

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

11 RUMALDO BARBOZA,
12 Plaintiff,
13 v.
14 GREEN,
15 Defendant.

Case No. 1:12-cv-01914-AWI-JLT (PC)
Appeal No. 13-17220

**NOTICE AND ORDER FINDING THAT
PLAINTIFF IS NOT ENTITLED TO
PROCEED IN FORMA PAUPERIS OR
APPEAL**

**NOTICE AND ORDER FINDING THAT
PLAINTIFF IS NOT ENTITLED TO
PROCEED IN FORMA PAUPERIS ON
APPEAL**

(Doc. 24)

18 Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights
19 action pursuant to 42 U.S.C. § 1983. Plaintiff filed his initial complaint on November 26, 2012.
20 (ECF No. 1.) At the same time, Plaintiff filed a motion for temporary restraining order and
21 preliminary injunction. (ECF No. 3.) In that motion, Plaintiff sought an injunction requiring
22 prison officials to provide him with pain medication, referral to a pain management specialist, and
23 physical therapy when it was discontinued in August of 2010 for the treatment of an elbow injury
24 he sustained December 12, 2009. (*Id.*, at 2, 7.) On December 7, 2012, findings and
25 recommendations issued to deny Plaintiff's request based on lack of jurisdiction since Plaintiff
26 failed to state any cognizable claims and a lack of showing of irreparable injury. (ECF No. 10.)
27 An order adopting issued on September 20, 2013. (ECF No. 18.)

28 On October 22, 2013, Plaintiff filed a notice of appeal. (ECF No. 21.) On November 4,

1 2013, the Court of Appeals for the Ninth Circuit referred the matter to the district court for the
2 limited purpose of determining if Plaintiff is entitled to proceed in forma pauperis on appeal.
3 (ECF No. 24.) For the reasons which follow, the Court finds that he is not and elects to revoke
4 Plaintiff's in forma pauperis status on appeal. Fed. R. App. P. 24(a)(3)(A).

5 Plaintiff's claim arose from discontinued treatment for an injury he sustained on December
6 12, 2009 for which he claims to have been denied adequate pain medication. (ECF Nos. 1, 3.)
7 Plaintiff waited more than two years to file his initial complaint. (ECF No. 1.) In the underlying
8 motion, Plaintiff failed to show irreparable injury by failing to offer any argument as to why the
9 denial of physical therapy and the medication regimen he sought posed an immediate and lasting
10 threat to his current health and well-being; nor did he explain why immediate action is now
11 required given his extended delay in bringing this matter to the Court's attention. *See Winter v.*
12 *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted).

13 Further, at this stage, Plaintiff has yet to state a cognizable claim against the only named
14 Defendant in the action. (See ECF No. 15.) Plaintiff has not file a first amended complaint,
15 despite being given opportunity and an extension of time to do so. (See ECF No. 20.) Thus, the
16 district court is also unable to order the relief Plaintiff seeks due to lack of personal jurisdiction
17 over the defendant in this action. *See Zepeda v. United States Immigration Service*, 753 F.3d 719,
18 727 (9th Cir. 1985) (emphasis added).

19 "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is
20 not taken in good faith." 28 U.S.C. § 1915(a)(3). The test for allowing an appeal in forma
21 pauperis is easily met; the good faith requirement is satisfied if the appellant seeks review of any
22 issue that is not frivolous. *Gardner v. Pogue*, 558 F.2d 548, 550-51 (9th Cir. 1977) (citing
23 *Coppedge v. United States*, 369 U.S. 438, 445, 82 S.Ct. 917 (1962)) (quotation marks omitted);
24 *see also Hooker v. American Airlines*, 302 F.3d 1091, 1092 (9th Cir. 2002) (if at least one issue or
25 claim is non-frivolous, the appeal must proceed in forma pauperis as a whole).

26 Since Plaintiff has yet to state a cognizable claim in this action (but has been given leave to
27 do so) and waited over two years past the events in question to seek court intervention, Plaintiff's
28 appeal of the order denying his motion for temporary restraining order and/or injunctive relief

1 seeking immediate prescriptive pain medication and medical treatment is not taken in good faith
2 and is frivolous.

3 Accordingly, the Court HEREBY ORDERS as follows:

4 1. Pursuant to Fed. R. App. P. 24(a)(3)(A), the Court finds that Plaintiff's appeal is
5 frivolous and he should not be permitted to proceed in forma pauperis on appeal; and

6 2. Pursuant to Fed. R. App. P. 24(a)(4), the Clerk of the Court shall serve this order on
7 Plaintiff and the Court of Appeals for the Ninth Circuit.

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9 IT IS SO ORDERED.

10 Dated: November 12, 2013

11 /s/ Jennifer L. Thurston
12 UNITED STATES MAGISTRATE JUDGE

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