

1                   LAW OFFICES  
2                   PHELPS & MOORE  
3                   PROFESSIONAL LIMITED LIABILITY COMPANY  
4                   4045 EAST UNION HILLS DRIVE  
5                   SUITE A-102  
6                   PHOENIX, ARIZONA 85050  
7                   (602) 788-2089

8 Jon L. Phelps (027152)  
9 jon@phelpsandmoore.com  
10 Shannon A. Lindner (026688)  
11 shannon@phelpsandmoore.com  
12 Counsel for Plaintiff Norman Zwicky

13                   EDWARD L. BARRY  
14                   ATTORNEY AT LAW  
15                   2120 COMPANY STREET  
16                   THIRD FLOOR  
17                   CHRISTIANSTED, VIRGIN ISLANDS 00820  
18                   (340) 719-0601

19 Edward L. Barry (005856)  
20 ed@AttorneyEdBarry.com  
21 Co-Counsel for Plaintiff Norman Zwicky

22                   **THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
23                   **IN AND FOR THE COUNTY OF MARICOPA**

24 NORMAN ZWICKY,  
25  
26                   Plaintiff,

vs.

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

Defendant.

**CASE NO. CV2015-051911**

**PLAINTIFF'S MOTION FOR  
MODIFICATION OF PROTECTIVE  
ORDER AND ORDER TO DISCLOSE  
OWNERS LIST**

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

**TELEPHONIC CONFERENCE SET  
FOR AUGUST 19th, 8:30 A.M.**

**PLAINTIFF'S MOTION RE PROTECTIVE ORDER AND OWNERS LIST**

The parties, through counsel, have sought to cooperatively resolve the remaining issues, thus far to no avail.

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**Protective Order**

As the Court and counsel for defendants have been advised, the undersigned counsel believe that the documents produced reveal that there is a reasonable, good faith factual and legal basis for a federal class action lawsuit alleging misfeasance and malfeasance in the conduct of this timeshare enterprise. The Court will further recall that the investigation of management practices for possible future litigation was the basic purpose of this suit to enforce inspection rights.

Plaintiff intends to proceed accordingly. Of course, in any proposed class action pleading, Plaintiff (and other putative class representatives) will be expected to meet *Bell Atlantic* standards of “plausibility”<sup>1</sup> and Rule 9(b) standards of particularity in any allegations of fraud. Fed.R.Civ.P. 9(b). Such factual specificity in the allegations will obviously require direct use of materials provided under the existing confidentiality order, which is not only a legitimate use of these materials but the use that was intended all along. However, Plaintiff of course does not want to violate any order of this Court. Nor—contrary to Defendant’s position—would it be appropriate that Plaintiff be required to submit to some type of screening procedure before filing the complaint in Federal court to satisfy either this Court or the Defendant that the use of the evidence Plaintiff has obtained in this suit is being appropriately utilized. (Such a proposed arrangement, allowing a defendant to participate in the censorship of a complaint against that defendant, would be unheard of and untenable. There is no known precedent for it.)

Plaintiff suggests the following language in a supplemental order, in an effort to protect Plaintiff’s rights to proceed with the class action, while at the same time maintaining confidentiality of materials not needed in the initial pleadings or motion practice:

Plaintiff’s counsel have advised the Court that they intend to

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<sup>1</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

1 proceed with class action litigation in this matter, based in part  
2 upon the materials disclosed in connection with this litigation.  
3 The Order set forth in the Minute Entry of May 6, 2016  
4 (“Protective Order”) shall in no way be construed to prohibit or  
5 restrict Plaintiff or his counsel from quoting, referring to, or  
6 otherwise utilizing the information produced in connection with  
7 this litigation in any pleadings, motions, or responses to motions  
8 in such proposed class action litigation. Otherwise, the  
9 Protective Order shall remain in effect until 60 days after any  
10 proposed class action lawsuit is filed in the District Court, and  
11 shall then expire. Nothing in this Order shall be construed as  
12 any attempt to limit the independent power of the District Court  
13 to enter its own protective order upon appropriate motion in that  
14 Court.

### 10 Owners List

11 Plaintiff has in this case sought to enforce his inspection rights given by statute and  
12 by common law, including the right to inspect “shareholder lists” (member lists, in this  
13 instance).<sup>2</sup>

15 In this case, defense counsel advised the Court that there are 22,500 members of the  
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17  
18 <sup>2</sup> The relevant statutes specifically preserve common law inspection rights  
19 enforceable through independent action. A.R.S. § 10-1602(E)(2) (general corporations); §  
20 10-11602(D)(2) (nonprofits); A.R.S. § 33-2209(D)(2) (timeshare inspection statute;  
21 specifically preserving “[t]he power of a court, independently of this chapter, to compel the  
22 production of records for examination on proof by an owner of proper purpose”); *Shantz v.*  
23 *Tucson Gas & Elec. Co.*, 5 Ariz. App. 511, 513-14, 428 P.2d 686, 688 (App. 1967) (“Th[e]  
24 common law right of inspection is a remedial right which exists independently of statute.  
25 Statutes providing for a shareholder's right of inspection have been construed as enlarging or  
26 extending the common law right rather than as a restriction or abrogation of the right of  
inspection.”); and see, e.g., *Left Hand Ditch Co. v. Hill*, 933 P.2d 1, 5 (Colo. 1997) (stating  
that “shareholders in a nonprofit water corporation have a ‘fundamental right’ to inspect the  
corporation's shareholder list,” even though right not conferred by statute) (*citations*  
*omitted*); 5A Fletcher Cyc. Corp. § 2225 (“Shareholders may inspect shareholders' lists for  
the purpose of informing other shareholders concerning suits that they have brought to  
ascertain whether any of them desire to join the action.”).

1 Collection (which, as the Court will recall, is the master association of owners in a grouping  
2 of numerous separate vacation resorts, each reportedly having their own HOA). Given the  
3 sheer number of owners involved, Plaintiff has narrowed his request to a list of owners who  
4 have protested the amount of their annual assessments. See Plaintiff’s Motion for Summary  
5 Judgment, *November 25, 2015*, p. 9; Statement of Material Facts, ¶ 27.  
6

7 The Court, pursuant to oral stipulation in open court, has deferred ruling on the  
8 owners list issue.  
9

10 Without intending to compromise his *independent* common law rights, Plaintiff has  
11 sought to achieve a workable compromise in this case by attempting to comply with the  
12 timeshare statute’s limitations on disclosure of timeshare owner lists set forth in Arizona  
13 Revised Statutes Section 33-2210. That statute generally prohibits the *direct disclosure* of  
14 owners lists (§33-2210(D)), but *requires* the association or its manager to themselves mail  
15 “any materials provided by any owner, on the written request of that owner, if the purpose  
16 of the mailing is to advance legitimate association business.” §33-2210(B).<sup>3</sup>  
17

18 Plaintiff has proposed that the Defendant mail out, to this limited sub-list of owners,  
19 a letter from Phelps & Moore, PLC, in substantially the form attached as **Exhibit A** hereto.<sup>4</sup>  
20 In a follow-up letter, and in an attempt to comply with the statute, Plaintiff’s counsel has  
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22 <sup>3</sup> Plaintiff submits that he has conclusively established a proper purpose in this case  
23 to the satisfaction of the Court, and will not re-argue the point. Under the circumstances,  
24 the Board of the Association—stacked with executives of Diamond Resorts International—  
25 should of course not be able to veto this Court’s ruling by deciding, on its own, that sending  
26 out a mailing would not (in the words of the statute) “advance legitimate association  
business.”

<sup>4</sup> Some minor changes might be required to ensure compliance with the ethics rules.

1 offered to pay the *reasonable* cost of mailing that letter (if Defendant opts to physically mail  
2 the communication, as opposed to emailing it). **Exhibit B** hereto. See Section 33-2210(B)  
3 (“The owner who requests the mailing shall reimburse the association or other managing  
4 entity in advance for the actual costs in performing the mailing or a proportionate share of  
5 actual costs if the mailing is included in a mailing that includes other items.”).<sup>5</sup>

7 Alternatively, the Court could require Defendant to mail (or electronically  
8 disseminate) to the limited group of owners a notice in the form approved by the Court,  
9 containing substantially the following language:  
10

11 **NOTICE OF COURT ORDER**

12 **PLEASE TAKE NOTICE** that this Court has ordered the  
13 production, for the purpose of inspection, copying and investigation, of  
14 certain business records of Defendant Premier Vacation Collection Owners  
15 Association (the “Association”) to Plaintiff Norman Zwicky, a member of  
16 the Association represented by Attorney Jon Phelps of the law firm of  
17 Phelps & Moore, PLC, 4045 East Union Hills Drive, Suite A-102, Phoenix,  
18 Arizona 85050; telephone (602) 788-2089; email  
19 jon@phelpsandmoore.com.

- 20 • This Order is for your information only and requires no action by  
21 you.
- 22 • Please do not contact the Court. The Court cannot answer any  
23 questions. You may, if you wish, contact the Plaintiff’s attorney.
- 24 • The Court has made no ruling on any claim of improper conduct

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25 <sup>5</sup> If the Defendant does not agree to mail the notice out voluntarily, in accordance  
26 with the statute, Plaintiff should not be burdened with this cost, particularly where Plaintiff  
has had to file this lawsuit and incur very substantial attorney’s fees to enforce his basic  
inspection rights, both statutory and common law. That issue is for the Court’s discretion.  
Perhaps the Court will wish to consider offsetting the *reasonable* cost of mailing from any  
award of attorneys’ fees.

1 by the Defendant. The Court's role in this matter was strictly to  
2 enforce Mr. Zwicky's rights to inspect certain business records.

- 3 • This Notice of Court Order is being sent to you by the Association  
4 pursuant to a separate order of the Court. Your name and contact  
5 information has not been disclosed to the Court, and has not been  
6 disclosed to Mr. Zwicky or his attorneys.

7 **CONCLUSION**

8 Plaintiff asks the Court to modify the Protective Order to allow him to proceed with  
9 an appropriate class action without fear of violating its confidentiality provisions. Plaintiff  
10 also asks that notice of this action, together with information that will provide protesting  
11 owners the ability to join forces with Plaintiff if they so wish, should be provided in a  
12 manner that is effective, economical, and that preserves owners' privacy rights.

13 By separate motion, Plaintiff will supplement his application for attorney's fees.  
14

15 RESPECTFULLY SUBMITTED this 28 day of July, 2016.

16 PHELPS & MOORE, PLC

17  
18 By /s/ Jon L. Phelps  
19 Jon L. Phelps  
20 4045 East Union Hills Drive  
Suite A-102  
Phoenix, Arizona 85050  
Counsel for Plaintiff

21 -and-

22 /s/ Edward L. Barry  
23 Edward L. Barry  
24 2120 Company Street, Third Floor  
Christiansted, VI 00820  
Co-counsel for Plaintiff

25 ORIGINAL of the foregoing efiled on  
26 this the 29th day of July, 2016;

1 COPY of the foregoing delivered via azturbocourt.gov  
on this 29th day of July, 2016 to:

2  
3 The Honorable John Hannah  
4 Northeast Regional Center  
18380 N. 40th Street  
Phoenix, Arizona 85032

5 COPY of the foregoing delivered via email and U.S. mail  
on this the 29th day of July, 2016 to:

6  
7 John E. DeWulf  
Katherine DeStefano  
COPPERSMITH BROCKELMAN PLC  
8 2800 North Central Avenue, Suite 1200  
Phoenix, Arizona 85004  
9 Counsel for Defendant

10 By /s/ Kelly Naddaff \_

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# **EXHIBIT A**

LAW OFFICES  
**PHELPS & MOORE**  
Professional Limited Liability Company

**Street Address:**  
4045 East Union Hills Drive  
Suite A-102  
Phoenix, Arizona 85050

**JON L. PHELPS**  
**ROBERT M. MOORE**  
jon@phelpsandmoore.com  
rob@phelpsandmoore.com  
Phone (602) 788-2089  
Fax (602) 663-9050

**CY T. HAINEY**  
cy@phelpsandmoore.com

July 14, 2016

**ADVERTISING MATERIAL:  
THIS IS A COMMERCIAL SOLICITATION**

Dear Member:

It is my understanding that you are a member of Premiere Vacation Collection Owners Association (the "Association"). My firm is currently investigating claims that excessive fees are being charged by the Association in connection with memberships like yours, in contemplation of class action litigation.

If you feel that your fees are excessive and would like to learn more about this matter, or wish to consider possible participation in a class action, we would be pleased to discuss this matter further with you.

This letter is being sent to you directly by the Association, in order to protect your personal privacy, as the result of a court order in *Zwicky v. Premier Vacation Collection Owners Association*, Maricopa County Arizona Superior Court, Case No. CV2015-0951911, a lawsuit involving owners' rights to inspect financial records of the Association. Neither the Association nor any other person or entity as admitted any form of wrongdoing, nor has the Court made any determination of wrongdoing. Your names, address or other personal contact information have not been disclosed.

Sincerely,

**JON L. PHELPS**  
For the Firm

JLP/cth

# **EXHIBIT B**

# EDWARD L. BARRY

ATTORNEY AT LAW  
53A COMPANY STREET  
THIRD FLOOR  
CHRISTIANSTED, ST. CROIX  
U.S. VIRGIN ISLANDS 00820

EDWARD L. BARRY\*

OF COUNSEL:  
SCOT F. McCHAIN†  
DAVID M. NISSMAN‡

TELEPHONE 340.719.0601  
FACSIMILE 340.719.0602

www.AttorneyEdBarry.com  
ed@AttorneyEdBarry.com

July 26, 2016

\*Virgin Islands & Arizona

†Virgin Islands; also licensed  
CPA in Texas

‡Virgin Islands & Oregon

John E. DeWulf  
COOPERSMITH BROCKELMAN  
2800 North Central Avenue, Suite 1200  
Phoenix, Arizona 85004  
Via email: jdewulf@cblawyers.com

Re: Zwicky v. Premier Vacation Collection  
Maricopa County Superior Court No. CV2015-051911

Dear Mr. DeWulf:

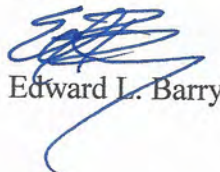
This letter seeks to comply with the procedural requirements of A.R.S. § 33-2210 to the extent those requirements may apply. (Recall that we have relied upon common law principles as an independent basis for inspection of a limited owner's list, and have urged the Court to find that technical compliance with statutory preconditions to disclosure of information has been excused by futility.)

We do NOT seek to communicate with all owners of the Collection. As clarified previously, we seek to communicate only with owners who have protested the level of assessments, including those who have initiated litigation.

In deference to subsection D of the timeshare statute, we are not asking for disclosure of names and addresses (even though that information is certainly available under the common law for a proper purpose, which is a right specifically preserved by A.R.S. § 33-2209(D)(2)). We are asking that our communication be sent by the Collection to the owner.

We now further offer to cover the reasonable cost of mailing our single-page communication, in accordance with Section 33-2210. Please advise of the cost of same. (Alternatively, the Collection could use email communication to avoid all such cost.)

Sincerely,



Edward L. Barry

**EXHIBIT B**