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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HORACE BELL,

Plaintiff,

v.

LARRY DILEO, et al.,

Defendants.

CASE NO: 1:10-cv-02364-GBC (PC)

ORDER TO SHOW CAUSE REGARDING
EXHAUSTION, THREE STRIKES, AND
RULE 11(b)(3) VIOLATION

(Doc. 1)

I. Exhaustion Requirement

Horace Bell (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action filed pursuant to 42 U.S.C. § 1983. On December 20, 2010, Plaintiff filed his original complaint. On page two of the form complaint, Plaintiff alleges that there is a grievance procedure available at his institution, but that the grievance process is not completed due to delay in processing the appeals. (Doc. 1, Comp., p. 2). Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available administrative remedies prior to filing suit. *Jones v. Bock*, 549 U.S. 199, 211-12 (2007); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). The Court must dismiss a case without prejudice even when there is exhaustion while the suit is pending. *Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005).

1 Exhaustion is required regardless of the relief sought by the prisoner. *Booth v. Churner*, 532
2 U.S. 731, 741, 121 S.Ct. 1819 (2001). A prisoner must “must use all steps the prison holds out,
3 enabling the prison to reach the merits of the issue.” *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir.
4 2009); *see also Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005). A prisoner's concession to
5 non-exhaustion is valid grounds for dismissal so long as no exception to exhaustion applies. 42
6 U.S.C. § 1997e(a); *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003).

7 The Court takes judicial notice of the fact that the California Department of Corrections and
8 Rehabilitation has an administrative grievance system for prisoner complaints. Cal. Code Regs., tit.
9 15 § 3084.1 (2008). The process is initiated by submitting a CDC Form 602. *Id.* at § 3084.2(a).
10 Four levels of appeal are involved, including the informal level, first formal level, second formal
11 level, and third formal level, also known as the "Director's Level." *Id.* at § 3084.5. Appeals must
12 be submitted within fifteen working days of the event being appealed, and the process is initiated by
13 submission of the appeal to the informal level, or in some circumstances, the first formal level. *Id.*
14 at §§ 3084.5, 3084.6(c).

15 In order to satisfy section 1997e(a), California state prisoners are required to use the available
16 process to exhaust their claims prior to filing suit. *McKinney v. Carey*, 311 F.3d 1198, 1199-1201
17 (9th Cir. 2002); *see also Woodford v. Ngo*, 548 U.S. 81, 85 (2006). “[E]xhaustion is mandatory
18 under the PLRA and . . . unexhausted claims cannot be brought in court.” *Jones*, 549 U.S. at 211
19 (citing *Porter v. Nussle*, 534 U.S. 516, 524). Plaintiff states in his complaint that he has not
20 exhausted administrative remedies because of “delay in processing health care appeals.” However,
21 “[a]ll ‘available’ remedies must . . . be exhausted; those remedies need not meet federal standards,
22 nor must they be ‘plain, speedy, and effective.’” *Porter*, 534 U.S. at 524 (quoting *Booth v. Churner*,
23 532 U.S. 731, 739 n.5); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). It does not
24 appear to the Court that Plaintiff has exhausted his administrative remedies at the time of filing this
25 action.

26 27 **II. Three Strikes**

28 Section 1915 of Title 28 of the United States Code governs proceedings in forma pauperis.

1 Section 1915(g) provides that:

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

7 28 U.S.C. § 1915(g). Determining whether Plaintiff’s actions and appeals count as strikes under
8 section 1915(g) requires the Court to conduct a “careful evaluation of the order dismissing an action,
9 and other relevant information,” to determine if, in fact, “the action was dismissed because it was
10 frivolous, malicious or failed to state a claim.” *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir.
11 2005).

12 A review of the record of actions filed by Plaintiff in the United States District Court and
13 appeals filed in the Ninth Circuit reveals that Plaintiff filed three or more actions or appeals that were
14 dismissed as frivolous, malicious or for failing to state a claim upon which relief may be granted.
15 The Court takes judicial notice that the Plaintiff has two prior actions dismissed under *Heck v.*
16 *Humphrey*, 512 U.S. 477 (1994) for not stating a cognizable claim under section 1983. Those cases
17 are: *Bell v. Harrington, et al.*, 2:09-cv-08808-UA-RC (PC) (C.D. Cal.) (dismissed December 30,
18 2009, for failure to state a claim under *Heck*) (strike one) and *Bell v. Harrington, et al.*, 2:10-cv-
19 00421-UA-RC (PC) (C.D. Cal.) (dismissed February 24, 2010, for failure to state a claim under
20 *Heck*) (strike 2). The Court finds that a dismissal pursuant to *Heck* counts as a strike under 28
21 U.S.C. § 1915(g). The Supreme Court in *Heck* stated its ruling was based on a denial of “the
22 existence of a cause of action.” *Heck*, 512 U.S. at 489. Additionally, several other courts have held
23 that dismissals under *Heck* count as strikes under 28 U.S.C. § 1915(g). *See e.g., Hamilton v. Lyons*,
24 74 F.3d 99, 102 (5th Cir. 1996) (“A § 1983 claim which falls under the rule in *Heck* is legally
25 frivolous.”); *Schafer v. Moore*, 46 F.3d 43, 45 (8th Cir. 1995) (“[I]n light of *Heck*, the complaint was
26 properly dismissed for failure to state a claim.”).

