UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GREATER STOCKTON CHAMBER OF COMMERCE, et al.,

Plaintiffs,

v.

J. CLARK KELSO, et al.,

Defendants.
_______________________________/

CIV. NO. S-09-3308 LKK/JFM

O R D E R

In Plata v. Schwarzenegger, No. C-01-1351 TEH, the Northern District of California appointed a Receiver to oversee provision of medical care by the California Department of Corrections and Rehabilitation ("CDCR"). The Receiver proposed construction of a prison medical facility near Stockton, California. The Greater Stockton Chamber of Commerce, the City of Stockton, and the County of San Joaquin argue that the procedures involved in this proposal violate the California Environmental Quality Act ("CEQA"). These parties collectively filed a petition for a writ of mandamus in Superior Court for the County of San Joaquin to that effect. Respondents to this petition are the Receiver, the California Prison Healthcare Receivership Corporation, and CDCR (California Department of Corrections and Rehabilitation). The Receiver removed to federal court, invoking the federal officer removal statute, 28 U.S.C. § 1442. Once removed, this case was related to Coleman v. Schwarzenegger, No. Civ. 90-520, a class action challenging CDCR's provision of mental health care.

Petitioners move for a remand to state court, and additionally challenge the decision to relate this case to Coleman. The court resolves the matter on the papers, supplemental briefing, and two rounds of oral argument. For the reasons stated below, petitioners' motion is denied.

I. BACKGROUND

In two cases, Plata and Coleman, classes of California inmates challenge CDCR's provision of physical and mental health care. Both cases are at issue in this motion, in that the Receiver was appointed in one, Plata, and this court determined that the instant CEQA suit was related to the other, Coleman. The court summarizes the pertinent history of each case here.[1]

[1] In both class actions, plaintiffs have sought an order reducing California's inmate population. In accordance with the Prison Litigation Reform Act, a single three-judge district court was formed to consider this request as it applied to both cases. A recent order of this three-judge court provided an expansive history of both cases. Coleman v. Schwarzenegger, No. Civ. 90-520, 2009 WL 2430820, 2009 U.S. Dist. LEXIS 67943 (E.D. Cal. Aug. 4, 2009) (three judge court). Much of the history provided here is drawn from this order.

A. Plata

In 2001, a class of inmate-patients filed the case now denominated Plata v. Schwarzenegger, No. C01-1391 TEH (N.D. Cal.), alleging that the California prison medical healthcare delivery system violated the Eighth Amendment.

> The Plata plaintiffs and defendants negotiated a stipulation for injunctive relief, which the Plata court approved by court order. [¶] However, defendants proved incapable of or unwilling to provide the stipulated relief. Three years after approving the stipulation as an order of the court, the Plata court conducted an evidentiary hearing that revealed the continued existence of appalling conditions arising from defendants' failure to provide adequate medical care to California inmates. . . . Following that hearing, the Plata court concluded that it had no choice but to place the CDCR's medical health care delivery system in Receivership.

Coleman, No. Civ. 90-520, 2009 WL 2430820 at *3, 2009 U.S. Dist. LEXIS 67943 at *46 (E.D. Cal. Aug. 4, 2009) (three judge court). On February 14, 2006, the Plata court appointed the Receiver "with the goals of restructuring the day-to-day operations and developing, implementing, and validating a new, sustainable system that provides constitutionally adequate medical care to all class members as soon as practicable." Plata, No. C01-1391 (N.D. Cal. Feb. 14, 2006) ("Order Authorizing Receiver" or "OAR"). The current Receiver, J. Clark Kelso, was substituted for the original Receiver on January 23, 2008.

The Plata court conferred on the Receiver "all powers vested by law in the Secretary of the CDCR as they relate to the administration, control, management, operation, and financing of the California prison medical health care delivery system." OAR ¶ II.A. In exercising this authority, the Receiver must "make all reasonable efforts to exercise his powers . . . in a manner consistent with California state laws, regulations, and contracts." Id. ¶ II.D. But if the Receiver

> finds that a state law, regulation, contract, or other state action or inaction is clearly preventing [him] from developing or implementing a constitutionally adequate medical health care system, or otherwise clearly preventing [him] from carrying out his duties . . . and that other alternatives are inadequate, the Receiver shall request the Court to waive the state or contractual requirement that is causing the impediment. Upon receipt of any such request, the Court shall determine the appropriate procedures for addressing such request on a case-by-case basis.

