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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA
8

9 GREGORY MCKINNEY,

10 Plaintiff,

11 v.

12 S. HUBBARD, et al.,

13 Defendants.

14 Case No. 1:09-cv-02096-BAM (PC)

15 NOTICE AND ORDER REVOKING IN
16 FORMA PAUPERIS STATUS

17 (ECF No. 21)

18 By notice entered January 23, 2017, the United States Court of Appeals for the Ninth
19 Circuit referred this matter to the District Court for the limited purpose of determining whether in
20 forma pauperis status should continue for this appeal or whether the appeal is frivolous or taken
in bad faith. *See* 28 U.S.C. § 1915(a)(3); *see also* *Hooker v. American Airlines*, 302 F.3d 1091,
1092 (9th Cir. 2002) (revocation of in forma pauperis status is appropriate where the district court
finds the appeal to be frivolous).

21 Permitting litigants to proceed in forma pauperis is a privilege, not a right. *Franklin v.*
22 *Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984); *Williams v. Field*, 394 F.2d 329, 332 (9th Cir.
23 1968), cert. denied, 393 U.S. 891 (1968); *Williams v. Marshall*, 795 F.Supp. 978, 978-79 (N.D.
24 Cal. 1992). A federal court may dismiss a claim filed in forma pauperis before service if it is
25 satisfied that the action is frivolous or malicious. 28 U.S.C. § 1915(e)(2); *see Sully v. Lungren*,
26 842 F.Supp. 1230, 1231 (N.D. Cal. 1994). If a plaintiff with in forma pauperis status brings a case
27 without arguable substance in law and fact, the court may declare the case frivolous. *Franklin*,
28 745 F.2d at 1227.

1 On October 18, 2011, the Magistrate Judge dismissed Plaintiff's complaint with prejudice
2 for failure to state a claim and entered judgment. (ECF Nos. 13, 14.) On June 20, 2016, Plaintiff
3 filed a motion for relief from the Court's October 18, 2011 order. (ECF No. 16.) On December
4 20, 2016, the Court issued an order denying Plaintiff's motion as untimely. (ECF No. 17.)
5 Plaintiff now appeals the Court's order denying his motion. (ECF No. 18.)

6 Plaintiff failed to file a motion for relief within the time periods prescribed in Federal Rule
7 of Civil Procedure 60(b). Motions made under Rule 60(b)(1)-(3) must be filed no more than one
8 year after the entry of the judgment or order. Fed. R. Civ. P. 60(c)(1). All other motions under
9 Rule 60(b) must be made within a “reasonable time.” *Id.* Plaintiff did not file his motion for relief
10 from the Court’s October 18, 2011 order until almost five years after the entry of the judgment,
11 well beyond the time limits permitted under Rule 60(c)(1). Plaintiff did not even inquire about the
12 status of his case until more than four years had passed following the entry of the judgment in his
13 case. Plaintiff’s appeal of the Court’s order, which resulted from Plaintiff’s own inaction, is
14 therefore frivolous.

15 || Accordingly, the Court HEREBY ORDERS that:

- 16 1. This matter is declared frivolous;

17 2. In accordance with 28 U.S.C. § 1915(a)(3), Plaintiff is not entitled to proceed in forma

18 pauperis in Appeal No. 17-15098, filed January 12, 2017;

19 3. As required by Federal Rules of Appellate Procedure 24(a)(4), this Order serves as

20 notice to the parties and the United States Court of Appeals for the Ninth Circuit of the

21 finding that Plaintiff is not entitled to proceed in forma pauperis for this appeal; and

22 4. The Clerk of the Court is directed to serve a copy of this Order on Plaintiff and the

23 United States Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

26 || Dated: **January 26, 2017**

/s/ *Barbara A. McAuliffe*
UNITED STATES MAGISTRATE JUDGE