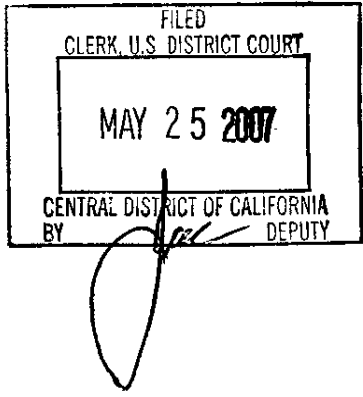


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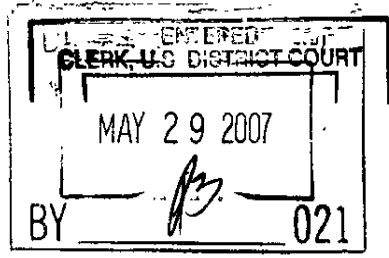
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

AUGUSTA MILLENDER, BRENDA ) Case No. CV 05-2298 DDP (RZx)  
MILLENDER, WILLIAM JOHNSON, )  
 )  
Plaintiffs, ) ORDER DENYING PLAINTIFFS'  
 ) APPLICATION FOR CERTIFICATION  
 ) OF ORDER FOR INTERLOCUTORY  
 ) APPEAL  
 )  
v. ) [Application filed on 4/2/07]  
 )  
 )  
COUNTY OF LOS ANGELES, ET )  
AL., )  
 )  
Defendants. )

This matter is before the Court on Plaintiffs' Application for Certification of Order for Interlocutory Appeal ("Motion"). The Court finds that this Motion is appropriate for resolution without oral argument. After reviewing the papers submitted by the parties, and considering the arguments contained therein, the Court denies Plaintiffs' Motion.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).



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1 I. **Background**

2 A. **Factual Background**

3 The facts of this case are set forth in detail in the  
4 Court's Order regarding the Parties' cross-motions for summary  
5 adjudication entered on March 19, 2007. (See Order Granting in  
6 Part and Denying in Part Plaintiffs' Motion for Summary  
7 Adjudication; Granting in Part and Denying in Part Individual  
8 Defendants' Motion for Summary Adjudication; and Granting in  
9 Part and Denying in Part Municipal Defendants' Motion for  
10 Summary Adjudication, entered March 19, 2007 ("March 19  
11 Order")). Therefore, the Court need not repeat those facts in  
12 this Order and, instead, provides only a brief factual  
13 background.

14 At approximately 5:00 a.m. on November 6, 2003, the Los  
15 Angeles County Sheriff's Department executed a search and arrest  
16 warrant at 2234 E. 120th Street ("the Millender Residence").  
17 The Millender Residence was occupied by Augusta Millender, her  
18 daughter Brenda Millender, and her grandson William Johnson  
19 (collectively referred to as "Plaintiffs"). Pursuant to the  
20 warrant, the Sheriff's Department was looking for Jerry Bowen  
21 ("Bowen") and, among other things, the weapon he allegedly used  
22 to commit a crime. Bowen is the former foster son of Augusta  
23 Millender. Neither Bowen nor the weapon were found at the  
24 Millender Residence.

25 On March 28, 2005, Plaintiffs filed a Civil Rights Complaint  
26 with State Law Claims ("Compl.") against the County of Los  
27 Angeles, the Los Angeles County Sheriff's Department, and  
28 Sheriff Leroy Baca (collectively referred to as "Municipal

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1 Defendants"), and certain Los Angeles County deputies  
2 (collectively referred to as "Individual Defendants").  
3 Specifically, Plaintiffs' Complaint includes three causes of  
4 action under 42 U.S.C. § 1983 for violations of the Fourth and  
5 Fourteenth Amendments and for conspiracy to deprive them of  
6 their civil rights based on their race (including Monell claims  
7 against the County of Los Angeles and the Sheriff's Department,  
8 and supervisory liability claims against Sheriff Baca in his  
9 official and individual capacities). The Complaint also  
10 includes supplemental claims for: violations of the California  
11 Constitution; violations of civil rights under *California Civil*  
12 *Code* §§ 52.1 & 51.7; negligence; and conspiracy.

13 Plaintiffs allege that the violations of their rights caused  
14 them special and general damages, physical injuries and extreme  
15 emotional distress including, but not limited to, fright, shock,  
16 embarrassment, anger and other emotional distress.

17 **B. Procedural Background**

18 On September 18, 2006, the Parties filed cross-motions for  
19 summary judgment and/or summary adjudication.<sup>1</sup> The Court heard  
20 oral arguments on the motions on February 28, 2007. On March  
21 19, 2007, the Court entered an order granting in part and  
22 denying in part each of the three motions for summary  
23 adjudication. (See March 19 Order).

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24  
25 <sup>1</sup> Specifically, the Parties filed the following three  
26 motions: (1) Plaintiffs' Notice of Motion and Motion for Summary  
27 Adjudication; (2) Individual Defendants' Notice of Motion and  
28 Motion for Summary Judgment and/or Summary Adjudication of  
Issues; and (3) Municipal Defendants' Notice of Motion and  
Motion for Summary Judgment or, in the Alternative, for Summary  
Adjudication of Issues.

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1 On April 2, 2007, Plaintiffs filed an Application for  
 2 Certification of Order for Interlocutory Appeal pursuant to 28  
 3 U.S.C. § 1292(b), which is currently before the Court.<sup>2</sup>  
 4 Specifically, Plaintiffs ask the Court to certify the following  
 5 two issues upon which the Court granted Defendants summary  
 6 adjudication in the March 19 Order: (1) whether the warrant  
 7 contained probable cause to believe Jerry Bowen would be at the  
 8 Millender Residence; and (2) whether the warrant contained  
 9 probable cause to search for documents tending to indicate who  
 10 had control of the Millender Residence. (Motion, p. 1).  
 11 Defendants oppose Plaintiffs' Motion.

12 On April 10, 2007, Defendants County of Los Angeles,  
 13 Lawrence and Messerschmidt filed a Notice of Appeal to the  
 14 United States Court of Appeals for the Ninth Circuit.  
 15 Specifically, Defendants appeal this Court's denial of their  
 16 Motion for Summary Judgment on grounds of qualified immunity.

17  
 18 **II. Discussion**

19 **A. Legal Standard for Certifying Questions for**  
 20 **Interlocutory Appeal**

21 Title 28 U.S.C. § 1292(b) provides:

22 When a district judge, in making in a civil  
 23 action an order not otherwise appealable under

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24 <sup>2</sup> The Court notes that, in the last sentence of their  
 25 Motion, Plaintiffs "respectfully request the Court certify the  
 26 two probable cause issues for appeal pursuant to *Federal Rules*  
 27 *of Civil Procedure*, Rule 54(b)." (Motion at 6:16-17). However,  
 28 Plaintiffs bring this Motion under 28 U.S.C. § 1292(b) and not  
 Rule 54(b). Furthermore, they make no mention of Rule 54(b)  
 anywhere else in the Motion or anywhere in their Reply.  
 Therefore, the Court disregards Plaintiffs' request as it  
 relates to Rule 54(b).

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1 this section, shall be of the opinion that  
 2 such order involves a controlling question of  
 3 law as to which there is substantial ground  
 4 for difference of opinion and that an immediate  
 5 appeal from the order may materially advance  
 6 the ultimate termination of the litigation, he  
 7 shall so state in writing in such order. The  
 8 Court of Appeals which would have jurisdiction  
 9 of an appeal of such action may thereupon, in  
 its discretion, permit an appeal to be taken  
 from such order, if application is made to it  
 within ten days after the entry of the order:  
*Provided, however,* that application for an  
 appeal hereunder shall not stay proceedings  
 in the district court unless the district  
 judge or the Court of Appeals or a judge  
 thereof shall so order.

10 28 U.S.C. § 1292(b) (West 1993).

