CAUSE NO. 2019-33333

TANGLEWOOD HOMES ASSOCIATION, INC. *Plaintiff*,	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, TEXAS
WMJK, LTD. *Defendant*.	§	133RD JUDICIAL DISTRICT

WMJK, LTD.'s RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On August 20, 2019, Defendant WMJK, Ltd. ("Miller Family"), filed an Emergency Motion for Continuance of Tanglewood Homes Association's ("THA" or "the Association") Summary Judgment Hearing, which is set for September 9, 2019, and established that it needed and was entitled to discovery prior to responding to THA's Motion for Summary Judgment ("THA's MSJ"). The Miller Family further noted that Plaintiff's Motion will not dispose of the entire case and therefore would not only be an inefficient use of the Court's time, but it would also present the issues piecemeal resulting in an incomplete picture of the legal and fact issues in play. The Court has not ruled on the Motion for Continuance prior to the Miller Family's deadline to respond to Plaintiff's Motion for Summary Judgment. As such, the Miller Family files the following response subject to its objection that it is improper to force it to respond to the Plaintiff's Motion without providing the Miller Family the opportunity to conduct needed discovery. This response is not and should not be construed as a waiver of the Miller Family's objection. Subject to its objection, the Miller Family files this Response to THA's Motion for Summary Judgment and shows the following:

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INTRODUCTION

The Miller Family's property fronting San Felipe ("1661 Tanglewood Blvd.") is and always has been used for commercial purposes:

Property view from San Felipe:

Serial view of property:

From its inception, the Reservations, Restrictions, and Covenants (the "Restrictive Covenants")[1] for Tanglewood expressly permitted and protected this right. Indeed, until this lawsuit (and for the last 70 years), there is no evidence that anyone ever claimed that residential restrictions apply to 1661 Tanglewood Blvd. or that 1661 Tanglewood Blvd. ever violated the Restrictive Covenants. Yet, when the Miller Family acquired a lucrative contract to sell the property to a local developer, THA (and some of the residents), decided that they no longer want 1661 Tanglewood to be commercial real estate. Neither the Restrictive Covenants nor the law permits THA to rob the Miller Family of its vested and protected property rights.

Tellingly, in THA's Motion for Summary Judgment the Court will not find a single mention of Section 7(2), which contains an express carve-out for 1661 Tanglewood Blvd.

[1] As explained below there are multiple sections of Tanglewood each with its own restrictive covenants. The term "Restrictive Covenants" refers to them globally. When referring to a specific section's Restrictive Covenants, it will be noted.

Importantly, this carve out not only clearly states that it can be used for commercial purposes, but it also dictates that no other restrictions apply to 1661 Tanglewood Blvd.:

> [Tanglewood Section 7] shall be used for residence purposes only, ***with the exception of lot four (4), block thirty-two (32) which lot may be used for commercial purposes***, however, such use shall not emit obnoxious odors or loud noises, and no structures of a temporary nature may be placed or erected thereon, ***and no other restrictions herein set forth shall affect this lot four (4), block thirty-two (32)***.[2]

Exhibit 1 at 4. (emphasis added).

More than just failing to mention Section 7(2), THA has no qualms about asking the Court to ignore it and instead arguing that the Court should look only to the attempts to amend the Restrictive Covenants. This is not the law. As the Court is aware, in construing restrictive covenants, the Court must look at the covenants as a whole. And when the Court does, it will see that THA's claims lack merit.

It is not the Miller Family, but instead THA that is refusing to respect the Restrictive Covenants. The various declarations THA seeks would do violence to the clear and unambiguous provisions set out in them. Its only chance of distorting the clear intent of the Restrictive Covenants is an improper attempt to rewrite them. This is not and should not be allowed. The Restrictive Covenants and the law are clear—the Miller Family and subsequent purchasers are entitled to rely on the perpetual Section 7 Restrictive Covenants and continue to use and further develop the property at 1661 Tanglewood Blvd. for commercial purposes. Just because the surrounding property owners now wish that the Restrictive Covenants stated something different cannot make it so.

[2] 1661 Tanglewood Blvd. was platted from the raw land in the plat of Tanglewood Section 7 as Lot 4 of Block 32. *See* Exhibits 1 and 2.

FACTUAL BACKGROUND

I. Tanglewood is developed by William Farrington.

The Miller Family is made up of William Giddings Farrington's four grandchildren. Mr. Farrington was the original visionary and developer of Tanglewood Subdivision. Beginning in 1948, Mr. Farrington undertook the development of a first-class planned community. He had been involved in the development of Houston for years but bringing Tanglewood to fruition would become one of his most distinguished accomplishments. He cherished the opportunity to develop the area with purpose and forethought.

Tanglewood was developed in phases and is ultimately made up of 23 different platted sections. *See* THA's MSJ, Exhibits A-8 and A-10. The Restrictive Covenants apply only section by section, not over the entirety of Tanglewood. However, a single owners association, THA, acts for each section of Tanglewood. *See id.* With each section, the Tanglewood Corporation, which was run by Mr. Farrington for the majority of the development, carefully crafted and recorded subdivision plats and restrictive covenants to establish the intended land use scheme for the subdivision. Mr. Farrington took care to ensure that both the Association and the individual property owners retained enforcement rights. He felt so strongly that his carefully planned land use scheme be perpetual, the Restrictive Covenants do not contain any end to their applicability nor any provision allowing for amendment or modification. *See* Exhibit 1.

II. Section 7 Restrictive Covenants expressly reserve the right to use 1661 Tanglewood Blvd. for commercial purposes and prohibit other restrictions from applying to it, and consistent with this, since inception, the property has been used for commercial purposes.

1661 Tanglewood Blvd. was platted for the first and only time in the Tanglewood Section 7 plat (Lot 4, Block 32, Tanglewood Section 7 plat). *See* Exhibits 1 and 2. While the Section 7 Restrictive Covenants are similar to the Restrictive Covenants for the other sections in Tanglewood, there is a significant exception in Section 7(2), which is a carve-out provision

explicitly stating that Lot 4, Block 32 (*i.e.*, 1661 Tanglewood Blvd.) may be used for commercial purposes, and further that the property is not subject to any other restrictions set forth in the Restrictive Covenants. *See* Exhibit 1 at 4.[3] The Restrictive Covenants could not be more clear and unambiguous on this point.

