

LAINIE WHITMIRE and  
RAY WHITMIRE,  
Plaintiffs,

v.

NATIONAL CUTTING HORSE  
ASSOCIATION,  
Defendant.

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IN THE DISTRICT COURT

OF TARRANT COUNTY, TEXAS

236<sup>TH</sup> JUDICIAL DISTRICT

**PLAINTIFFS' SUPPLEMENT TO  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

FILED  
TARRANT COUNTY  
2010 JUL 15 PM 4:24  
THOMAS A. WILDER  
DISTRICT CLERK

COME NOW Plaintiffs Lainie Whitmire and Ray Whitmire file this Supplement to Motion for Partial Summary Judgment as follows:

**I.  
INTRODUCTION**

The NCHA has improperly terminated the paid lifetime membership of Ray Whitmire despite the fact that he has not violated a single NCHA rule. The NCHA terminated Mr. Whitmire's membership under the guise that he violated Article II of the NCHA Constitution which is vague, ambiguous and fails entirely to apprise Mr. Whitmire of his rights and the extent of the NCHA's authority and, further, fails to apprise Mr. Whitmire of the specific conduct that might be prohibited or otherwise barred by virtue of its vague and ambiguous wording. The conduct of Mr. Whitmire which forms the basis for the NCHA's arbitrary and capricious termination of his membership is essentially being married to Lainie Whitmire who had previously filed a lawsuit against the NCHA.

The NCHA's interpretation and application of its Constitution and By-laws in this fashion as an ostensible basis for arbitrarily and permanently revoking Mr. Whitmire's

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membership is so overbroad, over-reaching, unfairly selective in its application and inconsistent with the known facts and plain wording of the NCHA Constitution and By-laws that it denied Mr. Whitmire due process and breached the NCHA's fiduciary obligations to Mr. Whitmire.

The NCHA further filed a declaratory judgment action seeking to have the Court intervene in the affairs of the NCHA and issue a declaration interpreting NCHA Rule 41 and find that based on that interpretation the NCHA is entitled to recover tens of thousands if not hundreds of thousands of dollars in attorney's fees from Mr. and Mrs. Whitmire. This claim must fail as it is barred by the doctrine of judicial non-interference and is unsupported by the plain language of the rule itself given that Mr. and Mrs. Whitmire are no longer members of the NCHA.

Pursuant to Rule 166a of the Texas Rules of Civil Procedure and Section 37.001 *et seq.* of the Texas Civil Practices & Remedies Code, Plaintiff Ray Whitmire requests that the Court enter summary judgment declaring that Article II of the NCHA Constitution and By-laws are ambiguous when applied within this context and should be construed against the NCHA in resolving any conflict regarding their interpretation and application by the NCHA. Plaintiffs Ray and Lainie Whitmire further request that the Court enter summary judgment denying the NCHA's request for declaratory relief and deny the NCHA's claim for attorney's fees pursuant to Chapters 37 and 38 of the Texas Civil Practice and Remedies Code.

## II.

### ARGUMENT AND AUTHORITIES

#### A. Summary Judgment Standard

"A party seeking ... to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary

judgment in his favor upon all or any part thereof.” TEX. R. CIV. P. 166a(a). A court should grant summary judgment when the movant shows that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Randall’s Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995); Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985); TEX. R. CIV. P. 166a(c). In a declaratory judgment action for the construction of a contract provision, a movant is entitled to judgment as a matter of law when the contract is unambiguous and can be given a certain legal meaning. Frost Nat’l Bank v. L&F Distribs., Ltd., 165 S.W.3d 310, 312 (Tex. 2005)(per curiam). Thus, in a contract case, the test for summary judgment is “under a standard of non-ambiguity.” Equitable Recover, L.P. v. Heath Ins. Brokers of Texas, L.P., 235 S.W.3d 376, 383 (Tex. App.—Dallas 2007, pet. filed); see Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass’n, 205 S.W.3d 46, 56, 64 (Tex. App.—Dallas 2006, pet. denied).

