DISTRICT COURT
STATE OF COLORADO } ss.
Arapahoe County.
CERTIFIED to be a full, true and correct copy of the original in my custody.
DATED May 21 A.D. 04
TAMMERA HERIVEL
Clerk of the District County
By Christa Hurd Deputy
(15 pg)

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 S. Potomac Street Englewood CO 80112	
JAMES R. HERSEL, KIMBERLY A. HERSEL, OLIVER W. MOWRY, JAMES K. DAHL, FREDRICK P. JONES and MARY M. JONES, on behalf of themselves and all others similarly situated, **Plaintiffs,** vs. 1. **MISSION VIEJO HOMEOWNERS' ASSOCIATION;** 2. **ROBERT A. KOLTISKA;** 3. **BOB BITTENGER, TOM BRANDHORST, MARK COHEN, STEVE FERENCY, RICK FOERSTER, NOLAN GRAVES, HERB GREEN, JIM KONE, ED LEWIS, DANA LORE-SMITH, TERRY MANNLEIN, MIKE McGREW, LORI MONROE, JEAN O'CONNOR, MARK OLSEN, WAYNE PETERSON, HELEN RAISER, DAVE ROBINSON, DAVE RUBLE, ART THORNE, DEBBIE WATKINS and KEN WRIGHT;** 4. **QUEST MANAGEMENT, INC., COLORADO PROPERTY MANAGEMENT GROUP, INC., and WESTWIND MANAGEMENT GROUP, INC.** **Defendants.**	▲ COURT USE ONLY ▲
Hon. Garth L. Nieschburg, Senior Judge	Case No.: 98CV3641 Courtroom/Div:B

AMENDED ORDER, JUDGMENT AND DECREE

This action came on for trial to the Court July 21 through July 25, 2003. Plaintiffs appeared by their attorneys, Jeanne M. Toro and Gary H. Tobey; David H. Stacy, Esq. appeared for defendants Koltiska and Quest Management Group; Dale R. Hendrickson, Esq. appeared for Colorado Property Management Group; and Clinton P. Swift appeared for Mission Viejo Homeowners Association, Inc. and for individual board members. The Court, having heard the evidence and considered the matters on file herein, finds as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This action came on for trial to the Court on two claims of action. The first claim is for a declaratory judgment pursuant to the Rules of Civil Procedure, declaring the rights of the parties to various agreements effecting real estate located in the County of Arapahoe and State of Colorado known as Mission Viejo Subdivision to the City of Aurora.
2. The second cause of action is for damages pursuant to C.R.S. 38-35-109 (3). As to each claim the Court makes the following findings of relevant facts by a preponderance of the evidence.

A. DECLARATORY JUDGMENT

3. During the 1970's and early 1980's the subdivision development known as Mission Viejo Subdivision to the City of Aurora, County of Arapahoe and State of Colorado was placed of record in 15 separate filings. At issue in this case are twelve filings: Filings 1, 2, 6, 8, 9, 10, 11, 12, 13, 15, 16 and 18. None of the declarations setting forth restrictive covenants for the foregoing numbered filings mentioned a homeowners association nor any common area or land, and none provided for assessment of liens or foreclosure of assessment liens. The plat of the entire subdivision shows no common area owned by a homeowners association. (Exhibits 2 and 4)

4. In 1975, the Mission Viejo Homeowners Association, known hereafter as MVHOA, was incorporated. The articles of incorporation limited the membership to residents and/or owners of lots within the Mission Viejo Subdivision subject to any restrictions and limitations in the by-laws of the corporation. The articles of incorporation were filed with the Secretary of State in February 1975 but were never recorded in the records of the County Clerk and Recorder's Office, County of Arapahoe, State of Colorado.
5. The by-laws of the corporation in the MVHOA were not offered as an exhibit nor recorded in the records of said clerk and recorder's office. The stated purpose of MVHOA included enforcing restrictive covenants. MVHOA has never owned any real property in the subdivision and the only personal property owned are sprinkler heads and pipes installed in an area dividing a street. The subdivision company deeded all streets and parks to the City of Aurora and land for the construction of an elementary school to the appropriate school board.
6. The homeowners association acted as a voluntary association with voluntary dues. Sometime in 1993, members of the association and board members became concerned about noncompliance with the restrictive architectural codes filed in the declarations with the original plat of the subdivision, as well as gang activity which had moved off Colfax Avenue into the streets surrounding the subdivision in Aurora.
7. The board had decided in 1992 to initiate a drive to collect signatures to amend the declarations to allow for the assessment of mandatory fees for the purpose of enforcing the restrictive covenants and also for snow removal and security issues. On

