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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STAFF SERGEANT ANTHONY RIOS)	CASE NO.: CV 13-1937 ABC (MANx)
JR.,)	
)	
Plaintiff,)	
)	
v.)	
)	ORDER GRANTING PLAINTIFF'S MOTION
RAY MABUS, Secretary of the)	FOR PRELIMINARY INJUNCTION
Navy,)	
)	
BRIGADIER GENERAL PAUL)	
LEBIDINE, and)	
)	
LIEUTENANT COLONEL DEAN SCHULZ,)	
)	
Defendants.)	
_____)	

Pending before the Court is Plaintiff Anthony Rios Jr.'s motion for preliminary injunction, filed on May 4, 2013. (Docket No. 13.) Defendants Ray Mabus, Brigadier General Paul Lebidine, and Lieutenant Colonel Dean Schulz opposed on May 20 and Plaintiff replied on May 27. (Docket Nos. 20, 26.) The Court heard oral argument on June 10, 2013. For the reasons below, the motion is **GRANTED**.

1 **I. BACKGROUND**

2 Plaintiff seeks to enjoin Defendants from interfering with his
3 visitation with his minor son pursuant to a December 16, 2010 Los
4 Angeles Superior Court Order, awarding Plaintiff physical custody of
5 his minor son the first, third and fourth weekends of each month, the
6 entire four-day Thanksgiving period, and a mid-week evening visit each
7 week upon 48 hours advance notice ("State Court Visitation Order").
8 (Declaration of Anthony Rios, Ex. 2.)

9 In 2011 and 2012, Plaintiff, along with several other members of
10 the 3rd Air Naval Gunfire Liaison Company ("3D ANGLICO"), was
11 investigated by the unit for filing fraudulent travel claims. (Rios
12 Decl. ¶ 9.) Pursuant to Article 32 of the Uniform Code of Military
13 Justice ("UCMJ"), Major M. J. Studenka was appointed as a neutral
14 investigating officer. UCMJ, Art. 32(a) ("No charge or specification
15 may be referred to a general court-martial for trial until a thorough
16 and impartial investigation of all the matters set forth therein has
17 been made."). During a January 2012 hearing in connection with the
18 investigation, First Sergeant Whitcomb testified that Plaintiff's wife
19 had come to him with allegations that Plaintiff physically abused her
20 shortly after October 2010. (Rios Decl. ¶ 10.) No investigation or
21 disciplinary action was taken against Plaintiff at that time, likely
22 because the unit did not believe his wife's allegations, as she was
23 the one taken into custody and facing a criminal prosecution for
24 aggravated assault.¹ (Rios Decl., Ex. 3 at 23.)

25 On March 18, 2012, Plaintiff was ordered by Lieutenant Colonel S.
26

27 ¹ Yvette Rios' jury trial for numerous charges, including
28 assault with a deadly weapon, is scheduled to begin on June 24, 2013
in Orange County. (Reply at 1, Ex. 15.)

1 C. Collins to have no contact with his wife or son for 30 days. (Rios
2 Decl. ¶ 11.) It does not appear this order was in writing. After the
3 expiration of that 30-day period, Plaintiff was served with a Military
4 Protective Order, dated April 19, 2012, directing him to refrain from
5 contact with his wife and son at all times. (Rios Decl., Ex. 4.) He
6 argues that the MPO conflicts with the State Court Visitation Order
7 and deprives him of his constitutional right to the care, custody, and
8 control of his son under the due process clause of the Fifth Amendment
9 and the association clause of the First Amendment. (Mem. at 3-4.)
10 The original version of the MPO stated that it "shall remain in effect
11 until unless [sic] sooner canceled by [Lieutenant Colonel S. C.
12 Collins] or by higher authority." (Id. at 2.)

13 On May 4, 2012, a few weeks after service of the MPO, Plaintiff
14 began having supervised visitation with his son for approximately two
15 hours every Friday afternoon. (Declaration of Lieutenant Colonel Dean
16 Schulz ¶ 4.) Some weeks did not include a supervised visit due to
17 Plaintiff's unavailability, a military event that required the
18 participation of all personnel (e.g., reserve drill weekend), or when
19 Plaintiff's wife "did not allow her son to participate" in the
20 supervised visitations. Id. ¶ 3. According to Plaintiff, his wife
21 "missed many of these Friday meetings." (Rios Decl. ¶ 19.)

