DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 South Tejon Street 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) / Third Party Plaintiff(s): WOODMEN HILLS COVENANT MANAGEMENT BOARD, a Colorado non-profit corporation; and WOODMEN HILLS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision; and Defendant(s): Melody Homes, Inc. d/b/a D.R. Horton – Melody Series. v. Third Party Defendants(s) / Counterclaim Plaintiff(s): TRAVIS R. HELTON and KAREN E. HELTON. Attorney for Plaintiffs and Third Party Defendants: M. Jacqueline Gaithe, PC M. Jacqueline Gaithe (#34348) 111 South Tejon Street, Suite 202 Colorado Springs, CO 80903 Phone: (719) 635-2595 Facsimile: (719) 578-8836 E-mail: jackie@mjglaw.net	**□ COURT USE ONLY□** Case Number:08CV2923 Div. No.: 5 Ctrm:

PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT, AND IN THE ALTERNATIVE, PLAINTIFFS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs/Counterclaim Defendants Charles Warne and Bridget Warne, Brandon Cuffe, Norman Villanueva and Nancy Villanueva, Howard Surber and Liana Surber, and third Party Defendants/Counterclaim Plaintiffs Travis R. Helton and Karen E. Helton (collectively hereinafter referred to as "Plaintiffs"), by and through their attorney, M. Jacqueline Gaithe of M.

Jacqueline Gaithe, PC, respectfully submit their Motion for Default Judgment on their Cross-Motion for Summary Judgment, and in the alternative, Plaintiffs' Reply in Support of Their Cross-Motion for Summary Judgment, and for their motion and reply state as follows:

I. Plaintiff's Motion for Default Judgment on Plaintiffs' Cross-Motion for Summary Judgment[1]

1. Defendants filed a motion for summary judgment on or about March 16, 2009. Plaintiffs filed their response in opposition to same combined with their cross-motion for summary judgment on or about April 3, 2009. Defendants filed their Reply in Support of Their Motion for Summary Judgment ("Defendants' Reply") on April 14, 2009.

2. However, they have not responded to Plaintiffs' cross-motion for summary judgment. See generally Defendants' Reply. There is absolutely no reference whatsoever to Plaintiffs' cross-motion for summary judgment in Defendants' Reply. Indeed, neither the pleading itself nor the title of the pleading make any reference whatsoever to Plaintiffs' cross-motion for summary judgment. Moreover, Defendants do not ask the Court to deny Plaintiffs Cross-Motion for Summary Judgment.

3. Further, Defendants have indicated that they will not be filing any further pleadings. See e-mail from Geoff Lindquist, Esq. dated April 23, 2009 attached hereto as Exhibit 1.

4. Pursuant to C.R.C.P. 121, §1-15(3), the "[f]ailure of a responding party to file a responsive brief may be considered a confession of the motion." C.R.C.P. 121, §1-15(3).

5. Therefore, Plaintiffs request that this Court enter a default judgment granting Plaintiffs' Cross-Motion for Summary Judgment.

II. Reply in Support of Plaintiffs' Cross-Motion for Summary Judgment

In the event the Court entertains the notion that Defendants Reply is also their response to Plaintiffs' Cross-Motion for Summary Judgment, Plaintiffs reply as follows in support of their Cross-Motion for Summary Judgment:

A. Disputed and Undisputed Facts

1. Defendants argue that several of Plaintiffs' Undisputed Facts are in dispute.

[1] No conferral is necessary pursuant to C.R.C.P. 121, §1-15(8).

Additionally, there are certain key facts noted by Plaintiffs in their Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment that are in dispute in this matter.

2. Plaintiffs offer the attached Exhibit 2 incorporated as if fully set forth herein regarding the disputed and undisputed facts in this matter. Exhibit 2 lists each of the Plaintiffs' Undisputed Facts and references the pleadings and/or documents attached to pleadings or referenced in discovery, confirming that these facts are not in dispute.

3. Therefore, Plaintiff requests that the Court rely on the undisputed facts as presented by Plaintiffs in determining any motions for summary judgment.

