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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 EARL WARNER,

12 Plaintiff-Appellant

No. 2:09-cv-01568-KJM-EFB

13 vs.

14 M. MARTEL, Warden; et al.,

15 Defendant-Appellees.

ORDER

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17 Plaintiff, who is a prisoner proceeding pro se and in forma pauperis in a civil  
18 rights action under 42 U.S.C. § 1983, filed a timely notice of appeal on October 31, 2012 from  
19 this court's September 26, 2012 order, which denied plaintiff's motion for reconsideration.  
20 (ECF 71, 69); FED. R. APP. P. 4(a), 4(c). Plaintiff now requests to continue proceeding in forma  
21 pauperis on appeal.

22 Under 28 U.S.C. § 1915(a)(3) a court may deny a request to proceed in forma  
23 pauperis on appeal if it determines that the appeal is not taken in good faith. The good faith  
24 requirement is satisfied if the plaintiff seeks review of any issue that is "not frivolous."  
25 *Gardner v. Pogue*, 558 F.2d 548, 551 (9th Cir.1977) (quoting *Coppedge v. United States*,  
26 369 U.S. 438, 445 (1962)). An action is "frivolous" for purposes of § 1915(a)(3) if it lacks any

1 arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325, 327(1989); *Franklin v.*  
2 *Murphy*, 745 F.2d 1221, 1225 (9th Cir. 1984).

3           The court finds that plaintiff's appeal is not in good faith. Defendants filed a  
4 motion for summary judgment on February 21, 2012. (ECF 53.) On March 19, 2012, the  
5 assigned magistrate judge informed plaintiff that if he was unable to respond to defendants'  
6 motion because of inadequate access to his property, he could request an extension of time.  
7 (ECF 69 at 2.) Plaintiff took no action. (*Id.*) On April 19, 2012, the magistrate judge warned  
8 plaintiff that failure to respond to defendants' motion could result in dismissal of his claim. (*Id.*)  
9 The magistrate judge granted an extension of time. (*Id.*)

10           On May 3, 2012, plaintiff filed a motion for a protective order requesting greater  
11 access to legal materials. (*Id.*) The magistrate judge denied this motion, noting among other  
12 things that the 140-page filing undermined plaintiff's claim that his paper supply was limited to  
13 seven pages. (*Id.*) The magistrate judge again extended plaintiff's time to respond. (*Id.* at 3-4.)  
14 Plaintiff moved for reconsideration of the denial of his protective order, yet still failed to respond  
15 to defendants' motion for summary judgment. (*Id.*) On July 10, 2012, plaintiff still had not  
16 responded, nor requested an extension of time. (*Id.* at 3.) Accordingly, the magistrate judge  
17 dismissed plaintiff's case for failure to prosecute and failure to comply with court orders. (ECF  
18 65.)


19           This court affirmed the magistrate judge's determination that plaintiff was  
20 capable of prosecuting this action but had simply failed to do so. (ECF 69 at 3.) Plaintiff was  
21 repeatedly given extensions of time, yet continually failed to abide by court deadlines. (*Id.*) The  
22 magistrate judge granted two extensions of time *sua sponte*. Plaintiff filed other motions while  
23 remaining silent for nearly five months as to defendants' motion for summary judgment. This  
24 court adopted the magistrate judge's findings and recommendations in full, dismissing plaintiff's  
25 action. (*Id.* at 4.) This court also denied plaintiff's request for reconsideration of the magistrate  
26 judge's denial of his protective order as moot, as the underlying action had been dismissed. (*Id.*)

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2 Plaintiff cannot cure prior repeated failures to respond to defendants' dispositive  
3 motion through an appeal when his motion for appeal presents no explanation or excuse for his  
4 failures to respond. Therefore, plaintiff's appeal of this denial is frivolous, lacking an arguable  
5 basis in law and fact.

6 Because plaintiff brings a frivolous appeal, his request to proceed in forma  
7 pauperis (ECF 71) is DENIED.

8 IT IS SO ORDERED.

9 DATED: November 20, 2012.

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11 UNITED STATES DISTRICT JUDGE  
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