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10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
11 **MARICOPA COUNTY**

12 NORMAN ZWICKY, ) NO. CV2015-051911  
13 )  
14 Plaintiff, )  
15 ) **DEFENDANT’S RESPONSE TO**  
16 v. ) **PLAINTIFFS’ MOTION FOR**  
17 ) **SUMMARY JUDGMENT AND**  
18 PREMIERE VACATION COLLECTION ) **CROSS-MOTION FOR SUMMARY**  
OWNERS ASSOCIATION, f.k.a. Premiere ) **JUDGMENT**  
Vacation Club, an Arizona nonprofit )  
corporation, )  
) (Assigned to the Honorable John Hannah)  
Defendant. )  
)

19 Defendant Premiere Vacation Collection Owners Association (“PVCOA”) is entitled  
20 to summary judgment on Norman Zwicky’s documents and records requests. PVCOA has  
21 provided Mr. Zwicky with all documents and records requested in the Verified Complaint,  
22 thus mooting the lawsuit. In addition, PVCOA has provided all documents to which  
23 Mr. Zwicky may be entitled pursuant to A.R.S. § 33-2209, even though the Verified  
24 Complaint does not request them, and Mr. Zwicky is not entitled to any additional inspection  
25 of PVCOA’s financial records based on either statute or common law. Mr. Zwicky has  
26 failed and refused for years to pay the maintenance fees he owes as a member of PVCOA.  
27 This lawsuit is a fishing expedition to find some evidence of PVCOA’s wrongdoing. This  
28

1 Court should stop this course of action. Mr. Zwicky has been treated fairly and has already  
2 received all of the information to which he is entitled as a member of PVCOA. For that  
3 reason, there is no genuine dispute as to any material fact and PVCOA is entitled to  
4 judgment as a matter of law. This Response and Cross-Motion for Summary Judgment is  
5 supported by the following Memorandum of Points and Authorities and Defendant’s  
6 Controverting and Separate Statement of Facts in Response to Plaintiff’s Statement of Facts  
7 and in Support of Defendant’s Cross-Motion for Summary Judgment.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **Factual Background**

10 PVCOA is an Arizona nonprofit corporation and a timeshare owners’ association.  
11 Plaintiff Norman Zwicky is a member of PVCOA. Mr. Zwicky originally owned a timeshare  
12 interest in Kohl’s Ranch, which he converted to a points-based membership interest in the ILX  
13 Premiere Vacation Club in 2004. [Def.’s Separate Statement of Facts (“DSOF”) ¶ 1]  
14 Mr. Zwicky received \$18,900 for his original timeshare interest in Kohl’s Ranch, and paid an  
15 additional \$7,495 for his membership in the ILX Premiere Vacation Club. [DSOF ¶ 2] As a  
16 Platinum member of the ILX Premiere Vacation Club, Mr. Zwicky gained access to a variety of  
17 resort properties, rather than only the Kohl’s Ranch property. [DSOF ¶ 3] When he purchased  
18 his interest in the ILX Premiere Vacation Club, Mr. Zwicky acknowledged that “Members are  
19 required to pay annual dues or maintenance fees (“Maintenance Fees”) and may be subject to  
20 other types of special assessments.” [DSOF ¶ 4] The purchase agreement never promised that  
21 maintenance fees would remain what they were in 2004 in perpetuity. Instead, Mr. Zwicky  
22 acknowledged that “Maintenance Fees are established annually by the Club and are subject to  
23 change.” [DSOF ¶ 5] He also acknowledged that “Maintenance Fees are due in advance by  
24 January 1 of such year.” [DSOF ¶ 6]

25 Premiere Development Incorporated was the original developer of the ILX Premiere  
26 Vacation Club, and unsold inventory was sold through ILX Resorts Incorporated. [DSOF ¶ 7]  
27 In 2010, ILX Resorts went into bankruptcy, and a substantial portion of its assets were acquired  
28