**B. Relevant Rules**

Ray Whitmire’s membership was ostensibly terminated pursuant to Article II of the NCHA Constitution, which states, in relevant part, as follows:

Membership, or application therefore, may be terminated or rejected by the Executive Committee or the Board of Directors for cause detrimental to the interest of the Association, or to its programs, policies, objectives or the harmonious relationship of its members, as determined by the Executive Committee or the Board of Directors. Termination or application rejection proceedings under this paragraph shall be conducted under the Association’s disciplinary procedures for notice, hearing and temporary suspension; the effect of termination or rejection may be the denial of the privileges of the Association, as set forth in the Association disciplinary procedures.

[Exhibit C, Second Affidavit of Jeff Hooper at Exhibit A].

The NCHA's disciplinary procedures for notice and hearing are set forth in NCHA Standing Rules 37 and 38. [Affidavit of Jeff Hooper, Exhibit B].<sup>1</sup> Rule 38 specifies in relevant part as follows:

Any member may be disciplined fined, placed on probation or suspended from the Association, and any member or non-member may be denied all privileges of the Association by the Executive Committee or Hearing Committee or Grievance Committee **whenever it shall have been established by a preponderance of the evidence that such member or non-member has violated any rule of the Association.**

[Id.] (emphasis added).

As set forth herein, the NCHA's termination of Ray Whitmire's membership was defective on due process grounds for two reasons. First, the provision of Article II relied upon by the NCHA is too vague to permit termination of Mr. Whitmire's membership consistent with Texas principles of due process. Second, because the NCHA failed to introduce any evidence of a rule violation by Ray Whitmire, the NCHA failed to meet the preponderance of the evidence standard set forth in NCHA Standing Rule 38. Therefore, Mr. Whitmire is entitled to summary judgment as a matter of law.

C. **Ray Whitmire Was Denied Due Process Because His Membership Was Terminated Pursuant to an NCHA Rule that is Impermissibly Vague.**

The provision in Article II of the NCHA Constitution invoked by the NCHA in support of its termination of Mr. Whitmire's membership is impermissibly vague because it does not provide fair notice of what conduct might subject a member to punishment therefore the actions taken by the NCHA are impermissible arbitrary and capricious. Moreover, as this case illustrates, it is susceptible to arbitrary, capricious and discriminatory enforcement. The

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<sup>1</sup> The referenced affidavit is the Affidavit of Jeff Hooper attached to the NCHA's first Motion for Summary Judgment filed with the Court on December 27, 2007.

vagueness of the provision is highlighted by the testimony of NCHA agents and personnel who are unable to articulate definite standards to which a member of common intelligence may conform his behavior to avoid termination of NCHA membership. For example, Mr. Goins, the NCHA's counsel testified as follows:

Q. Now, there in the second sentence, it states that "Membership, or application therefore, may be terminated or rejected by the Executive Committee or Board of Directors for cause detrimental to the interest of the Association or to its programs, policies, objectives, or the harmonious relationship of its members, as determined by the Executive Committee or the Board of Directors."

A. Um-hum.

Q. I would ask you, sir, in connection with cause detrimental to the interest of the association or its programs, policies, objectives, or the harmonious relationship of its members, where would I look to find what that cause would be?

A. What that cause would be?

Q. Yes, sir. Where in the rules or the bylaws or the constitution of the NCHA, if I were a member, where would I look to find out what conduct would be prohibited by Article II of the constitution?

A. I don't know what you're talking about. It says as determined by the executive committee or its board of directors.

Q. Okay. So is it your understanding then that other than this general statement regarding cause detrimental to the interest of the association, that there is no specific guidance provided in either the constitution or the bylaws or the rules and regulations as to what would constitute such a detrimental cause as is set forth there?

A. I don't understand your question. It's too long. It says what it says.

Q. Well, I understand that, sir, and that's my question. If a member wants to find out what type of conduct would be prohibited by Article II of the constitution, where would they look?