B. Ambiguous Language of the Covenants – A Question of Fact

4. Defendants argue that because the parties have differing opinions of the meaning of the Covenants does not mean the Covenants are ambiguous. However, where more than one meaning can be construed from the four corners of the document, an ambiguity exists. KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769, 777 (Colo. 1985). Here, Defendants rely on certain paragraphs to make their argument regarding whether D.R. Horton still had authority to enter into an assignment of right to enforce covenants. Plaintiffs rely on other portions of the Covenants to make their argument that D.R. Horton no longer had the authority to enter into such assignment.

5. Further, Defendants ask the Court to read certain provisions of the Covenants in isolation. The Covenants must be read as a whole. Any ambiguity in the Covenants as a whole allows the Court to then look at evidence outside the four corners of the document.

6. Where the document cannot be read as a whole and arrive at one outcome or where paragraphs are inconsistent, an ambiguity exists and the Court must look to extrinsic evidence, including the parties intent when interpreting the contract. Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911-912 (Colo. 1996) and Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315, 1318 (Colo. App. 1982).

7. Because intent is a fact question, evidence of the intent of the parties must be presented to the Court in order for the Covenants to be interpreted accordingly, making summary judgment inappropriate.

8. However, Plaintiffs have submitted numerous documents to the Court indicating D.R. Horton's intent -- 120 days after D.R. Horton sold the last lot in these filings, its authority to assign covenant enforcement was gone. See e-mail correspondence from Glenn Nier to Debbie A Berdahl attached hereto as Exhibit 3 and incorporated as if fully set forth herein; e-mail from Debbie A. Berdahl to Geoffrey Lindquist attached hereto as Exhibit 4 and incorporated as if fully set forth herein; letter from D.R. Horton in-house counsel to Geoffrey

Lindquist, Esq. dated February 27, 2007 attached hereto as Exhibit 5 and incorporated as if fully set forth herein; and letter from Anthony Rechlitz, Esq. and attached red-lined Contract and Assignment attached hereto as Exhibits 6 and 6a, respectively, and incorporated as if fully set forth herein.

9. Exhibits 3 through 6a make it clear that D.R. Horton intended that its period of declarant control expired 120 days after it sold the last lot in these filings. Indeed, Exhibit 6a, drafted by counsel for D.R. Horton and at D.R. Horton's request removes all absolutes from the Contract and Assignment, using language such as "may have" and "may be" rather than "have" and "is". See Exhibit 6a at Recital B, and at Paragraphs 1 and 2; see also Exhibit 6a at Paragraph 3 where quitclaim language is used, noting that:

> THE ASSIGNOR [D.R. HORTON] EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES AND REPRESENTATIONS, WHETHER EXPRESS OR IMPLIED, REGARDING THE VALIDITY OF ANY TITLE, INTEREST, RIGHT, POWER, OR CLAIM WHICH ASSIGNOR MAY HAVE TO ENFORCE SUCH COVENANTS. ACCORDINGLY, THIS ASSIGNMENT TRANSFERS ONLY THE TITLE, INTEREST, RIGHT POWER OR CLAIM ASSIGNOR MAY HAVE, IF ANY, TO ENFORCE SUCH COVENANTS.

See Exhibit 6a at Paragraph 3 (All capitals emphasis included in original document; underlined emphasis added by Plaintiffs).

10. Defendants have neither denied the proposition offered by Plaintiffs as to what D.R. Horton's intent, nor have they offered any alternative arguments regarding the intent of D.R. Horton. Therefore, Plaintiffs respectfully request that this Court look to the evidence presented by Plaintiffs showing D.R. Horton's intent when ruling on the pending motions for summary judgment.

11. Plaintiffs also redirect the Court to their legal argument set forth in their Response to Motion for Summary Judgment and Plaintiffs Cross-Motion for Summary Judgment pertaining to covenant enforcement and that covenants are to be interpreted considering their underlying purpose. See Plaintiff's Response and Cross-Motion at Section D: "The Declaration Contains No Provision for Enforcement, Formation of HOA, Dues Assessment"; see also Wilson v. Goldman, 699 P.2d 420 (Colo. App. 1985) (where the Court opined that restrictive covenants must be construed as a whole, giving effect to all provisions contained therein).

C. D.R. Horton Had No Authority to Assign Covenant Enforcement and Was No Longer (if it even ever was) a Master Association or Similar Body at the Time the Contract and Assignment Was Signed.

12. The central question to this litigation is whether or not D.R. Horton had any authority to assign covenant enforcement to Woodmen Hills Metro District and/or Woodmen Hills Covenant Enforcement Board.

13. It is Plaintiffs' position that this authority expired 120 days after D.R. Horton sold its last lot in these filings, if not sooner. See Covenants at Article VI and Article VII, Paragraph 6. It is also D.R. Horton's position that this authority expired 120 days after it sold its last lot in these filings. See Exhibits 3 through 6a.

14. Because D.R. Horton no longer had this authority, the Contract and Assignment is void, voidable, invalid and/or unenforceable. Therefore, whether or not D.R. Horton was a "master association or similar body" is a non-issue in this litigation.

15. Even assuming arguendo that D.R. Horton was a "master association or similar body"[2], that designation disappeared when D.R. Horton sold its last lot in these filings. D.R. Horton no longer retained any title, interest, right, power, or claim with respect to these filings, and certainly could no longer assign any title, interest, right, power or claim to enforce covenants in those filings. See Covenants, Articles VI and VII, Paragraph 6.

16. Defendants also argue that the 120 day time frame does not apply. Plaintiffs point out to the Court that there were certain reservations of rights that D.R. Horton carved out to extend beyond the date of the sale of the last lot in these filings. See Covenants at Article VI. The rights carved out in this section are not illustrative as Defendants would have the Court to believe. Rather, any other right D.R. Horton had that was not enumerated in Article VI expired as soon as D.R. Horton sold its last lot in these filings. Had D.R. Horton intended to retain the right of covenant enforcement, it certainly would have been enumerated here. Indeed, the Covenants reference throughout certain situations wherein lot owners would have to get permission from Declarant for certain acts pursuant to the Covenants until the last lot was sold in the filings. See Covenants at Article VI, Paragraph 1 and at Article VII, Paragraphs 1 and 3. At best, D.R. Horton retained rights to assign covenant enforcement until 120 days had lapsed after the sale of the last lot. On the other spectrum, one can certainly argue that D.R. Horton lost any rights to assign covenant enforcement the day the last lot was sold in these filings. At any rate, both of these dates had come and gone at the time the "quit claim" Contract and Assignment was signed.

[2] Defendants have been unable to articulate any case law or applicable statutory language to state with certainty that D.R. Horton was a "master association or similar body". Further, Defendants' attempt to argue that the Court should rely on a definition of master association or similar body found in the CCOIA statutes is misplaced since the Covenants make it clear that CCOIA is inapplicable to the covenants for these filings. See Covenants at Article 1, Paragraph 4.

17. Defendants argue by implication that D.R. Horton's right to assign covenant enforcement is perpetual. From a practical standpoint, this makes no sense. Further, the Covenants state otherwise. See Covenants at Articles VI and VII, Paragraph 6. D.R. Horton no longer held title to any property whatsoever in these filings. It is ludicrous, certainly inconceivable, that D.R. Horton would have the right to assign covenant enforcement for these filings when it no longer held title to any property in these filings and could not, pursuant to the Covenants, enforce the covenants once it sold its last lot in these filings. See Covenants at Article VII, Paragraph 6.

18. Moreover, the Covenants are clear on what, if any, rights of covenant enforcement D.R. Horton/Declarant had and for how long said rights were retained. See Covenants at Article VII, Paragraph 6. This Article states in pertinent part:

> During such time as Declarant owns any Lot, Declarant, or any authorized agent of it, may enforce, by self-help, any of the provision(sic), covenants, conditions, restrictions, and equitable servitudes contained in this Declaration, provided such self-help is preceded by notice and hearing.

See Covenants at Article VII, Paragraph 6 (Emphasis added).

Therefore, Declarant's right to covenant enforcement expired as soon as it sold its last Lot in these filings.

19. Additionally, Defendants' reliance on Lookout Mountain Paradise Hills Homeowner's Association v. Viewpoint Associates, 867 P.2d 70 (Colo. Ct. App. 1993) for the proposition that a declarant still had the right to assign architectural control to a third party after conveying its last lot is misplaced. Comparing the set of facts and underlying documents in the present matter to those in Lookout Mountain is like comparing apples to oranges.

20. First, the covenants in Lookout Mountain specifically stated that the Declarant had the right of architectural control and that it could assign the architectural control. The covenants in Lookout Mountain were very specific as to the format and conditions by which assignment of architectural control could occur, giving no deadline in which such assignment must occur. See Lookout Mountain, 867 P.2d at 72, 76. Generally speaking, covenants are specific as to any rights retained by Declarant. However, the Covenants in the present matter do not specifically state that the Declarant had the right to enforce covenants perpetually and could assign that right at any time. Rather, the Covenants in the present matter set forth a select few rights the Declarant retained after the last lot was sold. The implication is that other Declarant rights lapsed when the last lot was sold. The Covenants in the present matter also leave Covenant enforcement to the lot owners once the Declarant sold its last lot in these filings. See Covenants at Article VII, Paragraphs 5 and 6.

21. Second, the assignment at issue in Lookout Mountain dealt with the assignment of Grantor's right to architectural control. Architectural control in Lookout Mountain dealt with the requirement that all building plans and plans for improvements to the land be approved by the grantor (or an assign if the assignment provisions were followed). In the present matter, the assignment at issue deals with covenant enforcement, to which there is none other than self-help, abatement and/or injunction.

22. Defendants further argue that D.R. Horton could not amend the covenants while it held title to property in these filings, but it could assign covenant enforcement a year and a half after it sold its last lot in these filings. Again, from a practical and legal standpoint, this argument just does not fly.

23. While it is undisputed that D.R. Horton was the Declarant for the relevant covenants in this matter, it is disputed that these Defendants are Declarant's assigns. Had D.R. Horton assigned covenant enforcement before the last lot was sold in these filings, then that might be the case and these Defendants would then have the right to enforce covenants. However, that is not the case here.

24. Indeed, the only parties who can enforce covenants now are the lot owners. See Covenants, generally, and at Article VII, Paragraphs 5 and 6. As pointed out by Plaintiffs[3] in their Response in Opposition to Motion for Summary Judgment and Plaintiffs Cross-Motion for Summary Judgment in the section entitled "The Declaration Contains No Provision for Enforcement, Formation of HOA, Dues Assessment", the only mechanism for enforcement is self help, either by abatement or injunctive relief, but solely at the hands of lot owners at this juncture since D.R. Horton has already sold the last lot in these filings. Id.

25. Further, since the Assignment is invalid and/or D.R. Horton was not a "master association or similar body", then Defendants do not have any right to assess fees against these lot owners for covenant enforcement. Said fees should be reversed and the Plaintiffs should be refunded the monies already paid to Woodmen Hills Metro District ("WHMD"). The statute relied upon by WHMD would only be applicable had WHMD entered into a valid, enforceable contract or assignment for covenant enforcement. That is not the case in this matter. Moreover, since the Assignment from D.R. Horton to WHMD is invalid and unenforceable, so, too, is the assignment from WHMD to the Woodmen Hills Covenant Management Board.

D. Even if the Assignments are Valid (and They Are Not), Defendants Have Exceeded The Scope of Enforcement Rights

26. Pursuant to C.R.S. 32-1-1004(8)(a) and C.R.S. 32-1-1004(8)(a)(I), a Metro

[3] Defendants would like the Court to believe they are the ones who mentioned the self-help mechanism of enforcement, when in reality it was Plaintiffs who brought this sole mechanism of enforcement to the Court's attention.

