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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 TTLC AHWATUKEE LAKES INVESTORS,
14 LLC, an Arizona limited liability company,

15 Defendant.

16 Case No. CV2014-051035

17 **PLAINTIFFS' REPLY TO**
18 **DEFENDANT'S OBJECTION**
19 **TO FORM OF JUDGMENT**

20 (Assigned Hon. John R. Hannah, Jr.)

21 The contents of the Joint Pretrial Statement, the parties' course of litigation (and
22 trial presentations), the Court's express Findings of Fact and Conclusions of Law and the
23 substance of the 1992 Covenants, Conditions and Restrictions notwithstanding, Defendant
24 TTLC Ahwatukee Lakes Investors, LLC ("Defendant") argues "this Court may not dictate
25 in any permanent injunction it enters what the [Ahwatukee Lakes] golf course must look
26 like, what it must consist of or what buildings and facilities it must have." Defendant's
27 Objection to Plaintiff's Notice of Lodging Form of Judgment ("Defendant's Objection"),
28 2:9-11. Instead, Defendant contends the only injunctive power the Court has is to issue
an open-ended restoration requirement of the Lakes Golf Course, so it can be used as a
golf course. Defendant's Objection, 2:27 to 3:2. The broad approach advocated by the
Defendant is contrary to Arizona law and fails for multiple of the reasons discussed below.

1. **Defendant has waived its objection to an injunction requiring it to reconstruct the Lakes Golf Course because (a) throughout this action and during the trial the parties litigated the issue of whether Defendant would be required to reconstruct the Lakes Golf Course to its 2013 condition; and (b) Defendant's objection has not previously been raised and the Joint Pretrial Statement Issues of Fact and Law controls the course of this action.**

1 Plaintiffs and Defendant hired expert witnesses to express opinions regarding the
2 issue of restoration of the Lakes Golf Course to its 2013 condition when it was closed.
3 Defendant's Trial Exhibit 45 was entitled "Ahwatukee Lakes Golf Course Redevelopment
4 Assessment". The "Construction Budget Assumptions" on page 4 of Exhibit 45 states, in
5 the first bullet point, "This budget reflects the intention to restore ALGC to its prior
6 condition in terms of design, turf coverage and quality." Plaintiffs' Trial Exhibit 23 also
7 dealt with, among others, the issue of reconstruction of the Lakes Golf Course to its prior
8 condition. Both Plaintiffs' and Defendant's expert testified to the issue during the trial.

9 The parties' Joint Pretrial Statement ("JPS") Stipulated Facts and Law ¶ 19 stated,
10 "At the time Defendant took fee title to the Property, the former golf course had been
11 closed and neglected to the point that the golf course would have to be completely
12 reconstructed in order to put it back in the condition it was in as of May of 2013 when
13 Bixby closed the operation of the golf course."¹ Additionally, the JPS Issues of Fact and
14 Law issue ¶ 8 frames the following issue: "Whether Plaintiffs are entitled to an injunction
15 requiring Defendant to reconstruct and operate the Ahwatukee Lakes Golf Course?" JPS
16 issue ¶ 8 squarely puts the question of whether Plaintiffs Linda W. Swain and Eileen T.
17 Breslin ("Plaintiffs") are entitled to an injunction requiring Defendant to reconstruct and
18 operate the Lakes Golf Course. Having placed the issue before the Court, Defendant has
19 waived any objection to whether it can be required to reconstruct and operate the Lakes
20 Golf Course. Defendant's Pre-Trial Memorandum did not assert any objection to
21 Plaintiffs' entitlement to an injunction mandating Defendant reconstruct and operate the
22 Lakes Golf Course.²

24 ¹ The JPS Stipulated Facts and Law ¶ 34 also states, "Prior to purchasing the Property, Defendant
25 was aware the Property would need to be re-constructed if it were ever to be used as a golf course
26 after June 19, 2015."

27 ² In their Pre-Trial Memorandum, Defendant argued Plaintiffs were not entitled to an injunction
28 based on the equitable defenses of "relative hardships and injustice", "public interest",
"misconduct of the parties", "delay on the part of the plaintiff" and the "adequacy of other
remedies". Defendant's Pre-Trial Memorandum, 2:25 to 3:2. In making the relative [continued]

1 A joint pretrial statement “controls the subsequent course of litigation”. *Murcott*
2 *v. Best Western International, Inc.*, 198 Ariz. 349, 9 P.3d 1088, 1097 (App. 2000). Under
3 the *Murcott v. Best Western* decision, a party failing to preserve an issue in a joint pretrial
4 statement has waived that issue. *Id.* See also *Carlton v. Ernhardt*, 138 Ariz. 353, 355,
5 674 P.2d 907, 909 (App. 1983) (a joint pretrial memorandum that omitted a lack of
6 personal jurisdiction defense removed the defense from the case). An argument is also
7 waived if it has not been “squarely raised” during the trial. *Van Dever v. Sears, Roebuck*
8 *& Co.*, 129 Ariz. 150, 152, 629 P.2d 566, 568 (App. 1981) (a “post-trial objection is too
9 late”). Given these legal concepts, Defendant waived the issue of whether the 1992
10 Covenants, Conditions and Restrictions preclude the issuance of an injunction requiring
11 the reconstruction of the Lakes Golf Course because the parties litigated the reconstruction
12 issue prior to and during the trial without Defendant’s objection being previously raised.

13 **2. Paragraph 2 of the 1992 Covenants, Conditions and Restrictions is a**
14 **“Use Restriction” which much be read and interpreted in the context and the entirety**
15 **of the document.**

16 Defendant, ignoring the remaining substance and its context within the entire
17 document, cites to one sentence of paragraph 2 of the 1992 Covenants, Conditions and
18 Restrictions to support its assertion that Plaintiffs’ proposed injunctive order requires the
19 Court to modify those restrictive covenants. Defendant’s Objection, 2:16-20. Paragraph
20 2 contains the “Use Restriction” for the Lakes Golf Course. It is a key provision to the
21 Court’s Conclusion of Law ¶ 2 that “[t]he intention of the 1992 Covenants, Conditions
22 and Restrictions was that a golf course would be operated on the Property.”³ In arguing

23 _____
24 hardship argument, Defendant specifically argued it would be too expensive for it to be required
25 to reconstruct and operate the Lakes Golf Course. *Id.* at 3:3-6. Defendant did not make, or even
26 imply, the argument it has now framed in Defendant’s Objection.

27 ³ The opening portion of that paragraph states: “The Property shall be used for no purposes other
28 than golf courses and such improvements and facilities (including without limitation, clubhouses,
restaurants, pro shops, overnight lodging facilities, resort and connected recreational facilities,
bars, parking areas and golf cart trails) and uses as are reasonably related to, convenient for or in
furtherance of golf course use or the accommodation of golf course patrons and guests”.

1 the import of any of its individual clauses, the use restriction provisions of paragraph 2
2 must be read in the context of the entirety of the 1992 Covenants, Conditions and
3 Restrictions.⁴

4 It is indisputable that the Lakes Golf Course was not useable as a golf course since
5 before Defendant purchased the Lakes Golf Course in June 2015. *See, e.g.*, Findings of
6 Fact ¶¶. 27, 29, 50-51. Allowing the Lakes Golf Course to continue in such a condition
7 was a breach of the 1992 Covenants, Conditions and Restrictions. *See, e.g.*, Conclusions
8 of Law ¶¶ 10-14. The last sentence of paragraph 2 (which Defendant ignores) states,
9 “Declarant, on behalf of itself and its successors and assigns, agrees that *the covenants*
10 *and restrictions herein may be enforced by Declarant or any Benefitted Person.*”
11 Emphasis supplied. Paragraph 4 (“Enforcement”) of the 1992 Covenants, Conditions and
12 Restrictions specifically states that “*injunctive relief against the owners*” is available to
13 “any Benefitted Person”. Emphasis supplied.

14 When the “Declarant” is the cause for the condition of the Lakes Golf Course being
15 incapable of being used for playing or practicing golf, paragraphs 2 and 4 of the 1992
16 Covenants, Conditions and Restrictions explicitly authorize the Court to issue an
17 injunctive order to enforce the restrictive covenants. Where the condition of the Lakes
18 Golf Course prevents its use as a golf course, the injunctive relief authorized by paragraphs
19 2 and 4 is necessarily intended to allow for an injunctive order requiring the reconstruction
20 of the Lakes Golf Course so it may be used as a golf course.

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22
23
24 ⁴ It has long been the rule that an interpretation which gives effective meaning to all provisions of
25 a contract is preferable to an interpretation which leaves a part of the contract ineffective. *Reserve*
26 *Insurance Co. v. Staats*, 9 Ariz. App. 410, 412, 453 P.2d 239, 241 (1969). *See also Taylor v.*
27 *State Farm Mut. Auto Ins. Co.*, 175 Ariz. 148, 158, 854 P.2d 1134, 1144 (1993) (a contract should
28 not be interpreted to not render a provision superfluous); *Allen v. Honeywell Retirement Earnings*
Plan, 382 F.Supp.2d 1139, 1165 (D. Ariz. 2005) (rules of contract construction “disfavors
constructions that nullify a contract term or render a term superfluous or redundant”).

1 Because Defendant was aware when it purchased the Lakes Golf Course that (i) it
2 would need to comply with paragraph 2⁵, (ii) the Lakes Golf Course would need to be
3 reconstructed so it could be used as a golf course⁶ and (iii) the cost of reconstructing the
4 Lakes Golf Course would be in the millions of dollars⁷ and because Defendant was part
5 of the reason why the Lakes Golf Course is in its current condition⁸, it cannot now say one
6 sentence in paragraph 2 (taken out of context) gives Defendant “the sole discretion to
7 determine what type of golf course and what facilities will be maintained on the Property”.
8 Defendant’s Objection, 2:21-22. The scope and intent of paragraph 2 and 4 vest the Court
9 with the authority to issue the injunctive order proposed by Plaintiffs.

10 While paragraph 2 reserves to “Declarant” the right to “redesign or reconfigure the
11 golf course on the Property”, Defendant’s Objection has not established that Plaintiffs’
12 permanent injunction constitutes a “redesign” or “reconfiguration” of the Lakes Golf
13 Course. The restoration of the Lakes Golf Course was litigated throughout the course of
14 this action against Defendant, both parties retained expert witnesses to testify regarding
15 the reconstruction and both experts testified at trial as to how the Lakes Golf Course could
16 be restored to its 2013 condition. The language of the proposed injunctive order is
17 consistent with concepts presented by the parties’ experts at trial.

18 **3. The scope of Defendant’s proposed injunction is not consistent with the**
19 **relief allowed in paragraphs 2 and 4 of the 1992 Covenants, Conditions and**
20 **Restrictions and would be too vague to be enforceable as a permanent injunction.**

21 Defendant contends “the only permanent injunction this Court is authorized to
22 enter based upon the 1992 Covenants, Conditions and Restrictions is simply to require
23 TTLC and any future owner of the Property to operate a golf course on the Property so
24 that it may be used for golfing and golfing practice.” Defendant’s Objection, 2:27 to 3:2.

25 ⁵ JPS Stipulated Facts and Law ¶ 33.

26 ⁶ JPS Stipulated Facts and Law ¶ 34.

27 ⁷ Defendant’s Exhibit 45 and its expert’s trial testimony.

28 ⁸ Conclusion of Law ¶¶ 24 and 25

1 Defendant's contention is incorrect for two fundamental reasons. First, as explained in
2 section 2 above, where the condition of the Lakes Golf Course prevents its use as a golf
3 course, the injunctive relief authorized by paragraphs 2 and 4 of the 1992 Covenants,
4 Conditions and Restrictions is necessarily intended to allow an injunctive order requiring
5 the reconstruction of the Lakes Golf Course so that it may be used as a golf course.

6 Apart from the scope of paragraphs 2 and 4 of the 1992 Covenants, Conditions and
7 Restrictions, the open-ended breadth of scope of Defendant's proposed permanent
8 injunction is contrary to Arizona law and would preclude any such injunction from being
9 enforceable. Defendant's proposed scope of injunction provides no details to the required
10 course of reconstruction – making it impossible to determine whether the injunctive order
11 is being followed at any point in time. Rule 65(d)(1), Ariz.R.Civ.P., describes the required
12 contents of an injunctive order. Rule 65(d)(1)(C) requires the injunctive order “describe
13 in reasonable detail – and not by referring to the complaint or other document – the act or
14 acts restrained or required.” In Arizona, an injunctive order must be specific in its terms.
15 *Arizona Civil Remedies*, Injunctions, § 1.5.1(pg. 1-28) (4th Ed. 2015). Moreover, “overly
16 broad” injunctive orders are not enforceable. *Berry v. Foster*, 180 Ariz. 233, 234, 883
17 P.2d 470, 471 (App. 1994).

18 *Arizona Civil Remedies* handbook explains why injunctive orders must be specific:

19 It is well-settled that a party bound by an injunction must be able to
20 determine from its terms what he may and may not do.” Without such detail,
21 a party cannot be held in contempt. A party cannot be held guilty of
contempt for violation of an order that is vague or uncertain.

22 *Id.* at § 1.5.1(pg. 1-28) (citing to 11A *Wright & Miller*, § 2955 at 319-20). Defendant's
23 proposed injunctive order contains no standards by which progress of the restoration could
24 be measured because no specific reconstruction details are provided. Likewise, Defendant
25 would be essentially the sole arbiter of whether the injunctive order was being met,
26 assuring itself that it could not be challenged in either the scope of progress of its
27 restoration of the Lakes Golf Course. Defendant's proposed injunctive order is not valid
28

1 under Arizona law or even by the standard of common sense. Defendant’s proposed scope
2 of injunction is yet another attempted roadblock to enforcement of the 1992 Covenants,
3 Conditions and Restrictions.

4 **4. A Special Master is necessary for the reconstruction process**

5 Defendant argues against a special master by contending the Court cannot grant the
6 requested injunction unless the Court “re-writes the 1992 Covenants, Conditions and
7 Restrictions for the parties.” Defendant’s Objection, 3:9-18. However, unless the Court
8 ignores the 1992 Covenants, Conditions and Restrictions (which it does not have the
9 authority to do), the Court must require Defendant to restore the Lakes Golf Course. A
10 special master is necessitated by Defendant’s breach of the 1992 Covenants, Conditions
11 and Restrictions. Having also breached its covenant of good faith and fair dealing of that
12 document, the oversight of any restoration must be by a third party special master.

13 A special master can be appointed to “address [] post-trial matters that cannot be
14 addressed effectively and timely by an available superior court judge in the county where
15 the action is pending”. Given the Proposed Injunction requiring the Lakes Golf Course to
16 be restored over a period of 18 months, compliance with the Proposed Injunction cannot
17 be effectively and timely addressed without a special master familiar with the restoration
18 of golf courses who can monitor the progress of the restoration and report to the Court
19 (that most certainly does not need to get involved in the minutia of the design and
20 restoration of a golf course). On a practical level, because superior court judges are
21 frequently rotated for the benefit of the court system as a whole, having a special master
22 with continuity is a major advantage in the Court’s supervision of the injunction.

23 **5. The Arizona Rules of Civil Procedure do not require Plaintiffs to have**
24 **provided a form of injunctive order prior to its inclusion in Plaintiffs’ proposed form**
25 **of judgment required by Rule 58(a), Arizona Rules of Civil Procedure.**

26 Defendant objects that Plaintiffs did not previously provide Defendant with “a
27 specific form of injunction they wanted entered in this case”. Defendant’s Objection,
28 1:23-24. Defendant cites no authority that Plaintiffs were obligated to provide a specific

1 form of injunctive order. Because a permanent injunctive order is part of a judgment
2 entered by the Court, Rule 58(a), Ariz.R.Civ.P., controls the timing of when a form of
3 permanent injunctive order is required. Plaintiffs complied with Rule 58(a) by lodging
4 the form of Judgment and Order for Permanent Injunction.

5 Defendant was on notice of Plaintiffs seeking permanent injunctive relief
6 throughout this action. Their Third Claim for Relief and Prayer clause C requested “the
7 issuance of a permanent injunction to order TTLC Ahwatukee Lakes Investors, LLC to
8 restore the Ahwatukee Lakes Golf Course so that it may be used for golfing or golfing
9 practice by Swain, Breslin, the Benefitted Persons or by the public”. As noted above, the
10 scope of the requested restoration was litigated by the parties through their respective
11 expert witnesses. Defendant’s expert report (trial Exhibit 45) and Plaintiffs’ expert report
12 (trial Exhibit 23) detailed what each recommended for the restoration of the Lakes Golf
13 Course. Defendant has not shown the Court that the scope of the proposed permanent
14 injunctive order is outside of the scope of either to the parties’ two expert reports.

15 **6. Conclusion**

16 For the reasons set forth herein, Plaintiffs respectfully request their proposed form
17 of Judgment and Order for Permanent Injunction be entered in this action.

18 Dated this 22nd day of February 2018.

19 TIMOTHY H. BARNES, P.C.

20 By /s/ Timothy H. Barnes (SBN 003373)

21 Timothy H. Barnes

22 *Attorney for Plaintiffs*

23 Original of the foregoing e-filed and
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