A. I guess you -- you'd look at this and you would look at Webster's Dictionary and you would think about what your mother and father and Sunday school teacher and your teachers at school taught you about how to act and what was harmonious. And I guess that's where you would look.

[Exhibit "A", Deposition of Eldridge Goins, Vol. II, pp. 224:11 to 226:1].

Thus, Mr. Goins indicates that the only guidance provided to members with respect to compliance with Article II's vague platitudes may be found in dictionaries and childhood lessons

learned from parents and Sunday school teachers. Equally unhelpful is the NCHA's designated representative's generic suggestion that a member should generally comply with NCHA rules, which Ray Whitmire has done, to avoid termination of membership pursuant to Article II.

Q. Okay. Well, but let's take a look at that. I guess what I'm trying to figure out is how does a person have notice, though, of what is or is not inconsistent with Article II of the constitution?

MR. WEHRMANN: Object to form.

A. I think in Mr. Whitmire's case he was given notice and he was given the opportunity to appear with counsel and state his case. And the executive committee all came to town and gave him, you know, a fair hearing and made their determination.

Q. But how is a member supposed to look at Article II in the day-to-day activities of being a member of the NCHA and say my -- my conduct measures up with those standards?

MR. WEHRMANN: Object to form.

Q. How is a person supposed to know? If you have a rule that says the rule is that you're supposed to be good --

A. Okay. Show me the NCHA rule that says you're supposed to be good.

Q. Well, you're --

A. You're making up some kind of --

Q. And you are saying that they shouldn't do anything that's detrimental to the interests of the association. How is a member supposed to know what conduct is detrimental and what's not?

MR. WEHRMANN: Object to form.

A. I think in this case, Mr. Whitmire knows that his conduct is detrimental to the NCHA.

Q. Okay. But that wasn't my question, sir. How is a member simply to be put on notice that this is how you comply with the obligation not to do anything detrimental to the interests of the association?

MR. WEHRMANN: Object to form.

A. I think their first step would be to comply with the -- with the rules of the organization.

[Exhibit "B", Deposition of Jeff Hooper as NCHA's Designated Representative, pp. 171:8 to 172:18].

As the foregoing makes clear, Article II of the NCHA Constitution is so vague that it exposes NCHA members to the risk of termination of their membership without providing any fair notice as to what conduct will be deemed detrimental to the NCHA and the harmonious

relationship of its members. The vagueness of the provision is underscored by the testimony of NCHA agents who are unable to articulate any concrete guidance as to how members are to determine whether their conduct may or may not constitute cause for termination of their memberships. Accordingly, all NCHA members are exposed to the arbitrary whim of the NCHA Executive Committee to expel members who, for whatever reason, they simply chose to expel. Thus, in this case, Ray Whitmire's membership was terminated not in accordance with the rule of law, but by the mere whim of man. Plaintiff is therefore entitled to summary judgment that the NCHA violated his due process rights and declaratory judgment that Article II of the NCHA Constitution and the NCHA By-Laws are not a sufficient basis to support termination of his NCHA membership and are ambiguous when applied in this context and should be construed against the NCHA.

**D. The NCHA Presented No Evidence that Ray Whitmire Had Violated Any NCHA Rule.**

As set forth above, NCHA Standing Rule 38 requires that a violation of NCHA rules be proven by a preponderance of the evidence in order to discipline a member. In this case, the NCHA presented no evidence that Ray Whitmire had violated any NCHA rules. On November 19, 2007, the NCHA Executive Committee convened its hearing to determine whether Mr. Whitmire's membership should be terminated pursuant to Article II of the NCHA Constitution. [Exhibit "C", Second Affidavit of Jeff Hooper at Exhibit D]. Although Mr. Hooper has testified that compliance with NCHA rules is a generic benchmark to determine whether someone's conduct constitutes cause for termination of membership pursuant to Article II of the NCHA Constitution, Mr. Hooper presented no evidence at the hearing that Mr. Whitmire had violated any NCHA rules. [Exhibit "C", Transcript of November 19, 2007 hearing included within Exhibit D to Second Affidavit of Jeff Hooper].

Not only did the NCHA fail to present any evidence that Ray Whitmire had violated any NCHA rules, the NCHA also failed to present any evidence to support any of the accusations made in its September 6, 2007 letter in which it first informed Mr. Whitmire of the hearing on the possible suspension of his membership. That letter makes three allegations against Ray Whitmire: 1) that Ray Whitmire paid for the Lainie Whitmire's lawsuit against the NCHA; 2) that Ray Whitmire attempted to create disharmony in the Association by criticizing the policies, objectives, officers and staff of the NCHA to NCHA members during NCHA sponsored or approved cutting horse events; and 3) that Ray Whitmire engaged a lawyer to file suit against the NCHA to obtain a large money judgment.

Setting aside the fact that none of the conduct of which Ray Whitmire was accused is prohibited by the NCHA rules, the NCHA failed to present evidence in support of its allegations. First, the NCHA presented no evidence at the November 19, 2007 hearing that Ray Whitmire hired and paid Mrs. Whitmire's attorneys. [Id.]. In fact, Plaintiff's counsel has produced the fee statements in this lawsuit which indicate that all fee statements have been directed to Lainie Whitmire, not Ray Whitmire. Moreover, Jeff Hooper acknowledged in his subsequent deposition that he had no evidence besides his unsubstantiated belief that Ray Whitmire had hired and paid Lainie Whitmire's counsel.

Q. Your belief that he may have assisted or paid for the suit, what was the information you base that upon?

A. On -- on my belief. I believe that to be true.

[Exhibit "B", Deposition of Jeff Hooper, Vol. II, p. 238:15-19].

Mr. Hooper also acknowledged that no evidence was presented at the November 19, 2007 hearing that Ray Whitmire had attempted to create disharmony in the Association by criticizing

the policies, objectives, officers and staff of the NCHA to NCHA members during NCHA sponsored or approved cutting horse events.

Q. Okay. My question to you, sir, your statement in Paragraph 3 of Exhibit 120 about criticisms that Ray Whitmire uttered during NCHA sponsored or approved cutting horse events, when did you witness those criticisms?

A. It was represented to me by other members that he had done that.

Q. Okay. Which other members, sir?

A. Edley Hixon is one of those.

Q. And what event did that occur at, sir?

A. I don't recall.

Q. Did Edley Hixon attend the meeting of the executive committee?

A. Not to my knowledge.

Q. That was held on -- let me -- let me be more precise in my question. Did Edley Hixon attend the November 19th, 2007 hearing that followed this letter?

A. Not to my knowledge.

Q. Okay.

A. At that hearing, we convened and I made an opening presentation, and then Mr. Whitmire asked that his lawyer and myself and our legal counsel all be excused so that he could speak directly to the executive committee. So what transpired there, I can't give you firsthand account of.

Q. But your -- you did not see Edley Hix- --Hixon there at that meeting?

A. I personally didn't see Edley Hixon there at that meeting, no, sir.

Q. Did you present an affidavit from Edley Hixon at that meeting?

A. I personally did not, no, sir.

Q. Who else besides Edley Hixon?

A. I don't recall off the top of my head.

Q. Okay. Did you provide any affidavits during the course of that meeting indicating that somebody had witnessed Ray Whitmire criticizing the policies, objectives, officers and staff of the NCHA to NCHA members during NCHA sponsored or approved cutting horse events?

A. I personally did not.

[Id. at pp. 240:22 to 242:12].

Thus, although the NCHA claims hearsay statements of one individual to support its claim that Ray Whitmire has engaged in prohibited criticism of the NCHA leadership, no evidence of such criticism was provided at the November 19, 2007 hearing.

