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SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA

LINDA W. SWAIN, an individual; and EILEEN T. BRESLIN, an individual, Plaintiffs vs. TTLC AHWATUKEE LAKES INVESTORS, LLC, an Arizona limited liability company, Defendant.	Case No. CV2014-051035 **REPLY IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE RE: CONTEMPT FOR VIOLATING INJUNCTION TO RESTORE GOLF COURSE** **PLAINTIFFS' RESPONSE TO MOTION TO STAY INJUNCTION PENDING APPEAL** (Oral Argument Requested) (Assigned Hon. Steven K. Holding)

In opposition to Plaintiffs' Application for Order to Show Cause Re: Contempt for Violating Injunction to Restore Golf Course ("Plaintiffs' Application"), ALCR, LLC ("ALCR"), the latest owner of the Ahwatukee Lakes Golf Course (the "Golf Course"),[1] argues it should not be held in contempt for failing to comply with the terms of the May 31, 2018 Final Judgment and Order for Permanent Injunction ("Judgment" or "Permanent Injunction"). ALCR brazenly argues "the golf course does not exist" and audaciously

[1] ALCR is the ostensible owner of the Golf Course who is not a party to this action – although ALCR's owners were previously parties to this action. The membership of ALCR – Nectar Investment, LLC, Ahwatukee Golf Properties, LLC, Hiro Investment, LLC, Nectar Investment, LLC and Kwang Co., LLC – is comprised of essentially the same owners of the Golf Course as the original defendants in this action – Nectar Investment, LLC, Ahwatukee Golf Properties, LLC, Hiro Investment, LLC, Nectar Investment, LLC, Kwang Co., LLC and Bixby Village Golf Course, Inc. (the "Former Defendants") – who sold to TTLC Ahwatukee Lakes Investors, LLC ("TTLC") (who was foreclosed by ALCR). Bixby Village Golf Course, Inc. (one of the Former Defendants) and Ahwatukee Golf Properties, LLC (also a Former Defendant and a manager of ALCR) are each owned by Wilson Gee and his wife. *See* Exhibit A and Exhibit D to Plaintiffs' Application. Wilson Gee manages ACLR as the current owner of the Golf Course and managed the Former Defendants as prior owners of the Golf Course.

asserts "it is inaccurate to say [the Golf Course] continues to deteriorate" because, ALCR reasons, the Golf Course has "been permitted to return to its natural state over the past six years since the golf course was shut down in 2013 because it was not profitable". ALCR Response/Motion, 1:24 to 2:1. These assertions ignore that the Judgment enjoins the owner to restore and operate the Golf Course and, because that ruling is in a final Judgment that has not been stayed, Plaintiffs' rights under the Permanent Injunction can be protected through contempt or, if stayed, protected by a bond under Rule 62(c) and Rule 62(e) , Arizona Rules of Civil Procedure.

ALCR's same assertions (made by TTLC) were rejected by the Court during the trial, as well as being rejected by the Arizona Court of Appeals in the Former Defendants' appeal from the Judgment. ALCR's assertions contradict the Court's Findings of Fact and Conclusions of Law in which the Court found the deteriorated condition of the Golf Course was the result of years of neglect by Wilson Gee and decisions made and actions taken when Mr. Gee closed the Golf Course.[2] The Arizona Court of Appeals rejected the Former Defendants' argument that the Golf Course could be permitted to return to its natural state in its September 19, 2019 Opinion ("Opinion"), ¶ 20.[3] As well, relying on the Court's Findings of Fact, the Arizona Court of Appeals rejected the Former Defendants' argument that the Golf Course was unprofitable. Opinion, ¶ 32.[4]

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[2] Finding of Fact 26 (Wilson Gee allowed condition of Golf Course to deteriorate as early 2005 and the photographic evidence contracts Mr. Gee's denial); Finding of Fact 27 (when Wilson Gee closed the Golf Course in 2013, it "was stripped of items that had value, such as sod and irrigation equipment"); Conclusion of Law 10 ("By closing the Ahwatukee Lakes Golf Course in May 2013, shutting off the water and electricity, removing the irrigation heads from the irrigation system, draining the lakes and failing to maintain the property so that it could be used for golfing or golfing practice, the contractual obligations under the 1992 CC&Rs were not met by the former owners, thus a breach had occurred."); Conclusion of Law 25 ("The inequitable conduct of Bixby Properties, which largely created the alleged hardship to the property owner . . . That result, frankly, will not be unfair.").

