

1 TIMOTHY H. BARNES, P.C.
2 428 East Thunderbird Road, #150
3 Phoenix, Arizona 85022
4 (602) 492-1528 Direct
5 tim@thbpc.com

6 Timothy H. Barnes (SBN 003373)
7 *Attorney for Plaintiffs*

8 **SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA**

9 LINDA W. SWAIN, an individual; and EILEEN
10 T. BRESLIN, an individual,

11 **Plaintiffs**

12 vs.

13 BIXBY VILLAGE GOLF COURSE INC., a
14 foreign corporation; HIRO INVESTMENT,
15 LLC, an Arizona limited liability company;
16 NECTAR INVESTMENT, LLC, an Arizona
17 limited liability company; KWANG CO., LLC,
18 an Arizona limited liability company;
19 AHWATUKEE GOLF PROPERTIES, LLC, an
20 Arizona limited liability company; TTLC
21 AHWATUKEE LAKES INVESTORS, LLC, an
22 Arizona limited liability company,

23 **Defendants.**

Case No. CV2014-051035

**PLAINTIFFS' CONTEMPT
HEARING BRIEF**

(August 18, 2020 Evidentiary Hearing)

(Assigned Hon. Theodore Campagnolo)

24 Plaintiffs Linda W. Swain and Eileen T. Breslin ("Plaintiffs") submit their
25 Contempt Hearing Brief as per the Court's July 1, 2020 Order.

26 **Procedural and Factual Background**

27 Plaintiffs brought this action seeking the enforcement of the 1992 Covenants,
28 Conditions and Restrictions applicable to the Ahwatukee Lakes Golf Course ("Golf
Course"). On May 31, 2018, the Court entered its Final Judgment ("Judgment") and Order
for Permanent Injunction ("Injunction") in favor of Plaintiffs and against Defendant TTLC
Ahwatukee Lakes Investors, LLC ("TTLC").¹ The Court's Injunction provided:

¹ The Court also entered an attorneys' fees judgment against Bixby Village Golf Course, Inc., Hiro Investment, LLC, Nectar Investment, LLC and Kwang Co., LLC and Ahwatukee Golf Properties (collectively, "Bixby Village").

1 IT IS HEREBY ORDERED that the owners of the Ahwatukee Lakes Golf
2 Course (legally described on Exhibit A (pages 11-17) to the 1992 Covenants,
3 Conditions and Restrictions) are permanently enjoined to and shall operate a
4 golf course on the subject property, for the benefit of those described in the
5 1992 Covenants, Conditions and Restrictions as Benefitted Persons, in
6 conformity the ‘Declaration of Use Restriction’ set forth in paragraph 2 of
7 the 1992 Covenants, Conditions and Restrictions.

8 IT IS FURTHER ORDERED that the owners of the Ahwatukee Lakes Golf
9 Course shall provide information concerning the restoration of the golf
10 course to the plaintiffs, their attorneys and representatives and to any other
11 Benefitted Persons, upon reasonable request, sufficient to allow the plaintiffs
12 and Benefitted Persons to determine whether the property owners are
13 complying with the permanent injunction.

14 In September 2018, TTLC’s interest in the Golf Course was foreclosed out by a
15 Trustee’s Sale conducted by ALCR, LLC (“ALCR”) – who had taken an assignment of
16 Bixby Village’s interest in the Deed of Trust on the Golf Course.² ALCR is wholly owned
17 by some but not all members of Bixby Village – including Nectar Investment, LLC and
18 Ahwatukee Golf Properties, LLC as Managers and Hiro Investment, LLC, Nectar
19 Investment, LLC and Kwang Co., LLC as Members.³ On September 21, 2018, ALCR
20 took title to the Golf Course.

21 On September 19, 2019, the Arizona Court of Appeals issued its opinion affirming
22 the Court’s “ruling granting the injunction” in this matter. In a September 25, 2019, article
23 in the *Ahwatukee Foothills News*, Wilson Gee, a principal in Bixby Village Golf Course,
24 Inc., Ahwatukee Golf Properties, LLC and ALCR was quoted as saying, “[the Golf
25 Course] will never be a golf course again.” Wilson Gee was further quoted as saying of
26 the Arizona Court of Appeals September 19, 2019, Opinion,

27 It really doesn’t change anything. Obviously, we’re not going to do anything
28 and the next guy’s not going to do anything because it doesn’t make sense to

29 ² Except where noted otherwise below, the facts in this section are taken from the
30 factual statements included in Plaintiffs’ Application for Order to Show Cause Re:
31 Contempt for Violating Injunction to Restore Golf Course and supported by the exhibits
32 attached thereto.

33 ³ Each of the managers and members of ALCR were also defendants in this action
34 subject to the Judgment entered by the Court.

1 be a golf course. That's wrong. That's the reality. Doesn't matter what the
2 courts rule. It's not going to happen.

3 See pg. 2 on September 25, 2019 *Ahwatukee Foothills News* article, which is Contempt
4 Hearing Exhibit 2.

5 To date, the Golf Course has continued to deteriorate since it was closed in 2013
6 and no apparent steps have been taken to restore the Golf Course so that ALCR can operate
7 a golf course on the Golf Course.

8 **Legal Argument**

9 **1. Contempt Generally**

10 "Any act which is calculated to hinder, obstruct or embarrass a court in the
11 administration of justice, or which lessens the dignity or authority of a court may be
12 defined as contempt." *Ong Hing v. Thurston*, 101 Ariz. 92, 98, 416 P.2d 416 (1966).
13 Contempt is statutorily defined in A.R.S. §§ 12-861, et seq., but the Arizona Supreme
14 Court has recognized that Arizona courts have inherent authority to punish for contempt.
15 *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 258, 418 P.2d 594 (1966).

16 Contempt sanctions are deemed to exist in four categories by the courts. All
17 contempt is either direct or indirect contempt based on whether the contemptuous act is
18 done in or outside of the presence of the court. Criminal contempt is available when a
19 party does an act or thing that has been forbidden by the court. *Ong Hing v. Thurston*, at
20 Ariz. 96. And civil contempt has been defined variously by courts but includes the
21 disobedience of a court order to take particular actions for the benefit of the opposing party
22 in the litigation. *Korman v. Strick*, 133 Ariz. 471, 743, 652 P.2d 544 (1982).

23 Rule 65 governs injunctions and restraining orders. Rule 65(f) concerns the
24 procedure for obtaining sanctions for violation of an injunction. Rule 65(f)(6) provides

25 *Sanctions may include imposing a fine or jail.* If the court orders a party or
26 person to be fined or jailed for civil contempt and if the contempt can be
27 purged by complying with the court's orders, the court must give that party
28 or person the opportunity to purge the contempt by complying with the
court's order or as the court otherwise orders.

1 (Emphasis supplied.) Based on the express language of Rule 65(f)(6), the Court is given
2 wide latitude in meting out sanctions for violation of the Injunction. However, any
3 sanction “for civil contempt must be designed to coerce the person to do or to refrain from
4 doing some act”; and “the sanction must fit the particular circumstances of the contempt.”
5 *Stoddard v. Donahoe*, 224 Ariz. 152, 157, 228 P.3d 144 (App. 2010); *Trombi v. Donahoe*,
6 223 Ariz. 261, 267, 222 P.3d 284 (App. 2009).

7 The Court’s latitude in assessing civil contempt sanction includes the possible
8 assessment of punitive damages. *Verde Ditch C. by Allert v. James*, 157 Ariz. 369, 758
9 P.2d 144 (App. 1988). To recover punitive damages something more is required over and
10 above the “mere commission of a tort” which, the Supreme Court noted as an example,
11 “such as a conscious and deliberate disregard of the interests of others that the conduct
12 may be called wilful or wanton.” *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565,
13 578 (1986) (emphasis supplied). The wrongdoer must be consciously aware of the
14 wrongfulness or harmfulness of his conduct and yet continue to act in the same manner in
15 deliberate contravention to the rights of the victim. *Id.* See also *Linthicum v. Nationwide*
16 *Life Ins. Co.*, 150 Ariz. 326, 330 (Ariz. 1986) (A defendant acts with an evil mind if he “
17 should be consciously aware of the evil of his actions, of the spitefulness of his motives
18 or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial
19 risk of tremendous harm to others.”)

20 **2. ALCR has consciously chosen to not comply with the Injunction and its**
21 **principal Wilson Gee, who has stridently mocked the Court’s Injunction, has**
22 **looked for ways to avoid compliance with the Injunction instead of complying**
23 **with the Injunction**

24 While ALCR did not become involved with the Golf Course until the Fall of 2018,
25 its managers, members, and principals were the owners of the Golf Course when this
26 action was filed in October 2014. Wilson Gee was the principal of the former owners and
27 is also now the principal of ALCR. Wilson Gee made conscious decisions – both before
28 and after the trial – to allow the Golf Course to deteriorate to the point it no longer

1 resembles a golf course. The Court’s January 2, 2018 Findings of Fact (“FF”)⁴ establish
2 the pre-trial condition of the Golf Course as closed since May 2013 and neglected to the
3 point the golf course would have to be wholly reconstructed (FF 64); and Mr. Gee’s
4 company had shut down the well so the golf course could not be irrigated, removed all but
5 obsolete irrigation heads and shut off power (FF 65). The Court’s Conclusion of Law 25
6 laid the blame at Wilson Gee’s feet for the current condition and situation. Conclusion of
7 Law 25 stated:

8 The inequitable conduct of Bixby Properties, which largely created the
9 alleged hardship to the property owner, also cuts against equitable relief for
10 Defendant. At the very least, Defendant had reason to know that Bixby’s
11 actions substantially contributed to the conditions that made restoration of
12 the golf course economically unfeasible. Bixby, not TTLC, will bear most
of the economic burden if the transaction fails. That result, frankly, will not
be unfair.

13 The Injunction notwithstanding, when Wilson Gee essentially reacquired the Golf
14 Course through ALCR in September 2018, no steps were taken by ALCR to comply with
15 the Injunction. In fact, as noted above (2:18 to 3:3), Wilson Gee was openly hostile
16 towards compliance with the Injunction after the Arizona Court of Appeals issued its
17 Opinion. Even after the Arizona Supreme Court denied Bixby Village’s Petition for
18 Review, Wilson Gee defiantly threatened filing a bankruptcy if the Plaintiffs would not
19 compromise with him. See pg. 2 on April 8, 2020 *Ahwatukee Foothills News* article which
20 is Contempt Hearing Exhibit 3.⁵

21 The formation of ALCR as a single asset real estate (the Golf Course) limited
22 liability company was no doubt Wilson Gee’s conscious business decision made with the
23

24
25 ⁴ The Court may take judicial notice of papers filed in this action. Livermore, Bartels,
26 Hameroff, *Arizona Law of Evidence*, Judicial Notice, §201.1 (4th Ed. 2000) [*continued*]
27 (superior court can take judicial notice of the record of its own records or those filed in
28 another action in the superior court). See also *Schuldes v. National Surety Corp.*, 27
Ariz.App. 611, 617, 557 P.2d 543, 549 (1937) (trial court can take judicial notice of
pleadings in same action).

⁵ “On the other hand, [Wilson Gee] added, if [Plaintiffs] refuse to meet or can’t reach
a compromise, ‘Then I think I really have no other option than to take it into bankruptcy.’”

1 possibility of a chapter 11 bankruptcy filing front and center in his thinking. By filing
2 bankruptcy, ALCR could attempt to sell the Golf Course under 11 U.S.C. § 363 – known
3 as a bankruptcy sale “free and clear of liens, claims, encumbrances, and other interests”.
4 A chapter 11 filing by ALCR would be perhaps the final arrow in Wilson Gee’s quiver
5 (other than its possible Petition for Writ of Certiorari to the United States Supreme Court⁶)
6 in an attempt to sluff the Golf Course’s 1992 Covenants, Conditions and Restrictions from
7 the Golf Course. That tactic has been sought by other golf course owners across the
8 country. *See, e.g., Skyline Woods v. Broekemeier*, 276 Neb. 792, 814-815, 758 N.W.2d
9 376 (Neb. 2008); *In re Skyline Woods Country Club*, 431 B.R. 830 (BAP 8th Cir. 2010);
10 and *In re Skyline Woods Country Club*, 636 F.3d 467 (8th Cir. 2011).

11 **3. Sanctions must be imposed to coerce compliance with the Injunction**

12 The Injunction is simple and straight forward – the owners of the Golf Course “are
13 permanently enjoined to and shall operate a golf course on the subject property.”
14 Compliance with the Injunction only requires action by the owner of the Golf Course. It
15 does not require an agreement between the owner and any third party. It is not dependent
16 on any action other than by the owner of the Golf Course. The Injunction affords Plaintiffs
17 and other Benefitted Persons the opportunity to make a “reasonable request” for
18 “information concerning the restoration of the golf course”, allowing Plaintiffs or other
19 Benefitted Persons “to determine whether the property owners are complying with the
20 permanent injunction.”

21 ALCR’s conduct demonstrating compliance with the Injunction is evidenced by
22 Wilson Gee’s words and actions since the entry of the Injunction. Those words and
23 actions do not evidence ALCR is purportedly complying with the Injunction. That Wilson
24 Gee has paid a golf course architect to draw up a plan does not constitute compliance with
25 the Injunction. For that, ALCR must show ongoing, comprehensive actions to restore the
26 Golf Course so that it can be operated as mandated by the Injunction. ALCR’s exhibits
27

28 ⁶ With the 150-day pandemic deadline from the April 3, 2020 denial of its Petition for Review, the last day to file such a petition is Monday, August 31, 2020.

