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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 MICHAEL SCHMITT,
12 CDCR #BB-8941,

13 Plaintiff,

14 vs.

15 U.S. MARSHAL SERVICE;
16 AGENT WALKER, Fugitive Task Force,
17 Defendants.
18

Case No.: 3:17-CV-00817-JLS-KSC

ORDER:

19 **1) DENYING MOTION TO**
20 **PROCEED IN FORMA PAUPERIS**
21 **AS BARRED BY 28 U.S.C. § 1915(g)**
22 **[ECF No. 3]**

AND

23 **(2) DISMISSING CIVIL ACTION**
24 **WITHOUT PREJUDICE FOR**
25 **FAILURE TO PAY FILING FEE**
26 **REQUIRED BY 28 U.S.C. § 1914(a)**
27 **AND FOR FAILURE TO STATE A**
28 **CLAIM PURSUANT TO**
28 U.S.C. § 1915A(b)(1)

24 Plaintiff Michael Schmitt, currently incarcerated at the California Institution for Men
25 (“CIM”) in Chino, California,¹ and proceeding pro se, has filed a civil action using a
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28 ¹ Plaintiff was incarcerated at North Kern State Prison in Delano, California, at the time he
filed suit, (*see* ECF No. 1, at 1), but the return address on his latest filing lists a return

1 Standard Form 95 “Claim for Damage, Injury, or Death,” pursuant to the Federal Tort
2 Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671-80 (ECF No. 1). In this two-page
3 document, Plaintiff claims the U.S. Marshal Service and a Fugitive Task Force agent
4 named Walker caused \$750 in property damage when they broke a door and forced entry
5 into his home at 1425 14th Street in San Diego, California, while arresting him on
6 November 2, 2016, based on a “County Probations Violations Warrant.” (*Id.* at 1.)

7 Plaintiff did not prepay the civil filing fee when he filed suit, nor did he file a Motion
8 to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). Therefore, on
9 August 1, 2017, the Court dismissed the case pursuant to 28 U.S.C. § 1914(a), but granted
10 Plaintiff forty-five days leave in which to do either, (ECF No. 2). On September 1, 2017,
11 he filed a Motion to Proceed IFP, (ECF No. 3).

12 **I. Motion to Proceed IFP**

13 “All persons, not just prisoners, may seek IFP status.” *Moore v. Maricopa Cnty.*
14 *Sheriff’s Office*, 657 F.3d 890, 892 (9th Cir. 2011). Prisoners like Plaintiff, however, “face
15 an additional hurdle.” *Id.* In addition to requiring prisoners to “pay the full amount of a
16 filing fee,” in “monthly installments” or “increments” as provided by 28 U.S.C.
17 § 1915(a)(3)(b), *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016), the Prison Litigation
18 Reform Act (“PLRA”) amended section 1915 to altogether preclude the privilege to
19 proceed IFP:

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

24
25 address at CIM. (*See* ECF No. 3 at 1). While Civil Local Rule 83.11.b requires parties
26 proceeding pro se to “keep the court and opposing parties advised as to current address,”
27 the Court has sua sponte confirmed that Plaintiff has since been transferred to CIM and has
28 directed the Clerk to amend the docket to reflect Plaintiff’s current address in order to
ensure he is served with this Order. *See* <http://inmatelocator.cdcr.ca.gov/Results.aspx> (last
visited Nov. 1, 2017).

1 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’
2 provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter
3 “*Andrews*”).

4 “Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed IFP.”
5 *Id.*; see also *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter
6 “*Cervantes*”) (under the PLRA, “[p]risoners who have repeatedly brought unsuccessful
7 suits may entirely be barred from IFP status under the three strikes rule”). The objective
8 of the PLRA is to further “the congressional goal of reducing frivolous prisoner litigation
9 in federal court.” *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997). “[S]ection
10 1915(g)’s cap on prior dismissed claims applies to claims dismissed both before and after
11 the statute’s effective date.” *Id.* at 1311.

12 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which
13 were dismissed on the ground that they were frivolous, malicious, or failed to state a claim,”
14 *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the district court
15 styles such dismissal as a denial of the prisoner’s application to file the action without
16 prepayment of the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008);
17 see also *El-Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016) (noting that when
18 court “review[s] a dismissal to determine whether it counts as a strike, the style of the
19 dismissal or the procedural posture is immaterial. Instead, the central question is whether
20 the dismissal ‘rang the PLRA bells of frivolous, malicious, or failure to state a claim’”) (quoting
21 *Blakely v. Wards*, 738 F.3d 607, 615 (4th Cir. 2013)).

22 Once a prisoner has accumulated three strikes, he is prohibited by section 1915(g)
23 from pursuing any other IFP civil action or appeal in federal court unless he alleges he is
24 facing “imminent danger of serious physical injury.” See 28 U.S.C. § 1915(g); *Cervantes*,
25 493 F.3d at 1051–52 (noting § 1915(g)’s exception for IFP complaints which “make[] a
26 plausible allegation that the prisoner faced ‘imminent danger of serious physical injury’ at
27 the time of filing”).

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1 **II. Discussion**

2 As an initial matter, the Court has carefully reviewed Plaintiff’s pleading and has
3 ascertained that it does not contain any “plausible allegations” to suggest he “faced
4 ‘imminent danger of serious physical injury’ at the time of filing.” *Cervantes*, 493 F.3d at
5 1055 (quoting 28 U.S.C. § 1915(g)). Instead, as noted above, Plaintiff is currently
6 incarcerated at CIM, and he seeks money damages pursuant to the FTCA based on alleged
7 property damage done to his home in San Diego during his arrest approximately one year
8 ago on November 2, 2016. (ECF No. 1, at 1.)

9 While defendants typically carry the burden to show that a prisoner is not entitled to
10 proceed IFP, “in some instances, the district court docket may be sufficient to show that a
11 prior dismissal satisfies at least one on the criteria under § 1915(g) and therefore counts as
12 a strike.” *Andrews*, 398 F.3d at 1119–20. That is the case here.

13 A court may take judicial notice of its own records, *see Molus v. Swan*, No. 3:05-cv-
14 00452-MMA-WMc, 2009 WL 160937, *2 (S.D. Cal. Jan. 22, 2009) (citing *United States*
15 *v. Author Services*, 804 F.2d 1520, 1523 (9th Cir. 1986)); *Gerritsen v. Warner Bros. Entm’t*
16 *Inc.*, 112 F. Supp. 3d 1011, 1034 (C.D. Cal. 2015), and ““may take notice of proceedings
17 in other courts, both within and without the federal judicial system, if those proceedings
18 have a direct relation to matters at issue.”” *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th
19 Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)); *see*
20 *also United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d
21 244, 248 (9th Cir. 1992).

22 Therefore, this Court takes judicial notice that Plaintiff, Michael Schmitt, currently
23 identified as CDCR Inmate #BB-8941, and formerly identified as San Diego County
24 Sheriff’s Department Inmate Booking #14765015, CDCR Inmate #T-74599, and BOP
25 Register Inmate #53627-198, has had three prior prisoner civil actions dismissed on the
26 grounds that they were frivolous, malicious, or failed to state a claim upon which relief
27 may be granted.

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1 They are:

2 1) *Schmitt v. Costello, et al.*, Civil Case No. 3:04-cv-02582-H-WMc (S.D. Cal.
3 May 23, 2005) (Order Dismissing First Amended Complaint “for failing to state a claim
4 upon which relief may be granted and for seeking monetary relief against Defendants who
5 are immune” pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A)), (ECF No. 6) (strike one);

6 2) *Schmitt v. Gore, et al.*, Civil Case No. 3:14-cv-02937-JLS-RBB (S.D. Cal.
7 April 15, 2015) (Order granting IFP and Dismissing Complaint “for failing to state a claim
8 upon which § 1983 relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and §
9 1915A(b)(1)”), (ECF No. 4) (strike two); and

10 3) *Schmitt v. Gore, et al.*, Civil Case No. 3:17-cv-00753-JAH-NLS (S.D. Cal.
11 July 11, 2017) (Order Dismissing Civil Action for Failure to Pay Filing Fees, Failing to
12 File Motion to Proceed IFP and “as frivolous pursuant to 28 U.S.C. § 1915A(b)(1)”), (ECF
13 No. 3) (strike three).

14 Accordingly, because Plaintiff has, while incarcerated, accumulated three “strikes”
15 pursuant to § 1915(g), and he fails to make a “plausible allegation” that he faced imminent
16 danger of serious physical injury at the time of filing, he is not entitled to the privilege of
17 proceeding IFP in this action. *See Cervantes*, 493 F.3d at 1055; *Rodriguez v. Cook*, 169
18 F.3d 1176, 1180 (9th Cir. 1999) (finding that 28 U.S.C. § 1915(g) “does not prevent all
19 prisoners from accessing the courts; it only precludes prisoners with a history of abusing
20 the legal system from continuing to abuse it while enjoying IFP status”); *see also Franklin*
21 *v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (“[C]ourt permission to proceed IFP is
22 itself a matter of privilege and not right.”).