11 Thus, the three requirements for certification of an  
 12 interlocutory appeal under § 1292(b) are: "(1) that there be a  
 13 controlling question of law; (2) that there be substantial  
 14 grounds for difference of opinion; and (3) that an immediate  
 15 appeal may materially advance the ultimate termination of the  
 16 litigation." In re Cement Antitrust Litigation, 673 F.2d 1020,  
 17 1026 (9th Cir. 1982), aff'd 459 U.S. 1190, 103 S. Ct. 1173, 75  
 18 L. Ed. 2d 425 (1983). Section 1292(b) is "to be used only in  
 19 exceptional situations in which allowing an interlocutory appeal  
 20 would avoid protracted and expensive litigation." Id. "The  
 21 party seeking certification has the burden of showing that  
 22 exceptional circumstances justify a departure from the 'basic  
 23 policy of postponing appellate review until after the entry of a  
 24 final judgment.'" Fukuda v. County of Los Angeles, 630 F. Supp.  
 25 228, 229 (C.D. Cal. 1986) (quoting Coopers & Lybrand v. Livesay,  
 26 437 U.S. 463, 474-75, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)).

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1           **B.    Analysis**

2           Plaintiffs contend that the requirements for certification  
3 of an interlocutory appeal are satisfied with regard to both of  
4 the probable cause questions at issue. Defendants concede that  
5 these issues are "controlling questions of law" but argue that  
6 substantial grounds for difference of opinion do not exist and  
7 that an immediate appeal will not advance the ultimate  
8 termination of the litigation.

9                   **1.    Controlling Question of Law**

10           Plaintiffs assert that the probable cause questions at issue  
11 in this Motion are "controlling questions of law" because: (1)  
12 the issue of whether there was probable cause for the issuance  
13 of the warrant controls the case in that, if the Ninth Circuit  
14 determines there was not probable cause, then all the remaining  
15 issues in the case, except for damages, are either decided or  
16 moot; and (2) if the affidavit was overbroad with respect to the  
17 search for evidence of who controlled the premises, the scope of  
18 the search would not have been nearly as intrusive in that  
19 "defendants would have been in and out of the home in a matter  
20 of minutes, rather than four hours, and they would not have had  
21 the opportunity to turn the whole house upside down."<sup>3</sup>

22           The Ninth Circuit has stated that the "controlling question  
23 of law requirement [should] be interpreted in such a way to

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24  
25           <sup>3</sup> Plaintiffs appear to further suggest that these issues  
26 are "controlling questions of law," because the question of  
27 "reasonableness" under the Fourth Amendment is an important one  
28 that must evolve with changing times (e.g., commando-style raids  
by SWAT teams). However, the cases that Plaintiffs cite are  
factually distinct and provide little or no support for  
Plaintiffs' Motion.

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1 implement th[e] policy" of applying section 1292(b) "sparingly  
2 and only in exceptional cases." In re Cement Antitrust  
3 Litigation, 673 F.2d at 1027. Nevertheless, in In re Cement  
4 Antitrust Litigation, the court held that "all that must be  
5 shown in order for a question to be 'controlling' is that  
6 resolution of the issue on appeal could materially affect the  
7 outcome of the litigation in the district court." Id. at 1026.  
8 The court appeared to approve of the Third Circuit's holding  
9 that "at the very least, a controlling question of law must  
10 encompass every order which, if erroneous, would be reversible  
11 error on final appeal." Id. Based on In re Cement Antitrust  
12 Litigation, the rule in the Ninth Circuit is that an issue need  
13 not be dispositive of the lawsuit in order to be "controlling,"  
14 but it cannot be "collateral to the basic issues of the case."  
15 See id. at 1026-27.

16 Whether the warrant affidavit was sufficient, on its face,  
17 to provide probable cause for the magistrate to believe that  
18 Bowen would be at the Millender Residence is a question of law.  
19 United States v. Chesher, 678 F.2d 1353, 1359 (9th Cir. 1982).  
20 Plaintiffs point out, however, that this probable cause issue  
21 includes "both whether the warrant was 'facially valid' . . .  
22 and whether Messerschmidt misled the issuing magistrate by  
23 omitting material information from or making misstatements in  
24 the affidavit." (Plaintiffs' Reply to Defendants' Opposition to  
25 Application for Certification of Order for Interlocutory Appeal  
26 ("Reply"), 1:22-25). This portion of the issue is a mixed  
27 question of law and fact. Butler v. Elle, 281 F.3d 1014, 1024-  
28 26 (9th Cir. 2002); see also People v. Kurland, 28 Cal. 3d 376,

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1 387, 618 P.2d 213 (1980). Mixed questions of law and fact are  
2 not appropriate for certification by a district court pursuant  
3 to 28 U.S.C. § 1292(b).<sup>4</sup> See Securities & Exch. Comm'n v. First  
4 Jersey Sec., Inc., 587 F. Supp. 535, 536 (S.D.N.Y. 1984); see  
5 also Sierra Foothills Public Utility District v. Clarendon Am.  
6 Ins. Co., 2006 WL 2085244, \*3 (E.D. Cal.).

7 The Court agrees with Plaintiffs that these probable cause  
8 issues are central, and not collateral, to Plaintiffs' claims  
9 for violation of their Fourth Amendment rights to be free from

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12 <sup>4</sup> The Ninth Circuit does not appear to have directly  
13 addressed the question of whether, as a general rule, a mixed  
14 question of law and fact is appropriate for immediate review  
15 pursuant to 28 U.S.C. § 1292(b). In Steering Committee, et al. v.  
16 United States, the Ninth Circuit noted that "[s]ome courts have  
17 refused to permit interlocutory appeals of mixed questions of  
18 law and fact pursuant to 28 U.S.C. § 1292(b)." 6 F.3d 572, 575  
19 (9th Cir. 1993). In Steering, however, the court held that  
20 interlocutory review of both legal and factual findings related  
21 to liability determinations was appropriate in multiparty  
22 negligence air crash disaster cases, particularly those  
23 involving multidistrict litigation. Id. In doing so, though,  
24 the court noted that there was a pure legal question in the case  
25 and that "the presence of a pure legal question" permitted it  
26 "to resolve all questions material to the order." Id. at 575-  
27 76.

20 The Court based its holding on this issue on undisputed  
21 facts regarding Detective Messerschmidt's state of mind. (See  
22 March 19 Order at 30:19-37:12). In fact, the Court did not even  
23 reach the legal question of materiality. (See id.). Therefore,  
24 certification would be inappropriate, because it would require  
25 the appellate court to conduct a detailed review of the record  
26 including videotape testimony, declarations, database printouts,  
27 etc. Furthermore, even if we chose to certify this issue as a  
28 "controlling question of law," the Court would find that the  
third requirement for interlocutory review has not been  
satisfied. If the Ninth Circuit were to reverse this Court on  
the "state of mind" question, it would most likely remand on the  
issue of materiality, which this Court did not address. This  
would not advance the ultimate termination of the litigation and  
could mean that the Ninth Circuit would be faced with reviewing  
the question of "judicial deception" for a second time on  
appeal.

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1 unreasonable search and seizures.<sup>5</sup> There is no doubt that a  
 2 reversal of the Court's ruling on these issues could materially  
 3 affect the outcome of this litigation. Furthermore, Defendants  
 4 concede that "the issue of probable cause decided by the  
 5 District Court is 'controlling' and that a contrary resolution  
 6 of the issue could be determinative of *some* but certainly not  
 7 *all* of the issues presented in this action." (Defendants'  
 8 Opposition to Plaintiffs' Application for Certification of Order  
 9 for Interlocutory Appeal ("Opp."), 2:14-16). As the Ninth  
 10 Circuit has held, though, the phrase "controlling question of  
 11 law" should not be interpreted "so narrowly as to require that  
 12 reversal of the district court's order terminate the  
 13 litigation." In re Cement Antitrust Litigation, 673 F.2d at  
 14 1026. Therefore, the Court finds that, with the exception of  
 15 the "judicial deception" issue, the issues presented for  
 16 certification are "controlling questions of law" within the  
 17 meaning of 28 U.S.C. § 1292(b).

18                   **2. Substantial Grounds for Difference of Opinion**

19           Next, Plaintiffs contend that the second requirement for  
 20 certification of interlocutory appeal - that there be  
 21 substantial grounds for difference of opinion - is satisfied  
 22 here.

23           "A party's strong disagreement with the court's ruling is  
 24 not sufficient for there to be a 'substantial ground for  
 25 difference [of opinion]'; the proponent of an appeal must make

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27           <sup>5</sup> For purposes of this Motion, the Court assumes that the  
 28 question of whether there was probable cause to support a search  
 for evidence of who controlled the premises is one of law  
 appropriate for certification pursuant to 28 U.S.C. § 1292.

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1 some greater showing." Hansen v. Schubert, 459 F. Supp. 2d 973,  
2 1000 (E.D. Cal. 2006). Substantial grounds for difference of  
3 opinion may exist, though, "where differing views of case law  
4 could produce differences in opinion . . . ." See Hubbard v.  
5 Costco Wholesale Corp., 2004 WL 3636055, \*2 (C.D. Cal.).

6 a. Probable Cause to Believe Bowen Could be  
7 Found at the Millender Residence

8 In support of their argument, Plaintiffs point out that (1)  
9 the Court noted in its March 19 Order that these are close  
10 questions; and (2) this Court decided this issue one way, while  
11 the Los Angeles Superior Court in the criminal case decided it  
12 the opposite way. Both of these contentions apply only to the  
13 first probable cause issue - whether the warrant contained  
14 probable cause to believe Bowen would be at the Millender  
15 Residence.

16 Defendants respond that the "'close' question of whether the  
17 affidavit supported a finding of probable cause was thoroughly  
18 analyzed by the District Court . . . and is unlikely to be  
19 reversed on appeal," particularly in light of the recognized  
20 deference that courts give to the issuing magistrate. (Opp. at  
21 2:22-4:3).

22 The Court agrees with Defendants that it thoroughly analyzed  
23 this question and that it both correctly applied the law and  
24 correctly gave deference to the issuing magistrate's finding.  
25 Nevertheless, Plaintiffs are correct that a Los Angeles Superior  
26 Court judge expressed the opposite opinion on this very issue.  
27 Therefore, the Court finds that Plaintiffs have met their burden  
28 of showing that there are substantial grounds for difference of

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1 opinion on the issue of whether the affidavit established  
2 probable cause to believe that Bowen would be at the Millender  
3 Residence.

4                   **b. Probable Cause to Search for Evidence of Who**  
5                   **Had Control of the Millender Residence**

6                   Plaintiffs do not appear to make any argument  
7 applicable to a showing of substantial grounds for difference of  
8 opinion as to whether there was probable cause to search for  
9 evidence of who controlled the Millender Residence. At most,  
10 Plaintiffs contend that this is an important question and that  
11 what is "not reasonable must evolve with the ever-changing means  
12 of police forces," particularly in light of "commando-style"  
13 raids by SWAT teams. (Reply at 2:18-3:2). While this may be  
14 true, it does not satisfy the requirement that there be  
15 substantial grounds for difference of opinion on each issue  
16 certified for interlocutory appeal. Accordingly, the Court  
17 finds that Plaintiffs have not met their burden and that  
18 certification of this issue is, therefore, not warranted.

19                   **3. Material Advancement of the Ultimate Termination**  
20                   **of the Litigation**

21                   The Court must address one final question: could immediate  
22 appeal of the issue of whether the affidavit, on its face,  
23 established probable cause to believe that Bowen could be found  
24 at the Millender Residence materially advance the ultimate  
25 termination of this litigation?

26                   "Section 1292(b) was intended primarily as a means of  
27 expediting litigation by permitting appellate consideration  
28 during the early stages of litigation of legal questions which,

1 if decided in favor of the appellant, would end the lawsuit."  
2 United States v. Woodbury, 263 F.2d 784, 787 (9th Cir. 1959).  
3 However, as previously discussed, this does not mean that an  
4 interlocutory appeal must completely end the litigation. See  
5 id. Rather, an "interlocutory appeal must be likely to  
6 materially speed the termination of the litigation." Hansen,  
7 459 F. Supp. 2d at 1000. "This factor is linked to whether an  
8 issue of law is 'controlling' in that the court should consider  
9 the effect of a reversal by the court of appeals on the  
10 management of the case." Id.

11 Plaintiffs argue that certification of this issue is  
12 consistent with the goal behind 28 U.S.C. § 1292(b) of providing  
13 more efficient disposition of litigation (e.g., avoiding  
14 unnecessary trials and unnecessary or repeated protracted  
15 proceedings). Specifically, Plaintiffs contend that if the  
16 Court of Appeals finds that there was no probable cause, the  
17 only issue left for trial would be damages. On the other hand,  
18 if the Court of Appeals affirms this Court's findings,  
19 Plaintiffs "may have to lower their sights" in settlement  
20 discussions. Either way, Plaintiffs argue that settlement would  
21 be encouraged. Plaintiffs further contend that they would be  
22 "unreasonably prejudiced by trying the entry issues in  
23 isolation." (Motion at 5:27-6:4). Finally, Plaintiffs argue  
24 that certifying the issue for appeal now, while Defendants are  
25 appealing the qualified immunity issue, would promote judicial  
26 efficiency and justice.

27 In opposition to Plaintiffs' Motion, Defendants contend  
28 that: (1) even if the Ninth Circuit reversed this Court,

1 additional issues would remain; (2) the fact that Defendants are  
2 appealing the qualified immunity issue, which is immediately  
3 appealable, adds no weight to Plaintiff's request; and (3) the  
4 possibility of settlement does not justify certification for  
5 immediate appeal. Thus, Defendants assert that granting  
6 certification here would not be consistent with the policy of  
7 applying section 1292(b) "sparingly and only in exceptional  
8 cases." In re Cement Antitrust Litigation, 673 F.2d at 1027.

9 The Court does not disagree with Plaintiffs that there would  
10 be some advantages to an immediate appeal on this issue.  
11 However, the Court does not feel that there are exceptional  
12 circumstances here which justify departure from the general  
13 policy of avoiding piecemeal appeals. While Plaintiffs claim  
14 that a reversal on this issue should end the case, "save for  
15 damages," this is not entirely true. For instance, the Court  
16 would still have to determine whether individual SWAT Defendants  
17 are entitled to qualified immunity on the unlawful entry issue.  
18 Furthermore, Plaintiffs' Monell claims and claims regarding  
19 *Respondeat Superior* would remain. Additionally, "litigants have  
20 always had to deal with difficult choices . . . as a result of  
21 orders entered prior to or during trials." Woodbury, 263 F.2d  
22 at 787-88. Whether to settle is one of these difficult choices  
23 with which parties struggle in the majority of cases. It would  
24 certainly not be practical to allow interlocutory appeal in  
25 every such case. Finally, while it is true that one issue in  
26 this case is being appealed, the Court cannot justify certifying  
27 a question for interlocutory appeal that it would not otherwise  
28 certify on that basis. Accordingly, the Court finds that

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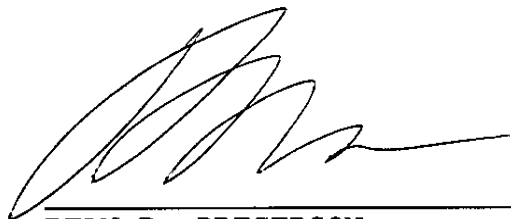
1 immediate appeal would not materially advance the termination of  
2 this litigation and that this case does not reach the  
3 "exceptional circumstances" that Congress had in mind when it  
4 enacted 28 U.S.C. § 1292(b).

5  
6 **III. Conclusion**

7 Based on the foregoing, the Court denies Plaintiffs'  
8 Application for Certification of Order for Interlocutory Appeal.

9  
10 IT IS SO ORDERED.

11  
12  
13 Dated: 5-23-07



DEAN D. PREGERSON  
United States District Judge