1 by a subsidiary of Diamond Resorts Corporation, including unsold inventory of the Premiere  
2 Vacation Club, now known as the Premiere Vacation Collection. [DSOF ¶ 8] PVCOA has a  
3 management agreement with Diamond Resorts Management, Inc., an affiliate of Diamond  
4 Resorts International, Inc. (“DRI”). [DSOF ¶ 9] In order to avoid the financial problems that  
5 forced the original developer into bankruptcy, PVCOA has arranged for management services  
6 and assessed maintenance fees as necessary to continue to provide members with the same  
7 level of quality. [DSOF ¶ 10]

8 Mr. Zwicky has refused to pay his maintenance fee assessments for a number of years.  
9 Pursuant to the membership plan, maintenance assessments must be paid in advance at the  
10 beginning of the year. [DSOF ¶¶ 11-12] On June 6, 2013, PVCOA sent a final notice  
11 indicating a delinquent amount of \$7,522.64, including his 2013 assessments. [DSOF ¶ 13]  
12 On November 26, 2013, PVCOA sent a bill reflecting a past due balance of \$7,675.09, plus  
13 additional charges totaling \$2,178.09 for the 2014 assessments. [DSOF ¶ 14] At that time,  
14 PVCOA also provided him with a copy of the 2014 budget, showing revenues, expenses, and  
15 assessment calculations, as well as the 2014 Assessment Billing and Collection Policy. [DSOF  
16 ¶ 15] On November 20, 2014, PVCOA sent Mr. Zwicky a bill reflecting a past due balance of  
17 \$10,972.36, with additional charges for the 2015 assessments, totaling \$13,314.95. [DSOF  
18 ¶ 16] Mr. Zwicky has not paid these bills and now owes over \$13,000 in arrears. [DSOF ¶ 17]

19 On April 16, 2013, before he filed this lawsuit, Mr. Zwicky requested production of  
20 PVCOA’s Member Plans, Articles of Incorporation, Bylaws, and Rules and Regulations. In  
21 response to Mr. Zwicky’s request, PVCOA provided the following documents on May 1,  
22 2013:

- 23 • Second Amended and Restated Premiere Vacation Collection Membership Plan;
- 24 • Articles of Incorporation;
- 25 • Bylaws;
- 26 • Second Amended and Restated Rules and Regulations of Premiere Vacation Collection  
27 Owners Association, Inc.

1 [DSOF ¶ 19]

2 Then, also before filing this lawsuit, Mr. Zwicky requested from Diamond Resorts  
3 International a copy of the membership plans and rules and regulations in place in October  
4 2004. [DSOF ¶ 20] In a letter dated February 3, 2014, Patricia Rosado, Consumer and  
5 Regulatory Affairs Officer for Diamond Resorts International, responded to that request.  
6 [DSOF ¶ 21] Ms. Rosado explained that in 2010, ILX Acquisition, Inc., a subsidiary of  
7 Diamond Resorts International, acquired a substantial portion of the assets of ILX Resorts,  
8 including the rights as the seller of the Premiere Vacation Collection. [DSOF ¶ 22]  
9 Although PVCOA remained in place after the acquisition, there were adjustments to  
10 assessments that were necessary to avoid going into bankruptcy, as the original developer  
11 had. [DSOF ¶ 23] Ms. Rosado explained to Mr. Zwicky’s counsel that the historic 2004  
12 documents were not available to Diamond Resorts International, and that she had  
13 previously provided the available membership plans and rules and regulations. [DSOF ¶ 24]

14 On March 16, 2015, Mr. Zwicky sent a letter to Diamond Resorts International  
15 requesting information which was later requested in Paragraph 20 of the Verified Complaint,  
16 related to the allocation of Premiere Vacation Collection “points” and the amount paid by  
17 Diamond Resorts to PVCOA in the form of assessments. [DSOF ¶ 25] Mr. Zwicky filed  
18 this action on May 13, 2015, seeking production of these records as well as an order  
19 enforcing his inspection rights under A.R.S. § 10-11602, A.R.S. § 33-2209, and/or the  
20 common law. In connection with the lawsuit, Mr. Zwicky served formal document requests  
21 seeking documents and information far beyond what was requested in the Verified  
22 Complaint. In response to Mr. Zwicky’s discovery requests, and without conceding that he  
23 was entitled to any of the information sought based on A.R.S. § 10-11602, A.R.S. § 33-2209,  
24 and/or the common law, on August 31, 2015, PVCOA produced documents showing the  
25 allocation of sold and unsold points, maintenance fee calculations and assessment fees per  
26 point as requested by Paragraph 20 of the Complaint. Further, PVCOA produced its annual  
27 budget showing revenues and expenses. The documents produced were:

- 1 • Maintenance Fee Expense Report (PVCOA0001-02)
- 2 • Member Summary–Point Analysis (PVCOA0003)
- 3 • 2015 Maintenance Fee Calculation (PVCOA0004)
- 4 • 2015 Budget (PVCOA0005)

5 [DSOF ¶¶ 26-27] PVCOA has provided the information requested in the Verified  
6 Complaint, the information requested in Mr. Zwicky’s requests for production, and all of the  
7 information to which he is entitled as a member of PVCOA.

### 8 **Analysis**

9 Summary judgment is proper if, after viewing the evidence in the light most favorable  
10 to the nonmoving party, there is no genuine dispute as to any material fact and the moving  
11 party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme School v.*  
12 *Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990).

#### 13 **I. Mr. Zwicky is Not Entitled to any Declaratory Relief Recognizing His Inspection** 14 **Rights under A.R.S. § 10-11602, A.R.S. § 33-2209, or Common Law.**

15 Mr. Zwicky’s Verified Complaint seeks both (1) the production of records relating to  
16 ownership of membership points and maintenance assessments and (2) declaratory relief  
17 recognizing his inspection rights. Because PVCOA has already provided all of the  
18 documents requested in Mr. Zwicky’s Verified Complaint (and all of the documents and  
19 information he is legally entitled to), this action is now moot, and Mr. Zwicky is not entitled  
20 to judgment as a matter of law.

#### 21 **a. This Action is Moot Because PVCOA has Already Provided All Requested** 22 **Information.**

23 PVCOA has already provided all of the information and documents requested in  
24 Paragraph 20 of the Verified Complaint, rendering this action moot. A matter may be  
25 dismissed as moot when the court’s action will have no effect on the parties. *Cardoso v.*  
26 *Soldo*, 230 Ariz. 614, 617, 277 P.3d 811, 814 (App. 2012). This inquiry is a matter of  
27 prudential or judicial restraint subject to the exercise of the court’s discretion. *Id.* The court  
28 may decide to consider issues that have become moot when the present an issue of great

1 public important or one capable of repetition yet evading review. *Id.* Neither of those  
2 circumstances applies here. The court’s action will have no effect on the parties because  
3 Mr. Zwicky has already been provided with all documents requested in the Verified  
4 Complaint. The fact that he requested additional documents in subsequent document  
5 requests or his Rule 26.1 Initial Disclosures does not change the fact that he has already  
6 received the relief sought in the Verified Complaint.

7 Mr. Zwicky attempts to prolong this matter by seeking discovery of documents  
8 beyond what was sought in the Verified Complaint, in essence asking PVCOA to chase a  
9 moving target. Mr. Zwicky now claims to have been denied documents he never even  
10 requested before filing this litigation. The declaration of counsel attached to Mr. Zwicky’s  
11 Statement of Facts in support of his Motion for Summary Judgment seeks documents beyond  
12 those requested in the Verified Complaint. [PSOF Ex. M ¶¶ 5-8] The scope of discovery is  
13 limited to matters which are “relevant to the subject matter involved in the pending action”  
14 or “reasonably calculated to lead to the discovery of admissible evidence.” Ariz. R. Civ. P.  
15 26(b)(1)(A). The additional documents requested in discovery do not illuminate the scope of  
16 Mr. Zwicky’s record inspection rights. They simply constitute additional relief beyond what  
17 was actually sought in the Verified Complaint. As such, the discovery requests are improper  
18 and cannot expand the scope of the relief sought in this action. Because Mr. Zwicky has  
19 already received all the documents requested in the Verified Complaint, he is not entitled to  
20 judgment as a matter of law, and this action should be dismissed.

