

DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO

Court Address: 270 South Tejon
Colorado Springs, CO 80903

Plaintiff(s): CHARLES WARNE, an individual; BRIDGET WARNE, an individual; BRANDON CUFFE, an individual; NORMAN VILLANUEVA, an individual; NANCY VILLANUEVA, an individual; HOWARD SURBER, an individual; and LUANA SURBER, an individual,

v.

Defendant(s): WOODMEN HILLS COVENANT MANAGEMENT BOARD, a Colorado non-profit corporation; and WOODMEN HILLS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision.

Attorney for Plaintiffs:

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Case Number: 08CV2923

Div. No.: 5 Ctrm:

**SECOND AMENDED COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiffs Charles Warne and Bridget Warne (“The Warnes” or “Mr. and Ms. Warne”), Brandon Cuffe (“Mr. Cuffe”), Norman Warne and Nancy Villanueva (“The Villanuevas” or “Mr. and Ms. Villanueva”), Howard Surber and Luana Surber (“The Surbers” or “Mr. and Ms. Surber”), (collectively hereinafter referred to as “Plaintiffs”), by their attorney, M. Jacqueline Gaithe, PC, submit the following averments for their Second Amended Complaint For Declaratory and Injunctive Relief against Defendants Woodmen Hills Covenant Management Board (“WHCB” or “Defendant”) and Woodmen Hills Metropolitan District (the “Metro District” or “Defendant”):

I. JURISDICTION AND VENUE

1. Plaintiffs Charles Warne and Bridget Warne are individuals who reside in El Paso County, Colorado.
2. Plaintiff Brandon Cuffe is an individual who resides in El Paso County, Colorado.
3. Plaintiffs Norman Villanueva and Nancy Villanueva are individuals who reside in El Paso County, Colorado.
4. Plaintiffs Howard Surber and Luana Surber are individuals who reside in El Paso County, Colorado.
5. Defendant Woodmen Hills Covenant Management Board is a Colorado non-profit corporation having its principal place of business in the State of Colorado.
6. Defendant Woodmen Hills Metropolitan District is a quasi-municipal corporation and political subdivision within the State of Colorado.
7. Venue is proper pursuant to C.R.C.P. 98(a) because the actions complained of and the relief sought herein affect real property situated in El Paso County, Colorado.

II. GENERAL ALLEGATIONS

8. The Warnes purchased real property in Woodmen Hills Filing Number 8 in or about May 2004.
9. Mr. Cuffe purchased real property in Woodmen Hills Filing Number 8 in or about June 2004.
10. The Villanuevas purchased real property in Woodmen Hills Filing Number 8 in or about January 2003.
11. The Surbers purchased real property in Woodmen Hills Filing Number 8 in or about February 2003.
12. A certain Declaration of Covenants, Conditions and Restrictions for Woodmen Hills Filing No. 8 and a Portion of Filing No. 9 (the "Covenants") was executed on or about October 24, 2000 and was duly recorded in the real property records of El Paso County, Colorado, at

Reception Number 200136133 on or about November 9, 2000.

13. The Covenants did not provide for any “payment by the Owners of any assessments or other amounts nor does the Declaration provide for a homeowners association to collect or expend funds for such matters.”

14. For these and other reasons, an Amendment to Declaration of Covenants, Conditions and Restrictions for Woodmen Hills Filing No. 8 and a Portion of Filing No. 9 (the “Amended Covenants”) was executed by the Declarant, Melody Homes, Inc., on or about February 12, 2003 and duly recorded in the real property records of El Paso County, Colorado, at Reception Number 203034235 on or about February 18, 2003.

15. The Amended Covenants essentially stripped the Covenants of any enforcement mechanisms and completely deleted any and all references to a Design Review Committee and Design Standards.

16. The Amended Covenants were in place at the time the Warnes and Mr. Cuffe purchased real property in Woodmen Hills Filing Number 8.

17. The Amended Covenants were in place shortly after the Villanuevas purchased real property in Woodmen Hills Filing Number 8. The Amended Covenants were signed on or about the same date that the Surbers purchased real property in Woodmen Hills Filing Number 8.

