Michael K Jeanes, Clerk of Court
*** Electronically Filed ***
K. Dyer, Deputy
4/21/2016 3:40:00 PM
Filing ID 7362532

John E. DeWulf (#006850)
Katherine DeStefano (#025441)
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1200
Phoenix, Arizona 85004
(602) 224-0999
jdewulf@cblawyers.com
kdestefano@cblawyers.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

MARICOPA COUNTY

NORMAN ZWICKY, Plaintiff, v. PREMIERE VACATION COLLECTION OWNERS ASSOCIATION, f.k.a. Premiere Vacation Club, an Arizona nonprofit corporation, Defendant.	NO. CV2015-051911 **DEFENDANT'S RESPONSE TO PLAINTIFF'S APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS** (Assigned to the Honorable John Hannah)

Defendant Premiere Vacation Collection Owners Association ("PVCOA") submits this Response to Plaintiff Norman Zwicky's Application for Award of Attorneys' Fees and Costs. Mr. Zwicky is not entitled to attorneys' fees based on the language in Mr. Zwicky's Purchase Agreement with Premiere Development Inc. because this matter does not fall within the scope of that contractual provision, nor can he recover attorneys' fees under A.R.S. § 12-341.01 because this matter does not arise out of a contract. The application seeks $28,696.00 in attorneys' fees, including fees sought for Mr. Barry's time in the amount of $21,562.50, for which he failed to keep any contemporaneous records of his time and tasks performed. In addition, Mr. Zwicky seeks costs in the amount of $704.10, but the list

of costs attached to his counsel's affidavit totals only $370.64, and there is no supporting documentation for any of these costs. The attorneys' fees claimed by Mr. Zwicky are unreasonable and unsupported by the affidavits of counsel. Accordingly, this Court should deny Mr. Zwicky's request or, in the alternative, reduce the amount of attorneys' fees awarded.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL HISTORY.

PVCOA is a timeshare owners' association, and Plaintiff Norman Zwicky is a member of PVCOA. Mr. Zwicky entered into a Purchase Agreement with Premiere Development Inc. in 2004 to convert his original timeshare interest in Kohl's Ranch to a membership in the ILX Premiere Vacation Club. Premiere Development Inc. was the original developer of the ILX Premiere Vacation Club, and unsold inventory was sold through ILX Resorts Incorporated. In 2010, ILX Resorts went into bankruptcy, and a substantial portion of its assets were acquired by a subsidiary of Diamond Resorts Corporation, including unsold inventory of the Premiere Vacation Club, now known as the Premiere Vacation Collection. PVCOA has a management agreement with Diamond Resorts Management, Inc., an affiliate of Diamond Resorts International, Inc. Mr. Zwicky has refused to pay his maintenance fee assessments since 2013 and now owes over $13,000 in arrears.

On April 16, 2013, before he filed this lawsuit, Mr. Zwicky requested production of PVCOA's Member Plans, Articles of Incorporation, Bylaws, and Rules and Regulations. In response to Mr. Zwicky's request, PVCOA provided those documents on May 1, 2013. Mr. Zwicky filed this action on May 13, 2015, seeking production of records related to the allocation of Premiere Vacation Collection "points" and the amount paid by Diamond Resorts to PVCOA in the form of assessments, as well as an order enforcing his inspection rights under A.R.S. § 10-11602, A.R.S. § 33-2209, and/or the common law. In connection with the lawsuit, Mr. Zwicky served formal document requests seeking additional documents. On August 31, 2015, PVCOA produced documents showing the allocation of sold and unsold points,

maintenance fee calculations and assessment fees per point, and the annual budget showing revenues and expenses.

The parties both moved for summary judgment, and the Court heard oral argument on March 11, 2016. In a minute entry filed on March 14, 2016, the Court granted Mr. Zwicky's motion for summary judgment and ordered Mr. Zwicky to present a proposed form of order specifying the information that he was asking the Court to order PVCOA to produce. Mr. Zwicky has applied for attorneys' fees and costs pursuant to A.R.S. §§ 12-341 and 12-341.01, and also based on his Purchase Agreement with Premiere Development Inc. (attached as Exhibit A to Defendant's Statement of Material Facts, Jan. 11, 2016).

II. THE APPLICATION FOR ATTORNEYS' FEES SHOULD BE DENIED.

a. Mr. Zwicky is not entitled to an award of attorneys' fees based on any contractual provision.

Mr. Zwicky argues that he is entitled to attorneys' fees based on language from his Purchase Agreement with Premiere Development Inc. PVCOA is not bound by Mr. Zwicky's agreement with an entirely different entity to pay a prevailing party's attorneys' fees because PVCOA is not a party to that agreement. Furthermore, the contractual provision is inapplicable because this action was not brought to enforce or interpret the Purchase Agreement.

The Purchase Agreement states: "In any action or proceeding to enforce or interpret this Agreement, the prevailing party or parties shall be entitled to reimbursement of its reasonable attorneys' fees and litigation expenses from the non-prevailing party or parties to this Agreement, as the court or arbitrator may determine." [Def.'s Statement of Material Facts, Ex. A, Jan. 11, 2016] PVCOA is not a party to the Purchase Agreement, and, for that reason, does not fall within the scope of the fee-shifting provision. Nor is PVCOA, as the timeshare owners' association, a successor in interest to Premiere Development Inc., which was the developer. Following the bankruptcy of ILX Resorts Incorporated, a substantial portion of the assets of the original developer were acquired by Diamond Resorts

Corporation, not PVCOA. [Def.'s Separate Statement of Facts, 1/11/16, ¶¶7-10] Therefore, PVCOA was not a party to the Purchase Agreement or a successor in interest to Premiere Development, Inc., and is not a "non-prevailing party or parties to this Agreement."

Secondly, this action does not "enforce or interpret" the Purchase Agreement. Mr. Zwicky has not brought any action for breach of contract or any other contractual claim. The record inspection rights Mr. Zwicky asserted in this lawsuit were based on statutory or common law rights of inspection, not any contractual provisions. The Court's grant of summary judgment in Mr. Zwicky's favor did not require the court to interpret any of the language in the Purchase Agreement or enforce any of its terms. For that reason, Mr. Zwicky is not entitled to attorneys' fees based on the contractual provision in his Purchase Agreement with Premiere Development Inc.

b. Attorneys' fees may not be awarded pursuant to A.R.S. § 12–341.01(A) because this matter does not arise out of a contract.

A.R.S. § 12-341.01 provides that in any contested action "arising out of a contract . . . the court may award the successful party reasonable attorney fees." Arizona courts "interpret A.R.S. § 12-341.01 to mean that the ultimate prevailing party in an underlying action arising out of contract may be awarded attorney's fees." *U.S. Insulation, Inc. v. Hilro Constr. Co.*, 146 Ariz. 250, 259, 705 P.2d 490, 499 (App. 1985). This litigation involved a statutory or common law records request and declaratory relief as to that records request. The determination of Plaintiff's claims did not require interpretation of any contract language and was not based on contractual rights. For that reason, it did not arise out of a contract. A.R.S. § 12-341.01 is inapplicable to an action raising issues concerning interpretation of statutes rather than contract issues. J*.C. Penney v. Lane*, 197 Ariz. 113, 119, 3 P.3d 1033, 1039 (App. 1999). Here, Plaintiff's records request implicated the statutes applicable to timeshare associations and common law inspection rights, but did not require determination of any contract issues. Therefore, this matter was not an action "arising out of" the Purchase Agreement or any other contract, and A.R.S. § 12-341.01 does not apply.

c. An award of fees is not warranted under § 12–341.01(A).

Even if the Court decides that A.R.S. § 12-341.01 does apply to this action, an award of attorneys' fees is discretionary under that statute, and fees are not warranted. In determining whether to award fees under § 12–341.01(A), the court must consider: (1) the merits of the claim or defense the unsuccessful party presented; (2) whether the parties could have avoided or settled the litigation and whether the successful party's efforts were completely superfluous in achieving the result; (3) whether assessing fees against the unsuccessful party will cause an extreme hardship; (4) whether the successful party prevailed on all relief sought; (5) the novelty of the legal questions presented; (6) whether the claims or defenses had been previously adjudicated in Arizona; and (7) whether an award of fees would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney fees. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).

An award of fees under § 12–341.01(A) is not appropriate in this case for several reasons. First, applying factors (1), (5), (6) and (7) above, these were novel claims that had not been previously addressed in Arizona. We will not reiterate here all the points made in the briefing papers, but note that the parties relied extensively on cases from other jurisdictions supporting their respective positions on various arguments. There is no settled Arizona case law addressing whether a timeshare owner has a common law right of inspection or the standards for determining what constitutes a proper purpose in the context of inspecting the records of a timeshare owners' association. Indeed, the primary basis for the Court's ruling was Delaware authority, not any settled Arizona case law. PVCOA's contentions that Mr. Zwicky had not met the statutory requirements for timeshare record inspection and that there was no common law right of inspection for timeshare owners, although rejected by this Court, were not unmeritorious. Awarding attorney's fees in these circumstances would deter other parties with tenable claims or defenses from litigating or

defending legitimate issues for fear of incurring liability for substantial amounts of attorney fees.

In addition, an award of fees under the circumstances would constitute an extreme hardship to PVCOA. An award of attorneys' fees would directly and negatively impact the association's ability to serve the interests of the other members of the association. Especially in light of the fact that Mr. Zwicky has failed to pay his assessments for a number of years, it would be inequitable in these circumstances to require PVCOA to bear the cost of Mr. Zwicky's attorney's fees. For these reasons, an award of fees is not warranted under § 12–341.01(A).

d. The amount of fees claimed is unreasonable.

When determining whether the amount of a fee award is reasonable, the court must consider the reasonableness of both the billing rate and the hours expended. *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983).

1. The fee application fails to provide sufficient information for the Court to determine the reasonableness of the hours expended by Mr. Barry.

The fee application is insufficiently detailed to support an award for services performed by Mr. Barry because he failed to keep contemporaneous time records and is unable to state the date services were provided or the time spent on particular tasks. "In order for the court to make a determination that the hours claimed are justified, the fee application must be in sufficient detail to enable the court to assess the reasonableness of the time incurred." *Schweiger*, 138 Ariz. at 188, 673 P.2d at 932. "Practitioners are advised to prepare their summaries based upon contemporaneous time records which indicate the work performed by each attorney for whom fees are sought." *Id*. "The affidavit of counsel should indicate the type of legal services provided, the date the service was provided, the attorney providing the service (if more than one attorney was involved . . .), and the time spent in providing the service." *Id.* "It is insufficient to provide the court with broad summaries of the work done and time incurred." *Id*. "'[A]ny attorney who hopes to obtain an allowance

from the court should keep accurate and current records of work done and time spent.'" *Id.* (quoting *In re Hudson & Manhattan R.R. Co.*, 339 F.2d 114, 115 (2d Cir. 1964)).

Mr. Barry seeks $21,582.50 in attorneys' fees for his work in this matter, but admits that he failed to keep contemporaneous records of his legal services, and is unable to state the date each service was provided or to specify how much time was spent on particular tasks. Instead, he generally summarizes his work and approximately estimates his time using round numbers. This type of broad summary is plainly insufficient. Mr. Barry's descriptions include block billing for multiple tasks, which does not allow the Court to assess the reasonableness of the time incurred because it is impossible to know how much time was spent on each of the various tasks. Moreover, Mr. Barry himself does not even know how much time he spent on particular tasks. Because Mr. Barry's broad summaries do not provide sufficient information for the Court to determine whether the hours claimed are justified, the application must be denied as to Mr. Barry's time, in the amount of $21,582.50.

2. The number of hours claimed is unreasonable.

"Just as the agreed upon billing rate between the parties may be considered unreasonable, likewise, the amount of hours claimed may also be unreasonable. If a particular task takes an attorney an inordinate amount of time, the losing party ought not be required to pay for that time." *Id.* In addition to being unreasonable as a whole, the specific time entries for the numerous attorneys and paralegals listed reflect duplication of effort.

