No. _____

IN THE

Supreme Court of the United States

ANGELOTTI CHIROPRACTIC, INC., ET AL.
Petitioners,

v.

CHRISTINE BAKER, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under California's no-fault workers' compensation system, employers are required to provide medical treatment and disability benefits to employees who suffer work-related injuries. In exchange, injured workers generally may not sue in tort for work-related injuries. If a medical provider treats an injured worker and the employer or its insurance carrier refuses to pay the provider's claim, the provider may then file a "workers' compensation lien" in connection with the employee's workers' compensation case.

Relying on their right to obtain reimbursement through the filing of workers' compensation liens, doctors, chiropractors, pharmacies, interpreters, photocopy services, and other businesses have provided billions of dollars' worth of valuable medical care, medications, and related goods and services to California's injured workers.

In late 2012, California enacted a law known as SB863, which imposed an unprecedented, retroactive $100 "activation" fee on each and every pending lien held by certain providers. All pre-existing liens for which the $100 "activation" fee was not paid by December 31, 2013 were to be "dismissed by operation of law." Because providers are precluded from seeking compensation in any other way, dismissal of their liens results in the complete forfeiture of the provider's claims.

In sustaining the retroactive lien activation fee from challenge under the Takings Clause, the Ninth Circuit held, as a matter of law, that workers'

compensation liens are merely inchoate unsecured claims, and that such claims do not amount to a property interest protected by the Takings Clause.

The question presented is whether claims that have not yet been reduced to final judgment are "property" protected by the Takings Clause of the United States Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Angelotti Chiropractic, Inc., dba Taft Chiropractic; Mooney & Shamsbod Chiropractic, Inc.; Christina Arana & Associates, Inc.; Joyce Altman Interpreters, Inc.; Scandoc Imaging, Inc.; Buena Vista Medical Services, Inc.; and David H. Payne, M.D., Inc., d/b/a Industrial Orthopedics Spine & Sports Medicine. There is no parent corporation or publicly held corporation with more than 10% ownership of any of the Petitioners.

Respondents are Christine Baker, Director of the California Department of Industrial Relations; Ronnie Caplane, Chair of the Workers' Compensation Appeals Board; and Destie Lee Overpeck, Administrative Director of the California Division of Workers' Compensation within the California Department of Industrial Relations.

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The Ninth Circuit's decision is reported at 791 F.3d 1075 (9th Cir. 2015). The district court's decision is not reported but is included in the Appendix.

JURISDICTION

The Ninth Circuit entered judgment on June 29, 2015, and denied Petitioners' petition for rehearing and rehearing *en banc* on October 8, 2015. App. 30-31. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

The challenged provisions of SB863, codified at California Labor Code § 4903.06, provide in pertinent part:

> 4903.06. (a) Any lien filed pursuant to subdivision (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien prior to January 1, 2013, shall be subject to a lien activation fee. . . .
>
> (1) The lien claimant shall pay a lien activation fee of one hundred dollars ($100) to the Division of Workers' Compensation on or before January 1, 2014. . . .

(2) The lien claimant shall include proof of payment of the filing fee or lien activation fee with the declaration of readiness to proceed.

* * *

(4) All lien claimants that did not file the declaration of readiness to proceed and that remain a lien claimant of record at the time of a lien conference shall submit proof of payment of the activation fee at the lien conference. If the fee has not been paid or no proof of payment is available, the lien shall be dismissed with prejudice.

(5) Any lien filed pursuant to subdivision (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien prior to January 1, 2013, for which the filing fee or lien activation fee has not been paid by January 1, 2014, is dismissed by operation of law.

(b) This section shall not apply to any lien filed by a health care service plan licensed pursuant to Section 1349 of the Health and Safety Code, a group disability insurer under a policy issued in this state pursuant to the provisions of Section 10270.5 of the Insurance Code, a self-insured employee welfare benefit plan, as defined in Section 10121 of the Insurance Code, that is issued in this state, a Taft-Hartley health and welfare fund, or a publicly funded program providing medical benefits on a nonindustrial basis.

STATEMENT OF THE CASE

A. Overview Of The California Workers' Compensation System

Workers' compensation systems are designed to provide treatment and compensation for job-related injuries in return for a limit on the remedies that might otherwise be available under traditional tort law. *See Barth v. Firestone Tire & Rubber Co.*, 673 F. Supp. 1466, 1470-71 (N.D. Cal. 1987). California was one of the first states to enact a workers' compensation law, which it did under the authority of a 1911 amendment to the state constitution. 1-1 Rassp & Herlick, *California Workers' Compensation Law* § 1.01 (Lexis 2013) ("Rassp & Herlick"); Cal. Const. art. XIV, § 4.

California's workers' compensation law requires employers to provide medical care to their workers for job-related injuries. Cal. Lab. Code § 3600; Rassp & Herlick § 1.03[1]. Covered medical treatment is sometimes provided through an employers' Medical Provider Network ("MPN") or an approved managed-care program called a Health Care Organization ("HCO").

An employer may fail to provide adequate medical treatment for a variety of reasons. The employer may claim the employee's injury was not work-related and deny treatment on that basis. Alternatively, the care available through the employer's HCO or MPN may not be sufficient to treat a particular condition, or the employer may contend certain treatments are medically unnecessary. *See McCoy v. Indus. Accident Comm'n*, 410 P.2d 362, 365 (Cal. 1966).

In such situations, a worker may be forced to seek medical care on his or her own. If the self-procured medical care is "reasonably required to cure or relieve the injured worker from the effects of his or her injury," the employer is liable for the costs of those services. Cal. Lab. Code § 4600(a).

In addition to medical services, an employee may also need ancillary services in connection with his treatment, such as the presence of an interpreter during a medical examination or photocopying of medical and employment records. These expenses are also compensable as part of a workers' compensation claim. Rassp & Herlick §§ 4.05, 4.07.

An employee may also obtain "medical-legal" services, which are costs incurred "for the purpose of proving a contested [workers' compensation] claim." Cal. Lab. Code § 4620(a); *Adams v. Workers' Comp. Appeals Bd.*, 555 P.2d 303, 305 (Cal. 1976). Medical-legal services can include "X-rays, laboratory fees, other diagnostic tests, medical reports, medical records, medical testimony, and, as needed, interpreter's fees by a certified interpreter." Cal. Lab. Code § 4620(a).

