

FILED

13 SEP 16 PM 4:23

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ML

DEPUTY

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

GUSTAVO McKENZIE,
CDCR #D-17477,

Plaintiff,

Civil No. 12cv1602 BEN (RBB)

vs.

**ORDER GRANTING
DEFENDANTS' MOTION FOR
ORDER REQUIRING PLAINTIFF
TO PAY FULL CIVIL FILING
FEE AND REVOKING ORDER
GRANTING PLAINTIFF LEAVE
TO PROCEED *IN FORMA
PAUPERIS* PURSUANT TO
28 U.S.C. § 1915(g)**

R. CASILLAS; J. NUTT; M.D.
CARPIO; J. OLIVO; HECTOR
LOPEZ; D. RODERICK; E. URIBE; E.
CASTILLO; R. LIZARRAGA; B.
HATFIELD; DOE 1; P. ALANIS; J.
SALCEDA,

[ECF No. 20]

Defendants.

I. PROCEDURAL HISTORY

On June 27, 2012, and while incarcerated at Corcoran State Prison located in Corcoran, California, Plaintiff, proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983 regarding conditions of his confinement when he was incarcerated at Calipatria State Prison. In addition, Plaintiff filed a Motion to Proceed *In Forma Pauperis* ("IFP"). (ECF No. 2.)

1 On July 19, 2012, the Court granted Plaintiff's Motion to Proceed IFP and directed
2 service of the Plaintiff's Complaint on the named Defendants. (ECF No. 4.) Defendants
3 have now filed a "Motion to Revoke Plaintiff's IFP Status and to Dismiss for Failure to
4 Pay Filing Fee." (ECF No. 20.) Plaintiff has filed an Opposition to which Defendants
5 have filed a Reply. (ECF Nos. 22, 23.)

6 **II. DEFENDANTS' MOTION**

7 In this Motion, Defendants seek revocation of Plaintiff's IFP status and dismissal
8 of this action for failing to pay the initial civil filing fee. (*See* Mot. [ECF No. 20-1], at
9 1-2.) Defendants also seek judicial notice of previous civil filings by Plaintiff. (*See* RJN
10 [ECF No. 20-2].) A court "may take notice of proceedings in other courts, both within
11 and without the federal judicial system, if those proceedings have a direct relation to
12 matters at issue." *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting
13 *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)). In this case, the Court
14 finds it is appropriate to take judicial notice of the documents attached to Defendants'
15 Notice.

16 Defendants argue that Plaintiff is not entitled to IFP status in this matter based on
17 his previous litigation history. *See* 28 U.S.C. § 1915(g). In addition, Defendants argue
18 that Plaintiff's Complaint has "made no allegations to support a claim that he is currently
19 in 'imminent danger of serious physical injury'." *Andrews v. Cervantes*, 493 F.3d 1047,
20 1051-52 (9th Cir. 2007) (hereafter "*Cervantes*") (noting § 1915(g)'s exception for IFP
21 complaints which "make[] a plausible allegation that the prisoner faced 'imminent
22 danger of serious physical injury' at the time of filing").

23 **A. Standard**

24 Section 1915 of Title 28 of the United States Code allows certain litigants to
25 pursue civil litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C.
26 § 1915(a)(2). However, the Prison Litigation Reform Act ("PLRA") amended § 1915
27 to preclude the privilege to proceed IFP:
28

1 if the prisoner has, on 3 or more prior occasions, while
2 incarcerated or detained in any facility, brought an action or
3 appeal in a court of the United States that was dismissed on
4 the grounds 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.

5 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’
6 provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter
7 “*Andrews*”). “Pursuant to § 1915(g), a prisoner with three strikes or more cannot
8 proceed IFP.” *Id.*; see also *Cervantes*, 493 F.3d at 1052 (under the PLRA, “[p]risoners
9 who have repeatedly brought unsuccessful suits may entirely be barred from IFP status
10 under the three strikes rule[.]”). The objective of the PLRA is to further “the
11 congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney*
12 *v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).

13 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner,
14 which were dismissed on the ground that they were frivolous, malicious, or failed to state
15 a claim,” *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the
16 district court styles such dismissal as a denial of the prisoner’s application to file the
17 action without prepayment of the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153
18 (9th Cir. 2008). Once a prisoner has accumulated three strikes, he is prohibited by
19 § 1915(g) from pursuing any other IFP action in federal court unless he can show he is
20 facing “imminent danger of serious physical injury.” See 28 U.S.C. § 1915(g).

21 **B. Application of 28 U.S.C. § 1915(g)**

22 Defendants set forth six (6) matters, filed by Plaintiff, which they argue constitute
23 “strikes” under 28 U.S.C. § 1915(g). Plaintiff correctly notes, and Defendants concede,
24 that the second “strike” listed in their papers cannot be considered a “strike” for the
25 purposes of this matter. (See Reply [ECF No. 23], at 3.) Therefore, the Court will
26 consider the other matters submitted by Defendants in determining whether Plaintiff is
27 barred from proceeding IFP pursuant to 28 U.S.C. § 1915(g).

28

1 **1. McKenzie v. Woodford, E.D. Cal. Civil Case No. 1:04-cv-05903-**
2 **AWI-WMW (Order Dismissing Action [ECF No. 26] and**
3 **Adopting Findings and Recommendation to dismiss action for**
4 **failure to state a claim dated December 20, 2007)**

5 Defendants argue that this case is clearly a “strike” for § 1915(g) purposes.
6 Plaintiff argues, however, that he “was never served/never received the U.S. Magistrate’s
7 Report and Recommendation.” (Opp’n [ECF No. 22], at 7.) As a result, Plaintiff
8 maintains he was “denied the right to file an objection to the R&R.” (*Id.*) However,
9 while the record in this matter does show that the “Findings and Recommendation” were
10 returned “undeliverable” to Plaintiff, the docket in this matter also fails to reflect any
11 effort on Plaintiff’s part to update the Court with his current address nor did he ever seek
12 to challenge the judgment that was entered nearly six (6) years ago. The Ninth Circuit
13 has recently held that a “dismissal ripens into a ‘strike’ for § 1915(g) purposes on the
14 ‘date of the Supreme Court’s denial or dismissal of petition for writ of certiorari, if the
15 prisoner filed one, or from the date when the time to file a petition for writ of certiorari
16 expired, if he did not.” *Silva v. Di Vittorio*, 658 F.3d 1090, 1100 (9th Cir. 2011)
17 (citations omitted). Here, Plaintiff’s time to appeal has long since passed. Therefore,
18 based on the documents found in the docket of this matter, this Court finds that the
19 dismissal of this action for failing to state a claim should be considered a “strike.”

20 **2. McKenzie v. Alameida, et al., C.D. Cal. Civil Case No. CV-02-**
21 **07551-UA -PJW) (Order re Leave to File Action Without**
22 **Prepayment of Full Filing Fee dated December 10, 2002)**

23 In this action, Plaintiff’s Motion to Proceed IFP was denied on the grounds that
24 the action was “[l]egally and/or factually patently frivolous.” (*Id.*) Plaintiff argues that
25 the one page document attached as Exhibit “D” to Defendants’ Request for Judicial
26 Notice is “misleading.” (Opp’n at 8.) Plaintiff appears to argue the merits of this matter
27 that was dismissed in the Central District in 2002. (*Id.*) However, the Ninth Circuit has
28 held that when a district court denies a Motion to Proceed IFP on the grounds that the

1 complaint is “‘frivolous, malicious, or fails to state a claim upon which relief may be
2 granted,’ such a complaint is ‘dismissed’ for purposes of § 1915(g).” *O’Neal v. Price*,
3 531 F.3d 1146, 1153 (9th Cir. 2008). Accordingly, this Court finds that the denial of IFP
4 due to the underlying matter being “patently frivolous” is a “strike” pursuant to §
5 1915(g).