27 Moreover, a prisoner’s claims are considered frivolous if it “merely repeats pending or
28 previously litigated claims.” *See Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995)
(quoting *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir.1988)). Therefore, the Court finds that
Bell v. Harrington, et al., 2:10-cv-00421, was merely duplicative of a previous suit dismissed for

1 failure to state a claim and thus the action is also frivolous. *See Cato v. United States*, 70 F.3d 1103,
2 1105 n.2 (9th Cir. 1995).

3 Generally, a dismissal for failure to prosecute does not fall within the plain language of
4 Section 1915(g).¹ However, a court is to carefully evaluate the substance of the dismissal and where
5 the merits of the claim have been determined to be frivolous or malicious, it constitutes as a strike.
6 *See Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005); *see also O'Neal v. Price*, 531 F.3d 1146,
7 1152-53 (9th Cir. 2008) (finding a strike under section 1915(g) to include when a trial court denies
8 a request to file an action without prepayment of the filing fee on the ground that complaint is
9 frivolous and then subsequently dismisses the action). Moreover, section 1915(e)(2) requires
10 appellate courts to dismiss all frivolous appeals. 28 U.S.C. § 1915(e)(2); *O'Neal v. Price*, 531 F.3d
11 1146, 1153 (9th Cir. 2008) (observing requirement for appellate and trial courts in 28 U.S.C. §
12 1915(e)(2), 42 U.S.C. § 1997e(c) and 28 U.S.C. § 1915A); *see also Thompson v. Drug Enforcement*
13 *Admin.*, 492 F.3d 428, 436 (D.C. Cir. 2007). The Court finds that appellate cases *Bell v. Flippo, et*
14 *al.*, No. 10-15186 (9th Cir. 2010) (dismissed June 2, 2010) (strike 3) and *Bell v. Shapiro, et al.*, No.
15 10-55278 (9th Cir. 2010) (dismissed July 13, 2010) (strike 4), were frivolous appeals and they count
16 as a strikes under Section 1915(g). In *Flippo*, in an order dated April 16, 2010, the Ninth Circuit
17 denied Plaintiff's motion to proceed in forma pauperis due to the court's finding that the appeal was
18 frivolous. On June 2, 2010, Plaintiff's appeal was dismissed for failure to prosecute. Similarly in
19 *Shapiro*, the appellate court found in its order dated June 12, 2010, that the appeal was frivolous and
20 consequently denied Plaintiff's motion to proceed in forma pauperis. Since Plaintiff failed to timely
21 submit a filing fee payment for his frivolous appeal, the appellate court dismissed the case for failure
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¹ The Court takes judicial notice of *Bell v. Harrington et al.*, 2:10-cv-03599 (C.D. May 20, 2010) where the
court notes the alias names of Horace Bell, Horace Andrew Bell and his true name Horace Thomas and on June 7,
2010, Plaintiff was declared a vexatious litigant with regards to repeat filings of the same habeas case. Plaintiff
demonstrates a pattern of abusive litigation practice. Plaintiff has on more than one occasion brought an action to
the point of trial and then failed to prosecute the case. In *Thomas v. Barrett*, 2:94-cv-02264-JMI-SH, Plaintiff
"Horace Thomas" litigated the case until the pretrial conference and on May 16, 1995, the action was dismissed for
failure to prosecute. In *Bell v. Scicluna*, 2:95-cv-02217, after litigating the case for nearly four years, the Plaintiff
"Horace Bell" refused to attend the trial confirmation hearing and stated to the court that he refused to testify and
sought to withdraw his complaint. *Bell v. Scicluna*, 2:95-cv-02217 (Doc. # 101, Findings and Recommendations,
May 5, 1999). The action was ultimately dismissed on July 13, 1999, for failure to prosecute.

1 to prosecute on July 13, 2010.

2 The Court also counts *Bell v. Torres, et al.*, 2:10-cv-07488-UA (dismissed on October 22,
3 2010) (strike 5) as a strike for failure to state a claim. See *O'Neal v. Price*, 531 F.3d 1146, 1152-53
4 (9th Cir. 2008); *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005). In *Torres*, the court denied
5 leave to file action without prepayment of filing fee due to an inadequate showing of indigency and
6 for failure to state a claim. The Court determined in *Torres* that Plaintiff sought to bring a claim
7 against the California Attorney General who was not subject to suit and a claim against the court
8 clerk for the Los Angeles County Superior Court who was immune for actions within the scope of
9 the clerk's duties. The Court also found that Plaintiff "failed to set forth any facts stating that any
10 defendant took any action that caused any constitutional injury." *Bell v. Torres, et al.*, 2:10-cv-
11 07488-UA.

12 It appears to the Court that Plaintiff became subject to section 1915(g) on June 2, 2010, and
13 is precluded from proceeding in forma pauperis unless he is, at the time the complaint is filed, under
14 imminent danger of serious physical injury.

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16 **III. Rule 11(b)**

17 In violation of Rule 11(b)(3) of the Federal Rules of Civil Procedure, Plaintiff files this action
18 under an alias name "Horace Bell" when, in fact, his true name is "Horace Thomas."² Also in
19 violation of Rule 11(b)(3) of the Federal Rules of Civil Procedure, Plaintiff willfully and in bad faith
20 states in his original complaint that the number of previous or pending lawsuit is unavailable and
21 only cites to a few defendants in prior/pending lawsuits. Such misrepresentation obfuscates the fact
22 that Plaintiff has filed several suits and stating the number of lawsuits is unavailable contradicts the
23 fact that Plaintiff has two other pending cases before this Court and at least four other pending cases
24 before other courts. Rule 11(b) and (3) states:

25 By presenting to the court a pleading, written motion, or other paper--whether by
26 signing, filing, submitting, or later advocating it--an . . . unrepresented party certifies
27 that to the best of the person's knowledge, information, and belief, formed after an
28 inquiry reasonable under the circumstances:

² See note 1 above.

1 (3) the factual contentions have evidentiary support or, if specifically so
2 identified, will likely have evidentiary support after a reasonable opportunity for
3 further investigation or discovery

4 Fed.R.Civ.P. 11(b)(3).

5 Plaintiff has filed over twenty-five other civil suits under his real name and alias names.
6 Plaintiff currently has four other section 1983 cases open in this district, and has recently been
7 declared a vexatious litigant on May 20, 2010, in the Central District Court case *Bell v. Harrington*
8 *et al.*, 2:10-cv-03599. Plaintiff's failure to provide accurate information about previous lawsuits
9 interferes with the court's efforts to conserve judicial resources by preventing the proliferation of
10 vexatious litigation. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th
11 Cir. 1995) (dismissal sanction warranted when deliberate deception undermines integrity of judicial
12 proceedings); *Warren v. Guelker*, 29 F.3d 1386, 1389 (9th Cir.1994) (per curiam) (pro se, in forma
13 pauperis prisoner's misrepresentation about previous lawsuits may violate Rule 11). It is apparent
14 from Plaintiff's history of litigation and use of a false name even in this case that his
15 misrepresentation and omissions regarding the number of previous and pending lawsuits in the
16 complaint is willful and in bad faith. *See Anheuser-Busch, Inc. v. Natural Beverage Distributors*,
17 69 F.3d 337, 348 (9th Cir. 1995). As Plaintiff is proceeding in forma pauperis in other cases before
18 the Court, the Court finds that monetary sanctions would be inappropriate and finds that the
19 appropriate sanction for violating Rule 11(b)(3) is to dismiss the case without prejudice. *See*
20 *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995); *Warren*
v. Guelker, 29 F.3d 1386, 1389 (9th Cir.1994).

21 **IV. Conclusion**

22 Plaintiff admittedly has not completed the grievance process prior to initiating this action.
23 It appears that the Plaintiff has on three prior occasions brought civil actions and appeals that have
24 been dismissed as frivolous or for failure to state a claim. Furthermore, it appears that Plaintiff has
25 violated Rule 11(b)(3) of the Federal Rules of Civil Procedure. Based on the above, the Court
26 HEREBY ORDERS:

- 27 1. Plaintiff SHALL SHOW CAUSE within thirty (30) days of the date of service of
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1 this order why the action should not be dismissed without prejudice for failure to
2 exhaust administrative remedies.

3 2. Plaintiff SHALL SHOW CAUSE within thirty (30) days of the date of service of
4 this order why the abovementioned actions and appeals do not count as “strikes”
5 under 28 U.S.C. § 1915(g).

6 3. Plaintiff SHALL SHOW CAUSE within thirty (30) days of the date of service of
7 this order why filing under a false name and the false statement of prior litigation
8 in Plaintiff's complaint does not violate Rule 11(b)(3) of the Federal Rules of
9 Civil Procedure and why this action should not be dismissed without prejudice as
10 the appropriate sanction for violating Rule 11(b)(3).

11
12 IT IS SO ORDERED.

13 Dated: December 30, 2010

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UNITED STATES MAGISTRATE JUDGE