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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

OSCAR HERNANDEZ,
Plaintiff,
v.
FIRST FRANKLIN LOAN
SERVICES, et al.
Defendants.

Case No.: C 08-263 WDB

**ORDER THAT CASE BE
REASSIGNED AND
RECOMMENDATION THAT
APPLICATION TO PROCEED IN
FORMA PAUPERIS BE DENIED
AND THAT CASE BE DISMISSED
WITHOUT PREJUDICE**

On January 15, 2008, Plaintiff filed a Petition along with an Application to Proceed in Forma Pauperis. Based on the Application,

IT IS HEREBY ORDERED that this case be reassigned to a District Judge¹ with the recommendation that the Application be denied and that the Petition be dismissed.

The federal *in forma pauperis* statute, enacted in 1892 and presently codified as 28 U.S.C. § 1915, is designed to ensure that indigent litigants have meaningful access to the federal courts. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342-343 (1948). To this end, § 1915(a) allows a litigant to commence a civil action in federal court *in*

¹ This court is ordering reassignment to a District Judge because, absent consent of all parties, a Magistrate Judge does not have authority to make case-dispositive rulings. *See, e.g., Tripathi v. Rison*, 847 F.2d 548 (9th Cir. 1988).

1 *forma pauperis* by filing in good faith an affidavit stating, *inter alia*, that he is unable to
2 pay the costs of the lawsuit. *See Neitzke v. Williams*, 490 U.S. 319, 324 (1989).

3 In the present case, Plaintiff states in his Application that he is currently employed,
4 earning \$2100 per month in *net* pay (\$2700 per month in gross pay) and that his monthly
5 expenses are \$1900. Given the amount Plaintiff is able to expend on monthly living
6 expenses (for example, \$300 a month on clothes), and his apparent ability to earn more
7 than a living wage, Plaintiff does not qualify as an indigent person. *See e.g., Adkins v.*
8 *E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948) (holding that IFP affidavit must
9 demonstrate that person cannot, because of his poverty, provide himself and any
10 dependents with the necessities of life). Plaintiff should therefore pay the \$350 cost of
11 filing suit, and the Court RECOMMENDS that the Application to Proceed In Forma
12 Pauperis be DENIED.

13 Moreover, even if the Court granted Plaintiff's *in forma pauperis* Application,
14 Plaintiff would not automatically be entitled to continue to prosecute his Petition. A court
15 is under a continuing duty to dismiss a case filed without the payment of the filing fee
16 whenever it determines that the action "(i) is frivolous or malicious; (ii) fails to state a
17 claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
18 who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). A Complaint is
19 frivolous if "it lacks an arguable basis either in law or in fact." *Nietzke v. Williams*, 490
20 U.S. 319, 325 (1989) (found to be superseded on other grounds by reason of adoption of
21 section 1915(e), which makes dismissal for failure to state a claim mandatory).

22 Plaintiff's Petition is incoherent and fails to state a claim. Accordingly, in addition
23 to recommending that the *in forma pauperis* Application be denied, the undersigned also
24 RECOMMENDS that the case be DISMISSED without prejudice.

25 Dated: February 5, 2008

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28 WAYNE D. BRAZIL.
United States Magistrate Judge