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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

VANGUARD MEDICAL MANAGEMENT BILLING, INC., a California corporation; ONE-STOP MULTI-SPECIALTY MEDICAL GROUP, INC., a California corporation; ONE-STOP MULTI-SPECIALTY MEDICAL GROUP & THERAPY, INC., a California corporation; NOR CAL PAIN MANAGEMENT MEDICAL GROUP, INC., a California corporation; EDUARDO ANGUIZOLA, M.D., an individual, and DAVID GOODRICH, in his capacity as Chapter 11 Trustee,

Plaintiffs,

vs.

CHRISTINE BAKER, in her official capacity as Director of the California Department of Industrial Relations; GEORGE PARISOTTO, in his official capacity as Acting Administrative Director of the California Division of Workers Compensation; and DOES 1 through 10, inclusive.

Defendants.

Case No. **17-cv-00965-GW-DTB**

PLAINTIFFS' RESPONSE BRIEF ON DUE PROCESS ISSUES

Hearing Information:
Date: August 24, 2017
Time: 8:30 a.m.
Place: United States Courthouse, 350 West 1st Street, Los Angeles, CA 90012, Courtroom D, 9th Floor

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I. INTRODUCTION AND PRELIMINARY STATEMENT

This Court issued a detailed 28-page Tentative Ruling on the Plaintiffs' Motion for a Preliminary Injunction in which it instructed the State to identify and explain the procedures that "provide an opportunity to challenge the application of Section 4615 to a given lien holder." (Civil Minutes, Tentative Ruling, Docket No. 40 ("Tentative") at 26.) At oral argument on July 13, 2017, the Court's intention in this regard was clear:

> "So if one assumes that as everybody else is arguing that it is an absolute bar, then, I don't understand how in the way of – if we have one of those providers, that they can do anything because once they go into the attempt to argue it, the response from the worker's compensation board is that you are barred. That is the response. Where do they get an opportunity to make an argument?"

(Reporter's Transcript of Proceedings, July 13, 2017 ("RT") at 10:16-24.) More specifically, the Court asked the State to brief the "question of what is the procedural avenue that the providers have to somehow challenge [the automatic stay] in some way, shape or form." (RT at 12:7-11.)

The Court also permitted the parties to brief the issue of whether Section 4615 interferes with the lien claimants' fundamental right of access to the courts, thus necessitating a strict scrutiny standard of review on Plaintiffs' substantive due process claim. Finally, in response to Plaintiff's offer to present Workers' Compensation Appeals Board (WCAB) hearing representatives as live witnesses, the Court indicated that it would not entertain such evidence, as Plaintiffs' challenge to the statute is a *facial* challenge, not an *as-applied* challenge.[1] (RT at 13:22-14:3.)

Instead of prioritizing and directly addressing the Court's specific

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[1] "[You brought a facial challenge. You haven't brought an as-applied challenge so therefore there is a problem there. If it is facial, why do I want to hear particular instances of what happens because, again, that is not your argument? Your argument is brought on the face of the statute, not as it is applied." (RT 13:22-14:3.)

questions, the State takes issue with the Court's detailed Tentative Ruling and reiterates its initial arguments in this case, not responding to the Court's questions until Page 18 of its brief. The State completely ignored the Court's directive that it need not consider individual WCAB cases in the context of a facial challenge and filed a 15-page declaration of WCAB Chief Judge Paige Levy, along with nearly 100 pages of individual WCAB case files. Notwithstanding the fact that Judge Levy's declaration appears to violate her duties under the California Code of Judicial Ethics,[2] it is still noteworthy because it further exposes the constitutional failures created on the face of Labor Code 4615, as explained in more detail below.

The State has not identified which procedures or avenues are available to a provider whose claims have been "automatically stayed" pursuant to Section 4615 because none exist: there are no regulations, no rules, and no procedural mechanisms for providers to argue (1) that their liens are untainted by any allegations of misconduct and therefore, (2) that they have been misidentified,

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[2] All workers' compensation administrative law judges "shall subscribe to the Code of Judicial Ethics adopted by the California Supreme Court." Cal. Lab. Code § 123.6. Canon 3B(9) of the California Code of Judicial Ethics states: "A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of staff and court personnel subject to the judge's direction and control. This canon does not prohibit judges from making statements in the course of their official duties or from explaining the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity." Plaintiffs submit that to the extent that Judge Levy wanders from merely explaining court procedures to engaging in prohibited public comment—for example, by declaring that "in practical terms, liens are always 'stayed' in every workers' compensation case until the underlying case is resolved" (Levy Decl., ¶ 13)—it is improper. Paragraph 18 of the Levy Declaration, in which Judge Levy purports to assume the role of an advocate by answering the Court's questions to Defendants' counsel for them, is even more inappropriate. Accordingly, because Judge Levy's declaration violates Canon 9B, lacks relevancy, and contains improper opinion, this Court could strike Judge Levy's declaration *sua sponte* if it were so inclined. Plaintiffs opted not to pepper the Court with more paper by filing a separate Motion to Strike.

(3) that their liens are improperly stayed and barred from adjudication before the WCAB. There are no procedures available that would permit lien claimants to argue that they or their liens should be removed from the indicted list, that they have been improperly identified, or that "flags" placed in the Department of Workers' Compensation's ("DWC") Electronic Adjudication Management System ("EAMS")[3] should be removed.

For these reasons and those set forth below, the Plaintiffs urge the Court to expand and adopt its Tentative Ruling and strike down Section 4615. The invalidation of Section 4615 would not harm the public. Indeed, striking down Section 4615 would promote both the administration of justice and patients' access to their chosen medical providers. Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd., 26 Cal. App. 4th 789, 803 (1997) ("it is obviously beneficial to industrially injured workers to have the rights of those providing them with professional services adequately observed and protected"). It will also end the chaos—for the State, providers, lien claimants, WCAB judges, and patients—that has been caused by Section 4615 while leaving intact the longstanding right of applicants, insurers and employers to address fraud. Parties remain able to address and prevent fraud by arguing before the WCAB judges that specific liens result from fraud and should not be paid. (See Beverly Hills Multispecialty, supra, for a discussion of due process when fraud is asserted as a defense.) In the absence of Section 4615, a WCAB judge can exercise his or her full power to adjudicate such claims (a power effectively divested from them by Section 4615, as confirmed by Judge Levy's declaration) and deny payment based on a fraud defense.

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[3] The EAMS system is essentially the court docket of the WCAB. In her Declaration, Judge Levy claims that the EAMS only "flags" liens for "information purposes." (Levy Decl. ¶ 9.) That claim is incorrect: the EAMS docket itself shows such liens are not flagged: they are stayed. (Request for Judicial Notice ("RFJN") ¶ 5.) There are no rules, protocols, training manuals or anything else in writing to suggest that the liens marked as "stayed" on the EAMS are merely "flagged."

Plaintiffs will confine this brief to the boundaries set by this Court at the preliminary injunction hearing: (1) whether Labor Code Section 4615 or any other rules or regulations prescribe procedures that protect indicted providers' procedural due process rights; and (2) the appropriate standard of review on their substantive due process claim (along with the appropriate result of that review). Analysis of these two issues suggests that the Court ought to strike down Section 4615 on both procedural and substantive due process grounds.

II. LABOR CODE SECTION 4615 UNCONSTITUTIONALLY DENIES PROVIDERS THEIR PROCEDURAL DUE PROCESS RIGHT TO PRESENT ARGUMENTS ABOUT THE AUTOMATIC STAY

Labor Code Section 4615 states that "any lien filed by or on behalf of a physician or provider… *shall be* ***automatically stayed*** upon the filing of criminal charges against that provider for an offense involving fraud against the workers' compensation system, medical billing fraud, insurance fraud or fraud against the Medicare or Medi-Cal programs." (Emphasis added.) By the terms of the statute itself, the automatic stay applies regardless of whether the lien has *any* connection at all to pending criminal charges, even if the lien is unrelated to fraud of any sort. The Court asked the State what avenue or procedures are available to a provider to argue that a lien should not be stayed, that a lien does not arise from fraud, or that the provider (or lien claimant) has been improperly stayed. The simple answer to this question is that no such procedure or avenue exists under either the statute or any other rules and regulations. The State purports to answer the Court's queries on page 24 of its brief, relying primarily on Paragraph 18 of Judge Levy's declaration.[4]

[4] Although Plaintiffs' position is that Judge Levy's declaration is improper, that declaration does underscore Section 4615's due process problem, as further explained in Section II.D.

A. The Process Due to the Lien Claimants

In determining the amount of process that lien claimants are due, the court should weigh three factors: (1) the interests of the individual in retaining their property and the injury threatened by the official action; (2) the risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and (3) the costs and administrative burden of the additional process, along with the interests of the government in efficient adjudication. Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Tentative Ruling at 25.

Here, all three of these factors militate in favor of according lien claimants significantly more due process than they have received. First, the lien claimants have a strong interest in their property (to wit, their ability to seek to enforce their liens), which in 100% of cases (as explicitly contemplated by the plain language of Section 4615) arises out of valuable professional services rendered pursuant to the State's provision of the lien proceeding as the exclusive vehicle through which lien claimants may seek payment. As the California Court of Appeal held in Beverly Hills Multispecialty, patients have a strong interest in ensuring that their work injury providers are paid. Second, as demonstrated by Judge Levy's own declaration, there is a substantial risk of error through the procedures established by the State: it has now been confirmed that the creation of both the published list and the EAMS "flags" are accomplished by persons unknown with unknown training using information from sources unknown. There is no statutory authority through which the list and flags can be challenged, again as contemplated by the statute, creating the substantial (and already realized) risk of the erroneous inclusion of providers who have not actually been charged and the automatic stay of liens that the State knows are untainted by fraud. Given what is clear from the language of the statute and the information that Judge Levy has provided about the injustices that have already resulted, the probable value of the additional

procedural safeguards that would be created by the invalidation of Section 4615—which would essentially institute a procedural requirement that some connection to fraud be demonstrated before a lien can be stayed—would be high indeed.

Third, and finally, any costs or administrative burden created by invalidating Section 4615 would be either *de minimis* or non-existent. If Section 4615 were to be invalidated, an insurer who believes that a lien is tainted by fraud could refuse to pay and require a hearing (which insurers already do), inform the WCAB judge of the alleged lien-fraud connection and provide the WCAB judge with evidence of the indictment and the connection between the lien and the charged offense, for example, by showing that the lien pertains to treatment that is the subject of a criminal charge. This is hardly an expensive or burdensome procedure, particularly in light of the interests involved. For that reason, dismantling Section 4615 would do no harm at all: employers and insurers are free to allege, in the context of each case, that a particular lien is void for fraud, and WCAB judges are empowered to continue to adjudicate whether such allegations are meritorious. The invalidation of Section 4615 would not undercut the long-standing defense of fraud to any particular claim. See, e.g., Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd., 26 Cal. App. 4th 789 (1997) (demonstrating WCAB judges' well-established power to prevent the payment of liens infected by fraud by permitting employers and insurers to raise the defense of fraud, provided that lien claimants are notified of the fraud defense consistent with their right to due process).

B. The Statute Does Not Define the Term "Automatic Stay," But the State Has Interpreted It to Cover Non-Charged Entities That Receive No Notice that They Have Been Targeted

After analyzing the interests created by the WCAB and the lien system, this Court noted in its Tentative Ruling that "Defendants do not plainly articulate the procedural effects of Section 4615 on existing liens." Tentative Ruling at 25. The

Court further noted that "the term 'stay' is undefined in the statute or related regulations, and Defendants do not ever explain just what that means with regard to a lien claimant." Id. The Court issued a specific directive intended to enable it to tease out any process that might be available to providers:

> (1) Does the state prevent charged lien holders from appearing and participating in lien conferences and lien trials? (2) Does it present charged lien holders that are approved in those settings? (3) Does it affect the notice rights granted by state regulation? Until those questions are sufficiently answered, the Court would tend to agree with Plaintiffs that Section 4615 affords no due process to charged lien holders.

In short, the Court asked the State where and how and in what shape and form the lien claimants have "opportunity to present reasons why the proposed action should not be taken."

Because the statute does not define the meaning of the "automatic stay," and Judge Levy suggests that being on the list of stayed providers is merely a "flag" and that the liens are not, in fact, "automatically stayed," it is appropriate here to look to the rules of general statutory construction. Putting aside the fact that Judge Levy appears to suggest the WCAB judges somehow have discretion to not enforce the will of the Legislature embodied in the "automatic stay," the first principle of statutory construction is that "[t]he plain meaning of the statute controls, and courts will look no further, unless its application leads to unreasonable or impracticable results." United States v. Leyva, 282 F.3d 623, 625 (9th Cir. 2002). "To determine a word's plain and ordinary meaning, we may refer to standard English dictionaries." United States v. Ezeta, 752 F.3d 1182, 1185 (9th Cir. 2014).

A "stay" is defined as "the postponement or halting of a proceeding, judgment, or the like; an order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding." Black's Law Dictionary (9th ed.) 1548. The term "stay laws" is defined as follows:

> Acts of the legislature prescribing a stay of execution in certain cases, or a stay or foreclosure mortgages, or closing the courts for a limited period, or proceeding that suits shall not be instituted until a certain time after the cause of action arose, or otherwise suspending legal remedies…

https://dictionary.thelaw.com/stay/. Labor Code Section 4615 uses the term "shall" in reference to the stays of proceedings for liens of criminally charged providers. See Cal. Labor Code § 4615(a) (providing that any lien filed by or on behalf of a charged provider "shall" be automatically stayed). "The term 'shall' is usually regarded as making a provision mandatory, and the rules of statutory construction presume that the term is used in its ordinary sense unless there is clear evidence to the contrary." Vietnam Veterans of America v. Central Intelligence Agency, 811 F.3d 1068, 1081 (9th Cir. 2015). Here, there is no evidence that the California Legislature misused the term "shall" or intended it to be interpreted as making the stay optional under any circumstances, contrary to Judge Levy's assertion. In other words, Section 4615's directive that liens "**shall** be automatically **stayed**" upon the filing of criminal charges is abundantly clear. Therefore, Judge's Levy's attempt in her declaration to soften the effect of the clear and plain statutory language should be rejected because she ignores the plain language of this unambiguous statute. Moreover, Judge Levy's anecdotal information about specific cases overlooks the fact that this motion is predicated on a *facial* challenge, not an *as-applied* challenge.

The rules of statutory construction also permit the Court to look at uses of the term "automatically stayed" within the applicable regulatory scheme. See Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context… It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in

the overall statutory scheme… A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, …and fit, if possible, all parts into a harmonious whole…") (citations and quotation marks omitted). With respect to the WCAB Rules of Practice and Procedure, the term "automatic stay" is used in only one other place, namely, Regulation 10782, which governs cases filed by vexatious litigants. If a party is determined, after notice and an opportunity to be heard, to be a "vexatious litigant," that party will be subjected to a pre-filing requirement. If a party files a notice that a declared vexatious litigant is pursuing a claim, then the filing of a notice with the WCAB "shall automatically stay the request for action" until it is determined that the party complied with its pre-filing requirements. 8 C.C.R. § 10782(f). This is the only place in the entire WCAB Rules where the term "automatic stay" is used. Significantly, Regulation 10782 sets forth a detailed, comprehensive scheme that describes the due process procedures to be afforded before a person is adjudged a vexatious litigant, along with a panoply of procedures for the Court to follow after a notice has been filed and before subjecting the purported vexatious litigant to the "automatic stay." In other words, under the workers' compensation system's regulatory scheme, even vexatious litigants are afforded notice and an opportunity to be heard before being "automatically" declared as such. Additionally, any notice that results in the "automatic stay" must be served on all the parties to the proceeding. In contrast, Section 4615 provides no corresponding procedures. There is no hearing afforded before a lien claimant is placed on California Department of Industrial Relations (DIR) public list or is "flagged" on EAMS. There is no due process or notice in the WCAB for a person who has been placed on either of these lists to contest or argue against the application of the "automatic stay."

Worse yet, in a stunning admission, Judge Levy's declaration discloses that anonymous Department of Workers' Compensation staff members have created a clandestine list of entities to which the "automatic stay" provisions of Section 4615

are to be applied. (Levy Decl. ¶ 8.) Judge Levy has distributed this list to her presiding judges "[o]n at least one occasion" (Levy Decl. ¶ 8) for use in imposing lien stays notwithstanding the fact that there is no evidence that any of the entities on that list (other than the indicted providers whose names are published on the DIR website) receive any notice that they have been marked for a lien freeze. Plaintiffs obtained one of these lists through a Public Records Act request, but the list is both under- and overinclusive—it does not include *all* the charged providers as listed on the DIR website, and it includes a variety of entities that are *not* on the published DIR list—showing yet again that the DIR has unconstitutionally shortcut the process in which it stays liens under Section 4615.

C. What Kind of Hearing Does the State Provide?

Another question posed by the Court related to what type, shape, and/or form of hearing is available to stayed lien claimants to dispute any aspect of the application of the stay. This question embodies the analysis that has long been recognized as a fundamental requirement of procedural due process, as eloquently described in Judge Friendly's seminal article "Some Kind of Hearing," 123 U. PENN. L. REV. 1268, 1281 (1975), cited in, inter alia, Kennerly v. United States, 721 F.2d 1252, 1256-1257, 1258 (9th Cir. 1983). Accordingly, the question is as follows: what kind of hearing is afforded to those affected by the "automatic stay" provision of Section 4615?

1. The "hearing" available to automatically stayed lien claimants under Section 4615, which permits them only to confirm their identity, is tantamount to no hearing at all

The State's response to the Court's questions about whether Section 4615 affords lien claimants "some kind of hearing" is set forth on pages 24-25 of its brief. The State's response relies not on any statutory definitions, regulations, procedures or rules, but instead on Paragraph 18 of Judge Levy's declaration. The State makes the following claims:

- Labor Code Section 4615 "does not prevent charged providers and lien claimants from appearing and participating in lien conferences, or in any other type of proceeding in the case." (Oppo. Brief at 24:10-19.)
- WCAB judges "may adjudicate issues concerning the applicability of Section 4615 to a particular lien, lien claimant, provider, etc., i.e., determine whether the statute applies." (Oppo. Brief at 24:12-14.)
- "If a lien is determined to be stayed under the provisions of the statute, no further adjudication as to the merits of the lien would be proper and the lien would remain stayed pending the disposition of the criminal charges. (Oppo. Brief at 24:14-17.)

All this is to say that under Section 4615, the inquiry is limited to the workers' compensation judge asking the hearing representative the name of the relevant provider and then checking to see if that name is on either the DIR list or the other lists the DIR sent directly to Judge Levy (but that are not publicly available). Plaintiffs submit that when the text of a law denies the litigant the right to tell the court anything other than his name, which is the case with Section 4615 both on its face and as interpreted by the Division of Workers' Compensation, that litigant has been denied a meaningful opportunity to be heard.[5]

2. In the vacuum of Section 4615's nonexistent procedural protections, the State's policy is to provide workers' compensation judges with extrastatutory discretion in applying the law

Judge Levy's recitation of procedure in which the WCAB judges are

[5] To the extent that the Court decides to look at individual cases, attached to the Plaintiffs' Request for Judicial Notice ("RJN") are actual minutes from the WCAB that show that the WCAB Judges are effectively barring lien claimants from participation in the lien process. However, Plaintiffs acknowledge and understand that this Court has already stated its initial view that this Motion is being treated as a facial challenge and individual case files are irrelevant to that analysis, so those documents in RJN may be mere surplusage intended to preserve the record on appeal.

supposed to engage to determine whether a lien should be stayed creates another problem for the State: this account of how Section 4615 is being implemented directly contradicts the plain language of Section 4615. Judge Levy claims that because WCAB judges have the power to "hear and determine all issues of fact and law presented," they may determine "whether Section 4615 applies" to a particular case. Judge Levy is wrong for several reasons. First, the Legislature did not give WCAB judges the discretion to determine which liens, which providers or which collectors are subject or not subject to the stay.[6] Judge Levy's position suggests that the judges under her tutelage may circumvent the Legislature's clear directive—that "any liens" are "automatically stayed." Second, except in the event of misidentification, presumably "any" lien of a charged provider is stayed: the statute makes no distinction among fraudulent liens, liens that are alleged to be fraudulent in a separate criminal proceeding, and a provider's potentially thousands of liens in the WCAB system that have never been alleged (in any forum) to be fraudulent. Third, Judge Levy's claim that the liens are merely "flagged" as "possibly" stayed is belied by the EAMS system itself, which clearly states on the docket that, the liens are "stayed" pursuant to Section 4615. (Plaintiffs' Request for Judicial Notice ("RJN") ¶ 5 & Ex. 5.)

