

1 were entitled to qualified immunity. (Id.)

2
3 Plaintiff filed a timely Notice of Appeal on January 17, 2017. (ECF No. 25.) On
4 January 23, 2017, the Ninth Circuit ordered Plaintiff to file a motion to proceed in forma
5 pauperis on appeal or else have his appeal dismissed. (ECF No. 28.) Plaintiff filed a
6 motion to proceed in forma pauperis on appeal in this Court on February 13, 2017. (ECF
7 No. 29.) For the reasons, outlined below, the Court determines that the appeal is not
8 frivolous and grants the motion to proceed in forma pauperis.

9 An appeal may be taken in forma pauperis if the appeal is taken in “good faith.”
10 28 U.S.C. § 1915(a). “Good faith” requires a showing that the issues are arguable on the
11 merits and are, therefore, not frivolous; it does not require a showing of probable
12 success.

13 After consideration, the Court concludes that the appeal is not frivolous within the
14 meaning of 28 U.S.C. § 1915(a)(3). As noted above, Judge O’Neil determined that
15 Defendants in this action were entitled to qualified immunity and therefore the action
16 needed to be dismissed. (ECF No. 23.) In reaching his conclusion that Defendants were
17 entitled to qualified immunity, Judge O’Neil relied upon Smith v. Schwarzenegger, 137
18 F.Supp.3d 1233 (E.D. Cal. 2015), in which the District Court held that defendants were
19 entitled to qualified immunity in inmates’ action alleging violation of Eighth Amendment
20 arising from contraction of Valley Fever. (ECF No. 23 at 2.) As of October 5, 2017, the
21 holding in Smith is on appeal before the Ninth Circuit; oral argument was held on May
22 17, 2017 and the matter was taken under submission. Smith v. Schwarzenegger, No. 15-
23 17155, ECF No. 96 (9th Cir. May 17, 2017). Because the legal basis on which Judge
24 O’Neil dismissed this action is currently on appeal, the Court concludes that this appeal
25 is being undertaken in good faith.

26 Furthermore, review of the application and Plaintiff’s prison trust account
27 statement reveal that he is entitled to in forma pauperis status. (ECF No. 29.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to proceed in forma pauperis on appeal (ECF No. 29) is GRANTED.

2. As required by Fed. R. App. P. 24(a)(4), this Order serves as notice to the parties and the Ninth Circuit Court of Appeals of the finding that Plaintiff is entitled to proceed in forma pauperis for his appeal of this case.

3. The Clerk of Court is directed to serve a copy of this order on Plaintiff and the Ninth Circuit Court of Appeals.

4. Mule Creek State Prison shall collect payments from Plaintiff's prison trust account in an amount equal to twenty per cent (20%) of the preceding month's income credited to the prisoner's trust account and shall forward those payments to the Clerk of the Court each time the amount in the account exceeds \$10.00, in accordance with 28 U.S.C. § 1915(b)(2), until a total of \$505.00 has been collected and forwarded to the Clerk of the Court. The payments shall be clearly identified by the name and number assigned to this action.

5. The Clerk of the Court is directed to serve a copy of this order and a copy of plaintiff's in forma pauperis application on Mule Creek State Prison, via the court's electronic case filing system (CM/ECF).

IT IS SO ORDERED.

Dated: October 7, 2017

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE