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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 **REPLY IN SUPPORT OF MOTION TO SET AMOUNT OF SUPERSEDEAS BOND AT $0 AND STAY ENFORCEMENT OR EXECUTION OF JUDGMENT PENDING APPEAL** (Assigned to the Honorable John Hannah)

Defendant Premiere Vacation Collection Owners Association ("PVCOA") has moved for this Court to set the amount of the supersedeas bond necessary to stay the execution of the Final Judgment ("Judgment") entered on September 14, 2016 at $0. Pursuant to Arizona Rule of Civil Procedure ("ARCAP") 7(a) and A.R.S. § 12-2108, the maximum amount at which the bond may be set is $0. The language in ARCAP 7(a) is mandatory, stating that the amount of the bond "must be" set at the lower of three specified amounts. ARCAP 7(a) is applicable in circumstances where the judgment provides non-monetary relief, and, in accordance with the language of the rule, this Court should enter an affirmative order staying execution of the Judgment pending resolution of PVCOA's

appeal. In the alternative, there are also grounds for the Court to enter a stay pursuant to its discretion to make the orders necessary to preserve the status quo during the appeal.

I. Pursuant to ARCAP 7(a) and A.R.S. § 12-2108, the Court should set the amount of the supersedeas bond at $0 and enter a stay of enforcement of the Judgment pending appeal.

Plaintiff argues that ARCAP 7(a) does not apply because the judgment did not include any money damages. This is incorrect. Plaintiff cites no Arizona authority indicating that ARCAP 7(a) does not apply to judgments providing nonmonetary relief. Plaintiff correctly notes that the decision in *Wells Fargo Bank N.A. v. Rogers*, 239 Ariz. 106, 366 P.3d 583 (App. 2016), review denied (Sept. 20, 2016), does not address this issue. Therefore, it cannot be inferred from that decision that the Court may simply assume that ARCAP 7(a) does not apply and disregard its mandatory language to set the amount of bond pursuant to that rule.

PVCOA has cited Arizona authority indicating that ARCAP 7(a) does apply even in circumstances where the amount of damages awarded by the judgment is zero. In *Kresock v. Gordon*, 239 Ariz. 251, 253, 370 P.3d 120, 122 (App. 2016), the superior court had awarded attorneys' fees as sanctions, but there were no money damages awarded by the judgment. The petitioners had unsuccessfully asked the superior court to stay enforcement of the judgment, claiming no supersedeas bond was required because the judgment awarded no damages. In a special action to the Court of Appeals, the court concluded that attorneys' fees awarded as sanctions are not "damages" within the meaning of A.R.S. § 12–2108(A)(1) and ARCAP 7(a)(4)(A). The court awarded relief from denial of the request for stay. The Court of Appeals did not hold that ARCAP 7(a) does not apply in circumstances where the amount of damages awarded by the judgment is zero.

Plaintiff has not cited **any** Arizona authority indicating that the mandatory formula to set bond and stay provided by ARCAP 7(a) does not apply to judgments providing non-monetary relief. Plaintiff has also cited federal authority (at 3-4) concerning Federal Rule of Civil Procedure 62, which addresses discretionary stays on various grounds. These cases do

not address whether the mandatory stay in ARCAP 7(a) does not apply to judgments providing equitable relief, and are inapposite. As discussed below in section II, there are also grounds for the Court to issue a discretionary stay pursuant to Arizona Rule of Civil Procedure 62(c) based on irreparable harm to PVCOA, but that does not mean that the Court is not also bound to comply with the mandatory language of ARCAP 7(a).

II. Allowing Mr. Zwicky to Use Trade Secret, Confidential and Proprietary Documents Before Resolution of PVCOA's Appeal Would Result in Irreparable Harm to PVCOA.

