

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 J.L. HOWZE,

12 Plaintiff,

13 v.

14 RICK MALMENDIER, et al.,

15 Defendants.
16

No. 2:16-cv-1737 GEB KJN P

ORDER

17 Plaintiff is a state prisoner, proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C.
18 § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C.
19 § 636(b)(1).

20 Plaintiff has neither paid the filing fee for this action nor requested leave to proceed in
21 forma pauperis pursuant to 28 U.S.C. § 1915. Review of court records reveals that on at least
22 three occasions lawsuits filed by the plaintiff have been dismissed on the grounds that they were
23 frivolous or malicious or failed to state a claim upon which relief may be granted:

24 Howze v. Vela, Case No. CV-13-1610 UA (RZ) (C.D. Cal. March 19, 2013) (the action
25 was “frivolous, malicious or fails to state a claim upon which relief may be granted,” citing 28
26 U.S.C. § 1915(g), “leave to amend would be futile.”).

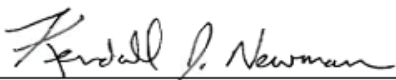
27 Howze v. Vela, Case No. 13-56019 (9th Cir. Jun. 12, 2013) (found appeal to be frivolous
28 and denied request to proceed in forma pauperis).

1 Howze v. Tanaka, Case No. 2:13-cv-4422 UA (RZ) (C.D. Cal. July 15, 2013) (denied in
2 forma pauperis status because the action was “frivolous, malicious or fails to state a claim upon
3 which relief may be granted.”).¹

4 Because plaintiff has sustained three strikes under § 1915g, he is precluded from
5 proceeding in forma pauperis in this action unless plaintiff is “under imminent danger of serious
6 physical injury.” 28 U.S.C. § 1915(g). Plaintiff has not alleged any facts which suggest that he is
7 under imminent danger of serious physical injury. Thus, plaintiff must submit the appropriate
8 filing fee in order to proceed with this action.

9 In accordance with the above, IT IS HEREBY ORDERED that plaintiff shall submit,
10 within twenty-one days from the date of this order, the appropriate filing fee. Plaintiff’s failure to
11 comply with this order will result in a recommendation that this action be dismissed.

12 Dated: November 22, 2016

13 
14 KENDALL J. NEWMAN
15 UNITED STATES MAGISTRATE JUDGE

16 /howz.1737.1915g
17
18
19
20
21
22

23 ¹ Plaintiff may have sustained a fourth strike in Howze v. Vela, No. 13-56382 (9th Cir. Aug. 8,
24 2013), where his appeal of no. 2:13-cv-4422 UA RZ, was affirmed. The Court of Appeals stated
25 that the “district court did not abuse its discretion by denying Howze leave to proceed in forma
26 pauperis because Howze’s claims were either frivolous or lacked merit.” No. 13-56382 at 2. The
27 affirmance of a strike dismissal, standing alone, is insufficient to constitute a strike. See El-
28 Shaddai v. Zamora, 833 F.3d 1036, 1043 (9th Cir. 2016). Rather, the appeal itself must be
dismissed as frivolous, malicious, or failing to state a claim in order to constitute a strike. Id.
The dismissal of the appeal in no. 13-56382 could arguably be considered a strike based on the
court’s use of the terms “frivolous or lacked merit.” However, because plaintiff has sustained
three other strikes, the court declines to make a determination as to the second appeal.