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Counsel for Plaintiff Norman Zwicky

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Norman Zwicky, for himself and on behalf
of all others similarly situated,

Plaintiff,

v.

Diamond Resorts International, Inc., *et al*,

Defendants.

No. 2:20-CV-02322-PHX-DJH

**DECLARATION OF JON L. PHELPS
IN SUPPORT OF MOTION FOR
ATTORNEYS' FEES, COSTS, AND
SERVICE AWARDS**

**(ASSIGNED TO THE HONORABLE
DIANE J. HUMETEWA)**

I, Jon L. Phelps, under penalty of perjury, declare that the following is true and correct to the best of my knowledge:

1. I am lead co-lead counsel for Plaintiffs Norman Zwicky ("Zwicky"), George Abarca ("Abarca"), Vikki Osborn ("Osborn"), and Elizabeth Stryks-Shaw ("Stryks-Shaw") (collectively "Plaintiffs") in this matter.

2. I submit this Declaration in support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards (the "Motion").

1 3. I base this Declaration upon my personal knowledge and matters shown upon
2 the regularly kept business records of Phelps & Moore, PLC.

3 4. I am a Member of the firm of Phelps & Moore, PLC (“PM”), co-lead counsel
4 for Plaintiffs and the Class in the above-captioned action.

5 5. I am a member in good standing of the State Bar of Arizona and I am familiar
6 with attorneys’ fees and legal services in the community, having been licensed to practice
7 by the Supreme Court of Arizona since 2009, and having been involved in a litigation
8 practice in state court and federal court since 2009.

9 6. I earned my Juris Doctorate degree Magna Cum Laude from the Sandra Day
10 O’Connor College of Law at Arizona State University in 2008.

11 7. While attending the Sandra Day O’Connor College of Law, I was a
12 Production Editor for Jurimetrics, The Journal of Law, Science, and Technology.

13 8. A Comment I wrote was published in Jurimetrics. Jon L. Phelps, *Copyleft*
14 *Termination: Will the Termination of the Copyright Act of 1976 Undermine the Free*
15 *Software Foundation’s General Public License*, 50 JURIMETRICS J. 261 (2010).

16 9. I have been actively involved in litigation practice in state and federal court
17 since 2009.

18 10. I have prior experience with Antitrust class action litigation and served for two
19 years on the State Bar of Arizona Class Actions and Derivative Suits committee.

20 11. I have been involved in litigating numerous Complex Commercial Litigation
21 matters including insurance bad faith, declaratory judgment, employment discrimination,
22 breach of contract, bankruptcy adversary complaints, and business dissolution.

23 12. PM has vigorously protected, and will continue to so protect, the interests of
24 the Class Members.

1 13. To date, PM has not received any fee for the work that has been done in this
2 Action or the prior State Court Records Inspection Action (the “Inspection Action”) that
3 resulted in a published opinion from Division 1 of the Arizona Court of Appeals.

4 14. PM did, however, receive nominal fees from Zwicky of \$1,661.00 for the
5 initial demand letters and follow-up correspondence prior to initiating the Inspection Action
6 that PM has refunded to Zwicky.

7 15. To date, PM has expended 1,102.7 attorney hours and 110.5 paralegal hours in
8 this Action and the prior Inspection Action.

9 16. PM’s billing records were kept contemporaneously in the normal course of
10 PM’s business operations.

11 17. Undersigned counsel has billed 381.5 hours on this matter. Undersigned’s
12 billing rate is \$400.00 per hour effective January 1, 2024 and this is the first hourly rate
13 increase since increasing the rate to \$350.00 per hour on January 1, 2021. Accordingly,
14 undersigned’s lodestar for his work on this matter is \$152,600.

15 18. Robert Moore, admitted to practice in 1989, has billed 89.2 hours on this
16 matter. Mr. Moore’s billing rate is \$375.00 per hour effective January 1, 2024 and this is his
17 first hourly rate increase since increasing his rate to \$350.00 per hour on January 1, 2021.
18 Accordingly, Mr. Moore’s lodestar for his work on this matter is \$33,450.

19 19. Jennie Tetreault, admitted to practice in 2019, has billed 503.8 hours on this
20 matter. Although no longer employed by PM, Ms. Tetreault has confirmed that her current
21 billing rate is more than \$350.00 per hour. Accordingly, Ms. Tetreault’s lodestar for her
22 work on this matter is \$176,330.

23 20. Shannon Lindner, admitted to practice in 2009, has billed 87.9 hours on this
24 matter. Although no longer employed by PM, Ms. Lindner has confirmed that her current
25

1 billing rate is \$350.00 per hour. Accordingly, Ms. Lindner's lodestar for her work on this
2 matter is \$30,765.

3 21. Cy Hainey, admitted to practice in 2013, has billed 22.3 hours on this matter.
4 Although no longer employed by PM, Mr. Hainey has confirmed that his current billing rate
5 is more than \$350.00 per hour. Accordingly, Mr. Hainey's lodestar for his work on this
6 matter is \$7,805.

