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

HULEN T. HARRELL,

Plaintiff,

No. CIV S-04-1968 JAM DAD P

vs.

P.D. PALMER, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. Pending before the is court plaintiff’s motion for certification of an interlocutory appeal of the undersigned’s September 29, 2009, order denying his motion for reconsideration.

BACKGROUND

On July 17, 2009, defendant Palmer filed a motion to compel plaintiff’s deposition. On August 20, 2009, the assigned magistrate judge found that it was undisputed that defendant Palmer had provided plaintiff with sufficient notice of his deposition, but plaintiff refused to participate in the deposition when defense counsel arrived at the prison. The magistrate judge granted defendant’s motion to compel and ordered plaintiff to submit to a deposition. In the same order, the magistrate judge denied plaintiff’s motion for a protective

1 order as well as his request for appointment of an expert to take the defendant's deposition.
2 Under the mailbox rule, on August 28, 2009, plaintiff filed and served a motion for
3 reconsideration of the magistrate judge's order. On September 29, 2009, this court denied
4 plaintiff's motion and affirmed the magistrate judge's order.

5 **DISCUSSION**

6 Under 28 U.S.C. § 1292(b):

7 When a district judge, in making in a civil action an order not
8 otherwise appealable under this section, shall be of the opinion that
9 such order involves a controlling question of law as to which there
10 is substantial ground for difference of opinion and that an
11 immediate appeal from the order may materially advance the
12 ultimate termination of the litigation, he shall so state in writing in
13 such order. The Court of Appeals which would have jurisdiction
14 of an appeal of such action may thereupon, in its discretion, permit
15 an appeal to be taken from such order, if application is made to it
16 within ten days after entry of the order: *Provided, however,* That
17 application for an appeal hereunder shall not stay proceedings in
18 the district court unless the district judge or the Court of Appeals
19 or a judge thereof shall so order. (emphasis in original)

14 Certification of an interlocutory appeal requires that: "(1) there is a controlling question of law,
15 (2) that there are substantial grounds for difference of opinion, and (3) that an immediate appeal
16 may materially advance the ultimate termination of the litigation." In re Cement Antitrust
17 Litigation, 673 F.2d 1020, 1026 (9th Cir. 1982) (en banc).

18 Interlocutory appeals pursuant to § 1292(b) are reserved for exceptional
19 circumstances. In this case, the court finds no controlling question of law at issue. See In re
20 Cement Antitrust Litigation, 673 F.2d at 1026 (questions of law appropriate for interlocutory
21 appeal include "the determination of who are necessary and proper parties, whether a court to
22 which a cause has been transferred has jurisdiction, or whether state or federal should be
23 applied."). In addition, the court finds no substantial grounds for a difference of opinion or
24 conflicting bodies of law with respect to whether plaintiff should be required to submit to a
25 deposition or any of his other discovery-related contentions. Nor has plaintiff identified any such
26 split authority. Finally, the court finds an immediate appeal of this court's order would not

1 advance the ultimate termination of this litigation. Id. (“the legislative history of 1292(b)
2 indicates that [this] section was to be used only in exceptional situations in which allowing an
3 interlocutory appeal would avoid protracted and expensive litigation.”). In fact, an interlocutory
4 appeal would further prevent the prompt and efficient resolution of this case. Accordingly, the
5 court will deny plaintiff’s motion for certification of an interlocutory appeal.

6 Plaintiff has also filed two requests for judicial notice in connection with his
7 motion for certification of an interlocutory appeal. First, plaintiff has filed a motion for judicial
8 notice of the law library schedule at CSP-Solano and notes that he could not have filed his
9 motion for interlocutory appeal any sooner because of law library closures. Plaintiff also seeks
10 that judicial notice be taken of various documents filed in this case. In light of the court’s
11 discussion on the merits of plaintiff’s motion, the court will deny his requests for judicial notice
12 as unnecessary.

13 **CONCLUSION**

14 Accordingly, IT IS HEREBY ORDERED that:

- 15 1. Plaintiff’s motion for certification of an interlocutory appeal (Doc. No. 54) is
16 denied; and
17 2. Plaintiff’s requests for judicial notice (Doc. Nos. 53 & 54) are denied.

18 DATED: March 2, 2010

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20 /s/ John A. Mendez
21 UNITED STATES DISTRICT JUDGE
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