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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT HADLEY HEIZELMAN,
BOP #20068-298
Inmate Booking No. 10797362,

Plaintiff,

Civil No. 11-0694 AJB (PCL)

vs.

ORDER:

**(1) DENYING MOTION TO
PROCEED *IN FORMA PAUPERIS*
AS BARRED BY 28 U.S.C. § 1915(g)
[ECF No. 2]**

WILLIAM DONAHUE, et al.,

Defendants.

AND

**(2) DISMISSING CASE FOR
FAILURE TO PAY FILING
FEE REQUIRED BY
28 U.S.C. § 1914(a)**

Plaintiff, a former federal prisoner currently detained at the San Diego County Jail (SDCJ) and proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the civil filing fee required by 28 U.S.C. § 1914(a); instead, he has submitted a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF No. 2].

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1 **I. Motion to Proceed IFP**

2 Section 1915 of Title 28 of the United States Code allows certain litigants to pursue civil
3 litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C. § 1915(a)(2).
4 However, the Prison Litigation Reform Act (“PLRA”) amended section 1915 to preclude the
5 privilege to proceed IFP:

6 . . . if the prisoner has, on 3 or more prior occasions, while
7 incarcerated or detained in any facility, brought an action or appeal
8 in a court of the United States that was dismissed on the grounds
9 that it is frivolous, malicious, or fails to state a claim upon which
relief can be granted, unless the prisoner is under imminent danger
of serious physical injury.

10 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’ provision.”
11 *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter “*Andrews*”). “Pursuant to
12 § 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.*; see also *Andrews v.*
13 *Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter “*Cervantes*”) (under the PLRA,
14 “[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from IFP
15 status under the three strikes rule[.]”). The objective of the PLRA is to further “the
16 congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney v. Kupers*,
17 128 F.3d 1310, 1312 (9th Cir. 1997).

18 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which were
19 dismissed on the ground that they were frivolous, malicious, or failed to state a claim,”
20 *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the district court styles
21 such dismissal as a denial of the prisoner’s application to file the action without prepayment of
22 the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). Once a prisoner has
23 accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other IFP
24 action in federal court unless he can show he is facing “imminent danger of serious physical
25 injury.” See 28 U.S.C. § 1915(g); *Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)’s exception
26 for IFP complaints which “make[] a plausible allegation that the prisoner faced ‘imminent
27 danger of serious physical injury’ at the time of filing.”).

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1 **II. Application of 28 U.S.C. § 1915(g)**

2 As an initial matter, the Court has carefully reviewed Plaintiff’s Complaint and has
3 ascertained that there is no “plausible allegation” to suggest Plaintiff “faced ‘imminent danger
4 of serious physical injury’ at the time of filing.” *Cervantes*, 493 F.3d at 1055 (quoting 28
5 U.S.C. § 1915(g)). In his Complaint, Plaintiff alleges that force was used against him while he
6 was in the El Cajon Courthouse, when he was formerly housed at the Metropolitan Correctional
7 Center and when he resided in Iowa.

8 A court “‘may take notice of proceedings in other courts, both within and without the
9 federal judicial system, if those proceedings have a direct relation to matters at issue.’” *Bias*
10 *v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d
11 801, 803 n.2 (9th Cir. 2002)); *see also United States ex rel. Robinson Rancheria Citizens*
12 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Thus, this Court takes judicial
13 notice that Plaintiff has had three prisoner civil actions dismissed on the grounds that they were
14 frivolous, malicious, or failed to state a claim upon which relief may be granted.

15 They are:

- 16 1) *Heizelman v. Martin, et al.*, Civil Case No. 1:07-cv-00288-EJL (D. Idaho Dec.
17 11, 2007 Initial Review Order dismissing complaint for failing to state cognizable
18 constitutional claims pursuant to 28 U.S.C. § 1915(e)(2)(B) [ECF No. 5]);
19 (March 19, 2009 Order granting Motion to amend and dismissing amended
20 complaint) [ECF No. 7]) (strike one);
- 21 2) *Heizelman v. Richardson, et al.*, Civil Case No. 1:09-cv-00182-BLW (D. Idaho
22 Oct. 16, 2009 Initial Review Order dismissing complaint for failing to state a
23 claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) [ECF No. 10]; (May 24, 2010
24 Order dismissing case [ECF No. 14]) (strike two); and,
- 25 3) *Heizelman, et al., v. Durham, et al.*, Civil Case No. 3:10-cv-01560-BTM (WMc)
26 (S.D. Cal. Sept. 20, 2010 Order sua sponte dismissing Complaint as frivolous
27 pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b) [Doc. No. 14]) (strike three).

1 Accordingly, because Plaintiff has, while incarcerated, accumulated three “strikes”
2 pursuant to § 1915(g), and he fails to make a “plausible allegation” that he faced imminent
3 danger of serious physical injury at the time he filed his Complaint, he is not entitled to the
4 privilege of proceeding IFP in this action. *See Cervantes*, 493 F.3d at 1055; *Rodriguez*, 169
5 F.3d at 1180 (finding that 28 U.S.C. § 1915(g) “does not prevent all prisoners from accessing
6 the courts; it only precludes prisoners with a history of abusing the legal system from
7 continuing to abuse it while enjoying IFP status”); *see also Franklin v. Murphy*, 745 F.2d 1221,
8 1231 (9th Cir. 1984) (“[C]ourt permission to proceed IFP is itself a matter of privilege and not
9 right.”).

10 **III. Conclusion and Order**


11 For the reasons set forth above, the Court hereby:

- 12 1) **DENIES** Plaintiff’s Motion to Proceed IFP [ECF No. 2] pursuant to 28 U.S.C.
13 § 1915(g);
14 2) **DISMISSES** this action without prejudice for failure to pay the \$350 civil filing
15 fee required by 28 U.S.C. § 1914(a), and
16 3) **CERTIFIES** that an IFP appeal from this Order would be frivolous and therefore,
17 would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). *See Coppedge v. United*
18 *States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977)
19 (indigent appellant is permitted to proceed IFP on appeal only if appeal would not be frivolous).

20 The Clerk shall close the file.

21 **IT IS SO ORDERED.**

22 DATED: April 13, 2011

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25 Hon. Anthony J. Battaglia
26 U.S. District Judge
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