21 **b. A.R.S. § 10-11602 does not apply to timeshare associations like PVCOA.**

22 Mr. Zwicky invokes A.R.S. § 10-11602 as authority for his request to inspect  
23 records. But he is not entitled to record inspection rights under A.R.S. § 10-11602 because  
24 that section “does not apply to timeshare plans or associations that are subject to title 33,  
25 chapter 20.” A.R.S. § 10-11602(H). By its express terms, A.R.S. § 10-11602 applies to  
26 inspection of records by members of nonprofit corporations, but does not apply to timeshare  
27 associations. PVCOA is a timeshare association that is subject to title 33, chapter 20 of the  
28

1 Arizona Revised Statutes because it is an “organized body consisting solely of the owners  
2 of timeshare interests in a timeshare plan.” A.R.S. § 33-2202(3). For that reason, A.R.S.  
3 § 10-11602 is inapplicable and does not provide Mr. Zwicky with any record inspection  
4 rights.

5 Further, even if A.R.S. § 10-11602 did apply to PVCOA, which it does not, it does  
6 not provide unlimited access to PVCOA’s business and financial records. The statute only  
7 provides for inspection of a limited set of documents, including articles of incorporation,  
8 bylaws, resolutions related to membership, meeting minutes, communications with  
9 members, a list of officers and directors, the most recent annual report, and member  
10 agreements. A.R.S. §§ 10-11601(E) & 10-11602(A). This list does not include the wide-  
11 ranging financial information Mr. Zwicky has requested. PVCOA has already provided  
12 Mr. Zwicky with the documents identified in this list. Thus, even though A.R.S. § 10-11602  
13 does not apply, Mr. Zwicky has received all the documents to which he would be entitled  
14 under that statute. Instead of A.R.S. § 10-11602, the applicable statute is A.R.S. § 33-2209,  
15 which provides record inspection rights to timeshare owners when certain statutory  
16 conditions are met.

17 **c. Mr. Zwicky is not entitled to additional record inspection rights under**  
18 **A.R.S. § 33-2209.**

19 A.R.S. § 33-2209 provides timeshare owners with certain statutory rights to inspect  
20 the records of a timeshare association. However, it does not provide Mr. Zwicky relief  
21 here. First, he does not have inspection rights under A.R.S. § 33-2209 for the records  
22 requested in Paragraph 20 of the Verified Complaint because they do not fall within the  
23 scope of that section. Second, Mr. Zwicky has not complied with the statutory  
24 requirements for obtaining the information sought. Third, the statute gives PVCOA  
25 discretion in this case to limit the production and inspection. A.R.S. § 33-2209(A) states:

26 Except as provided in this section and § 33-2210, any owner or any person  
27 designated by the owner in writing as the owner’s representative may inspect  
28 and copy all financial and other records of the association or other managing  
entity that are directly related to the timeshare plan at the location where such  
records are normally kept, or at another location reasonably specified by the

1 association or other managing entity, during normal business hours.  
2 The statute provides that the board or managing entity for the timeshare association “is  
3 responsible for determining the appropriateness of any owner request under this section,  
4 and shall provide a written response within thirty days after receipt of the request.” A.R.S.  
5 § 33-2209(C). PVCOA responded to Mr. Zwicky’s initial request in April 2013 within 30  
6 days, providing the requested documents in full. [DSOF ¶ 19] In response to subsequent  
7 requests during this litigation, PVCOA again provided what was requested. [DSOF ¶ 27]  
8 Significantly, pursuant to its duties, PVCOA has the discretion to determine “the  
9 appropriateness of any owner request.” A.R.S. § 33-2209. Pursuant to that discretion,  
10 PVCOA determined which documents were “directly related to the timeshare plan” and  
11 appropriate to disclose under the circumstances. Therefore, not only has Mr. Zwicky  
12 received all the information he is entitled to receive pursuant to A.R.S. § 33-2209, rendering  
13 this action moot, he has not demonstrated he is entitled to anything more.

14 Mr. Zwicky asserts that he is entitled to rifle through PVCOA’s files without any  
15 particular document in mind, just in case he manages to turn up evidence of some kind of  
16 wrongdoing. This is not what A.R.S. § 33-2209 provides, nor is it what the legislature  
17 intended to provide. The statute limits the documents available for inspection to those  
18 “financial and other records of the association or managing entity that are directly related to  
19 the timeshare plan” and also allows the board or managing entity to determine the  
20 appropriateness of a particular request. PVCOA has determined that it is reasonable to  
21 provide Mr. Zwicky with the financial information and documents already provided, but is  
22 not obligated by statute to turn over any and all business records.

