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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DENNIS G. CLAIBORNE,
Plaintiff,
v.
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, et al.,
Defendants.

No. 2:15-cv-0710 JAM CKD P

ORDER

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. On May 18, 2015, the undersigned granted plaintiff's request to proceed in forma pauperis. (ECF No. 9.) The court ordered service of the complaint on defendants Davies and Bolden (ECF Nos. 14 & 23; see ECF No. 22); Bolden has yet to be served.

Before the court is Davies' motion to revoke plaintiff's in forma pauperis status on the ground that plaintiff is a "three strikes" inmate under 28 U.S.C. § 1915(g), and to dismiss this action. (ECF No. 27.) As plaintiff has not timely opposed to the motion or responded in any way, the court considers the motion unopposed. See L.R. 230(1). For the reasons set forth below, the court will grant defendant's motion in part.

1 I. Motion to Revoke IFP Status

2 28 U.S.C. § 1915 permits any court of the United States to authorize the commencement
3 and prosecution of any suit without prepayment of fees by a person who submits an affidavit
4 indicating that the person is unable to pay such fees. However,

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

10 28 U.S.C. § 1915(g).

11 In forma pauperis status may be acquired and lost during the course of litigation.
12 Stehouwer v. Hennessey, 841 F. Supp. 316, 321 (N.D. Cal., 1994), vacated on other grounds by
13 Olivares v. Marshall, 59 F.3d 109 (9th Cir. 1995). The plain language of the statute (§ 1915(g))
14 makes clear that a prisoner is precluded from bringing a civil action or an appeal in forma
15 pauperis if the prisoner has brought three frivolous actions and/or appeals (or any combination
16 thereof totaling three). See Rodriguez v. Cook, 169 F.3d 1176, 1178 (9th Cir.1999). 28 U.S.C.
17 §1915(g) should be used to deny a prisoner’s in forma pauperis status only upon a determination
18 that each action reviewed (as a potential strike) is carefully evaluated to determine that it was
19 dismissed as frivolous, malicious or for failure to state a claim. Andrews v. King, 398 F.3d 1113,
20 1121 (9th Cir. 2005). Defendant has the burden to “produce documentary evidence that allows
21 the district court to conclude that the plaintiff has filed at least three prior actions . . . dismissed
22 because they were ‘frivolous, malicious or fail[ed] to state a claim.’” Id., at 1120, quoting
23 § 1915(g). Once defendants meet their initial burden, it is plaintiff’s burden to explain why a
24 prior dismissal should not count as a strike. Id. If the plaintiff fails to meet that burden,
25 plaintiff’s IFP status should be revoked under § 1915(g). Id.

26 In Silva v. Di Vittorio, 658 F.3d 1090, 1098-99 (9th Cir. 2011), the Ninth Circuit found
27 that “a dismissal must be final before it counts as a ‘strike’ for § 1915(g) purposes.” Thus, “a
28 district court’s dismissal of a case does not count as a ‘strike’ under § 1915(g) until the litigant

1 has exhausted or waived his opportunity to appeal. This means a dismissal ripens into a ‘strike’
2 for § 1915(g) purposes on the date of the Supreme Court’s denial or dismissal of a petition for
3 writ of certiorari, if the prisoner filed one, or from the date when the time to file a petition for writ
4 of certiorari expired, if he did not.” Id. at 1100 (internal quotation omitted). “If a prisoner does
5 not appeal a dismissal, the dismissal counts as a ‘strike’ from the date when his time to file a
6 direct appeal expired.” Id., n.6.

7 II. Discussion

8 Defendant contends that, while incarcerated, plaintiff has filed multiple federal cases that
9 were dismissed for being frivolous or failing to state a claim. (ECF No. 27-1 at 1.) Defendant
10 further asserts that plaintiff was declared a “three strikes” inmate, and had his IFP status revoked,
11 in a previous case in this district. (Id. at 1-2.) The court takes judicial notice of the following
12 cases¹ and summarizes them as follows:

13 A. Cases dismissed at screening

14 Between 1999 and 2002, five cases filed by plaintiff in the Central District of California
15 were dismissed at the screening stage under 28 U.S.C. § 1915A.² In four of those cases, the court
16 found that one or more claims were barred by Heck v. Humphrey, 512 U.S. 477 (1994). (RJN 1-
17 4.) Putting aside the Heck bar, one of the five dismissals indicated the action was “patently
18 frivolous” (RJN 1) and another indicated that plaintiff’s allegations were “not cognizable in a
19 §1983 action” (RJN 5).

20 Defendant argues that dismissal of a prisoner action as Heck-barred constitutes a §1915(g)
21 strike. See Martin v. Sias, 88 F.3d 774, 775 (9th Cir. 1996) (affirming dismissal of federal
22 prisoner’s Bivens action as frivolous under 28 U.S.C. § 1915(d) where action was Heck-barred);
23 see also Smith v. Veterans Admin., 636 F.3d 1306, 1312 (10th Cir. 2011) (civil rights action

24
25 ¹ A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d
500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

26 ² Claiborne v. Roe, No. CV 99-12852 (Def.’s Request for Judicial Notice (RJN) 1); Claiborne v.
27 Culver City Police Dept., et al., No. CV-001987 (RJN 2); Claiborne v. State of California, No.
28 CV 00-4044 (RJN 3); Claiborne v. Detective Gray Irwin, No. CV 01-00509 (RJN 4); Claiborne v.
Director of Corrections, No. CV 02-04037 (RJN 5).

1 dismissed as Heck-barred is a strike for failure to state a claim); In re Jones, 652 F.3d 36, 37-39
2 (D.C. Cir. 2011) (Heck dismissal counts as strike); Hamilton v. Lyons, 74 F.3d 99, 102 (5th Cir.
3 1996) (§ 1983 claim precluded by Heck rule is “legally frivolous”). The court need not rule on
4 this issue, however, as plaintiff incurred at least two strikes above, followed by multiple others.

5 B. Claiborne v. Stevens, et al., No. 4:06-2012 CW (PR) (N.D. Cal.). Plaintiff’s amended
6 complaint was dismissed in a September 25, 2007 screening order for failing to state a claim
7 against any defendant or cure the pleading defects of the original complaint. (RJN 6.) Thus this
8 action counts as a strike.

9 C. Claiborne v. Lt. Beebe, et al., No. 1:06-cv-00681 AWI-DLB-P (E.D. Cal.). Plaintiff’s
10 amended complaint was dismissed in an April 5, 2008 screening order for failure to state a claim
11 or cure the pleading defects of the original complaint. (RJN 7.) Thus this action counts as a
12 strike.

13 D. Appeals dismissed at screening

14 Plaintiff filed an appeal in the Ninth Circuit Court of Appeals, In re Claiborne, No. 06-
15 80106 (9th Cir.) (RJN 8.) The docket sheet reflects that, on October 20, 2006, the Ninth Circuit
16 issued a pre-filing review order, citing plaintiff’s “practice of burdening this court with meritless
17 litigation.” (Id.) Pursuant to the order, reviewing panels subsequently dismissed five appeals by
18 plaintiff as lacking merit or “so insubstantial as not to warrant further review.”³ (Id.)

19 These appeals count as additional strikes. See In re Thomas, 508 F.3d 1225, 1226, n.2
20 (9th Cir. 2007) (holding that when the Ninth Circuit imposes pre-filing requirements, it can
21 preclude appellant from proceeding with a petition or appeal “only when it is clear from the face
22 of the appellant’s pleadings that: (i) the appeal is patently insubstantial or clearly controlled by
23 well settled precedent; or (ii) the facts presented are fanciful or in conflict with facts of which the
24 court may take judicial notice.”); Thomas v. R.T.C. Grounds, 2015 WL 859546, at*3 (N.D. Cal.
25 Feb. 26, 2015) (appeals dismissed under Ninth Circuit’s pre-filing order “are equivalent to
26 dismissals for frivolousness or for failure to state a claim for relief and, thus, they count as strikes
27

28 ³ See docket entries of 11/19/2007; 5/14/2008; 10/08/2008; 6/28/2011; and 6/10/2014.

1 under § 1915(g).”).

2 E. IFP status revoked

3 Finally, in Claiborne v. Albonico, No. 2:08-cv-1319 CMK P (E.D. Cal.), on August 19,
4 2009, the court declared plaintiff a “three strikes” litigant under § 1915(g), revoked his in forma
5 pauperis status, and dismissed the action due to plaintiff’s failure to pre-pay the filing fee. (RJN
6 9.)

7 Based on the foregoing, the undersigned concludes that plaintiff is a “three strikes” inmate
8 under § 1915(g.). The complaint in the instant action does not qualify for the “imminent danger”
9 exception, as the case proceeds on allegations that plaintiff was subject to an unreasonable strip
10 search in October 2014. (ECF Nos. 1 & 9.) Thus the undersigned will revoke plaintiff’s IFP
11 status and order him to pay the filing fee or face dismissal of this action.

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. Defendant’s motion to revoke plaintiff’s IFP status and dismiss complaint (ECF No.
14 27) is partially granted;
- 15 2. Plaintiff’s in forma pauperis status is REVOKED pursuant to 28 U.S.C. § 1915(g);
- 16 3. The order directing the CDCR to make payments to the court from plaintiff’s prison
17 trust account for payment of the filing fee for this action (ECF No. 10) is VACATED;
- 18 4. The Clerk of Court is directed to serve a copy of this order on:
 - 19 (1) the Director of the CDCR; and
 - 20 (2) the Financial Department, U.S. District Court, Eastern District of California,
21 Sacramento Division;
- 22 5. Plaintiff shall submit, within fourteen days from the date of this order, the \$400.00
23 filing fee for this action; and
- 24 6. Plaintiff’s failure to comply with this order will result in a recommendation that this
25 action be dismissed.

26 Dated: December 22, 2015



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE