

1 UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3 OAKLAND DIVISION  
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5  
6 RICK MADSEN,

7 Plaintiff,

8 vs.

9 RISENHOOVER, et al.,

10 Defendants.  
11  
12

Case No: C 09-5457 SBA (pr)

**ORDER CERTIFYING THAT  
PLAINTIFF'S APPEAL IS NOT IN  
GOOD FAITH UNDER 28 U.S.C.  
§ 1915(a)(3) AND DENYING LEAVE  
TO APPEAL IN FORMA PAUPERIS**

13  
14 In March 29, 2013, the Court issued its Order Granting in Part and Denying in Part  
15 Defendant's Motion for Summary Judgment. Dkt. 134. The Court also referred the matter  
16 for a settlement conference, pursuant to Northern District's Prisoner Settlement Program.  
17 On April 25, 2013, Plaintiff filed a Notice of Appeal from the Court's March 29 Order.  
18 Dkt. 136.

19 A prisoner must seek leave to proceed in forma pauperis on appeal in the district  
20 court. See Fed. R. App. P. 24(a). As in the district court, a prisoner proceeding in forma  
21 pauperis on appeal will be required to pay the full filing fee. See 28 U.S.C. § 1915(b)(1).  
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23 If the district court finds that the appeal is frivolous and not taken in good faith and  
24 revokes in forma pauperis status, or if the prisoner never had such status and moves in the  
25 Ninth Circuit to proceed in forma pauperis, the Ninth Circuit will conduct an independent  
26 review of the record to determine whether the appeal is frivolous. The Ninth Circuit will  
27 decide whether to grant the prisoner in forma pauperis status. If in forma pauperis status is  
28 denied by the Ninth Circuit, the prisoner will nonetheless be directed to pay the entire filing


1 fee and to show cause why the appeal should not be dismissed as frivolous. See id. §  
2 1915(e)(2).

3 Under 28 U.S.C. § 1915(a)(3), “[a]n appeal may not be taken in forma pauperis if  
4 the trial court certifies in writing that it is not taken in good faith.” A notice of appeal taken  
5 from an order that is not immediately appealable is not in good faith. Javor v. Brown, 295  
6 F.2d 60, 61 (9th Cir. 1961) (“If it appears from the record that the order sought to be  
7 reviewed is not appealable, the conclusion is warranted that the appeal is not taken in good  
8 faith.”) (citing 28 U.S.C. § 1915(a)). Here, the order from which the notice of appeal has  
9 been taken is not a final order. See Safe Flight Instr. Corp. v. McDonnell-Douglas Corp.,  
10 482 F.2d 1086, 1093 (9th Cir.1973) (“Ordinarily the denial of a motion for summary  
11 judgment is not appealable, even where there has been an express direction and  
12 determination of the kind called for by Rule 54(b) . . .”). Accordingly,

13 THE COURT HEREBY CERTIFIES that Plaintiff’s appeal from the Court’s Order  
14 Granting in Part and Denying in Part Defendant’s Motion for Summary Judgment is not  
15 taken in good faith, within the meaning of 28 U.S.C. § 1915(a)(3). Therefore, Plaintiff’s  
16 motion seeking leave to appeal in forma pauperis is DENIED because this Court finds that  
17 the appeal is not taken in good faith. Pursuant to Federal Rule of Appellate Procedure  
18 24(a)(4), the Clerk is directed to provide notice of this Order to the Ninth Circuit Court of  
19 Appeals and the parties.

20 IT IS SO ORDERED.

21 Dated: April 26, 2013

  
22 SAUNDRA BROWN ARMSTRONG  
23 United States District Judge