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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Allen Hammler,  
  
Plaintiff,  
  
v.  
  
C. Imada,  
  
Defendant.

Case No.: 21cv149-CAB-WVG

**ORDER GRANTING MOTION TO  
REVOKE PLAINTIFF’S IN FORMA  
PAUPERIS STATUS [Doc. No. 11]**

On November 22, 2021, Defendant C. Imada filed a Motion to Revoke Plaintiff’s *In Forma Pauperis* (“IFP”) Status. [Doc. No. 11.] On January 18, 2022, Plaintiff Allen Hammler filed an opposition. [Doc. No. 18.] On February 3, 2022, Defendant filed a reply. [Doc. No. 19.]

**BACKGROUND**

On January 11, 2021, Plaintiff brought this civil rights matter pursuant to 42 U.S.C. § 1983, against Imada and two other defendants and sought leave to file the action, as required by the pre-filing order in *Hammler v. Alvarez*, No. 18-cv-0326- AJB-WVG (S.D. Cal.). [Doc. No. 1-2 at 1.] On January 27, 2021, the Chief Judge of the Court issued an order granting Plaintiff leave to proceed and directing the Clerk to file Plaintiff’s Complaint. [*Id.* at 2.] On January 28, 2021, this Court dismissed the action without prejudice on the grounds that Plaintiff failed to pay the civil filing fee or to

1 submit a motion to proceed in forma pauperis. [Doc. No. 2 at 2.] After the Court granted  
2 Plaintiff's request for an extension of time, Plaintiff submitted a motion to proceed in  
3 forma pauperis. The Court granted that application on August 11, 2021, as part of the  
4 screening order under 28 U.S.C. § 1915. [Screening Order at 8, Doc. No. 7.] In the  
5 screening order, the Court also determined that liberally construed, Plaintiff stated a  
6 cognizable claim against Defendant C. Imada for a violation of his First Amendment  
7 rights when Defendant C. Imada allegedly interfered with a telephone call from  
8 Plaintiff's family members in retaliation for grievances filed by Plaintiff. [*Id.* at 7.] The  
9 Court then dismissed the two other defendants and directed the U.S. Marshal to effect  
10 service on Defendant C. Imada. [*Id.* at 9.] The U.S. Marshal mailed a request for waiver  
11 of service to Defendant C. Imada who returned the waiver on October 22, 2021. [Doc.  
12 No. 9.]

13 On November 22, 2021, Defendant filed a motion to extend until a ruling on this  
14 motion. [Doc. No. 10.] On November 23, 2021, the Court granted the motion for  
15 extension. [Doc. No. 13.]

### 16 LEGAL STANDARD

17 This action is governed by the Prison Litigation Reform Act of 1995 ("PLRA"),  
18 which became effective on April 26, 1996. *Tierney v. Kupers*, 128 F.3d 1310, 1311 (9th  
19 Cir. 1997). The PLRA provides that a prisoner may not bring a civil action under 28  
20 U.S.C. § 1915, i.e., may not proceed IFP, "if the prisoner has, on 3 or more prior  
21 occasions, while incarcerated or detained in any facility, brought an action or appeal in a  
22 court of the United States that was dismissed on the grounds that it is frivolous,  
23 malicious, or fails to state a claim upon which relief may be granted, unless the prisoner  
24 is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Prisoners  
25 "who qualify for IFP status are excused from prepaying court fees and costs." *Harris v.*  
26 *Harris*, 935 F.3d 670, 673 (9th Cir. 2019). The PLRA's "three strikes" provision was  
27 "designed to discourage vexatious and voluminous prisoner litigation." *Id.*

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1 A case must be dismissed on one of the specified enumerated grounds for it to  
2 count as a strike under § 1915(g). *Id.* The Ninth Circuit has provided guidance on these  
3 enumerated grounds. The phrase “fails to state a claim on which relief may be granted ...  
4 parallels the language of Federal Rule of Civil Procedure 12(b)(6).” *Andrews v. King*, 398  
5 F.3d 1113, 1121 (9th Cir. 2005) (“King”) (internal quotation marks and citation omitted).  
6 “Thus, if a claim is dismissed for failure to state a claim under rule 12(b)(6), it counts as a  
7 strike for PLRA purposes.” *El-Shaddai v. Zamora*, 833 F.3d 1036, 1043 (9th Cir. 2016).  
8 “A complaint is subject to dismissal for failure to state a claim if the allegations, taken as  
9 true, show the plaintiff is not entitled to relief.” *Id.* (quoting *Jones v. Bock*, 549 U.S. 199,  
10 215 (2007)). A case is considered “frivolous if it is of little weight or importance: having  
11 no basis in law or fact.” *King*, 398 F.3d at 1121 (internal quotation marks and citation  
12 omitted); see also *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) (a claim is  
13 “frivolous” when it is without “basis in law or fact”). In addition, a case is considered  
14 “malicious if it was filed with the intention or desire to harm another.” *Id.* (internal  
15 quotation marks and citation omitted).

16 “Not all unsuccessful cases qualify as a strike under § 1915(g). Rather, § 1915(g)  
17 should be used to deny a prisoner's IFP status only when, after careful evaluation of the  
18 order dismissing an action, and other relevant information, the court determines that the  
19 action was dismissed because it was frivolous, malicious or failed to state a claim.” *Id.* A  
20 court is not required to announce in an order that its dismissal constitutes a strike under §  
21 1915(g) for that dismissal to later count as a strike. See *id.* at 1119 n.8. In determining  
22 whether a prior dismissal counts as a strike, a court “should look to the substance of the  
23 dismissed lawsuit, and not to how the court labelled or styled the dismissal.” *Harris*, 935  
24 F.3d at 673 (internal quotations marks and citation omitted). To be counted as a strike, a  
25 case must be dismissed in its entirety as frivolous, malicious, or for failure to state a  
26 claim. *Id.* at 674. “[P]artial dismissals of even one claim for a non-qualifying reason will  
27 save an entire case from constituting a strike.” *Id.*

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1 A “three-strikes litigant” is precluded from proceeding IFP in a new action unless  
2 he was “under imminent danger of serious physical injury” at the time he commenced the  
3 new action. See 28 U.S.C. § 1915(g); *Andrews v. Cervantes*, 493 F.3d 1047, 1052–53  
4 (9th Cir. 2007). The plain language of the imminent danger clause in § 1915(g) indicates  
5 that “imminent danger” is to be assessed at the time of filing of the complaint. See  
6 *Andrews*, 493 F.3d at 1053. The conditions that existed at some earlier or later time are  
7 not relevant. See *id.* The court “should not make an overly detailed inquiry into whether  
8 the allegations qualify for the [imminent danger] exception.” *Id.* at 1055. It is sufficient if  
9 the complaint “makes a plausible allegation that the prisoner faced ‘imminent danger of  
10 serious physical injury’ at the time of filing.” *Id.*

11 When a defendant challenges a prisoner-plaintiff’s right to proceed IFP, the  
12 defendant bears the burden of producing sufficient evidence to establish that § 1915(g)  
13 bars the plaintiff’s IFP status. *King*, 398 F.3d at 1116, 1120. The defendant must produce  
14 court records or other documentation that will allow the court to determine that the  
15 plaintiff has filed at least three prior actions that were dismissed because they were  
16 “frivolous, malicious or fail[ed] to state a claim.” *Id.* at 1120 (quoting 28 U.S.C. §  
17 1915(g)). Once the defendant has made out a prima facie case, the burden shifts to the  
18 plaintiff to persuade the court that § 1915(g) does not apply. *Id.* at 1116, 1120.

### 19 **REQUEST FOR JUDICIAL NOTICE**

20 Defendant has filed a request for judicial notice of various court records in cases  
21 filed by Plaintiff. [Doc. No. 11-1 and 11-2.] Pursuant to Federal Rules of Evidence  
22 201(b)(2), the request for judicial notice is *GRANTED*.

### 23 **DISCUSSION**

24 Defendant moves to revoke Plaintiff’s IFP status and dismiss this case, unless  
25 Plaintiff first pays the full filing fee, on the basis that Plaintiff has previously brought at  
26 least three suits or appeals that were dismissed because they were frivolous or failed to  
27 state a claim and no showing can be made by Plaintiff that he is or was in imminent  
28 danger of serious physical injury at the time he filed this action. [Doc. No. 11.]

1 A. Previous Suits or Appeals.

2 Here Plaintiff has brought more than three actions or appeals while incarcerated  
3 that were dismissed on the basis that they were frivolous or failed to state a claim. First,  
4 in *Hammler v. Director of CDCR*, No. 1:17-0097(N.D. Cal.), the magistrate judge  
5 dismissed the complaint for failure to state a claim and granted Plaintiff leave to file an  
6 amended complaint. [Doc. No. 11-1 at 11-20.] When Plaintiff failed to amend the  
7 complaint, the court dismissed the case and entered judgment on April 17, 2017. [Doc.  
8 No. 11-1 at 18-23.] Thus, the court's dismissal of the complaint constitutes a "strike"  
9 against Plaintiff under 28 U.S.C. §1915(g).

10 Second, in *Hammler v. Kernan*, No. 3:18-cv-1170 (S. D. Cal.), the district court  
11 screened Plaintiff's case and dismissed the complaint as being frivolous and as failing to  
12 state a claim upon which §1983 relief could be granted and gave Plaintiff leave to file an  
13 amended complaint. [Doc. No. 11-1 at 30-43.] After Plaintiff filed an amended  
14 complaint, the district court dismissed it for being frivolous and for failing to state a  
15 claim. [Doc. No. 11-1 at 44-52.] Thus, the district court's dismissal of the complaint and  
16 first amended complaint constitute a strike under 28 U.S.C. §1915(g).

17 Next, in *Hammler v. Hough*, No. 3:18-cv-1319 (S.D. Cal.), the district court  
18 screened Plaintiff's complaint and dismissed it for failure to state a claim. [Doc. No. 11-  
19 2 at 58-73.] After the district court granted Plaintiff leave to file an amended pleading,  
20 Plaintiff filed a First Amended Complaint which the district court dismissed for failing to  
21 state a claim and being frivolous. Judgment was entered accordingly, along with the  
22 district court certifying that an "appeal would not be taken in good faith." [Doc. No. 11-2  
23 at 74-92.] Nevertheless, Plaintiff appealed the district court's dismissal of the case to the  
24 United States Court of Appeals for the Ninth Circuit. Upon review of the record and  
25 Plaintiff's response to the order requiring him to explain why the appeal should not be  
26 dismissed as frivolous, the Ninth Circuit denied Plaintiff's motion to proceed in forma  
27 pauperis and dismissed Plaintiff's appeal as frivolous. [Doc. No. 11-2 at 93-95.] Thus,  
28

1 the district court’s dismissal of Plaintiff’s complaint and the Ninth Circuit’s dismissal of  
2 Plaintiff’s appeal count as two strikes.

3 Finally, in *Hammler v. Director of CDCR*, No. 2:17-cv-1949 (E.D. Cal.), the  
4 magistrate judge recommended that the complaint be dismissed without leave to amend  
5 for failure to state a cognizable claim. [Doc. No. 11-2 at 108-122.] The district court  
6 adopted the recommendation and dismissed the complaint, except as to one defendant.  
7 [Doc. NO. 11-2 at 123-125.] Thereafter, Plaintiff filed a First Amended Complaint  
8 against that defendant. The magistrate judge then made recommendations that the action  
9 was frivolous and denied leave to amend. [Doc. No. 11-2 at 126-134.] The district court  
10 adopted the recommendations and dismissed the action as frivolous. [Doc. No. 11-2 at  
11 135-137.] Thus, the district court’s dismissals of the complaint and first amended  
12 complaint constitute a “strike.”

13 Accordingly, there are more than the number of “strikes” required to revoke  
14 Plaintiff’s in forma pauperis status under 28 U.S.C. §1915(g).<sup>1</sup>

15 B. Imminent Danger.

16 Here, Plaintiff did not allege that he was under any imminent danger of serious  
17 physical injury at the time he filed his Complaint. [Compl. at 3-9, Doc. No. 1.] Rather,  
18 Plaintiff claims that Defendant interfered with his ability to accept a telephone call from  
19 his family members over four years ago. [*Id.* at 3.] Moreover, Plaintiff is currently housed  
20 at an entirely different institution from where Defendant is employed and is not in  
21 imminent danger for the acts alleged in the Complaint. [*Id.* at 1.] Therefore, Plaintiff is  
22 not entitled to benefit from the “imminent danger” exception. *See* 28 U.S.C. §1915(g);  
23 *Andrews*, 493 F.3d at 1053, 1056-57.<sup>2</sup>

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27 <sup>1</sup> In his opposition, Plaintiff does not address any of the evidence of “strikes” submitted by Defendant.  
28 [*See* Doc. No. 18.]

<sup>2</sup> Plaintiff also fails to argue or submit any evidence that he is in imminent danger. [*See* Doc. No. 18.]

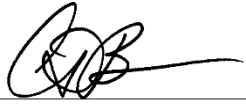
**CONCLUSION**

For the reasons set forth above, the Court **HEREBY ORDERS:**

1. Defendants’ motion to revoke Plaintiff’s IFP status and dismiss the complaint is **GRANTED**;
2. Plaintiff’s IFP status is **REVOKED**;
3. This action is **DISMISSED WITHOUT PREJUDICE** unless Plaintiff pays the \$400 filing fee in full no later than **March 4, 2022**; and
4. Should Plaintiff pay the filing fee, then Defendant shall respond to the Complaint by **March 25, 2022**.

**IT IS SO ORDERED.**

Dated: February 8, 2022

  
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Hon. Cathy Ann Bencivengo  
United States District Judge