DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 S. Tejon, P.O. Box 2980 Colorado Springs, CO 80901-2980 Phone: (719) 448-7650	
Plaintiffs: CHARLES WARNE, et al. **Defendants / Third Party Plaintiffs:** WOODMEN HILLS COVENANT MANAGEMENT BOARD, et al. **and** **Third Party Defendants:** TRAVIS R. HELTON and KAREN E. HELTON	**▲COURT USE ONLY▲** Case Number: 2008CV2923 Division: 5
Attorneys for Defendants: SUSEMIHL, McDERMOTT & COWAN, P.C. Jason W. Downie, Reg # 27256 Geoffrey L. Lindquist, Reg # 38290 660 Southpointe Court, Suite 210 Colorado Springs, CO 80906 Phone Number: (719) 579-6500 Fax Number: (719) 579-9339 E-mail: jdownie@smmclaw.com	

DEFENDANTS REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

DEFENDANTS Woodmen Hills Covenant Management Board (the "WHCMB") and Woodmen Hills Metropolitan District (the "WHMD"), by and through their counsel, Susemihl, McDermott & Cowan, P.C., by Jason W. Downie and Geoffrey L. Lindquist, submit their Reply in Support of their Motion for Summary Judgment:

DISPUTED AND UNDISPUTED FACTS

1. All supposed disputed material facts listed by Plaintiffs on pages 2 and 13 of their Response are questions of law to be decided by the court. The issues in this case include the interpretation of written contracts, recorded documents and covenants and provisions of the Colorado Revised Statutes. The interpretation of written contracts is a question of law. *Keith v. Kinney*, 140 P.3d 141 (Colo. Ct. App. 2005). Further, the interpretation of a statute is a question of law. *Robles v. People*, 811 P.2d 804 (Colo. 1991).

2. Plaintiffs state that the intent of the parties is relevant in this case. However, the intent of the parties in a contract is only relevant if the contract is ambiguous. *Columbus Investments v. Lewis*, 48 P.3d 1222 (Colo. 2002). Further, the question of whether a contract is ambiguous is a question of law. *Specialized Grading Enters., Inc. v. Goodland Constr., Inc.*, 181 P.3d 352 (Colo. Ct. App. 2007). Contrary to what Plaintiffs claim, having different opinions on the meaning of a contract does not make it ambiguous. *Cherokee Metropolitan Dist. v. Simpson*, 148 P.3d 142 (Colo. 2006).

3. Plaintiffs take issue with Defendants' Statement of Undisputed Facts. All facts listed in Defendants' Motion for Summary Judgment are accounts of the execution and recording of documents affecting real property located in El Paso County, Colorado. Copies of the documents were attached, and the review of the documents is not unduly burdensome to Plaintiffs or the Court. All documents are public records recorded in the real property records of El Paso County, Colorado.

4. Plaintiffs set out their own list of Undisputed Facts. Their list of facts includes argumentative language and spin more appropriate for their argument section of their pleading. Plaintiffs list certain provisions or interpretations of provisions of the recorded documents in an argumentative attempt to bolster their positions regarding the issues in the case. After parsing through Plaintiffs' list of undisputed facts and deleting argumentative or repetitive statements, all that remains are Defendants' set of facts – a listing of each recorded document at issue in this case.

STATEMENT OF LAW

5. As a supplement to Defendants' Statement of Law in the original Motion for Summary Judgment, Plaintiffs state as follows: As stated above, the interpretation of written contracts is a question of law. *Keith v. Kinney*, 140 P.3d 141 (Colo. Ct. App. 2005). Additionally, the interpretation of a statute is a question of law. *Robles v. People*, 811 P.2d 804 (Colo. 1991). Further, the interpretation of a covenant is a question of law. *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70 (Colo. Ct. App. 1993).

6. The intent of the parties in a contract is only relevant if the contract is ambiguous. *Columbus Invs. v. Lewis*, 48 P.3d 1222 (Colo. 2002). Further, the question of whether a contract is ambiguous is a question of law. *Specialized Grading Enters., Inc. v. Goodland Constr., Inc.*, 181 P.3d 352 (Colo. Ct. App. 2007). Having different opinions on the meaning of a contract does not make it ambiguous. *Cherokee Metropolitan Dist. v. Simpson*, 148 P.3d 142 (Colo. 2006). The presumption against restriction by covenant of the use of property has no application when the language is definite in its terms; one must follow the dictates of plain English. *Gleneagle Civil Ass'n v. Hardin*, 2008 WL 4592161 (2008) (citing *D.C. Burns Realty & Trust Co. v. Mack*, 450 P.2d 75, 76 (Colo. 1969)).

ARGUMENT

7. The central question in this case is whether a declarant of a declaration of covenants, conditions and restrictions for real property is a "master association or similar body" pursuant to C.R.S. § 32-1-1004(8)(a). A ruling on this question will affect the rest of the case. As it is a question of statutory interpretation, this is a question of law for the court. Defendants refer the Court to their argument in the Motion for Summary Judgment regarding whether the declarant was a "master association or similar body" under C.R.S. § 32-1-1004(8)(a).

8. There is no relevant testimony that could be given during a trial or other hearing to assist the Court in determining whether the declarant, Melody Homes / DR Horton is a "master association or similar body" pursuant to C.R.S. § 32-1-1004(8)(a). Further, no relevant cases have been found to assist the determination of whether a declarant is a "master association or smililar body".

9. However, the legislative history may be some help. Courts have looked at legislative history to help interpret a statute. *Bd. of County Comm'rs v. Costilla County Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004).

10. The second most important issue in this case is whether the declarant had any rights regarding the Declaration at the time it assigned them to Defendants. Since this question is an interpretation of contracts and covenants, it is another question of law that may be decided by the Court upon this Motion. Again, Defendants refer the court to their Motion for Summary Judgment for their argument on this issue. Further, the Colorado Court of Appeals has found that a declarant of property still had the right to assign architectural control to a homeowner's association after it had conveyed its remaining lots to another builder. *See Lookout Mountain Paradise Hills Homeowner's Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75-76 (Colo. Ct. App. 1993).

11. While not trying to be repetitive, Defendants feel it necessary to reiterate the fact that only certain declarant rights lapsed after 120 days after the Declarant sold its last lot. Plaintiffs conjure up the term 'declarant control' – a term not used in the Declaration nor defined in the Declaration – and state that the 'declarant control' ends after 120 days after the last lot is sold by Declarant. However, as stated in Defendants' Motion for Summary Judgment, there are only specific powers that lapse after this time frame. A plain reading of Article VI of the Declaration is illustrative, and no reasonable interpretation of Article VI leads to the conclusion that all of Declarant's powers lapse.

12. Although Defendants do not believe it is relevant to the issues in this case, Plaintiffs claim to show, by affidavit and otherwise, that the residents in Filings 8&9 do not want covenant enforcement, that homeowners agreed that there should be no covenant enforcement, and that the Declaration is a set of mere 'guidelines' that cannot be enforced by anyone.

13. Contrary to the claims of Plantiffs' affidavits, there are multiple residents in Filings 8&9 who are proponents of covenant enforcement. *See* Affidavits of Vincellette and Zinn, attached as Exhibit A and Exhibit B to this Reply. These several homeowners have lived

in their respective homes in Filings 8&9 since 2002. *See id*.

14. The supposed meeting between homeowners in Filings 8&9 may have taken place. Whether or not the meeting took place is not important or a material issue in the case. What is important is the fact that a meeting of homeowners has no legal significance regarding the enforceability of the Declaration. Article VII, Section 3 of the Declaration dictates what must be done for homeowners to amend or repeal the Declaration. No amendment of the or repeal Declaration was ever recorded in the real property records that voided the Declaration, nor can Plaintiffs produce any written, recorded agreement to the same effect.

15. In fact, in January, 2008, Plaintiff Charles Warne and Plaintiffs' affiant Tracy Ring attempted to amend the covenants to state they are mere guidelines, but were apparently unsuccessful. *See* the attached Exhibit C.

16. Plaintiffs cite a case, *Miller v. Curry*, that is wholly irrelevant to the issues in the present case. *Miller v. Curry* deals with a developer's apparent attempt to reserve development rights in a declaration. *Miller v. Curry*, 2009 WL 37600 (Colo. Ct. App.). The Colorado Common Interest Ownership Act requires that a declarant reserve development rights and include a "time limit within which each of those rights must be exercised." C.R.S. § 38-33.3-205(1)(h). The court held that the declaration's provision providing for an indefinite term could not be considered a time limit. *Miller*, 2009 WL 37600. The Declaration in this matter specifically excludes the community from the provisions of The Colorado Common Interest Ownership Act. Moreover, "development rights" pursuant to C.R.S. § 38-33.3-103(14) has a very specific meaning which does not have anything to do with covenant enforcement.[1]

17. Plaintiffs apparently argue that the holding in *Miller v. Curry* should be expanded to not allow the assignment of the Declaration. Defendants are unaware of any contract law principle or statutory provision that requires a 'time limit' in which a contract must be assigned. Thus, Defendants believe *Miller v. Curry* to be wholly irrelevant.

18. Futher, according to the Declaration, the definition of "Declarant" includes Melody Homes' successors and assigns and states that to be a successor or assign, the instrument assigning Declarant's interest must be recorded. *See* Article II, Section 3 of the Declaration.

19. Plaintiffs argue there are no enforcement provisions in the Declaration. To the contrary, Article VII, Section 5 of the Declaration states that a violation can be enjoined or abated by any Person entitled to enforce the Declaration. A Person is defined as any natural person, corporation, or any other entity permitted to hold title to real property under Colorado law. *See* Article II, Section 12 of the Declaration. The persons entitled to enforce the Declaration are listed in Article I, Section 3 of the Declaration and include the Declarant. Further, the Declaration provides attorneys' fees and costs to the party who is successful in enforcing the Declaration. *See* Article VII, Section 9 of the Declaration. In addition, the

[1] C.R.S. § 38-33.3-103(14) states "Development rights" means any right or combination of rights reserved by a declarant in the declaration to: (a) Add real estate to a common interest community; (b) Create units, common elements, or limited common elements within a common interest community; (c) Subdivide units or convert units into common elements; or(d) Withdraw real estate from a common interest community.

Plaintiffs' position that the covenants are merely "guidelines" and unenforceable because there is no homeowners association nor assessment of dues is preposterous and unsupported by any legal authority. Homeowners purchased property with recorded covenants. Any attempt to claim that the Declaration is unenforceable because of some small informal meeting among some lot owners or because an unidentified D.R. Horton sales representative is alleged to have stated to some homeowners there was no covenant enforcement unless there was a vote by the lot owners is unsupported by any legal authority whatsoever. Any reliance upon such matters would clearly be unreasonable. *See*, *Barker v. Jeremiasen*, 676 P.2d 1259 (Colo.App. 1984) (reliance is not reasonable when owner who violates covenant does not believe his or her use of the property to be in violation of covenants; covenants will be enforced even though plaintiff did not file suit until 1979 against owner violating covenants starting in 1973 by constructing buildings and commencing horse operation). As discussed herein, the Declaration provides for a method of enforcement and reliance on alleged statements to the contrary by an unidentified D.R. Horton representative would be unreasonable. In fact, Mr. Warne even alleges that he compared the language of the Declaration to the alleged statements of the D.R. Horton representative, presumably because he understood and knew the Declaration would control. The Declaration by its very nature would apply to everyone in the community. If an individual homeowner could claim a verbal statement that provisions of a recorded Declaration was not applicable or would not be enforced against him or her, there would be no standard and different homeowners would be subject to different rules, despite the recorded Declaration. The entire principal behind recorded covenants such as this that touch and concern the land is that they will be binding on future owners. *See, lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo.App. 1993), *cert. denied* (covenants which stated they ran with the land and which declared purpose to be the protection against improper use which will depreciate values is imposed for benefit of the entire subdivision). Regardless, this is a red herring and does not create any disputed facts. The Declaration is clear as to what activities are prohibited and clear that there is an enforcement mechanism.

20. Plaintiffs cite Article VII, Section 6 as the only way the Declarant could enforce the Declaration. Plaintiffs failed to mention that this section was a "self-help" section. "Self-help" is a legal term of art meaning "an attempt to redress a perceived wrong by one's own action rather than through the normal legal process." BLACK'S LAW DICTIONARY 632 (2nd pocket ed. 2001). Defendants are not now, nor have they been attempting to enforce the Declaration by self-help.

21. Plaintiffs argue that Defendants lack standing to challenge the validity of the Amendment to the Declaration. Again, the validity or lack of validity of the Amendment to the Declaration has nothing to do with what powers the Declarant still had under the Declaration or whether it was a "master association or similar body" under C.R.S. § 32-1-1004(8)(a). However, in response to Plaintiffs argument, Defendants' gained standing to challenge the validity of the Amendment to the Declaration via the D.R. Horton / Melody Contract.

22. Plaintiffs also argue that the residents of Filings 8&9 were kept in the dark regarding the Woodmen Hills Metropolitan District's plans to help with covenant enforcement. Defendants respond as follows: the Woodmen Hills Metropolitan District is a quasi-governmental entity and political subdivision of the state of Colorado. Pursuant to Title 32 of

the Colorado Revised Statutes, all meetings are public and notices are given and posted as required by Title 32. Further, several residents' accounts contrast against Plaintiffs' account of the WHMD's dealings. *See* Affidavit of Vincellette and Affidavit of Zinn.

23. Plaintiffs provide further arguments and regarding various issues involved in this case. In response, Defendants refer the Court to Defendants' Motion for Summary Judgment.

WHEREFORE, based on the foregoing, the Defendants, WHMD and WHCMB request this Honorable Court enter summary judgment in their favor.

Dated this 14th day of April, 2009.

SUSEMIHL, MCDERMOTT & COWAN, P.C.

Original signature on file at offices of Susemihl, McDermott & Cowan, P.C.

By:_____/s/_____
Jason W. Downie, #27256
Geoffrey L. Lindquist, #38290

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2009, a copy of the foregoing **DEFENDANTS REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT** was served via Lexis/Nexis File & Serve to the following:

M. Jacqueline Gaithe, PC
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111 South Tejon Street, Suite 202
Colorado Springs, CO 80903

Original signature on file at the offices of Susemihl, McDermott & Cowan, P.C.

_____/s/_____
Geoffrey L. Lindquist