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

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

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

I.
INTRODUCTION

This case concerns a land sale by WOWSC to a company owned by a former sitting director that the Plaintiffs believe was for an unfair price. The Plaintiffs attempt to spin conspiracy theories by stacking inference upon inference and fanning the flames of suspicion. None of this intrigue constitutes evidence of the bad faith and illegality they must show to survive summary judgment.

Numerous statutes and common law rules impose a high burden on a plaintiff trying to hold a non-profit director ***personally liable*** for acts taken as a director. These include the business judgment rule and safe harbor statutory provisions immunizing directors from personal liability, including in the context of "interested director" transactions. The business judgment rule and the Texas Business Organizations Code, with their heightened protections for non-profit directors, provide the roadmap to this Court's decision. The Plaintiffs must put forth evidence of subjective bad faith, illegality, and other factors to create a fact dispute regarding the Directors' personal liability. Critically, the burden is on the Plaintiffs, not the Directors. The Plaintiffs have not met their burden.

Numerous Texas and federal courts have rendered judgment as a matter of law in favor of non-profit directors when plaintiffs seek to hold them personally liable—even if a fact dispute otherwise exists regarding the ***validity*** of a corporate transaction. The policy reason is obvious. No one would volunteer to serve on a non-profit board if these volunteers were not protected from personal liability except for the most egregious acts. It borders on frivolous for the Plaintiffs to suggest that ***this*** case is the unusual, egregious case where a fact dispute exists regarding director personal liability.

The Plaintiffs have thrown the kitchen sink at this Court with their 54-page "Facts" section and hundreds of pages of exhibits. They have done everything in their power to try confusing what should be a straightforward case. In truth, material facts relevant to the Directors' liability are not in dispute. The contemporaneous recordings and minutes of board meetings and other documents say what they say and tell the entire story—as much as the Plaintiffs try spinning a tale that the Directors ***must*** have subjectively felt some ill intent. At bottom, the undisputed evidence demonstrates that the 2015 Board believed, based on the information before them at that time, that

WOWSC was selling land to Friendship Homes & Hangars, LLC ("Friendship") for a good price.[1] The 2019 Board believed that it was best for the corporation to settle with Friendship and improve the Original Transaction for WOWSC. The exhibits the Plaintiffs attach to their Response do not refute this—they back up why the Board members voted as they did. Even if the Plaintiffs are correct that it would have been more prudent for the Directors to have voted differently (which the Directors dispute), that does not mean the Directors can be found personally liable. There is no evidence demonstrating anything other than that the Directors acted in good faith and believed they were acting in the best interest of WOWSC.

If this Court believes a fact dispute exists regarding the validity of either transaction or any part of either transaction (such as the Plaintiffs' heightened focus on the conveyance of Piper Lane), a trial could perhaps be had on the issue of validity. But this Court should render a take-nothing judgment in the Directors' favor on ***personal liability*** or, at a minimum, render a take-nothing judgment in the disinterested Directors' favor on personal liability. The Directors (except perhaps Dana Martin) need not be parties to any trial regarding contract validity because they are not parties to these transactions.[2]

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[1] "2015 Board" refers to Dana Martin, Bill Earnest, Mike Madden, Pat Mulligan, and Bob Mebane. "2019 Board" refers to Bill Earnest, Joe Gimenez, Dorothy Taylor, and Mike Nelson. (Collectively, the "Boards".) "Original Transaction" refers to the 2015/2016 land sale by WOWSC to Friendship. "2019 Transaction" refers to the October 2019 Amended, Restated, and Superseding Agreement entered into between Friendship, WOWSC, and Martin under which the 2019 Board essentially settled with Friendship and Martin and improved the terms of the Original Transaction for WOWSC.

[2] As explained in their Motion, the Directors have no individual power to take any action on either transaction. They cannot "undo" the transactions as individuals, and many of the Directors do not even sit on the WOWSC board any longer. The Original Transaction was between WOWSC and Friendship. The 2019 Transaction was between WOWSC, Friendship, and Dana Martin, the sole "interested" Director in the Original Transaction. The other seven Directors are not parties to either transaction, and the uncontroverted evidence establishes they have no personal interest in either transaction. A take-nothing judgment on personal liability in the Directors' favor (or, at a minimum, in the disinterested Directors' favor) would resolve all claims against the Directors. If the Court believes a fact issue exists on the validity of the 2019 Transaction, however, presumably Dana Martin would remain in the case on the issue of validity since she is a party to that transaction.

II.

REPLY ARGUMENT

A. Response to Plaintiffs' 54-Page "Facts" Section

The Directors are not aware of many factual disputes in this case beyond the so-called "true" value of the property (if a "true value" exists). Any fact dispute that might exist is not material to this Motion. The Directors do briefly address the following parts of the Plaintiffs' 54-page "Facts" section:

- The Plaintiffs make many factual assertions without any citation to the record. Some of their unsupported statements are untrue. Because those unsupported statements are not material to this Motion, the Directors do not go toe to toe here on the Plaintiffs' misrepresentations. The summary judgment record speaks for itself.

- The Plaintiffs often assign their own opinions regarding the Directors' motives (for instance, claiming, without evidence, that the Directors "knew" certain things "weren't true" or "weren't reliable" or somehow did not act in "good faith")—but these are not facts, and they are not backed up by the record.

- The Plaintiffs claim the Directors "nitpick over value." Response[3] at 57. In reality, there are wildly varying opinions regarding the value of the land, with the Plaintiffs' preferred valuation (assigned retrospectively by David and Chance Bolton three years after the Original Transaction) at the extreme top end. There is no principle of Texas law under which a non-profit director can be held personally liable each time he or she votes for the company to sell property for $5 that a person later claims was arguably worth $10. The "true" value of the property (if it can even be ascertained) is not material to the Directors' Motion.

- The Plaintiffs' swipes regarding what the Directors purportedly "knew" about the land's "true" value spotlight the absurdity of this lawsuit. They claim the Directors somehow "knew" the value was higher than what they sold it for because they must have:

    - "known" the previous Frank Greenberg offer was too low or was somehow "concocted,"

[3] "Response" refers to the Plaintiffs' March 17, 2021 Response filed in opposition to the Directors' Motion. In this Reply, the Directors at times cite to evidence attached to the Plaintiffs' Response. The Directors also cite to evidence attached to their Motion and to their supplemental evidence timely filed with the Court on February 19, 2021.

- "known" the previous Spicewood Pilots Association offer was too low,

- "known" the Curt Friedland bank appraisal was somehow too low and "unreliable,"

- "known" the William Keller offer was too low,

- "known" the Windermere Oaks Property Owners' Association ("POA") offer was too low, and

- "known" the Jim Hinton appraisal was too low and unreliable.

The Plaintiffs seek to have this Court impose on the Directors an unbelievably heightened, micromanaging standard regarding Director responsibilities and liability, contrary to Texas law. There is no valid reason the Directors could not rely on certified appraisals and previous offers; on opinions of the WOWSC general manager, George Burriss; on opinions of realtors and other professionals; and even on each other in believing they had received a good offer.

- The Plaintiffs complain about WOWSC defending itself and its Directors against the Plaintiffs' serial litigation. The Plaintiffs and their friends have now filed or intervened in four proceedings against WOWSC—this suit, the previous Texas Open Meetings Act ("TOMA") suit, a rate proceeding at the PUC, and a Public Information Act proceeding (to require WOWSC to produce unredacted versions of the WOWSC's and Directors' counsel's legal invoices in this litigation). The Plaintiffs' website boasts about their many lawsuits against WOWSC and its Directors, which are causing WOWSC's legal fees. https://integritynow1.net/.[4]

- The Plaintiffs incredibly suggest that, even though the Directors have sat for more than 40 hours of depositions and produced (along with Friendship and WOWSC) thousands of pages of written discovery, "the Plaintiffs have not yet had an opportunity to explore" purported inconsistencies between the board meeting recordings and deposition testimony. Response at 37. The Plaintiffs surely know that any inconsistences are minor and are due to the Original Transaction happening

[4] The Public Information Act suit was originally brought by WOWSC to protect the attorney-client privilege in response to Danny Flunker's repeated public information requests for unredacted attorney invoices. This suit had been settled with the Attorney General until Danny Flunker, represented by the same counsel as the Plaintiffs, intervened in the public information suit and kept it going. The Directors mention this for the Court's information, but it is not material to the Directors' Motion.

more than five years ago.[5] The Plaintiffs surely know that many of the Directors who served on the 2015 Board are older individuals who did their best during deposition to remember details that occurred years ago (the Plaintiffs have attached several of the Directors' full deposition transcripts to their Response). The Plaintiffs also surely know that even if some Directors might not now remember every detail, their overall account of what happened and why they did what they did has never changed. Memories regarding details fade, but the recordings and documents produced to the Plaintiffs provide contemporaneous evidence of precisely what happened and why the Boards did what they did. And the Directors' declarations and deposition testimony are consistent with those recordings and minutes.

- The Plaintiffs baldly misrepresent that WOWSC never appraised the property, nor surveyed it before it was sold. This is demonstrably false under this record. Stewart Watson surveyed the land in September 2014, and Jim Hinton appraised the property in September 2015 (and previously Curt Friedland appraised the property). These occurred before it was sold. Directors' Supplemental Evidence in Support of Motion filed Feb. 19, 2021 ("Supplemental Evidence") at Exhibit 16, pp. 12-13; *id.* at Exhibit 20, pp. 3-4; Response at Exhibit 3, pp. 155-57; Motion at Exhibits 8-N, 8-Q.[6] That the Plaintiffs do not agree with the Hinton or Friedland appraisals does not equate to not appraising the property. In any event, the Plaintiffs do not cite any law mandating a property owner must appraise and survey land before selling it, and the Directors are aware of none.

- The Plaintiffs concede that WOWSC took the $200,000 it netted from the Original Transaction to pay down its debt incurred for building the new wastewater treatment plant. Response at 52; *see, e.g.*, Supplemental Evidence at Exhibit 15-D.

B. The business judgment rule and statutory safe harbor provisions shield the Directors from personal liability.

The Plaintiffs do not dispute that it is ***their*** burden to overcome the business judgment rule and "safe harbor" provisions in the Business Organizations Code, which immunize the Directors from personal liability. *See, e.g.*, *Burns v. Seascape Owners Ass'n, Inc.*, No. 01-11-00752-CV,

[5] For instance, they pick that Bill Earnest testified that he had attended Danny Flunker's birthday party the day of the December 19, 2015 meeting, when the meeting was in the morning and the party at night. That he might have not remembered that the meeting he missed was in the morning rather than the evening five years ago is immaterial. They point to Bob Mebane not remembering the name of the realtor he spoke to before the 2015 land sale (Doris Van Trease) during his deposition. The board meeting recordings indicate he spoke to Doris Van Trease one time five years ago. Not remembering her name five years later is hardly evidence of a lie.

[6] The Plaintiffs also do not inform the Court that the September 2014 Watson survey of the land was produced by the Directors and WOWSC in discovery. MULLIGAN000197; WOWSC000811.

2012 WL 3776513, at *9 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, no pet.); *Priddy v. Rawson*, 282 S.W.3d 588, 594-95 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *In re Estate of Poe*, 591 S.W.3d 607, 641 (Tex. App.—El Paso 2019, pet. filed). The Plaintiffs have produced no evidence meeting their high burden. In fact, the evidence establishes the opposite.

The Business Organizations Code safe harbor provisions provide that a director (or officer) of a nonprofit:

> is not liable to the corporation, a member, or another person for an action taken or not taken as a director if the director acted in compliance with this section. A person seeking to establish liability of a director must prove that the director did not act:
>
> > (1) in good faith;
> > (2) with ordinary care; and
> > (3) in a manner the director reasonably believed to be in the best interest of the corporation.

TEX. BUS. ORGS. CODE § 22.221; *see also id.* § 22.235; *Burns*, 2012 WL 3776513, at *9. A ***plaintiff*** must prove ***all three*** of these elements to overcome these safe harbors—not just one of them.