The NCHA's September 6, 2007 letter accused Ray Whitmire of suing the NCHA to obtain a large money judgment. Jeff Hooper testified that this accusation on September 6, 2007 was absolutely true.

Q. As of September 6th, 2007, was Ray Whitmire a party to this lawsuit?

A. Absolutely.

Q. You're 100 percent confident that on September 6th, 2007, Ray Whitmire was named as a plaintiff in the lawsuit against the NCHA that was filed by Lainie Whitmire in October 2004?

A. I believe that to be true. If it's not, I'm mistaken, but that's what I believe to be true.

[Id. at pp. 242:25 to 243:11].

In fact, the NCHA is wrong on that point. The record in this case reflects that Ray Whitmire only joined as a plaintiff in this lawsuit after the NCHA improperly threatened termination of his membership as a retaliatory gesture for Lainie Whitmire's prosecution of her claims in this lawsuit. Thus, no evidence was presented at the November 19, 2007 hearing that Ray Whitmire had sued the NCHA prior to September 6, 2007 to obtain a large money judgment. [Exhibit "C", Second Affidavit of Jeff Hooper at Exhibit D]. In fact, the summary judgment evidence clearly indicates that the NCHA Executive Committee was advised that Ray Whitmire only asserted a declaratory judgment claim after the September 6, 2007 threat, and that Mr. Whitmire would immediately dismiss that claim if the NCHA would simply withdraw its improper threat to terminate Mr. Whitmire's membership. [Id.]. Because the NCHA failed to present any evidence to support its accusations against Ray Whitmire, the NCHA failed to

comply with its burden under NCHA Standing Rule 38 to prove by a preponderance of the evidence that Ray Whitmire had violated any NCHA Rule.

Plaintiff is therefore entitled to summary judgment that the NCHA violated his due process rights and declaratory judgment that Article II of the NCHA Constitution and the NCHA By-Laws are not a sufficient basis to support to termination of his NCHA membership and are ambiguous when applied in this context and should be construed against the NCHA.

**E. Mr. Whitmire's Claims Fall Within the Exception to the Doctrine of Judicial Non-Intervention.**

Defendant seeks this Court's acquiescence to its arbitrary, capricious, and retaliatory conduct by claiming that Mr. Whitmire's claims are barred by the doctrine of judicial non-intervention. While it is true that courts at times may decline to interfere with the internal management of a voluntary association, the doctrine of judicial non-intervention is not without limits. Whitmire v. National Cutting Horse Association, 2009 WL 2196126 \*4 (Tex.App.—Fort Worth 2009, pet. denied).

Specifically, it has been held by the Fort Worth Court of Appeals in an appeal stemming from this very case as well as various other courts in Texas that judicial review of a private association's actions is appropriate when those actions are illegal, against some public policy, arbitrary, or capricious. Id.; Harden v. Colonial Country Club, 634 S.W.2d 56, 59 (Tex.App.—Fort Worth 1982, writ ref'd n.r.e.); Butler v. Hide-A-Way Lake Club, Inc., 730 S.W.2d 405, 410 (Tex.App.—Eastland 1987, writ ref'd n.r.e.).

It has further been held that the doctrine of judicial non-intervention does not apply when an association substitutes legislation for interpretation, oversteps bounds of reason, common sense, or fairness in its interpretation and administration. Swonke v. First Colony Comm. Services Assoc., Inc., 2010 WL 2361691 \*11 (Tex.App.—Houston [14<sup>th</sup> Dist.] 2010, no pet.

hist.) (citing Stevens v. Anatolian Shepherd Dog Club of Am., Inc., 231 S.W.3d 71, 74-75 (Tex.App.—Houston [14<sup>th</sup> Dist.] 2007, pet. denied). Moreover, in evaluating whether to apply the judicial non-intervention doctrine, Texas courts “require something akin to traditional due process on the part of voluntary associations.” See Hatley v. American Quarter Horse Association, 552 F.2d 646, 656 (5<sup>th</sup> Cir. 1977). Traditional due process requires that a rule or statute not be vague. See Comm’n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 437 (Tex. 1998).

