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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LINO HERNANDEZ,
CDCR #AF-8851,

Plaintiff,

vs.

Dr. NATHAN WILLIAMS, et al.,

Defendants.

Case No. 21cv347-MMA-KSC

**ORDER DENYING MOTION TO
PROCEED IN FORMA PAUPERIS
AS BARRED BY 28 U.S.C. § 1915(g);**

[Doc. No. 2]

**DISMISSING CIVIL ACTION
WITHOUT PREJUDICE FOR
FAILURE TO PAY FILING FEE
REQUIRED BY 28 U.S.C. § 1914(a)**

Plaintiff Lino Hernandez, also known as Lino Felipe Hernandez, a prisoner incarcerated at Calipatria State Prison (“CAL”) in Calipatria, California, and proceeding pro se, has filed a civil rights Complaint (“Compl.”) pursuant to 42 U.S.C. § 1983. See Compl., Doc. No. 1. Plaintiff did not prepay the civil filing fee required to commence a civil action at the time he filed this action; instead, he has filed a Motion for Leave to proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). See Doc. No. 2.

1 **I. Motion to Proceed IFP**

2 A. Standard of Review

3 “All persons, not just prisoners, may seek IFP status.” *Moore v. Maricopa County*
4 *Sheriff’s Office*, 657 F.3d 890, 892 (9th Cir. 2011). Prisoners like Hernandez, however,
5 “face an additional hurdle.” *Id.*

6 In addition to requiring prisoners to “pay the full amount of a filing fee,” in
7 “monthly installments” or “increments” as provided by 28 U.S.C. § 1915(a)(3)(b), the
8 Prison Litigation Reform Act (“PLRA”) amended section 1915 to preclude the privilege
9 to proceed IFP in cases where the prisoner:

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

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

22 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner,
23 which were dismissed on the ground that they were frivolous, malicious, or failed to state
24 a claim,” *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the
25 district court styles such dismissal as a denial of the prisoner’s application to file the
26 action without prepayment of the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153
27 (9th Cir. 2008). When courts “review a dismissal to determine whether it counts as a
28 strike, the style of the dismissal or the procedural posture is immaterial. Instead, the

1 central question is whether the dismissal ‘rang the PLRA bells of frivolous, malicious, or
2 failure to state a claim.’” *El-Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016)
3 (quoting *Blakely v. Wards*, 738 F.3d 607, 615 (4th Cir. 2013)).

4 Once a prisoner has accumulated three strikes, section 1915(g) prohibits his pursuit
5 of any subsequent IFP civil action or appeal in federal court unless she faces “imminent
6 danger of serious physical injury.” See 28 U.S.C. § 1915(g); *Cervantes*, 493 F.3d at
7 1051-52 (noting § 1915(g)’s exception for IFP complaints which “make[] a plausible
8 allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the time
9 of filing.”).

10 B. Discussion

11 Plaintiff’s Complaint alleges several CAL medical officials violated his Eighth and
12 Fourteenth Amendment rights by failing to increase his medication for back and leg pain,
13 conduct “more tests ... like [an] MRI,” refer him to a specialist or chiropractor, or grant
14 his health care appeals requesting a “proper treatment” plan. See Compl. at 3–5. While
15 he claims to have been provided inadequate care for his chronic medical condition in
16 September 2020, Plaintiff includes no “plausible allegations” to suggest he “faced
17 ‘imminent danger of serious physical injury’” at the time of filing.” *Cervantes*, 493 F.3d
18 at 1055 (quoting 28 U.S.C. § 1915(g)). Section 1915(g)’s “imminent danger” exception
19 cannot be triggered solely by complaints of past injury or generalized fears of possible
20 future harm. See *id.* at 1053 (“The exception’s use of the present tense, combined with
21 its concern only with the initial act of ‘bring[ing]’ the lawsuit, indicates to us that the
22 exception applies if the danger existed at the time the prisoner filed the complaint.”). The
23 “common definition of ‘imminent’ . . . does not refer only to events that are already
24 taking place, but to those events ‘ready to take place’ or ‘hanging threateningly over
25 one’s head.’” *Id.* at 1056. Thus, without more, allegations of chronic pain and claims of
26 inadequate medical care, like those Plaintiff makes here, do not meet § 1915(g)’s
27 imminent danger exception. See *e.g.*, *Balzarini v. Lewis*, 2015 WL 2345464, *8 (E.D.
28 Cal. May 14, 2015) (finding prisoner’s disagreement with medical personnel about the

1 course of his treatment for Hepatitis C and adequacy of his pain medication insufficient
2 to establish imminent danger); *Thomas v. Ellis*, 2015 WL 859071, *3 (N.D. Cal. Feb. 26,
3 2015) (finding allegations of prisoner complaining of “acute chronic pain in his mid and
4 lower back and lower extremities due to [a] gunshot injuries he received before his
5 incarceration,” who was receiving medical treatment for his chronic pain, but disagreed
6 “with the type of medication the medical staff [wa]s prescribing for him,” insufficient to
7 show imminent danger of serious physical injury); *Stephens v. Castro*, 2006 WL
8 1530265, *1 (E.D. Cal. May 31, 2006) (disagreement with prison personnel about course
9 of treatment does not establish imminent danger of serious physical injury under
10 § 1915(g)); *see also Dustin v. Kern Valley State Prison Personnel*, No. 1:19-cv-00989-
11 LJO-SAB (PC), 2019 WL 6463991, at *1 (E.D. Cal. Dec. 2, 2019) (allegations of
12 lingering pain caused by “injur[y] in the past by one or more former cellmates and a
13 porter do not establish that [plaintiff] was in imminent danger of serious physical injury
14 at the time he filed his complaint.”); *Stewart v. Lystad*, No. 2:16-CV-01439-BHS-JRC,
15 2016 WL 6816278, at *3 (W.D. Wash. Oct. 14, 2016) (finding prisoner’s claims of
16 “intractable” foot pain, and an alleged inability to “work out, fall asleep, work, stand for
17 long periods or walk long distances” insufficient to satisfy § 1915(g)’s “imminent
18 danger” exception), *report and recommendation adopted*, 2016 WL 6805339 (W.D.
19 Wash. Nov. 17, 2016).

20 Defendants typically carry the initial burden to produce evidence demonstrating a
21 prisoner is not entitled to proceed IFP, *Andrews*, 398 F.3d at 1119, but “in some
22 instances, the district court docket may be sufficient to show that a prior dismissal
23 satisfies at least one on the criteria under § 1915(g) and therefore counts as a strike.” *Id.*
24 at 1120. Therefore, this Court takes judicial notice of federal court docket proceedings
25 available on PACER¹ and finds that Plaintiff Lino Hernandez, aka Lino Felipe

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28 ¹ A court may take judicial notice of its own records, *see Molus v. Swan*, Civil Case No. 3:05-cv-00452-
MMA-WMc, 2009 WL 160937, *2 (S.D. Cal. Jan. 22, 2009) (citing *United States v. Author Services*, 804

1 Hernandez, identified as CDCR Inmate #AF-8851, while incarcerated, has had three prior
2 prisoner civil actions or appeals dismissed on the grounds that they were frivolous,
3 malicious, or failed to state a claim upon which relief may be granted.

4 They are:

5 1) *Hernandez v. Brooks, et al.*, Civil Case No. 2:09-cv-00817-UA-JC
6 (C.D. Cal., West. Div., May 14, 2009) (Order Denying Request to Proceed
7 without Prepayment of Filing Fee and finding Complaint subject to dismissal
8 for failing to state a claim pursuant to 28 U.S.C. § 1915(e)) (Doc. No. 2 at 1–
4) (strike one);

9 2) *Hernandez v. Brooks, et al.*, Civil Case No. 3:09-cv-02071-UA-JC
10 (C.D. Cal., West. Div., May 15, 2009) (Order Denying Request to Proceed
11 without Prepayment of Filing Fee and finding Complaint subject to dismissal
12 for failing to state a claim pursuant to 28 U.S.C. § 1915(e)) (Doc. No. 2 at 1–
4) (strike two); and

13 3) *Hernandez v. Ventura County, et al.*, Civil Case No. 3:09-cv-05990-
14 UA-JC (C.D. Cal., West. Div., Sept. 1, 2009) (Order Denying Request to
15 Proceed without Prepayment of Filing Fee and finding Complaint subject to
16 dismissal for failing to state a claim pursuant to 28 U.S.C. § 1915(e)) (Doc.
17 No. 2 at 1–5) (strike three).²

18 Accordingly, because Plaintiff has, while incarcerated, accumulated more than
19 three “strikes” pursuant to § 1915(g), and he fails to make a “plausible allegation” that he

20 F.2d 1520, 1523 (9th Cir. 1986)); *Gerritsen v. Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1034
21 (C.D. Cal. 2015), and “may take notice of proceedings in other courts, both within and without the federal
22 judicial system, if those proceedings have a direct relation to matters at issue.” *Bias v. Moynihan*, 508
23 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir.
2002)); *see also United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244,
248 (9th Cir. 1992).

24 ² Plaintiff also had his IFP privileges revoked pursuant to 28 U.S.C. § 1915(g) in two subsequently filed
25 Central District of California civil actions based on the same three strikes identified above. *See Hernandez*
26 *v. Ventura County*, Civil No. 2:09-cv-07838-GHC-JC (C.D. Cal., West. Div. July 27, 2010) (Report and
27 Recommendation [“R&R”] to Dismiss Complaint and to Revoke In Forma Pauperis Status) (Doc. No.
28 29); *adopted* (C.D. Cal., West. Div., Sept. 6, 2010) (Order and Judgment) (Doc. Nos. 30-31); *see also*
Hernandez v. Ventura County, Civil No. 2:09-cv-04373-GHC-JC (C.D. Cal., West. Div. Nov. 16, 2010)
(R&R to Revoke IFP Status and Dismiss Civil Action) (Doc. No. 7); *adopted* (C.D. Cal., West. Div., Dec.
15, 2010) (Order and Judgment) (Doc. Nos. 8, 9).

1 faced imminent danger of serious physical injury at the time he filed his Complaint, he is
2 not entitled to the privilege of proceeding IFP in this civil action. *See Cervantes*, 493
3 F.3d at 1055; *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999) (finding that 28
4 U.S.C. § 1915(g) “does not prevent all prisoners from accessing the courts; it only
5 precludes prisoners with a history of abusing the legal system from continuing to abuse it
6 while enjoying IFP status”); *see also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir.
7 1984) (“[C]ourt permission to proceed IFP is itself a matter of privilege and not right.”).

8 **III. Conclusion and Order**

9 For the reasons set forth above, the Court:

10 1) **DENIES** Plaintiff’s Motion to Proceed IFP (Doc. No. 2) as barred by 28
11 U.S.C. § 1915(g);

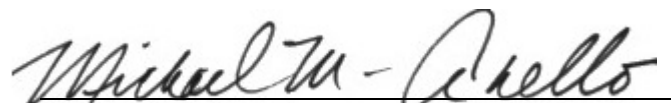
12 2) **DISMISSES** this civil action without prejudice based on Plaintiff’s failure
13 to pay the full statutory and administrative \$402 civil filing fee required by 28 U.S.C.
14 § 1914(a);

15 3) **CERTIFIES** that an IFP appeal from this Order would be frivolous and
16 therefore, would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3); and

17 4) **DIRECTS** the Clerk of Court to close the case.

18 **IT IS SO ORDERED.**

19 DATE: April 8, 2021



20 HON. MICHAEL M. ANELLO
21 United States District Judge
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