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11                   **THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12                   **IN AND FOR THE COUNTY OF MARICOPA**

13 NORMAN ZWICKY,

14                   Plaintiff,

15 vs.

16 PREMIERE VACATION COLLECTION  
17 OWNERS ASSOCIATION, f.k.a. Premiere  
18 Vacation Club, an Arizona nonprofit  
19 corporation,

20                   Defendant.

**CASE NO. CV2015-051911**

**COMBINED REPLY TO PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND RESPONSE TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

**(ASSIGNED TO HON. JOHN HANNAH)**

**ORAL ARGUMENT REQUESTED**

21                   **General Circumstances Prompting Inspection Request**

22                   Zwicky paid roughly \$26,000 (or the equivalent) for his DRI “vacation ownership  
23 interests.” He acquired no ownership interest in specific real property in exchange—not  
24 even a timeshare as that term is commonly understood. He merely received “points” in the  
25 DRI system, evidenced by something called a “membership certificate.” That certificate  
26 confers nothing more than intangible, *nonexclusive* rights to book *nonspecific* resort  
accommodations within the DRI network—*subject to availability* (the general public can  
book these same units at ordinary hotel rates), and *subject to payment of annual*  
*assessments*, which in Zwicky’s case are more than \$2,100 (plus “dues” of \$175 that DRI

1 tacks on).

2 Over 10 years, DRI consumers shell out roughly \$46,000 (\$26,000 up front, \$2,000 a  
3 year) for their annual vacation rights. That's an effective annual average of \$4,600. \$650  
4 *per day* for a 1-week vacation. \$460 *per day* for a 10-day vacation.

5 DRI certificates are being *given away* on the Internet to anyone willing to take on the  
6 assessment obligation. Their worth on the secondary market is exactly *zero*—a valuation  
7 strongly supported by rational economic analysis. The term “blue sky” originated in Kansas  
8 in the early 1900s to describe investment opportunities in which promoters “would sell  
9 building lots in the blue sky in fee simple.” That description fits Zwicky’s timeshare  
10 investment perfectly. The bargain to consumers offered by DRI is by all appearances  
11 illusory.

12 The organizational structure of this enterprise is a spider’s web of conflicting  
13 interests. The DRI-dominated Board (with fiduciary duties to members) retains a DRI  
14 affiliate as property manager (with fiduciary duties to members) under management  
15 agreements having uniquely lucrative terms *never fully disclosed*. DRI, in its dual capacity  
16 as developer, owns or controls substantial unsold inventory of units that it rents to the  
17 public. But DRI does not pay the same assessments per unit that private owners pay.<sup>1</sup>  
18 Defendant has refused to intelligibly and meaningfully disclose the basis for determination  
19 of DRI’s share of contributions towards common expenses.

### 20 **Purpose and Focus of Requested Inspection**

21 As explained, Zwicky seeks to focus on two general questions that *directly relate* to  
22 the potential excessiveness of member assessments, and that *directly relate* to the  
23

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24  
25 <sup>1</sup> For example, the Second Amended and Restated Premier Vacation Collection Membership  
26 Plan states that “Capital Assessments shall be levied among all of the Memberships ... *other than*  
*those owned or held for sale by Seller and its affiliates* ... in the same proportions as are  
Maintenance Fees.” *Id.*, §5.05; *emphasis added*.

1 consequent total loss of his investment in DRI points: (1) What is the actual total amount of  
2 DRI's property management fee (including overhead reimbursement), and what do the  
3 multiple relevant agreements that the Board approved say? (2) Is DRI paying its fair share  
4 of common expenses for the many units it owns or controls (and rents to the public without  
5 accounting to the Association)?

6 Defendant asserts that Plaintiff's true purpose is "avoidance of [his] responsibility to  
7 pay overdue maintenance assessments totaling more than \$13,000." Response at p.13. That  
8 is disingenuous. At the onset of this litigation, Zwicky was offered a walkaway settlement  
9 under which his overdue maintenance assessments would be waived. Zwicky refused.<sup>2</sup>  
10 Moreover, the claim that Zwicky is seeking through this action to "bully" the Association  
11 (*id.*) is curious, given that the Association is an arm of DRI, a NYSE-listed company.  
12 Zwicky is a retired postal worker.

### 13 Potential Litigation a Proper Purpose

14 Investigating management practices for legal wrongdoing is a quintessential proper  
15 purpose. *Tucson Gas & Elec. Co. v. Schantz*, 5 Ariz. App. 511, 513-14, 428 P.2d 686, 688-  
16 89 (1967) ("[T]he right of a stockholder extends to all books, papers, contracts, minutes or  
17 other instruments from which he can derive any information that will enable him to protect  
18 his interest."). Inspecting corporate records with potential future litigation in mind—  
19 litigation that would "protect [Zwicky's] interest" (*Id.*) and the interests of fellow  
20 Association members—is also completely proper. *Seinfeld v. Verizon Commc'ns, Inc.*, 909  
21 A.2d 117, 121 (Del. 2006) ("It is well established that a stockholder's desire to investigate  
22 wrongdoing or mismanagement is a 'proper purpose'."); 5A Fletcher Cyc. Corp. § 2225  
23 ("The right of a shareholder to inspect the books is not improper where the object may be to  
24

25 \_\_\_\_\_  
26 <sup>2</sup> This disclosure is legally and ethically proper. See *Hernandez v. State*, 203 Ariz. 196,  
199–200, ¶ 14, 52 P.3d 765, 768–69 (2002) (evidence of settlement for impeachment purposes not  
barred by Rule 408; properly admitted to avoid misleading jury).

1 commence an action against ... the officers or the corporation to correct abuses.”).

2         Zwicky, it must be remembered, has a *fundamental right* to inspection. 5A Fletcher  
3 Cyc. Corp. § 2213. The Board has a correlative *fundamental duty* of reasonable disclosure.  
4 When the board and executives of *any organization* entrusted with the financial interests of  
5 its members attempt to cloak the organization’s essential affairs in secrecy, as Defendant  
6 does here, then there can be no accountability and no effective legal recourse for members  
7 victimized by management abuses. 5A Fletcher Cyc. Corp. § 2213 (“Those in charge of the  
8 company may be guilty of gross incompetence or dishonesty for years and escape liability if  
9 the shareholders cannot inspect the records and obtain information.”).

10         These same policies extend to Zwicky’s request for a limited list of owners. 5A  
11 Fletcher Cyc. Corp. § 2225 (“Shareholders may inspect shareholders' lists for the purpose of  
12 informing other shareholders concerning suits that they have brought to ascertain whether  
13 any of them desire to join the action.”). Quoting the Supreme Court of Delaware:

14                 Horton seeks in good faith to solicit the support of other  
15 similarly situated Compaq stockholders, not only to seek  
16 monetary redress for their individual economic injuries, but also  
17 to prevent further acts of fraud or mismanagement from  
18 disrupting the fair market value of Compaq's stock. These goals  
19 are consistent with ... [proper] purposes that have been  
20 previously upheld by our courts....

21                 [*I*]nsofar as law and policy require corporations and their  
22 agents to answer for the breaches of their duties to shareholders,  
23 Compaq has no legitimate interest in avoiding the payment of  
24 compensatory damages....

25                 Compaq's contention that Horton's purpose is contrary to  
26 the best interests of the corporation and its current stockholders  
is both speculative and specious. Any harm that may accrue to  
the corporation as a result of releasing the list is too remote and  
uncertain to warrant denial of the stockholder's statutory right to  
inspection. If anything, the corporation and its stockholders, as  
well as public policy, will best be served by exposure of the  
fraud, if that is the case, and restoration of the stock to a value

1 set by a properly informed market.

2 *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 4-5 (Del. 1993).<sup>3</sup>

3 Contrary to Defendant's argument (Response at p. 11-12), Plaintiff's purpose is not  
4 "hostile" to the *Association*. It may very well be "hostile" to the existing Board and to DRI,  
5 but only if the evidence reveals that they have exploited or cheated members. If they have  
6 nothing to hide, they have nothing to fear. If wrongdoing is uncovered, the Association and  
7 all its members will benefit.

8 **Proper Purpose: Burden of Proof**

9 Defendant states that "Mr. Zwicky has not alleged or identified any factual or legal  
10 basis for any alleged fraud or wrongdoing. This is simply a fishing expedition." Response at  
11 12. Zwicky, after all, agreed that his assessments were subject to change at the discretion of  
12 the Board. That they are now over \$2,000 a year is just the way it is. A deal is a deal.  
13 Response at p.2. But Zwicky has shown that these costs have reached such extreme levels  
14 that he has been deprived of the benefit of his bargain. He has also shown good reason to  
15 question the legal validity of these exorbitant charges. There is good reason to question  
16 whether these assessments have been levied by the Board in a fair, honest, and  
17 commercially reasonable manner.<sup>4</sup>

18  
19 <sup>3</sup> Undersigned counsel is mindful of prohibitions on direct *solicitation* imposed by Model  
20 Rule 7.2. But "informing" other members of this lawsuit is not improper, and direct communication  
21 with other members' counsel is not improper.

22 <sup>4</sup> Defendant also vaguely asserts that the increases were necessary to put the Association  
23 back on sound financial footing after a bankruptcy. Response, at p.2-3. But *the Association* (i.e.,  
24 the Premiere Vacation "Club," as it was then known) was never a debtor in the Chapter 11 and was  
25 "not affected" by the bankruptcy. **Pltf. Counterstatement of Facts, ¶ 10** (quoting **Response**  
26 **Exhibit B**, Arizona Department of Real Estate Timeshare Disclosure Report by Premiere Vacation  
Club). DRI earned more than \$90 million in management fees in both 2009 and 2010 (when DRI  
acquired then-bankrupt ILX Resorts); and DRI currently has a market capitalization of \$1.8 billion.  
**Pltf. Counterstatement of Facts, ¶ 10**. The questionable overhead-shifting amendments to DRI's  
management agreements, approved by DRI-dominated boards, earned DRI an additional \$30  
million *at the associations' expense*. **Pltf. Statement of Material Facts, ¶ 14**.

1 The required quantum of proof in an inspection-right enforcement action was  
2 thoughtfully discussed in *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 122 (Del.  
3 2006).

4  
5 A stockholder is not required to prove by a  
6 preponderance of the evidence that waste and [mis]management  
7 are actually occurring. Stockholders need only show, by a  
8 preponderance of the evidence, a credible basis from which the  
9 Court of Chancery can infer there is possible mismanagement  
10 that would warrant further investigation—a showing that may  
ultimately fall well short of demonstrating that anything wrong  
occurred. That threshold may be satisfied by a credible  
showing, through documents, logic, testimony or otherwise, that  
there are legitimate issues of wrongdoing.

11 Although the threshold for a stockholder in a [statutory  
12 inspection] proceeding is not insubstantial, the “credible basis”  
13 standard sets the lowest possible burden of proof. The only way  
14 to reduce the burden of proof further would be to eliminate any  
15 requirement that a stockholder show some evidence of possible  
16 wrongdoing. That would be tantamount to permitting inspection  
based on the “mere suspicion” standard.... However, such a  
standard has been repeatedly rejected as a basis to justify the  
enterprise cost of an inspection.

17 In Delaware and elsewhere, the “credible-basis-from-  
18 some-evidence” standard is settled law. . . .

19 *Seinfeld*, 909 A.2d at 123-24; *internal citations*, footnotes, omitted.<sup>5</sup>

20 This liberal standard facilitates performance of a lawyer’s Rule 11 duties, particularly  
21 when the evidence is potentially complex and within the exclusive control of the  
22 organization. The lawyer can thus responsibly investigate the facts before commencing  
23 substantive litigation. Cf., *Louisiana Mun. Police Employees' Ret. Sys. v. Pyott*, 46 A.3d  
24 313, 348-50 (Del. Ch. 2012) (criticizing lawyers filing precipitous shareholder derivative

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25 <sup>5</sup> Just as the Court should not hold that a “credible basis” exists solely by virtue of an  
26 attorney’s legal arguments, neither should the Court hold there is an *absence* of a “credible basis”  
based upon lawyer rhetoric.

1 suits in order to claim “first-to-file” preference as designated counsel; specifically criticizing  
2 failure to file inspection actions as part of their Rule 11 due diligence), *rev'd oth. grnds. sub*  
3 *nom. Pyott v. Louisiana Mun. Police Employees' Ret. Sys.*, 74 A.3d 612 (Del. 2013).

4 Plaintiff has shown all that he can show, and all that he needs to show, to enforce his  
5 inspection rights. It may be true, as Defendant suggests, that no substantive wrongdoing has  
6 occurred. On the other hand, the evidence may show that Zwicky and thousands of other  
7 consumers are being victimized by egregious fraud—that they indeed purchased “building  
8 lots in the blue sky in fee simple.”

### 9 “Preemption”

10 Common law inspection rights extend not only to Arizona corporations (*Schantz*, 5  
11 Ariz. App. at 513-514, 428 P.2d at 688), but to property owners associations. Restatement  
12 (Third) of Property (Servitudes) §§ 6.13(1)(d), 6.20(7) (2000).

13 Defendant argues that the timeshare statute preempts these common law rights.  
14 Response at p.12. That simply misstates the law. *Schantz*, 5 Ariz. App. at 513-14, 428 P.2d  
15 at 688 (“Th[e] common law right of inspection is a remedial right which exists  
16 independently of statute. Statutes providing for a shareholder's right of inspection have been  
17 construed as enlarging or extending the common law right rather than as a restriction or  
18 abrogation of the right of inspection.”); accord (and cited in *Schantz*): 18 Am.Jur.2d,  
19 Corporations § 179; 18 C.J.S. Corporations § 502; 5 Fletcher, Cyclopedic Corporations §  
20 2215. Indeed the timeshare inspection statute specifically preserves the common law right.  
21 A.R.S. § 33-2209(D)(2); accord, A.R.S. § 10-1602(E)(2) (general corporations); and § 10-  
22 11602(D)(2) (nonprofits).

### 23 Board’s Purported Authority to Block Inspection

24 Defendant contends that the Board has essentially unreviewable discretion, under the  
25 business judgment rule, to dishonor a member’s request for inspection. Response at p.8-10.  
26 Defendant misscites, as authority, a case relating to the *governmental* discretionary power to

1 terminate certain employees (*White v. Superior Court In & For Pima Cty.*, 25 Ariz. App.  
2 438, 544 P.2d 262 (1975)). Unsurprisingly, Defendant cites no case from any jurisdiction  
3 holding that a board is the ultimate arbiter of its own claim to secrecy.

#### 4 **Futility of Formal Submission to Board for Supplemental Requests**

5 Defendant correctly points out that Zwicky did not formally submit his subsequent,  
6 more extensive requests to the Board. However, dismissing or staying this action pending  
7 “official” presentation of Zwicky’s modified requests to the Board, to achieve strict  
8 procedural compliance with the inspection, statute would be a meaningless ritual. Cf., e.g.,  
9 *Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 650 (7th Cir.1996) (exhaustion of  
10 administrative remedies excused if clearly shown to be futile). The Board has already  
11 reviewed, and already rejected, Zwicky’s later requests that were communicated through  
12 counsel. No good purpose would be served by “official” submissions to the Board for  
13 review of the supplemental requests. It would be an exercise in futility.

14 Insisting upon technical compliance with statutory procedures for inspection requests  
15 would be particularly inappropriate because Zwicky’s rights to inspection do not depend for  
16 their existence upon any statute, and are independently grounded in the common law.

#### 17 **Scope of Disclosures: Legal Standard**

18 When it comes to inspection, the scope of the right should be coextensive with the  
19 need. Under Arizona law, Zwicky is entitled to “all books, papers, contracts, minutes or  
20 other instruments from which he can derive *any information that will enable him to protect*  
21 *his interest.*” *Schantz*, 5 Ariz. App. at 513, 428 P.2d at 688 (*emphasis added*), citing 5  
22 Fletcher, *Cyclopedia Corporations* § 2239. This is a broad discretionary standard that  
23 appears similar to the discovery standard of Rule 26(b)(1)(a); it is clearly not one of strict  
24 evidentiary relevancy. Accord: *Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 918 (Del.  
25 Ch. 2007) (Where an inspection action is “based on alleged corporate wrongdoing ... the  
26 stockholder should be given enough information to effectively address the problem....”).

