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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GARY L. HARPOOL,

Plaintiff,

No. CIV S-10-1253 GGH P

vs.

M. BEYER, et al.,

Defendants.

ORDER

\_\_\_\_\_/

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Plaintiff filed a “motion of inquiry and request for TRO and preliminary injunction,” by application of the mailbox rule,<sup>1</sup> on August 10, 2010,<sup>2</sup> which was prior to the filing of this court’s order, on August 11, 2010, granting plaintiff’s request to proceed in forma pauperis but

<sup>1</sup> Pursuant to Houston v. Lack, 487 U.S. 266, 275-76, 108 S. Ct. 2379, 2385 (1988)(pro se prisoner filing is dated from the date prisoner delivers it to prison authorities). Stillman v. Lamarque, 319 F.3d 1199, 1201 (9<sup>th</sup> Cir. 2003)(mailbox rule applies to pro se prisoner who delivers habeas petition to prison officials for the court within limitations period); Douglas v. Noelle, 567 F.3d 1103, 1109 (9<sup>th</sup> Cir. 2009) (holding that “the Houston mailbox rule applies to § 1983 complaints filed by *pro se* prisoners”).

<sup>2</sup> The motion was filed in this court on August 13, 2010 and entered into the docket on August 16, 2010.

1 dismissing the complaint with leave to amend.

2 TRO

3 The purpose in issuing a temporary restraining order is to preserve the status quo  
4 pending a fuller hearing. The cases contain limited discussion of the standards for issuing a  
5 temporary restraining order due to the fact that very few such orders can be appealed prior to the  
6 hearing on a preliminary injunction. It is apparent, however, that requests for temporary  
7 restraining orders which are not ex parte and without notice are governed by the same general  
8 standards that govern the issuance of a preliminary injunction.<sup>3</sup> See New Motor Vehicle Bd. v.  
9 Orrin W. Fox Co., 434 U.S. 1345, 1347 n.2, 98 S. Ct. 359 (1977) (Rehnquist, J.); Los Angeles  
10 Unified Sch. Dist. v. United States Dist. Court, 650 F.2d 1004, 1008 (9th Cir. 1981) (Ferguson, J.  
11 dissenting); Century Time Ltd. v. Interchron Ltd., 729 F. Supp. 366, 368 (S.D.N.Y. 1990). In  
12 many cases the emphasis of the court is directed to irreparable harm and the balance of hardships  
13 because the merits of a controversy are often difficult to ascertain and adjudicate on short notice.

14 Preliminary Injunction Standard

15 “The proper legal standard for preliminary injunctive relief requires a party to  
16 demonstrate ‘that he is likely to succeed on the merits, that he is likely to suffer irreparable harm  
17 in the absence of preliminary relief, that the balance of equities tips in his favor, and that an  
18 injunction is in the public interest.’” Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9<sup>th</sup> Cir.  
19 2009), quoting Winter v. Natural Res. Def. Council, Inc., \_\_\_ U.S. \_\_\_, 129 S.Ct. 365, 374  
20 (2008).

21 A Ninth Circuit panel has found that post-Winter, this circuit’s sliding scale

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23 <sup>3</sup> To the extent that this is an ex parte motion for a TRO without notice, the undersigned  
24 notes that there are stringent requirements to be imposed under Fed. R. Civ. P. 65 for issuance of  
25 such an order, which plaintiff clearly has not met. Reno Air Racing Ass’n, Inc. v. McCord, 452  
26 F.3d 1126, 1131 (9<sup>th</sup> Cir. 2006). Rule 65(b)(1) permits issuance of a TRO without “notice to the  
adverse party or its attorney, only if: (A) specific facts in an affidavit or a verified complaint  
clearly show that immediate and irreparable injury...will result to the movant before the adverse  
party can be heard in opposition; and (B) the movant’s attorney certifies in writing any efforts  
made to give notice and the reasons why it should not be required.”

1 approach or “serious questions” test survives “when applied as part of the four-element *Winter*  
2 test.” Alliance for Wild Rockies v. Cottrell, No. 09-35756, 10855, 10865 (9<sup>th</sup> Cir. July 28, 2010)  
3 “In other words, ‘serious questions going to the merits,’ and a hardship balance that tips sharply  
4 toward the plaintiff can support issuance of an injunction, assuming the other two elements of the  
5 *Winter* test are also met.” Id.

6 In cases brought by prisoners involving conditions of confinement, any  
7 preliminary injunction “must be narrowly drawn, extend no further than necessary to correct the  
8 harm the court finds requires preliminary relief, and be the least intrusive means necessary to  
9 correct the harm.” 18 U.S.C. § 3626(a)(2).

#### 10 Discussion

11 Plaintiff asks for a TRO/preliminary injunction against all the defendants named  
12 within his original complaint as well as against the CDCR<sup>4</sup> based on additional evidence he  
13 submits with his motion. However, these exhibits, which consist of a handwritten letter, dated  
14 August 5, 2010, from plaintiff to Associate Warden Cappel, complaining about the actions of  
15 certain correctional officers while plaintiff was trying to conduct Men’s Advisory Council  
16 (MAC) business, and a memo dated February 18, 2010, regarding “MAC Access to Programs,”  
17 are hardly sufficient to serve as a basis for a preliminary injunction. Nor does plaintiff submit a  
18 properly supported affidavit demonstrating that he is likely to suffer irreparable harm in the  
19 absence of preliminary relief. Finally, at this time, as the complaint has been dismissed, albeit  
20 without prejudice, there are no colorable underlying allegations on which the court could make  
21 any assessment as to the likelihood of success on merits.

22 The motion will be vacated without prejudice to plaintiff’s filing a properly  
23 supported affidavit demonstrating that he is likely to suffer irreparable harm without a  
24 preliminary injunction. Such a motion should only be filed after plaintiff files a timely amended  
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26 <sup>4</sup> California Department of Corrections and Rehabilitation.

1 complaint, the court finds his allegations colorable, and defendants have been served.

2           Accordingly, IT IS ORDERED that plaintiff's motion for a TRO/preliminary  
3 injunction, filed on August 13, 2010 (docket # 10), is VACATED without prejudice, as set forth  
4 above.

5 DATED: August 18, 2010

/s/ Gregory G. Hollows

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7 GREGORY G. HOLLOWS  
8 UNITED STATES MAGISTRATE JUDGE

8 GGH:009  
9 harp1253.vac

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