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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF CALIFORNIA
7 MODESTO DIVISION
8

9 In re) Case No. 09-93249-E-11
10 MICHAEL KENNETH NEMEE and) Docket Control No. MDG-19
11 MICHELLE SEOBHAN McKEE NEMEE,)
12 Debtor(s).)
_____)

13 This memorandum decision is not approved for publication and may
14 not be cited except when relevant under the doctrine of law of the
15 case or the rules of claim preclusion or issue preclusion.

16 MEMORANDUM OPINION AND DECISION

17 In this voluntary Chapter 11 bankruptcy case commenced by
18 Michael and Michelle Nemees ("Nemees"), for which they are serving
19 as the Debtors-in-Possession, the court issued an order terminating
20 the automatic stay on February 14, 2012. With this order,
21 Community Bank of San Joaquin (the "Bank") was no longer stayed
22 from exercising its rights to nonjudicially foreclose on two
23 parcels of real property on which the Nemees constructed a golf
24 course (the "Real Property") and a power of sale for specified
25 personal property (the "Personal Property") which secures the
26 Bank's claims in this case. The court's findings of fact and
27 conclusions of law in determining that relief from the stay was
28 proper are set forth in the 23-page Civil Minutes for the

1 February 9, 2012 hearing. Dckt. 545. The court's analysis
2 included the operation of the bankruptcy estate by the Nemees as
3 the debtors-in-possession; the operation of the golf course by
4 Trinitas Enterprises, LLC ("Trinitas"), the Nemees' limited
5 liability company which is property of the bankruptcy estate, the
6 financial condition of the bankruptcy estate after more than two
7 years bankruptcy protection, the value of the Real Property and
8 Personal Property, whether the Real Property and Personal Property
9 were necessary to an effective reorganization, the monthly
10 operating reports filed by the Nemees, and whether the interests of
11 the Bank were adequately protected.

12 The Nemees appealed the order terminating the automatic stay
13 to the district court. Notice of Appeal, Dckt. 556. On March 6,
14 2012, the Nemees filed a Notice of Withdrawal, abandoning the
15 appeal of the order granting relief from the automatic stay. The
16 order granting relief from the stay is a final order.

17 The Nemees are currently prosecuting an appeal of a judgment
18 entered by this court in an adversary proceeding determining that
19 the construction and operation of a commercial golf course on the
20 Real Property were and are in violation of the Calaveras County
21 Zoning Ordinances. ("Land Use Judgment") The district court
22 issued a stay pending appeal on the injunctive relief portion of
23 this court's judgment. In its decision for the issuance of the
24 stay, the district court noted that the Nemees could well lose the
25 property which was the subject of the appeal through foreclosure by
26 the Bank. *Nemee v. County of Calaveras*, E.D. Case CV F 12-0002
27 LJO JLT, Dckt. 19.

28 ///

1 **MOTION TO REINSTATE STAY**

2 The Nemees have filed the present Motion, which is titled
3 "Motion to Reinstate Automatic Stay Until a Final Judgment is
4 Issued by the District Court in the Appeal of Adversary No. 09-
5 09088." From its title, it appears that the Nemees are seeking the
6 equivalent of a stay pending appeal pursuant to the Land Use
7 Judgment which the Bank is not a party. No request has been made
8 for this court to vacate that order pursuant to Federal Rule of
9 Civil Procedure 60 and Federal Rule of Bankruptcy Procedure 9024.

10 The Motion requests the court to "Impose the Automatic Stay"
11 to prevent the Bank from foreclosing on the golf course property
12 "until the parties can reach an agreement on compensation to the
13 bank in the interim or until the District Court issues its ruling
14 on the appeal of the Adversary case No. 09-09088." From this
15 description the court understands the relief request is for this
16 court to fashion a new "automatic stay" (to replace the one which
17 was terminated) so that the Nemees may use it to induce (or compel)
18 the Bank to "agree" not to foreclose on the Real Property until,
19 years down the road, the appeals of this court's Land Use Judgment
20 are exhausted.

21 The grounds pled with particularity for the relief requested
22 (as required by Federal Rule of Bankruptcy Procedure 9013) are:

- 23 1. On February 14, 2012, the bankruptcy court issued an
24 order granting relief from the automatic stay to the
25 Community Bank of San Joaquin.
- 26 2. On February 17, 2012, the district court entered a stay
27 pending appeal of the judgment in Adversary Proceeding
28 No. 09-09088.

- 1 3. The Nemees have attempted to negotiate a resolution of
2 the defaults on the obligations owing to the Bank which
3 are secured by the Real Property and Personal Property
4 that are the subject of the nonjudicial foreclosure sales
5 and the Personal Property sale.
- 6 4. Community Bank of San Joaquin has the nonjudicial
7 foreclosure sales set for April 17, 2012.
- 8 5. The district court in the appeal of this court's judgment
9 in the Adversary Proceeding "indicated an intent to
10 dismiss the appeal if the Bank forecloses on the debtor's
11 real property."
- 12 6. The Nemees propose to service the full interest on the
13 obligation secured by the Bank's deed of trust on the
14 160-acre parcel in the amount of \$2,100.00, in addition
15 to the \$6,300.00 a month payment to the Bank previously
16 required by the court. (The \$6,300.00 was ordered by the
17 court to protect the erosion of the Bank's second lien
18 position on the 120-acre parcel due to the accruing of
19 interest at 10% per annum and interest on delinquent
20 property taxes. Civil Minutes, Dckt. 341.)
- 21 7. It is alleged that the Rishwain Creditors are willing to
22 waive "the interest accumulation on the 120-acre parcel
23 during the pendency of the appeal."
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1 **Legal Authorities Presented by Nemees¹**

2 The Nemees direct the court to consider the holding of the
3 Ninth Circuit Court of Appeals in *Solidus Networks, Inc. V. Excel*
4 *Innovations, Inc. (In re Excel Innovations*, 502 F.3d 1086 (9th Cir.
5 2007) as the authority for the proposition that the court may
6 Impose an Automatic Stay. It is asserted by the Nemees that
7 pursuant to 11 U.S.C. § 105(a) there is a free floating authority
8 for the court to Impose an Automatic Stay without regard to the
9 provisions of 11 U.S.C. § 362(d)(1), (2), (3), and (4) for
10 termination of the automatic stay created by Congress in 11 U.S.C.
11 § 362(a). The Nemees also direct the court to a 1993 district
12 court case from the District of Colorado for the proposition that
13 this court may reinstate the automatic stay notwithstanding a
14 previous order terminating the stay. *In re Twenver, Inc.*, 149
15 B.R. 950 (D. Colo. 1993).

16 It is further contended that an order "Imposing an Automatic
17 Stay" pursuant to 11 U.S.C. § 105(a) does not require the court to
18 consider the normal grounds for injunctive relief and the court
19 does not need to determine that there is an inadequate remedy at
20 law or irreparable harm. The Nemees assert that even if the normal
21

22 ¹ In filing the present motion, counsel for the Nemees has
23 chosen to ignore the requirements of Local Bankruptcy Rule 9014-1
24 and the Revised Guidelines for Preparation of Documents by
25 combining his points and authorities with the motion. The rules
26 of the court apply to all parties in this district and counsel
27 before this court. No party should consider the court not
28 dismissing this motion out of hand for failure of experienced
counsel to comply with the Local Bankruptcy Rules a warrant for
counsel not to comply with the rules in this District or that
this counsel or his clients are entitled to special treatment in
any proceedings before the court. Given the significance of the
issues presented, the court considers the Motion.

1 injunctive relief standards are applied, because the district court
2 concluded that there would be significant hardship in connection
3 with the appeal of the Land Use Judgment, the Nemees are entitled
4 to a stay against the Bank.

5 The Nemees argue that if this court does not Impose an
6 Automatic Stay then the Land Use Judgment appeal may well be
7 meaningless because the estate will lose the real property to
8 foreclosure. They now assert that the district court has indicated
9 that it may dismiss the appeal if the foreclosure occurs. Further,
10 the Nemees allege that the creditors will be harmed if the real
11 property is lost to foreclosure, because if the appeal is
12 dismissed, the estate may lose the right to prosecute a claim for
13 damages against various former employees of Calaveras County. As
14 pointed out by counsel for Calaveras County, the district court
15 requested that the parties brief this issue, and has not stated it
16 will dismiss the appeal in the event of a foreclosure Scheduling
17 Order, E.D. Cal. Case No. 12-0002 LJO JLT Dckt. 22.

18 **Injunctive Relief is Properly Requested Through an Adversary**
19 **Proceeding**

20 Federal Rule of Bankruptcy Procedure 7001(7) requires that
21 injunctive relief be obtained through an adversary proceedings.
22 This provides the parties with all of the normal litigation
23 protections and procedure, including Federal Rule of Civil
24 Procedure 65, which is incorporated into Federal Rule of Bankruptcy
25 Procedure 7065. As stated in 2 Collier on Bankruptcy, 16th
26 Edition, ¶ 105.03[4], "Courts have been near universal in reversing
27 injunctions which have been issued without compliance with Rule
28 7001." *State Bank of S. Utah v. Glenhill (In re Glenhill)*, 76 F.3d

1 1070, 1080 (10th Cir. 1996); *Feld v. Zale Corp. (In re Zale Corp.)*,
2 62 F.3d 746 (5th Cir. 1995); *Wedgewood Inv. Fund, Ltd. v. Wedgewood*
3 *Realty Group, Ltd (In re Wedgewood Realty Group, Ltd.)*, 878 F.2d
4 693, 701 (3rd Cir. 1989); *In re Martin*, 268 B.R. 168 (Bkcy. E.D.
5 Ark. 2001), *affd* 271 B.R. 333 (B.A.P. 8th Cir. 2002); *Ramirez v.*
6 *Whelan (In re Ramirez)*, 188 B.R. 413, 416 (B.A.P. 9th Cir. 1995)
7 (Klein, J, concurring); *Tighe v. Mora (In re Nieves)*, 290 B.R. 370
8 (Bkcy C.D. Cal. 2003).

9 No adversary proceeding has been filed seeking the imposition
10 of a stay as to the Bank exercising its rights under the deeds of
11 trust. Instead, the Nemees have merely filed a motion in the
12 bankruptcy court and requested that injunctive relief be issued.
13 No injunctive relief may properly be granted pursuant to the motion
14 now before the court.

15 Notwithstanding the Nemees having failed to properly request
16 the relief and the issuance of an order which would be all but sure
17 to be reversed, the court considers the merits of the request.

18 **Scope of 11 U.S.C. § 105 Power**

19 The foundation upon which the request for this court to Impose
20 an Automatic Stay presented by the Nemees is *In re Excel*
21 *Innovations*. It is asserted that in the Ninth Circuit (1) under
22 § 105(a) the court may issue an injunction to protect property of
23 the estate, (2) that the Nemees do not need to comply with the
24 usual standard for the issuance of a preliminary injunction does
25 not apply when issued pursuant to § 105(a), and (3) the Nemees do
26 not need to demonstrate an inadequate remedy at law or irreparable
27 harm. Nemees combined Motion and Points and Authorities, p. 2:34,
28 3:1-7. This is a misstatement of that holding.

1 The actual ruling of the Ninth Circuit Court of Appeals in *In*
2 *re Excel Innovations* is limited to when the bankruptcy court issues
3 injunctive relief to protect a non-debtor who is not afforded
4 protection by the automatic stay.

5 Under 11 U.S.C. § 105(a), a bankruptcy court "may issue
6 any order, process, or judgment that is necessary or
7 appropriate to carry out the provisions of this title." Section 105(a) gives the bankruptcy courts **the power to**
8 **stay actions that are not subject to the 11 U.S.C. §**
9 **362(a) automatic stay** but "threaten the integrity of a
10 bankrupt's estate." *Canter v. Canter (In re Canter)*, 299
11 F.3d 1150, 1155 (9th Cir. 2002) (citation and quotation
12 marks omitted); *Ingersoll-Rand Fin. Corp. v. Miller*
13 *Mining Co.*, 817 F.2d 1424, 1427 (9th Cir. 1987).

14 *In re Excel Innovations*, 502 F.3d at 1093 (emphasis added). On its
15 face, the authority presented by the Nemees states that it does not
16 apply to the present situation - where the automatic stay did apply
17 to the property of the estate but the court terminated the stay
18 pursuant to the terms of 11 U.S.C. § 362(d)(1) and (2).

19 The Nemees also misstate the holding in *Excel Innovations* with
20 the representation that the usual standards for the issuance of a
21 preliminary injunction do not apply if it is based on § 105(a).
22 The express language in *Excel Innovations* is clearly to the
23 contrary, "We hold that the usual preliminary injunction standard
24 applies to stays of proceedings against non-debtors under
25 § 105(a)." *Id.*, 1094. The court finds no basis for the contention
26 that the Ninth Circuit Court of Appeals has ruled that the normal
27 standards for issuance of a preliminary injunction do not apply
28 even when considering such relief to protect a non-debtor who did
not have the benefit of the automatic stay. As stated by the Ninth
Circuit Panel, the failure of a trial court to properly apply the
standard for the issuance of a preliminary injunction when

1 considering granting injunctive relief for a non-debtor constitutes
2 reversible error. *Id.*, 1096.²

3 **The 11 U.S.C. § 105 Power is Not Exercised in Contravention of The**
4 **Bankruptcy Code**

5 The Nemees have requested this relief in a manner to suggest
6 they believe that the 11 U.S.C. § 105(a) power is a free floating
7 authorization to do whatever the judge believes appropriate on an
8 *ad hoc* basis irrespective of other provisions of the Bankruptcy
9 Code. Such a contention has long been rejected by the courts. *In*
10 *re Lloyd*, 37 F.3d 271 (7th Cir. 1994) (not grant the court "free
11 floating discretion" to create rights outside of the Bankruptcy
12 Code); *In re Fesco Plastics Corp*, 996 F.2d 152 (7th Cir. 1993)
13 (court may not employ its equitable powers to achieve result not
14 contemplated by the Code); *United States v Sutton*, 786 F2d 1305

15
16 ² There is also the issue of whether the court can create a
17 new "automatic stay" when the automatic stay established by
18 Congress has been terminated. By its very nature a new stay
19 created by the court is not "automatic." In an earlier decision,
the Ninth Circuit Court of Appeals noted that once the "automatic
stay" has been terminated, the automatic stay cannot be
reinstated as an "automatic stay."

20 The district court could not have been activating an
21 automatic stay. The automatic stay is "self-executing,
22 effective upon the filing of the bankruptcy petition."
In re Gruntz, 202 F.3d 1074, 1081 (9th Cir. 2000); see
23 11 U.S.C. § 362(a). Because the stay under § 362 is
24 "automatic" and "self-executing" only upon the filing
of a bankruptcy petition, no authority exists for
25 "reinstating" an automatic stay that has been lifted.
We have expressly recognized that "the bankruptcy
26 automatic stay is differentiated from a bankruptcy
court-ordered injunction, which issues under 11 U.S.C.
27 § 105." *Andreiu v. Reno*, 223 F.3d 1111, 1121 n.4 (9th
Cir. 2000).

28 *Canter v. Canter (In re Canter)*, 299 F.3d 1150, 1155 fn. 1 (9th
Cir. 2002).

1 (5th Cir. 1986) (must be exercised consistent with the provisions
2 of the Bankruptcy Code).

3 Congress created the automatic stay provisions of 11 U.S.C.
4 § 362(a) to protect the estate, debtor, and creditors.

5 The automatic stay is one of the fundamental debtor
6 protections provided by the bankruptcy laws. It gives the
7 debtor a breathing spell from his creditors. It stops all
8 collection efforts, all harassment, and all foreclosure
actions. It permits the debtor to attempt a repayment or
reorganization plan, or simply to be relieved of the
financial pressures that drove him into bankruptcy.

9 The automatic stay also provides creditor protection.
10 Without it, certain creditors would be able to pursue
11 their own remedies against the debtor's property. Those
12 who acted first would obtain payment of the claims in
13 preference to and to the detriment of other creditors.
Bankruptcy is designed to provide an orderly liquidation
procedure under which all creditors are treated equally.
A race of diligence by creditors for the debtor's assets
prevents that.

14 H. Rpt. No. 95-595, at 340 (1977), *reprinted in* Vol. C COLLIER ON
15 BANKRUPTCY App. Pt. 4(d)(i), at App. Pt. 4-1472 (Alan N. Resnick &
16 Henry J. Sommer eds. 16th ed.).

17 Congress also created the grounds upon which the automatic
18 stay would cease or when a creditor had the right to have the
19 automatic stay terminated, vacated, modified, conditioned or
20 annulled. 11 U.S.C. § 362(c) and (d). Previously the court
21 conditioned the continuation of the automatic stay on the Nemees
22 paying the Bank an amount equal to the interest accruing at 10% per
23 annum on the debt secured by a senior lien held by Mark and
24 Michelle Rishwain ("Rishwain Creditors") to secure their
25 \$666,479.45 claim and accrual of interest for past due property
26 taxes. April 4, 2011 Order, Dckt. 342; Civil Minutes, Dckt. 341.
27 On February 14, 2012, this court entered its order terminating the
28 automatic stay to allow the Bank to exercise its rights to conduct

1 nonjudicial foreclosure sales against the two parcels of real
2 property and certain Personal Property. Dckt. 546. In its
3 findings of fact and conclusions of law the court determined that
4 grounds existed for so terminating the automatic stay pursuant to
5 11 U.S.C. § 362(d)(1) and (2). Civil Minutes, Dckt. 545.

6 In granting relief from the automatic stay the court
7 determined that there was no equity in the Real Property and
8 Personal Property for either the Nemees or the bankruptcy estate
9 and that this property was not necessary for an effective
10 reorganization. 11 U.S.C. § 362(d)(2) grounds. As part of its
11 analysis, the court reviewed the Schedules filed by the Nemees;
12 balance sheets for the Trinitas, which were attached to the
13 Schedules; Statement of Financial Affairs; and 27 monthly operating
14 reports filed by the Nemees during the pendency of this bankruptcy
15 case. The court considered how Trinitas failed to pay rent or fees
16 to the estate until the adequate protection payments were ordered
17 by the court, there was no golf course operation as part of the
18 bankruptcy, and all business operations and revenues relating to
19 the golf course were outside of the estate. The court also noted
20 that as any revenues increased for the estate, the Nemees' personal
21 expenses increased, exhausting all cash flow. The court considered
22 the actual financial conduct of the Nemees, how they operated the
23 bankruptcy estate as fiduciaries, and the efforts they made to
24 proceed with any type of effective reorganization.

25 The court also determined that relief from the automatic stay
26 was proper for cause, there being a lack of adequate protection.
27 11 U.S.C. § 362(d)(1) grounds. The court considered the interests
28 of the estate, the Bank, and creditors. This included a review of

1 the hardships imposed on the various parties. The Civil Minutes
2 for that hearing reflect that the Rishwain Creditors appeared and
3 stated that they had discussed with the Nemees that they would
4 forebear the further accrual of interest so monies could be used to
5 pay taxes. When the court ordered the adequate protection payments
6 in April 2011, the Nemees argued that they were negotiating with
7 the Rishwain Creditors to cease the accrual of interest on their
8 claim. The Rishwain Creditors were not present at that hearing.
9 Between April 2011 and February 2012 it appeared that nothing was
10 done by the Nemees with respect to the Rishwain Creditors accrual
11 of interest at 10% per annum.

12 **The Requested Injunctive Relief is Inconsistent With the Bankruptcy**
13 **Code On the Facts Before the Court**

14 The Nemees have not requested that the court vacate its prior
15 order pursuant to Federal Rule of Civil Procedure 60(b) and Federal
16 Rule of Bankruptcy Procedure 9023. The Nemees have not appealed
17 the order granting relief from the stay on its merits or obtained
18 a stay of that order pending an appeal. The order terminating the
19 stay is a final order of this court.

20 What the Nemees request is that the court impose a new
21 injunction. The Motion does not address what has changed, if
22 anything, as to the merits of the order granting relief from the
23 stay or the debtor-creditor relationship with the Bank. Rather, it
24 is asserted that the Bank should be stayed to assist the Nemees
25 based on what is occurring in the Land Use Judgment appeal.

26 At oral argument the Nemees and the Rishwain Creditors
27 contended that it was unfair to let the Bank foreclose, as the only
28 way they saw to pay creditors which unsecured claims was through

1 the successful litigation on appeal and the further development of
2 the golf course. They believed that it was inappropriate to let
3 one creditor resort to its collateral if the effect was to preclude
4 the Nemees from achieving their goal of having a commercial golf
5 course (irrespective of whether the Nemees could demonstrate that
6 there was the potential for an effective reorganization) since that
7 was perceived as the only potential reorganization.

8 To impose a stay on the grounds requested by the Nemees is
9 directly in conflict with the creation, grounds for termination,
10 and purpose of the automatic stay. The stay in a bankruptcy case
11 is not to indefinitely preclude a creditor with a secured claim
12 from resorting its collateral to be paid something while the
13 debtors and creditors with unsecured claims exhaust every scheme
14 and remote possibility to make something for their unsecured
15 claims.

16 It was argued, unrealistically, that the Nemees were not
17 seeking an indefinite stay, but only four or five months while the
18 briefing for the pending appeal was prepared. No reason was given
19 as to why such a stay would be requested solely for the briefing of
20 the appeal to the district court. Further, the Nemees ignore that
21 it is highly likely the decision of the district court, whenever
22 that may be issued after the briefs were filed, would then be
23 appealed to the Ninth Circuit Court of Appeals (which the Nemees
24 would have to appeal if they lost and the County would likely
25 appeal if they lost). For any injunction to have a meaningful
26 effect it would have to be most likely at least two years in
27 duration.

28 The Nemees did not demonstrate to the court that the Real

1 Property and Personal Property were necessary to any effective
2 reorganization. The Nemees did not demonstrate to the court that
3 the interests of the Bank were adequately protected. In
4 determining the motion for relief from the automatic stay, the
5 Nemees had the burden of proof of these issues 11 U.S.C. § 362(g).
6 They did not carry the day. In connection with the present motion,
7 the Nemees have not presented the court with substantial evidence
8 of any change in that situation. A new stay under these
9 circumstances would be in derogation of the provisions of 11 U.S.C.
10 § 362(d).

11 **Even if Properly Before the Court, The Nemees Have Not**
12 **Show Grounds for Issuance of Preliminary Injunction**

13 The Nemees have failed to show proper grounds for the issuance
14 of injunctive relief (even if they had commenced the necessary
15 adversary proceeding). As stated by the Ninth Circuit in *Excel*,
16 preliminary injunctive relief is granted based on two alternative
17 tests. The first requires a showing of (1) a strong likelihood of
18 success on the merits, (2) the possibility of irreparable injury to
19 plaintiff if preliminary relief is not granted, (3) a balance of
20 hardships favoring the plaintiff, and (4) advancement of the public
21 interest. Under an alternative test, a court may grant the
22 injunction if the plaintiff demonstrates either a combination of
23 probable success on the merits and the possibility of irreparable
24 injury or that serious questions are raised and the balance of
25 hardships tips sharply in his favor. A bankruptcy debtor is
26 seeking a stay pursuant to 11 U.S.C. § 105(a) must also show a
27 reasonable likelihood of a successful reorganization *In re Excell*
28 *Innovations, Inc.*, 502 F.3d at 1095.

1 With respect to a reasonable likelihood of a successful
2 reorganization, the court has previously determined that the Real
3 Property and Personal Property subject to the Bank's lien was not
4 necessary to an effective reorganization. Further, that the Bank's
5 interests were not adequately protected during further delays
6 (after more than two years in bankruptcy) in restraining it from
7 foreclosing on the Real Property. Nothing has been presented to
8 the court which alters that determination. At best, it has been
9 argued that the foreclosure needs to be stayed so that the Nemees
10 can retain the Real Property and try to operate a golf course if
11 they ultimately prevail over Calaveras County on the appeal.
12 Merely because a debtor wants property for a perceived
13 reorganization does not mean that the property is necessary for an
14 effective reorganization.

15 The Nemees offer little, if any, analysis of the injunctive
16 relief factors. The limited discussion of the preliminary
17 injunction standards relates to the Land Use Judgment appeal by the
18 Nemees of the judgment obtained by Calaveras County (to which the
19 Bank is not a party). The balancing of equities is between the
20 Nemees and Calaveras County, and the hardship to the Nemees if
21 Calaveras County was not stayed from enforcing the judgment against
22 the Nemees to stop the operation of the golf course. However, this
23 does not adequately address the merits of any injunction against
24 the Bank.

25 Possibly as part of the balancing of the hardships, the Nemees
26 make several allegations. First, that they have attempted to make
27 proposals to the Bank, but contend that they have not received
28 responses. The Bank argues that it has communicated its position

1 as to what amount is necessary to obtain its consent - which was
2 asserted to be a number which the Nemees and some vaguely
3 referenced group of investors apparently do not like. No evidence
4 of such offers and counter-offers has been presented to the court.

5 The Nemees repeated their argument that the Bank should be
6 treated as a joint venturer for having loaned the money when it
7 knew (and Nemees knew) that no permits were obtained for
8 constructing the golf course. The Nemees go so far as to argue
9 that the Bank somehow acted wrongfully in lending the money that
10 the Nemees requested and used to construct the golf course they
11 desired. In making this argument, the Nemees appear to disavow any
12 responsibility for obtaining the loans when they knew that they did
13 not have the permits or then existing zoning and gambled on being
14 able to change the zoning on the Real Property in time to borrow
15 more money from another lender to pay off the debt to the Bank.
16 (The history of the Nemees' transactions with the Bank and
17 development of the golf course are reviewed in detail in this
18 court's Memorandum Opinion and Decision in Bankr. E.D. Cal. Adv.
19 No. 09-9088, Dckt. 235.) As the Bank argues, while contending that
20 the Bank should be treated as a joint venturer and be enjoined from
21 foreclosing on the Real Property and Personal Property, the Nemees
22 have never asserted that the Bank is a co-owner of the golf course
23 or entitled to the profits from its operation.