B. Workers' Compensation Liens

When a worker who suffered an injury covered by the workers' compensation system obtains medical services, ancillary services related to that medical treatment, or medical-legal services, the service provider is legally prohibited from seeking payment directly from the injured worker. Cal. Lab. Code § 3751(b). The service provider also cannot commence a civil action against the responsible employer or its

insurance carrier. *Perrillo v. Picco & Presley*, 157 Cal. App. 4th 914 (Cal. Ct. App. 2007). If the responsible employer or its insurance carrier does not voluntarily pay the service provider's bill, the only way in which the service provider can seek payment is through the filing of a workers' compensation lien.

For decades, medical providers and other businesses have provided services to injured workers without immediate payment in reliance on their legal right to seek compensation through the workers' compensation lien procedure. *See* Pamela J. Foust, *California Lien Claims* §§ 1:11, 2:04 (4th ed. 2012).

In order to pursue a lien claim, the provider files a form with the Workers' Compensation Appeals Board ("WCAB") and attaches an itemized statement of charges. Rassp & Herlick § 17.10. At that point, the claimant has the right to participate in the workers' compensation proceedings (called the case-in-chief) to protect its property interest. *Id.* § 17.111 [5].

Liens are not addressed until after the resolution of the worker's case-in-chief, at which time a "lien conference" is held. *Id.* § 17.113. If disputed issues remain, a "lien trial" will then conducted by an administrative law judge, subject to appeal to the WCAB. *Id.*

The administrative law judge and WCAB generally have no discretion in determining whether a provider is entitled to reimbursement, or the amount thereof. The requirements that must be met in order to obtain reimbursement are simple and objective. A provider of medical services, or ancillary services related to medical treatment, is entitled to

compensation if it prevails in establishing that the worker was employed by the responsible employer, that the worker suffered an industrial injury, and that the treatment was reasonably required to cure or relieve the effects of the injury. Cal. Lab. Code. §§ 3600, 4903(b). In most cases, the amount of reimbursement is governed by an Official Medical Fee Schedule ("OMFS") adopted by the Department of Industrial Relations. Cal. Lab. Code § 5307.1. In other cases, the provider is entitled to a reasonable fee determined by reference to the provider's usual fees and the usual fees of other providers in the same geographical area. *Kunz v. Patterson Floor Coverings, Inc.*, 67 Cal. Comp. Cas. 1588 (2002).

A provider of medical-legal services is entitled to payment on his or her liens regardless of whether the injured worker ultimately prevails on any aspect of his or her workers' compensation claim. A provider of medical-legal services is entitled to compensation so long as the services were "reasonably, actually and necessarily incurred," Cal. Lab. Code § 4621, "for the purpose of proving or disproving a contested claim." Cal. Lab. Code. § 4620.

Prior to the enactment of SB863, workers' compensation liens were fully alienable and transferable.[1] *Manriquez v. Adams*, 133 Cal. Rptr. 2d 449, 452 (Cal. Ct. App. 2003). Indeed, given the long time it generally takes for lien claims to be resolved, providers often sold or factored their liens to

[1] SB863 severely restricts the right to assign workers' compensation liens. Cal. Lab. Code § 4903.08.

investors to obtain cash flow to fund their businesses.[2]

C. Senate Bill 863

Senate Bill 863 was enacted in the fall of 2012, and became operative on January 1, 2013. 2012 Cal. Stat. Ch. 363. In response to a purported "crisis" of backlogged liens, SB863 included measures not only to reduce future lien filings, but also to cause existing liens to be forfeited.

To reduce future lien filings, SB863 required independent providers of services to workers' compensation claimants to pay a $150 per-lien filing fee on all *new* workers' compensation liens.[3] Cal. Lab. Code § 4903.05(c). To help clear the backlog of existing liens, SB863 required providers to pay a $100 per-lien "activation" fee to preserve each of their *preexisting* liens. Cal. Lab. Code § 4903.06(a)(1). The activation fee applies to all liens filed prior to January 1, 2013, regardless of how long ago the liens were filed or the services were provided. *Id.*

If a lienholder does not pay the activation fee by the time of the lien conference, the lien "shall be dismissed with prejudice." Cal. Lab. Code

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[2] *See, e.g.,* DePaolo's Work Comp World, *CA Liens…Again - Entrepreneurs See Opportunity Unfortunately* (August 15, 2011), available at www.daviddepaolo.blogspot.com/2011/08/ca-liensagain-entrepreneurs-see.html.

[3] The validity of the $150 filing fee for new liens was not challenged in this action. This action is limited to the constitutionality of the retroactive $100 "activation" fee for pre-existing liens.

§ 4903.06(a)(4). Additionally, if the lienholder does not pay this fee by January 1, 2014, the lien is to be "dismissed by operation of law." Cal. Lab. Code § 4903.06(a)(5).

The lien activation fee is not required of all lienholders. SB863 specifically exempts from the activation fee those entities most able to pay it: HMOs, insurance companies, and benefits plans sponsored by employers or labor unions. Cal. Lab. Code § 4903.06(b). By virtue of these exemptions, SB863 specifically targets for forfeiture the liens of independent providers to workers' compensation claimants, which are mostly small family-owned businesses such as the Petitioners.

There is no precedent for SB863's retroactive "activation" fee in California or elsewhere. Nor was there any advance notice prior to the enactment of SB863 that such a fee might retroactively be imposed in the future.

The lien activation fee is not refunded or shifted to the responsible employer if the lienholder ultimately prevails on its lien claim. The only opportunity to recover the activation fee is provided in Labor Code § 4903.07(a), which is similar to the offer of judgment procedure under Federal Rule of Civil Procedure 68. In order to recover the lien activation fee, a lienholder must make a comprehensive written offer to settle, that offer must be rejected, and the lienholder must then litigate his claim and prevail in an amount exceeding the previous offer of settlement. Cal. Lab. Code § 4903.07(a). Unlike court filing fees, which are

automatically recovered by the prevailing party, this is a complex procedure that necessarily requires a lienholder to offer to settle for less than the true value of the lien.

