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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 )  
MICHELLE SEOBHAN McKEE NEMEE, )  
11 )  
Debtor(s). )  
12 \_\_\_\_\_ )  
13 MICHAEL KENNETH NEMEE and ) Adv. Pro. No. 09-9088  
MICHELLE SEOBHAN McKEE NEMEE, ) Docket Control No. MDG-2  
14 )  
Plaintiff(s), )  
15 v. )  
16 COUNTY OF CALAVERAS, )  
17 Defendant(s). )  
18 \_\_\_\_\_ )

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

21 MEMORANDUM OPINION AND DECISION  
22 Application for Stay of Enforcement of  
Judgment Pending Appeal

23 Plaintiff Michael and Michelle Neme (Plaintiff-Debtors")  
24 seek an order staying the enforcement of this court's judgment of  
25 December 15, 2011, (Dckt. 179) which entered judgment in favor of  
26 the County of Calaveras (the "County"), the defendant, on all  
27 issues in the complaint, and entered an injunction in favor of the  
28 County prohibiting the use of the property as a commercial golf

1 course.

2 As addressed in this Decision, the contention that the  
3 Plaintiff-Debtors have a likelihood of prevailing on appeal is  
4 based on the grounds as set forth in their motion for new trial  
5 which has been denied by the court. The court incorporates herein  
6 its Memorandum Opinion and Decision on the motion for new trial,  
7 DCN MDG-3, by this reference, rather than copying and repeating the  
8 text of that ruling in this Decision.

9 **Legal Basis for a Stay Pending Appeal**

10 An appellant seeking a discretionary stay pending appeal under  
11 Fed. R. Bankr. P. 8005 must prove:

- 12 (1) appellant is likely to succeed on the merits of the  
13 appeal;  
14 (2) appellant will suffer irreparable injury;  
15 (3) no substantial harm will come to appellee; and  
16 (4) the stay will do no harm to the public interest.

17 *Schwartz v. Covington*, 341 F.2d 537 (9th Cir. 1965). "The party  
18 moving for a stay has the burden on each of these elements." *In re*  
19 *Shenandoah Realty Partners, L.P.*, 248 B.R. 505, 510 (W.D. Va.  
20 2000).<sup>1</sup>

21 "A stay is not a matter of right, even if irreparable injury  
22 might otherwise result." *Virginian R. Co. v. United States*, 272  
23 U.S. 658, 672 (1926). Instead, the first two factors are the most

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25 <sup>1</sup> Fed. R. Bank. P. 8005 provides that such a motion is  
26 ordinarily first presented to the bankruptcy judge. However, a motion  
27 for relief may be made directly to the bankruptcy appellate panel or  
28 the district court. Given the court's extensive ruling following  
trial, the court told counsel for Plaintiff-Debtors that taking the  
appeal directly to the district court could be appropriate rather than  
merely rearguing the same points to the trial court if a clear error  
could not be shown.

critical. *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1761 (2009). "It is not enough that the chance of success on the merits be better than negligible. . . . [S]imply showing some possibility of irreparable injury . . . fails to satisfy the second factor." *Id.* (citations and internal quotations omitted). Once an applicant satisfies the first two factors, then the court assesses the harm to the opposing party and weighs the public interest. *Id.*, 129 S. Ct. at 1762.<sup>2</sup>

### **Consideration of likelihood of Success on Appeal**

In their Motion for Stay Pending Appeal the Plaintiff-Debtors do not state any grounds with particularity upon which the requested relief is based.<sup>3</sup> Instead, the Motion merely states what will occur if the stay is not issued. The Points and Authorities filed in support of the Motion provide further explanation. Though the court prefers not having to dig through citations, quotations, legal arguments, and factual arguments to discern what the court believes to be the grounds intended by the movant, due to the exigencies of the circumstances, it will do so for this motion.

The Plaintiff-Debtors they feel strongly that the court's determination of the "legislative intent" concerning Agritourism is

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<sup>2</sup> In their brief, the Plaintiff-Debtors quote a decision of the U.S. Supreme Court which suggests that a rigid application of factors is not appropriate in determining stays pending appeals. Pls.' P. & A. 3:5-8, Dckt. 189. However, the quoted language – "should not be rigidly applied, but require a determination based on the individual circumstances of a particular case." – does not appear in the court's opinion. See *Hilton v. Braunskill*, 481 U.S. 770 (1987). The source of this quotation is unknown. The court will follow the Supreme Court's more recent statement of the law in *Nken v. Holder*.

<sup>3</sup> See Fed. R. Civ. P. 7(b), incorporated by Fed. R. Bankr. P. 7007 (requiring that motions state with particularity the grounds and the relief requested).

1 wrong for all the reasons asserted in the motion for new trial.<sup>4</sup>  
2 One factor asserted (respectfully and professionally by the  
3 Plaintiff-Defendants) is that this ruling is only one judge's  
4 opinion on an issue which was new to that judge, and likely most  
5 bankruptcy judges. But in asserting this point, the Plaintiff-  
6 Debtors do not state how this shows a likelihood of prevailing on  
7 appeal. No legal basis is given for a contention that a trial  
8 judge should stay a judgement since it is only one judge's opinion  
9 as to the fact or law.

10 Next, it is asserted that the court "completely ignored  
11 circumstances in that [sic] clearly indicated that the County of  
12 Calaveras was not enforcing agricultural zoning violations of  
13 substantial magnitude." This reference is to the owner of  
14 Ironstone Vineyards holding "rock concerts and other large, media-  
15 type events" in apparent violation of the Zoning Ordinances with no  
16 action taken against it. As addressed in the ruling on the motion  
17 for new trial, the court considered the use of that one property in  
18 the County by that one owner in coming to a decision as to the  
19 meaning of the Ordinance as it applies to all owners of property in  
20 the County. Further, the court considered whether an illegal use  
21 of other property by another owner was the basis for allowing the  
22 illegal use of the property by these Plaintiff-Debtors.

23 The third contention is that the Zoning Ordinance is vague,  
24 and therefore unconstitutional, with the Plaintiff-Debtors

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26 <sup>4</sup> Though it may be an inadvertent misstatement or evidence of  
27 the Plaintiff-Debtors' erroneous approach to properly determining the  
28 correct application of the Zoning Ordinances, the court was not merely  
determining a "legislative intent" for the addition of Agritourism to  
the permitted uses of the General Agriculture and Agriculture  
Preserve, but the actual, proper determination of the Zoning  
Ordinances as enacted.

1 expressing an intention to appeal this ruling to the United States  
2 Supreme Court if necessary. This contention was not raised by the  
3 Plaintiff-Debtors at trial and is now being presented for the first  
4 time with this Motion for Stay Pending Appeal. The Plaintiff-  
5 Debtors assert that there is no greater hypocrisy than this matter  
6 now before the court where the County seeks to enforce the law  
7 against them while not enforcing it against Ironstone Vineyards.

8 As addressed in the ruling on the motion for new trial, mere  
9 lax enforcement of ordinances is not a violation of a person's  
10 constitutional rights. The court did not have, and could not  
11 determine, the basis for Ironstone Vineyards conducting the  
12 activity on its property, whether a basis existed under any of the  
13 other uses permitted under the Zoning Ordinance for such use, or  
14 whether the County was lax in letting Ironstone Vineyards engage in  
15 such activity on its property. Even if the County allowed  
16 Ironstone Vineyard to violate the Zoning Ordinances, that does not  
17 allow the Plaintiff-Debtors and other land owners to violate the  
18 Zoning Ordinances.

19 With respect to the Ordinance being vague, the court  
20 determined the meaning of the statute using the plain language,  
21 including the descriptive, non-exclusive examples provided in the  
22 Ordinance.<sup>5</sup> At trial, the Plaintiff-Debtors did not assert that

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24 <sup>5</sup> The contention by Plaintiff-Debtors at trial, and as provided  
25 in the testimony of their witness Kenneth Churches, the owners of  
26 property zoned agriculture in Calaveras County sought to draft a  
27 proposed ordinance in a manner which did not enumerate an exclusive  
28 list of uses, but only described it generally. Their proposal and the  
Ordinance as enacted by the Board of Supervisors includes specific,  
non-exclusive, examples describing the types of enterprises that  
constitute Agritourism. As addressed in the Memorandum Opinion and  
Decision after trial and the ruling on the motion for new trial, these  
examples are properly used under the canons of statutory construction  
to determine what is meant by the more general definition of

1 the Ordinances were vague, but that they were crystal clear, with  
2 the plain meaning of the Ordinance allowing them to construct and  
3 operate a commercial golf course on the property. Only after  
4 having lost on their plain meaning arguments do the Plaintiff-  
5 Debtors (contrary to the plain meaning arguments made in the Motion  
6 for New Trial) assert the Ordinance is vague. Further, extending  
7 this argument to its legal conclusion, if the Ordinance allowing  
8 for Agritourism is stricken down as unconstitutional, then there is  
9 no Ordinance permitting Agritourism or the use sought by the  
10 Plaintiff-Debtors.<sup>6</sup>

11 The final likelihood of prevailing point asserted by the  
12 Plaintiff-Debtors is that whether golf course constitutes  
13 Agritourism is an issue of first impression that should be resolved  
14 by an appellate court. Further, since the court did not find that  
15 the use of property by Ironstone Vineyards for concerts all but  
16 determinative as to the meaning of Agritourism (with Plaintiff-  
17 Debtors ignoring that the use substantially predated the enactment  
18 of the Agritourism Ordinances), this court is probably wrong in its  
19 determination of the Zoning Ordinance. As set forth in the ruling  
20 on the motion for new trial, the use of property by Ironstone  
21 Vineyards was considered by the court. The use of that one

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23 Agritourism.

24 <sup>6</sup> In making this argument the Plaintiff-Debtors ignore the  
25 evidence and findings of the court that they began and substantially  
26 completed the commercial golf course before the 2005 amendments to the  
27 Zoning Ordinances which created a permitted use as one of the many  
28 permitted uses for property zoned Agriculture. As stated in the  
Memorandum Opinion and Decision, the Plaintiff-Debtors were aware that  
the commercial golf course was not legal when they were constructing  
it through 2005, as did their lender. The evidence presented to the  
court does not substantiate a contention that but for the Agritourism  
Ordinance the Plaintiff-Debtors never would have constructed a  
commercial golf course.

1 property, by that one owner, and the asserted lack of enforcement  
2 by the County, is not determinative of the meaning of the County  
3 Zoning Ordinances. No authority is given for such a proposition,  
4 and the argument is more closely tied to the harm suffered if the  
5 golf course is required to cease operation and the matter is later  
6 reversed on appeal.

7 **Irreparable Injury**

8 A substantial number of the arguments raised by the Plaintiff-  
9 Debtors go to the harm caused by requiring the golf course to cease  
10 operating. Reference is made to the millions of dollars that have  
11 been invested in the property. However, merely because someone  
12 chooses to invest millions of dollars in developing a commercial  
13 golf course, which at the time of construction and investment they  
14 knew was illegal and not permitted under the Zoning Ordinances as  
15 they existed prior to the 2005 addition of Agritourism, does not  
16 allow them to construct their own irreparable injury to exempt them  
17 from the law.

18 As discussed at oral argument, Plaintiff-Debtors eschewed the  
19 normal land use process of obtaining permits and verifying that the  
20 proposed use is allowed under the Zoning Ordinances. Instead they  
21 embarked on the development and construction of the commercial golf  
22 course banking on being able to subsequently convince County  
23 officials to change the zoning on the Property. Only after  
24 millions of dollars were borrowed and the commercial golf course  
25 constructed did the Plaintiff-Debtors seek a zoning change or  
26 appeal an adverse determination by the Planning Department to the  
27 Board of Supervisors. To the extent that Plaintiff-Debtors believe  
28 there is a potential for irreparable injury, they created the

1 situation by their "build it first and then seek permission or  
2 forgiveness later" strategy.

3 The Plaintiff-Debtors allege that without a stay they will  
4 suffer substantial harm. The Plaintiff-Debtors operate through a  
5 limited liability company they own the commercial golf course and  
6 intend to use disbursements from the limited liability company,  
7 supplemented by their other business activities, to fund the  
8 Chapter 11 plan payments. Plaintiff-Debtors allege that the loss  
9 of income from the golf course will prevent the payment of  
10 electricity bills, irrigation of the fairways and the olive  
11 orchard, rental payments on golf carts, and staff to maintain the  
12 golf course and olive trees – resulting in irreparable injury to  
13 the Plaintiff-Debtors and their property. They conclude that  
14 irrespective of the court's decision on the likelihood of  
15 prevailing on appeal, if the golf course operation ceases they  
16 cannot continue to fund the bankruptcy case, maintain the course,  
17 and make payments to the bank.<sup>7</sup> A stay pending appeal is not  
18 granted merely because the losing party may suffer an adverse  
19 consequence.

20 Moreover, mere economic losses do not represent irreparable  
21 injuries. As the Ninth Circuit states:

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22  
23 <sup>7</sup> With respect to the payments being made to the Bank, these  
24 were required by the court due to the failure of the Plaintiff-Debtors  
25 to pay the senior lien holder and allowing the interest to accrue on  
26 the senior loan to the detriment of the Bank. The payments required  
27 are only the court's approximation of the interest accruing on the  
28 loan secured by the senior deed of trust. Based on the evidence  
provided to the court, the value of the property was less than the  
liens against it, and allowing interest to accrue on the claim secured  
by the senior lien exhausted value in the collateral for the Bank. No  
payments have been made to the Bank to reduce or stop the accrual of  
interest on its claim during the pendency of the Plaintiff-Debtors'  
bankruptcy case filed in 2009.



1 Supreme Court case law and some of our own cases clarify  
2 that economic damages are not traditionally considered  
3 irreparable *because the injury can later be remedied by*  
4 *a damage award. See Sampson v. Murray*, 415 U.S. 61, 90,  
5 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974) ("[I]t seems clear  
6 that the temporary loss of income, ultimately to be  
7 recovered, does not usually constitute irreparable  
8 injury. . . . The possibility that adequate compensatory  
9 or other corrective relief will be available at a later  
10 date, in the ordinary course of litigation, weighs  
11 heavily against a claim of irreparable harm." (internal  
12 quotation omitted)); *Rent-A-Center, Inc. v. Canyon*  
13 *Television & Appliance Rental, Inc.*, 944 F.2d 597, 603  
("It is true that economic injury alone does not support  
a finding of irreparable harm, *because such injury can be*  
*remedied by a damage award.*" (emphasis added)); *Caribbean*  
*Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 676 (9th  
Cir. 1988); *Arcamuzi v. Cont'l Air Lines, Inc.*, 819 F.2d  
935, 938 (9th Cir. 1987); *Colo. River Indian Tribes v.*  
*Town of Parker*, 776 F.2d 846, 850-51 (9th Cir. 1985);  
*Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466,  
471 (9th Cir. 1984) ("Mere financial injury . . . will  
not constitute irreparable harm *if adequate compensatory*  
*relief will be available in the course of litigation.*"  
(emphasis added)).

14 *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851-852 (9th  
15 Cir. 2009) (emphasis supplied). All of the losses alleged by the  
16 Plaintiff-Debtors are economic losses which can be cured through a  
17 monetary damage award if they prevail on appeal.

18 It is further contended that a stay pending appeal is  
19 warranted because the County did not seek to kill the golf course  
20 while the appeal was pending, but that the stay would "mitigate  
21 economic loss should the Plaintiffs be right." It is asserted that  
22 if the Plaintiff-Debtors should prevail on appeal, there would be  
23 a catastrophic loss to the Plaintiff-Debtors which give no benefit  
24 to the County. Therefore, Plaintiff-Debtors contend that the  
25 injunction should be viewed as punitive, giving no benefit to  
26 anyone, including creditors in the bankruptcy case. Such could be  
27 said about almost any injunction, someone has to stop an activity  
28 which was to their economic or personal benefit.

1 Plaintiff-Debtors assert that they have always believed that  
2 they were going to win on the issue of the commercial golf course  
3 being Agritourism, and are surprised with how the court determined  
4 the case. Since there is a potential for a possible reversal, the  
5 court should not kill the seven million dollar investment in this  
6 commercial golf course. The Plaintiff-Debtors ask this court to  
7 realize that "its analysis certainly could be wrong." Therefore  
8 they should be allowed to continue to operate the golf course.

9 There is little doubt that requiring the Plaintiff-Debtors to  
10 cease allowing their limited liability company to operate a  
11 commercial golf course on the Property will likely doom their  
12 bankruptcy case which is built around the limited liability company  
13 continuing operation of the commercial golf course. However, the  
14 Plaintiff-Debtors have not presented the court with anything to  
15 show that even if they prevail there is an effective reorganization  
16 in the offing for the Chapter 11 case which does not include the  
17 operation of the golf course by the limited liability company. No  
18 reference is made to the monthly operating reports in contending  
19 that the commercial golf course operation is necessary to an  
20 effective reorganization or the actual finances of the operation of  
21 this golf course. The court has not been presented with evidence  
22 of a financial operation in the case which can be financially  
23 reorganized, only that the Plaintiff-Debtors only possibility of  
24 reorganization is with a commercial golf course continued to be  
25 operated by their limited liability company.<sup>8</sup>

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26  
27 <sup>8</sup> The actual golf course operation, including all revenues, are  
28 being held in a limited liability company owned by the Plaintiff-  
Debtors. This precludes the normal reporting requirements and  
accountability of a debtor-in-possession or trustee when a business  
owned by the debtor is operated as part of the bankruptcy estate.

1 **Substantial Harm to Appellee**

2 Another factor to consider, if the Plaintiff-Debtors were to  
3 obtain a stay pending appeal, is the harm to the County. The  
4 Plaintiff-Debtors do not address this factor in their Motion or  
5 Points and Authorities directly. As reference in their reply, the  
6 general tenor is that the County cannot be harmed because at worst  
7 the golf course closes later. If the Plaintiff-Debtors are correct  
8 and were to prevail on appeal, then the County would have the  
9 Plaintiff-Debtors operating golf course in the County.

10 The County asserts that allowing the commercial golf court to  
11 continue in operation only benefits the Debtors. Granting a stay  
12 pending appeal only further prevents the County from fulfilling its  
13 obligations to protect the public and enforce its ordinance. In  
14 balancing the harm to the County, given the passage of time, and  
15 the failure to show harm other than the Plaintiff-Debtors violating  
16 the County Zoning Ordinances, the County has not presented the  
17 court with financial, health, community, or public safety issues of  
18 substantial harm.

19 **The Public Interest**

20 The Plaintiff-Debtors do not address the public interest  
21 factor which is to be considered. The County asserts that allowing  
22 the Plaintiff-Debtors to operate the commercial golf course in  
23 violation of the Zoning Ordinances is not in the public interest.  
24 The Zoning Ordinances exist to protect the general public, and a  
25 stay pending appeal impedes the ability of the County to enforce  
26 this Ordinance. The public interest is not served by preventing  
27 the enforcement of the law now that the trial has been concluded.

28 The County further notes that this litigation was commenced in

1 state court and then removed by the Plaintiff-Debtors to the  
2 bankruptcy court as their forum of choice. The automatic stay  
3 arising upon the commencement of the case precluded the need for a  
4 preliminary injunction to stop enforcement by the County. No bond  
5 is required for the automatic stay to be in effect.

6 **Comments From Non-Parties to the Adversary Proceeding**

7 David and Hedy Hirsch and Roger and Kathy Gunderson, creditors  
8 holding general unsecured claims filed their statements as "parties  
9 in interest" in this Adversary Proceeding. Community Bank of San  
10 Joaquin has filed its response to the Motion for Stay Pending  
11 Appeal, however, it does not state what basis the Bank has for  
12 appearing in this Adversary Proceeding. Contrary to the contention  
13 of Hirsch and Gunderson, they are not parties to this Adversary  
14 Proceeding and are not parties in interest to participate in this  
15 Adversary Proceeding. They did not intervene or otherwise obtain  
16 permission from the court to insert themselves in this lawsuit.  
17 Merely because they are creditors of the Plaintiff-Debtors does not  
18 given them standing to appear in this Adversary Proceeding. Hirsch  
19 and Gunderson direct the court to 11 U.S.C. § 1109(b) as the  
20 authority for them to appear in this Adversary Proceeding.

21 The express language of this Code section states that a party  
22 in interest may "raise and may be heard on any issue in a case  
23 under this chapter [11]." A case under Chapter 11 is commenced by  
24 the filing of a bankruptcy petition. 11 U.S.C. § 301 and 302. An  
25 adversary proceeding is not a "case under Chapter 11," but a  
26 separate law suit to which only the parties in that action have  
27 standing. Fed. R. Bankr. P. 7001, 28 U.S.C. § 157(a) (federal  
28 court jurisdiction for any and all cases under Title 11 and all

1 proceedings arising under Title 11, or arising in or related to a  
2 case under Title 11). A "case" is not an adversary proceeding  
3 commenced by a debtor-in-possession or trustee, and creditors do  
4 not get to insert themselves in the adversary proceeding unless  
5 they intervene as provided in Federal Rule of Civil Procedure 24  
6 and Federal Rule of Bankruptcy Procedure 7024.

7       Because of the significance of this decision to the bankruptcy  
8 case, for which Hirsch and Gunderson are parties in interest, the  
9 court has reviewed the pleadings. The position taken by these four  
10 creditors suffers from the same substantive defects as the  
11 Plaintiff-Debtors. They argue that the court has ignored that  
12 portion of the definition of Agritourism stating that the examples  
13 are a non-exclusive list. The court did not interpret or apply the  
14 list of examples as an exclusive list and limited the definition of  
15 Agritourism to only those items. Instead, the court applied the  
16 established canons of construction to consider the correct  
17 interpretation of this statute. The Plaintiff-Debtors and these  
18 creditors choose to ignore the canons of statutory construction and  
19 given no consideration to the specific examples placed in the  
20 Ordinance defining Agritourism in order to reach their desired  
21 conclusion.

22       The court has addressed the above contention that failure to  
23 grant the stay will "kill off" the golf course, as well as the  
24 perceived harm to the public in Calaveras County if the golf course  
25 is not allowed to continue to operate.

26       The Community Bank of San Joaquin reminds the court that it is  
27 a creditor holding a junior lien secured by the commercial golf and  
28 has been forced to wait during this bankruptcy case to enforce its

1 lien rights. While the Bank's arguments may be relevant to  
2 considering a motion for relief from the automatic stay or other  
3 contested matter in the bankruptcy case, they are not to this  
4 Motion. Whether grounds exist to issue a stay pending appeal is  
5 not determined by the impact on an individual creditor.

6 **Impact on Appellate Court - Granting of Temporary Stay**

7 This court having denied the stay pending appeal, the  
8 Plaintiff-Debtors state that they intend to seek a stay pending  
9 appeal on an emergency basis before the District Court to which the  
10 appeal of the judgment has been taken. As stated in the Decision  
11 denying the motion for new trial, the court issued its Memorandum  
12 Opinion and Decision after trial several weeks in advance of  
13 entering the judgment to afford the Plaintiff-Debtors the  
14 opportunity to prepare their post-trial motions and not be forced  
15 to do so during the short fourteen-day appeal period following a  
16 judgment issued by the bankruptcy court. The court further delayed  
17 the effective date of the injunction until January 27, 2012. This  
18 was done to avoid a situation where this court was asked to rule on  
19 a motion for stay pending appeal hours or days before the  
20 injunction went into effect.

21 The motion for new trial and for stay pending appeal were  
22 filed on the twelfth day after the judgment was entered and thirty-  
23 seven days after the court issued its Memorandum Opinion and  
24 Decision after trial. Though filed, the motions were not set for  
25 hearing. When the motions were then set for hearing, the motion  
26 for stay pending appeal was not set for hearing until a month after  
27 the injunction went into effect. By the time the court caught the  
28 apparent calendaring error, there was not sufficient time to have

1 the motion heard on the court's January 11, 2012 calendar,  
2 necessitating the hearing on January 25, 2012. This resulted in  
3 the motion for stay being denied three days before the injunction  
4 prohibiting the operation of the commercial golf course going into  
5 effect.

6        Though the court does not find a basis for granting a stay  
7 pending appeal, the Plaintiff-Debtors have the right to seek such  
8 a stay from the District Court hearing the appeal. The process by  
9 which the hearing was set before this court has now created an  
10 "emergency" to have a motion for stay pending appeal heard by the  
11 District Court. This court is mindful of the tremendous caseload  
12 of the District Court judges in the Eastern District of California.  
13 It has one of the highest caseload in the nation, and the highest  
14 on a per active judge basis.

15        To avoid the Plaintiff-Debtors otherwise unnecessarily  
16 disrupting the District Court's calendar and orderly case  
17 management, the court grants a temporary stay of enforcement of the  
18 injunction through an including February 21, 2012. This allows the  
19 Plaintiff-Debtors to promptly file and serve the motion for stay  
20 pending appeal, regularly setting it for hearing before that court.  
21 This then allows the District Court to consider the motion and  
22 opposition in the ordinary course of court business. To the extent  
23 that the Plaintiff-Debtors do not promptly file, serve, and set  
24 such a motion for hearing, thereby creating a need for an emergency  
25 hearing, such will then be left to the District Court in the proper  
26 management of its calendar.

27 ///

28 ///

1 **CONCLUSION**

2 The court's consideration of this Motion begins with the first  
3 two requirements: (1) appellant is likely to succeed on the merits  
4 of the appeal, and (2) appellant will suffer irreparable injury.  
5 The court accepts the Plaintiff-Debtors contention that if the  
6 court does not issue the stay pending appeal and they are not able  
7 to continue to operate the commercial golf course, then they will  
8 not be able to care for it. The court presumes for the purpose of  
9 this motion that the fairways and greens will dry up and the land  
10 return to its natural state if the Plaintiff-Debtors' limited  
11 liability company is not allowed to continue the operation of a  
12 commercial golf course. The Defendant in this action is the  
13 Calaveras County, a political subdivision of the State of  
14 California. All of the injury asserted by the Plaintiff-Debtors  
15 are economic damages, if the County is determined to be wrong and  
16 it incorrectly applied its Zoning Ordinances to terminate the  
17 operation of the commercial golf course. Those are monetary  
18 damages for which compensation can be paid. There is not  
19 irreparable injury in this Adversary Proceeding.

20 However, before getting to the issue of irreparable injury the  
21 Plaintiff-Debtors must show that they are likely to succeed on the  
22 merits of the appeal. As determined in the Motion for New Trial,  
23 the Plaintiff-Debtors have not shown a material error in law or in  
24 fact with respect to the determination after trial. Merely asking  
25 the court to consider the possibility that another court may  
26 reverse is not showing that success on the merits of an appeal is  
27 likely. The Plaintiff-Debtors have not called into doubt the  
28 analysis of the Zoning Ordinances at issue or a material basis for



1 their contention that the definitional provision for Agritourism is  
2 a grant allowing the use of property in any manner separate and  
3 apart from the comprehensive statutory scheme for property zoned  
4 General Agriculture or Agriculture Preserve. There is no strong  
5 showing by the Plaintiff-Debtors that they are likely to prevail on  
6 appeal.

7 Having considered the factors governing the issuance of a stay  
8 pending appeal, the court determines that one is not warranted in  
9 this Adversary Proceeding. The Plaintiff-Debtors have not shown  
10 that they have a likelihood of prevailing on the appeal.

11 Because of the potential significant negative impact of the  
12 Plaintiff-Debtors having to seek an emergency stay pending appeal  
13 to prevent the injunction from going into effect on January 27,  
14 2012, the court grants a temporary stay of the enforcement of the  
15 injunction through an including February 21, 2012. This temporary  
16 stay is not granted based upon the Plaintiff-Debtors having shown  
17 a basis for granting such a stay, but in consideration of the  
18 District Court and the matters now pending before it.

19 This Memorandum Opinion and Decision constitutes the court's  
20 findings of fact and conclusions of law pursuant to Fed. R. Civ. P.  
21 52 and Fed. R. Bank. P. 7052.

22 The court shall issue a separate order consistent with this  
23 Decision.

24 Dated: January 27, 2012

25  
26 /s/ Ronald H. Sargis  
27 RONALD H. SARGIS, Judge  
28 United States Bankruptcy Court