7 22. Omer David, admitted to practice in 2018, has billed 8.5 hours on this matter.
8 PM's customary billing rate is \$350 per hour for attorney time in contingent fee matters
9 where attorney's fees may be recoverable. Accordingly, Mr. David's lodestar for his work
10 on this matter is \$7,805.

11 23. Laura Ciancanelli, admitted to practice in 2008, has billed 3.9 hours on this
12 matter. PM's customary billing rate is \$350 per hour for attorney time in contingent fee
13 matters where attorney's fees may be recoverable. Accordingly, Ms. Ciancanelli's lodestar
14 for her work on this matter is \$1,365.

15 24. Erica Fedon, admitted to practice in 2013, has billed 2.6 hours on this matter.
16 PM's customary billing rate is \$350 per hour for attorney time in contingent fee matters
17 where attorney's fees may be recoverable. Accordingly, Ms. Fedon's lodestar for her work
18 on this matter is \$910.

19 25. Kevin Whitacre, admitted to practice in 2014, has billed .2 hours on this
20 matter. PM's customary billing rate is \$350 per hour for attorney time in contingent fee
21 matters where attorney's fees may be recoverable. Accordingly, Mr. Whitacre's lodestar for
22 his work on this matter is \$70.

23 26. Chrisanne Gultz, admitted to practice in 2018, has billed .1 hours on this
24 matter. PM's customary billing rate is \$350 per hour for attorney time in contingent fee
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26

1 matters where attorney's fees may be recoverable. Accordingly, Ms. Gultz's lodestar for her
2 work on this matter is \$35.

3 27. Paralegals employed by PM have billed a combined 110.5 hours on this
4 matter. During the time this Action has been pending, PM's customary billing rate has for
5 paralegals has been between \$115 and \$145 per hour. PM's paralegal billing rate is \$175.00
6 per hour effective January 1, 2024. Accordingly, the lodestar for paralegal work on this
7 matter is \$19,337.50.

8 28. In addition to the work that has been performed to date, Undersigned Counsel
9 estimates that PM will expend at least an additional 65 hours of attorney time to finalize this
10 matter. It is estimated that Undersigned Counsel will bill 40 hours of those hours and Mr.
11 Moore will bill 25 of those hours representing an additional lodestar of \$25,375.

12 29. These hourly rates are comparable to, or less than, what is generally charged
13 for comparably experienced lawyers and paralegals in the community.

14 30. The cumulative lodestar for all PM attorneys and paralegals that worked on
15 this matter, including the anticipated forthcoming 65 hours is \$431,560.

16 31. Including co-lead counsel's lodestar of \$406,200, the combined lodestar of
17 counsel is \$837,760 resulting in a lodestar multiplier of less than 3.88.

18 32. PM bore great risk by employing and paying associate attorneys and
19 paralegals for their time in the prosecution of this Action and the Inspection Action over a
20 period of nearly nine years while the litigation was pending.

21 33. PM had to forego other work during the pendency of this action resulting in a
22 reduction in income to PM.

23 34. The partners of PM are aware that absent successful prosecution of this Action
24 and Court approval of an award of fees, PM will not be compensated for any of the time
25 spent on this matter nor the Inspection Action.
26

1 35. Class Counsel’s requested fee of 25% of the Settlement Fund is well within
2 the range of fees typically awarded in similar cases.

3 36. PM has, with co-lead counsel, advanced all costs necessary to successfully
4 prosecute this action and the prior Inspection Action.

5 37. PM has the financial resources to continue to advance all costs necessary to
6 successfully prosecute this action through preliminary and final approval.

7 38. PM has advanced a total of \$16,994.42 in expenses in this matter in the
8 following categories and amounts:

- | | | |
|----|---|-------------|
| 9 | a. Mediator’s fee | \$8,825.00. |
| 10 | b. Travel expenses to mediation for three attorneys | \$1,467.74 |
| 11 | c. Lodging for three for mediation | \$662.64 |
| 12 | d. Meals for three related to mediation travel | \$456.07 |
| 13 | e. Ground transportation during mediation travel | \$387.38 |
| 14 | f. Postage and express shipping | \$198.89 |
| 15 | g. eDiscovery vendor charges | \$335.48 |
| 16 | h. Court filing fees | \$944.94 |
| 17 | i. Process server fees | \$913.40 |
| 18 | j. Copy fees | \$2,340.70 |
| 19 | k. Binding/reproduction | 139.74 |
| 20 | l. Electronic records (PACER/Delaware Corp. Recs) | \$322.44 . |

21 39. The foregoing expenses pertaining to this case are reflected in the books and
22 records of PM. Class Counsel deemed the foregoing expenses necessary to advancing this
23 case toward final resolution.

