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

DAVID W. WILSON,

Plaintiff,

No. CIV S-07-1558 WBS GGH P

vs.

SUZAN HUBBARD, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ August 3, 2009, motion to revoke plaintiff’s in forma pauperis status pursuant to 28 U.S.C. § 1915(g). For the following reasons, the court recommends that defendants’ motion be granted.

28 U.S.C. § 1915(g) provides,

In no event shall a prisoner bring a civil action or appeal in a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Defendants argue that plaintiff has had at least three prior actions dismissed or otherwise rejected as frivolous, malicious or for failing to state a claim. Giving plaintiff the

1 benefit of the mailbox rule, this action was filed on July 13, 2007. See complaint, proof of  
2 service attached to points and authorities.

3 Defendants cite at least three cases that were previously dismissed as frivolous,  
4 malicious or for failing to state a claim. On October 31, 2006, Wilson v. Schwartz, CIV S-05-  
5 1649 GEB CMK P was dismissed for failing to state a claim upon which relief may be granted.<sup>1</sup>  
6 On March 8, 2007, Wilson v. Dovey, CIV S-06-1032 FCD EFB P was dismissed for failing to  
7 state a claim upon which relief may be granted. On June 4, 2007, Wilson v. Veal, CIV S-06-  
8 0067 FCD KJM P was dismissed for failing to state a claim upon which relief may be granted.

9 In his opposition plaintiff argues that this action should not be dismissed because  
10 in the complaint he alleges that he is under imminent danger of serious physical injury. To meet  
11 this exception, plaintiff must have alleged facts demonstrating that he was “under imminent  
12 danger” at the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1052-53 (9th  
13 Cir. 2007).

14 When plaintiff filed the original complaint, he was housed at the California  
15 Medical Facility (CMF). On December 20, 2007, the court dismissed this complaint with leave  
16 to amend. On January 9, 2009, plaintiff filed the first amended complaint. At that time, he was  
17 housed at California State Prison-Lancaster (CSP-Lan). The court ordered service of the first  
18 amended complaint.

19 Named as defendants in the first amended complaint are CMF Wardens Hubbard  
20 and Veal, CMF Associate Warden O’Ran, CMF Lieutenant Hudnall, CMF Correctional Officers  
21 Wann and Barajas, CSP-Lan Warden Haws, CSP-Lan Sergeant Moore, Director of Institutions  
22 Kernan and N. Grannis. Plaintiff alleged that while housed at CMF defendants refused to allow  
23 him to order and possess vitamins and other dietary supplements he had previously been allowed  
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25 <sup>1</sup> Judicial notice may be taken of court records. Valerio v. Boise Cascade Corp., 80  
26 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), aff’d, 645 F.2d 699 (9th Cir.), cert. denied, 454 U.S. 1126  
(1981).

1 to have. Plaintiff alleged that he used these vitamins and dietary supplements, including  
2 glucosamine, to treat his back, knee, hip and joint pain. Following his transfer to CSP-Lan, he  
3 went to pick up his personal property at Receiving and Release. However, he was not allowed to  
4 have several items of his personal property. Attached as an exhibit to the amended complaint is a  
5 response to an administrative appeal filed by plaintiff regarding this property. The appeal  
6 response describes the confiscated property as a belt, lamp, hot pot, fan, extension cord, hair  
7 combs, cable, can opener, radio, headphones and cassette tapes. The denied items were later  
8 donated to charity.

9           On November 12, 2008, the court granted defendants' motion to dismiss the  
10 claims against defendants Haws and Moore on grounds that they were not linked to plaintiff's  
11 claims challenging the confiscation of his personal property at CSP-Lan. Citing George v.  
12 Smith, 507 F.3d 605, 607 (7th Cir. 2007) ("Unrelated claims against different defendants belong  
13 in different suits[.]"), the court also found that plaintiff should not be allowed to file an amended  
14 complaint regarding his CSP-Lan claims as they were different from the claims against the CMF  
15 defendants. See September 4, 2008, order.

16           On December 5, 2008, plaintiff filed a second amended complaint. At this time,  
17 he was still housed at CSP-Lan. Named as defendants were CMF Wardens Hubbard and Veal,  
18 CMF Associate Warden O'Ran, CMF Lieutenant Hudnall, CMF Officers Barajas and Wann,  
19 Director of Adult Institutions Kernan, and Appeals Coordinators Grannis and Porter. In the  
20 second amended complaint, plaintiff challenged the confiscation of his vitamins and dietary  
21 supplements by the CMF defendants.

22           As discussed above, to meet the imminent danger exception to § 1915(g),  
23 plaintiff must have alleged facts demonstrating that he was "under imminent danger" at the time  
24 of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1052-53 (9th Cir.2007). At the  
25 time plaintiff filed the *operative* complaint, i.e. the second amended complaint, he clearly was  
26 under no imminent danger as he was complaining about events at a prison where he was no

1 longer housed. In addition, at the time plaintiff filed the first amended complaint, he was also  
2 under no imminent danger because the only claims concerning conditions at CSP-Lan involved  
3 challenges to the confiscation of personal property. The alleged deprivation of plaintiff's comb,  
4 can opener, etc. clearly did not involve an imminent danger of serious physical injury to plaintiff.

5           When plaintiff filed the original complaint he was housed at CMF. In this  
6 complaint, plaintiff alleged that defendants improperly confiscated his dietary supplements. The  
7 court dismissed this complaint because the legal claims raised by plaintiff (extortion, criminal  
8 profiteering, pawn brokering, petty theft, embezzlement, fraud, RICO, due process, Cartwright  
9 Act Violation) were not legally colorable.

10           Were the court required to consider whether plaintiff was under imminent danger  
11 of serious physical injury at the time he filed this *action* rather than at the time he filed the  
12 operative complaint, the court would find that he did not meet the § 1915(g) exception. While  
13 pain may constitute a serious physical injury, plaintiff could have treated his joint pain with  
14 prescribed Tylenol, for example, rather than the dietary supplements. In addition, it is unlikely  
15 that the discontinuation of plaintiff's access to these supplements would have caused him to  
16 suffer *imminent* pain. In other words, the pain caused by plaintiff's discontinued use of these  
17 supplements was, at best, a gradual worsening of symptoms. For these reasons, the court does  
18 not find that plaintiff suffered an imminent threat of serious physical injury at the time he filed  
19 this action.

20           Accordingly, IT IS HEREBY RECOMMENDED that defendants' August 3,  
21 2009, motion to revoke plaintiff's in forma pauperis status (no. 50) be granted; plaintiff be  
22 ordered to pay the filing fee within thirty days of the adoption of these findings and  
23 recommendations.

24           These findings and recommendations are submitted to the United States District  
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
26 days after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned  
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
3 shall be served and filed within ten days after service of the objections. The parties are advised  
4 that failure to file objections within the specified time may waive the right to appeal the District  
5 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: 09/10/09

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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