

08-15759

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**MEDICAL DEVELOPMENT INTERNATIONAL,
a Delaware corporation,**

Plaintiff-Appellant,

v.

**CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION;
ROBERT SILLEN, individually and as Receiver;
and J. CLARK KELSO, Receiver,**

Defendants-Appellees.

Consolidated Appeals from United States District Court:

Eastern District of California
Case No. 2:07-CV-02199-WBS-EFB
The Hon. William B. Shubb, Judge

Northern District of California
Case No. 3:01-CV-01351-TEH
The Hon. Thelton E. Henderson, Judge

**BRIEF OF APPELLEE CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION**

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By Electronic and U.S. Mail

RE: Medical Development International v. CDCR, et al. (Appeal)
United States Court of Appeals, Ninth Circuit, Case No. 08-15759

Dear Mr. Lee:

In my email message sent to you yesterday, I informed you of my intent to contact the Ninth Circuit's Clerk pursuant to Circuit Rule 31-2.2 to request an extension of time to file CDCR's Answer Brief. My request for the extension of time was granted and CDCR's brief is now due by March 9, 2009. Should MDI decide to submit an optional Reply Brief, it will be due 14 days after service of CDCR's brief.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michelle Mitchell".

MICHELLE M. MITCHELL
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

MMM:

cc: Martin H. Dodd, Esq.,
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INTRODUCTION

After the Northern District appointed a receiver over CDCR's medical care services system, MDI began providing medical services to CDCR without a contract. Shortly thereafter, the Receiver ordered CDCR not to make any further payment to MDI because questions had arisen about the legality of MDI's services. Because CDCR had been ordered by the Northern District to comply with the Receiver's directions, it had no discretion to ignore the Receiver's order not to pay MDI. MDI filed suit seeking damages against CDCR and the Receiver. The allegations against CDCR are not based on any independent action by CDCR, but exclusively on the Receiver's order not to pay MDI.

MDI initially filed its complaint against the Receiver and CDCR in state court. The Receiver had it removed to the Eastern District. Because MDI failed to obtain leave to sue from the appointing court before filing its action, the Eastern District granted Appellees' motions to dismiss. MDI then filed with the Northern District an application for leave to sue the Receiver in state court. The Northern District denied the application, finding that MDI could not make a prima facie case because the Receiver had immunity. Because MDI's

application did not seek leave as to CDCR, the Northern District refused to issue an advisory opinion as to CDCR's immunity.

This Court should affirm both rulings. The Eastern District properly dismissed MDI's complaint against the Receiver and CDCR because MDI failed to obtain leave from the appointing court before filing suit against the Receiver and CDCR. The Northern District was correct to refuse to provide an advisory opinion as to CDCR's immunity where MDI's application only sought leave to sue the Receiver and there was no action pending between MDI and CDCR in any district court. Although MDI seeks appellate review of the Northern District's ruling as to CDCR, there is no final decision as to CDCR that satisfies this Court's jurisdiction under 28 U.S.C. § 1291. Lastly, there is no compelling reason for this Court to exercise its discretion to rule on CDCR's immunity in the first instance on appeal.

JURISDICTION STATEMENT

The United States District Court for the Eastern District of California properly granted Appellees' motions to dismiss for lack of subject matter jurisdiction based on MDI's failure to obtain leave of the appointing court before filing an action against the Receiver. MDI appeals the judgment of dismissal. Jurisdiction is conferred on this Court under 28 U.S.C. § 1291.

The United States District Court for the Northern District had jurisdiction over MDI's Application for Leave to Sue the Receiver in State Court. MDI did not include CDCR in its request or have any pending action against CDCR. As such, the Northern District did not have jurisdiction over MDI's claims against CDCR. Jurisdiction is conferred on this Court under 28 U.S.C. § 1291 to review the Northern District's order as to the Receiver, but not as to CDCR.

STATEMENT OF THE ISSUES

1. The Northern District, the court that appointed the Receiver, ordered CDCR to follow the Receiver's orders. After the Receiver ordered CDCR not to pay MDI for services provided, MDI filed suit against the Receiver and CDCR. MDI's allegations against CDCR stem from its compliance with the Receiver's order and not from any independent action by CDCR. MDI failed to get leave from the appointing court before filing its suit. Did the Eastern District properly dismiss MDI's claims against CDCR along with its claims against the Receiver?

2. After MDI's Eastern District action against the Receiver and CDCR was dismissed, MDI filed an application seeking leave to sue the Receiver. MDI's application did not seek leave to sue CDCR, The Northern District

denied the application because the Receiver is entitled to immunity for his order related to MDI. Did the Northern District err by refusing to issue an advisory opinion as to a potential affirmative defense by CDCR where MDI's application did not seek leave as to CDCR and MDI did not have any action against CDCR pending in any court?

STANDARD OF REVIEW

I. Eastern District Appeal

CDCR concurs with MDI that this Court reviews *de novo* a dismissal based on lack of subject matter jurisdiction. *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir. 2004); *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999). Further, it is well settled that this reviewing Court is not limited to the grounds or reasoning relied upon by the district court. Rather, the judgment of dismissal should be affirmed on appeal if it is sustainable on any basis fairly supported by the record. *See Colautti v. Franklin*, 439 U.S. 379, 397 n.16 (1979); *City of Las Vegas, Nev. v. Clark Co., Nev.*, 755 F.2d 697 701 (9th Cir. 1985).

II. Northern District Appeal

Because MDI's application did not include a request as to CDCR and there was *no* pending action between MDI and CDCR before any district court,

the issue before this Court is one of jurisdiction. Jurisdiction is subject to a *de novo* standard of review. *Saldano v. O'Connell*, 322 F.3d 365, 368 (5th Cir. 2003).

STATEMENT OF THE FACTS

I. *Plata v. Schwarzenegger: Establishment of Federal Receivership*

In 2001, an inmate brought suit in the Northern District challenging the constitutional adequacy of medical care provided to CDCR inmates with serious medical needs. *See Plata et al. v. Schwarzenegger et al.*, No. C01-1351, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005). In 2005, the Hon. Thelton E. Henderson established a receivership “to take control of the delivery of medical services to California state prisoners.” (2 ER 101.)

On February 14, 2006, the court appointed Robert Sillen as the Receiver, effective April 17, 2006, and charged him with bringing CDCR’s medical care up to federal constitutional standards.^{1/} (2 ER 102.) The court charged the Receiver with “the duty to control, oversee, supervise, and direct all administrative, personnel, financial, accounting, contractual, legal, and other operational functions of the medical delivery component of the CDCR.” (2 ER

1. On February 1, 2008, the court dismissed Sillen as Receiver and replaced him with J. Clark Kelso. They are both referred to as the Receiver herein.

102.) So he could fulfill these duties, the court conferred on him 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 system.” (2 ER 104.) To that end, the CDCR Secretary’s exercise of these powers was suspended. (*Id.*) CDCR, its officers, employees and agents were ordered to follow the Receiver’s orders or risk being subject to contempt. (2 ER 108.)

The court conferred judicial immunity upon the Receiver, providing that “the Receiver and his staff shall have the status of officers and agents of this Court and as such shall be vested with the same immunities as vest with this Court.” (2 ER 106.)

On March 30, 2006, the court ordered CDCR to hire contract analysts, make emergency payment of “*current*, outstanding, valid and CDCR-approved medical invoices (even in the absence of a separate written contract) within 60 days” and develop new processes for medical contract management. (2 ER 164, ¶ B.1.) The court also waived the requirement that CDCR competitively bid medical services contracts. (2 ER 166, ¶ 4.)