1661 Tanglewood Blvd. has been used for commercial purposes for at least the 45 years. *See* Exhibit 3, ¶ 4. Consistent with the carve-out provision, 1661 Tanglewood Blvd. housed Mr. Farrington's company's offices. And it is still the offices of the Tanglewood Corporation and WMJK, Ltd.[4] *See id*. THA does not dispute this. Indeed, the Miller Family is not aware of THA ever claiming that using 1661 Tanglewood Blvd. for commercial purposes violated the Restrictive Covenants.[5] *See id*., ¶ 7. THA is not even complaining about it now. THA has not pleaded for, nor sought in its motion for summary judgment any declaration that 1661 Tanglewood Blvd. cannot be used for commercial purposes. Perhaps this is because THA recognizes that 1661 Tanglewood Blvd. was intended to be, has been, and is commercial property.

III. THA claims for the first time in this lawsuit that in 2002 and 2018 it attempted to rewrite and delete provisions of the Restrictive Covenants that have applied to 1661 Tanglewood Blvd. for almost 70 years.

In 2002 and again in 2018, the Association attempted to invoke statutory processes for amending the Restrictive Covenants. In 2002 it attempted to use Texas Property Code Chapter 204 ("Chapter 204"). In 2018, it attempted to use Texas Property Code Chapter 209 ("Chapter 209"). THA tried to use these statutory processes because the Tanglewood Restrictive Covenants

[3] Section 7 Restrictive Covenants were filed under Harris County Clerk's File No. 7864296 filed on April 2, 1951. *See* Exhibit 1.

[4] In addition, 1661 Tanglewood Blvd. has been used for other commercial purposes, such as leasing the property to commercial tenants. *See* Exhibit 3, ¶ 6.

[5] The Miller family seeks discovery relevant to this issue.

lack a contractual amendment process. There is no evidence that when the amendments were passed that THA took the position that they revoked Section 7(2)'s carve out position. Indeed, more than 17 years after the 2002 Amendments, this lawsuit marks the first time that THA has made such a claim. *See* Exhibit 3, ¶ 7. However, THA's position lacks merit. The 2002 and 2018 failed to amend Section 7's Restrictive Covenants, not only as to the 1661 Tanglewood Blvd., but as to all properties within Tanglewood.

EXHIBITS

THA attached several exhibits to its Motion for Summary Judgment, which are incorporated herein. The Miller Family attaches additional exhibits in this response, which are also incorporated herein. For ease of use, the Miller Family attaches all exhibits referenced in the response:

The Miller Family Exhibits:

Exhibit 1: Section 7 Restrictive Covenants

Exhibit 2: Section 7 Plat

Exhibit 3: Declaration of Kendall Miller, President of WMJK, Ltd.

THA's Exhibits:

Exhibit A: Declaration of Andrew P. Tower

Exhibit A-2: 1661 Tanglewood Blvd. General Warranty Deed

Exhibit A-3: Section 5 Plat

Exhibit A-4: Section 5 Restrictive Covenants

Exhibit A-7: Assignment from Tanglewood Corporation to THA

Exhibit A-8: 2002 Amendments

Exhibit A-10: 2018 Amendments

Exhibit B: Declaration of Steven Boyd, General Manager of THA

SUMMARY OF THE ARGUMENT

THA willfully ignores the character of the Miller Family's property as commercial property and the Restrictive Covenants that apply to it. Not only has THA failed to meet its burden to prove that there is a restrictive covenant that restricts 1661 Tanglewood Blvd. from being used for commercial purposes, but the evidence conclusively shows the opposite—the plain and unambiguous language of Section 7(2) of the Restrictive Covenants expressly ***permits*** 1661 Tanglewood Blvd. to be used and developed commercially, and ***prohibits*** any restrictions otherwise. Indeed, THA has breached the Restrictive Covenants by attempting to apply single-family residential restrictions to the property.

THA's efforts to make an end-run around Section 7(2) by allegedly amending the Restrictive Covenants are also problematic because not only do the amendments fail to revoke Section 7(2), but THA fails to establish that it met the statutory requirements that would permit it to pass the 2002 and 2018 Amendments. Nor will it be able to do so.

Finally, THA is barred from seeking to enforce residential restrictions against 1661 Tanglewood Blvd. It is undisputed that 1661 Tanglewood Blvd. has been used for commercial purposes and operated as a commercial property for over 70 years. Indeed, from its inception it has been commercial property. Thus, any attempts by THA to change this vested property right violates the Texas and United States Constitutions, and are breaches of THA's contractual obligations. Accordingly, the Court should deny THA's Motion for Summary Judgment. The Miller Family will then in due course present its Motion for Summary Judgment dismissing THA's claims. It will seek declarations protecting now and in the future the ability of the owners of 1661 Tanglewood Blvd. to use and develop it for residential or commercial purposes without restrictions except as set forth in Section 7(2). It will also seek an award of the reasonable and necessary attorneys' fees that were incurred to protect the Miller Family's vested property rights.

ARGUMENTS & AUTHORITIES

I. The restrictions in the 2002 and 2018 Amendments do not apply to 1661 Tanglewood Blvd.

A. THA ignores that Section 7(2) unambiguously states that 1661 Tanglewood Blvd. can be used for commercial purposes and that other restrictions, including the alleged amendments, cannot affect it.

THA recognizes that restrictive covenants are subject to the general rules of contract construction. *See Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex.1998); *Wiese v. Heathlake Cmty. Ass'n*, 384 S.W.3d 395, 400 (Tex. App.—Houston [14th Dist.] 2012, no pet.). And importantly, THA also recognizes that courts are:

> directed to "***examine and consider the entire writing*** in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. ***No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument***." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (citations omitted). ***The courts are also instructed to consider "the covenants as a whole*** in light of the circumstances present ***when the parties entered the agreement***," avoiding any "construction that nullifies a restrictive covenant provision." *Pilarcik*, 966 S.W.2d at 478-79.

See THA's Motion for Summary Judgment at 7 (emphasis added); *see also Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 842 (Tex. 2000) (noting that to "determine the parties' intent, [courts] must look at the arrangement as a whole").