A rule is impermissibly vague “if the persons regulated by it are exposed to risk or detriment without fair warning or if it invites arbitrary and discriminatory enforcement.” See id. Furthermore, a rule is impermissibly vague if “it would require people of common intelligence to guess at its meaning or there is a substantial risk of miscalculation by those whose acts are subjected to regulation.” See Tex. Liquor Control Bd. V. Attic Club, Inc., 457 S.W.2d 41, 45 (Tex. 1970). Ray Whitmire was not afforded due process by the NCHA because the constitutional provision relied on by the NCHA was impermissibly vague and the NCHA violated its own procedures by not presenting any evidence against Ray Whitmire to support its allegations of wrongful conduct.

In addition, the NCHA has enforced its purported Constitutional provision in an arbitrary and capricious manner. The NCHA has put forth no evidence that it has ever applied Article II in such a manner as to terminate the lifetime membership of a family member of someone who filed a wholly justified and good faith lawsuit against the NCHA. In fact, the NCHA is utilizing Article II in this case simply to arbitrarily, selectively and unfairly to punish Ray Whitmire and deprive him of valuable property rights simply because he would not disavow and abandon his wife.

Mr. Whitmire has a substantial pecuniary interest in being a member of the NCHA and has suffered a substantial pecuniary loss as a result of the NCHA's selective and vindictive application of Article II. [See Exhibit "D", Deposition of David Johnson]. As such, Mr. Whitmire's claims for declaratory judgment, violations of his due process rights and breach of fiduciary duty are not barred and the NCHA's defense of judicial non-intervention must be overruled as a matter of law.

**F. The NCHA's Claim for Declaratory Judgment Interpreting and Administering NCHA Rule 41 is Barred.**

The NCHA has steadfastly asserted that that doctrine of judicial non-interference precludes the Court from interfering in the NCHA's interpretation and enforcement of its own rules. Contrary to that position, the NCHA has filed a declaratory judgment action requesting that the Court intervene in the administration of NCHA Rule 41 and declare that the "NCHA is entitled to recovery of its reasonable and necessary fees and expenses under NCHA Rule 41." As the Fort Worth Court of Appeals ruled, in this very case, at the insistence and urging of the NCHA, "[j]udicial intervention is only proper when the actions of the organization are illegal, against some public policy, arbitrary, or capricious. Whitmire, 2009 WL 2196126 at \*4.

The request by the NCHA that the Court intervene in interpreting and administering Rule 41 does not fit within any of the exceptions to the judicial non-interference doctrine. The NCHA's request that the Court intervene in the form of granting its declaratory judgment, must therefore fail as a matter of law.

**G. The NCHA's Claim for Declaratory Judgment must also Fail Because Rule 41 on its Face Does Not Apply to Non-Members such as Ray and Lainie Whitmire.**

To the extent the NCHA claims that the doctrine of judicial non-intervention does not apply to its claims under Rule 41 and in the unlikely event that the Court rules that the NCHA's

counter-claim is not wholly barred, the NCHA's claim must still fail as a matter of law given that Rule 41 does not apply to non-members such as the Whitmires.

Since the filing of Plaintiff's Motion for Partial Summary Judgment, the NCHA has amended its declaratory judgment claim to seek a declaration for attorney's fees against Mr. Whitmire in addition to its claim against Mrs. Whitmire. These claims require the Court to construe and administer NCHA Rule 41. In construing a written contract, the court must ascertain and give effect to the parties' intentions as expressed in the document. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003); Hackberry Creek Country Club, Inc., 205 S.W.3d at 55. The parties' intent must be taken from the agreement itself and the agreement must be enforced as written. Wells Fargo Bank, Minnesota, N.A. v. North Cent. Plaza I, L.L.P., 194 S.W.3d 723, 726 (Tex. App.—Dallas 2006, pet. denied). If a contract is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law. Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983). A contract, however, is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. Id. at 393-94.

NCHA Rule 41 is explicitly limited in its application to a situation where "any **member** institutes litigation in which the association is included as defendant..." [See Paragraph VI, subparagraph 4 of the NCHA's Original Counterclaim on file herein]. Mr. Whitmire is simply not a "member" of the NCHA as required by the rule. Mr. Whitmire's lifetime membership in the NCHA was terminated by the NCHA as set forth above. [See Exhibit "A" to Defendant National Cutting Horse Association's Opposition to Plaintiffs' Motion for Partial Summary Judgment.] In that same pleading, the NCHA judicially admitted that "[t]he NCHA Executive Committee

further ruled to terminate the membership of Ray Whitmire.” [See Defendant National Cutting Horse Association’s Opposition to Plaintiffs’ Motion for Partial Summary Judgment P. 3, ¶ 7].

Because the NCHA wrongfully and vindictively terminated Mr. Whitmire’s lifetime membership, the NCHA’s claims against Mr. Whitmire must fail as a matter of law. Plaintiffs therefore request that the Court grant summary judgment denying the NCHA’s claim for declaratory judgment.

**H. The NCHA’s Claim for Attorney’s Fees Pursuant to Chapter 38 of the Texas Civil Practice and Remedies Code Must Fail as a Matter of Law.**

The NCHA has inexplicably filed a counterclaim against both of the Whitmires for attorney’s fees pursuant to Chapter 38 of the Texas Civil Practice and Remedies Code. [See Defendant NCHA’s Second Amended Counterclaim P. 3 ¶ 9]. Section 38.001 of the Texas Civil Practice and Remedies Code provides that a person may recover reasonable attorney’s fees if he has brought a claim of the type specifically enumerated in the statute. Tex. Civ. Prac. Rem. Code §38.001. The NCHA has not asserted a breach of contract claim or any of the other types of claims specifically enumerated and required by section 38.001 in order to obtain an award of attorney’s fees. Id.; Medical City Dallas, Ltd. v. Carlisle Corp., 251 S.W.3d 55, 63 (Tex. 2008).

Summary Judgment is therefore appropriate on the NCHA’s claim for attorney’s fees pursuant to CPRC 38.001 *et. seq.*

**III.  
CONCLUSION**

Plaintiff is entitled to summary judgment that the NCHA violated Mr. Whitmire’s due process rights and declaratory judgment that Article II of the NCHA Constitution and the NCHA By-laws are not a sufficient basis to support termination of his NCHA membership and are ambiguous when applied in this context and should be construed against the NCHA. Further, the

doctrine of judicial non-intervention raised as a defense by the NCHA does not apply to Mr. Whitmire's claims for declaratory judgment, violations of his due process rights, or the NCHA's breach of fiduciary duty.

Plaintiff is likewise entitled to summary judgment that dismissing the NCHA's request for declaratory judgment interpreting and administering NCHA Rule 41 as that claim does not fall within any of the exceptions to the doctrine of judicial non-intervention and is thus barred as a matter of law. Alternatively, the NCHA's declaratory judgment claim must fail as a matter of law because by its own terms it only applies to members of the NCHA which neither Mr. nor Mrs. Whitmire are. Finally, the NCHA's claim for attorney's fees pursuant to Texas Civil Practice and Remedies Code section 38.001 *et. seq.* must fail as a matter of law.

**WHEREFORE, PREMISES CONSIDERED,** Plaintiff Ray Whitmire respectfully requests that the Court grant summary judgment as set forth herein and Plaintiff's Ray and Lainie Whitmire request that the Court grant summary judgment that the NCHA take nothing by way of its cross claim and grant Plaintiffs such other and further relief, at law or in equity, to which they may be justly entitled.

Respectfully submitted,

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**ATTORNEYS FOR PLAINTIFFS  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of July, 2010, a true and correct copy of the foregoing document was served upon opposing counsel of record by hand delivery.

  
Michael J. Watson