District and/or its assigns cannot exceed the scope of the Covenants for which they have gained assignment of right to enforce covenants. While Defendants concede that there certainly is no vehicle for fining the lot owners in the Covenants and have not yet "fined" the lot owners, they do argue that they can enforce the Covenants, to include litigation, and assess a covenant enforcement fee.

27. Defendants have conceded the point regarding fines, as evidenced by the "warning" letters sent out by Defendants counsel indicating no fines are assessed for the alleged covenant violation contained in such warning letters. See warning letter sent to Charles Warne attached here to as Exhibit 7 (Pertinent portions have been emphasized/underlined by Plaintiffs for the Court's review and convenience).

28. Defendants' concession that fines cannot be assessed is further evidence that they agree and understand that they are bound by the parameters of the Covenants when it comes to enforcement, pursuant to C.R.S. 32-1-1004(8)(a) and C.R.S. 32-1-1004(8)(a)(I).

29. The warning letters also lend credence to Plaintiffs argument that the Covenants in place here are not enforceable except where a fellow lot owner engages in self-help, through abatement and/or injunction. See Covenants at Article VII, Paragraphs 5 and 6.

30. The Defendants in this matter do not have legal authority and lack standing to engage in such activity on behalf of lot owners. Further, Defendants' have exceeded the scope of enforcement set forth in the Covenants. Pursuant to C.R.S. 32-1-1004(8)(a) and C.R.S. 32-1-1004(8)(a)(I), a Metro District and/or its assigns cannot exceed the scope of the Covenants for which they have gained assignment of right to enforce covenants. Therefore, even if Defendants had a valid assignment (and they do not), they are limited to the confines of the Covenants at, Paragrahs 5 and 6 for covenant enforcement. They cannot bring suit to enforce covenants as the only mechanisms available for covenant are in Article VII, Paragraphs 5 and 6 of the Covenants.

E. Lot Owner Involvement and Views on Covenant Enforcement

31. Defendants argue that there are "multiple residents in Filings 8 & 9 who are proponents of covenant enforcement." Yet they only offer Affidavits of two residents when there are in excess of 100 lot owners in these filings. Two lot owners hardly constitute "multiple residents" as represented by Defendants.

32. Defendants also attempt to make much ado about nothing when they point out that while two lot owners held proxy to amend the Covenants, this never happened. The reason the amendment did not occur is that Plaintiffs and others began receiving threats of suit from Defendants counsel and they chose to hold this movement for covenant enforcement in abeyance during the pendency of this litigation.

III. CONCLUSION

Because Defendants have not filed, nor do they intend to file, a Response to Plaintiffs' Cross-Motion for Summary Judgment, Plaintiffs request that this Court grant Plaintiff's Cross-Motion for Summary Judgment by entering a default summary judgment on behalf of Plaintiffs pursuant to C.R.C.P. 121, §1-15(3).

In the event the Court deems Defendants' Reply in Support of Their Motion for Summary Judgment to also be their Response to Plaintiffs Cross-Motion for Summary Judgment, Plaintiffs request that the Court enter summary judgment on behalf of Plaintiffs as set forth in Plaintiffs' Cross-Motion for Summary Judgment, to include reasonable attorney's fees and costs pursuant to the Covenants. Said request is made based upon the arguments and facts presented in Plaintiffs' Response and Cross-Motion for Summary Judgment and as set forth herein.

Respectfully submitted this 27th day of April 2009.

M. JACQUELINE GAITHE, PC

Original signature on file at the office of M. Jacqueline Gaithe, PC

By: */S/ M. Jacqueline Gaithe*
M. Jacqueline Gaithe, #34348

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April 2009, a true and correct copy of the foregoing **PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT, AND IN THE ALTERNATIVE, PLAINTIFFS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT** was served electronically via Lexis-Nexis File & Serve addressed to the following:

Jason W. Downie, Esq.
Geoffrey L. Lindquist, Esq.
Susemihl, McDermott & Cowan, P.C.
660 Southpointe Court, Suite 210
Colorado Springs, CO 80906

/s/ J. Gaithe
Original signature on file at the office of M. Jacqueline Gaithe, PC