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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 GARY FRANCIS FISHER,

12 Plaintiff,

13 v.

14 DIRECTOR OF OPERATIONS, CDCR,

15 Defendant.  
16

No. 2:18-cv-2902 AC P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

17 Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42  
18 U.S.C. § 1983.

19 I. Three Strikes Analysis

20 Plaintiff has not yet submitted an application to proceed in forma pauperis or paid the  
21 required filing fee of \$350.00 plus the \$50.00 administrative fee. However, as explained below,  
22 plaintiff will not be directed to submit an application to proceed in forma pauperis because he has  
23 accrued three strikes under 28 U.S.C. § 1915(g) and he has not shown that he is under imminent  
24 danger of serious physical injury. Accordingly, the court will recommend that plaintiff be  
25 required to pay the \$400.00 in required fees or suffer dismissal of the complaint.

26 The Prison Litigation Reform Act of 1995 (PLRA) permits any court of the United States  
27 to authorize the commencement and prosecution of any suit without prepayment of fees by a  
28 person who submits an affidavit indicating that the person is unable to pay such fees. However,

1 [i]n no event shall a prisoner bring a civil action or appeal a  
2 judgement in a civil action or proceeding under this section if the  
3 prisoner has, on 3 or more occasions, while incarcerated or detained  
4 in any facility, brought an action or appeal in a court of the United  
5 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.

6 28 U.S.C. § 1915(g). The plain language of the statute makes clear that a prisoner is precluded  
7 from bringing a civil action or an appeal in forma pauperis if the prisoner has brought three  
8 frivolous actions and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook,  
9 169 F.3d 1176, 1178 (9th Cir. 1999). “[Section] 1915(g) should be used to deny a prisoner’s [in  
10 forma pauperis] status only when, after careful evaluation of the order dismissing an action, and  
11 other relevant information, the district court determines that the action was dismissed because it  
12 was frivolous, malicious or failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th  
13 Cir. 2005). “[W]hen a district court disposes of an in forma pauperis complaint ‘on the grounds  
14 that [the claim] is frivolous, malicious, or fails to state a claim upon which relief may be granted,’  
15 such a complaint is ‘dismissed’ for purposes of § 1915(g) even if the district court styles such  
16 dismissal as denial of the prisoner’s application to file the action without prepayment of the full  
17 filing fee.” O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (second alteration in original).  
18 Dismissal also counts as a strike under § 1915(g) “when (1) a district court dismisses a complaint  
19 on the ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff  
20 then fails to file an amended complaint” regardless of whether the case was dismissed with or  
21 without prejudice. Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017).

22 Inspection of other cases filed by plaintiff in this court and in the United States District  
23 Court for the Central District of California has led to the identification of at least three cases  
24 brought by plaintiff that qualify as strikes. The court takes judicial notice of the following  
25 lawsuits filed by plaintiff:<sup>1</sup>

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26 <sup>1</sup> The court “may take notice of proceedings in other courts, both within and without the federal  
27 judicial system, if those proceedings have a direct relation to matters at issue.” United States ex  
28 rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)  
(continued)

- 1 1. Fisher v. Federal Bureau of Investigation, E.D. Cal. No. 1:13-cv-0414 LJO SAB (case  
2 dismissed for failure to state a claim on July 26, 2013);
- 3 2. Fisher v. Arresting Agency, E.D. Cal. No. 1:14-cv-0376 AWI JLT (case dismissed for  
4 failure to state a claim on June 5, 2014);<sup>2</sup>
- 5 3. Fisher v. Bivins, 6 Unknown Agents, C.D. Cal. No. 2:14-cv-1439 UA MAN (case  
6 dismissed for failure to state a claim on March 6, 2014).

7 All of the preceding cases were dismissed well in advance of the September 20, 2018  
8 filing<sup>3</sup> of the instant action and none of the strikes have been overturned. Therefore, this court  
9 finds that plaintiff is precluded from proceeding in forma pauperis unless he is “under imminent  
10 danger of serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must  
11 have alleged facts that demonstrate that he was “under imminent danger of serious physical  
12 injury” at the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir.  
13 2007) (“[I]t is the circumstances at the time of the filing of the complaint that matters for  
14 purposes of the ‘imminent danger’ exception to § 1915(g).”); see also, Abdul-Akbar v. McKelvie,  
15 239 F.3d 307, 312-14 (3rd Cir. 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir.  
16 1999); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O’Guin, 144 F.3d 883,  
17 885 (5th Cir. 1998).

18 The complaint alleges that plaintiff has been denied access to his legal and medical  
19 records on various occasions. ECF No. 1 at 1-6. It also includes a section titled “Medical Care,”  
20 in which plaintiff appears to allege that he suffered a brain injury in 2014, and that he wants

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21 (citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court  
22 may take judicial notice of facts that are capable of accurate determination by sources whose  
accuracy cannot reasonably be questioned).

23 <sup>2</sup> Fisher v. Arresting Agency was dismissed as barred by Heck v. Humphrey, 512 U.S. 477  
24 (1994). Because the Heck bar was clear on the face of the complaint, and the complaint was fully  
25 dismissed under Heck because plaintiff was only seeking damages, dismissal of that case counts  
as a strike. Washington v. Los Angeles Cty. Sheriff’s Dep’t, 833 F.3d 1048, 1055-57 (9th Cir.  
2016).

26 <sup>3</sup> Since plaintiff is a prisoner proceeding pro se, he is afforded the benefit of the prison mailbox  
27 rule. Houston v. Lack, 487 U.S. 266, 276 (1988). Although plaintiff did not date the complaint,  
28 the envelope appears to have been signed by a correctional officer on September 20, 2018. ECF  
No. 1-1 at 2.

1 physical therapy to address his reduced mobility. Id. at 6. These allegations do not demonstrate  
2 an imminent risk of serious physical injury at the time of filing. The undersigned will therefore  
3 recommend that plaintiff be required to pay the filing fee in full or have the complaint dismissed.

4 II. Plain Language Summary of this Order for a Pro Se Litigant

5 You have at least three strikes under § 1915(g) and cannot be granted in forma pauperis  
6 status unless you show the court that you were in imminent danger of serious physical injury at  
7 the time you filed the complaint. Because your claims are based on a failure to provide you  
8 access to records and there are no facts that show that the failure to provide physical therapy puts  
9 you at risk of injury, you have not shown that you are at risk of imminent serious physical injury.  
10 It is therefore being recommended that you be required to pay the entire filing fee in full before  
11 you can go forward with your complaint.

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

14 IT IS FURTHER RECOMMENDED that plaintiff be ordered to pay the entire \$400.00 in  
15 required fees within thirty days or face dismissal of the case.

16 These findings and recommendations are submitted to the United States District Judge  
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
18 after being served with these findings and recommendations, plaintiff may file written objections  
19 with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings  
20 and Recommendations." Plaintiff is advised that failure to file objections within the specified  
21 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153  
22 (9th Cir. 1991).

23 DATED: November 5, 2018

24   
25 ALLISON CLAIRE  
26 UNITED STATES MAGISTRATE JUDGE  
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