Because the standard for a discretionary stay operates on a sliding scale, PVCOA is entitled to a stay by establishing either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and that the balance of hardships tips sharply in favor of the moving party. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410, 132 P.3d 1187, 1190 (2006) (citing *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990)). "The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger." *Id*. In this case, even if the Court finds only that the likelihood of success on the merits is not particularly strong, PVCOA will suffer irreparable harm from the disclosure of its confidential and proprietary information, and the balance of hardships tips sharply in PVCOA's favor.

A. PVCOA is Likely to Succeed on the Merits of its Appeal, and, at a Minimum, There Are "Serious Questions" Going to the Merits of the Appeal.

Plaintiff's analysis of likelihood of success on the merits is materially flawed because he continually mistakes the nature of this action. This is a statutory records request. It is not an action for fraud or any other tort. Plaintiff has not made any claims alleging fraud in this action or any other action. Plaintiff contends that he "established beyond all serious question that the annual assessments and dues charged by the Association for vacation rights had become so exorbitant—so dramatically and unexpectedly high—that his timeshare

investment of $26,000 has become absolutely worthless." [Resp. at 6] That is overstating the scope of this action. The value of Plaintiff's membership is an issue of fact that was not decided in this action, and was not even at issue in this action, because it has little to do with whether he had a "proper purpose" for requesting the documents at issue in this case within the meaning of A.R.S. § 33-2209. Plaintiff has not made any allegations, much less provided any evidentiary proof, of any fraud by PVCOA. Plaintiff had the opportunity to seek amendment of his complaint, but never did so. Plaintiff even concedes that the purpose of this action was not to decide whether PVCOA has engaged in any wrongdoing or financial mismanagement (Resp. at 7 n.7), so he cannot contend in the same breathe that the issue has been "established beyond all serious question." Plaintiff argues that there is "substantial evidence of significant hidden overcharges in the annual assessments" (Resp. at 7 n.7) without citing any evidentiary basis at all. His motion for summary judgment was unsupported by any such evidence, and is unlikely to withstand scrutiny by the Court of Appeals.

Plaintiff again misinterprets the significant of *Tucson Gas & Electric Company v. Schantz*, 5 Ariz. App. 511, 428 P.2d 686 (App. 1967), to this case. *Tucson Gas* did not involve a timeshare association; it stands only for the proposition that shareholders of a corporation have a common law right of inspection. It is unlikely that Arizona law would recognize a common law right of inspection for timeshare members, particularly in light of the comprehensive statutory scheme governing record requests from timeshare associations. Even assuming that Plaintiff does have a common law right of inspection as a member of a timeshare association, he has not proven a good faith proper purpose for his additional demands for documents and information, including proprietary and confidential management agreements and financial documents. Plaintiff has cited Delaware authority related to corporate shareholders, which is inapposite, but even those cases require that a proper purpose be based on some credible and reasonable evidence. Plaintiff has not proven any

credible basis for any proper purpose related to the moving-target document requests in this case.

Plaintiff has quoted Delaware authority addressing a shareholder's obligation to show, by a preponderance of the evidence, "a credible basis from which the [court] can infer there is possible mismanagement that would warrant further investigation . . . . That threshold may be satisfied by a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing." [Resp. to PVCOA's Cross-Motion for Summary Judgment at 6, quoting *Seinfeld v. Verizon Commc'ns, Inc*., 909 A.2d 117, 124 (Del. 2006)] The court in *Seinfeld* was considering a Delaware statutory records request and required a showing of "some evidence" of possible wrongdoing before permitting inspection of corporate books and records on that basis, in order to limit claims for inspection to those with merit. Here, Plaintiff has not produced ***any*** evidence of wrongdoing, and has failed to make a credible evidentiary showing that there are any legitimate issues of wrongdoing. His mere suspicion is insufficient to demonstrate a good faith proper purpose. Plaintiff is obligated to support his claim for relief with admissible and credible evidence. His failure to do so in order to demonstrate a good faith proper purpose is fatal to his claim.

