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MDR

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

Donnie Phillips,	)	No. CV 1-08-1388-FJM
Plaintiff,	)	<b>ORDER</b>
vs.	)	
Timothy Turmezei, et al.,	)	
Defendants.	)	

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**I. Background**

In a June 22, 2009 Order (Doc. #21), the Court screened Plaintiff’s First Amended Complaint; dismissed without prejudice Counts Three, Four, Five, Six, Seven, and Nine and Defendants Hammond, Hill, Tucker, and Grannis; ordered Defendants Murphy and Gentry to answer Count One; ordered Defendants Sullivan, Holland, and Peterson to answer Count Two; and ordered Defendants Murphy, Turmezei, and Verdin to answer Count Eight. The Court gave Plaintiff 30 days to complete and return to the Clerk of Court a Notice of Submission of Documents and submit with the Notice a copy of the First Amended Complaint, a copy of the Court’s June 22, 2009 Order, a completed summons for each Defendant, and a completed USM-285 for each Defendant.

On July 6, 2009, Plaintiff filed a document entitled “Objections and Motion for Reconsideration.” In his Objections and Motion for Reconsideration, Plaintiff “deeply implore[d] the Court to reconsider” the dismissal without prejudice of Court Three of the

1 First Amended Complaint. On July 8, 2009, Plaintiff submitted the papers required by the  
2 June 22nd Order.

3 In a September 17, 2009 Order, the Court denied Plaintiff's Objections and Motion  
4 for Reconsideration. The Court also ordered the Clerk of Court to send the papers submitted  
5 by Plaintiff to the United States Marshal in order to obtain waivers of service or service.

6 On October 1, 2009, Plaintiff filed a "Request for Leave to Seek (partial) Ninth  
7 Circuit Appeal of Court's Order and Partial Clarification of Order" (Doc. #25).

8 **II. Plaintiff's October 1, 2009 Request**

9 In his "Request for Leave to Seek (partial) Ninth Circuit Appeal of Court's Order and  
10 Partial Clarification Order," Plaintiff seeks leave for a Ninth Circuit review of portions of the  
11 Court's September 17th Order. He seeks reconsideration of the Court's dismissal of Count  
12 Three of the First Amended Complaint. He also requests clarification of the portion of the  
13 September 17th Order that states: "If Plaintiff does not either obtain a waiver of service of  
14 the summons or complete service of the Summons and First Amended Complaint on a  
15 Defendant within 120 days of the filing of this Order, the action may be dismissed as to each  
16 Defendant not served. Fed. R. Civ. P. 4(m)."

17 Plaintiff's request for further reconsideration of the Court's dismissal without  
18 prejudice of Count Three is denied. To the extent Plaintiff is seeking a certification under  
19 28 U.S.C. § 1292(b) to authorize an interlocutory appeal from the Court's September 17th  
20 Order, his request is denied.<sup>1</sup>

21 As to Plaintiff's request for clarification, the Court will grant that request. Plaintiff  
22 returned to the Court a completed summons and USM-285 for Defendants Murphy,  
23 Turmezei, Sullivan, Gentry, Verdin, Holland, and Peterson. In the Court's September 17th  
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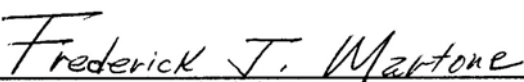
25 <sup>1</sup>Section 1292(b), 28 U.S.C., provides that, when a district court judge issues an order  
26 that is not otherwise appealable and the judge is "of the opinion that such order involves a  
27 controlling question of law as to which there is substantial ground for difference of opinion  
28 of the litigation, he shall so state in writing in such order." The Court made no such finding  
in its screening order.

1 Order, the Court directed the United States Marshal to obtain a waiver of service or complete  
2 service on these Defendants. Defendants Verdin, Turmezei, Gentry, Holland, and Peterson  
3 returned Waivers of Service of Summons (Docs. #26 and #27). Although no waiver of  
4 service has been filed for Defendant Holland, Defendant Holland is among the Defendants  
5 who filed a Motion for Extension of Time to Respond to Plaintiff's Complaint (Doc. #28).  
6 Thus, only Defendant Murphy has not waived service, been served, or made an appearance  
7 in this case. The Court will not dismiss Defendant Murphy, even if Defendant Murphy is not  
8 served within 120 days, unless (1) Plaintiff did not provide the United States Marshal with  
9 information sufficient to permit the United States Marshal to serve Defendant Murphy and  
10 (2) Plaintiff fails to promptly rectify any defect in the information provided to the United  
11 States Marshal after receiving notice of the defect.

12 **IT IS ORDERED** that Plaintiff's "Request for Leave to Seek (partial) Ninth Circuit  
13 Appeal of Court's Order and Partial Clarification of Order" (Doc. #25) is:

- 14 (1) **denied in part** to the extent it seeks reconsideration of the  
15 Court's June 22 and September 17, 2009 Orders;
- 16 (2) **denied in part** to the extent it seeks a certification pursuant to  
17 28 U.S.C. § 1292(b); and
- 18 (3) **granted in part** to the extent it seeks clarification of the  
19 provision in the Court's September 17, 2009 Order that states:  
20 "If Plaintiff does not either obtain a waiver of service of the  
21 summons or complete service of the Summons and First  
22 Amended Complaint on a Defendant within 120 days of the  
23 filing of this Order, the action may be dismissed as to each  
24 Defendant not served. Fed. R. Civ. P. 4(m)."

25 DATED this 26<sup>th</sup> day of January, 2010.

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Frederick J. Martone  
United States District Judge