeit via different claims and by bringing suit in their individual capacity against both WOWSC and its Directors. But Plaintiffs have already had that fight. And the law does not allow piecemeal litigation over the same subject matter, with plaintiffs trying to accomplish their goals via one cause of action first, and if that fails, trying another cause of action in a later case. Frustrated as they might be by the court system’s failure to give them the relief they wanted in the first case (all the way up to the Texas Supreme Court), Plaintiffs

nonetheless are precluded by collateral estoppel from bringing their claims about the same transaction a second time.

VII. CONCLUSION AND PRAYER

WOWSC and the Directors respectfully request the Court to dismiss the Plaintiffs' claims as lacking basis in law and fact and lacking subject matter jurisdiction on the basis of lack of standing. In addition and/or in the alternative, WOWSC and the Directors request that the Court grant WOWSC's and the Former Directors joint motion for summary judgment on the Original Transaction on the basis of res judicata or collateral estoppel.

In sum, WOWSC and the Directors request that this Court dismiss or deny relief on the following claims:

- Plaintiffs' breach of fiduciary duty, constructive fraud, joint and several liability, and any other common law claims asserted because (1) they lack standing to bring them in either an individual or representative capacity and (2) to the extent the claims are based on the Original Transaction in any way, they are barred by res judicata or collateral estoppel;
- Plaintiffs' *ultra vires* claim to the extent it is brought in an *individual capacity* against the Directors because members only have standing to bring a true *ultra vires* claim in an individual capacity against the *corporation* (WOWSC);
- Any request by Plaintiffs for damages to Plaintiffs or other WOWSC members, which is entirely premised on Plaintiffs' assertion that WOWSC is a cooperative of which they are "owners," for which they lack standing; and
- Plaintiffs' *ultra vires* and common law claims to the extent they are based on the Original Transaction, including purported unauthorized conveyance of property, *ultra vires* use of assets, adverse transaction, and failure to rescind the Original Transaction, because these claims are barred by res judicata or collateral estoppel.

In addition, the court should dismiss in their entirety the requested relief of damages, exemplary damages, and attorneys' fees, as there are no claims remaining under which they are recoverable. Should the court grant relief requested by WOWSC and the directors, only three

narrow avenues of relief would remain for Plaintiffs.

- 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).
- 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).
- A limited claim under Chapter 22 subchapter J of the Texas Business Organizations Code to determine effectiveness of any ratification. This would also solely concern the New Transaction.

Finally, pursuant to Rule 91a.7, WOWSC and the Directors respectfully request that the Court award them their reasonable and necessary attorney’s fees incurred with respect to the limited Rule 91a motions herein, after the opportunity to present evidence of such fees to the Court. WOWSC and the Directors respectfully request any and all other relief to which they may be entitled.

Respectfully submitted,

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Patrick Mulligan, Joe Gimenez, David Bertino,
Mike Nelson, Dorothy Taylor, and Norman Morse*

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 23rd day of December, 2019:

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MICHAEL MADDEN, DANA MARTIN,
ROBERT MEBANE,
PATRICK MULLIGAN, JOE GIMENEZ,
DAVID BERTINO, MIKE NELSON,
DOROTHY TAYLOR,
AND NORMAN MORSE**

/s/ Jose E. de la Fuente
JOSE E. de la FUENTE

EXHIBIT 1



Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the attached is a true and correct copy of each document on file in this office as described below:

WINDERMERE OAKS WATER SUPPLY CORPORATION
Filing Number: 137700801

Articles Of Incorporation

November 09, 1995

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on October 29, 2019.



A handwritten signature in black ink, appearing to read "Ruth R. Hughs".

Ruth R. Hughs
Secretary of State

ARTICLES OF INCORPORATION OF
WINDEMERE OAKS WATER SUPPLY CORPORATION

FILED
In the Office of the
Secretary of State of Texas
NOV 09 1995
CORPORATION SECTION

These Articles of Incorporation are adopted pursuant to provisions of the Texas Non-profit Corporations Act, TEX. REV. CIV. STAT. ANN. art. 1396-1.01, et seq ("Act") and art. 1434a, TEX. REV CIV STAT. ANN.

ARTICLE 1 - NAME

The name of the corporation is Windemere Oaks Water Supply Corporation

ARTICLE 2 - NONPROFIT CORPORATION

The Corporation is a non-profit, member-owned, member controlled water supply and sewer service corporation incorporated under the provisions and definitions of TEX. REV. CIV. STAT ANN. art 1434a ("1434a"), as amended from time to time, the Act where not inconsistent with 1434a, and Section 13.002 of the Texas Water Code, as amended from time to time

ARTICLE 3 - DURATION

The period of duration is perpetual

ARTICLE 4 - PURPOSES

The purpose of the Corporation is to furnish a water supply or sewer service, or both, to towns, cities, private corporations, individuals, and military camps and bases, and for the purpose of providing a flood control and drainage system for towns, cities, counties, other political subdivisions, private corporations, individuals, and other persons

ARTICLE 5 - POWERS

Except as otherwise provided in these Articles, the Corporation shall have all powers invested in a water supply or sewer service corporation by 1434a, the Act, the Texas Water Code, and the administrative rules of the Texas Natural Resource Conservation Commission and its successor agency(ies), not inconsistent with Internal Revenue Code Section 501(c)(12)(A) and related federal regulations, rulings, and procedures.

ARTICLE 6 - RESTRICTIONS AND REQUIREMENTS

No dividends shall ever be paid upon the memberships of the Corporation. No income of the Corporation may be distributed to members, directors, or officers in these roles. All profits arising from the operations of the business of the Corporation shall be annually paid out to cities, towns, counties, other political subdivisions, private corporations, and other persons who have during the past year transacted business with the Corporation, in direct proportion to the amount of business so transacted; provided that no such dividends shall ever be paid while any indebtedness of the Corporation remains unpaid and, provided also, that the Directors of the Corporation may allocate to such sinking fund(s) such amount of profits as they deem necessary for maintenance, upkeep, operation, and replacements.

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

ARTICLE 7 - MEMBERS AND CONTROL

The Corporation shall have one class of "members" which shall be defined by Texas Water Code, Section 13.002(11). All customers of the corporation must be members unless exempt by law.

A person is entitled to one vote in any Corporation election regardless of the number of memberships the person owns.

ARTICLE 8 - INITIAL REGISTERED OFFICE AND AGENT

The street address of the initial registered office of the Corporation is 379 Derby Lane, Spicewood, Burnet County, Texas 78669.

The name of the initial registered agent whose business address is the same as the Corporation's registered office's address is Charles Threat.

ARTICLE 9 - BOARD OF DIRECTORS

The affairs of the Corporation shall be managed by a Board of Directors elected by members beginning with the first annual meeting. The qualifications, manner of selection, duties, terms, and other matters relating to the Board of Directors shall be provided in the bylaws. The number of directors may be increased or decreased by amendment to the bylaws but there shall never be more than twenty-one (21) members of the Board of Directors unless otherwise allowed by 1434a.

The number of initial directors who shall govern the corporation until the first annual meeting are three (3) and their names and addresses are:

- | | |
|-------------------|-----------------------------------------------------------------|
| 1. Charles Threat | 379 Derby Lane
Spicewood, Texas 78669 |
| 2. Arthur Alworth | 7 Kendal
Spicewood, Texas 78669
Marble Falls, Texas 78654 |
| 3. Robert Wynne | 19 Briar Hill
Houston, Texas 77042 |

ARTICLE 10 - INCORPORATORS

The number of incorporators are three (3) and their names and addresses are:

- | | |
|---------------|-------------------------------------------------------|
| 1. Mark Zeppa | 6101 W. Courtyard Dr , Ste 221
Austin, Texas 78730 |
| 2 Sue Nielsen | 6101 W Courtyard Dr., Ste 221
Austin, Texas 78730 |
| 3 Jon Ellis | 6101 W. Courtyard Dr., Ste 221
Austin, Texas 78730 |

IN WITNESS WHEREOF, we have hereunto set our hands on this 9th day of November, 1995.

Mark A. Zeppa

Incorporator

Sue Nielsen

Incorporator

Jon Ellis

Incorporator

THE STATE OF TEXAS)
)
COUNTY OF TRAVIS)

I, the undersigned notary public, do hereby certify that on this day Mark Zeppa, Sue Nielsen, and Jon Ellis personally appeared before me and who being by me duly sworn, declared that they are the persons who signed the foregoing document as incorporators and that the statements therein contained are true.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 9th day of November, 1995.

seal

Susan P. Provenzano

Susan P. Provenzano

Notary Public in and for
the State of Texas

Commission Expires: 07-24-99

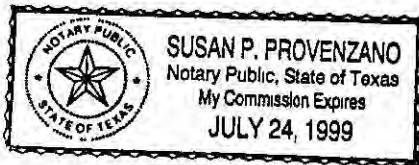


EXHIBIT 2

4. I am the custodian of records for the attached by-laws. The by-laws and the records of which it is comprised are kept in the regular course of business of WOWSC, and it is WOWSC's regular course of business for an employee or representative of WOWSC with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such a record; and the record was made at or near the time or reasonably soon thereafter.

5. The records attached hereto are originals or exact duplicates of the originals.

SIGNED UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
TEXAS ON THIS THE 20 DAY OF DECEMBER, 2019.



Joe Gimenez

EXHIBIT A

BY-LAWS
OF
WINDERMERE OAKS WATER SUPPLY CORPORATION

ARTICLE 1 - NAME

The name of the Corporation is Windermere Oaks Water Supply Corporation.

ARTICLE 2 - NONPROFIT CORPORATION

The Corporation is a non-profit, member-owned, member controlled water supply and sewer service corporation incorporated under the provisions and definitions of TEX. REV. CIV. STAT. ANN. art. 1434a (now Texas Water Code Chapter 67) and the Texas Non-Profit Business Corporation Act. The Corporation shall have members. The members shall elect the governing Board of Directors. The Corporation shall be subject to the Texas Open Meetings Act, Gov't Code Chapter 551 and the Texas Public Information Act, Gov't Code Chapter 552.

ARTICLE 3 - PURPOSES

The purpose of the Corporation is to furnish a water supply or sewer service, or both, to towns, cities, private corporations, individuals, and military camps and bases, and for the purpose of providing a flood control and drainage system for towns, cities, counties, other political subdivisions, private corporations, individuals, and other persons.

ARTICLE 4 - POWERS

Except as otherwise provided in these bylaws, the Corporation's articles of incorporation or the laws of this state, the Corporation shall have all powers invested in a water supply or sewer service corporation by 1434a, the Texas Non-Profit Corporation Act, the Texas Water Code, and the administrative rules of the Texas Commission on Environmental Quality and its successor agency(ies), not inconsistent with Internal Revenue Code Section 501(c)(12)(A) and related federal regulations, rulings, and procedures.

ARTICLE 5 - RESTRICTIONS AND REQUIREMENTS

1. DIVIDENDS

No dividends shall ever be paid upon the memberships of the Corporation. No income of the Corporation may be distributed to members, directors, or officers in these roles. All profits arising from the operations of the business of the Corporation shall be annually paid out to cities, towns, counties, other political subdivisions, private corporations, and other persons who have during the past year transacted business with the Corporation, in direct proportion to the amount of business so transacted; provided that no such dividends shall ever be paid while any indebtedness of the Corporation remains unpaid and, provided also, that the directors of the Corporation may allocate to such sinking fund(s) such amount of profits as they deem necessary for maintenance, upkeep, operation, and replacements.

2. TRANSFER OF ASSETS UPON DISSOLUTION

Upon discontinuance of the Corporation by dissolution or otherwise, all residual assets of the Corporation remaining after payment of the lawful indebtedness of the Corporation or return of excess profits to members shall be distributed among the members and former members in direct proportion to the amount of their patronage with the Corporation insofar as practical. Any indebtedness due the Corporation by a member for water/sewer service or otherwise shall be deducted from such member's share before final distribution. By application for and acceptance of membership in the Corporation, each member agrees that, upon discontinuance of the Corporation by dissolution or otherwise, all assets of the Corporation transferred to that member shall be in turn immediately transferred by that individual member to an entity that provides a water supply or sewer service, that is exempt from ad valorem taxation. By application for and acceptance of membership in the Corporation, each member grants the Corporation's Board of Directors that member's irrevocable power of attorney to execute all instruments and documents necessary to effectuate such transfers in order to preserve the Corporation's statutory rights to exemption from income and ad valorem taxation.