Plaintiff contends that PVCOA "never . . . adduced any contrary legal authority" showing that he had no "proper purpose" for his records request. This is false. PVCOA's summary judgment briefing addressed this precise issue using numerous citations to legal authority. [PVCOA's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, Jan. 11, 2016 at pp. 11-12; Reply in Support of Cross-Motion for Summary Judgment, Feb. 19, 2016 at pp. 4-9] Plaintiff also entirely ignores the other arguments PVCOA asserted on the merits in its cross-motion for summary judgment, such as the lack of common law rights of inspection under Arizona law, Plaintiff's failure to comply with the express statutory requirements, the statutory provisions allowing PVCOA the discretion to determine which documents to disclose, and the business judgment rule. The numerous issues that will be addressed on appeal demonstrate that there are serious

questions going to the merits on several different fronts.

With respect to the Court's modification of the protective order, Plaintiff contends that the confidential financial documents produced to him provide a reasonable basis to file a class action against PVCOA, but does not say what his claims would consist of or what the factual basis for those claims would be. Plaintiff is putting the cart before the horse. Until he has actually brought and articulated such claims, this Court is in a poor position to determine whether there is any valid basis to allow him to publicly disclose the confidential and proprietary financial documents disclosed in reliance on this Court's protective order. Meanwhile, failing to stay the Court's modification of the protective order will result in irreparable harm to PVCOA.

B. PVCOA Will Suffer Irreparable Harm if the Confidential and Proprietary Documents Produced to Plaintiff in Reliance on the Court's Protective Order are Publicly Disclosed While the Appeal is Pending.

Plaintiff argues that PVCOA will not suffer any irreparable harm from the public disclosure of its confidential, proprietary, and trade secret information because the trade secrets "consist of fraudulent business practices." [Resp. at 9] Again, Plaintiff has not made any allegations of fraud in this action or any other action. There is nothing improper about a timeshare association keeping its confidential, proprietary, and trade secret information out of public view, where it may be exploited and misinterpreted by competitors. Once the confidential documents produced to Plaintiff are publicly disclosed, the bell cannot be unrung. The information would be publicly available and the harm to PVCOA could not be undone. PVCOA's motion is supported by a declaration from Kathy Wheeler, a Director of PVCOA, explaining how and why it would harm PVCOA for Plaintiff to publicly disclose the limited set of highly sensitive confidential and trade secret documents designated as such in PVCOA's production.

To be clear, PVCOA is not seeking to prevent Plaintiff from using any of the documents produced to him over the past several years. PVCOA is only seeking to protect the documents designated as confidential from publication, exploitation or dissemination,

pending resolution of the appeal: the Indirect Corporate Costs spreadsheet; the Interval Assignment and Recovery Agreements for PVCOA and its resorts for the period from 2011 through 2015; the Management Agreements for PVCOA and its resorts for the period from 2011 through 2015; the Management Fees report; and the Occupancy and Revenue report. With respect to the relative hardships to the parties, Plaintiff will suffer no harm if the Court stays the judgment, but PVCOA will suffer irreparable harm if Plaintiff is allowed to publicly disclose the documents while PVCOA appeals the issue of whether he was entitled to see them in the first place. The benefit of the appeal will be lost if Plaintiff is allowed to exploit PVCOA's confidential and trade secret information before the appeal has even been heard.

Plaintiff also asks the Court to ignore the express statutory language in A.R.S. § 33-2210(D), which protects the privacy of association members, because it is in "derogation of common law inspection rights." Plaintiff cites no Arizona case law undermining the validity of the timeshare record request statutory framework in general, or A.R.S. § 33-2210(D) in particular. There is no reason to assume that the statutes are invalid based on a common law right that may not even exist under Arizona law, since there is no Arizona authority recognizing a common law right of inspection for members of timeshare associations, rather than corporate shareholders. Although PVCOA's main concern with the modification to the protective order is the disclosure of the confidential documents, sending the requested "Notice of Litigation" could also result in confusion among the members or manipulation by Plaintiff's counsel, in circumvention of the federal rules applicable to contact with potential class members prior to class certification.