or about April 19, 1993 Robert A. Koltiska, a defendant in this action, and Robin Supinger met with an attorney, Edward Burns, concerning the amendment of the declarations. Mr. Burns advised them that he would prepare an instruction sheet for gathering signatures, that the signatures from homeowners must be notarized, that all owners of a single unit or lot must sign the petition to amend the declarations, that a majority of lot owners in each filing must sign the petition, and that a list of lot or unit owners should be obtained from a county clerk and recorder's office (Exhibits 7, pg. 7 – 15) Mr. Burns also advised that the signature pages to the petition to amend declarations must be recorded in the county clerk and recorder's office under Colorado law. The proposed amendment to the declarations provided the MVHOA could collect mandatory fees and place liens against property on which the owner had failed to pay the assessments.

8. In October 1993 and January 1994, the MVHOA board held two meetings with homeowners to discuss mandatory dues. Two hundred to four hundred people attended the meetings. The Mission Viejo Development has a total of 1749 lots in the various filings.

9. The amendment to the declarations were called "agreements to modify declarations of establishment of restrictions, easements, conditions and reservations."

10. In early 1994, Mr. Koltiska obtained a list of lot owners in the Mission Viejo Subdivision from the Arapahoe County Assessor's Office rather than the county clerk's office. The Court has taken judicial notice that the records of ownership in the assessor's office are obtained by the assessor from the clerk and recorder's office in

each county in Colorado and are usually not as current as the clerk and recorder's records.

11. The board never attempted to obtain copies of deeds to each lot and the assessor's list was never updated through either the assessor's office or the county clerk and recorder's office. However, the persons on the board and in charge of gathering signatures did take note of properties that were for sale and had changed hands.
12. Mr. Burns had advised the MVHOA board that if a lot was deeded away before the agreement to amend the declarations and signature pages were recorded that they must obtain a signature on the petitions to amend the declarations from the new owner or owners of a particular lot.
13. During the years 1994 and 1995, board members and others collected signatures on the signature pages. (See Exhibit 3) If a homeowner indicated that he or she would sign the agreement to amend the declarations, the person circulating the petition would inform a notary public, who would then obtain the homeowner's signature on the signature pages. In many instances, the notary did not carry the petition when they obtained the signatures they notarized.
14. The board counted signatures as they were obtained for each filing. If the board believed that additional signatures were required, more signatures were obtained and the signatures were recounted. Although the count was confirmed once the board believed they had sufficient numbers, no attempt was made thereafter to obtain an updated list or to check again to determine if properties were sold prior to the recording of the agreements to modify declarations.

15. When the board members learned the cost to record the agreement to amend declarations and signature pages was $5.00 per page, they became concerned about the cost. Mr. Koltiska brought a certification form to the March 14, 1995 board meeting; the certification permitted the president of MVHOA to certify that a majority of signatures had been obtained for each filing rather than recording the signature pages. (Exhibit 7, pg. 7-47) Mr. Koltiska believes he got the certification form from Chris Gusa, an employee of the city of Aurora. None of the board members nor Mr. Koltiska contacted any attorney to review the use of a certification form in place of recording signature pages. The president of MVHOA, Mr. Green, signed each of the certificates for subject filings. Early in 1995, a management agreement was signed by MVHOA with the company Quest Management, Inc., which was owned by Mr. Koltiska. Pursuant to the instructions of the board, Mr. Koltiska recorded the agreements to modify between March 24 and May 1, 1995.
16. In July 1995 Glenda Montague and Barbara Christianson formed a group known as the Mission Viejo Neighbors who opposed the mandatory dues that were being assessed by the MVHOA. A meeting of this group was held at the South Branch Library in July 1995. This informal group may have at one time included 200 owners of the 1749 lots in the Mission Viejo Subdivision.
17. In 1997 plaintiff Mary Jones and others tried to obtain information and documents from MVHOA and its then-management company, Colorado Property Management Group, Inc. (CPMG) without success.

18. Laura Carnagie, the president of MVHOA, asked Faiszah Faris, secretary of the MVHOA, to copy the signature pages for Filing 11 for Ms. Jones late in the spring of 1997. Ms. Faris gave Ms. Jones a copy of all the signature pages. Late 1997 to early 1998, the plaintiffs in this action as well as other homeowners had begun to question the validity of the agreement to modify the declarations, including whether there were sufficient signatures collected.

19. Ms. Faris and the board had a disagreement and she was removed as secretary of MVHOA in late June 1997. There is no credible evidence that Ms. Faris did not eventually return all the records, including signature pages for the amendment of the declarations petition to the association, MVHOA, or to its management group.

20. During the years 1997 and 1998, the MVHOA board instructed CPMG to record 118 liens against properties in the Mission Viejo Subdivision for dues to the association that had not been paid by the lot owners. Since that time, all of said liens have been released according to Court Exhibit I received by the Court after trial and incorporated herein by reference.

21. The Court heard testimony from an expert on property law, Willis Carpenter, Esq. Mr. Carpenter opined that the agreements to modify the declarations circulated in 1993 and 1994 and recorded March 24 through May 1, 1995 in the records of Arapahoe County, Colorado are invalid because they did not meet the requirements of C.R.S. 38-35-109(1). That provision requires and provides " ... No such unrecorded instrument or document shall be valid against any person with any kind of rights in or to such real property who first records and those holding rights under such person,

except between the parties thereto and against those having notice thereof prior to acquisition of such rights. This is a race-notice recording statute." Further, C.R.S. 38-33.3-217(3), a section of the Colorado Common Interest Ownership Act (CCIOA), provides "Every amendment to the declaration must be recorded in every county in which any portion of the common interest community is located and is effective only upon recordation. An amendment must be indexed in the grantee's index in the name of the common interest community and the association and in the grantor's index in the name of each person executing the amendment." Because the signature pages were never filed with the Arapahoe County Clerk and Recorder's Office, or recorded there, and because there is no evidence that the agreements to modify were ever indexed as to the grantors in the name of each person executing the amendment, said amendments to the declarations are invalid and not binding upon any person who took title to any of the property subsequent to the time that the amendments to the declarations were signed by the individual lot owners. Thus, the evidence presented in this action does not demonstrate that a sufficient number of property owners in the Mission Viejo Subdivision properly executed the amendment to declarations so as to constitute a majority of lot owners in the twelve filings at issue here. This is the case, whether the Court considers statistical evidence or actual evidence of the number of valid signatures gathered for such petitions.

22. Further, because there was such a long lapse of time between the gathering of the signatures which began in 1993 until the time they were recorded in March, April and May of 1995, there is evidence that some of the signators to the petition had

conveyed their interest in the real estate prior to the time of recording. Further, because there is no evidence that all of the signature pages are available for review and correlation, the process used was so flawed that the amendment to the declarations did not constitute notice to the nonsignators or subsequent purchasers in the Mission Viejo Subdivision.

23. C.R.S. 38-33.3-217(5) allows for amendments to the declaration required by the Colorado common interest ownership act to be prepared, executed, recorded and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of such designation, by the president of the association. However, this does not do away with the requirement in paragraph (3) requiring that each person signing the amendments be indexed by name in the grantor's index of the county clerk and recorder's office.

24. The facts of this case differ from the facts in Evergreen Highlands Association v. West, 73 P.3rd 1 (Colo. 2003). In that case, there was never any contention that the amendment to the declarations or covenants were not validly obtained and recorded. Further, in Evergreen, supra the Articles of Incorporation for the homeowners association were duly recorded in the records of the county clerk and recorder. Evergreen, supra stands for the proposition that in a common interest community there arises an implied obligation that the association may collect dues or funds to carry out its functions relevant to the declarations restricting the use of the property, or the management of commonly held property in the subdivision. However, in the case at hand, both pursuant to the Colorado Common Interest Ownership Act found at

C.R.S. 38-33.3-217(3)(5) and pursuant to the recordation act found at C.R.S. 38-35-109 *et seq.*, MVHOA failed in their efforts to amend the original declarations by having failed to comply with the requirements of those statutes in recording the amendments. The evidence in this case does not demonstrate that the filings in question had a majority of the lot owners in each of the filings execute the amendments to the declarations. Neither were said declarations properly recorded according to the law. Therefore, MVHOA did not have the authority to assess or collect fees or enforce liens against property owners who failed to pay the mandatory MVHOA dues assessed from 1995 through 2003.

25. The judge to whom this case was previously assigned ruled that the statute of limitations that applies to this action is the two-year general statute of limitations found in C.R.S. 13-80-102 (1)(i). This action was commenced on October 8, 1998, which would be within two years of the filing of the first lien that occurred in 1997.

26. Because MVHOA was in existence before July 1, 1992 the effective date of the enactment of the CCIOA, there is no evidence in the record that MVHOA complied with C.R.S. 38-33.3-118 allowing MVHOA to opt into the CCIOA by giving written notice of a meeting and at said meeting, a vote of 67% of the owners of the real estate in the development elected to be covered by the CCIOA. Further, C.R.S. 38-33.3-217 (5) does not apply to a homeowners association in existence before July 1, 1992 unless the procedure set forth in C.R.S. 38-33.3118 has been implemented or the amendments to the declarations were properly enacted, which is not the case here.

B. DAMAGES PURSUANT TO C.R.S. 38-35-109(3)

27. The class plaintiffs claimed damages pursuant to the above-referenced statute for recording an invalid lien. Between December 1997 and April 1998 MVHOA and its manager, CPMG, recorded 117 liens against Mission Viejo lot owners. An additional lien was recorded in October 1998 through its new management company, Westwind.

28. Prior to filing these liens, MVHOA board obtained an opinion from the law firm of Grimshaw and Herring on January 16, 1996. That opinion addressed to Robert A. Koltiska informed the board that as to filings 1, 2, 6,8,9,10,11,12,13,15,16 and 18, a total of 1749 lot owners signed the petitions approving the modifications of the declarations, therefore, the opinion stated that the association had the power to assess mandatory dues and fees and to file liens against property for which the owner failed to pay such charges. The MVHOA relied on this opinion in filing the liens above-mentioned. The opinion was wrong on its face in that there were only a total of 1749 lots, of which 1677 owners should have executed the amendment to the declarations. 1677 valid signatures were never obtained. Further, the board members individually were acting as unpaid volunteers on behalf of a nonprofit corporation and, therefore, enjoy statutory immunity from liability for the acts they undertook for MVHOA under Colorado statute.

29. Nonetheless, the Court finds that the individual board members and the corporation MVHOA acted in good faith in reliance on this opinion before filing any liens against

the offending property owners who failed to pay the dues and assessments. These liens were filed in 1997 and 1998.

30. C.R.S. 38-35-109(3) provides that "...Any person who offers to have recorded ...knowing or having a reason to know that such document is invalid, shall be liable to the owner of such real property for the sum of not less than one thousand dollars or for actual damages caused thereby, whichever is greater..."

31. "Knowing or having reason to know" means that the person or persons would have been aware at the time the recordings were made that the instrument was false or would have been practically certain that it would result in an invalid lien against the described property. People v. Forgey, 770 P.2d 781 (Colo. 1989). The evidence being in this case that the directors of MVHOA relied on the legal opinion of Grimshaw and Herring before recording such liens acted in good faith and they would not have reason to know that the liens were invalid or false. Therefore, the class plaintiff cannot recover damages, either actual or liquidated, against the individual board members or MVHOA corporation for knowingly filing false liens against their property.

32. The only evidence of any actual damage was testimony that one defendant had to post a $600 cash bond for a short period of time on the sale of his property, which sum was later refunded to him. Therefore, the class plaintiffs are not entitled to damages of one thousand dollars per lien filed or any actual damages as a result of the filing and the subsequent release of said liens for homeowners association dues.

33. The class plaintiffs are entitled, however, to their costs and fees in this action.

C. ATTORNEYS FEES

34. Attorneys fees may only be collected by prevailing parties to a lawsuit from opposing parties pursuant to statutory provisions or agreements by the parties to an action to pay said fees or to hold a party harmless from the assessment of attorney's fees by reason of the filing of an action at law or equity.

35. C.R.S. 13-17-102 *et seq.* provides "(2)... in any civil action or any nature commenced in any court of record in this state, the court shall award...reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification." The Court determines that the claims of all of the parties to this action do not meet the definition of being "frivolous", "groundless" nor "vexatious" within the meaning of the statute. Therefore, no party can recover attorney fees pursuant to C.R.S. 13-17-102 *et seq.*

36. The Court has determined that MVHOA had not opted into the CCIOA pursuant to the requirements of that act. Therefore, the class plaintiffs cannot be awarded attorney fees pursuant to C.R.S. 38-33.3-123 (1).

37. The Court dismissed the claims against Colorado Management Group, Inc. (CMGI) at mid-trial. Pursuant to the indemnification agreement between MVHOA and CMGI, the Court finds MVHOA owes CMGI $21,601.26 in attorney fees and costs. The Court finds that said fees and costs are reasonable.

38. The amendments to this Order are contained herein. The request to amend the judgment by plaintiffs is therefore otherwise denied.