THA does nothing more than pay lip-service to these standards.[6] What is glaringly absent

[6] The Texas Supreme has recognized that there is an ongoing debate about when Chapter 202's more liberal standard of interpretation is applied versus the stricter common law standard. *See Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 284 (Tex. 2018). Several courts have held that the chapter 202 standard only applies when there is an ambiguity. *Id*. As such, in this case, the Miller Family asserts that the common law rules of construction apply and "covenants restricting the free use of land are not favored by the courts" and further all "doubts must be resolved in favor of the free and unrestricted use of the premises, and the restrictive clause must be construed strictly against the party seeking to enforce it." *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987). However, regardless of the standard applied, Section 7(2) can only be construed in one way—to prohibit any residential restrictions from applying to 1661 Tanglewood Blvd.

from THA's Motion is any discussion of the actual Restrictive Covenants it was trying to amend. As mentioned above, Tanglewood is divided into separately platted sections, each with its own set of Restrictive Covenants. Tanglewood is not a single subdivision. It is a series of legally separate subdivisions created by a common developer. THA does not even discuss, much less seek to prove, the set of restrictions it contends apply to 1661 Tanglewood Blvd. It expressly states that the "facts stated immediately above [regarding the application of section 5 and 7 to 1661 Tanglewood Blvd.] are provided solely as background." *See* THA's Motion for Summary Judgment at 4. And shockingly, THA then admits that "[THA's Motion for Summary Judgment] does not address the Section 5 and 7 restrictions." *Id.*

While perhaps THA would prefer the Court to review the 2002 and 2018 Amendments in a vacuum, it is contrary to the law to do so. Again, courts must consider the covenants as a whole. *See also Scoville v. SpringPark Homeowner's Ass'n, Inc.*, 784 S.W.2d 498, 502 (Tex. App.—Dallas 1990, writ denied) ("[S]everal instruments pertaining to the same purpose, whether executed contemporaneously or at different times, will be read together"); *Bd. of Ins. Com'rs v. Great S. Life Ins. Co.*, 150 Tex. 258, 266, 239 S.W.2d 803, 809 (1951) ("We do not agree with respondents that we may look alone to the provisions of the individual policies to determine the nature of the insurance involved or the validity of the policies. These policies do not contain the entire contract between the parties."). The 2002 and 2018 Amendments are not some type of stand-alone restrictions, they are exactly what they state, amendments to the original Restrictive Covenants. *See* THA's MSJ Exhibit A-10 at 1-6; THA's MSJ Exhibit A-8 at 6-11. And as the amendments expressly state, other than as allegedly amended, all original provisions of the Restrictive Covenants "remain in full force and effect." *See* THA's MSJ Exhibit A-10 at 7; *see also* THA's MSJ Exhibit A-8 at 22 (the provisions of the Original Restrictions "remain in full force and effect,

as amended herein, and are hereby ratified and confirmed").[7] Thus, the amendments must be read in conjunction with what is contained in the original Restrictive Covenants to give proper meaning to the initial declarant's intent, as modified by any valid amendments.

The conclusive evidence establishes that 1661 Tanglewood Blvd. is controlled by the Section 7 Restrictive Covenants. Beyond the express statement that Section 7(2) applies to 1661 Tanglewood Blvd., the following shows that 1661 Tanglewood Blvd. is platted in Section 7:

- Section 7 plat shows the property within the plat lines; Exhibit 2;
- Section 7 Restrictive Covenants; Exhibit 1; and
- General Warranty Deed for 1661 Tanglewood Blvd. describes the property as follows: All of Lot Four (4), ***Unrestricted***, Block Thirty Two (32), of Tanglewood, ***Section Seven (7)***, according to the map or plat thereof recorded in Volume 36, Page 13, Map Records of Harris County, Texas, and having street addresses as recognized by the United States Postal Service of 1661 Tanglewood Boulevard, and 5200 San Felipe, Houston, Texas 77056; THA's MSJ Exhibit A-2 (emphasis added).[8]

And in the Section 7 Restrictive Covenants is Section 7(2), which specifically addresses 1661 Tanglewood Blvd. separately. It states that:

> [Section 7 properties] shall be used for residence purposes only, ***with the exception of lot four (4), block thirty-two (32) [1661 Tanglewood Blvd.] which lot may be used for commercial purposes***, however, such use shall not emit obnoxious odors or loud noises, and no structures of a temporary nature may be placed or erected thereon, ***and no other restrictions herein set forth shall affect this lot four (4), block thirty-two (32) [1661 Tanglewood Blvd.]***.

[7] THA's policy manual addressed some issues covered by the Restrictive Covenants, but did "not [] change…the Restrictions." THA's MSJ Exhibit A-9 at 2.

[8] THA alleges that it is somehow an "indisputable fact" that the plat in section 5 "encompasses 1661 Tanglewood Blvd." THA does not explain this contention nor provide any evidence in support of it. Nor can it. The section 5 plat shows that 1661 Tanglewood Blvd. was not included. *See* THA's MSJ, Exhibit A-3.

Exhibit 1 at 4 (emphasis added). To be clear, this provision contains two important and unambiguous facts: (1) 1661 Tanglewood Blvd. may be used for residential or commercial purposes, and (2) no other restrictions shall affect this. *See id*. Thus, it not only gives permission for 1661 Tanglewood Blvd. to be use for commercial purposes, but it also prohibits the application of any other restrictions to the property. Section 7(2) sets forth the unambiguous intent of the original declarant of the Restrictive Covenants, yet THA seeks to obfuscate that intent by trying to direct the Court's focus solely on the amendments.

In 2002 and 2018 THA attempted to amend the original Restrictive Covenants. In particular, THA alleges that "the following paragraphs are added to the Restrictions applicable to all sections of Tanglewood to read as follows: Only one (1) residential dwelling may be constructed on a lot." *See* THA's MSJ at 9. It argues that these amendments unambiguously apply to 1661 Tanglewood Blvd. because "they state repeatedly that they apply to all Tanglewood Sections and to all property within Tanglewood. There are no carve outs for any property." *See id*. at 7. This is incorrect. As shown, there is a specific carve out for 1661 Tanglewood Blvd. THA just refuses to acknowledge it.

