UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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REVERGE ANSELMO and SEVEN HILLS LAND AND CATTLE COMPANY, LLC,

Plaintiffs,

v.

RUSS MULL, LESLIE MORGAN, a Shasta County Assessor-Recorder, COUNTY OF SHASTA, BOARD OF SUPERVISORS OF THE COUNTY OF SHASTA, LES BAUGH and GLEN HAWES,

Defendants.
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COUNTY OF SHASTA, AND COUNTY OF SHASTA, for the People of the State of California,

Cross-Complainant,

v.

REVERGE ANSELMO; SEVEN HILLS LAND AND CATTLE COMPANY LLC; NANCY HALEY; MATTHEW RABE; MATTHEW KELLEY; ANDREW JENSEN; and ROES 1 THRU 50,

NO. CIV. 2:12-1422 WBS EFB

ORDER RE: MOTION FOR PRELIMINARY INJUNCTION

Cross-Defendants.
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Defendant and cross-plaintiff Shasta County seeks a preliminary injunction relating to its cross-claims for nuisance per se against plaintiffs and cross-defendants Reverge Anselmo and Seven Hills Land and Cattle Company based on plaintiffs' activities on their property located in Shasta County.

I. Factual and Procedural Background

Plaintiffs initiated this action in state court against defendants Shasta County, the Board of Supervisors of the County of Shasta, and Shasta County officials Russ Mull, Leslie Morgan, Les Baugh, and Glen Hawes. In their Third Amended Complaint, plaintiffs allege claims against Shasta County and its employees under 42 U.S.C. § 1983. Plaintiffs' claims arise from defendants' alleged wrongful interference with plaintiffs' use of two pieces of real property. The first is a 670-acre ranching property identified by assessor's parcel numbers ("APN") 093-260-025, 093-260-024, and 093-260-023 ("ranch property"), and the second is a 1,500-acre property where plaintiffs operate Anselmo Vineyards, located at 28740 Inwood Road in Shingletown, APN 094-050-021 ("winery property").

Plaintiffs' winery property is located in a Shasta County land use zone designated "Exclusive Agricultural" and is also approved for an "Agricultural Preserve," which allows the landowners to apply for a Williamson Act contract with the state. (Simon Decl. ¶ 5 (Docket No. 50-17).) Under the Williamson Act, cities and counties may enter into contracts with land owners of

qualified property to retain the agricultural, recreational, or open-space use of the land in exchange for lower property tax assessments. See Cal. Gov't Code § 51200 et seq. Plaintiffs received a Williamson Act contract for the winery property in 2006, but filed a notice of Non-Renewal for a 7.5-acre portion of the winery property on April 24, 2008. (Simon Decl. ¶¶ 5, 15, & Ex. 14; Mull Decl. Ex. 6 (Docket No. 50-13).) Shasta County also issued a use permit for plaintiffs to operate a "small winery" on the property and subsequently approved a conditional use permit allowing plaintiffs to operate a "medium winery" on the property. (Simon Decl. ¶¶ 4, 6, 8.)

In their Third Amended Complaint, plaintiffs allege that county officials engaged in a variety of wrongful conduct that interfered with plaintiffs' use of their property, such as issuing wrongful notices of grading violations, filing false reports with various officials and agencies, requiring an unnecessary environmental impact study, and interfering with plaintiffs' development of their winery. (Third Am. Compl. ¶¶ 23, 27, 30, 40, 44-58) (Docket No. 1, Ex. B).)

While the case was still pending in state court, Shasta County initiated cross-claims for nuisance per se against plaintiffs. Shasta County's nuisance per se claims are based on plaintiffs' grading on their ranch property and construction or conversion of structures on their winery property. Shasta County specifically requests the court to enter injunctions against plaintiffs on the following six alleged nuisances per se:

(1) plaintiffs' grading on the ranch property without a grading permit and plaintiffs' farming operations on the ranch

property;

(2) plaintiffs' construction, use, and occupancy of an entertainment event tent on the winery property without a building permit or certificate of occupancy;

(3) plaintiffs' conversion, use, and occupancy of a horse barn for winery offices on the winery property without a building permit or certificate of occupancy;

(4) plaintiffs' construction, use, and occupancy of a part of their winery structure that was converted into a restaurant and dining room without a required building permit, use permit, zone amendment, or certificate of occupancy, and without required access and parking for disabled persons pursuant to the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12183, ("ADA");

(5) plaintiffs' construction, use, and occupancy of a wood structure on the winery property without a required building permit or certificate of occupancy; and

(6) plaintiffs' construction, use, and occupancy of a chapel on the winery property without a required building permit, use permit, zone amendment, or certificate of occupancy, and without required access for disabled persons pursuant to the ADA.

In opposing Shasta County's motion for a preliminary injunction, plaintiffs expend a great amount of time rehashing arguments the court rejected in its October 11, 2012 Order and thus the court will not address those arguments a second time. The court will also not address plaintiffs' procedurally improper and unnecessary request for sanctions under Federal Rule of Civil Procedure 11 against Shasta County.

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II. Discussion

To succeed on a motion for a preliminary injunction, a plaintiff must establish that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); Perfect 10, Inc. v. Google, Inc., 653 F.3d 976, 979 (9th Cir. 2011). The Supreme Court has repeatedly emphasized that "injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter, 555 U.S. at 22.

"The concept of a nuisance per se arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance." Beck Dev. Co. v. S. Pac. Transp. Co., 44 Cal. App. 4th 1160, 1206 (3d Dist. 1996). "[T]o be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law." Id. at 1207. To establish nuisances per se, "no proof is required, beyond the actual fact of their existence." City of Costa Mesa v. Soffer, 11 Cal. App. 4th 378, 382 (4th Dist. 1992); accord City of Claremont v. Kruse, 177 Cal. App. 4th 1153, 1166 (2d Dist. 2009) (rejecting defendants' argument that the city needed to show that defendants' conduct caused "actual harm" because such a showing is not required to prove a nuisance per se).

California Government Code section 38771 provides, "By ordinance the city legislative body may declare what constitutes a nuisance." Here, Shasta County Code section 8.28.010 provides, "Every violation of any regulatory or prohibitory provision contained in Division 4 or 18 of the Food and Agricultural Code of the State of California, or of this Code, is expressly declared to be a public nuisance." When municipalities have enacted similar ordinances, California courts have found nuisances per se when defendants failed to comply with various provisions of the municipal codes. See, e.g., Kruse, 177 Cal. App. 4th at 1165-66 (failure to obtain a business license and tax certificate); City of Corona v. Naulls, 166 Cal. App. 4th 418, 427 (4th Dist. 2008) (failure to obtain Department of Planning approval and zoning variance).

A. Grading on the Ranch Property

In relevant part, Shasta County Code section 12.12.020 defines "grading" as "movement of any earth materials . . . [w]hich damages or has the potential to significantly damage directly, or indirectly through erosion, any natural or manmade watercourse." The Code prohibits grading "without a grading permit," unless the activity is exempt from the permit requirement. Shasta County Code §§ 12.12.040, 12.12.050. One of the exemptions to the grading permit requirement is "[c]ultivation and production of agricultural products, including but not limited to . . . the rearing and management of livestock." Id. § 12.12.050(A)(1). This exception to the permit requirement does not apply if the "grading will adversely affect any off-site drainage or aquatic habitat." Id. § 12.12.050(B).

In his October 15, 2007, Inspection Report, Andrew Jensen of the Central Valley Regional Water Quality Control Board concluded that "the majority of the site had been graded" and that "there was a small tributary of South Fork Bear Creek that had been completely graded with heavy equipment." (Jensen Dep. Ex. 35; see also Pisano Decl. Ex. 2 (Docket No. 50-1).) Kevin Westlake, a Senior Environmental Health Specialist for Shasta County also toured the ranch property on November 29, 2007, and "observed that there had been recent grading." (Westlake Decl. ¶ 5 & Ex. 4 (Docket No. 50-11).) Shasta County has thus submitted evidence making it likely that plaintiffs conducted grading near the South Fork Bear Creek on their ranch property and it is undisputed that plaintiffs did not obtain a grading permit.

