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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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

NO. CIV. 2:12-1422 WBS EFB

Plaintiffs,

ORDER RE: MOTION FOR  
PRELIMINARY INJUNCTION

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.

\_\_\_\_\_  
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,

1 Cross-Defendants.  
2 \_\_\_\_\_/

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

9 I. Factual and Procedural Background

10 Plaintiffs initiated this action in state court against  
11 defendants Shasta County, the Board of Supervisors of the County  
12 of Shasta, and Shasta County officials Russ Mull, Leslie Morgan,  
13 Les Baugh, and Glen Hawes. In their Third Amended Complaint,  
14 plaintiffs allege claims against Shasta County and its employees  
15 under 42 U.S.C. § 1983. Plaintiffs' claims arise from  
16 defendants' alleged wrongful interference with plaintiffs' use of  
17 two pieces of real property. The first is a 670-acre ranching  
18 property identified by assessor's parcel numbers ("APN")  
19 093-260-025, 093-260-024, and 093-260-023 ("ranch property"), and  
20 the second is a 1,500-acre property where plaintiffs operate  
21 Anselmo Vineyards, located at 28740 Inwood Road in Shingletown,  
22 APN 094-050-021 ("winery property").

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

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

12 In their Third Amended Complaint, plaintiffs allege  
13 that county officials engaged in a variety of wrongful conduct  
14 that interfered with plaintiffs' use of their property, such as  
15 issuing wrongful notices of grading violations, filing false  
16 reports with various officials and agencies, requiring an  
17 unnecessary environmental impact study, and interfering with  
18 plaintiffs' development of their winery. (Third Am. Compl. ¶¶  
19 23, 27, 30, 40, 44-58) (Docket No. 1, Ex. B.)

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

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

1 property;

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

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

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

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

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

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

28 ///

1 II. Discussion

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

13 "The concept of a nuisance per se arises when a  
14 legislative body with appropriate jurisdiction, in the exercise  
15 of the police power, expressly declares a particular object or  
16 substance, activity, or circumstance, to be a nuisance." Beck  
17 Dev. Co. v. S. Pac. Transp. Co., 44 Cal. App. 4th 1160, 1206 (3d  
18 Dist. 1996). "[T]o be considered a nuisance per se the object,  
19 substance, activity or circumstance at issue must be expressly  
20 declared to be a nuisance by its very existence by some  
21 applicable law." Id. at 1207. To establish nuisances per se,  
22 "no proof is required, beyond the actual fact of their  
23 existence." City of Costa Mesa v. Soffer, 11 Cal. App. 4th 378,  
24 382 (4th Dist. 1992); accord City of Claremont v. Kruse, 177 Cal.  
25 App. 4th 1153, 1166 (2d Dist. 2009) (rejecting defendants'  
26 argument that the city needed to show that defendants' conduct  
27 caused "actual harm" because such a showing is not required to  
28 prove a nuisance per se).

1 California Government Code section 38771 provides, "By  
2 ordinance the city legislative body may declare what constitutes  
3 a nuisance." Here, Shasta County Code section 8.28.010 provides,  
4 "Every violation of any regulatory or prohibitory provision  
5 contained in Division 4 or 18 of the Food and Agricultural Code  
6 of the State of California, or of this Code, is expressly  
7 declared to be a public nuisance." When municipalities have  
8 enacted similar ordinances, California courts have found  
9 nuisances per se when defendants failed to comply with various  
10 provisions of the municipal codes. See, e.g., Kruse, 177 Cal.  
11 App. 4th at 1165-66 (failure to obtain a business license and tax  
12 certificate); City of Corona v. Naulls, 166 Cal. App. 4th 418,  
13 427 (4th Dist. 2008) (failure to obtain Department of Planning  
14 approval and zoning variance).

