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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARTIN CRUZ HERNANDEZ,)	CASE NO. CV 08-06572 RGK (RZ)
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM AND ORDER RE
)	PLAINTIFF’S “CIVIL COMPLAINT
)	FOR INJUNCTIVE RELIEF”
CORRECTIONAL LIEUTENANT)	[filed Nov. 21, 2008]
RICOCO, ET AL.,)	
)	
Defendants.)	
_____)	

The Court construes Plaintiff’s November 21, 2008 “Civil Complaint For Injunctive Relief” as an *ex parte* motion seeking a temporary restraining order (TRO). The Court DENIES the application for the following reasons.

The *in forma pauperis* and *pro se* plaintiff, Martin Cruz Hernandez, is a federal prisoner at Lompoc. He commenced this *Bivens* action with a complaint filed on October 21, 2008, alleging that a guard, defendant Ricoco, beat him in June 2008 while Plaintiff was handcuffed, and that other defendants threatened to retaliate against Plaintiff if Plaintiff pursued litigation in response. The Clerk sent service-of-process-related forms to Plaintiff on November 7, 2008, but service of process is not yet perfected.

Plaintiff now seeks a TRO barring prison officials from transferring him. He explains that he fears a retaliatory transfer due to his litigation (and also due to a letter sent in August 28 calling for Ricoco to be prosecuted criminally). Any transfer, he speculates,

1 would keep him “from his legal paperwork for an indefinite time,” and, he further
2 speculates, would be undertaken with the purpose of interfering with his litigation.
3 Because no defendant yet has appeared or even has been served with process, this motion
4 is made on an *ex parte* basis.

5 The standard for granting a TRO is essentially identical to that used for
6 granting a preliminary injunction. *See* FED. R. CIV. P. 65(b); *City of Tenakee Springs v.*
7 *Block*, 778 F.2d 1402, 1407 (9th Cir. 1985). The Court must balance “the plaintiff’s
8 likelihood of success against the relative hardship to the parties.” *Clear Channel Outdoor*
9 *Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). The Ninth Circuit has
10 provided two sets of criteria for courts to consider. “Under the traditional criteria, a
11 plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of
12 irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships
13 favoring the plaintiff, and (4) advancement of the public interest (in certain cases)
14 Alternatively, a court may grant the injunction if the plaintiff demonstrates *either* a
15 combination of probable success on the merits and the possibility of irreparable injury *or*
16 that serious questions are raised and the balance of hardships tips sharply in his favor.”
17 *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (emphasis in
18 original) (citation and internal quotation marks omitted).

19 “These two formulations represent two points on a sliding scale in which the
20 required degree of irreparable harm increases as the probability of success decreases. They
21 are not separate tests but rather outer reaches of a single continuum.” *Id.* (citation and
22 internal quotation marks omitted). As a result, “the greater the relative hardship to the
23 party seeking the [temporary restraining order], the less probability of success must be
24 shown.” *Clear Channel*, 340 F.3d at 813 (internal brackets omitted).

25 Here, even if the Court generously assumes for the sake of discussion that
26 Plaintiff shows a strong likelihood of success on the merits, he asserts absolutely no
27 *irreparable* harm that may befall him absent issuance of a TRO. Plaintiff alleges that he
28 fears he may be transferred for retaliatory reasons, and that, if this occurs, he may be

1 separated temporarily from his legal papers. Such allegations simply do not indicate any
2 threat of irreparable harm. Should Plaintiff successfully plead and prove such allegations,
3 then his legal remedies, presumably including injunctive relief and possibly including
4 damages, will suffice.

5 If the prison's conduct, unrestrained by a TRO, somehow results in the
6 dismissal of a legal claim or other "actual injury," then Plaintiff may bring a collateral
7 action – a case within a case – asserting not only that his prior claims were meritorious, *i.e.*,
8 that Plaintiff was damaged as a result, but also that Defendants' alleged wrongdoing
9 constituted a denial of Plaintiff's right of access to the courts. The Court expresses no view
10 on the merits of such an action. Rather, the point here is that Plaintiff *would* have an
11 apparently adequate remedy if he proved his assertions, contrary to his implicit argument
12 that he will suffer *irreparable* harm if the Court issues no TRO.

13 Nor does the balance of hardships "tip[] sharply in [Plaintiff's] favor,"
14 particularly given the alacrity with which Plaintiff has proven capable of filing a lawsuit
15 and the current application for a TRO. This suggests that prison officials are not
16 preventing Plaintiff from accessing the Court, whether or not, as Plaintiff alleges, they
17 *might* improperly transfer him to another prison so as to burden his ability to litigate his
18 claims in the future.

19 For the foregoing reasons, Plaintiff's TRO application is DENIED.

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21 IT IS SO ORDERED.

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23 DATED: December 9, 2008

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R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE