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2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION
5

6 HUGH JAMES HOWARD,

7 Plaintiff,

8 vs.

9 IRWIN JOSEPH, CHERYL JARVI-JONES,

10 Defendants.
11

Case No: C 09-6020 SBA

**ORDER DENYING REQUEST FOR
CERTIFICATE OF APPEALABILITY**

12 This Court previously issued an Order dismissing the action, pursuant to the screening
13 provisions of 28 U.S.C. § 1915(e)(2). (Docket 10.) Plaintiff has filed a request for a certificate of
14 appealability. However, a certificate of appealability is required only in appeals taken in habeas
15 cases. See 28 U.S.C. § 2253(c)(1). Since this case was brought as a civil rights action under 42
16 U.S.C. § 1983, and not as a habeas petition, no certificate of appealability is required for plaintiff to
17 proceed with his appeal.

18 The above notwithstanding, Plaintiff should be aware that the Court's prior dismissal of his
19 action does not prevent him from pursuing his claims against Defendants in this Court. After filing
20 his complaint and request to proceed in forma pauperis ("IFP"), Plaintiff tendered payment of the
21 \$350 filing fee. However, because Plaintiff commenced this case with an IFP request, the
22 strictures of section 1915(e)(2) became germane. That statute provides that "the court shall
23 dismiss the case" if it determines that (1) "the allegation of poverty is untrue" or (2) that the
24 action is frivolous or malicious, fails to state claim on which relief may be granted, or seeks
25 monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).
26 Here, the Court determined that Plaintiff failed to state a claim and thus dismissed the action.

27 The Court's ruling under section 1915(e)(2), however, does not prevent Plaintiff from
28 presenting his claims in a separate complaint (opened as a new action) accompanied by a filing

1 fee. “Dismissals under the in forma pauperis statute are in a class of their own, acting not as
2 dismissals on the merits but, rather, as denials of in forma pauperis status.” Marts v. Hines,
3 117 F.3d 1504, 1505 (5th Cir. 1997) (en banc); see also Denton v. Hernandez, 504 U.S. 25, 34
4 (1992). Thus, a dismissal of a complaint filed in forma pauperis does not preclude “the
5 subsequent filing of a fee-paid complaint making the same allegations.” Marts, 117 F.3d at
6 1505.

7 In this case, Plaintiff paid the \$350 filing fee but did not withdraw his request to
8 proceed IFP. As a result, the Court adjudicated his IFP request and dismissed the action
9 accordingly. Although Plaintiff cannot pursue his claims under the above case number, he may
10 nonetheless pursue his claims in a separate action by paying the filing fee and filing a new
11 complaint, making the same allegations made in this case. Accordingly, the Court will order
12 the Clerk to refund the filing fee paid by Plaintiff in this action.¹

13 IT IS HEREBY ORDERED THAT Plaintiff’s request for a certificate of appealability is
14 DENIED. This Order terminates Docket Nos. 11 and 12.

15 IT IS SO ORDERED.

16 Dated: September 1, 2010


SAUNDRA BROWN ARMSTRONG
United States District Judge

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27 ¹ So that there is no ambiguity regarding the effect of the Court’s prior dismissal on
28 Plaintiff’s ability to proceed with a paid Complaint, the Court will modify its Order of January 14,
2010 to reflect that that dismissal is “without prejudice” to the filing of a paid complaint.

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

HUGH JAMES HOWARD,
Plaintiff,

v.

IRWIN JOSEPH et al,
Defendant.

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Case Number: CV09-06020 SBA

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 2, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Hugh James Howard
17473 Middle Belt Road
Romulus, MI 48174

Dated: September 2, 2010

Richard W. Wieking, Clerk

By: LISA R CLARK, Deputy Clerk