

## Verna Colwell

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Case Number: CV2015-051911 (Note: If this filing is for case initiation, you will receive a separate notification when the case # is assigned.)

Case Title: Zwicky Vs. Premiere Vacation Collection Owners Ass

Filed By: John E DeWulf

AZTurboCourt Form Set: #1982025

Keyword/Matter #: 2431.001 - Motion to Stay

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Summary Sheet (This summary sheet will not be filed with the court. This sheet is for your personal records only.)

Attached Documents:

Motion: Motion to Set Amount of Supersedeas Bond at \$0 and Stay Enforcement or Execution of Judgment Pending Appeal

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10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

11 **MARICOPA COUNTY**

12 NORMAN ZWICKY,

13 Plaintiff,

14 v.

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

19 Defendant.

) NO. CV2015-051911

)  
)  
) **MOTION TO SET AMOUNT OF**  
) **SUPERSEDEAS BOND AT \$0 AND**  
) **STAY ENFORCEMENT OR**  
) **EXECUTION OF JUDGMENT**  
) **PENDING APPEAL**

) (Assigned to the Honorable John Hannah)

20 Defendant Premiere Vacation Collection Owners Association (“PVCOA”) moves  
21 this Court to set the amount of the supersedeas bond necessary to stay the execution of the  
22 Final Judgment (“Judgment”) entered on September 14, 2016 at \$0. Pursuant to Arizona  
23 Rule of Civil Procedure (“ARCAP”) 7(a) and A.R.S. § 12-2108, the maximum amount at  
24 which the bond may be set is \$0, which will obviate the need to actually file a supersedeas  
25 bond with this court. PVCOA also respectfully requests that this Court enter an affirmative  
26 order staying execution of the Judgment pending resolution of PVCOA’s appeal. In the  
27 alternative, PVCOA requests that the Court enter a stay pursuant to its discretion to make  
28 the orders necessary to preserve the status quo during the appeal. This motion is supported

1 by the following Memorandum of Points and Authorities.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3  
4 ARCAP 7(a) and A.R.S. § 12-2108 provide for the filing of a supersedeas bond in  
5 civil appeals to stay enforcement of, or execution on, the judgment pending resolution of the  
6 appeal. PVCOA filed a notice of appeal on October 14, 2016. Because the amount of  
7 damages awarded by the Final Judgment was \$0, that is the amount required to set bond in  
8 this matter. In accordance with setting the bond amount at \$0, PVCOA requests that the  
9 Court consider the supersedeas bond requirement satisfied and enter an order staying  
10 execution of the Judgment pending resolution of PVCOA's appeal.

11 **Factual Background**

12 This action is a statutory records request filed pursuant to A.R.S. § 33-2209 by Mr.  
13 Zwicky, a member of PVCOA, a timeshare association. The documents requested in the  
14 Verified Complaint were produced to Mr. Zwicky during discovery. PVCOA produced  
15 documents showing the allocation of sold and unsold points, maintenance fee calculations  
16 and assessment fees per point as requested by Paragraph 20 of the Complaint. Further,  
17 PVCOA produced its annual budget showing revenues and expenses. Nonetheless, Mr.  
18 Zwicky argued that he was entitled to more information than the documents specifically  
19 identified in the Complaint and that he was entitled to such information as it related to his  
20 rights as a member of PVCOA.

21 PVCOA argued that the records sought by Mr. Zwicky fell outside the scope of his  
22 inspection rights under A.R.S. § 33-2209, that Mr. Zwicky had not complied with the  
23 statutory requirements for obtaining the information sought, and that the statute gives  
24 PVCOA discretion to limit the production and inspection. PVCOA also argued that Mr.  
25 Zwicky's records requests did not describe with reasonable particularity the owner's  
26 purpose, and that the requests were not made in good faith and for a proper purpose, because  
27 Mr. Zwicky has not alleged that PVCOA has engaged in any wrongdoing or financial  
28

1 mismanagement, and indeed, there is no basis for any such allegations. Finally, PVCOA  
2 argued that there is no common law right of inspection for members of nonprofit  
3 corporations or timeshare associations, and the statutory conditions in A.R.S. § 33-2209  
4 preempt any common law right of inspection.

5 On March 11, 2016, the Court granted summary judgment in favor of Mr. Zwicky and  
6 ordered him to submit a proposed form of order specifying the documents that he was asking  
7 the Court to order PVCOA to produce. He submitted that proposed form of order on March  
8 18, 2016. The proposed form of order included language that would have allowed Mr.  
9 Zwicky and his lawyers and any of his lawyers' future clients to use all documents disclosed  
10 in this matter in any other future litigation. Such future litigation has not been filed, and the  
11 nature of those future claims is still undetermined.

12 PVCOA's objection to the proposed form of order (filed March 25, 2016) argued that  
13 the proposed language to protect PVCOA's confidential, proprietary, and/or trade secret  
14 information was insufficient (at pp. 4-5). PVCOA argued that a blanket exception for any  
15 and all hypothetical clients was premature and speculative, and that after any future class  
16 action litigation had been filed, Plaintiff could move to modify the protective order to  
17 include other clients. PVCOA also objected that allowing Mr. Zwicky to use the records in  
18 "future litigation" was undefined and speculative, since no such litigation had actually been  
19 filed against PVCOA. PVCOA noted that Mr. Zwicky would have the ability to formally  
20 request documents through discovery in any future litigation, and could also request  
21 modification of the protective order at that time (after other litigation had actually been filed)  
22 to permit the use of the documents in that future litigation. PVCOA did not argue that such a  
23 modification would be appropriate before the filing of that litigation; it argued exactly the  
24 opposite, that permitting the use of the confidential, proprietary, or trade secret documents in  
25 future litigation was premature and speculative, because any such future litigation is  
26 hypothetical, and this Court was poorly positioned to evaluate the contours of what  
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1 legitimate use might entail. PVCOA proposed alternative language for the protective order  
2 to accompany the production of documents pursuant to A.R.S. § 33-2209.

3 The parties had not come to any agreement regarding a protective order. On May 6,  
4 2016, the Court held oral argument on the proposed form of order. The Court ordered  
5 PVCOA to produce certain items, but not others, from the list requested by Mr. Zwicky in  
6 his proposed form of order. The minute entry dated May 6, 2016 stated:

7 IT IS FURTHER ORDERED that all documents and records provided to the  
8 plaintiff pursuant to this order, and the information in those documents, shall  
9 be maintained in confidence by the plaintiff and not disclosed to anyone except  
10 the plaintiff, his current attorneys and any attorneys with whom they be [sic]  
11 discussing potential future representation of the plaintiff, accountants and other  
12 experts retained or potentially retained by the plaintiff's attorneys to assist  
13 them in the representation and the personnel of the firm of the attorneys' and  
14 experts' firms.

11 IT IS FURTHER ORDERED that any disclosure beyond that requires a further  
12 order of this Court.

13 IT IS FURTHER ORDERED this protective order does not apply to any  
14 documents (or information in documents) that are public record such as SEC  
15 filings, shareholder disclosures and the like.

16 The Court is of the view that it may well be appropriate for the plaintiff to be  
17 permitted to disclose this information in other forums including other  
18 litigation, government agencies and so on but those matters are not before the  
19 Court now. There is no imperative for the Court to make that decision now.  
20 For example, there is not an issue of public safety that would require  
21 immediate disclosure. If there is some matter of public concern that the  
22 plaintiff thinks will require disclosure then they can bring that to the Court's  
23 attention and the Court will consider whether any of this information truly is  
24 entitled to confidentiality. The basis for the Court's order today is the  
25 agreement of the parties and the plaintiff's current need for the information as  
26 opposed to any finding by the Court that any of this information is in fact  
27 entitled to be treated as confidential.