Id.

The Receiver incorporated the California Prison Healthcare Receivership Corporation ("CPHRC") soon after he was appointed. See Receiver's First Bi-Monthly Report, filed in Plata July 5, 2006, at 12. At that time, the Receiver explained that CPHRC "provide[s] a corporate embodiment for the Office of the Receiver. Most of the affairs of the Office of the Receiver, such as staff employment, contracting and banking, are being conducted through [CPHRC]." Id. According to the present Receiver, by January 2008, CPHRC had grown to include a number of staff and to participate in day to day provision of medical care to prisoners incarcerated in CDCR. March 11, 2010 Decl. of Receiver Clark J. Kelso, ¶ 11. However, the Receiver has since transferred "most of the managerial and administrative activities" back to CDCR, such that CPHRC currently employs "senior staff counsel and [only] three other employees." Id. ¶ 12.

In June of 2009, CPHRC was suspended by the California Secretary of State for failure to file the biennial Statement of Information required of non-profit corporations. Cal. Corp. Code §§ 6210, 5008.6. CPHRC has since filed the required statement, and has been reinstated in good standing.

B. Coleman

In a separate case, filed a decade before Plata, a class of prisoners challenges CDCR's provision of mental health care. Coleman, No. Civ. 90-520. In Coleman the undersigned determined that California provides constitutionally inadequate mental health care, and throughout the Coleman litigation, the court has noted "the need for additional treatment space at every level of the mental health care delivery system." Coleman Order of Aug. 4, 2009 at 28, 2009 WL 2430820, at *15, 2009 U.S. Dist. LEXIS 67943, at *84 (three judge court) (citing Special Master's Resp. to Court's May 17, 2007 Req. for Information at 5).

C. The Proposed California Health Care Facility

Throughout the Plata Receivership, the Receiver has worked to increase the clinical and bed space for inmate patients. In December 2006, the Receiver first reported to the Plata court on his plans to construct new facilities to provide as many as 5000 beds for inmate patients. Plata Receiver's Third Bi-Monthly Report, Dec. 5, 2006, 27-28 (filed in this case as Resp'ts' Ex. 7).

One such new facility is the proposed California Health Care Facility ("CHCF"),[2] a 1.2 million square foot, 1,734 bed medical prison facility to be located in unincorporated San Joaquin County near southeast Stockton. Of these beds, over 600 are planned to be used for provision of mental health care. Coleman Defs.' Resp. to Court's Sept. 24, 2009 Order That Defs. File A Detailed Long-Range Bed Plan, Attach. A at 6 (filed Nov. 6, 2009); see also Coleman Order filed January 4, 2010.

A draft Environmental Impact Report ("EIR") for the CHCF proposal was released on October 24, 2008. The draft EIR states that "CPR [the California Prison Health Care Receivership Corporation], act[ed] as lead agency under the California Environmental Quality Act" and that "CPR is acting in the capacity of a state agency and is the lead agency under CEQA with primary authority over the project." Pet'rs' Req. for Judicial Notice ("RFJN") Ex. 1 (Draft EIR at 2-1). The draft was circulated for public comment through December 8, 2008. This draft was also filed with the Governor's Office of Planning and Research.

All three petitioners submitted comments regarding the draft. Notably, the County questioned whether the Receiver was a local, state, or federal agency. Pet'rs' RFJN Ex. 2 (Final EIR 3.13-4). These distinctions mattered, the County argued, because state and local agencies are subject to differing obligations under CEQA, and because federal entities may be subject to the National

[2] This facility has also been referred to as the "Consolidated Care Center."

Environmental Policy Act's separate provisions. Id.

Three months after the close of the public comment period, on March 16, 2009, the final EIR was released. Like the draft EIR, the final EIR states that CPHRC is the "lead agency" for the project, although the Receiver disputes the meaning of these statements. Petitioners contend that the final EIR responded to the County's earlier inquiry by explicitly identifying the Receiver/CPHRC as a state agency. Petitioners rely on the following language from the final EIR:

> As executive manager of medical care in the California state prisons, the Receiver acts as a state agency until such time that control over the prison health care reverts back to CDCR. In this capacity, the Receiver has the principal responsibility for carrying out and approving the proposed project, as is the responsibility for all lead agencies. Therefore, the Receiver, acting through [CPHRC], is the lead agency for the proposed project under CEQA (see Section 15367 of the State CEQA Guidelines), which is similar to other state and/or CDCR CEQA review processes . . . For purposes of clarification, the Receiver, acting as the lead agency, is obligated to comply with CEQA's substantive and procedural requirements.

Pet'rs' RFJN 2 (Final EIR at 3.13-56). Unlike the draft EIR, the final EIR was not filed with the Governor's Office of Planning and Research. Am. Pet. ¶ 21.

Six months later, in September 2009, CDCR delegated authority to the Receiver to certify the EIR, to make mandatory findings, and to approve the project on behalf of CDCR. Am. Pet. ¶ 22.

Petitioners allege that the project was discussed and modified at various subsequent proceedings from which petitioners were excluded. On October 1, 2009, the Receiver completed a 33 page "Technical Memorandum Environmental Review of Minor Changes to the Proposed Project," which discussed deviations from the proposal as it was evaluated by the draft and final EIRs. Id. ¶ 23. Petitioners allege that although this memorandum was provided to some public agencies, it was not provided to the Chamber; petitioners do not specify whether the City and County were among the agencies that received copies of this memorandum. Id. On October 10, 2009, the Receiver allegedly discussed the status of the project with unspecified parties at the offices of the State Bar of California, but the three petitioners were not informed of these meetings. Id. ¶ 28.

On October 12, 2009 the Receiver certified the EIR, adopted findings of fact and a statement of overriding considerations, and approved the Project. The Secretary of CDCR concurred.

D. Procedural History

Petitioners filed a petition for writ of mandate challenging the project's CEQA compliance in state court on November 19, 2009, and filed an amended petition a week later. Petitioners bring six causes of action, all under CEQA, for:

1. Failure to adequately address alternatives.
2. Failure to adequately disclose and mitigate significant impacts, including impacts on public services, water supply, energy impacts, air quality, traffic, climate change, growth, and cumulative effects.
3. Failure to adequately respond to comments.
4. Use of the "technical memorandum" rather than a revised EIR.

5. Adopting findings without proper support.

6. "Unlawful delegation of authority."

Although the petition states, in one sentence, that the writ of mandate is necessary "to ensure that the Respondents comply with all applicable Federal, State, and local laws," Amended Petition at 2, the petition does not otherwise cite or explicitly invoke any federal law.

Respondents removed to federal court, citing 28 U.S.C. § 1442(a)(1) and (3). This court then ordered this case related to Coleman.

Petitioners moved to remand and alternatively for reconsideration of the order relating this case to Coleman. The court initially heard the matter on January 25, 2010. At that hearing, petitioners indicated that their sixth claim was predicated in part of the fact that CPHRC had been suspended. Because this basis for the claim was not apparent from the petition or briefing, the court continued the hearing and granted the parties an opportunity to submit further briefing. After the additional briefing was submitted, the court again heard the matter on March 22, 2010.

In the interim, petitioners filed a "request for hearing" pursuant to California Public Resources Code section 21167.4, and the court held a Fed. R. Civ. P. 16 scheduling conference. On the parties' stipulation, the court ordered that "state procedures, in so far as they do not conflict with federal procedure, will govern resolution of the petition." Order of March 2, 2010. Respondents lodged the proposed administrative record on March 1, 2010, and the court ordered petitioners to be prepared to file objections to the record shortly after the March 22 hearing. The court further ordered the parties to be prepared to propose a schedule for further handling of this case at that time.

II. Discussion

Petitioners make three arguments for remand: that removal was improper under 28 U.S.C. section 1442, that the Receiver waived the right to invoke section 1442, and that this court should abstain under Burford v. Sun Oil, 319 U.S. 315 (1943). The court rejects each of these arguments. The court further re-affirms that this case was properly related to Coleman, and sets a schedule for further proceedings in this matter.

A. Removal under 28 U.S.C. § 1442

The Receiver removed under 28 U.S.C. section 1442, which provides in pertinent part:

> (a) A civil action . . . commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) . . . any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office . . .
> >
> > (3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties[.]

As this section has been interpreted, a party seeking removal thereunder must show that "(a) it is a 'person' within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims,[ ] and (c) it can assert a 'colorable federal defense.'" Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1251 (9th Cir. 2006) (quoting Jefferson County v. Acker, 527 U.S. 423, 431 (1999)). The first two of these three requirements stem from the statutory text; to be an officer acting "under color of office," there must be a causal connection between the charged conduct and the asserted official authority. Jefferson County, 527 U.S. at 431.

The third requirement, for a "colorable federal defense," is distinct. Id., Mesa v. California, 489 U.S. 121, 136 (1989). A "causal nexus" does not itself demonstrate the existence of a federal defense, and a federal officer cannot automatically remove merely on the ground that a state court may be biased in its application of state law. Mesa, 489 U.S. at 137-38. The officer must demonstrate that the case "arises under" a federal law other than a "purely jurisdictional" statute. Id. at 137.[3] For purposes of section 1442, assertion of a colorable federal defense satisfies

[3] Mesa held that if section 1442 were interpreted as allowing such "protective" removal akin to diversity jurisdiction, the statute would risk violating Article III's jurisdictional limits. Because the Court found that the history of the statute weighed against this interpretation, the Court declined to reach the constitutional question. Justice Brennan, joined by Justice Marshall, filed a concurrence opining that the majority's approach would permit protective removal absent a federal defense in an extraordinary case. 489 U.S. at 140.

this requirement--section 1442, unlike 28 U.S.C. sections 1331 and 1441, does not require that the federal issue appear on the face of a well pleaded complaint. Id., see also Kircher v. Putnam Funds Trust, 547 U.S. 633, 644 n.12 (2006). More broadly, section 1442, unlike section 1441's general removal provisions, is to be "liberally construed." Watson v. Philip Morris Cos., 551 U.S. 142, 147 (2007).

The court analyzes the pending motion under this framework. The parties, however, primarily rely on two other cases. The more recent case is Medical Dev. Int'l v. CDCR, 585 F.3d 1211 (9th Cir. 2009) ("MDI"). MDI considered a separate suit against the Plata Receiver, and a similar removal. Plaintiff MDI provided medical services to CDCR without a finalized contract. The Receiver terminated MDI's services, and MDI was not paid for much of its work. MDI filed suit against the Receiver, who removed under 28 U.S.C. section 1442(a)(1) and (3). The Ninth Circuit concluded that removal was proper. The panel's analysis of removal was brief, and is repeated here in its entirety:

> It is obvious that the requirement for removal under the statute is met. "[A] Receiver is an officer of the courts of the United States . . . ." [Ely Valley Mines, Inc. v. Hartford Acci. & Indem. Co., 644 F.2d 1310, 1312 (9th Cir. 1981)]. "The requirement of 'any act under color of such office' has been construed as requiring a causal connection between the charged conduct and the official authority." Id. at 1313. That connection is established where the challenged conduct involves actions "entrusted" to the Receiver "in his capacity as Receiver." [Gay v. Ruff, 292 U.S. 25, 39 (1934)]. Because MDI has conceded that it is suing the Receiver over the performance of his

> court-appointed duties, the nexus is present. See Arizona v. Manypenny, 451 U.S. 232, 242, 101 S. Ct. 1657, 68 L. Ed. 2d 58 (1981) (explaining that "the right of removal" created by § 1442(a) "is absolute for conduct performed under color of federal office, and . . . the policy favoring removal should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)" (internal quotation marks omitted)).

MDI, 585 F.3d at 1216 (omissions in MDI). The panel held that the district court therefore had jurisdiction over the suit.[4] MDI did not discuss the presence of federal defenses as an element of removal separate from the presence of a "nexus," nor did MDI cite Mesa. Mesa was plainly satisfied, however, as the remainder of the opinion in MDI--indeed, the bulk of the analysis--concerned two purported federal defenses. Accordingly, MDI does not indicate that a federal defense is unnecessary.

The other case emphasized by the parties is Ely Valley Mines, Inc. v. Hartford Acci. & Indem. Co., 644 F.2d 1310 (9th Cir. 1981). Ely Valley Mines concerned claims against a Receiver who had been appointed to oversee a bankrupt mining operation. Plaintiff claimed that the Receiver falsely testified to the district court, obtained wrongful orders from the district court, failed to comply with various court orders, and that the Receiver was vicariously liable for failure to maintain the business's property. Id. at 1312. The Ninth Circuit held that:

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[4] Plaintiff in MDI did not timely move to remand, and thereby waived procedural objections to removal. MDI, 585 F.3d at 1216. In this case, none of petitioners' arguments for remand are procedural.

> removal by a federal court appointed Receiver is proper under 28 U.S.C. § 1442(a) when the plaintiff is challenging the Receiver's personal dereliction in the execution of the Court's orders or judgments but not when the Receiver is negligent in performing duties not entrusted to him by the courts.

Id. at 1313. The court primarily relied on Gay v. Ruff, 292 U.S. 25 (1934), which held that a Receiver overseeing a railway corporation could not remove a claim that he was vicariously liable for wrongful death arising from a train's operation. Ely Valley Mines contrasted the state law vicarious liability claim in Gay with the claim concerning the Receiver's conduct "before the appointing court" at issue in Ely Valley Mines, concluding that removal was proper for the latter. Id. at 1313. The court noted that the defenses would involve an examination of the Receiver's duties, but the court did not specifically identify or discuss any possible federal defenses. Id.

In this case, both sides attempt to read too much into Ely Valley Mines. Petitioners heavily rely on Ely Valley Mines's "personal dereliction in the execution of the Court's orders" language. They argue that an allegation of "dereliction" is a necessary prerequisite to removal, and that dereliction requires negligence or bad faith, neither of which is alleged by petitioners' CEQA claims. See Reply at 2-3. The court, however, understands "personal dereliction," as used in Ely, to merely refer to a breach of an obligation imposed on the Receiver personally. Furthermore, the key concern in the passage quoted above is not the degree of culpability, but rather the source of the obligation, i.e., whether the claim pertains to a duty specific to the Receivership. Finally, to the extent Ely's interpretation of section 1442 differs from Durham's three-factor test, any differences are attributable to the Supreme Court's intervening decisions in Mesa and Jefferson County. Durham, Mesa, and Jefferson County are therefore controlling.

The court similarly rejects respondents' contention that Ely Valley Mines established a rule that a Receiver may remove unless a claim "involve[s] only state law and the Receiver is charged only with vicarious wrongdoing." Opp'n at 8 (quoting Ely Valley Mines, 644 F.3d at 1313). Ely Valley Mines held that removal of such a claim would be inappropriate, but as the other cases cited above demonstrate, these are not the only claims that are non-removable.

B. The Three-Factor Durham Test Is Satisfied Here

As noted above, Durham provides a three factor test for federal officer removal. MDI compels the conclusion that the first two of these factors are satisfied here. In this case, as in MDI, it is clear that the Receiver is a "person" within the meaning of section 1442(a), and an officer of the federal courts. 585 F.3d at 1216. MDI further establishes that a "nexus" exists. Id. Petitioners assert, with little discussion of MDI, that MDI is factually distinct because "[i]n managing daily CDCR operations, such as certifying EIRs, the Receiver follows state law and thus acts under state authority." Reply at 3. However, petitioners offer no explanation as to how the Receiver's management of service providers in MDI was not equally bound by state law and taken under state authority. Accordingly, petitioners fail to distinguish MDI in this regard.

The remaining question is whether the Receiver has raised a colorable federal defense. In this context, colorable is a low threshold. A defense need not be "'clearly sustainable'" in order to be colorable. Jefferson County, 527 U.S. at 432 (quoting Willingham v. Morgan, 395 U.S. 402, 407 (1969)). "The officer need not win his case before he can have it removed." Willingham, 395 U.S. at 407. Instead, removal allows the officer to have "'the validity of the [federal] defense . . . *tried* in a federal court.'" Jefferson County, 527 U.S. at 431 (quoting Willingham, 395 U.S. at 407) (emphasis added). Tellingly, both Jefferson County and MDI found removal to be proper despite ruling against the removing officers on the merits of the asserted federal defenses. Jefferson County, 527 U.S. at 531 ("[Defendants'] argument, although we ultimately reject it, . . . presents a colorable federal defense."), MDI, 585 F.3d at 1219, 1222.

In this case, the Receiver invokes three affirmative federal defenses: judicial immunity, possible waiver of state law under the Supremacy Clause, and the Barton rule requiring permission from the appointing court before filing suit against a receiver. The Receiver further argues that his actions complied with CEQA because the scope of the CEQA analysis was narrowed by his federal obligations.[5] Each of these defenses is sufficiently colorable to

[5] Much of the parties' initial briefing focused on petitioners' sixth claim and federal issues potentially unique

support removal. Following MDI, the court begins with Barton. As this defense is sufficient, discussion of the remaining defenses is dicta, and the court discusses them only cursorily.

As summarized in MDI, in Barton v. Barbour, 104 U.S. 126, 131 (1881), the Supreme Court held that "when a plaintiff sues a Receiver outside of and without the permission of the appointing court, the non-appointing court is without jurisdiction to entertain the suit." 585 F.3d at 1216-17. "Part of the rationale underlying Barton is that the court appointing the receiver has in rem subject matter jurisdiction over the receivership property. As the Supreme Court explained, allowing the unauthorized suit to proceed 'would have been a usurpation of the powers and duties which belonged exclusively to another court.'" Beck v. Fort James Corp. (In re Crown Vantage, Inc.), 421 F.3d 963, 971 (9th Cir. 2005) (quoting Barton, 104 U.S. at 136, internal citations omitted). Although this rule is most often invoked in bankruptcy cases, it appears to apply to receivers generally. Id. (quoting In re Linton, 136 F.3d 544, 545 (7th Cir. 1998)).

There is a statutory exception to this rule, under which:

> Trustees, receivers or managers of any

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thereto. As noted above, the court invited additional briefing on this topic. Because petitioners have since stated their willingness to abandon their sixth claim, and because the court concludes that alternate justifications for removal exist, the court does not discuss any issues particular to the sixth claim. The court notes, however, that if removal were predicated solely on the sixth claim (which is not the case here), abandonment of the sixth claim after removal would not necessarily deprive the court of the ability to hear the remaining claims through the exercise of supplemental jurisdiction.

> property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

28 U.S.C. § 959(a). In adjudicating the merits of the Barton defense, the MDI court held that the Receiver's operation of CDCR "fits that category of an ongoing, operating enterprise" contemplated by this exception. MDI, 585 F.3d at 1218. The court then engaged in an extensive discussion of the types of claims against such enterprises that fit within the statutory exception. Id. at 1218-1219. At the end of this discussion, the MDI court concluded that the plaintiff's claim could proceed "to the extent that it [sought] an amount due under a contract." Id. at 1219.

Because this case concerns a different type of claim, the Receiver has a colorable basis for distinguishing MDI and thus for invoking Barton. Here, petitioners make no claim for money damages. Instead, they seek a writ of mandate directing respondents "to immediately suspend all activities in furtherance of the project," to set aside the EIR, and to comply with CEQA. Amended Petition, 24. The Supreme Court and the statutory text have both recognized that injunctive relief has greater potential to intrude upon the jurisdiction of the appointing court. In interpreting a predecessor to 28 U.S.C. section 959(a), the Supreme Court held that a claim against a bankruptcy trustee relating to the trustee's operation of a bankrupt railroad fell within the exception "so far as it involves only a money claim," but that "the issuance of an injunction against operation of the trains over respondent's tracks would have been an interference with the exclusive jurisdiction of the [appointing] court." Thompson v. Texas M. R. Co., 328 U.S. 134, 138-39 (1946). Similarly, the modern statute recognizes that the appointing court retains "equity power" over claims against a Receiver. 28 U.S.C. § 959(a).

There is therefore a colorable basis for the Receiver's invocation of Barton in this suit, notwithstanding the Ninth Circuit's holding that Barton was inapplicable on the facts of MDI. At this stage, the court does not decide the merits of the Barton defense. It may be that Thompson does not apply here, and that the factual differences between this case and MDI fail to provide a basis for distinction. These questions are nonetheless the type to be answered by a federal court. The Receiver's invocation of 28 U.S.C. section 1442 was therefore proper.

In the alternative, the court notes that the remaining defenses also support removal. As to judicial immunity, MDI also implicitly found this to be a colorable defense, and MDI's ruling on the merits of this defense, like the court's ruling on Barton, noted that plaintiff was "seeking damages for the Receiver's refusal to pay for services MDI performed under contract with CDCR." 585 F.3d at 1222. Accordingly, the Receiver may colorably argue that for purposes of judicial immunity, as for purposes of Barton, the relief sought distinguishes this case from MDI. As to waiver of state law, while petitioners argue that this defense is unripe, defenses, rather than claims, fall outside the ordinary contours of the ripeness doctrine. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967), overruled on other grounds in Califano v. Sanders, 430 U.S. 99, 97 (1977) (describing ripeness). Assuming that, as petitioners argue, the CEQA claim's merits must be resolved before waiver may be decided, petitioners provide no authority for the proposition that a federal defense will only support removal if the defense is immediately adjudicable, and as explained below, this court need not abstain from any antecedent CEQA questions. Finally, respondents' supplemental brief argues that federal law defined the project needs and imposed an urgency requirement that precluded the Receiver from considering additional alternatives or an expanded project definition. Insofar as 28 U.S.C. section 1442 is to be interpreted liberally in favor of removal, Watson, 551 U.S. at 147, these are both federal defenses, and each is sufficiently colorable to support removal. Jefferson County, 527 U.S. at 431.

C. Whether The Receiver Waived The Right to Invoke 28 U.S.C. § 1442

Petitioners separately make what is best characterized as an estoppel argument. They contend that the Receiver disclaimed any obligations under NEPA by stating that he was acting as a state agency rather than a federal agency, and that this statement precludes him from now arguing that he is a federal officer capable of invoking 28 U.S.C. section 1442.

The court assumes without deciding that the right to remove under section 1442 can be waived.[6] Petitioners' argument nonetheless fails for at least two reasons. First, petitioners have not provided any evidence that the Receiver in fact stated that he was not a federal agency subject to NEPA. While the Receiver stated that he was acting as a state agency subject to CEQA, nothing here suggests that the Receiver could not have simultaneously acted as a federal agency. The statements petitioners quote do not explicitly disclaim NEPA obligations, and petitioners have not alleged that the Receiver made any other pertinent statements.

Second, the question of whether the Receiver is an "agenc[y] of the Federal Government" for purposes of NEPA, 42 U.S.C. § 4332(2), is distinct from the question of whether the Receiver is an "officer of the courts of the United States" for purposes of 28 U.S.C. § 1442(a)(3). Even assuming that the Receiver stated that he was not an agency subject to NEPA, and that the Receiver was bound by that statement, petitioners have offered no explanation as to why this would preclude the Receiver from invoking section 1442(a)(3) as an officer of the court.

D. Abstention

Petitioners' remaining argument for remand is that this court should abstain under Burford v. Sun Oil, 319 U.S. 315 (1943).

[6] Petitioners have provided neither authority indicating that this right is waivable nor discussion of what facts would be necessary to demonstrate waiver.

Burford abstention has three elements:

> first, that the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court; second, that federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence; and third, that federal review might disrupt state efforts to establish a coherent policy

United States v. Morros, 268 F.3d 695, 705 (9th Cir. 2001) (quoting Knudsen Corp. v. Nevada State Dairy Com., 676 F.2d 374, 376 (9th Cir. 1982)).

Federal courts have interpreted and enforced CEQA on numerous occasions. Perhaps most notably, this court has previously adjudicated a CEQA claim, and has been affirmed by the Ninth Circuit in so doing. Tahoe Tavern Prop. Owners Ass'n v. United States Forest Serv., No. CIV. S-06-407, 2007 U.S. Dist. LEXIS 35935, 2007 WL 1279496 (E.D. Cal., Apr. 30, 2007) (Karlton, J.), affirmed by 314 Fed. Appx. 919, 920 (9th Cir. 2008). The Ninth Circuit and the District Courts within this state have frequently entertained CEQA claims. See City of Carmel-by-the-Sea v. United States DOT, 95 F.3d 892, 899 (9th Cir. 1996) (CEQA/NEPA claim), League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency, No. 2:08-cv-2447, 2009 U.S. Dist. LEXIS 65753 (E.D. Cal. July 30, 2009) (exercising supplemental jurisdiction over a CEQA claim), Cmtys. for a Better Environment v. Cenco Ref. Co., 180 F. Supp. 2d 1062, 1088 (C.D. Cal. 2001) (same), People by California Dep't of Transp. v. South Lake Tahoe, 466 F. Supp. 527, 537, 543 (E.D. Cal. 1978) (holding that the Tahoe Regional Planning Agency was subject to

CEQA, and reserving jurisdiction to enjoin defendant from violating CEQA). In at least three other cases, the Ninth Circuit has found it appropriate to interpret CEQA in the context of other claims. Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d 978, 995 (9th Cir. 2006), Vieux v. E. Bay Reg'l Park Dist., 906 F.2d 1330, 1342 (9th Cir. 1990), South Pasadena v. Goldschmidt, 637 F.2d 677, 680 (9th Cir. 1981). After thirty years of federal adjudication of CEQA claims, there is no indication that such adjudication has disrupted state efforts to establish a coherent policy.

Despite this history, it appears that only one case has specifically discussed whether federal courts should abstain from CEQA claims under Burford. Emeryville Redevelopment Agency v. Clear Channel Outdoor, 2006 U.S. Dist. LEXIS 34822 (N.D. Cal. May 22, 2006); but see United States v. California, 639 F. Supp. 199, 208 (E.D. Cal. 1986) (noting that a Burford argument had been raised, but declining to reach the issue where, in light of a parallel state proceeding abstention was separately required under Younger). Emeryville Redevelopment Agency first concluded that abstention was appropriate under the separate doctrine of Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). Only after having determined that abstention was appropriate did the court reach the issue of Burford abstention. The court's entire Burford analysis consisted of the following:

> the unique aspects of CEQA also favor abstention under the broader abstention doctrine espoused in [Burford]. "The general thrust of Burford-type abstention can be well captured by saying that abstention is ordered

> in order to avoid needless conflict with the administration by a state of its own affairs." Wright and Miller, Federal Practice and Procedure, § 4244 (2d ed. 1988). As the Ninth Circuit has stated, "Burford allows courts to 'decline to rule on an essentially local issue arising out of a complicated state regulatory scheme.'" [Morros, 268 F.3d at 705] (internal citation omitted).
>
> California has a specific administrative mechanism to adjudicate certain CEQA matters. California Public Resources Code § 21167.1 (b) provides:
>
>> To ensure that actions or proceedings brought pursuant to Sections 21167, 21168, and 21168.5 may be quickly heard and determined in the lower courts, the superior courts in all counties with a population of more than 200,000 shall designate one or more judges to develop expertise in this division and related land use and environmental laws, so that those judges will be available to hear, and quickly resolve, actions or proceedings brought pursuant to Sections 21167, 21168, and 21168.5.
>
> Thus California has put into place a specialized procedure to quickly and consistently resolve issues involving land use and the environment. Under Burford, this Court should not needlessly interfere with this regulatory scheme.

Emeryville Redevelopment Agency, 2006 U.S. Dist. LEXIS 34822 at *12-13. This case therefore did not discuss the third Burford factor, whether federal adjudication will disrupt state efforts to adopt a coherent policy. Morros, 268 F.3d at 705. Because the court concludes that this factor is not satisfied, the court declines to follow Emeryville Redevelopment Agency, and the court need not reach that case's evaluation of the first two Burford factors. Burford abstention is not appropriate as to the CEQA claims.

E. Relation to Coleman

Finally, petitioners object to this court's order relating this case to Coleman. Because the challenged project involves Coleman beds, "both actions involve the same property, transaction, or event." Local Rule 123(a)(2). In addition, the defense of waiver of state law, as it may apply to this case, overlaps with the waiver issue as it has been discussed in Coleman. Accordingly, relating these cases furthers judicial economy, and relation was proper under Local Rule 123(a)(4).

F. Fees

Because petitioners' motion is denied, petitioners are not entitled to fees.

IV. CONCLUSION

For the reasons stated above, petitioners' motion to remand (Dkt. No. 14) is DENIED. Petitioners SHALL file objections to the administrative record and a proposed schedule for the litigation of this case no later than thirty (30) days from the date of this order. Respondents SHALL file a response and proposed schedule no later than ten (10) days thereafter. The court will determine at that time whether a status conference is necessary.

IT IS SO ORDERED.

DATED: April 2, 2010.

Lawrence K Karlton

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT