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7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
8 **MARICOPA COUNTY**

10 NORMAN ZWICKY, ) NO. CV2015-051911  
11 )  
12 ) Plaintiff, )  
13 ) **DEFENDANT’S RESPONSE TO**  
14 ) **PLAINTIFF’S MOTION FOR**  
15 ) **MODIFICATION OF PROTECTIVE**  
16 ) **ORDER AND ORDER TO DISCLOSE**  
17 ) **OWNERS LIST**  
18 ) (Assigned to the Honorable John Hannah)  
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1 hearing the case to supervise the precertification communications with potential class  
2 members. Because the motion asks for relief beyond the scope of the Court’s proper authority  
3 in this matter, the motion should be denied.

4 **Factual Background**

5 Before Mr. Zwicky even filed this lawsuit, PVCOA had already provided him copies  
6 of the Second Amended and Restated Premiere Vacation Collection Membership Plan; the  
7 Articles of Incorporation; the Bylaws; and the Second Amended and Restated Rules and  
8 Regulations of Premiere Vacation Collection Owners Association, Inc. Mr. Zwicky filed this  
9 action on May 13, 2015, seeking information listed in Paragraph 20 of the Verified Complaint,  
10 related to the allocation of Premiere Vacation Collection “points” and the amount paid by  
11 Diamond Resorts to PVCOA in the form of assessments. In connection with the lawsuit,  
12 Mr. Zwicky also served formal document requests seeking documents and information beyond  
13 what was requested in the Verified Complaint. On August 31, 2015, in response to  
14 Mr. Zwicky’s discovery requests, and without conceding that he was entitled to any of the  
15 information sought based on A.R.S. § 10-11602, A.R.S. § 33-2209, and/or the common law,  
16 PVCOA produced documents showing the allocation of sold and unsold points, maintenance  
17 fee calculations and assessment fees per point as requested by Paragraph 20 of the Complaint.  
18 Further, PVCOA produced its annual budget showing revenues and expenses, including the  
19 Maintenance Fee Expense Report (PVCOA0001-02); Member Summary–Point Analysis  
20 (PVCOA0003); 2015 Maintenance Fee Calculation (PVCOA0004); and 2015 Budget  
21 (PVCOA0005). With its supplemental disclosure statement, PVCOA also produced  
22 Mr. Zwicky’s payoff documents, assessment fees, final notice, and correspondence to  
23 Mr. Zwicky’s counsel (PVCOA0006-0047).

24 On March 11, 2016, the Court granted Mr. Zwicky’s motion for summary judgment,  
25 and ordered Mr. Zwicky to submit a proposed form of order explaining precisely which  
26 additional documents he wanted from PVCOA (since Mr. Zwicky’s demands were a moving  
27 target) and including a proposed protective order. Mr. Zwicky filed that proposed form of  
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1 order on March 18, 2016, requesting a protective order that permitted unlimited use or  
2 disclosure of any documents obtained for Mr. Zwicky's attorneys' planned class action  
3 litigation. PVCOA objected to that proposed protective order on March 25, 2016, arguing that  
4 PVCOA's confidential, proprietary, and/or trade secret information was deserving of  
5 protection, and that the proposed language regarding any "future litigation" was undefined and  
6 speculative, since neither Mr. Zwicky nor his lawyers had yet brought any claims against  
7 PVCOA other than this records request. Mr. Zwicky filed a response to PVCOA's objections  
8 on April 11, 2016, again arguing against any limits on the use of confidential and proprietary  
9 information by Mr. Zwicky's lawyers in yet-to-be-filed class actions. The parties fully briefed  
10 the protective order issue and the Court held oral argument on this issue on May 6, 2016.

11 The Court rejected Mr. Zwicky's proposed protective order, instead ordering as  
12 follows:

13 that all documents and records provided to the plaintiff pursuant to this order,  
14 and the information in those documents, shall be maintained in confidence by  
15 the plaintiff and not disclosed to anyone except the plaintiff, his current attorneys  
16 and any attorneys with whom they [may] be discussing potential future  
representation of the plaintiff, accountants and other experts retained or  
potentially retained by the plaintiff's attorneys to assist them in the  
representation and the personnel of the firm of the attorneys' and experts' firm.

17 [Ruling, 5/6/16] Mr. Zwicky did not file a motion for reconsideration of the Court's ruling on  
18 the protective order.

19 On June 6, 2016, in response to the Court's ruling on the production of additional  
20 documents pursuant to the grant of summary judgment, PVCOA produced over a thousand  
21 pages of documents, including highly detailed financial reports, as well as confidential and  
22 proprietary documents that are not publicly available or shared with members in the normal  
23 course of business. Specifically, PVCOA produced documents responsive to items 1-7 and  
24 15-19 from Plaintiff's proposed form of order, including the following:

- 25 • Public reports filed with the Arizona Department of Real Estate (PVCOA000876-  
26 1205);

- 1 • Annual financial reports for PVCOA and its resorts for the period from 2011 through  
2 2015 (PVCOA000048–588; PVCOA001270–1304);
- 3 • Indirect Corporate Costs spreadsheet (PVCOA000589–592);
- 4 • Interval Assignment and Recovery Agreements for PVCOA and its resorts for the  
5 period from 2011 through 2015 (PVCOA000593–718);
- 6 • Management Agreements for PVCOA and its resorts for the period from 2011 through  
7 2015 (PVCOA000719–832; PVCOA001252–69);
- 8 • Management Fees report (PVCOA000833);
- 9 • Annual budgets for PVCOA and its resorts for the period from 2011 through 2015  
10 (PVCOA000834–75); and
- 11 • Occupancy and Revenue report (PVCOA001206–51).

12  
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14 PVCOA designated certain documents as “CONFIDENTIAL,” because they contained  
15 sensitive personal information, personnel records, trade secrets, proprietary business  
16 information, or other confidential research, development, financial, or commercial  
17 information. The documents designated CONFIDENTIAL included the Indirect Corporate  
18 Costs spreadsheet; the Interval Assignment and Recovery Agreements for PVCOA and its  
19 resorts for the period from 2011 through 2015; the Management Agreements for PVCOA and  
20 its resorts for the period from 2011 through 2015; the Management Fees report; and the  
21 Occupancy and Revenue report. In PVCOA’s Notice of Production of Documents, PVCOA  
22 stated that its production of confidential records was done in reliance on the protective order  
23 in the Court’s Ruling dated May 6, 2016. Mr. Zwicky has not contended that this production  
24 was insufficient in any way under the Court’s Ruling.

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1 **Argument**

2 **I. Mr. Zwicky is Not Entitled to Modification of the Protective Order.**

3 This Court has already addressed the need for a protective order to protect the  
4 confidential and proprietary information disclosed in this matter, and the parties fully briefed  
5 and argued this issue to the Court. Nothing has changed since those briefs and arguments were  
6 submitted to the Court, so there is no reason to modify the protective order at this time.  
7 Mr. Zwicky is essentially filing a motion for reconsideration of the Court’s May 6, 2016  
8 Ruling.

9 Mr. Zwicky’s attorneys have now proposed doing away with the protective order  
10 entirely as to their own future litigation, and entirely as to the rest of the world 60 days after  
11 the filing of some sort of federal class action. Mr. Zwicky’s attorneys are putting the cart  
12 before the horse. They have not yet filed any federal class action, so there is no need for them  
13 to disclose the documents. Until the complaint is actually filed, there is no way for this Court  
14 to evaluate whether the information is relevant to those potential undefined claims. Any such  
15 relevance determination is premature, because the claims have not yet been asserted. The  
16 Court does not know what claims Mr. Zwicky’s attorneys plan to assert or the factual or legal  
17 basis for those claims. The Court cannot evaluate whether there is a need to modify the  
18 protective order until the Court knows what the information is needed for, based on the claims  
19 actually asserted by Mr. Zwicky’s attorneys. The Court cannot weigh the harm to PVCOA  
20 against Mr. Zwicky’s attorneys’ need for the documents if one side of the scale is a complete  
21 unknown.

22 Moreover, Mr. Zwicky’s attorneys fail to explain why they cannot craft a complaint  
23 that complies with the protective order. Assuming that Mr. Zwicky’s attorneys do, in fact,  
24 have a good faith basis to assert claims against PVCOA, they need not attach hundreds of  
25 pages of detailed and confidential financial documents in order to set forth a “short and plain”  
26 statement of the claim showing that the putative class is entitled to relief, pursuant to Rule 8  
27 of the Federal Rules of Civil Procedure.  
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1 PVCOA has disclosed abundant non-confidential information which Mr. Zwicky's  
2 attorneys may use to support their claims without violating the protective order, including the  
3 membership plan, the articles of incorporation and bylaws, the rules and regulations, annual  
4 budgets for PVCOA and its resorts, maintenance fee expense reports and calculations, member  
5 summary points analysis, reports filed with the Arizona Department of Real Estate, and annual  
6 financial reports for PVCOA and its resorts. Mr. Zwicky does not dispute that PVCOA's  
7 response to Mr. Zwicky's discovery requests and the Court's Ruling has been thorough and  
8 comprehensive. PVCOA has attempted to assuage Mr. Zwicky's concerns by providing him  
9 with abundant information. Mr. Zwicky's attorneys have not explained why they cannot state  
10 a claim based on the non-confidential materials, without delving into confidential and  
11 proprietary material in violation of the protective order and PVCOA's reliance on the Court's  
12 Ruling.

13 PVCOA produced these confidential documents in reliance on the Court's protective  
14 order, and Mr. Zwicky's attorneys should not be allowed to disregard that protection. There  
15 is no legitimate reason to modify the protective order, and doing so would be premature. If  
16 and when any such class action has been filed and certified, then this Court, or perhaps the  
17 Federal District Court, would be in a position to consider whether it is appropriate to modify  
18 the protective order for purposes of that future litigation.

19 It is important to keep in mind the true nature of this action. This is not a class action  
20 involving any alleged misconduct by PVCOA; indeed, no misconduct was even alleged in the  
21 Verified Complaint. The Court's role in this action is to determine what records Mr. Zwicky  
22 is entitled to and to determine whether PVCOA has complied with the orders to produce those  
23 records. The Court's role is not to help Mr. Zwicky's attorneys prepare a class action  
24 complaint that has not yet been filed or to facilitate precertification communications with  
25 potential class members. Mr. Zwicky's attorneys seem to believe that the purpose of this  
26 action (a books and records request to an owners' association) was to circumvent the discovery  
27 rules that would apply to any federal class action in order to gather information necessary to  
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1 prevail on those theoretical claims. Indeed, Mr. Zwicky’s lawyers actually admitted in the  
2 response to PVCOA’s objections filed on April 11, 2016 (at 6), that the purpose of this action  
3 was not to investigate mismanagement by PVCOA as it affects Mr. Zwicky’s rights, but  
4 instead to gather information for “future class action litigation.” That is not a proper purpose  
5 within the meaning of the record inspection statutes or the common law right of inspection.  
6 Mr. Zwicky has now received the relief he sought in this action in order to protect his rights  
7 as a member of PVCOA. There is no reason to expand this action or to modify the protective  
8 order in this action in order to promote the interests of Mr. Zwicky’s attorneys in an action that  
9 has not yet even been filed.

10 **II. Mr. Zwicky’s Attorneys May Not Circumvent the Federal Rules of Civil**  
11 **Procedure Applicable to Class Actions by Contacting Prospective Class Members**  
12 **Before Filing Any Action Alleging Wrongdoing.**

13 Mr. Zwicky’s attorneys have proposed soliciting members of PVCOA to retain their  
14 firm, and also sending a notice of this action to PVCOA’s members. This request is premature  
15 because Mr. Zwicky’s attorneys have not yet filed any federal class action, and precertification  
16 communications with potential class members should be controlled by the court handling the  
17 class action, pursuant to Federal Rule of Civil Procedure 23(d).

18 Mr. Zwicky cites A.R.S. § 33-2210(B) when arguing that he has the right to force  
19 PVCOA to send a communication to all member soliciting the firm of Mr. Zwicky’s attorneys.  
20 This would be a misuse of the statute.<sup>1</sup> The statute provides that an association shall mail to  
21 owners materials provided by an owner, “if the purpose of the mailing is to advance legitimate  
22 association business, such as a proxy solicitation for any purpose, including the recall of one  
23 or more board members elected by the owners or the discharge of the manager or management  
24 firm.” The proposed notification has nothing to do with “legitimate association business,”  
25 because there is no reason the members need to be informed of this action. There is no

26 \_\_\_\_\_  
27 <sup>1</sup> Mr. Zwicky is also incorrect that the statute allows him to shift the cost of contacting  
28 members from himself to PVCOA. A.R.S. § 33-2210(B) expressly provides that the member  
seeking any such communication must reimburse the association for the actual costs of any  
such mailing.

1 proposed recall of any board members or any proposed discharge of a manager or firm. From  
2 a procedural perspective, this action is over as to the merits. Mr. Zwicky has already been  
3 granted summary judgment, and the records he sought have already been disclosed to him.  
4 Mr. Zwicky has not voiced any objection to the sufficiency of PVCOA's response to the  
5 Court's Ruling dated May 5, 2016. His rights have been satisfied with respect to the relief  
6 sought in this lawsuit. There is no need to inform the other members of this action, because  
7 it has concluded.

8 In addition, the language of the proposed notice (Zwicky's Motion at 5-6) is confusing  
9 and misleading, since it fails to explain why the member is being notified of this action in the  
10 first place. Indeed, the reason for that omission is clear: there is no reason to notify other  
11 members of this records request at this stage of the proceeding. There is no need for them to  
12 take any action with respect to this records request, because the records have now been  
13 produced. What is the purpose of notifying other members that Mr. Zwicky has received  
14 records?

15 It seems clear that the true purpose of the notice is for Mr. Zwicky's attorneys to round  
16 up some clients for the federal class action they would like to file, as described in a proposed  
17 solicitation (Zwicky's Motion, Ex. B). In that case, Federal Rule of Civil Procedure Rule  
18 23(d) controls, and the appropriate authority to determine whether and how to contact those  
19 people is the federal court handling the potential class action, not this Court. It is premature  
20 for Mr. Zwicky's attorneys to contact potential class members before the contemplated class  
21 action has even been filed. The federal court handling the potential class action, not the Court  
22 handling this records request, would be the proper authority to supervise any precertification  
23 communications with potential class members to ensure that they receive accurate and  
24 impartial information regarding the class action, in accordance with Rule 23(d) of the Federal  
25 Rules of Civil Procedure. To ask this Court to authorize such precertification communications  
26 with potential class members exceeds this Court's authority as well as the legal scope of this  
27 action. This request from Mr. Zwicky's attorneys' is improper and possibly unethical.

1 **Conclusion**

2 Because there is no legitimate basis to modify the protective order, PVCOA respectfully  
3 requests that the Court deny Mr. Zwicky's motion for modification of the protective order. In  
4 addition, it is premature and inappropriate for Mr. Zwicky's attorneys to solicit potential class  
5 members through PVCOA before any federal class action has even been filed. To allow Mr.  
6 Zwicky's attorneys to solicit PVCOA's members using the proposed solicitation or  
7 notification would exceed this Court's authority in this matter. For that reason, the Court must  
8 deny the motion.

9 DATED this 12<sup>th</sup> day of August, 2016.

10 **COPPERSMITH BROCKELMAN PLC**

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