Similarly, the business judgment rule immunizes a director from liability for acts that are within the honest exercise of his or her business judgment and discretion. *Sneed v. Webre*, 465 S.W.3d 169, 178 (Tex. 2015). "In Texas, the business judgment rule protects corporate officers and directors from being held liable to the corporation for acts that are negligent, unwise, inexpedient, or imprudent if the acts were within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved." *Id.* at 178 (internal quotations and citations omitted). Contrary to what the Plaintiffs claim, Texas courts (including binding Austin Court of Appeals' precedent) have concluded that the business judgment rule protects even acts of ***gross negligence***. *See, e.g.*, *Roels v. Valkenaar*, No. 03-19-00502-CV, 2020 WL 4930041, at *9 (Tex. App.—Austin Aug. 20, 2020, no pet.); *Chapman v. Arfeen*, No.

09-16-00272-CV, 2018 WL 4139001, at *15 (Tex. App.—Beaumont Aug. 30, 2018, pet. denied).[7] "Texas courts to this day will not impose liability upon a non-interested corporate director unless the challenged action is ultra vires or tainted by fraud…." *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 721 (5th Cir. 1984).

The Plaintiffs lodge various complaints about the Original Transaction—that it was not for enough money, that the 2015 Board did not sufficiently market the property, that Martin was an interested director, that the 2015 Board violated TOMA, and that WOWSC's corporate resolution approving the transaction was improper. Each purported act of mismanagement the Plaintiffs allege, if true, at most constitutes negligence. The 2019 Board then attempted to "clean up" some of the mistakes in the Original Transaction with the 2019 Transaction, which superseded the Original Transaction. The Plaintiffs' complaint about the 2019 Transaction, which undisputedly was not tainted by TOMA violations, is less clear. For both Boards and transactions, there is no evidence the Directors engaged in "ultra vires" or "fraudulent" activities that might overcome the business judgment rule. And there is no evidence the Directors did not act in good faith, with ordinary care, or in a manner they reasonably believed to be in the best interest of the corporation.

1. The Original Transaction (2015 Board)

Bill Earnest

At the outset, the Plaintiffs concede that Bill Earnest did not vote on the Original Transaction. The Plaintiffs suggest—without evidence—that Earnest somehow deliberately missed the December 19, 2015 meeting because he did not want to participate in the vote. Regardless of why Earnest was not there or where he was at the time, he was not there. Motion at

[7] The Plaintiffs rely on a 1993 federal district court case attempting to apply Texas law that stated the business judgment rule does not protect against gross negligence. Response at 66 n.290. More recent Texas cases—including binding precedent from the Austin Court of Appeals—state the opposite.

Exhibit 5, ¶ 9; *id.* at Exhibit 8-F; Supplemental Evidence at Exhibit 20. He cannot be held personally liable for the Original Transaction when he did not even participate in the vote. *See* TEX. BUS. ORGS. CODE § 20.002(c) (referring to "acts" or "transfers").

Dana Martin

Dana Martin did not participate in the vote on the Original Transaction either. Motion at Exhibit 1, ¶ 4; *id.* at Exhibit 8-F; Supplemental Evidence at Exhibit 20, p. 70. As explained below, the Original Transaction was an interested director transaction that complied with Business Organizations Code section 22.230 (a separate safe harbor provision for interested director transactions). Section 22.230 would not exist if a director is precluded from even making an offer to do business with the corporation on whose board the director sits. The three disinterested Directors (Mike Madden, Bob Mebane, and Pat Mulligan) did not have to accept Friendship's offer, but they chose to do so because they believed it was a good one. Supplemental Evidence at Exhibits 15-E (WOWSC002223), 20; Motion at Exhibits 2-4. It is unclear why the Plaintiffs believe that an interested director who recuses herself from a transaction vote that is then approved by disinterested directors can be personally liable for the transaction.[8] *See* TEX. BUS. ORGS. CODE § 22.230(b)(1).

Bob Mebane, Mike Madden, and Pat Mulligan

Bob Mebane's, Mike Madden's, and Pat Mulligan's reasoning behind their decision to approve the Original Transaction on behalf of WOWSC has never wavered since the time of the

[8] Additionally, to the extent the Plaintiffs seek on behalf of WOWSC to hold Martin liable, the WOWSC, then, would be in breach of its agreement releasing Martin from any claims related to the Original Transaction or anything regarding the land sale. Motion at Exhibit 8-X, art. III, § 2. As explained in the Motion and below, the Plaintiffs do not have standing or capacity to bring claims on behalf of WOWSC, and WOWSC has not brought claims against Martin. And regardless, the Plaintiffs' claims fail on the merits as a matter of law. But if the Plaintiffs truly may bring claims on behalf of WOWSC against Martin, WOWSC would be in breach of the 2019 Transaction.

Original Transaction. Mebane's declaration and deposition testimony explain that he talked with various developers and realtors about the airport property and its worth. Motion at Exhibits 2, 10. He believed, based on those conversations, that Friendship made a good offer that was in the best interest of the corporation to accept. *Id.* The recording of the December 19, 2015 meeting—and meetings before that—back up his account of the events. Supplemental Evidence at Exhibits 17-20. Mebane reported his conversations with real estate professionals to the 2015 Board at the October 31, 2015 meeting. *Id.* at Exhibit 18. It was at the October 31, 2015 meeting that the Board, based on Mebane's conversations with developers and realtors (including Doris Van Trease), decided it financially made the most sense to sell only the portion of the property on Piper Lane rather than the entire tract. *Id.* at Exhibit 18. If someone developed the front part of the property and WOWSC retained an easement to the back part, then the front development could improve the value of the back lot. *Id.* at Exhibit 18; *see also id.* at Exhibit 17, pp 8-9; *id.* at Exhibit 15-E (WOWSC002231).

WOWSC had received previous, lower offers for the property, including from Frank Greenburg, William Keller, the Windermere Oaks POA, and the Spicewood Pilots Association. Motion at Exhibits 2-4, 8-D, 8-E, 8-FF; Supplemental Evidence at Exhibits 14-B, 14-C. Mike Madden relied on Mebane's recitation of his conversations, appraisals of the property, and some of these previous offers. Motion at Exhibit 4; Response at Exhibit 5, pp. 17-19, 23-25, 35-37, 45-48. Pat Mulligan likewise considered these previous offers, and Mebane, Madden, and Mulligan discussed some of these offers at the December 19, 2015 meeting. Motion at Exhibit 3; Supplemental Evidence at Exhibit 15-E (WOWSC002223); *id.* at Exhibit 20, pp. 42, 50. WOWSC

possessed appraisals for the property performed by Jim Hinton[9] and Curt Friedland before the December 19, 2015 meeting. Motion at Exhibits 8-N, 8-Q.

Mebane, Madden, and Mulligan did have concerns the Hinton appraisal came out lower than they believed the land was worth based on their understanding of previous offers and sales at the Spicewood Airport. Supplemental Evidence at Exhibit 17. But they did not sell the land for the amount appraised by Hinton. Motion at Exhibits 8-G, 8-N. Mebane, Madden, and Mulligan knew some people might be upset if WOWSC sold the land to Martin's company (Friendship) because "[t]here's people in the community that don't like Dana," and they were concerned it would be perceived as a "sweetheart deal." Supplemental Evidence at Exhibit 20, pp. 37, 57. They considered rejecting the offer and putting the land up for sale for 90 days instead and then, if it did not sell, going back to Friendship. *Id.*, pp. 37-40, 44, 53-55, 59-60. But ultimately, they believed it was in the best interest of WOWSC ***and*** the community to sell the land to Friendship rather than an outside developer who might not care about the impact of the development on the neighborhood. *Id.*, pp. 48-49, 57-58, 64-65. And because WOWSC had never received such a good offer for the land, they were concerned that if they rejected Friendship's offer and put the land up for sale for 90 days unsuccessfully, they would not receive such a good offer from Friendship again. Supplemental Evidence at Exhibit 14-B; *id.* at Exhibit 20, pp. 39-63. In short, they believed a $200,000 net profit for the 4.3 acres was a good price based on all the information they had before them. Motion at Exhibits 2-4; Supplemental Evidence at Exhibit 15-E, WOWSC002230 (at December 7, 2015 board meeting, board discussed selling four of the eleven acres for $200,000)

[9] In their Response, the Plaintiffs complain that one of the Directors, Bill Earnest, filed a complaint against the Plaintiffs' preferred appraiser, David Bolton, with the Texas Appraisal Licensing & Certification Board. They neglect to mention the regulatory complaints that they or their allies on their behalf have made against Jim Hinton (with the Texas Appraisal Licensing & Certification Board), Martin (with the Texas Real Estate Commission), and even WOWSC's former counsel Les Romo (with the State Bar of Texas) in connection with this dispute.

and WOWSC002233 (at April 6, 2015 meeting, board discussed selling entire 11-acre tract for at least $350,000); *id.* at Exhibit 18, p. 19; *id.* at Exhibit 20; Response at Exhibit 3, pp. 50-51, 55 (Mulligan testifying Board believed the entire 11-acre tract was worth $250,000-$350,000); *id.* at Exhibit 5, pp. 16-17; *id.* at Exhibit 11, pp. 23-34, 54. The 2015 Board was then able to take the $200,000 in proceeds from the sale and pay down the wastewater treatment plant loan. Motion at Exhibits 2-4; Response at Exhibit 11, pp. 57-58; Supplemental Evidence at Exhibit 15-D.

The Plaintiffs appear to argue that the 2015 Board could not reasonably rely on ***any*** of the information they had before them in December 2015. The Plaintiffs claim that the Hinton and Friedland appraisals were too low and unreliable and that the previous offers WOWSC had received for the land were somehow invalid. They seem to believe the Directors were precluded from doing anything short of marketing the property with a realtor, even though no law or provision of the WOWSC governing documents requires this. The heightened standard the Plaintiffs would have this Court impose on the 2015 Board is absurd and completely contrary to Texas law. The 2015 Board was statutorily entitled to rely on the advice of persons with professional expertise as an element of the safe harbor statutes and business judgment rule. TEX. BUS. ORGS. CODE § 3.102. The WOWSC bylaws similarly provide that its Directors may rely on professional advice and opinion. Motion at Exhibit 8-B, ¶ 19. Therefore:

- The 2015 Board could rely on WOWSC's attorney, Mark Zeppa, who had advised that WOWSC could sell its land without obtaining bids and could contract with a board member so long as that board member did not vote on the contract.[10] Motion at Exhibits 2-4; Supplemental Evidence at Exhibit 4-A. Notably, sometime after the Original Transaction, Zeppa directly advised Mebane that the 2015 Board had done

[10] The Plaintiffs claim Mark Zeppa was actually just advising a third party, Malcolm Bailey. In fact, Zeppa's email advice was also directed to Mulligan, who was then president of WOWSC. Supplemental Evidence at Exhibit 14-A. There is no dispute that Mark Zeppa was WOWSC's lawyer for many years. His name shows up throughout the summary judgment record.

nothing wrong in approving the Original Transaction. Supplemental Evidence at Exhibit 13-A.[11]

- The 2015 Board could rely on the appraisals they had received and former offers for the property, outlined above.

- The 2015 Board could rely on each other in making their decisions.

- The 2015 Board could rely on the advice of WOWSC's long-time general manager, George Burriss, who attended all of the Board meetings and urged the Board that Friendship's offer was a good one they should accept. Supplemental Evidence at Exhibit 20, pp. 41-43, 55; *see also* Motion at Exhibit 8-B, art. 9, ¶ 7 (authorizing WOWSC to hire general manager); Response at Exhibit 23 (attaching "Manager's Report" by George Burriss); *id.* at Exhibit 9, p. 8.

See Young v. Heins, No. 01-15-00500-CV, 2017 WL 2376828, at *10 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied) (safe harbor statute protected directors who relied on advice of counsel and expertise of property management company in carrying out their duties); *In re Life Partners Holdings, Inc.*, No. DR-11-CV-43-AM, 2015 WL 8523103, at *15-16 (W.D. Tex. Nov. 9, 2015) (directors were entitled to rely on professional analyses, and not consulting legal counsel does not show bad faith); *Priddy*, 282 S.W.3d at 597 (board could rely on information provided by previous boards to enjoy safe harbor immunity).

