

1 advisement of the sitting judge” and making a “tactical choice” to abandon an action that has
2 been found not to state a claim. (*Id.*) Plaintiff also argues that such a choice “prevents frivolous
3 claims” from “putting undue burden on a strained court system.” (*Id.*) Plaintiff asserts that he is
4 unaware of any local or federal rule that requires him to “file a reply to the notice of dismissal for
5 failure to state a claim, with leave to amend.” (*Id.*, p. 4.)

6 The Ninth Circuit has clarified that when dismissal of a prior action is reviewed “to
7 determine whether it counts as a strike, the style of the dismissal or the procedural posture is
8 immaterial. Instead, the central question is whether the dismissal rang the PLRA bells of
9 frivolous, malicious, or failure to state a claim.” Harris v. Magnum, 863 F.3d 1133, 1142 (9th
10 Cir. 2017). More to the point, the Ninth Circuit has rejected Plaintiff’s argument. “It also does
11 not matter whether the dismissals were with or without prejudice.” Id.; O’Neal v. Price, 531 F.3d
12 1146, 1154 (9th Cir. 2008). Two of Plaintiff’s prior actions cited in the OSC, *Hoffmann v.*
13 *California Correctional Health Care Services et al.*, 2:16-cv-01691-MCE-AC and *Hoffmann v.*
14 *Growden et al.*, 2:15-cv-01431-EFB, were dismissed for failure to state a claim. It matters not
15 whether they were dismissed with or without prejudice, or with or without leave to amend.
16 Harris, 863 F.3d at 1142; O’Neal, 531 F.3d at 1154. Because they were dismissed for failure to
17 state a claim prior to Plaintiff filing this action, *California Correctional Health Care Services* and
18 *Growden* rang the PLRA bell as strikes. Harris, 863 F.3d at 1142.

19 Second, Plaintiff argues that the third action cited in the OSC, *Hoffmann v. Jones*, 2:15-
20 cv-01735-MCE-KJN which was dismissed as duplicative of 2:15-cv-1729 CKD P on September
21 28, 2015, should not count as a strike since Plaintiff was apparently released and re-incarcerated¹
22 before he filed this action. Plaintiff argues that the three strikes “provision would end when the
23 plaintiff exits his period of incarceration.” (Doc. 12, p. 3.) Since Plaintiff was once again
24 incarcerated in January of 2016, he appears to argue that the three strikes provision would begin
25 to run anew. (*Id.*)

26
27 ¹ While Plaintiff indicates that he was re-incarcerated in January of 2016, he does not state when he had been
28 released. Plaintiff does not attack the application of 28 U.S.C. § 1915 to either 2:15-cv-01735-MCE-KJN, or 2:15-
cv-1729 CKD P, nor could he since he was incarcerated the entire duration of both of those proceedings.

1 Plaintiff's argument is unclear. However, the requirements of subsections (g) and (h) of
2 1915 explicitly apply to actions brought by one "incarcerated or detained in any facility" by "any
3 person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or
4 adjudicated delinquent for, violation of criminal law or the terms or conditions of parole,
5 probation, pretrial release, or diversionary program." Since it acknowledges possible violation of
6 conditions of parole, probation, or pretrial release, §1915 encompasses occasions where one has
7 been released from custody and is subsequently re-incarcerated. The docket for *Jones* shows that
8 Plaintiff filed the case and was served papers while housed in the Lassen Community
9 Correctional Facility in Susanville, California. Thus, he was detained under § 1915(g). To the
10 extent that Plaintiff is attempting to argue that his release erases all prior strikes, there is no
11 authority cited for this proposition, and this Court will not be the first to endorse it. Plaintiff has
12 failed to show that *Jones* is not a strike.

13 Finally, Plaintiff argues that he is pursuing a number of actions whose merit should
14 outweigh those counted as strikes against his *in forma pauperis* application in this case. (Doc. 12,
15 p. 5.) Again, Plaintiff cites no authority for this argument. The plain language of § 1915(g)
16 applies to all prisoner cases and provides no exception based on whether the merits of the other
17 cases outweigh former strikes.

18
19 **ORDER**

20 Accordingly, IT IS HEREBY ORDERED that:

- 21 1. Plaintiff's March 20, 2018, reply (Doc. No. 12) provides no basis to vacate the March 15,
22 2018, dismissal; and
23 2. This case remains CLOSED.

24
25 IT IS SO ORDERED.

26 Dated: March 22, 2018

27 
28 SENIOR DISTRICT JUDGE