18. At some point after the Warnes, Mr. Cuffe, the Villanuevas and the Surbers purchased in Woodmen Hills Filing Number 8, a neighborhood meeting was called by the Declarant. At that meeting, the Owners in Woodmen Hills Filing Number 8 and a Portion of Number 9 (the “Owners”) were advised that there was no homeowners association and it would be up to them to decide whether to proceed with putting one in place. The Owners chose not to establish or elect a homeowners association. The Owners were led to believe that there would also be no covenant enforcement.

19. Upon information and belief, the Declarant sold or transferred ownership of the last property in Woodmen Hills Filing Number 9 in or about September, 2003. Declarant sold or transferred ownership of the last property in Woodmen Hills Filing Number 8 in or about April, 2006. With the April 2006 sale or transfer, Declarant no longer had any legal right, title, interest, power or claim in or to the properties and covenants or covenant enforcement associated with Woodmen Hills Filing Number 8 and a Portion of Number 9.

20. Upon information and belief, the Woodmen Hills Metropolitan District and/or the Woodmen Hills Covenant Management Board initiated dialogue with a representative of the former Declarant, Melody Homes, Inc. d/b/a D.R.Horton - Melody Series (“Declarant Horton”)

late Summer 2007 in an effort to get Declarant Horton to enter into a purported assignment of right to enforce covenants.

21. Upon information and belief, Declarant Horton entered into a certain assignment with Woodmen Hills Metropolitan District through coercion or other suspect means. This Contract and Assignment of Right to Enforce Covenants was signed on or about August 14, 2007 (“First Assignment”), but was not recorded in the real property records of El Paso County, Colorado until November 13, 2007 at Reception Number 207145595.

22. This First Assignment occurred more than a year after Declarant had sold or transferred its last property in Woodmen Hills Filing Number 8 and nearly four years after Declarant had sold or transferred its last property in Woodmen Hills Filing Number 9.

23. At the time of the assignment, Declarant Horton had no right, title, interest, power or claim as to the properties or covenants affecting the properties associated with Woodmen Hills Filing Number 8 and a Portion of Number 9 and could not assign any right to enforce covenants in either of those Filings.

24. Upon information and belief, the First Assignment is void, voidable or invalid.

25. On or about October 18, 2007, the Woodmen Hills Metropolitan District assigned its purported interest from the First Assignment to the Woodmen Hills Covenant Management Board in a Contract and Assignment of Right to Enforce Covenants (“Second Assignment”). This Second Assignment was not recorded in the real property records of El Paso County, Colorado until November 14, 2007 at Reception Number 207146008.

26. Upon information and belief, the Second Assignment is also void, voidable or invalid.

27. Subsequent to these “assignments,” WHCMB began attempts to enforce the Covenants. WHCMB also initiated a “covenant fee” of \$6.50 on a monthly basis to fund covenant enforcement by way of assessment on the Woodmen Hills Filing Number 8 and a Portion of Number 9 residents’ monthly water bill.

28. Property Owners in Woodmen Hills Filing 8 and the Portion of Filing 9 began receiving alleged covenant violation notices from WHCMB in or about January 2008. The Warnes, Mr. Cuffe, the Villanuevas, and the Surbers maintain that WHCMB does not have any authority to attempt enforcement of any covenant or covenants. The Covenants and/or the Amended Covenants set forth no mechanism for covenant enforcement and any attempts by WHCMB are outside the scope of any authority contained in or contemplated by the Covenants and/or the Amended Covenants.

29. Likewise, the WHCMB does not have any authority to assess a monthly “covenant

fee” for covenant enforcement, particularly where the Covenants and/or the Amended Covenants made no provision for any assessments regarding covenant enforcement.

30. The Warnes have communicated their position to WHCMB, through its counsel, that WHCMB has no authority to enforce covenants, assess a monthly “covenant fee” or assess penalties/fines for alleged covenant violations.

31. WHCMB has admitted it has no authority to assess fines or penalties for alleged covenant violations.

32. In May 2008, the Warnes and Mr. Cuffe received letters from counsel for WHCMB advising its intention of filing suit to enforce the Covenants if they did not contact WHCMB’s counsel within ten (10) days. The Villanuevas and the Surbers received letters from counsel for WHCMB advising of alleged covenant violations, its intent to enforce same and providing a deadline for compliance.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment Pursuant to C.R.C.P. 57 and C.R.S. §§ 13-51-101, *et seq.*)

33. Plaintiffs Mr. and Ms. Warne, Mr. Cuffe, Mr. and Ms. Villanueva, and Mr. and Ms. Surber reallege and incorporate by reference the averments set forth in the preceding paragraphs 1 through 32 above.

34. A dispute and actual controversy has arisen between the parties to this case concerning WHCMB’s authority, or lack thereof, to attempt enforcement of Covenants against these property owners in Woodmen Hills Filing Number 8 and a Portion of Number 9 and the matters described above.

35. A dispute and actual controversy has arisen between the parties to this case concerning the Metro District’s and/or WHCMB’s authority, or lack thereof, to assess a “covenant fee” for covenant enforcement against the property owners in Woodmen Hills Filing Number 8 and a Portion of Number 9 and the matters described above.

36. The Warnes, Mr. Cuffe, the Villanuevas and the Surbers believe the First Assignment and Second Assignment to be void, voidable or invalid.

37. Plaintiffs desire a judicial determination and declaration regarding the validity of the two assignments at issue – the Metro District’s assignment from Declarant Horton and the assignment from the Metro District to WHCMB.

38. Plaintiffs also desire a judicial determination and declaration regarding the Metro District’s and/or WHCMB’s authority to attempt covenant enforcement and assessment of a “covenant fee” for covenant enforcement against the property owners in Woodmen Hills Filing

Number 8 and a Portion of Number 9 and the matters described above. A judicial determination is necessary and appropriate at this time.

39. An adjudication declaring the respective rights, obligations and status of the parties would terminate some of the controversy giving rise to this case.

40. Based upon the controversy, Charles Warne, Bridget Warne, Brandon Cuffe, Norman Villanueva, Nancy Villanueva, Howard Surber, and Luana Surber respectfully request the Court enter a declaratory judgment determining:

- A. That the First Assignment is void, voidable or invalid;
- B. That the Second Assignment is void, voidable, or invalid;
- C. That the Amended Covenants are the controlling document for the Owners in Woodmen Hills Filing Number 8 and a Portion of Filing Number 9;
- D. That the Amended Covenants have no mechanism for covenant enforcement or assessment of fees against Owners for covenant enforcement;
- E. That Woodmen Hills Covenant Management Board and/or the Woodmen Hills Metropolitan District have no authority to attempt enforcement of the Covenants and no authority to assess penalties/fines for alleged covenant violations;
- F. That Woodmen Hills Covenant Management Board and/or the woodmen Hills Metropolitan District has no authority to cause an assessed “covenant fee” for covenant enforcement be charged to the Warnes, Mr. Cuffe, the Villanuevas, and the Surbers; and
- G. That Declarant or Declarant Horton no longer has any legal right, title, interest, power or claim in or to the properties, covenants or covenant enforcement affecting the properties associated with Woodmen Hills Filing Number 8 and a Portion of Number 9 and as such cannot make any assignments of any right, title, interest, power or claim in or to properties, covenants or covenant enforcement associated with Woodmen Hills Filing Number 8 and a Portion of Filing Number 9 to third-parties.

WHEREFORE, Plaintiffs Charles Warne, Bridget Warne, Brandon Cuffe, Norman Villanueva, Nancy Villanueva, Howard Surber, and Luana Surber pray for judgment as follows pursuant to C.R.C.P. 57 and C.R.S. §§ 13-51-101, *et seq.*, a finding and Order of the Court:

- A. That the First Assignment is void, voidable or invalid;
- B. That the Second Assignment is void, voidable, or invalid;
- C. That the Amended Covenants are the controlling document for the Owners in Woodmen Hills Filing Number 8 and a Portion of Filing Number 9;
- D. That the Amended Covenants have no mechanism for covenant enforcement or assessment of fees against Owners for covenant enforcement;
- E. That Woodmen Hills Covenant Management Board, its successors or assigns, and/or the Woodmen Hills Metropolitan District, its successors or assigns, have no authority to attempt enforcement of the Covenants and no authority to assess penalties/fines for alleged covenant violations;
- F. That Woodmen Hills Covenant Management Board, its successors or assigns, and/or the Woodmen Hills Metropolitan District, its successors or assigns, have no authority to cause an assessed “covenant fee” for covenant enforcement be charged to Owners in Woodmen Hills Filing Number 8 and a Portion of Filing Number 9 and as such a refund of all paid “covenant fees” plus interest shall be made to the Warnes, Mr. Cuffe, the Villanuevas, and the Surbers;
- G. That Declarant or Declarant Horton no longer has any legal right, title, interest, power or claim in or to the properties, covenants or covenant enforcement affecting the properties associated with Woodmen Hills Filing Number 8 and a Portion of Number 9 and as such cannot make any assignments of any right, title, interest, power or claim in or to properties, covenants or covenant enforcement associated with Woodmen Hills Filing Number 8 and a Portion of Filing Number 9 to third-parties;
- H. For Charles Warne’s, Bridget Warne’s, Brandon Cuffe’s, Norman Villanueva’s, Nancy Villanueva’s, Howard Surber’s and Luana Surber’s costs incurred in this action pursuant to C.R.S. § 13-51-114; and
- I. For such other and further relief as this Court deems just and proper.