23 In addition, Mr. Zwicky has not complied with the statutory conditions for a proper  
24 request, including the condition that the request is made in good faith and for a proper  
25 purpose. The right to inspect records depends on the following conditions:

- 26 1. The owner’s request is in writing and is received by the managing entity in  
27 care of the person and at the address designated by the managing entity for  
receipt of such requests.
- 28 2. The owner’s written request is made in good faith and for a proper purpose.

- 1 3. The owner's written request describes with reasonable particularity the
- 2 owner's purpose and the records the owner desires to inspect.
- 3 4. The records are directly connected with the owner's purpose.
- 4 5. The owner agrees in writing not to use the records for any purpose other
- 5 than the purpose described in the written request.

6 A.R.S. § 33-2209(B). Mr. Zwicky's records requests do not describe with reasonable  
7 particularity the owner's purpose, and the requests were not made in good faith and for a  
8 proper purpose. The letters dated April 16, 2013 and March 16, 2015 do not describe the  
9 owner's purpose in making the request. [DSOF ¶¶ 18 & 25; Wheeler Decl. ¶¶ 22-23, 31 &  
10 Ex. D; Verified Compl. Ex. D] The letter dated January 16, 2014 requests copies of the  
11 2004 membership plans and rules and regulations, threatening a class action lawsuit and  
12 complaining that the assessment fee was increased in 2010 "without justification." [DSOF  
13 ¶ 20; Wheeler Decl. ¶ 26 & Ex. F] Coupling the request with a demand that the  
14 maintenance fee assessments revert to those before ILX Resorts went into bankruptcy does  
15 not constitute a good faith proper purpose, and is not directly connected to the 2004  
16 membership plans and rules and regulations.

17 Mr. Zwicky has not alleged that PVCOA has engaged in any wrongdoing or  
18 financial mismanagement, and indeed, there is no basis for any such allegations. Rather, he  
19 admits that he is hoping to find evidence that PVCOA has violated "fiduciary principles of  
20 commercial reasonableness and good faith." (Motion, p. 7.) A fishing expedition is not a  
21 proper purpose. Mr. Zwicky has refused to pay his maintenance fee assessments without  
22 any legal basis, simply because he personally feels that they are too high. His efforts are  
23 apparently aimed at justifying his non-payment. Mr. Zwicky's record inspection requests  
24 failed to identify any good faith proper purpose, and Mr. Zwicky has failed to show that the  
25 records are directly connected with the owner's purpose. In addition, Mr. Zwicky has not  
26 agreed in writing not to use the records for any purpose other than the purpose described in  
27 the written request. Because the statutory conditions were not met, Mr. Zwicky is not  
28 entitled to record inspection rights under A.R.S. § 33-2209. Further, as noted previously,  
PVCOA has the discretion to determine the appropriateness of any request under the statute.

1 PVCOA has determined that under the circumstances, it was appropriate to disclose records  
2 reflecting sold and unsold points, maintenance fee calculations, assessment information and  
3 the annual budget showing revenues and expenses. PVCOA’s determinations should not be  
4 disturbed. Where a statute vests complete discretion in an entity or authority to take certain  
5 action, the courts will not disturb the exercise of that discretion. *See White v. Superior*  
6 *Court In & For Pima Cty.*, 25 Ariz. App. 438, 440, 544 P.2d 262, 264 (1975) (concluding  
7 that statute constitutionally vested complete discretion in the appointing authority to  
8 terminate plaintiff’s employment).

9 **d. The Relief Sought in Plaintiff’s Verified Complaint is Barred by the**  
10 **Business Judgment Rule.**

11 “The business judgment rule presumes that ‘in making a business decision the  
12 directors of a corporation acted on an informed basis, in good faith and in the honest belief  
13 that the action taken was in the best interest of the company.’” *United Dairymen of Arizona*  
14 *v. Schugg*, 212 Ariz. 133, 140, 128 P.3d 756, 763 (App. 2006) (quoting *Blumenthal v. Teets*,  
15 155 Ariz. 123, 128, 745 P.2d 181, 186 (App. 1987)). PVCOA’s directors have acted on an  
16 informed basis, in good faith and in the honest belief that the action taken was in the best  
17 interest of the company when providing information to PVCOA’s members (including  
18 Plaintiff) and when managing PVCOA’s business. Pursuant to A.R.S. § 33-2209, PVCOA  
19 has the discretion to determine the reasonableness of records requests, and PVCOA has  
20 determined which documents it is reasonable to provide to members in good faith. Those  
21 documents have already been provided to Mr. Zwicky. PVCOA also determines members’  
22 maintenance assessments in order to ensure financial sustainability and to provide members  
23 with high quality resort experiences and excellent hospitality. The business judgment rule  
24 presumes that in assessing fees or disclosing financial and business records to members, the  
25 directors of PVCOA acted on an informed basis, in good faith and in the honest belief that  
26 the action taken was in the best interest of the company.

27 . . .

1           **e. Mr. Zwicky is not entitled to additional inspection rights based on**  
2           **common law.**

3           Mr. Zwicky also asserts that he is entitled to inspect PVCOA’s records based on the  
4 common law, but his inspection rights are limited to those provided by statute. Mr. Zwicky  
5 has not identified any Arizona case law recognizing a common law right of inspection for  
6 members of nonprofit corporations or timeshare associations, and Zwicky’s citations to  
7 authority related to shareholders’ rights to inspect the books and records of a for-profit  
8 corporation are inapposite. Furthermore, the statutory conditions in A.R.S. § 33-2209  
9 preempt any common law right of inspection. Because the common law right of inspection  
10 does not include the statutory conditions discussed above, allowing members of a timeshare  
11 association to inspect any and all records of the association without complying with the  
12 statutory conditions is inconsistent with state law.

13           “[I]t is not the function of the courts to rewrite statutes. The choice of the appropriate  
14 wording rests with the Legislature, and the court may not substitute its judgment for that of  
15 the Legislature.” *City of Phoenix v. Butler*, 110 Ariz. 160, 162, 515 P.2d 1180, 1182 (1973)  
16 (citation omitted). Because recognizing a common law right of inspection for members of a  
17 timeshare association would gut the statutory conditions in A.R.S. § 33-2209, any common  
18 law right of inspection is preempted. Mr. Zwicky argues that the statutory inspection rights  
19 supplement, rather than conflict with, the common law rights. A.R.S. § 33-2209(D)(2)  
20 states: “This section does not affect either . . . 2. The power of a court, independently of this  
21 chapter, to compel the production of records for examination on proof by an owner of proper  
22 purpose.” However, as explained above, allowing Mr. Zwicky to do an end run around the  
23 statutory conditions in A.R.S. § 33-2209 is not consistent with Arizona law. Moreover, even  
24 if A.R.S. § 33-2209 does not preempt common law inspection rights, Mr. Zwicky still must  
25 articulate and prove a good faith proper purpose, which he has not done.

26           Although there is little Arizona case law describing the contours of a “proper  
27 purpose,” case law from other jurisdictions is instructive. “A ‘proper purpose’ is generally  
28 defined as a purpose that is (1) related to a legitimate interest of a shareholder, and (2) not

1 harmful to the corporation or its shareholders.” *Davey v. Unitil Corp.*, 133 N.H. 833, 837,  
2 585 A.2d 858, 860 (1991). A proper purpose “cannot be to use [the information] in a  
3 capricious, irresponsible or hostile way or in such a manner as to depreciate the assets of the  
4 company and the value of the stock of the other shareholder[s].” *Id.* (quoting *Celina Mut.*  
5 *Ins. Co. v. American Druggists Ins. Co.*, 52 Ohio App.2d 304, 310, 369 N.E.2d 1066, 1070-  
6 71 (Ohio Ct. App. 1977)). Even where shareholders of a for-profit corporation have “some  
7 rights to corporate information which are not enjoyed by the general public, shareholder  
8 status does not in and of itself entitle an individual to unfettered access to corporate  
9 confidences and secrets.” *Nat’l Football League Properties, Inc. v. Superior Court*, 65 Cal.  
10 App. 4th 100, 107, 75 Cal. Rptr. 2d 893, 897 (1998) (internal quotation omitted). For that  
11 reason, Mr. Zwicky is not entitled to any attorney-client privileged communications or  
12 confidential or trade secret information. *Id.*

13           Although his record requests did not identify any proper purpose, Mr. Zwicky now  
14 claims that his purpose is to investigate whether he has been the victim of fraud, breach of  
15 fiduciary duty, or other wrongdoing. This is not a proper purpose because it is not asserted  
16 in good faith. Mr. Zwicky has not alleged or identified any factual or legal basis for any  
17 alleged fraud or wrongdoing. This is simply a fishing expedition. Mr. Zwicky mainly relies  
18 on treatises discussing for-profit shareholders’ inspection rights; he does not cite any  
19 authority examining a proper purpose with respect to a timeshare association. Mr. Zwicky  
20 cites authority related to officer misconduct, but he has not alleged that any PVCOA officers  
21 or directors have committed any kind of fraud or misconduct. A good faith proper purpose  
22 requires Mr. Zwicky to have some factual basis for his subjective belief in the possibility of  
23 misconduct; baseless speculation is insufficient. To be clear, Mr. Zwicky has not filed any  
24 action against PVCOA alleging any kind of fraud, breach of fiduciary duty, or misconduct.  
25 In the absence of any such allegations, digging around in PVCOA’s files in the hope of  
26 finding some factual or legal basis for such an action (or, better yet, a class action) is not a  
27 good faith proper purpose.

1 In fact, the only apparent purpose of the request, aside from harassment and  
2 annoyance, is avoidance of Mr. Zwicky's responsibility to pay overdue maintenance  
3 assessments totaling more than \$13,000. Because Mr. Zwicky has already received all the  
4 information and documents he is entitled to as a member of PVCOA, the only possible  
5 reason for prolonging this litigation is to bully PVCOA into forgiving his maintenance  
6 assessments, which is not a proper purpose. That purpose is expressly hostile to the  
7 association, unrelated to any of Mr. Zwicky's legitimate interests as a member, and harmful  
8 to the association. Indeed, Mr. Zwicky's purpose in avoiding responsibility for his  
9 maintenance fees directly harms the other members as well as the association itself.

10 Mr. Zwicky now claims, after the fact, that his purpose in bringing this lawsuit is "to  
11 force [PVCOA] to disclose their financial records so that my lawyers can investigate whether  
12 the Association's charges for dues and assessments [sic] against me are valid, or whether on the  
13 other hand those charges are improper and excessive." [PSOF Ex. G ¶ 2] He also claims that  
14 his purpose is "to find out why my assessments are so high, and why my investment is  
15 worthless, and specifically whether those problems are due to improper management practices."  
16 [PSOF Ex. G ¶ 9] Mr. Zwicky's counsel also now claims that the purpose of this litigation is to  
17 determine whether Mr. Zwicky's "annual assessment liability" is "lawful" and why "his  
18 investment" is "by all appearances worthless." [PSOF Ex. M ¶ 2] These alleged purposes are  
19 patently asserted in bad faith because these arguments go far beyond the relief actually sought  
20 in the Verified Complaint, and Mr. Zwicky was already provided with sufficient information to  
21 determine the accuracy and validity of his assessments.

22 Mr. Zwicky's counsel contends that the records provided are inadequate to verify the  
23 basis for calculating Mr. Zwicky's annual assessments and their lawfulness. However, the bills  
24 sent to Mr. Zwicky by PVCOA for his assessments included an annual budget showing  
25 revenues, expenses, and assessment calculations, as well as the annual Assessment Billing and  
26 Collection Policy. [DSOF ¶¶ 13-16] This is sufficient to determine whether the assessments  
27 were valid and correctly calculated. In addition, PVCOA has provided information showing  
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1 the allocation of sold and unsold points, maintenance fee calculations and assessment fees per  
2 point, as well as PVCOA's annual budget. [DSOF ¶ 27] At the time he purchased his  
3 membership interest in 2004, Mr. Zwicky acknowledged that his maintenance fees were  
4 established annually and were subject to change. [DSOF ¶¶ 4-5] Mr. Zwicky has not alleged  
5 or produced any evidence showing any impropriety or any legal basis to claim that the  
6 assessments are excessive. Because PVCOA has already provided Mr. Zwicky with the  
7 documents necessary to determine that the overdue assessments are valid and in arrears, these  
8 alleged purposes are not asserted in good faith and do not constitute a "proper purpose."