6 **3. *McKenzie v. Alameida, et al.*, Case No. 03-55221 (9th Cir. 2003)**
7 **(Order denying Plaintiff’s Motion to Proceed IFP and dismissing**
8 **Appeal [Doc. Nos. 15, 18] dated May 20 and June 20, 2003)**

9 Defendants argue that Plaintiff’s appeal of a dismissal determined to be frivolous
10 should also be considered a “strike” for § 1915(g) purposes. In this matter, the district
11 court determined that Plaintiff’s appeal was not taken in good faith. *See McKenzie v.*
12 *Alameida, et al.*, C.D. Cal. Civil Case No. CV-02-07551-UA-PJW) (Order denying
13 Motion to Proceed IFP on Appeal [Doc. No. 9] certifying that the “proposed appeal is
14 not taken in good faith under 28 U.S.C. 1915(a) and is frivolous, without merit and does
15 not present a substantial question within the meaning of 28 U.S.C. 753(f) dated February
16 21, 2003.”)

17 The Ninth Circuit affirmed the district court’s finding that the appeal was not
18 taken in good faith and “confirm[ed] that appellant is not entitled to in forma pauperis
19 status for this appeal.” (*McKenzie v. Alameida, et al.*, Case No. 03-55221 (9th Cir.),
20 Doc. No. 15, Order denying Motion to Proceed IFP on Appeal and directing Plaintiff to
21 pay civil filing fee). When Plaintiff failed to pay the civil filing fee, the Ninth Circuit
22 dismissed the appeal. (*Id.*, Doc. No. 18.) The Ninth Circuit has held that “strikes”
23 pursuant to § 1915(g) are “prior cases *or appeals*, brought while the plaintiff was a
24 prisoner, which were dismissed ‘on the ground that [they were] frivolous, malicious, or
25 fail[] to state a claim.” *Lira v. Herrera*, 427 F.3d 1164, 1170 n.7 (9th Cir. 2005)
26 (emphasis added). Here, Plaintiff’s appeal was dismissed because the Ninth Circuit
27 denied his IFP on the grounds that his appeal was frivolous. Accordingly, this Court
28 finds that this matter constitutes Plaintiff’s third “strike.”

1 **4. Imminent danger of serious physical injury**

2 There is an exception to the three strikes bar of § 1915(g) if there is a “plausible
3 allegation” to suggest Plaintiff “faced ‘imminent danger of serious physical injury’ at the
4 time of filing.” *Cervantes*, 493 F.3d at 1055 (quoting 28 U.S.C. § 1915(g)). However,
5 at the time Plaintiff filed this Complaint regarding incidents at Calipatria State Prison,
6 he was housed in a different prison. Moreover, there are no claims in Plaintiff’s
7 Complaint that he faced “imminent danger of serious physical injury” while housed at
8 Corcoran relating to the claims in this action and he does not submit any argument in his
9 Opposition to rebut Defendants’ showing that he did not suffer from any imminent
10 danger at the time he filed this action.

11 Accordingly, because Plaintiff has, while incarcerated, accumulated three “strikes”
12 pursuant to § 1915(g), and he fails to make a “plausible allegation” that he faced
13 imminent danger of serious physical injury at the time he filed his Complaint, he is not
14 entitled to the privilege of proceeding IFP in this action. *See Cervantes*, 493 F.3d at
15 1055; *Rodriguez*, 169 F.3d at 1180 (finding that 28 U.S.C. § 1915(g) “does not prevent
16 all prisoners from accessing the courts; it only precludes prisoners with a history of
17 abusing the legal system from continuing to abuse it while enjoying IFP status”); *see*
18 *also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (“[C]ourt permission to
19 proceed IFP is itself a matter of privilege and not right.”).

20 **III. CONCLUSION AND ORDER**

21 Accordingly, IT IS HEREBY ORDERED that:

22 1) Defendants’ Motion to Revoke Plaintiff’s IFP Status and to Dismiss under
23 the “Three Strikes” provision of 28 U.S.C. § 1915(g) is **GRANTED**.

24 2) This action is **DISMISSED** without prejudice for failure to pay the \$350
25 civil filing fee required by 28 U.S.C. § 1914(a); and

26 ///

27 ///

28

1 3) Plaintiff must pay the \$350 filing fee in full within thirty (30) days from the
2 date this Order is Filed. If Plaintiff fails to pay the filing fee within thirty (30) days, this
3 action shall remain closed without further Order of the Court.

4
5 DATED: _____

9/16/13



HON. ROGER T. BENITEZ
United States District Court

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28