15 A. Grading on the Ranch Property

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

1           In his October 15, 2007, Inspection Report, Andrew  
2 Jensen of the Central Valley Regional Water Quality Control Board  
3 concluded that "the majority of the site had been graded" and  
4 that "there was a small tributary of South Fork Bear Creek that  
5 had been completely graded with heavy equipment." (Jensen Dep.  
6 Ex. 35; see also Pisano Decl. Ex. 2 (Docket No. 50-1).) Kevin  
7 Westlake, a Senior Environmental Health Specialist for Shasta  
8 County also toured the ranch property on November 29, 2007, and  
9 "observed that there had been recent grading." (Westlake Decl. ¶  
10 5 & Ex. 4 (Docket No. 50-11).) Shasta County has thus submitted  
11 evidence making it likely that plaintiffs conducted grading near  
12 the South Fork Bear Creek on their ranch property and it is  
13 undisputed that plaintiffs did not obtain a grading permit.

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

1 "Bear Creek proper and then ultimately into the Sacramento  
2 River," thus plaintiffs' grading activities "potentially could  
3 impact below because everything flows downstream." (Jensen Dep.  
4 68:1-23 (Pisano Decl. Ex. 1).)

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

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



1 (C).

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

11           The Ninth Circuit has explained that, "[a]s a general  
12 rule, '[p]ast wrongs are not enough for the grant of an  
13 injunction'; an injunction will issue only if the wrongs are  
14 ongoing or likely to recur." F.T.C. v. Evans Prods. Co., 775  
15 F.2d 1084, 1087 (9th Cir. 1985) (quoting Enrico's, Inc. v. Rice,  
16 730 F.2d 1250, 1253 (9th Cir. 1984)) (second alteration in  
17 original); cf. Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.,  
18 23 F.3d 1508, 1511 (9th Cir. 1994) ("Federal courts are not  
19 obligated to grant an injunction for every violation of the law.  
20 . . . The plaintiff must make a showing that a violation of the  
21 [Endangered Species Act] is at least likely in the future.").  
22 Accordingly, because there is no evidence suggesting that  
23 plaintiffs are currently grading or intend to grade the ranch  
24 property in the future, the court will deny Shasta County's  
25 motion for a preliminary injunction relating to plaintiffs'  
26 grading on their ranch property.

27           B.   Construction and Conversion of Structures on the Winery  
28               Property

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

10 Shasta County has submitted sufficient evidence to show  
11 it can likely prove that plaintiffs performed the following work  
12 on the winery property without obtaining a building permit: 1)  
13 construction of an event tent, (Simon Decl. ¶ 30; Bellinger Decl.  
14 ¶¶ 4, 7 & Exs. 23 & 25 (Docket No. 50-22)); 2) conversion of a  
15 horse barn into offices for the winery, (Simon Decl. ¶¶ 20, 30;  
16 Bellinger Decl. ¶¶ 4, 7 & Exs. 23, 25); 3) conversion of part of  
17 the winery structure into a restaurant and dining room, (Simon  
18 Decl. ¶ 19; Bellinger Decl. ¶ 7 & Ex. 25); 4) construction of a  
19 wood structure next to the winery building, (Simon Decl. ¶ 30;  
20 Bellinger Decl. ¶¶ 4, 7, 9 & Exs. 23, 25);<sup>2</sup> and 5) construction of  
21  
22

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23 <sup>1</sup> Shasta County also cites to sections of the California  
24 Building Code as giving rise to plaintiffs' violations. However,  
25 Shasta County Code section 8.28.010 declares a nuisance per se  
26 for violations of "any regulatory or prohibitory provision  
of the State of California, or of this Code." It does not appear  
to extend to violations of the California Building Code.

27 <sup>2</sup> Shasta County indicates that the wood structure appears  
28 to house recreational vehicles. At oral argument, plaintiffs'  
counsel indicated that it houses portable restrooms.

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

8 Plaintiffs do not dispute that they completed the work  
9 without obtaining building permits.<sup>5</sup> Shasta County is thus likely

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10  
11 <sup>3</sup> There is an ongoing dispute between the parties about  
12 whether the chapel is for only private use or is available for  
13 public uses, such as weddings and communions. In his  
14 declaration, Anselmo states that the chapel "is not utilized for  
15 weddings or public use associated with the winery or restaurant"  
16 and is only used by himself "and occasional guests and visiting  
17 priests and nuns." (Anselmo Decl. ¶ 8 (Docket No. 86).)  
18 Plaintiffs also submitted a letter from the Catholic Bishop of  
19 Sacramento indicating permission is not granted for mass on  
20 Sundays or for "weddings, baptisms and other sacraments." (Id.  
21 Ex. G.)

22 <sup>4</sup> Shasta County also bases its nuisance per se claims on  
23 plaintiffs' failure to obtain certificates of occupancy for the  
24 five structures. As authority for the requirement for a  
25 certificate of occupancy, however, Shasta County cites only to  
26 Shasta County Code subsections 16.04.150(B) and 16.04.160(A).  
27 Subsection 16.04.150(B) addresses a change in occupancy after a  
28 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 . . . .").

25 <sup>5</sup> Plaintiffs applied for permits for the restaurant  
26 conversion and chapel, but did not submit additionally requested  
27 information and thus the permits were never issued. (See Simon  
28 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

1 to prevail on its nuisance per se claims based on plaintiffs'  
2 violations of Shasta County Code subsections 16.04.150(A) and  
3 16.04.150(A).<sup>6</sup>

4           According to Shasta County, a finding that it is likely  
5 to prevail on its nuisance per se claims is sufficient, in  
6 itself, to grant its motion for a preliminary injunction. Shasta  
7 County relies on the California Supreme Court's holding that,  
8 "[w]here a governmental entity seeking to enjoin the alleged  
9 violation of an ordinance which specifically provides for  
10 injunctive relief establishes that it is reasonably probable it  
11 will prevail on the merits, a rebuttable presumption arises that  
12 the potential harm to the public outweighs the potential harm to  
13 the defendant." IT Corp. v. Cnty. of Imperial, 35 Cal. 3d 63, 72  
14 (1983). If, however, "the defendant shows that it would suffer  
15 grave or irreparable harm from the issuance of the preliminary  
16 injunction, the court must then examine the relative actual harms  
17 to the parties." Id.

18           Courts have held, however, that federal, not state,  
19 \_\_\_\_\_  
20 restrooms.

21           <sup>6</sup> Shasta County also contends that the operation of the  
22 restaurant and chapel are not allowable uses under its zoning  
23 laws, plaintiffs' conditional use permit for a "medium winery,"  
24 and plaintiffs' Williamson Act contract. Because the court finds  
25 that Shasta County is likely to prevail on its nuisance per se  
26 claims based on plaintiffs' failure to obtain building permits,  
27 it need not address the other theories underlying its nuisance  
28 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.

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

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

1 Unified Sch. Dist., 731 F. Supp. 947, 956 (E.D. Cal. 1990).  
2 After concluding that a plaintiff is entitled to seek a  
3 preliminary injunction, however, courts often rely on the federal  
4 standard in exercising their discretion to determine whether to  
5 grant an injunction. See Certified Restoration Dry Cleaning  
6 Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 541 (6th Cir. 2007)  
7 (“[W]e apply our own procedural jurisprudence regarding the  
8 factors to consider in granting a preliminary injunction . . .  
9 .”); Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir.  
10 1990) (“[T]he doctrine of Erie R.R. Co. v. Tompkins, 304 U.S. 64  
11 (1938), does not apply to preliminary injunction standards . . .  
12 .”); United Nat’l Maint., Inc. v. San Diego Convention Ctr.  
13 Corp., Civ. No. 07-2172 AJB, 2012 WL 3861946, at \*4 (S.D. Cal.  
14 Sept. 5, 2012) (applying state law to determine whether an  
15 injunction is an available remedy on plaintiff’s claim, but then  
16 applying “federal law principles in determining whether to  
17 exercise discretion to grant or deny an injunction that is  
18 available under state law”); Travelers Cas. & Sur. Co. of Am. v.  
19 W.P. Rowland Constructors Corp., Civ. No. 12-00390 PHX FJM, 2012  
20 WL 1718630, at \*2 (D. Ariz. May 15, 2012); Toschi v. Cnty. of San  
21 Mateo, Civ. No. 07-3625 MMC, 2009 WL 982136, at \*12 n.13 (N.D.  
22 Cal. Apr. 13, 2009); Sullivan By & Through Sullivan, 731 F. Supp.  
23 at 956 (“[F]ederal law provides the standards governing  
24 plaintiff’s motion for preliminary injunctive relief with respect  
25 to both her federal and state law claims.”); Kaiser Trading Co.  
26 v. Associated Metals & Minerals Corp., 321 F. Supp. 923, 931 n.14  
27 (N.D. Cal. 1970) (“[T]he best approach would be to look to state  
28 law to determine if a preliminary injunction is permissible . . .

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

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

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

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

11 Winter, 555 U.S. at 22.

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

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



1 80. The Ninth Circuit further explained, "The use of  
2 presumptions or categorical rules in issuing injunctive relief  
3 would constitute 'a major departure from the long tradition of  
4 equity practice,' and 'should not be lightly implied.'" Id. at  
5 979 (quoting eBay Inc., 547 U.S. at 391).

6 Silver Sage Partners, Ltd. v. City of Desert Hot  
7 Springs, 251 F.3d 814 (9th Cir. 2001), also does not entitle  
8 Shasta County to a presumption of irreparable harm. In Silver  
9 Sage, the Ninth Circuit recognized that it has "held that where a  
10 defendant has violated a civil rights statute, we will presume  
11 that the plaintiff has suffered irreparable injury from the fact  
12 of the defendant's violation." Silver Sage Partners, Ltd. 251  
13 F.3d at 827 (citing cases where this presumption has been applied  
14 to claims under Title VII and the Fair Housing Act and for  
15 discrimination) (emphasis added); see also Antoninetti v.  
16 Chipotle Mexican Grill, Inc., 643 F.3d 1165, 1175-76 (9th Cir.  
17 2010) (discussing Silver Sage in the context of an ADA case, but  
18 declining to decide whether the ADA "authorizes a district court  
19 to deny injunctive relief after finding a violation of the Act").  
20 Here, Shasta County's nuisance per se claims are not based on  
21 violations of civil rights and it would be misguided to transport  
22 presumptions developed in civil rights cases to permitting and  
23 zoning code violations.

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

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

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

20 Nonetheless, even if Shasta County is entitled to a  
21 presumption of irreparable harm under IT Corp. or Nutri-cology,  
22 the presumption is rebuttable. See IT Corp., 35 Cal. 3d at 72  
23 (holding that the presumption is rebuttable); Nutri-cology, Inc.,  
24 982 F.2d at 398 (discussing the district court’s application of a  
25 rebuttable presumption). Here, plaintiffs have shown that they  
26 are likely to suffer sufficient irreparable harm to rebut a  
27 presumption of irreparable harm in favor of Shasta County. If  
28 Shasta County’s motion for a preliminary injunction is granted,

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

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

24 “The purpose of a preliminary injunction is merely to  
25 preserve the relative positions of the parties until a trial on  
26 the merits can be held.” Univ. of Tex. v. Camenisch, 451 U.S.  
27 390, 395 (1981). “A preliminary injunction . . . is not a  
28 preliminary adjudication on the merits but rather a device for

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

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


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

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

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

15 IT IS FURTHER ORDERED THAT a Status (Pretrial  
16 Scheduling) Conference is set in this matter on November 26,  
17 2012, at 2:00 p.m. in Courtroom No. 5. The parties shall submit  
18 a joint status report no later than November 13, 2012, that  
19 proposes deadlines for the close of discovery and filing of  
20 dispositive motions and dates for the pretrial conference and  
21 trial.

22 DATED: October 24, 2012

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24 

25 WILLIAM B. SHUBB  
26 UNITED STATES DISTRICT JUDGE  
27  
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