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20 **THE SUPERIOR COURT OF THE STATE OF ARIZONA**
21 **IN AND FOR THE COUNTY OF MARICOPA**

22 NORMAN ZWICKY,

23 Plaintiff,

24 vs.

25 PREMIERE VACATION COLLECTION
26 OWNERS ASSOCIATION, f.k.a. Premiere
 Vacation Club, an Arizona nonprofit
 corporation,

 Defendant.

CASE NO. CV2015-051911

**RESPONSE TO OBJECTION TO
PROPOSED ORDER**

(ASSIGNED TO HON. JOHN HANNAH)

PLAINTIFF'S RESPONSE TO OBJECTION TO PROPOSED ORDER

 The Court *could have* entered an order, couched in general and all-encompassing terms, requiring Defendant to disclose for inspection: "(1) all documents tending to show how much money the property manager DRI is actually being paid for fees, overhead reimbursement, or other payments on the Association and constituent Resort levels, and all

1 relevant governing agreements”; and (2) “all documents tending to show whether DRI is
2 paying an equitable share of expenses of the Association and each constituent Resort, in the
3 totality of the circumstances, including a description, the amounts and allocation to DRI of
4 each category of expense and revenue of each Resort (including hotel operation-expenses
5 and revenues), and all governing relevant agreements.”¹

6 That list would be very short—two items.

7 Such an order would indeed reflect the fair sum and substance of Plaintiff’s requests
8 for inspection, his legitimate needs, and the Court’s intent in its ruling on Plaintiff’s
9 inspection rights (statutory and common law). But it would inevitably spawn subsequent
10 enforcement proceedings, and would be an open invitation for the parties to advance
11

12 ¹ Recall in this regard that the Developer, DRI (or affiliate) operates the “timeshare”
13 regime, under which Association members use their “points” as currency to book rooms at
14 the Resorts within the system. DRI (or affiliate), as Developer, acting in a *separate* capacity
15 as hotelier, *simultaneously* rents out rooms to the general public. DRI keeps that money.
16 **Summary Judgment Response Exhibit A**, Time-Share Disclosure Report, May 27, 1998
17 (stating that Developer reserves right to rent out *all* “unoccupied” units; “Members will not
18 be entitled to receive any proceeds resulting from or related to operations of the Timeshare
19 Resorts as hotels...”). As noted in oral argument, there are two parallel accounting
20 universes in place here: One for the Associations, and another for DRI’s hotel operations
21 (which were never disclosed to Association members, even though *the Association*
22 apparently pays DRI for *all services* as property management company at the Resorts and
23 apparently reimburses DRI for *all of its internal overhead*, including employee salaries).
24 Zwicky needs to scrutinize both of these accounting “universes.” Zwicky seeks, and the
25 proposed order requires, disclosure of the extent to which the Association is subsidizing the
26 Developer’s hotel operations by shifting “hotel” expenses over to the Association. Zwicky
also seeks, and the proposed order requires, disclosure of the extent to which the
Association is subsidizing the Developer’s *unsold timeshare inventory*, including inventory
re-acquired from defaulting timeshare owners (which DRI rents out to the general public).
These are the subject of the so-called “inventory recovery agreements” with the Boards of
each Resort under which DRI pays some, but not all, of the normal assessments on those
units. The proposed order requires disclosure of these. Obviously, if DRI—or any other
owner in the Association—fails to pay its *full share of assessments*, the financial burden is
spread disproportionately to other Association owners to cover the total annual budgeted
common expenses. Assessments are a zero-sum game in that respect.

1 competing subjective views of the scope and interpretation the generalized language. The
2 Court can readily see that from the *existing* objections to provisions of the order that contain
3 any form of general language.

4 For that reason, particularity in identifying the categories of documents to be
5 provided for inspection—even if that list is long—is essential.²

6 Moreover, and as a practical matter, an order that mandates inspection of a long list
7 of discrete, narrowly-defined types of accounting documents is not necessarily any more
8 burdensome than a short list of very broad categories.

9 And when viewing the overall burden of inspection in proper perspective, this Court
10 should bear in mind that there are approximately 22,500 members of the Association paying
11 over \$2,000 annually, each of whom may have been potentially overcharged for assessments
12 year after year. Such overcharges, if proven, may be “small claims”-caliber viewed
13 individually, but in the aggregate they could easily add up to tens of millions of dollars.
14 Defendant thus cannot argue that the burden outweighs the potential benefit, or that it is too
15 much given the potential amount at stake in subsequent merits litigation. Cf., Rule
16 26(b)(1)(C)(iii) (reasonableness of burden of discovery to be measured by needs of case,
17 amount in controversy, parties’ resources, importance of issues); *id.*, State Bar Committee
18 Note to 1984 Amendments (discovery not to be “disproportionate”); and cf., 2015
19 Amendments to *Federal* Rule 26(b)(1) (discovery to be “proportional to the needs of the
20 case”).

21 Defendant has rhetorically argued, but has not credibly substantiated, that inspection
22

23
24 ² The objections to the terminology of the order are baseless. For example, Defendant
25 objects to the term “inventory recovery.” That term is used by *DRI itself* in numerous SEC filings
26 that discuss “inventory recovery agreements” in which DRI re-sells units (“points”) that defaulting
owners have forfeited or abandoned. The SEC documents talk about agreements the Boards have
made on the amount of assessments that DRI must pay on these units when they are re-sold to new
time-share owners.

1 of these documents would be particularly burdensome. Indeed, Defendant has not shown
2 that it cannot very readily create specific, custom *summaries* of accounting data precisely
3 responsive to the categories through its computerized accounting system. These types of
4 custom-summaries are easily generated by simple accounting software available to the
5 general public that costs a *few hundred dollars* (e.g., QuickBooks). DRI, by contrast, uses
6 sophisticated, “fully automated” Oracle accounting software in its property management
7 operations.³

8 It is impossible to imagine that DRI in its management of the Association’s fiscal
9 affairs, and separately in the management of each Resort’s fiscal affairs, cannot routinely
10 enter the search parameters required for each specific category of documents identified in
11 the order and generate the relevant summary. Presumably, if the CEO of DRI demanded
12 this identical information, it would be on his desk the next day. DRI and the Association
13 should also, if necessary to comply with the order, be able to obtain the ready assistance of
14 their independent accounting firms who perform annual audits (McGladrey LLP of Las
15 Vegas, Nevada for the Association; BDO USA LLC for Diamond Resorts International).⁴

16 Surely, DRI must be able to specifically define and quantify such things as “hotel”
17 occupancy rates versus Association-member occupancy rates for each Resort; DRI’s
18 retained revenues generated by unoccupied units, that it rents out; and the actual expenses it
19 pays (and to whom) or reimburses to the Resort or Association for these separate hotel
20 operations. These are very basic “metrics.” (If DRI does not keep regular, systematic and
21

22 ³ See <https://www.diamondresorts.com/resortmanagement.aspx> (*last visited 3/30/16*).

23 ⁴ Defendant argues that the inspection statute requires disclosure only of existing records.
24 But if the information is contained in one or more computer databases (and certainly it must be),
25 then the databases themselves (i.e., the records) *do exist*. There is no logical or common sense
26 requirement that these records be routinely kept in paper form, particularly when so many
businesses go “paperless” when possible. (See discussion of Rule 34, *infra*.) Plaintiff’s *common*
law rights are in all events not subject to the technical strictures of the statutes, and should be
construed to reflect modern realities in business record-keeping.

1 *separate* accounting records for its own “hotel” operations—at least for income tax and
2 hotel tax purposes—then DRI will obviously face very serious problems well beyond the
3 areas of potential mismanagement thus far identified in this litigation, such as fiduciary
4 commingling.)

5 By way of analogy, Rule 34 requires that electronic discovery be accomplished by
6 producing “data or data compilations stored in any medium from which information can be
7 obtained - *translated into reasonably usable form when translation is practicably*
8 *necessary.*” Ariz. R. Civ. P. 34(a); *emphasis added.* Generating summaries responsive to
9 the items specified in the order would seem to be the most sensible approach and impose a
10 minimal burden—if (as *must be* the case) the DRI accounting people generate these types of
11 reports in the ordinary course of business. Alternatively Defendants may produce relevant
12 “data” from Defendant’s computers, which would presumably mean cloning the hard-
13 drive(s) of the Association and each Resort, with all metadata, operating systems, and
14 accounting software intact, and with instructions for use. Ariz. R. Civ. P. 34(a). In other
15 words, the database must be readily searchable without having to hire forensic experts to
16 “break the code.”

17 A “document dump” with a truckload full of hard copies would be obvious bad faith.

18 If this Court has insufficient information about DRI’s accounting system and its
19 capabilities to comply with the order, then perhaps Defendant should be ordered to appear
20 with a senior accounting executive in a brief hearing. With no disrespect intended, this
21 Court simply cannot accept counsel’s unsubstantiated claims that compliance imposes
22 undue difficulties.

23 Contrary to Defendant’s objection, the salary information of Resort employees is
24 *extremely* relevant, because the order further requires a description of their job duties. If,
25 say, there is a Resort general manager making \$100,000 a year that is charged as a common
26 expense; if the manager is simultaneously running DRI’s separate “hotel” enterprise along

1 with providing accommodations and services to Association members; and if DRI is paying
2 *no part* of the manager's salary, this would be a blatant fraud on Association members.
3 (Members would pay that \$100,000 salary, plus a 15% management fee to DRI on top on
4 the Resort level, plus—apparently—another *compounded* 15% fee to DRI on the
5 Association level.)

6 Finally, Defendant's objection to the existing "protective order" language is
7 inappropriate. Defendant indeed intends, through *its* proposed language, to restrict Plaintiff
8 from the *essential purpose* of the inspection: future class action litigation. Defendants
9 cannot presume to bar counsel from speaking with other actual or prospective similarly-
10 situated clients, or to restrict the content of such privileged communications—even in the
11 investigatory stage. Nor is there any basis for requiring counsel to disclose these
12 communications to opposing counsel or the Court, or seek prior approval. This Court has
13 never suggested that it has any intent to burden Plaintiff's ability to proceed with any
14 appropriate merits litigation. The restrictions sought by Defendant would indeed be
15 unprecedented and completely anomalous.

16 The existing proposed protective order is sufficient. It would prohibit clearly
17 improper uses of the information, such as disclosure to a competitor. But Plaintiff and his
18 counsel must have the freedom to use the information for the essential purposes that this
19 Court has determined to be proper, without interference by Defendant and without
20 intervention by the Court.

21 As to the issue of costs, Defendant has the ability to produce all records
22 electronically at a nominal cost. Accordingly, Defendant can bear the costs of producing the
23 records.

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25 //

1 RESPECTFULLY SUBMITTED this 7th day of April, 2016.

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16 **ORIGINAL** of the foregoing efiled on
17 this the 7th day of April, 2016;

18 **COPY** of the foregoing delivered via azturbocourt.gov
19 on this the 7th day of April, 2016 to:

20 The Honorable John Hannah
21 Northeast Regional Center
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