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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 REPLY IN SUPPORT OF
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.**

REPLY RE PROTECTIVE ORDER AND OWNERS LIST ISSUES

Plaintiff, at the outset, showed the Court that the Association, through its developer-dominated Board and developer-affiliated property management company, has repeatedly

1 imposed annual assessment obligations on its many thousands of members-consumers that
2 were so excessive as to virtually deprive them of any net economic benefit of their
3 substantial cash investments in their “timeshares” (certificates of membership). Plaintiff
4 wanted to know whether these massive annual charges were lawfully imposed. The Court
5 will further recall that Plaintiff, at the outset, forthrightly disclosed that his purpose in
6 bringing this inspection action was to investigate management practices in contemplation of
7 possible future class action litigation.

8 Defendant asserts—without citation to authority—that this is “not a proper purpose
9 within the meaning of the record inspection statutes or the common law right of inspection.”
10 Response at p. 7. Defendant has it wrong. See 5A Fletcher Cyc. Corp. § 2225 (“The right
11 of a shareholder to inspect the books is not improper where the object may be to commence
12 an action against ... the officers or the corporation to correct abuses.”).

13 Indeed the courts of Delaware strongly encourage the use of statutory inspection
14 actions as a preliminary step to possible class action litigation (or shareholder derivative
15 suits), criticizing some lawyers who precipitously file such actions without doing their Rule
16 11 due diligence to lay claim to lead counsel status (and thus potentially substantial legal
17 fees) under the “fast-filer presumption.” E.g., *Louisiana Mun. Police Employees' Ret. Sys.*
18 *v. Pyott*, 46 A.3d 313, 349–50 (Del. Ch. 2012) (discussing “the race-to-the-courthouse
19 problem”), *rev'd sub nom. Pyott v. Louisiana Mun. Police Employees' Ret. Sys.*, 74 A.3d 612
20 (Del. 2013); *Amalgamated Bank v. NetApp, Inc.*, No. CIV.A. 6772-VCG, 2012 WL 379908,
21 at *3 (Del. Ch. Feb. 6, 2012) (“If the purpose of the Section 220 [Delaware’s inspection
22 statute] action is to seek information necessary to meet the pleading requirements in a
23 substantive action, the Plaintiff should, for purposes of economy, and consistent with the
24 requirements of Rule 11, bring the Section 220 action before filing the substantive action.”).

25 In the present case, the Defendant-Association and its counsel ultimately—when
26 explicitly ordered—disclosed information that was essential to the investigation of

1 management practices bearing upon the amount of annual assessments. Without discussing
2 specifics in this memorandum (which is not sealed), Plaintiff advises that some of this
3 information was exculpatory. Very significantly so. Such disclosure has benefitted all
4 concerned, because otherwise Plaintiff, in pursuing a substantive cause of action, would
5 have had to resort to pleading certain matters upon information and belief—matters that *this*
6 *action* has revealed to be unfounded. Other matters relating to future allegations of
7 excessive assessments, discussed in previous memoranda, appear to be well established in
8 the evidence.

9 This inspection action has therefore well-served its basic purpose of *transparency* by
10 facilitating a preliminary inquiry into the true facts and into the lawfulness of Defendant’s
11 assessment charges. It has also served the purpose of *accountability* by providing Plaintiff,
12 through his counsel, the wherewithal to file an appropriate substantive action that is *based*
13 *upon a reasonable, good faith investigation into the facts.*

14 Defendant insists that the information thus obtained be kept under lock and key.
15 Plaintiff’s counsel, during oral argument, pointed out the anomalous and fundamentally
16 untenable position that they would be in, if, having *possession* of critical evidence needed to
17 pursue a substantive cause of action, they were prohibited from its *use*. As previously
18 emphasized, Plaintiff, in pleading any substantive action, needs to meet the factual
19 plausibility standard of *Bell Atlantic* and the particularity standard of Federal Rule 9(b).

20 At the same time, Plaintiff’s counsel in oral argument acknowledged that if the
21 documents produced did not in their judgment show evidence of wrongdoing, there would
22 be no legitimate purpose in disclosing them. The issues of the duration of the Protective
23 Order, or any need for relief from it, would be moot. Under these circumstances, the Court
24 ordered:

25 The Court is of the view that it may well be appropriate for the
26 plaintiff to be permitted to disclose this information in other

1 forums including other litigation, government agencies and so
2 on but those matters are not before the Court now. There is no
3 imperative for the Court to make that decision now.

4 Minute Entry, May 6, 2016.

5 The Protective Order was clearly intended as tentative, and subject to modification as
6 dictated by subsequent developments. Thus there is no basis for Defendant's claim that
7 Plaintiff is foreclosed from seeking relief from the Order because he failed to timely seek
8 reconsideration. (E.g., Response at p.3.)

9 In reality, there is not a *single document* produced that members of the Association
10 do not have a right to know, and that the Developer's executives serving on the Board and
11 the Developer-affiliates fulfilling the Board's delegated duties as property manager do not
12 have a corresponding fiduciary duty to disclose. E.g., Restatement (Third) of Property
13 (Servitudes) § 6.20(7) (2000) (developer retaining control in common interest real estate
14 community has duty to "disclose all material facts and circumstances affecting the financial
15 condition of the association, including the interest of the developer and the developer's
16 affiliates in any contract, lease, or other agreement entered into by the association"). Can
17 the Defendant give *one good reason* why its thousands of members should not know exactly
18 how and why their annual assessments have reached the level of *over \$2,000 a year*? Do
19 they not have a right to know if there are hidden charges?

20 Regarding the owner's list: Plaintiff has, as stated, sought a reasonable
21 accommodation of owner privacy ostensibly given cognizance in the timeshare statute,
22 A.R.S. §33-2210(D), which generally prohibits *direct* disclosure of owners lists. But there
23 is an important countervailing interest at stake here, and that is the interest of corporate
24 democracy which shareholder list inspection rights are designed to promote. *Durnin v.*
25 *Allentown Fed. Sav. & Loan Ass'n*, 218 F. Supp. 716, 718 (E.D. Pa. 1963) ("The right to
26 examine the stockholders list is a basic privilege of every stockholder of a corporation and

1 should be given the widest recognition as fundamental to corporate democracy.”). It is easy
2 to see how the Developer, while ostensibly protecting the laudable interest of owner
3 privacy, is in reality erecting self-serving barriers to the ability of the 22,500 members of the
4 Association to communicate with each other and to unite in *any cause* (litigation-related or
5 otherwise) in defense of their common interests.¹

6 A single member, standing alone, has little chance against a corporate leviathan such
7 as DRI. But a group of members, willing and able to serve as representatives of many
8 thousands of people in a properly-funded class action, can level the playing field. “In unity
9 there is strength,” as every schoolchild reading *Aesop’s Fables* knows. Blocking an
10 individual member’s ability to communicate with others regarding essential legal rights, as
11 Defendant now seeks to do, is a divide-and-conquer legal strategy that seeks to keep
12 Association members fractionated and isolated from each other. It keeps DRI in control.

13 That litigation strategy is also Defendant’s business strategy. Because DRI has sole
14 access to the owners’ contact information—and thus a monopoly on the methods and means
15 of mass communication with owners about the Association’s affairs—owners receive only
16 the information that DRI *wants* the owners to receive. If the classic model of a common
17 interest owner’s association is a “little democratic sub society,” in the oft-quoted words of
18 *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975),
19 DRI’s business model in structuring and operating this Association is a totalitarian regime.

21 ¹ DRI has also subverted corporate sufferance and systematically assuring itself of perpetual
22 dominance and control of the Association by granting itself *9 times* the voting power of any
23 individual member until 95% of the timeshare interests (including those held for sale) are sold.
24 *Second Amended and Restated Premier Vacation Collection Membership Plan*, § 3.4. That 95%
25 threshold will never, ever be reached. By design. As the SEC documents acknowledge, DRI
26 continually replenishes its unsold inventory by recycling the repossessed interests of Association
members who default in their assessment obligations of which there are, unsurprisingly, a great
number. DRI in the SEC documents calls this practice, in which it never has to buy new resort
properties to acquire the new timeshare inventory it sells—typically for \$26,000 to each new
owner—a “capital-light” model.

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ORIGINAL of the foregoing efiled on
this the 17th day of August, 2016;

COPY of the foregoing delivered via azturbocourt.gov
on this 17th day of August, 2016 to:

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

COPY of the foregoing delivered via email and U.S. mail
on this the 17th day of August, 2016 to:

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By /s/ Kelly Naddaff _