While it is unclear why THA does not address the Restrictive Covenants as a whole, it appears that THA is claiming that the amendments' general recitations that they apply to "all property" somehow "unambiguously" revoked Section 7(2)'s specific carve-out provision. But the amendments do no such thing. There is nothing in the alleged amendments that delete, revoke, modify, or in any other way change or alter Section 7(2). It was left untouched and intact. And as the amendments show, when the homeowners intended to delete something from the Restrictions and Covenants, they expressly stated as much: "This paragraph is deleted in its entirety;" "All of the foregoing paragraphs are deleted in their entireties from the Restrictions."

See Exhibits A-8 at 7 and A-10 at 3. THA is effectively asking the Court to interpret and thereby rewrite the amendments to ***implicitly*** revoke a section—Section 7(2)—that they did not ***expressly*** revoke. Courts are not permitted to "rewrite the Declaration or add to its language under the guise of interpretation." *Waterford Harbor Master Ass'n v. Landolt*, 14-13-00817-CV, 2015 WL 293262, at *6 (Tex. App.—Houston [14th Dist.] Jan. 22, 2015, pet. denied).

Moreover, the law is clear that specific provisions will control over general provisions. In *C.A.U.S.E. v. Vill. Green Homeowners Ass'n, Inc.*, 531 S.W.3d 268, 275 (Tex. App.—San Antonio 2017, no pet.), a homeowners' association claimed that the restrictions gave it the authority to compel residents to use a trash provider chosen by the association. The association claimed that it was "complying with its duty to manage and maintain the neighborhood streets" by compelling use of a single trash collector. *Id*. It then relied on a provision "allowing it to promote the health, safety, and welfare of the subdivision," and a provision that " permit[ted] the Association to make contracts with third parties to provide services to the Association with respect to security and maintenance of the neighborhood." *Id*. The homeowner countered that the declaration provided that "[a]ll refuse garbage and trash shall be collected or disposed of by Owner, at his expense" and that this specific provision controlled. *Id*. at 274-75. The court of appeals agreed with the homeowner:

> More specific provisions in a contract prevail over general mandates. *In re Lee*, 411 S.W.3d 445, 455 (Tex. 2013); *Houston Laureate Assocs., Ltd. v. Russell*, 504 S.W.3d 550, 559 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Thus, we are not persuaded that the provisions generally relating to maintenance of the common areas allow the Association to compel residents to use a single trash collector selected by the Board.

Id. at 275.

So too is this case here. The specific carve-out of 1661 Tanglewood Blvd. in Section 7(2) controls over a general statement that the amendments apply to all properties—in precisely the

same way the specific provision in Section 7(2) controlled over the general statements in the original Section Restrictive Covenants that the restrictions applied to all properties. The original Section 7 Restrictive Covenants contained a residential use only restriction that is nearly identical to the one in the 2018 Amendments. *Compare* Exhibit 1 at 4 ("Only one residence shall be constructed on each lot") *with* THA's MSJ Exhibit A-10 at 3 ("Only one (1) residential dwelling may be constructed on a lot"). And there is no question that Section 7(2) controlled over the original residential restrictions such that it did not apply to 1661 Tanglewood Blvd. *See* Exhibit 1 at 2. Therefore, it is axiomatic that in repeating this near identical restriction in the 2018 Amendments would not change anything and Section 7(2)'s specific language would still be controlling. Again, Section 7(2) expressly states as much: "no other restrictions herein set forth shall affect this lot four (4), block thirty-two (32) [1661 Tanglewood Blvd.]." Exhibit 1 at 4.

Concluding that the 2002 and 2018 Amendments applying to all properties trump the specific carve-out provision in Section 7(2) would not only be inconsistent with the unambiguous language, but it would also result in construing the Restrictive Covenants in a manner that nullifies Section 7(2). Such a construction should be avoided. *See Pilarcik*, 966 S.W.2d at 479 (stating that a construction that nullifies a restrictive covenant should be avoided)." *Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 67 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Indeed, the amendments require that if there is conflict between the Tanglewood Policy Manual, which contains the building specifications THA alleges apply to 1661 Tanglewood Blvd., and the Restrictive Covenants, the Restrictive Covenants control: "If there is a conflict between any provision in the Tanglewood Policy Manual and these Restrictions, the Restrictions shall control." *See* THA's MSJ Exhibit A-8 at 21. The Policy Manual in turn confirms it is not intended to change the Restrictions. *See id.*, Exhibit A-9 at 2.

Accordingly, even if the amendments were properly adopted (which as discussed below there is no evidence they were, and indeed conclusive evidence shows they were not), the Section 7(2) covenant that other restrictions will not affect 1661 Tanglewood Blvd. is controlling and the newly amended restrictions do not apply to 1661 Tanglewood Blvd. The court should therefore deny THA's motion for summary judgment, and eventually enter a declaratory judgment that the Section 7 Restrictive Covenants permit any owner of 1661 Tanglewood Blvd. to use it for residential or commercial purposes and all other restrictions do not apply.

B. Parol evidence consistent with the plain language of the Restrictive Covenants is admissible to show the true intent of the parties to protect 1661 Tanglewood from being subject to residential restrictions.

The Miller Family asserts that Section 7(2) unambiguously states that 1661 Tanglewood Blvd. can be used for commercial purposes and that residential restrictions do not apply to it. In support of this the Miller Family seeks discovery confirming that the intent of the parties, both at the time the original Restrictive Covenants were drafted and when THA attempted to pass the 2002 and 2018 amendments, is consistent with this unambiguous language. THA has resisted these efforts and argues that there is "no reason for discovery" and that if "the restrictions are unambiguous, then no discovery is warranted." *See* THA's Motion for Summary Judgment, at 2 and THA's Opposition to the Miller Family's Emergency Motion for Continuance, at 5. However, this is not the law. If a deed is unambiguous on its face but becomes uncertain when an attempt is made to apply it to the subject matter, parol evidence consistent with the plain language is admissible to ascertain the true intents of the parties. *See Murphy v. Dilworth*, 251 S.W.2d 1004, 1005 (1941). The Miller Family, therefore, again requests that it be given an opportunity to perform discovery to show that the intent of drafters of the Restrictive Covenants and the Amendments is consistent with the plain language of Section 7(2)'s carve-out provision that residential restrictions do not apply to 1661 Tanglewood Blvd.

C. If the Court does not conclude that Section 7(2) unambiguously prohibits the 2002 and 2018 Amendments from applying to 1661 Tanglewood, there is at least an ambiguity on whether the amendments intended to change Section 7(2) such that other restrictions can now be applied to 1661 Tanglewood.

The Miller Family asserts that the evidence establishes that Section 7(2) is unambiguous when it states that residential single family only restrictions do not apply to 1661 Tanglewood Blvd. and that not only is there no evidence that the 2002 and 2018 revoked, deleted, modified, altered, or in any way changed this provision, but also the unambiguous language of the amendments proves otherwise. However, if the Court is inclined to disagree, contrary to THA's position that the 2002 and 2018 unambiguously permit residential restrictions to apply to 1661 Tanglewood, the terms in the amendments are ambiguous on this point. And if this is the case, the Court should deny summary judgment and permit the Miller Family to conduct discovery.

II. THA's attempts to amend Section 7(2) were improper.

Beyond the fact that the 2002 and 2018 did not apply residential restrictions to 1661 Tanglewood Blvd., the amendments are not controlling because THA did not and does not have the statutory authority to amend the Restrictive Covenants to remove the protections provided in Section 7(2).[9] While THA claims that the Miller Family is barred from challenging the amendments, it fails to provide conclusive evidence establishing this, nor will it be able to do so.

A. THA did not meet the statutory requirements necessary to use Texas Property Code Chapters 204 and 209 to amend the Restrictive Covenants.

An association seeking to enforce a restrictive covenant bears the burden to establish the "validity and enforceability of the amended covenants" and must come forward with conclusive "evidence to establish both its right to amend and its compliance with the legal steps to amend the

[9] The issue of THA's authority to amendment the Restrictive Covenants is also of paramount importance in ruling on the relief the Miller Family seeks in this case. *See* WMJK, Ltd.'s Amended Answer and Request for Declaratory Relief, at 8-9.

covenants." *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 308 (Tex. App.—Fort Worth 2001, no pet.); *see also City of Pasadena v. Gennedy*, 125 S.W.3d 687, 697-98 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (stating that a party attempting to rely on an amendment to restrictive covenants had the burden to demonstrate that the deed restrictions were validly amended). THA did not and cannot do this.

The Restrictive Covenants do not provide a provision allowing for amendment. *See* Exhibits 1 at 6; THA's MSJ Exhibit A-8 at 2. As such, the common law states that homeowners associations cannot amend restrictive covenants unless the lot owner affected by the restrictive covenants agrees. *See Smith v. Williams*, 422 S.W.2d 168, 172 (Tex. 1967) (noting that "the general rule that some of the owners of property in a restricted subdivision may not release or modify applicable restrictions without the concurrence of others who own property in the subdivision."). This is wholly consistent with even the most basic principles of contract law. Rather than rely on common law though, THA relies on two statutory schemes that permit certain homeowners to amend restrictive covenants with less than unanimous consent: Texas Property Code, Chapter 204 for the 2002 Amendments and Chapter 209 for the 2018 Amendments. *See* THA's MSJ Exhibits A-8 at 6; A-10 at 2. However, THA misapplies these statutes. It did not have the authority to use them to amend Section 7(2) or frankly any of the other Restrictive Covenants. As such, the 2002 Amendments are void as to 1661 Tanglewood Blvd. and the 2018 Amendments are void in their entirety.

1. Chapter 204 prohibits THA from amending the Restrictive Covenants as to 1661 Tanglewood Blvd.

In claiming that the 2002 Amendments apply to 1661 Tanglewood Blvd., THA once again ignores cogent facts, including the clear and unambiguous language of the statute. Importantly,

the clear terms of Texas Property Code prohibited THA from passing amendments affecting 1661 Tanglewood Blvd.

Section 204.002(c) states that:

> (c) ***[Chapter 204] does not apply to portions of a subdivision that are zoned for or that contain a commercial structure***, an industrial structure, an apartment complex or a condominium development governed by Title 7 Property Code.

TEX. PROP. CODE § 204.002 (emphasis added). This is for good reason. The statutory process was authorized by the Texas Legislature to provide limited rights in areas where residentially restricted neighborhoods have a legitimate need to update antiquated restrictions in the residential area. It was not intended and cannot be used to reverse vested property rights of business owners. Business owners who have been using their property for commercial purposes have every reason to rely on existing restrictions and covenants that permit them to operate their business. Surrounding homeowners, especially those who are on notice of the commercial nature of the property, should not be permitted to effectively evict a business simply by sheer force of numbers. This would be the antithesis of protecting the rights of property owners.

Here, it is beyond dispute that 1661 Tanglewood Blvd. contains a commercial structure.[10] Again, Section 7(2) expressly states that 1661 Tanglewood Blvd. "may be used for commercial purposes." *See* Exhibit 1 at 4. And indeed, it has been used for a commercial purpose, containing a commercial structure for at least the last 45 years. *See* Exhibit 3, ¶4. It houses the corporate headquarters for Tanglewood Corporation and WMJK, Ltd. *See id*. This building is not a residential structure. *See id.*, ¶ 5. It does not have a accommodations for sleeping or eating. *See id.* Rather than a full-size kitchen, it has two small office breakrooms. *See id.* It has a formal

[10] In its Motion for Summary Judgment, THA does not argue otherwise.

reception area, designated men's and women's restrooms, water fountains, two large conference rooms, and a line of offices off a central spine. *See id.* As such, Texas Property Code Chapter 204 cannot be used to amend the Restrictive Covenants that apply to 1661 Tanglewood Blvd.

Equally problematic for THA is Property Code section 204.010. It clearly states that a property owner association can exercise certain powers "***unless otherwise provided by the restrictions***." TEX. PROP. CODE § 204.010 (emphasis added). Accordingly, THA cannot seek to apply residential restrictions against 1661 Tanglewood because Section 7(2) specifically provides otherwise.