None of this evidence is in dispute. Instead, the Plaintiffs try to distract with suspicion and intrigue and ask this Court to stack inference upon inference to somehow conclude there is evidence of bad faith. But as the Texas Supreme Court has explained: "[S]ome suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence. We have also said that an inference stacked only on other inferences is not legally sufficient evidence." *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727-28 (Tex. 2003). And to show bad faith, the

[11] The Plaintiffs attach as evidence a memo from Mark Zeppa to Mebane dated December 29, 2016, discussing the Original Transaction. Response at Exhibit 85. As the Plaintiffs are aware, after Zeppa was provided minutes of the December 19, 2015 board meeting and executive session, he revised his opinion in the January 3, 2017 opinion letter. Supplemental Evidence at Exhibit 13-A.

Plaintiffs are required to show "***scienter*** on the part of the defendant director." *Life Partners Holdings*, 2015 WL 8523103, at *14 (emphasis added).

A review of the board meeting transcripts[12] (or actual recordings if the Court prefers) and meeting minutes tells the entire story of why the 2015 Board chose to sell the 4.3 acres to Friendship. And nothing in this evidence demonstrates bad faith or that the 2015 Board did not reasonably believe they were acting in the best interest of the corporation. *See* Supplemental Evidence at Exhibit 14-B (email exchange among Mebane, Madden, and Mulligan in February 2017—long before they were sued—describing the December 19, 2015 meeting and confirming among themselves that they had made a "strong ethical business decision" in the Original Transaction). At most, any flaws with the Original Transaction and how it was entered would constitute negligence. As a matter of law, the Directors cannot be found liable for negligence or even gross negligence under the business judgment rule or safe harbor provisions.[13]

2. The 2019 Board

The Plaintiffs claim for damages against the 2019 Board (Joe Gimenez, Dorothy Taylor, Mike Nelson, and Bill Earnest) is puzzling. Their complaint against the 2019 Board seems to center

[12] The Plaintiffs do not seem to like the certified transcripts of the board meetings that the Directors' counsel had prepared. Every transcription by a court reporter might contain some typographical mistakes, but any mistakes here are minor. The Directors' counsel had a neutral court reporter at Veritext transcribe the board meetings for the convenience of the Court and parties, to ensure the board meetings remain part of the record and are not lost (including if the case is appealed), and so the Court knows who said what. Certainly, if the Court or Plaintiffs prefer, they can listen to the actual recordings instead. The Directors have provided this Court with links to the actual recordings produced by WOWSC in this suit, and they are part of the evidence in this case. Supplemental Evidence at Exhibit 15, ¶ 4; *id.* at Exhibit 15-E.

[13] The Plaintiffs suggest, without briefing, that the 2015 Board "exposed the WSC to a claim by Friendship that the WSC must dedicate land for drainage facilities in the future." Response at 47-48. This is pure speculation, and there is no evidence anyone, including Friendship, is contemplating a claim against WOWSC related to drainage. They cite to an Exhibit 13 (the Friendship corporate representative deposition), but there is no Exhibit 13 attached to their Response. At the Friendship deposition, however, Martin did not state what the Plaintiffs suggest. *See* Friendship Deposition, pp. 42-49. Martin testified Friendship did ***not*** acquire some sort of easement or rights to WOWSC's remainder tract for drainage. *Id.*, pp. 49-50.

on (1) the 2019 Board settling with Friendship and Martin rather than filing suit, (2) the 2019 Transaction correcting the deed mistake in the Original Transaction to include Piper Lane, and (3) the 2019 Board approving the advancement of legal expenses to sued Directors (and, it seems, even having WOWSC defend itself against the Plaintiffs' claims). The Plaintiffs do not attempt to explain how the 2019 Board somehow did not act in good faith or in a manner they reasonably believed was in the best interest of the corporation, and they certainly do not explain how the 2019 Board acted ultra vires or fraudulently.

a. Settling Rather than Suing

The Plaintiffs do not cite even one case in which a director was held personally liable for a litigation strategy or decision made on behalf of the corporation. None exists. The business judgment rule and safe harbor provisions soundly protect directors from liability for litigation decisions made on behalf of the company. *See*, *e.g.*, *Sneed*, 465 S.W.3d at 178 ("The business judgment rule … applies to protect the board of directors' decision to pursue or forgo corporate causes of action."). For reasons outlined in their declarations (and confirmed in their deposition testimony), the 2019 Board chose to settle with Friendship rather than pursue claims because they believed that was in the corporation's best interest. Motion at Exhibits 5-8; Response at Exhibit 9, pp. 78-79; *id.* at Exhibit 10, pp. 10-14, 47-48; *id.* at Exhibit 12, pp. 130-33.

Mike Nelson believed pursuing litigation to recover the land would cost WOWSC significant amounts and open it up to countersuits by Friendship and the title company. Motion at Exhibit 8; Response at Exhibit 10, pp. 15-18, 44-46, 48-49, 70-71. He was concerned that it would tarnish WOWSC's reputation and the value of WOWSC's other real estate if the corporation attempted to walk back on its real estate transactions. Response at Exhibit 10, pp. 44-45. Nelson was also disappointed by the Bolton appraisal for several reasons, including that it did not consider

the land sold was raw land that needed to be fully developed. Motion at Exhibit 8, ¶ 6.[14] Bill Earnest believed it unlikely a suit against Friendship and Martin would be successful, and he had concerns about the Bolton appraisal, including that it was an outlier compared to other valuations of the land. *Id.* at Exhibit 5, ¶ 10. Joe Gimenez understood that a lawsuit path would be very costly, with no guarantee of success. *Id.* at Exhibit 6, ¶¶ 6, 9-10. He also questioned the Bolton appraisal because Bolton had been supplied information by the Plaintiffs. *Id.*, ¶ 7. Gimenez believed the 2015 Board had done their due diligence, and he spoke with them to confirm what they had done before selling the property. *Id.*, ¶ 8. Dorothy Taylor had concerns about the Bolton appraisal because it was an outlier compared to all the previous offers WOWSC had received for the land. Motion at Exhibit 7, ¶ 9. Taylor hoped that the 2019 Transaction, which cleaned up some of the issues with the Original Transaction, would stop the Plaintiffs' litigation and the expense it was causing WOWSC. *Id.*, ¶ 10. She also understood that a lawsuit against Friendship would cost WOWSC significant amounts of money with no guarantee of success. *Id.*

The Plaintiffs do not explain why the 2019 Board could not rely on statements by the 2015 Board regarding their due diligence or the various valuations and appraisals WOWSC had in its records. Motion at Exhibit 5, ¶ 10; *id.* at Exhibit 6, ¶ 8; *id.* at Exhibit 7, ¶ 10; *id.* at Exhibit 8, ¶ 6; Response at Exhibit 9, pp. 64-66; *id.* at Exhibit 10, pp. 10-11, 33-35; *see Young*, 2017 WL 2376828, at *10; *Life Partners Holdings*, 2015 WL 8523103, at *15-16; *Priddy*, 282 S.W.3d at 597. The Plaintiffs do not explain why the 2019 Board could not, in its business judgment based on the information before it, believe other valuations besides Bolton's were more reliable. Motion at Exhibits 5-8; Response at Exhibit 10, pp. 50-53, 56-58, 60, 65-68, 75. They do not explain why they could not rely on advice of counsel and other professionals. TEX. BUS. ORGS. CODE § 3.102;

[14] Nelson's declaration contains a paragraph numbering error. This refers to the second paragraph 6.

Motion at Exhibit 8-B, art. 8, ¶ 19; Response at Exhibit 10, p. 17, 46; *id.* at Exhibit 12, pp. 133-34. They do not explain how the 2019 Board Directors can be held personally liable for decisions made to rectify mistakes they saw in the Original Transaction and ensure a superseded agreement was entered at meetings that fully complied with TOMA. Once more, the Plaintiffs improperly stack inference upon inference and suspicion upon suspicion in claiming the 2019 Board acted in bad faith. *Marathon Corp.*, 106 S.W.3d at 727-28.

b. Piper Lane

The Plaintiffs complain about Piper Lane, contending that the Original Transaction did not include Piper Lane and that the 2019 Board somehow "gave away" Piper Lane to Friendship in the 2019 Transaction. The Directors addressed this in their Motion. The Original Transaction was for 4.3 acres—the exact acreage that includes Piper Lane. Motion at Exhibit 8-G (WOWSC000027). At the WOWSC corporate representative deposition, Mike Nelson explained that the company (the 2019 Board) believed the Original Transaction included Piper Lane on the basis of the Original Transaction Contract (4.3 acres) and the Stewart Watson survey of the conveyed property from early 2016. Response at Exhibit 12, pp. 20-33, 43-46, 138; *see also* Motion at Exhibits 8-G, 8-DD; Response at Exhibit 11, pp. 5-6. WOWSC sold the 4.3 acres to Friendship for $203,000 and then received additional consideration when entering the 2019 Transaction. Motion at Exhibits 8-G, 8-X; Response at Exhibit 12, p. 139. There is no evidence the 2019 Board acted in bad faith or in a manner they did not reasonably believe was in the best interest of the corporation in agreeing to correct the deed to include Piper Lane. Motion at Exhibits 8-L, 8-X.

The Directors further note that, at least according to the Burnet County Appraisal District, Piper Lane is currently appraised at **$12,902**. https://propaccess.trueautomation.com/c

lientdb/Property.aspx?cid=85&prop_id=117532. The Plaintiffs are well aware that the 2019 Transaction provided WOWSC with additional consideration for the transaction. Motion at Exhibit 8-X. Even if there is debate regarding whether the Original Transaction included Piper Lane, the Plaintiffs' idea that WOWSC "gave away" Piper Lane is unsupportable. At most, it would be a complaint, once more, that the Board was wrong for assigning a value of $5 rather than the $10 the Plaintiffs seem to believe is the "true" value of Piper Lane. There is no Texas case holding a director personally liable for being mistaken about the "true" value of property.

The Plaintiffs suggest that only members of the Spicewood Airport and Pilots Association have the right to use Piper Lane and that the 2019 Transaction cut off WOWSC's access to its remainder tract. This is demonstrably false. The 2019 Board strengthened an easement to the remainder tract to ensure it can be accessed. Motion at Exhibits 8-V, 8-X. And there is no evidence in this record that only Pilots Association members can "use" Piper Lane and that WOWSC is somehow precluded from "using" Piper Lane.[15] The Plaintiffs' entire "landlocked" argument regarding Piper Lane and the remainder tract is a red herring.

But more to the point, the Plaintiffs provide no real explanation of how the 2019 Board Directors can be ***personally liable*** if they were wrong regarding Piper Lane. That mistake would amount to no more than mismanagement or neglect—not subjective bad faith—which are

[15] Martin's declaration does not state that Pilots Association members have exclusive use of Piper Lane. Motion at Exhibit 1, ¶ 7. She stated that all members of the Pilots Association have access to Piper Lane. *Id.* In any event, because WOWSC is a water supply corporation that, under its articles of incorporation, serves the sole purpose of furnishing water supply and sewer services, it is unclear why WOWSC would be "using" an airport taxiway. Motion at Exhibit 8-A, art. 4. WOWSC is obviously not a pilot or in the airplane or airport business. The only reason WOWSC would have "used" Piper Lane in the past is because its wastewater treatment plant was previously on the airport property. That is no longer the case—WOWSC airport land is now vacant, surplus property. Presumably, if WOWSC were to sell its remainder tract in the future, the purchaser would either choose to develop that land for airport use (and thus join the Pilots Association, as other airport users do) or else develop it for residential use and access the land by Soda Creek Road. *See* Motion at 23-27.

protected from the business judgment rule and safe harbor provisions. *Poe*, 591 S.W.3d at 641; *Life Partners Holdings*, 2015 WL 8523103, at *14. To the extent the Court believes a fact issue exists regarding whether the Piper Lane piece of the transactions is valid, it can limit trial to the validity of that part of the transaction. The Directors (besides Martin to the 2019 Transaction) were not parties to either transaction and need not be parties to such a trial.

c. Advancement of Legal Expenses

The Plaintiffs complain, without briefing, that the WOWSC should not advance legal expenses to sued Directors. The Directors explained the legal framework authorizing advancement of expenses under Business Organizations Code Chapter 8 in their Motion, which the Plaintiffs do not contradict. Motion at pp. 35-37. There is no evidence WOWSC did not comply with Chapter 8 in advancing legal expenses, and the Plaintiffs do not even attempt to explain how this chapter was not complied with. The WOWSC also previously adopted policies expressly authorizing the company to advance legal costs. Supplemental Evidence at Exhibit 15-B, art. IV. The 2019 Board relied on advice of counsel that the advancement of litigation expenses complied with Texas law. Motion at Exhibits 5-8.[16]

The Plaintiffs also state, without argument, that the Directors did not provide written affirmations until November 2019, when the 2015 Board was first sued for damages and the 2019 Board first named as defendants. Response at 55. They do not address that Chapter 8 does not require written affirmations from former Directors, nor that the Directors' legal expenses were minimal until the Plaintiffs elected to considerably complicate and ramp up expenses in this case

[16] The Plaintiffs complain that an attorney opinion regarding advancement has not been produced in this case. Response at 55. They again mislead. They are well aware that the 2019 Board Directors stated in response to interrogatories that they received advice of counsel orally during executive session. Bill Earnest Response to Interrogatory No. [14] (Dec. 10, 2020); Mike Nelson Response to Interrogatory No. [14] (Dec. 10, 2020); Joe Gimenez Response to Interrogatory No. [14] (Dec. 10, 2020); Dorothy Taylor Response to Interrogatory No. [14] (Dec. 10, 2020). There is no written opinion to produce.

by suing for damages virtually every Director who has served on the Board the past six years. *See* Motion at 35-37.[17]

Finally, the Plaintiffs suggest, without argument, that WOWSC cannot advance Martin's fees when the company has released her from liability. Response at 55. The Plaintiffs do not explain this theory. But WOWSC has not sued Martin—the Plaintiffs have. If WOWSC sued Martin, it would likely be in breach of the 2019 Transaction—but it has not. Motion at Exhibit 8-X, art. III. Additionally, Chapter 8 contains no provision prohibiting a company from advancing defense costs to a sued former or current director under circumstances suggested by the Plaintiffs. Chapter 8 broadly authorizes advancement of legal expenses to current and former directors. TEX. BUS. ORGS. CODE §§ 8.104, 8.105.

Notably, if the Directors prevail in this suit, it is ***mandatory*** for the company to fully pay the Directors' legal costs. *Id.* § 8.051. Thus, if this Court grants summary judgment in the Directors' favor, WOWSC will be required to pay the Directors' fees anyway, as a matter of law.

3. Business Organizations Code Section 7.001

As explained, to overcome the Directors' safe harbor immunity, the Plaintiffs are required to put forth evidence that the Directors did not act (1) in good faith, (2) with ordinary care, ***and*** (3) in a manner they reasonably believed was in the best interest of the corporation. They must show all three. The Directors have explained above that there is no evidence supporting subjective bad faith or that they did not reasonably believe they were acting in the best interest of the corporation. The Plaintiffs also cannot establish a lack of ordinary care because the Directors are

[17] The Plaintiffs previously sued former directors Norm Morse and David Bertino as well, who did not even participate in the transactions the Plaintiffs complain of. The Plaintiffs exempted their allies, Bill Stein and Bill Billingsley, who also served on the Board during this time period.

As Mike Nelson testified at his deposition, if the Plaintiffs' lawsuits were dropped, WOWSC and its Directors would no longer be in litigation and the legal expenses the Plaintiffs complain about—and which they are causing—would stop. Response at Exhibit 10, p. 10.

immunized against liability for violating any duty of care under Business Organizations Code section 7.001 and the WOWSC bylaws. TEX. BUS. ORGS. CODE § 7.001; Motion at Exhibit 8-B, art. 8, ¶ 18.

Section 7.001 exculpates directors for liability for breach of the duty of care (i.e., gross negligence). *Life Partners Holdings*, 2015 WL 8523103, at *8. As authorized by section 7.001, the WOWSC bylaws similarly limit Director liability for violations of a duty of care. Motion at Exhibit 8-B, art. 8, ¶ 18. Because the Directors are immunized from liability for any violation of a duty of care, the Plaintiffs cannot satisfy the "ordinary care" element of the safe harbor provisions. Thus, the Plaintiffs cannot be held personally liable as a matter of law.

4. Texas courts routinely rule in directors' favor as a matter of law under the business judgment rule and safe harbor provisions.

This Court can rest assured that Texas courts routinely grant summary judgment and other dispositive motions in favor of directors under the business judgment rule and safe harbor provision in cases similar to this one. A representative sample is below:

- *Burns*, 2012 WL 3776513: The Houston (First) Court of Appeals affirmed a take-nothing summary judgment in favor of non-profit corporation directors under the safe harbor provision. The plaintiffs failed to put forth evidence demonstrating the directors acted in bad faith or did not "reasonably believe[] their conduct was in the best interest of the corporation" in allegedly destroying condo owner's property. *Id.* at *9-10.

- *Young*, 2017 WL 2376828: The Houston (First) Court of Appeals affirmed a take-nothing summary judgment in favor of non-profit directors. Plaintiffs had sued directors for breach of fiduciary duty, breach of contract, and other claims, contending that the directors knowingly enforced in an unlawful way HOA covenants against him, knowingly misapplied his payments for maintenance assessments, and violated statutes and deed restrictions. The plaintiffs failed to put forth evidence that the directors did not act in good faith, with ordinary care, and in a manner they reasonably believed to be in the best interest of the company. *Id.* at *9-10.

- *Priddy*, 282 S.W.3d 588: The Houston (Fourteenth) Court of Appeals affirmed summary judgment in nonprofit directors' favor under the safe harbor statute. The plaintiffs sued the directors of a non-profit corporation that administered the common areas of a subdivision comprised of airplane hangars and homes for fraud, breach of fiduciary duty, and violations of deed restrictions. The court of appeals concluded that the summary judgment evidence supported the directors' position that they relied in good faith on information prepared by previous boards and that the safe harbor statute immunized them from personal liability. *Id.* at 595-97.

- *Green v. Port of Call Homeowners Ass'n*, No. 03-18-00264-CV, 2018 WL 4100855 (Tex. App.—Austin Aug. 29, 2018, no pet.): The Austin Court of Appeals affirmed the grant of a take-nothing summary judgment rendered in favor of non-profit corporation directors. *Id.* at *4-6. The property owner plaintiffs alleged that the board of directors failed to comply with governing documents, violated statutes, misappropriated funds, and engaged in other misconduct regarding their management of the homeowners' association. The court of appeals concluded that the plaintiffs did not raise genuine issues of material fact regarding whether the directors acted in good faith, with ordinary care, or in a manner they reasonably believed to be in the best interest of the association. *Id.* at *5.

- *Resolution Trust Corp. v. Norris*, 830 F. Supp. 351 (S.D. Tex. 1993): Corporation sued directors for ultra vires acts, breach of fiduciary duty, fraud, and other claims to recover over $200 million in alleged losses related to real estate loans. The district court granted a 12(b)(6) motion to dismiss. The failure of the directors to monitor the acts of individuals charged with preparing the loans and then presenting loans that did not comply with federal or state regulations for board approval was not an "ultra vires" act so as to be excluded from the protection of the Texas business judgment rule. *Id.* at 356-57. Because there was no indication that the directors knowingly engaged in illegal conduct, the actions (including approval of loans that violated state and federal law) was not ultra vires and therefore not taken outside the business judgment rule. *Id.* at 357.

- *Life Partners Holdings*, 2015 WL 8523103, at *14: The federal district court granted summary judgment in favor of the directors of a corporation who were sued for breach of fiduciary duty and other claims. There was no genuine issue of material fact that the directors at issue were disinterested or that they acted in bad faith, which requires "***scienter*** on the part of the defendant director." *Id.* at *14, 20-21 (emphasis added).

- *Roels*, 2020 WL 4930041: The Austin Court of Appeals dismissed most of a shareholder suit brought against for-profit corporation directors under the TCPA because the shareholders did not put forth evidence overcoming the business judgment rule. *Id.* at *1, 10. Rather, the plaintiffs' true allegations concerned director actions that were "negligent, unwise, inexpedient, or imprudent"—not that were ultra vires or fraudulent. *Id.* at *9.

- *Chapman*, 2018 WL 4139001: The court of appeals affirmed the grant of summary judgment in favor of company directors under the business judgment rule. The court noted that the business judgment rule protects against negligence and even gross negligence. *Id.* at *15. Because the plaintiff's claims regarding the director's actions amounted to gross negligence rather than fraud, dishonesty, or self-dealing, summary judgment under the business judgment rule was appropriate. *Id.*

- *Moody v. Nat'l Western Life Ins. Co.*, No. 01-18-01106-CV, 2020 WL 7251459 (Tex. App.—Houston [1st Dist.] Dec. 10, 2020, no pet.): Applying Delaware law (the law of that case), the Houston (First) Court of Appeals affirmed the dismissal of the shareholder plaintiff's claims because the plaintiff failed to scale the business judgment rule. *Id.* at *14. The plaintiff's allegations that the directors "may have been motivated by some interest other than a genuine attempt to advance the best interest of the corporations" was not sufficient to survive a plea to the jurisdiction. *Id.* at *11.

- *Sneed*, 465 S.W.3d at 187: The Texas Supreme Court observed: "It is insufficient for a shareholder plaintiff to allege a derivative right to relief against a corporation's officers or directors for breach of a duty based upon "mere mismanagement or neglect ..., or the abuse of discretion lodged in them in the conduct of the company's business. ***Such allegations may be disposed of on special exceptions or summary judgment***." (Emphasis added.) (Citations omitted.)

This Court should render a take-nothing judgment in the Directors' favor in this case as well.

C. The So-Called "Illegal and Unauthorized Acts" the Plaintiffs Allege

1. The Plaintiffs misconstrue Texas Law.

The Plaintiffs claim the business judgment rule, safe harbor provisions, and other exculpatory provisions do not apply because the Directors' acts were purportedly unauthorized by WOWSC governing documents and were fraudulent. The Plaintiffs misinterpret Business Organizations Code section 20.002 and the ultra vires exception to the business judgment rule and safe harbor provisions.[18]

[18] For sure, there are very few cases concerning alleging ultra vires acts, likely because of how expansive corporate powers are in Texas and because of the robust protections shielding directors from personal liability. *See, e.g.*, TEX. BUS. ORGS. CODE §§ 2.001, 2.003, 2.008, 2.101, 3.005(a)(3), 22.221, 22.230, 22.235.

a. Plaintiffs must show unauthorized, illegal acts.

Section 20.002 provides that an act of the corporation to transfer property is ***not*** invalid by virtue of being beyond the scope of the purpose of the corporation or inconsistent with a limitation on the authority of a director to exercise a statutory power of the corporation, as expressed in the articles of incorporation. TEX. BUS. ORGS. CODE § 20.002(b). As relevant here, the provision goes on to state that: "The fact that an act or transfer is beyond the scope of the expressed purpose or purposes of the corporation or is inconsistent with an expressed limitation on the authority of an officer or director may be asserted in a proceeding … by the corporation, acting … through members in a representative suit, against an officer or director or former officer or director of the corporation for exceeding that person's authority…." *Id.* § 20.002(c)(2).

Notably, section 20.002(c) says nothing about damages or holding a director personally liable.[19] Texas case law and other statutory provisions, though, confirm there are heightened protections against holding a director ***personally liable***. First, as explained above, safe harbor provisions and the business judgment rule immunize directors from personal liability for negligence and even gross negligence. Second, what is considered an "ultra vires" act so that a director might lose those statutory and common law protections is not simply failure to comply with a governing document. Case law is clear that a director may only be potentially held personally liable for an alleged ultra vires act if the director knowingly commits an unauthorized ***and*** an illegal act. *See, e.g.*, *Staacke v. Routledge*, 241 S.W. 994, 999 (Tex. 1922); *Campbell v. Walker*, No. 14-96-01425-CV, 2000 WL 19143, at *11 (Tex. App.—Houston [14th Dist.] 2000,

[19] The only part of the section addressing damages is the provision authorizing the Court to award damages to the corporation (WOWSC) or the other party to the contract (Friendship/Martin) for loss or damages resulting from the court setting aside and enjoining performance of the contract. *Id.* § 20.002(d).

no pet.); *Sutton v. Reagan & Gee*, 405 S.W.2d 828, 836 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.); *Gearhart*, 741 F.2d at 719; *Resolution Trust*, 830 F. Supp. at 357.

The Plaintiffs suggest this principle does not apply in a representative suit alleging ultra vires acts because, in that context, a director does not enjoy the protection of the corporate veil. No case supports this, and certainly not the *Sutton* case cited by the Plaintiffs. *Sutton* contains a discussion of piercing the corporate veil as a way to hold a ***shareholder*** personally liable for acts of the corporation. 405 S.W.2d at 836-37. Earlier in the opinion, *Sutton* directly addresses ***director*** liability for alleged ultra vires acts:

> While there is authority to the effect that a director is personally liable if he participates, or allows the corporation to engage, in ultra vires acts, our Supreme Court has held that the doing of an ultra vires act is not a sufficient basis for imposing liability on the officers or directors of a corporation.

Id. at 836. This is not a corporate veil-piercing case, and there is no claim attempting to pierce the WOWSC corporate veil. Texas case law is clear that a plaintiff must demonstrate an unauthorized, illegal act done knowingly to potentially hold a director personally liable.

The Plaintiffs additionally claim that "illegal acts" can be more than just violations of statute. The Directors' Motion recognizes case law stating an illegal act is one that is inherently and essentially evil or immoral, violates a positive statutory prohibition, or is against public policy. Motion at 20 (citing *Whitten v. Republic Nat'l Bank of Dallas*, 397 S.W.2d 415, 418 (Tex. 1965)). But the Texas Supreme Court has made clear that an act is not against public policy when only shareholders and creditors of a corporation are impacted because the act would not impact the public at large. *Whitten*, 397 S.W.2d at 418. And to call the actions the Plaintiffs complain about "evil or immoral" would take the ultra vires doctrine to an absurd place and is not what the term "malum in se" means. *See id.* (using corporate funds to pay the personal debt of an officer is not "evil or immoral," despite the Texas Business Corporation Act prohibiting lending money to

directors or officers); *Tovar v. State*, 978 S.W.2d 584, 587 n.4 (Tex. Crim. App. 1998) (defining "malum in se" as being "evil" and including such offenses as murder and larceny). ***Any*** alleged dereliction of corporate duties would be "evil" and akin to murder or larceny under the Plaintiffs' logic. Allegedly mismanaging corporate assets and authorizing an interested director transaction in violation of TOMA does not fall within the serious nature of malum in se. *See Aleman v. Tex. Med. Bd.*, 573 S.W.3d 796, 812 & n.3 (Tex. 2019) (Blacklock, J., concurring) (noting distinction between malum in se (lawbreaking that is wrong in itself) and malum prohibitum (lawbreaking that is "wrong only because the government happens to have made it illegal")).

b. Plaintiffs must show "knowing" violations of law.

The Plaintiffs also claim a violation need not be "knowing" to hold a director personally liable. That flies in the face of the business judgment rule, which protects directors against negligence and even gross negligence, and the safe harbor provisions, which require subjective bad faith for a director to lose its protections. *See* Section II.B., *supra*. WOWSC's bylaws similarly require "intentional misconduct" or a "knowing violation of the law on the part of the director" for the corporation or the corporation's membership to seek monetary damages from the director. Motion at Exhibit 8-B, art. 8, ¶ 18; *see also* TEX. BUS. ORGS. CODE § 7.001 (authorizing companies to immunize directors from liability for damages).

Clearly, a director mistakenly violating a bylaw or statute is not sufficient to impose personal liability under Texas law or the WOWSC bylaws. Contrary to what the Plaintiffs seem to argue, the law does not impose a strict liability standard for any of the alleged violations of bylaws or statutes. *See Sutton*, 405 S.W.2d at 836 (merely committing ultra vires act is not sufficient to hold a director personally liable); *Resolution Trust*, 830 F. Supp. at 357 ("[T]o call such actions ultra vires, absent an allegation of actual knowledge of illegal conduct, distorts the meaning of

ultra vires. It blurs the already murky distinction between ultra vires acts that are outside the business judgment rule and negligent acts that are protected by the rule.").[20] The Plaintiffs seem to believe if they use the phrase "ultra vires" or bring a purported "claim" under section 20.002(c)(2), then they have automatically overcome the safe harbor provisions, business judgment rule, section 7.001, and the WOWSC bylaws. That is incorrect.

c. The Directors acted in their capacity as WOWSC directors.

The Plaintiffs also allege that the Directors were not acting as WOWSC directors in causing WOWSC to enter the Original Transaction or the 2019 Transaction. This argument is puzzling. Both transactions were entered into by WOWSC. The affairs of WOWSC are managed by its board of directors. TEX. BUS. ORGS. CODE § 22.201; Motion at Exhibit 8-A, art. 9. The Plaintiffs may believe WOWSC should not have entered into those transactions, but there is no evidence that any of these Directors were engaging in any acts except on behalf of WOWSC. There is also no evidence any Director besides Martin had any personal interest in either transaction—the evidence instead establishes the opposite. Motion at Exhibits 2-8.

2. The Plaintiffs' Laundry List of Purported Illegal, Unauthorized Acts

The Directors address below the actions the Plaintiffs claim are ultra vires and illegal.[21] *See* Response at 65-66 (listing alleged ultra vires, illegal acts). At the outset, the Plaintiffs' arguments regarding illegality are smoke and mirrors. The Plaintiffs' issue is really price. If the 2015 Board had fully complied with TOMA but still sold the land to Friendship for $203,000, the

[20] The Plaintiffs claim *Resolution Trust* is inapplicable because it concerned alleged illegal acts by employees. The opinion explains the distinction between protected acts of negligence and unprotected acts of knowing violation of the law. 830 F. Supp. at 357. Additionally, the WOWSC bylaws and Texas statutes and case law state the same, as explained above.

[21] The Plaintiffs also identify, without briefing, advancement of legal expenses, a purported "violation" of the safe harbor provisions and purported gross negligence, as supposed "illegal" acts. Response at 65-66. Those are all addressed in Section II.B. above.

Plaintiffs would invariably still have brought this suit. If the corporate resolution contained no alleged flaws, that would not resolve the Plaintiffs' complaint. That the Plaintiffs are ***still*** suing after the 2019 Board corrected many of the issues they complain about tells the full story of the nature of the Plaintiffs' complaint. Purported TOMA violations or failure to adopt a proper corporate resolution did not cause the alleged damages the Plaintiffs are claiming.[22]

a. Purported "Use of Unauthorized Powers for an Unauthorized purposes" or "Exceeding Limits on Powers"

The Plaintiffs claim the Directors exceeded expressed limitations on their powers. Apparently, they refer to the provision of WOWSC's articles of incorporation cited in their Third Amended Petition, which provides: "The Corporation shall have no power to engage in activities or use its assets in a manner that are not in furtherance of the legitimate business of a water supply cooperative…." Motion at Exhibit 8-A, art. 6. The Directors addressed this in their Motion. The WOWSC may sell property to pay down debt incurred in building a new wastewater treatment plant. Motion at 21-29 (and cited exhibits); *see also* Supplemental Evidence at Exhibit 15-D, Exhibit 20.

Again, the Plaintiffs' issue in this case and damage model is, in reality, about the selling price. And no provision of WOWSC's governing documents, nor any state law, mandates that the corporation must sell its assets for any particular price or market property with a realtor before selling. Further, as explained, the 2015 Board believed it ***was*** getting a good price based on all the information before it at that time. *See* Section II.B., *supra*. The Plaintiffs point to *Golson v.*

[22] It is also noteworthy that the Plaintiffs have not brought a declaratory judgment action to invalidate the transaction under the interested director provision (TEX. BUS. ORGS. CODE § 22.230), as plaintiffs normally do when attempting to attack interested director transactions, nor sued under TOMA to attempt to invalidate the transaction. They seem to want to ***personally*** target the Directors for money damages rather than pursue avenues that could arguably unwind the transaction. This fact highlights the Plaintiffs' motive in this suit is to hurt the Directors rather than pursue other potentially available remedies.

Capehart as supporting a suit for damages against a director for purportedly selling property for less than it is worth. Response at 63-64 (citing 473 S.W.2d 627, 628 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.)). That is not what that case says. In that estate dispute, the executor sued to set aside a land sale when land was "sold" for $1.00. *Id.* at 627-28. That was not a suit seeking to hold a corporate director personally liable, but an estate suit to unwind a transaction. The Directors can locate ***no*** case in which disinterested corporate directors have been found personally liable for purportedly selling property for an insufficient price.

In terms of the 2019 Board, it is unclear how the Plaintiffs believe they acted inconsistently with the WOWSC governing documents. WOWSC has the right to settle potential litigation, advance defense costs, and negotiate an agreement that it believes is more favorable than the initial one. *See* Section II.B., *supra*. The Plaintiffs continue to provide no real explanation regarding how the 2019 Board even conceivably acted ultra vires and illegally in taking these actions.

Finally, in many of the numerous cases set forth in Section II.B above, those plaintiffs alleged corporate directors exceeded their authority under their governing documents and violated statutory provisions. Yet courts granted judgment as a matter of law under the safe harbor provisions or business judgment rule. *See*, *e.g.*, *Green*, 2018 WL 4100855, at *1-2, 4-5 (allegation that directors failed to comply with Articles of Association and Debt Collection Practices Act); *Young*, 2017 WL 2376828, at *3 (alleging directors violated deed restrictions governing HOA and Texas Property Code provisions). Simply slapping the "ultra vires" label on an allegation does not mean the Directors are not protected from personal liability.[23]

[23] The Plaintiffs point to previous Director or Board statements before the Original Transaction expressing that the Board intended to sell the entire 11 acres (rather than only a part) and that WOWSC had a duty to its members to market the land and obtain the best price for the property. The Directors do not dispute those statements were made. What they dispute is (1) that they were prohibited, as directors, from changing their mind based on new information before them, or (2) that they did not believe they were getting the best price for the land, as the summary judgment record conclusively proves.

b. Interested Director Transaction

The Plaintiffs suggest the Directors are personally liable because the Original Transaction was purportedly an invalid interested director transaction.[24] At the outset, when transactions are invalid interested director transactions, a plaintiff's primary remedy is to bring a declaratory judgment action seeking to invalidate the transaction. *See* TEX. BUS. ORGS. CODE § 22.230. Section 22.230 "saves" interested director transactions and immunizes interested directors from personal liability so long as that provision applies.

An interested director transaction is one in which a corporation enters a transaction with a sitting director or an entity in which a director is a member or has a financial interest. *Id.* § 22.230(a). Undisputedly, Martin was an interested director in regard to the Original Transaction. There is no evidence, however, that the Directors who approved the Original Transaction—Madden, Mebane, and Mulligan—had any personal interest in the transaction. The uncontroverted evidence establishes the opposite. Motion at Exhibit 2, ¶ 9; *id.* at Exhibit 3, ¶ 8; *id.* at Exhibit 4, ¶ 8; *see* Supplemental Evidence at Exhibit 20 (transcript of December 19, 2015 board meeting providing no indication Madden, Mebane, or Mulligan have any personal financial interest in Friendship or the transaction).[25] As relevant here, section 22.230 "saves" such an interested director transaction, if:

> The material facts as to the relationship or interest and as to the contract or transaction are disclosed to or known by… the corporation's board of directors…, and the board… in good faith and with ordinary care authorize the contract or transaction by the affirmative vote of the majority of the disinterested directors….