The parties appear to agree that plaintiffs' grading would come within the permit exception for agricultural and raising livestock so long as the grading did not "adversely affect any off-site drainage or aquatic habitat." Shasta County Code § 12.12.050(B). On October 30, 2007, Shasta County issued a "Notice of Grading Violation" to plaintiffs, which stated that the grading activities were "impacting areas of the South Fork of Bear Creek." (Mull Decl. Ex. 7.) In his declaration, Russ Mull, the Director of Shasta County Department of Resource Management, indicated that the County had determined that the agricultural exemption to the permit requirement did not apply. (Id. ¶¶ 10-11.) Jensen also concluded in his report that "a significant amount of sediment [] had been discharged into the creek due to the grading," (Jensen Dep. Ex. 35), and testified at his deposition that he believed South Fork Bear Creek flows into

"Bear Creek proper and then ultimately into the Sacramento River," thus plaintiffs' grading activities "potentially could impact below because everything flows downstream." (Jensen Dep. 68:1-23 (Pisano Decl. Ex. 1).)

Plaintiffs, however, contend that the agricultural exemption applies because there is no evidence of any adverse effect from their conduct, which they describe as the removal of "berry vines and debris from a pasture." (Minasian Decl. ¶ 4 & Ex. A (Docket No. 85); see Minasian Decl. Ex. C (letter from plaintiffs' counsel to Shasta County indicating that water samples taken by the Regional Water Quality Control Board and Department of Fish and Game "do not show any adverse impact").)

Even assuming Shasta County is likely to establish that plaintiffs were required to obtain a grading permit because their grading "adversely affect[ed] any off-site drainage or aquatic habitat," granting the injunction Shasta County requests is not appropriate. First, based solely on the nuisance per se resulting from plaintiffs' grading without a permit, Shasta County requests the court to enjoin all "farming operations" on the ranch property. While the grading may have been performed to advance plaintiffs' farming and ranching operations, Shasta County has not provided any authority that the nuisance per se resulting from the grading extends to all related activities on the property. The request to enjoin all "farming operations" on the ranch property is simply too broad and falls short of the mandate in Federal Rule of Civil Procedure 65 that any injunction "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained." Fed. R. Civ. P. 65(d)(1)(B)-

(C).

There is also no evidence suggesting that a more narrow injunction prohibiting all grading operations is necessary. The original grading at issue occurred in 2007 and Mull indicates that he observed evidence of grading when he toured the Ranch property on February 1, 2008. (Mull Decl. ¶ 14.) Neither party has suggested, however, that the grading is continuing today or will resume in the future and even Mull describes plaintiffs' need to obtain a permit in order to "cure the grading violation for [plaintiffs] having graded." (Id. ¶ 21 (emphasis added).)

The Ninth Circuit has explained that, "[a]s a general rule, '[p]ast wrongs are not enough for the grant of an injunction'; an injunction will issue only if the wrongs are ongoing or likely to recur." F.T.C. v. Evans Prods. Co., 775 F.2d 1084, 1087 (9th Cir. 1985) (quoting Enrico's, Inc. v. Rice, 730 F.2d 1250, 1253 (9th Cir. 1984)) (second alteration in original); cf. Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc., 23 F.3d 1508, 1511 (9th Cir. 1994) ("Federal courts are not obligated to grant an injunction for every violation of the law. . . . The plaintiff must make a showing that a violation of the [Endangered Species Act] is at least likely in the future."). Accordingly, because there is no evidence suggesting that plaintiffs are currently grading or intend to grade the ranch property in the future, the court will deny Shasta County's motion for a preliminary injunction relating to plaintiffs' grading on their ranch property.

B. Construction and Conversion of Structures on the Winery Property

Shasta County Code subsection 16.04.150(A) provides, "No person shall do, cause or permit to be done any work for which a permit is required by this chapter unless a permit for that work is first obtained." Similarly, the following section states, "No person shall erect, construct, enlarge, alter, repair, move, install, improve or convert a structure or mobile home, or any portion thereof . . . without first obtaining a valid permit for such work when a permit is required by this chapter . . . ." Shasta County Code § 16.04.160(A).[1]

Shasta County has submitted sufficient evidence to show it can likely prove that plaintiffs performed the following work on the winery property without obtaining a building permit: 1) construction of an event tent, (Simon Decl. ¶ 30; Bellinger Decl. ¶¶ 4, 7 & Exs. 23 & 25 (Docket No. 50-22)); 2) conversion of a horse barn into offices for the winery, (Simon Decl. ¶¶ 20, 30; Bellinger Decl. ¶¶ 4, 7 & Exs. 23, 25); 3) conversion of part of the winery structure into a restaurant and dining room, (Simon Decl. ¶ 19; Bellinger Decl. ¶ 7 & Ex. 25); 4) construction of a wood structure next to the winery building, (Simon Decl. ¶ 30; Bellinger Decl. ¶¶ 4, 7, 9 & Exs. 23, 25);[2] and 5) construction of

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[1] Shasta County also cites to sections of the California Building Code as giving rise to plaintiffs' violations. However, Shasta County Code section 8.28.010 declares a nuisance per se for violations of "any regulatory or prohibitory provision contained in Division 4 or 18 of the Food and Agricultural Code of the State of California, or of this Code." It does not appear to extend to violations of the California Building Code.

[2] Shasta County indicates that the wood structure appears to house recreational vehicles. At oral argument, plaintiffs' counsel indicated that it houses portable restrooms.

a chapel,[3] (Simon Decl. ¶ 27; Bellinger Decl. ¶ 4 & Ex. 23). After determining that each structure was completed without a building permit, Shasta County Building Inspector/Code Enforcement Officer Jerry Bellinger posted "Red Tag" orders prohibiting entry into each structure and saw Anselmo remove all of the "Red Tag" orders. (Bellinger Decl. ¶¶ 5-6, 8 & Exs. 24, 26.)[4]

Plaintiffs do not dispute that they completed the work without obtaining building permits.[5] Shasta County is thus likely

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[3] There is an ongoing dispute between the parties about whether the chapel is for only private use or is available for public uses, such as weddings and communions. In his declaration, Anselmo states that the chapel "is not utilized for weddings or public use associated with the winery or restaurant" and is only used by himself "and occasional guests and visiting priests and nuns." (Anselmo Decl. ¶ 8 (Docket No. 86).) Plaintiffs also submitted a letter from the Catholic Bishop of Sacramento indicating permission is not granted for mass on Sundays or for "weddings, baptisms and other sacraments." (Id. Ex. G.)

[4] Shasta County also bases its nuisance per se claims on plaintiffs' failure to obtain certificates of occupancy for the five structures. As authority for the requirement for a certificate of occupancy, however, Shasta County cites only to Shasta County Code subsections 16.04.150(B) and 16.04.160(A). Subsection 16.04.150(B) addresses a change in occupancy after a certificate of occupancy has already been issued and subsection 16.04.160(A) is limited to requiring building permits. See Shasta County Code § 16.04.150(B) ("No person shall change or permit or cause a change of the occupancy of any structure for which a certificate of occupancy has been issued, unless a new certificate of occupancy has first been secured from the building official."), § 16.04.160 ("No person shall erect, construct . . . without first obtaining a valid permit for such work when a permit is required by this chapter . . . .").

[5] Plaintiffs applied for permits for the restaurant conversion and chapel, but did not submit additionally requested information and thus the permits were never issued. (See Simon Decl. ¶¶ 16, 24-25, 27-28 & Exs. 15, 18, 20, 21.)

The court assumes that building permits were required for each of the five structures for purposes of this motion. Plaintiffs contend that building permits were not required for the office or wooden structure that houses the portable

to prevail on its nuisance per se claims based on plaintiffs' violations of Shasta County Code subsections 16.04.150(A) and 16.04.150(A).[6]

According to Shasta County, a finding that it is likely to prevail on its nuisance per se claims is sufficient, in itself, to grant its motion for a preliminary injunction. Shasta County relies on the California Supreme Court's holding that, "[w]here a governmental entity seeking to enjoin the alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant." IT Corp. v. Cnty. of Imperial, 35 Cal. 3d 63, 72 (1983). If, however, "the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties." Id.

Courts have held, however, that federal, not state,

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restrooms.

[6] Shasta County also contends that the operation of the restaurant and chapel are not allowable uses under its zoning laws, plaintiffs' conditional use permit for a "medium winery," and plaintiffs' Williamson Act contract. Because the court finds that Shasta County is likely to prevail on its nuisance per se claims based on plaintiffs' failure to obtain building permits, it need not address the other theories underlying its nuisance per se claims. Likewise, the court need not address Shasta County's additional theories for its nuisance per se claims, namely California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210, and California's general nuisance statute, Cal. Civ. Code § 3479. Shasta County also argues that plaintiffs' failure to provide the required ADA access and parking constitutes a nuisance per se, but did not allege claims for or violations of the ADA in its First Amended Cross-Complaint.

standards govern issuance of a preliminary injunction when a federal court is sitting in diversity or exercising supplemental jurisdiction over state law claims. For example, in Ferrero v. Associated Materials Inc., 923 F.2d 1441 (11th Cir. 1991), the Eleventh Circuit noted the conflict between state law, which presumed that an injunction was an appropriate remedy, and the federal preliminary injunction standard. Ferrero, 923 at 1448. Although the differences between state and federal law could have led to "an outcome determinative result," the Eleventh Circuit concluded that the federal standard controlled because Federal Rule of Civil Procedure 65 is constitutional and within the rules' enabling act. See id. (discussing Hanna v. Plumer, 380 U.S. 460, 467-71 (1965)); see also Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Richard L. Marcus, Federal Practice & Procedure § 2943 (Sept. 2012) ("Although the federal rule on injunctions does not expressly provide any standards of availability, it does purport to uphold the historic federal judicial discretion to preserve the situation pending the outcome of a case lodged in the court. Thus the rule may be read as a codification of the traditional federal equity practice and although the standards are not articulated, there is enough detail in Rule 65 to make it clear that it embodies an important federal policy.").

In applying the federal injunction standard, courts recognize that state law would control on the issue of whether a plaintiff is entitled to seek injunctive relief on the claim. See Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 645-46 (9th Cir. 1988); Sullivan By & Through Sullivan v. Vallejo City

Unified Sch. Dist., 731 F. Supp. 947, 956 (E.D. Cal. 1990). After concluding that a plaintiff is entitled to seek a preliminary injunction, however, courts often rely on the federal standard in exercising their discretion to determine whether to grant an injunction. See Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 541 (6th Cir. 2007) ("[W]e apply our own procedural jurisprudence regarding the factors to consider in granting a preliminary injunction . . . ."); Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990) ("[T]he doctrine of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), does not apply to preliminary injunction standards . . . ."); United Nat'l Maint., Inc. v. San Diego Convention Ctr. Corp., Civ. No. 07-2172 AJB, 2012 WL 3861946, at *4 (S.D. Cal. Sept. 5, 2012) (applying state law to determine whether an injunction is an available remedy on plaintiff's claim, but then applying "federal law principles in determining whether to exercise discretion to grant or deny an injunction that is available under state law"); Travelers Cas. & Sur. Co. of Am. v. W.P. Rowland Constructors Corp., Civ. No. 12-00390 PHX FJM, 2012 WL 1718630, at *2 (D. Ariz. May 15, 2012); Toschi v. Cnty. of San Mateo, Civ. No. 07-3625 MMC, 2009 WL 982136, at *12 n.13 (N.D. Cal. Apr. 13, 2009); Sullivan By & Through Sullivan, 731 F. Supp. at 956 ("[F]ederal law provides the standards governing plaintiff's motion for preliminary injunctive relief with respect to both her federal and state law claims."); Kaiser Trading Co. v. Associated Metals & Minerals Corp., 321 F. Supp. 923, 931 n.14 (N.D. Cal. 1970) ("[T]he best approach would be to look to state law to determine if a preliminary injunction is permissible . . .

[and then] look to federal law to determine whether the court should exercise its discretion."). But see Safety-Kleen Sys., Inc. v. Hennkens, 301 F.3d 931, 935 (8th Cir. 2002) (applying state law irreparable injury standard); Outsource Int'l, Inc. v. Barton, 192 F.3d 662, 673-74 (7th Cir. 1999) (noting that the majority incorrectly "assumes that state rather than federal law governs the standard for the grant or denial of a preliminary injunction") (Posner, J., dissenting); E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., --- F. Supp. 2d ----, ----, 2012 WL 4490547, at *10-12 (E.D. Va. 2012) (concluding that applying federal standards to determination of injunctive relief would "trench upon the rule of Erie").

Nonetheless, concluding that the federal preliminary injunction standard controls does not necessarily foreclose Shasta County's reliance on a presumption of irreparable harm. A line of Ninth Circuit cases has held that, "[i]n statutory enforcement cases where the government has met the 'probability of success' prong of the preliminary injunction test, we presume it has met the 'possibility of irreparable injury' prong because the passage of the statute is itself an implied finding by Congress that violations will harm the public." United States v. Nutri-cology, Inc., 982 F.2d 394, 398 (9th Cir. 1992).

It is uncertain, however, whether this presumption is still good law. First, it is tied to the Ninth Circuit's sliding scale standard for preliminary injunctions that allowed a showing of only the possibility of irreparable harm if the plaintiff made a stronger showing of success on the merits. In 2008, the Supreme Court rejected this standard:

> [T]he Ninth Circuit's "possibility" standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction. Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Winter, 555 U.S. at 22.

Second, in the patent context, the Supreme Court rejected Federal Circuit precedent providing for the issuance of a permanent injunction after proof of a patent violation in all but exceptional cases. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006). The Court explained that it has "consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed" and held that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards." Id. at 392-94.

The Ninth Circuit extended the holding from eBay to preliminary injunctions in patent cases. In discussing eBay, the Ninth Circuit explained that the Court "warned against reliance on presumptions or categorical rules" and found that the Federal Circuit "had erred in adopting a categorical rule instead of making a fact-specific application of the traditional four-factor test for injunctive relief." Perfect 10, Inc., 653 F.3d at 979-

80. The Ninth Circuit further explained, "The use of presumptions or categorical rules in issuing injunctive relief would constitute 'a major departure from the long tradition of equity practice,' and 'should not be lightly implied.'" Id. at 979 (quoting eBay Inc., 547 U.S. at 391).

Silver Sage Partners, Ltd. v. City of Desert Hot Springs, 251 F.3d 814 (9th Cir. 2001), also does not entitle Shasta County to a presumption of irreparable harm. In Silver Sage, the Ninth Circuit recognized that it has "held that where a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation." Silver Sage Partners, Ltd. 251 F.3d at 827 (citing cases where this presumption has been applied to claims under Title VII and the Fair Housing Act and for discrimination) (emphasis added); see also Antoninetti v. Chipotle Mexican Grill, Inc., 643 F.3d 1165, 1175-76 (9th Cir. 2010) (discussing Silver Sage in the context of an ADA case, but declining to decide whether the ADA "authorizes a district court to deny injunctive relief after finding a violation of the Act"). Here, Shasta County's nuisance per se claims are not based on violations of civil rights and it would be misguided to transport presumptions developed in civil rights cases to permitting and zoning code violations.

Given the uncertainty of the presumption discussed in Nutri-cology after Winter and the Supreme Court's "warn[ing] against reliance on presumptions or categorical rules" in eBay, the court will not simply presume Shasta County is likely to suffer irreparable harm. Instead, the court will adhere to the

traditional preliminary injunction inquiry and evaluate whether (2) Shasta County is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. Winter, 555 U.S. at 20. In doing so, the court "'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" Id. at 24 (quoting Amoco Prod. Co. v. Gambell, 480 U.S. 531, 544 (1987)).

Here, the greatest injury to Shasta County is that plaintiffs appear to blatantly ignore the ordinances requiring them to obtain building permits. Plaintiffs' seemingly intentional refusal to apply for building permits not only prevents Shasta County from fulfilling its duty to enforce its codes, but also sends a disfavorable message to other citizens about the importance of complying with the County's permitting requirements. While these concerns are legitimate, they can be adequately remedied after a trial on the merits and do not rise to the level of irreparable harm.

Nonetheless, even if Shasta County is entitled to a presumption of irreparable harm under IT Corp. or Nutri-cology, the presumption is rebuttable. See IT Corp., 35 Cal. 3d at 72 (holding that the presumption is rebuttable); Nutri-cology, Inc., 982 F.2d at 398 (discussing the district court's application of a rebuttable presumption). Here, plaintiffs have shown that they are likely to suffer sufficient irreparable harm to rebut a presumption of irreparable harm in favor of Shasta County. If Shasta County's motion for a preliminary injunction is granted,

plaintiffs have represented that they will be forced to layoff their thirty-eight employees. (Anselmo Decl. ¶ 10.) This loss of employment is not insignificant in the current economy and in an area where "[j]obs are scarce." (Id.) The sudden closure of the restaurant would also deplete the good will and patronage that plaintiffs have established over the last three-and-a-half years. Plaintiffs explain that the winery property is located approximately twenty-five miles from Redding in a rural area, thus "it has taken a great deal of advertising and word-of-mouth to develop the patronage since 2008." (Id. ¶ 9.) Lastly, the inability to practice his faith and worship in the chapel on his property imposes a significant harm on Anselmo.

In balancing the harm to Shasta County against the harms to plaintiffs in having to shut down their operations before the entirety of this action is resolved on the merits (Anselmo Decl. ¶ 10), the timing of Shasta County's motion cannot be ignored. Plaintiffs initiated this action in state court on October 2, 2008. During the three-and-a-half years this case was pending in state court, Shasta County never sought a temporary restraining order or preliminary injunction. Shasta County has not identified any change in circumstances that renders its need for a preliminary injunction today any different than it was during the pendency of this action.

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981). "'A preliminary injunction . . . is not a preliminary adjudication on the merits but rather a device for

preserving the status quo and preventing the irreparable loss of rights before judgment.'" U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010) (quoting Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984)) (omission in original). In seeking a preliminary injunction, Shasta County is not attempting to preserve any property or right, but is seeking the ultimate relief it will likely seek at the close of trial. Given that this case has been pending for over three-and-a-half years and trial was set to commence in state court on January 6, 2013, there is no reason why a trial in this court cannot commence forthwith.

Lastly, with respect to the public interest, the court does not find that this factor weighs heavily for either side. The public undoubtedly has an interest in having Shasta County's code equally enforced. Waiting until the trial to make this determination, however, does not appear to pose harm to the public because, aside from alleged ADA violations that are not at issue in this action, Shasta County has not suggested or submitted any evidence demonstrating that any of the structures on the winery property pose a risk to public health or safety. Anselmo, on the other hand, has submitted a declaration indicating that the winery, restaurant, and tasting room have met all California Health Department "food and cleanliness inspection conditions and have routinely been inspected for all purposes in regard to food safety, water and sewage, and waste disposal" and that there are no outstanding violations. (Anselmo Decl. ¶ 17.) Plaintiffs also submitted a report from a retained architectural and construction expert, which concludes that the chapel "has

been constructed in substantial conformance with building codes and conforms to or exceeds the standards of good building practices in the state of California." (Schraibman Decl. Ex. A (Docket No. 88).)

Accordingly, while Shasta County is likely to prevail on its nuisance per se claims based on plaintiffs' failure to obtain building permits for the structures on the winery property, it has failed to show that it is likely to suffer irreparable harm, that the balance of equities tips in its favor, or that an injunction is in the public interest. The court must therefore deny Shasta County's motion for a preliminary injunction.

IT IS THEREFORE ORDERED THAT Shasta County's motion for a preliminary injunction be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED THAT a Status (Pretrial Scheduling) Conference is set in this matter on November 26, 2012, at 2:00 p.m. in Courtroom No. 5. The parties shall submit a joint status report no later than November 13, 2012, that proposes deadlines for the close of discovery and filing of dispositive motions and dates for the pretrial conference and trial.

DATED: October 24, 2012

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE