

1 The in forma pauperis statute, 28 U.S.C. § 1915, distinguishes unincarcerated
2 indigent people from incarcerated ones. Under § 1915(a)(1), a non-prisoner plaintiff may
3 file suit without prepaying fees, provided he or she submits an affidavit demonstrating
4 “that the person is unable to pay such fees or give security therefor.” Escobedo v.
5 Applebees, 787 F.3d 1226, 1232 (9th Cir. 2015); Ingle v. Cir. City Stores, Inc., 328 F.3d
6 1165, 1177 (9th Cir. 2003). An indigent prisoner, by contrast, is not exempt from
7 prepayment. 28 U.S.C. § 1915(b)(1). Instead, the prisoner must submit a copy of his or
8 her trust account statement, make an initial upfront payment, followed by subsequent
9 monthly installments, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(1)-(2). An
10 indigent prisoner is also subject to the limitations imposed by 28 U.S.C. § 1915(g), which
11 provides that:

12 In no event shall a prisoner bring a civil action or appeal a
13 judgment in a civil action or proceeding under this section if
14 the prisoner has, on 3 or more prior occasions, while
15 incarcerated or detained in any facility, brought an action or
16 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.

17 Plaintiff, as a “three-striker,” is subject to this latter provision.

18 Plaintiff’s argument that 28 U.S.C. § 1915(g) does not apply to him because he is
19 no longer incarcerated is unavailing. Whether or not he is incarcerated now is immaterial
20 since the relevant inquiry is whether he was incarcerated at the time that he filed this
21 action.

22 In a related context, the Ninth Circuit was asked to consider the availability of 28
23 U.S.C. §1915(g)’s “imminent danger” exception to a plaintiff who was released from
24 prison after filing suit:

25 The PLRA provides that a prisoner with three strikes cannot
26 use IFP status to “*bring* a civil action ... unless the prisoner *is*
27 under imminent danger of serious physical injury.” 28 U.S.C.
28 § 1915(g) (emphases added). The exception’s use of the
present tense, combined with its concern only with the initial

1 act of “bring[ing]” the lawsuit, indicates to us that the
2 exception applies if the danger existed at the time the
3 prisoner filed the complaint. See United States v. Jackson,
4 480 F.3d 1014, 1018-19 (9th Cir. 2007) (noting the use of
5 tenses in statutes generally is significant and “one would not
6 refer in the present tense to something that had already
7 happened” (citing The Dictionary Act, 1 U.S.C. § 1)). In other
8 words, the availability of the exception turns on the conditions
9 a prisoner faced at the time the complaint was filed, not at
10 some earlier or later time. **Andrews's removal from the
11 California prison system after filing the complaint is
12 therefore irrelevant to our § 1915(g) analysis.**

13 Andrews v. Cervantes, 493 F.3d 1047, 1052-53 (9th Cir. 2007) (emphasis added.) As
14 the court noted, “it is the circumstances at the time of the filing of the complaint that
15 matters for purposes of the ‘imminent danger’ exception to § 1915(g).” Id. at 1053. In the
16 absence of controlling authority holding otherwise, the undersigned sees no reason to
17 impose a different standard for the rule than for the exception. Plaintiffs’ subsequent
18 release from prison, therefore, does not alter the Court’s analysis regarding his inability
19 to proceed in forma pauperis in light of his three-striker status and his failure to satisfy
20 the “imminent danger” exception.

21 Accordingly, IT IS HEREBY ORDERED that:

- 22 1. Plaintiff’s motion to proceed in forma pauperis (ECF No. 128) is DENIED; and
- 23 2. Pursuant to the September 28, 2015, Order, Plaintiff is directed to pay the
24 filing fee of \$400.00 within **fourteen (14) days** of service of this order; Plaintiff
25 is again warned that failure to pay the filing fee will result in dismissal without
26 prejudice for failure to prosecute.

27 IT IS SO ORDERED.

28 Dated: January 15, 2016

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE