



1 According to plaintiff, he suffers from chronic pain, loss of sleep, and stiffness on a daily basis.  
2 Plaintiff further alleges that treating his arthritic condition is complicated because he also suffers  
3 from Hepatitis C. According to plaintiff, the only pain relief medication that defendants have  
4 ordered for him (Aleve) carries a black box warning for people with liver conditions. In this  
5 regard, plaintiff alleges that he is forced to choose between pain relief and accelerated liver  
6 damage. Plaintiff claims that defendants' refusal to provide him with alternative pain relief,  
7 surgery, and/or physical therapy violates his rights under the Eighth Amendment. (Am. Compl.  
8 at 4-18.)

### 9 ANALYSIS

10 In defendants' motion to revoke plaintiff's IFP status, defense counsel argues that the  
11 Ninth Circuit Court of Appeals as well as several district courts have already found plaintiff  
12 ineligible to proceed IFP because he has accrued at least three strikes for purposes of 28 U.S.C. §  
13 1915(g). Defense counsel also argues that the imminent danger exception to § 1915(g) is not  
14 available to plaintiff in this action. (Defs.' Mem. of P. & A. at 2-6.)

#### 15 I. Legal Standards Applicable Under 28 U.S.C. § 1915(g)

16 "The burden of establishing that three strikes have accrued is on the party challenging the  
17 prisoner's right to proceed in forma pauperis." Knapp v. Hogan, 738 F.3d 1106, 1110 (9th Cir.  
18 2013). See also Silva v. Vittorio, 658 F.3d 1090, 1097, n. 3 (9th Cir. 2010); O'Neal v. Price, 531  
19 F.3d 1146, 1151 (9th Cir. 2008); Andrews v. King, 398 F.3d 1113, 1116 (9th Cir. 2005). The  
20 Ninth Circuit has cautioned that when called upon to determine whether a prior dismissal  
21 qualifies as a strike, a subsequent court must be mindful of the following:

22 Not all unsuccessful cases qualify as a strike under § 1915(g).  
23 Rather, § 1915(g) should be used to deny a prisoner's IFP status  
24 only when, after careful evaluation of the order dismissing an  
25 action, and other relevant information, the district court determines  
26 that the action was dismissed because it was frivolous, malicious or  
27 failed to state a claim . . . .

28 [U]nder the plain language of § 1915(g), [ ] prior dismissals [ ]  
qualify as strikes only if, after reviewing the orders dismissing  
those actions and other relevant information, the district court  
determine[s] that they ha[ve] been dismissed because they were  
frivolous, malicious or failed to state a claim. See § 1915(g).

1 Andrews, 398 F.3d at 1121. See also Knapp, 738 F.3d at 1109.

2 In addition, in interpreting § 1915(g) the Ninth Circuit has observed:

3 [T]he legislative history of the PLRA also supports our reading of  
4 the statute. While it is clear that Congress enacted § 1915(g) to  
5 curb frivolous prisoner complaints and appeals, see Taylor v.  
6 Delatoore, 281 F.3d 844, 849 (9th Cir. 2002) (“The PLRA filing fee  
7 provisions were enacted to deter the large number of frivolous  
8 inmate lawsuits that were „clogging“ the federal courts and  
9 „draining“ limited judicial resources”), the PLRA’s reforms were  
10 “designed to filter out the bad claims and facilitate consideration of  
11 the good.” Jones, 549 U.S. at 204, 127 S. Ct. 910. “Congress  
12 intended section 1915(g) only to penalize litigation that is truly  
13 frivolous, not to freeze out meritorious claims or ossify district  
14 court errors.” Adepegba, 103 F.3d at 388; see also Jennings, 175  
15 F.3d at 780. Thus, our reading of the statute “not only respects  
16 Congress” intent to curb meritless lawsuits, but ensures that  
17 meritorious lawsuits are not swept away in the process.” See Lopez  
18 v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000) (quoting 141 Cong.  
19 Rec. S146110–01, S14267 (daily ed. Sept. 29, 1995)) (“As chief  
20 sponsor of the PLRA, Senate Judiciary Committee Chairman Orrin  
21 Hatch made the following statement: „I do not want to prevent  
22 inmates from raising legitimate claims. This legislation will not  
23 prevent those claims from being raised.“”).

24 Silva, 658 F.3d at 1099-1100.

25 The undersigned notes that a myriad of issues surrounding the determination of which  
26 dismissals count as a strike under § 1915(g) has, in recent years, consumed considerable judicial  
27 resources in both the trial and appellate courts. In part influenced by this fact, the undersigned is  
28 persuaded by a relatively recent decision of the Third Circuit Court of Appeals in which that  
appellate court concluded:

[W]e are ultimately persuaded that the PLRA’s purpose is best  
served by taking an approach that does not open the door to more  
litigation surrounding § 1915(g). Thus, we adopt the following  
rule: a strike under § 1915(g) will accrue only if the entire action or  
appeal is (1) dismissed explicitly because it is “frivolous,”  
“malicious,” or “fails to state a claim” or (2) dismissed pursuant to  
a statutory provision or rule that is limited solely to dismissals for  
such reasons, including (but not necessarily limited to) 28 U.S.C.  
§§ 1915A(b)(1), 1915(e)(2)(B)(i), 1915(e)(2)(B)(ii), or Rule  
12(b)(6) of the Federal Rules of Civil Procedure.

Applying this rule, we must now decide whether the dismissal of  
Byrd’s appeal in Byrd v. Gillis under § 1915(e)(2)(B) because it  
was “without merit” constitutes a strike. The dismissal is not  
encompassed by the first category of our adopted rule. The terms  
“frivolous,” “malicious,” or “fails to state a claim” were not used to  
dismiss the appeal in its entirety. Although we have often

1 associated the term “without merit” with the term “frivolous,” we  
2 cannot say that these terms have the exact same meaning.  
3 Regardless, the first category of our new rule requires that the terms  
4 “frivolous,” “malicious,” or “fails to state a claim” be explicitly  
5 stated for the dismissal to constitute a strike.

6 Byrd v. Shannon, 715 F.3d 117, 126 (3d Cir. 2013) (emphasis added). See also Ball v. Famiglio,  
7 726 F.3d 448, 463 (3d Cir. 2013) (same); Keeton v. Cox, No. CIV S-06-1094 GEB KJM, 2009  
8 WL 650413 at \*6 (E.D. Cal. Mar. 12, 2009) (“Neither of these underlying orders suggested that  
9 the action was finally terminated because it was frivolous, malicious or failed to state a claim;  
10 rather, the orders found the pleading deficits might be ameliorated.”).

## 11 II. Plaintiff’s Prior Cases

12 With the above principles in mind, the court now turns to the four lawsuits previously  
13 filed by plaintiff which defense counsel characterizes as “strikes” in the pending motion to revoke  
14 plaintiff’s IFP status.<sup>2</sup>

- 15 • **Hicks v. Marshall, No. 3:93-cv-04272-CAL (N.D. Cal.)**

16 In this case, plaintiff filed a civil rights action under 42 U.S.C. § 1983, claiming a  
17 violation of due process under the Fourteenth Amendment. (Def’s. “Mot. to Revoke Pl.’s IFP  
18 Status, Ex. A.) The United States District Court for the Northern District of California granted  
19 defendants’ motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Id.)

20 Neither party appears to dispute, and this court finds, that this case constitutes a strike for  
21 purposes of § 1915(g).

- 22 • **Hicks v. Lewis, No. 3:94-cv-02103-CAL (N.D. Cal.)**

23 In this case, plaintiff filed a civil rights action under 42 U.S.C. § 1983, claiming a  
24 violation of his rights under the Eighth Amendment. (Def’s. “Mot. to Revoke Pl.’s IFP Status, Ex.  
25 B.) The United States District Court for the Northern District of California summarily dismissed  
26 plaintiff’s complaint for failure to state a cognizable claim for relief. (Id.)

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28 <sup>2</sup> Defendants have filed a request for judicial notice of their exhibits, which consist of copies of  
docket sheets and court orders from plaintiff’s previously-filed cases. Pursuant to Federal Rule of  
Evidence 201, the court will grant defendant’s request.

1 Again, neither party appears to dispute, and this court finds, that this case constitutes a  
2 strike for purposes of § 1915(g).

3 • **Hicks v. Berkson, No. 1:02-cv-05905 AWI SMS (E.D. Cal.)**

4 In this case, plaintiff filed a civil rights action under 42 U.S.C. § 1983, claiming a  
5 violation of his rights under the Eighth Amendment and Fourteenth Amendment. (Def.’s Mot. to  
6 Revoke Pl.’s IFP Status, Ex. C.) Magistrate Judge Sandra M. Snyder screened plaintiff’s  
7 complaint and dismissed it with leave to amend. (Id.) Magistrate Judge Snyder warned plaintiff  
8 that his failure to file an amended complaint would result in a recommendation that the action be  
9 dismissed for failure to obey a court order and for failure to state a claim upon which relief may  
10 be granted. (Id.) Subsequently, plaintiff filed a request to withdraw his complaint. (Id.)  
11 Magistrate Judge Snyder issued an order explaining to plaintiff that he could dismiss the action  
12 without prejudice by filing a notice of dismissal. (Id.) Judge Snyder ordered plaintiff to file  
13 either a notice that he wished to dismiss the action or an amended complaint. (Id.) Again, Judge  
14 Snyder warned plaintiff that failure to file an amended complaint would result in a  
15 recommendation that the action be dismissed for failure to obey a court order and for failure to  
16 state a claim upon which relief may be granted. (Id.) Plaintiff failed to comply with the court’s  
17 order, so Judge Snyder issued findings and recommendations, recommending dismissal of the  
18 action for plaintiff’s failure to obey a court order and for failure to state a claim. (Id.) United  
19 States District Judge Anthony Ishii adopted the findings and recommendations in full and  
20 dismissed the action. (Id.)

21 Once more, neither party appears to dispute, and this court finds, that this case constitutes  
22 a strike for purposes of § 1915(g).

23 • **Hicks v. Family Healthcare, No. 2:08-cv-05978 UA FMO (C.D. Cal.)**

24 In this case, plaintiff filed a civil rights action under 42 U.S.C. § 1983, claiming  
25 negligence and medical malpractice. (Def.’s Mot. to Revoke Pl.’s IFP Status, Ex. D.) Magistrate  
26 Judge Fernando M. Olguin recommended dismissal of the action because it was “Legally and/or  
27 factually patently frivolous.” United States District Alicemarie H. Stotler adopted the  
28 recommendation and terminated the action.

1 Again, neither party appears to dispute, and this court finds, that this case constitutes a  
2 strike for purposes of § 1915(g).

3 As defense counsel observes, the Ninth Circuit Court of Appeals has found that the four  
4 cases discussed above were “dismissed as frivolous or for failure to state a claim” for purposes of  
5 § 1915(g). (Def’s Mot. to Revoke Pl.’s IFP Status, Ex. E (Hicks v. Evans, No. 12-17616 (9th  
6 Cir.)). In that case, the Ninth Circuit ordered plaintiff to pay the filing fee or show cause why his  
7 in forma pauperis status should not be revoked. (Id.) Plaintiff failed to comply with the Ninth  
8 Circuit’s order, so the court dismissed plaintiff’s appeal for failure to pay the docketing/filing fees  
9 in the case. (Id.) Several district courts have also revoked plaintiff’s in forma pauperis status  
10 based on the cases discussed above. (Def’s Mot. to Revoke Pl.’s IFP Status, Ex. F (Hicks v.  
11 Thomas, No. 1:02-cv-05287 REC DLB (E.D. Cal.)), Ex. G. (Hicks v. John Does 1 thru 5, No.  
12 1:07-cv-00006 BLW LMG (E.D. Cal.)), Ex. H (Hicks v. Chrisman, No. 3:13-cv-00505 SI (N.D.  
13 Cal.)).

14 Based on the record in this case, and pursuant to the cases cited above, the court finds that  
15 defendants have demonstrated that plaintiff accrued three or more strikes under 28 U.S.C. § 1915  
16 prior to filing this action.

### 17 III. Imminent Danger Exception

18 There is an exception to the three-strike bar of § 1915(g), which allows a prisoner to use  
19 in forma pauperis status to bring a civil action despite three prior dismissals where the prisoner is  
20 under imminent danger of serious physical injury. See Andrews, 493 F.3d at 1056-57. In his  
21 original complaint, plaintiff alleges that he suffers from an arthritic condition as well as Hepatitis  
22 C. (Compl. at 4) According to plaintiff, the only pain relief medication defendants have ordered  
23 for him (Aleve) carries a black box warning for people with liver conditions. (Id. at 6-8) In this  
24 regard, plaintiff alleges that defendants are forcing him to choose between pain relief and  
25 accelerated liver damage. (Id. at 10)

26 Defense counsel contends that plaintiff alleges a mere disagreement over defendants’  
27 chosen course of pain management and that plaintiff’s allegations do not support a plausible  
28 inference that he faced imminent danger of serious physical injury when he commenced this

1 action. Counsel notes that plaintiff attached to his complaint as an exhibit a medical record  
2 reflecting that as of June 6, 2013, two months before plaintiff filed his original complaint in this  
3 action, plaintiff's liver function tests were within normal limits. (Defs.'s Mem. of P. & A. at 6-10,  
4 Pl.'s Compl. Ex. D.)

5 Nonetheless, the undersigned finds that the allegations in plaintiff's original complaint  
6 satisfy the imminent danger exception to the three strikes rule. The Ninth Circuit has made clear  
7 that § 1915(g) concerns "only a threshold procedural question" and that district courts should not  
8 make an "overly detailed inquiry" into whether plaintiff's allegations qualify for the exception.  
9 Andrews, 493 F.3d at 1055. To illustrate, the Ninth Circuit in Andrews relied on a decision from  
10 the Seventh Circuit Court of Appeals in which that court stated:

11 The State says [the prisoner's] allegations are not serious enough.  
12 However § 1915(g) is not a vehicle for determining the merits of a  
13 claim. To follow the State's logic, a district court would not just  
14 need to determine whether a prisoner is alleging some type of  
15 ongoing or imminent harm. It would also need to fine-tune what is  
16 „serious enough“ to qualify for the exception. Is being denied heart  
17 medication? What about a cholesterol-lowering drug? How  
18 frequently do beatings need to occur before they are serious? This  
19 would result in a complicated set of rules about what conditions are  
20 serious enough, all for the simple statutory provision governing  
21 when a prisoner must pay the filing fee for his claim. This is not  
22 required ....

23 Id. (quoting Ciarpaglini v. Saini, 352 F.3d 328, 331 (7th Cir. 2003)).

24 Instead, the Ninth Circuit held that "the [imminent danger] exception applies if the  
25 complaint makes a plausible allegation that the prisoner faced „imminent danger of serious  
26 physical injury“ at the time of filing." Id. As noted above, plaintiff alleges in his original  
27 complaint that the defendants will provide him only with pain relief medication that is known to  
28 cause accelerated liver damage. If true, plaintiff's allegations are not "overly speculative or  
fanciful" and "more than plausibly raise[] the specter of serious physical injury." Id. at 1055 &  
1057 n.11. See also Jensen v. Knowles, no. 2:02-cv-2373 JKS P, 2008 WL 744726 at \*2 (E.D.  
Cal. Mar. 18, 2008) ("As the court does not intend to play doctor, the Court finds that Plaintiff's  
allegation that he was deprived of his medically prescribed diabetic meal is a „plausible  
allegation“ of a danger of serious physical harm.”).





1 **CONCLUSION**

2 Accordingly, IT IS HEREBY ORDERED that:

- 3 1. Defendants' request for judicial notice (Doc. No. 20-1) is granted;
- 4 2. Plaintiff's motion to reinstate defendant Zamora (Doc. No. 18) is granted;
- 5 3. The Clerk of the Court shall send plaintiff one USM-285 form, one summons, an
- 6 instruction sheet, and a copy of the amended complaint (Doc. No. 10);
- 7 4. Within thirty days from the date of this order, plaintiff shall complete the attached
- 8 Notice of Submission of Documents and submit all of the following documents to the court at the
- 9 same time:
- 10 a. The completed, signed Notice of Submission of Documents;
- 11 b. One completed summons;
- 12 c. One completed USM-285 form for defendant Zamora; and
- 13 d. Two copies of the endorsed amended complaint;
- 14 5. Plaintiff shall not attempt to effect service of the amended complaint on defendant
- 15 Zamora or request a waiver of service of summons from the defendant. Upon receipt of the
- 16 above-described documents, the court will direct the United States Marshal to serve the above-
- 17 named defendant pursuant to Federal Rule of Civil Procedure 4 without payment of costs;
- 18 6. Plaintiff's motion to amend (Doc. No. 25) is denied; and
- 19 7. Plaintiff's motion for preliminary injunctive relief (Doc. No. 27) is denied as moot.
- 20 8. The clerk of the court randomly assign a United States District Judge to this case.  
IT IS HEREBY RECOMMENDED that:

- 21 1. Defendant's motion to revoke plaintiff's IFP status (Doc. No. 20) be denied;
- 22 2. Within forty-five (45) days of the date of any order adopting these findings and
- 23 recommendations, defendants be directed to file a response to plaintiff's first amended complaint.

24 These findings and recommendations are submitted to the United States District Judge

25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

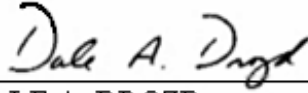
26 after being served with these findings and recommendations, any party may file written

27 objections with the court and serve a copy on all parties. Such a document should be captioned

28 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the

1 objections shall be filed and served within fourteen days after service of the objections. The  
2 parties are advised that failure to file objections within the specified time may waive the right to  
3 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 Dated: March 24, 2015

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7 DALE A. DROZD  
8 UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL HICKS,  
Plaintiff,  
v.  
BEHROZ HAMKAR et al.,  
Defendants.

No. 2:13-cv-1687 WBS DAD P

ORDER

Plaintiff submits the following documents in compliance with the court's order filed

\_\_\_\_\_:

- \_\_\_\_\_ **one** completed summons form
- \_\_\_\_\_ **one** completed USM-285 form
- \_\_\_\_\_ **two** copies of the Amended Complaint

DATED:

\_\_\_\_\_  
Plaintiff