1 Judges should have “wide latitude in determining the proper scope of inspection,” and  
2 should “tailor the inspection to the stockholder's stated purpose.” *Id.*

3 **Scope of Disclosures: Zwicky’s Needs**

4 Defendant complains that Plaintiff has modified his requests over time. Response at  
5 p. 7 (suggesting that Plaintiff’s requests have been a “moving target”). That is true. But it  
6 is also true that the documents Defendants provided in the beginning do not adequately  
7 answer the essential questions.

8 The generalized summaries thus far provided by Defendant do not show the *total*  
9 amount of property management fees paid to DRI (i.e., the *duplicative* percentage-fees  
10 charged *on* both the Association- and resort-levels), nor do they provide any specifics  
11 concerning the amounts and individualized descriptions of the items of internal overhead  
12 that DRI passed through as common expenses (pursuant to a change in policy and  
13 modification of the management agreements)—even though management performs services  
14 for DRI’s *separate* operations as hotelier at each resort, the proceeds of which are not  
15 credited to common revenues of the Association. DRI rents unoccupied units out to the  
16 public, without accounting to the Association for these revenues. **Pltf. Counterstatement**  
17 **of Facts, ¶3.**

18 In fact Defendant has *never disclosed* any of the management agreements between  
19 DRI and the Association (or between DRI and the various individual resorts). See  
20 Restatement (Third) of Property (Servitudes) § 6.20(7) (2000) (duty to disclose “any ...  
21 agreement entered into by the association” with developer).

22 Moreover, it is impossible to determine whether DRI is paying an equitable share of  
23 overall expenses within the system (a somewhat complex, multifactorial analysis). Zwicky  
24 was given a *summary* of apportionment of common expenses between DRI (as developer)  
25 and private owners, but that summary is generalized, opaque and unverifiable. To do a  
26 proper review Plaintiff needs to know, as to *each constituent Resort*, how many units DRI



1 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of February, 2016.

2 PHELPS & MOORE, PLC

3  
4 By /s/ Jon L. Phelps \_\_\_\_\_

5 Jon L. Phelps  
6 4045 East Union Hills Drive  
7 Suite A-102  
8 Phoenix, Arizona 85050  
9 Counsel for Plaintiff

10 **ORIGINAL** of the foregoing efiled on  
11 this the 1<sup>st</sup> day of February, 2016;

12 **COPY** of the foregoing delivered via azturbocourt.gov  
13 on this the 1<sup>st</sup> day of February, 2016 to:

14 The Honorable John Hannah  
15 Northeast Regional Center  
16 18380 N. 40<sup>th</sup> Street  
17 Phoenix, Arizona 85032

18 **COPY** of the foregoing delivered via U.S. mail  
19 on this the 1<sup>st</sup> day of February, 2016 to:

20 John E. DeWulf  
21 Katherine DeStefano  
22 Coppersmith Brockelman, PLC  
23 2800 North Central Avenue, Suite 1200  
24 Phoenix, Arizona 85004  
25 Counsel for Defendant

26 By /s/ Kelly Naddaff \_\_\_\_\_

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# **EXHIBIT A**

1                   LAW OFFICES  
2                   **PHELPS & MOORE**  
3                   PROFESSIONAL LIMITED LIABILITY COMPANY  
4                   4045 EAST UNION HILLS DRIVE  
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10                  Attorneys for Plaintiff Norman Zwicky

11                   **THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12                   **IN AND FOR THE COUNTY OF MARICOPA**

13                  NORMAN ZWICKY,

14                   Plaintiff,

15                  vs.

16                  PREMIERE VACATION COLLECTION  
17                  OWNERS ASSOCIATION, f.k.a. Premiere  
18                  Vacation Club, an Arizona nonprofit  
19                  corporation,

20                   Defendant.

Case No. CV2015-051911

**PLAINTIFF'S INITIAL RULE 26.1  
DISCLOSURE STATEMENT**

**(ASSIGNED TO THE HONORABLE  
JOHN HANNAH)**

21                   **PLAINTIFF'S INITIAL DISCLOSURE STATEMENT**

22                  Pursuant to 26.1, Arizona Rules of Civil Procedure, Plaintiff Norman Zwicky hereby  
23                  provides the following initial disclosures:

24                   **1. Factual basis of the claim.**

25                  The claim in this case consists entirely in the enforcement of Plaintiff's rights to  
26                  inspect the books and records of the Defendant Premier Vacation Collection Owners  
Association for the purpose of determining whether the fiscal affairs of the Association have  
been managed lawfully. The facts supporting his claim to entitlement are that Plaintiff is a  
member of the Association; that he acquired his membership ("points") for consideration  
exceeding \$26,000; that his points are essentially worthless and he is saddled with a  
perpetual liability for dues and assessments having illusory economic value; and that his

1 avowed purpose in seeking to inspect the records is to investigate the fiscal affairs of the  
2 Association, and the management practices its executives and property management  
3 company, for possible unlawfulness.

4 **2. Legal basis for claim.**

5 Plaintiff's inspections rights are based upon the common law and (independently)  
6 upon Arizona statutes. The common law recognizes that "a shareholder has a fundamental  
7 right to be intelligently informed about corporate affairs." 5A Fletcher Cyc. Corp. § 2213.  
8 "[T]he right of a stockholder extends to all books, papers, contracts, minutes or other  
9 instruments from which he can derive any information that will enable him to protect his  
10 interest." *Tucson Gas & Elec. Co. v. Schantz*, 5 Ariz. App. 511, 513-14, 428 P.2d 686, 688-  
11 89 (1967). 5A Fletcher Cyc. Corp. § 2213. "Those in charge of the company may be guilty  
12 of gross incompetence or dishonesty for years and escape liability if the shareholders cannot  
13 inspect the records and obtain information." 5A Fletcher Cyc. Corp. § 2213.

14 This common law right extends to members of an association of owners of any type  
15 of common interest real estate community (whether or not incorporated, and whether for-  
16 profit or non-profit). Restatement (Third) of Property (Servitudes) § 6.13(1)(d) (2000) ("In  
17 addition to duties imposed by statute and the governing documents, the association has the  
18 following duties to the members of the common-interest community: ... (d) to provide  
19 members reasonable access to information about the association, the common property, and  
20 the financial affairs of the association."). Under basic fiduciary principles, these common  
21 law disclosure duties extend to those serving as property management company (agent) for  
22 the Association. Restatement (Second) of Agency § 382 (1958) (An "agent is subject to a  
23 duty to keep, and render to his principal, an account of money ... which he has received or  
24 paid out on behalf of the principal."). In this case the property management company is  
25 Diamond Resorts International or a subsidiary.

26 Statutes governing inspection rights do not supplant or supersede common law

1 inspection rights. *Tucson Gas & Elec. Co.*, 5 Ariz. App at 513-514, 428 P.2d at 688-89  
2 (“Th[e] common law right of inspection is a remedial right which exists independently of  
3 statute. Statutes providing for a shareholder's right of inspection have been construed as  
4 enlarging or extending the common law right rather than as a restriction or abrogation of the  
5 right of inspection.”(internal citations omitted)); 5A Fletcher Cyc. Corp. § 2215.10 (stating  
6 that inspection statutes are not merely declaratory of common law, but typically “enlarge the  
7 right of inspection and remove certain common-law restrictions, thus rendering the right  
8 consistent and coextensive with the shareholder's rights, as a common owner of the  
9 property, books and papers of the corporation”). The statutes specifically preserve these  
10 common law rights. A.R.S. § 10-11602(D)(2) (non-profit corporations; recognizing “[t]he  
11 power of a court, independently of chapters 24 through 40 of this title, to compel the  
12 production of corporate records for examination on proof by a member of proper purpose”);  
13 A.R.S. § 33-2209(D)(2) (timeshare associations; preserving “[t]he power of a court,  
14 independently of this chapter, to compel the production of records for examination on proof  
15 by an owner of proper purpose”).

16 Inspection rights are codified at A.R.S. §§ 10-11602, *et seq.* (non-profit  
17 corporations); A.R.S. § 33-2209 (timeshares; “any owner or any person designated by the  
18 owner in writing as the owner's representative may inspect and copy all financial and other  
19 records of the association or other managing entity that are directly related to the timeshare  
20 plan”). Because the Association wrongfully withheld access to the records upon Zwicky’s  
21 request (i.e., withheld records having sufficient detail allow for meaningful scrutiny), the  
22 cost of inspection and copying is to be borne by the Association. A.R.S. § 10-11604(A).

23 Plaintiff seeks the books and records for a proper purpose: To investigate whether he  
24 has been the victim of fraud, breach of fiduciary duty, or other wrongdoing and to thereby  
25 determine his legal rights and liabilities *vis-à-vis* the Association, the Board, and its  
26 manager. *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 121 (Del. 2006) (“It is well

1 established that a stockholder's desire to investigate wrongdoing or mismanagement is a  
2 'proper purpose.'"); 5A Fletcher Cyc. Corp. § 2223 ("The modern tendency of the courts is  
3 to permit shareholders to examine the books and records of the corporation for the purpose  
4 of ascertaining whether the business of the corporation has been properly conducted....").

5 **3. Witnesses whom the disclosing party expects to call at trial.**

6 Plaintiff Norman Zwicky, c/o Phelps & Moore, PLC, 4045 East Union Hills Drive,  
7 Suite A-102, Phoenix, Arizona 85050; tel. (602) 788-2089.

8 Any employee of Defendant, its agents, or affiliated companies that will be identified  
9 through the discovery process.

10 **4. Persons with knowledge.**

11 Unknown. The identities of the persons having knowledge of the transactions here in  
12 question is information exclusively available to Defendant (itself or through inquiry of its  
13 agent, the property management company).

14 **5. Plaintiff's expert witnesses.**

15 Plaintiff does not anticipate calling any expert witness in this matter.

16 **6. Computation and measure of damages.**

17 Plaintiff does not claim damages in this action. However, Plaintiff will seek  
18 attorneys' fees and costs of inspection pursuant to A.R.S. § 10-11604(C) and A.R.S. § 12-  
19 341.01(A). These are presently undetermined and undeterminable.

20 **7. Existence, location, custodian, and general description of any tangible**  
21 **evidence, relevant documents, or electronically stored information to be used at trial.**

22 Plaintiff anticipates that there will be no "trial." However, if there is a hearing  
23 conducted pursuant to A.R.S. § 10-11604, Plaintiff anticipates that he will introduce  
24 documents showing his membership in the Association through the purchase of 1300 points  
25 for approximately \$26,000 (**Exhibit A**); documents showing exorbitant assessments and  
26 dues billed to Plaintiff (**Exhibit B**); documents showing absence of significant fair market

1 value of points (**Exhibit C 1-3**); and Plaintiff's demand for inspection (**Exhibit D**).

2 **8. Description of documents relevant to subject matter.**

3 The categories of records relevant to the subject matter of this action (all within the  
4 exclusive custody and control of Defendant and its agent, the property management  
5 company, except as noted) are generally described as follows:

6 (a.) Articles of Amendment to Articles of Incorporation, Premier Vacation Club.

7 Already in Defendant's possession.

8 (b.) Bylaws (Restated), Premier Vacation Club. Already in Defendant's  
9 possession.

10 (c.) Second Amended and Restated Rules and Regulations, Premier Vacation  
11 Collection Owners Association, Inc. Already in Defendant's possession.

12 (d.) Purchase agreement and related documents showing Plaintiff's  
13 purchase of 1,300 points for \$26,395 in 2004. (Attached as **Exhibit A**.)

14 (e.) 2014 Assessment billing to Plaintiff. (Attached as **Exhibit B**.)

15 (f.) Documents showing lack of value of points in secondary market.

16 i. **Exhibit C-1**: Ad for sale of 6,000 points for \$1 (attached).

17 ii. **Exhibit C-2**: Ad for sale of 8,500 points for \$1 (attached).

18 iii. **Exhibit C-3**: eBay offer to give away 5,000 points (attached).

19 (g.) Demand for inspection, April 26, 2015. (Attached as **Exhibit D**.)

20 (h.) Public Report, amendment, or similar or related documents, filed with  
21 Arizona Department of Real Estate and any other jurisdiction covering  
22 Collection. Already in Defendant's possession.

23 (i.) Annual budgets, past 5 years (for Association and each constituent resort).  
24 Already in Defendant's possession.

25 (j.) All property management contracts between Diamond Resorts International or  
26 any subsidiary (hereinafter, collectively, "DRI") and the Association, any

1 modifications thereof, and any documents relating to or explaining the  
2 purpose of such modification. These documents are within Defendant's  
3 exclusive knowledge, possession and control.

