LAW OFFICES
PHELPS & MOORE
PROFESSIONAL LIMITED LIABILITY COMPANY
7430 EAST BUTHERUS DRIVE, SUITE A
SCOTTSDALE, ARIZONA 85260
(480) 534-1400
Jon L. Phelps (027152)
jon@phelpsandmoore.com
Robert M. Moore (013338)
rob@phelpsandmoore.com
Jennie I. Tetreault (035566)
jennie@phelpsandmoore.com

Edward L. Barry (005856)
2120 Company Street, Third Floor
Christiansted, Virgin Islands 00820
(340) 719-0601
ed.barry.legal@gmail.com
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 **RESPONSE IN OPPOSITION TO DEFENDANT, DIAMOND RESORTS INTERNATIONAL, INC.'S NOTICE OF JOINDER AND MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED** **(ASSIGNED TO THE HONORABLE DIANE J. HUMETEWA)**

Pursuant to Rules 12(b)(2) and (6) of the Federal Rules of Civil Procedure, Plaintiff Norman Zwicky ("Zwicky"), opposes Defendant Diamond Resorts International, Inc.'s ("DRI") Joinder and Motion to Dismiss Zwicky's Second Amended Class Action Complaint (Doc. 47), and requests that this Court deny the Motion in its entirety. In the alternative,

Zwicky requests leave to conduct jurisdictional discovery.

MEMORANDUM OF POINTS AND AUTHORITIES

I. DRI'S JOINED ARGUMENTS ARE WITHOUT MERIT.

A. Zwicky has standing, his claims are not time-barred, and he states cognizable causes of action against DRI under Arizona and Federal RICO statutes and for breach of fiduciary duties.

Contrary to DRI's 12(b)(6) arguments—incorporating the Motion to Dismiss of Corporate Defendants ILX Acquisition, Inc. ("ILX") and Diamond Resort Management, Inc. ("DRMI"), Doc. 39—Zwicky has standing to bring this action for the same reasons articulated in his response to Corporate Defendants' Motion. *See* Zwicky Response, Doc. 51 at 3–8. Zwicky's claims are also not time-barred for the reasons stated in that same Response. *See id.* at 8–15. Furthermore, any deficiency in the SAC with respect to standing or statutes of limitation can be cured by amendment. *See id.* at 7, n. 3 & 15, n. 11.

Moreover, Zwicky states cognizable causes of action against DRI with the particularity required by Rule 9(b), for substantially the same reasons set forth in his Responses to the Motions to Dismiss of, respectively, the Corporate Defendants, Defendant Kathy Wheeler ("Wheeler"), and Defendant Troy Magdos ("Magdos"). *See* Doc. 51 at 15–23; Doc. 55 at 3–6; Doc. 56 at 3–6.

And as further discussed in connection with personal jurisdiction, Plaintiff has specifically alleged *direct* wrongful conduct by DRI—acting through its principal executives, Defendants Stephen J. Cloobeck ("Cloobeck"), David F. Palmer ("Palmer"), and C. Alan Bentley ("Bentley"), and its vice president-level executives Defendants Wheeler, Magdos and Linda Riddle ("Riddle")—in the fraudulent assessment-billing scheme alleged in this case. DRI is indeed liable for the tortious conduct of its own principal officers and executive employees under simple, elementary principles of respondeat superior. *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Tr. of Phoenix, Inc.*, 5 P.3d 249, 254 (Ariz.

Ct. App. 2000) ("An employer is vicariously liable for the negligent or tortious acts of its employee acting within the scope and course of employment.") (citations omitted); *In re Tesla, Inc. Sec. Litig.*, 477 F. Supp. 3d 903, 926 (N.D. Cal. 2020) ("It is beyond dispute that a corporation can be liable for the fraud committed by its officers, so long as the officer commits it within the scope of his or her employment.").

When deciding the 12(b)(6) aspect of DRI's Motion, the Court should decline DRI's improper invitation to determine the *accuracy* of the factual allegations of the SAC. *Schwake v. Ariz. Bd. Of Regents*, 967 F.3d 940, 947–48 (9th Cir. 2020) ("In assessing the sufficiency of a complaint, the role of the court is not in any way to evaluate the truth as to what really happened, but merely to determine whether the plaintiff's factual allegations are sufficient to allow the case to proceed.") (internal citations omitted). Instead, the Court must accept the well-pled allegations of the SAC at face value, indulging all legitimate inferences in favor of Zwicky. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) ("In deciding [a 12(b)(6)] motion, all material allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them."); *McShannock v. JP Morgan Chase Bank NA*, 976 F.3d 881, 886–87 (9th Cir. 2020) ("All allegations of material fact are taken as true and construed the light most favorable to the nonmoving party.").

Furthermore, and as elsewhere argued, any deficiency in the SAC as to those matters can be cured by amendment. *See* Doc. 51 at 22, n. 19.

II. ZWICKY HAS MADE A PRIMA FACIE SHOWING OF PERSONAL JURISDICTION OVER DRI.

The Court should reject DRI's 12(b)(2) challenge to personal jurisdiction. As will be established, the Court has specific jurisdiction through DRI's forum-related activities, its commission of intentional torts; and general jurisdiction through alter-ego, agency and/or conspiracy principles. And, in all events, Zwicky should be given a fair opportunity to cure any perceived deficiencies in the record by conducting jurisdictional discovery.

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A. Under Fed. R. Civ. P. 12(b)(2), Zwicky has met his minimal burden to make a prima facie showing of jurisdictional facts.

1. Standards governing Rule 12(b)(2) motions

In facing a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir.1990). "However, this burden is minimal"; the plaintiff merely needs to make "a prima facie showing of jurisdictional facts." *Larsen v. Lauriel Investments, Inc.*, 161 F. Supp. 2d 1029, 1048 (D. Ariz. 2001) (citing *Fields v. Sedgwick Associated Risks*, 796 F.2d 299, 301 (9th Cir.1986)). "Although the plaintiff cannot simply rest on the bare allegations of its complaint, uncontroverted allegations in the complaint must be taken as true." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (internal quote marks, citations, omitted). "Uncontroverted" means allegations not contradicted by competent evidence. *E.g.*, *Patterson v. Home Depot, USA, Inc.*, 684 F. Supp. 2d 1170, 1175 (D. Ariz. 2010) (stating that the court, in deciding a 12(b)(2) motion, may "assume the truth of allegations in a pleading to the extent that such allegations are not contradicted by affidavit") (internal quote marks, citations, omitted); *Fabara v. GoFit, LLC*, 308 F.R.D. 380, 385 (D.N.M. 2015) ("In considering whether plaintiff has made a prima facie showing of personal jurisdiction over defendant, the Court must take the complaint's allegations as true to the extent the defendant's affidavits do not controvert them.").

"Where the jurisdictional facts are intertwined with the merits, a decision on the jurisdictional issues is dependent on a decision of the merits. In such a case, the district court could determine its jurisdiction in a plenary pretrial proceeding." *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.,* 557 F.2d 1280, 1285, n.2 (9th Cir. 1977). "However, it is preferable that this determination be made at trial, where a plaintiff may present his case in a coherent, orderly fashion and without the risk of prejudicing his case on the merits." *Id.*; *see Walker v. University Books, Inc.,* 382 F.Supp. 126, 131 (N.D. Cal. 1974) (finding that the plaintiff's

"fairly specific allegations suffice as proof for the purpose of resolving the initial personal jurisdiction problem, even though later court proceedings on the merits may prove all or part of the allegations erroneous"); *Nissim Corp. v. ClearPlay, Inc.,* 351 F.Supp.2d 1343 (S.D. Fla. 2004) (stating that "although issues raised in a Motion to Dismiss should generally be decided prior to trial, the Federal Rules specifically grant district courts the discretion to defer such [jurisdictional] determinations until trial").

Here, DRI has adduced no *evidence,* by affidavit or otherwise, to controvert the allegations of the SAC, including substantive allegations of wrongdoing, that bear upon jurisdiction. To the extent the Court may find that personal jurisdiction depends on a showing of DRI's actual perpetration of the fraudulent scheme through its officers and agents, and/or actual complicity in the breach of various fiduciary duties, the issue of jurisdiction should be deferred until a plenary trial on the merits.

2. *Summary of Jurisdiction-Related Allegations, Evidence.*

Plaintiff attaches his Statement of Jurisdictional Facts ("SJF"), attached hereto as **Exhibit 1**, which summarizes the salient, well-pled allegations of the SAC and cites to additional Exhibits, also attached hereto.[1] These Exhibits include matters that the Court may judicially notice, for example, excerpts from official 10-K disclosure reports filed with the U.S. Securities and Exchange Commission ("SEC") by DRI. *See Metzler Inv. GMBH v. Corinthian Colleges, Inc*., 540 F.3d 1049, 1064 n. 7 (9th Cir.2008) (holding that it was proper to take "judicial notice for Corinthian's … publicly available financial documents, including a number of Corinthian's SEC filings."); *In re Am. Apparel, Inc. S'holder Litig*., 855 F. Supp. 2d 1043, 1062 (C.D. Cal. 2012) ("[T]he court takes judicial notice of the

[1] Before DRI filed its Motion, Zwicky offered to amend the SAC, but DRI refused to stipulate to allow him to do so upon the basis that *any* amendment would be futile. *See* Doc 47-1 at 2. The SJF therefore contains factual allegations that Zwicky would have alleged in his compliant but for that refusal.

existence and contents of American Apparel's [S.E.C.] Form[] 10–K."). Such documents are indeed competent evidence. They represent written statements of DRI filed with a federal regulatory agency and certified as true by DRI's principal executives and directors. *See* Fed. R. Evid. 801(d)(2) (statement of opposing party offered against that party not hearsay); *see also S.E.C. v. Jasper,* 678 F.3d 1116, 1124 (9th Cir. 2012) (10-K filing admitted under "business records" exception to hearsay rule under Fed. R. Evid. 803(6)).[2]

DRI is a corporate leviathan in the timeshare industry, at one time publicly traded on the NASDAQ Stock Exchange, but whose stock was later acquired in 2016 by a private equity firm for $2.2 billion. SJF ¶¶ 1, 2. DRI has more than 200 subsidiaries, and over 8,000 employees (including part-time employees and those employed by subsidiaries). *Id.* ¶¶ 2, 5. As of 2016, DRI had some 109 resort properties with over 8,000 units under management. *Id.* ¶ 6. A great many of these Resorts are encompassed within DRI's "points"-based timeshare regime. DRI's network includes eight (8) groupings of resorts called "Collections," each governed by a separate owners association. *Id.* ¶ 7. And each individual resort in a given Collection—sometimes referred to as a "Component Site" in DRI's corporate documents—has its own owners association ("HOA"). *Id.* ¶8. DRI (and/or its subsidiaries), owns substantial "bulk membership" interests in each Collection, and the Collections in turn have substantial ownership interests in the constituent resorts. *Id.* ¶ 10. The sheer numerosity of points owned by DRI (or its subsidiaries), coupled with special appointment powers and preferential voting rights granted in the Collections' organic documents, give DRI a stranglehold on the boards of directors of Collections, and often those of the Component Site HOAs. *Id.*

[2] Alternatively—i.e., if and only if the Court finds that, when considering the SAC and the SJF, a prima facie showing has *not* been made—the Court should allow Plaintiff reasonable jurisdictional discovery. *See infra*, Part II.E (discussion of jurisdictional discovery).

Three of the eight DRI Collections include one or more resorts located in Arizona. SJF ¶ 16. One of those Collections is, of course, the Premiere Vacation Club Collection, governed and managed by the Premiere Vacation Club Owners Association, Inc. ("PVCOA" or "the Association"), which has 25,000 or so private members (past and present) holding "points" in the Collection, including Zwicky. *Id.* ¶ 8. PVCOA is an Arizona nonprofit corporation. *Id.* ¶¶ 17, 39, 43. PVCOA encompasses numerous resorts located in the State of Arizona, *viz.*: Varsity Clubs of America: Tucson Chapter, in Tucson; Sedona Vacation Club at Los Abrigados, in Sedona; Kohl's Ranch Lodge in Payson; The Inn at Los Abrigados Resort in Sedona; Rancho Manana Resort in Cave Creek; Bell Rock Inn, in the Village of Oak Creek; Scottsdale Camelback Resort, in Scottsdale; and Roundhouse Resort, in Pinetop. *Id.* ¶ 17.

As alleged in the SAC, DRI itself (or through its wholly-owned subsidiary, ILX) possesses a massive number of "points" through its Bulk Membership in PVCOA, and additionally retains overwhelming, preferential voting power granted by the Association's organic documents (each developer vote is weighed at nine times that of a private owner). SAC, ¶¶ 31–32; SFJ ¶ 17. In accordance with its general business model described in its SEC filings, DRI (or its subsidiary) exercised its dominant control over the Association to retain DRMI, an Arizona corporation that is a wholly-owned subsidiary of DRI, to manage the Collection and each of the Component Site HOAs. *Id.,* ¶ 22.

In fact, the five-member Board of Directors of PVCOA is stacked with DRI employees. SJF ¶¶ 11–12. Three of its Directors—a majority of the Board, and the sole officers of the Association—are executive-level employees of DRI. *Id.* Defendant Magdos, the Association's President; Defendant Wheeler, its Secretary/Treasurer; and former defendant Riddle (now deceased), its Vice President are (or were, at material times) simultaneously employed as vice presidential-level executive employees of DRI. *Id.* Each of

1 these DRI employees, acting within the course and scope of his or her employment with
2 DRI (as well as their conflicted dual role as Association officers and directors)—and in
3 complete derogation of their fiduciary duties towards members—directly participated in a
4 scheme to defraud Zwicky and the 25,000 other private timeshare owners of PVCOA. SJF
5 ¶¶ 19–22, 31–32, 39–43. These DRI employees—in preparing, approving and disseminating
6 the Association's annual budgets containing massive hidden charges comprised of DRI's
7 internal overhead expenses—engaged in a pattern of mail fraud, wire fraud and violations of
8 the Arizona Racketeering Act. SJF ¶¶ 31–32, 39–43.

9 Defendants Magdos and Wheeler also served on at least two Arizona Resort HOA
10 Boards within the PVCOA Collection (and perhaps *all* of them—a fact that could be
11 ascertained through jurisdictional discovery, if necessary). *Id.* ¶ 19–22. Given DRI's adverse
12 domination of the Association's affairs—entailing the gross abuse of fiduciary powers of the
13 PVCOA Directors, and the total subordination of their duties to the Association to the
14 conflicting economic interests of DRI—Zwicky has plausibly alleged that PVCOA is a *de*
15 *facto* proprietary instrumentality of DRI, and a sham nonprofit entity serving as mere
16 conduit for DRI's illicit corporate profits. SJF ¶ 44.

17 Moreover, DRI's *principal* executives—Defendants Cloobeck (a CEO), Palmer (a
18 CEO) and Bentley (a CFO)—were acutely aware of the overhead-shifting scheme, which
19 was in fact part of the basic business model of DRI disclosed and described to DRI *investors*
20 on multiple occasions in DRI's SEC filings signed and certified by these Defendants—but
21 *never* disclosed to PVCOA timeshare owners. SJF, ¶¶ 9–10, 33–38. It is a legitimate
22 inference—given these principal executives' position of superior knowledge and authority,
23 and the massive amounts of revenue involved in the overhead-shifting scheme—that
24 Cloobeck, Palmer, and Bentley were fully aware that these charges were not disclosed to
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PVCOA members in the annual budgets or otherwise. *Id.* ¶ 35.[3] The economic injury from these fraudulent hidden charges was suffered by 25,000 members of PVCOA, an Arizona nonprofit corporation—some significant portion of whom must be Arizona residents (a fact ascertainable through jurisdictional discovery, if necessary). These members utilized multiple timeshare vacation resort accommodations physically located in Arizona and managed by DRMI, an Arizona corporation that is a wholly-owned subsidiary of DRI.

An additional jurisdictional nexus between DRI and the State of Arizona is evidenced by the settlement of a consumer fraud lawsuit brought by the Arizona Attorney General. *In re Diamond Resorts Corporation,* Maricopa County Superior Court Case No. CV2016-010300. That lawsuit was prompted by "hundreds" of complaints to the Attorney General's office regarding deceptive practices by DRI and affiliates. SJF ¶ 23. Those included alleged misrepresentations concerning assessment obligations of individuals (like Zwicky) who were induced in sales presentations to give up their traditional, owned timeshare unit in a specific Arizona resort and convert their ownership interest into intangible "points" in the Collection. *Id.* In a settlement agreement titled "Assurance of Discontinuance," DRI and affiliates agreed, inter alia, to cease and desist from certain alleged deceptive practices; to implement a series of specific, affirmative remedial measures to avoid future violations of the Consumer Fraud Act; and to pay $800,000. SJF ¶¶ 23-30. Of that total, $650,000 was allocated to a limited victim-restitution fund, and the remaining $150,000 paid under explicit authority of A.R.S. § 44-1541, a provision of the Arizona Consumer Fraud Act (authorizing "civil penalties"). *Id.* Only consumers who attended DRI sales presentations conducted in Arizona, or who were Arizona residents attending such sales presentations in Arizona or elsewhere, were eligible to submit administrative claims for restitution. *Id.* ¶ 25.

[3] *Fiore v. Walden*, 688 F.3d 558, 575 (9th Cir.2012) ("We will draw reasonable inferences from the complaint in favor of the plaintiff where personal jurisdiction is at stake ...."), *rev'd oth. grnds.*, 571 U.S. 277 (2014).

1 **B. The Court has specific jurisdiction over DRI.**

2 A court may exercise specific personal jurisdiction if the defendant has "sufficient
3 contacts with the forum state in relation to the cause of action." *Sher v. Johnson*, 911 F.2d
4 1357, 1361 (9th Cir. 1990) (citation omitted). The Court uses a three-part test to determine if
5 specific jurisdiction is proper: the defendant must "purposefully avail[] himself or herself of
6 the privilege of conducting activities in the forum"; plaintiff's "claim must arise out of or
7 result from defendant's forum-related activities; and exercise of jurisdiction must be
8 reasonable." *Id.* The plaintiff has the burden to establish the first two elements; if he does,
9 then the burden shifts to the defendant to "present a compelling case" that the exercise of
10 jurisdiction would be "unreasonable." *DBSI, Inc. v. Oates,* No. CV-19-5830-PHX-JJT, 2020
11 WL 5517305, at *4 (D. Ariz. Sept. 14, 2020) (quoting *Burger King Corp. v. Rudezwicz*, 471
12 U.S. 462, 476 (1985)) (slip copy). For the first prong, "purposeful availment," the court
13 looks at "not the number of contacts, but the importance of the particular activities. *Larsen*,
14 161 F. Supp. 2d at 1048. So long as it creates a 'substantial connection' with the forum,
15 even a single act can support jurisdiction." *Id.* For the second prong, causation, the plaintiff
16 must show that "the litigation arises out of or is related to the defendant's forum related
17 activities." *Id.* at 1049. These requirements are clearly satisfied here, due to the long-term,
18 critical placement of DRI executives on the Board of PVCOA and the Boards of at least two
19 Arizona resort HOAs.

20 When it comes to intentional torts, courts utilize a simplified variant of the traditional
21 "minimum contacts" analysis. This is the so-called "effects test," derived from the seminal
22 case of *Calder v. Jones*, 465 U.S. 783 (1984). *See Dole Food Co. v. Watts,* 303 F.3d 1104,
23 1111 (9th Cir. 2002) ("Under our precedents, the purposeful direction or availment
24 requirement for specific jurisdiction is analyzed in intentional tort cases under the 'effects'
25 test derived from *Calder*…"). Under the "effects test," a defendant is "subject to personal
26 jurisdiction when the defendant commits an intentional tort, [and] … the defendant knew or

1 had reason to know that the conduct will have a significant effect in the forum." *Larsen*, 161
2 F. Supp. 2d at 1049 (citing *Calder,* 465 U.S. at 789–90).
3 As fully detailed above, DRI, through its executive-level employees Magdos,
4 Wheeler, and Riddle, had very substantial contacts with Arizona in relation to their actions
5 on the Board of Directors of PVCOA, an Arizona nonprofit corporation, and by virtue of
6 DRI's overwhelming dominance in the governing affairs of the Association (as well as the
7 Boards of at least two of the Arizona component site HOAs). Every year, the Association's
8 Board levied assessments upon members amounting to many millions of dollars. DRI, by
9 using PVCOA as a conduit for corporate revenues, profited enormously from the corporate
10 overhead-shifting practices unwittingly subsidized by PVCOA members, thereby easily
11 satisfying both "purposeful availment" and "purposeful direction" requirements. *Lazar v.*
12 *Kroncke,* 862 F.3d 1186, 1201–02 (9th Cir. 2017). *See* SJF ¶ 33 (showing that DRI's
13 overhead-shifting subsidy, system-wide, yielded roughly $30 million in additional DRI
14 revenues in 2010 alone).
15 Moreover, DRI—through the conduct of these DRI vice presidents, as well as its
16 principal executives Cloobeck, Palmer, and Bentley, all of whose conduct DRI was liable
17 for under basic respondeat superior principles, *supra* at Part I.A—repeatedly and
18 systematically engaged in a pattern of "intentional torts," knowing full well that its practice
19 of fraudulently inflating assessments was causing massive economic harm to the 25,000
20 members of PVCOA, an Arizona entity. That—as this Court has recognized—is an
21 independently sufficient jurisdictional predicate under the *Calder* "effects test." *Larsen,* 161
22 F. Supp. 2d at 1049; *Travelers Cas. & Sur. Co. of Am. v. Telstar Const. Co*., 252 F. Supp. 2d
23 917, 931 (D. Ariz. 2003) ("In cases involving certain types of torts, the Ninth Circuit has
24 held that courts should apply the 'effects test' and that 'jurisdiction may attach if an out-of-
25 forum defendant merely engages in conduct aimed at, and having an effect in, the situs
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1 state.'") (quoting *Ziegler v. Indian River County,* 64 F.3d 470, 473 (9th Cir.1995); *Yahoo!*
2 *Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme,* 433 F.3d 1199, 1206 (9th Cir.
3 2006) (holding that the "purposeful direction" is satisfied when the defendant "(1)
4 committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that
5 the defendant knows is likely to be suffered in the forum state"); *Dole Food*, 303 F.3d at
6 1113–14 (applying "effects test" in support of exercise of personal jurisdiction over foreign
7 corporation engaged in fraud impacting forum state).

8 **C. The Court has general jurisdiction over DRI through alter-ego, corporate**
9 **conspiracy, and agency theories.**

10 "When no federal statute governs personal jurisdiction, the district court applies the
11 law of the forum state." *LNS Enterprises LLC v. Cont'l Motors Inc.*, 464 F. Supp. 3d 1065,
12 1071 (D. Ariz. 2020) (citing *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905
13 F.3d 597, 602 (9th Cir. 2018). "Arizona exerts personal jurisdiction to the maximum extent
14 permitted by the Arizona Constitution and the United States Constitution." *Id.* (citing Ariz.
15 R. Civ. P. 4.2(a)) (internal citation omitted).

16 Under some circumstances, when the forum state has general ("all purpose")
17 jurisdiction over a corporation's subsidiary and "the parent and subsidiary are not really
18 separate entities, or one acts as an agent of the other, the local subsidiary's contacts with the
19 forum may be imputed to the foreign parent corporation." *Doe v. Unocal Corp.*, 248 F.3d
20 915, 926 (9th Cir. 2001). To satisfy "the alter ego exception to the general rule that a
21 subsidiary and the parent are separate entities" and pierce the corporate veil, the plaintiff
22 must make a prima facie showing that "(1) that there is such unity of interest and ownership
23 that the separate personalities of the two entities no longer exist and (2) that failure to
24 disregard their separate identities would result in fraud or injustice." *MMI, Inc. v. Baja, Inc.,*
25 743 F. Supp. 2d 1101, 1111 (D. Ariz. 2010) (quoting *Unocal,* 248 F.3d at 926). The first
26 prong of this test is satisfied by a showing that the "parent controls the subsidiary to such a

1 degree as to render the latter a mere instrumentality of former." *Unocal,* 248 F.3d at 926.
2 The second prong is satisfied because it would be unconscionable for DRI to immunize
3 itself from the very fraud it profited from, by passing the buck to a local (and perhaps
4 substantially underfunded) subsidiary.

5 Even when alter-ego or veil-piercing doctrines are not applicable, agency principles
6 will allow the court to assert jurisdiction when "one corporation is controlled by another, the
7 former acts not for itself but as directed by the later, the same as an agent" such that the
8 "principal is liable for the acts of its agent within the scope of the agent's authority."
9 *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1238–40 (N.D. Cal. 2004); "To
10 satisfy the agency test, plaintiff must make a prima facie showing that the subsidiary
11 represents the parent corporation by performing services sufficiently important to the parent
12 corporation that if it did not have a representative to perform them, the parent would
13 undertake to perform substantially similar services." *Perryman v. Dorman*, No. CV-10-
14 1800-PHX-FJM, 2011 WL 379313, at *8 (D. Ariz. Feb. 2, 2011) (quoting *Harris Rutsky &*
15 *Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003)). Here, both
16 PVCOA and DRMI performed services indispensable to DRI in managing the Collection
17 properties and its finances for the ultimate financial benefit of DRI.

18 Moreover, corporate conspiracies conducted in violation of the Federal RICO statute
19 establish that the subsidiary and the parent "have a community of interest." *Webster v.*
20 *Omnitrition Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996); *cf. United States v. Benny*, 786 F.2d
21 1410, 1416 (9th Cir. 1986) (stating that the corporate form is the "sort of legal shield for
22 illegal activity that Congress intended RICO to pierce"). "It has long been acknowledged
23 that parents may be directly liable for their subsidiaries' actions when the alleged wrong can
24 be traced to the parent through the conduit of its own personnel and management." *United*
25 *States v. Bestfoods*, 524 U.S. 51, 64 (1998) (internal citation omitted); *see, generally* 18
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Fletcher Cyclopedia of Corporations, § 8642.50 (stating that under "conspiracy theory of jurisdiction," non-resident member of conspiracy to defraud with substantial effects on forum state may be subject to forum state jurisdiction (listing authority)). *See also Laurel Gardens, LLC v. Mckenna*, 948 F.3d 105, 116–17 (3rd Cir. 2020) (finding that five Circuits, including the Ninth, have found that 18 U.S.C. § 1965 provides the Court with a statutory basis for its exercise of jurisdiction over all co-conspirators in a RICO conspiracy provided that the Court has personal jurisdiction over at least one, notwithstanding the statute (citing *Butcher's Local Union No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 538–39 (9th Cir. 1986)) (other citations omitted); *accord Larsen*, 161 F. Supp. 2d at 1051 (citing 18 U.S.C. § 1965).

Plaintiff has plausibly alleged that PVCOA, an Arizona corporation, was a sham nonprofit entity—in essence a *de facto* proprietary subsidiary of DRI, dominated by and totally subservient to DRI—operating as a conduit for DRI's undisclosed overhead-shifting charges. SJF ¶ 44. Plaintiff has thus satisfied Arizona requirements for veil-piercing; has established that PVCOA was a mere agent or instrumentality of DRI; and has further alleged in substantial, uncontroverted detail that DRI conspired with its wholly-owned Arizona subsidiaries DRMI and PVCOA (also an Arizona entity) to fraudulently overcharge PVCOA members. SJF ¶ 45 (citing SAC ¶¶ 4, 32, 34–36, 76, 79, 86, 120, 122, 151–152, 178–180, 192–193). Plaintiff has also plausibly alleged that DRI *itself*, through its officers and employees, caused significant economic injury in Arizona, rendering DRI subject to specific personal jurisdiction under the straightforward *Calder* "effects test."

D. In case of doubt, the Court should grant Zwicky leave to conduct jurisdictional discovery.

Zwicky submits that the allegations of the SAC—uncontroverted by any *actual evidence* proffered by DRI by way of affidavit (*Schwarzenegger,* 374 F.3d at 800), and the additional materials submitted in conjunction with Zwicky's SJF—constitute a strong prima facie showing of personal jurisdiction. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir.

2008) ("If the district court decides the motion without an evidentiary hearing, … then the plaintiff need only make a prima facie showing of the jurisdictional facts.") (internal quote marks and citation omitted). DRI, in opposition, has proffered only conclusory statements in argument to the effect that it is a Delaware corporation with a principal place of business in Nevada, conducting *no* relevant business in Arizona. Doc. 47 at 6–7. This is ineffectual. "Arguments by counsel are not evidence." *Sanchez v. Maricopa Cty*., No. CV 07-1244-PHX-JAT, 2008 WL 4057002, at *1 (D. Ariz. Aug. 27, 2008); *PCT Int'l Inc. v. Holland Elecs. LLC*, No. CV-12-01797-PHX-JAT, 2015 WL 5210628, at *6 (D. Ariz. Sept. 8, 2015) ("Holland's assertion in its motion is the argument of counsel, not evidence.") Moreover, DRI improperly invites the Court to ignore Zwicky's factual allegations and find that—despite its failure to offer any evidence to the contrary—Zwicky is simply wrong when he states that DRI had a relevant role in a systematic perpetration of fraud that was conducted by its agents and subsidiaries and provided it a substantial financial benefit. *See Cheatham v. ADT Corp*., 161 F. Supp. 3d 815, 823 (D. Ariz. 2016) ("In ruling on such a [12(b)(2)] motion, the court will consider the pleadings and any affidavits submitted by the parties, accepting as true any uncontroverted allegations in the complaint and resolving any factual conflicts in the plaintiff's favor.") (citing *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir.2011)).

At this early juncture in the litigation, Zwicky's understanding of DRI's labyrinth of 200-plus subsidiaries is necessarily imperfect. For example, Zwicky does not know whether Defendant ILX—described by the Arizona Corporation Commission ("ACC") as "a special purpose affiliate of Diamond Resorts," created to purchase the resorts and other assets of the bankruptcy estate of ILX Resorts Incorporated,[4] and listed as the "developer" in the organic

[4] *In the Matter of the Application of Kohls Ranch Water Co. for an Emergency Rate Increase*., No. 72094, 2011 WL 281305, at *1 (O.L.C. Jan. 20, 2011).

documents of PVCOA—is anything more than a shell corporation and a façade for DRI. What does ILXA actually do? Does it have an actual, functioning board? Who are its officers and directors, and what is their relationship with DRI? Does it have any employees at all? Does it maintain books and records separate and apart from those of DRI?[5]

While Zwicky believes the SAC establishes a prima facie showing of personal jurisdiction, a fuller inquiry of the relationships and operations pertinent to the jurisdictional question would allow Plaintiff to "follow the money"—the ill-begotten gains from the imposition of hidden overcharges in members' assessments—and to inquire more precisely into the actual scope of the fraudulent scheme and DRI's specific role in that scheme. For example: *Whose* internal overhead was actually shifted—those of DRI, the parent company, or a particular subsidiary? Did PVCOA members pay for CEO Cloobeck's private jet, for example, as an "indirect corporate cost" (whatever that term may actually denote)?[6] Is there any real difference from the standpoint of DRI's accounting practices, or the net economic benefit to DRI? Did DRI give specific marching orders to its executive employees doing double-duty as PVCOA directors on the criteria and parameters of the overhead-shifting, and the nature and content of disclosures to be made to individual members? To what extent did the undisclosed overhead subsidies represent double payment for services provided by DRMI? Was this a skimming operation, plain and simple? Other questions include the actual number of Arizona residents holding "points" in PVCOA—a number potentially amounting to thousands—and the total amount of their losses. These questions, however, are properly the subject of merits discovery, not jurisdictional discovery.[7]

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[5] All of the financial statements contained in the SEC filings are "consolidated," meaning that they aggregate the collective financial status and operations of DRI and all of its numerous subsidiaries, without differentiation.

[6] https://www.vanityfair.com/news/2021/04/inside-the-messy-litigious-breakup -of-an-onlyfans-model-and-her-uber-wealthy-boyfriend (*last visited* Apr. 22, 2021).

[7] Bear in mind that the Arizona Superior Court inspection action targeted only the books and

To reiterate: The *uncontroverted* allegations and existing record before the Court should be more than sufficient for a *prima facie showing* of jurisdiction. But if the Court disagrees, it should not grant DRI's Motion, but instead allow jurisdictional discovery. "The Ninth Circuit has adopted a liberal approach to the granting of jurisdictional discovery, ... noting that it 'should ordinarily be granted where 'pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.'" *Houston v. Bank of Am., N.A.*, No. CV 14-02786 MMM AJWX, 2014 WL 2958216, at *4 (C.D. Cal. June 25, 2014), quoting *Butcher's Union Local No. 498 v. SDC Investment, Inc.,* 788 F.2d 535, 540 (9th Cir.1986). Jurisdictional discovery is a particularly useful tool when jurisdiction over a parent of a forum-based subsidiary is sought either on an alter-ego or agency theory—two of several alternative theories of jurisdiction advanced by Zwicky. *See Harris Rutsky & Co.*, 328 F.3d at 1135 ("The record is simply not sufficiently developed to enable us to determine whether the alter ego or agency tests are met. … Further discovery on this issue might well demonstrate facts sufficient to constitute a basis for jurisdiction.").

III. CONCLUSION

The Court should consider the SAC and the SJF and deny DRI's Motion in its entirety. In the alternative, the Court should allow jurisdictional discovery for the purpose of adducing additional evidence bearing upon DRI's contacts with the State of Arizona, and the nature and extent of its wrongful actions purposefully directed towards this State.

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records of the Association—not DRI, not ILXA, and not DRMI.

1 RESPECTFULLY SUBMITTED this 23rd day of April, 2021.

2 /s/ Jon L. Phelps
3 Jon L. Phelps (027152)
4 Robert M. Moore (013338)
Jennie I. Tetreault (035566)
5 PHELPS & MOORE, PLLC
7430 East Butherus Drive, Suite A
6 Scottsdale, AZ 85260
(480) 534-1400
7 jon@phelpsandmoore.com
8 rob@phelpsandmoore.com
9 jennie@phelpsandmoore.com

10 Edward L. Barry (005856)
2120 Company Street, Third Floor
11 Christiansted, Virgin Islands 00820
(340) 719-0601
12 ed.barry.legal@gmail.com
Attorneys for Norman Zwicky
13

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15

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CERTIFICATE OF SERVICE

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18 I certify that on this 23rd day of April, 2021, a PDF copy of the foregoing was
19 electronically transmitted to the Clerk of Court using the CM/ECF System for filing and
20 transmitted via email to:

21 Brandon T. Crossland
22 bcrossland@bakerlaw.com
Julie Singer Brady
23 jsingerbrady@bakerlaw.com
Yameel L. Mercado Robles
24 ymercadorobles@bakerlaw.com
25 BAKER & HOSTETLER LLP
200 South Orange Avenue, Suite 2300
26 Orlando, Florida 32801

Mark A. Fuller
mark.fuller@gknet.com
GALLAGHER & KENNEDY
2575 East Camelback Road
Phoenix, Arizona 85016
Counsel for DRI, ILX, DRM, Magdos, Wheeler & Riddle

/s/ *Jessica Holfman*