

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 TONY ASBERRY,
5 Plaintiff,
6 v.
7 NURSE FLOREZ, et al.,
8 Defendants.

Case No. [20-cv-04000-YGR](#) (PR)

**ORDER GRANTING DEFENDANTS'
MOTION TO REVOKE *IN FORMA
PAUPERIS* STATUS; AND
DISMISSING ACTION WITHOUT
PREJUDICE**

9 **I. INTRODUCTION**

10 Plaintiff, an inmate currently incarcerated at the California Substance Abuse and Treatment
11 Facility, filed a *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983. Dkt. 1. He alleges
12 violations of his constitutional rights by prison officials and medical staff at Salinas Valley State
13 Prison (“SVSP”), where he was formerly incarcerated. *Id.* at 4-17. In his complaint, plaintiff
14 names the following defendants at SVSP: Nurse Florez, Correctional Officers Alba, Villanueva,
15 and Carrillo. *Id.* at 3. Plaintiff seeks compensatory and punitive damages. *Id.* at 18. Plaintiff was
16 previously granted leave to proceed *in forma pauperis* (“IFP”). Dkt. 5.

17 The parties are presently before the Court on defendant Villanueva’s motion to revoke
18 plaintiff’s IFP status, pursuant to 28 U.S.C. § 1915(g), and to dismiss the action without prejudice.
19 Dkt. 12. Defendants Florez, Alba, and Carrillo have filed motions to join defendant Villanueva’s
20 motion. Dkts. 18, 22, 24. Defendants Florez, Alba, and Carrillo motions are GRANTED, and the
21 joinder is accepted.

22 Also pending before this Court are pending motions filed by defendants Villanueva,
23 Florez, Alba, and Carrillo (hereinafter “defendants”) requesting extensions of time to file
24 responsive pleadings to the complaint pending the Court’s ruling on the motion to revoke
25 plaintiff’s IFP status. Dkts. 13, 19, 21, 25.

26 Having read and considered the papers submitted, and being fully informed, the Court
27 GRANTS defendants’ motion to revoke plaintiff’s IFP status and to dismiss the action for the
28 reasons set forth below, and it terminates all other remaining pending motions as moot.

1 **II. BACKGROUND**

2 As mentioned above, on January 15, 2021, the Court granted plaintiff’s motion for leave to
3 proceed IFP. Dkt. 5. On the same date, the Court issued an Order of Service. Dkt. 6. The
4 following background is taken from the Court’s January 15, 2021 Order, which states as follows:

5 Plaintiff, who is a “full-time . . . wheelchair user,” alleges multiple
6 claims, which the Court has summarized as the following: (1) a claim
7 of deliberate indifference to his safety needs in violation of his Eighth
8 Amendment rights, stemming from a May 20, 2019 incident in which
9 he was attacked by two other inmates at SVSP (who he describes as
10 unnamed “housing unit workers known as porters”), and Plaintiff has
11 adequately linked all the named Defendants to his claim for failing to
12 intervene during the attack; (2) a claim of deliberate indifference to
13 Plaintiff’s serious medical needs in violation of his Eighth
14 Amendment rights, stemming from the failure to properly treat his
15 injuries stemming from the May 20, 2019 incident, and Plaintiff has
16 adequately linked all the named Defendants to his claim; (4) a claim
17 for retaliation based on the named Defendants’ failure to protect
18 Plaintiff from being assaulted during the May 23, 2020 incident
19 because Plaintiff filed grievances against other prison staff members;
20 and (5) state law claims, including “other violations of mandatory
21 duties imposed on Defendants.” Dkt. 1 at 4-17.

22 Plaintiff has stated a cognizable First Amendment retaliation claim as
23 well as a cognizable Eighth Amendment claims for deliberate
24 indifference to his safety and serious medical needs against all named
25 Defendants. The Court will exercise supplemental jurisdiction over
26 Plaintiff’s state law claims, including “other violations of mandatory
27 duties imposed on Defendants.”

28 Dkt. 6 at 3.

 As mentioned above, defendants are requesting the Court revoke plaintiff’s IFP status
under 28 U.S.C. § 1915(g) and to dismiss the instant action. Dkt. 12. Even though plaintiff was
given the opportunity to file an opposition, he did not do so.

III. DISCUSSION

A. 28 U.S.C. § 1915(g)

 The Prison Litigation Reform Act of 1995 (“PLRA”) was enacted, and became effective,
on April 26, 1996. It provides that a prisoner may not bring a civil action IFP under 28 U.S.C.
§ 1915 “if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any
facility, brought an action or appeal in a court of the 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.” 28 U.S.C. § 1915(g).

1 Section 1915(g) requires that this Court consider prisoner actions dismissed before, as well as
2 after, the statute’s 1996 enactment. *Tierney v. Kupers*, 128 F.3d 1310, 1311-12 (9th Cir. 1997).

3 Section 1915(g) is commonly referred to as the “three strikes rule.” The three strikes rule
4 “requires so-called ‘frequent filer’ prisoners to prepay the entire filing fee before federal courts
5 may consider their civil actions and appeals.” *Kinnell v. Graves*, 265 F.3d 1125, 1127 (10th Cir.
6 2001).

7 For purposes of a dismissal that may be counted under section 1915(g), the phrase “fails to
8 state a claim on which relief may be granted” parallels the language of Federal Rule of Civil
9 Procedure 12(b)(6) and carries the same interpretation, the word “frivolous” refers to a case that is
10 “of little weight or importance: having no basis in law or fact,” and the word “malicious” refers to
11 a case “filed with the ‘intention or desire to harm another.’” *Andrews v. King*, 398 F.3d 1113,
12 1121 (9th Cir. 2005) (citation omitted) (“*Andrews I*”). Only cases within one of these three
13 categories can be counted as strikes for section 1915(g) purposes. *See id.* Dismissal of an action
14 under section 1915(g) should only occur when, “after careful evaluation of the order dismissing an
15 [earlier] action, and other relevant information, the district court determines that the action was
16 dismissed because it was frivolous, malicious or failed to state a claim.” *Id.*

17 *Andrews I* requires that the prisoner be given notice of the potential applicability of
18 section 1915(g), by either the district court or the defendants, but also requires the prisoner to bear
19 the ultimate burden of persuasion that section 1915(g) does not bar pauper status for him. *Id.* A
20 defendant seeking to challenge a prisoner’s IFP status has the burden of producing evidence that
21 allows the district court to conclude that the prisoner plaintiff has suffered at least three prior
22 dismissals that count as strikes under section 1915(g). *Id.* at 1120. Once the defendants have met
23 this initial burden, the burden shifts to the prisoner to show why a prior dismissal should not count
24 as a strike, or why he is entitled to the imminent danger of serious physical injury exception. *Id.*

25 A dismissal under section 1915(g) means that a prisoner cannot proceed with an action as a
26 pauper under section 1915(g), but he still may pursue his claims if he pays the full filing fee at the
27 outset of the action. *See Tierney v. Kupers*, 128 F.3d 1310, 1311-12 (9th Cir. 1997) (affirming
28 district court’s denial of IFP status; dismissing complaint without prejudice per section 1915(g)).

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B. Plaintiff's Prior "Strikes"

Defendants allege that plaintiff has filed, while incarcerated, at least three actions in the United States District Court for the Southern District of California that were dismissed on the basis that they were frivolous, malicious, or failed to state claim. At the time plaintiff was granted leave to proceed IFP, the Court was unaware that plaintiff had filed any of these cases or the basis of the dismissals of any such cases in other districts, i.e., the United States District Court for the Southern District of California.

This Court GRANTS defendants' request for judicial notice of the court documents provided in support of the motion to dismiss on the grounds that plaintiff is barred from proceeding IFP under 28 U.S.C. § 1915(g).¹ Dkt. 26. Defendants argue that the following dismissals may be counted as dismissals for purposes of section 1915(g): (1) *Asberry v. Cate, et al.*, No. 3:13-cv-00055-MMA-DHB (S.D. Cal. Mar. 28, 2013) (voluntarily dismissed by plaintiff after district court previously dismissed it for failure to state a claim upon which relief may be granted); (2) *Asberry v. Cate, et al.*, No. 3:13-cv-3006-CAB-RBB (S.D. Cal. Dec. 27, 2013) (dismissed for failure to file timely amended complaint after original complaint was dismissed as frivolous and for failure to state a claim as a matter of law); (3) *Asberry v. Cate, et al.*, No. 3:13-cv-02573-WQH-JLB (S.D. Cal. Oct. 28, 2014) (dismissed for failure to file timely third amended complaint after second amended complaint was dismissed for failure to state a claim as a matter of law); and (4) *Asberry v. Godinez, et al.*, No. 3:19-cv-00153-DMS-RBB (S.D. Cal. Apr. 15, 2019) (denying request to proceed IFP based on plaintiff accumulated three strikes before filing lawsuit; dismissing complaint as frivolous). *See* Dkt. 12 at 6-7; Dkt. 34-1 at 3-72 (Exs. A-D).

Although defendants have attempted to list four prior dismissals, only three prior dismissals need qualify under section 1915(g). This Court must review at least three dismissals to determine whether they qualify as strikes under section 1915(g). *See Andrews I*, 398 F.3d at 1121.

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¹ The district court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (internal quotation marks and citations omitted) (granting request to take judicial notice in section 1983 action of five prior cases in which plaintiff was *pro se* litigant, to counter her argument that she deserved special treatment because of her *pro se* status).

1 Here, the Court will review all four aforementioned dismissals, which were all entered before the
2 instant action was brought by plaintiff on June 16, 2020, in order to determine whether they may
3 be counted as dismissals for purposes of section 1915(g). As further explained below, three of
4 these four dismissals qualify as “strikes” under section 1915(g). *See id.*

5 **1. Case No. 3:13-cv-00055-MMA-DHB – Voluntary Dismissal Not Strike**

6 In Case No. 3:13-cv-00055-MMA-DHB, the district judge dismissed plaintiff’s complaint
7 with leave to amend, finding that it failed to state a claim. Dkt. 34-1, Ex. A at 3-7. Instead of
8 filing an amended complaint, plaintiff’s voluntarily dismissed the case. *Id.* at 8-9.

9 Defendants argue that this dismissal constitutes a strike under section 1915(g) because “[a]
10 prisoner may not avoid incurring strikes simply by declining to take advantage of opportunities to
11 amend.” Dkt. 12 at 6. Defendants point out that other “[d]istrict courts have held that voluntary
12 dismissals entered after a court had already, independently dismissed the action for failure to state
13 a claim count as strikes. *Id.* (citing *Williams v. Navarro*, 2018 WL 4489683, at *3 (S.D. Cal. Sept.
14 19, 2018) (counting a voluntary dismissal as a strike when the case was voluntarily dismissed after
15 the Court had previously dismissed the case for failure to state a claim with leave to amend);
16 *Chambers v. Laske*, 2018 WL 3219649, at *7 (C.D. Cal. May 11, 2018) (finding the same)). The
17 Court disagrees with defendants, as explained below.

18 In Case No. 3:13-cv-00055-MMA-DHB, as mentioned, the district judge found that
19 plaintiff failed to state a claim, and dismissed plaintiff’s complaint with leave to amend. Dkt. 34-
20 1, Ex. A at 3-7. Rather than filing an amended complaint, plaintiff subsequently filed a notice of
21 voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a), in which he requested that
22 his complaint be voluntarily dismissed. The docket sheet for Case No. 3:13-cv-00055-MMA-
23 DHB shows no further entries after plaintiff’s notice for voluntary dismissal. *See id.* at 4-5.
24 Because the record shows that Case No. 3:13-cv-00055-MMA-DHB was closed, this Court
25 assumes that the district judge accepted plaintiff’s request for voluntary dismissal pursuant to Rule
26 41(a), and dismissed the action without prejudice by operation of law. *See id.*

27 Because section 1915(g) does not distinguish between dismissals with or without
28 prejudice, a dismissal without prejudice may count as a strike. *See O’Neal v. Price*, 531 F.3d

1 1146, 1154 (9th Cir.2008). However, “under Rule 41(a)(1)(I), ‘a plaintiff has an absolute right to
2 voluntarily dismiss his action prior to service by the defendant of an answer or a motion for
3 summary judgment.’” *Commercial Space Mgmt. Co., Inc. v. Boeing Co., Inc.*, 193 F.3d 1074,
4 1077 (9th Cir.1999) (quoting *Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir.1997)). “[A]
5 dismissal under Rule 41(a)(1) is effective on filing, no court order is required, the parties are left
6 as though no action had been brought, the defendant can’t complain, and the district court lacks
7 jurisdiction to do anything about it.” *Id.* at 1078.

8 The Court points out that other district courts have held that a voluntary dismissal does *not*
9 constitute a strike under section 1915(g). *See Williams v. Grannis*, 2008 WL 4078664, *4 (E.D.
10 Cal. 2008) (finding that voluntary dismissal did not constitute a strike under section 1915(g)); *see*
11 *also Jones v. Eller*, 2018 WL 1801254, at *3 (C.D. Cal. Jan. 22, 2018) (noting that two stipulated
12 voluntary dismissals did not constitute strikes pursuant to § 1915). Therefore, the Court finds that
13 defendants have failed to meet their burden of establishing that the voluntary dismissal of Case
14 No. 3:13-cv-00055-MMA-DHB constitutes a dismissal for a qualifying reason under section
15 1915(g), and therefore it does not count as a strike. *See Andrews I*, 398 F.3d at 1120.

16 **2. Case No. 3:13-cv-3006-CAB-RBB – First Strike**

17 In Case No. 3:13-cv-3006-CAB-(RBB), the district judge dismissed plaintiff’s complaint
18 with leave to amend on December 27, 2013, finding that the complaint was frivolous and failed to
19 state a claim. Dkt. 34-1, Ex. B at 4-11. Nothing in the record shows that plaintiff filed an
20 amended complaint. *See id.* at 2-3. Thereafter, the record shows that the case was closed. *See id.*

21 When a court dismisses a complaint with leave to amend, the dismissal does not count as a
22 strike because the suit continues. *Lomaz v. Ortiz-Marquez*, 140 S. Ct. 1721, 1727 n.4 (2020).
23 However, when the district court dismisses a complaint for failure to state a claim and grants leave
24 to amend, and the plaintiff then fails to file an amended complaint, the dismissal counts as a strike
25 under section 1915(g). *Harris v. Mangum*, 863 F.3d 1133, 1143 (9th Cir. 2017) (“*Harris IP*”).

26 Here, the record shows that the district court dismissed the complaint as frivolous as well
27 as for failure to state a claim, *and* that plaintiff failed to file an amended complaint; therefore, it
28 counts as a strike. *See id.* Plaintiff fails to provide persuasive evidence that rebuts the showing by

1 defendants that dismissals of the complaint as frivolous and for failure to state a claim constitute
2 qualifying reasons for a strike under section 1915(g). Therefore, the Court finds that defendants
3 have met the burden of establishing that Case No. 3:13-cv-3006-CAB-(RBB) was dismissed for
4 qualifying reasons under section 1915(g), and therefore counts as a strike. *See Andrews I*, 398
5 F.3d at 1120.

6 **3. Case No. 3:13-cv-02573-WQH-JLB (S.D. Cal.) – Second Strike**

7 In Case No. 3:13-cv-02573-WQH-JLB, the district judge dismissed with leave to amend
8 plaintiff’s Second Amended Complaint on the basis that it failed to state a claim. *See* Dkt. 34-1,
9 Ex. C at 11-28. Having received no third amended complaint more than a month after the filing
10 deadline, the district judge enter another order dismissing the action without prejudice for failing
11 to state a claim, and failing to comply with the previous aforementioned order. *Id.* at 29-33.
12 Plaintiff appealed, and the Ninth Circuit affirmed dismissal. *See id.* at 8-9. Defendants again
13 argue that the dismissal in Case No. 3:13-cv-02573-WQH-JLB constitutes an additional strike for
14 the purposes of section 1915. Dkt. 12 at 7 (citing *Harris II*, 863 F.3d at 1143). Plaintiff has not
15 challenged defendants’ assertion. Therefore, defendants have met the burden of establishing that
16 Case No. 3:13-cv-02573-WQH-JLB counts as a strike. *See Andrews I*, 398 F.3d at 1120.

17 **4. Case No. 3:19-cv-00153-DMS-RBB – Third Strike**

18 In Case No. 3:19-cv-00153-DMS-RBB, the district judge denied plaintiff’s motion to
19 proceed IFP, finding that he had accumulated “three strikes” before filing the lawsuit. Dkt. 34-1,
20 Ex. D 3-8. The court also screened the complaint, and dismissed the action as frivolous. *Id.* at 8-
21 9.

22 The Ninth Circuit has held that a case is “dismissed” for the purposes of section 1915(g)
23 “when the court denies the prisoner’s application to file the action without prepayment of the
24 filing fee on the ground that the complaint is frivolous, malicious or fails to state a claim, and
25 thereupon terminates the complaint.” *O’Neal v. Price*, 531 F.3d 1146, 1152 (9th Cir. 2008).
26 When a district court disposes of an IFP complaint on such grounds, the complaint is “dismissed”
27 for the purposes of section 1915(g) “even if the district court styles such dismissal as denial of the
28 prisoner’s application to file the action without prepayment of the full filing fee.” *Id.* at 1153

1 (finding that the district court necessarily reviewed the complaints and made an assessment on
2 their merits in making the determination whether the actions qualified for IFP status). This was
3 indeed the case in Case No. 3:19-cv-00153-DMS-RBB, wherein the district judge of the Southern
4 District denied plaintiff’s request to proceed IFP *and* also dismissed the complaint was frivolous.
5 Dkt. 34-1, Ex. D 3-8. Therefore, the aforementioned decision in Case No. 3:19-cv-00153-DMS-
6 RBB constitutes a qualifying strike under section 1915(g). *See Andrews I*, 398 F.3d at 1120.

7 In sum, three of four plaintiff’s aforementioned dismissals constitute “strikes” under
8 section 1915(g).² Thus, plaintiff’s IFP status must be revoked unless he can show that he is
9 entitled to the imminent danger of serious physical injury exception under section 1915(g).

10 **C. Imminent Danger Exception**

11 A plaintiff barred from bringing an action IFP because he has three strikes may still
12 proceed without prepaying court fees if he can show he is “under imminent danger of serious
13 physical injury.” 28 U.S.C. § 1915(g). The availability of the exception turns on the “conditions a
14 prisoner faced at the time the complaint was filed, not at some earlier or later time.” *Andrews v.*
15 *Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007) (“*Andrews II*”). As this is merely a “threshold
16 procedural” question, the Ninth Circuit has indicated that district courts should not conduct an
17 overly detailed inquiry into whether a particular danger is serious enough under the serious
18 physical injury prong. *Id.* at 1055. Rather, “the exception applies if the complaint makes a
19 plausible allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the time
20 of filing.” *Id.* In order to satisfy the imminence prong, the prisoner must allege that the danger is
21 ongoing. *See id.* at 1056-57.