ORDER

IT IS THE ORDER, JUDGMENT AND DECREE of the Court:

1. That the amendment to the declarations for the Mission Viejo Subdivision to the City of Aurora, County of Arapahoe and State of Colorado filed on or between March 24, 1995 and May 1, 1995 be and is hereby decreed null and void pursuant to the findings above.
2. That the liens filed by the Mission Viejo Homeowners Association, a corporation, against various lots in said Subdivision in filings 1, 2, 6, 8, 9, 10, 11, 12, 13, 15, 16 and 18 be and are hereby decreed null and void.
3. The Court hereby awards costs and fees to the class plaintiffs in this action against Mission Viejo Homeowners Association, a corporation, said reasonable fees and costs to be determined pursuant to statute upon submission of a bill of costs by said prevailing parties. Bills of costs will be submitted to the Court within thirty days of the date of this Order.
4. Colorado Property Management Group, Inc. be and is hereby awarded its reasonable attorneys fees and costs against Mission Viejo Homeowners Association, a corporation, in the amount of $21,601.26.

DONE IN OPEN COURT this 15th day of December 2003, nunc pro tunc October 9, 2003.

BY THE COURT:

GARTH L. NIESCHBURG, SENIOR JUDGE

Pc: Jeanne M. Toro, Esq.
Gary H. Tobey, Esq.
David H. Stacy, Esq.
Dale R. Hendrickson, Esq.
Thomas J. Dougherty, Esq.
Clinton P. Swift, Esq.

LEGAL DESCRIPTIONS OF PROPERTIES IN MISSION VIEJO SUBDIVISION, ARAPAHOE COUNTY, COLORADO, SUBJECT TO THE AMENDED ORDER, JUDGMENT AND DECREE DATED DECEMBER 15, 2003

Lots 1-30, Block 2
Lots 1-26, Block 3
Lots 1-122, Block 4
Lots 1-50, Block 5
Lots 1-24, Block 6
Mission Viejo Filing No. 1

Lots 1-3, Block 1
Lots 1-26, Block 2
Lots 1-52, Block 3
Lots 1-44, Block 4
Mission Viejo Filing No. 2

Lots 1-6, 10-35, Block 1
Lots 1-27, Block 2
Lots 1-29, Block 3
Lots 1-27, Block 4
Lots 1-30, Block 5
Lots 1-33, Block 6
Mission Viejo Filing No. 6

Lot 1, Block 1
Lots 1-2, Block 2
Mission Viejo Filing No. 6
Amended

Lots 1-14, Block 1
Lots 1-24, Block 2
Lots 1-10, Block 3
Mission Viejo Filing No. 8

Lots 10-20, Block 1
Lots 11-16, Block 2
Lots 1-3, Block 3
Lots 1-8, Block 4
Lots 1-36, Block 5
Lots 1-27, Block 6
Lots 1-19, Block 7
Mission Viejo Filing No. 9

Lots 1-9, Block 1
Lots 1-10, Block 2
Mission Viejo Filing No. 9
Amended

Lots 1-8, Block 1
Lots 1-49, Block 2
Lots 1-31, Block 3
Lots 1-43, Block 4
Lots 1-27, Block 5
Lots 1-13, Block 6
Mission Viejo Filing No. 10

Lots 1-11, Block 1
Lots 1-17, Block 2
Lots 1-20, Block 3
Lots 1-27, Block 4
Lots 1-12, Block 5
Lots 1-30, Block 6
Lots 1-37, Block 7
Lots 1-33, Block 8
Lots 1-25, Block 9
Lots 1-40, Block 10
Lots 1-13, Block 11
Lots 1-28, Block 12
Lots 1-17, Block 13
Lots 1-41, Block 14
Lots 1-17, Block 15
Mission Viejo Filing No. 11

Lots 1-15, Block 1
Lots 1-15, Block 2
Lots 1-22, Block 3
Lots 1-45, Block 4
Lots 1-42, Block 5
Mission Viejo Filing No. 12

Lots 1-44, 48-80, Block 1
Lots 1-52, Block 2
Lots 1-44, Block 3
Lots 1-40, Block 4
Mission Viejo Filing No. 13

Lots 1-6, Block 1
Mission Viejo Filing No. 15

Lots 1-14, Block 1
Lots 1-39, Block 2
Lots 1-36, Block 3
Lots 1-25, Block 4
Mission Viejo Filing No. 16

Lots 1-3, Block 1
Mission Viejo Filing No. 18