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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MIGUEL ENRIQUE DIAZ,
Plaintiff,
v.
STU SHERMAN, et al.,
Defendants.

Case No. 1:13-cv-01627-DAD-MJS (PC)

**ORDER GRANTING DEFENDANTS’
REQUEST FOR JUDICIAL NOTICE;
AND**

**FINDINGS AND RECOMMENDATIONS
TO:**

- (1) GRANT IN PART DEFENDANTS’
MOTION TO REVOKE PLAINTIFF’S
IN FORMA PAUPERIS STATUS;**
- (2) REVOKE PLAINTIFF’S IN FORMA
PAUPERIS STATUS;**
- (3) DIRECT PLAINTIFF TO PAY FILING
FEE; AND**
- (4) GRANT DEFENDANTS’ MOTION TO
STAY DISCOVERY**

(ECF Nos. 33 & 36)

FOURTEEN-DAY DEADLINE

I. INTRODUCTION

Plaintiff is a state prisoner proceeding pro se in this civil rights action brought pursuant to 42 U.S.C. § 1983. On January 9, 2014, Plaintiff was granted leave to proceed in forma pauperis (“IFP”) status. (ECF No. 9.) Plaintiff has declined Magistrate

1 Judge jurisdiction.

2 Before the Court is Defendants' January 29, 2016, motion to revoke Plaintiff's
3 IFP status. (ECF No. 33.) Also before the Court is Defendants' March 4, 2016, motion
4 to stay all discovery for sixty (60) days pending this Court's ruling on their motion to
5 revoke Plaintiff's IFP status (ECF No. 36.) Plaintiff filed an opposition to both of
6 Defendants' motions on March 23, 2016. (ECF No. 37.) Defendants have not
7 submitted a reply. This matter is submitted pursuant to Local Rule 230(l).

8 **II. MOTION TO REVOKE IN FORMA PAUPERIS STATUS**

9 **A. Legal Standard**

10 28 U.S.C. § 1915 permits a federal court to authorize the commencement and
11 prosecution of an action without prepayment of fees by an individual who submits an
12 affidavit demonstrating that he is unable to pay the fees. However,

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

21 28 U.S.C. § 1915(g).

22 The imminent danger exception applies if “the complaint makes a plausible
23 allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the time
24 of filing.” Andrews v. Cervantes, 493 F.3d 1047, 1055 (9th Cir. 2007). The Ninth Circuit
25 interprets “imminent danger” to mean “ongoing danger,” meaning the prisoner must
26 allege that prison officials have continued with a practice that has injured him or others
27 similarly situated in the past. Id. at 1056-57.

28 A prisoner seeking to invoke the imminent danger exception in § 1915(g) must
make specific, credible allegations of imminent danger of serious physical harm. McNeil
v. U.S., 2006 WL 581081 (W.D. Wash. Mar. 8, 2006) (citing Kinnell v. Graves, 265 F.3d
1125, 1127-28 (10th Cir. 2001), and White v. Colorado, 157 F.3d 1226, 1232 (10th Cir.

1 1998)). Vague, speculative, and non-specific allegations are insufficient. See Pauline v.
2 Mishner, 2009 WL 1505672 (D. Haw. May 28, 2009) (plaintiff's vague and conclusory
3 allegations of possible future harm to himself or others are insufficient to trigger the
4 "imminent danger of serious physical injury" exception to dismissal under § 1915(g));
5 Cooper v. Bush, 2006 WL 2054090 (M.D. Fla. July 21, 2006) (plaintiff's allegations that
6 he will commit suicide, or that he has already attempted suicide and will do so again,
7 are insufficient to show imminent danger); Luedtke v. Bertrand, 32 F.Supp.2d 1074,
8 1077 (E.D. Wis. 1999) ("[p]laintiff's vague allegation of a conspiracy among the
9 defendants to beat, assault, injure, harass and retaliate against him are not enough.
10 These allegations are insufficient and lack the specificity necessary to show an
11 imminent threat of serious physical injury.").

12 **B. Defendants' Request for Judicial Notice**

13 Defendants ask the Court to take judicial notice of the following cases: Diaz v.
14 Vasquez, 1:12-cv-00732-SAB (E.D. Cal.) (dismissed on February 25, 2013, for failure to
15 state a claim; appeal dismissed for lack of jurisdiction); Diaz v. Diaz, 1:12-cv-1296-AWI-
16 SAB (E.D. Cal.) (dismissed on September 4, 2014, for failure to state a claim; appeal
17 dismissed for failure to obey a court order); Diaz v. Diaz, 1:13-cv-00453-SKO (E.D. Cal.)
18 (dismissed on July 28, 2014, for failure to state a claim; appeal filed, disposition
19 pending); Diaz v. State of California, 2:04-cv-02375-MJS (E.D. Cal.) (appeal dismissed
20 on December 19, 2007, as not in good faith). Since judicial notice may be taken of
21 court records, Defendants' request will be granted. Valerio v. Boise Cascade Corp., 80
22 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454
23 U.S. 1126 (1981).

24 **C. Plaintiff's Allegations**

25 Plaintiff initiated this action on October 9, 2013, and is proceeding on a First
26 Amended Complaint filed November 6, 2014. (ECF No. 24.) On October 9, 2015,
27 Plaintiff's First Amended Complaint was screened and found to state claims against (1)
28 Sgt. Lowther; (2) Sgt. Beltran; (3) Lt. Morales; (4) Lt. Popper; (5) Lt. Gallegher; (6) CO

1 Root; (7) CO Cavagnaro; (8) CO Mason; (9) CO Morales; (10) CO Boncore/Williams;
2 (11) CO Childress; (12) Appeals Coordinator Heck; and (13) AW Ramirez.

3 Plaintiff alleges that Defendants Ramirez, Lt. Morales, Popper, Beltran, Root,
4 Cavagnaro, Mason, Lowther, and Heck retaliated against Plaintiff after he filed a
5 number of appeals and lawsuits by denying him access to food and/or work
6 assignments over the course of several months. He also alleges that Defendants CO
7 Morales, Boncore/Williams and Childress denied Plaintiff access to all prison food
8 between the dates of August 25, 2013, and September 4, 2013, and this amounted to
9 cruel and unusual punishment under the Eighth Amendment. Plaintiff further alleges
10 the Defendant Gallegher denied Plaintiff the opportunity to call witnesses or present
11 evidence at five disciplinary hearings where Plaintiff was ultimately found guilty, in
12 violation of Plaintiff's due process rights.

13 **D. Analysis**

14 Defendants move for the outright dismissal of this action on the grounds that
15 Plaintiff has incurred three "strikes" within the meaning of 28 U.S.C. § 1915(g). The
16 Court agrees that Plaintiff has incurred three strikes. Nonetheless, outright dismissal
17 would be premature without first determining whether the imminent danger exception
18 might apply to this case. Andrews, 493 F.3d at 1055. Defendants do not address this
19 point in their moving papers.

20 In his opposition to the instant motion, Plaintiff alleges that the imminent danger
21 exception applies here because the Defendants were denying him two meals a day for
22 nine months. (ECF No. 37.) It is well settled that the sustained deprivation of food can
23 be cruel and unusual punishment when it results in pain without any penological
24 purpose. Foster v. Runnels, 554 F.3d 807, 814 (9th Cir. 2009) (finding an Eighth
25 Amendment violation where prison official denied inmate 16 meals over a 23 day
26 period). To decide whether Plaintiff was in imminent danger of serious harm from food
27 deprivation, the Court must look at what, if any, danger Plaintiff faced at the time his
28 complaint was filed. Andrews, 493 F.3d at 1055. In the complaint filed on October 9,

1 2013, Plaintiff alleged that he was able to eat prison-supplied food as of October 5,
2 2013. Plaintiff thus essentially admits that the Defendants' allegedly unlawful conduct
3 stopped before he filed this action.

4 Moreover, Plaintiff fails to provide specific, credible allegations of imminent
5 danger of serious physical harm caused by the past denial of food. He states only that
6 the lack of food led him to have low blood sugar, which *could* have made it dangerous
7 for him to receive the insulin injections he needed for his diabetes. He does not,
8 however, allege that he in fact suffered a serious illness, had to be hospitalized, or
9 actually experienced anything that could be considered "serious harm." Compare
10 Andrews, 493 F.3d at 1050-51 (where prisoner alleged facts indicating that he had
11 suffered a particular injury, that Defendants knew of a particular harm to him, and that
12 they failed to act to address the harm.)

13 Accordingly, the Court concludes that the imminent danger exception does not
14 apply to the facts of this case. Defendants' motion to revoke Plaintiff's IFP status should
15 be GRANTED IN PART, and Plaintiff should be directed to pay the \$400 filing fee
16 before proceeding in this action.

17 **III. DEFENDANTS' MOTION TO STAY**

18 Defendants filed a motion on March 4, 2016, requesting that this Court stay all
19 discovery for a period of sixty (60) days while their motion to revoke Plaintiff's IFP status
20 and dismiss Plaintiff's complaint is pending. The Court may modify a scheduling order
21 for good cause. Fed. R. Civ. P. 16(b)(4); Johnson v. Mammoth Recreations, Inc., 975
22 F.2d 604, 608 (9th Cir. 1992). Good cause having been shown, the Court will
23 recommend that this action be stayed pending resolution of this Court's
24 recommendation that Defendants' motion to revoke be granted and Plaintiff be directed
25 to pay the filing fee in full.

26 **IV. CONCLUSION AND ORDER**

27 Based on the foregoing, it is HEREBY ORDERED that Defendants' request for
28 judicial notice is granted; and

1 IT IS HEREBY RECOMMENDED that:

- 2 1. Defendants' motion to revoke Plaintiff's IFP status (ECF No. 33) be
3 GRANTED IN PART;
- 4 2. Defendants' motion to stay discovery (ECF No. 36) be GRANTED;
- 5 3. If the District Judge adopts these recommendations, Plaintiff be directed to
6 pay the \$400 filing fee in full within twenty-one (21) days of the District
7 Judge's order; and
- 8 4. If Plaintiff fails to timely pay the \$400 filing fee in full, all pending motions be
9 terminated and the action be dismissed without prejudice.

10 These Findings and Recommendations are submitted to the United States
11 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).
12 Within **fourteen** (14) days after being served with these Findings and
13 Recommendations, any party may file written objections with the Court and serve a
14 copy on all parties. Such a document should be captioned "Objections to Magistrate
15 Judge's Findings and Recommendations." Any reply to the objections shall be served
16 and filed within **fourteen** (14) days after service of the objections. The parties are
17 advised that failure to file objections within the specified time may result in the waiver of
18 rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter
19 v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

20
21 IT IS SO ORDERED.

22 Dated: April 13, 2016

23 /s/ Michael J. Seng
24 UNITED STATES MAGISTRATE JUDGE