II. MDI's Contract Negotiations And Performance Without An Executed Contract.

By March 2006, before the April 17 effective date of the Receiver's appointment, MDI began negotiating with CDCR to provide physician and hospital services to inmates at two CDCR institutions. (2 ER 127, ¶21.) CDCR initiated the contract process by completing preliminary contract request documents, a copy of which were forwarded to MDI. (*Id.*) MDI began providing services in September 2006 without waiting for an approved executed contract "to filter through the many hurdles of the state bureaucracy." (2 ER 128, ¶ 25.)

CDCR contract-processing staff began questioning whether MDI's scope of work violated California's prohibition on the corporate practice of medicine. (2 ER130, ¶ 33.) In late December 2006, MDI forwarded a proposed restructured agreement to address the corporate-practice-of-medicine concerns. (2 ER130, ¶ 35.) A contract with the restructured agreement was never executed, having been intercepted by the Receiver's Chief of Staff by January 2007. (2 ER 130, ¶ 36.)

The Receiver, concerned by the prospect that MDI's services may constitute the illegal corporate practice of medicine, "suspended the process of finalizing the restructured agreement and unilaterally stopped payments on all

invoices submitted by MDI.” (2 ER 130, ¶ 37.) Nonetheless, MDI continued to provide services while attempting to meet with the Receiver to convince him to reverse his decision to withhold payments. (2 ER 130-131, ¶¶ 39 - 40, 42.) On April 7, 2007, the Receiver ended all contact with MDI. (2 ER 132, ¶ 51.)

STATEMENT OF THE CASE

I. State Superior Court.

MDI filed a complaint against CDCR and the Receiver (in his individual and official capacity) in Sacramento County Superior Court. (2 ER 121.) The Receiver, under 28 U.S.C. §§ 1442(a)(1) and (a)(3), removed the matter to federal court in the Eastern District of California. (2 ER 117 - 118.)

II. United States Federal Court, Eastern District.

The Receiver and CDCR filed motions to dismiss asserting immunity and lack of subject matter jurisdiction. (2 ER 94, 96.) Citing lack of subject matter jurisdiction because MDI failed to obtain leave from the appointing court (the Northern District) before pursuing litigation against the Receiver, the Eastern District granted the motions to dismiss and entered judgment against MDI. (1 ER 12 - 24.)

On March 14, 2008, MDI filed a Notice of Appeal. (2 ER 87.) MDI filed a declaration from counsel and a stipulation from the parties along with a

Motion to Stay the Appeal so MDI could file a motion in the Northern District requesting leave to sue the Receiver and CDCR. (Docket Nos. 4, 5.)

III. United States Federal Court, Northern District.

On May 15, 2008, MDI filed an application that only sought leave to pursue its litigation against the Receiver in state court. (2 ER 36 - 49.)

Asserting immunity with regard to actions taken in furtherance of his judicially conferred duties and MDI's failure to otherwise state a claim upon which relief could be granted, the Receiver opposed MDI's application for leave. (1 ER 5; SER, 106-126.) Although unsolicited by the court, CDCR filed a similar opposition with the additional argument that it too was immune from suit because MDI's claims against CDCR are premised entirely on CDCR complying with the Receiver's order to stop MDI's payments. (*Id.*) On June 24, 2008, the Northern District denied MDI's request for permission to sue the Receiver, finding that MDI could not establish a prima facie case because the Receiver was entitled to immunity from suit arising from the Receiver's decision to stop payments to MDI. (1 ER 1 - 11.)

On July 3, 2008, MDI filed a motion for clarification as to whether the court's June 24 order intended to decide whether the Receiver's immunity extended to the CDCR. (2 ER 29-35.) On July 31, 2008, the court clarified that

the order did not decide the issue for two reasons: (1) MDI's application did not include a request for leave to sue CDCR in state court; and (2) a decision on that issue would be an unconstitutional advisory opinion because MDI did not have any pending action with CDCR in any court. (1 ER 1 - 4.) On August 14, 2008, MDI filed a Notice of Appeal. (2 ER 25.)

SUMMARY OF ARGUMENT

The Eastern District properly dismissed the complaint for lack of subject matter jurisdiction because MDI's failed to obtain leave of the appointing court before bringing an action against a federal court receiver. Citing judicial economy, the district court properly granted CDCR's motion to dismiss because MDI's allegations against CDCR stem entirely from its compliance with the Receiver's order to stop payment. The Eastern District correctly dismissed MDI's premature complaint, and this Court should affirm that decision.

The Northern District did not err by failing to rule on issues related to claims against CDCR. Because MDI did not seek leave to sue CDCR and did not have a pending action with CDCR, such a ruling would have been an advisory opinion. This Court should not exercise its discretion here to rule on an issue in the first instance on appeal. Therefore, this Court should dismiss MDI's appeal for lack of jurisdiction.

ARGUMENT

I.

THE EASTERN DISTRICT APPROPRIATELY GRANTED CDCR'S MOTION TO DISMISS BECAUSE MDI'S ALLEGATIONS AGAINST CDCR STEM ENTIRELY FROM ITS COMPLIANCE WITH THE RECEIVER'S ORDER TO STOP PAYMENTS TO MDI.

In the underlying action, MDI sought to recover damages from the Receiver and CDCR for the Receiver's order that CDCR not pay MDI. (2 ER 121 -158.) The Receiver and CDCR filed motions to dismiss in which they asserted immunity as a defense and raised the court's lack of subject matter jurisdiction. (1 ER 13 -25.) The Eastern District correctly found that the Northern District, as the court that appointed the Receiver, should have the opportunity to evaluate the questions of liability and immunity within the context of the goals of the receivership. (1 ER 22.)

A. The Eastern District Lacked Subject Matter Jurisdiction Because MDI Failed to Obtain Leave of the Appointing Court To Sue the Receiver.

It is undisputed that MDI failed to seek leave from the Northern District, the appointing court, before filing its action against the Receiver. The Receiver in his Answering Brief has thoroughly argued the reasons why MDI's failure to obtain leave from the appointing court deprived the Eastern District of subject

matter jurisdiction. In the interest of judicial economy, CDCR will not re-argue the reasons that the Eastern District lacked subject matter jurisdiction and hereby joins the Receiver's argument on this point to the extent that it is necessary to evaluate the correctness of the judgment dismissing MDI's complaint.

B. Dismissal of MDI's Complaint Was Warranted Where Allegations Against CDCR Were Based Solely on the Receiver's Action and MDI Failed to Obtain Leave of the Appointing Court to Assert Its Claims.

It is unclear whether MDI specifically challenges the Eastern District's dismissal of MDI's complaint as to CDCR. To the extent that it does, CDCR asserts that the Eastern District was correct to dismiss the complaint for lack of subject matter jurisdiction because of MDI's failure to obtain leave of the appointing court before bringing its action against the Receiver and CDCR.

MDI does not seek liability against CDCR on the basis of any independent action by CDCR. All of MDI's claims against CDCR are based on the same singular action, CDCR's compliance with the Receiver's order not to process the MDI contract and not to pay MDI. (2 ER 130, ¶¶ 36-37.) CDCR, however, did not have discretion to ignore the Receiver's orders.

As the Eastern District correctly noted, the appointing court suspended CDCR's authority over "the administration, control, management, operation,

and financing of the California prison medical health care system” for the duration of the receivership. (1 ER 22-23.) The appointing court transferred that authority to the Receiver to assist him in his official duties. (*Id.*) In fact, MDI concedes that projects, like the one for which MDI was providing services, are exclusively “under the control of Mr. Sillen.” (2 ER 131, ¶41.)

Furthermore, the appointing court ordered all agents and employees of CDCR to “*fully* cooperate with the Receiver in the discharge of his duties,” providing that anyone who “thwarts or delays the Receiver’s performance of his duties . . . shall be subject to contempt proceedings.” (2 ER 108, ¶ A.) Simply put, CDCR could not refuse to follow the Receiver’s orders regarding MDI without being held in contempt of court.

Therefore, the same legal and public interest concerns that dictate that the appointing court be afforded the opportunity to evaluate the allegations against the Receiver and the potential impact on the receivership must necessarily apply to CDCR as well. There simply is no basis for drawing a distinction between the defendants in this regard. As the Eastern District correctly and succinctly stated “due to the significant overlap in plaintiff’s allegations, the interests of judicial economy also support the accompanying dismissal of plaintiff’s causes of action with respect to CDCR.” (1 ER 23.)

For these reasons, this Court should affirm the Eastern District's dismissal of the complaint for lack of subject matter jurisdiction because of MDI's failure to obtain leave of the appointing court before bringing its action against the Receiver and CDCR.

II.

THE NORTHERN DISTRICT CORRECTLY REFUSED TO PROVIDE AN ADVISORY OPINION AS TO CDCR IMMUNITY.

A. The Northern District Did Not Err by Failing to Rule on Issues MDI Did Not Raise In Its Application for Leave.

Although the Eastern District noted the "significant overlap" of allegations against the CDCR with those against the Receiver, MDI filed an application with the Northern District which only asked the court to grant leave to sue the Receiver in state court.^{2/} (2 ER 36 - 49; 1 ER 5-11.) In fact, the Northern District noted that this was "the only issue [MDI] presented for resolution." (1 ER 4.) Not surprisingly, the Northern District only addressed

2. To the extent that MDI may now assert that it did not need leave as to CDCR, this is a new position that is contrary to the Eastern District's order and to MDI's own position in documents it previously filed with this Court. In the documents that MDI filed requesting a stay of its appeal from the Eastern District's judgment, MDI states throughout that the stay is requested so that MDI could request leave from the Northern District to pursue any claims against the Receiver and CDCR.

the question posed to it in MDI's application – whether the Court should grant MDI leave to sue the Receiver. (*Id.*)

Although MDI's application did not seek leave to pursue any claims against CDCR, MDI argues that the issue of CDCR's immunity was before the Northern District because CDCR and MDI "sought clarification on the effect of the receivership on the CDCR's immunity." (Appellant's Opening Br., 50.) However, the Northern District properly disregarded these arguments because the issue was not included in MDI's application, the operative pleading before the court.^{3/} MDI's subsequent Motion for Clarification "sought guidance as to whether the Court intended the June 24, 2008 order to rule on the CDCR's immunity from suit as well as the Receiver's." (1 ER 1.) Thus, MDI purportedly sought guidance on a point it had not included in its original application. In response, the Northern District correctly noted that, "MDI did not seek leave of this Court to sue the CDCR in state court." (*Id.*) MDI's request for clarification did not change the scope of MDI's original application. The Northern District, therefore, did not err by refusing to address issues that MDI did not raise in its application for leave. Accordingly, the Northern District's order should be affirmed on this basis alone.

3. CDCR raised the issue of its immunity in its Opposition to MDI's Application. MDI addressed this issue in its Reply to CDCR's Opposition.

B. The Northern District Was Not Required to Provide an Advisory Opinion Because There Was No Pending Action Between MDI and CDCR.

The Northern District also declined to rule on MDI's clarification request as to CDCR because "[s]uch a decision would be advisory only and therefore unconstitutional." (1 ER 2.) The Northern District explained that a ruling as to CDCR's immunity would be an advisory opinion because there was "no pending case between MDI and CDCR in this Court, nor any other court at this time, and MDI essentially seeks an order deciding whether an immunity defense, if raised by the CDCR in an as yet unfiled lawsuit, would succeed." (1 ER 1- 2.) MDI's only operative pleading before the Northern District was its application seeking leave to sue the Receiver. CDCR was not a party to that proceeding or to any other pending proceeding with MDI.

It is axiomatic that generally a party must have filed a complaint—even a complaint for declaratory judgment—in federal court before it may request relief from the court. Only after a party has fulfilled that crucial first step can the inquiry turn to the jurisdiction of the federal court over the matter. MDI failed to satisfy the initial procedural requirement necessary for a ruling by the Northern District.

The Northern District did not err in refusing to address the issue of CDCR's immunity simply because MDI had *previously* filed an action against CDCR and the Receiver. That complaint had been dismissed and was no longer pending. Nor can the Northern District be faulted for not addressing the issue simply because MDI *intended* to file a new complaint against CDCR in state court. The Northern District refused to provide MDI an advisory opinion, noting:

As the Supreme Court has explained, a federal court may not adjudicate an action for declaratory relief where one party "attempts to gain a litigation advantage by obtaining an advanced ruling on an affirmative defense." *Calderon v. Ashmus*, 523 U.S. 740, 747.

MDI's request for a ruling about CDCR's immunity was simply a request for an advanced ruling on an affirmative defense in anticipation of its future state court action. (2 ER 33; 1 ER 2.) The Northern District did not err by refusing to issue an advisory opinion.

MDI argues that the Northern District should have ruled on the issue anyway because "both MDI and CDCR sought clarification." (AOB, 50.) MDI misses the point. The federal court has no power to "render opinions merely advisory or . . . to set precedent for future litigation." *Waiialua Agricultural Co. v. Manejo*, 178 F.2d 603, 613 (9th Cir. 1949). There was no pending action

between MDI and CDCR before the Northern District or any court. MDI requested the ruling by the Northern District for the very purpose of using it in future litigation.

Even if MDI had satisfied procedural requirements for a ruling, the Northern District still lacked authority to issue a ruling where doing so would not resolve or forgo litigation entirely. “The Supreme Court has explicitly held that Article III does not permit the courts to resolve issues when it is not clear that the resolution of the question will resolve a concrete controversy between interested parties.” *Coffman v. Breeze*, 323 U.S. 316, 322-24 (1945). Assuming arguendo that the district court had issued a ruling that CDCR is not entitled to immunity, it “would not resolve the entire case or controversy” because CDCR could still pursue the action and CDCR would certainly assert other defenses. *See Calderon v. Ashmus*, 523 U.S. 740, 747(1998). Therefore, the Northern District did not err by refusing to provide an advisory opinion as to CDCR immunity.

C. Exercise of This Court’s Discretion to Rule on an Issue In the First Instance Is Not Merited Under These Facts Where MDI Has Ignored Procedural Requirements and Jurisdictional Limitations of the Court.

MDI appeals the Northern District’s order and asks this Court to determine de novo whether CDCR is entitled to assert immunity as a defense to

claims by MDI. (AOB, 49-51.) However, the only ruling by the Northern District that relates to CDCR specifically declined to rule on the merits of the immunity issue. As such, there is no order that addressed-- let alone resolved-- MDI's claims against CDCR.

Federal courts are courts of limited jurisdiction. This Court has appellate jurisdiction to review the final decision or final order if it expresses the district court's final disposition of either a collateral issue or all issues as to all parties in the proceedings below (the "final judgment rule"). 28 U.S.C. § 1291; *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981). The Northern District order appealed by MDI is only a final decision as to MDI and the Receiver. The order does not resolve all claims or issues between MDI and CDCR. Regarding MDI's appeal as it relates to CDCR, the Northern District's order does not satisfy the final judgment rule or confer appellate jurisdiction under 28 U.S.C. § 1291.

Assuming arguendo that appellate jurisdiction could be established, MDI does not ask this court to review whether the Northern District had jurisdiction to rule on CDCR's immunity and, if so, remand with instructions to decide the issue. Instead, MDI asks this Court to decide the issue of immunity here in the first instance. (AOB, 51- 56.) This Court should reject MDI's attempt to

circumvent the district court and undermine the standards for appellate review.

Notwithstanding the fact that MDI did not include CDCR in its application, had not intervened in the *Plata* action, and did not file an action in the Northern District, MDI argues that the Northern District had jurisdiction over the issue of CDCR's immunity because "CDCR's immunity . . . directly arises out of the court's Article III equitable jurisdiction to create the receivership." (AOB, 49.) MDI further asserts that this Court should therefore usurp the role of the district court and issue a ruling on its behalf. In support, MDI cites two cases by this Court that reviewed rulings of the district court on legal questions. (AOB 49 -50.) *See Alaska Right to Life Political Action v. Feldman* 504 F.3d 840 (9th Cir. 2007); *Sayles Hydro Assoc. v. Maughan* 985 F.2d 451 (9th Cir. 1993). Unlike MDI, plaintiffs in both actions had filed suits in the district court seeking declaratory and injunctive relief against defendants that were parties to the appeal.^{4/} The district court in each of those actions issued orders granting or denying motions for summary judgment filed by the parties. Neither of those cited cases stands for the proposition that a district

4. In *Alaska Right to Life*, the plaintiffs sought declaratory and injunctive relief regarding the Alaska Code of Judicial Conduct and its enforcement. In *Sayles Hydro Assoc. v. Maughan* 985 F.2d 451 (9th Cir. 1993), the plaintiffs sought declaratory and injunctive relief prohibiting a state agency from requiring a permit for operation of a project for which the federal licensing agency had already issued plaintiffs a license.

court can or must issue an advisory opinion on a legal issue where no action is currently pending between the parties.^{5/} Nor do the cases support MDI's novel theory that the appellate court must decide in the first instance an issue raised (but not decided) in an order that lacks finality. What MDI advocates is not de novo review, but rather the exercise of original jurisdiction by the appellate court in an action where MDI has actively avoided litigating the merits in the federal court and has expressed an intent to use the court's ruling in its continued litigation against CDCR. This would reward parties that find it strategically advantageous to ignore procedural requirements for intervention or to avoid filing an action with the district court and that pursue piecemeal litigation.

If this Court were to determine that the Northern District was incorrect in its assessment that it lacked jurisdiction over a dispute between MDI and CDCR, the matter should be remanded to the Northern District with instructions for it to issue a ruling. If the Northern District issues a ruling that qualifies as a final order and MDI is dissatisfied, it may then appeal the order and seek de novo review of the order by this Court.

5. MDI makes repeated references to a state court action against CDCR that it filed *after* the Northern District's ruling. That fact does nothing to cure the jurisdictional defects in MDI's appeal.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the Eastern District and dismiss for lack of jurisdiction MDI's appeal of the order of the Northern District with regard to CDCR. If the Court reverses the order of the Northern District, this Court should remand to that court to issue a ruling as to whether CDCR is entitled to immunity under these very narrow facts.

Dated: March 9, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(C) because it contains 4,622, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using a WordPerfect word processing program in 14 point Times New Roman font.
Dated: March 9, 2009

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STATEMENT OF RELATED CASES

Appellant MDI submitted a Statement of Related Cases which listed several cases that arise out of *Plata v. Schwarzenegger*, United States District Court for the Northern District of California, No. 3:01-CV-01351-THE. None of these cases however involve the same legal issues pending before the Court in this matter.

Dated: March 9, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: **Medical Development International v. CDCR, et al. (Appeal)**
No.: **08-15759**

I hereby certify that on March 9, 2009, I electronically filed the following document(s) with the Clerk of the Court by using the CM/ECF system:

BRIEF OF APPELLANT CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On March 9, 2009, I have mailed the foregoing document(s) by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 9, 2009, at Sacramento, California.

Brenda Sanders

Declarant

Signature

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