[24] The 2019 Transaction was not an interested director transaction because Martin was no longer on the WOWSC board. There is no evidence any Director from the 2019 Board has any personal interest in the Original Transaction or the 2019 Transaction. The evidence establishes the opposite. Motion at Exhibits 5-9. The Original Transaction, however, was undisputedly an interested director transaction because Martin was then on the board. The 2019 Transaction superseded the Original Transaction. *Id.* at Exhibit 8-X.

[25] Again, it is uncontroverted that Bill Earnest was not at the December 19, 2015 meeting and did not vote to approve the Original Transaction. *See, e.g.*, Motion at Exhibit 5; Supplemental Evidence at Exhibit 20.

TEX. BUS. ORGS. CODE § 22.230(b); *see also Roel*, 2020 WL 4930041, at *5.[26]

The uncontroverted evidence establishes the 2015 Board complied with this provision. It is undisputed that the 2015 Board (1) knew of the relationship between Martin and Friendship (that Friendship was her company), (2) Martin (the interested director) recused herself from the vote on Friendship's offer, and (3) a majority of disinterested Directors approved the transaction. Motion at Exhibits 1-4; Supplemental Evidence at Exhibit 20. These fundamental facts are not in dispute, and this is all the Business Organizations Code requires. The Plaintiffs seem to suggest that the "material facts" regarding the "contract or transaction" were not disclosed at the December 19, 2015 meeting. The contract, which was presented by Martin to the disinterested Directors, says what it says, and its terms were before the 2015 Board because the contract itself was presented and signed at that meeting. Motion at Exhibit 8-G; Supplemental Evidence at Exhibit 20. The material terms of the Original Transaction are contained in the contract itself.[27] The Plaintiffs also claim that Martin told the 2015 Board that she had "a partner who owned an unspecified equity interest." Response at 48. The December 19, 2015 recording does not back that up. Martin stated at the meeting that she had it "worked out with a partner and I've got the financing arranged." Supplemental Evidence at Exhibit 20, pp. 3, 7. She did not state that Friendship had other members beyond herself.[28] In any event, section 22.230 just requires that the "material facts as to the

[26] An interested director transaction can also be "saved" even if a majority of disinterested directors do not approve the transaction, if the transaction is fair to the corporation. TEX. BUS. ORGS. CODE § 22.230(b)(2). The fairness prong is not at issue in this summary judgment Motion since a majority of disinterested Directors approved the transaction.

[27] The Plaintiffs suggest Martin was required to disclose various items that are not true and represent nothing except the Plaintiffs' opinion regarding Martin's purported motives. Response at 48. Again, the contract itself sets forth its terms, and the Board reviewed and approved the contract at the meeting.

[28] The partner she could have been referring to may have been her lender for the purchase, the Whiddens. Response at Exhibit 6, pp. 167, 180, 233.

relationship or interest" are disclosed to or known by the Board. TEX. BUS. ORGS. CODE § 22.230(b). The uncontroverted evidence establishes the 2015 Board members present at the December 19, 2015 meeting knew that Friendship was Martin's business. Supplemental Evidence at Exhibit 20, pp. 39, 40, 69; *see also* Motion at Exhibits 2-4.

Additionally, section 22.230 envisions that only the ***interested*** director might potentially be liable for an interested director transaction, and this is because only an interested director could engage in self-dealing behavior that might breach the duty of loyalty to the company. TEX. BUS. ORGS. CODE § 22.230(e); *see Imperial Grp. (Tex.), Inc. v. Schonick*, 709 S.W.2d 358, 365 (Tex. App.—Tyler 1986, writ ref'd n.r.e.) (duty of loyalty demands there shall be no conflict between duty and self-interest). Disinterested Directors like Madden, Mulligan, and Mebane have no self-interest in a transaction. But even the interested director is immune from liability if section 22.230 is satisfied.

The Plaintiffs grasp at straws in claiming section 22.230 does not apply because the contract was not "otherwise valid and enforceable." They contend WOWSC contracted with a "nonexistent entity," that the contract was "tainted by fraud," and that it was a contract with a sitting director. Response at 74. First, there is zero evidence of fraud in this case. To recover for fraud, a plaintiff must establish the defendant knowingly or recklessly made a false, material misrepresentation to the plaintiff with intent that the plaintiff act on it, causing the plaintiff damages. *Int'l Bus. Machs. Corp. v. Lufkin Indus.*, 573 S.W.3d 224, 228 (Tex. 2019). The Plaintiffs do no identify any "knowing" or "reckless" "false, material misrepresentation" that was made by a Director in connection with the Original Transaction or 2019 Transaction. *See* Motion at 44-45.[29]

[29] The Plaintiffs again claim appraiser Jim Hinton's appraisal was fraudulent. Response at 35. There is no evidence it was "fraudulent," and Jim Hinton is not a party in this case.

As explained above, if anything, there was negligence. Second, the unrefuted evidence demonstrates Friendship was Martin's DBA (with its own checking account and so forth) that was converted to an LLC before the Original Transaction closed. Motion at Exhibit 1, ¶ 3.[30] The Plaintiffs cite no authority supporting that the Original Transaction was invalid due to the Friendship business structure.

Finally, in regard to conflicts of interest, section 22.230 itself is what saves interested director transactions. The Plaintiffs complain the 2015 Board had not adopted a written conflict of interest policy as required by WOWSC's bylaws. Motion at Exhibit 8-B, art. 8, ¶ 18. The bylaws, though, authorize a director to engage in business with the company if the director does not vote on any matter in which they may have a pecuniary interest. *Id.* And section 22.230(d) expressly authorizes an interested director to be present in and participate in a meeting regarding the interested director transaction TEX. BUS. ORGS. CODE § 22.230(d).

c. Purported "Corporate Waste"

The Plaintiffs argue the Directors "wasted" corporate assets by selling land for less than they believe it was worth. The Directors addressed price above. A Director does not act ultra vires and illegally by selling property for less than it is arguably worth—and particularly here where all the evidence demonstrates the Directors believed WOWSC was getting a good price. *See* Section II.B., *supra*.

Few Texas cases discuss "corporate waste." Under Delaware law, a plaintiff may in rare circumstances recover on a claim of waste. "To recover on a claim of waste, a plaintiff must prove

[30] Exhibit 13 of Plaintiffs' Response was apparently supposed to have been Dana Martin's deposition transcript from the Friendship corporate representative deposition, but it was not filed or attached. In any event, as Plaintiffs are aware, Martin testified that before Friendship converted to an LLC in early 2016, Friendship operated as Martin's DBA, had done business around Windermere Oaks for years, had its own checking account, and so forth. Friendship Corporate Representative Deposition, pp. 11-15, 23-25.

that the relevant exchange was 'so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.' Thus, a claim of waste will lie 'only in the rare, unconscionable case where directors irrationally squander or give away corporate assets.'" *Zutrau v. Jansing*, No. 7457-VCP, 2014 WL 3772859, at *17 (Del. Chan. July 31, 2014) (quotations omitted). It is limited to extreme cases such as where "the challenged transaction served no corporate purpose or where the corporation received no consideration at all." *Arnaud van der Gracht de Rommerswael on Behalf of Rent-A-Center, Inc. v. Speese*, No. 4:17CV227, 2017 WL 4545929, at *8 (E.D. Tex. Oct. 12, 2017) (quoting *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)). "This stringent standard is a corollary of the proposition that where business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose." *Id.* at *20; *see also In re Denbury Res., Inc.*, No. 05-09-01206-CV, 2009 WL 4263850, at *1 (Tex. App.—Dallas Dec. 1, 2009, orig. proceeding). "A corporate waste claim fails 'if there is any substantial consideration received by the corporation, and … there is a good faith judgment' that under the circumstances the transaction was worthwhile." *Arnaud*, 2017 WL 4545929, at *8 (quoting *White v. Panic*, 783 A.2d 543, 583 (Del. 2001)).

In Section II.B above and in their Motion, the Directors explain their business purpose for the Original Transaction and 2019 Transaction. The 2015 Board believed, based on previous offers and professional opinions, that they were receiving a good price. The 2019 Board, after receiving public input, entered the 2019 Transaction to improve the terms of the Original Transaction and resolve the company's dispute with Friendship and Martin. It is undisputed that WOWSC netted $200,000 from the land sale, that it then used to pay down its debt incurred building its new wastewater treatment plant. Motion at Exhibits 2-4, 8-F, 8-G; Supplemental Evidence at Exhibit

15-D. This is hardly a case where the sale and later settlement "cannot be attributed to any rational business purpose" or where WOWSC received no consideration at all.

d. The Corporate Resolution

The Plaintiffs argue that WOWSC's March 2016 corporate resolution was not actually approved at the February 2016 board meeting and is therefore "fictitious" and "fraudulent." But they cannot dispute the 2015 Board did, in fact, approve the sale of the land to Friendship at the December 19, 2015 Board meeting. Motion at Exhibit 8-F; Supplemental Evidence at Exhibit 20, pp. 69-71. That the corporate resolution may bear the wrong date or was allegedly not formally and separately approved from the December 19, 2015 transaction approval does not make it somehow fraudulent. The Plaintiffs do not point to any law mandating that a board adopt a resolution at a separate board meeting from the meeting where the vote to approve the transaction occurred. TEX. BUS. ORGS. CODE § 22.255 ("A corporation may convey real property of the corporation when authorized by appropriate resolution of the board of directors or members.") The Plaintiffs also do not point to any evidence that the resolution is somehow "fraudulent" when WOWSC's board ***had*** approved the transaction at the December 19, 2015 meeting. The resolution does not memorialize a vote that never occurred.

Further, the Directors can locate no case in which a director has been held ***personally liable*** for a resolution purportedly not being "appropriate" or including wrong information. The lone case relied on by Plaintiffs regarding the corporate resolution is *Guarneri v. Kessler*, a Fifth Circuit case from 1938 concerning a deportation under the federal Immigration Act. 98 F.2d 580 (5th Cir. 1938). The immigrant was convicted of smuggling, served a prison term, and then was subject to deportation. The Fifth Circuit concluded the smuggling conviction was a crime of moral turpitude because it involved dishonesty and fraud and so the immigrant could be deported. *Id.* at 580-81.

The Plaintiffs cannot seriously equate a conviction of smuggling with a corporate resolution allegedly not being properly prepared and adopted—particularly when at an earlier meeting the 2015 Board undisputedly approved the land sale that was the subject of the resolution. Again, the Plaintiffs do not, in fact, seek to hold the Directors personally liable for the resolution purportedly not being proper. They seek to hold the Directors personally liable because they believe the land was sold to a sitting director for too little. That is the actual crux of their claim.[31] If the resolution had been formally approved in February 2016, there can be no doubt the Plaintiffs would still have brought their claim.

The Plaintiffs finally suggest the 2019 Board was required to adopt a corporate resolution under Business Organizations Code section 22.255 as well. The 2019 Transaction did not convey property—it superseded the Original Agreement, including by correcting a deed mistake in the Original Transaction. Motion at Exhibits 8-L, 8-X. Regardless, to the extent the 2019 Board was supposed to adopt a corporate resolution, the Plaintiffs do not explain how that failure would make those Directors ***personally liable*** for any alleged damages caused by the underlying transactions. There is no case or statute suggesting that failure to adopt a corporate resolution is grounds for holding a director personally liable. And there is certainly no evidence this was a "knowing" failure.

[31] Texas Civil Practice and Remedies Code section 16.033 ***does*** time-bar any claim the Plaintiffs may have regarding the 2016 corporate resolution. The Plaintiffs have filed suit to recover real property, and they complain about defects in the corporate resolution approving the conveyance. Their pleading states they seek damages against the Directors to the extent their recovery of the real property does not compensate WOWSC for all loss and injury. Third Amended Petition ¶ 7.32. Section 16.033(a)(1) imposes a two-year limitations period on a person with ***any*** "right of action for the recovery of real property" for "failure of the record to show authority of the board of directors … of a corporation…." The transaction deeds that the Plaintiffs claim were not properly approved by corporate resolution have been on file since 2016. Motion at Exhibit 8-H. This complaint is barred by limitations.

e. The Texas Open Meetings Act

The Plaintiffs do not appear to allege the 2019 Board violated TOMA, as they cannot. In approving the 2019 Transaction, WOWSC published notice of the subject of the meeting, solicited robust membership participation, and voted on the transaction in open meeting. Motion at Exhibits 8-T, 8-U, 8-X; *see also id.* at Exhibit 6, ¶ 10; *id.* at Exhibit 7, ¶ 10; *id.* at Exhibit 8, ¶¶ 6-7.

The Plaintiffs' alleged TOMA violations solely appear to concern the 2015 Board. As in their *TOMA Integrity* lawsuit, the Plaintiffs allege that the 2015 Board did not properly comply with TOMA in relation to the Original Transaction. They cite Texas Government Code section 551.002 (requiring meetings to be open except as provided by TOMA); 551.005 (requiring officials to complete open meetings training within a certain timeframe); 551.021 (requiring minutes or recordings of open meeting); 551.072 (requiring discussions of real property to occur in closed meeting); and section 551.102 (requiring final votes to occur in open meeting).[32] Notably, the Plaintiffs discuss TOMA extensively in their Response while simultaneously claiming this is not a TOMA suit.

This Court already adjudicated that WOWSC violated TOMA at the December 19, 2015 meeting. *See TOMA Integrity, Inc. v. Windermere Oaks Water Supply Corp.*, No. 06-19-00005-CV, 2019 WL 2553300, at *1 (Tex. App.—Texarkana Jun. 21, 2019, pet. denied). The court of appeals specifically discussed the requirements of several provisions of TOMA, including some of the ones the Plaintiffs point to now, in agreeing with this Court a TOMA violation occurred. *Id.*

[32] Some of these alleged violations are untrue and some debatable. For instance, the recording and transcript demonstrate the 2015 Board stated that they would bring Martin back in when they came out of executive session. Supplemental Evidence at Exhibit 20, p. 62, 70. They did not formally announce coming out of executive session, but they had stated executive session would end when she came back in. *Id.* at Exhibit 20. Another example is that, contrary to what the Plaintiffs suggest, the 2015 Board ***did*** create and publish minutes of their meetings, including the December 19, 2015 meeting. Motion at Exhibit 8-F. TOMA does not mandate publication of minutes on a website.

The Directors cannot see how any complaint concerning TOMA in relation to the Original Transaction is not barred by res judicata. *See Igal v. Brightstar Info. Tech. Grp.*, 250 S.W.3d 78, 86 (Tex. 2008); *Hallco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 58 (Tex. 2006) (res judicata applies to claims which, through the exercise of diligence, could have been litigated in a prior suit).

But there are several other issues with attempting to use TOMA as the "hook" for opening up the 2015 Board Directors to personal liability. First, any complaint under TOMA is barred by limitations. The limitations period for a criminal action against an individual under TOMA is two years, and the limitations period for a civil action is four years. TEX. CODE CRIM. PROC. art. 12.02; TEX. CIV. PRAC. & REM. CODE § 16.051. No Director has ever been convicted, indicted, or even investigated for a criminal violation of TOMA. *See*, *e.g.*, § 551.144 (a person commits an offense by knowingly participating in a close meeting that is not permitted under TOMA); § 551.143 (a person commits an offense if the person knowingly conspires to circumvent TOMA by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of TOMA). *But see State v. Doyal*, 589 S.W.3d 136 (Tex. Crim. App. 2019) (concluding that section 551.143 is unconstitutionally vague on its face).

Second, any alleged TOMA violations in regard to the Original Transaction were cured and mooted when the 2019 Board approved the 2019 Transaction. The 2019 Transaction, which superseded the Original Transaction, was undisputedly done in compliance with TOMA. Motion at Exhibits 8-T, 8-U, 8-X; *see also id.* at Exhibit 6, ¶ 10; *id.* at Exhibit 7, ¶ 10; *id.* at Exhibit 8, ¶¶ 6-7; *see Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).[33]

[33] The Plaintiffs claim that because they seek damages, the 2019 Transaction could not have mooted any controversy regarding the Original Transaction. Response at 69-70. Yet if the alleged "illegal" acts by the 2015 Board were rectified by the 2019 Board, such as adopting a superseding agreement that was undisputedly adopted in compliance with TOMA, the Plaintiffs do not explain how they would still somehow have a claim for damages related to the transactions under TOMA.

Third, and more critically, and with only one inapplicable exception, there is nothing in TOMA that imposes ***personal, civil liability*** on a person for a violation of its provisions. The purpose of TOMA is "to safeguard the public's interest in knowing the workings of its governmental bodies." *Hays Cty. v. Hays Cty. Water Planning P'ship*, 69 S.W.3d 253 (Tex. App.—Austin 2002, no pet.); *see also Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990). Texas courts ***do*** at times grant relief under TOMA to ensure it serves this purpose. That relief is generally an injunction to stop the body from holding meetings in violation of TOMA, or, when appropriate, invalidating an action that violated TOMA. TEX. GOV'T CODE § 551.141 (an action taken by a governmental body in violation of TOMA is voidable); *id.* § 551.142 (an interested person may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of TOMA by a governmental body); *Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n*, 2 S.W.3d 459, 461-62 (Tex. App.—San Antonio 1999, pet. denied) (enjoining water district from holding meetings in violation of TOMA); *City of Leon Valley v. Wm. Rancher Estates Joint Venture*, No. 04-14-00542-CV, 2015 WL 2405475, at *4 (Tex. App.—Austin May 20, 2015, no writ) (remedy for TOMA violation is an injunction or a reversal of the TOMA violation); *Rivera v. City of Laredo*, 948 S.W.2d 787, 793 (Tex. App.—San Antonio 1997, writ denied) (appointment of an officer made in violation of TOMA was set as aside as void).

TOMA contains ***one*** provision imposing personal civil liability that does not apply here. *See* TEX. GOV'T CODE § 551.146 (imposing personal liability if a person without lawful authority knowingly discloses to a member of the public the certified agenda or recording of a meeting that was lawfully closed to the public, causing injury); *City of Leon Valley*, 2015 WL 2405475, at *3. That is the ***sole*** provision imposing potential civil liability for a TOMA violation. Indeed, one

searches Texas case law in vain to find even one case imposing ***personal liability*** on an individual for a violation of TOMA. Even worse, the Plaintiffs seek to hold the Directors ***strictly liable*** for allegedly violating TOMA. The one inapplicable provision authorizing personal liability under TOMA imposes a "knowing" standard, highlighting that TOMA is not intended to impose strict liability against a director in a claim for damages.[34] Under the Plaintiffs' proposed "rule," a plaintiff could forego the remedies available under TOMA and immediately seek damages under Business Organizations Code section 20.002(c)(2) from a director. Indeed, a plaintiff could do the same under the Public Information Act and various other laws that set forth specific remedies for their violation. That result is plainly absurd and cannot be what the Legislature intended in enacting section 20.002(c)(2).[35]

TOMA is a red herring in regard to the Plaintiffs' claim for damages against the Directors.[36]

f. The Meeting Minutes

The Plaintiffs finally complain that the 2015 Board prepared "fictitious" and "fraudulent" meeting minutes, presumably referring to the December 19, 2015 meeting minutes stating the board voted in open session to approve the Original Transaction. Motion at Exhibit 8-F. As explained in Note 32 above, it is debatable whether the 2015 Board left executive session to vote on the Original Transaction, though they several times discussed going out of executive session to

[34] The Plaintiffs state, without citing any evidence, that TOMA violations were "known" to the Director Defendants. Response at 69. That is a flagrant misrepresentation that is easily refuted by the record. The 2015 Board believed it was complying with TOMA. Response at Exhibit 11, pp. 71-81. There is no evidence any Director "knew" any alleged violation of TOMA was occurring.

[35] The Plaintiffs seem to ask this Court to "import" TOMA into section 20.002(c). Courts may not interpret separate statutory schemes enacted for different purposes years apart *in pari materia* (i.e., together). *See, e.g.*, *DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407, 410-11 (Tex. App.—Dallas 2010, pet. denied).

[36] The Directors are not aware of any statement by WOWSC's counsel that the Original Transaction was "illegal." Response at 7. Presumably, Plaintiffs are referring to WOWSC's counsel's demand letter to Friendship and Martin before the settlement, which referenced the adjudicated TOMA violation but did not make any accusation that the transaction itself was illegal. Motion at Exhibit 8-S.

accept Friendship's offer. *See* Supplemental Evidence at Exhibit 20. If anything, there is ambiguity in the meeting recording. The Plaintiffs cannot refute, though, that the 2015 Board ***did*** create minutes for the December 19, 2015 board meeting. Motion at Exhibit 8-F.

TOMA requires a record of minutes of open meeting. TEX. GOV'T CODE § 551.021. The minutes must (1) state the subject of each deliberation, and (2) indicate each vote, order, decision, or other action taken. *Id.* The 2015 Board's minutes from December 19, 2015 state they considered and voted on the Original Transaction, as required under TOMA. *Id.*; Motion at Exhibit 8-F. And once more, regardless, the Plaintiffs do not identify—and the Directors cannot locate—any case or statute holding a director personally liable for meeting minutes purportedly containing an inaccuracy.

D. Volunteer Immunity Statutes

The volunteer immunity state and federal statutes provide additional immunity for the Directors. TEX. CIV. PRAC. & REM. CODE ch. 84; 42 U.S.C. § 14501, *et seq.* The Plaintiffs claim these statutes do not apply because the statutes purportedly do not apply to WOWSC. The language of the statutes belies the Plaintiffs' assertion. The Texas Charitable Immunity and Liability Act ("Texas Act") applies to any organization "organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community." TEX. CIV. PRAC. & REM. CODE § 84.003(1)(B). The Federal Volunteer Protection Act ("Federal Act") similarly applies to any non-profit organization organized and conducted for public benefit and includes organizations operated primarily for civic purposes. 42 U.S.C. § 14505. WOWSC, as a non-profit providing water and wastewater services to the Windermere Oaks community, provides for the welfare of the Windermere Oaks community and operates for "civic purposes." Courts have concluded that volunteer protection acts are extremely broad and that a variety of non-profit directors enjoy volunteer immunity. *See Ventres*

v. Goodspeed Airport, LLC, No. X07CV01402085S, 2008 WL 2426790, at *23 n.25 (Conn. Super. Ct., May 27, 2008) (directors for land trust non-profit enjoyed volunteer immunity and reciting some of the many other organizations that enjoy volunteer immunity); *Elliot v. La Quinta Corp.*, No. 2:06CV56, 2007 WL 757891, at *3 (N.D. Miss. Mar. 8, 2007) (noting the "extremely broad definition of 'organization' under the Volunteer Protection Act" and applying it to a youth athletic club).

The Plaintiffs also claim the Federal Act does not immunize the Directors from a suit brought by WOWSC. *See* 42 U.S.C. § 14.503(c). First, the Texas Act does not contain the same provision. And, the Federal Act preempts the Texas Act, "except that this chapter shall ***not*** preempt any State law that provides additional protection from liability relating to volunteers…." 42 U.S.C. § 14.502(a) (emphasis added). Second, while the Directors concede that a court in another state excluded a representative suit against directors, Response at 77 (citing *Melucci v. Sckman*, No. 516/12, 2012 WL 5192763 (N.Y. Sup. 2012)), no Texas state or federal court has held this. Thus, that case is not binding. As the Directors have explained, the Plaintiffs lack standing or capacity to bring a representative suit against the Directors in Texas.[37]

The Plaintiffs also suggest the Federal Act does not apply because the Directors purportedly did not act within the scope of their responsibilities to WOWSC. Response at 77 (citing *Owen v. Bd. of Dirs. of Washington City Orphan Asylum*, 888 A.2d 255 (D.C. 2002)). As explained above, there is no evidence the Directors somehow did not act within their capacity as WOWSC directors in approving either transaction. The Directors are entitled to sell land to pay for a wastewater treatment plant. They are entitled to settle potential litigation and improve the Original

[37] At a minimum, the Plaintiffs' own cited authority disavows their ability to sue the Directors as ***individuals***. The volunteer protection statutes preclude any suit by the Plaintiffs in their individual capacity against the Directors.

Transaction. They are entitled to rely on professional advice. To the extent the 2015 Board violated TOMA or purportedly did not prepare a "proper" resolution, that does not equate to the land sale itself being undertaken outside their capacity as WOWSC directors.

The Plaintiffs also do not explain any provision of law or governing document that the 2019 Board is alleged to have violated in entering the 2019 Transaction.

Thus, the Directors are immunized from liability under the volunteer protection acts. *See Brown v. Hensley*, 515 S.W.3d 442, 447-49 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (affirming summary judgment against volunteer board members of an HOA under the Texas Charitable Immunity and Liability Act).

E. Non-Interference in Affairs of Non-Profits

As explained in the Directors' Motion, Texas courts particularly refuse to interfere in the affairs of non-profits. The Plaintiffs claim this doctrine does not apply because of the Directors' purported illegal acts. These so-called "illegal" acts are addressed above. *See* Section II.C., *supra*. The Directors simply note that the purpose of the doctrine is to prevent court interference "every time some member, or group of members, had a grievance, real or imagined" (like in this case) because the interference would frustrate the ability of the non-profit to operate (like here). *Harden v. Colonial Country Club*, 634 S.W.2d 56, 60 (Tex. App.—Fort Worth 1982, no writ). Texas courts grant summary judgment in directors' favor because of this non-interference even when plaintiffs allege directors violated corporate bylaws. *Butler v. Hide-A-Way Lake Club, Inc.*, 730 S.W.2d 405 (Tex. App.—Eastland 1987, writ ref'd n.r.e.).

Additionally, it is not surprising the Plaintiffs cite historic cases regarding limitations on the scope of corporate powers. Response at 67 (citing cases from 1919). As explained in Note 18 above, the modern ultra vires exception to the business judgment rule is narrow in Texas because

the Business Organizations Code grants corporations such expansive powers. *See, e.g.*, TEX. BUS. ORGS. CODE §§ 2.001, 2.003, 2.008, 2.101, 3.005(a)(3), 22.221, 22.230, 22.235.

F. The Plaintiffs lack capacity or standing to bring their claims either individually or derivatively.

1. A pleading asserting lack of capacity need not be verified if lack of capacity is apparent on the face of the record.

A pleading claiming lack of legal capacity need not be verified if "the truth of such matters appear of record." TEX. R. CIV. P. 93. The Directors' argument that the Plaintiffs lack capacity (or standing) to bring claims individually or as representatives of WOWSC is made as a matter of law and needs not be verified by affidavit. In fact, it is not clear what the Directors would even aver to. The Plaintiffs state in the Third Amended Petition that they are members of WOWSC and are suing individually and as purported representatives of WOWSC. Third Amended Petition, pp. 1, 3, 7. The Directors attack Plaintiffs' lack of capacity to sue the Directors as members of WOWSC or as representatives of WOWSC. The Plaintiffs' lack of capacity is apparent on the face of their pleading, and the Directors need not aver to that. TEX. R. CIV. P. 93.

2. There is a split in authority regarding the Plaintiffs' standing or capacity to bring representative claims—but Texas law is clear that they lack standing or capacity as individuals to directly sue the Directors.

The Directors' Motion summarizes the case law on standing and capacity. First, in regard to representative claims, two Texas court of appeals cases conflict on the issue of representative capacity to bring claims against directors of a non-profit. The Amarillo Court of Appeals rejected the ability of non-profit members to sue directors representatively, including when bringing ultra vires claims. *Flores v. Star Cab Co-op. Ass'n, Inc.*, No.07-06-0306-CV, 2008 WL 3980762, at *7 (Tex. App.—Amarillo Oct. 22, 2008, pet. denied).[38] Conversely, the Houston (Fourteenth) Court

[38] Contrary to what the Plaintiffs claim, the *Flores* court suggested that ultra vires claims could not be brought representatively either. 2008 WL 3980762, at *7.

of Appeals recognized that non-profit members have standing to bring representative ultra vires claims against directors. *Carmichael v. Tarantino Props., Inc.*, 604 S.W.3d 469, 481-82 (Tex. App.—Houston [14th Dist.] 2020, no pet.). The Directors are aware of the language of section 20.002(c)(2). But the Directors propose that, when reading section 20.002(c)(2) together with Chapter 22—which provides no "policing" or procedures governing representative suits as the for-profit chapter does—the preferred reading is that section 20.002(c)(2) does not authorize representative actions in the non-profit context. *See* Motion at pp. 52-54. The Texas Supreme Court has not yet spoken on this issue.

The Plaintiffs rely on *Governing Board v. Pannill* to support their standing or capacity to bring a representative suit. 561 S.W.2d 517, 524 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.). First, that was a suit to enjoin a transaction—not a suit for damages. Second, that court suggested that a plaintiff seeking to bring a derivative suit must satisfy the requirements for class action lawsuits under Texas Rule of Civil Procedure 42 in seeking to represent the entirety of shareholders. *Id.*; *see also Ford v. Bimbo Corp.*, 512 S.W.2d 793, 795 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). It makes sense that if a plaintiff ***can*** bring a representative action on behalf of a non-profit, there must be ***some*** procedure governing this action.[39] Otherwise, like here, a disgruntled group of neighbors could bring actions on behalf of a community non-profit against other neighbors regardless of how representative they are of the entire "class" of members. This is obviously a neighborhood divided, and the Plaintiffs present no evidence they represent the interest of ***all*** WOWSC members. And they certainly present no evidence that ***they*** can represent the best interests of the WOWSC. To the extent the class action procedural requirements apply as *Pannill*

[39] As explained in the Directors' Motion, the for-profit chapter of Business Organizations Code contains procedures governing representative suits (Chapter 21). The non-profit chapter does not (Chapter 22).

suggests, the Plaintiffs have not demonstrated they have met them. Thus, they lack capacity to bring a representative suit. At a minimum, their standing or capacity is limited to bringing a true representative ultra vires claim—not common law breach of fiduciary duty claims "dressed" as ultra vires claims. *Carmichael*, 604 S.W.3d at 481.

Additionally, regardless of whether it should be framed as an issue of standing or capacity, *Pike v. Texas EMC Management, LLC* does not support that the Plaintiffs can ***individually*** sue the Directors for personal damages. 610 S.W.3d 763 (Tex. 2020); *see also Cooke v. Karlseng*, 615 S.W.3d 911, 913 (Tex. 2021).[40] The Texas Supreme Court noted that a limited partner, the partnership, and the general partner did not lack standing in the jurisdictional sense to bring claims against limited partners. 610 S.W.3d at 778. This is because a partner could be individually injured by virtue of loss in value of its interest in the organization. *Id.* The Plaintiffs have never explained how they have suffered individualized injury by virtue of the Original Transaction or 2019 Transaction. The Plaintiffs suggest that WOWSC would have excess money in its reserves that it could distribute to WOWSC members if only it had sold the land for more money. Response at 8, 60. But the WOWSC articles of incorporation prohibit payment of dividends or income to members. Motion at Exhibit 8-A, art. 6 ("No dividends shall ever be paid upon the memberships of the Corporation. No income of the Corporation may be distributed to members, directors, or officers in these roles."). So the Plaintiffs' suggestion that WOWSC would have provided money to its members but-for the transactions is not convincing.[41] The Plaintiffs also state, without

[40] As noted by the Plaintiffs, *Pike* applies to a partnership. The Supreme Court's rationale, though, may apply in the corporate context given language in the opinion and holding. The Supreme Court stated: "we hold that a partner ***or other stakeholder in a business organization*** has constitutional standing to sue for an alleged loss in the value of its interest in the organization." *Pike*, 610 S.W.3d at 778 (emphasis added).

[41] The Plaintiffs point to federal tax provisions in suggesting WOWSC is required to pay amounts to its members. That is not what the WOWSC articles of incorporation state. This is not a tax case or a case challenging the WOWSC tax-exempt status, which this Court does not have jurisdiction to decide. Motion at 23 n.17.

evidence, that the Directors' actions caused rate increases. Response at 60. A conclusory statement in a pleading or motion is no evidence. *See*, *e.g.*, *Thanh Le v. North Cypress Med. Ctr. Operating Co., Ltd.*, No. 14-16-00314-CV, 2017 WL 1274241, at *6 (Tex. App.—Houston [14th Dist.] April 4, 2017, no pet.) (mem. op.) ("Le's unsworn assertions in his response … are merely conclusory statements that do not constitute competent summary judgment evidence."); *La China v. Woodlands Operating Co., L.P.*, 417 S.W.3d 516, 528 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Further, the Supreme Court acknowledged that even if a stakeholder has standing, that does not mean the stakeholder has capacity to sue or can overcome statutory provisions defining and limiting the stakeholder's ability to recover damages. *Pike*, 610 S.W.3d 763. In regard to capacity, the Supreme Court held that "whether a claim brought by a partner actually belongs to the partnership is likewise a matter of capacity because it is a challenge to the partner's legal authority to bring the suit." *Id.* at 779. The Supreme Court has many times concluded that "the cause of action for injury to the property of a corporation, or the impairment or destruction of its business, is vested in the corporation." *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990); *see also*, *e.g.*, *Myer v. Cuevas*, 119 S.W.3d 830, 836 (Tex. App.—San Antonio 2003, no pet.) ("Corporate officers owe fiduciary duties to the corporations they serve. However, corporate officers do not owe fiduciary duties to individual shareholders unless a contract or special relationship exists between them in addition to the corporate relationship.") (citations omitted).

In regard to liability limitations, the Supreme Court acknowledged those arguments go to the merits of a case, and the Directors have addressed this above (business judgment rule, safe harbor provisions, protections for volunteer directors, and so forth). *See* Section II.B-D, *supra*.

The Plaintiffs lack standing or capacity to bring individual or representative claims against the Directors.

G. The Plaintiffs provide no argument in support of their claim for attorney's fees.

The Plaintiffs provide no briefing in support of their claim for attorney's fees. In one sentence, they state that there is a fact dispute regarding the recovery of attorney's fees. Response at 2. But whether a statute provides for the recovery of attorney's fees is a question of law for this Court. *Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, L.L.C.*, 596 S.W.3d 370, 374 (Tex. App.—Dallas 2020, pet. denied). The Plaintiffs have not identified any statute that would provide for the recovery of attorney's fees against the Directors in this case.[42] This Court should render a take-nothing judgment in the Directors' favor on the Plaintiffs' claim for attorney's fees. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019); *Tucker v. Thomas*, 419 S.W.3d 292, 295); *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011).

CONCLUSION AND PRAYER

The Plaintiffs' Response is replete with strained legal arguments "supported" by suspicion stacked upon suspicion and inferences stacked upon inferences. But there is no actual evidence of the subjective bad faith and other factors that could open the Directors up to personal liability. The evidence instead establishes that the Directors acted with nothing but good faith and in a manner they reasonably believed was in the best interest of WOWSC. That the Plaintiffs take ***57 pages*** to even get to the law highlights the obvious. A review of Texas law shows that it is only in the most egregious circumstances that a director can be held personally liable. This case does not present anything approaching those sorts of egregious circumstances.

[42] The Plaintiffs have not sued under a contract that provides for the recovery of fees.

For the reasons set forth in their Motion and this Reply, Defendants Windermere Oaks Water Supply Corporation Directors William Earnest, Thomas Michael Madden, Dana Martin, Robert Mebane, Patrick Mulligan, Joe Gimenez, Mike Nelson, and Dorothy Taylor respectfully request the Court to grant their Motion for Summary Judgment and render a take-nothing judgment in their favor on each of the Plaintiffs' claims against them. The Directors further seek such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2021, a true and correct copy of the foregoing was served electronically, via e-file Texas, on all counsel of record:

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