For example, certain time entries predate the initiation of this litigation and do not relate to the subject matter of this action. This action was filed on May 13, 2015. All time entries for Erica Fedon and Laura Ciancanelli, and some time entries for Rob Moore and Jon Phelps, predate the filing of the complaint and are unrelated to the complaint. The parties began corresponding in 2013, and PVCOA had provided a number of documents as requested by Mr. Zwicky prior to the filing of this litigation. The time entries related to those record requests, which were satisfied before the initiation of this litigation, are not related to the subject matter of this litigation and do not arise out of a "contested action."

See A.R.S. 12-341.01; *Morrison v. Shanwick Int'l Corp*., 167 Ariz. 39, 47, 804 P.2d 768, 776 (App. 1990) (holding that a contested action is one in which the defendant has appeared and generally defends against the claims and demands made by the plaintiff).

In addition, the time entries reflect duplicative interoffice conferencing. It is also unexplained why such a large number of attorneys and paralegals have worked on this matter, reflecting duplicative and unnecessary efforts. For these reasons, the amount of attorneys' fees awarded, if any, must be reduced. Certainly, at a minimum, fees should not be awarded for Mr. Barry's time, because he failed to keep contemporaneous time records and is unable to provide sufficient detail to enable the Court to assess the reasonableness of the time incurred.

e. Mr. Phelps's declaration does not state that Mr. Zwicky has actually been billed or paid the enumerated fees in Exhibit 1.

Attorneys' fees awarded under § 12–341.01(A) "need not equal or relate to the attorney fees actually paid or contracted, but the award may not exceed the amount paid or agreed to be paid." A.R.S. § 12–341.01(B); *see also Bldg. Innovation Indus., L.L.C. v. Onken*, 473 F. Supp. 2d 978, 986 (D. Ariz. 2007). Mr. Phelps's declaration states that "Plaintiff is obligated to pay for the total charges" pursuant to his fee agreement with Phelps Law Group, the predecessor to Phelps & Moore, PLC. Mr. Zwicky has not provided the Court with a copy of that fee agreement. Mr. Phelps's declaration does not state that Mr. Zwicky has actually been billed or paid for any of the charges by Phelps & Moore, PLC or by Mr. Barry. Mr. Barry is not a member or employee of Phelps & Moore, PLC and does not have any separate fee agreement with Mr. Zwicky. Mr. Barry's declaration states that he has a fee sharing arrangement with Phelps & Moore, PLC, but a copy of that agreement has not been provided to the Court. There is no basis to conclude that Mr. Zwicky has agreed to pay for Mr. Barry's fees, especially since Mr. Barry failed to keep any contemporaneous time records, as explained above. Because the application does not state that Mr. Zwicky has actually been billed for or paid any of the charges shown in Exhibit 1, the application should be denied.

f. Mr. Zwicky's request for costs is unsupported by the affidavit of counsel and lacks supporting documentation.

Mr. Zwicky argues that he is entitled to costs pursuant to A.R.S. § 12-341, which provides that "[t]he successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law." Exhibit 1 to Mr. Phelps's declaration provides a list of costs incurred purportedly totaling $704.10. In fact, the total amount of the listed costs is only $370.64. In addition, there is no supporting documentation attached to the declaration that would allow the Court to determine whether these costs were actually expended or incurred in relation to this matter. For that reason, PVCOA requests that the court deny an award of costs or, in the alternative, reduce the amount of costs awarded to no more than $370.64.

Conclusion

PVCOA respectfully requests that the Court deny Mr. Zwicky's request for attorney's fees and costs or, in the alternative, reduce the award to a reasonable amount of attorney's fees and costs totaling no more than $370.64.

DATED this 21st day of April, 2016.

COPPERSMITH BROCKELMAN PLC

By *__/s/ John E. DeWulf__*
John E. DeWulf
Katherine DeStefano
2800 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004
Attorneys for Defendant

ORIGINAL e-filed and a copy mailed this 21st day of April, 2016, to:

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

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

By /s/ *Verna Colwell*