



1 I. BACKGROUND<sup>3</sup>

2 Established in 1990, Plaintiff REDC is a national real estate auction company that works  
3 with residential builders and developers, as well as banks and lenders, to provide a means by  
4 which foreclosed properties can be auctioned to the general public. (Frieden Decl. ¶¶ 2-3.) REDC  
5 claims to have developed a proprietary and highly successful business model regarding the  
6 auction process. Specifically, "REDC [has] developed time-tested processes for marketing . . .  
7 properties through its website, television commercials, radio commercials[,] print ads, and e-  
8 marketing. REDC [has] also developed a unique . . . methodology with respect to how it conducts  
9 its auctions, sells the properties, and facilitates the closings. (Frieden Decl. ¶¶ 4-6.)

10 In April 2007, Defendant Riemann, a principal at Defendant J.C.R., introduced REDC to a  
11 purported potential investor. (Frieden Decl. ¶ 14.) REDC had prior used the services of J.C.R. to  
12 produce television commercials. (Frieden Decl. ¶¶ 8-12.) REDC subsequently disclosed, in  
13 confidence, significant details about its business operations to the investor, Riemann, and J.C.R.  
14 (Frieden Decl. ¶¶ 15-16.) No offer was ultimately made to purchase REDC. (Frieden Decl. ¶ 16.)

15 In November 2007, Defendants Campbell and Watson met with Joe Tomkinson, chairman  
16 of Impac Mortgage Holdings, Inc. ("Impac"), to discuss the possibility of making a significant  
17 investment in Impac. (Tomkinson Decl. ¶ 3.) Impac is REDC's primary source of foreclosed  
18 properties to be sold at auction, and acts in a consulting capacity regarding REDC's business  
19 activities. (Tomkinson Decl. ¶ 2.) During the meeting, confidential and proprietary information  
20 concerning REDC's business operations was disclosed. (Tomkinson Decl. ¶ 7.) No offer was  
21 ultimately made to invest in Impac. (Tomkinson Decl. ¶ 10.)

22 In January 2008, REDC learned that J.C.R. had started a competitor real estate auction  
23 company, Defendant NHA, and that Campbell and Watson were principals in NHA. (Frieden Decl.  
24 ¶¶ 16, 22.) NHA held its first auction in February 2008. (Frieden Decl. ¶ 25.) According to REDC,  
25 NHA has copied REDC's business model. Specifically, NHA is operating a website substantially  
26 similar to REDC's website, running television commercials substantially similar to those produced

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28 <sup>3</sup> The following facts are culled solely from REDC's filings.

1 by REDC, and conducting auctions in a manner substantially similar to how auctions are  
2 conducted by REDC.

3 On February 27, 2008, REDC filed suit against NHA, J.C.R., Riemann, Campbell, and  
4 Watson (collectively, "Defendants"), alleging: (1) copyright infringement in violation of 17 U.S.C.  
5 § 501 against NHA, J.C.R., and Riemann; (2) unfair business competition in violation of California  
6 Business and Professions Code § 17200 against Defendants; (3) false or misleading advertising  
7 under 15 U.S.C. § 1125 against NHA, J.C.R., and Riemann; (4) false or misleading advertising  
8 in violation of California Business and Professions Code § 17500 against NHA, J.C.R., and  
9 Riemann; (5) breach of confidence against J.C.R., Riemann, Campbell, and Watson; (6)  
10 misappropriation of trade secrets against J.C.R., Riemann, Campbell, and Watson; (7) fraud  
11 (intentional misrepresentation) against Riemann, J.C.R., Campbell, and Watson; (8) fraud  
12 (concealment) against Riemann, J.C.R., Campbell, and Watson; (9) breach of implied contract  
13 against Riemann, J.C.R., Campbell, and Watson; and (10) unjust enrichment and imposition of  
14 constructive trust against Defendants.

15 Concurrently with the Complaint, REDC has filed the instant Ex Parte Application. REDC  
16 seeks a temporary restraining order, and ultimately, a preliminary injunction, enjoining NHA,  
17 J.C.R., and Riemann from using REDC's copyrighted works, disseminating false or misleading  
18 advertising, and conducting auctions of real property based on REDC's business plan. (EPA 1.)<sup>4</sup>

19 II. DISCUSSION

20 Under Federal Rule of Civil Procedure ("Rule") 65(b), a temporary restraining order ("TRO")  
21 may be granted "without written or oral notice to the adverse party or its attorney only if: (A)  
22 specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable  
23 injury, loss, or damage will result to the movant before the adverse party can be heard in  
24 opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and  
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28 <sup>4</sup> More specifically, REDC seeks to enjoin twenty one separate activities that fall within the  
ambit of one of these three broad categories. (See Proposed TRO Order.)

1 the reasons why it should not be required."<sup>5</sup> The circumstances justifying the issuance of an ex  
2 parte TRO are extremely limited. See *Reno Air Racing, Ass'n v. McCord*, 452 F.3d 1126, 1131  
3 (9th Cir. 2006) (citing *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 438-39  
4 (1974) ("[O]ur entire jurisprudence runs counter to the notion of court action taken before  
5 reasonable notice and an opportunity to be heard has been granted both sides of a dispute."). The  
6 Court finds that the instant case does not present an exception to this general rule, as REDC has  
7 failed to clearly demonstrate that the alleged threat of irreparable harm is sufficiently immediate  
8 to justify emergency relief.

9 While citing to Rule 65(b),<sup>6</sup> REDC applies the following standard in support of its argument:

10 To obtain injunctive relief, the movant must demonstrate either: (1) a combination  
11 of probable success on the merits and the possibility of irreparable harm, or (2) that  
12 serious questions are raised as to the merits and that the balance of hardships tips  
13 in its favor.

14 *Dep't of Parks & Recreation v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1123 (9th Cir. 2006). The  
15 above standard applies to motions for preliminary injunctions. While the Ninth Circuit has  
16 previously stated that this standard is "substantially identical" to that applied when a TRO is  
17 sought, see *Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir.  
18 2001), a more recent Ninth Circuit decision suggests a key difference.

19 In *Earth Island Institute v. United States Forest Service*, 442 F.3d 1147 (9th Cir. 2006), the  
20 Ninth Circuit found that the district court had applied the incorrect legal standard on a motion for  
21 preliminary injunction in denying relief on the ground that "'immediate and irreparable' injury had  
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23 <sup>5</sup> REDC's attorney has submitted a declaration stating that, on March 3, 2008 – the day  
24 the Ex Parte Application was filed – notice was provided to Defendants.

25 <sup>6</sup> REDC references the language of Rule 65(b), but mistakenly cites Rule 65(a) and Rule  
26 65(c). Rule 65(b) is the proper rule in this instance. See *Tootsie Roll Indus., Inc. v. Sathers, Inc.*,  
27 666 F. Supp. 655, 657-58 (D. Del. 1987) ("Tootsie Roll has certified that counsel for Sathers was  
28 given notice of the instant action prior to its filing. Because Sathers . . . has had no opportunity to  
be heard, the Court will apply the procedure set forth in Rule 65(b) of the Federal Rules of Civil  
Procedure. Although by its terms that Rule applies when the adverse party has not received  
notice, its logic is applicable to the instant situation.").

1 not been shown." *Id.* at 1158. On a motion for preliminary injunction, where probable success on  
2 the merits has been demonstrated, a plaintiff need not show a "significant threat of irreparable  
3 injury." *Id.* at 1159. Rather, a plaintiff need only demonstrate the "mere possibility of irreparable  
4 injury." *Id.* This standard, however, is contrary to the standard set forth in Rule 65(b): the movant  
5 must "*clearly show that immediate and irreparable injury, loss, or damage will result* to the movant  
6 before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b) (emphasis added).

7 Here, REDC has failed to meet the Rule 65(b) standard. According to REDC, if a TRO is  
8 not issued and NHA is allowed to continue to hold auctions, REDC will suffer irreparable harm in  
9 two ways: (1) REDC's good will and reputation will diminish; and (2) banks and lenders will stop  
10 selling foreclosed properties.<sup>7</sup> The Court does not find such injury to be immediately irreparable.  
11 It is unlikely that REDC's well-established reputation, built up over seventeen years, will be  
12 irreparably diminished in the next three weeks. Furthermore, it is unlikely that REDC's access to  
13 foreclosed properties will be irreparably reduced during this time, especially considering that there  
14 is no risk that REDC's primary source of foreclosed properties, Impac, will confuse NHA with  
15 REDC.

16 Accordingly, the Court finds that a slight delay in ruling on REDC's request for injunctive  
17 relief, so as to allow the Defendants to be heard, is proper. While REDC may ultimately be entitled  
18 to a preliminary injunction, REDC is not presently entitled to a TRO.

### 19 III. RULING

20 For the foregoing reasons, REDC's Ex Parte Application for a TRO is DENIED.

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22 <sup>7</sup> Additionally, REDC argues that, in copyright cases, a likelihood of success on the merits  
23 raises a presumption of irreparable harm, *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1335  
24 (9th Cir. 1995), and that a similar presumption applies to claims under the California Business and  
25 Professions Code, although the authority cited in support of the latter position, *Vision v. Melville*,  
26 888 F.2d 609, 612 n.3 (9th Cir. 1989), does not appear to hold so broadly. Regardless, in both  
27 cases, such a presumption only applies for purposes of granting a preliminary injunction, not a  
28 TRO. In other words, the presumption is that irreparable harm will occur "prior to a full  
determination on the merits." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000);  
*see also Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990) (stating that the purpose of the  
preliminary injunction is to prevent an injury from occurring before trial). For purposes of the  
instant Application, however, the Court must find that irreparable harm will occur prior to a hearing  
on a preliminary injunction - i.e., *immediately*.

1 REDC may amend its current Application for purposes of seeking a preliminary injunction,  
2 or may stand on the Application as filed, which the Court will treat as a motion for a preliminary  
3 injunction. Any amended version must be filed on or before **March 14, 2008**. REDC need not  
4 submit additional declarations and supporting documents, and may reference all such documents  
5 already on file with the Court. Any opposition must be filed on or before **March 21, 2008**.<sup>8</sup> Any  
6 reply must be filed on or before **March 28, 2008**. The Court will notify the parties if it determines  
7 that an oral hearing is necessary.

8 IT IS SO ORDERED.

9  
10 March 7, 2008

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S. JAMES OTERO  
UNITED STATES DISTRICT JUDGE

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27 <sup>8</sup> NHA, J.C.R., and Riemann may stand on their current Oppositions, or file amended  
28 Oppositions. They may reference documents already on file with the Court or attach new  
documents in support of their Oppositions.