9 Although PVCOA has already provided Mr. Zwicky with extensive books and records  
10 of the association, Mr. Zwicky's counsel complains that PVCOA has not provided  
11 management contracts between PVCOA and Diamond Resorts International or a list of  
12 members who have complained about their assessments. [DSOF ¶¶ 19, 27; PSOF Ex. M  
13 ¶¶ 7-8] These items were not requested from PVCOA prior to this litigation or even in the  
14 Verified Complaint. Moreover, they are completely unrelated to the value of Mr. Zwicky's  
15 membership interest on the secondary market or whether the maintenance assessments have  
16 been correctly calculated. Putting aside the obvious privacy and confidentiality concerns  
17 associated with handing out members' financial information, Mr. Zwicky has failed to show  
18 any good faith proper purpose in requesting this information. Preparing a baseless class  
19 action lawsuit is not a proper purpose, and neither is trying to avoid Mr. Zwicky's  
20 contractual responsibility to pay overdue assessments. Mr. Zwicky now evidently regrets his  
21 2004 purchase decision because the assessment fees have increased over time and the value  
22 of his ownership interest on the secondary market is less than what he feels it ought to be.  
23 [PSOF Ex. G ¶¶ 4, 7-8; PSOF Ex. J] Buyer's remorse a decade later is not a proper purpose,  
24 nor is avoiding overdue maintenance assessments, "investigating" some unarticulated  
25 wrongdoing, or threatening baseless class action litigation. Mr. Zwicky may no longer like  
26 the deal he made in 2004, but he has not articulated any good faith proper purpose to gain  
27 unfettered access to all of PVCOA's financial, business, and member records.

1 **II. Mr. Zwicky is Not Entitled to Attorneys' Fees.**

2 Mr. Zwicky is not entitled to attorney's fees under A.R.S. § 10-11604(C) because that  
3 section, like § 10-11602, does not apply to timeshare plans or associations. *See* A.R.S. § 10-  
4 11602(H). Plaintiff is not entitled to attorney's fees under § 12-341.01 because this matter is  
5 a statutory and/or common law records request and does not arise out of a contract.

6 **III. There is No Genuine Dispute as to any Material Fact and PVCOA is Entitled to  
7 Judgment as a Matter of Law.**

8 For the reasons explained above, Mr. Zwicky is not entitled to inspect additional  
9 records of PVCOA based on A.R.S. § 10-11602, A.R.S. § 33-2209, or the common law.  
10 Although PVCOA disputes a number of the statements in Plaintiff's Statement of Facts, none  
11 of those disputed issues of fact are material to the issues in this lawsuit. The relief requested  
12 in the Verified Complaint only concerns the scope of Mr. Zwicky's record inspection rights;  
13 it does not concern whether the maintenance fees assessed are too high or whether PVCOA  
14 has engaged in any wrongdoing. Indeed, there are no allegations, much less evidence,  
15 indicating that PVCOA has engaged in any type of wrongdoing or misconduct. Mr. Zwicky  
16 has already received all the documents and information he is entitled to as a member of  
17 PVCOA. There is no proper purpose asserted in good faith that would support giving  
18 Mr. Zwicky unlimited access to PVCOA's financial and business documents. Mr. Zwicky's  
19 attempt to avoid his responsibility for overdue maintenance assessments and threats of  
20 baseless class action litigation do not constitute a "proper purpose" made in good faith.  
21 There are no genuine disputes of material fact, and PVCOA is entitled to judgment as a  
22 matter of law.

23 **Conclusion**

24 Defendant PVCOA respectfully requests that the Court deny Plaintiff's Motion for  
25 Summary Judgment, grant PVCOA's Cross-Motion for Summary Judgment, and enter  
26 judgment in favor of PVCOA.  
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DATED this 11<sup>th</sup> day of January, 2016.

**COPPERSMITH BROCKELMAN PLC**

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