24 Further, the Nemees present the court with a situation that if
25 they win on appeal, the Nemees win and then at best try to figure
26 out how to pay the Bank at its contract rate of interest years
27 later. However, if the Nemees lose on appeal, the Bank is left to
28 its collateral which the Nemees have used for years without making

1 substantial payments to the Bank. In this gamble the Nemees use
2 the Bank's collateral and have nothing at risk if they lose.

3 The Nemees suggest that they make two new payments, neither of
4 which were supported by any evidence of ability to pay. First,
5 they propose a payment of \$2,100.00 to be applied to interest to
6 the Bank for its loan secured by the deed of trust against the 160-
7 acre parcel. This is to be in addition to the \$6,300.00 a month
8 payment under the adequate protection order for the interest
9 accrual on the Rishwain Creditor's senior lien on the 120-acre
10 parcel and accrual of interest on the delinquent taxes. No
11 evidence is given as to how and why the Nemees can now generate
12 that money. As discussed in the findings of fact and conclusions
13 of law for the order granting relief from the stay, the monthly
14 operating reports demonstrate that the Nemees are not able to
15 generate any additional monies beyond their living expenses and
16 paying the existing adequate protection payments.

17 The second proposed payment is to make \$5,000.00 a month
18 payments on the taxes. No explanation is provided as to why now,
19 more than two years later, some thought is given to making the tax
20 payments. No evidence is provided as to the ability to make
21 \$5,000.00 a month payments or the source of those monies.

22 At oral argument counsel for the Nemees made vague references
23 to investors who would be willing to make the payments. These
24 shadowy "investors" were not presented to the court and no
25 explanation was given as to whether this was to be post-petition
26 credit obtained by the Nemees, sale of assets of the estate, sale
27 of assets of Trinitas, or gifts to the estate.

1 **CONCLUSION**

2 The court cannot properly grant the injunctive relief
3 requested on this motion filed in the bankruptcy case. Even if the
4 Nemees properly filed an adversary proceeding and sought the
5 requested injunctive relief as provided under Federal Rule of Civil
6 Procedure 65 and Federal Rule of Bankruptcy Procedure 65, such
7 relief is not proper in this case. Exercise of the 11 U.S.C.
8 § 105(a) power as requested to impose a new stay conflicts with the
9 Bankruptcy Code under the facts before the court. It has been
10 determined by final order, for which no appeal is pending and the
11 time to appeal has expired, that the automatic stay is terminated
12 pursuant to 11 U.S.C. § 362(d)(1) and (2). The stay as requested
13 would override the provisions of 11 U.S.C. § 362(d) and create a
14 shadow automatic stay to exist on grounds outside of what Congress
15 provided under the Bankruptcy Code.

16 Even if the motion was properly before the court and was not
17 in conflict with the Bankruptcy Code, the Nemees have not
18 established that a preliminary injunction is proper against the
19 Bank. Their arguments and contentions go to the dispute they have
20 with the County of Calaveras in other litigation. The Nemees do
21 not address the hardships to the Bank, the impact of more than two
22 years of the automatic stay, and the effect of further delaying the
23 Bank for years of appeals.

24 The Ninth Circuit Court of Appeals has also been clear that it
25 must be shown in this type of situation that the property is
26 necessary to an effective reorganization. The court has determined
27 that the Real Property and Personal Property are not necessary to
28 an effective reorganization in this case. Nothing has been

1 presented to the court to change that determination. That the
2 Nemees' desired reorganization includes the Real Property does not
3 make it an effective reorganization.

4 The Motion to Reinstate the Automatic Stay is denied. This
5 memorandum opinion and decision constitutes the court's findings of
6 fact and conclusions of law. The court shall issue a separate
7 order consistent with this ruling.

8 Dated: April 19, 2012

9 /s/

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11 RONALD H. SARGIS, Judge
12 United States Bankruptcy Court
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