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8	UNITED STATES DISTRICT COURT	
9	EASTERN DISTRICT OF CALIFORNIA	
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11	BILLY DRIVER,	Case No. 1:17-cv-00202-DAD-BAM (PC)
12	Plaintiff,	FINDINGS AND RECOMMENDATIONS RECOMMENDING THAT PLAINTIFF'S
13	V.	APPLICATION TO PROCEED IN FORMA PAUPERIS BE DENIED (ECF No. 2)
14	U.S. SPECIAL MASTER, et al.,	
15	Defendants.	FOURTEEN (14) DAY DEADLINE
16		TOURIEEN (14) BITT BERIDEN (E
17	Findings and Recommendations	
18	Plaintiff Billy Driver ("Plaintiff") is a state prisoner proceeding pro se and in forma	
19	pauperis in this civil rights action under 42 U.S.C. § 1983. Plaintiff initiated this action on	
20	February 13, 2017. (ECF No. 1.) On the same day, Plaintiff filed an application to proceed in	
21	forma pauperis under 28 U.S.C. § 1915. (ECF No. 2.)	
22	The Prison Litigation Reform Act provides that "[i]n no event shall a prisoner bring a civil	
23	action under this section if the prisoner has, on 3 or more prior occasions, while incarcerated	
24	or detained in any facility, brought an action or appeal in a court of the United States that was	
25	dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief	
26	may be granted, unless the prisoner is under imminent danger of serious physical injury." 28	
27	U.S.C. § 1915(g).	
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Plaintiff has suffered three or more strikes under section 1915 (g), and the Court takes judicial notice of the following cases: (1) *Driver v. Martel*, Case No. 2:08-cv-01910-GEB-EFB (E.D. Cal.) (dismissed September 16, 2009, for failure to state a claim); (2) *Driver v. Kelso*, Case No. 2:11-cv-02397-EFB (E.D. Cal.) (dismissed September 12, 2012, for failure to state a claim); and (3) *Driver v. Epp*, Case No. 2:12-cv-00589-EFB (E.D. Cal.) (dismissed September 5, 2012, for failure to state a claim). Therefore, Plaintiff may not proceed in forma pauperis unless he has met the imminent danger exception to section 1915(g).

The availability of the imminent danger exception turns on the conditions a prisoner faced at the time the complaint was filed, not at some earlier or later time. *See Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007). "[A]ssertions of imminent danger of less obviously injurious practices may be rejected as overly speculative or fanciful." *Id.* at 1057 n.11. Imminent danger of serious physical injury must be a real, present threat, not merely speculative or hypothetical. To meet this burden under § 1915(g), an inmate must provide "specific fact allegations of ongoing serious physical injury, or a pattern of misconduct evidencing the likelihood of imminent serious physical injury." *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003). "Vague and utterly conclusory assertions" of harm are insufficient. *White v. Colorado*, 157 F.3d 1226, 1231–32 (10th Cir. 1998). That is, the "imminent danger" exception is available "for genuine emergencies," where "time is pressing" and "a threat ... is real and proximate." *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002).

The Court has reviewed Plaintiff's complaint and finds that his allegations do not satisfy the imminent danger exception to section 1915(g). *Andrews*, 493 F.3d at1053-55. Plaintiff's complaint concerns events occurring at California State Prison, Los Angeles County in Lancaster, California and at Kern Valley State Prison in Delano, California. Plaintiff alleges that he has been pepper sprayed over twenty times, illegally issued over 100 CDCR 115 rule violations, forced to take medication, and illegally denied parole. Plaintiff also alleges that has been denied access to the courts. (ECF No. 1.) Plaintiff has not alleged any harmful side effects from the involuntary medication or any current threats of being pepper sprayed. Moreover, Plaintiff's allegations concern past conduct. As Plaintiff is no longer incarcerated at Kern Valley State

1 Prison, he cannot be under imminent danger from persons at Kern Valley State Prison. 2 Therefore, the Court finds no allegations that Plaintiff was in imminent danger of serious physical 3 injury at the time he filed the complaint. Therefore, Plaintiff has not satisfied the exception from the three strikes bar under 28 U.S.C. § 1915(g), and must pay the \$400.00 filing fee if he wishes 4 5 to litigate this action. 6 Accordingly, the Court HEREBY RECOMMENDS that: 7 1. In accordance with 28 U.S.C. § 1915(g), Plaintiff's application to proceed in forma 8 pauperis (ECF No. 2) be DENIED; and 9 2. Plaintiff be required to pay the \$400.00 filing fee in full to proceed with this action. 10 These findings and recommendations are submitted to the United States District Judge 11 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within fourteen 12 (14) days after being served with these findings and recommendations, Plaintiff may file written 13 objections with the Court. Such a document should be captioned "Objections to Magistrate 14 Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within 15 the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 16 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)). 17 IT IS SO ORDERED. 18 /s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE 19 **February 22, 2017** Dated: 20 21 22 23 24 25 26 27

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