22 A district court should liberally construe the allegations in a complaint filed by a *pro se*
23 prisoner facing a section 1915(g) bar. *See McAlphin v. Toney*, 281 F.3d 709, 710-11 (8th Cir.
24 2002) (liberally construing allegations in complaint for initial determination of whether prisoner is
25 under imminent danger of serious physical injury). It is sufficient if any part of the complaint
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27 ² The Court points out that even if it has found above that the voluntary dismissal in Case
28 No. 3:13-cv-00055-MMA-DHB did not constitute a strike, only *three* prior dismissals need
qualify under section 1915(g). As shown above, the Court reviewed plaintiff’s three other
dismissals and determined that they all qualified as strikes under section 1915(g).

1 plausibly alleges that the prisoner is in imminent danger of serious physical injury at the time of
2 filing. *Andrews II*, 493 F.3d at 1053.

3 Here, the question is whether plaintiff was in imminent danger on June 16, 2020, the date
4 he filed his complaint. The Court finds that plaintiff's allegations fail to show that he was. As
5 mentioned above, plaintiff alleged in his complaint that his claims stem from a May 20, 2019
6 incident, which was almost a *year* prior to the filing of the complaint. The Court notes that
7 plaintiff's complaint does not allege that he faced an imminent danger of serious physical injury at
8 the time he filed his complaint. *See generally* Dkt. 1. Therefore, plaintiff has not shown that he is
9 entitled to the imminent danger exception under section 1915(g) to avoid dismissal without
10 prejudice. Plaintiff's IFP status is therefore revoked. *See Banos v. O'Guin*, 144 F.3d 883, 885
11 (5th Cir. 1998) (revoking IFP status on appeal on three strikes grounds); *Patton v. Jefferson Corr.*
12 *Center*, 136 F.3d 458, 461, 465 (5th Cir. 1998) (district court correctly revoked IFP upon
13 discovering on remand that plaintiff had five prior strikes). Accordingly, the Court GRANTS
14 defendants' motion to revoke plaintiff's IFP status, and to dismiss the action without prejudice.
15 Dkt. 12.

16 **IV. CONCLUSION**

17 For the reasons outlined above, the Court orders as follows:

18 1. Defendants Florez, Alba, and Carrillo have filed motions to join defendant
19 Villanueva's motion to revoke plaintiff's IFP status, pursuant to 28 U.S.C. § 1915(g), and to
20 dismiss the action without prejudice. Dkts. 18, 22, 24. Defendants Florez, Alba, and Carrillo
21 motions are GRANTED, and the joinder is accepted.

22 2. This Court GRANTS defendants' request for judicial notice of the court documents
23 provided in support of the motion to dismiss on the grounds that plaintiff is barred from
24 proceeding IFP under 28 U.S.C. § 1915(g). Dkt. 34-1.

25 3. The Court GRANTS defendants' motion to revoke plaintiff's IFP status, pursuant
26 to 28 U.S.C. § 1915(g), and to dismiss the action without prejudice. Dkt. 12. Leave to proceed
27 IFP is REVOKED, and the Court's January 15, 2021 Order granting plaintiff IFP status (Dkt. 5) is
28 VACATED.

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4. This case is DISMISSED without prejudice to plaintiff's filing a motion to reopen no later than **twenty-eight (28) days** from the date of this Order accompanied by the full filing fee of \$402.00. *See* 28 U.S.C. § 1915(g). **If plaintiff fails to file a motion to reopen and pay the full filing fee within the twenty-eight-day time frame, then he may pursue his claims by filing a new civil rights case in which he pays the full filing fee.**

5. The Clerk of the Court shall terminate all remaining pending motions as moot (dks. 13, 19, 21, and 25).

6. The Clerk shall also close the case.

7. This Order terminates Docket Nos. 12, 13, 19, 21, and 25.

IT IS SO ORDERED.

Dated: November 30, 2021



HON. YVONNE GONZALEZ ROGERS
United States District Judge