3. LIMITATION ON ACTIVITIES

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

ARTICLE 6 - OFFICES

1. REGISTERED OFFICE AND AGENT

The registered office of the Corporation shall be maintained at 424 Coventry Road, Spicewood, Texas 78669-3119 in the State of Texas. The registered agent shall be the duly elected President. The registered office or the registered agent, or both, may be changed by resolution of the board of directors, upon filing the statement required by law.

2. PRINCIPAL OFFICE

The principal office of the Corporation shall be at 424 Coventry Road, Spicewood, Texas 78669-3119 provided that the board of directors shall have the power to change the location of the principal office in its discretion.

3. OTHER OFFICES

The Corporation may also maintain other offices at such places within or without the State of Texas as the board of directors may from time to time appoint or as the business of the Corporation may require.

ARTICLE 7 - MEMBERS

1. PLACE OF MEETING

All meetings of members shall be held either at the registered office of the Corporation in Texas or at such other places, either within or without the state, as shall be designated in the notice of the meeting.

2. ANNUAL MEETING

The annual meeting of members for the election of directors and for the transaction of all other business which may come before the meeting shall be held on the first Saturday in February of each year (if not a legal holiday and, if a legal holiday, then on the next Saturday following) at the hour specified in the notice of meeting. In no event, shall the annual meeting be before January 1 or later than April 30 of any year.

The annual meeting of members may be held for any other purpose in addition to the election of directors, which may be specified in a notice of such meeting.

A members meeting (annual or special) may be called by resolution of the board of directors, the president, or by a writing filed with the secretary signed either by a majority of the directors or by members owning a majority of memberships in the Corporation and entitled to vote at any such meeting.

3. NOTICE OF MEMBERS' MEETING

Written or printed notice stating the place, day and hour of the meeting, and in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten (10) nor more than fifty (50) days before the date of the meeting, either personally or by mail, by or at the direction of the president, secretary or the officer or person calling the meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the member at his address as it appears on the membership books of the Corporation, with postage thereon prepaid.

4. MEMBERSHIPS AND VOTING OF MEMBERSHIPS

The Corporation shall have one class of 'members', which shall be defined by Texas Water Code, Section 13.002(11), as it may be amended.

All customers of the Corporation must hold a membership unless otherwise exempted by law.

Each member shall be entitled to only one vote on each matter submitted to a vote at a meeting of members regardless of the number of memberships held by that member.

A member may vote either in person or ballot mailed or delivered to the Corporation prior to the meeting in the manner and within the deadlines prescribed in the meeting notice.

No member shall be eligible to participate in any vote of the membership if that member has an outstanding utility account balance owed to the Corporation for utility services rendered, membership fees, or authorized fees if said debt has been delinquent for a period of not less than sixty (60) days prior to the date of such election or vote.

5. CLOSING TRANSFER BOOKS AND FIXING RECORD DATE

For the purpose of determining members entitled to notice of or to vote at any meeting of members or any adjournment thereof or in order to make a determination of members for any other proper purpose, the board of directors may provide that the membership transfer books shall be closed for a stated period not exceeding thirty (30) days. If the membership books shall be closed for the purpose of determining members, such books shall be closed for at least ten (10) days immediately preceding such meeting. In lieu of closing the membership books, the by-laws or in the absence of an applicable by-law, the board of directors, may fix in advance a date as the record date for any such determination of members, not later than thirty (30) days and, in case of a meeting of members, not earlier than ten (10) days prior to the date on which the particular action, requiring such determination of members is to be taken. If the membership books are not closed and no record date is fixed for the determination of members entitled to notice of or to vote at a meeting of members, the date on which notice of the meeting is mailed or the date on which the resolution of the board of directors declaring such election is adopted, as the case may be, shall be the record date for such determination of members. When a determination of members entitled to vote at any meeting of members had been made as provided in this section, such determination shall apply to any adjournment thereof, except where the determination has been made through the closing of membership transfer books and the stated period of closing has expired.

6. QUORUM OF MEMBERS

A quorum for the transaction of business at a meeting of the members is a majority of the members present. In determining whether a quorum is present, all members who mailed or delivered ballots to the independent election auditor or the corporation on a matter submitted to a vote at the meeting are counted as present.

7. VOTING LISTS

The officer or agent having charge of the membership books for the memberships of the Corporation shall make, at least ten (10) days before each meeting of members, a complete list of the members entitled to vote at such meeting or any adjournment thereof, arranged in alphabetical order, with the address of and the number of memberships held by each, which list, for a period of ten (10) days prior to such meeting, shall be kept on file at the registered office of the Corporation and shall be subject to inspection by any member at any time during usual business hours. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any member during the whole time of the meeting. The original membership books shall be prima facie evidence as to who are the members entitled to examine such list or books or to vote at any meeting of members.

ARTICLE 8 - DIRECTORS

1. BOARD OF DIRECTORS

The business and affairs of the Corporation shall be managed by a board of directors. Directors must be: (a) residents of the State of Texas, (b) utility customers of the Corporation and (c) members in the Corporation.

2. NUMBER OF DIRECTORS

The number of directors shall be five (5) provided that the number may be increased or decreased from time to time by an amendment to these by-laws, but no decrease shall have the effect of shortening the term of any incumbent director. The number of directors may never exceed twenty-one (21).

There shall be two sets of directors, each serving two year terms expiring on alternate years except as provided herein. Each set of directors shall have relatively the same number of directors.

The Corporation shall have three initial directors for purposes of incorporating the Corporation and directing its affairs until the election of the first elected directors at the first annual meeting of members. All directorships shall be open for election at the first annual membership meeting. Four of the directorships shall be for terms of two years; Three directorship shall be for terms of one year. The length of the terms for the first elected directors shall be determined by lot. Thereafter, all directorships shall be for two year terms expiring on alternating years.

3. QUALIFICATIONS FOR ELECTION OR APPOINTMENT AS DIRECTOR.

(a) To be qualified for election or appointment as a director, a person must be:

- (1) 18 years of age or older on the first day of the term to be filled at the election or on the date of appointment, as applicable; and
- (2) a member or shareholder of the corporation.

(b) In addition to the qualifications prescribed by Subsection (a), a person is not qualified to serve as a director if the person:

- (1) has been determined by a final judgment of a court exercising probate jurisdiction to be:

(A) totally mentally incapacitated; or

(B) partially mentally incapacitated without the right to vote; or

(2) has been finally convicted of a felony from which the person has not been pardoned or otherwise released from the resulting disabilities.

(c) If the board determines that a person serving as a director does not have the qualifications prescribed by Subsections (a) and (b), the board shall, not later than the 60th day after the date the board makes that determination, remove the director and fill the vacancy by appointing a person who has the qualifications prescribed by those subsections.

4. BALLOT APPLICATION FOR ALL MEMBER ELECTIONS.

(a) To be listed on the ballot as a candidate for a director's position, a person must file an application with the corporation that includes:

(1) the director's position sought, including any position number or other distinguishing number;

(2) the person's written consent to serve, if elected;

(3) biographical information about the person; and

(4) a statement of the person's qualifications, including a statement that the person has the qualifications prescribed by Water Code Section 67.0051.

(b) The application must be filed with the corporation not later than the 45th day before the date of the annual meeting.

(c) The corporation shall make available director candidate application forms at the corporation's main office and shall provide application forms by mail or electronically on request.

5. BALLOT FOR ALL MEMBER ELECTIONS.

(a) Not later than the 30th day before the date of an annual meeting, the corporation shall mail to each member or shareholder of record:

(1) written notice of the meeting;

(2) the election ballot; and

(3) a statement of each candidate's qualifications, including biographical information as provided in each candidate's application.

(b) The election ballot must include:

(1) the number of directors to be elected; and

(2) the names of the candidates for each position.

6. ELECTION PROCEDURES FOR ALL MEMBER ELECTIONS.

(a) A member or shareholder may vote:

(1) in person at the annual meeting;

(2) by mailing a completed ballot to the office of the independent election auditor or to the corporation's main office, which ballot must be received by the corporation not later than noon on the business day before the date of the annual meeting; or

(3) by delivering a completed ballot to the office of the independent election auditor or to the corporation's main office not later than noon on the business day before the date of the annual meeting.

(b) The independent election auditor, appointed by majority vote of the Board of Directors, shall receive and count the ballots before the annual meeting is adjourned.

(c) For each director's position, the candidate who receives the highest number of votes is elected.

(d) If two or more candidates for the same position tie for the highest number of votes for that position, those candidates shall draw lots to determine who is elected.

(e) The independent election auditor shall provide the board with a written report of the election results.

(f) The board may adopt necessary rules or bylaws to implement this section, including rules or bylaws to ensure the fairness, integrity, and openness of the voting process.

7. OFFICIAL BALLOT.

The Board shall adopt an official ballot form to be used in conducting the business of the Corporation for any member election. No other ballot form will be valid. Ballots from members or shareholders are confidential and are exempted from disclosure by the corporation until after the date of the relevant election. Proxies shall not be used.

8 INDEPENDENT ELECTION AUDITOR.

The Board shall select an independent election auditor not later than the 30th day before the scheduled date of the annual meeting. The independent election auditor is not required to be an experienced election judge or auditor and may serve as an unpaid volunteer. At the time of selection and while serving in the capacity of an independent election auditor, the independent election auditor may not be associated with the corporation as:

- (a) an employee;
- (b) a director or candidate for director; or
- (c) an independent contractor engaged by the corporation as part of the corporation's regular course of business.

9. VACANCIES

A director may resign at any time during his term. If a director is absent from three (3) or more consecutive regular meetings of which the director was sent mailed written notice, that director may be removed by two-thirds (2/3rds) vote of all other directors in special meeting. The director subject to removal for absenteeism must be sent written notice of the time, date, place, and purpose of such meeting by certified United States mail at least ten (10) days before the meeting.

A director may be removed majority vote of all members. Any member, officer or director may present charges in writing against a director with the Secretary/Treasurer of the Corporation. If presented by a member, the charges must be accompanied by a petition signed by at least ten (10%) percent of the members of the Corporation. Such removal shall be voted on at the next regular or special meeting of the membership. The director(s) against whom such charges have been presented shall be informed in writing of the charges at least twenty days before the meeting, and shall have the opportunity at such meeting to be heard in person or by counsel, to present witnesses and other evidence in rebuttal of such charges, and to question other witnesses. The person(s) bring such charges shall have the same rights. The president shall preside over the meeting unless (s)he is the subject of the charges, in which case the vice president shall

preside. If both the president and vice president are the subject of the charges, the directors who are not subject to charges shall appoint a presiding officer by majority vote.

Any vacancy occurring in the board of directors may be filled by the affirmative vote of the remaining directors, though less than a quorum of the board. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office. Any directorship to be filled by reason of an increase in the number of directors shall be filled by election at an annual meeting or at a special meeting of members called for that purpose.

10. QUORUM OF DIRECTORS

A majority of the board of directors shall constitute a quorum for the transaction of business. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors.

11. ANNUAL MEETING OF THE DIRECTORS

Within thirty days after each annual meeting of members the board of directors elected at such meeting shall hold an annual meeting at which they shall elect officers and transact such other business as shall come before the meeting. Nothing in these bylaws or any action of the board of directors shall prohibit the holding of the annual meeting of directors immediately following and at the same place as the annual meeting of members except the unavailability of all directors elected at the annual meeting; in which such case, the annual meeting of directors shall be held within thirty days.

12. REGULAR MEETING OF DIRECTORS

A regular meeting of the board of directors may be held at such a time as shall be determined from time to time by resolution of the board of directors.

13. SPECIAL MEETINGS OF DIRECTORS

The secretary shall call a special meeting of the board of directors whenever requested to do so by the president or by two directors. Such special meeting shall be held at the time specified in the notice of meeting.

14. PLACE OF DIRECTORS' MEETINGS

All meetings of the board of directors (annual, regular or special) shall be held either at the principal office of the Corporation or at such other place, either within or without the State of Texas, as shall be specified in the notice of meeting.

The board of directors shall provide access for the public, new service applicants, and/or members to all regular meetings of the board by setting aside time for hearing of suggestions, proposals, or grievances. Reasonable time limitations may be imposed on persons appearing to address the board on such matters.

15. NOTICE OF DIRECTORS' MEETINGS

Notice of regular or special meetings of the Board of Directors shall be given as required by law and shall include posting of the meeting as required by the Texas Open Meetings Act, Texas Government Code, Sections 551.001 et seq., by furnishing the notice to the county clerk or clerks of the county or counties in which the Corporation provides service, and by posting such notice in a place readily convenient to the public in its administrative office at all times at least seventy-two (72) hours preceding the scheduled time of the meeting. Such notice shall specify the date, hour, place and subject of each meeting held by the Board of Directors. In case of emergency or urgent public necessity, which shall be clearly identified in the notice, it shall be sufficient if the notice is posted four hours before the meeting is convened. Cases of emergency or urgent public necessity are limited to imminent threats to public health or safety or reasonably unforeseeable situations requiring immediate action by the Board. In the event of an emergency meeting, it shall be sufficient if notice is posted four hours before the meeting is convened, and the President or two or more Directors calling such emergency meeting shall, if the request therefor containing all pertinent information has previously been filed at the headquarters of the Corporation, give notice by telephone or telegraph to any news media requesting such notice and consenting to pay any and all expenses incurred by the Corporation in providing such special notice. All such meetings shall then be conducted in the manner required by the Texas Open Meetings Act.

Unless waived in writing, each director must be given a copy of all meeting notices within no less than the time limits set forth above. Notice of annual and regular meetings must be given at least ten (10) days before the meeting. Notice to directors may be by regular mail or hand delivery.

16. ATTENDANCE AT MEETINGS

As all meetings of directors must be open to the public, unless otherwise allowed by the Texas Open Meetings Act for emergency situations, telephone or other similar meetings shall not be permitted. Directors must attend meetings in person.

17. COMPENSATION

Directors, as such, shall not receive any stated salary for their services, but by resolution of the board of directors, expenses of attendance, if any, may be allowed for attendance at each annual, regular or special meeting of the board, provided, that nothing herein contained shall be construed to preclude any director from serving the Corporation in any other capacity and receiving compensation therefor.

18. CONFLICT OF INTEREST

The board of directors shall adopt and maintain a conflict of interest policy designed to promote the business of the Corporation and serve the interests of the membership. A director shall not be prohibited from providing goods or services to the Corporation at competitive prices by reason of their directorship, but said director shall not be authorized to vote on any matter in which they may have a pecuniary interest except as a customer of the Corporation. A director has an affirmative duty to exercise reasonable due diligence to investigate and disclose any real or apparent conflicts of interests or pecuniary interests (s)he may have on a matter affecting the Corporation or its members.

No director shall be liable to the Corporation or to the Corporation's membership for monetary damages for any act or omission in the director's capacity as a director of the Corporation, except and unless the director shall be found liable for a breach of the director's duty of loyalty to the Corporation or the Corporation's membership; an act or omission not in good faith that constitutes a breach of the director's duty to the Corporation or an act or omission that involves intentional misconduct or knowing violation of the law on the part of the director; a transaction from which the director receives an improper benefit, whether or not the benefit results from an act or omission for which liability of the director is expressly provided by Texas law.

19. GOOD FAITH RELIANCE

In conducting their duties as members of the board, each director (1) shall be entitled to rely, in good faith and with ordinary care, on information, opinions, reports or statements, including financial statements and other financial data, concerning the Corporation of the Corporation's affairs that have been prepared or presented by one or more officers or employees of the Corporation; or by legal counsel, public accountants, registered engineers, or other persons retained by the Corporation for the development of professional advice and information falling within such person's professional or expert competence; (2) may believe, in good faith and with ordinary care, that the assets of the Corporation are at least that of their book value; and (3) in determining whether the Corporation has made adequate provision for the discharge of its liabilities and obligations, may rely in good faith and with ordinary care on the financial statements of, or other information concerning, any person or entity obligated to pay, satisfy or discharge

some or all of the Corporation's liabilities or obligations; and may rely in good faith and with ordinary care on information, opinions, reports or statements by one or more officers or employees of the Corporation; or by legal counsel, public accountants, registered engineers, or other persons retained by the Corporation provided that said director reasonably believes such matters fall within such person's professional or expert competence. Nevertheless, a director must disclose any knowledge which (s)he may have concerning a matter in question that makes reliance otherwise provided herein to be unwarranted.

ARTICLE 9 - OFFICERS

1. OFFICERS ELECTION

The officers of the Corporation shall consist of a president, a vice-president, and a secretary-treasurer. All such officers shall be elected at the annual meeting of the board of directors. Directors may be elected officers. If any office is not filled at such annual directors meeting, it may be filled at any subsequent regular or special meeting of the board. The board of directors at such annual meeting, or at any subsequent regular or special meeting may also elect or appoint such other officers and assistant officers and agents as may be deemed necessary. Any two or more offices may be held by the same person, except the offices of president and secretary-treasurer.

All officers and assistant officers shall be elected to serve until the next annual meeting of directors (following the next annual meeting of members) or until their successors are elected; provided, that any officer or assistant officer elected or appointed by the board of directors may be removed with or without cause at any regular or special meeting of the board whenever in the judgment of the board of directors the best interests of the Corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed. Any agent appointed shall serve for such term, not longer than the next annual meeting of the board of directors, as shall be specified, subject to like right of removal by the board of directors.

2. VACANCIES

If any office becomes vacant for any reason, the vacancy may be filled by a majority vote of the board of directors.

Officers may resign.

Officers may be removed for good cause by the membership under the same procedures applying to directors.

Officers shall serve at the pleasure of the directors and may be removed at any time by a two-thirds vote of the directors. Officers against whom written charges have been brought shall be entitled to the same notice and hearing rights as directors.

3. POWER OF OFFICERS

Each officer shall have, subject to these by-laws and art. 1434a, VATCS, in addition to the duties and powers specifically set forth herein, such powers and duties as are commonly incident to his office and such duties and powers as the board of directors shall from time to time designate. All officers shall perform their duties subject to the directions and under the supervision of the board of directors. The president may secure the fidelity of any and all officers by bond or otherwise.

4. PRESIDENT

The president shall be the chief executive officer of the Corporation. He shall preside at all meetings of the directors and members. He shall see that all orders and resolutions of the board are carried out, subject however, to the right of the directors to delegate specific powers, except such as may be by statute exclusively conferred in the president, to any other officers of the Corporation.

He or any vice-president shall execute bonds, mortgages and other instruments requiring a seal, in the name of the Corporation, and, when authorized by the board, he or any vice-president may affix the seal to any instrument requiring the same, and the seal when so affixed shall be attested by the signature of either the secretary or an assistant secretary. He or the secretary-treasurer shall sign certificates of membership.

The president shall be ex-officio a member of all standing committees.

He shall submit a report of the operations of the Corporation for the year to the directors at their meeting next preceding the annual meeting of the members and to the members at their annual meeting.

5. VICE-PRESIDENT

The vice-president shall, in the absence or disability of the president, perform the duties and exercise the powers of the president, and he shall perform such other duties as the board of directors shall prescribe.

6. THE SECRETARY-TREASURER AND ASSISTANT SECRETARIES-TREASURER

The secretary-treasurer shall attend all meeting of the board and all meetings of the members and shall record all votes and the minutes of all proceedings and shall perform like duties for the standing committees when required. He shall give or cause to be given notice of all meetings of the members and all meetings of the board of directors and shall perform such other duties as may be prescribed by the board. He shall keep in safe custody the seal of the Corporation, and when authorized by the board, affix the same to any instrument requiring it, and when so affixed, it shall be attested by his signature or by the signature of an assistant secretary-treasurer.

The secretary-treasurer shall have the custody of the corporate funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation and shall deposit all moneys and other valuable effects in the name and to the credit of the Corporation in such depositories as may be designated by the board of directors.

The secretary-treasurer shall disburse the funds of the Corporation as may be ordered by the board of directors, taking proper vouchers for such disbursements. He shall keep and maintain the Corporation's books of account and shall render to the president and directors an account of all of his transactions as treasurer and of the financial condition of the Corporation and exhibit his books, records and accounts to the president or directors at any time. He shall disburse funds for capital expenditures as authorized by the board of directors and in accordance with the orders of the president, and present to the president for his attention any requests for disbursing funds if in the judgment of the secretary-treasurer any such request is not properly authorized. He shall perform such other duties as may be directed by the board of directors or by the president.

If required by the board of directors, he shall give the Corporation a bond in such sum and with such surety or sureties as shall be satisfactory to the board for the faithful performance of the duties of his office and for the restoration to the Corporation, in case of his death, resignation, retirement or removal from office, of all books, papers, vouchers, money and other property of whatever kind in his possession or under his control belonging to the Corporation.

The assistant secretary-treasurer shall, in the absence or disability of the secretary-treasurer, perform the duties and exercise the powers of the secretary-treasurer, and he shall perform such other duties as the board of directors shall prescribe.

In the absence of the secretary-treasurer or an assistant secretary-treasurer, the minutes of all meetings of the board and members shall be recorded by such person as shall be designated by the president or by the board of directors.

7. GENERAL MANAGER

a. The Corporation shall not be required to have a general manager; however, the business of the Corporation may be handled under the direction of the board of directors, by a general manager to be elected by a majority vote of the board. The general manager shall be employed at a salary to be fixed by the board of directors. The general manager shall perform such duties and for such term or office as shall be fixed by majority vote of the board of directors.

b. The general manager shall not have authority to expend the funds of the Corporation in excess of \$10,000.00 per expenditure without prior approval of the board of directors.

c. The general manager shall not have authority to sell or dispose of the assets of the Corporation in excess of \$5,000.00 without prior approval of the board of directors.

8. COMPENSATION

The Corporation shall not be obligated to pay salaries to any officer; however, if approved by the board of directors, salaries of all officers of the Corporation, except the secretary-treasurer and general manager, shall not exceed \$5000.00 per annum. The salary of the secretary-treasurer shall be fixed by the board of directors at a sum commensurate with the duties required of him.

9. CONFLICT OF INTEREST

An officer shall not be prohibited from providing goods or services to the Corporation at competitive prices by reason of their office. An officer has an affirmative duty to exercise reasonable due diligence to investigate and disclose to the board of directors any real or apparent conflicts of interests or pecuniary interests (s)he may have on a matter affecting the Corporation or its members.

10. GOOD FAITH RELIANCE

In conducting their duties as officers, each officer (1) shall be entitled to rely, in good faith and with ordinary care, on information, opinions, reports or statements, including financial statements and other financial data, concerning the Corporation of the Corporation's affairs that have been prepared or presented by one or more officers or employees of the Corporation; or by legal counsel, public accountants, registered engineers, or other persons retained by the Corporation for the development of professional advice and information falling within such person's professional or expert competence; (2) may believe, in good faith and with ordinary care, that the assets of the Corporation are at least that of their book value; and (3) in determining whether the Corporation has made

adequate provision for the discharge of its liabilities and obligations, may rely in good faith and with ordinary care on the financial statements of, or other information concerning, any person or entity obligated to pay, satisfy or discharge some or all of the Corporation's liabilities or obligations; and may rely in good faith and with ordinary care on information, opinions, reports or statements by one or more officers or employees of the Corporation; or by legal counsel, public accountants, registered engineers, or other persons retained by the Corporation provided that said officer reasonably believes such matters fall within such person's professional or expert competence. Nevertheless, an officer must disclose any knowledge which (s)he may have concerning a matter in question that makes reliance otherwise provided herein to be unwarranted.

ARTICLE 10 - CERTIFICATES OF MEMBERSHIP, ETC.

1. CERTIFICATES OF MEMBERSHIP

The Corporation is and shall continue to be a Corporation without capital stock, and membership in the Corporation shall be deemed personal estate and shall be transferable only on the books of the Corporation. Notwithstanding the personalty characterization of memberships, memberships may be conditioned upon or tied to ownership in realty property in the area served as may be provided by Texas law.

The certificates for memberships of membership of the Corporation shall be numbered and shall be entered in the Corporation as they are issued. They shall exhibit the holder's name and shall be signed by the president or secretary-treasurer and shall be sealed with the seal of the Corporation or a facsimile thereof. In case any officer or officers who shall have signed or whose facsimile signature or signatures shall have been used on any such certificate or certificates shall cease to be such officer or officers of the Corporation, whether because of death, resignation or otherwise, before said certificate or certificates shall have been issued, such certificate may nevertheless be issued by the Corporation with the same effect as though the person or persons who signed such certificates or whose facsimile signature or signatures shall have been used thereon had been such officer or officers at the date of its issuance. Certificates shall be in such form as shall in conformity to law prescribed from time to time by the board of directors.

The Corporation may appoint from time to time agents and registrars, who shall perform their duties under the supervision of the secretary-treasurer.

2. TERMINATION OF MEMBERSHIPS

Membership in the Corporation may be tied to fee simple ownership to property within the Corporation's utility service area; however, a fee simple owner of real property within the

utility service area may hold a membership so that tenants or occupants of his property may receive utility service from the Corporation. Non-fee simple title holders who take utility service from the Corporation may hold memberships in their own names, which memberships shall not be tied to real property. The membership rights of any subscriber to utility service from the Corporation shall automatically terminate upon the occurrence of any event or change of circumstances which would disqualify the person from membership as provided by these bylaws, including but not limited to, the sale of the membership real property to which his membership is tied.

Memberships in the corporation may be transferred as provided by art. 1434a, Section 9A, VATCS, as amended, except no membership may be transferred until all monies owed the corporation by the member and/or person obtaining service through such membership have been paid in full.

The board of directors may cancel the membership associated with any utility service account which has an unpaid balance for a period of more than sixty days after the original due date. In the event of such cancelation, the membership fee associated with such membership shall be forfeited to the corporation without prejudice to the corporation's right to pursue such additional collection remedies which may exist at law or in equity. In the event a membership is cancelled for such delinquency, utility service shall not be restored to the service connection associated with such membership until a new membership has been applied for and the current membership fee paid. The applicant for restored service must also comply with all other customary conditions precedent to receiving utility service including, but not limited to, paying customary reconnection or tap fees.

3. TRANSFER OF MEMBERSHIP

(a) A person who owns a membership in the Corporation may not sell or transfer that membership to another person or entity except:

(1) by will to a transferee who is a person related to the testator within the second degree of consanguinity;

(2) by transfer without compensation to a transferee who is a person related to the owner of the membership within the second degree of consanguinity;
or

(3) by transfer without compensation or by sale to the Corporation.

(b) Subsection (a) of this section does not apply to a person or entity that transfers the membership to another person as part of the conveyance of real estate from which the membership arose. In such cases the transferee must still qualify for membership as provided herein and pay all applicable membership fees.

(c) The transfer of membership under this section does not entitle the transferee to water or sewer service unless each condition for water or sewer service is met as provided in the Corporation's published rates, charges, and conditions of service.

(d) The Corporation may, consistent with the limitations prescribed by subsection (a) of this section, reassign a canceled membership to any person or entity that has legal title to the real estate from which the canceled membership arose and for which water or sewer service is requested, subject to compliance with the conditions for water or sewer service in the Corporation's published rates, charges, and conditions of service.

4. REGISTERED MEMBERS

The Corporation shall be entitled to treat the holder of record of any membership or certificate of membership as the holder in fact thereof, and accordingly shall not be bound to recognize any equitable or other claim to or interest in such membership on the part of any other person, whether or not it shall have express or other notice thereof, except as otherwise provided by law.

5. LOST CERTIFICATE

The board of directors may direct a new certificate or certificates to be issued in place of any certificate or certificates theretofore issued by the Corporation alleged to have been lost or destroyed, upon the making of an affidavit of that fact by the person claiming the certificate to be lost. When authorizing such issue of a new certificate or certificates, the board of directors in its discretion and as a condition precedent to the issuance thereof, may require the owner of such lost or destroyed certificate or certificates or his legal representative to advertise the same in such manner as it shall require to give the Corporation a bond with surety and in form satisfactory to the Corporation (which bond shall also name the Corporation's agents and registrars, if any, as obligees) in such sum as it may direct as indemnity against any claim that may be made against the Corporation or other obligees with respect to the certificate alleged to have been lost or destroyed, or to advertise and also give such bond.

6. MEMBERSHIP FEES

All persons lawfully receiving or applying to receive public utility service from the Corporation shall pay a membership fee of \$350.00 as a condition precedent to lawfully receiving utility service. The board of directors shall establish reasonable deferred payment policies for the payment of membership fees by any other service applicant upon whom a one time payment of the entire membership fee shall work a financial hardship. Such policies shall be consistent in application on each person without regard to citizenship, race, sex, color, creed, national origin or other protected status under state or

federal law. All applicants for restored service whose memberships have been forfeited to the Corporation shall pay a membership fee of \$350.00 in addition to any applicable reconnection charges. All transferees of memberships as provided by these bylaws shall pay a membership fee of \$350.00. A membership fee and service application shall be required for each service connection requested regardless of whether the applicant already holds a membership. Membership fees will be refundable at the time the service customer leaves the system unless the customer has any unpaid debts or obligations to the Corporation; in which case such membership fees as the customer may have on deposit with the Corporation shall be applied to the customer's debts to the Corporation, without prejudice to the Corporation's right to pursue other legal remedies existing at law or in equity.

ARTICLE 11 - DEPOSITORY

The Board of Directors shall select as depository for the funds of the Corporation, a bank within the State of Texas which is insured with the Federal Deposit Insurance Corporation and shall require of said depository such bond as the Board deems necessary for the protection of the Corporation; and such funds as the Board of Directors may from time to time allocate to a sinking fund for replacement, amortization of debts and the payment of interest which shall not be required to be expended within the year in which the same is deposited shall be invested in bonds or other evidence of indebtedness of the United States of America or deposited at interest with the Federal Deposit Insurance Corporation in a savings account.

ARTICLE 12 - MISCELLANEOUS

1. INFORMAL ACTION

No action required to be taken or which may be taken at a meeting of the members, directors or members of committees, may be taken without a meeting. All actions and votes taken shall be duly recorded in the books and records of the Corporation.

2. SEAL

The Board of Directors shall provide a corporate seal, which shall be in the form of a circle and shall have inscribed thereon the name of the Corporation and the words "Corporate Seal of Windermere Oaks Water Supply Corporation".

3. BOOKS AND RECORDS

The Corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its members, Board of Directors, and committees

having the authority of the Board of Directors, and shall keep at the registered or principal office a record giving the names and addresses of the members entitled to vote. All books and records of the Corporation may be inspected by any member or his agent or attorney for any proper purpose at any reasonable time when so requested in writing.

With prior written request, corporate records, books, and annual reports, subject to exceptions provided by the Texas Open Records Act, Texas Government Code, Sections 552.001 et seq., including any amendments thereto, shall be available for public inspection and copying by the public or their duly authorized representatives during normal business hours subject to reasonable charge for the preparation of copies.

In the event of any conflict between the provision of the Open Records Act and the provisions of these Bylaws, the provisions of the Open Records Act shall prevail.

4. CHECKS

All checks or demands for money and notes of the Corporation shall be signed by such officer or officers or such other person or persons as the board of directors may from time to time designate.

5. FISCAL YEAR

The fiscal year of the Corporation shall begin on the 1st day of January in each and every year.

6. DIRECTORS' ANNUAL STATEMENT

The board of directors shall present at each annual meeting of members a full and clear statement of the business and condition of the Corporation.

8. AMENDMENTS

These by-laws may be altered, amended or repealed in whole or in part by the affirmative vote of a majority of the board of directors. No amendment of these bylaws affecting memberships, the voting rights of members, or the number of directors may be made without a majority vote of a quorum of members.

For so long as the Corporation is indebted for a loan or loans made by or through the Texas Water Development Board, USDA Rural Development, their successor agencies, these by-laws shall not be altered, amended or repealed without the prior written consent

of the General Fund Manager (or equivalent designated agency representative) of the Texas Water Development Board, USDA Rural Development, their successor agencies. If the Corporation becomes indebted to another state or federal financial institution and said creditor requires similar limitations on the amendment of these by-laws as a condition precedent to necessary debt financing, amendment of these by-laws shall be restricted as set forth in the loan agreement.


9. OBLIGATIONS INCIDENTAL TO INDEBTEDNESS

The board of directors may establish and operate such financial reserves, sinking funds, or debt service accounts as may be reasonably necessary to comply with loan or bond covenants entered into between the Corporation and its creditors.

Subject to such restrictions as may exist under the laws of Texas or of the United States, the board of directors may encumber the assets of the Corporation by reasonable liens or security interests as provided by the loan or bond covenants entered into between the Corporation and its creditors. When encumbered, the assets of the Corporation may not be sold, conveyed or disposed of without notice to and permission from the creditor holding such liens or security interests as provided in the loan or bond covenants, except as may otherwise be provided by law and/or the sale and distribution of potable water in the ordinary course of business.

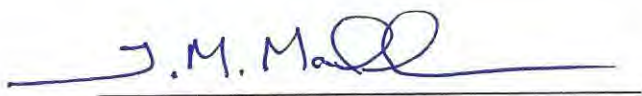
Should the Corporation become indebted to the Texas Water Development Board or other state or federal financial institution and such indebtedness is evidenced by bonds or loans, the board of directors shall be expressly empowered to adopt such standard and customary water supply or sewer service corporation bond or loan resolutions as may be required by the Texas Water Development Board or other state or federal financial institution as a condition of such indebtedness.

Amendments approved in manner prescribed by law on the 25th day of September, 20 14 and are so certified by our authorized signatures below:



President
PAT MULLIGAN

Attest:



Secretary/Treasurer
T. M. MADDEN

EXHIBIT 3

CAUSE NO. 48292

RENE FFRENCH	§	IN THE BURNET COUNTY
<i>Intervenor Plaintiff</i>	§	
	§	
JOHN RICHARD DIAL	§	
<i>Intervenor Plaintiff</i>	§	
	§	
STUART BRUCE SORGEN	§	
<i>Intervenor Plaintiff</i>	§	
	§	
<i>And AS REPRESENTATIVES FOR</i>	§	
WINDERMERE OAKS WATER SUPPLY	§	
CORPORATION	§	
	§	
v.	§	33rd DISTRICT COURT
	§	
FRIENDSHIP HOMES & HANGARS, LLC,	§	
WINDERMERE OAKS WATER SUPPLY	§	
CORPORATION, AND ITS DIRECTORS	§	
WILLIAM EARNEST; THOMAS MICHAEL	§	
MADDEN; DANA MARTIN; ROBERT	§	
MEBANE; and PATRICK MULLIGAN	§	
<i>Defendants</i>	§	

ORIGINAL PETITION IN INTERVENTION

Intervenor-Plaintiff Members Ffrench, Dial, and Sorgen, as members of the WOWSC, file this intervention pursuant Tex. Bus. Org. Code § 20.002(c) and (d) seeking to protect the interest of the WOWSC and its members from the financial harm that was caused by, or will be caused by, the named defendant WOWSC directors. Those Defendant Directors acted inconsistent with the limitation on their authority by selling WOWSC property to one of their own Board members for a small fraction of the value of property, and to challenge ownership by Defendant Friendship Homes of certain property. Intervenor Members stand as representatives of the WOWSC for the corporation's claims against the named Defendant WOWSC Directors for betraying the WOWSC members by exceeding their authority. Intervenor Members also bring suit against the WOWSC

to enjoin the performance of the transfer of WOWSC property, including an option for right of first refusal, to Defendant Friendship Homes & Hangars, LLC, Defendant WOWSC Director Martin's company.

1. a. Intervenor file as party plaintiffs.
- b. Discovery will be conducted under TRCP 190.3, Level 2.

CLAIM FOR RELIEF

2. Plaintiff seeks monetary relief of \$100,000 or less and nonmonetary mandamus and injunctive relief. TRCP 47(c)(2).

PARTIES

3. INTERVENOR PLAINTIFFS:

a. Intervenor-Plaintiff Lawrence Rene Ffrench is a member of the WOWSC and resident of Burnet County, Texas who can be served by his counsel of record in this case. The last 3 digits of his Driver's License is 768 and the last 3 digits of his Social Security Number is 866.

b. Intervenor-Plaintiff John Richard "Dick" Dial is a member of the WOWSC and resident of Burnet County, Texas who can be served by his counsel of record in this case. The last three digits of his driver's license is 446, and the last three digits of his social security number is 924.

c. Intervenor-Plaintiff Stuart Bruce Sorgen is a member of the WOWSC and resident of Burnet County, Texas who can be served by his counsel of record in this case. The last three digits of his driver's license is 560, and the last three digits of his social security number is 492.

d. Intervenor-Plaintiff Windermere Oaks Water Supply Corporation (WOWSC) intervenes, through members Ffrench, Dial, and Sorgen in a representative suit, for action against

Defendant Directors WILLIAM EARNEST; THOMAS MICHAEL MADDEN; DANA MARTIN; ROBERT MEBANE; and PATRICK MULLIGAN pursuant to Tex. Bus. Org. Code section 20.002(c)(2). WOWSC can be served through its registered agent, David Bertino , 424 Coventry, Spicewood, Texas 78669.

4. DEFENDANTS:

a. Defendant Friendship Homes & Hangars, LLC is a Texas limited liability company who has already been served through its Registered Agent, Dana Martin and filed an Answer.

b. Defendant WOWSC is a Texas nonprofit corporation and a water supply corporation. WOWSC can be served through its registered agent, David Bertino , 424 Coventry, Spicewood, Texas 78669.

c. Defendant William Earnest was a WOWSC Board member who acted inconsistent with an expressed limitation on his authority in selling the WOWSC property. He can be served at 1117 Majestic Hill Blvd, Spicewood Texas 78669.

d. Robert Mebane was a WOWSC Board member who acted inconsistent with an expressed limitation on his authority in selling the WOWSC property. He can be served at 343 Coventry Rd., Spicewood Texas 78669.

e. Dana Martin was a WOWSC Board member, with a conflict of interest as an officer/owner of Defendant Friendship Homes & Hangars, LLC who acted inconsistent with an expressed limitation on her authority in selling the WOWSC property by concealing material facts, of which she was aware, from the Board. She can be served at 205 Coventry Rd., Spicewood Texas 78669.

f. Patrick Mulligan was a WOWSC Board member who acted inconsistent with an expressed limitation on his authority in selling the WOWSC property. He can be served at 1009

Coventry Rd., Spicewood Texas 78669.

g. Thomas Michael Madden was a WOWSC Board member who acted inconsistent with an expressed limitation on his authority in selling the WOWSC property. He can be served at 112 Fair Oaks Dr., Georgetown, TX 78628.

JURISDICTION & VENUE

5. The Court has jurisdiction over this case for the equitable relief requested and venue is mandatory in this Court.

FACTS

6. At WOWSC board meetings on December 19, 2015 and on February 22, 2016, the Defendant WOWSC Directors approved sale of WOWSC property, approximately 3.86 acres along the west side of Piper Lane (Tract 1), to Defendant Friendship Homes & Hangars, LLC (Defendant Friendship), a company later created by then-WOWSC Board member Dana Martin. The sale of this property was done without public notice or competition for sales of the land and has been adjudged to have violated the Texas Open Meetings Act.

7. At the time of the Board's authorization, Defendant Friendship did not even exist as a Texas company. Texas Secretary of State records show that Defendant Friendship was not incorporated until March 1, 2016. Closing on the sale of the property occurred on March 13, 2016, just 12 days after Defendant Friendship was incorporated.

8. The price approved by the Defendant WOWSC Directors for the property was to net \$200,000 to WOWSC. An appraisal of the property, by Jim H. Hinton II, was commissioned by the Defendant WOWSC Directors, or Dana Martin herself, identifying the highest and best use of the property as "vacant land." The appraisal failed to recognize, as Defendant Martin (being a realtor herself who had sold similar property in the area) well knew, that the property's highest

and best use was division into several airport hangar lots, for which the value was actually \$700,000, 3 ½ times more valuable than the deal cooked up between the Defendant WOWSC Directors and Defendant Martin.

9. At no time do the minutes of the WOWSC indicate that the Board ever approved an additional “right of first refusal” for Ms. Martin’s company on an additional 7.01 acres (Tract 2). Yet, at the closing on the sale on March 13, 2016, such right of first refusal was included. Had the entire 10.88 acres been sold as a unit, an appraisal by David R. Bolton, MAI, SREA (commissioned by the WOWSC Board in office in the Fall of 2018) showed the market value at \$1.3 million!

10. After acquiring the 3 acres, Defendant Martin submitted a subdivision plat to the Burnet County Commissioners Court, to divide the property into airport hangar lots. In a blatantly obvious effort to drive *down* the value of the 7 acres over which Defendant Friendship held a right of first refusal, Martin’s subdivision specifically did not grant access to the 7-acre tract from the 3-acre tract. The Bolton appraisal valued the 7-acre tract without the access easement at \$120,000 but valued it at \$760,000 with the access easement. If she owned the 3 acres, Ms. Martin had to power to grant the easement or not.

11. After members of WOWSC expressed their outrage at this rip-off, insider, concealed transaction, a new Board of the WOWSC voted to challenge the sale. *See* Exhibit IP-1 (letter from WOWSC to Defendant Friendship dated January 25, 2019). But in March 2019 an election changed the membership of the Board to include members supported by Dana Martin. Despite the valid legal grounds laid out in the January Demand Letter, the current WOWSC Board has taken no action to protect the WOWSC or its members from the unauthorized actions of the Defendants.

12. The Articles of Incorporation of the WOWSC, contains a restriction on the power of the corporation that was violated by the land sale transaction:

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

The Articles of Incorporation of the WOWSC (filed November 9, 1995)

**COUNT 1 – SUIT PURSUANT TO TEX. BUS. ORG. CODE § 20.002(c)(1):
MEMBERS v. WOWSC**

13. The facts stated above are incorporated here as the basis for this cause of action for mandamus and injunctive relief. The Intervenor-Plaintiff Members seek to enjoin the performance of any act, or the transfer of property by the WOWSC, that (1) recognizes or facilitates the sale of Tract 1 (3 acres), and (2) that recognizes or facilitates the implementation of the unauthorized right of first refusal of Tract 2 (7 acres) without full and fair compensation to the WOWSC. This claim is made pursuant to Tex. Bus. Org. Code § 20.002(c)(1) because the land sale, as authorized, is inconsistent with an expressed limitation on the authority of the WOWSC as expressed in the WOWSC Articles of Incorporation and Tex. Bus. Org. Code § 22.230(b). Material facts, *e.g.*, the highest and best use of the property and the value of the property, were concealed from the Board; no one exercising good faith or ordinary care could have approved the land sale contract; and the contract was not fair to the WOWSC.

**COUNT 1 – SUIT PURSUANT TO TEX. BUS. ORG. CODE § 20.002(c)(2):
WOWSC v. DEFENDANT WOWSC DIRECTORS**

14. The facts stated above are incorporated here as the basis for this cause of action for mandamus and injunctive relief. WOWSC, through the Intervenor-Plaintiff Members in a representative suit, seek a court order pursuant to Tex. Bus. Org. Code § 20.002(c)(2) and (d) against the Defendant WOWSC Directors and Defendant Friendship to set aside and enjoin the performance of the land sale contract for Tract 1 and Tract 2 because the sale, as authorized is

inconsistent with an expressed limitation on the authority of the Defendant WOWSC Directors as expressed in the WOWSC Articles of Incorporation and Tex. Bus. Org. Code § 22.230(b). Material facts, *e.g.*, the highest and best use of the property and the value of the property, were concealed from the Board; no one exercising good faith or ordinary care could have approved the land sale contract; and the contract was not fair to the WOWSC. Plaintiffs ask the Court to declare that the WOWSC property at issue is not owned by Defendant Friendship because no valid authorization for the sale of that property or the right of first refusal, and such authorization was necessary for the sale to occur.

CONDITIONS PRECEDENT

15. All conditions precedent to Plaintiffs' claim for relief have been performed or have occurred.

PRAYER

For these reasons, Intervenor-Plaintiff Members ask the court to set aside and enjoin the land sale contract; enjoin implementation of Defendant Friendship's right of first refusal and denial of an access easement from Tract 1 to Tract 2; set aside and enjoin the performance of the land sale contract in Tract 1 as being inconsistent with the expressed limitation on the authority of the Defendant WOWSC Directors, and to grant Plaintiffs all other relief to which they may be entitled.

Respectfully submitted,



Bill Aleshire
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Austin, Texas 78701
Telephone: (512) 320-9155

Cell: (512) 750-5854
Facsimile: (512) 320-9156
Bill@AleshireLaw.com

ATTORNEY FOR INTERVENOR-PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded via electronic filing and service on May 14, 2019 to:

Molly Mitchell

State Bar No. 14217815

mollym@abdmlaw.com

ALMANZA, BLACKBURN, DICKIE & MITCHELL, LLP

2301 S. Capital of Texas Hwy., Bldg. H

Austin, Texas 78746

(512) 474-9486

(512) 478-7151 FAX

ATTORNEYS FOR FRIENDSHIP HOMES & HANGARS, LLC in Cause No. 48292



Bill Aleshire

Mr. de la Fuente's Direct Line: (512) 322-5849
Email: jdelafuente@lglawfirm.com

January 25, 2019

***Via Email: mollym@abdmlaw.com
and Via USPS Regular Mail***

Molly Mitchell
ALMANZA, BLACKBURN, DICKIE & MITCHELL, LLP
2301 S. Capital of Texas Highway, Bldg. H
Austin, Texas 78746

Re: Friendship Homes & Hangars, LLC purchase of real property interests
from Windermere Oaks Water Supply Corporation

Dear Molly,

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

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

The circumstances surrounding the transactions are problematic for several reasons.

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

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

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

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

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

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

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

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

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

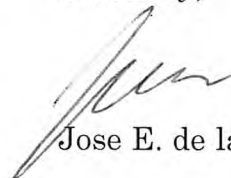
Finally, pursuant to the Unimproved Property Contract and as consideration for the transactions, Friendship Homes agreed to grant a 50-foot easement to run from Piper Lane to the west property line of the 3.86 acres that Friendship Homes acquired in fee simple. An inspection of the Burnet County property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

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

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

We look forward to your prompt response to this correspondence.

Sincerely,



Jose E. de la Fuente

JEF:cad

EXHIBIT 4

CAUSE NO. 47531

TOMA INTEGRITY, INC.	§	IN THE DISTRICT COURT
<i>Plaintiff</i>	§	
	§	
v.	§	BURNET COUNTY
	§	
WINDERMERE OAKS WATER SUPPLY CORPORATION	§	
<i>Defendant</i>	§	33rd DISTRICT COURT

PLAINTIFF’S FIRST AMENDED PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff TOMA Integrity, Inc. files this first amended petition against Defendant Windermere Oaks Water Supply Corporation (“WOWSC”) seeking to enforce the Texas Open Meetings Act and allege as follows:

NATURE OF THE CASE AND DISCOVERY CONTROL PLAN

1. a. Discovery will be conducted under TRCP 190.3, Level 2.
- b. Tex. Gov’t Code Section 551.041 (the Texas Open Meetings Act (TOMA)) requires a governmental body like the Windermere Oaks Water Supply Corporation (WOWSC) to announce each subject its board will consider at a meeting in advance of that meeting. This fundamental requirement keeps our government from acting in secret and hiding its intentions from taxpayers/ratepayers.
- c. But on December 19, 2015, the WOWSC Board, without any competitive bid process or advance public announcement of their intent, sold valuable property belonging to WOWSC to a business owned by one of the Board members. To make matters worse, the Board also gave the Board member a right-of-first-refusal for the purchase of even more WOWSC property. There was no item on the meeting agenda giving fair notice to the public, or WOWSC

ratepayers, that any WOWSC property would be sold. This was a blatant violation of the Texas Open Meetings Act, and the remedy is for this Court to reverse that violation and declare that Board action void.

CLAIM FOR RELIEF

2. Of the choices available for statement of relief required to be stated by TRCP 47(c)(2), Plaintiff seeks “monetary relief of \$100,000 or less and nonmonetary mandamus and injunctive relief.” However, as shown in this petition and its Prayer, Plaintiff does not seek monetary damages, and seeks only relief afforded by the Texas Open Meetings Act.

PARTIES

3. a. Plaintiff TOMA Integrity, Inc. is a nonprofit corporation formed by WOWSC ratepayers whose purpose includes, but is not limited to, encourage honesty and integrity in the management and development of properties owned or served by WOWSC and promote open government and effective public oversight of governmental actions that affect the served area. TOMA Integrity, Inc. is an interested person for purposes of TOMA plaintiff status. TOMA Integrity, Inc. can be served through its attorney-of-record in this case.

b. Defendant Windermere Oaks Water Supply Corporation is “governmental body” as defined by the Texas Open Meetings Act. *See* Tex. Gov’t Code section 551.001(3)(K) (“a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code”). WOWSC is a defendant pursuant to TOMA section 551.142 as the governmental body who violated the meeting notice requirement of TOMA Section 551.041. WOWSC has been served.

JURISDICTION & VENUE

4. The Court has jurisdiction over this case under TOMA section 551.142 which also makes venue mandatory in this Court.

FACTS

5. a. The facts stated in Paragraph 1 above are incorporated herein.

b. TOMA section Sec. 551.041 says, “NOTICE OF MEETING REQUIRED. A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body.” Courts have construed this provision. “The notice ... must be sufficiently specific to alert the general public to the topics to be considered at the upcoming meeting.” *City of Laredo v. Escamilla*, 219 S.W.#d 14, 19 (Tex. App.—San Antonio 2006 pet. denied). “To determine if the notice sufficiently informs the public of the topic under discussion, the court will focus its analysis on comparing the content of the notice given and the action taken at the meeting.” *Markowski v. City of Marlin*, 940 S.W.2d 720, 726 (Tex. App.—Waco 1997, no writ) (citing *Rettberg*, 873 S.W.2d at 412; *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 180 (Tex.App.—Corpus Christi 1990, writ denied) (emphasis added). “The notice must be more specific if the public has a special interest in the topic under discussion.” *Id.* The WOWSC ratepayers have a special interest in sale of WOWSC property, particularly when the property sale is an insider deal with a Board member, without competition, and at a below-market price.

c. “Content of the Notice Given”: Attached is Exhibit P-1, the meeting notice of the WOWSC Board for December 19, 2015. No action item on that agenda gave the public a hint that the Board was considering selling WOWSC property. Even though the agenda included a vague notice that the Board would “discuss” items in executive session (“5. Executive session to discuss real estate, personnel, or legal matters.”), the agenda also said, “Items 2 through 4 are

posted for discussion and possible action by the Board.” So, the public was told that Item 5 was not an action item. Regardless, the vague, generic notice of Item 5 does not comply with the TOMA. *See Cox Enterprises v AISD*, 706 S.W.2d 956, 959 (Tex. 1986) (“The Act's purposes cannot be circumvented by mere reference to one of the [executive session] exceptions. The advance notice given under section [now, 551.041] should specifically disclose the subjects to be considered at the upcoming meeting.”).

d. “The Action Taken at the Meeting”: A comparison of the agenda meeting notice to the minutes reveals the TOMA notice violation on the sale of WOWSC property to a business owned by WOWSC’s director Dana Martin. Attached Exhibit P-2 are the minutes of the WOWSC Board meeting on December 19, 2015. The minutes include the following entry of action on a subject that was not included on the meeting agenda:

Out of Executive Session at 11:30 AM. Pat Mulligan made a motion to accept a proposal from Friendship Homes and Hangers to purchase 4 acres of land at the old WWTP to net \$200,000.00 to the Windermere Oaks Water Supply Corporation to be used to reduce the outstanding loan from the new waste water treatment plant. Motion seconded by Mike Madden. Board Members in favor Bob Mebane, Pat Mulligan, Mike Madden, and Dana Martin recused herself from the vote and the executive session.

As is shown in the attached Exhibit P-3, officers of WOWSC, in reliance on this unlawful vote of December 19, 2015, subsequently executed documents to sell the WOWSC property and grant the buyer a right-of-first-refusal that was not even included in the motion, let alone included in an TOMA-compliant meeting notice.

e. TOMA Integrity challenges all actions of the WOWSC Board to sell or agree to a right-of-first-refusal of the WOWSC property because the Board actions violated TOMA and should be declared void.

f. As the attached Affidavit of John Richard Dial and attached Certificate of

Formation shows, TOMA Integrity, Inc. was created by residents or ratepayers of WOWSC. Thus, TOMA Integrity, Inc. has associational standing to bring this claim for its directors, any one of whom could have also brought suit pursuant to the Texas Open Meetings Act, Tex. Gov't Code section 551.142. Courts have made it clear that groups like TOMA Integrity may bring open meetings lawsuits:

The majority of courts addressing the “interested person” requirement have adopted an extremely broad interpretation regarding who constitutes an “interested person.” *See Rivera v. City of Laredo*, 948 S.W.2d 787, 792 (Tex.App.—San Antonio 1997, writ denied) (adopting broad definition of “interested person”); *Save Our Springs Alliance, Inc. v. Lowry*, 934 S.W.2d 161, 163 (Tex.App.—Austin 1996, orig. proceeding) (“The Texas legislature exercised its discretion to grant broader standing to citizens under the Open Meetings Act.”); *City of Fort Worth v. Groves*, 746 S.W.2d 907, 913 (Tex.App.—Fort Worth 1988, no writ) (viewing “interested person” as affected taxpayer and citizen based on underlying purpose of act); *Cameron County Good Gov't League v. Ramon*, 619 S.W.2d 224, 230–31 (Tex.Civ.App.—Beaumont 1981, writ ref'd n.r.e.) (“it is difficult to see how the legislature could broaden the class of ‘any interested person’ ”); *but see City of Abilene v. Shackelford*, 572 S.W.2d 742, 745–46 (Tex.Civ.App.—Eastland 1978) (interpreting “interested person” as requiring plaintiff to show particular injury or damage different than public at large), *rev'd on other grounds*, 585 S.W.2d 665 (Tex.1979); *see also City of Bells*, 744 S.W.2d at 639–40 (applying general rules regarding standing without differentiating standing under Open Meetings Act).

In keeping with the majority of courts that have addressed this issue, we believe the Open Meetings Act should be construed broadly.

Matagorda County Hosp. Dist. v. City of Palacios, 47 S.W.3d 96, 102 (Tex. App.—Corpus Christi 2001, no pet.)

COUNT 1 – SUIT FOR MANDAMUS/INJUNCTIVE RELIEF

6. The facts stated above are incorporated here as the basis for this cause of action for mandamus and injunctive relief. *See* TOMA, Tex. Gov't Code section 551.142(a) (“Sec. 551.142. MANDAMUS; INJUNCTION. (a) An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or

threatened violation of this chapter by members of a governmental body.”). Plaintiff brings this suit for mandamus against the Windermere Oaks Water Supply Corporation to reverse the violation of TOMA and asks the Court to declare void the action the WOWSC Board took on December 19, 2015 to sell WOWSC property without the required public notice.

CONDITIONS PRECEDENT

7. All conditions precedent to Plaintiff’s claim for relief have been performed or have occurred.

ATTORNEY FEES

8. Plaintiff has retained the under-signed attorney to bring this action. Plaintiff asks the court to award costs and reasonable and necessary attorney fees pursuant to TOMA section 551.142(b).

PRAYER

For these reasons, Plaintiff asks the Court to set this matter for hearing on mandamus to reverse the violation of the TOMA public-notice section 551.041 and declare void the action the WOWSC Board took on December 19, 2015 to sell WOWSC property, as enumerated above, and award Plaintiff costs and reasonable and necessary attorney fees, and to grant Plaintiff all other relief to which it may be entitled.

Respectfully submitted,



Bill Aleshire
Bar No. 24031810
AleshireLAW, P.C.
700 Lavaca, Suite 1400
Austin, Texas 78701
Telephone: (512) 320-9155
Cell: (512) 750-5854
Facsimile: (512) 320-9156

Bill@AleshireLaw.com

ATTACHED: AFFIDAVIT OF RICHARD DIAL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded via electronic filing or email on this the 30th day of March, 2018, to:

COUNSEL FOR DEFENDANT:

Les Romo
Law Offices of Les Romo
102 West Morrow Street, Suite 202
P.O. Box 447
Georgetown, Texas 78627
(512) 868-5600
Fax: (512) 591-7815
State Bar No. 17225800
lesromo.lawoffice@gmail.com



Bill Aleshire

CAUSE NO. 47531

TOMA INTEGRITY, INC.
Plaintiff

§ IN THE DISTRICT COURT

§

§

v.

§

BURNET COUNTY

§

WINDERMERE OAKS WATER SUPPLY
CORPORATION
Defendant

§

§

§

33rd DISTRICT COURT

AFFIDAVIT OF JOHN RICHARD DIAL

STATE OF TEXAS §
BURNET COUNTY §

Before me, the undersigned notary, on this day personally appeared John Richard Dial, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

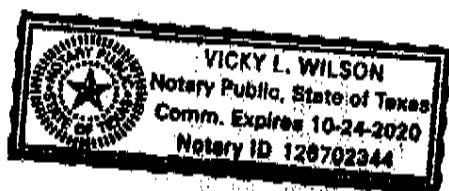
1. "My name is John Richard Dial. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.


2. "I am a Director of TOMA Integrity, Inc. and am familiar with the corporation and those persons associated with the corporation.

3. The people who are represented by TOMA Integrity, Inc., including myself, are persons who are directly affected by fees and other decisions made by the Windermere Oaks Water Supply Corporation. The attached Exhibit A to this affidavit is a true and correct copy of the Certificate of Formation for TOMA Integrity, Inc. as filed with the Texas Secretary of State's Office."


JOHN RICHARD DIAL

Sworn to and subscribed before me by John Richard Dial on March 5, 2018.




Notary Public in and for
the State of Texas

Form 202

Secretary of State
 P.O. Box 13697
 Austin, TX 78711-3697
 FAX: 512/463-5709

Filing Fee: \$25



**Certificate of Formation
 Nonprofit Corporation**

Filed in the Office of the
 Secretary of State of Texas
 Filing #: 802879506 12/11/2017
 Document #: 780508970002
 Image Generated Electronically
 for Web Filing

Article 1 - Corporate Name

The filing entity formed is a nonprofit corporation. The name of the entity is :

TOMA INTEGRITY, INC.

Article 2 – Registered Agent and Registered Office

A. The initial registered agent is an organization (cannot be corporation named above) by the name of:

OR

B. The initial registered agent is an individual resident of the state whose name is set forth below:

Name:

S. BRUCE SORGEN

C. The business address of the registered agent and the registered office address is:

Street Address:

519 AIRSTRIP RD SPICEWOOD TX 78669

Consent of Registered Agent

A. A copy of the consent of registered agent is attached.

OR

B. The consent of the registered agent is maintained by the entity.

Article 3 - Management

A. Management of the affairs of the corporation is to be vested solely in the members of the corporation.

OR

B. Management of the affairs of the corporation is to be vested in its board of directors. The number of directors, which must be a minimum of three, that constitutes the initial board of directors and the names and addresses of the persons who are to serve as directors until the first annual meeting or until their successors are elected and qualified are set forth below.

Director 1: **J. RICHARD DIAL**

Title: **Director**

Address: **315 COVENTRY RD SPICEWOOD TX, USA 78669**

Director 2: **S. BRUCE SORGEN**

Title: **Director**

Address: **519 AIRSTRIP RD SPICEWOOD TX, USA 78669**

Director 3: **DANIEL FLUNKER**

Title: **Director**

Address: **307 COVENTRY RD SPICEWOOD TX, USA 78669**

Director 4: **LAWRENCE FFRENCH**

Title: **Director**

Address: **15104 STRADER CIRCLE AUSTIN TX, USA 78734**

Article 4 - Organization Structure

A. The corporation will have members.

or

B. The corporation will not have members.

Article 5 - Purpose

The corporation is organized for the following purpose or purposes:

THE CORP IS FOR THE PUBLIC GOOD OF PEOPLE WHO LIVE IN AND AROUND A

**BURNET COUNTY
WATER SUPPLY CORP.**

Supplemental Provisions / Information

Additional Provisions

Said corporation is organized exclusively for charitable, religious, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to its members, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in these articles.

No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or (b) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

Upon the dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any such assets not so disposed of shall be disposed of by a Court of Competent Jurisdiction of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are organized and operated exclusively for such purposes.

[The attached addendum, if any, is incorporated herein by reference.]