[3] "Practically speaking, this would mean that the property may be left barren and overgrown with weeks, emitting what Swain and Breslin characterize as an 'overwhelming stench,' yet comply with the covenant."

[4] Finding of Fact 25 ("There was no evidence that the golf course could not have been operated profitably in 2008"); and Finding of Fact 28 ("The evidence did not show that Bixby could not have [*continued*] operated the golf course profitably, with adequate maintenance, at any point in time before Bixby closed the course and stripped it").

ALCR's argument that the Court should not act on Plaintiff's Application but stay it because the appeal is still pending[5] ignores that ALCR is not a party to the appeal and is only now subject to this Court's jurisdiction pursuant to the substance of the Permanent Injunction which is directed to "the owners of the Ahwatukee Lakes Golf Course" (as opposed to being limited to a prior owner of the Golf Course). Judgment, 2:5-16. ALCR tells the Court no stay of the Judgment was sought during the appeal based on discussions of counsel. While Plaintiffs' counsel does not fully agree with ALCR's description of the discussions, the fundamental problem with the ALCR's assertion is that *the Former Defendants had no standing to obtain a stay of the Permanent Injunction after they were no longer the owner of the Golf Course as of September 21, 2018 when ALCR took title to the Golf Course*. Plaintiffs' Application, ¶ 10.

After the Former Defendants' appeal was filed[6], ALCR was consciously created by Wilson Gee and the Former Defendants for some strategic reason – perhaps in an attempt to bog down the enforcement of the Permanent Injunction by filing bankruptcy if the Arizona Supreme Court denies the Former Defendants' Petition for Review. Regardless, less than one week after the Arizona Court of Appeals' Opinion was issued, Wilson Gee announced to all that he had no intention of complying with the Permanent Injunction.[7] In making his arguments to this Court, Wilson Gee is essentially asking the Court to facilitate his unrepentant intention to sell the Golf Course to a developer and the Arizona courts' rulings be damned.

ALCR contends the Former Defendants' Petition for Review presents "serious, difficult and numerous" issues "i.e., can the court make a private company build a golf

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[5] ALCR Response/Motion, 3:9-18; and 3:20 to 5:23.

[6] The Former Defendants filed their appeal on June 11, 2018 and TTLC filed its appeal on June 12, 2018. The appellants' appeal briefs were filed as a combined brief of those parties.

[7] In a September 25, 2019, article in the *Ahwatukee Foothills News*, Wilson Gee is quoted as saying, "It really doesn't change anything. Obviously, we're not going to do anything and the next guy's not going to do anything because it doesn't make sense to be a golf course. That's wrong. That's the reality. Doesn't matter what the courts rule. It's not going to happen." *See* Plaintiffs' Application, ¶ 18 and Exhibit I.

course; if so, what must it look like and then can it make a private company operate a golf course." ALCR Response/Motion, 3:9-11. In making this argument, ALCR, just as TTLC and the Former Defendants before it, ignores that it made the conscious choice to acquire real property which was subject to covenants that ran with the land. As the Arizona Court of Appeals said with respect to a prior owner, "

> TTLC took a calculated risk when it decided to buy the property . . . Permitting TTLC to now claim that an enforcement of the restrictions works a hardship on it would indeed be inequitable.

Opinion, ¶ 36. Judge Howe's statement applies equally to ALCR.

ALCR, in a business decision made by Wilson Gee, came to own the Golf Course with full knowledge of the restrictions, as well as the Permanent Injunction to restore and operate the Golf Course, the pending appeal and the fact there was no pending stay of the Permanent Injunction during the appeal process. There is no room for any argument by ALCR that it has been harmed by anything other than its own decision to acquire the Golf Course. To argue otherwise cannot be taken as anything other than a conscious litigation tactic to put off the inevitable. Wilson Gee is pulling the strings of yet another entity that is looking to make those same arguments flatly rejected by this Court and by a unanimous Arizona Court of Appeals decision.

Response to Motion to Stay Injunction Pending Appeal

ALCR requests a stay pursuant to Rule 62(c). ALCR Response/Motion 3:20 to 5:23. ALCR tips its hat to the requirements of Rule 62(c)[8] and cites *State v. O'Connor*, 171 Ariz. 19, 827 P.2d 480 (App. 1992), for the general proposition that "an appeal divests the trial court of jurisdiction" subject to "a flexible approach" in applying that rule. This case has no application to the issues before the Court and ignores the express requirements of Rule 62(e). The court in *State v. O'Connor* recognized the "rule divesting a trial court of jurisdiction to rule on matters the subject of an appeal" is a "court-made" rule (as opposed to a rule enacted by the Arizona Supreme Court or a statute) that is subject to

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[8] ALCR Response/Motion 3:20 to 4:3.

"many equally well-established exceptions". *Id*. at Ariz. 21. *State v. O'Connor* stands for the proposition that an appeal does not, just by reason of having been filed, strip the trial court of all jurisdiction to deal with all subsequent issues which may arise and be brought before the trial court while an appeal is pending.

More fundamentally, in addition to various recognized court-made exceptions, there are statutory or rule-made exceptions to the court-made rule discussed in *State v. O'Connor*. If a supersedeas bond has not been set, Rule 62(d) expressly states, "unless the court orders otherwise, an interlocutory or *final judgment in an action for an injunction or receivership is not stayed after being entered, even if an appeal is taken*". Emphasis supplied. Thus, in order to stay a final judgment granting injunctive relief, a stay of the injunctive order must be obtained under Rule 62(e). That rule, as does Rule 62(c), also requires the stay must be "on such terms for bond, security, or otherwise that preserve the adverse party's rights." Clearly, the court-made rule in *State v. O'Connor* does not preclude the enforcement of the Permanent Injunction.

Once again, ALCR tips its hat to requirements of obtaining a stay pending appeal, but, once again, misses the mark on establishing its right to a stay pending the completion of appeal. A stay pending appeal under Rule 62 is not a matter of right by the moving party, but an exercise of the court's discretion. As noted by the United States Supreme Court regarding the issuance of a stay pending appeal, "[t]he propriety of its issue is dependent upon the circumstances of the particular case". *Nken v. Holder*, 556 U.S. 416, 433 (2009). The issuance of a stay pending appeal is based on the movant satisfying the Court under the 4-part test applied to a stay sought under Rule 62. Those four factors include: (1) the probability of the appellant will ultimately succeed on appeal; (2) the likelihood of irreparable harm to appellant if stay not granted; (3) the balancing of hardships if stay is granted or stay is not granted; and (4) impact of issuance of stay on third parties and the general public. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990).

1. Likelihood of Success on Appeal

The standard for this first factor is that the Former Defendant's likelihood of success on the Petition for Review must be "better than negligible". *Arizona Civil Remedies* (4th Ed.), Injunctions, §1.6.5 (Likelihood of Success on the Merits). Professor Charles Alan Wright has suggested to obtain a stay pending appeal, the appellant must show a strong likelihood of success on appeal. *Id.* at 1.10.5.

The Former Defendants' Petition for Review has a steep cliff face to overcome in order to be successful on its Petition for Review. The Arizona Court of Appeals Opinion relied on solid Arizona Supreme Court precedent in rejecting the Former Defendants' interpretation of the underlying restrictive covenant.

> The Arizona Supreme Court has made clear in *Powell v. Washburn*, 211 Ariz. 533 (2006) . . . that whether a covenant is deemed restrictive or affirmative, it must be interpreted according to its enactors' intent. In this case, the circumstances surrounding the creation of the covenant and the covenant's language demonstrate that is enactors intended to require the operation of a golf course on the property. Because this Court rejects TTLC's argument and the other arguments discussed below, this Court affirms the trial court's ruling granting the injunction.

Opinion, ¶ 2.

Furthermore, the Opinion flatly rejected the Former Defendants' argument supporting the ALCR's supposed "serious, difficult and numerous" issues regarding whether the court can "make a private company build a golf course; if so, what must it look like and then can it make a private company operate a golf course." In ruling against the Former Defendant's argument that the Thirteenth Amendment – premised on "involuntary servitude" – precluded the courts from requiring the reconstruction and operation of a golf course, the Court of Appeals stated:

> We reject TTLC's Thirteenth Amendment argument. TTLC *voluntarily* entered into a contract to purchase the Lakes Golf Course property with full knowledge of the risks involved in the transaction. Moreover, despite its *voluntary* choice to purchase the encumbered property, its argument fails because a covenant – whether affirmative or negative – is enforceable against

subsequent purchasers who take their ownership with notice of the restriction.

Opinion, ¶ 39 (emphasis supplied). The Former Defendant's likelihood of success is on its Petition for Review is at best negligible. They are challenging long established Arizona common law regarding the interpretation of contracts and resisting long established English common law[9] upon which Arizona has based its long-held interpretation of the legal effect of restrictive covenants in deeds to Arizona real property.

Based solely on the sheer volume of petitions for review filed with the Arizona Supreme Court, the likelihood of the supreme court granting the Former Defendants' Petition for Review, much less overturn the Arizona Court of Appeals Opinion, does not rise to the level of being other than negligible. There are currently 124 civil petitions for review and 169 criminal petitions for review pending before the Arizona Supreme Court[10]. Of those, there are 14 pending civil and 19 criminal petitions for review on the Arizona Supreme Court's current agenda in which the petitions have been granted and are awaiting a hearing before the supreme court. The most recent statistical analysis counsel was able to locate indicated that of the 1,080 petitions of review filed in 1995 (429 civil and 587 criminal), the Arizona Supreme Court granted 4.95% of the civil petitions for review and 4.43% of the criminal petitions for review. John Rea, Carrie Brennan, Supreme Court Practice, *Arizona Attorney*, February 1997.

2. <u>ALCR's Irreparable Injury Absent Stay</u>

ALCR's irreparable injury is a fleeting concept in this matter. In Arizona, "the required degree of irreparable harm increases as the probability of success decreases". *Ogunleye v. Arizona*, 66 F.Supp. 2d 1104, 1111 (D. Ariz. 1999) (quoting *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985)). Given the ALCR's negligible likelihood of success, ALCR's claimed irreparable injury should

[9] *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Court of Chancery, England 1848) (landmark English case recognizing that in certain restrictive covenants can "run with the land".

[10] Excluding petitions for review identified as "ending" on the Arizona Supreme Court's website.

not be given significant credence. Particularly because, with the outcome of a pending Petition for Review a matter of months, ALCR would not have to be paying $5 million to comply with the Permanent Injunction. Because ALCR is not in imminent danger of having to pay $5 million, it will not be irreparably harmed. *See Renters Ltd. v. United Press International, Inc.*, 903 F.2d 904, 907 (2nd Cir. 1990) ("Irreparable harm must be shown by the moving party to be imminent, not remote or speculative").

The reality of the circumstances are, however, that ALCR – which is controlled by Wilson Gee – will not be irreparably injured so much as, this Court's Conclusion of Law 25[11] so aptly concluded it would be fair for Mr. Gee to "bear most of the economic burden" of having to restore and operate the Golf Course. The Court's Conclusion of Law 25 was based on the fact that "Bixby's actions substantially contributed to the conditions that made restoration of the golf course economically unfeasible." There is no room for Wilson Gee complaining about the current circumstances raining irreparable injury upon him and his investors when he is the root cause of the problem about which he complains.

