

1 John E. DeWulf (#006850)
2 Katherine DeStefano (#025441)
3 **COPPERSMITH BROCKELMAN PLC**
4 2800 North Central Avenue, Suite 1200
5 Phoenix, Arizona 85004
6 (602) 224-0999
7 jdewulf@cblawyers.com
8 kdestefano@cblawyers.com

9 *Attorneys for Defendant*

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 REPLY IN SUPPORT**
16 v.) **OF MOTION FOR SUMMARY**
17) **JUDGMENT**
18 PREMIERE VACATION COLLECTION)
OWNERS ASSOCIATION, f.k.a. Premiere)
Vacation Club, an Arizona nonprofit) (Assigned to the Honorable John Hannah)
corporation,)
Defendant.)
_____)

19 Defendant Premiere Vacation Collection Owners Association (“PVCOA”) has already
20 provided Mr. Zwicky with all the documents and records requested in the Verified
21 Complaint, enabling him to determine whether his maintenance assessments are legally valid
22 and correctly calculated. Mr. Zwicky has not proven that he is entitled to management
23 agreements or other members’ personal and financial information based on either statutory or
24 common law. Nor has he proven a good faith proper purpose based on the investigation of
25 possible wrongdoing by PVCOA, because there must be some credible evidentiary basis for
26 his belief that possible wrongdoing may have occurred. He has not made any factual
27 allegations of wrongdoing or produced any credible evidence indicating any wrongdoing.

1 His frustration with the current value of his PVCOA membership on the secondary market or
2 the amount of his maintenance assessments does not entitle him to access confidential and
3 proprietary management agreements or other members' private information. PVCOA has
4 responded reasonably and transparently to Mr. Zwicky's repeated requests for information,
5 but there is a limit. Mr. Zwicky has already received all financial information and
6 documents requested in the Verified Complaint. Mr. Zwicky's remaining requests, which go
7 beyond the relief sought in the Complaint, demonstrate that this action is nothing more than a
8 fishing expedition, lacking any good faith proper purpose.

9 **I. Mr. Zwicky Implicitly Concedes that He is Not Entitled to Statutory Inspection**
10 **Rights Under A.R.S. § 10-11602 or A.R.S. § 33-2209.**

11 Mr. Zwicky's response fails to address PVCOA's arguments that he is not entitled to
12 statutory inspection rights. As such, he has implicitly conceded that A.R.S. § 10-11602 is
13 inapplicable to a records request to a timeshare association, and that he has not met the
14 statutory requirements in A.R.S. § 33-2209. He argues that it would be "futile" to require
15 him to comply with the statutory requirement to submit a written request to PVCOA, but
16 there are good reasons for requiring a member to submit a written request before running to
17 court. Primarily, it is not a good use of judicial resources to use litigation to achieve what
18 could be accomplished by contacting the association directly. Indeed, PVCOA has produced
19 documents in response to Mr. Zwicky's requests before initiation of this litigation, so there is
20 no reason to assume that submitting a written request would be "futile," given PVCOA's
21 good faith responses to prior requests. In addition, the statute requires a written request in
22 order to provide clarification of both the scope of the request and the proper purpose
23 associated with the request, to allow the timeshare association to "determin[e] the
24 appropriateness of any owner request," as is its prerogative pursuant to the statute. A.R.S. §
25 33-2209(C). Given what appears to be Mr. Zwicky's most recent position, PVCOA has
26 determined that it is not appropriate to disclose confidential and proprietary management
27
28

1 agreements or the personal and financial information of other members. For that reason, Mr.
2 Zwicky is not entitled to such information pursuant to statutory inspection rights.

3 **II. This Action is Now Moot Because PVCOA has Provided All Documents and**
4 **Information Sought in the Verified Complaint.**

5 Mr. Zwicky's Verified Complaint seeks (1) the production of records relating to
6 ownership of membership points and maintenance assessments and (2) declaratory relief
7 recognizing his inspection rights. PVCOA has already provided all of the documents
8 requested in Mr. Zwicky's Verified Complaint (and all of the documents and information he
9 is legally entitled to), and this action is now moot. Mr. Zwicky argues that his Rule 26.1
10 disclosure statement sets forth the documents and information he is seeking in this matter.
11 But a plaintiff cannot expand the scope of relief sought simply through a disclosure
12 statement or discovery requests, and Mr. Zwicky has not filed any amended complaint.
13 Furthermore, any amendment would be futile because Mr. Zwicky is not legally entitled to
14 the management agreements or other members' private information.

15 The complaint must allege the relief sought, which in this case consists of a
16 description of the documents allegedly wrongfully withheld by PVCOA and sought by
17 Plaintiff in this matter. Paragraph 20 of the Verified Complaint sets forth the documents and
18 information Mr. Zwicky seeks in this matter, which have already been provided by PVCOA.
19 Mr. Zwicky has admitted that he is asking PVCOA to chase a moving target (Resp. at 9),
20 and, as explained in more detail below, the documents provided do adequately explain the
21 basis for calculation of his maintenance assessments. Mr. Zwicky's attempt to expand the
22 scope of this action is improper, and he has already received the documents and information
23 sought in the Verified Complaint. For that reason, the Court should dismiss this action as
24 moot.

25 **III. PVCOA's Determination of Which Documents are Appropriate to Disclose is**
26 **Protected by the Business Judgment Rule.**

27 In response to PVCOA's argument that its directors are protected by the business
28 judgment rule, Mr. Zwicky argues that PVCOA does not have "essentially unreviewable

1 discretion.” [Resp. at 7-8] PVCOA does, however, have discretion pursuant to A.R.S. § 33-
2 2209(C) and the business judgment rule to determine, in good faith, which documents are
3 appropriate to disclose to its members. “The business judgment rule presumes that ‘in
4 making a business decision the directors of a corporation acted on an informed basis, in good
5 faith and in the honest belief that the action taken was in the best interest of the company.’”
6 *United Dairymen of Arizona v. Schugg*, 212 Ariz. 133, 140, 128 P.3d 756, 763 (App. 2006)
7 (quoting *Blumenthal v. Teets*, 155 Ariz. 123, 128, 745 P.2d 181, 186 (App. 1987)). The
8 business judgment rule is constrained by the directors’ duties of good faith and fiduciary
9 duty to the members, but Mr. Zwicky has not alleged or proven any evidentiary basis to
10 show a breach of fiduciary duty or a lack of good faith. Therefore, PVCOA has the statutory
11 authority to determine the appropriateness of Mr. Zwicky’s requests pursuant to A.R.S. § 33-
12 2209(C), and the business judgment rule presumes that in making those determinations,
13 PVCOA’s directors acted on an informed basis, in good faith, and in the honest belief that
14 the determination was in the best interest of the association.

15 **IV. Mr. Zwicky Has Failed to Prove a Proper Purpose for his Remaining Document**
16 **Requests.**

17 Mr. Zwicky exclusively relies on treatises and authority related to record requests
18 from shareholders of corporations, rather than members of timeshare associations. The two
19 contexts are very different, and the authority cited is inapposite. The difference is
20 underscored by the fact that the Arizona legislature created separate statutory frameworks for
21 records requests applicable to non-profit corporations and timeshare associations. *See*
22 A.R.S. § 10-11602; A.R.S. § 33-2209. Authority showing that shareholders are entitled to
23 information about other shareholders or agreements between a corporation’s board and third
24 parties are simply not applicable to this case, especially in the absence of any factual
25 allegations or proof of wrongdoing. A timeshare owner’s interest is substantively different
26 than a corporate shareholder’s interest, and the kinds of information he or she is entitled to is
27 necessarily different as well.

1 The only Arizona authority Mr. Zwicky cites for the proposition that there is a
2 common law right of inspection for members of a timeshare association is *Tucson Gas &*
3 *Electric Company v. Schantz*, 5 Ariz. App. 511, 428 P.2d 686 (App. 1967). This case did not
4 involve a timeshare association; it stands only for the proposition that shareholders of a
5 corporation have a common law right of inspection. It is far from clear whether Arizona law
6 even recognizes a common law right of inspection for timeshare members, particularly in
7 light of the comprehensive statutory scheme governing timeshares.

8 Even assuming that Mr. Zwicky does have a common law right of inspection as a
9 member of a timeshare association, he has not proven a good faith proper purpose for his
10 additional demands for documents and information, specifically management agreements
11 and other members' personal and financial information. Mr. Zwicky cites Delaware
12 authority related to corporate shareholders, which is inapposite, but even those cases require
13 that a proper purpose be based on some credible and reasonable evidence. [Resp. at 6]
14 There is no such credible basis for any proper purpose related to the remaining document
15 requests in this case.