If this discretionary regime sounds confusing, that is because it is. Even Judge Levy admits "there may have been some initial confusion among the [WCAB Judges] as to how Section 4615 operates and how it applies to individual cases." (Levy Decl. ¶ 9.) This "confusion" has one simple cause: on its face, Section 4615 is accompanied by no regulations, rules or protocols pursuant to

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[6] Defendants cannot rely on the general rule that a judge has the power to hear all issues before him or her to save Section 4615. The rule that the *specific* (i.e., automatic, nondiscretionary stays of specified providers' liens) controls over the *general* (i.e., a judge's power to hear all issues before him or her) is a well-known canon of statutory construction. United States v. Navarro, 160 F.3d 1254, 1256 (9th Cir. 1998) (so stating).

which lien claimants are provided with any due process at all. Judge Levy seems to suggest that this lack of due process can be cured through "training and instruction," which she expects the Presiding Judges to distribute. (Levy Decl. ¶ 9.) Plaintiffs suggest that without statutory guidance, Judge Levy's extrastatutory "training and instruction" is not the stuff of which due process is made and is no substitute for constitutional safeguards.

D. Judge Levy's Declaration Identifies a New Notice Problem Created by Section 4615: the "Secret List" of Stayed Lien Claimants

In the text of Section 4615, the Legislature directed the DIR's administrative director to "promptly post on the division's Internet Web site the names of any physician or provider of medical treatment whose liens were stayed…" Cal. Lab. Code § 4615(b). The Court has the list before it and can clearly see that only charged, indicted individuals appear on it. However, after the July 13 hearing, Plaintiffs learned of the existence of a "secret list" of lien claimants circulated to the WCAB judges that directed those judges to apply the automatic stay to numerous providers—hundreds of uncharged individuals and entities—who were not included on the publicly disclosed list. Plaintiffs asked counsel for the State to provide the list[7] and received a spreadsheet that includes the names of physicians and numerous entities whose liens are stayed but who are not included on the public list. (RJN ¶ 6 & Ex. 6; see supra § II.B.)

Judge Levy addresses the issue of this "secret list" in Paragraph 8 of her declaration. She admits that the "secret list" includes many entities that are not included in the list that the Legislature directed the DIR to post. This raises an enormous due process issue. What is the procedure by which the DWC staff created this list? Who at the DWC created this list? What criteria did the staff use

[7] The State deemed this request a "public records request" and provided a response, of which this Court may take judicial notice because they are records of the State. (RJN, Ex. 6.)

to determine which entities' liens should be stayed? What procedure exists if a provider, lien claimant or entity, objects or has grounds to contest being placed on that list? How is a provider, lien claimant or entity supposed to learn that he, she, or it has been placed on the list? The secret list—which Judge Levy admits contains providers, collectors and entities that have *not* been criminally charged—was neither published nor distributed to the public, lien claimants or providers. Instead the DWC prepared (and continually updated) this exhaustive list behind closed doors and then Judge Levy distributed them to all of California's WCAB judges.

Judge Levy attempts to soften the existence, creation and impact of these clandestine lists by claiming that they merely resulted in "flagging" entities "as part of a clerical process for the purpose of alerting the [judges] to the possibility that a stay might apply to those lies under Section 4615." (Levy Decl. ¶ 8.) However, the State's Electronic Adjudication Management System (EAMS) records (i.e., the hearing dockets), of which this Court is requested to take judicial notice, tell a different story. The EAMS records shows that entities on the spreadsheet (i.e., the secret list) are not listed as "flagged": they are listed as being subject to a lien "stay" pursuant to Section 4615. (RJN ¶ 6 & Ex. 6.)

The astonishing discovery of the "secret list" raises serious due process issues, the most important of which is the following: What is the procedure or avenue for a provider or entity to claim that they should not be on a list of which they are not even aware and which has been published nowhere? There is no process. Judge Levy makes much of the fact that parties to a workers' compensation cases are entitled and receive notice of all hearings. (Levy Decl. ¶ 18.) However, on its face Section 4615 provides *no* mechanism through which lien claimants such as Plaintiffs One-Stop Medical, One-Stop Therapy, Norcal or Vanguard—or any other entities seeking to enforce their liens—receive advance notice that their liens are to be "automatically stayed" because they "might" be

somehow connected to fraud or one of the charged providers. It appears, based on Judge Levy's explanation of how the system works, that such entities receive notice of a Section 4615 stay based on alleged fraud when the hearing representative enters the hearing room and is informed that his or her client is on the non-published "list" that is used to create EAMS "flags."[8] Prior to that moment, "flagged" lien claimants receive no notice at all that their names appear on a list created by "clerical" staff and placed in EAMS, that their liens are stayed and that the judges have secret spreadsheets that include their names.

As noted in Plaintiffs' opening Supplemental Brief, a comparison of Section 4615's notice provision with that of the Bankruptcy Code is instructive in this case because it provides a stark contrast between a notice regime that provides adequate due process and one that does not. Bankruptcy cases, like cases affected by Section 4615, involve an automatic stay, namely, the automatic stay of collections against the petitioner. Unlike Section 4615 cases, however, in bankruptcy cases there are statutory measures that permit parties to seek relief from a stay and enable the court to review the propriety of the stay. See Bankruptcy Code Section 362(d), cited in Plaintiffs' Supplemental Brief at 5. Moreover, in bankruptcy cases, unlike in Section 4615 cases, the stay is triggered when a party files a "*Notice* of Automatic Stay" (emphasis added), which is served upon and notifies the other parties that their rights have been affected, enabling them to seek relief if the stay is inappropriate. Section 4615 contains no similar mechanism, nor does its text contain any other provision that enables providers to challenge either a secretly mandated stay or the stay of an untainted lien.

[8] In this regard, Plaintiffs again note that Section 4615 turns the presumption of innocence upside down by changing a party's legal position and ability to pursue its liens (which are essentially causes of action that can only be adjudicated before the WCAB) based on unproven criminal charges.

E. Defendants' Citation of Individual Section 4615 Cases to Save the Statute Is Both Inappropriate and Unavailing

At the July 13, 2017, hearing on this matter, the Court clearly indicated that the experiences of lien claimants in individual cases are not relevant to this facial challenge. Nevertheless, Defendants have filed approximately 100 pages of records of individual cases to support their claim that providers' procedural due-process rights are respected under Section 4615. (Levy Decl., *passim* and accompanying exhibits.) Plaintiffs therefore must provide a brief response, which is as follows: none of the cases attached to Judge Levy's declaration stand for the proposition that on the face of Section 4615, charged providers are permitted to argue that their liens are untainted by any alleged misconduct. The cases proffered by Judge Levy involve a variety of issues related to deadlines, the service of lien declarations, and mistaken identities.[9] Significantly, they do *not* involve the issue of whether lien claimants subject to the stay are permitted the opportunity to present *any* reason why the proposed action (i.e., the stay) should not be taken, as is their fundamental right, other than their non-appearance or mistaken inclusion on the list.[10] In any event, those cases, hand-picked out of *hundreds of thousands*

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[9] Plaintiffs note that Judge Levy chose not to provide this Court with records of the many cases in which uncharged providers have been refused the right to demonstrate to the workers' compensation judge that their appearance on either the public list or the secret list of charged providers is in error. Mindful of this Court's admonishment that individual cases are not relevant to this facial constitutional challenge, Plaintiffs did not provide this evidence in this Supplemental Brief, but mention it here only because Defendants chose to raise this issue anyway. To the extent that the Court decides to turn back and review the statute in an as-applied context, Plaintiffs intend to preserve the record for appeal and have submitted a Request for Judicial Notice that demonstrates how the WCAB has closed the courtroom doors to the Plaintiffs and those acting on their behalf. (See RJN, *passim*.) If the Court were to proceed based on the facial challenge, then the documents in the RJN would be (only) as irrelevant as the documents submitted by the State.

[10] And then, only in some cases, and certainly not pursuant to the text on the face of Section 4615.

of liens, demonstrate nothing instructive in the analysis of a facial challenge.

The long explanation proffered by Judge Levy beginning at paragraph 13 of her declaration is similarly unhelpful to Defendants, especially in light of the fact that this case involves a facial challenge. For example, her claim that the Declaration of Readiness to Proceed, Petition, Petition for Removal, and Petition for Reconsideration procedures (see paragraphs 14 and 15 of the Levy Declaration) permits providers to raise "essentially any kind of issue" is not referenced anywhere in Section 4615 or any associated regulations as a procedure through which the "guilt" of a lien will be considered before confirming the automatic stay.

More troublingly, at least part of this "explanation" appears, taking the most charitable view, to be in error: notwithstanding Judge Levy's claim that cases of mistaken identity are easily remedied through "a letter, or even an email" (see paragraph 17), in reality, those remedies have not been afforded to providers and are, in some cases, prohibited by law. (RJN, ¶¶ 3 & Ex. 3 (Division of Workers Compensation Appeals Board Policy and Procedures Manual ("WCAB Policy/Procedures Manual") § 1.0 (letters to a WCAB are *ex parte* and must be reported as violating rules).) The very idea that a lien claimant should avail itself to due process by sending unsolicited letters or emails to a WCAB judge and violating the WCAB's *very first rule* prohibiting *ex parte* communications is show-stopping.[11]

III. STRICT SCRUTINY OF SECTION 4615 REVEALS THAT IT VIOLATES SUBSTANTIVE DUE PROCESS BY DENYING ACCESS TO THE COURTS

As set forth in Plaintiffs' "opening" Supplemental Brief, the appropriate

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[11] The WCAB Policy/Procedures Manual also sets forth the protocol for a WCAB Judge to follow when a party or lien claimant is accused of fraud, reminding the Judge to adhere to the ethical Canons in the Code of Judicial Ethics against commenting on a pending matter. (RJN ¶¶ 1, 2 & Exs. 1, 2 (WCAB Policy Procedure Manual § 1.125, Canon of Judicial Ethics 3.)

standard of review in this case with respect to the substantive due-process claim is strict scrutiny. The statute's failure to provide lien claimants, for an indefinite length of time, with any opportunity to be heard to argue that their liens are untainted and fraud-free represents a barrier to the meaningful exercise of their fundamental right to access to the courts. Under a strict-scrutiny analysis, Section 4615, which on its face stays all liens including those that the State knows are untainted, is not "narrowly tailored" to advance a compelling governmental interest. Therefore, Section 4615 is unconstitutional on its face, and it must be stricken.

A. The Appropriate Standard of Review on Plaintiffs' Substantive Due Process Claim is Strict Scrutiny

Plaintiffs' substantive due process argument is simple: (1) in cases involving a substantive due process claim, strict scrutiny applies when fundamental rights are implicated, (2) access to the courts[12] is a fundamental right, and therefore (3) strict scrutiny is the appropriate standard of review. In opposition to this relatively straightforward reasoning, Defendants suggest that because workers' compensation lien claimants' access to the courts does not involve "marriage, family, procreation, and the right to bodily integrity," it is not a fundamental right. (Oppo. Br. at 18.)

Defendants are incorrect. The annals of American law are replete with cases in a variety of contexts unrelated to "marriage, family, procreation and the right to bodily integrity" observing that access to the courts is a fundamental right. See, e.g., Guttman v. Khalsa, 669 F.3d 1101, 1112, 1112 n.2, 1117, 1118 (10th Cir.

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[12] Before continuing with their substantive due-process analysis, Plaintiffs would like to take this opportunity to clarify a foundational issue: to wit, whether the apparatus established by the State to adjudicate workers' compensation cases is a "court." As this Court appropriately noted on page 2 of the Tentative Ruling, the WCAB is "one of California's regularly constituted courts of law…" (Tentative Ruling at 2.)

2012) (in case involving Americans with Disabilities Act, repeatedly noting that access to the courts is a fundamental right); Gunter v. Morrison, 497 F.3d 868, 874 (8th Cir 2007) (in retaliation case involving qualified-immunity issue, noting that "free and unhampered" access to the courts is a fundamental right); Garcia v. Santana, 174 Cal.App.4th 464, 472, 476 (2009) (confirming in landlord-tenant matter involving the propriety of an attorney fee award that access to the courts is a fundamental right).[13] In other words, Defendants' proposition that the fundamental right of access to the courts becomes somehow un-fundamental based on the subject matter of the case is insupportable.[14]

Moreover, many cases since Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) have demonstrated that Albright did *not* categorically deny substantive due process protection to fundamental rights not involving "marriage, family, procreation" and the like. Indeed, numerous of these cases have arisen in the area of property rights and other issues unrelated to marriage, family, or procreation. See, e.g., BMW of North America v. Gore, 517 U.S. 559, 574-75, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (punitive damages in tort case violated substantive due process right not to be arbitrarily deprived of property); State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 412, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (same); Engquist v. Oregon Department of Agriculture,

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[13] Moreover, as noted in Plaintiffs' opening supplemental brief, Section 4615 on its face denies providers the right to demonstrate that individual liens are untainted by fraud. In other words, it violates the presumption of innocence, which is also a fundamental right. See, e.g., Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895).

[14] At least one district court in the Ninth Circuit has held that the 2015 case of Obergefell v. Hodges, __ U.S. __, 135 S.Ct. 2584, 2597-98, 2605-06, 192 L.Ed.2d 609 (2015) has substantially expanded the federal courts' ability to strike down a state statute for reasons of substantive due process, "reinvigorat[ing]" the broader notion of substantive due process that once held sway. U.S. Bank, N.A. v. SFR Investments Pool, 124 F.Supp.3d 1063, 1072-1073 (D. Nev. 2015).

478 F.3d 985, 996 (9th Cir. 2007) (plaintiff stated a claim for substantive due process violation in alleging that state defendant's actions prevented her from practicing her profession).

Next, Defendants argue that this case is not about access to the courts, but about Plaintiffs' right to "immediately enforce and collect on their liens." Defendants do not cite any page of any brief filed by Plaintiffs for this claim, because it is untrue. As Plaintiffs have repeatedly indicated, their objection to Section 4615 is that it does not allow them meaningful access to the courts (here, the workers' compensation court system established by the State as the exclusive forum in which lien claims may be heard) to enforce their untainted liens. Plaintiffs are not demanding "immediate" enforcement and collection: they merely wish to participate in the lien-enforcement process on their untainted liens in the same manner as any other holder of an untainted lien, and to have some kind of chance to argue about the application of Section 4615 to any given liens.

Finally, Plaintiffs wish to address Defendants' suggestion that under Albright, fundamental rights that are provided through an "explicit textual source of constitutional protection" are unworthy of substantive due process protection. (Oppo. Br. at 21.) First, Plaintiffs note that only four Justices joined this part of the Albright opinion, casting doubt on its precedential value. Second, the explicit text of Defendants' brief betrays their misunderstanding of the application of what Albright said to this case. Defendants are correct that Albright (at least the plurality of Justices who signed on to this portion of Albright) stated that substantive due process analysis is inappropriate if a particular constitutional amendment "provides an explicit textual source of constitutional protection against a particular sort of government behavior." Albright, 510 U.S. at 273, cited in Oppo. Br. at 21. Defendants are wrong to assert that Plaintiffs ever argued that their access to the courts is the subject of "explicit textual" protection. What Plaintiffs actually contend is that access to the courts is *derived* from the First

Amendment, which does not explicitly mention access to the courts. U.S. Const. Amendment 1. Indeed, a diligent search of the case law uncovered no case in which the "more-specific-provision" rule has been used by any court in the Ninth Circuit to deny a substantive due process claim based on denial of access to the courts. Third, the aspect of the right of access to the courts that requires that the opportunity to access the courts must be at a meaningful time and in a meaningful manner is derived from the due process protection of the Fifth Amendment—not the First Amendment. Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

B. Section 4615 Effectively Denies Plaintiffs Access to the Courts

Defendants next argue that Plaintiffs have not been denied access to the courts because they are permitted to "bring a challenge to the stay's application" in the workers' compensation proceeding. (Oppo. Br. at 21.) This argument is disingenuous for what it does not say: although Plaintiffs might be allowed by some judges to "challenge the stay's application" to the extent that they are (sometimes) permitted to inform the workers' compensation judge that they are improperly included on "the list," there is no procedure giving anyone notice of this method; for this reason, they are not allowed to mount any other type of challenge to the stay of their liens, most notably including the challenge that the lien at issue is unconnected to any fraudulent activity. (RJN, ¶ 5; see also Labor Code § 4615, *passim*.) As a technical matter, are providers permitted to enter the hearing room? Yes. But what Section 4615 does—and this is apparent from the face of the law—is to metaphorically slap a piece of duct tape over charged providers' mouths, to be removed only long enough to answer the question "Have you been indicted or not?" Under the plain text of Section 4615, providers have no right to demonstrate to the WCAB that the liens they seek to enforce are unrelated to any alleged misconduct, that the application of the stay to their untainted liens

violates the presumption of innocence or any other fundamental right, or that the stays are inappropriate for any other reason.

This cramped, literalist interpretation of Plaintiffs' right to access the courts conflicts with the well-established understanding throughout the American court system that a merely formal "right of access" to enter a courtroom[15] is insufficient to vindicate a litigant's access right: instead, the right of access encompasses a *meaningful* right of access pursuant to which litigants are permitted (within reason) to make claims based on the law and the facts—for example, that the application of the stay to an untainted lien would be inappropriate. Cf. Ryland v. Shapiro, 708 F.2d 967, 972 (5th Cir. 1983) (in civil rights case in which plaintiffs alleged that state officials interfered with their right to institute wrongful death suit, holding that mere formal right of access to the courts does not pass constitutional muster; access must be adequate, effective, and meaningful and that the delay caused by the defendants was prejudicial to the plaintiffs' chances of recovery because of the issue of stale evidence, the fading of material facts in the minds of potential witnesses, and the potentially greater expense of litigating such an action); Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998) (when plaintiffs can show that their non-frivolous claims had been or would be blocked by restrictions that violated the Constitution, they have standing to assert denial of access to the courts in violation of their due process rights); May v. Rich, 531 F.Supp.2d 998, 999 (C.D. Ill. 2008) (right of access to the courts means that litigant has the right to pursue legal redress for claims that have a reasonable basis in law or fact; also noting that the right to access to the courts is protected by both the right to petition and the right to substantive due process); Matter of N.C. Trading, 66 C.C.P.A. 11, 21 n.28 (U.S. Ct. Customs and Pat. Appeals 1978) (right of access to the courts is a matter of due

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[15] This right includes administrative hearing rooms. See, e.g., California Teachers Ass'n. v. State of California, 20 Cal.4th 327, 335 (1999) (right of access to the courts extends to the constitutional right to petition administrative tribunals).

process in that the access must be at a meaningful time and in a meaningful manner).

C. Section 4615 Cannot Survive Strict Scrutiny

Because, as set forth above, meaningful access to the courts is a fundamental right that is infringed by Section 4615, the law must withstand this Court's strict scrutiny or be invalidated. The strict scrutiny standard is as follows:

> Under the doctrine of substantive due process, when the government infringes a "fundamental liberty interest," the strict scrutiny test applies and the law will not survive constitutional muster "unless the infringement is narrowly tailored to serve a compelling state interest."

Dragovich v. U.S. Dept. of the Treasury, 848 F.Supp.2d 1091, 1104 (N.D. Cal. 2012), citing Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 139 L.Ed.2d 772 (1997).

Section 4615 cannot survive this level of scrutiny. Although the State argues that Labor Code Section 4615 was intended to combat fraud, it freely admits that on its face, the law automatically stays "any lien" filed by or on behalf of a charged provider, even if there is no allegation anywhere that the given lien is tainted with an allegation of fraud. There are many ways in which the State could have designed a statute to achieve its stated goals. For instance, it could have stayed only those liens that are identified and the subject of a criminal proceeding. It even could have chosen to aggressively enforce its *existing* rules and procedures permitting defenses of fraud or changed the standard of proof for those defenses. The law as it stands provides that liens can *always* be challenged on the grounds that they are fraudulent, as long as due process is observed. Alternatively, it could have adapted the existing procedure found in Labor Code Section 139.21, pursuant to which a workers' compensation judge determines whether individual liens filed by a convicted provider are the product of fraud and therefore unenforceable. The State did none of these things. Indeed, the statements of Defendant Christine Baker reported in Plaintiffs' Opening Brief indicate that the intention was not to

combat fraud, but instead to obliterate an army of liens with a single shot, to the benefit of California prosecutors and the powerful insurance lobby. Even if it was not the intention to strike the liens with a single shot, it certainly is the effect of Section 4615 pursuant to its plain text. This is hardly narrow tailoring, regardless of the importance of the interest proffered by the State.

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court GRANT the request for a Preliminary Injunction by entering an order that Section 4615 is invalid and prohibiting the Defendants from enforcing it.

THE ARMENTA LAW FIRM, A.P.C.

Dated: August 15, 2017

By /s/ M. Cris Armenta
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SULMEYER KUPETZ APC

Dated: August 15, 2017

By /s/ Mark Horoupian
Mark Horoupian
Attorneys for David Goodrich, Chapter 11 Trustee

CERTIFICATE OF SERVICE

Case Name: Vanguard Medical Management, et al. vs. Christine Baker, et al.

Case No. 5:17-cv-00965

I hereby certify that on August 15, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS' RESPONSE BRIEF ON DUE PROCESS ISSUES

I certify that ALL participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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 August 15, 2017 in Manhattan Beach, CA.

__/s/ Heather Rowland___
Heather Rowland