2. THA is not entitled to use Chapter 209 to amend the Restrictive Covenants.

Texas Property Code Section 209.0041(h) permits homeowners to amend restrictive covenants "only by a vote of 67 percent of the total votes allocated to property owners entitled to vote on the amendment." Importantly though, Chapter 209 has limited application. Not every homeowner's association is entitled to use the statutory process. In particular, section 209.0041(b) states that the chapter only applies "to a residential subdivision in which property owners are ***subject to mandatory membership in a property owners' association***." TEX. PROP. CODE § 209.0041(b) (emphasis added). THA has not established that the Tanglewood homeowners are subject to mandatory membership in the Association. Nor will it be able to do so.

The Texas Supreme Court has recognized that:

> the very heart of a mandatory-membership homeowners association, as opposed to a voluntary one, is the association's right to require that all property owners pay assessment fees, and the property owner's corresponding right to demand that maximum services be provided within the association's budget, both of which are considered "inherent property right[s]." *Inwood N. Homeowners' Ass'n, Inc.*, 736 S.W.2d at 636; *Pooser v. Lovett Square Townhomes Owners' Ass'n*, 702 S.W.2d 226, 231 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Western Hills Harbor Owners Ass'n v. Baker, 516 S.W.3d 215, 224 (Tex. App.—El Paso 2017, no pet.). Importantly, a homeowners' association only has the powers and authority enumerated in its

dedicatory instruments. *See Pine Trail Shores Owners' Ass'n, Inc. v. Aiken*, 160 S.W.3d 139, 146 (Tex. App.—Tyler 2005, no pet.). As such, an association that seeks to levy an assessment or fee, must establish that the dedicatory instrument grants this authority. *Id*.; *see Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 691 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("A party seeking enforcement of a deed restriction always has the burden at trial to demonstrate the enforceability of the restriction."). In this case, there is no evidence of a dedicatory instrument granting THA the authority to assess mandatory fees.

In *Western Hills Harbor Owners Association*, the court concluded that the dedicatory instrument while not expressly stating that membership in the association was mandatory, did impose mandatory assessments on all lots owners and did not give the owners any choice but to pay those assessments. 516 S.W.3d at 224. Further, the declaration provided that those assessments were for the construction of "swimming pools, parks, roads and other improvements" in the subdivision, which were to be utilized solely by "members" of the association and their families. *Id*. Based on this language the court concluded that the subdivision developer made clear its intent to create a mandatory-membership association for the benefit of its members, as opposed to one that was simply voluntary. *Id*.

The facts of this case are markedly different. The dedicatory instrument, *i.e.*, the Restrictive Covenants, do not require mandatory membership or impose mandatory assessments on all lot owners. *See* Exhibit 1. At most, it gives the THA limited power to perform limited maintenance and recoup its expenses. *See id*. However, these are not mandatory assessments on all lot owners. Additionally, the Restrictive Covenants make no reference to what any money collected will be used for. *See id*. Therefore, unlike the association in *Western Hills Harbor Owners Ass'n*, THA lacks the key power held by mandatory membership property owners'

associations: "the power to 'levy and collect assessments' on the property owners and to impose a lien for a property owner's failure to pay those assessments." *Western Hills Harbor Owners Ass'n*, 516 S.W.3d at 224.

Finally, the 2018 Amendments seek to amend the 2002 Amendments. *See* THA's MSJ Exhibit A-10. However, as shown above, the 2002 Amendments do not apply to 1661 Tanglewood Blvd. It axiomatic then that any amendments to the 2002 Amendments likewise do not apply to 1661 Tanglewood. Accordingly, for the foregoing reasons, THA was not entitled to use Chapter 209 to amend the Restrictive Covenants and the 2018 Amendments are void in their entirety.

B. The Miller Family is not barred from challenging the attempted amendments.

To be clear, THA argues that even though it is suing the Miller Family and seeking a declaration that the 2002 Amendments prohibit using 1661 Tanglewood Blvd. for commercial purposes, that the Miller Family should be barred from attacking the validity of the amendments. Not only does THA not have evidence to support any type of bar, THA's arguments are contrary to the law.

A claim for declaratory relief does not accrue until there is an actual controversy between the parties, which determines the date when the limitations begin to run. *See In re Estate of Denman*, 362 S.W.3d 134, 146 (Tex. App.—San Antonio 2011, no pet.). In *Vann v. Homeowners Ass'n for Woodland Park of Georgetown, Inc.*, a property owner contested the homeowners' association attempt to require them to keep their trash cans out of view. *See* 03-18-00201-CV, 2018 WL 4140443, at *1 (Tex. App.—Austin Aug. 30, 2018, no pet.). The property owner argued that this requirement was not part of the restrictions applying to their property and therefore the association lacked the authority to require them to move their trash cans. *Id*. The association argued that the property owner's claim was barred by the statute of limitations since the suit was brought more than four years after the association recorded its "Rules and Regulations" purporting

to require trash can removal. *Id*. The court rejected this argument and concluded that an actual controversy did not arise between the property owner and the association until the association began sending the property owner notices that they were required to store their trash cans out of view. *Id*. at 6-7. The court also noted that:

> The [property owner] could have read the Rules and Regulations in light of the other documents in their chain of title and concluded that the Rules and Regulations were not binding on them because they were not subject to the Master Declaration or the HOA's authority. Indeed, as discussed above, the [property owner] would have been correct in that interpretation. Nothing in the record before us indicates that the [property owner] had notice that the HOA would attempt to enforce the Rules and Regulations against them until the HOA began sending them notices, which undisputedly occurred less than four years before the [property owner] filed suit.

Id. at *7.

Similarly, in this case, until THA filed the present lawsuit, there was no actual controversy regarding whether the 2002 Amendments applied to 1661 Tanglewood Blvd. THA's only alleged evidence of notice is that the Miller Family had notice of the 2002 Amendments. However, this is not evidence that the Miller Family had notice that THA would attempt to enforce the 2002 Amendments residential restrictions against them. *See* Exhibit 3, ¶¶ 7-8. The evidence is to the contrary. First, the 2002 Amendments do not address Section 7(2), which permits commercial use and prohibits other restrictions from affecting the property. As discussed, the 2002 Amendments leave Section 7(2) intact and as such it is a controlling provision in the Restrictive Covenants. Accordingly, it would not only be reasonable, but it would have been correct for the Miller Family to read the 2002 Amendments in light of the Section 7 Restrictive Covenants and conclude that 1661 Tanglewood Blvd. was not subject to them. *See id.* Second, for the last 17 years, since the passage of the 2002 Amendments, THA has never claimed that residential restrictions apply to 1661 Tanglewood Blvd. nor have they ever claimed that 1661 Tanglewood Blvd., which has been

openly and obviously used for commercial purposes, is in violation of the Restrictive Covenants or the amendments. *See id*., ¶ 7. And third, the Miller Family was told that the amendments would not affect 1661 Tanglewood Blvd. *See id*, ¶ 8.

Regardless, THA's limitations claim is without merit because the law is clear that:

> If a counterclaim or cross claim arises out of the same transaction or occurrence that is the basis of an action, a party to the action may file the counterclaim or cross claim even though as a separate action it would be barred by limitation on the date the party's answer is required.

TEX. CIV. PRAC. & REM. CODE § 16.069. Any such counterclaim must be filed within 30 days from the date the answer is due. *See id*. In this case, the Miller Family filed its counter-claim challenging 2002 and 2018 Amendments contemporaneously with its answer. *See* WMJK Ltd.'s Original Answer and Request for Declaratory Relief, at 9-10. Accordingly, the Miller Family is not barred from attacking the 2002 or 2018 Amendments.

THA also claims that the Miller Family should be estopped, has waived, or has ratified the 2002 and 2018 amendments. Yet, as explained above, there is no evidence that the Miller Family had notice that THA would try to enforce the amendments against 1661 Tanglewood Blvd. *See* Exhibit 3, ¶¶ 7-8. Again, nothing in the amendments removed the carve-out provision contained in Section 7(2). As such, regardless of whether the Miller Family allegedly approved the amendments or failed to complain about them, the Miller Family is not barred from attacking the amendments and defending itself against THA's lawsuit.

III. THA fails to establish that it has the authority to require the owner of 1661 Tanglewood Blvd. to submit architectural and construction plans for approval.

In THA's MSJ, it seeks a declaration that the Miller Family is required to get "THA's prior written approval of all architectural plans and construction documents before the commencement of construction." *See* THA's MSJ at 12. However, THA has failed to provide any evidence

showing that it has the authority to require homeowners in Tanglewood to seek prior written approval of all architectural plans and construction documents before commencing construction.

THA's MSJ Exhibit A-7 purports to be an assignment from Tanglewood Corporation to THA of the "right and duty to approve" construction plans. *See id*. at 2. It does this based on the claim that the Restrictive Covenants contain provisions requiring homeowners to submit plans and specifications for improvements to Tanglewood Corporation. *See id*. at 1. However, the Section 7 Restrictive Covenants do not actually contain any such provision. Thus, it does not confer this right and duty upon the Tanglewood Corporation. *See* Exhibit 1. Accordingly, Tanglewood Corporation could not have assigned it to THA, which then means that THA cannot seek to enforce it.

IV. THA is barred from seeking to enforce residential restrictions against 1661 Tanglewood Blvd.

The Miller Family has asserted several other legal and equitable defenses that would bar THA from enforcing residential restrictions against 1661 Tanglewood Blvd. The Miller Family has served discovery in support of these defenses, but not received responses to its written discovery requests nor been provided with an opportunity to conduct depositions. As such, the Miller Family requests additional time to respond to THA's Motion for Summary Judgment so that it can provide additional evidence in support of its defenses. These include the possible defenses that THA is:

- Barred by limitations and/or laches to assert a violation because for almost 70 years 1661 Tanglewood Blvd. has openly and obviously been used for commercial purposes.[11] *See* Exhibit 3, ¶ 4.

[11] *See Girsh v. St. John*, 218 S.W.3d 921, 925 (Tex. App.—Beaumont 2007, no pet.) ("The statute of limitations for suits to enforce deed restrictions is four years.").

- Equitably estopped from seeking to enforce residential restrictions against 1661 Tanglewood Blvd. because there is some evidence that:

    - No one ever told the Miller Family that despite the plain language of the amendments failing to revoke Section 7(2), the intent of the 2002 and 2018 amendments was to change commercial character the property. To the contrary, the Miller Family was told that the amendments would not affect 1661 Tanglewood Blvd. *see id*., ¶ 8.

    - THA knew or should have known that 1661 Tanglewood Blvd. was being used for commercial purposes; *see id*., ¶ 4.

    - The Miller Family had no knowledge that the 2002 and 2018 amendments revoked the protections provided by Section 7(2) because it does not state as much, and a reasonable person would not believe that it revoked, modified, deleted, change, or any way altered Section 7(2); *see id*., ¶ 8.

    - THA concealed its alleged intent to revoke the protections contained in Section 7(2); and

    - the Miller Family relied on Section 7(2) and statements about the amendments effects to its detriment when it negotiated and entered into a contract for sale to a local developer, who ultimately back out of the deal because of THA's position regarding the restrictions.[12] *See id*., ¶ 9.

- THA is quasi-estopped from seeking to enforce residential restrictions against 1661 Tanglewood Blvd. because THA cannot assert, to the Miller Family's disadvantage, a right inconsistent with a position THA previously took about the commercial nature of 1661 Tanglewood Blvd.[13] *See id*., ¶¶ 7-9.

- THA has waived, acquiesced to, and/or abandoned its right to enforce single-family residential restrictions on 1661 Tanglewood Blvd.[14] *See id*., ¶ 7.

[12] *See Dempsey v. Apache Shores Property Owners Ass'n, Inc.*, 737 S.W.2d 589, 595-96 (Tex. App.—Austin 1987, no writ).

[13] *See Cimarron Country Property Owners Ass'n v. Keen*, 117 S.W.3d 509, 511-13 (Tex. App—Beaumont 2003, no pet.).

[14] THA has conceded either that it has waived, or there is a fact issue about whether it has waived, enforcement of the 2002 Amendments: "Waivers of restrictive covenant are limited to uses substantially

- Conditions on San Felipe and in the surrounding neighborhood have changed such that enforcing residential restrictions on 1661 Tanglewood Blvd. would not obtain the benefits sought to be realized by the restrictions.[15] *See supra*, at 2-3; Exhibit 3.

V. Any attempt by THA to change the commercial nature of 1661 Tanglewood Blvd. should be considered invalid.

A restrictive covenant "is a contractual agreement between the seller and purchaser of real property." *Dealer Computer Servs., Inc. v. DCT Hollister Rd, LLC*, 574 S.W.3d 610, 616 (Tex. App. 2019), citing *Ski Masters of Tex., LLC v. Heinemeyer*, 269 S.W.3d 662, 668 (Tex. App.—San Antonio 2008, no pet.). The Section 7 Restrictive Covenants do not contain a provision permitting them to be amended. As such, they enshrine and grant the Miller Family specific property right protection. And in particular, they grant the right to use 1661 Tanglewood Blvd. for residential or commercial use, and the right to prohibit other restrictions from affecting this. *See* Exhibit 1 at 4.

Chapter 204 and Chapter 209 of the Property Code are legislatively-created schemes for enabling property owners to amend these contractual obligations through certain procedures. In most instances, the Texas Legislature has been careful to ensure that private contractual rights are not impaired by these statutes. For example, as discussed above, Property Code section 204.010 grants certain powers to property owner associations, "[u]nless otherwise provided by the

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similar to the uses historically allowed. As to the 2002 restrictions (and only the 2002 restrictions), THA will concede that." THA's Opposition to Defendant's Emergency Motion for Continuance, at 6 (citations omitted); *Carlington v. Boudreaux*, 921 S.W.2d 550, 553 (Tex. App.—Beaumont 1996, no writ) (noting the relevance of enforcement entity's inaction in response to violations by others to waiver of its enforcement rights against one particular owner).

[15] *See Moseley v. Arnold*, 486 S.W.3d 656, 668 (Tex. App.—Texarkana 2016, no pet.); *Overton v. Ragland*, 54 S.W.2d 240, 241 (Tex. Civ. App.—Amarillo 1932, writ dism'd).

restrictions." TEX. PROP. CODE § 204.010. By contrast, Texas Property Code section 209.0041(f), the most recent attempt to allow for the amendment of private contractual obligations established by deed restrictions, the Legislature is less protective in that it states that "[t]his section supersedes any contrary requirement in a dedicatory instrument." TEX. PROP. CODE § 209.0041(f). As such, section 209.0041(f) appears to allow certain property owner associations to wipe out private contractual obligations. And this is problematic because the United States and Texas Constitutions prohibit this. Article I, § 10 of the United States Constitution provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article I, § 16 of the Texas Constitution provides "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts shall be made."

In *Brooks v. Northglen Ass'n*, the Supreme Court was evaluating property owners' "challenge to their homeowners association's attempt to increase and accumulate annual assessments and impose late fees." *See* 141 S.W.3d 158, 160 (Tex. 2004). In particular, the property owners argued the "assessment of a late fee would violate the U.S. and Texas Constitutions' impairment-of-contracts provisions because the deed restrictions do not provide for late fees." *Id.* at 169. In rejecting this argument, the Court concluded that:

> Section 204.010 does not substantially impair Northglen's deed restrictions. The statute operates only where the deed restrictions do not "otherwise provide." TEX. PROP. CODE § 204.010. It does not serve to withdraw or remove any contractual obligation. ***If the statute required the assessment of late fees where late fees were expressly prohibited by the deed restrictions, this would likely be a different case***. *See Travelers' Ins. Co. v. Marshall,* 124 Tex. 45, 76 S.W.2d 1007 (1934) (discussing statutes that declare a complete moratorium on particular contracts). Section 204.010 does not substantially impair the deed restrictions because the statute operates only where the deed restrictions do not "otherwise provide." ***It does not serve to withdraw or remove any contractual obligation.***

Id. at 170 (emphasis added).

The same cannot be said of THA's attempt to use Chapters 204 and 209 to apply residential restrictions on 1661 Tanglewood Blvd. THA is attempting to use these statutory schemes to impose amendments that directly contradict and would withdraw the obligations under Section 7(2). Section 7(2) not only explicitly establishes and protects the right of its owner to use the property for residential or commercial purposes, but it further provides that no other restrictions would apply to affect this right. The Section 7 Restrictive Covenants further protects these rights by not providing any mechanism to amend them. Thus, the original declarant created a specific contractual scheme for the development of Section 7 of Tanglewood that involves explicit authority to use 1661 Tanglewood Blvd. for residential or commercial purposes and prohibits the imposition of any restrictions on that right. The use of either Chapters 204 or 209 to remove that contractually established and protected right in a manner that "supersedes any contrary requirement" in a dedicatory instrument is an unconstitutional impairment of contract.

CONCLUSION

Accordingly, the Miller Family respectfully requests that the Court deny THA's summary judgment. Alternatively, the Miller Family reasserts its request to continue the hearing on THA's Motion for Summary Judgment and reserves the right to supplement and amend its response. The Miller Family requests all further relief to which they may be entitled to, at law or equity.

Respectfully submitted,

RUSTY HARDIN & ASSOCIATES, LLP

/s/ Rusty Hardin

Rusty Hardin
Texas Bar No. 08972800
Lara Hudgins Hollingsworth
Texas Bar No. 00796790
Terry Kernell
State Bar No. 11339020
1401 McKinney Street, Suite 2250
Houston, Texas 77010
Telephone: (713) 652-9000
Facsimile: (713) 652-9800
rhardin@rustyhardin.com
lhollingsworth@rustyhardin.com
tkernell@rustyhardin.com

and

WILSON CRIBBS & GOREN
Reid Wilson
Texas Bar No. 21711500
Omar Izfar
Texas Bar No. 24041171
2500 Fannin St.
Houston, Texas 77002
Telephone: (713) 547-8504
Facsimile: (713) 229-8824
rwilson@wcglaw.com
oizfar@wcglaw.com

ATTORNEYS FOR DEFENDANT WMJK, LTD.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served to all parties and/or counsel of record on September 3, 2019, pursuant to the Texas Rules of Civil Procedure.

Mark Maney — *Via E-Service*
Texas Bar No. 12898200
Maney & Gonzalez-Felix, P.C.
712 Main St., Suite 2100
Houston, Texas 77002
mmaney@maneylaw.com

Andrew P. Tower — *Via E-Service*
Texas Bar No. 00786291
5850 San Felipe, Suite 500
Houston, Texas 77057
andy@atowerassoc.com

ATTORNEYS FOR PLAINTIFF

Lara Hudgins Hollingsworth