

\*\*E-Filed 1/3/07\*\*

NOT FOR CITATION

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

HAIR CLUB FOR MEN, LLC,

Plaintiff,

v.

RCDC CORPORATION, et al.,

Defendants.

Case Number C 06-7842 JF (PVT)

ORDER DENYING APPLICATION  
FOR TRO AND SETTING HEARING  
ON MOTION FOR PRELIMINARY  
INJUNCTION

[re: doc. no. 2]

On December 22, 2006, Plaintiff Hair Club For Men, LLC ("Hair Club") filed the instant action against Defendants RCDC Corporation ("RCDC"), its principal Robert Clark ("Clark"), and its former employee Silvia Herrera ("Herrera"), alleging claims for breach of contract, misappropriation of trade secrets and unfair competition. On June 27, 2005, Hair Club, RCDC and Clark entered into an Asset Purchase Agreement under which Hair Club purchased certain assets from RCDC in connection with retail non-surgical hair restoration and replacement. Among the purchased assets were certain client contracts and client lists. The purchase price depended in part upon how many of RCDC's clients transferred their business to Hair Club in the year following the inception of the agreement. Among other things, RCDC and Clark agreed not

1 to engage in the “Purchased Business” – i.e., the business of non-surgical hair restoration –  
2 within twenty miles of any Hair Club establishment for a period of two years. The agreement  
3 also was contingent upon two “key employees” of RCDC going to work for Hair Club. One of  
4 these employees, Herrera, began working for Hair Club in June 2005. Herrera executed a non-  
5 disclosure, non-competition and non-solicitation agreement with Hair Club which provided that  
6 in the event she left Hair Club she would not engage in the business of hair replacement within  
7 ten miles of a Hair Club facility for a period of two years.

8 In November 2006, Herrera resigned from her position at Hair Club. A number of Hair  
9 Club customers who had made appointments with Herrera subsequently cancelled their  
10 appointments and stated that they would not be returning to Hair Club for services. Hair Club  
11 asserts that Herrera’s car has been seen outside RCDC’s place of business on several occasions,  
12 and that three of Hair Club’s former clients that had been serviced by Herrera have been seen at  
13 RCDC’s business premises. Hair Club asserts that Herrera and RCDC are violating their non-  
14 compete agreements and using Hair Club’s proprietary information to service clients at the  
15 RCDC facility.

16 Along with its complaint, Hair Club filed an application for a temporary restraining order  
17 and a motion for preliminary injunction, seeking *inter alia* to enjoin RCDC from employing  
18 Herrera; to enjoin RCDC, Clark and Herrera from servicing any of Hair Club’s non-surgical hair  
19 restoration clients; and to enjoin Herrera from engaging in the business of hair replacement or  
20 hair restoration.

21 Defendants filed opposition on December 28, 2006, asserting that RCDC, Clark and  
22 Herrera are entitled to provide services *other* than the non-surgical hair replacement services  
23 covered by the agreements at issue, that such services include skincare and related services, and  
24 that there is no evidence that the clients who were seen at RCDC’s premises were there for  
25 prohibited services rather than skincare or other services not prohibited by the parties’  
26 agreements. Defendants also argue that the non-competition agreement entered into by Herrera  
27 is unenforceable and that in any event she has not violated that agreement. Finally, Defendants  
28

1 assert that it is Hair Club that has breached the parties' agreements by failing to solicit business  
2 from the client list purchased from RCDC until eight months after transfer of the list, thus  
3 depressing the purchase price of the RCDC assets.

4 The standard for issuing a TRO is the same as that for issuing a preliminary injunction.  
5 *Brown Jordan International, Inc. v. Mind's Eye Interiors, Inc.*, 236 F. Supp.2d 1152, 1154 (D.  
6 Hawaii 2002); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F.Supp. 1320,  
7 1323 (N.D. Cal. 1995). In the Ninth Circuit, a party seeking a preliminary injunction must show  
8 either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the  
9 existence of serious questions going to the merits and the balance of hardships tipping in the  
10 movant's favor. *Roe v. Anderson*, 134 F.3d 1400, 1401-02 (9th Cir. 1998); *Apple Computer, Inc.*  
11 *v. Formula Int'l, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). These formulations represent two  
12 points on a sliding scale in which the required degree of irreparable harm increases as the  
13 probability of success decreases. *Roe*, 134 F.3d at 1402.

14 Based upon the record currently before it, the Court concludes that Hair Club has not  
15 demonstrated a likelihood of success on the merits. While Defendants did enter into various  
16 non-compete agreements, it is not clear from the evidence presently in the record that Defendants  
17 are violating those agreements. Moreover, Hair Club has not demonstrated that it will be  
18 irreparably injured if Defendants are permitted to continue operations pending a hearing on Hair  
19 Club's motion for preliminary injunction. Given that Hair Club is a much larger business than  
20 RCDC, the Court is not persuaded that the equities favor granting injunctive relief at this time.  
21 Because of the serious nature of Hair Club's allegations, however, the Court will set a hearing on  
22 Hair Club's motion for preliminary injunction so that it may hear argument for both sides before  
23 issuing a ruling based upon a more complete record.

**ORDER**

- (1) Plaintiff's application for TRO is DENIED;
- (2) Plaintiff's motion for preliminary injunction is set for hearing on January 26, 2007;
- (3) Each side may file a supplemental brief on or before January 17, 2007 and a supplemental reply brief on or before January 23, 2007.

DATED: January 3, 2007

  
JEREMY FOGEL  
United States District Judge

1 This Order was served on the following persons:

2  
3 Steven G. Cohen steven.cohen@dlapiper.com, donna.penning@dlapiper.com

4 Margaret Anne Crawford maggie.crawford@dlapiper.com, larry.landry@dlapiper.com

5 Martin Daniel Dermer  
6 Joseph David Dermer  
7 Dermer Law Firm  
15720 Winchester Blvd., Suite 1  
Los Gatos, CA 95030