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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LAMAR ELLIS; DR. LAMAR ELLIS
CHARITABLE REMAINDER TRUST;
LAMAR ELLIS' TRUST; LAMAR
ELLIS REVOCABLE TRUST;
LAMELLI LTD PARTNERSHIP; and
ENERGETIC PSYCHOANALYTIC
INSTITUTE AND TRAINING SCHOOL
INC,

Plaintiffs,

vs.

BERNARD L. MADOFF;
INVESTMENT SECURITIES LLC;
PIONEER INVESTMENT FIRM;
AMSOUTH BANK; REGIONS BANK;
DEPOSIT GUARANTY NATIONAL
BANK; UNITED STATES SECURITIES
AND EXCHANGE COMMISSION;
THADARINE MCINTOSH; MOODY
RATING AGENCY; FITCH RATING
LTD; STANDARD AND POOR'S
RATING AGENCY,

Defendants.

CASE NO. 10-CV-1295-H (JMA)

ORDER

**(1) DENYING WITHOUT
PREJUDICE MOTION TO
PROCEED *IN FORMA*
PAUPERIS;**

**(2) DIRECTING PLAINTIFF TO
PAY THE FILING FEE; AND**

**(3) DENYING WITHOUT
PREJUDICE MOTION TO
APPOINT COUNSEL**

On June 17, 2010, Plaintiff Lamar Ellis, proceeding *pro se*, filed a complaint in this action against Defendants Bernard Madoff, Investment Securities LLC, Pioneer Investment

1 Firm, Amsouth Bank, Regions Bank, Deposit Guaranty National Bank, United States
2 Securities and Exchange Commission, Thadarine McIntosh, Moody Rating Agency, Fitch
3 Rating Ltd., and Standard and Poor's Rating Agency, alleging that Defendants traded
4 Plaintiffs' assets without permission, which resulted in a \$13,000,000,000 loss to Plaintiffs.¹
5 (Doc. No. 1.) Plaintiff Lamar Ellis also filed a motion for leave to proceed *in forma pauperis*
6 and a motion to appoint counsel. (Doc. Nos. 2 & 3.) For the following reasons, the Court
7 DENIES Plaintiff's motion to proceed *in forma pauperis*, DENIES the motion for appointment
8 of counsel, and directs Plaintiff to pay the court filing fee.

9 Discussion

10 **I. Motion to Proceed in Forma Pauperis**

11 All parties instituting any civil action, suit or proceeding in a district court of the United
12 States, except an application for writ of habeas corpus, must pay a filing fee of \$350.00 See
13 28 U.S.C. § 1915(a). An action may proceed despite a plaintiff's failure to prepay the entire
14 fee only if the plaintiff is granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. §
15 1915(a). See Rodriguez v. Cook, 169 F.3d 1176, 1177 (9th Cir. 1999). The benefit of
16 proceeding *in forma pauperis* is a privilege, not a right. Franklin v. Murphy, 745 F.2d 1221,
17 1231 (9th Cir. 1984). As 28 U.S.C. § 1915(a)(1) states, in part:

18 Any court of the United States may authorize the commencement, prosecution
19 or defense of any suit, action or proceeding, civil or criminal, or appeal therein,
20 without prepayment of fees or security therefor, by a person who submits an
21 affidavit that includes a statement of all assets such person possesses that the
22 person is unable to pay such fees or give security therefor.
23 28 U.S.C. § 1915(a)(1).

24 A petitioner need not "be absolutely destitute to enjoy the benefit of this statute."
25 Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339 (1948); Jefferson v. United
26 States, 277 F.2d 723, 725 (9th Cir. 1960), *cert. denied*, 364 U.S. 896 (1960). He must,
27 however, demonstrate his poverty with "some particularity, definiteness, and certainty."

28 ¹ The complaint also names as co-Plaintiffs Dr. Lamar Ellis Charitable Remainder Trust, Lamar Ellis' Trust, Lamar Ellis Revocable Trust, Lamelli LTD Partnership, and Energetic Psychoanalytic Institute and Training School Inc., however, these entities are not represented by counsel.

1 United States v. McQuade, 647 F.2d 938, 940 (9th Cir.1981) (*per curiam*).

2 The Court notes that the complaint names as Defendants, among others, Bernard
3 Madoff and various investment entities. (Doc. No. 1.) Plaintiff has alleged that he and his co-
4 Plaintiffs suffered a loss in the amount of \$13 billion dollars. (Id.) However, in this case, after
5 reviewing Plaintiff Lamar Ellis’s affidavit, the Court concludes that Plaintiff has not made an
6 adequate showing that he is unable to pay the filing fee.² (Doc. No. 2.) Plaintiff Lamar Ellis
7 is not incarcerated, and currently receives a total of \$4,262.00 per month in the form of social
8 security, civil service disability, and VA disability payments. (Id. at 1-2.) Plaintiff’s affidavit
9 also indicates that his checking account balance is approximately \$1100.00. (Id. at 2.) Under
10 these facts, the Court is not persuaded that Plaintiff Lamar Ellis is unable to pay the filing fee
11 from his available funds. Accordingly, the Court DENIES without prejudice Plaintiff’s motion
12 for leave to proceed *in forma pauperis*, and directs Plaintiff to pay the \$350.00 filing fee.

13 **II. Motion to Appoint Counsel**

14 In an *in forma pauperis* action, a district court “may request an attorney to represent any
15 person unable to afford counsel.” 28 U.S.C. § 1915(e)(1). The decision whether to appoint
16 counsel is within the discretion of the court and is “granted only in exceptional circumstances.”
17 Agyeman v. Corrections Corp. of America, 390 F.3d 1101, 1103 (9th Cir. 2004) (quoting
18 Franklin v. Murphy, 745 F.2d 1221, 1236 (9th Cir. 1984)). In exercising its discretion, the
19 court must consider three factors: “(1) the plaintiff’s financial resources, (2) the efforts made
20 by plaintiff to secure counsel, and (3) whether the plaintiff’s claim has merit.” Bradshaw
21 v. Zoological Soc. of San Diego, 662 F.2d 1301, 1318 (9th Cir. 1981). Because the Court
22 denies Plaintiff’s motion to proceed *in forma pauperis*, the Court also DENIES without
23 prejudice Plaintiff’s motion for appointment of counsel.

24 **III. Appearance by Non-Individuals**

25 In additional to the individual Plaintiff Lamar Ellis, the complaint also names as co-
26 Plaintiffs several non-individuals entities, including Dr. Lamar Ellis Charitable Remainder

27
28 ² None of the non-individual Plaintiffs submitted IFP affidavits.