23 **III. Screening of Complaint pursuant to § 1915A**

24 While the Court has determined Plaintiff is not entitled to proceed IFP in this action,
25 and his case requires dismissal pursuant to 28 U.S.C. § 1914(a) alone, it further elects to
26 conduct a sua sponte review of Plaintiff’s Complaint because he was “incarcerated or
27 detained in any facility [and] is accused of, sentenced for, or adjudicated delinquent for,
28 violations of criminal law or the terms or conditions of parole, probation, pretrial release,

1 or diversionary program” at the time he filed it. *See* 28 U.S.C. § 1915A(a), (c).

2 Section 1915A, also enacted as part of PLRA, requires sua sponte dismissal of
3 prisoner complaints, or any portions thereof, which are frivolous, malicious, or fail to state
4 a claim upon which relief may be granted. 28 U.S.C. § 1915A(b); *Coleman v. Tollefson*,
5 135 S. Ct. 1759, 1764 (2015); *Resnick v. Hayes*, 213 F.3d 443, 446-47 (9th Cir. 2000).
6 “The purpose of § 1915A is to ‘ensure that the targets of frivolous or malicious suits need
7 not bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 907 n.1 (9th Cir.
8 2014) (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir.
9 2012)).

10 Plaintiff’s Complaint fails to state a claim upon which FTCA relief may be granted
11 against either the “U.S. Marshal Service” or “Agent Walker.” *See id.*; 28 U.S.C.
12 § 1915A(b)(1). The FTCA, 28 U.S.C. §§ 1346(b) & 2671–2680, waives the sovereign
13 immunity of the United States for certain torts committed by federal employees. *FDIC v.*
14 *Meyer*, 510 U.S. 471, 476 (1994). The FTCA provides that district courts have exclusive
15 jurisdiction of civil actions against the United States for money damages “for injury or loss
16 of property, or personal injury or death caused by the negligent or wrongful act or omission
17 of any employee” of the federal government while acting within the scope of his office or
18 employment. 28 U.S.C. § 1346(b); *FDIC*, 510 U.S. at 476 n.4.

19 As such, the FTCA “provides the exclusive statutory remedy for torts committed by
20 employees of the United States who act within the scope of their employment.” *Salcedo-*
21 *Albanez v. United States*, 149 F. Supp. 2d 1240, 1243 (S.D. Cal. 2001). Therefore, a suit
22 under the FTCA must be filed solely against the United States. *See* 28 U.S.C. § 1346(b);
23 *Lance v. United States*, 70 F.3d 1093, 1095 (9th Cir. 1995) (“The United States is the only
24 proper defendant in an FTCA action.”). The FTCA does *not* authorize tort claims against
25 federal agencies in their own names, nor does it allow claims against individual
26 government employees acting within the scope of their employment. 28 U.S.C.
27 § 2679(b)(1); *FDIC v. Craft*, 157 F.3d 697, 706 (9th Cir. 1998) (“The FTCA is the
28 exclusive remedy for tortious conduct by the United States, and it only allows claims

1 against the United States.”); *Epstein v. United States*, No. 16-CV-2929-BAS (WVG), 2017
2 WL 4227054, at *2 (S.D. Cal. Sept. 21, 2017).

3 Accordingly, because Plaintiff’s Complaint names only the U.S. Marshal Service
4 and Agent Walker as Defendants, it is also subject to sua sponte dismissal because it fails
5 to state a claim upon which FTCA relief may be granted. *See* 28 U.S.C. § 1915A(b)(1);
6 *Coleman*, 135 S. Ct. at 1764; *Nordstrom*, 762 F.3d at 907, n.1.

7 **IV. Conclusion and Order**

8 For the reasons set forth above, the Court:

9 1) **DENIES** Plaintiff’s Motion to Proceed IFP, (ECF No. 3), as barred by 28
10 U.S.C. § 1915(g);

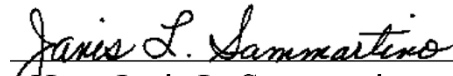
11 2) **DISMISSES** this action without prejudice for failure to pay the full statutory
12 and administrative \$400 civil filing fee required by 28 U.S.C. § 1914(a), and for failing to
13 state a claim upon which FTCA relief can be granted pursuant to 28 U.S.C. § 1915A(b)(1);

14 3) **CERTIFIES** that an IFP appeal from this Order would be frivolous and
15 therefore, would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). *See*
16 *Coppedge v. United States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548,
17 550 (9th Cir. 1977) (indigent appellant is permitted to proceed IFP on appeal only if appeal
18 would not be frivolous); and

19 4) **DIRECTS** the Clerk of Court to close the file.

20 **IT IS SO ORDERED.**

21 Dated: November 20, 2017


22 Hon. Janis L. Sammartino
23 United States District Judge
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