

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2014-051035

03/09/2023

HONORABLE MELISSA IYER JULIAN

CLERK OF THE COURT  
A. Delgado  
Deputy

LINDA W SWAIN, et al.

TIMOTHY H BARNES

v.

BIXBY VILLAGE GOLF COURSE INC, et al.

CHRIS R BANISZEWSKI  
DANIEL D MAYNARD  
JUDGE JULIAN

**UNDER ADVISEMENT RULING**

**Re: Plaintiffs' Application to Determine ALCR in Violation of Contempt Sanctions Order,  
Impose Coercive Sanctions, and Continue Special Master, filed October 13, 2022**

Pending before this Court is Plaintiffs' Application to Determine ALCR in Violation of Contempt Sanctions Order, Impose Coercive Sanctions, and Continue Special Master, filed October 13, 2022. A response in opposition was filed on November 14, 2022, and this Court held an evidentiary hearing on the application on January 23, 2023. The parties thereafter requested to submit written closing arguments, which the court received and considered, taking this matter under advisement upon their receipt on February 6, 2023.

**Findings of Fact**

1. The lengthy history of this litigation has been recounted several times in prior orders. This Court will not recount that history in detail again, but refers the parties to the history as described in prior opinions. *See* 11-9-2020 Minute Entry; *Swain v. Bixby Vill. Golf Course Inc.*, 247 Ariz. 405 (Ct. App. 2019). It suffices to say that the question presented is whether Defendant

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ALCR, LLC (“ALCR”) has complied with a prior sanctions order dated November 9, 2020 and entered November 16, 2020 (the “Sanctions Order”).

2. The Sanctions Order considered ALCR’s violation of the original injunction judgment entered in 2018, which required ALCR to restore and operate a golf course on the property in compliance with the community’s Declaration of Covenants, Conditions, Restrictions and Easements (“CC&Rs”).

3. As noted by the Court’s June 1, 2018, minute entry, the CC&R’s do not require ALCR “to restore the Lakes Golf Course as it existed in May 2013.” 6/1/2018 Minute Entry at 2. Rather, ALCR is obligated to “create and operate a gold course that is consistent with the reasonable expectations” of the benefitted homeowners. *Id.* In fulfilling that duty, the CC&Rs reserved ALCR’s right to “redesign” aspects of the facilities on the golf course so long as any redesign or reconfiguration is “reasonably related to” and “in furtherance of” the golf course’s operations. *Id.* But ALCR “is prohibited from allowing the property or any portion of it to lie fallow or otherwise not to be used for the benefit of the homeowners.” *Id.*

4. After making detailed findings regarding ALCR’s non-compliance with the 2018 judgment, this Court set forth three deadlines to ensure the reconstruction of the golf course advanced with reasonable diligence. These deadlines included “(a) The completion of preliminary pre-construction matters;” “(b) The commencement of construction;” and “(c) The completion of construction and the commencement of operating the Golf Course.” Sanctions Order at ¶ 40.

5. As explained by the Court’s January 19, 2022, minute entry, ALCR did not timely comply with the first deadline. As a result, Judge Agne directed the deposit of the first \$500,000 coercive sanction and appointed special master Mark Woodward to oversee the restoration of the golf course.

6. Plaintiff’s do not dispute that construction of the golf course commenced after Mr. Woodward’s appointment and therefore do not seek entry of the coercive fine imposed for the second deadline. Plaintiffs do contend that ALCR failed to “complete construction of the Golf Course and to begin operation of the Golf Course” as required by the third deadline. As a result, Plaintiffs seek entry of the final \$2,000,000 coercive sanction imposed by the Sanctions Order.

7. With respect to the final deadline, the Court described its intent in setting the third and final deadline for “completion” of the golf course:

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Completion means completion. Not substantial completion. Not partial completion. Completion means that the Golf Course is open for golfing on all 18 holes, and that any amenities mentioned in the Declarations, such as a pro shop, pathways, etc. are ready for usage by golfers.

Sanctions Order at ¶ 46.

8. Upon his appointment, Woodward began work to assist in the restoration of the golf course. He testified that he viewed his scope of work as being limited to overseeing the restoration of the golf course to a playable condition by repairing the irrigation system and regrowing the greens. As a result, Woodward did not monitor the reconstruction of other facilities such as bathrooms or the clubhouse/pro shop.

9. Woodward began work by overseeing the restoration of the course irrigation system, which essentially had to be rebuilt given the lengthy period it remained unused and the vandalism to the system that occurred during that period. Once the irrigation system was restored and functional, Woodward testified that they had to wait until June 2022 to plant the grass due to the weather conditions.

10. In his capacity as special master, Woodward also recommended changes in certain aspects of the course design to conserve water. He explained that water conservation is a state-mandated objective for those restoring golf courses in Arizona and is supported with grant funds allocated by the Arizona Department of Water Resources. The primary method of redesigning a course for water conservation purposes is turf reduction.

11. In restoring the course, changes were made in the course design and appearance on Woodward's recommendation. This included limiting turf in areas that had been landscaped with grass and trees. Woodward testified that the redesigned course provided for these rough areas to be redesigned with desert landscaping that would consume far less water than the grass or trees that existed before the course shut down.

12. After the grass was planted on the redesigned course, it took time to grow in and was not fully grown by the time of the original deadline set forth in the Sanctions Order (August 31, 2022). Accordingly, after considering ALCR's motion, this Court extended that the deadline for completion to October 21, 2022.

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13. The Lakes Golf Course opened by the extended October 2022 deadline. Kerry Dugan is the course manager and testified at the hearing that over 5,000 rounds of golf have been played on the course since the opening date.

14. Although the golf course is now playable, Plaintiffs identified several issues with other aspects of the course, which they contend violate their reasonable expectations as the benefitted owners. Each of those concerns and the court's findings as to each is addressed below.

**Cracked/Broken Cart Paths & Bridges**

15. Plaintiffs presented photographic evidence depicting areas of the golf course as of August 2022 and January 4, 2023, when some of the homeowners toured the course grounds. As shown in Exhibits 13-19, several areas of the bridges and cart paths show cracked concrete and graffiti that had not be cleaned or repaired as of the date of the hearing. Aside from being unsightly, Mr. Woodard noted that these areas presented safety hazards to those walking the course.

16. The Court finds that the existence of the unsightly and unsafe cart paths and bridges defaced with graffiti is inconsistent with the benefitted owners' reasonable expectations. The failure to repair those items prior to the extended October 2022 deadline violated the Sanctions Order.

**Bathrooms**

17. The golf course previously had permanent bathrooms for use by players. As set forth in Exhibits 20, 21, and 22, these bathrooms remain in a state of disrepair and are not functional. The photographs depict dirty floors, broken sinks, and smashed toilets.

18. Mr. Dugan testified that ALCR has begun efforts to rebuild one of the bathrooms on the east side of the golf course. He indicated that the delay in rebuilding the bathroom was due in part to ALCR's inability to get City permits. As to another bathroom, ALCR has demolished it because it was deemed to be an unsound structure, but still has taken no steps to seek permitting or to otherwise begin rebuilding the bathroom.

19. ALCR has placed temporary bathrooms or "porta-potties" for use by golfers on the course. Woodward testified that it is not unusual for golf courses to provide temporary bathrooms instead of permanent facilities.

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20. However, the permanent bathroom facilities previously existing at the golf course were a part of what the benefitted owners reasonably expected. The unsightly, unsafe, and unusable facilities that currently exist are inconsistent with those expectations. Further, the placement of temporary porta-potties on the golf course is not a suitable alternative to comply with the owner's reasonable expectations as such temporary facilities alter the picturesque landscape of the course, which the owners have a right to enjoy without viewing temporary bathroom facilities.

21. Mr. Dugan admitted that ALCR had no concrete plans for rebuilding the deteriorating bathroom structures nor any timeline for their completion.

**Debris, Sand, and Weeds**

22. Plaintiffs presented additional photographs showing a significant overgrowth of weeds along with concrete and sand debris littered throughout areas in the "rough" of the golf course and in the parking lot. Some of the weeds and trees have grown so high that they appear over the surface of even the refilled lakes.

23. Woodward acknowledged that these areas had to be treated for weed growth, a matter requiring ongoing attention given how neglected those areas were for a lengthy period. Dugan testified that ALCR had authorized treatment of the weeds, but acknowledged that areas of the rough remain unsightly and wholly inconsistent with the lush greens and trees that previously existed before the course fell into a state of disrepair and neglected maintenance.

24. Testimony also reflected that there is a large gravel/sand pile in the parking lot of the golf course that is being used to refill "hazards" with no plans to store the sand in a less visible area.

25. The Court appreciates the need for turf reduction and water conservation. Because the CC&Rs allow ALCR to make design changes to the course to accomplish that objective, Plaintiffs are not entitled to sanctions merely because every tree and patch of grass has not been replanted or because every lake or reservoir has not been refilled. Design changes implemented for conversation purposes may prevent the course from appearing identical to what existed in 2013 without violating the Sanctions Order.

26. Nevertheless, the ugly overgrowth of weeds and debris currently existing in the rough does not reflect an alternative that comports with the benefitted owners' reasonable expectations.