21 On June 6, 2016, PVCOA produced documents to Mr. Zwicky pursuant to this  
22 protective order, designating as CONFIDENTIAL certain highly sensitive trade secret,  
23 proprietary, and confidential documents. Those documents included the Indirect Corporate  
24 Costs spreadsheet; the Interval Assignment and Recovery Agreements for PVCOA and its  
25 resorts for the period from 2011 through 2015; the Management Agreements for PVCOA  
26 and its resorts for the period from 2011 through 2015; the Management Fees report; and the  
27  
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1 Occupancy and Revenue report. Mr. Zwicky did not contend that the production failed to  
2 comply with the Court's May 6, 2016 minute entry in any respect.

3 Mr. Zwicky immediately moved for modification of the protective order, and PVCOA  
4 responded by explaining the reasons why the documents were designated as  
5 CONFIDENTIAL, why they were entitled to confidentiality, and why there was no basis for  
6 modification of the protective order. PVCOA argued that nothing had changed since the  
7 Court's last ruling on the issue and that Mr. Zwicky had received abundant publicly available  
8 information that would allow his attorneys to craft a complaint in compliance with Rule 8's  
9 notice pleading standard. The Court held oral argument and the Court granted that motion  
10 on August 19, 2016. The Court also ordered PVCOA to send a "Notice of Court Order" of  
11 this action (drafted by Mr. Zwicky's lawyers, with minor modification by the Court), to its  
12 members, soliciting clients for Mr. Zwicky's lawyers for a federal class action that has not  
13 yet been filed.

14 The Court entered the Final Judgment on September 14, 2016. The Judgment ordered  
15 PVCOA to produce the documents that had already been produced on June 6, 2016;  
16 modified the protective order to allow Mr. Zwicky to use the documents already produced as  
17 he wished in any other public court filing; required PVCOA to send the "Notice of Court  
18 Order" to certain members of PVCOA; and awarded \$349.00 in costs, with interest at the  
19 legal rate of 4.25% per annum from the date of judgment.

### 20 Argument

#### 21 **I. The Court should set the amount of the supersedeas bond at \$0 and enter a stay** 22 **of enforcement of the Judgment pending appeal.**

23 A supersedeas bond "stays enforcement of, or execution on, a judgment while an  
24 appeal is pending." ARCAP 7(a)(1)(A). "The appellant may file a supersedeas bond before  
25 or after filing a notice of appeal." *Id.* "The amount of the bond must be the lowest of the  
26 following amounts:

- 27 1. The total amount of damages awarded excluding punitive damages.

1           2.     Fifty per cent of the appellant’s net worth.

2           3.     Twenty-five million dollars.”

3  
4     A.R.S. § 12-2108(A); ARCAP 7(a)(4). There are two exceptions to this mandatory formula:  
5     “if an appellee proves by clear and convincing evidence that an appellant is intentionally  
6     dissipating assets outside the ordinary course of business to avoid payment of a judgment,  
7     the court may require the appellant to post a bond in an amount up to the full amount of the  
8     judgment.” A.R.S. § 12-2108(B); ARCAP 7(a)(5)(A). Second, “if an appellant proves by  
9     clear and convincing evidence that the appellant is likely to suffer substantial economic harm  
10    if required to post bond in an amount required under subsection [A.R.S. § 12-2108(A)], the  
11    trial court may lower the bond amount to an amount that will not cause the appellant  
12    substantial economic harm.” A.R.S. § 12-2108(C); ARCAP 7(a)(5)(B).

13           The statute and rule “set forth a three-step process for determining the amount of a  
14    supersedeas bond.” *City Ctr. Exec. Plaza, LLC v. Jantzen*, 237 Ariz. 37, 41, 344 P.3d 339,  
15    343 (App. 2015). “The first step requires the trial court to set the bond as the lesser of the  
16    following: the total amount of damages awarded, excluding punitive damages; 50% of the  
17    appellant's net worth; or \$25 million (“the presumed amounts”).” *Id.* (citing A.R.S. § 12-  
18    2108(A)(1)-(3); ARCAP 7(a)(4)(A)-(C)). “That is, the statute and rule require the court to  
19    compare the three values and select the smallest amount as the presumed amount of the  
20    bond.” *Id.* “The second step permits an upward deviation from the presumed amount ‘up to  
21    the full amount of the judgment’ if an appellee proves by clear and convincing evidence that  
22    the appellant is dissipating assets.” *Id.* (citing A.R.S. § 12-2108(B); ARCAP 7(a)(5)(A)).  
23    “The third and final step permits a downward deviation from the presumed amount if an  
24    appellant proves by clear and convincing evidence that it will likely suffer substantial  
25    economic harm if required to post a bond in the presumed amount.” *Id.* (citing A.R.S. § 12-  
26    2108(C); ARCAP 7(a)(2)(5)(B)).

27           Applying this three-step process, the amount of the supersedeas bond in this case must  
28    be set at \$0. The Judgment did not award any monetary damages, only \$349.00 in costs,

1 with interest at the legal rate of 4.25% per annum from the date of judgment. The term  
2 “damages” in A.R.S. § 12-2108(A) and ARCAP 7(a)(4) does not include costs. *City Ctr.*  
3 *Exec. Plaza*, 237 Ariz. at 42, 344 P.3d at 344 (concluding that trial court erred by including  
4 attorneys’ fees and costs as damages, and setting amount of supersedeas bond at \$1, which  
5 was the amount of damages awarded in the judgment). The Judgment also required PVCOA  
6 to produce certain documents (which it had already done), modified the protective order, and  
7 required PVCOA to send a notice of this litigation to certain members. The amount of  
8 damages awarded in this case (\$0) is less than 50% of PVCOA’s net worth or \$25 million;  
9 therefore, the presumptive amount of the bond is \$0. There is no evidence that PVCOA is  
10 intentionally dissipating assets outside the normal course of business to avoid paying the  
11 Judgment, so there is no evidentiary basis for the court to adjust the bond amount upwards.  
12 For that reason, the Court must follow with the mandatory language of the rule to set the  
13 amount of the supersedeas bond at \$0 and enter an order staying enforcement of, or  
14 execution on, the Judgment pending the resolution of PVCOA’s appeal.

15 ARCAP 7(a)(2) also permits the trial court to exercise its discretion to “enter any  
16 further order, in lieu of or in addition to the bond, which may be appropriate to preserve the  
17 status quo or the effectiveness of the judgment.” The Arizona Court of Appeals has  
18 explained that pursuant to this rule, “a court may appropriately exercise its authority to  
19 preserve the status quo, that is, the situation that exists by virtue of the judgment rendered  
20 against the appellant or the effectiveness of the judgment when not to do so would  
21 effectively and practically deprive the appellee of the benefits it received by virtue of the  
22 judgment in its favor.” *Wells Fargo Bank N.A. v. Rogers*, 239 Ariz. 106, 366 P.3d 583, 586  
23 (App. 2016) (internal citation omitted). There is no need for any further order in lieu of or in  
24 addition to the stay requested by PVCOA, because a stay of enforcement of the judgment  
25 will preserve the status quo. Mr. Zwicky already has in his possession the documents that  
26 were produced by PVCOA pursuant to the court’s original protective order, and will not be  
27 deprived of the benefits he has received by virtue of the judgment in his favor. Therefore,  
28



1 there is no need for any further order beyond a stay pending appeal. The only security  
2 necessary to stay enforcement of the Judgment pending PVCOA's appeal is a supersedeas  
3 bond in the amount of the "total damages awarded," which in this case is \$0. Where a  
4 judgment does not contain any award of damages and the amount of the supersedeas bond  
5 must be set at \$0 pursuant to A.R.S. § 12-2108 and ARCAP 7(a), there is no need for the  
6 appellant to actually file a supersedeas bond with the superior court to stay enforcement of  
7 the judgment. *See Kresock v. Gordon*, 239 Ariz. 251, ¶¶ 6-11, 370 P.3d 120, 122-24 (App.  
8 2016). A bond set in the amount of \$0 does not require the deposit of any money with the  
9 superior court, and there is no practical purpose in requiring PVCOA to file a \$0 surety bond  
10 with the court. Therefore, this Court should deem the requirement for filing a supersedeas  
11 bond met in this case and enter an order staying enforcement of or execution of the Judgment  
12 pending the resolution of PVCOA's appeal, thereby preventing Mr. Zwicky from acting on  
13 the modification of the protective order until after resolution of the appeal.

14 **II. PVCOA Also Requests a Stay of the Enforcement of the Judgment Because**  
15 **Allowing Mr. Zwicky to Use Trade Secret, Confidential and Proprietary**  
16 **Documents Before Resolution of PVCOA's Appeal Would Result in Irreparable**  
17 **Harm to PVCOA.**

18 In addition to its request for a stay pursuant to ARCAP 7, PVCOA requests that this  
19 Court enter a stay of enforcement of the judgment pending appeal because Mr. Zwicky's use  
20 of PVCOA's trade secret, propriety, and confidential documents would cause irreparable  
21 harm to PVCOA's interests. The nature of the equitable relief awarded in the Judgment  
22 (modifying the protective order and mandating the notice of litigation) makes it appropriate  
23 for this Court to stay enforcement of the modification of the protective order pursuant to  
24 Arizona Rule of Civil Procedure Rule 62(c), which permits this Court to "suspend, modify,  
25 restore, or grant an injunction during the pendency of the appeal upon such terms as to bond  
26 or otherwise as it considers proper for the security of the rights of the adverse party." Rule  
27 62(c) is a codification of the exception that an appeal divests the trial court of jurisdiction to  
28 proceed except in furtherance of the appeal. *State ex rel. Corbin v. Tolleson*, 152 Ariz. 376,

1 378, 732 P.2d 1114, 1116 (App. 1986). “The trial court may make the orders necessary to  
2 preserve the status quo during the appeal and to protect the unsuccessful party from any  
3 irreparable harm that would occur from enforcing the ruling on the injunction.” *State ex rel.*  
4 *Corbin v. Tolleson*, 152 Ariz. 376, 378, 732 P.2d 1114, 1116 (App. 1986) (holding that Rule  
5 62(c) does not give the trial court authority to modify or dissolve an injunction that has been  
6 appealed, but instead only gives the authority to preserve the status quo during the appeal).

7       When determining whether to enter a stay preserving the status quo pending review of  
8 a case on appeal, the Arizona Court of Appeals has adopted the standard applicable to  
9 preliminary injunctions. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407,  
10 410, 132 P.3d 1187, 1190 (2006). That standard requires the following elements: (1) a  
11 strong likelihood of success on the merits; (2) irreparable harm if the stay is not granted; (3)  
12 that the harm to the requesting party outweighs the harm to the party opposing the stay; and  
13 (4) that public policy favors the granting of the stay. *Id.* (citing *Shoen v. Shoen*, 167 Ariz.  
14 58, 63, 804 P.2d 787, 792 (App. 1990)). The scale is sliding, not absolute, and the moving  
15 party may establish either 1) probable success on the merits and the possibility of irreparable  
16 injury; or 2) the presence of serious questions and that the balance of hardships tips sharply  
17 in favor of the moving party. *Id.* (citing *Shoen*, 167 Ariz. at 63, 804 P.2d at 792). “The  
18 greater and less reparable the harm, the less the showing of a strong likelihood of success on  
19 the merits need be. Conversely, if the likelihood of success on the merits is weak, the  
20 showing of irreparable harm must be stronger.” *Id.*

21       With respect to the first factor, PVCOA is likely to succeed on the merits of the  
22 appeal because Mr. Zwicky failed to demonstrate a “proper purpose” for requesting the  
23 records disclosed pursuant to the Court’s orders pursuant to common law or A.R.S. § 33-  
24 2209, is not entitled to communication with PVCOA’s members pursuant to A.R.S. § 33-  
25 2210(B), and is not entitled to publicly disclose PVCOA’s trade secret, confidential, and  
26 proprietary information that was disclosed to him in reliance on this Court’s protective order.

27       Most importantly, PVCOA will suffer irreparable harm if its trade secret, proprietary,  
28

1 and confidential documents are publicly disclosed by Mr. Zwicky before the appeal is  
2 resolved. As explained below, the documents designated CONFIDENTIAL by PVCOA in  
3 its disclosure to Mr. Zwicky are trade secret, proprietary, and confidential.

4         The Draft Third Restatement of Employment Law defines proprietary information as  
5 “commercially valuable information that the [owner] has developed or obtained and taken  
6 reasonable measures to keep confidential. It does not include information that is generally  
7 known, derived from general training . . . , or is readily ascertainable by proper means.”  
8 Restatement (Third) of Employment Law § 6.01 (Draft 2005). Arizona has adopted the  
9 Uniform Trade Secret Act (“UTSA”), A.R.S. § 44-401, et seq. The UTSA defines “trade  
10 secret” as:

11             information, including a formula, pattern, compilation, program, device,  
12             method, technique or process, that both:

13             (a) Derives independent economic value, actual or potential, from not  
14             being generally known to, and not being readily ascertainable by proper means  
15             by, other persons who can obtain economic value from its disclosure or use.

16             (b) Is the subject of efforts that are reasonable under the circumstances  
17             to maintain its secrecy.

18 A.R.S. § 44-401(4). “This rather expansive definition emphasizes the secrecy of the alleged  
19 trade secret, as well as the competitive advantage afforded by it.” *Enterprise Leasing Co. of*  
20 *Phoenix v. Ehmke*, 197 Ariz. 144, 149, 3 P.3d 1064, 1069 (App. 1999) (holding that financial  
21 documents and customers worksheets reflecting substantial market research were trade  
22 secrets). “Because the hallmark of a trade secret is secrecy, the two-part inquiry under the  
23 UTSA focuses on: first, whether the subject matter of the information is secret; and second,  
24 whether reasonable efforts have been taken to keep the information secret.” *Calisi v. Unified*  
25 *Fin. Serv., LLC*, 232 Ariz. 103, 106, 302 P.3d 628, 631 (App. 2013). Arizona courts will  
26 look to the list of relevant factors in the Restatement for guidance:

27             The Restatement adopts a six-factor test to determine whether a trade secret  
28             exists: (1) the extent to which the information is known outside of the business;  
              (2) the extent to which it is known by employees and others involved in its  
              business; (3) the extent of measures taken by the business to guard the secrecy  
              of its information; (4) the value of the information to the business and its  
              competitors; (5) the amount of effort or money expended by the business in

1 developing the information; (6) the ease or difficulty with which the  
2 information could be properly acquired or duplicated by others.

3 *Enterprise Leasing*, 197 Ariz. at 149 n.6, 3 P.3d at 1069 n.6 (citing Restatement of Torts §  
4 757 cmt. b).

5 PVCOA did not designate all documents produced pursuant to this Court's order  
6 dated May 6, 2016 as CONFIDENTIAL, and is not asking for such treatment to apply to all  
7 of those documents. PVCOA designated as CONFIDENTIAL only certain documents that  
8 contain highly sensitive trade secret, proprietary, and confidential information. Those  
9 documents include the Indirect Corporate Costs spreadsheet; the Interval Assignment and  
10 Recovery Agreements for PVCOA and its resorts for the period from 2011 through 2015; the  
11 Management Agreements for PVCOA and its resorts for the period from 2011 through 2015;  
12 the Management Fees report; and the Occupancy and Revenue report. If the Court would  
13 like to review these documents in camera, PVCOA would be happy to provide copies of  
14 them to the Court (under seal) for such in camera review.

15 Kathy Wheeler, a Director of PVCOA, has submitted a declaration stating that the  
16 documents designated as CONFIDENTIAL "all have independent economic value, based on  
17 the fact that this information is not generally known to PVCOA's competitors in the vacation  
18 ownership resort marketplace." [Decl. of K. Wheeler, attached hereto as Ex. A at ¶ 6] She  
19 also stated that "PVCOA's competitors would obtain economic value from the public  
20 disclosure or use of this information." [*Id.*] Ms. Wheeler also addressed PVCOA's efforts to  
21 keep this information confidential:

22 PVCOA uses reasonable efforts to maintain the confidentiality of this  
23 information designated CONFIDENTIAL. PVCOA does not share this  
24 information with the public or its general membership, however the  
25 information is made available to PVCOA's member officers and directors. In  
26 addition, PVCOA ensures that electronically stored information is accessible  
27 only to those individuals through password-protected accounts or documents.  
28 This financial and management information is not generally known in the  
vacation ownership resort industry and confers a competitive advantage to  
PVCOA. PVCOA has expended considerable effort and money to develop this  
information and maintain its confidentiality.

[*Id.* at ¶ 7]

1           The documents PVCOA has designated as CONFIDENTIAL are proprietary because  
2 they are commercially valuable and PVCOA has taken reasonable measures to keep them  
3 confidential. Restatement (Third) of Employment Law § 6.01 (Draft 2005). These  
4 documents are not publicly available or generally known in the industry, and they are not  
5 readily obtainable by proper means. *Id.* These documents are also trade secrets because the  
6 subject matter of the information is secret, and PVCOA has taken reasonable information to  
7 keep the information secret. *Calisi*, 232 Ariz. at 106, 302 P.3d at 631. The documents  
8 include detailed financial analysis of corporate costs, occupancy, and revenue, as well as  
9 management agreements that have competitive value. These documents have independent  
10 economic value from not being generally known to PVCOA's competitors in the vacation  
11 ownership resort marketplace, and PVCOA has taken reasonable measures to guard the  
12 secrecy of this information. *See* A.R.S. § 44-401(4). For these reasons, Mr. Zwicky's use or  
13 disclosure of these documents while the appeal is pending would result in irreparable harm to  
14 PVCOA's interests.

15           With respect to the third factor, the harm to the PVCOA outweighs the harm to Mr.  
16 Zwicky, because a stay would merely preserve the status quo pending appeal. If PVCOA  
17 loses the appeal, the documents are already in Mr. Zwicky's possession and he would be  
18 entitled to use them pursuant to the Court's modification of the protective order and in  
19 accordance with the decision of the Court of Appeals. In contrast, if PVCOA wins the  
20 appeal, but Mr. Zwicky has already used or publicly disclosed the documents designated  
21 CONFIDENTIAL, then the bell cannot be unring, and PVCOA will have lost the benefit of  
22 the appeal. Finally, public policy favors the granting of the stay, because there is a strong  
23 public interest in protecting trade secret and confidential information. On balance, there is a  
24 presence of serious questions going to the merits, and the balance of hardships tips sharply in  
25 favor of the moving party. Therefore, PVCOA is entitled to a stay pending appeal in order to  
26 preserve the status quo.

1 **Conclusion**

2 For the foregoing reasons, PVCOA requests this court set the amount of the  
3 supersedeas bond at \$0 and enter an order staying execution of the Judgment pending the  
4 resolution of PVCOA's appeal. For the court's convenience, a proposed form of order is  
5 submitted herewith. In the alternative, PVCOA requests that the Court enter a stay pursuant  
6 to its discretion to make the orders necessary to preserve the status quo during the appeal.

7 DATED this 28<sup>th</sup> day of October, 2016.

8 **COPPERSMITH BROCKELMAN PLC**

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26 By /s/ Verna Colwell  
27  
28

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10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
11 **MARICOPA COUNTY**

12	NORMAN ZWICKY,	) NO. CV2015-051911
13		)
14	Plaintiff,	)
15		) <b>DECLARATION OF KATHY</b>
16	v.	) <b>WHEELER</b>
17		)
18	PREMIERE VACATION COLLECTION	)
19	OWNERS ASSOCIATION, f.k.a. Premiere	) (Assigned to the Honorable John Hannah)
20	Vacation Club, an Arizona nonprofit	)
21	corporation,	)
22		)
23	Defendant.	)
24		)

25 I, Kathy Wheeler, hereby state:

26 1. I currently serve as a Director of Premiere Vacation Collection Owners  
27 Association ("PVCOA") and have served in that role since December 2010. I have personal  
28 knowledge of the facts set forth below.

29 2. Pursuant to the court's minute entry dated May 6, 2016, PVCOA produced the  
30 following documents:

- 31 • Public reports filed with the Arizona Department of Real Estate (PVCOA000876-  
32 1205);
- 33 • Annual financial reports for PVCOA and its resorts for the period from 2011 through

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

11 3. PVCOA designated certain documents as “CONFIDENTIAL,” because they

12 contained sensitive trade secrets, proprietary business information, or other confidential

13 research, development, financial, or commercial information.

14 4. The documents designated CONFIDENTIAL included the Indirect Corporate

15 Costs spreadsheet, Interval Assignment and Recovery Agreements, Management

16 Agreements, Management Fees report, and Occupancy and Revenue report. These

17 documents include detailed financial and commercially valuable information.

18 5. In PVCOA’s Notice of Production of Documents, PVCOA stated that its

19 production of confidential records was done in reliance on the protective order in the Court’s

20 Ruling dated May 6, 2016, ordering that “all documents and records provided to the plaintiff

21 pursuant to this order, and the information in those documents, *shall be maintained in*

22 *confidence* by the plaintiff and not disclosed to anyone except the plaintiff, his current

23 attorneys and any attorneys with whom they be [sic] discussing potential future

24 representation of the plaintiff, accountants and other experts retained or potentially retained

25 by the plaintiff’s attorneys to assist them in the representation and the personnel of the firm

26 of the attorneys’ and experts’ firms” (emphasis added).

27 6. The Indirect Corporate Costs spreadsheet, Interval Assignment and Recovery

28



1 Agreements, Management Agreements, Management Fees report, and Occupancy and  
2 Revenue report all have independent economic value, based on the fact that this information  
3 is not generally known to PVCOA's competitors in the vacation ownership resort  
4 marketplace. PVCOA's competitors would obtain economic value from the public  
5 disclosure or use of this information.

6 7. PVCOA uses reasonable efforts to maintain the confidentiality of this  
7 information designated CONFIDENTIAL. PVCOA does not share this information with the  
8 public or its general membership, however the information is made available to PVCOA's  
9 member officers and directors. In addition, PVCOA ensures that electronically stored  
10 information is accessible only to those individuals through password-protected accounts or  
11 documents. This financial and management information is not generally known in the  
12 vacation ownership resort industry and confers a competitive advantage to PVCOA.  
13 PVCOA has expended considerable effort and money to develop this information and  
14 maintain its confidentiality.

15  
16 I declare under the penalty of perjury that the foregoing is true and correct.

17  
18 DATED this 28 day of October, 2016.

19  
20   
21 Kathy Wheeler