3. Balancing Hardships

Under Arizona law, the balance of hardships has been looked as requiring the moving party to establish either "(1) probable success on the merits and the possibility of irreparable injury; or (2) the presence of serious questions and 'the balance of hardships tips sharply' in his favor." *Shoen v. Shoen*, at Ariz. 63, at P.2d 792. ALCR cannot meet either of the balancing tests because its likelihood of success is negligible, and the balance of hardships does not tip sharply in its favor!

Rather, the Court's Conclusion of Law 25 resolves the question of how the hardships should be balanced. For this Court to expressly find it "will not be unfair" for

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[11] "The inequitable conduct by Bixby Properties, which largely created the alleged hardship to the property owner, also cuts against equitable relief for Defendant. At the very least, Defendant had reason to know that Bixby's actions substantially contributed to the conditions that made restoration of 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."

Wilson Gee to bear the burden speaks volumes – not just in resolving the case at the trial court level, but in evaluating how the respective hardships should be balanced.

4. Impact of Stay on General Public

As with balancing the hardships, the impact of a stay on Ahwatukee and the homeowners surrounding the Golf Course continues to be devastating. Wilson Gee's stay request mirrors a decade-long record of evasions, fabrications and fictions that have deprived retirees around the Golf Course of the enjoyment of their homes for the opportunity of Mr. Gee to make millions. At each step, first the retirees, and then the courts have unveiled the fictions, affirmed the retirees, and set the stage to hold Gee civilly liable for his outspoken contempt of the Court's Permanent Injunction.

The record shows that Wilson Gee has degraded the Golf Course since 2008. He sealed it with a chain link fence in 2013. He sold the land to Pulte and, when residents stopped Pulte, sold it again to TTLC, who asserted it "good public policy" to take over the Golf Course. But when TTLC could not convince the community to allow the development, TTLC argued the Thirteenth Amendment precluded it from the involuntary servitude created by its own decision to purchase the Golf Course. The Court and the Arizona Court of Appeals rejected the involuntary servitude argument. Now, after ALCR foreclosed on the Golf Course, it now is telling this Court that the central "serious, difficult and numerous" issue for the Petition for Review[12] is the very issue unequivocally rejected by the Court and the Court of Appeals.

Even if, for sake of argument, ALCR satisfies the Court under the 4-part test, a stay requires a bond or other security under both Rule 62(c) and Rule 62(e) (for stays of injunctive relief). Although it is mandated by Rule 62, ALCR has not addressed this issue. If ALCR's motion seeking a stay is to be granted, Plaintiffs respectfully submit a substantial bond must be required. The Permanent Injunction requires the owner of the Golf Course restore and operate a golf course. Permanent Injunction, 2:6-16. It requires

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[12] "[C]an the court make a private company build a golf course; if so, what must it look like and then can it make a private company operate a golf course." ALCR Response/Motion, 3:9-11.

the owner to "provide information concerning restoration of the golf course to the plaintiffs, their attorneys and representatives and to any other Benefitted Persons, upon reasonable request, sufficient to allow the plaintiffs and Benefitted Persons to determine whether the property owners are complying with the permanent injunction."

Wilson Gee has already announced he has no intention to comply with the terms and requirements of the Permanent Injunction.[13] For ALCR to be entitled to a stay, it must be ordered to pay a substantial bond. Plaintiffs' respectfully submit a bond of not less than $250,000.00 should be required if the Court grants any stay of the Permanent Injunction. Because ALCR has not addressed the issue of a bond for any stay, Plaintiffs reserve the right to file a sur-reply to this portion of Plaintiffs' response regarding the issue of a bond. Had ALCR included a discussion of the bond requirement in its Motion, Plaintiffs would be able to address the specifics of ALCR's argument on the bond issue.

For all the reasons set forth herein, Plaintiffs respectfully request the Court deny ALCR's request for a stay and issue an Order for ALCR to appear before this Court and show cause why is should not be held in contempt for failure to have begun compliance with the express terms and requirements of the Permanent Injunction.

Dated this day of December 2019.

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Original of the foregoing e-filed and
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[13] *See* footnote 6 above.

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