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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALLEN HAMMLER,

 Plaintiff,

 v.

COMPOSE, et al.,

 Defendants.

No. 1:19-cv-01149-DAD-GSA (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS

(Doc. No. 5)

Plaintiff Allen Hamler is a state prisoner proceeding *pro se* with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff commenced this action by filing a complaint on August 23, 2019. (Doc. No. 1.) Plaintiff has not filed an application to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915, nor has he paid the \$400.00 filing fee. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On September 10, 2019, the assigned magistrate judge issued findings and recommendations, recommending that the court not permit plaintiff to proceed *in forma pauperis* and that he be required to pay the filing fee in order to proceed with this action because: (1) he is subject to the three strikes bar under 28 U.S.C. § 1915(g); and (2) the allegations in plaintiff’s complaint do not satisfy the “imminent danger of serious physical injury” exception to § 1915(g). (Doc. No. 5 at 3–4.) Those findings and recommendations were served on plaintiff and contained notice that any objections thereto were to be filed within fourteen (14) days after service. (*Id.* at

1 5.) On October 24, 2019, plaintiff filed objections to the pending findings and recommendations.
2 (Doc. No. 9.)

3 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the undersigned has
4 conducted a *de novo* review of the case. Having carefully reviewed the entire file, including
5 plaintiff’s objections, the undersigned concludes that the findings and recommendations are
6 supported by the record and proper analysis.¹

7 In his objections to the pending findings and recommendations, Plaintiff asserts that two
8 of the dismissal orders relied upon in the findings and recommendations—*Hammler v. Kernan*,
9 3:18-cv-01170-DMS-NLS (S.D. Cal. Dec. 10, 2018) and *Hammler v. Hough*, 3:18-cv-01319-
10 LAB-BLM (S.D. Cal. May 24, 2019)—cannot count as strikes because they are pending appeal in
11 the Ninth Circuit Court of Appeals. (Doc. No. 9 at 2.) Plaintiff is mistaken as a matter of law.
12 The United States Supreme Court has clarified that “[a] prior dismissal on a statutorily
13 enumerated ground counts as a strike even if the dismissal is the subject of an appeal,” and has
14 held “that a prisoner who has accumulated three prior qualifying dismissals under § 1915(g) may
15 not file an additional suit *in forma pauperis* while his appeal of one such dismissal is pending.”
16 *Coleman v. Tollefson*, ___U.S.___, ___, 135 S. Ct. 1759, 1763, 1765 (2015); *see also Lipsey v.*
17 *Mendoza*, No. 1:18-cv-00969-LJO-GSA-PC, 2019 WL 295767, at *2 (E.D. Cal. Jan. 23, 2019)
18 (citing *Coleman*, 135 S. Ct. at 1765) (“Plaintiff is not entitled to proceed *in forma pauperis* in this
19 case, even if he has not exhausted or waived his opportunity to appeal any of his cases that count
20 as a strike under 28 U.S.C § 1915(g).”).

21 Plaintiff also contends that the dismissal order in *Hammler v. Hudson*, 2:16-cv-01153-
22 JAM-EFB (E.D. Cal. May 17, 2019) should not count as a strike because his complaint in that
23 case was dismissed for failure to exhaust administrative remedies, which is not one of the
24 enumerated reasons under § 1915(g). (Doc. No. 9 at 2.) However, plaintiff’s failure to exhaust

25 ¹ The undersigned notes that the findings and recommendations relied upon four prior cases that
26 were dismissed and counted all of them as strikes under 28 U.S.C. § 1915(g). The undersigned
27 disagrees with the magistrate judge’s conclusion that the dismissal in *Hammler v. Director of*
28 *CDCR*, 1:17-cv-00097-NJV (N.D. Cal. Apr. 27, 2017) (“*CDCR*”) constitutes a strike under §
1915(g). However, because the court agrees that the other three dismissals count as strikes, the
analysis and conclusion remain the same.

1 his administrative remedies prior to filing suit was clear from the face of his complaint filed in
2 *Hudson*. (*Hudson*, Doc. No. 50 at 4, 10.) Thus, the *Hudson* dismissal is properly counted as a
3 strike under § 1915(g). *See El-Shaddai v. Zamora*, 833 F.3d 1036, 1044 (9th Cir. 2016) (Holding
4 that a dismissal for failure to exhaust administrative remedies counts as a strike dismissal under
5 § 1915(g) if the failure to exhaust is clear from the face of the complaint); *Kelly v. Elit*, No. 1:18-
6 cv-00019-DAD-SAB, 2018 WL 1905667, at *2 (E.D. Cal. Apr. 23, 2018) (“[I]f a case is
7 dismissed because the failure to exhaust was clear on the face of the complaint, and no outside
8 evidence was considered in reaching that determination, the dismissal would count as a strike.”).

9 Accordingly:

- 10 1. The findings and recommendations (Doc. No. 5) issued on September 10, 2019 are
11 adopted;
- 12 2. Within thirty days from the date of service of this order, plaintiff is required to pay
13 in full the \$400.00 filing fee for this action; and
- 14 3. Plaintiff’s failure to pay the required filing fee as ordered will result in the
15 dismissal of this action without prejudice.

16 IT IS SO ORDERED.

17 Dated: December 17, 2019

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20 UNITED STATES DISTRICT JUDGE
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