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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTHUR RAY DEERE, SR.,  
Plaintiff,  
v.  
CDC MEDICAL STAFF, et al.,  
Defendants.

No. 2:16-cv-1695-EFB P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel and in forma pauperis in an action brought under 42 U.S.C. § 1983. On February 16, 2018, defendants filed a motion to revoke plaintiff’s in forma pauperis status. ECF No. 33. In response, plaintiff filed a statement that he did not contest the motion and did not oppose dismissal of his case without prejudice. ECF No. 36. That filing was construed as a notice of voluntary dismissal. Pursuant to the notice, the case was closed. ECF No. 37. Plaintiff now seeks “to Reinstate IFP Status and Continue Civil Action,” which the court construes as both a motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and an opposition to defendants’ motion to revoke plaintiff’s in forma pauperis status. ECF No. 38. For the reasons stated below, the court recommends that plaintiff’s Rule 60(b) motion be granted and that defendants’ motion to revoke plaintiff’s in forma pauperis status also be granted.

1 A voluntary dismissal is a judgment, order, or proceeding from which Rule 60(b) relief  
2 can be granted. *In re Hunter*, 66 F.3d 1002, 1004 (9th Cir. 1995). Under Rule 60(b) a court may  
3 relieve a party from a final judgment or order if the moving party can show: (1) mistake,  
4 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud,  
5 misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment  
6 has been satisfied, released, or discharged; or (6) any other reason that justifies relief. Fed. R.  
7 Civ. P. 60(b).

8 Here, plaintiff asserts that he did not contest defendants' motion or the dismissal of this  
9 case because he believed that an attorney would be subsequently filing a new complaint on his  
10 behalf. *See* ECF No. 38 at 1-2 & 8 (Ex. 2); ECF No. 39. However, after this case was closed, the  
11 attorney encouraged plaintiff to join a pending class action, and declined to file a new action on  
12 plaintiff's behalf. ECF No. 38 at 10, Ex. 3. Given these circumstances, and according plaintiff  
13 some lenity in light of his incarceration and pro se statute, the court finds that plaintiff's dismissal  
14 of this case was a mistake. Accordingly, it is recommended that plaintiff's unopposed motion to  
15 reopen this case be granted.

16 Defendants contend that plaintiff's in forma pauperis status should be revoked because he  
17 has three strikes within the meaning of 28 U.S.C. § 1915(g) and was not in imminent danger of  
18 serious physical injury at the time he commenced this action.<sup>1</sup> ECF No. 33. Plaintiff does not  
19 contest his status as a three-strikes litigant.<sup>2</sup> *See* ECF No. 38. Rather, he claims that § 1915(g)'s  
20 "imminent danger" exception applies to his case. *Id.* at 2. The section 1915(g) exception applies  
21 if the complaint makes a plausible allegation that the prisoner faced "imminent danger of serious  
22 physical injury" at the time of filing. 28 U.S.C. § 1915(g); *Andrews v. Cervantes*, 493 F.3d 1047,  
23 1055 (9th Cir. 2007). Plaintiff's allegations provide no such indication. His original complaint,

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24 <sup>1</sup> Under 28 U.S.C. § 1915(g), a prisoner may not proceed in forma pauperis if the prisoner  
25 has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action  
26 or appeal in a court of the United States that was dismissed on the grounds that it is frivolous,  
27 malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under  
imminent danger of serious physical injury.

28 <sup>2</sup> Plaintiff was previously designated a three-strikes litigant in *Deere v. Estock*, 3:13-cv-  
01344-JLS-NLS (S.D. Cal. Sept. 20, 2013).

1 filed June 16, 2016, sought damages on the grounds that he was permanently impaired because  
2 the California Department of Corrections and Rehabilitation had previously denied him Hepatitis  
3 C treatment, which had allowed his disease to progress. ECF No. 1 at 2-3. At the time plaintiff  
4 filed the complaint, however, treatment for his disease was allegedly underway. *Id.* at 3. In light  
5 of the foregoing, plaintiff's in forma pauperis status must be revoked and he should be required to  
6 submit the appropriate filing fee in order to proceed with this action.

7 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court randomly assign a  
8 United States District Judge to this action.

9 Further, IT IS HEREBY RECOMMENDED that:

- 10 1. Plaintiff's "Motion to Reinstate IFP Status and Continue Civil Action," (ECF No. 38)  
11 be construed as both a motion for relief from judgment pursuant to Rule 60(b) of the  
12 Federal Rules of Civil Procedure and an opposition to defendants' Motion to Revoke  
13 Plaintiff's In Forma Pauperis Status (ECF No. 33);
- 14 2. Plaintiff's Rule 60(b) motion (ECF No. 38) be granted; and
- 15 3. Defendants' Motion to Revoke Plaintiff's In Forma Pauperis Status (ECF No. 33) be  
16 granted to the extent that plaintiff's in forma pauperis status be revoked and plaintiff  
17 be required to pay the \$400 filing fee within fourteen days from the date of any order  
18 adopting these findings and recommendations and be warned that failure to do so will  
19 result in the dismissal of this action.

20 These findings and recommendations are submitted to the United States District Judge  
21 assigned to the case pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
22 after being served with these findings and recommendations, any party may file written  
23 objections with the court and serve a copy on all parties. Such a document should be captioned  
24 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: February 19, 2019.

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5 EDMUND F. BRENNAN  
6 UNITED STATES MAGISTRATE JUDGE  
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