CAUSE NO. 48292

RENE FFRENCH, JOHN RICHARD DIAL, AND STUART BRUCE SORGEN, INTERVENOR PLAINTIFFS	§	IN THE DISTRICT COURT
v.	§	
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, MIKE NELSON, AND DOROTHY TAYLOR, DEFENDANTS	§	33RD JUDICIAL DISTRICT
	§	BURNET COUNTY, TEXAS

PLAINTIFFS' RESPONSE TO THE DIRECTOR DEFENDANTS' TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

COME NOW PLAINTIFFS RENE FFRENCH, JOHN RICHARD DIAL AND STUART BRUCE SORGEN ("Plaintiffs") and, subject to and without waiving their OBJECTIONS TO SUMMARY JUDGMENT EVIDENCE, file this their RESPONSE TO THE DIRECTOR DEFENDANTS' TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT and would show the Court as follows.

I.

Summary of Bases for Denial of Motion

The Director Defendants' Motion should be denied on the following bases, each of which is discussed in detail below:

- Plaintiffs have capacity to bring their claims. The Director Defendants have not denied Plaintiffs' capacity under oath.

- Proof of special circumstances (i.e., an illegal act) is not required to hold the Director Defendants personally liable for the consequences of their own conduct.

- Even if proof of an illegal act were required, the record here establishes that the WSC's ultra vires transfers were illegal and that the Director Defendants themselves engaged in illegal acts. Alternatively, Plaintiffs' summary judgment proof raises fact issues that preclude the entry of summary judgment.

- The doctrine of judicial nonintervention in the internal affairs of a private voluntary association does not apply to a suit against a corporation for acts that are beyond the scope of its expressed purpose or to a suit against corporate directors for exceeding their authority.

- None of Plaintiffs' claims is moot or is barred by res judicata. Alternatively, Plaintiffs' summary judgment proof raises fact issues that preclude the entry of summary judgment.

- Section 16.033, Tex. Civ. Prac. & Rem.Code, does not apply.

- None of the so-called "safe harbor" doctrines or provisions asserted by the Director Defendants preclude Plaintiffs' recovery herein. Alternatively, Plaintiffs' summary judgment proof raises fact issues that preclude the entry of summary judgment.

- Plaintiffs' summary judgment proof raises fact issues that preclude the entry of summary judgment on their request for attorneys' fees.

II.

Summary of the Argument

In the spring of 2011, Dana Martin and her partner Malcolm Bailey made a play in a down market to acquire 7 acres of the WSC's airport property for a bargain price before anyone else found out it might be for sale. The WSC directors refused to take the bait. Their position, communicated both privately and publicly, reflected their awareness of the Board's responsibilities and a commitment to the WSC membership from which there was no public departure for many years. First, that the WSC should not sell its property under inopportune conditions. Second, that the value of the airport property's unique development potential should inure to the benefit of the WSC and its members through a

higher price. Third, that the Board's fiduciary responsibility requires that before property is sold the directors must ascertain the market value of the property, advertise it for sale to multiple buyers and accept the highest offer.

For years, the Board (which over that time included almost all of them involved in the Martin transaction) stood firm on these matters. When the wastewater treatment plant was moved in 2014, they made the judgment that a sale of the entire 11-acre parcel would be more advantageous than a piecemeal disposition. They acknowledged publicly and among themselves that they should not go forward without reliable information concerning the property they proposed to sell, and they agreed to get it. They affirmed to the membership that when they were ready to sell the property, they would advertise it for sale to multiple buyers and pick the "best offer."

Martin had her eye on the WSC's airport property for years before she became a WSC director in the spring of 2015. Less than eight months later, Mulligan, Madden and Mebane voted behind closed doors to give Martin the deal she had been angling for – but had been unable to secure -- since spring 2011. They all did virtually everything the Board had consistently committed it should not, and would not, do. They violated the law in the process.

As a result, the WSC disposed of valuable airport real estate worth more than $700,000 to a sitting director for only $200,000 and rendered its remaining land almost unmarketable. The corporation stayed in debt that it has not paid off even now. There have been other consequences as well.

Members organized and spent their own money to try to restore the property to the WSC. The WSC's counsel concluded the members were right and the WSC's retained valuation expert measured the total damage at a million dollars or more. There was a

Board election before anything could be done. The directors closed ranks and spent a great deal more of the members' money to defend themselves from personal liability for their actions.

Already in the throes of a lawsuit involving the transfer of 3.8 acres of WSC land, the 2019 Board conveyed the WSC's improved Piper Lane taxiway tract to Martin for no consideration and in violation of applicable law. They claimed with a straight face they thought this would prompt the Plaintiffs to dismiss their lawsuit.

Texas law does not protect or exculpate corporate fiduciaries who engage in such misconduct. The Director Defendants have prevented the WSC from pursuing them and now assert there is nothing the membership can do about it. The Texas Legislature has said otherwise. Plaintiffs have properly invoked the statutory mechanism. This Response demonstrates that they are entitled to a trial on their claims for recovery damages against the Director Defendants for the injuries they have caused.

III.

The Summary Judgment Proof

This Response is supported in part by the deposition excerpts and other exhibits attached hereto and by the materials incorporated herein by reference.

IV.

The Facts

The following matters are undisputed or are reflected in the summary judgment proof.

The Players

This is to provide an overview of each Director Defendants' participation in the events giving rise to the dispute.

Dana Martin

Dana Martin is a pilot and a long-time member of the Spicewood Airport community. She is a licensed real estate professional with 40 years of experience, more than 20 years of which has involved buying and selling real estate in the Spicewood, Texas area.[1] She has been involved in more real estate transactions than she can count as a party or a broker.[2] She and her partner Malcolm Bailey developed Windermere Airpark I and II, the original hangar lot subdivisions in the Spicewood Airport. She has fingers in virtually every pie in the Spicewood area. She set her sights on the WSC's airport property long before she became a director in 2015. When she joined the inner circle, she learned just what she needed to do.

Pat Mulligan

Pat Mulligan holds himself out as a long-time CEO and business owner. He was elected to the WSC Board in 2006 and was a director and President of the Board for most of the ten years that followed. As Board President, he signed the Bylaws pursuant to which the WSC operated at the time of the events giving rise to this dispute. Mulligan knew when Dana Martin became a director that she had a conflict of interest. He foresaw that she would try to take advantage of her position.

Bill Earnest

Bill Earnest is a former commercial airlines pilot. He claims to have been one of a select few to fly the U-2 spy plane. He was elected to four terms as WSC director and served as Board Vice President. Until Martin came on the Board, the other directors

[1] Martin at 71-2 (Exhibit 6).

[2] Martin at 73 (Exhibit 6).

looked to Earnest on matters involving the airport. He did not attend the December 19, 2015 meeting and claims he knew nothing about the Martin transaction for some time. He resigned from the Board shortly after the transaction closed in March 2016. He was on the Board when the 2019 settlement with Martin was approved. He resigned again shortly thereafter.

Dorothy Taylor

Dorothy Taylor is a founding member of the Central Texas Water Coalition, a nonprofit organization that advocates for the preservation of the Highland Lakes. Taylor has been a WSC director off and on over much of the past 10 years. She was defeated by Martin in the 2015 director election and was not on the Board when the contract was approved on December 19, 2015. She learned of it after the transaction closed and went to members of the community suggesting that something should be done. When Earnest resigned, the others appointed Taylor to fill the vacancy. She stopped complaining about the transaction after that.

Mike Madden

Mike Madden has been involved with WSC matters since 2006, when he served on a Board committee that recognized the unique development potential of the WSC's airport property. He approved the relocation of the wastewater treatment facilities to enable the WSC to have the full advantage of the financial benefits of its holdings. He took the required TOMA training course and accepted responsibility in 2014 and 2015 for keeping the community informed through meeting notices and minutes.

Bob Mebane

Bob Mebane became a WSC director and President of the Board in the spring of 2015. Before that, he was president of the Windermere Oaks Property Owners Association.

He knew the Board had committed for years to take the steps required for the WSC to maximize the value received from its land. When he became Board President, he set a course in the opposite direction. He did and said what was needed to stay the course.

Joe Gimenez

Joe Gimenez is a promoter; he performs public relations and marketing services. After a failed run in 2018, he was elected to the Board and became President in 2019. He took control over the ongoing effort to recover the WSC's property or pursue other relief against Martin and Friendship. By the time he was done, the WSC had transferred even more airport land to Martin, had compromised the marketability of its remainder tract and had released Martin from all accountability. Under his leadership, the WSC has spent hundreds of thousands of dollars to defend conduct its own lawyers say is illegal.

Mike Nelson

Mike Nelson is an electrical engineer. He became a WSC director in 2018 and has been on the Board continuously since then.[3] He claims to have initiated the effort in late 2018 to obtain an independent forensic appraisal of the property sold to Martin that all parties could rely on. He approved the appraiser and scope of work recommended by WSC counsel. He reviewed the finished product and presented it to the WSC membership without reservation. He approved the demand letter and other efforts by WSC counsel done in reliance on the forensic appraisal. In 2019, he disregarded the opinions of the WSC's retained expert opted to move forward based on his personal valuation analysis.

The Windermere Oaks Water Supply Corporation

[3] Nelson at 5 (Exhibit 10).

The WSC is a nonprofit corporation organized under the authority of Chapter 67 of the Texas Water Code.[4] Its stated corporate purposes are to furnish a water supply or sewer service, or both, to its customers and to provide a flood control or drainage system.[5] Pursuant to its formation document, the WSC has no power to engage in activities or use its assets in a manner that are not in furtherance of the legitimate business of a water supply cooperative or sewer service cooperative as recognized by 1434a and Internal Revenue Code 501(c)(12)(A).[6]

The WSC claims tax exempt status under Section 501(c)(12).[7] As a 501(c)(12) organization, the WSC is required to be organized and to operate exclusively for the purpose of providing specific services (here, water supply and sewer service) to its membership approximately at cost and on a mutual basis.[8] The WSC must use its income solely to cover losses and expenses of operations, with any excess being returned to the members or retained to cover reasonably anticipated future losses and expenses.[9] It is not supported by gifts, grants or contributions. To maintain its tax-exempt status, at least 85% of the WSC's revenue must be derived from sales of services to its customers.[10]

The WSC is subject to the Texas Open Meetings Act ("TOMA") and the Texas Public Information Act.[11]

The Lay of the Land

[4] Exhibit 14, (DX 151) [FHH at 68 (Exhibit 13)] at art. 2. Article 1434a is the predecessor to Chapter 67.
[5] Exhibit 14, Article 4.
[6] Exhibit 14, Article 6.
[7] Mebane at 22 (Exhibit 8), Exhibit 16 (DX 3), Form 990 (2015); Exhibit 17 (DX 4), Form 990 (2016); Exhibit 18, Form 990 (2018).
[8] IRS Publication 557 (Rev. February 2021) at 53.
[9] *Id.*
[10] 26 U.S.C. §501(c)(12).
[11] Exhibit 15 (DX 152, the Bylaws, art. 2.

For many years prior to the events giving rise to this controversy, the Windermere Oaks Water Supply Corporation ("WSC") operated its wastewater treatment plant on approximately 4 acres of an 11-acre tract[12] it owned at the Spicewood Airport located on the west side of the Piper Lane taxiway.[13] The remainder of the tract was vacant land, except for a small parcel used by property owners in Windermere Oaks to store boat trailers and similar items.

The WSC also owned a small parcel on the east side of the Piper Lane taxiway.[14] Prior to the relocation of the wastewater treatment plant, the WSC maintained underground utility lines on this tract.[15]

Until 2019, the WSC also owned the land on which the western portion of the paved Piper Lane taxiway and setback area are (and always have been) located.[16] The Piper Lane taxiway is the main aircraft thoroughfare from that portion of the airport community to the runway.[17] Spicewood Aviation and/or Windermere Airpark have purported to grant those who pay dues and fees to the Spicewood Airport & Pilots Association the right to use their Piper Lane taxiway easement.[18] The WSC is not a member of the Spicewood Airport & Pilots Association,[19] but before the Board gave Martin the land in 2019 neither the WSC

[12] The relative location of these tracts and other property referred to herein is illustrated on Exhibit 19, which is a demonstrative provided for the Court's convenience.
[13] Exhibit 20 (DX 38) [authenticated by Martin at 38 (Exhibit 6)] is an aerial photograph depicting the area prior to the relocation of the wastewater treatment plant. Exhibit 21 (DX 39) [authenticated by Martin at 38 (Exhibit 6)] depicts the area after the plant was moved outside the airport.
[14] Earnest at 130-1 (Exhibit 4).
[15] Earnest at 201 (Exhibit 4).
[16] Earnest at 144 (Exhibit 4).
[17] In 1999, the WSC granted a nonexclusive easement to Spicewood Aviation, Inc. and Windermere Airpark, LLC for the purpose, inter alia, of "taxiing, ingress, egress and parking of airplanes." Exhibit 22 is a true and correct copy of the recorded Easement Agreement. See also Earnest at 210 (Exhibit 4) – aircraft coming from the WSC's 11-acre tract must travel on the Piper Lane taxiway to reach the runway.
[18] Martin Declaration of 10.30.2020 at para. 7 (Exhibit 1 to the Director Defendants' Motion).
[19] Earnest at 208 (Exhibit 4).

nor its successor in interest needed anyone else's permission to use the Piper Lane taxiway.[20]

Highest and Best Use for Hangar Development

In 2006, the WSC's Board made formal efforts to investigate options for the disposition of 3 parcels of vacant WSC land. The vacant acreage in the airport next to the wastewater treatment plant was one of these parcels.[21] Pat Mulligan was on the 2006 Board.[22] Mike Madden and a group of long-time residents with development experience[23] comprised the Land Committee tasked with developing recommendations concerning the disposition of the property.

The Committee's observations and recommendations were summarized in a report provided to the Board on May 16, 2006.[24] As to the 5.5-acre parcel in the airport, the Committee recommended that the land be sold as one unimproved parcel for "$300,000 or more", with the final asking price to be determined after completion of a professional analysis of its development potential for hangar use. The Committee recommended the tract be deed restricted for hangar use and have certain other restrictions (including a prohibition against helicopters) to ensure that future development would be compatible with the existing airport community.

Madden and the other Committee members clearly knew, and shared with Mulligan and the other directors, that the WSC's airport land was more valuable -- by

[20] Earnest at 136 (Exhibit 4).
[21] Mulligan at 63 (Exhibit 3).
[22] Mulligan at 61-2 (Exhibit 3).
[23] Mulligan at 62 (Exhibit 3)
[24] Exhibit 23 (DX 108); Mulligan at 61-2 (Exhibit 3).

several factors -- than land that was not suitable for hangar development.[25] They suggested an asking price of at least $60,000 per acre for the airport property, which at the time and for years thereafter was adjacent to an operating wastewater treatment plant.[26] They suggested an asking price of only $23,000 per acre for the WSC's property east of Exeter Road, which was suitable for residential development but not for hangar development.[27] They also noted that a nearby 12-acre parcel, which also had no potential for hangar development, was on the market for around $23,000 per acre.

Neither the Board nor the Land Committee recommended that the WSC dispose of its land on which the paved Piper Lane taxiway was located. No Board even considered having the WSC dispose of its improved Piper Lane taxiway property until October 2019.[28] Even now, no one can articulate how it would ever have been in the best interests of the WSC and its members to dispose of the Piper Lane taxiway tract while the WSC still owned land in the airport.[29]

2006 Bank Appraisal

In connection with a loan for a new water treatment plant in late 2006, the WSC's lender engaged an appraiser to provide an appraisal of the vacant portion of the airport property.[30] The bank appraisal covered 7.027 acres.[31] It estimated the value of the

[25] Earnest also acknowledges the airport land's development potential for hangars will command a higher price. Earnest at 61 (Exhibit 4).
[26] Mulligan at 65 (Exhibit 3). The decision to relocate the wastewater treatment plant was not made until years later in August 2013. Mulligan at 53-4 (Exhibit 3); DX 80 (Exhibit 24).
[27] In August 2013, the Board voted to relocate the wastewater treatment facilities to the less valuable Exeter Road tract. Earnest at 56 (Exhibit 4).
[28] Mulligan at 175 (Exhibit 3) (Martin sought to buy "undeveloped land"); Earnest at 230 (Exhibit 4) (no recollection that Martin ever suggested she intended to acquire ownership of the Piper Lane taxiway); Mebane at 181 (no recollection of Martin mentioning she wanted to buy Piper Lane); WSC Deposition (Madden) at 15 (Exhibit 11) (no recollection that Martin even told other directors she wanted to acquire the improved Piper Lane taxiway).
[29] See, e.g., Earnest at 66-7 & 211 (Exhibit 4).
[30] Mulligan at 59 (Exhibit 3). The appraiser was not retained by the WSC. Even Mulligan, who was on the Board at the time, knew almost nothing about the bank appraisal, then or at the time of his deposition. Mulligan at 61.

property at $350,000 (or approximately $50,000 per acre) as of December 1, 2006, based on its development potential for residential use.[32] The bank's appraiser did not value the property based on its highest and best use for hangar development.

So far as anyone is aware, no WSC Board ever wavered from the view that the highest and best use for the WSC's airport property was for hangar lot development.[33] So far as anyone is aware, no WSC Board ever wavered from the view that property's development potential for airport use made it significantly more valuable than property suited for residential use.[34] No WSC Board ever expressed the view that it planned to market the WSC's airport property based on its development potential for residential use.[35] To the contrary, Mulligan confirmed that the 2015 Board's plan was to put the WSC's airport property on the market based on the value of its development potential for hangar use to yield the best price.[36]

When the Director Defendants later sponsored the story that they considered the 2006 bank appraisal to be a reliable indicator of the market value of the WSC's airport property, they knew it wasn't true.

The 2011 Martin/Bailey Overture

In the spring of 2011, Dana Martin and her partner Malcolm Bailey sent a representative to initiate discussions with the WSC about buying the vacant land next to

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[31] Mulligan at 59 (Exhibit 3).
[32] Mulligan at 61 (Exhibit 3)
[33] Mulligan at 61, 113-4 (Exhibit 3); Earnest at 61 (Exhibit 4).
[34] Mulligan at 54-5 (Exhibit 3).
[35] Mulligan at 64 (Exhibit 3); Madden at 25-6 (Exhibit 5).
[36] Mulligan at 114 (Exhibit 3).

the wastewater treatment plant.[37] According to Earnest, the property was not up for sale at that time; the Board had not even discussed it.[38]

Mulligan, the "official WOWSC liaison," responded to Martin and Bailey's agent via email dated April 24, 2011.[39] He advised them of several determinations by the Board:

First, it is not in the best interests of the WSC's members to sell the property in a depressed market.

Second, the airport property is a "valuable piece of real estate" with future development potential that must be accounted for in the price.

Third, the Board has a fiduciary responsibility to advertise the property for sale and to accept the highest offer.

The Board publicly addressed these matters at its meeting on April 23, 2011. The directors approved Mulligan's motion "that it would be in the best interest of the WOWSC stockholders that we sell the 7 acres to help offset the cost of a new wastewater treatment plant."[40] The minutes reflect that after discussion "the Board agreed that we had a fiscal responsibility to our shareholders to (a) determine the fair market value of this property and (b) obtain the best possible price by exposing the property to more than one buyer." At all times prior to December 19, 2015, the Board's position expressed to the membership was that it had a duty to obtain the highest price possible for the WSC's airport property.[41]

[37] Mulligan at 38 (Exhibit 3); Exhibit 25 (DX 98)
[38] Earnest at 51 (Exhibit 4).
[39] Mulligan at 13 (Exhibit 3); Exhibit 26 (DX 96).
[40] Exhibit 24 (DX 80), WOWSC000025-6.
[41] Taylor at 12-13 (Exhibit 9).

Within a day, Mulligan received an unsolicited email from attorney Mark Zeppa expressing the view that the WSC was not required to follow the public bid process.[42] This was provided in response to the Board's statement that it had a fiduciary responsibility to advertise the property for sale and to accept the highest offer.[43] Zeppa was Malcolm Bailey's lawyer. Zeppa was responding to a request from Bailey and was working on Bailey's behalf – not on behalf of the WSC -- when he prepared and sent the email. Mulligan and Earnest knew this at the time.[44] They also knew this when Martin characterized it as an opinion of the WSC's counsel during the meeting in December 2015.[45]

The WSC had never used public bidding procedures for any sale or purchase, and no one had suggested those procedures would be applicable.[46] Bailey and Zeppa's effort was to persuade the Board to deal with Bailey and Martin without letting any other prospective buyer know the property might be available.[47]

Bailey and Martin did not tender a contract or a written offer. Their agent reported that they remained interested but intended to do additional study.[48] Mulligan now claims that the agent made a verbal offer on behalf of Martin and Bailey but told Mulligan they were prepared to go higher.[49] Mulligan also testified he had no idea whether the alleged

[42] Mulligan at 31-2 (Exhibit 3); Exhibit 27 (DX 97).
[43] Mulligan at 35-6 (Exhibit 3); Exhibit 25 (DX 98). See second full paragraph on page 2 of DX 98 – "Malcolm contacted his attorney, Mark Zeppa, for clarification concerning your sentence 'Also please bear in mind . . .'"
[44] Mulligan at 39, 40-1 (Exhibit 3); Exhibit 28(DX 100).
[45] Mulligan at 43.
[46] Mulligan at 32-4 (Exhibit 3).
[47] Mulligan at 70-1 (Exhibit 3). Mulligan testified that no one other than Bailey and Martin ever tried to make a "backdoor" deal.
[48] Mulligan at 45-6 (Exhibit 3); Exhibit 29 (DX 104).
[49] Mulligan at 19, 46 (Exhibit 3).

verbal offer was bona fide.[50] The WSC certainly did not agree upon a price with Bailey and Martin.

Mulligan, Earnest, Martin and Taylor had actual knowledge of these matters. When they later sponsored the story that the WSC's attorney approved what was done, they knew it was false. When they later suggested Malcolm Bailey's opening offer (if there was such an offer) reflected the market value of the 7 acres, they knew that wasn't true either.

WSC's Purchase of "Strategic" Taxiway Property

In keeping with the plan to market the WSC's airport property based on its value for hangar lot development, in 2012 the Board authorized Mulligan to pursue land acquisitions that would increase the "strategic and financial value" of the WSC's existing land.[51] Mulligan pursued the acquisition of a vacant tract owned by Spencer Mann adjacent to and southeast of the WSC's existing property, which was impressed with a taxiway easement.[52] The Board spent $25,000 (or $94,700 per acre) to purchase the unimproved 0.264 acre taxiway tract.[53]

According to records from the WSC's files, the Burnet Central Appraisal District value for the taxiway tract at the time it was purchased from Mann was $92,924 (or $352,000 per acre).[54] The Board later rejected an offer from adjacent landowner Clay Johnson to purchase an easement across the taxiway tract for a fraction of what the WSC had spent to buy it.[55]

[50] Mulligan at 49-50 (Exhibit 3). Mulligan says he had no idea whether Bailey had the wherewithal to buy the property.
[51] Earnest at 167 & 169-70 (Exhibit 4); Exhibit 30 (DX 89), Board Meeting Minutes 1.14.2012 and 8.26.2012.
[52] Earnest at 170-1 (Exhibit 4).
[53] Earnest at 171 & 175 (Exhibit 4); Exhibit 30 (DX 89), 11.9.2012 deed from Spencer Mann.
[54] Earnest at 173 (Exhibit 4); Exhibit 30 (DX 89), Burnet CAD data from WSC files. Earnest testified in his deposition that "just because the appraisal district said it, doesn't make it so." Earnest at 178.
[55] Exhibit 31, 3.7.2015 executive session at p. 69-70.

The Martin contract included the taxiway tract at a price of $47,000 per acre, or approximately one-half of what the WSC had paid for it. Mulligan, Earnest, Madden and Taylor had actual knowledge of this.

Greenberg's Unsolicited Letter of Intent

In May of 2013, Frank Greenberg sent an unsolicited letter of intent for the purchase of the vacant 7 acres of the WSC's airport property for $175,000.[56] Greenberg was a friend of Earnest and he had a hangar at the Spicewood Airport.[57] Greenberg's letter required acceptance by the WSC within two days of its date (May 13, 2013). By its terms, the offer was to expire on May 11, 2013 at 5:00 p.m.[58] The Board allowed the offer to expire.

At a Board meeting sometime later, Earnest acknowledged to members that the Greenberg letter of intent was "concocted."[59]

After the offer expired, Greenberg followed up with Mulligan.[60] He suggested the WSC sell the property through a sealed bid process. He advised that "the Board will be very pleased with our revised offer."

Mulligan responded via email to Greenberg dated May 24, 2013.[61] He explained that the Board had not prepared a "bid document" that described what the WSC was willing to sell. He also expressed concern about potential liability if there were any protests to the closed bidding. He advised that the Board had decided to hire an "outside

[56] Earnest at 108-9 (Exhibit 4); Exhibit 32 (DX 85).
[57] Earnest at 109 (Exhibit 4).
[58] Exhibit 32 (DX 85) at page EARNEST 000003.
[59] Earnest at 119-120 (Exhibit 4); Exhibit 33 (DX 86), a video recording of a portion of the meeting.
[60] Taylor at 66-9 (Exhibit 9); Exhibit 34 (TAYLOR_000040).
[61] Exhibit 34, email 5.24.2013 from Mulligan to Greenberg, copy to Taylor, Madden, Penner and Earnest.

Real Estate company" to handle the transaction, at which time "we would love to have a bid from you."

The Board never prepared a document that described what property it intended to sell and the terms on which it proposed to make the sale.[62] The Board never hired an "outside Real Estate company."[63] The Board never advised Greenberg (or any other potential purchaser) the WSC was prepared to receive and consider an offer.[64] The Board members knew Greenberg was prepared to pay more for the 7 acres of airport land; they just never gave Greenberg (or anyone else) the opportunity to make an informed offer.[65]

Mulligan, Taylor, Earnest and Madden were personally involved in these exchanges. They knew very well that the Greenberg letter of intent was not a reflection of the market value of the 7 acres. It was not even a reflection of what Greenberg was willing to pay for the 7 acres, much less of the amount the WSC was willing to accept. They knew the Board sent Greenberg away and never notified him or any other prospective purchaser that the WSC was ready to sell its airport property.[66] They did not act in good faith when they later claimed to have approved Martin's contract because it was the "best offer" they had received.

Decision to Free Up the WSC's Valuable Airport Land for Sale

There was much debate in 2013 about whether to continue the WSC's wastewater operations on the airport property or to reconstruct those facilities on other land outside

[62] See discussion regarding Kenny Dryden below.
[63] Taylor at 67 (Exhibit 9).
[64] Id.
[65] Taylor at 68-9 (Exhibit 9).
[66] As discussed below, this was largely due to the fact that the Board itself never thought the airport property was ready to sell.

the airport.[67] At its meeting on August 24, 2013, the Board made a presentation to the community and voted to relocate the WSC's wastewater treatment facilities to its land across Exeter Road from the airport.[68] The Board advised the membership this move would enable the WSC to "free the existing airport land for sale and give us the highest and best use of our property."[69]

Mulligan, the Board President at that time, admits the Board did not know in August 2013 what the WSC's airport property was worth.[70] The WSC had never had its airport property appraised. The 2006 bank appraisal valued the 7.027 acres of airport property based on its development potential for residential use, not for hangar use.[71] In an August 22, 2013 email to fellow directors Mulligan, Earnest and Taylor, Madden pointed out that with all the construction that had been going on in the airport an appraisal of the WSC's airport property would be beneficial.[72] He advised the property "may be worth more than we think and I would like to see the WOWSC realize the highest price we can obtain for this property."

Mulligan, Earnest, Madden and Taylor must have believed the WSC's airport property was worth considerably more than the $200,000 for which it was later sold to Martin. They approved more than $700,000 of debt[73] and told the members at that time they would use the proceeds from the sale of the airport property to pay off the loans.[74]

[67] Earnest at 58 (Exhibit 4).
[68] Exhibit 35 (DX 39) is an aerial photo showing the location of the new wastewater treatment facilities relative to the airport. Martin at 38 (Exhibit 6).
[69] Mulligan at 55 (Exhibit 3)
[70] Mulligan at 55-6 (Exhibit 3).
[71] Mulligan at 53-4 (Exhibit 3). The most recent appraisal was the 2006 bank appraisal that valued the property for residential development at around $50,000 per acre. Mulligan at 56.
[72] Madden at 13 (Exhibit 5); Exhibit 36 (DX 140).
[73] Earnest at 82-3 (Exhibit 4); Exhibit 37 (DX 7), 2.18.2014 meeting minutes at p. 2; Exhibit 38 (DX 8), $685, 707 deed of trust, and Exhibit 39 (DX 9), $35,611 deed of trust.
[74] Mulligan at 20-1 (Exhibit 3).

When Martin talked with the WSC's lender McAlpin in the fall of 2015, he recalled that the plan had been to sell the WSC's airport property and get the debt all paid off.[75]

At its meeting on January 13, 2014, the Board advised that a review had been conducted of the deeds and easements for the airport property "in order to assist the real estate agent in his appraisal and marketing of the property."[76] The truth, however, was that no real estate agent had been or ever was engaged.[77]

The minutes for the Board's meeting on February 18, 2014 recite that "Pat Mulligan will have survey and appraisal done of property that WOWSC is considering selling."[78] Neither Mulligan nor any other Director Defendant ever did either of those things.

Board Rejects Right of Refusal as a "Restriction"

At that same Board meeting, the Windermere Oaks Property Owners' Association requested that the Board give the POA a right of refusal on the airport property.[79] While the meeting minutes do not reflect any Board action on this item, the Board must have decided to refuse this request.

Director Dorothy Taylor was tasked with preparing a written response to Tom Doffing, the POA representative.[80] Taylor's email response confirmed that the budget for the new wastewater treatment plant "was contingent on selling the property to reduce the debt incurred as much as possible." Taylor further confirmed that the "WOWSC Board has a fiduciary responsibility to our members" and that it would not be in their best interest to put a "restriction" on the sale of the property that "would compromise our ability to obtain

[75] Exhibit 42, excerpt from transcript of Executive Session on 12.7.2015 at page 8.
[76] Exhibit 24 (DX 80), Minutes 1.13.2014.
[77] Mulligan at 54-5 (Exhibit 3).
[78] Exhibit 24 (DX 80), Minutes 2.18.2014.
[79] Exhibit 24 (DX 80), Minutes 1.13.2014.
[80] Taylor at 60-2 (Exhibit 9); Exhibit 45 (DX 139).

the 'best' offer from any potential purchaser." She advised that "[a]t such time as the property is put on the market," the Board would consider any offer the POA wished to make. At Mulligan's request, she advised the POA that the Board would evaluate all purchase offers based on a number of factors before deciding which one to accept.[81]

There was never a time when the property was put on the market. It is undisputed that the property was never put on the market, not for even a single day.[82] There was nothing that prevented Mulligan, Earnest, Madden, Mebane and Taylor from putting the property on the market in 2014 when the new wastewater treatment plant came online or thereafter, they just never did it.[83]

After a lengthy discussion in executive session on March 7, 2015, Mulligan, Earnest, Madden and Taylor appear to have agreed that they were finally ready to put the property on the market, they just didn't.[84] They talked about having Earnest put a "for sale" sign on the property, but even that was never done.[85] They told other people they were planning to put the property up for sale,[86] but they never did. Around that same time, Mulligan advised Taylor that the Board was "now in a position to get a meaningful appraisal."[87] That was never done either.

When Mulligan, Earnest, Taylor and Madden refused to grant a preferential purchase right to the POA, which was acting for the benefit of the vast majority of the WSC's ratepayers, in 2014 they said it would impair the marketability of the property it

[81] Exhibit 45 (DX 139), see 1.16.2014 email from Mulligan to Taylor.
[82] Earnest at 42-3 (Exhibit 4); Taylor at 61-2 (Exhibit 9).
[83] Earnest at 47 & 52-3 (Exhibit 4); Mebane at 55 & 57 (Exhibit 8).
[84] See, e.g., Exhibit 31, excerpt from executive session 3.7.2015 at pp. 29-30, where Taylor stated "George has said to me that there's no reason that it can't be put up for sale tomorrow."
[85] Mulligan at 24 & 83 (Exhibit 3); Exhibit 46 (DX 109).
[86] See, e.g., Exhibit 47 (DX 111) [authenticated by Mulligan at 82 (Exhibit 3)] and Mulligan at 111 (Exhibit 3).
[87] Exhibit 48 (TAYLOR_000052-3).

covered and compromise the ability to get the best price. Mulligan, Earnest and Madden could not have thought otherwise in 2015, when they gave the same preferential purchase right to Martin, a sitting director who was acting for no one's benefit but her own.

The False Start: Kenny Dryden

In 2014, Mulligan and Earnest had a handful of exchanges with an Austin realtor named Kenny Dryden. It is undisputed, however, that Kenny Dryden was never engaged to market the property and that he took no steps to do so.[88] That false start was the only step the directors ever took in the direction of notifying the pool of prospective purchasers that the WSC's airport property was on the market.[89]

Mulligan got Dryden's name from a contact of his in the real estate business, Chrissy Cornelius.[90] Mulligan described the property as "a natural extension of an existing small airport." He told her "there appears to be a lot of interest." He told her the Board was "looking for someone to represent us to multiple bidders and who does not have ties to this community." He wanted "an arms length agreement to avoid any perception of conflict of interest."

Mulligan testified he wanted to find someone from outside of the community that would be impartial.[91] He wanted to avoid the perception that there had been an "insider trade or something like that."[92] He testified that perception would apply to anyone trying to come in a "back door." He admitted nobody ever tried to come in a "back door" other than Dana Martin and Malcolm Bailey.[93]

[88] Mulligan at 21-2 (Exhibit 3).
[89] Mulligan at 21-2 (Exhibit 3).
[90] Mulligan at 48-9 (Exhibit 3); Exhibit 49 (DX 106).
[91] Mulligan at 69-70 (Exhibit 3).
[92] Mulligan at 69-70 (Exhibit 3).
[93] Mulligan at 70-1 (Exhibit 3).

Mulligan introduced Dryden and Earnest via email.[94] He asked Earnest to work with Dryden to come up with a document "we can show to a potential purchaser." That never happened. As Earnest described it:

> I talked to him two or three times and he never showed or that I know of, Pat said he came to the airport, but I wasn't there when he came to the airport so I had not -- had not met him and he never did do very much. And he told me in the last phone call that he didn't know anything about airport property and that he really wasn't interested, that wasn't the type of properties he worked with, and that was after six months of this introduction.[95]

It turned out that Dryden worked with office buildings for doctors and dentists and knew nothing about airport real estate.[96] Dryden was never engaged and never took any steps to market the WSC's airport property.[97] Earnest testified that he made his fellow directors aware long before the meeting on December 19, 2015 that Dryden did not know anything about airport property.[98]

Mebane has given two wildly different accounts of a single encounter he claims to have had with Dryden.[99] Neither account is credible. Mulligan, Madden, Mebane and Earnest all knew in the fall of 2015 that Kenny Dryden was not a reliable source of

[94] Earnest at 67 (Exhibit 4); Exhibit 50 (DX 82).
[95] Earnest at 68 (Exhibit 4).
[96] Earnest at 69 (Exhibit 4). Earnest later confirmed to members at a Board meeting that Dryden knew nothing about airport property. Earnest at (Exhibit 4); Exhibit 51 (DX 83), an excerpt from a videotaped Board meeting.
[97] Mulligan at 22 (Exhibit 3).
[98] Earnest at 73 (Exhibit 4).
[99] Mebane testified in deposition that he had one conversation with Dryden (who he described as "a gentleman that had dealt with the board previously") a month or so after coming on the Board about Dryden's experience as the real estate agent for the WSC when it sold a hangar lot in 2013 or 2014. Mebane at 57-59 & 63 (Exhibit 8). That is a complete fabrication. The WSC sold one hangar lot in May 2015 and Dana Martin was the real estate agent involved; Dryden had nothing to do with that or any other transaction at the airport. The audiotape produced by the WSC reflects that during the executive session on October 31, 2015, Mebane claimed he had just talked to Dryden (who he described then as a life-long friend) and that Dryden was a veritable wealth of information concerning the value and development potential of the WSC's airport property. Exhibit 41, excerpt of Executive Session 10.31.2015. Given the sworn testimony of Mulligan and Earnest directly to the contrary, that version also appears to be a complete fabrication. The fact that neither Mulligan nor Earnest point that out in the recording casts doubt on its authenticity.

information concerning the WSC's airport property. They could not have reasonably relied on any information claimed to be from Dryden.

Sale of Entire Parcel is in the Best Interest

Windermere Oaks residents had for years been using a small area at the south end of the 11-acre tract for storage of boats and trailers. The boat storage area included less than an acre. It was low-lying and had no taxiway access except as part of the 11-acre tract.[100] The only vehicular access to the boat storage area was a narrow road off the Sky King taxiway.[101]

At the Board meeting on March 24, 2014, directors Mulligan, Earnest, Taylor and Madden considered whether to include that area when they got ready to sell the 11-acre tract.[102] They voted that it should be included and directed Taylor to draft a letter to Mebane, who was the POA president at that time. Taylor drafted the letter and circulated it to the other directors for review.[103] On April 3, 2014, she sent an email to Mebane[104] in which she confirmed that the budget for the new wastewater treatment plant "was contingent on selling [the WSC's] property in the air park area to reduce the debt incurred as much as possible." She stated the "Board has a fiduciary responsibility to our members" and "we feel it is not in the best interest" to do something that "would compromise our ability to obtain the 'best' offer from any potential purchaser." She advised the Board "unanimously voted at its last open meeting that we will put the entire tract on the market." She requested cooperation in developing a schedule for removal of the trailers and other items from the area.

[100] Earnest at 100-101 (Exhibit 4); Exhibit 52 (DX 84), aerial photo on page 1.
[101] Earnest at 101-2 (Exhibit 4).
[102] Exhibit 24 (DX 80), 3.24.2014 minutes at p. 4.
[103] Taylor at 56-7 (Exhibit 9); Exhibit 53 (DX 117), page TAYLOR000048.

As noted above, the Board did not put the property on the market. At the Board's meeting on February 2, 2015, Earnest, Mulligan and Taylor approved a motion to give written notice to residents to remove all items from the boat storage area by June 1, 2015. The minutes reflect this was done "to enable the WOWSC to put the property up for sale," which had not been done.[105]

At the Board's March 16, 2015 meeting, POA President Mebane again suggested the POA might want to make an offer to on the boat storage area.[106] By way of Board response, the meeting minutes reproduced the contents of Taylor's April 3, 2014 email.

In July 2015, the POA presented the Board with a written offer to purchase the boat storage area. By this time, Mebane and Martin had joined Mulligan, Earnest and Madden on the WSC Board.[107] Martin prepared the POA offer and sent it to Danny Flunker to present.[108] Apparently, Martin did not make her fellow directors aware that she had prepared the offer.[109] As a separate parcel, the area may have been suitable for storage of boat trailers, but it was not suitable for hangar development. The POA's proposed price of $20,000 reflected as much.[110]

All of the discussion concerning the POA proposal took place in executive session.[111] The executive session minutes[112] produced by the WSC suggest that the discussion of the

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[104] Mebane admits he was aware of these matters when he was POA president. Mebane at 172-3 (Exhibit 8).
[105] Exhibit 24 (DX 80), 2.2.2015 minutes at bottom of page 1 and top of page 2.

[106] Exhibit 24 (DX 80), 3.16.2015 minutes.
[107] Mebane at 172-3 (Exhibit 8).
[108] Exhibit 52 (DX 84) at pp. EARNEST 000013 – 000022 & email dated 7.7.2015 from Martin to Danny Flunker.
[109] Earnest at 103 (Exhibit 4).
[110] Earnest at 103 (Exhibit 4); see also Exhibit 54 (DX 50) [identified by Martin at 138-9 (Exhibit 6)], a January 2014 email in which Martin opined to a colleague that the fair market value of vacant, unplatted property in the Spicewood Airport that could be turned into hangar lots was at least $76,876 per acre and that she was willing to pay $80,000 per acre.
[111] Mebane at 172-3 (Exhibit 8); Exhibit 55 (DX 23).

POA proposal was tabled pending receipt of an appraisal. They suggest Martin volunteered to contact several appraisers for a fee estimate. The minutes reflect that Mulligan requested an appraisal of the entire 11-acre parcel and an appraisal of the boat storage area by itself, and that Martin said that could be done.

There is no record of any Board action on the POA proposal. Mebane and Earnest testified that the POA offer was rejected.[113] Mulligan recalls there being "consensus" that the 11-acre tract would be more valuable with the boat storage area being included.[114] In any event, Martin did not procure the appraisal of the boat storage area Mulligan had requested or an appraisal of any other portion of the 11-acre tract.

So far as anyone can recall, there was never any Board discussion or Board vote in any open meeting to the effect that the Board was willing to entertain offers for only a portion of the 11-acre tract.[115] The only Board meeting minutes that reflect any willingness to consider a piecemeal sale are the minutes for the December 19, 2015 meeting. Even had those minutes been timely posted, by then it was clearly too late for any other prospective purchaser to make an offer.

When the POA made its written offer, Mulligan, Earnest, Madden and Mebane knew the POA wanted to buy a storage area for residents' boat trailers and other paraphernalia; the POA wasn't proposing to purchase or to pay the price for property with hangar development potential.[116] They also knew the POA offer was not a price the WSC was willing to accept for any purpose. Martin, who prepared the POA offer, certainly knew

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[112] The Director Defendants included these minutes as Exhibit 15-E to the Second Declaration of Mike Nelson. A copy is attached hereto as Exhibit 56 for ready reference. The WSC has not produced the audio recording of this executive session.
[113] Mebane at 172-3 (Exhibit 9); Earnest at 104 (Exhibit 4).
[114] Mulligan at 128-9 (Exhibit 4).
[115] Taylor at 59 (Exhibit 9); Mulligan at 154-5 (Exhibit 3); WSC (Madden) at 17-8 (Exhibit 11).

that the proposed price of $20,000 (or around $30,000 per acre) was only a fraction of the $80,000 per acre amount she herself was prepared to pay during that same time for other property in the Spicewood Airport that was suitable for hangar development. None of them could have reasonably relied in good faith on the POA offer as a reflection of the market value of the 11-acre tract.

In July 2015, Madden found an envelope stuck in the fence of the water plant.[117] It was a letter from Susan Reed, who had previously expressed interest in purchasing a portion of the 11-acre tract along the western boundary adjacent to her land. Madden reminded Mebane that Robb Van Eman, another adjacent landowner, had also expressed interest in buying a portion of the WSC's airport property. He told Mebane that if the board was inclined to change its decision to sell the property as a single tract, they needed to let these people know so they could make an offer. None of the directors notified Reed, Van Eman or any other prospective purchaser that the Board was prepared to consider offers for the purchase of less than all of the 11-acre tract.[118] Martin, who participated in the Board's executive session discussions by virtue of her position as director, appears to have been the only prospective purchaser who had this information.

Martin's Conflict of Interest

Martin admits she had set her sights on acquiring some or all of the WSC's airport property years before she became a director.[119] Mulligan, Madden, Earnest and Taylor were aware of this. As discussed above, these concerns prompted Mulligan to look for a real estate agent with no ties to the community. During the executive session on March 7,

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[116] Earnest at 103 (Exhibit 4).
[117] WSC (Madden) at 15 (Exhibit 11); Exhibit 57 (DX 173).
[118] WSC (Madden) at 17-8 (Exhibit 11).
[119] FHH Deposition at 52 (Exhibit 13).

2015, they discussed Martin's long-held expectation that she would "get the land back" that Malcolm Bailey had sold to the WSC many years earlier.[120]

Also, at the time Martin threw her hat in the ring to become a director she was crosswise with the WSC over an unpermitted storm drain that she and her partner Bailey had installed without the WSC's consent. The storm drain channelized and discharged runoff from the airpark onto the WSC's airport property just above the lift station.[121] The drainage had caused damage to the WSC's facilities, but Martin had not been inclined to do anything about it. Mulligan, Earnest, Madden and Taylor expressed concern during the March 7, 2015 executive session that if the WSC tried to do anything about it there would be expense and liability to the downstream landowner.[122] They considered Martin to be responsible.[123]

Their discussion at the March 2015 executive session makes clear that Mulligan, Earnest, Madden and Taylor had experience dealing with Martin and were wary, if not outright distrustful, of her. They referred to her as "the usual player."[124] They were confident Martin did not have a permit for the "outfall," even though she insisted she did.[125] They discussed Martin's practice of buying up small scraps of land "and then when you want something she screws you with it" – "it's just what Dana does."[126] When they

[120] Exhibit 31, excerpt from transcript of 3.7.2015 executive session, p. 41.
[121] Exhibit 46 (DX 109) [authenticated by Mulligan at 82 (Exhibit 3)].
[122] Exhibit 31 at pp. 14-17.
[123] Exhibit 31 at p.45 - "Dana has caused a ball of mud."
[124] Exhibit 31 at p. 13.
[125] Exhibit 31 at pp. 16 and 39.
[126] Exhibit 31 at pp. 20-1.

decided to have Earnest put a "for sale" sign on the WSC's lot east of Piper Lane, Earnest told them "Dana will try to get something out of it."[127] She did.

During that executive session they also discussed the problem that would be created if Martin were to sit in on confidential discussions concerning the airport property should she be elected to the Board. They acknowledged that would allow her to get inside information she should not have.[128] Taylor told Mulligan "if it was a piece of property for you, I'd ask the same thing. You need to leave the room."[129] Taylor suggested they get a legal opinion to back them up. There is no indication that ever happened.

To the contrary, the audio recordings establish that while she was a director Martin participated in every executive session the Board convened for purposes of discussing the airport property. Mulligan mentioned early on that Martin needed to recuse herself from these discussions, but she never did and no one required her to leave until it no longer mattered. As discussed more fully below, Martin had access to a wealth of information that was not available to anyone other than the directors. Just as had been predicted, she used that information for her own personal advantage and benefit.

WSC Airport Lot Brings $95,000 in May 2015

Once the new wastewater treatment plant came online, the WSC removed the underground infrastructure from its small lot on the east side of the Piper Lane taxiway. Mulligan, Earnest, Madden and Taylor decided in executive session on March 7, 2015 that

[127] Exhibit 31 at p. 27. This is an example of an error in the transcripts. What is transcribed as "we'll" is actually "Dana will."
[128] Exhibit 31 at pp. 51-2.

[129] Exhibit 31 at p. 53.

the vacant lot should be sold.[130] Earnest, a long-time member of the airpark community, told the others that since the lot had an unobstructed view of the runway it might be more attractive to some buyers. He suggested they set an asking price of $100,000. The others deferred to Earnest's judgment concerning the likely value of the lot and the asking price.

The taxiway easement the WSC had granted in 1999 was wider in that area and covered a portion of the lot. There was discussion about whether to release the taxiway easement.[131] Earnest insisted that the WSC should only release the easement on the lot itself, but that the taxiway should remain intact for the benefit of the WSC's purchaser.[132]

Martin claims that she noticed some construction in the area and approached Earnest about the lot.[133] Within a very short time, Martin had the property under contract for one of her business associates, Charles Whidden.[134] Her offer price was $90,000 and the parties agreed on $95,000 (or $558,000 per acre).[135] Martin worked with the surveyor and processed a subdivision plat in the WSC's name to create "Tract G" prior to closing.[136] Martin, who was on the Board at the time, collected a commission on the sale.[137] Within a year and without changing anything, the Whiddens flipped it for a profit.[138]

Martin herself has acknowledged that any buyer could have created seven Tract Gs along the west frontage of Piper Lane right across the street, which is a part of the land that was conveyed to her, with only the nominal expense of platting.[139] Each of those lots

[130] Exhibit 31 at pp. 9-10.
[131] Exhibit 31, pp. 11-2. Here is another example of a transcription error. Earnest was not asking questions.
[132] *Id.*
[133] Martin at 99 (Exhibit 6).
[134] Martin at 100-101 (Exhibit 6).
[135] Mulligan at 122 (Exhibit 3); Exhibit 58 (DX 112), the sale contract; Martin at 111 (Exhibit 6).
[136] Martin at 103 (Exhibit 6); Exhibit 59 (DX 41), the commissioners court minutes, and Exhibit 60 (DX 42), the plat for Tract G.
[137] Martin at 101-2 (Exhibit 6).
[138] Martin at 163 (Exhibit 6).
[139] Martin at 187-8 (Exhibit 6).

would have immediate access to the same improved taxiway as Tract G.[140] Tract G has a runway view, but no one has suggested that this would double or triple its value. At even $80,000 per lot, however, a strip along the west frontage of Piper Lane would command over $550,000 all by itself. Martin got much more for much less.

There was no posted meeting agenda that would have informed the membership the Board was planning to act on the sale of the lot.[141] There were no posted minutes that mentioned the sale of the lot until much later.[142] As discussed below, there was a pattern of concealments when it came to matters in which Martin was interested. This was the first.

The Hinton Appraisal

Martin gained control over the appraisal process when the others allowed her to determine who would be considered for the assignment.[143] Taylor had suggested several appraisers in 2013 and again in March 2015, but they were not considered.[144] Martin claims she selected three appraisers she knew had experience with the appraisal of airport properties.[145] She claims the Board did not want to spend money on an appraisal and Hinton was the low bid.[146]

There was no discussion in an open session about whether to obtain an appraisal of the airport property. There was no vote in an open session to engage Hinton (or

[140] *Id.*
[141] Martin at 102 (Exhibit 6).
[142] *Id.*
[143] Martin at 47-8 (Exhibit 6).
[144] Exhibit 48.
[145] Martin at 50-1 (Exhibit 6). This is ironic, since the land was later appraised for residential development.
[146] *Id*.

anyone else) to prepare an appraisal. All those discussions and decisions occurred in executive session.[147] Those topics never appeared on any posted meeting notice.

Martin was the only director to interface with Hinton on the appraisal assignment.[148] She testified that she provided him with an aerial photograph and one "comp" and no other information,[149] but that was not the truth.

Among other things, Martin informed Hinton there needed to be three to four feet of fill across the entire property.[150] She had no engineering report or professional analysis to support the suggestion that three to four feet of fill would be required to develop the property, and she has none now.[151] The property slopes gently in a south/southwesterly direction; there is no radical change in topography and it is certainly not 3 to 4 feet lower than the taxiway.[152]

She told Hinton the "best use" of the property was for "storage buildings or hangars or a combo of each."[153] No one had ever planned to develop this property, in the middle of the Spicewood Airport with over 500 feet of improved taxiway frontage, for storage buildings. Martin herself admitted in deposition that she knew the highest and best use of the WSC's airport property was for hangars – "We all agreed to that."[154]

[147] Martin at 55 (Exhibit 6).
[148] FHH at 99-100 (Exhibit 13).
[149] Martin at 60-1 (Exhibit 6).
[150] FHH at 103 (Exhibit 13); Exhibit 61 (DX 122), 9.2015 email exchanges between Martin and Hinton.
[151] FHH at 103 (Exhibit 13).
[152] See Exhibit 62 (DX 143) [authenticated by Madden at 41-2 (Exhibit 5)], a photograph of the frontage along Piper Lane taxiway. When Madden saw it, he insisted that "a lot of work" must have been done on the property. Madden at 42-3. It hasn't. Martin/FHH mowed the property and picked up trash. No one has brought in any fill or made any changes to the topography of the property. Martin at 182 (Exhibit 6). The topography looked just like it does in the photo when the land was sold to Martin.
[153] Exhibit 61 at Martin 000110.
[154] Martin at 80 (Exhibit 6).

Martin told Hinton that a sewer plant operated on the property for 40 years had been "pushed in" and would need to be "dug out," filled and compacted. This was false. The WSC had not even owned the property for 40 years. By September 2015, the WSC had largely completed its closure plan and had gotten TCEQ approval of it soils analyses.[155]

Under the heading "Recent SALES nearby," she listed two properties. Neither of them could be developed for hangar use.[156] There had been at least seven sales of undeveloped hangar property in the Spicewood Airport.[157] Martin had been personally involved in all but 2 of them and she knew about those 2 sales well before September 2015.[158] She did not provide any of these seven sales to Hinton.

The aerial photo she furnished to Hinton showed an operating wastewater treatment plant; it predated the relocation of the treatment plant and the WSC's remediation work. The photo showed the old boat storage area littered with boats and trailers that had already been removed; Martin suggested that the area was under lease.[159]

Martin says the purpose for the Hinton appraisal was to get value information for the WSC land to be sold. Significantly, however, Martin's depiction of the "11.3+- acres" she wanted Hinton to appraise did not include the paved Piper Lane taxiway.[160] She

[155] Exhibit 31, 3.7.2015 executive session at pp. 61-4 & 67.
[156] FHH at 105-6 (Exhibit 13); Exhibit 61 at Martin 000113.
[157] FHH at 106 (Exhibit 13); Exhibit 63 (DX 91), a summary of market transactions in the airport.
[158] FHH at 106-7 (Exhibit 13)
[159] Exhibit 61 at Martin 000112.
[160] *Id.*

recently posted the same photo with the same type of overlay to identify the land she claims to have purchased.[161] That did not include the paved Piper Lane taxiway either.

Hinton concluded the highest and best use of the WSC's airport property was single family residential development and he valued it accordingly. Mulligan took issue with the Hinton appraisal within an hour of receiving it. In an email to the other directors, he advised that he did not agree with the valuation.[162] He pointed out that Hinton did not value the property based on its highest and best use for airport purposes, but as a residential development. He also pointed out that the "comps" were not suitable for hangar development and did not have utilities available. He was right on all counts.

There was nothing on the posted agenda for the Board meeting on October 1, 2015 that would have notified members of the community that the Board intended to discuss the disposition of the WSC's airport property.[163] There was no discussion of the airport property in open session.[164] All of the discussion was behind closed doors during the executive session. Martin was present and participated fully.

Even Martin had to admit that the Hinton number was too low.[165] Mebane told them all he had spoken to Hinton and listened to his rationale, but no one was interested enough to ask what that was.[166] Martin tried to suggest that Hinton just

[161] Exhibit 64.
[162] Mulligan at 102 (Exhibit 3); Exhibit 65 (DX 110)
[163] FHH at 114-5 (Exhibit 13); see also Exhibit 66 (DX 113) [authenticated by Mulligan at 137-8 (Exhibit 3)] at MSJR012. For purposes of this Response, Plaintiffs have numbered the pages with the prefix "MSJR" in the lower left-hand corner.
[164] FHH at 114 (Exhibit 13). Martin testified that "anytime we discussed real estate, the whole board went into executive session."
[165] FHH at 115.
[166] Exhibit 40, 10.1.2015 executive session at 4.

didn't have enough sale data, but Mulligan and Madden took issue. Mulligan pointed out the recent sale of Tract G.[167] He suggested they could just sell a strip along the frontage of Piper Lane taxiway to a buyer who wanted to create lots just like Tract G. Martin told them the WSC could not legally sell off a strip of land. That was false and Martin knew it was false at the time she said it.[168] Then she told them that the development costs would be too high. That, too, was false. Martin knew the only cost would be for platting and it would be nominal.[169]

Madden pointed out the sale from Van Trease Trust to Scott Martin of 1.4 acres for $180,000.[170] Martin said the sale wasn't comparable because of the relative size of the properties. She did not disclose that she intended to subdivide the property she wanted into two smaller hanger lots before she purchased it.[171]

Mebane did not recommend they accept the Hinton value conclusion or base any decisions on it.[172] He said they could list it for $500,000 or whatever they chose – "the more the merrier."

That was the end of the discussion concerning the Hinton appraisal. Based on the recordings and minutes produced by the WSC, the Hinton appraisal was not mentioned again, and it certainly was not relied on by anyone. All of the directors knew that Hinton simply did not value the property they were planning to sell. They seem not to have noticed that the effective date of Hinton's valuation was a full year earlier, on

[167] This exchange is at pp. 4-6 of Exhibit 40.
[168] FHH at 190-1 (Exhibit 13).
[169] In fact, Martin later replatted the property and flipped a 1.25-acre lot on the south end of the property for a $90,000 net profit. No fill, no utility connections and no other expense. FHH at 184-5 & 188-9 (Exhibit 13); Exhibit 67 (DX 16).
[170] See pp. 6-7 of Exhibit 40.
[171] FHH at 192-3
[172] Exhibit 40 at pp. 7-8.

September 1, 2014.[173] Hinton's value conclusion was not even a relevant data point and none of them could reasonably have thought otherwise.

Upon the completion of an investigation by the 2018 Board, the WSC's counsel concluded that Hinton had violated applicable professional standards and had engaged in fraud and other wrongful conduct. These conclusions were summarized in a letter dated January 25, 2019 prepared by Joe de la Fuente of Lloyd Gosselink.[174] The letter was requested in early discovery but was not produced until March 15, 2021.

No Urgency to Sell

Having disposed of the Hinton appraisal, the Board turned its attention to pertinent matters.

During the October 1, 2015 executive session, Mulligan made it crystal clear that there was no urgency to sell the property to manage the debt. To the contrary, his "gut feeling" was that unless a sale could "make a big chunk of money" they should not do it.[175] He explained that if it became necessary the rates could be "tweaked" a small amount and that it might even be better to handle it with a rate adjustment.[176] It was suggested that perhaps the WSC could just "sit on this piece of property for another year, another two years, or five years and see what happens then."[177]

Martin continued to push for a sale. When the directors discussed having someone talk to a couple of realtors to "feel them out" about listing the property,

[173] Martin at 89-91 (Exhibit 6).
[174] Exhibit 68 (WOWSC002244 – 002246).
[175] Exhibit 40 at pp. 10-11.
[176] Exhibit 40 at pp. 13-4.
[177] Exhibit 40 at pp. 10-11. Here is another transcription error; in line 23 on p. 10 "settle" is actually "sit on."

Mulligan reminded Martin that she needed to recuse herself. Martin agreed, but she did not recuse and no one required her to do so.[178]

Decision to Prepare a Formal Plan and Present It to the Membership

There were surely communications among Board members concerning the WSC's airport property outside the context of a Board meeting. Mebane stated during executive session on October 31, 2015 that he had talked to each of the directors individually about the WSC's airport property.[179] Aside from a handful of emails that cannot be denied, however, none of the directors can recall those discussions. So far as Plaintiffs can discover, the directors' discussions that anyone is willing to recall occurred exclusively in executive session.[180] So far as Plaintiffs are able to discover, all of the discussions are reflected on the audio tapes.

At the next Board meeting on October 31, 2015, the directors convened into executive session and discussed the WSC's airport property. The main topic expected to be discussed at the meeting was "airport land status" and it was expected the Board would vote on how to proceed.[181] Martin insisted that the discussion of the airport real estate must be in executive session.[182] The posted agenda included nothing that put the membership on notice that there might be a discussion of, or action concerning, the airport property.[183]

The audio tape produced by the WSC reflects that Mebane told the others he had talked with 2 realtors, a "potential developer" and a former staffer with the state airport

[178] Exhibit 40 at p. 9.
[179] Exhibit 41 at 7.
[180] FHH at 80 (Exhibit 13).
[181] Exhibit 113 at MSJR014.
[182] Exhibit 113 at MSJR015.
[183] Exhibit 113 at MSJR020.

regulator since the October 1, 2015 meeting. That is squarely at odds with the sworn testimony he gave before the tapes were produced.[184]

Under oath, he testified that the only investigative work he did was months earlier, right after he came on the Board.[185] He testified he went out and talked to several unnamed people; no one came to the airport to look at the property. It is unclear whether Mebane ever knew much of anything about the WSC's airport property, but he certainly would not have known enough right after he came on the Board to properly inform even a qualified valuation professional. Further, he could not have had discussions with anyone right after he came on the Board concerning Martin's proposal to buy the best 4 acres of the property. On the tape, he claims to have discussed the Martin offer with Van Trease.

The audio tape reflects that Mebane told the others he had talked with Doris Van Trease, a well-known local realtor who had been very active in the Spicewood Airport.[186] Under oath, Mebane testified he did not know Doris Van Trease.[187] He testified he talked to "a lady," but he could not recall her name and he did not make any notes of the conversation.[188] He did not know then or at the time of his testimony whether the "lady" had been involved in a single airport property transaction. "Somebody" told him she knew "something" about airport properties in Lakeway or Lago Vista.[189] He did not

[184] As the Court may recall, the WSC failed to put the tapes on a privilege log or otherwise to disclose their existence in response to discovery. By the time the tapes were produced in early 2021 all but 2 of the Director Defendants had been deposed. Untold hours of deposition time were wasted to run to ground events the tapes make clear just never happened. More problematic, there are many inconsistencies and Plaintiffs have not yet had an opportunity to explore them.
[185] Mebane at 63, 66-7 & 71 (Exhibit 8).
[186] Exhibit 41 at p. 4. Mebane referred to her as "Doris Van Cleat."
[187] Mebane at 61 (Exhibit 8).
[188] Mebane at 88 (Exhibit 8).
[189] Mebane at 88-9 (Exhibit 8).

ask the "lady" about listing the property for sale.[190] That "lady" could not have been the Doris Van Trease he talked about during executive session.

The audio tape reflects that Mebane told the others he had talked with Kenny Dryden. As discussed above, his sworn testimony concerning his encounter with Kenny Dryden is dramatically different from the account reflected by the tape. Among other things, he testified that he only talked with Dryden because Earnest recommended it.[191] The Dryden he met with did not hold himself out as having special knowledge or expertise concerning the value of airport property.[192] Mebane claims he just went by to talk to that Dryden about his "opinion of the area" and his "experience" selling the one tract for the WSC.[193] Dryden never sold any property for the WSC. Earnest told all of them well before these meetings that Dryden did not know anything about airport property.[194]

Further, even if everything happened just as the tape suggests, Mebane did not provide the others with the information required to determine whether the figures he was giving them were reliable. They all knew Mebane himself had no special knowledge or expertise regarding the valuation of airport properties. He had learned what he knew, and more than he ever wanted to know, from what he had read during the preceding couple of weeks.[195]

Mebane gave them no information about the analysis he believed Van Trease or Dryden or the unidentified airport developer or the unidentified former regulator had

[190] Mebane at 57-8, 61-2 (Exhibit 8).
[191] Mebane at 90 (Exhibit 8).
[192] Mebane at 91 (Exhibit 8).
[193] Mebane at 91 & 94.
[194] Such dramatic inconsistencies cast doubt on the authenticity of the audio tape. Plaintiffs are currently pursuing further discovery in that regard.

performed to arrive at the value numbers he attributed to them, or even whether they had performed any analysis at all.[196] He gave them no information about the sales data and other information he believed Van Trease or Dryden or the unidentified airport developer or the unidentified former regulator had relied on, or whether they had used any data or information at all. These directors knew how important those matters could be. They had recently discarded a professional value opinion for which the WSC paid money because the appraiser's methodology was flawed and his data was not comparable.

At that time, however, the Board was not trying to ascertain the fair market value of the property. The Board was not even trying to determine an asking price. The Board was certainly not trying to evaluate an offer to determine whether it was the highest obtainable price. They were trying to determine whether to take next steps in connection with a possible sale of some or all of the property and to identify what those next steps might be.[197]

This was the first time that anyone had suggested the WSC might want to sell only a portion of the 11-acre tract. Mebane put that on the table and he suggested several options.[198] They did not have any sort of professional opinion to the effect that the property would bring more if sold on a piecemeal basis.[199]

Martin grabbed the concept of selling the front portion of the property, which she referred to as the "heart of the whole property," and ran with it.[200] She suggested the

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[195] Exhibit 41 at p. 7-8 (Exhibit 8).
[196] FHH at 127-30 (Exhibit 13).
[197] Exhibit 41 at 32.
[198] Exhibit 41 at 5.
[199] FHH at 126-7 (Exhibit 13).
[200] Exhibit 41 at 9.

WSC could get $250,000 for the front part now and $250,000 for the back part later. She had designed a layout that would yield 17 hangar lots on the front part alone.[201] She pointed out that any purchaser would likely develop its own taxiway somewhere on the northern end of the property. She suggested that the WSC should require any purchaser to grant an easement over such taxiway when it was developed, which would give the WSC the benefit of both the developer's taxiway and the taxiway purchased from Mann. She suggested that as an incentive the WSC could grant the developer a right of refusal on the WSC's remaining property.[202]

Neither Martin's layout nor any materials she sponsored included the Piper Lane taxiway in the land to be sold. To the contrary, in connection with the discussion about ensuring proper aircraft access Earnest pointed out that the WSC owned the Piper Lane taxiway.[203] No one suggested they dispose of it.

The discussion makes clear that the directors were working with sketches of at least some of the property at that time. Martin repeatedly told them they could just "square it off there."[204] "I would square off this piece."[205] "I would square it off and make that the first piece."[206] Martin told them it would be "just like the Whidden sale," which included only the lot. Martin apparently borrowed a pencil and drew out how she proposed to square it off. She even pointed out the dimension of 349 feet. None of those sketches have been produced. The discussion makes clear, however, that the

[201] Exhibit 41 at p. 11.
[202] Exhibit 41 at 31-2. This was the original rationale for the right of refusal – to obtain valuable easement rights on an improved taxiway at the developer's expense. When Martin presented her offer, she told them she would do this. They did not properly document the WSC's rights when the transaction closed and those rights were lost when the Board approved the 2019 settlement.
[203] Exhibit 41 at 31.
[204] Exhibit 41 at 13.

Board was considering a sale of vacant land to someone who would develop it into hangar lots. One of the options was to sell a strip of vacant land along a portion of the frontage of the Piper Lane taxiway. The Board was not considering a sale of the Piper Lane taxiway.

Martin also tried to persuade the others that the WSC was under pressure to sell land due to the WWTP financing, that they needed to "get that payment down to where we can stomach the monthly."[207] Mulligan again assured everyone that they were "stomaching the monthly" just fine and putting money in the bank to boot.[208] He advised that they could, and should, make a decision on the sale of the property independently from any decisions they might make in the future regarding the debt.[209] Mulligan also reminded them that the prior Board had purposefully chosen to have a level pay over a longer term rather than to have a shorter term with a large balloon payment.[210]

Martin suggested repeatedly they should "do it in 2 steps to maximize," "just sell off this, maximize as much money to pay down the bank," "can we all focus on selling that piece, maximizing it, hold the balance for appreciation," and "sell the best piece off, maximize on it."[211] That was exactly the word to use. Maximizing the sale proceeds from the property for the benefit of the WSC and its members was exactly what the Board had said it would do for years.[212]

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[206] Exhibit 41 at 17.
[207] Exhibit 41 at 19.
[208] Exhibit 41 at 36.
[209] Exhibit 41 at 19-21.
[210] Exhibit 41 at 21.
[211] Exhibit 41 at 15, 16, 28, 39.
[212] Martin agrees that maximizing the value means to get the best price and best terms that are available on the market. FHH at 62 (Exhibit 13).

They came to consensus that they would move forward with a plan to put a squared off tract of vacant land along Piper Lane on the market by listing it with Doris Van Trease.[213] They did not decide, or even discuss, what they thought a "squared off" tract might be worth. They did not decide what they thought the asking price should be. They agreed that Mebane would prepare a "formal plan" that clearly identified the land they proposed to sell, the restrictions they proposed to have on it and the arrangement they proposed to make with Van Trease to market it.[214] They agreed the "formal plan" would be presented to the membership and voted on in an open meeting.

Within 24 hours of persuading the others to move forward with a sale of a portion of the property, Martin emailed Mebane with the terms of a proposal she planned to pitch to one or more prospects.[215] The proposed price was $200,000. Martin testified she got that number from "Bob" during an executive session discussion about reducing the loan.[216] It was a number she heard Mebane say in executive session they might accept. It was not a number Martin associated with the fair market value of the property she wanted to buy. She did not have an appraisal or other opinion of value that put the value of the "heart" of the WSC's airport property at anywhere near as low as $200,000. She didn't have any opinion of value for the property at all.[217]

The Fake Restructure Proposal

Neither Mebane nor anyone else prepared a "formal plan." No one took steps to have the surveyor prepare a description of any "squared off" portion of the land. The meeting notice posted for the Board's next meeting on December 7, 2015 did not include

[213] Exhibit 41 at 39 & 42.
[214] Exhibit 41 at 39.
[215] Exhibit 69 (DX 127); FHH at 124 (Exhibit 13).
[216] FHH at 125-6 (Exhibit 13).

any item concerning the WSC's airport property.[218] It is undisputed there was no discussion during the open portion of the December 7, 2015 meeting concerning the WSC's airport property. The WSC produced an audio tape that reflects there was such a discussion during executive session at the December 7, 2015 meeting.

It appears that sometime between the October 31 meeting and the November 7 meeting Mebane and Martin had a meeting with the WSC's lender concerning the outstanding debt. There is no record anyone asked them to do that. Mulligan had assured everyone at the earlier meeting there was no need to address the financing in connection with a decision concerning the sale of property.

The recording reflects that Martin informed Mulligan, Earnest, Mebane and Madden at the executive session on December 7 that she was "still interested" in purchasing WSC property.[219] She did not recuse herself from the executive session and no one asked her to leave. The "real estate" exception to TOMA no longer applied to their discussions, but they continued to have those discussions behind closed doors.

Martin and Mebane told the others they had met with the banker about restructuring the loan.[220] Mebane told them that the banker "ran some numbers" and told them if the WSC would make a $200,000 principal reduction he would restructure the loan to reduce the monthly payment by about $3,000.[221] According to Martin, the banker told them he would change the interest rate to a fixed 5% and would reduce the number of payments. Martin told them the banker recalled the plan being to sell the

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[217] FHH at 126 (Exhibit 13).
[218] Exhibit 70.
[219] Exhibit 42 at 11.
[220] Exhibit 42 at 7.
[221] *Id.*

airport property and get it all paid off.[222] Martin claimed she told him things had changed. She knew that was not true.

In fact, the banker did not tell Martin and Mebane he could reduce the monthly payment amount or that he could reduce the number of monthly payments or that a $200,000 principal reduction was needed. All the banker said was that he would "modify the loan with a nonadjustable rate fixed for five years" if there were a principal reduction.[223] He did not discuss any particular amount of principal reduction; Martin made that up. Martin testified the discussion was about selling the 11 acres for "as much as we could get." If that is true, it is highly unlikely the banker even had $200,000 in mind. In any event, it is clear the $200,000 figure did not come from the banker; it was a number Martin came up with.

Martin told the others that she told her "investor" the WSC would need to net $200,000 from the sale.[224] They all knew at the time, however, that the Board's duty was to obtain the highest price the market would pay. They also knew the Board had committed to the membership for years that the directors would take the steps required to get the highest price, which clearly included putting the property on the market and advertising it for sale, and that none of those steps had ever been taken.

They had no reliable information before them concerning the fair market value of the property. Mebane advised they would hold off on listing the property to see if

[222] Exhibit 42 at 8.
[223] Martin at 65-6 (Exhibit 6).
[224] Exhibit 42 at 11. That the WSC might be looking to "net" $200,000 from a sale was not just inside information, it was inside information that Martin and Mebane had manufactured.

Martin brought a $200,000 offer.[225] Earnest was present when they decided not to put the property on the market.

Martin emailed that offer to Mebane a few days before the next Board meeting.[226] Martin claims she based her offer price on the Hinton appraisal and Board discussion of an alleged recommendation to list 4.3 acres for $225,000.[227] All of that information was available to Martin only by virtue of her position as director and her participation in executive session. She knew the Hinton appraisal was not a reliable value opinion. She had no idea whether the statement attributed to Van Trease was or was not consistent with actual market data.[228]

Martin told Mebane that she was considering presenting her offer at the December 19, 2015 meeting.[229]

Approval of a Transaction with a Sitting Director

The posted agenda for the Board meeting on December 19, 2015 did not include an item that notified the membership the Board might consider or act on an offer for a portion of the WSC's airport property. The court has previously determined this was a violation of TOMA.

For years, the Director Defendants have claimed that Martin presented her offer in open session. That is not true. Martin presented her offer in executive session. She remained in executive session and participated in the Board's discussion for

[225] Exhibit 42 at 17.
[226] Exhibit 71 (DX 130).
[227] Martin Declaration at para. 3 (Exhibit 1 to Motion).
[228] FHH at 197
[229] FHH at 135 (Exhibit 13).

approximately half of the session.[230] These discussions were not within the "real estate" exception and were not allowed to be conducted behind closed doors.

The contract Martin presented listed the buyer as Friendship Homes & Hangars. Friendship did not exist then; it was not formed until March 2016. If a contract was approved that day, it was a contract with Martin. Although the Bylaws required it, there the WSC had no conflict of interest policy in December 2015.[231]

Mulligan, Madden and Mebane had no more or better information concerning the value of the property covered by the contract at the December meeting. No one could really remember what Van Trease was supposed to have said. No one had any idea what data (if any) Van Trease might have considered or what analysis (if any) Van Trease might have performed. It is undisputed, however, that Mebane talked to Van Trease, if at all, prior to the October 31, 2015 meeting.[232] There had been no discussion of selling the front part of the property along Piper Lane at that time. There certainly could not have been discussion about selling 4.3 acres as Martin claims. Martin did not make her offer until much later, so Mebane could not have discussed the offer with Van Trease, Dryden or any of the unnamed "real estate people."

Then there was Mebane's statement that he had "been told by people that are in the development business" that "you better take it."[233] That was even more sketchy than the Van Trease information. And the unnamed airport developer said he wouldn't pay more than $15,000 acre – what would they expect him to say?

[230] Exhibit 43, transcript of 12.19.2015 executive session, at 3 and 35; FHH at 139 (Exhibit 13).
[231] FHH at 86 (Exhibit 13).
[232] Mebane testified under oath that these conversations occurred, if at all, in June 2015.
[233] Exhibit 43 at 42.

There could well have been buyers prepared to pay far more than what Martin was offering. They could have found out in short order had they marketed the property for sale and given serious attention to the offers received. There had been every opportunity to do just that. They just had not done it.[234] They were in no position to try to justify their decision on the grounds it was the best offer they had received.

The taped discussion makes clear that Mulligan, Madden and Mebane were well aware they had not lived up to the commitments made to the community.[235] They also knew the community would see this for the "sweetheart deal" it was. They predicted people would be upset about it. They were strategizing even before they voted on the story they would tell the membership about all the work they had done to vet the offer.[236] It just wasn't true.

They knew the solution was to put the backroom deal with Martin on hold and put the property on the market.[237] There was no reason not to do it. The real estate market was depressed.[238] The WSC was not in a bind for money. Martin had been after the property for years; the Board had turned her down and put her off and there she was offering more money than before.

At least some of the Director Defendants wanted to take the credit for selling property and reducing debt.[239] They bragged to each other about getting concessions from Martin to pay for their drainage problems, but they never got any and quite likely

[234] Even Martin admits this. Martin at 161 (Exhibit 6).
[235] Exhibit 43 at 40-5 & 48.
[236] Exhibit 43 at 61.
[237] Exhibit 43 at 44-5.
[238] Mulligan at 17 (Exhibit 3).
[239] Exhibit 43 at 51.

exposed the WSC to a claim by Friendship that the WSC must dedicate land for drainage facilities in the future.[240]

They brought Martin back into the meeting, but they never went out of executive session.[241] They voted on the contract in executive session. That was a violation of TOMA. Madden generated meeting minutes that falsely portrayed they had voted in open session.[242] The others, including Earnest, approved those minutes at the next meeting. The minutes for the December 19, 2015 meeting were not posted on the WSC website for quite some time.[243]

Martin did not disclose the truth about her ownership interest in Friendship; she represented she had a partner who owned an unspecified equity interest. Martin did not disclose the truth about her interactions with the WSC's banker. Martin did not disclose that her "good faith offer" was based on inside information about what the directors were planning to do and not on market value. Martin did not disclose she had been prepared to pay far more for other vacant land just across the airpark that she intended to develop into hangar lots. Martin did not disclose her efforts to influence the Hinton value conclusion. Martin did not disclose that she intended to acquire the paved Piper Lane taxiway. Martin did not disclose that she had not consulted with the LCRA during the option period and did not know what dedications or concessions on the remainder tract might be required. Martin did not disclose she did not intend to be obligated to grant taxiway easement rights on the taxiway she planned to develop.

[240] FHH at 42-3 and 44-5 (Exhibit 13), Friendship may have right to require land dedication and other concessions and is not giving up any rights.
[241] Exhibit 43 at 64 et seq.; WSC (Nelson) at 107 (Exhibit 12).
[242] Exhibit 72 (DX 144).
[243] Declaration of Patti Flunker, Exhibit 73.

Earnest skipped the December 19, 2015 meeting. He did not tell the truth about why he did that. He claims that he missed the meeting because he went to Danny Flunker's birthday party instead. That is not true. The meeting was at 9:00 in the morning. Danny Flunker attended the meeting. The birthday party was not until later that night. Earnest knew Martin wanted the property and he knew from the December 7, 2015 meeting that Martin was going to make an offer. Earnest knew they should have marketed the property.[244] He did not want to be involved with the approval of the Martin contract then, and he claims now that because he did not vote he cannot be held responsible.

Shortly after the meeting, Martin emailed a copy of the contract to her fellow directors.[245]

The Aftermath

The Board had never obtained a survey of the land the planned to sell. Martin went to work with the surveyor to prepare a survey of the boundaries of the land she intended to buy. By email dated January 21, 2016, the surveyor sent Martin a sketch showing the boundaries and asked Martin to confirm that it was correct.[246] The surveyor drew a thick red line to delineate the eastern boundary of the tract.[247] The tract did not include the paved Piper Lane taxiway. Martin told him that the sketch was "Correct."[248]

Martin had control over the processing of a subdivision plat on the WSC's behalf. She laid out the vacant land into 2 hangar lot properties: Tract H1 and Tract H2. The

[244] Earnest at 46-7 & 150-1 (Exhibit 4).
[245] FHH at 149-50; Exhibit 74 (DX 146).
[246] Exhibit 75 (DX 153) at Martin 000135 – 6. FHH at 151 (Exhibit 13).
[247] Exhibit 76 (DX 154). FHH at 151 (Exhibit 13).

plat was approved March 8, 2016.[249] The eastern boundary for Tract H1 and Tract H2 was exactly where the surveyor drew it. Martin advised the title company that the WSC was selling her Tract H1 and Tract H2.[250] Two deeds were delivered at closing: one conveyed Tract H1 and the other conveyed Tract H2.[251] It is inconceivable that a person with Martin's experience and special training would be "mistaken" about what was to be conveyed and what was conveyed.

In connection with the closing, Mebane and Madden executed and delivered on the WSC's behalf a document entitled Corporate Resolution.[252] It purports to have been adopted at the Board's meeting on February 22, 2016. Both Earnest and Madden confirmed that there is nothing on the posted agenda or posted meeting minutes concerning a sale of WSC land. The court has previously determined this violated TOMA.

All directors were present for the February 22 meeting. The audio tape reflects that there was a discussion in executive session concerning an amendment to the contract to extend the date for closing. These discussions are not covered by the "real estate" exception to TOMA and thus are required to be conducted in an open meeting. This was a violation of TOMA.

The tape confirms that the Board did not vote on or adopt any corporate resolution at the February 22, 2016 meeting. The matters described in the corporate resolution signed by Mebane and Madden never occurred, even though the document falsely portrayed that they did. Mebane or Madden or both likely signed the document

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[248] Exhibit75 (DX 153) at Martin 000135; FHH at 151 (Exhibit 13).
[249] Exhibit 77 (DX 156).
[250] Exhibit 78 (DX 155). FHH at 163 (Exhibit 13).
[251] Exhibit 79 (DX 157 & 159). FHH at 176, 184.

at Martin's office. She admits she had all the closing documents at one time or another.[253] She knew the title company would require a corporate resolution to close the transaction.[254]

The conveyance of WSC property without a duly adopted corporate resolution violated Section 22.255 of the Business Organizations Code.

Even the fraudulent resolution did not authorize the conveyance of Piper Lane. The 2019 Board did not adopt a corporate resolution authorizing the conveyance of Piper Lane. The execution and delivery of the Correction Deed[255]without a duly adopted corporate resolution violated Section 22.255.

At some point in early 2016 Taylor learned that the Board had approved a transaction to sell part of the WSC's airport property to Martin or her entity.[256] Taylor called Patti Flunker, a WSC member and resident in the Windermere community. According to Flunker, Taylor sounded very upset.[257] Taylor informed Flunker that the WSC board had voted to sell some of the WSC's land in the Spicewood Airport to Martin through her business entity Friendship Homes & Hangars. Taylor forwarded an email she had received from the Burnet County Commissioners Court reflecting that some of the WSC's airport land had been platted. She told Flunker that Tract H1 and Tract H2 were sold to Martin or Friendship.

Taylor told Flunker that the WSC's airport property was not to have been sold piecemeal or without ever having been advertised for sale.

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[252] Exhibit 80 (DX 94). Earnest at 214-5 (Exhibit 4); Madden at 68 (Exhibit 5).
[253] FHH at 170 (Exhibit 13).
[254] FHH at 171 (Exhibit 13).
[255] Exhibit 81 (DX 21).
[256] Taylor at 7-8 (Exhibit 9).
[257] These facts are set forth in the Declaration of Patti Flunker, Exhibit 73.

Flunker had no idea that Martin operated an entity called Friendship Homes & Hangars and she said that to Taylor. Taylor assured her that Friendship was Martin.

Taylor told Flunker she believed Martin had a clear conflict of interest. She said that something needed to be done about it. She suggested that Flunker or her husband Danny recruit others in the community to participate in a challenge.

After she spoke with Taylor, Flunker looked at the minutes posted on the WSC's website. She could not find a reference to a land transaction with Martin or Friendship in any of the posted minutes. When copies of minutes were gathered in late 2016 for attachment to the members' petition to remove Martin from the Board, no minutes for the December 19, 2015 Board meeting were found. Martin oversaw the WSC website in 2016.

The Director Defendants claim they made a $200,000 principal payment after the closing; Plaintiffs assume that is true for purposes of this Response. The principal payment notwithstanding, there was still a loan balance in excess of $350,000. In late March 2016, the directors approached the WSC's lender about a modification of the terms of the existing loan.[258] In May 2016, the WSC's debt was modified.[259] The modification provided for a higher interest rate (5% v. 3.75%), a shorter term (5 yr. v. 10 yr.) and a balloon payment of more than $171,000 in 2021. The directors also incurred new debt in the form of a $100,000 line of credit. The WSC has not analyzed whether these arrangements were beneficial to the company.[260]

[258] Martin at 278 (Exhibit 6); Exhibit 82 (DX 75).
[259] Taylor at 82, Exhibit 83 (DX 136).
[260] WSC (Madden) at 46 (Exhibit 11).

Had Martin been required to pay market value for Tract H1 and Tract H2,[261] the WSC's debt would have been extinguished with money left over.[262]

Members filed a petition to remove Martin from the Board in late 2016.[263] The petition complained of Martin's conflict of interest and of the lack of transparency in connection with the approval of a right of refusal. Mebane sent the petition to Mark Zeppa. Zeppa wrote a detailed memorandum explaining the numerous ways in which the Board had violated TOMA in connection with the transaction.[264] Martin received a copy of the memorandum shortly after it was prepared.

Zeppa concluded that "the actions of the WOWSC Board discussing and approving the sale are voidable."[265] He advised "if the Board wants to preserve the deal it made with Ms. Martin, the Board should re-do the transaction."[266] He explained this would require posting in an agenda for a future meeting for discussion and action in general session.

They knew the transaction was voidable. They knew that could be remedied. They chose not to remedy it. Apparently, none of them were willing to engage in discussions and vote on the Martin offer in an open session in front of the membership. Instead, they created exposure for the WSC[267] and later spent the members' money to defend their TOMA violations and to oppose the members' efforts to make the corporation whole.

[261] Bolton at 7 (Exhibit 7); Exhibit 2 (DX 2) at p. 3.
[262] WSC (Madden) at 41 (Exhibit 11).
[263] Exhibit 84 (DX 116).
[264] FHH at 146, Exhibit 85 (DX 132).
[265] Almost immediately after this memorandum was circulated, Zeppa produced a second memorandum portraying that there were no TOMA violations and that Martin did nothing wrong. It is readily apparent, however, that Zeppa did not receive new information. He was still Malcolm Bailey's lawyer and he just changed his conclusion. The Director Defendants have included only this second memorandum in their summary judgment materials. See Exhibit 13-A.
[266] Exhibit 85 at p. 2.
[267] Friendship's lawyer sent a letter threatening that the WSC would be liable for breach of warranty if the TOMA Integrity plaintiffs prevailed and the sale were set aside. Exhibit 86 (DX 158).

During this time, other issues arose as a result of the 2015 Board's failure to comply with their statutory duties. The right of refusal had to be amended so it would not encompass all of the WSC's other land.[268] An issue arose concerning whether the platted easement on the south end of the property was adequate for taxiway purposes.

The Investigation

In 2018, directors who had not been involved in these events gained enough control over the Board to prompt an investigation into the Martin deal. Among other things, they wanted reliable data as to the value of the property Martin acquired as of the date of the transaction.[269] The WSC's counsel approached both TOMA Integrity and Friendship in an effort to obtain agreement for an appraisal by an appraiser approved by all parties pursuant to an engagement letter joined in by all.[270] The WSC recommended that Chance Bolton be selected as the appraiser.

The WSC and TOMA Integrity agreed without conditions. Friendship agreed, but on the conditions that the appraisal remain confidential and not be admissible in any court proceeding. The WSC and TOMA proceeded on their own and at their expense. Bolton prepared an appraisal and delivered it in late 2018.[271] The appraisal concluded that the value of the land sold to Martin at the time of the transaction was $700,000. The appraisal concluded that the remainder tract had been diminished in value by over $600,000.

It is undisputed that at the time and for months thereafter the WSC Board presented the Bolton appraisal as reliable data and itself relied on report. The WSC's

[268] Taylor at 40-1, Exhibit 87 (DX 118).
[269] WSC (Nelson) at 50-1 (Exhibit 12).
[270] Exhibit 88 (WOWSC001747 – 001750).
[271] Bolton at 7; Exhibit 2 (DX 2).

counsel wrote a detailed demand letter to Martin and Friendship that analyzed their numerous instances of misconduct and incorporated Bolton's conclusions.[272] WSC representatives requested that Friendship return the property.[273] Martin said she would wait to see what happened with the Board elections.

Earnest, who had resigned in 2016, came back to run for the Board. The full details are beyond the scope of this response, but suffice it to say that he applied at the last minute and hired a lawyer to get him on the ballot. Things changed dramatically after the 2019 election.

The Settlement

The court in the TOMA Integrity lawsuit found that the WSC had violated TOMA but declined to void the land transaction. Martin filed a new plat for the property. Members continued to believe that the property should be returned to the WSC. A new lawsuit was filed in connection with the plat application. Later, the directors who were involved in the approval were joined as parties. The WSC advanced funds to pay their litigation expenses. Thereafter, other directors were joined as parties. The WSC advanced funds to pay their litigation expenses as well.

The WSC did not require the Director Defendants to provide sworn statement and affirmation required under Sections 8.104 and 8.105 until late November 2019.[274] The Director Defendants claim to be relying on an opinion of counsel, but they have not produced it. Martin's obligation pursuant to her undertaking are likely encompassed within the full release she was given in connection with the settlement.

[272] Exhibit 1 (DX 1).
[273] FHH at 181.
[274] See Exhibit 8BB to Director Defendants' Motion.

In October 2019, the Board approved an Amended, Restated, and Superseding Agreement ("Agreement") with Martin and Friendship.[275] Pursuant to the Agreement, Gimenez executed and delivered a Correction Deed[276] that left the prior conveyance intact and included the 0.5-acre paved Piper Lane taxiway. According to Friendship's attorney, this deed is effective to transfer title to the Piper Lane taxiway as of March 14, 2014.

There is no corporate resolution authorizing the conveyance of the Piper Lane taxiway. Only $2,500 in additional consideration was paid for the Piper Lane taxiway, and that money is subject to being refunded. The 2019 Board did not know the fair market value of the Piper Lane taxiway when it approved the settlement.[277] The 2019 Board did not reserve an easement across the Piper Lane taxiway for the benefit of its remainder tract.

The settlement also involved a taxiway easement agreement covering the platted access easement on the south end on the property now owned by the Mairs. This is the access easement the WSC reserved in the deed and includes the taxiway tract the WSC purchased from Mann. Martin had promised in the contract to grant a second taxiway easement on the taxiway she would later develop. The right to have that valuable second taxiway was released.

The evidence before the court establishes that property worth $700,000 was sold to Martin for $200,000 in 2016. That transaction has been left intact. Additional acreage in the form of Piper Lane now belongs to Martin for $2,500 refundable dollars. None of the Director Defendants is prepared to take the position that such a transaction is within the

[275] Exhibit 89 (DX 13).
[276] Exhibit 81 (DX 21).
[277] See e.g., WSC (Nelson) at 17. The WSC has asserted a privilege and refuses to disclose the information.

corporate powers or within the scope of their lawful authority as directors and officers. Instead, they now nitpick over value. Bolton was the appraiser the WSC's counsel selected and the WSC retained to provide it with value information and he did just that. No one ever questioned him, much less complained to him, about his analysis. None of them has the expertise to quarrel with Bolton's conclusions. None of them has the expertise to reach the conclusion that work of the title company's appraiser is reliable. In an effort to get out of the trap, some of them filed a baseless complaint with the state licensing agency.[278]

Throughout this time, the WSC has spent enormous amounts of money to "defend" itself in a lawsuit where no one is seeking to recover against it.

V.

Applicable Law

A. Summary Judgment Cannot Be Granted on Grounds of Lack of Capacity.

At the tail end of their legal briefing, the Director Defendants suggest that Plaintiffs lack capacity to bring this lawsuit.[279] Inasmuch as capacity is a threshold matter, Plaintiffs address this contention at the outset. The Director Defendants are not entitled to summary judgment for two independent reasons.

1. No Verified Denial.

Rule 93, Tex. R. Civ. Proc., requires that a pleading setting up the propositions that (i) the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued or (ii) that the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued must be verified by

[278] Earnest at 225-6 (Exhibit 4).
[279] The Director Defendants also suggest from time to time that they are not liable in the capacity in which they are sued. For the reasons discussed herein, summary judgment cannot be granted on that basis either.

affidavit. The Director Defendants' live answers do not include a verified denial as to either of these matters. Accordingly, summary judgment cannot be granted on the grounds of lack of capacity.

2. Plaintiffs Are Authorized to Bring This Suit As a Matter of Law.

Section 22.002, Tex. Bus. Orgs. Code, expressly confers authority on a member of a nonprofit corporation to bring two types of actions. A member may sue the corporation to set aside or enjoin an ultra vires act or transfer. §20.002(c)(1). A member may also bring a representative suit against current or former officers or directors for exceeding their authority. §20.002(c)(2). Plaintiffs' lawsuit involves both.

The history of Section 20.002 makes clear that the Legislature intended just exactly that. One of the predecessors to Section 20.002 was Article 1396-2.03(A) of the Texas Non-Profit Act. Article 1396-2.03(A) provided that an ultra vires act of a non-profit corporation could be challenged (i) in an action by a member against the corporation to set aside or enjoin the activity, or (ii) by a member in a representative suit if the action is against incumbent or former directors for exceeding their authority. The provisions of Article 1396-2.03(a) were carried forward into Section 20.002 almost verbatim. The Legislature simply consolidated them with their for-profit ultra vires counterpart (art. 2.04 of the Texas Business Corporation Act) and recodified them into Section 20.002 of the Texas Business Organizations Code.

It was well-established in the earlier case law that statutory ultra vires claims against current and former directors could be asserted both by members of a non-profit in a representative suit and by shareholders of a for-profit in a derivative suit. See, e.g., *Governing Bd. v. Panill*, 561 S.W.2d 517, 524 (Tex. Civ. App. – Texarkana 1977, writ ref'd n.r.e.). The recodification did nothing to change that result. The court in *Carmichael v.*

Tarantino Properties, Inc., 604 S.W.3d 469 (Tex. App. – Houston [14th Dist.] 2020, no pet.), on which the Director Defendants rely, expressly recognized that by its terms Section 22.002 authorizes members to assert claims that the condominium association's present and former officers and directors breached fiduciary duties to the Association by their ultra vires conduct. *Id.* at 475.[280] The *Carmichael* court distinguished cases in which the plaintiffs had not asserted claims under Chapter 20 and thus the court did not address the issue. *Id.* (plaintiffs in *Tran v. Hoang*, 481 S.W.3d 313 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) did not assert ultra vires claims on behalf of a nonprofit corporation, thus the question of whether Chapter 20 authorizes such claims was neither presented nor addressed); *see also Flores v. Star Cab Co-op. Ass'n, Inc.*, 2008 WL 3980762, at *7 (Tex. App. - Amarillo 2008, pet. denied) (holding that the Texas Non–Profit Corporation Act [Chapter 22] does not contain a provision like Business Corporation Act article 5.14, authorizing a derivative action, but not addressing suits under Chapter 20).

The decision in *Pike v. Texas EMC Mgmt., LLC*, 610 S.W.3d 763 (Tex. 2020) provides no support for the notion that Plaintiffs lack capacity. First, that case involved a partnership and the application of Chapters 152 and 153, Tex. Bus. Orgs. Code, which are specific to partnerships. Further, the plaintiff in *Pike* did not sue in a representative capacity; he sued directly for injuries he claimed to have suffered directly. While the Court noted in passing that Chapter 153 expressly gives a limited partner authority to sue derivatively for injury to the limited partnership, the questions whether and under what circumstances that plaintiff would have had authority to sue derivatively had he chosen to do so were not before the Court.

[280] The court's discussion was in the context of standing, rather than capacity, but it is clear that the question before

This suit is expressly authorized by the plain language of Section 20.002. The statute means just what is says and no court has ever held otherwise.

The opinion in *Pike* does, however, provide strong support for Plaintiffs' contention that they, as the financial stakeholders in the enterprise operated by the WSC, are constitutionally entitled to sue directly for their own injuries resulting from the Director Defendants' misconduct. As Plaintiffs' prior briefing makes clear, those injuries include profits (which the articles[281] and bylaws[282] require be distributed to them annually as customers of the Corporation) lost as a result of the sale of an asset worth $700,000 for only $200,000 and the diminution in value of the other airport land and (ii) increased rates and special assessments charged to cover operating costs and revenue shortfalls that would not otherwise exist. While Plaintiffs do not agree with the Court's prior ruling on this issue, they respect that the Court has ruled. Should this Court be inclined to revisit that ruling, however, Plaintiffs urge on the basis of *Pike* and the authorities previously cited that they are entitled to bring a direct action against the Director Defendants in this matter.

B. Proof of special circumstances (i.e., an illegal act) is not required to hold the Director Defendants personally liable for the consequences of their own conduct.

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the court was whether the members had authority to bring suit.

[281] Article 6 provides, in pertinent part, that "[a]ll profits arising from the operations of the business of the Corporation shall be annually paid out to . . . persons who have during the past year transacted business with the Corporation." Only members of the Corporation are customers entitled to a share of profits.

[282] Article 5, §1. The distribution of profits is not "dividends paid on memberships" or income distributed to members "in [that] role." As Plaintiffs' prior briefing demonstrates, the distribution of profits to members as customers is provided for in the enabling statute (see §67.008, Tex. Water Code) and is required under federal law (see §501(c)(12)).

The Director Defendants assert that they cannot be held personally liable herein unless their unauthorized acts were illegal and the Director Defendants knew they were illegal. Motion at 19. The authorities they rely upon do not support their claim.

First, none of the cited opinions holds that a director cannot be held personally liable for his own ultra vires conduct unless he knew his conduct was illegal. The Director Defendants themselves do not purport to direct us to any such holding (see Motion at 19-20) and Plaintiffs are aware of none. The parenthetical attributed to the opinion in *Resolution Trust Corp. v. Norris*, 830 F. Supp. 351 (S.D. Tex. 1993) is taken out of context. That case involved an effort to hold the corporation's directors vicariously liable for the alleged illegal or ultra vires acts of the corporation's employees. The court held that the directors' failure to monitor the acts of loan officers and other individuals charge with preparing loans and presenting them for Board approval would not constitute an ultra vires act on the part of the directors themselves unless they had knowledge of the employees' illegal conduct. *Id.* at 357. That holding has no application here.

Further, none of the cases cited for this proposition involve a suit brought under Section 20.002 against a current or former director for exceeding that person's authority. Section 20.002 is devoid of any condition that the unauthorized act or acts were illegal or that the perpetrators knew they were illegal.

Finally, the principle on which the Director Defendants rely does not apply where the corporation (here, in a representative suit) seeks to hold its directors directly liable for their own acts and omissions. The cases cited for this proposition involve efforts to hold directors (primarily "outside" directors of failed financial institutions) personally liable for acts by the corporation that were alleged to be beyond the scope of its powers as defined by its charter or the laws of the state of incorporation. It has long been the law in Texas that,

as a general matter, the corporate form shields directors, officers and stockholders from individual liability for the acts and omissions of the company in its corporate capacity. This rule applied even where the real purposes for which the corporation was operated differed from the purposes for which it was organized as set forth in its charter, provided those purposes were lawful. *Seymour Opera House Co. v. Wooldridge*, 31 S.W. 234 (Tex. Civ. App. 1895). In *Staacke v. Routledge*, 241 S.W. 994 (1922), on which *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707 (5th Cir. 1984) and its progeny rely, the Court simply applied those principles and concluded that the corporate form does not shield the owners or directors from personal liability for the ultra vires acts of the corporation where those corporate acts are unlawful. 214 S.W. at 999.

Here, on the other hand, Plaintiffs do not seek to hold the Director Defendants personally liable for acts of the corporation. This is a suit by the corporation itself (through its authorized representatives) to hold its directors accountable for the consequences of their own conduct exceeding their authority. The corporate form is not a shield against that liability. No veil piercing theory is required. See, e.g., *Sutton v. Reagan & Gee*, 405 S.W.2d 828, 834 (Tex. Civ. App. – San Antonio 1966, writ ref'd n.r.e.) (director is clearly liable to the corporation for any loss it may suffer as a result of his breaches of duty). The rationale that gave rise to the rule in *Staake* does not apply here. Perhaps that is why it has not been applied in any case brought under Section 20.002(c)(2).

Some of the cases cited by the Director Defendants characterize the conduct for which personal liability is sought as a "breach" of the directors' common law duty of obedience. E.g., *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984). The opinions make clear, however, that the "breach" to which they refer is the corporation's commission of ultra vires acts. The effort is to impose personal liability for

these corporate acts on the directors because they are directors. *Id.* That is in stark contrast to this suit, which seeks to hold the Director Defendants liable for the consequences of their own conduct.

C. The types of illegal acts in which the Director Defendants engaged.

Should the Court determine that proof of an "illegal" ultra vires act is required to hold the Director Defendants liable for exceeding their authority, Plaintiffs have met that standard here. The summary judgment evidence is discussed in detail below. This section explains the legal principles on which Plaintiffs rely.

Under Section 20.002, members are entitled to assert the corporation's claims for acts or transfers involving (i) the directors' use of authorized powers for unauthorized purposes and (ii) the directors' exercise of authority inconsistent with an expressed limitation on such authority. *Carmichael v. Tarantino Properties, Inc.*, 604 S.W.3d 469, 478 (Tex. App. – Houston [14th Dist.] 2020, no pet.). The Director Defendants' suggestions that these claims are actionable only if the corporation receives no benefit (Motion at 19) [283] and that they cannot be held liable if they did not personally receive any benefit (Motion at 3)[284] are unsupported by any authority and are simply wrong.

The Director Defendants are also wrong to suggest that this suit is simply a complaint about "[a] sale of property for arguably less than it is worth." Motion at 28-9. To be sure, inadequacy of consideration can be sufficient in and of itself to give rise to a cause of action. E.g., *Golson v. Capehart*, 473 S.W.2d 627, 628 (Tex. Civ. App. – Eastland

[283] The case cited for that proposition, *Resolution Trust Corp. v. Holmes,* 1992 WL 533256 (S.D. Tex. 1992), most certainly does not so hold.

[284] The court in *Gearhart* distinguished liability for breaches of the duty of care (for which disinterested directors may protected by the business judgment rule) and liability for breaches of the duty of obedience, i.e., not to engage in acts beyond the corporate authority (to which the business judgment rule does not apply). A director's "disinterest" is not a factor in determining liability for a breach the duty of obedience. 741 F.2d at 721.

1971, writ ref'd n.r.e.). Plaintiffs' claims here, however, are based on numerous instances of excessive conduct by the Director Defendants that resulted in, *inter alia*, the disposition of corporate property for the personal benefit of a sitting director for a fraction of its market value or for no consideration at all.

As described by the Texas Supreme Court, an "illegal act" in this context is one in violation of a specific statute, malum in se, malum prohibitum, or against public policy. *Staacke*, 241 S.W. at 998–99; *accord Bond v. Terrell Cotton & Woolen Mfg. Co.*, 82 Tex. 309, 313, 18 S.W. 691, 693 (1891) (A corporate act becomes illegal, when committed in violation of an express statute on a specific subject, or when it is malum in se or malum prohibitum, or when it is against public policy.)

The Director Defendants' suggestion that the decision in *Whitten v. Republic Nat. Bank of Dallas*, 397 S.W.2d 415, 418 (Tex. 1965) limited "illegal acts" solely to acts expressly prohibited by specific statute (Motion at 20) is simply incorrect. In *Whitten,* the Supreme Court expressly cited and relied on *Bond's* more complete list of acts that are considered "illegal" for these purposes. The Director Defendants do not cite to any decision that purports to narrow the list and Plaintiffs are aware of none.

Likewise, the Director Defendants cite no authority for their suggestion that an act is not "illegal" for these purposes unless the statute in question expressly authorizes the recovery of damages against individual violators. Motion at 32-3. Such a construction would be contrary to the rationale for the rule. As discussed above, to the extent the law recognizes an "illegal act" requirement in this context the "act" to which it refers is an act of the corporation and not an act of an individual director. The requirement exists, if at all, for the very purpose of determining when individual directors can be held personally liable for the acts of the corporation. To hold that for two "illegal acts" a plaintiff must also show

individual acts in violation of a statute and that the statute expressly provides for personal liability is contrary to the governing law and the purposes and rationale for the rule.

As discussed more fully above, the facts here demonstrate numerous ultra vires acts that are also illegal. These include:

- The use of authorized powers for unauthorized purposes and the exercise of authority inconsistent with an expressed limitation on such authority [which is malum prohibitum and a violation of Section 20.002, Tex. Bus. Orgs. Code] to the detriment of the corporation [which is malum in se];[285]
- The approval and execution of conflict transactions that are not shown to have been fair to the corporation, which is malum in se;[286]
- The waste of corporate assets, which is malum in se;
- The execution of a conveyance of corporate real property without an appropriate resolution of the board, which is malum prohibitum and a violation of Section 22.255, Tex. Bus. Orgs. Code;[287]
- The execution and delivery of a fictitious and fraudulent corporate resolution, which is malum in se;[288]
- The exercise of director authority not done in good faith, with ordinary care and in a manner reasonably believed to be in the best interests of the corporation, which is malum prohibitum and a violation of Section 22.221, Tex. Bus. Orgs. Code;[289]

[285] Tex. Bus. Orgs. Code §20.002(c)(2).
[286] Tex. Bus. Orgs. Code §22.230; *Carmichael,* 604 S.W.3d at 477. The failure to comply with one or the other of the stated criteria renders the statute inapplicable and therefore common law rules apply.
[287] Tex. Bus. Orgs. Code §22.255 (corporation may convey real property when authorized by appropriate resolution).
[288] E.g., *Guarneri v. Kessler*, 98 F.2d 580, 581 (5th Cir. 1938).
[289] Tex. Bus. Orgs. Code §22.221(a).

- The abdication of director responsibilities and/or gross negligence in the exercise of director powers, which is malum per se;[290]
- The exercise of authority in noncompliance with the requirements of the Texas Open Meetings Act (including, without limitation, Sections 551.002, 551.005, 551.021, 551.072 and 551.102, Tex. Govt. Code) in connection with the approval and execution of a transaction on behalf of the corporation, which is malum prohibitum, a violation of the Act and against public policy;[291]
- The preparation, approval and publication of fictitious and fraudulent meeting minutes, with is malum prohibitum, malum in se and against public policy; and
- The advancement of litigation expenses to current and former directors in noncompliance with Sections 8.104 and 8.105, Tex. Bus. Orgs. Code, which is malum prohibitum and a violation of a specific statute.[292]

D. The doctrine of judicial nonintervention in the internal affairs of a private voluntary association does not apply here.

Traditionally, courts are not disposed to interfere when a private voluntary association fails to conduct its business according to its own procedures. *Dallas Cty. Med. Soc'y v. Ubinas Brache*, 68 S.W.3d 31, 41 (Tex. App. 2001). By choosing to become a member, a person subjects himself, within legal limits, to the organization's power to make and administer its own rules. *Harden v. Colonial Country Club*, 634 S.W.2d 56, 59 (Tex.App.-Fort Worth 1982, writ ref'd n.r.e.). Thus, the courts generally do not interfere with an association's administration of its rules concerning such matters as the admission,

[290] E.g., *Resolution Tr. Corp. v. Norris*, 830 F. Supp. 351, 357 (S.D. Tex. 1993) (abdication of duties and gross negligence are actionable breaches of fiduciary duty).

supervision or expulsion of members [*Whitmire v. Nat'l Cutting Horse Ass'n*, 2009 WL 2196126, at *1 (Tex. App. – Ft. Worth 2009, pet. denied)], the privileges associated with membership [*Dickey v. Club Corp. of Am.*, 12 S.W.3d 172, 174 (Tex. App. – Dallas 2000, pet. denied)], the internal application of its own bylaws and regulations [*Burge v. Am. Quarter Horse Ass'n*, 782 S.W.2d 353, 355 (Tex. App. – Amarillo 1990, no pet.)] or the imposition of fines and penalties against members for rule violations [*Hoey v. San Antonio Real Est. Bd.*, 297 S.W.2d 214, 216 (Tex. Civ. App. – San Antonio 1956, no writ hist.). The idea is that where the association has the authority to make the rules, it must also have the authority to interpret and apply them and that the choice to become a member implies consent to be bound by the association's determinations as to those matters. The doctrine of nonintervention does not apply where the actions of the organization contravene public policy or the laws of the land. See *Whitmire*, 2009 WL 2196126, at *4 and cases cited therein.

A corporation is the creature of the law. Its existence, rights, and powers depend upon the will of the sovereign as expressed in its charter and the general laws relating to corporations. It has only such powers as are expressly conferred, or such as by necessary implication arise out of those expressly granted and essential in carrying out the corporate purposes. *Taylor Feed Pen Co. v. Taylor Nat. Bank*, 215 S.W. 850, 851 (Tex. Comm'n App. 1919); see also *National Equitable Soc. v. Alexander,* 220 S.W. 184, (Tex. Civ. App. – Austin 1919, no writ hist).

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[291] *City of Laredo v. Escamilla*, 219 S.W.3d 14, 19 (Tex. App. – San Antonio 2006, pet. denied) (The provisions of TOMA are mandatory). See also *Texas State Bd. of Pub. Acct. v. Bass*, 366 S.W.3d 751, 759 (Tex. App. – Austin 2012, no pet.) (The intended beneficiaries of the Act are members of the interested public).
[292] Tex. Bus. Orgs. Code §§8.104(a) and 8.105(b) and (c).

Unauthorized corporate acts contravene the laws of the land. Texas statute requires that disputes concerning the scope of the corporation's powers, the exercise of those powers or the exercise of authority by the corporation's officers and directors be decided by the courts, not the corporation. Tex. Bus. Orgs. Code 20.002(c). The doctrine of nonintervention in the internal affairs of a private voluntary association does not apply.

E. Res Judicata and Mootness.

Res judicata bars the relitigation of claims that have been finally adjudicated or that could have been litigated in the prior action. For res judicata to apply, the following elements must be present: (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). As explained in great detail in Plaintiffs' Consolidated Response to the parties' motions for summary judgment, the doctrine of res judicata does not bar Plaintiffs' claims because, *inter alia*, they are not seeking relief under the Texas Open Meetings Act (the claim raised in the first action) and because the claims asserted in this lawsuit could not have been asserted by TOMA Integrity, Inc. because they can only be brought by members. To the extent necessary or appropriate, Plaintiffs incorporate fully by reference the relevant portion of their previously filed Consolidated Response.

Res judicata certainly does not prevent Plaintiffs from presenting evidence of the Director Defendants' numerous TOMA violations to show that their excessive acts were also malum prohibitum, in violation of a specific statute and contrary to public policy. To the contrary, the doctrine of collateral estoppel precludes either the WSC or the Director

Defendants from attempting to show that they did not violate the Act as set forth in the earlier judgment.

Moreover, as discussed above the very recent production of the audio tape recordings of the Board's executive sessions in October and December 2015 and February 2016 has revealed other TOMA violations that were known to Director Defendants but have been cloaked in secrecy under the guise of the so-called executive session "privilege" for years. These violations were not known about (and therefore could not have been raised) in the earlier litigation by TOMA Integrity, Inc. Plaintiffs do not raise them in this lawsuit for purpose of seeking a recovery under TOMA.[293] Instead, these additional TOMA violations are proof of other ultra vires acts that were also malum prohibitum, in violation of a specific statute and contrary to public policy.

The mootness doctrine likewise does not apply here. The Director Defendants assert that in connection with the October 2019 settlement with Martin and Friendship they "fixed" the 2016 Board's failure to reserve proper taxiway access to the remainder tract and the 2016 Board's granting of a preferential purchase right to Martin for no consideration. Even if that were true, their "fixes" would not moot the controversy even as to those two matters.

A cause becomes moot when judgment is sought on some matter which, when rendered, for any reason, cannot have any practical effect on the then existing controversy. *Carr v. Austin Forty*, 744 S.W.2d 267, 270 (Tex. App. – Austin 1987, writ den.), citing *McNeill v. Hubert*, 23 S.W.2d 331 (Tex.1930). Plaintiffs seek a judgment for money damages for losses sustained as a result of the 2016 transaction. Assuming *arguendo* that

[293] For this reason, the doctrine of res judicata, the statute of limitations applicable to claims for relief under TOMA

at least some portion of the damages were mitigated by the October 2019 settlement, a judgment for the damages incurred would clearly have an effect on the existing controversy.

F. Section 16.033, Tex. Civ. Prac. & Rem. Code, does not apply.

The Director Defendants' reliance on Section 16.033, Tex. Civ. Prac. & Rem.Code, is misplaced. That section, which is entitled "Technical Defects in Instruments," governs actions for the recovery of real property or an interest in real property on the grounds that the conveyancing instrument was technically defective in one or more of the enumerated respects. Tex. Civ. Prac. & Rem. Code Ann. § 16.033. It does not apply here for several reasons.

First, the Director Defendants' Motion seeks to prevent Plaintiffs from recovering money damages. Their Motion is not directed to any alleged "action for the recovery of real property" to which Section 16.033 might apply.

Second, Plaintiffs do not seek to set aside a deed on the grounds that the deed is technically defective. Plaintiffs allege that, regardless how legitimate the paperwork might appear, the Martin contract and the entire transaction (including the 2019 giveaway of Piper Lane) were ultra vires and were without authority. That is not a suit to which Section 16.033 applies. See, e.g., *Campsey v. Jack Cty. Oil & Gas Ass'n*, 328 S.W.2d 912, 915 (Tex. Civ. App. – Ft. Worth 1959, writ ref'd n.r.e.).

Finally, Section 16.033 applies to a challenge to an instrument of conveyance more than two years after the instrument was filed for record. It is undisputed that the Sham Resolution to which the Director Defendants refer is not a conveyancing

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and similar issues are not a concern here.

instrument and that it was never recorded in the Burnet County public records. Moreover, Plaintiffs' complaint is not that the Sham Resolution is technically defective. Their complaint is that the Sham Resolution is a complete fabrication that fraudulently purports to memorialize events that never occurred. Section 16.033 does not apply to that claim.

G. The so-called "safe harbor" provisions.

The Director Defendants assert that they are protected from liability pursuant to a variety of common law doctrines and statutory provisions. These include:

- the business judgment rule;
- Section 22.221, Tex. Bus. Orgs. Code;
- Section 22.230, Tex. Bus. Orgs. Code;
- Section 22.235, Tex. Bus. Orgs. Code;
- Chapter 84, Tex. Civ. Prac. & Rem. Code;
- 42 U.S.C. §14501;
- the WSC's bylaws and Section 7.001, Tex. Bus. Orgs. Code.

Each of these is discussed below.

Business Judgment Rule

The business judgment rule protects a corporate director who acts in good faith, with reasonable care and without corrupt motive from liability for mistakes of business judgment that damage the corporate interests. *Gearhart*, 741 F.2d at 721. Ultra vires acts, however, are outside the scope of judgment and discretion that the business judgment rule protects. *Resol. Tr. Corp. v. Norris*, 830 F. Supp. 351, 359 (S.D. Tex. 1993); see also *Cates v. Sparkman*, 73 Tex. 619, 11 S.W. 846 (1889) (The Texas business judgment rule

continues to be a viable part of Texas jurisprudence that furthers the public policy of encouraging citizens to serve as corporate directors by immunizing them from acts and omissions that in hindsight proved to be wrong, as long as the directors were not personally interested in the transaction *or did not act fraudulently or contrary to their lawful authority*.) (emphasis added). Thus, the business judgment rule does not protect the Director Defendants from liability for the ultra vires acts of the corporation or for their own ultra vires acts.

Even in context of a breach of the common law duty of care, the business judgment rule does not protect directors who abdicated their responsibilities as directors, were grossly negligent or engaged in fraud. *Norris,* 830 F. Supp. at 357.

Section 22.221

Section 22.221 requires that a director discharge his/her duties in good faith, with ordinary care and in a manner the director reasonably believes to be in the best interests of the corporation. Tex. Bus. Orgs. Code §22.221(a). Pursuant to subsection (b), a director is not liable to the corporation, a member or another person for an action taken or not taken as a director if he/she acted in compliance with the requirements of subsection(a).[294]

Section 3.102, Tex. Bus. Orgs. Code, permits a director to in good faith and with ordinary care rely on certain information prepared or presented by individuals within one or more of the enumerated categories. That section only applies, however, to information concerning the "domestic entity or another person." Further, it does not apply where the director has knowledge of a matter that makes reliance unwarranted.

[294] The Director Defendants also rely on Section 22.235, a similar provision that applies to the acts of officers taken in that capacity.

The WSC's bylaws (Art. 8, § 19) are more limited. The information must be prepared or presented by an officer or employee or a third party retained by the corporation provided the director reasonably believes the matters fall within such person's professional competence. Also, the bylaws require that a director must disclose knowledge concerning a matter that makes reliance unwarranted.

Applying common law standards applicable to breach of the duty of care, the courts have held that these matters present questions of fact that must be decided on a case-by-case basis. *Gearhart*, 741 F.2d at 721.

So far as Plaintiffs can tell, the courts have not yet addressed the question whether (and to what extent) Section 22.221 applies to a director's exercise of authorized powers for unauthorized purposes or the exercise of authority inconsistent with an expressed limitation on such authority.

Section 22.230

This section provides that an "otherwise valid and enforceable" contract or transaction involving an interested director is not void or voidable by reason of the director's relationship if one of two enumerated conditions is satisfied. One condition is authorization by affirmative vote of a majority of the disinterested directors acting in good faith, with ordinary care and with knowledge of the material facts as to the relationship and as to the contract or transaction. Tex. Bus. Orgs Code § 22.230(b)(1). The other condition is that the contract or transaction is fair to the corporation when it is authorized, approved or ratified by the board. Tex. Bus. Orgs Code § 22.230(b)(2).

If at least one condition is satisfied, then neither the corporation nor its shareholders has a cause of action against the interested director[295] for breach of duty by reason of the director's relationship or interest in the transaction or the director's attendance at the meeting, participation in a vote on the matter or execution of a written consent. Tex. Bus. Orgs Code § 22.230(e).

The exculpatory provision is expressly limited. It does not encompass claims against directors for other breaches of duty or for unauthorized exercises of power. Subsection (b) is likewise limited. It applies only with respect to "an otherwise valid and enforceable contract or transaction." A contract with a nonexistent entity, a transaction tainted by fraud or a contract with a sitting director made in violation of the bylaws are not within this category.

Chapter 84

Chapter 84 extends protection to volunteers of charitable organizations. The WSC is not a "charitable organization" as defined in the Act.

The WSC is a tax-exempt organization, but not under 501(c)(3) or (4). The WSC claims its exemption under 501(c)(12).

The WSC is not a "bona fide charitable, religious, prevention of cruelty to children or animals, youth sports and youth recreational, neighborhood crime prevention or patrol, or educational organization."

The WSC is not an "other organization organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good

[295] It is unclear whether the exculpatory provision is intended to apply to the interested director, to the other party to the contract or transaction or to interested director and the director's affiliates, associates and entities in which any of them have a managerial position or financial interest. Except in the unusual circumstances present in this case,

and general welfare of the people in a community" that "normally receives more than one-third of its support in any year from private or public gifts, grants, contributions, or membership fees." Tex. Civ. Prac. & Rem. Code Ann. § 84.003.

Pursuant to its enabling statute, the purposes for which the WSC may be organized are to provide water supply, sewer service, or both, and flood control and a drainage system for a political subdivision, private corporation, or another person. Tex. Water Code Ann. § 67.002. As a 501(c)(12) organization, the WSC is required to be organized and to operate exclusively for the purpose of providing specific services (here, water supply and sewer service) to its membership approximately at cost and on a mutual basis. IRS Publication 557 (Rev. February 2021) at 53. The WSC must use its income solely to cover losses and expenses of operations, with any excess being returned to the members or retained to cover reasonably anticipated future losses and expenses. *Id.* It is not supported by gifts, grants or contributions. To maintain its tax exempt status, at least 85% of the WSC's revenue must be derived from sales of services to its customers. 26 U.S.C. §501(c)(12).

In considering whether the American Legion was an "other organization organized and operated exclusively for the promotion of social welfare", the Attorney General looked to the definition of "charitable purposes" found in the Charitable Raffle Enabling Act:

> benefitting needy or deserving persons in this state, indefinite in number, by enhancing their opportunity for religious or educational advancement, relieving them from disease, suffering, or distress, contributing to their physical well-being, assisting them in establishing themselves in life as worthy and useful citizens, or increasing their comprehension of and devotion to the principles on which this nation was founded and enhancing their loyalty to their government.

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the only one against whom the corporation or its shareholders would have a breach of duty claim is the interested director.

Tex. Att'y Gen. Op. LO-97-098 (1997). The WSC certainly is not organized and operated exclusively for these purposes.

42 U.S.C. §14501

Similarly, the WSC is not a "non-profit organization" for purposes of the federal volunteer protection act.

As discussed above, the WSC is not an "organization which is described in section 501(c)(3) of Title 26 and exempt from tax under section 501(a) of such title." 42 U.S.C.A. § 14505(4)(A).

The WSC is not "any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes." 42 U.S.C.A. § 14505(4)(B). As discussed above, the WSC is required to be organized and conducted for the benefit of its member-customers.

The court in *Ventres v. Goodspeed Airport, LLC*, 2008 WL 2426790 (Conn. Super. Ct. 2008), judgment aff'd on other grounds, 301 Conn. 194, 21 A.3d 709 (2011), analyzed the legislative history of the statute and concluded that:

> the legislative history of the Act reflected that the bill covered not only "501(c)(3)" organizations, but that it also covered volunteers of the organizations which did good work, but did not have a statutory tax exemption. The court added that the legislative history also indicated that the bill covered volunteers of local charities, volunteer fire departments, little leagues, veterans groups, trade associations, chambers of commerce, and other nonprofit entities that existed for charitable, religious, educational, and civic purposes.

The WSC simply does not meet the criteria.

Even if the Act applied, however, it would not protect the Director Defendants in this case. The Act provides that "[n]othing in this section shall be construed to affect any civil action brought by any nonprofit organization or any

governmental entity against any volunteer of such organization or entity." 42 U.S.C.A. § 14503. Melucci v. Sackman, 37 Misc. 3d 1212(A), 2012 WL 5192763 (N.Y. Sup 2012) involved a representative suit asserting the rights of the nonprofit corporation against the defendants as directors of the corporation. The court rejected the defendant's contention that the complaint was barred by the Federal Volunteer Protection Act, 42 U.S.C.A. §§ 14501 et seq. The court held that the Act is only applicable to those causes of action alleging harm to the plaintiff personally and does not preclude representative claims brought on behalf of the corporation to redress breaches of fiduciary responsibility causing harm to the corporation.

Owen v. Bd. of Directors of Washington City Orphan Asylum, 888 A.2d 255 (D.C. 2005), involved a board of trustees' unilateral decision to oust the board of directors and discontinue funding the asylum, in contravention of the corporate charter. The court concluded that the trustees exceeded the scope of their responsibilities as volunteers in a nonprofit organization. The court held that the Act afforded immunity to those "acting within the scope of [their] responsibilities in the nonprofit organization" (42 U.S.C.A. § 14503(a)),” but that the trustees' actions inconsistent with the language of the charter were not protected.

WSC’s Bylaws and Section 7.001, Tex. Bus. Orgs. Code

The WSC’s certificate of formation “or similar instrument” cannot eliminate or limit the liability of a director for monetary damages to the extent the director is found liable for:

(1) a breach of the person's duty of loyalty to the organization or its owners or members;

(2) an act or omission not in good faith that:

(A) constitutes a breach of duty of the person to the organization; or

(B) involves intentional misconduct or a knowing violation of law;

(3) a transaction from which the person received an improper benefit, regardless of whether the benefit resulted from an action taken within the scope of the person's duties; or

(4) an act or omission for which the liability of a governing person is expressly provided by an applicable statute.

Tex. Bus. Orgs. Code Ann. § 7.001(c). As discussed more fully above, the Director Defendants' conduct falls within several of these categories.

WHEREFORE, premises considered, Plaintiffs request that the Director Defendants' Motion be in all respects denied and that they be awarded such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2021, a true and correct copy of the foregoing was served via eService on all counsel of record:

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