4 (k.) All property management contracts between DRI and any Resort  
5 included within the Premier Collection, any modifications thereof, and any  
6 documents relating to or explaining the purpose of such modification. These  
7 documents are within Defendant's exclusive knowledge, possession and  
8 control.

9 (l.) All documents showing the nature, date, purpose, and amounts paid or owing  
10 to DRI by the Association as a management fee, reimbursement of overhead,  
11 or similar or related property management charge. These documents are  
12 within Defendant's exclusive knowledge, possession and control.

13 (m.) All documents showing the nature, date, purpose, and amounts paid or  
14 owing to DRI by any Resort included within the Premier Collection as a  
15 management fee, reimbursement of overhead, or similar or related property  
16 management charge. Already in Defendant's possession.

17 (n.) Documents showing the identities of the Board members of the  
18 Defendant and each constituent Resort, and their relationship (if any) with  
19 Diamond Resorts International. These documents are within Defendant's  
20 exclusive knowledge, possession and control.

21 (o.) All documents previously identified in Plaintiff's Amended Request for  
22 Production that will allow Plaintiff to determine, precisely and in full detail,  
23 the nature, amount and purpose of all **common expenses** as between private  
24 (non-DRI) owners and DRI. These documents are within Defendant's  
25 exclusive knowledge, possession and control.

26 (p.) All documents previously identified in Plaintiff's Amended Request

1 for Production that will allow Plaintiff to determine, precisely and in full  
2 detail, the basis of apportionment all **common expenses** as between private  
3 (non-DRI) owners and DRI. These documents are within Defendant's  
4 exclusive knowledge, possession and control.

5 (q.) All documents previously identified in Plaintiff's Amended Request  
6 for Production that will allow Plaintiff to determine, precisely and in full  
7 detail, the nature, amount and source of all **revenues** derived by operations of  
8 the Association, by any of its constituent Resorts, by any timeshare unit or  
9 "points" within each Resort, whether each of these is treated as **common**  
10 **revenues**, and if not how such revenues are allocated or apportioned as  
11 between or among DRI, the Association, the constituent Resort, and/or any  
12 individual owner. These documents are within Defendant's exclusive  
13 knowledge, possession and control.

14 (r.) Tax returns of the Defendant-Association, or for DRI (acting in its capacity as  
15 property management company of the Association, or as owner of timeshare  
16 units or points, or otherwise) for the past 4 years, including returns for income  
17 tax, sales tax, gross receipts tax, hotel tax, "transient lodger" tax, or similar or  
18 related tax returns relating to revenues from units within any constituent resort  
19 or points included within in the Association.

20 (s.) Documents previously identified in Plaintiff's Amended Request for  
21 Production that will allow Plaintiff to determine, precisely and in full detail,  
22 the actual number, basis for classification, and treatment (for legal and  
23 accounting purposes, including assessment liability) of all categories of  
24 ownership timeshare units or "points" within the Collection, and within each  
25 Resort— including Private (non-DRI affiliated) owners; DRI; non-occupied  
26 timeshare units or "points" in default; timeshare units or "points" owned or

1 controlled by the Association; and any other categories of ownership  
2 recognized by the Association. These documents are within Defendant's  
3 exclusive knowledge, possession and control.

4 (t.) Documents showing the identities of Association members who have  
5 complained that their assessments were unlawful or excessive, or claimed or  
6 alleged that the charges or operations of the Association were fraudulent  
7 (including documents relating to any litigation where the foregoing were or  
8 are at issue). These documents are within Defendant's exclusive knowledge,  
9 possession and control.

10 DATED this 5th day of October, 2015.

11 PHELPS & MOORE, PLC

12 By 

13 Jon L. Phelps  
14 4045 East Union Hills Drive  
15 Suite A-102  
16 Phoenix, Arizona 85050  
17 Counsel for Plaintiff

18 ORIGINAL sent via U.S. Mail this  
19 5th day of October, 2015 to:

20 Coppersmith Brockelman PLC  
21 John E. DeWulf  
22 2800 N. Central Avenue  
23 Suite 1200  
24 Phoenix, AZ 85004  
25 Counsel for Defendant

26 By: 