22 On July 17, 2012, Plaintiff sought to appeal the restricted
23 visitation by requesting Mast, the formal process by which Marine
24 Corps members communicate grievances to, or seek assistance from,
25 their commanding officers. (Rios Decl., Ex. 5.) Plaintiff's request
26 Mast was denied on July 26, 2012. Id. Plaintiff filed a request for
27 redress of grievances under Article 138 of the Uniform Code of
28 Military Justice (a formal complaint against a commanding officer) on

1 September 14, 2012, and again on February 2, 2013. (Id., Exs. 6, 9.)
2 The September 2012 request was denied (id., Ex. 7), and it appears
3 there has been no response to the February 2013 request. (Mem. at 8).

4 On October 2, 2012, Major Studenka concluded his investigation
5 with an Investigating Officer's Report. (Rios Decl., Ex. 24.) In the
6 report, he recommended that the assault charges against Plaintiff be
7 dismissed on the grounds that it was "clear that the government cannot
8 prove any of the assault-related charges given the severe issues of
9 credibility for [Plaintiff's wife]." (Id. at 24.).

10 On October 19, 2012, against Major Studenka's recommendation,
11 Plaintiff was charged with, among other things,² assault in violation
12 of USMJ Article 128. The assault charge is based on various
13 incidents, some of which involve Plaintiff's wife and son. (Rios
14 Decl., Ex. 8.) Plaintiff is charged with striking his wife in the
15 face with a remote control on or about August 7, 2009; choking his
16 wife, kicking his son in the stomach with his combat boots, and
17 throwing his wife to the ground by her hair on or about November 15,
18 2009; striking his wife in the arm with his fist on or about August 8,
19 2010; allegedly throwing his wife to the ground by her hair, cutting
20 her arm with a piece of glass, slamming her to the ground by the head,
21 and choking her on or about October 22, 2010. Id. The court-martial
22 has been continued numerous times, most recently from June 11 to
23 September 4, 2013. (Second Declaration of Nicholas Grey ¶ 2.)

24 _____
25 ² Plaintiff is also charged with making false statements in his
26 request mast in violation of USMJ, Article 107. This charge was
27 brought over the objection of Major Studenka, who recommended
28 dismissing "all charges and specifications related to SSgt RIOS's
request mast" on the grounds that "[r]equesting mast is a process that
should never be chilled by the threat of criminal prosecution." (Rios
Decl., Exs. 3 at 25, 8.)

1 Plaintiff filed this Complaint on March 13, 2013. (Docket No.
2 1.) On April 4, 2013, he applied *ex parte* for a temporary restraining
3 order. (Docket No. 5.) The MPO was subsequently modified in writing
4 on April 5, 2013 to authorize "supervised command visitation,"
5 apparently codifying the practice that had been in place since May
6 2012. The modified MPO further indicates that it "shall remain in
7 effect through the disposition of the allegations of domestic abuse or
8 until unless [sic] sooner canceled by [Lieutenant Colonel Dean Schulz]
9 or by higher authority." (Opp. at 2, Ex. 1.)

10 This Court denied Plaintiff's *ex parte* application on April 10,
11 2013. (Docket No. 7.) Plaintiff now moves to enjoin Defendants from
12 enforcing the MPO or issuing any further MPO that limits his
13 visitation with his son pursuant to the State Court Visitation Order.

14 **II. DISCUSSION**

15 **A. Plaintiff Has a Fundamental Right in the Care, Custody, and** 16 **Control of His Son**

17 Parents have a liberty interest in the "care, custody, and
18 control of their children." Mueller v. Auker, 700 F.3d 1180, 1186
19 (9th Cir. 2012), citing Troxel v. Granville, 530 U.S. 57, 65 (2000)
20 ("The liberty interest at issue in this case--the interest of parents
21 in the care, custody, and control of their children--is perhaps the
22 oldest of the fundamental liberty interests recognized by this
23 Court."). However, "the liberty interest in familial relations is
24 limited by the compelling government interest in the protection of
25 minor children, particularly in circumstances where the protection is
26 considered necessary as against the parents themselves." Mueller, 700
27 F.3d at 1187 (citation and quotation marks omitted).

28 A parent has "a constitutionally protected right to the care and

1 custody of his child[] and he cannot be summarily deprived of custody
2 without notice and a hearing except when the child[] [is] in imminent
3 danger." Ram v. Rubin, 118 F.3d 1306, 1310 (9th Cir. 1997). In Ram,
4 a social services administrator took the plaintiff's sons into
5 temporary protective custody for four days without prior notice or a
6 hearing based on two-year-old sexual abuse allegations that had been
7 investigated twice and found unconfirmed. Id. at 1310-11. The Ninth
8 Circuit reversed entry of summary judgment for the social services
9 administrator on the issue of qualified immunity, finding that genuine
10 issues of material fact existed as to whether a reasonable state
11 official could have believed such actions were lawful. Id. at 1311.

12 Defendants do not dispute that Plaintiff has a Fifth Amendment
13 due process right to the care, custody, and control of his son.³
14 (Opp. at 5.) The critical issue before the Court is whether
15 Defendants have shown "imminent danger" sufficient to deprive
16 Plaintiff of this fundamental right. The four-day temporary
17 protective custody in Ram pales in comparison to the nearly 14 months
18 that the MPO has been in effect in this case. As discussed in more
19 detail below, the lack of due process balancing suggests a likely
20 violation of Plaintiff's well-established right to the care, custody,
21 and control of his son. Simply put, deprivations that may be
22 acceptable on an emergency basis are much harder to justify after 14
23 months.

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27 ³ Having found a constitutionally protected right to the
28 custody, care, and control of one's child, the Court need not reach
Plaintiff's argument regarding whether the First Amendment protects
Plaintiff's right to associate with his son.

1 **B. The Court May Review Plaintiff's Claim Under Mindes**

2 Before reaching the preliminary injunction factors, the Court
3 considers whether it may review Plaintiff's claim. Mindes v. Seaman,
4 453 F.2d 197 (5th Cir. 1971) sets forth a two element threshold test
5 for review of internal military affairs, followed by a four factor
6 test. The Ninth Circuit expressly approved Mindes in Wenger v.
7 Monroe, 282 F.3d 1068, 1072 (9th Cir. 2002). "Under the Mindes test
8 as modified by this Circuit, a person challenging a military decision
9 generally must satisfy two threshold elements before a court can
10 determine whether review of his claims is appropriate." Wenger. 282
11 F.3d at 1072. The two threshold elements are (a) an allegation of the
12 violation of a constitutional right, a federal statute, or military
13 regulations, and (b) exhaustion of available intraservice corrective
14 measures. Id.

15 Plaintiff has alleged violations of his First and Fifth Amendment
16 rights, so the first threshold element is satisfied. As to the second
17 element, Plaintiff has requested mast and submitted two requests for
18 redress of grievances, to no avail. (Rios Decl., Exs. 5, 6, 9.) He
19 further argues that the Rules of Court-Martial do not have a mechanism
20 for enjoining MPOs and the military judge's authority is circumscribed
21 by those rules. (Mem. at 9.) The Court is satisfied that Plaintiff
22 has exhausted his intraservice corrective measures.

23 Next, the Court examines the four Mindes factors to determine if
24 judicial review of the military decision is appropriate: (1) the
25 nature and strength of the plaintiff's claim; (2) the potential injury
26 to the plaintiff if review is refused; (3) the extent of interference
27 with military functions; and (4) the extent to which military
28 discretion or expertise is involved. Mindes, 452 F.2d at 201-202;

1 Wenger, 282 F.3d at 1072-73. The Court evaluates each in turn.

2 **1. Nature and Strength of Plaintiff's Claim**

3 In evaluating whether the MPO is properly subject to review by
4 this Court, the "claim" at issue is Plaintiff's constitutional right
5 to the care, custody, and control of his son vis-à-vis Defendants'
6 action in issuing the MPO and continuing to enforce it without a due
7 process hearing. The Court will not make rulings on the merits of
8 Defendants' claims against Plaintiff, which will be before the court-
9 martial.

10 The nature and strength of Plaintiff's claim strongly favors
11 Plaintiff. As discussed above, Plaintiff has a fundamental liberty
12 interest in the care, custody, and control of his son that cannot be
13 taken away without due process absent a showing of imminent danger.
14 Ram, 118 F.3d at 1310. The MPO has been in effect since April 19,
15 2012 (Rios Decl., Ex. 4) -- nearly 14 months -- and the court-martial
16 to which it is tied has been continued to September 4, 2013. (Grey
17 Second Decl. ¶ 2.) These facts do not bespeak "imminent danger"
18 justifying the continued enforcement of the MPO without a hearing.

19 Also at issue and troubling to the Court is the outstanding State
20 Court Visitation Order issued in December 2010. (Rios Decl., Ex. 2.)
21 Notably, that order was issued *after* Plaintiff allegedly kicked his
22 son in November 2009 (see Yvette Rios' 7/16/12 Statement, Rios Decl.,
23 Ex. 12) and *after* he allegedly assaulted his wife in August 2009,
24 November 2009, August 2010, and October 2010. (Id. at 3; Rios Decl.,
25 Ex. 8.)

26 There is no evidence in the record that Plaintiff's wife brought
27 these incidents to the attention of the court despite the fact that
28 the parties appeared in state court on November 5, 2010 with counsel

1 to modify the visitation times, specify exchange locations, and state
2 that the parties are to have absolutely no contact with one another
3 during the exchanges. (Rios Decl., Ex. 2.) These changes are
4 reflected in the State Court Visitation Order issued in December 2010.
5 As a result, the State Court Visitation Order rendered by a court with
6 expertise in family law matters is still valid. Any attempt to apply
7 for modification of that order, which would have provided for a
8 hearing and findings on the record, is conspicuously absent here.

9 **2. Potential Injury to Plaintiff if Review Is Refused**

10 The second factor is the potential injury to Plaintiff without
11 review. Once again, this factor favors Plaintiff because he is being
12 deprived of visitation with his son, which was expressly granted to
13 him by the State Court Visitation Order. This deprivation has gone on
14 for about 14 months and the delay of Plaintiff's court-martial, likely
15 for several more months, only heightens the risk of injury to
16 Plaintiff if review is refused.

17 **3. Extent of Interference with Military Functions and**
18 **Extent to Which Military Discretion or Expertise Is**
Involved

19 The third and fourth Mindes factors favor reviewability because
20 matters beyond the military's boundaries should be accorded little
21 deference. Mindes, 453 F.2d at 201-02 ("Courts should defer to the
22 superior knowledge and experience of professionals in matters such as
23 promotions or orders directly related to specific military
24 functions.").

25 In this case, the MPO does not call for military expertise or
26 involve a "specific military function." Defendants cite to Marine
27 Corps Order 1754.11, entitled "Marine Corps Family Advocacy and
28 General Counseling Program," which provides policy and procedural

1 guidance for the execution of the Family Advocacy and General
2 Counseling Programs to prevent and respond to child abuse and domestic
3 abuse. (Marine Corps Order 1754.11 at 2, [http://www.marines.mil/
4 Portals/59/Publications/MCO%201754_11.pdf](http://www.marines.mil/Portals/59/Publications/MCO%201754_11.pdf).) Defendants claim that
5 1754.11 authorizes commanders to "be prepared to act decisively in
6 cases involving alleged child abuse" and grants them "the inherent
7 authority to take reasonable actions commensurate with that
8 responsibility." Id. ¶ 4.a.

9 Defendants' reliance on 1754.11 is not persuasive. The MPO has
10 been in place for 14 months based on allegations of abuse from 2009
11 and 2010. This is not a reasonable action. To the extent Defendants
12 claim they are acting pursuant to 1754.11, that order contemplates an
13 "Incident Determination" process whereby a multi-disciplinary
14 committee "decides which referrals for suspected child abuse . . .
15 meet the DOD criteria found in appendix E that define such abuse,
16 requiring entry into the [Family Advocacy Program] Central Registry."
17 Id. at 5-5. 1754.11 sets forth the process for providing notice of an
18 Incident Determination Committee meeting and later review of IDC
19 decision. Id. at 5-7-5-11. Neither party addresses whether this
20 process was followed with respect to Plaintiff.

21 Defendants then argue that the Court should not interfere with
22 the MPO because it "could potentially affect" Plaintiff's court-
23 martial and that the military is "best equipped to handle these
24 issues." (Opp. at 7-8.) The Court disagrees. Defendants' belief
25 that they are striking the proper balance by granting Plaintiff
26 supervised visitations until the disposition of his court-martial
27 (Opp. at 9) does not come close to satisfying due process. First, the
28 forum with superior expertise in visitation matters is the family law

1 court. The military's imposition of minimal supervised visitations
2 under the modified MPO has in effect revoked that court's order
3 without any judicial involvement. Worse, there is no end in sight.
4 Second, no impartial body has ruled that the MPO balances the safety
5 of Plaintiff's son with Plaintiff's parental rights. On this record,
6 there is insufficient justification for military involvement in this
7 family matter.

8 C. A Preliminary Injunction Is Warranted

9 "A plaintiff seeking a preliminary injunction must establish that
10 he is likely to succeed on the merits, that he is likely to suffer
11 irreparable harm in the absence of preliminary relief, that the
12 balance of hardships tips in his favor, and that an injunction is in
13 the public interest." Winter v. Natural Res. Defense Council, Inc.,
14 555 U.S. 7, 20 (2008); Marlyn Nutraceuticals, Inc. v. Mucos Pharma
15 GmbH & Co., 571 F.3d 873, 877 (9th Cir. 2009). The purpose of a
16 preliminary injunction "is to preserve the status quo and the rights
17 of the parties until a final judgment issues in the cause." U.S.
18 Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010).

19 Contrary to Defendants' argument that the status quo is the
20 currently allowed minimal supervised visitation (Opp. at 3, n. 1), the
21 Court agrees with Plaintiff that the status quo, or last uncontested
22 status between the parties, was January 2012 when Plaintiff last had
23 visitation with his son in accordance with the State Court Visitation
24 Order. (Mem. at 13.)

25 1. Likelihood of Success on the Merits

26 For the same reasons articulated above regarding the nature and
27 strength of Plaintiff's claim under Mindes, Plaintiff is likely to
28 succeed on the merits.

1 Unique to the preliminary injunction analysis is that "[a]
2 preliminary injunction is always appropriate to grant intermediate
3 relief of the same character as that which may be granted finally."
4 De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 220
5 (1945) (finding district court lacked jurisdiction to enter a money
6 judgment and therefore could not enjoin defendants from removing
7 property from United States as "security").

8 Plaintiff is likely to succeed on the merits for the additional
9 reason that the "MPO's duration is tied to the resolution of
10 Plaintiff's trial by court-martial" (Opp. at 1), but the court-martial
11 lacks the authority to impose an injunction even if Defendants succeed
12 at trial. Manual for Court-Martial United States,
13 http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf, Part IV -
14 Punitive Articles, ¶ 54.e.7, (2012 ed.) (punishment for "assault
15 consummated by a battery upon a child under 16 years" limited to
16 dishonorable discharge, forfeiture of all pay and allowances, and
17 confinement for 2 years). Defendants lack the ability to impose
18 something akin to the MPO after the court-martial and therefore face
19 an uphill battle in justifying the MPO before the court-martial.
20 Plaintiff's likelihood of success on the merits weighs in favor of
21 granting an injunction.

22 **2. Irreparable Harm**

23 Plaintiff's court martial has been continued yet again from June
24 11 to September 4, 2013 due to the replacement of his defense team.
25 (Grey Second Decl. ¶ 2.) As a result, Plaintiff will suffer
26 irreparable harm from the denial of due process which has imposed upon
27 him the deprivation of his visitation rights with his son.
28 Defendants' response that the MPO authorizes supervised visitation is

1 insufficient for multiple reasons. First, visitation under the MPO is
2 so significantly curtailed as to both time and flexibility compared to
3 the State Court Visitation Order as to constitute a denial of
4 meaningful access to his son. Second, there is evidence in the record
5 that Plaintiff does not always get even these minimal supervised
6 visits and that Defendants take no action to rectify the situation.⁴
7 (Rios Decl. ¶ 19.) Third, the family court - not a court-martial - is
8 best equipped to consider whether Plaintiff is a risk to his son or
9 whether visitation is in his son's best interests.⁵ Plaintiff has
10 shown that he is likely to suffer irreparable harm in the absence of a
11 preliminary injunction.

12 3. Balance of Hardships

13 The equities fall in Plaintiff's favor. As discussed in
14 conjunction with the Mindes factors, Plaintiff has not had any due
15 process. He has not had notice and a hearing before a neutral
16 decision-maker. Of particular concern to the Court is that the MPO

17 ⁴ Plaintiff's wife does not always bring his son for the
18 scheduled visits. (Rios Decl. ¶ 19; Schulz Decl. ¶ 4.) On other
19 occasions, it is seemingly inconvenient for the military to provide
20 the supervision required by the MPO due to all-unit events (e.g.
21 reserve drill weekends). (Schulz Decl. ¶ 3.) Instead of providing a
22 substitute staff member, it appears Plaintiff's visitations are simply
23 cancelled. (See id. ¶ 3.) Although the Schulz declaration states
24 that "[a]ny weeks that did not include a supervised visit were done
25 with the full knowledge and consent of" Plaintiff (id.), it is obvious
26 that Plaintiff has not in fact consented. The fact that the
27 supervised visits do not always occur suggests that the military at
28 times does not comply with its own MPO.

⁵ Plaintiff has bombarded the Court with exhibits, including
statements and video recordings that go to the merits of the
allegations of abuse against Plaintiff. The Court has not considered
any of these exhibits in its ruling because it is not the role of this
Court to make rulings on the merits of the case before the court-
martial. The Court notes, however, that the assault charges were
brought against Plaintiff despite Major Studenka's recommendation that
those charges be dismissed. (Rios Decl., Ex. 24 at 24.)

1 has in essence invalidated an order issued by the Los Angeles Superior
2 Court without any court process or, presumably, even the knowledge of
3 that court that its order is being violated. Nor has a neutral
4 decision-maker determined that Plaintiff's son is in "imminent danger"
5 sufficient to justify depriving Plaintiff of his fundamental right to
6 the care, custody, and control of his son for nearly 14 months.

7 **4. Public Interest**

8 By issuing the MPO and allowing it to remain in existence with
9 only minor changes for 14 months, the military has in essence usurped
10 the role of the state court. Granting a preliminary injunction and
11 dissolving the MPO will return jurisdiction to the state court with
12 expertise in family law. That court is in the best position to weigh
13 the interests of Plaintiff's son against allegations of physical
14 abuse. The public interest is served both by respecting the order of
15 the superior court and by ensuring Plaintiff receives due process
16 before any further deprivation of his visitation rights.

17 **5. Bond**

18 There is no money at issue in this case and the government has
19 not requested a bond. Because there is no need for Plaintiff to post
20 a bond as security for any damages Defendants might suffer as a result
21 of a wrongful injunction, the Court finds that a bond is unnecessary
22 under the circumstances.

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1 **III. CONCLUSION**

2 For the reasons above, Plaintiff's motion for a preliminary
3 injunction is GRANTED. Plaintiff is ORDERED to lodge a proposed
4 injunction consistent with this opinion **within five days of the date**
5 **of this Order.**

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7 **DATED: June 11, 2013**



8 **AUDREY B. COLLINS**
9 **UNITED STATES DISTRICT JUDGE**

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