C. The Balance of Hardships Tips Sharply in PVCOA's Favor and Public Policy Favors Granting the Stay.

Plaintiff vaguely refers to "fiduciary disclosure duties" as a counterweight to the irreparable harm that will result from the disclosure of PVCOA's confidential, trade secret, and proprietary documents. [Resp. at 10] To be clear, Plaintiff has not brought any claim for breach of fiduciary duty in this action, or any other action. Plaintiff has not alleged,

much less proven, any violation of fiduciary duty, and the disclosure of PVCOA's documents was not based on any principle of fiduciary duty. This is not a valid consideration in the Court's analysis of the balance of hardships. Plaintiff argues that his "right to know" outweighs PVCOA's interest in confidentiality. But Plaintiff has already received the documents, and has already found out whatever there is to find out about the way his assessments were calculated. The question is whether he should be allowed to cause irreparable commercial damage to PVCOA by disclosing confidential information before the appeal has been resolved to determine whether he was entitled to have the information in the first place.

There will be no harm to Plaintiff resulting from a stay. He will still be free to file a complaint alleging whatever claims he wants to, whenever he wants to. There is no need to publicly disclose PVCOA's confidential information in order for Plaintiff to craft a complaint that complies with notice pleading standards, assuming there are any grounds to state a claim of any sort. The balance of hardships tips sharply in PVCOA's favor because the only possible harm would result from the public disclosure of confidential and proprietary information.

Finally, Plaintiff argues that PVCOA's interest in its trade secret and confidential information is somehow a "means of enshrouding the fiscal affairs of a nonprofit association of timeshare owners." [Resp. at 12] This is misleading. As a matter of course, PVCOA provides all of its members with annual budgets and financial statements setting forth transparently the financial information to which they are entitled. The hundreds of pages of documents that were produced to Plaintiff that have not been designated confidential attest to this transparency, including the membership plan, bylaws, rules and regulations, Maintenance Fee Expense Report (PVCOA0001-02); Member Summary–Point Analysis (PVCOA0003); 2015 Maintenance Fee Calculation (PVCOA0004); 2015 Budget (PVCOA0005); and Mr. Zwicky's payoff documents, assessment fees, and final notice (PVCOA006-0047); Arizona Department of Real Estate reports (PVCOA000876–1205);

annual financial reports for PVCOA and its resorts for the period from 2011 through 2015 (PVCOA000048–588; PVCOA001270–1304); and annual budgets for PVCOA and its resorts for the period from 2011 through 2015 (PVCOA000834–75). From the beginning of Plaintiff's action, PVCOA has attempted to cooperate with his counsel's requests for information, but those requests have been a moving target (as Plaintiff has acknowledged). There is no valid public policy that would be served by allowing Plaintiff's counsel to exploit, or disseminate confidential and proprietary information pending the appeal of this matter. Plaintiff argues that PVCOA has somehow committed some wrongdoing by defending itself in this action, but this accusation is baseless. There are no allegations in this case or any other alleging any wrongdoing by PVCOA, and Plaintiff's implications to the contrary should not be credited by the Court. Public policy supports issuance of a stay in these circumstances.

In summary, there are serious questions going to the merits, and PVCOA will be irreparably harmed by the disclosure of the documents that were designated as confidential pursuant to the Court's protective order. The balance of hardships tips sharply in favor of PVCOA, and public policy also supports issuance of a stay.

III. Conclusion

PVCOA respectfully requests that this Court set the amount of the supersedeas bond at $0 and enter an order staying execution of the Judgment pending the resolution of PVCOA's appeal. In the alternative, PVCOA requests that the Court enter a stay pursuant to its discretion to make the orders necessary to preserve the status quo during the appeal.

DATED this 5th day of December, 2016.

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