

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES HAMPTON,  
Plaintiff,  
v.  
TIM VIRGA et al.,  
Defendants.

No. 2:13-cv-0923 JAM DB P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and was granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 on March 21, 2014. (ECF No. 7). This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff filed his second amended complaint on October 26, 2015. (ECF No. 13). Defendant Agnone was served on November 11, 2017. (See ECF No. 18). On January 26, 2018, defendant Agnone filed a motion to revoke plaintiff's in forma pauperis status pursuant to 28 U.S.C. § 1915(g) along with a supporting request for judicial notice. (ECF Nos. 21 et seq., 22). Specifically, he contends that while incarcerated, plaintiff has brought at least three actions that were dismissed as frivolous, or malicious, or for failure to state a claim, and that as a result, plaintiff is barred from proceeding in forma pauperis under the statute. (See ECF No. 21-1 at 4-5; see also ECF No. 22 at 2). Plaintiff has not opposed the motion. Nevertheless, for the reasons

1 stated herein, the court will grant the judicial notice request and deny the motion to revoke  
2 plaintiff's in forma pauperis status.

3 I. RELEVANT LAW

4 A. 28 U.S.C. § 1915(g): Three Strikes Rule

5 Section 1915(g) states:

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

12 28 U.S.C. § 1915(g).

13 “It is well-settled that, in determining a [Section] 1915(g) ‘strike,’ the reviewing court  
14 looks to the dismissing court’s action and the reasons underlying it.” Knapp v. Hogan, 738 F.3d  
15 1106, 1109 (9th Cir. 2013) (brackets added) (citation omitted). “[Section] 1915(g) should be used  
16 to deny a prisoner’s in forma pauperis status only when, after careful evaluation of the order  
17 dismissing an action, and other relevant information, the district court determines that the action  
18 was dismissed because it was frivolous, malicious or failed to state a claim.” Andrews v. King,  
19 398 F.3d 1113, 1121 (9th Cir. 2006) (brackets added).

20 B. Judicial Notice

21 “A court shall take judicial notice if requested by a party and supplied with the necessary  
22 information.” Fed. R. Evid. 201(d). “A judicially noticed fact must be one not subject to  
23 reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the  
24 trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy  
25 cannot reasonably be questioned.” Fed. R. Evid. 201(b)(1)-(2). A court may take judicial notice  
26 of its own records in other cases. See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

27 C. Transfer of Case

28 Generally speaking, when a court decides upon a rule of law, that decision should continue  
to govern the same issues in subsequent stages in the same case. Christianson v. Colt Industries  
Operating Corp., 486 U.S. 800, 815-16 (1988) (citation omitted). Moreover, “when an action is

1 transferred, it remains what it was; all further proceedings in it are merely referred to another  
2 tribunal, leaving untouched what has been already done.” Danner v. Himmelfarb, 858 F.2d 515,  
3 521 (9th Cir. 1988) (brackets omitted) (quoting Magnetic Eng’g & Mfg. Co. v. Dings Mfg. Co.,  
4 178 F.2d 866, 868 (2nd Cir. 1950)).

5 D. Failure to Exhaust Resulting in Failure to State a Claim

6 The failure to exhaust is an affirmative defense, and a failure to exhaust being clear on the  
7 face of a complaint is rare. See Albino v. Baca, 747 F.3d 1162, 1166, 1169 (9th Cir. 2014). If a  
8 court needs to review documents in addition to the complaint in order to establish failure to  
9 exhaust, a dismissal of that case does not constitute a strike. See, e.g., El-Shaddai v. Zamora, 833  
10 F.3d 1036, 1044 (9th Cir. 2016). If, however, failure to exhaust is clear on the face of a pleading,  
11 it may be considered a failure to state a claim upon which relief may be granted under Federal  
12 Rule of Civil Procedure 12(b)(6). See Albino, 747 F.3d at 1169 (“[I]n those rare cases where a  
13 failure to exhaust is clear from the face of the complaint, a defendant may successfully move to  
14 dismiss under Rule 12(b)(6) for failure to state a claim.”); see generally El-Shaddai, 833 F.3d at  
15 1044 (“[A] complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative  
16 defense . . . appears on its face.”). Dismissals under Rule 12(b)(6) for failure to state a claim may  
17 constitute a strike within the meaning of the PLRA. Washington v. Los Angeles County Sheriff’s  
18 Dep’t, 833 F.3d 1048, 1055 (9th Cir. 2016) (citing Knapp, 738 F.3d at 1109).

19 II. DISMISSAL HISTORY OF ALLEGED “STRIKE” CASES

20 In support of the motion to revoke plaintiff’s in forma pauperis status, defendant Agnone  
21 identifies the following three cases plaintiff has filed in the past that he contends were dismissed  
22 in such a way that they constitute “strikes” under Section 1915(g). They are: (1) Hampton v.  
23 Harrison, No. 2:06-cv-5418 (C.D. Cal. Sep. 14, 2006) (“Harrison”); (2) Hampton v. Ayers, No.  
24 2:07-cv-1268 (C.D. Cal. Aug. 14, 2007) (“Ayers”), and (3) Hampton v. Schwarzenegger, No.  
25 2:09-cv-3432 (C.D. Cal. May 22, 2009) (“Schwarzenegger”).<sup>1</sup>

26 \_\_\_\_\_  
27 <sup>1</sup> Because the court has reviewed and will reference documents from these cases that are not  
28 included in defendant Agnone’s request for judicial notice pleading, the court will cite directly to  
the documents in the dockets of these cases instead of to the copies in defendant Agnone’s  
request for judicial notice.

1 A. Hampton v. Harrison, No. 2:06-cv-5418 (C.D. Cal. Sep. 14, 2006)

2 In Harrison, both the reasoning and the language behind its dismissal were clear. The court  
3 denied plaintiff's request to proceed in forma pauperis on the ground that plaintiff had failed to  
4 state a claim upon which relief could be granted. (See Harrison, ECF No. 2).

5 B. Hampton v. Ayers, No. 2:07-cv-1268 (C.D. Cal. Aug. 14, 2007)

6 In Ayers, when dismissing the case, the court first found plaintiff's complaint had no  
7 cognizable claims. (See Ayers, ECF Nos. 12, 17). At that time, the court gave plaintiff the  
8 opportunity to amend his complaint. (See Ayers, ECF No. 12). Plaintiff, however, failed to  
9 amend, and as a result, the court dismissed the case for failure to prosecute. (See Ayers, ECF  
10 Nos. 17, 19, 20) (citing to Fed. R. Civ. P. 41(b)).

11 C. Hampton v. Schwarzenegger, No. 2:09-cv-3432 (C.D. Cal. May 22, 2009)

12 In Schwarzenegger, plaintiff's initial pleading in the Northern District, filed May 4, 2009,  
13 was simply a motion for a preliminary injunction, nothing more. (See Schwarzenegger, ECF No.  
14 1). It was not accompanied by a complaint. (See Schwarzenegger, ECF No. 1). As a result, at the  
15 time it was filed, plaintiff was instructed by the Northern District to file a complaint as well as an  
16 in forma pauperis application within thirty days. (See Schwarzenegger, ECF No. 2, 3).

17 Shortly thereafter, on May 11, 2009, the case was ordered transferred to the Central  
18 District, and plaintiff's preliminary injunction motion was lodged in that district. (See  
19 Schwarzenegger, ECF Nos. 4-6 et seq.). On May 22, 2009, in a form order, the Central District  
20 adopted its magistrate judge's recommendation that plaintiff's request to file the action without  
21 prepayment of the full filing fee be denied in part because "no complaint [had] been filed" and  
22 because "plaintiff [had] not exhausted his administrative remedies."<sup>2</sup> (See Schwarzenegger, ECF  
23 No. 7) (brackets added).

24 ///

25 ///

---

26 <sup>2</sup> The court also listed: (1) an inadequate showing of indigency; (2) plaintiff's failure to authorize  
27 disbursements from his prison trust account to pay the filing fee, and (3) plaintiff's failure to  
28 provide a certified copy of the trust fund statement for the last six months as additional reasons  
for denying plaintiff's in forma pauperis request. (See Schwarzenegger, ECF No. 7).

1 III. ANALYSIS

2 Pursuant to Federal Rule of Evidence 201(b), the court takes judicial notice of the  
3 documents filed in support of defendant Agnone’s motion to revoke plaintiff’s in forma pauperis  
4 status. (See ECF No. 22). The court, sua sponte, also takes judicial notice of all documents on the  
5 docket in Harrison, Avery, and Schwarzenegger that are not included in defendant Agnone’s  
6 judicial notice request. Therefore, documents therein that are relevant to address defendant  
7 Agnone’s motion to revoke will be considered in the court’s analysis.

8 A review of these cases indicate that the reasons that Harrison and Ayers were dismissed  
9 clearly meet the “frivolous,” “malicious,” or “failure to state a claim” standards listed in Section  
10 1915(g). However, the reasons that Schwarzenegger was dismissed do not clearly fall within these  
11 parameters. This fact leads the court to recommend denial of the instant motion.

12 A. Harrison Is a Strike Under Section 1915(g)

13 With respect to Harrison, plaintiff was denied in forma pauperis status based on his failure  
14 to state a claim upon which relief could be granted. (See Harrison, ECF No. 2). The Ninth Circuit  
15 has stated that such a finding may constitute a strike for purposes of Section 1915(g). See O’Neal  
16 v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (stating denial of in forma pauperis status on the  
17 grounds that plaintiff has failed to state a claim counts as a strike for purposes of Section 1915(g)).  
18 Therefore, defendant Agnone’s assertion that the Harrison dismissal constitutes a strike (see ECF  
19 No. 21-1 at 4-5) is correct.

20 B. Ayers Is a Strike Under Section 1915(g)

21 In Ayers, even though its final dispositive order cited a failure to prosecute as the reason  
22 for the dismissal of plaintiff’s case (see Ayers, ECF Nos. 17, 19, 20), such a dismissal may also be  
23 considered a strike for Section 1915(g) purposes, given that it “[rings] the [Prison Litigation  
24 Reform Act’s] bells of frivolous, malicious, or failure to state a claim.” Harris v. Mangum, 863  
25 F.3d 1133, 1142 (9th Cir. 2017) (brackets added) (citation omitted). In other words, the Ayers  
26 court’s ultimate dismissal for failure to prosecute does not negate its underlying, initial finding that  
27 plaintiff’s complaint had no cognizable claims or rather, failed to state a claim (see generally  
28 Ayers, ECF No. 12). See Harris, 863 F.3d at 1142 (stating style or procedural posture of dismissal

1 is immaterial when determining whether dismissal counts as strike); see generally Knapp, 738 F.3d  
2 at 1110 (stating complaint dismissed for failure to amend after initially being dismissed as  
3 incomprehensible draws inference plaintiff could not state a claim). Therefore, the dismissal in  
4 Ayers also falls within the parameters of Section 1915(g) and counts as a strike.

5 C. Schwarzenegger Is Not a Strike Under Section 1915(g)

6 As for Schwarzenegger, the court finds that the dismissal is not a strike. First, the reasons  
7 behind the Central District’s denial of in forma pauperis status which also served as a dismissal of  
8 plaintiff’s case are convoluted. On one hand, the court stated the dismissal was because plaintiff  
9 had not filed a complaint.<sup>3</sup> (See Schwarzenegger, ECF No. 7). On the other hand, the Central  
10 District then hypothetically characterized plaintiff’s preliminary injunction motion as a complaint  
11 in order to support a denial of plaintiff’s in forma pauperis status. (See Schwarzenegger, ECF No.  
12 7). Specifically, the court ultimately found that “on its face,” the “complaint” showed that plaintiff  
13 “[had] not exhausted his administrative remedies, given his apparent failure to seek relief at the  
14 second and third levels of the administrative process.” (See Schwarzenegger, ECF No. 7)  
15 (brackets added).

16 Second, although an affirmative defense like failure to exhaust may be interpreted as a  
17 failure to state a claim, see Albino, 747 F.3d at 1169; see generally El-Shaddaj, 833 F.3d at 1044,  
18 and a dismissal for failure to state a claim may properly be deemed a strike under Section 1915(g)

---

20 <sup>3</sup> With respect to this finding, it should be noted that on May 4, 2009, the same day plaintiff filed  
21 in federal court, the Northern District granted plaintiff thirty days to perfect the preliminary  
22 injunction action via the filing of a complaint. (See Schwarzenegger, ECF Nos. 2, 3). However,  
23 upon transfer of the case, the Central District did not abide by this ruling. Instead, within eleven  
24 days of receiving plaintiff’s case, the court denied plaintiff’s in forma pauperis status and closed  
25 the matter. (See Schwarzenegger, ECF Nos. 4-7) (transferring case on May 13, 2009 and  
dismissing case on May 22, 2009). This decision does not align with the court’s traditional  
leanings towards comity, namely, to defer to a prior court’s decisions and orders. See generally  
Christianson, 486 U.S. at 815-16; see also Danner, 858 F.2d at 521.

26 This court does not opine as to whether the Central District’s decision not to follow  
27 through with the Northern District’s order was a correct one. This fact is only mentioned to  
28 further demonstrate the lack of clarity behind the Central District’s decision to dismiss plaintiff’s  
action. Therefore, these findings should not be used to discount or call into question the final  
outcome in Schwarzenegger.

1 (see generally Washington, 833 F.3d at 1055), a review of plaintiff’s preliminary injunction  
2 motion and the rest of the Schwarzenegger docket does not provide a clear indication that plaintiff  
3 failed to exhaust his administrative remedies. On the contrary, as shown below it indicates that  
4 this finding of fact by the Central District is unsupported by the record.

5 In the motion, plaintiff does state that prison officials “[had] refused to log grievances or  
6 complaints against fellow officers.” (See Schwarzenegger, ECF No. 1 at 2) (brackets added).  
7 However, this is all plaintiff states that is even remotely close to the issue of whether plaintiff had  
8 completed the administrative exhaustion process. Nothing else in the motion addresses whether  
9 plaintiff had exhausted (see generally Schwarzenegger, ECF No. 1), and defendant Agnone points  
10 to no other documents on the docket that do so, either (see generally ECF No. 21 et seq.).<sup>4</sup> Thus,  
11 the Central District’s finding that plaintiff had failed to exhaust (see Schwarzenegger, ECF No. 7)  
12 is unsupported by the record. As such, its subsequent dismissal of the case cannot be considered a  
13 strike pursuant to Section 1915(g).

14 In sum, plaintiff’s preliminary injunction motion does not show on its face that plaintiff  
15 had failed to exhaust his administrative remedies which would allow for dismissal for failure to  
16 state a claim under El-Shaddai and Albino. For these reasons, the court declines to consider the  
17 Central District’s dismissal of Schwarzenegger a strike under Section 1915(g). Therefore,  
18 defendant Agnone’s argument that plaintiff is a three-strikes litigant pursuant to Section 1915(g)  
19 and that as a result, plaintiff’s in forma pauperis status should be revoked because he failed to  
20 allege that he was in imminent danger of serious physical harm at the time he filed his initial  
21 complaint, fails. Consequently, it shall be recommended that: (1) Harrison and Ayers be  
22 declared strikes; (2) Schwarzenegger be declared not a strike, and (3) the motion to revoke  
23 plaintiff’s in forma pauperis status be denied.

24 Accordingly, IT IS HEREBY ORDERED that defendant Agnone’s request for judicial  
25 notice (ECF No. 22) is GRANTED.

26 \_\_\_\_\_  
27 <sup>4</sup> Indeed, it appears that the court may have mistakenly taken another inmate’s sworn affidavit  
28 that was attached to plaintiff’s motion as plaintiff’s own declaration. (See Schwarzenegger, ECF  
No. 1 at 5) (affidavit by inmate Calvin Newborn stating prison officials had failed to process a  
grievance of his at the second level of appeal).

1 IT IS FURTHER RECOMMENDED that:


2 1. Hampton v. Harrison, No. 2:06-cv-5418 (C.D. Cal. Sep. 14, 2006) and Hampton v.  
3 Ayers, No. 2:07-cv-1268 (C.D. Cal. Aug. 14, 2007) be declared strikes under 28 U.S.C. §  
4 1915(g);

5 2. Hampton v. Schwarzenegger, No. 2:09-cv-3432 (C.D. Cal. May 22, 2009) be declared  
6 not a strike under 28 U.S.C. § 1915(g), and

7 3. Defendant Agnone’s motion to revoke plaintiff’s in forma pauperis status (ECF No.  
8 21) pursuant to 28 U.S.C. § 1915(g) be DENIED.

9 These findings and recommendations are submitted to the United States District Judge  
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
11 after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
14 objections shall be served and filed within fourteen days after service of the objections. The  
15 parties are advised that failure to file objections within the specified time may waive the right to  
16 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 Dated: August 15, 2018

18  
19  
20   
21 DEBORAH BARNES  
22 UNITED STATES MAGISTRATE JUDGE

23 DLB:13  
24 DB/ORDERS/ORDERS.PRISONER.CIVIL RIGHTS/hamp0923.1915g.ifp

25  
26  
27  
28