24 40. Defendants will establish a \$13,000,000 settlement fund for the benefit of
25 approximately 26,775 potential Class Members inclusive of Service Awards to the Class
26

1 Representatives, attorneys' fees and costs awarded to Class Counsel, and all Settlement
2 Administration Costs, including costs of class notice and settlement administration.

3 41. The parties have agreed that any unclaimed settlement funds will be redirected
4 to Habitat for Humanity as a *cy pres* award recipient rather than revert to Defendant.

5 42. Additionally, Defendants have agreed to provide certain non-monetary terms
6 that include updated written management agreements, specific disclosure requirements
7 regarding management fees, a cap on management fees, specific disclosure requirements
8 regarding common expenses and operating costs, and disclosure of any material
9 reimbursement or absorption or allocation of internal expenses.

10 43. I firmly believe this settlement to be fair, reasonable, and adequate, and in the
11 best interests of all Class Members.

12 44. It appears that the Class Members also believe that the Class Members also
13 believe the settlement to be fair, reasonable, and adequate, and in the best interests of all
14 Class Members as only two Class Members have opted out and none have objected to any of
15 the terms of the Settlement. (Exhibit A).

16 45. Given the significant recoveries obtained here—particularly considering the
17 risks associated with continued litigation—I firmly believe that this settlement is fair,
18 reasonable, and adequate, and should be finally approved.

19 46. Zwicky, who has been involved in this matter since prior to the Inspection
20 Action, should receive a \$10,000 Service Award from the settlement fund, subject to the
21 Court's approval. Abarca, Osborn, and Stryks-Shaw should each receive a \$1,500 Service
22 Award from the settlement fund.

23 47. Mr. Abarca, Ms. Osborne, Ms. Stryks-Shaw (who all joined the case in 2021),
24 and Mr. Zwicky devoted considerable time and energy to this case locating relevant
25 documents, communicating regularly with counsel about the case both by phone and by
26

1 email, making efforts to find and communicate with other putative Class Members,
2 discussing the case with putative Class Members, actively participating in analysis of the
3 claims and defenses for purposes of settlement and, taking the time to be available for the
4 mediation in this matter to approve or reject any settlement offer.

5 48. Since the additional Class Representatives joined the case in 2021, it is
6 estimated that based upon the documents provided to them for review and activities set forth
7 in the prior paragraph that each of the four Class Representatives have dedicated at least 15
8 hours each to this case.

9 49. Without the efforts of Mr. Abarca, Ms. Osborne, and Ms. Stryks-Shaw, class
10 settlement might not have been possible.

11 50. Given this and the effort of Mr. Abarca, Ms. Osborne, and Ms. Stryks-Shaw as
12 well as the results achieved for the Class, I firmly believe that Service Awards in the amount
13 of \$1,500 each for these three Class Representatives are fair and reasonable.

14 51. Mr. Zwicky has been a dedicated class representative throughout the history of
15 this case, the Inspection Action, and for approximately two years prior to the filing of the
16 Inspection Action.

17 52. Mr. Zwicky pursued this matter on a class wide basis to seek redress for
18 himself and others he believed were harmed by the alleged actions of the Defendants in this
19 case.

20 53. During the Inspection Action, overtures were made to Mr. Zwicky to settle his
21 individual claim for an amount greater than he will ultimately receive as a Class
22 Representative.

23 54. Mr. Zwicky declined to settle his individual claim and chose to pursue this
24 action on behalf of himself and all Class Members.
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EXHIBIT A

Zwicky v. Diamond Resorts International Inc.
Settlement Statistics
(as of December 8, 2023)

COMPILATION OF CLASS DATA	
Total Records Received:	26,775
Unique Class Member Records (after de-duping):	26,775
EMAILED NOTICE (on October 5, 2023)	
Total Emailed Notices (to all valid email address on all Class Member records):	26,837
▪ Total Undeliverable Emailed Notices	3,724
Total Unique Class Members attempted:	22,842
▪ Total Unique Class Members with Undeliverable Emailed Notice:	3,092
MAILED NOTICE (on October 5, 2023)	
Total Mailed Notices to Class Members (to all Class Members with no valid email address on record):	7,025
▪ Mailed Notices Returned as Undeliverable:	1,630
▪ Undeliverable Notices Re-mailed to Forwarding Address:	9
▪ Undeliverable Notices Re-Mailed after Research:	569
▪ Re-mailed Notices Returned as Undeliverable:	147
▪ Undeliverable Re-mailed Notices Re-mailed to a Forwarding Address:	1
EXCLUSIONS (Deadline: December 26, 2023)	
Exclusions Received:	2
OBJECTIONS (Deadline: December 26, 2023)	
Objections Received:	0
SETTLEMENT WEBSITE (ZwickyAssessmentSettlement.com, live October 5, 2023)	
Total Unique Visitors:	1,257
Total Page Views:	2,089
TELEPHONE ASSISTANCE (1- 877-871-0328)	
Total Calls:	53

EXHIBIT A