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**Clubhouse/Pro-Shop**

27. Before litigation commenced, the golf course operated a 5,000 square foot clubhouse that included a pro shop and snack bar. It maintained a liquor license and sold beer and wine to patrons. The old club house and pro shop burned down and has never been rebuilt.

28. Instead of constructing a new club house, ALCR placed a 10x32 foot temporary modular building on the property instead. Once homeowner testified that she walked the course in early January 2023 and asked to inspect the inside of the modular club house at that time. She was refused entry after an attendant explained that the temporary building had no working electricity. Instead of encountering a fully functional clubhouse and pro shop, she was met with a lone attendant who assisted course customers with only a card table and a porta-potty.

29. Dugan testified that ALCR intends to reconstruct a permanent clubhouse building at some unknown point in the future, but admitted that it has not taken any steps to plan for its reconstruction.

30. The Court finds that the unpowered, 10 x 32 modular building being advertised as a “temporary clubhouse” is inconsistent with the benefitted owner’s reasonable expectations and in no way comparable to what existed in 2013.

**Conclusions of Law**

31. In determining whether ALCR has violated the Sanctions Order, this Court is tasked with enforcing its terms in accordance with “the intention of the court” as “determined from all parts of the instrument, and words and clauses thereof should be construed according to their natural and legal import.” *Paxton v. McDonald*, 72 Ariz. 378, 382 (1951).

32. In this case, Judge Campagnolo made his order very clear regarding what the third deadline for “completion” requires: “Completion means that the Golf Course is open for golfing on all 18 holes, and that any amenities mentioned in the Declarations, such as a pro shop, pathways, etc. are ready for usage by golfers.

33. The Court cannot find that ALCR completed the golf course, even within the extended October 2022 deadline under that standard. As noted above, a significant portion of the golf course’s landscape remains overgrown with weeds and portions are still covered with cracked concrete, graffiti, and debris. The bathrooms are an unsightly, unusable hazard and the “temporary club house” is a fraction of the size of the previous clubhouse. It does not offer the same amenities,

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and until recently did not even have electricity. This does not demonstrate compliance with the final deadline as set by the Sanctions Order. "Completion" as defined in that order has not been achieved.

34. The Court notes that some of the changes complained of by the benefitted owners are not necessarily a basis for sanctions. As the Court noted above, the turf reduction plan implemented in the restoration of the course constitutes a reasonable modification to its design for the laudable purpose of water conservation.

35. Nevertheless, the redesign of the landscape must at least provide a comparable alternative view for homeowners and not one that is littered with weeds and debris. In its current state, the surrounding areas of the green cannot be described as a well-manicured "desert landscape."

36. The Court also notes that ALCR attached additional evidence to its closing argument, indicating that some problem areas of the course identified during the hearing had been repaired. This additional evidence is insufficient to avoid the final sanction, however, because the bulk of the concerns identified by the benefitted homeowners remain. Moreover, the delayed attempt to comply with those aspects of the Sanctions Order demonstrates why the coercive sanctions were entered in the first place. The history of this case and prior findings entered herein show that ALCR has been reluctant to fulfill its obligation under the judgment unless and until sanctions are imposed upon it.

**Orders**

**IT IS THEREFORE ORDERED** granting Plaintiffs' Application to Determine ALCR in Violation of Contempt Sanctions Order, Impose Coercive Sanctions, and Continue Special Master, filed October 13, 2022.

**IT IS FURTHER ORDERED** imposing the monetary sanction applicable to completion of the golf course and amenities in the form of a civil bond in the amount of \$2,000,000 to be deposited by ALCR with the Clerk of the Superior Court within ten (10) business days from the date this order is entered and to be held as a bond pending completion of the golf course and amenities as required by the November 16, 2020, sanctions order.

**IT IS FURTHER ORDERED** extending the special master appointment order for Mark Woodward pending completion of the remaining items needed to satisfy the sanctions order. If Mr. Woodward is unable to continue or is unwilling to continue serving as special master, the

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parties shall meet and confer regarding the appointment of a new special master within 30 days from the date this order is entered.

**IT IS FURTHER ORDERED** awarding Plaintiffs their reasonable attorneys' fees and costs incurred herein from September 1, 2022, through February 6, 2023, as an additional sanction for ALCR's violation of the Sanctions Order. Plaintiff's counsel shall submit a proposed form of order and application for attorneys' fees within 20 days from the date this order is entered. If Defendant ALCR wishes to contest the amount of fees requested, any objection to the application or proposed order shall be filed within 10 days thereafter. Plaintiff shall not file a reply to the application or proposed order unless the Court directs a reply to be filed.