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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARRYL KEITH AGGERS,
Plaintiff,
vs.
CAPTAIN TYSON, et al.,
Defendants.

Case No. 1:07-cv-01701 AWI JLT (PC)
ORDER CONTINUING IN FORMA PAUPERIS
STATUS ON APPEAL

_____/

Plaintiff is a state prisoner proceeding pro se and in forma pauperis. On August 1, 2011, the Court dismissed this action for Plaintiff’s failure to exhaust administrative remedies prior to filing suit. (Doc. 52.) Plaintiff subsequently filed a notice of appeal. (Doc. 55.) On September 12, 2011, the Ninth Circuit referred this matter back to this Court for the limited purpose of deciding whether Plaintiff’s in forma pauperis status should continue on appeal.

“An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). “In the absence of some evident improper motive, the applicant’s good faith is established by the presentation of any issue that is not plainly frivolous.” Ellis v. United States, 356 U.S. 674 (1958). An action is frivolous “where it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989). In other words, the term “frivolous”, as used in § 1915 and when applied to a complaint, “embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.” Id.

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In this case, there is nothing to suggest that Plaintiff's appeal is not being taken in good faith. Plaintiff's contention that he should be excused from his failure to exhaust administrative remedies is not plainly frivolous in either law or fact. Accordingly, the Court concludes that Plaintiff's in forma pauperis status should not be revoked on appeal.

The Clerk of the Court is directed to forward a copy of this order to the Ninth Circuit Court of Appeals.

IT IS SO ORDERED.

Dated: September 13, 2011

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE