

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 PAUL BOSCHETTI,

No. C 13-2706 CW

5 Plaintiff,

ORDER GRANTING IN
PART LEAVE TO
APPEAL IN FORMA
PAUPERIS

6 v.

7 DANIEL O'BLENIS,

8 Defendant.
9

10 Defendant Daniel Everett, named herein as Daniel O'Blenis,
11 moves for leave to appeal in forma pauperis (IFP). For the
12 reasons set forth below, this motion is granted in part.

13 "[A] party to a district-court action who desires to appeal
14 in forma pauperis must file a motion in the district court." Fed.
15 R. App. P. 24(a)(1). "An appeal may not be taken in forma
16 pauperis if the trial court certifies in writing that it is not
17 taken in good faith." 28 U.S.C. § 1915(a)(3). "If the district
18 court denies the motion, it must state its reasons in writing."
19 Fed. R. App. P. 24(a)(2).

20 Defendant seeks to appeal this Court's August 14, 2013 order
21 remanding the case to San Francisco County Superior Court for lack
22 of federal subject matter jurisdiction and awarding attorneys'
23 fees to Plaintiff Paul Boschetti. See Docket No. 26, Notice of
24 Appeal. In this circuit, an order remanding a case to state court
25 for lack of federal subject matter jurisdiction "is not reviewable
26 on appeal or otherwise." 28 U.S.C. § 1447(d); see also Abada v.
27 Charles Schwab & Co., Inc., 300 F.3d 1112, 1116 (9th Cir. 2002)
28 ("Remand orders based on a defect in removal procedure or lack of

1 subject matter jurisdiction are immune from review even if the
2 district court's order is erroneous.'" (citations omitted)).
3 Accordingly, Defendant's appeal of the remand order is frivolous
4 and not taken in good faith under 28 U.S.C. § 1915(a)(3). See
5 Hooker v. American Airlines, 302 F.3d 1091, 1092 (9th Cir. 2002)
6 (construing "not in good faith" to mean frivolous).

7 However, Defendant's appeal of the attorneys' fees award is
8 not frivolous. The Ninth Circuit has held that such an award is
9 subject to appellate review even when the accompanying remand
10 order is not. Dahl v. Rosenfeld, 316 F.3d 1074, 1079 (9th Cir.
11 2003) ("Although we have no power to reverse the remand decision,
12 we can nonetheless consider the district court's award of
13 attorneys' fees."). Thus, Defendant may proceed IFP in his appeal
14 of the attorneys' fees award.

15 CONCLUSION

16 For the reasons set forth above, Defendant's motion for leave
17 to appeal IFP (Docket Nos. 27, 29) is GRANTED in part. Pursuant
18 to Federal Rule of Appellate Procedure 24(a)(4), the Clerk shall
19 notify the Ninth Circuit that this Court has denied Defendant's
20 motion to appeal the remand order IFP and certified in writing
21 that the appeal (9th Cir. Case No. 13-16666) is not taken in good
22 faith. Defendant may, however, proceed IFP on his appeal of the
23 attorneys' fees award.

24 IT IS SO ORDERED.

25
26 Dated: 8/26/2013

27 
28 CLAUDIA WILKEN
United States District Judge