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3 IN THE UNITED STATES DISTRICT COURT  
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
5

6 TODD A. ASHKER,

No. C 05-3759 CW

7 Plaintiff,

ORDER DENYING  
PLAINTIFF'S MOTION  
FOR  
RECONSIDERATION

8 v.

9 MICHAEL C. SAYRE, et al.,

10 Defendants.  
11 \_\_\_\_\_/

12  
13 Plaintiff Todd Ashker moves for reconsideration of the  
14 Court's April 9, 2012 Order Regarding Defendant's Progress Reports  
15 and Terminating Order for Physical Therapy. Docket No. 550.  
16 Defendant Martin Hoshino<sup>1</sup> opposes the motion. The motion was  
17 decided on the papers. Having considered all of the papers filed  
18 by the parties and the entire record in this case, the Court  
19 DENIES Plaintiff's motion.

20 BACKGROUND

21 On February 4, 2010, the Court entered an Order for Specific  
22 Performance in which it ordered Defendant to submit a report every  
23 three weeks indicating the status of his performance of the 2002  
24 Settlement Agreement between the CDCR and Plaintiff. The Court  
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27 <sup>1</sup> Pursuant to Federal Rule of Civil Procedure 25(d), the  
28 Court SUBSTITUTES Secretary Martin Hosino in place of former  
Secretary of the California Department of Corrections and  
Rehabilitation Matthew Cate.

1 also ordered among other things that CDCR reinstate twice weekly  
2 physical therapy sessions to continue until Plaintiff's "medical  
3 needs contraindicate the therapy, that is, until a physical  
4 therapist not employed by the CDCR certifies in writing to the  
5 Court that the therapy is no longer beneficial to Plaintiff."  
6 Defendant began submitting timely reports of his progress in  
7 complying with the Court's Order for Specific Performance.

8       In one of his progress reports, Defendant requested that the  
9 Court terminate the part of its order requiring that Plaintiff  
10 receive physical therapy twice a week. Defendant submitted the  
11 declaration of Ryan Farr, an independent contractor who, since  
12 2009, had been contracted with the CDCR and, since August 2009,  
13 had been Plaintiff's physical therapist. Mr. Farr stated that the  
14 physical therapy Plaintiff was receiving was maintaining rather  
15 than improving his condition. Because physical therapists usually  
16 do not perform maintenance programs, he would not advise a doctor  
17 to prescribe formal physical therapy based on Plaintiff's  
18 condition at that time. With respect to the Court's February 4,  
19 2010 order, Mr. Farr stated that "if the term 'contraindicate' is  
20 defined as 'no longer beneficial,' then the physical therapy is  
21 contraindicated because it no longer provides a benefit to Mr.  
22 Ashker, in that it is not improving Mr. Ashker's condition." Mr.  
23 Farr further stated that if "contraindicate" is defined to mean  
24 "harmful," the court-ordered physical therapy would never end  
25 because the treatment Plaintiff receives would not be harmful to  
26 him. Moreover, Mr. Farr noted that Plaintiff could easily perform  
27 most of the physical therapy exercises on his own, which he was  
28 doing at that time.

1 In its April 9, 2012 order, the Court noted that Plaintiff  
2 had received copies of Defendant's progress reports and had not  
3 filed any objection to Defendant's request to end the physical  
4 therapy sessions. The Court relied on Mr. Farr's opinion that  
5 Plaintiff could continue his exercises on his own, and that the  
6 sessions were maintaining rather than improving his condition, and  
7 granted Defendant's request to vacate the portion of the order  
8 requiring that Plaintiff receive physical therapy.

9 On April 30, 2012, Plaintiff filed a motion for leave to file  
10 a motion for reconsideration of the Court's April 9 order, stating  
11 among other things that he did not believe that he needed to  
12 respond to a request set out in Defendant's progress report. The  
13 Court deemed Plaintiff's motion to be his motion for  
14 reconsideration and set deadlines for Defendant to file any  
15 opposition and Plaintiff to file any reply. Defendant has opposed  
16 the motion and Plaintiff has filed a reply.

17 DISCUSSION<sup>2</sup>

18 I. Physical Therapist Ryan Farr

19 The Court's February 4, 2010 order required that the  
20 certification that Plaintiff's medical needs contraindicate  
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22 <sup>2</sup> Defendant asserts that Plaintiff's motion fails on  
23 procedural grounds, because he cannot satisfy Local Rule 7-9(b)'s  
24 requirement that "a material difference in fact or law exists from  
25 that which was presented to the Court before entry" of the order  
26 at issue; "emergence of new material facts or a chance of law;" or  
27 "[a] manifest failure by the Court to consider material facts or  
28 dispositive legal arguments which were presented to the Court."  
Because the Court denies Plaintiff's motion for reconsideration it  
need not decide whether Local Rule 7-9(b) applies in this case,  
where pro se Plaintiff did not believe he needed to respond to a  
request set out in Defendant's progress report.

1 physical therapy be made by "a physical therapist not employed by  
2 the CDCR." According to Mr. Farr's declaration, he is "an  
3 independent contractor, and [has] been contracted with the  
4 California Department of Corrections and Rehabilitation since  
5 August, 2009." Farr Declaration at ¶ 1. Plaintiff argues that  
6 Mr. Farr's certification is not sufficient to satisfy the Court's  
7 order, because he is a "contract employee" of CDCR and therefore  
8 is not neutral.

9 Plaintiff cites several cases related to the question of  
10 whether medical personnel contracted by a government entity are  
11 state actors for purposes of section 1983 liability. See, e.g.,  
12 West v. Atkins, 487 U.S. 42, 54-57 (1988). However, the ability  
13 to sue Mr. Farr pursuant to section 1983 is not at issue. The  
14 relevant question is whether Mr. Farr is "employed by the CDCR."  
15 Plaintiff has presented no evidence to contradict Mr. Farr's  
16 declaration that he is an independent contractor contracted by  
17 CDCR.

18 II. Whether the Physical Therapy is "Contraindicated"

19 Plaintiff next argues that, because the physical therapy  
20 continues to be "beneficial," it was improper to discontinue the  
21 sessions. In particular, Plaintiff cites the portion of Mr.  
22 Farr's declaration which states, "The whirlpool provides increased  
23 circulation and has been helpful in temporarily decreasing Mr.  
24 Ashker's discomfort." Farr Dec. ¶ 5. Plaintiff asserts that this  
25 constitutes an admission by Mr. Farr that Plaintiff continues to  
26 benefit from the physical therapy sessions. However, Mr. Farr  
27 qualified his statement regarding the whirlpool by stating that  
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1 "modalities such as this are temporary in benefit and are not  
2 customarily used at this stage of treatment." Id. Mr. Farr  
3 further opined that the whirlpool "may temporarily 'feel good,'  
4 but it provides no long-term benefit." Farr Dec. ¶ 9.

5 Moreover, Plaintiff bases his argument that physical therapy  
6 should continue so long as he receives any benefit on the Court's  
7 February 4, 2010 order which provided that physical therapy "shall  
8 continue until Plaintiff's medical needs contraindicate the  
9 therapy, that is, until a physical therapist not employed by the  
10 CDCR certifies in writing to the Court that the therapy is no  
11 longer beneficial to Plaintiff." While read in isolation, this  
12 provision could be construed to require that physical therapy be  
13 continued so long as it provides any benefit to Plaintiff.  
14 However, when read in context of the provision of the Settlement  
15 Agreement it was interpreting, it is more limited. The quoted  
16 language from the Court's order was based on the following portion  
17 of the 2002 Settlement Agreement:

18 The Releasees agree to reinstate Releasor's receipt of  
19 the physical therapy he was previously receiving to  
20 rehabilitate his arm. The physical therapy shall  
continue until a change in Releasor's medical needs  
contraindicate the therapy.

21 2002 Settlement Agreement, ¶ 4. When ordering specific  
22 performance, the Court cannot order any party to do more than was  
23 agreed to in the initial contract, in this case the 2002  
24 Settlement Agreement.

25 Here, the Settlement Agreement provides that the purpose of  
26 the physical therapy is to "rehabilitate" Plaintiff's arm.  
27 According to Mr. Farr, Plaintiff's physical therapy "acts as a  
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1 maintenance program to maintain his present level of  
2 functionality." Farr Dec. ¶ 5. In other words, the physical  
3 therapy is no longer rehabilitating Plaintiff's arm. Indeed, the  
4 evidence Plaintiff submits supports a finding that the physical  
5 therapy provides temporary pain relief rather than rehabilitation.  
6 For example, Plaintiff declares that "the hot whirlpool sessions .  
7 . . [help] with the movement and pain for several hours, or longer  
8 (the rest of the day) depending on activity (use) afterwards" and  
9 describes the physical therapy as part of his "arm maintenance-  
10 pain management regimen." Ashker Dec. ¶¶ 7,8.

11 Again, the Court credits Mr. Farr's opinion that, at this  
12 point, physical therapy is acting as a maintenance program instead  
13 of improving Plaintiff's medical condition and that Plaintiff, on  
14 his own, can and does perform most of the exercises to maintain  
15 his level of functioning. Plaintiff declares that stopping the  
16 whirlpool treatments "has effected [him] mentally and physically."  
17 Ashker Dec. ¶ 8. Specifically, Plaintiff asserts that he has had  
18 to "cut back on [his] in cell exercises due to increase in pain  
19 brought on by loss of whirlpool, loss of writing asst., cuts in  
20 pain medication." Id. However, this is not sufficient to  
21 establish that the termination of the whirlpool sessions will lead  
22 to deterioration in the condition of Plaintiff's arm, or that the  
23 whirlpool sessions are a beneficial part of the rehabilitation of  
24 his arm.

25 CONCLUSION

26 For the reasons stated above, the Court reaffirms its order  
27 granting Defendant's request to vacate the part of its Order  
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1 requiring that Plaintiff receive physical therapy. Plaintiff's  
2 motion for reconsideration is DENIED. Docket No. 551.

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4 IT IS SO ORDERED.

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6 Dated: 1/28/2013

  
CLAUDIA WILKEN  
United States District Judge

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