

CAUSE NO. 48292

RENE FFRENCH, JOHN RICHARD	§	IN THE DISTRICT COURT
DIAL, AND STUART BRUCE SORGEN,	§	
INTERVENOR PLAINTIFFS	§	
	§	
v.	§	
	§	
FRIENDSHIP HOMES & HANGARS,	§	
LLC, WINDERMERE OAKS WATER	§	
SUPPLY CORPORATION, AND ITS	§	33RD JUDICIAL DISTRICT
DIRECTORS WILLIAM EARNEST,	§	
THOMAS MICHAEL MADDEN, DANA	§	
MARTIN, ROBERT MEBANE, PATRICK	§	
MULLIGAN, JOE GIMENEZ, MIKE	§	
NELSON, AND DOROTHY TAYLOR,	§	
DEFENDANTS	§	BURNET COUNTY, TEXAS

**DEFENDANTS WINDERMERE OAKS WATER SUPPLY CORPORATION
DIRECTORS WILLIAM EARNEST, THOMAS MICHAEL MADDEN, DANA MARTIN,
ROBERT MEBANE, PATRICK MULLIGAN, JOE GIMENEZ, MIKE NELSON, AND
DOROTHY TAYLOR'S TRADITIONAL AND NO-EVIDENCE MOTION FOR
SUMMARY JUDGMENT**

Under Texas Rule of Civil Procedure 166a(c) and (i), Defendants Windermere Oaks Water Supply Corporation Directors William Earnest, Thomas Michael Madden, Dana Martin, Robert Mebane, Patrick Mulligan, Joe Gimenez, Mike Nelson, and Dorothy Taylor ("Directors") file this Traditional and No-Evidence Motion for Summary Judgment ("Motion"), asking this Court to render a take-nothing judgment in the Directors' favor.

INTRODUCTION/GROUNDS FOR SUMMARY JUDGMENT

The Plaintiffs' entire lawsuit is premised on their belief that the Windermere Oaks Water Supply Corporation ("WOWSC") sold land to a former sitting director for less money than it was worth. In reality, the Business Organizations Code authorizes non-profit corporations to enter into contracts with sitting directors when certain conditions are met. And WOWSC has the absolute right to sell its land, with no statutory restriction on price. Additionally, the land at issue has been

instead. The Plaintiffs' personal feelings about the transaction does not make the 2019 Board's actions ultra vires and illegal so as to potentially open these Directors up to personal liability.²⁶

4. The Directors did not act ultra vires and illegally in voting for WOWSC to advance expenses to the sued Directors.

The Plaintiffs complain that the Directors are receiving “illegal distributions” by the WOWSC advancing defense costs in this lawsuit. Petition at 5-6. As a matter of law, the 2019 Board did not act ultra vires or illegally in making this business decision, nor are the Director recipients accepting “illegal” distributions as suggested by the Plaintiffs.

WOWSC through the 2019 Board voted to advance defense costs to the Directors who the Plaintiffs sued, as is expressly authorized by Texas Business Organizations Code, Chapter 8. Corporations routinely vote to defend directors who are sued in their capacity as corporation directors, as expressly allowed by Chapter 8. And for good reason: if corporations did not, they would have difficulty recruiting anyone to take on a board position (and particularly a volunteer board position like here). *See In re Auguilar*, 344 S.W.3d 41, 43-44 (Tex. App.—El Paso 2011, orig. proceeding) (in suit by corporation against for-profit director alleging breach of fiduciary duties, advancement of defense costs by the corporation was required because “indemnification encourages corporate service by protecting an official’s personal financial resources from depletion by the expenses incurred during litigation that results from the official’s service”); *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005) (“Advancement is an especially

²⁶ The Plaintiffs point to the ratification subchapter of Chapter 22. There was no corporate “ratification” here in the meaning of the chapter. There was instead an amended, restated, and superseded agreement (the 2019 Transaction) which contained different terms from the Original Transaction. Chapter 22 also does not set forth a mechanism for a derivative claim against Directors by members, nor sets forth a provision authorizing money damages against a Director. *See, e.g.*, BOC § 22.512. The Directors read the Plaintiffs’ references to Chapter 22 as concerning their claim against WOWSC to enjoin or “set aside” the transactions.

important corollary to indemnification” because it provides corporate officials with immediate interim relief from the burden of paying for a defense.).

Chapter 8 of the Business Organizations Code authorizes advancement of defense costs to directors and officers of a corporation. Chapter 8 applies to all domestic entities or organizations subject to the laws of this State, except for general partnerships and limited liability companies. BOC §§ 8.001(2), 8.002. Thus, it applies to WOWSC, a non-profit corporation. The chapter provides the following framework regarding advancement of defense costs:

- An enterprise *may* pay or reimburse reasonable expenses incurred by a ***present governing person*** who was, is, or is threatened to be made a defendant in a proceeding in advance of the final disposition of the proceeding ***without making the determinations required under section 8.101(a)*** when the enterprise receives: (1) a written affirmation by the person of the person’s good faith belief that the person has met the standard of conduct necessary for indemnification under this chapter; and (2) a written undertaking by or on behalf of the person to repay the amount paid or reimbursed if the final determination is that the person has not met that standard or that indemnification is prohibited by Section 8.102. BOC § 8.104.²⁷ A resolution of the board or an agreement that requires the payment or reimbursement permitted under this section authorizes that payment or reimbursement after the enterprise receives an affirmation and undertaking described by Subsection (a). *Id.*
- A corporation may also advance expenses to a person who is ***not a governing person*** as provided by general or specific action by the corporation’s board, contract, or common law. *Id.* § 8.105. Notwithstanding any authorization or determination specified in Chapter 8, an enterprise may pay or reimburse, in advance of the final disposition in a proceeding and on terms the enterprise considers appropriate, reasonable expenses incurred by a former governing person who was, is, or is threatened to be made a defendant in the proceeding. *Id.*²⁸

²⁷ The determinations under section 8.101(a) are that the person acted in good faith, reasonably believed they were acting in the best interest of the corporation, that the amount of expenses is reasonable, and that indemnification should be paid. *Id.* § 8.101(a).

²⁸ Chapter 8 also includes provisions regarding indemnification of a judgment. If a director prevails, indemnification by the corporation is mandatory. *Id.* § 8.051. Even if the director does not prevail, permissive indemnification can be appropriate. *Id.* §§ 8.101-8.102. At this point, the WOWSC has not indemnified any judgment against the directors because none has been rendered.

Thus, under this framework, WOWSC may advance expenses to *current* Directors who fill out the statements required by section 8.104. *Id.* § 8.104. And WOWSC may advance expenses to *former* Directors without the necessity of the statements required by section 8.104. *Id.* § 8.105.

The 2019 Board voted to indemnify and advance expenses to the sued Directors. Ex. 8-Z, 8-AA, 5 through 8. The 2019 Board did so because they believed that if WOWSC did not defend its volunteer directors when they are sued in their capacity as Board members, it would be very difficult to find volunteers to serve on the Board. Ex. 5 through 8. Indeed, the Plaintiffs’ serial lawsuits against WOWSC and its Directors, including claims that advancement of expenses are “illegal distributions,” are having that effect. In the most recent election, only one new person was willing to step up to serve on the Board. Ex. 6, 8-CC. If the WOWSC did not defend its directors, it is easy to imagine no one being willing to serve at all. Each of the Directors filled out the statements described by section 8.104—even the former Directors, though this was not legally required for them. Ex. 8-BB.

There is nothing “illegal” about these distributions, which must be repaid if certain conditions are met as set forth in Chapter 8. Ex. 8-BB. Even though the Plaintiffs complain (improperly) that the Directors were “unfaithful fiduciaries,” it is when a director is being accused of breaching fiduciary duties that advancement is most appropriate. *Aguilar*, 344 S.W.3d at 47 (“Advancement claims are frequently granted when, as in this case, the corporation is suing an official for breach of fiduciary duty. The corporation cannot defend against the advancement claim on the ground that it now believes the fiduciary to have been unfaithful because it is in those very cases that the right to advancement attaches most strong.”) (citations omitted). The 2019 Board and recipient Directors complied with Chapter 8 and did not act ultra vires—let alone illegally—so as to open them up to personal liability for advancement of defense costs.