Effectiveness of Filing

A. This document becomes effective when the document is filed by the secretary of state.

OR

B. This document becomes effective at a later date, which is not more than ninety (90) days from the date of its signing. The delayed effective date is:

Organizer

The name and address of the organizer are set forth below.

MARSHA SIHA 17350 STATE HWY 249 #220 HOUSTON TX 77064

Execution

The undersigned affirms that the person designated as registered agent has consented to the appointment. The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument and certifies under penalty of perjury that the undersigned is authorized under the provisions of law governing the entity to execute the filing instrument.

MARSHA SIHA

Signature of organizer.

FILING OFFICE COPY

EXHIBIT 5



Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the attached is a true and correct copy of each document on file in this office as described below:

TOMA INTEGRITY, INC.
Filing Number: 802879506

Certificate of Formation

December 11, 2017

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on October 29, 2019.



A handwritten signature in black ink, appearing to read "Ruth R. Hughs".

Ruth R. Hughs
Secretary of State

Form 202

Secretary of State
P.O. Box 13697
Austin, TX 78711-3697
FAX: 512/463-5709

Filing Fee: \$25



**Certificate of Formation
Nonprofit Corporation**

**Filed in the Office of the
Secretary of State of Texas
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OR

B. Management of the affairs of the corporation is to be vested in its board of directors. The number of directors, which must be a minimum of three, that constitutes the initial board of directors and the names and addresses of the persons who are to serve as directors until the first annual meeting or until their successors are elected and qualified are set forth below.

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Title: **Director**

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Director 2: **S. BRUCE SORGEN**

Title: **Director**

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Title: **Director**

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No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or (b) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

Upon the dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any such assets not so disposed of shall be disposed of by a Court of Competent Jurisdiction of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are organized and operated exclusively for such purposes.

[The attached addendum, if any, is incorporated herein by reference.]

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OR

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Execution

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MARSHA SIHA

Signature of organizer.

FILING OFFICE COPY

EXHIBIT 6

CAUSE NO. 47531

TOMA INTEGRITY, INC.	S	IN THE DISTRICT COURT
<i>Plaintiff</i>	S	
	S	
V.	S	
	S	33RD JUDICIAL DISTRICT
WINDERMERE OAKS WATER SUPPLY CORPORATION	S	
<i>Defendant</i>	S	
	S	
	S	
	S	BURNET COUNTY, TEXAS

FINAL JUDGMENT

On June 15, 2018, the Court heard Plaintiff's and Intervenor-Plaintiff's Motion for Summary Judgment on Open Meetings Claim and Defendant's Amended Motion to Dismiss for Lack of Jurisdiction. On July 23, 2018, the Court signed an Order Granting Plaintiffs' Motion for Summary Judgment in part, and Denying Defendant's Amended Motion to Dismiss. On July 30, 2018, Plaintiffs filed a Supplemental Petition waiving their claims to attorney's fees and costs. On September 19, 2018, the Court signed an Order on Plaintiffs' Objections to Defendant's Summary Judgment evidence.

All parties, together, have filed a Joint Motion For Entry of Final Judgment.

Having considered the Motion, the Court Rules as follows:

The Court Hereby RENDERS Final Judgment for Plaintiffs that Defendant Windermere Oaks Water Supply Corporation (WOWSC) violated Texas Government Code section 551.041 in the WOWSC Board actions on December 19, 2015 and February 22, 2016, as alleged by Plaintiffs.

All other prayers for relief in this case are DENIED.

IT IS SO ORDERED.

SIGNED this 13th Day of November, 2018.



Judge Margaret G. Mirabal
Presiding Judge

EXHIBIT 7



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-19-00005-CV

TOMA INTEGRITY, INC., AND JOHN DIAL, Appellants

V.

WINDERMERE OAKS WATER SUPPLY CORPORATION, Appellee

On Appeal from the 33rd District Court
Burnet County, Texas
Trial Court No. 47531

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Windermere Oaks Water Supply Corporation, a governmental subdivision, posted notices of a public meeting at which Windermere's board authorized the sale of a portion of Windermere's property to a third party. However, the notices failed to include the subject of the prospective sale as required by Section 551.041 of the Texas Government Code and, thus, violated the Texas Open Meetings Act (Act). After the closing of the sale, TOMA Integrity, Inc., and John Dial sued to obtain declarations that Windermere had violated the Act and that the board's authorization was invalid. The 33rd Judicial District Court in Burnet County,¹ Texas, found a violation of the Act, but refused to declare the board's actions invalid.

Windermere does not challenge the finding that it violated the Act. Rather, this appeal is brought by TOMA and Dial, who argue that, while they received this favorable finding, the trial court abused its discretion in failing to void the board's actions. Because we find that (1) a declaration voiding the board's actions was unavailable under the Act and (2) TOMA and Dial's requests relating to past notices are moot, we affirm the trial court's judgment.

“Meetings of governmental bodies generally must be open to the public.” *Tex. State Bd. of Pub. Accountancy v. Bass*, 366 S.W.3d 751, 759 (Tex. App.—Austin 2012, no pet.) (citing TEX. GOV'T CODE ANN. § 551.002). “Section 551.102 provides that: ‘A final action, decision, or vote on a matter deliberated in a closed meeting under this chapter may only be made in an open meeting that is held in compliance with the notice provisions of this chapter.’” *Id.* at 762 (quoting TEX.

¹Originally appealed to the Third Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We follow the precedent of the Third Court of Appeals in deciding this case. *See* TEX. R. APP. P. 41.3.

GOV'T CODE ANN. § 551.102). “The Act’s purposes are to provide public access to and increase public knowledge of governmental decision-making.” *Id.* at 759 (citing *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex. 1991)). To that end, a governmental body, like Windermere, is required to “give written notice of the date, hour, place, and subject of each meeting held by the governmental body.”² TEX. GOV'T CODE ANN. § 551.041. “The intended beneficiaries of the Act are members of the interested public, not individual citizens such as the accountants in this case.” *Bass*, 366 S.W.3d at 759.

In this appeal, it is undisputed that Windermere failed to include the subject matter of the meeting from its public notices issued December 19, 2015, and February 22, 2016, and thus violated the Act. After the board authorization was so obtained, Windermere sold the property to a third party in March 2016. The Act provides that “an action taken by a governmental body in violation of [the Act] is voidable.” TEX. GOV'T CODE ANN. § 551.141. Thus, any “interested person . . . may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.” TEX. GOV'T CODE ANN. § 551.142(a).

In December 2017, TOMA and Dial sued Windermere and prayed that the trial court “reverse the violation of [the Act] and declare void the action the [Windermere] Board took on December 19, 2015[,] to sell [Windermere’s] property and on February 22, 2016[,] to again authorize the sale and authorize officers to sign the closing documents without the required public

²It is undisputed that Windermere is a governmental body that must comply with the Act.

notice.” Although the trial court found Windermere violated the Act, it declined to declare void the board’s actions or reverse the violation.

(1) *A Declaration Voiding the Board’s Actions Was Unavailable Under the Act*

The Act allows for actions “by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation.” TEX. GOV’T CODE ANN. § 551.142(a); *see Bass*, 366 S.W.3d at 760. “There is a split in authority regarding whether [the Act] waives immunity for declaratory judgment actions.” *Calhoun Port Auth. v. Victoria Advocate Publ’g Co.*, No. 13-18-00486-CV, 2019 WL 1562003, at *3 n.4 (Tex. App.—Corpus Christi Apr. 11, 2019, no pet.) (mem. op.). The Austin Court of Appeals has determined that the Act “set[s] the boundaries of [its] waiver[] of immunity to the express relief provided in the statute[]—injunctive and mandamus relief—and [does not] extend[] the scope of waiver to include the declaratory relief.” *Id.* (alterations in original) (quoting *City of New Braunfels v. Carowest Land, Ltd.*, 549 S.W.3d 163, 173 (Tex. App.—Austin 2017, pet. filed)).³

The Act is designed to provide an “immediate remedy” for violations. *Cornyn v. City of Garland*, 994 S.W.2d 258, 267 (Tex. App.—Austin 1999, no pet.). TOMA and Dial’s petition did not seek immediate mandamus or injunctive relief. Rather, after the property was sold, they sought declaratory relief that the board’s past actions were void. Such relief is unavailable. *Id.*

³*But see Town of Shady Shores v. Swanson*, 544 S.W.3d 426, 437 n.1 (Tex. App.—Fort Worth 2018, pet. filed) (“[A]lthough [the Act] does not broadly waive immunity for all declaratory judgment actions, it does waive immunity for a declaration that an action taken in violation of [the Act] is void.”).

(2) *TOMA and Dial's Requests Relating to Past Notices Are Moot*

Even assuming the trial court could entertain TOMA and Dial's request to declare the board's actions void under the circumstances of this case and the precedent of the Austin Court of Appeals, nothing required the trial court to do so. "TOMA expressly provides '[a]n action by a governmental body in violation of this chapter is voidable'—not void or void ab initio." *Love Terminal Partners v. City of Dallas*, 256 S.W.3d 893, 897 (Tex. App.—Dallas 2008, no pet.) (alteration in original) (quoting TEX. GOV'T CODE ANN. § 551.141). "The terms have distinct legal meanings." *Id.* (citing *Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd.*, 179 S.W.3d 589, 618 (Tex. App.—Austin 2005, pet. denied)). "If an action is void or void ab initio, the transaction is a nullity." *Id.* "If, however, conduct is merely voidable, the act is valid until adjudicated and declared void." This is because a violation of the Act "does not equate to a failure to properly execute the contract." *Hous. Auth. of City of Dallas v. Killingsworth*, 331 S.W.3d 806, 812 (Tex. App.—Dallas 2011, pet. denied). Thus, the board's approval of and actions to effectuate the sale "remain[] valid 'until adjudicated and declared void.'" *Id.* at n.5 (quoting *Love Terminal Partners, L.P.*, 256 S.W.3d at 897 (citing *Swain v. Wiley College*, 74 S.W.3d 143, 146 (Tex. App.—Texarkana 2002, no pet.) ("A 'voidable' act operates to accomplish the thing sought to be accomplished until the fatal vice in the transaction has been judicially ascertained and declared.")); see *Bass*, 366 S.W.3d at 761 ("[P]roving that a meeting violated the Act does not necessarily render voidable all related subsequent actions by a governmental body.").

"Thus, even a contract procured by a potentially voidable act is still a valid contract." *Id.*; see *Carowest*, 549 S.W.3d at 173 (concluding that, while the trial court had jurisdiction under the

Act, it lacked subject-matter jurisdiction to declare a contract void following violations of the Act). Consequently, as explained below, TOMA and Dial's requests that the trial court reverse the board's past acts are moot.

Here, long before suit was filed seeking relief under the Act, Windermere's property had been sold by the board to a third party not included in this lawsuit. These facts raise the issue of mootness. "The mootness doctrine implicates subject[-]matter jurisdiction [and] 'prevents courts from rendering advisory opinions.'" *In re Smith Cty.*, 521 S.W.3d 447, 453 (Tex. App.—Tyler 2017, orig. proceeding) (citing *City of Dallas v. Woodfield*, 305 S.W.3d 412, 416 (Tex. App.—Dallas 2010, no pet.)). "A case becomes moot if . . . the issues presented are no longer 'live' . . . i.e., there is no action on the merits that a court could take that would affect the parties' rights or interests." *Cook v. Hedtke*, No. 03-17-00663-CV, 2018 WL 1660078, at *2, 3 (Tex. App.—Austin Apr. 6, 2018, no pet.) (mem. op.) (citing *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001)).

"In *Cornyn*, the Austin Court held that a claim relating only to improper notices of past meetings suffers from 'apparent mootness.'" *Rubalcaba v. Raymondville ISD*, No. 13-14-00224-CV, 2016 WL 1274486, at *2 (Tex. App.—Corpus Christi Mar. 31, 2016, no pet.) (mem. op.) (quoting *Cornyn v. City of Garland*, 994 S.W.2d 258, 267 (Tex. App.—Austin 1999, no pet.)). There, as here, plaintiffs alleged that the governmental body violated the Act by failing to sufficiently describe the subject to be discussed in its meeting and sought a declaration establishing the same. *Cornyn*, 994 S.W.2d at 266. The City of Garland "pleaded that the [plaintiffs'] claims were moot insofar as they related to the notices posted previously for past city council meetings and required an advisory opinion." *Id.* The Austin Court of Appeals agreed. *Id.* It has since

reiterated its opinion that requests for relief like the one sought by TOMA and Dial are moot because “[a] decision simply addressing whether a . . . violation [of the Act] had occurred in the past would have no practical effect on the parties.” *Cook*, 2018 WL 1660078, at *3 (citing *In re Smith Cty.*, 521 S.W.3d 447, 454–55 (Tex. App.—Tyler 2017, orig. proceeding); *Brownsville Indep. Sch. Dist. Bd. of Trs. v. Brownsville Herald*, 831 S.W.2d 537, 538 (Tex. App.—Corpus Christi 1992, no writ)).⁴

We affirm the trial court’s judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: June 7, 2019
Date Decided: June 21, 2019

⁴*See Fite v. Port City State Bank*, 582 S.W.2d 210, 211 (Tex. App.—Houston [1st Dist.] 1979, no writ) (“Texas courts have consistently held that an appeal of the denial of a temporary injunction to restrain the sale of property becomes moot where the property is sold bona fide before there is an adjudication of the appeal.”); *see also Schulze v. EMC Mortg. Corp.*, No. 04-08-00010-CV, 2008 WL 2116277, at *1 (Tex. App.—San Antonio May 21, 2008, no pet.) (mem. op.); *Ranchos Real Developers, Inc. v. Cty. of El Paso*, No. 08-04-00014-CV, 2004 WL 1427376, at *1 (Tex. App.—El Paso June 24, 2004, no pet.) (mem. op.).

EXHIBIT 8

FILE COPY

RE: Case No. 19-0731

DATE: 12/13/2019

COA #: 06-19-00005-CV

TC#: 47531

STYLE: TOMA INTEGRITY, INC v. WINDERMERE OAKS WATER SUPPLY
CORP.

Today the Supreme Court of Texas denied the petition
for review in the above-referenced case.

MR. BILL ALESHIRE

ALESHIRELAW, P.C.

700 LAVACA STREET, SUITE 1400

AUSTIN, TX 78701

* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 19-0731

DATE: 12/13/2019

COA #: 06-19-00005-CV

TC#: 47531

STYLE: TOMA INTEGRITY, INC v. WINDERMERE OAKS WATER SUPPLY
CORP.

Today the Supreme Court of Texas denied the petition
for review in the above-referenced case.

MR. MICHAEL ALLAN GERSHON
LLOYD, GOSSELINK, BLEVINS, ROCHELLE &
TOWNSEND, P.C.

816 CONGRESS, SUITE 1900
AUSTIN, TX 78701

* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 19-0731

DATE: 12/13/2019

COA #: 06-19-00005-CV

TC#: 47531

STYLE: TOMA INTEGRITY, INC v. WINDERMERE OAKS WATER SUPPLY
CORP.

Today the Supreme Court of Texas denied the petition
for review in the above-referenced case.

MR. JOSEPH R. LARSEN
GREGOR CASSIDY PLLC
700 LOUISIANA ST., SUITE 3950
HOUSTON, TX 77002-2859
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FILE COPY

RE: Case No. 19-0731

DATE: 12/13/2019

COA #: 06-19-00005-CV

TC#: 47531

STYLE: TOMA INTEGRITY, INC v. WINDERMERE OAKS WATER SUPPLY
CORP.

Today the Supreme Court of Texas denied the petition
for review in the above-referenced case.

MS. DEBBIE AUTREY
CLERK, SIXTH COURT OF APPEALS
100 N. STATE LINE AVE., SUITE 20
TEXARKANA, TX 75501
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 19-0731

DATE: 12/13/2019

COA #: 06-19-00005-CV

TC#: 47531

STYLE: TOMA INTEGRITY, INC v. WINDERMERE OAKS WATER SUPPLY
CORP.

Today the Supreme Court of Texas denied the petition
for review in the above-referenced case.

DISTRICT CLERK BURNET COUNTY
BURNET COUNTY COURTHOUSE ANNEX
1701 E POLK ST, SUITE 90
BURNET, TX 78611-2757
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 19-0731

DATE: 12/13/2019

COA #: 06-19-00005-CV

TC#: 47531

STYLE: TOMA INTEGRITY, INC v. WINDERMERE OAKS WATER SUPPLY
CORP.

Today the Supreme Court of Texas denied the petition
for review in the above-referenced case.

JOSE E. DE LA FUENTE
LLOYD GOSSELINK ROCHELLE & TOWNSEND,
P.C.
816 CONGRESS AVENUE, SUITE 1900
AUSTIN, TX 78701-2478
* DELIVERED VIA E-MAIL *

EXHIBIT 9

Transcript of the Testimony of
Joseph Gimenez

Date:

November 19, 2019

Case:

RENE FFRENCH vs FRIENDSHIP HOMES & HANGARS

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CAUSE NO. 48292

RENE FFRENCH, JOHN RICHARD (IN THE DISTRICT COURT
DIAL and STUART BRUCE (
SORGEN, each on his own (behalf and as a
representative of (WINDERMERE OAKS WATER
SUPPLY CORPORATION, (

Plaintiffs, (

VS. (BURNET COUNTY, TEXAS

FRIENDSHIP HOMES & HANGARS, (LLC, WINDERMERE OAKS WATER
SUPPLY CORPORATION and its (Directors WILLIAM EARNEST,
THOMAS MICHAEL MADDEN, (DANA MARTIN, ROBERT MEBANE
and PATRICK MULLIGAN, (

Defendants. (33RD JUDICIAL DISTRICT

VIDEOTAPED ORAL DEPOSITION OF

JOSEPH J. GIMENEZ

NOVEMBER 19, 2019

VIDEOTAPED ORAL DEPOSITION OF JOSEPH J. GIMENEZ,
produced as a witness at the instance of the
Plaintiffs, and duly sworn, was taken in the
above-styled and numbered cause on the 19th day of
November, 2019, from 10:28 a.m. to 4:29 p.m., before
RENEA SEGGERN, CSR in and for the State of Texas,
reported by machine shorthand at the offices of Lloyd
Gosselink Rochelle & Townsend, P.C., 816 Congress

1 Avenue, Suite 1900, Austin, Texas, pursuant to the
2 Texas Rules of Civil Procedure and the provisions
3 stated on the record or attached hereto.
4

5 A P P E A R A N C E S

6 FOR THE PLAINTIFFS:

7 THE LAW OFFICE OF KATHRYN E. ALLEN, PLLC
8 Ms. Kathryn E. Allen
9 114 W. 7th Street
10 Suite 1100
11 Austin, Texas 78701
12 (512) 495-1400
13 kallen@keallenlaw.com

14 FOR THE DEFENDANT WINDERMERE OAKS WATER SUPPLY
15 CORPORATION:

16 LLOYD GOSSELINK ROCHELLE & TOWNSEND, P.C.
17 Mr. Jose E. de la Fuente
18 Ms. Lindsay Killeen
19 816 Congress Avenue
20 Suite 1900
21 Austin, Texas 78701
22 jdelafuente@lglawfirm.com
23 lkilleen@lglawfirm.com

24 FOR THE DEFENDANT WOWSC DIRECTORS:

25 ENOCH KEVER, PLLC
Ms. Shelby L. O'Brien
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5918 W. Courtyard Drive
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Austin, Texas 78730
(512) 615-1225
sobrien@enochkever.com

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A P P E A R A N C E S, Continued
FOR THE DEFENDANT FRIENDSHIP HOMES & HANGARS, LLC:
ALMANZA, BLACKBURN, DICKIE & MITCHELL, L.L.P.
Ms. Molly Mitchell
2301 Capital of Texas Highway
Building H
Austin, Texas 78746
(512) 474-9486
mollym@abdmlaw.com

ALSO PRESENT:
Mr. Manuel Martin, Videographer
Mr. William Earnest
Mr. Bruce Sorgen
Mr. Rene Ffrench

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P R O C E E D I N G S

THE VIDEOGRAPHER: Today's date is
November 19th, 2019 and the time is 10:39 [sic] a.m.
We are on the record for the oral videotaped
deposition of Joe Gimenez.

JOSEPH GIMENEZ,
having been first duly sworn, testified as follows:

EXAMINATION

BY MS. ALLEN:

Q Could you please introduce yourself for the
ladies and gentlemen of the jury and say your name
exactly the way you want me to say it.

A Okay. I'm Joe Gimenez.

Q Okay, and is it accurate that you are
currently the president of the board of directors of
the Windermere Oaks Water Supply Corporation?

A Yes.

Q Are you aware that under the governing
documents the entity is required to operate as a
cooperative? Do you know that?

A No.

Q Okay. Do you know what a cooperative is?

A No.

Q I'm going to call it a cooperative because
that's how it is supposed to operate; so if I talk

1 Q (BY MS. ALLEN) Okay, the contract that
2 you're talking about, Exhibit 14, that's the contract
3 that was the subject of one of the blatant open
4 meetings act violations; was it not?

5 MR. DE LA FUENTE: Object to form.

6 MS. O'BRIEN: Object to form.

7 A I don't know how that would work. I don't
8 know. I'm not an attorney.

9 Q (BY MS. ALLEN) You don't know how that
10 works?

11 A No, ma'am.

12 Q Do you know any of the circumstances that
13 surround this contract that is Exhibit 14?

14 MR. DE LA FUENTE: Object to form.

15 A Say that again. Do I know any?

16 Q (BY MS. ALLEN) Do you know the circumstances
17 that gave rise to Exhibit 14?

18 MR. DE LA FUENTE: Object to form.

19 MS. O'BRIEN: Object, form.

20 A No, I don't know those circumstances.

21 Q (BY MS. ALLEN) Do you know whether or not it
22 was purportedly approved at a meeting that violated
23 TOMA?

24 A Do I know if it was approved, purportedly
25 approved?

1 Q Was it purportedly approved at a meeting that
2 violated TOMA, that is, are there meeting minutes that
3 reflect a discussion of Exhibit 14 for a meeting where
4 it was not posted on the notice?

5 A I'm all confused now. I don't know.

6 Q You don't know?

7 A No.

8 Q Okay. Did somebody suggest to you -- let me
9 say it this way. Did the board reach the conclusion
10 that the water supply company was somehow obligated to
11 convey the .5151 acres?

12 A That it was -- to convey -- that this
13 board -- okay.

14 Q That any board.

15 A Okay.

16 Q That the water supply company was obligated
17 to convey .5151 acres?

18 A Well, the original contract says 4.3 and I
19 think it was a deficiency of the deed that it said
20 3.86 at some point.

21 Q Well, so let's take that one step at a time.
22 Do you have any earthly idea whether Exhibit 14 is or
23 is not a valid contract -- valid and binding and
24 enforceable?

25 MR. DE LA FUENTE: Objection to form.

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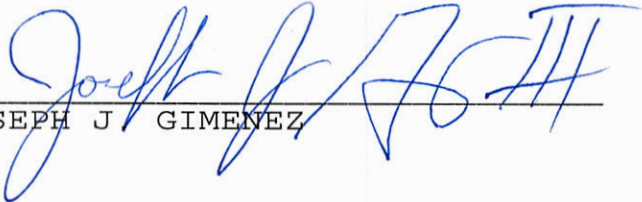
CHANGES AND SIGNATURE

WITNESS NAME: JOSEPH J. GIMENEZ

DATE OF DEPOSITION: NOVEMBER 19, 2019

PAGE	LINE	CHANGE	REASON
119	18-19	"100 Appraisers"	I tried to convey that 100 different appraisers would generate 100 different appraisals.

I, JOSEPH J. GIMENEZ, have read the foregoing deposition and hereby fix my signature that same is true and correct, except as noted above.



JOSEPH J. GIMENEZ

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STATE OF Texas)
COUNTY OF Burnet)

Before me, Wendie Phillips, on this day Dec. 9, 2019
personally appeared JOSEPH J. GIMENEZ, known to me (or
proved to me under oath or through Texas driver license) to
be the person whose name is subscribed to the
foregoing instrument and acknowledged to me that they
executed the same for the purposes and consideration
therein expressed.

Given under my hand and seal of office this
9 day of Dec, 2019.

Wendie Phillips
NOTARY PUBLIC IN AND FOR
THE STATE OF Texas