16 Mr. Zwicky quotes Delaware authority addressing a shareholder's obligation to show,
17 by a preponderance of the evidence, "a credible basis from which the [court] can infer there
18 is possible mismanagement that would warrant further investigation That threshold
19 may be satisfied by a credible showing, through documents, logic, testimony or otherwise,
20 that there are legitimate issues of wrongdoing." [Resp. at 6, quoting *Seinfeld v. Verizon*
21 *Commc'ns, Inc.*, 909 A.2d 117, 124 (Del. 2006)] The court in *Seinfeld* was considering a
22 statutory records request (which Mr. Zwicky is not entitled to in this matter, for the reasons
23 explained above), and required a showing of "some evidence" of possible wrongdoing before
24 permitting inspection of corporate books and records on that basis, in order to limit claims
25 for inspection to those with merit. Here, Mr. Zwicky has not produced **any** evidence of
26 wrongdoing, and has failed to make a credible evidentiary showing that there are any
27 legitimate issues of wrongdoing. His mere suspicion is insufficient to demonstrate a good
28

1 faith proper purpose. He urges the Court not to find an absence of a credible basis “based
2 upon lawyer rhetoric.” [Resp. at 6] He has an evidentiary burden of proof, and cannot avoid
3 it simply by labelling PVCOA’s arguments “lawyer rhetoric.” Mr. Zwicky, as the plaintiff in
4 this matter, is obligated to support his claim for relief with admissible and credible evidence.
5 His failure to do so in order to demonstrate a good faith proper purpose is fatal to his claim.

6 In support of his request for other members’ personal and financial information,
7 Zwicky quotes another Delaware case where the court permitted solicitation of stockholders
8 for “legitimate” litigation against the corporation. [Resp. at p. 4, quoting *Compaq Computer*
9 *Corp. v. Horton*, 631 A.2d 1, 4-5 (Del. 1993)] In *Compaq*, the court concluded that any
10 harm that might accrue to the corporation from the release of the list was too remote and
11 uncertain to warrant denial of the stockholder’s statutory right to inspection. This case is
12 distinguishable because Mr. Zwicky does not have any statutory right to inspection, as
13 explained above and in Defendant’s Motion for Summary Judgment. In addition, PVCOA’s
14 concern regarding disclosure of members’ personal and financial information relates to its
15 obligation to protect members’ privacy, not merely avoiding harm to PVCOA. Inspection of
16 a stock ledger by corporate shareholders is substantively different than releasing timeshare
17 members’ personal and financial information, and *Compaq* does not support Mr. Zwicky’s
18 request. Furthermore, Mr. Zwicky’s allusion to a class action against PVCOA is not
19 “legitimate” and is not a good faith proper purpose because he has not produced any
20 evidence of wrongdoing or demonstrated any credible legal or factual basis for any such suit.

21 Mr. Zwicky argues that the financial documents already disclosed to him do not show
22 the total amount of property management fees or specific amounts related to “internal
23 overhead.” [Resp. at 9] In fact, PVCOA already disclosed budgets, maintenance fee
24 expense reports, points analysis, and a maintenance fee calculation report, which show
25 precisely this information. [Def.’s Separate Statement of Facts ¶ 27 & Ex. H to Declaration
26 of Kathy Wheeler, PVCOA0001-05] The annual budget, which was provided to Mr. Zwicky
27 with his annual statements, as well as disclosed in this litigation, shows the assessment
28

1 revenue collected from owners (members) as well as the developer, and other income.
2 [Def.'s Separate Statement of Facts ¶¶ 18-19, 27 & Ex. C & H to Declaration of Kathy
3 Wheeler, PVCOA0005] The annual budget also shows PVCOA's expenses, including
4 maintenance fee obligation; management fees; bad debt expenses; assessment, billing, and
5 accounting fees; and general and administrative fees. The budget transparently explains
6 PVCOA's overhead, as well as the total amount of management fees and maintenance fee
7 obligations. Mr. Zwicky claims that Diamond Resorts does not pay the same assessments
8 per unit that private owners pay, implying that the developer is paying less than its fair share
9 of assessments. [Resp. at 2] However, the maintenance fee calculation report includes the
10 assessment fee per point, clearly showing that members pay \$0.1394 per point, while the
11 developer pays \$0.1993 per point, a higher assessment per point than members.

12 [PVCOA0004] The report also shows the total points owned by members and the developer,
13 as well as the total assessments and base fees for members and the developer.

14 Mr. Zwicky also complains that the documents already disclosed do not show, as to
15 each constituent resort, how many units Diamond Resorts owns or controls and whether
16 Diamond Resorts is paying assessments on all of those units. This is precisely the
17 information provided in the maintenance fee expense report. [PVCOA0001-02] The table
18 shows, for each resort in the Premiere Vacation Collection, how many units are owned by
19 Premiere Vacation Collection, private owners, and ILX Acquisition, Inc., a subsidiary of
20 Diamond Resorts. The table shows the total intervals for each resort, as well as the number
21 of intervals owned by each interest holder, as well as the total assessment paid by each
22 interest holder, and its percentage of the total assessments for that property. Mr. Zwicky's
23 speculation about revenue generated by unoccupied units is unrelated to his own membership
24 interest. Similarly, Mr. Zwicky's conjecture regarding some kind of "subsidy" to PVCOA
25 "in lieu of assessments" or back-payments owed to PVCOA is entirely speculative and
26 unrelated to the calculation of his own maintenance assessments. The financial information
27 provided to Mr. Zwicky is transparent and clear, and provides him all the information
28

1 necessary to verify that *his* maintenance assessments associated with *his* membership
2 interest are legally valid and correctly calculated. Mr. Zwicky complains about the format of
3 the financial reports and budgets, but a records request does not obligate an organization to
4 produce documents in a format other than as they are kept in the usual course of business.
5 PVCOA is not obligated to generate financial analysis in a format or by a method that is
6 preferred by Plaintiff's counsel.

7 In support of his argument that he is entitled to disclosure of PVCOA's management
8 agreements, Mr. Zwicky cites a Restatement provision never adopted by any Arizona court
9 for the proposition that a developer has a duty to disclose its contracts. [Resp. at 9] This
10 Restatement provision states: "Until the developer [of a common-interest residential
11 community] relinquishes control of the association to the members, the developer owes the
12 following duties to the association and its members . . . (7) to disclose all material facts and
13 circumstances affecting the financial condition of the association, including the interest of
14 the developer and the developer's affiliates in any contract, lease, or other agreement entered
15 into by the association." Restatement (Third) of Property (Servitudes) § 6.20 (2000). Even
16 assuming that this provision applies to a vacation club or timeshare developer, the original
17 developer already relinquished its responsibilities to PVCOA and the members, making this
18 provision inapplicable. Mr. Zwicky's inspection rights with respect to PVCOA (a member's
19 association, not the original developer) are controlled by Arizona statutory law, specifically
20 A.R.S. § 33-2209, not this Restatement provision.

21 Mr. Zwicky speculates that PVCOA's management agreements must contain
22 information about how Diamond Resorts' cash contributions to common expenses are
23 calculated, but the financial documents already disclosed include this information. Mr.
24 Zwicky has not shown any good faith proper purpose in seeking disclosure of the
25 confidential and proprietary management agreements. Statutory inspection demands from
26 corporate stockholders are constrained by confidentiality concerns, and those concerns are
27 equally weighty in this context. *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 824
28

1 (Del. Ch. 2007) (rejecting shareholder’s statutory demand for inspection of confidential
2 information).

3 Mr. Zwicky argues that his purpose in requesting the management agreements and
4 members’ personal information is to investigate wrongdoing. However, this purpose is not
5 asserted in good faith because there are no factual allegations of any wrongdoing by PVCOA
6 or its board, and mere suspicion is insufficient to demonstrate a credible basis for further
7 investigation. Mr. Zwicky argues that his assessments are so high that he has been deprived
8 of the benefit of his bargain. [Resp. at 5] To be clear, Mr. Zwicky has not alleged any
9 contract claims against PVCOA, nor has he alleged any factual or legal basis for any such
10 claim. He also argues that there is “good reason to question whether these assessments have
11 been levied by the Board in a fair, honest, and commercially reasonable manner.” [Resp. at
12 5] The documents already disclosed to Mr. Zwicky make clear that the assessments are
13 legally valid and correctly calculated, and Mr. Zwicky has not identified any reasonable and
14 credible factual basis for his groundless suspicion otherwise. Because he has failed to prove
15 a good faith proper purpose that is related to the remaining requests for documents, he is not
16 entitled to relief based on any common law right of inspection.

17 **Conclusion**

18 Defendant PVCOA respectfully requests that the Court deny Plaintiff’s Motion for
19 Summary Judgment, grant PVCOA’s Cross-Motion for Summary Judgment, and enter
20 judgment in favor of PVCOA.

21 DATED this 19th day of February, 2016.

22 **COPPERSMITH BROCKELMAN PLC**

23
24 By /s/ John E. DeWulf
25 John E. DeWulf
26 Katherine DeStefano
27 2800 N. Central Avenue, Suite 1200
28 Phoenix, Arizona 85004
Attorneys for Defendant

1 ORIGINAL e-filed and a copy mailed
2 this 19th day of February, 2016, to:

3 Jon L. Phelps, Esq.
4 PHELPS & MOORE
5 4045 E. Union Hills Drive
6 Suite A-102
7 Phoenix, Arizona 85050
8 Attorneys for Plaintiff

9 Edward L. Barry, Esq.
10 Law Office of Edward L. Barry
11 2120 Company Street, Third Floor
12 Christiansted, Virgin Islands 00820
13 Co-Counsel for Plaintiff

14 By /s/ Verna Colwell