SECOND CLAIM FOR RELIEF
(Injunctive Relief Against Defendants)

41. Plaintiffs Mr. and Ms. Warne, Mr. Cuffe, Mr. and Ms. Villanueva, and Mr. and

Ms. Surber reallege and incorporate by reference the averments set forth in the preceding paragraphs 1 through 40 above.

42. As a result of Woodmen Hills Covenant Management Board's repeated attempts to enforce covenants and assess covenant fees without proper authority, the Warnes, Mr. Cuffe, the Villanuevas and the Surbers have been damaged and continue to be damaged.

43. As a result of Woodmen Hills Covenant Management Board communicating its intent to file suit against the Warnes and Mr. Cuffe and the uncertainty regarding their respective property rights, the Warnes and Mr. Cuffe have been damaged and continue to be damaged.

44. As a result of Woodmen Hills Covenant Management Board communicating alleged covenant violations to the Villanuevas and the Surbers with deadlines for compliance and the uncertainty regarding their respective property rights, the Villanuevas and the Surbers have been damaged and continue to be damaged.

45. Any attempts by the Woodmen Hills Covenant Management Board to enforce covenants and/or initiate litigation against the Warnes, Mr. Cuffe, the Villanuevas, and/or the Surbers have and will result in immediate and irreparable harm to the Warnes, Mr. Cuffe, the Villanuevas, and the Surbers.

46. The Warnes', Mr. Cuffe's, the Villanuevas', and the Surbers' property rights have been affected and will continue to be affected as long as Woodmen Hills Covenant Management Board continues its attempts to enforce covenants and/or initiate litigation against them.

47. The Warnes, Mr. Cuffe, the Villanuevas, and the Surbers have no plain, speedy or adequate remedy at law.

48. Rule 65 of the Colorado Rules of Civil Procedure empowers this Court to grant equitable relief as necessary to prevent irreparable injury to the Warnes, Mr. Cuffe, the Villanuevas, and the Surbers.

WHEREFORE, Plaintiffs Charles Warne, Bridget Warne, Brandon Cuffe, Norman Villanueva, Nancy Villanueva, Howard Surber, and Luana Surber pray for judgment as follows on their Second Claim for Relief:

- A. For a preliminary injunction enjoining and restraining the Woodmen Hills Covenant Management Board, its successors or assigns, and/or the Woodmen Hills Metropolitan District, its successors or assigns, from attempting enforcement of any kind of any covenants against the Warnes, Mr. Cuffe, the Villanuevas, and the Surbers, including, but not limited to, assessment of fines/penalties for any purported covenant violation, at any time during the pendency of the declaratory relief action;

- B. For a preliminary injunction enjoining and restraining the Woodmen Hills Covenant Management Board, its successors or assigns, and/or the Woodmen Hills Metropolitan District, its successors or assigns, from assessing a “covenant fee” of any kind for the purposes of covenant enforcement against the Warnes, Mr. Cuffe, the Villanuevas, and the Surbers at any time during the pendency of the declaratory relief action;
- C. For costs incurred by the Warnes, Mr. Cuffe, the Villanuevas, and the Surbers in this action, including reasonable attorneys’ fees; and
- D. For such other and further relief as this Court deems just and proper.

Respectfully submitted this 25th day of June 2008.

M. JACQUELINE GAITHE, PC

By: /S/ M. Jacqueline Gaithe

M. Jacqueline Gaithe, #34348 _____

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