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E-FILED: 7/9/07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JASON J. ADAMSKI, CHERYL A.
ADAMSKI,

Plaintiffs,

v.

PAMELA A. MARTIS, in her capacity as
garrison commander, Presidio of Monterey,
United States Army,

Defendant.

No. C-07-03307 RMW

ORDER DENYING APPLICATION FOR
TEMPORARY RESTRAINING ORDER AND
SETTING BRIEFING SCHEDULE AND
HEARING DATE FOR PRELIMINARY
INJUNCTION

Plaintiffs Jason and Cheryl Adamski request that this court grant a temporary restraining order preventing the enforcement of a bar letter issued by defendant Pamela Martis that bars plaintiff Jason Adamski from entering the Presidio of Monterey Base Complex, which includes the area where plaintiffs' home is located. The parties stipulated to a briefing schedule with a hearing on plaintiffs' motion for temporary restraining order set for July 6, 2007. Defendant Pamela Martis opposes the motion. The court has read the moving and responding papers and considered the argument of counsel. For the reasons set forth below, the court DENIES plaintiffs' motion for a temporary restraining order.

I. BACKGROUND

On March 1, 2007 plaintiffs, who are husband and wife, entered into a one-year lease for a

1 single family home within the boundaries of the Presidio of Monterey Annex and the Ord Military
2 Community. Compl. ¶ 5. Upon signing the lease, plaintiffs moved into and occupied the leased
3 property as their residence. *Id.* This housing community is primarily intended for members of the
4 military, but is also open to civilian residents. *Id.* Plaintiffs are both civilian residents of the
5 community. *Id.* ¶ 3. The housing community and parts of the surrounding areas were formerly the
6 Fort Ord Army Base. *Id.* ¶ 6. Portions of the former base have been conveyed to surrounding
7 municipalities or other entities. *Id.* However, the housing community in which plaintiffs reside,
8 although not physically barricaded from the surrounding areas, remains under Army command. *Id.*
9 According to plaintiffs, the areas under Army command are policed by civilian federal police
10 officers, not by military police. *Id.* The Parks at Monterey Bay, the entity leasing the property, is a
11 partnership among Clark Realty, Pinnacle Realty, the United States Army, and the United States
12 Navy pursuant to the Military Housing Privatization Act of 1996. *Id.* ¶ 5.

13 Plaintiff Jason Adamski was convicted in 1999 of "attempted gross sexual imposition" on a
14 minor in the state of Ohio. *Id.* ¶ 7. Based on that conviction, he is required to register as a sex
15 offender under California law. *Id.* He avers that he has complied with the registration requirements.
16 However, when completing the lease application and lease agreement with The Parks at Monterey
17 Bay, plaintiffs did not disclose Mr. Adamski's prior conviction or that he is required to register as a
18 sex offender under local laws. *Id.* In late April or early May 2007 another resident discovered that
19 Mr. Adamski is a registered sex offender and reported that fact to the landlord. The landlord
20 provided written notice to the residents of the community without identifying Mr. Adamski and
21 warned residents to avoid harassment of Mr. Adamski. *Id.*; Ex. A.

22 In their lease application, plaintiffs were asked the question "Have you or your secondary
23 applicant ever been convicted of a crime? If yes, list state." Plaintiffs answered the question in the
24 negative and both signed the application. In their declarations in support of their motion for
25 temporary restraining order, both plaintiffs state that they believed, in good faith, that they need not
26 have disclosed a conviction that is over seven years old in response to the question in the
27 application. Defendant Martis is a colonel on active duty in the United States Army and serves as
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1 garrison commander of the Presidio of Monterey, including the Presidio of Monterey Annex and the
2 Ord Military Community. *Id.* ¶ 4. On May 21, 2007 Martis, acting in her capacity as garrison
3 commander, sent a letter to Mr. Adamski stating, *inter alia*:

4 [E]ffective June 21, 2007, you are barred from the Presidio of Monterey Base
5 Complex, which consists of the Presidio of Monterey and the Ord Military
6 Community. Thereafter, you will not reenter or be found within the limits of the
7 Presidio of Monterey Base Complex at any time unless federal judicial authorities
8 or law enforcement personnel request your presence.

9 ***

10 This action is being taken because your residence in a military housing community
11 as a registered sex offender affects the good order and discipline of the military
12 community, which I am responsible for maintaining. You failed to indicate on your
13 rental application that you had been previously convicted of a felony sex offense, and
14 your presence is affecting the well-being of other residents in the military housing
15 community.

16 *Id.* at Ex. B. Plaintiffs aver that Martis's "bar letter" has effectively evicted Mr. Adamski from his
17 home and deprived him of the benefits of his one-year lease under threat of arrest and federal
18 criminal prosecution for trespass pursuant to 18 U.S.C. § 1382. *Id.* ¶ 7.

19 Plaintiffs complain that defendant's actions have deprived Mr. Adamski of his property
20 interest in a leasehold to his home and his right to associate with his wife and newborn daughter
21 while they continue to live in the leased property without due process and without compensation in
22 violation of the Fifth Amendment of the United States Constitution. Similarly, plaintiff Cheryl
23 Adamski has been deprived of her right to associate with her husband. Thus, plaintiffs seek
24 declaratory relief that defendant's directive violated their Fifth Amendment rights and injunctive
25 relief restraining defendant from enforcing the directive in the May 21, 2007 letter. *Id.* ¶¶ 8-13.
26 Plaintiffs also claim they are entitled to injunctive relief, reasonable attorney's fees, and damages or
27 civil penalty pursuant to Cal. Penal Code § 290.46(l) based on defendant's alleged misuse of the
28 information derived from the Megan's Law database. *Id.* ¶¶ 15-16.

II. ANALYSIS

Plaintiffs seek immediate injunctive relief on the basis that they will suffer irreparable harm
and injury if Mr. Adamski is barred from his residence without due process. Although plaintiffs also

1 appear to seek a preliminary injunction,¹ given the limited time the parties had for briefing the
2 issues, the court will consider the motion only as one for temporary injunctive relief.

3 **A. Legal Standard**

4 Under Fed. R. Civ. P. 65(b), plaintiffs must make a showing that immediate and irreparable
5 injury, loss or damage will result to plaintiff if the order is not issued to support their motion for a
6 temporary restraining order. Temporary restraining orders are governed by the same standard
7 applicable to preliminary injunctions. *See Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs.,*
8 *Inc.*, 181 F. Supp. 2d 1111, 1126 (E.D. Cal. 2001) ("The standard for issuing a preliminary
9 injunction is the same as the standard for issuing a temporary restraining order.").

10 The Ninth Circuit has set forth two separate sets of criteria for determining whether to grant
11 preliminary injunctive relief:

12 Under the traditional test, a plaintiff must show: (1) a strong likelihood of success
13 on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief
14 is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement
15 of the public interest (in certain cases). The alternative test requires that a plaintiff
demonstrate either a combination of probable success on the merits and the
possibility of irreparable injury or that serious questions are raised and the balance
of hardships tips sharply in his favor.

16 *Taylor v. Westly*, ___ F.3d ___, 2007 WL 1557611, *2 (9th Cir. May 31, 2007) (certified for
17 publication). "These two formulations represent two points on a sliding scale in which the required
18 degree of irreparable harm increases as the probability of success decreases." *Id.* "They are not
19 separate tests but rather outer reaches of a single continuum." *Id.*

20 **B. Likelihood of Success on the Merits**

21 Defendant first argues that plaintiffs' motion for temporary restraining order must be denied
22 because, as a matter of law, plaintiffs cannot prevail on the merits. It is well-settled that a
23 commanding officer has the power to exclude civilians from the area of her command. *Cafeteria*
24 *and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 893 (1961), *overruled on other grounds*
25 *by Bd. of Regents v. Roth*, 408 U.S. 564 (1972). However, "[a]lthough a commanding officer has

27 ¹ In addition to their application for a temporary restraining order, plaintiffs also submitted
28 an application for issuance of an order to show cause regarding preliminary injunction.

1 broad discretion to exclude civilians from a military base, this power cannot be exercised in a
2 manner that is patently arbitrary or discriminatory." *United States v. Albertini*, 472 U.S. 675, 690
3 (1985) ("*Albertini I*") (citing *Cafeteria and Restaurant Workers Union*, 367 U.S. at 898). Thus,
4 whether plaintiffs are likely to prevail on the merits of their claims turns on whether defendant's
5 exercise of power to issue the bar letter was valid.

6 Plaintiffs argue that no case law addresses a civilian's Fifth Amendment right to not be
7 excluded without due process in a military enclave. Therefore, plaintiffs submit, this court should
8 apply by analogy case law regarding First Amendment rights within military enclaves. Specifically,
9 plaintiffs point to *Flowers v. United States*, 407 U.S. 197 (1972), for the proposition that base
10 commanders may not enforce letters violating the constitutional rights of civilians on portions of
11 military bases or enclaves which are open to the public.

12 However, the Supreme Court has expressly clarified that the standards set forth in *Flowers*
13 are applicable to First Amendment rights and are not relevant for the purposes of determining the
14 validity of a commanding officer's bar letter. *See Greer v. Spock*, 424 U.S. 828, 838 (1976) ("The
15 notion that federal military reservations, like municipal streets and parks, have traditionally served
16 as a place for free public assembly and communication of thoughts by private citizens is . . .
17 historically and constitutionally false."); *Albertini I*, 472 U.S. at 685-87. In *Albertini I*, a
18 commanding officer had issued a bar letter against Albertini for having previously vandalized
19 government property on the military base. *Id.* at 677-78. The Supreme Court rejected Albertini's
20 claim that *Flowers* rendered the bar letter invalid:

21 *Flower[s]* establishes that where a portion of a military base constitutes a public
22 forum because the military has abandoned any right to exclude[]civilian traffic and
23 any claim of special interest in regulating expression, a person may not be excluded
24 from that area on the basis of activity that is itself protected by the First Amendment.
Properly construed, *Flower[s]* is simply inapplicable to this case. There is no
suggestion that respondent's acts of vandalism in 1972, which resulted in the
issuance of the bar letter, were activities protected by the First Amendment.

25 *Id.* at 685-86 (citing *Greer v. Spock*, 424 U.S. at 836-38). Albertini had entered the base during an
26 open house in which the military had openly invited the public. The Court held that the claimed
27 indicia of the open nature of the military base did not render the commanding authorities powerless
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1 to exclude certain civilians via bar letters:

2 We do not agree that the historically unquestioned power of a commanding officer
3 to exclude civilians from the area of his command should be analyzed in the same
4 manner as government regulation of a traditional public forum simply because an
5 open house was held at Hickam. The fact that respondent had previously received
6 a valid bar letter distinguished him from the general public and provided a
7 reasonable grounds for excluding him from the base. That justification did not
8 become less weighty when other persons were allowed to enter. . . . Where a bar
9 letter is issued on valid grounds, a person may not claim immunity from its
10 prohibition on entry merely because the military has temporarily opened a military
11 facility to the public.

12 *Id.* at 687. Rather, the Court held, the issue is whether Albertini could show that the bar letter "is
13 inconsistent with any statutory or regulatory limits on the power of military officials to exclude
14 civilians from military bases." *Id.* at 690.

15 Plaintiffs argue that defendant improperly issued the bar letter without due process. Both the
16 Supreme Court and Ninth Circuit have addressed the issue of due process rights on military
17 reservations. In *Greer*, the Supreme Court held, "[a] necessary concomitant of the basic function of
18 a military installation has been the historically unquestioned power of its commanding officer
19 *summarily* to exclude civilians from the area of his command. *Greer*, 424 U.S. at 838 (emphasis
20 added) (citation, internal quotations, and internal edit omitted); *see also Berry v. Bean*, 796 F.2d
21 713, 717 n.3 (4th Cir. 1986) ("We note, however, the First Circuit's conclusion that 'the power to
22 exclude civilians summarily has been acknowledged by almost every court to consider the matter.'")
23 (quoting *Serrano Medina v. United States*, 709 F.2d 104, 109 (1st Cir. 1983)) (additional citation
24 omitted). In *Cafeteria and Restaurant Workers Union*, 367 U.S. at 895, the Supreme Court held that
25 a restaurant worker at a restricted-access military facility could be excluded from the site without a
26 hearing. Whether there is any due process right to a hearing "is to be determined flexibly in light of
27 the nature of the government function involved and of the private interest affected." *United States v.*
28 *Albertini*, 783 F.2d 1484, 1486 (9th Cir. 1986) ("*Albertini II*") (citing *Cafeteria and Restaurant*
Workers Union, 367 U.S. at 895).

29 In *Albertini II*, the appellant appealed his conviction of illegal entry into a military base in
30 contravention of a bar letter. In addressing the appellant's argument that due process requires the
31 commander to afford him a hearing at or before the time the bar letter is issued, the Ninth Circuit

1 held that "Albertini's argument is effectively foreclosed by *Cafeteria and Restaurant Workers Union*
2 *v. McElroy*." 783 F.2d at 1487. The court first acknowledged that "[t]he commander has authority
3 to maintain discipline and order on the base and to ensure its smooth operation." *Id.* (citation and
4 internal quotation marks omitted). The court found that although Albertini had "some form of
5 liberty interest in access to Hickam Air Force Base," "the interest of the base commander in
6 maintaining control over the entry of persons to Hickam Air Force Base is substantial; indeed, there
7 is a strong tradition of treating that interest as being in a specially protectible class by itself." *Id.*
8 (citation omitted). The court reasoned that "[e]ven during an open house, an important security
9 interest remains in controlling the access of persons thought to present special problems or dangers."
10 *Id.* at 1486. In conclusion the court found that the balance of interests supported that "the
11 commander of Hickam Air Force Base, in the exercise of his unique control over the facility with
12 which he was entrusted, was not required by due process to hold or give an opportunity for a hearing
13 at the time he issued the bar letter to Albertini." *Id.*

14 Here, plaintiffs have asserted that Mr. Adamski's interest in access to the Presidio of
15 Monterey premises is that of a lessee's leasehold interest in real property. Such an interest is
16 somewhat stronger than the interests at issue in *Albertini I & II* (interest as an invitee to open house
17 at military reservation) and *Cafeteria and Restaurant Workers Union* (restaurant worker's interest in
18 access to her place of employment). However, plaintiffs cite no cases that provide that a property
19 interest outweighs the "substantial" interest of a base commander in maintaining control over who
20 may enter a military reservation. Moreover, here, plaintiffs do not dispute that the leasehold
21 property was obtained by answering a "qualifying question" on the lease application falsely.
22 Although plaintiffs contend that they in good faith believed that they did not have to disclose a 1999
23 conviction because it was over seven years old, the question as stated on the application inquired
24 whether the applicants had *ever* been convicted of a crime.

25 In addition, plaintiffs have not demonstrated that defendant acted capriciously or arbitrarily
26 in issuing the bar letter. As noted, one of the qualifying questions for the lease application for the
27 housing community was whether the applicants had ever been convicted of a crime. Although
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1 defendant bars Mr. Adamski based on his status as a sex offender, plaintiffs have not shown that
2 such a bar is "inconsistent with any statutory or regulatory limits on the power of military officials to
3 exclude civilians from military bases." *See Albertini I*, 472 U.S. at 690. Further, defendant noted in
4 the bar letter that Mr. Adamski actively concealed his previous conviction in the lease application
5 and that other residents in the housing community have expressed concern. Finally, although
6 plaintiffs contend that no one has asserted that Mr. Adamski has committed any illegal acts within
7 the base, harassed anyone on the base, or committed any sexual offense on the base, it is not within
8 the purview of this court to question a commanding officer's decision to issue a bar letter that is not
9 otherwise capricious or arbitrary. *See Chappell v. Wallace*, 462 U.S. 296, 305 (1983) ("courts are
10 ill-equipped to determine the impact upon discipline that any particular intrusion upon military
11 authority might have").

12 C. Possibility of Irreparable Injury

13 Even if this court were to find that Mr. Adamski's interest in access to the leased property
14 outweighs defendant's interest in maintaining order and control within the military reservation, it
15 does not appear that plaintiffs have asserted that irreparable harm will occur if a temporary
16 restraining order is not issued. Plaintiffs contend that they will be harmed because they have a one-
17 year lease term on the property and may not sublease without permission from the landlord.
18 However, as defendant contends, this harm is economic and does not constitute irreparable harm.
19 Alternatively, plaintiffs claim they will be harmed because the letter forces Mr. Adamski to be apart
20 from his family. However, the bar letter bars Mr. Adamski from the property within the Presidio of
21 Monterey Base, not from associating with his family.

22 D. Conclusion

23 Because plaintiffs have not demonstrated a strong likelihood of success on the merits and
24 have not demonstrated they will suffer irreparable harm absent a temporary restraining order, the
25 court does not find that issuance of a temporary restraining order is warranted.

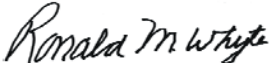
26 III. ORDER

27 For the foregoing reasons, the court DENIES plaintiff's motion for temporary restraining
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1 order. As agreed to by the parties at the July 6, 2007 hearing, a preliminary injunction hearing shall
2 be set for Tuesday, July 31, 2007, at 2:00 p.m. The parties' briefs are due as follows:

3 Motion for preliminary injunction: July 16, 2007, 5:00 p.m.
4 Opposition: July 23, 2007, 5:00 p.m.
5 Reply: July 27, 2007, 5:00 p.m.
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7 DATED: 7/6/07



RONALD M. WHYTE
United States District Judge

United States District Court
For the Northern District of California

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1 **Notice of this document has been electronically sent to:**

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7 Counsel are responsible for distributing copies of this document to co-counsel that have not
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9 **Dated:** 7/9/07 SPT
10 **Chambers of Judge Whyte**

United States District Court
For the Northern District of California

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