

KIRC News Update December 18, 2011



Judgment in Agritourism Trial entered December 16 Summary of Actions Taken on December 7 Bankruptcy Court hearings Clock Ticking on Appeal; Upcoming Court Dates/Filing Deadlines; Links to News Articles

Several new articles reported highlights of the December 7 Bankruptcy Court hearings, including many of the most noteworthy comments of the day. (See links to news articles on p. 4.) Due to the extensive coverage, we decided to delay this KIRC News Update until Judge Ronald H. Sargis' final Judgment in the agritourism trial and all relevant Civil Minutes and Orders from the December 7 proceedings posted to the Court's website. Details are summarized below.

FINAL JUDGMENT IN AGRITOURISM TRIAL ENTERED DECEMBER 16

On December 15, Judge Sargis signed and filed a four-page final Judgment, based upon his 65-page Memorandum Opinion and Decision. The Judgment was entered on the docket December 16.

IN BRIEF, THE JUDGMENT:

- granted the County's motion to dismiss the Nemees' claim for injunctive relief;
- entered judgment for Calaveras County on all claims, denying the Nemees relief "*on each and every claim asserted in the Second Amended Complaint*";

...ORDERED, ADJUDGED, AND DECREED THAT:

- the golf course constructed and operated by the Nemees and through Trinitas Enterprises LLC is not permitted under Calaveras County Zoning Ordinances;
- a commercial golf course is not a permitted activity as Agritourism and is not a permitted activity as an agricultural operation on AP or A1 property under County Code; and such use of The Property is a public nuisance;
- judgment is granted to Calaveras County, on the Counterclaim, and "*Michael Nemee and Michelle Nemee, and each of them, and their respective family members, agents, employees, servants, representatives, and any entity in which Michael Nemee or Michelle Nemee have an ownership, equitable, or other interest*", ["the Nemees et al"] shall, effective January 27, 2012, and continuing thereafter,
 - Terminate and cease the use of the golf course on The Property as a commercial golf course;
 - Terminate and cease to allow the use of the golf course by any person who claims to have purchased a golf membership or obtained any other right to use the golf course;
 - Terminate and cease use of the golf course for any private, public or charitable events;
 - Terminate and cease advertising or marketing the golf course for commercial use;
 - [the Nemees et al] shall comply with the County Zoning Ordinances for the use of The Property

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT:

- the Nemees may seek to modify this injunction to the extent that it becomes inconsistent with future amendments to Calaveras County zoning codes or ordinances;
- the County may obtain from this court further orders for the enforcement of this injunctive relief as necessary for the abatement of the public nuisance, and seek the award of costs and expenses of such abatement, if [the Nemees et al] fail to comply with this injunction on or before January 27;
- Calaveras County shall file its costs bill and motion for allowance of attorneys' fees, if any, on or before December 21; and any fees, costs and expenses awarded by the court shall be enforced as part of this judgment.

SUMMARY OF ACTIONS TAKEN ON DECEMBER 7 COURT HEARINGS

- **DENIED** (in a pre-hearing disposition) **THE DEBTORS' MOTION TO CONTINUE Any Requests for Relief from Stay** until the court issues its opinion on the agritourism adversary proceeding. [The court issued its Opinion the same day the Debtors' Motion was filed.]
- **CONTINUED the Bank's Motion for Relief from Stay hearing** until 9:30 a.m. February 9, 2012 in Sacramento. Supplemental pleadings [including CBSJ attorney Dennis Hauser's argument that the Bank's claims are not adequately protected] shall be filed and served on or before January 26, and any reply by the Debtors must be filed on or before February 2, 2012.
- **MODIFIED THE STAY**, effective January 18, for the limited purpose of allowing the Bank to "*record, notice, publish and...schedule a nonjudicial foreclosure sale for the real property...*" identified as APN 050-052-041 and APN 050-052-042" [the 160- and 120-acre Trinitas parcels].
- **CONTINUED the Status Conference on the new \$12 million Civil Rights/damages** adversary proceeding until February 22. The Civil Minutes note that the Complaint and Summons were filed October 7, and had to be served on the Defendants on or before October 21; yet no certificate of service has been filed by the Plaintiff.
- **ORDERED Plaintiffs' trial attorney Kenneth M. Foley to appear in court, in person, January 25, to show cause why the court should not dismiss the Civil Rights lawsuit** for failure to prosecute. Any opposition must be in writing and filed at least 14 days before the hearing.
- Acknowledged that the September 14, 2011 **Debtors' Amended Disclosure Statement (DADS)** was **WITHDRAWN** by Debtors' attorney Malcolm Gross at the hearing, and that the matter is **REMOVED FROM THE CALENDAR**. [Successful litigation against the County was fundamental to the Nemees' Disclosure Statement and Reorganization Plan.]
- **CONTINUED THE BANKRUPTCY STATUS CONFERENCE** until February 22, 2012.

DECEMBER 7, 10 AM: JUDGE DELAYS BANK'S RELIEF

On December 6, Judge Sargis issued a tentative ruling denying the Bank's Motion for Relief from Stay or, if the Bank preferred, continuing the hearing until February 9. In court, Hauser noted that continuing the hearing until February 9 would delay a foreclosure sale until mid-March. He added that the County's injunctive relief to halt commercial golfing January 27 will cause golfing revenues to dry up, and end the Debtors' ability to make the \$6,300 monthly adequate protection payments to the Bank. The delay could also result in several weeks' interruption in golf course maintenance, which Hauser implied would compromise the resale value of the property.

However, the Civil Minutes of the hearing reflect the fact, set forth in the judge's November 21 Decision, that: "*the Bank made the loan based upon the noncommercial golf course value of the property that secures its claim. The court's decision in the Adversary Proceeding does not alter such grounds, as it merely determines that the property cannot be used for a commercial golf course.*" The "*...adequate protection order remains in full force and effect.*" "*No basis has been shown for the court to determine that the Bank is not adequately protected between now and January 27, 2012...*" Sargis declined to lift the stay for the Bank before January 27, in order "*to afford the Debtors the opportunity to seek a stay of enforcement of the injunctive relief pending appeal, if any, from an appropriate court.*" On the other hand, "*Modifying the stay to allow for the scheduling of a non-judicial foreclosure sale pending final hearing will not unduly impact the Debtors. Any determination to terminate the stay will stand or fall on its merits...*"

The Civil Minutes conclude: "*The Bank requested, in lieu of the court denying the motion, that the matter be continued to 9:30 a.m. on February 9, 2012, at Courtroom 33, Sixth Floor, Robert T. Matsui United States Courthouse, 501 I Street, Sacramento, California. Such hearing is sufficiently after the January 27, 2012 injunction date for the court and all parties to know whether the golf course has been allowed to continue in operation.*"

**DECEMBER 7, 2:30-3:30 PM: DISCLOSURE STATEMENT WITHDRAWN,
FOLEY A NO-SHOW, CIVIL RIGHTS CASE CONTINUED TO FEBRUARY 22**

When the Nemees hearings were called in the afternoon, Mr. Foley failed to appear.

Judge Sargis formally noted that the Disclosure Statement had been withdrawn and the hearing dropped from the court's calendar.

He then announced that he had received Comments on the Proposed Judgment Form from both the County and the Plaintiffs, but indicated the Nemees' comments were not on point. He said he anticipated signing and issuing his Final Judgment soon. [Note: Although the Nemees' comments were apparently filed late Friday, December 2, they were not entered on the docket until Monday, and KIRC did not find the file until Tuesday, after the December 6 News Update went out.]

Plaintiffs' Comments on Proposed Judgment Form signal intent to file Motion for a New Trial

The Nemees' Comments telegraphed their intention: *"to file a Motion for a New Trial, which asserts that the Court has reached the wrong decision in applying the existing evidence to the ordinance consistent with the rules of interpretation."* Plaintiffs asked the court to *"completely strike the Grant of Injunctive Relief"* allowing the County to prohibit commercial golfing, based on alleged *"discriminatory application of the law"* regarding Ironstone Vineyards. They also asked the court to delay Colonial Pacific Leasing Company's relief from stay to repossess 54 golf carts. Lastly, they requested Sargis *"delete from the judgment any reference to the award of attorney's fees..."* to the County.

[Note: The issue of interpreting the County's agritourism ordinance and the relevance of whether code violations exist at Ironstone were covered extensively in the judge's Decision.]

In court, Sargis acknowledged the Debtors' right to request a new trial, if they can *"show me I've clearly done something wrong."* However, he warned that if their strategy is simply to delay injunctive relief by filing a series of frivolous motions, *"it's not going to fall on sympathetic ears."* Furthermore, *"unless someone has something spectacular"* to add to their arguments, the judge said he would not let anyone shut down the golf course before January 27. Terminating stay before then would interfere with the Debtors' rights to appeal. Sargis indicated that by January 27 *"another set of eyes"* at the Appellate Court will have reviewed his ruling and determined whether the appeal has any merit.

Plaintiffs ordered to show cause why \$12 million lawsuit shouldn't be dismissed

A footnote to the Nemees' Comments on the Proposed Judgment Form stated: *"Plaintiffs intend to seek a Stipulation from Defendants staying any activity in a new lawsuit which was filed by Plaintiffs shortly before the commencement of the trial in this case; the purpose of which suit was to reserve Plaintiffs' right to monetary damages should they prevail in this action."*

When the afternoon discussion shifted to the Civil Rights/Damages claim, (Adversary Proceeding #11-09068) County Counsel Janis Elliott informed the Court that the Plaintiffs never served the Defendants Brent Harrington, Robert Sellman, Shaelyn Strattan and the County of Calaveras. She emphasized that the County would NOT stipulate to stay the new lawsuit pending appeal of the agritourism action. Elliott said the County's position is that the new lawsuit is based on old facts, many of which are the same facts litigated during the agritourism trial. Since, as time passes, memories fade, she urged the judge to resolve the matter expeditiously.

With Mr. Foley unavailable to answer questions, Sargis asked Gross to explain why the lawsuit is idling, instead of being prosecuted. Gross, who said he thought Foley would be appearing by phone, admitted he had *"no idea."* *"I don't know how aggressively he intends to pursue it."* *"The last discussion I had with Mr. Foley, it wasn't a priority at that time."*

Sargis said he would issue an Order for the Plaintiffs to Show Cause why the lawsuit should not be dismissed for failure to prosecute. He continued the Hearing to February 22, at 3:30. When the

Order to Show Cause was filed December 15, it ordered Ken Foley to appear **in person** in court on January 25 at 2:30 p.m. to answer the question, and Debtors to file any opposition to the order in writing at least 14 days earlier.

ARTICLE REPORTS FOLEY ALSO MISSED KEY HEARING IN STATE COURT

On December 11, The Record published a story linking Foley's non-appearance in Bankruptcy Court December 7 to a similar absence from a status conference in a murder trial he's defending in Calaveras Superior Court. **"Judge doubts lawyer's defense, Foley rejects claims he has too much going on"**: http://www.recordnet.com/apps/pbcs.dll/article?AID=/20111211/A_NEWS/112110313

CLOCK TICKING ON APPEAL / MOTION FOR A NEW TRIAL

Federal Appellate Court structure and law is extremely complex and confusing; but, it appears that the Judgment's posting to the Court's docket triggered a 14-day deadline for filing an Appeal of the judge's ruling and a Motion for a New Trial. If the Nemees fail to file a timely Appeal of the Judgment and are not granted a stay of enforcement of the injunctive relief, on January 27, 2012 Colonial Pacific Leasing Company will be able to repossess the golf carts, and the County will be positioned to enforce the court order ending commercial golfing at Trinitas.

UPCOMING COURT DATES / FILING DEADLINES

- Dec. 21: County costs bill and motion for allowance of attorneys' fees due.
- Dec. 30: [14 days after final Judgment entered] Motion for a New Trial due; Appeal of Judgment in Agritourism Trial due.
- Jan. 11: Written opposition to Order to Show Cause due.
- Jan. 18: Stay modified to allow CBSJ to record, publish and notice a non-judicial foreclosure sale.
- Jan. 25: 2:30 pm, Hearing on Order to Show Cause why Civil Rights lawsuit should not be dismissed.
- Jan. 26: CBSJ supplemental pleadings in Motion for Relief from Stay due.
- Jan. 27: Effective date for County's Injunctive Relief to halt commercial golfing at Trinitas, and CPLC's Relief from Stay to repossess golf carts.
- Feb. 2: Debtors' Reply to CBSJ Motion for Relief supplemental pleadings due.
- Feb. 9: 9:30 am, CBSJ Relief from Stay Hearing (Courtroom 33, 6th floor, 501 I St., Sacramento)
- Feb. 22: 3:30 pm, Continued Status Conference on Civil Rights adversary proceeding #11-09068
- Feb. 22: 3:30 pm, Continued Status Conference on Chapter 11 Bankruptcy

LINKS TO NEWS ARTICLES

"Judge holds off Trinitas bank seizure, Golf goes on as foreclosure sale put off until 2012":

http://www.recordnet.com/apps/pbcs.dll/article?AID=/20111208/A_NEWS/112080319

"Trinitas resolution won't come before Feb.":

<http://www.uniondemocrat.com/20111208105595/News/Local-News/Trinitas-resolution-wont-come-before-Feb>

"Trinitas' bank put on hold":

http://www.calaverasenterprise.com/news/article_f590829c-2291-11e1-9904-001871e3ce6c.html

"Crucial Day in Court for Trinitas" and "Trinitas' days numbered unless appeal is successful":

These *Valley Springs News* articles, published December 7 and December 9, are not available online.

We'll keep you posted. In the meantime, please accept our sincere wishes for a wonderful Christmas and a happy, healthy New Year!

Lew & Kathy Mayhew

Keep It Rural, Calaveras—209-763-2899—P.O. Box 456, Burson, CA

THE ENTERPRISE

Opinion

LETTERS

Good prevailed in battle of Trinitas

So it's taken the better part of a decade for the courts to prove, and rule on, what the vast majority of Calaveras County citizens cried foul about way back when. The Trinitas project was a sham/scam, and the owners and their representatives were shown to be guilty of trying to come up in the hills and pull the wool over our county's eyes.

One disappointing aspect of their attempt was that local citizens/ business owners and lawyers joined the Nemees ranks in attempting to mislead county representatives. Ah, but for the love of the almighty greenback; right or wrong didn't enter into the equation.

It's refreshing to see that right does win out on occasion. Hats off to the neighbors of the scam for not giving in, and hats off to the Mayhews for helping to lead the battle. This shows that, yes, the "little guy" can in fact triumph over illegal business attempts and unethical persons.

So referring to your front page headline "Is this the end for Trinitas?" I, and contrary to what many of the Nemees backers hope, believe it is.

In this day and age good luck to all of the county's legal and by the book golf courses. They played fair in their development stages, the Nemees and their representatives didn't. Game over, way over par, don't let the gate hit you on the way out.

Michael F. Falvey
Mountain Ranch

[This Letter to the Editor was inadvertently left out of the December 6 KIRC News Update]

Crucial day in court for Trinitas

By Nick Baptista

Wednesday could be a day of reckoning in U.S. Bankruptcy Court for Michael and Michelle Nemees and their Trinitas Golf Club.

Wednesday marks the first time the case has been back in court since Judge Ronald H. Sargis issued his written decision Nov. 21 finding the 18-hole golf course off Ospital Road was not in compliance

with Calaveras County's zoning ordinance.

The judge said he did not find Trinitas golf course qualifies as a permitted use under the county's agri-tourism ordinance and granted the county's counterclaim for injunctive relief to begin enforcing zoning violations on the property.

"The court finds that con-

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Trinitas

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struction of the golf course and development of the property by the plaintiffs was not done based upon being misled by representatives of the county or a misunderstanding of the law, but as part of a calculated business strategy by the plaintiffs," Sargis said in his 65-page decision. "At the heart of this strategy is a 'it is better to seek forgiveness than to get permission' approach to land use and real estate development."

The Nemees' bankruptcy plans to eventually pay their creditors through golf course rev-

enue is now in doubt since the judge's ruling.

The Nemees sought financial relief under Chapter 11 of the United States Bankruptcy Code in 2009 after the Calaveras County Board of Supervisors turned down a zoning change and subdivision proposal for their proposed golf course development, which would have included a clubhouse, lodge, restaurant and 13-home gated community.

The first matter before Judge Sargis on Wednesday is a hearing on the Community Bank of San Joaquin's motion for Relief of Stay and allow the bank to foreclose on the property.

The Nemees' bankruptcy attorney has filed a motion challenging the bank's request.

The first hearing on the Nemees' Civil Rights lawsuit against the county and several county employees is scheduled for 2:30 p.m., while a hearing on the Nemees' Amended Disclosure Statement and a status conference is scheduled an hour later.

Mike Nemees had no comment to *The Valley Springs News* before Wednesday's hearing. He said he has been advised by his attorneys not to discuss the matter and all questions should be referred to them.

Keep It Rural Calaveras, a group composed of neighbors and others opposed to the golf course, was pleased with the judge's ruling.

"KIRC is grateful Judge Sargis

saw through the false allegations to the truth," said KIRC spokesman Lew Mayhew. "His independent reading of the zoning codes validated the county's reasonable interpretation of the agri-tourism ordinance consistent with the ag zones' purpose to preserve lands for agricultural production. We appreciate the courage of the three supervisors who upheld the meaning of the code, and give great credit to County Counsel Janis Elliott, who so effectively laid the foundation for the judge's decision. Impacted neighbors and others are thankful that the county will soon gain injunctive relief to stop the illegal activity."

Wednesday's proceedings are at the U.S. Bankruptcy Court in Modesto.



THURSDAY

December 8, 2011

THE MOTHER LODE'S LEADING INFORMATION SOURCE

50¢

Sonora, CA



FILE PHOTO/UNION DEMOCRAT

A JUDGE'S ruling will halt golfing at the Wallace-area Trinitas golf course at the end of January.

Trinitas resolution won't come before Feb.

By SEAN JANSSEN
The Union Democrat

A federal bankruptcy court judge Wednesday continued until Feb. 9 a hearing that would have allowed a foreclosure sale to proceed on the Trinitas golf course near Wallace.

Judge Ronald Sargis also gave attorneys for Trinitas owners Michael and Michelle Nemees until another hearing Feb. 22 to show cause that a \$12 million civil rights lawsuit that names several former county officials as defendants should not be dropped.

The Nemees owe more than \$2 million on the 280-acre property to the Community Bank of San Joaquin in Stockton.

The bank is eager to proceed with the foreclosure after the bankruptcy filing and subsequent proceedings have put it on hold for more than two years. Bank attorney Dennis Hauser said about \$380,000 in interest has accrued on the property during that time.

"This is a small bank. This is its largest loan to my understanding," Hauser said. "The bank seriously needs relief or it will have problems down

the road with its regulators."

Sargis noted that the October trial on the Nemees' claims the golf course should be permitted as agritourism under the county zoning code, which he ruled against, bore out that "everybody knew what was being built out there."

That includes bank officials who chose to make loans to the Nemees despite the lack of county approval for the project.

Sargis' ruling, which upholds the county's counterclaim that golf activities

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TRINITAS: Judge orders halt to golfing Jan. 27

FROM THE FRONT PAGE

should be halted on the property, takes effect on Jan. 27.

Sargis held that comments submitted Dec. 2 by attorney Ken Foley for the Nemees seeking a new trial on the agritourism claim "do not address the technical language" of that ruling and it will be finalized with only minor corrections to references to case law requested by Calaveras County Counsel Janis Elliott.

The judge agreed with attorney Malcolm Gross, representing the Nemees Wednesday at the Modesto courthouse,

that he should get more time to digest the ruling and prepare his opposition to the bank's motion for relief from a stay on the foreclosure.

"I'm not going to let someone shut it down until they've had that opportunity," Sargis said.

The bank has taken the position, meanwhile, that, regardless of the ultimate outcome for the golf course, it believes the Nemees will be unable to ever pay back the loan.

The Feb. 9 hearing will take place at the Sacramento federal courthouse due to a scheduling conflict in Modesto.

The Nemees were not present

at the courthouse Wednesday and Elliott made her appearance via teleconference in the initial hearing on the civil rights suit filed in October.

That complaint alleges former interim county Community Development Director Brent Harrington, planner Shaelyn Strattan and others violated the Nemees' right to due process when they disallowed the commercial operation of the golf course.

Elliott said none of the defendants, including 20 John and Jane Does, named in the suit have been served with subpoenas.

When Sargis asked about the seeming lack of pursuit of that case by Foley, who did not appear in the courtroom or remotely, Gross responded that "I don't know how aggressively he's going to pursue that matter at this point."

"Why would this case be idling as opposed to being prosecuted by the plaintiffs?" Sargis asked.

"I have no idea, your honor," Gross replied.

He added that in his last discussion with Foley, he had told him that suit "was not a priority at this point in time."

"If he wants to pursue it,

we want to pursue it now," Elliott said, while noting the case seems to center around the same set of facts as did the agritourism case and that the longer there is a wait, the more difficult it will be for witnesses to recall the events of years past.

If no further progress is made by the plaintiffs in the civil rights suit, Sargis may dismiss the case at a 3:30 p.m. hearing on Feb. 22 in Modesto.

Contact Sean Janssen at sjanssen@uniondemocrat.com or 890-7741.

Judge holds off Trinitas bank seizure

Golf goes on as foreclosure sale put off until 2012

By Dana M. Nichols
Record Staff Writer

MODESTO — It appears that golf will continue until at least Jan. 27 at the troubled Trinitas golf course near Wallace, after a U.S. Bankruptcy Court judge Wednesday denied a bank's request to seize the property and sell it at auction.

Community Bank of San Joaquin had asked Judge Ronald Sargis to lift a stay that has been in place to prevent the foreclosure auction since 2009, when Trinitas owners Michael and Michelle Nemees filed for bankruptcy after the Calaveras County Board of Supervisors twice voted against measures that would have granted Trinitas legal status.

The golf course on 280 acres along Ospital Road was built in an agricultural preserve without permits. Sargis ruled in a recent trial that golf is not a legal form of agritourism in

Calaveras County, and thus the county can enforce zoning codes banning golf there.

Sargis said Wednesday he would sign that judgment, which requires the Nemees to halt the golf operation by Jan. 27.

Dennis Hauser, an attorney representing Community Bank of San Joaquin, noted that once golf stops, so, too, will the source of income the Nemees are presumably using to make partial payments to the bank. Hauser told Sargis that makes it urgent to allow the bank to finish the foreclosure auction to reduce its losses.

"This is a very small one-branch bank," Hauser said. "This is its largest loan," he said of the more than \$2.4 million the bank has lent the Nemees.

Hauser said the bank "is being crucified" by being unable to collect more than partial payments on what is owed.

Sargis was not entirely sympathetic and pointed out that the bank played a role in constructing an illegal golf course.

"Everybody knew what was being built out there was not in

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TRINITAS: Owners have filed civil rights suit against Calaveras

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compliance with the zoning," Sargis told Hauser.

Sargis did promise to modify the stay so that by Jan. 18, Community Bank of San Joaquin could begin the formal notices required to hold a foreclosure auction. Those notices take about three weeks, Hauser said.

Sargis said that will make it possible for him to reconsider the

bank's request for a foreclosure auction on Jan. 25, by which time he said he expects he will know if the Nemees plan to appeal their loss in the agritourism case and whether the U.S. 9th Circuit Court of Appeal will accept the case.

If that case goes to an appeal hearing, it could allow the Nemees to continue the Trinitas golf operation beyond the Jan. 27

stop date in Sargis' ruling.

The basic bankruptcy proceeding and the agritourism suit are just part of a maze of legal actions surrounding Trinitas. Also Wednesday the bankruptcy court held an initial status conference on a more recent lawsuit the Nemees filed in which they argue county officials violated their constitutional rights by denying the golf course.

Sargis scheduled the next status conference on that suit for Feb. 22 after attorney Ken Foley of San Andreas, who filed the civil rights suit for the Nemees, failed to appear for Wednesday's conference.

Contact reporter Dana M. Nichols at (209) 607-1361 or dnichols@recordnet.com. Visit his blog at recordnet.com/calaverasblog.

Trinitas' bank put on hold

By Alex George

Trinitas golf course will remain open until at least Jan. 27, after a U.S. Bankruptcy Court judge turned down a bank's request to immediately seize the property and sell it at auction.

Community Bank of San Joaquin requested Judge Ronald Sargis lift a stay that prohibits foreclosure on the property. In bankruptcy law, an automatic stay is an automatic injunction that prevents creditors from collecting debts from a debtor who has declared bankruptcy. Trinitas owners Michael and Michelle Nemees filed for bankruptcy in 2009, after the Calaveras County Board of Supervisors voted against granting their golf course legal status.

The golf course was built on 280 acres of agricultural land without proper permits. Despite the Nemees' claim that golf should qualify as agritourism, Judge Sargis ruled in November that golf is not a legal form of agritourism in Calaveras County.

Sargis said Wednesday he would sign a judgment that would require the Nemees to cease all golf operations by Jan. 27.

Dennis Hauser, an attorney representing Community Bank of San Joaquin, pointed out that once golf at Trinitas is halted, the

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Nemees will have no source of income to pay back bank loans. Hauser urged Sargis to lift the stay as quickly as possible, so the bank may move forward with a foreclosure auction that would help reduce its losses.

"It is a misstatement to say the bank is protected. That's untrue," Hauser said. "This is a very small one-branch bank, and this is its largest loan."

To date, the bank has loaned more than \$2.4 million to the Nemees. Hauser said the bank is financially handicapped by not being able to collect more than partial payments on money owed.

While Sargis said he was sympathetic to the bank's request, the bank played a role in helping finance an illegal golf course.

"It became clear that everyone in the world knew what was being built there was not in compliance with zoning," Sargis said.

Sargis said he would modify the stay, so that by Jan. 18, the Community Bank of San Joaquin could file notices of sale to begin a foreclosure auction; a process that could take up to three weeks. Sargis said this will give him time to consider the bank's request to hold a foreclosure auction.

According to the Nemees' attorney, Ken Foley of San Andreas, his clients plan on filing an appeal to Sargis' ruling on the grounds that golf constitutes agritourism. If the appeal is heard by the U.S. 9th Circuit Court of Appeals, it could permit the Nemees to continue operating Trinitas beyond Jan. 27.

In the proceedings Wednesday, Sargis said an unfavorable ruling is not grounds for an appeal.

"Show me where I did something wrong," Sargis said. "If you are intending to argue the same things, you are better off going over my head."

The Nemees deadline for appeal is 14 days after the judge has issued his final opinion. While Sargis has ruled in favor of the county, he has not yet published his final opinion.

The bankruptcy hearings and agritourism suit are not the only legal issues swirling around Trinitas. On Wednesday, the bankruptcy court held an initial conference on a lawsuit the Nemees filed in which they claim the county violated their constitutional rights by prohibiting the golf course's construction.

Sargis scheduled the next status conference on that suit for Feb. 22 after Foley, who initially filed the civil rights suit, failed to appear at Wednesday's conference.

Contact Alex George at ageorge@calaverasenterprise.com.

THE *Valley Springs* NEWS

Trinitas' days numbered unless appeal is successful

By Nick Baptista

Barring a successful appeal, U.S. Bankruptcy Court Ronald H. Sargis on Wednesday indicated he will hold firm on his tentative decision that as early as next month could lead to Mike and Michelle Nemees losing their Trinitas Golf Course.

The decision also grants Calaveras County officials authority to enforce zoning codes and bar golfing on the agricul-

turally zoned land.

Sargis indicated he's prepared to make his written Nov. 21 ruling final, which would start a 14-day clock for the Nemees' attorneys to file an appeal. He has set the date of Jan. 27, 2012, as when Community Bank of San Joaquin could begin foreclosure proceedings to gain possession of the land off Ospital Road and the county can halt golfing on the property.

He cautioned the Nemees' attorneys against a strategy of filing an appeal simply to delay the process. An appeal should be based on a serious mistake in judicial reasoning, he said, and not just a rehearing of the facts expecting a different outcome. To do so would "not fall on sympathetic ears."

In a related matter, the judge scheduled a status conference for Feb. 22 on a civil rights case

filed by the Nemees against the county and county officials. The Nemees contend the county and its employees violated their constitutional rights by denying approval of the golf course.

County Counsel Janis Elliott informed the court the defendants had not been served notices and the issues raised by the Nemees were already addressed in the earlier agri-tour-

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ism case the judge decided in favor of the county. San Andreas attorney Ken Foley, who is representing the Nemees in the

potential civil rights case, was not present at Wednesday's status conference.

The judge said the ball is in Foley's court to show cause why the lawsuit should not be dismissed.

A request by the bank to lift a

stay on the foreclosure proceeding was denied. The judge told bank attorney Dennis Hauser that as long as the Nemees make monthly payments on the property, the bank is adequately protected.

Hauser expressed a concern the property could be in limbo for a month as Jan. 27 approaches and appeals are made.

He said it is his understanding the bank's loan to the Nemees for the 280-acre Trinitas property is the largest loan in the bank's portfolio and the bank is being "crucified" by regulators.

The bank is not adequately protected, Hauser said, and seriously needs relief or it "will have a problem down the road with regulators."

Sargis said he would modify the stay so the bank on or about Jan. 18 could begin recording

and publishing formal notices required under state law to hold a foreclosure auction.

The hearing on the bank's motion was continued to 9:30 a.m. Feb. 9 in the Sacramento Bankruptcy Court.

The Nemees sought financial relief under Chapter 11 of the United States Bankruptcy Code in 2009 after the Calaveras County Board of Supervisors turned down a zoning change and subdivision proposal for their proposed golf course development, which would have included a clubhouse, lodge, restaurant and 13-home gated community.

Chapter 11 of the United States Bankruptcy Code permits reorganization under the bankruptcy laws of the United States. It is questionable whether the Nemees can continue with a reorganization plan if they lose the golf course.

Judge doubts lawyer's defense

Foley rejects claims he has too much going on

By **Dana M. Nichols**

Record Staff Writer

December 11, 2011 12:00 AM

SAN ANDREAS - Judges are questioning Attorney Ken Foley's handling of high-profile cases, including litigation surrounding the Trinitas golf course and the homicide defense of James Allison Livezey.

On Dec. 2, Calaveras Superior Court-assigned Judge Thomas A. Smith suggested Foley wasn't devoting enough time to Livezey's defense. And on Wednesday, U.S. Bankruptcy Court Judge Ronald Sargis questioned why Foley had made no further progress on a \$12 million civil rights lawsuit he filed in October on behalf of Trinitas golf course owners Michael and Michelle Nemees.

Foley - Calaveras County's most prominent private attorney - rejected the suggestion that he isn't serving his clients well.

"I don't know what he was talking about," Foley said in response to Smith's remark.

Over the years, Foley has represented a number of people accused of murder as well as other well-known clients such as former county water district director Guy Meyers and the late Dale Buller, a millionaire buffalo rancher whose 600-weapon gun collection was seized in 2008.

Foley is known for his humor and for his vigorous use of procedural tactics. Because of tension between Foley and Calaveras Superior Court Presiding Judge Douglas Mewhinney, Foley routinely uses California Code of Civil Procedure section 170.6 to have his cases moved out of Mewhinney's courtroom.

That code section allows attorneys to request a different judge because they believe the judge scheduled to hear a matter is biased.

Yet even the other judges sometimes seem to lose patience.

On Dec. 2, Livezey appeared in court. In part, the hearing was intended to determine if Livezey's trial on homicide charges would begin as planned the following Wednesday. Livezey's appearance was originally scheduled for earlier in the week, but had been rescheduled once already because Foley was out of town.

Foley again did not appear at the scheduled time the morning of Dec. 2. David Singer, an attorney in Foley's law practice, told Judge Smith that Foley was handling another matter in a court in Sonora. Smith pushed the Livezey appearance back to late in the afternoon.

Foley arrived at the Calaveras courtroom in the afternoon and asked to move Livezey's trial date. Smith pointed out that Foley had not filed a motion as required.

Foley offered a variety of reasons for that failure, including his work elsewhere.

"I have a brief due in federal court today," Foley said. That's when Smith suggested that Livezey deserved more attention.

"Maybe you are just too busy and accepting too many cases Mr. Foley," Smith said.

Foley said he had just returned from vacation. "I was gone for 10 days."

Federal Bankruptcy Judge Sargis, hearing a number of different Trinitas-related matters, had similar questions.

Paperwork that Foley filed recently in connection to Trinitas said that he might ask for a new trial on the question of whether golf is agritourism. Sargis ruled against the Nemees, a result that if not overturned on appeal will allow county officials to close the golf operation.

Foley did not appear either physically or by phone that day in the Bankruptcy Court to hear Sargis criticize the planned request for a new trial.

"Show me where I've clearly done something wrong ... as opposed to shooting from the hip," Sargis said.

A few minutes later, Sargis asked why Foley had made no progress on the suit in which the Nemees seek \$12 million from Calaveras County officials for allegedly violating their civil rights.

"Why would this case be idling versus being prosecuted by the plaintiffs?" Sargis asked.

Malcolm Gross, an attorney representing the Nemees in bankruptcy-related matters, was present but could not answer Sargis' question. "I have no idea, your honor," Gross said.

Sargis warned that those representing Trinitas should not simply file a flurry of groundless motions in order to delay his ruling, which orders golf at Trinitas to stop by Jan. 27.

Foley, interviewed at his office Thursday morning, denied that his tactics are intended to stall the demise of Trinitas.

"Of course it's not delay," Foley said. "That's a \$7 million investment sitting there," he said in reference to the golf course on Ospital Road and the reasons for trying to fully legalize the operation.

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