D. The District Court's Decision

Petitioners initiated this action to challenge the constitutionality of SB863's discriminatory, retroactive "activation" fee. In their complaint, Petitioners alleged that SB863 violated the Takings Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution.

The district court granted Respondents' Rule 12(b)(6) motion to dismiss Petitioners' takings and due process claims. However, the district court denied Respondents' motion to dismiss as to the equal protection claim, and issued a preliminary injunction against the enforcement of the lien activation fee on the basis of the equal protection claim, finding that the discrimination between independent providers and HMOs, insurance companies and other exempt entities lacked any rational basis.

In granting the preliminary injunction, the district court concluded that Petitioners "are likely to suffer grievous harm, if not outright elimination" as a result of SB863's retroactive lien activation fee. App. 70. The district court explained that because each of the Petitioners hold thousands of liens accumulated over many years (as many as 21,000 in the case of one pharmacy, requiring a total of $2.1 million in activation fees), "Plaintiffs' finances threaten to be stretched to – or past – the breaking point if they are

to pay all of the fees that would be due." App. 69. "Either they must pony up scores, or hundreds, or thousands, of $100 fees, or they simply lose their liens. These liens are, in essence, accounts receivable for Plaintiffs, at least some of which have purportedly been used . . . to secure business financing." App. 69-70.

With respect to the takings claim, the district court concluded that under Ninth Circuit law holders of workers' compensation liens have no property interest protected by the Takings Clause. The district court distinguished a well-established line of decisions of this Court holding that liens are property protected by the Takings Clause. *United States v. Security Indus. Bank*, 459 U.S. 70, 76 (1982) (lien secured by interest in household furnishings); *Armstrong v. United States*, 364 U.S. 40, 46 (1960) (lien in boat hull); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (mortgage lien); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S. Ct. 2586, 2601 (2013) (explaining that the Court has "repeatedly held that the government takes property when it seizes liens") (*citing Armstrong*, 364 U.S. at 80). The district court distinguished these cases by arguing that recovering on any particular lien is contingent on certain determinations, and that workers' compensation liens are thus really more in the nature of a "chose in action." App. 40-42. The district court specifically noted that under Ninth Circuit law, "a cause of action" that has not led to a final judgment "falls short of a protected property interest for purposes of a Takings claim." App. 42.

Having concluded that workers' compensation liens are not property interests protected by the Takings Clause, the district court did not proceed to apply the *Penn Central* factors to determine whether SB863's retroactive activation fee resulted in a regulatory taking. App. 51. The district court noted, however, that were it to reach the *Penn Central* factors, "Plaintiffs would appear to have a strong argument in connection with the 'economic impact' and 'interference with investment-backed expectations' factors (along with any retroactivity factor)" and that "a Rule 12(b)(6) dismissal would likely be much more difficult for Defendants to obtain." App. 44 at n.9.

E. The Ninth Circuit's Decision

In a published opinion, the Ninth Circuit affirmed the dismissal of Petitioner's takings claim. *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1081 (9th Cir. 2015). Like the district court, the Ninth Circuit distinguished this Court's decisions holding that liens are property protected by the Takings Clause. The panel reasoned that *Security Industrial Bank*, *Armstrong* and *Radford* all involved "liens secured by a particular piece of property" whereas workers' compensation liens are "unsecured" and merely "act as a placeholder for a possibility of a future recovery in a lien trial." App. 16.

Like the district court, the panel then held that claims "are not property interests protected by the Takings Clause" and that claims do "not vest until reduced to a final judgment." App. 14-15.

The Ninth Court vacated the preliminary injunction and dismissed Petitioners' equal protection claim on the ground that the discrimination caused by exemptions to the activation fee survived rational basis review. App. 21-26.[4]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case implicates a recognized split of authority on a fundamental question of federal constitutional law. As explained in the Second Edition of American Jurisprudence, "some courts have held that a cause of action becomes a vested property interest that is protected by the Takings Clause as soon as it accrues and so has that status even before the issuance of a final judgment." 26 Am. Jur. 2d Eminent Domain § 126 (2015). However, there is "contrary authority finding that, although a cause of action is a species of property, a party's property right in any cause of action does not vest for Takings Clause purposes until a final unreviewable judgment is obtained." *Id.*

The Federal Circuit and Court of Claims, along with the Alaska Supreme Court, have expressly adopted the former rule, that claims are protected by the Taking Clause once they have accrued. The Ninth and First Circuits, on the other hand, have expressly adopted the later rule, that claims are not protected

[4] The Ninth Circuit did not dispute any of the district court's findings regarding the severe impact the activation fee would have on Petitioners.

by the Takings Clause until reduced to a final, unreviewable judgment.

This split of authority on an important, fundamental question of federal constitutional law is squarely presented in this case. The district court and Ninth Circuit both held that despite their name, workers' compensation liens are in reality mere unsecured claims. App. 14, 16, 40, 42. Otherwise, they would have been bound to follow this Court's prior decisions holding that liens are property interests protected by the Takings Clause. *See Koontz*, ___ U.S. ___, 133 S. Ct. at 2601; *Security Indus. Bank*, 459 U.S. at 76; *Armstrong*, 364 U.S. at 46; *Radford*, 295 U.S. 555.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A RECOGNIZED SPLIT OF AUTHORITY ON THE QUESTION WHETHER A CLAIM THAT HAS NOT YET BEEN REDUCED TO FINAL JUDGMENT IS A PROPERTY INTEREST PROTECTED BY THE TAKINGS CLAUSE

A. The Ninth And First Circuits Have Held That A Claim Is Not A Property Interest Protected By The Takings Clause Until Reduced To A Final, Unreviewable Judgment

The Ninth Circuit has "squarely held that although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." *Bowers v. Whitman*, 671 F.3d 905, 914 (9th Cir. 2012) (quoting *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th

Cir. 2009), in turn quoting *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001)); *see also Fields v. Legacy Health Sys.*, 413 F.3d 943, 956 (9th Cir. 2005) ("Causes of action are a species of property protected by the Fourteenth Amendment's Due Process Clause. However, a party's property right does not vest until a final unreviewable judgment is obtained.") (citation, internal quotation marks, and emphasis omitted); *Austin v. City of Bisbee*, 855 F.2d 1429, 1435 (9th Cir. 1988) (holding that a cause of action "is inchoate and affords no definite or enforceable property right until reduced to final judgment") (citation and internal quotation marks omitted).

The First Circuit has unequivocally adopted the same view. *See Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269, 273 n.11 (1st Cir. 1993) ("It is well established that a party's property right in a cause of action does not vest 'until a final, unreviewable judgment has been obtained.'") (quoting *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986)).

Although they have not specifically addressed the issue in the context of a takings claim, the Tenth and Eleventh Circuits appear to follow the same view. *See Salmon v. Schwarz,* 948 F.2d 1131, 1143 (10th Cir. 1991); *Sowell v. American Cyanamid Co.,* 888 F.2d 802, 805 (11th Cir. 1989).

B. The Federal Circuit, Court Of Claims And Alaska Supreme Court Have Reached The Opposite Conclusion, Holding That A Claim Is A Property Interest Protected By The Takings Clause Even Before It Is Reduced to Judgment

The Federal Circuit squarely addressed the question whether claims that have not yet been reduced to final judgment are property in interests protected by the Takings Clause in *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). The issue in that case was whether the claimants pleaded viable takings claims based on the United States' actions in compromising their claims against Mexico. The Federal Circuit held that "a legal cause of action is property within the meaning of the Fifth Amendment" and that the plaintiffs "properly alleged possession of a compensable property interest" by alleging that the United States "took away their legal right to sue for compensation." *Id.* at 1481 (citing *Cities Servs. Co. v. McGrath*, 342 U.S. 330, 335-36 (1952) and *Ware v. Hylton*, 3 U.S. 199, 245 (1796)).

The Federal Circuit reached the same conclusion in *Abrahim-Youri v. United States*, 139 F.3d 1462, 1465 (Fed. Cir. 1997) ("We agree with plaintiffs that their property rights-their choses in action against Iran-were extinguished when the Government espoused and settled their claims.").

The Court of Federal Claims has followed this line of authority, as recently as October 29, 2015, holding that causes of action not yet reduced to final

judgment constitute property interests protected by the Takings Clause. *See Alimanestianu v.* United *States*, __ Fed. Cl. __, No. 14-704C, 2015 WL 6560537 (Ct. Claims Oct. 29, 2015) (wrongful death claim against Libia held to be property interest protected by Takings Clause); *Aureus Asset Managers, Ltd. v. United States*, 121 Fed. Cl. 206 (Ct. Claims 2015) (claims for indemnification for losses sustained in insuring aircraft destroyed by Libya in terrorist attacks, constituted property interest protected by Takings Clause).

Even before the Federal Circuit's decision in *Alliance of Descendants of Texas Land Grants,* the Court of Federal Claims had held that claims are property interests protected by the Takings Clause. *See Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (Ct. Claims 1983) (Kozinski, J.) (holding that a corporation's claim against the People's Republic of China was a property interest protected by the Takings Clause). Indeed, in *Shanghai Power*, the Court of Federal Claims held that claims for compensation "will be recognized as property for purposes of the fifth amendment unless that interest is devoid of a legally enforceable right or recognition of a property interest would contravene public policy." *Id.*, at 240.

The Alaska Supreme Court has similarly held that causes of action become property interests protected by the Takings Clause as soon as the claim accrues. In *Hageland Aviation Services, Inc. v. Harms*, 210 P.3d 444 (Alaska 2009), the Alaska Supreme Court held that "a cause of action becomes a vested property interest that is protected by the

takings clause as soon as it accrues and so has that status even before the issuance of a final judgment." *Id.* at 449. The court went on to reiterate—in terms that are precisely the opposite of the language of applicable Ninth Circuit decisions—that "claims need not have been reduced to final judgment to create vested property interests that are protected by the takings clause." *Id.*

The Sixth Circuit appears to follow the same view. *See Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1367 (6th Cir. 1984) ("A litigant has no vested property right in a cause of action until it accrues.").

C. The Conflict Should Be Resolved Now, Because The Federal Circuit, Court Of Claims And Ninth Circuit Are Especially Important Courts For Takings Claims

It does not make sense to wait for further percolation to resolve this important conflict. The Federal Circuit and Court of Federal Claims are especially important courts with respect to the resolution of takings claims. Under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction over any claim against the United States for money damages exceeding $10,000 that is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). As a result, takings claims against the United States seeking money damages

generally "must be brought to the Court of Federal Claims in the first instance." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998). Appeals from decisions of the Court of Federal Claims go to the Federal Circuit. 28 U.S.C. § 1295(a)(3).

Because of its vast geographic reach, including the State of California, the Ninth Circuit undoubtedly has appellate jurisdiction over more takings claims than any other regional circuit. Indeed, this Court has not shirked from granting certiorari to review the Ninth Circuit's takings decisions even in the absence of intercircuit conflict. *See, e.g., Horne v. Department of Agriculture*, ___ U.S. ___, 133 S.Ct. 2053 (2013) (reversing Ninth Circuit decision holding that taking of portion of raisin crop did not amount to a taking).

II. CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE NINTH CIRCUIT'S EXTREME POSITION IS CAUSING PROFOUND HARM TO CONSTITUTIONALLY PROTECTED INTERESTS

One commentator has concluded that the Ninth Circuit's "extreme view" that claims do not constitute property interests protected by the Takings Clause until reduced to final, non-reviewable judgments "is probably wrong, at least as a matter of history, logic, analogy, and doctrine." Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 Hastings Const. L.Q. 373, 392 (Spring 2009).

By holding that workers' compensation liens and other claims are not property protected by the Taking Clause, the Ninth Circuit has given the State of California a blank check to do *anything* to pending workers' compensation liens and all other claims that have not been fully adjudicated.

The Ninth Circuit's decision in this case has also arguably given employers and their insurers the ability to engage in bad faith practices with impunity. For example, one federal district court in California recently held, citing the Ninth Circuit's decision in this case, that because workers' compensation liens are not "property," claims cannot be stated under the Racketeer Influenced and Corrupt Organizations Act ("RICO") against companies who systematically deny meritorious workers' compensation claims because there is no requisite injury to "business or property." *Black v. CorVel Enterprise Inc.*, Slip Op., No. 5:14-cv-02588-JGB-KK, (C.D. Cal Sept. 21, 2015); *see also* Greg Jones, *Court Cites Angelotti in Dismissing Bad Faith Complaint against TPAs*, https://www.workcompcentral.com (Oct. 29, 2015).

Petitioners' workers' compensation liens are not an "entitlement" or a mere benefit that the government benevolently provides. Nor are they merely a creature of statute. Petitioners obtained their liens by providing valuable services and goods to California's injured workers in reliance on a long-standing right to obtain reimbursement through the workers' compensation lien system. App. 34-35. Petitioners thereby provided consideration for their liens. And in the absence of California's workers'

compensation system, Petitioners would have the right to obtain compensation directly from the injured workers under various well-established common law principles, including principles of contract, quasi-contract and unjust enrichment.

As discussed above, workers' compensation liens constitute Petitioners' accounts receivable. App. 69-70. Until the enactment of SB863, they were factored and used to secure business financing. *Id.* Because Petitioners are legally prohibited from seeking compensation in any other way, Cal. Lab. Code § 3751(b); *Perrillo*, 157 Cal. App. 4th 914, the dismissal of their liens will completely bar them from obtaining compensation for the goods and services they provided for many years. Indeed, the district court found that Petitioners face "outright elimination" as a result of the cumulative effect of the retroactive fees. App. 70.

The Ninth Circuit's decision that Petitioners' lien claims are not even "property" protected by the Takings Clause defies common sense, ignores real-world realities, and severely upsets the reasonable, investment-backed expectations of an entire industry.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 29, 2015]

No. 13-56996

D.C. No. 8:13-cv-01139-GW-JEM

ANGELOTTI CHIROPRACTIC, INC.; MOONEY & SHAMSBOD CHIROPRACTIC, INC.; CHRISTINA-ARANA & ASSOCIATES, INC.; JOYCE ALTMAN INTERPRETERS, INC.; SCANDOC IMAGING, INC.; BUENA VISTA MEDICAL SERVICES, INC.; DAVID H PAYNE M.D., INC.,
Plaintiffs-Appellants,

v.

CHRISTINE BAKER, in her official capacity as Director of the California Department of Industrial Relations; RONNIE CAPLANE, in her official capacity as Chair of the Workers' Compensation Appeals Board; DESTIE LEE OVERPECK, in her official capacity as Acting Administrative Director of the

California Division of Workers Compensation,
Defendants-Appellees.

No. 13-57080

D.C. No. 8:13-cv-01139-GW-JEM

ANGELOTTI CHIROPRACTIC, INC.; MOONEY & SHAMSBOD CHIROPRACTIC, INC.; JOYCE ALTMAN INTERPRETERS, INC.; SCANDOC IMAGING, INC.; BUENA VISTA MEDICAL SERVICES, INC.; DAVID H PAYNE M.D., INC.; CHRISTINA-ARANA & ASSOCIATES, INC.,
Plaintiffs-Appellees,

v.

CHRISTINE BAKER, in her official capacity as Director of the California Department of Industrial Relations; RONNIE CAPLANE, in her official capacity as Chair of the Workers' Compensation Appeals Board; DESTIE LEE OVERPECK, in her official capacity as Acting Administrative Director of the California Division of Workers Compensation,
Defendants-Appellants.

App. 3

OPINION

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted
November 18, 2014—Pasadena, California

Filed June 29, 2015

Before: Mary M. Schroeder and Jacqueline H. Nguyen, Circuit Judges and Jack Zouhary,[*] District Judge.

Opinion by Judge Nguyen

SUMMARY[**]

Civil Rights

The panel affirmed the district court's dismissal of plaintiffs' claims under the Takings Clause and Due Process Clause challenging California Senate Bill 863, vacated the district court's preliminary injunction and through pendent appellate jurisdiction, reversed the district court's denial of defendants' motion to dismiss plaintiffs' Equal Protection Clause claim.

In 2012, California enacted Senate Bill 863 to combat an acute "lien crisis" in its workers'

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[*] The Honorable Jack Zouhary, District Judge for the U.S. District Court for the Northern District of Ohio, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

compensation system. These liens are filed by medical providers and other vendors to seek payment for services provided to an injured worker with a pending claim. In an effort to clear an enormous and rapidly growing backlog of these liens, SB 863 imposes a $100 "activation fee" on entities like plaintiffs for each workers' compensation lien filed prior to January 1, 2013. Plaintiffs sued, claiming that SB 863 violates the Takings Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution.

The panel held that the district court properly dismissed the Takings Clause claim because the economic impact of SB 863 and its interference with plaintiffs' expectations was not sufficiently severe to constitute a taking. The panel further concluded that the lien activation fee did not burden any substantive due process right to court access and also rejected plaintiffs' claim that the retroactive nature of the lien activation fee violated the Due Process Clause.

Vacating the district court's preliminary injunction, the panel held that the district court abused its discretion in finding that a "serious question" existed as to the merits of plaintiffs' Equal Protection claim. Applying rational basis review, the panel held that Labor Code § 4903.06(b), which exempts certain entities other than plaintiffs from having to pay the lien activation fee, was rationally related to the goal of clearing the lien backlog. The panel also reversed the district court's denial of defendants' motion to dismiss the Equal Protection Clause claim because the panel's ruling on the preliminary injunction necessarily resolved the motion to dismiss.

COUNSEL

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OPINION

NGUYEN, Circuit Judge:

In 2012, California enacted Senate Bill 863 ("SB 863") to combat an acute "lien crisis" in its workers' compensation system. These liens are filed by medical providers and other vendors to seek payment for services provided to an injured worker with a pending claim. In an effort to clear an enormous and rapidly growing backlog of these liens, SB 863 imposes a $100 "activation fee" on entities like plaintiffs for each workers' compensation lien filed prior to January 1, 2013. Plaintiffs sued, claiming that SB 863 violates the Takings Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution.

We affirm the district court's dismissal of plaintiffs' claims under the Takings Clause and Due Process Clause. As to the Equal Protection claim, however, we vacate the preliminary injunction and, through pendent appellate jurisdiction, reverse the district court's denial of the motion to dismiss this claim.

BACKGROUND

A. Overview of the Workers' Compensation System

Employers in California typically provide medical care and other services to employees for work-related injuries. *See generally* Cal. Lab. Code §§ 3600, et seq. An employer or its workers' compensation insurer may choose to provide medical care to workers through the employer's Medical Provider Network ("MPN"), 2 Witkin, *Summ. Cal. Law*, Work. Comp. § 262 (10th ed. 2005), its Health Care Organization ("HCO"), Cal. Lab.

Code § 4600.3, or neither of these. An MPN is a group of health care providers selected by an employer or insurer to treat injured workers, and an HCO is a managed care organization that contracts with an employer to provide managed medical care.

In certain cases, an employer or its insurer might decline to provide medical treatment to an injured employee on the grounds that an injury is not work-related or the treatment is not medically necessary. An injured worker may then seek medical treatment on his or her own, and, if the injury is later deemed work-related and the treatment medically necessary, the employer is liable for the "reasonable expense" incurred in providing treatment, which may include ancillary services such as an interpreter to facilitate treatment. Cal. Lab. Code § 4600(a), (f); 2 Witkin, *Summ. Cal. Law*, Work. Comp. § 264; *Guitron v. Santa Fe Extruders*, 76 Cal. Comp. Cases 228, at *9 (WCAB 2011). An employer also may be liable for "medical-legal expenses" necessary "for the purpose of proving or disproving a contested claim" for workers' compensation benefits, such as diagnostic tests, lab fees, and medical opinions. Cal. Lab. Code § 4620(a).

A provider of services—whether for medical treatment, ancillary services, or medical-legal services—may not seek payment directly from the injured worker. *Id.* § 3751(b). Nor may a provider seek payment through the filing of a civil action against the employer or its insurer. *Vacanti v. State Comp. Ins. Fund*, 24 Cal. 4th 800, 815 (2001) ("[C]laims seeking compensation for services rendered to an employee in connection with his or her workers' compensation claim fall under the exclusive jurisdiction of the [Workers'

Compensation Appeals Board].”). Instead, these providers may seek compensation by filing a lien in the injured employee’s workers’ compensation case. *See generally* Rassp & Herlick, *Cal. Workers’ Comp. Law* ch. 17 (Lexis 2014). The filing of a lien entitles a provider to participate in the workers’ compensation proceeding in order to protect its interests. *Id.* § 17:111[5]. After the underlying workers’ compensation case is adjudicated, a “lien conference” is held to discuss the liens that have not already been resolved through settlement. *Id.* § 17:113. Any issues not resolved at the lien conference will be set for a “lien trial.” *Id.*

Whether a provider of medical or ancillary services obtains payment on its lien depends on the result reached in the underlying case. These providers are entitled to payment of their liens if the injured worker establishes that the injury was work-related and that the medical treatment provided was “reasonably required to cure or relieve the injured worker from the effects of his or her injury.” Cal. Lab. Code § 4600; *see also id.* § 4903.

Providers of medical-legal services must demonstrate that the expense was “reasonably, actually, and necessarily incurred,” Cal. Labor Code § 4621, “for the purpose of proving or disproving a contested” workers’ compensation claim, Rassp & Herlick § 17.70[1](c) (quoting Cal. Lab. Code § 4620(a)). Medical-legal lien claimants may still obtain payment even if the injured worker does not prevail in the underlying workers’ compensation proceeding, provided that the medical-legal expenses are “credible and valid.” *Id*.

B. The Lien Crisis and SB 863

The parties do not dispute that California's workers' compensation system is overwhelmed by liens, with a substantial backlog that is growing rapidly. On September 18, 2012, California enacted SB 863, which aims to address the "lien crisis," described in a January 5, 2011 report prepared by the California Commission on Health and Safety and Workers' Compensation ("Commission Report"). The Commission Report noted that the workers' compensation courts lacked "the capacity to handle all the lien disputes" that were filed. For example, the Los Angeles Office of the Workers' Compensation Appeals Board devotes 35 percent of its time to lien-related matters, and even though it resolves liens at the rate of approximately 2,000 per month as of October 2010, the rate of filings is such that the backlog of unresolved liens grows by approximately 2,000 per month, on top of the pre-existing backlog of 800,000. According to the Commission Report, the backlog has two effects. First, frivolous liens remain pending for years rather than being denied outright, resulting in the employer paying to settle just to close the case. Second, meritorious liens are delayed, which means that employers can deny these claims with impunity for years. One of the reforms recommended by the Commission Report is the institution of a lien filing fee in order to deter the filing of liens generally, and particularly to deter the filing of frivolous liens.

SB 863 imposes a $150 filing fee for all liens filed on or after January 1, 2013. Cal. Lab. Code § 4903.05(c)(1). Plaintiffs do not challenge the filing fee in this action. More pertinently, SB 863 imposes a $100

"activation fee" for pending liens filed prior to January 1, 2013, which must be paid at the time that a declaration of readiness is filed for a lien conference. *Id.* § 4903.06(a)(1), (2). Any lien for which the activation fee is not paid by January 1, 2014, is "dismissed by operation of law." *Id.* § 4903.06(a)(5). The purpose of these fees, according to a report of the State Assembly's Committee on Insurance, is to "provide a disincentive to file frivolous liens." The lien activation fee provision exempts the following entities:

> a health care service plan licensed pursuant to Section 1349 of the Health and Safety Code, a group disability insurer under a policy issued in this state pursuant to the provisions of Section 10270.5 of the Insurance Code, a self-insured employee welfare benefit plan, as defined in Section 10121 of the Insurance Code, that is issued in this state, a Taft-Hartley health and welfare fund, or a publicly funded program providing medical benefits on a nonindustrial basis.

Id. § 4903.06(b).

A lien claimant may recover reimbursement for the activation fee by taking the following steps: first, 30 or more days prior to filing a lien or a declaration of readiness for a lien conference, the lien claimant must make a "written demand for settlement of the lien claim for a clearly stated sum;" second, the defendant (i.e., the entity owing on the lien) must fail to accept the settlement within 20 days of receipt of the settlement demand; and third, after submission of the lien dispute to an arbitrator or the Workers' Compensation Appeals Board, "a final award is made

in favor of the lien claimant of a specified sum that is equal to or greater than the amount of the settlement demand." Cal. Lab. Code § 4903.07(a). This section does not preclude reimbursement of the activation fee pursuant to "the express terms of an agreed disposition of a lien dispute." *Id.* § 4903.07(b).

C. The Present Action

Plaintiffs sued various state officials and agencies[1] asserting claims for violations of the Takings Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution.[2] Plaintiffs filed a motion for a preliminary injunction, and defendants moved to dismiss plaintiffs' complaint for failure to state a claim. After hearing argument and issuing multiple written tentative rulings, the district court dismissed plaintiffs' Due Process and Takings claims without leave to amend and entered final judgment as to those claims pursuant to Federal Rule of Civil Procedure 54(b). The court denied defendants' motion to dismiss the Equal Protection claim. The court

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[1] The plaintiffs are Angelotti Chiropractic, Inc., Mooney & Shamsbod Chiropractic, Inc., Christina-Arana & Associates, Inc., Joyce Altman Interpreters, Inc., Scandoc Imaging, Inc., Buena Vista Medical Services, Inc., and David H. Payne, M.D., Inc. Defendants are Christine Baker, in her official capacity as the Director of the California Department of Industrial Relations, Ronnie Caplane, in her official capacity as Chair of the Workers' Compensation Appeals Board, and Destie Lee Overpeck, in her official capacity as Acting Administrative Director of the California Division of Worker' Compensation.

[2] Plaintiffs also assert a stand-alone claim under 42 U.S.C. § 1983. In the district court and on appeal, the parties do not address this claim. We follow their lead.

also issued a preliminary injunction in plaintiffs' favor as to the Equal Protection claim, but not as to the other claims. Defendants appeal the district court's issuance of the preliminary injunction and its denial of the motion to dismiss the Equal Protection claim. Plaintiffs cross-appeal as to the dismissal of their Takings and Due Process claims.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction over the district court's order dismissing the Takings and Due Process claims pursuant to 28 U.S.C. §§ 1291, as a result of the district court's certification pursuant to Federal Rule of Civil Procedure 54(b). *See, e.g.*, *Ariz. State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1039–40 (9th Cir. 1991). We have jurisdiction over the district court's preliminary injunction order pursuant to 28 U.S.C. § 1292(a)(1), and we have pendent appellate jurisdiction over the district court's denial of defendants' motion to dismiss the Equal Protection claim. *See Arc of Cal. v. Douglas*, 757 F.3d 975, 993 (9th Cir. 2014).

We review de novo the district court's dismissal of the Takings and Due Process claims and accept factual allegations in the complaint as true. *Flores v. Cnty. of L.A.*, 758 F.3d 1154, 1156 n.2, 1158 (9th Cir. 2014). We review the district court's decision to grant a preliminary injunction for abuse of discretion. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). In conducting that review, we consider whether plaintiffs are "likely to succeed on the merits, . . . likely to suffer irreparable harm in the absence of preliminary relief," whether "the balance of equities

tips in [their favor]," and whether "an injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)). "Serious questions going to the merits and hardship balance that tips sharply towards [plaintiffs] can [also] support issuance of a[] [preliminary] injunction," so long as there is a likelihood of irreparable injury and the injunction is in the public interest." *Id.* at 1132 (internal quotation marks omitted).

DISCUSSION

Plaintiffs challenge the district court's dismissal of their Takings and Due Process claims. On cross-appeal, defendants challenge the district court's issuance of the preliminary injunction on the Equal Protection claim. Defendants also argue that the court erred in denying their motion to dismiss the Equal Protection claim. We address each claim in turn.

A. Takings

Plaintiffs contend that the lien activation fee violates the Takings Clause of the Fifth Amendment, which prohibits the taking of private property "for public use, without just compensation." U.S. Const. amend. V. The Takings Clause protects property interests created by independent sources such as state law, but does not itself create property interests. *Bowers v. Whitman*, 671 F.3d 905, 912–14 (9th Cir. 2012). The property interest must be "vested." In other words, "if the property interest is 'contingent and uncertain' or the receipt of the interest is 'speculative' or 'discretionary,' then the government's modification

or removal of the interest will not constitute a . . . taking." *Id.* (citing *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1002–04 (9th Cir. 2007)).

Here, the workers' compensation liens are not property interests protected by the Takings Clause. First, the right to workers' compensation benefits is "wholly statutory," and such rights are not vested until they are "reduced to final judgment." *Graczyk v. Workers' Comp. Appeals Bd.*, 184 Cal. App. 3d 997, 1006 (1986). In *Graczyk*, plaintiff Ricky Graczyk, a varsity football player at California State University, Fullerton ("CSUF"), sustained a series of head, neck, and spine injuries in 1977 and 1978. *Id.* at 1000. Graczyk sought workers' compensation benefits from CSUF on the grounds that his status as a student athlete qualified him as an employee of CSUF within the definition of the California Labor Code. *Id.* A workers' compensation judge agreed, and found Graczyk eligible for workers' compensation benefits. *Id.* at 1001. While the judge acknowledged that, in 1981, the Legislature expressly excluded student athletes from the definition of "employee," the judge nevertheless found that the new definition could not be applied retroactively to "deprive [Graczyk] of his vested right to employee status under the law existing at the time of his injury." *Id.*

The Workers' Compensation Appeals Board reversed, and the Court of Appeal affirmed. *Id.* at 1001–09. The court reasoned that Graczyk's "inchoate right to benefits under the workers' compensation law is wholly statutory and had not been reduced to final judgment before the [1981 amendment]. Hence, [Graczyk] did not have a vested right . . . ." *Id.* at 1006.

The court explained that, "[w]here a right of action does not exist at common law, but depends solely on statute, the repeal of the statute destroys the inchoate right unless it has been reduced to final judgment." *Id.* at 1006–07; *see also Beverly Hilton Hotel v. Workers' Comp. Appeals Bd.*, 176 Cal. App. 4th 1597, 1605 (2009) (citing *Graczyk* for the proposition that "[w]orkers' compensation awards may become null by subsequent legislation enacted prior to a final judgment"); *S. Coast Regional Comm'n v. Gordon*, 84 Cal. App. 3d 612, 619 (1978) (noting that "a statutory remedy does not vest until final judgment since it has been held in a long line of cases that the repeal of a statute creating a penalty, running to either an individual or the state, at any time before final judgment, extinguishes the right to recover the penalty" (internal quotation marks omitted)).

Since an injured workers' right to benefits does not vest until final judgment, the same is true for the liens at issue here, which are derivative of the underlying workers' compensation claim. *See Perrillo v. Picco & Presley*, 157 Cal. App. 4th 914, 929 (2007) (noting that a lien claimant's rights to medical-legal costs are "derivative" of the injured worker's rights). Medical and ancillary lienholders have the right to recover on the lien only upon a determination that the expense was "reasonably required to cure or relieve the injured worker from the effects of his or her injury." Cal. Lab. Code § 4600. Similarly, medical-legal lien claimants must also demonstrate that an expense is "incurred . . . for the purpose of proving or disproving a contested" workers' compensation claim, even if the injured worker does not prevail in the underlying claim. Rassp & Herlick § 17.70[1](c) (quoting Cal. Lab. Code

§ 4620(a)). Thus, because the right to workers' compensation benefits does not vest until reduced to a final judgment, it would be illogical to reach a different conclusion as to the liens.

Plaintiffs' reliance on *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982), is unpersuasive. There, the claim for compensation at issue was a jury verdict for damages, *id.* at 1304, and even though it was not reduced to a final judgment because it was still pending on appeal, *id.*, a jury award is substantially more final than a pending workers' compensation lien, which is derivative of rights yet to be adjudicated at all. Plaintiffs also cite several Supreme Court cases that have identified liens as property protected by the Takings Clause. These cases do not help plaintiffs because they address liens secured by a specific piece of property. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 573–75 (1935) (mortgage lien secured by 170 acre farm); *Armstrong v. United States*, 364 U.S. 40, 41 (1960) (lien secured by boat hulls); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 71–72 (1982) (lien secured by interest in household furnishings). Here, by contrast, the liens are unsecured, and act as a placeholder for the possibility of a future recovery in a lien trial following the adjudication of the underlying workers' compensation claim.

Finally, plaintiffs argue that the lien activation fee constitutes a taking of the services that they have already provided to injured workers because the fee requires them to pay large sums of money ($100, many times over) to save their liens from dismissal. As the

district court properly found, the services were provided to the injured workers, not the state, and were provided before the enactment of SB 863, and thus could not have been "taken" by that legislation. While we agree that "an unreasonable amount of required uncompensated service" might qualify as a taking, *Family Div. Trial Lawyers of Sup. Ct.-D.C., Inc. v. Moultrie*, 725 F.2d 695, 705–06 (D.C. Cir. 1984), plaintiffs here were never under any compulsion to provide services. Rather, they rendered these services freely, with the expectation that they might be compensated through the lien system. Provided that the activation fee is paid, SB 863 does not affect plaintiffs' ability to obtain payment on outstanding liens. Moreover, by using the offer of settlement procedure set forth in Labor Code § 4903.07(a), plaintiffs can preserve the possibility of obtaining reimbursement of the fee. Under these circumstances, we conclude that the district court properly dismissed the Takings claim because the economic impact of SB 863 and its interference with plaintiffs' expectations is not sufficiently severe to constitute a taking. *Cf. Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1252 (9th Cir. 2013) (holding that change in Medicaid reimbursement rates did not give rise to a Takings claim because medical provider participation in the program is voluntary).

B. Due Process

We next turn to plaintiffs' claim that the lien activation fee violates their due process rights. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life,

liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Plaintiffs argue that the lien activation fee provisions burden their substantive due process right of access to the courts, as set forth in *Boddie v. Connecticut*, 401 U.S. 371 (1971), and *Payne v. Superior Court*, 553 P.2d 565 (Cal. 1976). In *Boddie*, the Supreme Court struck down a filing fee that prevented indigent litigants from obtaining a divorce. 401 U.S. at 380–82. The Court reasoned that court proceedings were "the sole means in Connecticut for obtaining a divorce," *id.* at 380, and noted the "basic importance" of marriage in society, *id.* at 376. In *Payne*, the California Supreme Court held that a prisoner had a due process right to attend, or at least meaningfully participate in, civil proceedings initiated against him despite his incarceration. 553 P.2d at 570–73. Citing *Boddie*, the California Court explained that "a defendant in a civil case seeks not merely the benefit of a statutory expectancy, but the protection of property he already owns or may own in the future." *Payne*, 553 P.2d at 571. Thus, the prisoner had been "[f]ormally thrust into the judicial process," and therefore had "no alternative to the court system to protect his interests." *Id.* at 572.

Here, by contrast, plaintiffs have not been "thrust" into the judicial process. *Cf. id.* Nor is formal adjudication of the lien the only way for plaintiffs to obtain payment, *cf. Boddie*, 401 U.S. at 380, since they are not barred from settling lien disputes out of court. Moreover, this case does not present a weighty societal concern on the level of the institution of marriage. *Cf. id.* The lien activation fee here is more akin to filing fees in conventional litigation scenarios, in which the

Supreme Court has rejected due process challenges. *See United States v. Kras*, 409 U.S. 434, 443–46 (1973) (upholding bankruptcy filing fee because bankruptcy did not involve "fundamental interest" on the order of marriage, and a debtor may resolve disputes with creditors through other avenues besides the courts); *Ortwein v. Schwab*, 410 U.S. 656, 659 (1973) (upholding filing fee for action challenging reduction in welfare payments because a pre–reduction hearing was provided, and the interest in welfare is of "far less constitutional significance than the interest of the *Boddie* appellants"); *see also Roller v. Gunn*, 107 F.3d 227, 233 (4th Cir. 1997) (explaining that filing fee for litigation by indigent prisoner merely "places the . . . prisoner in a position similar to that faced by those whose basic costs of living are not paid by the state . . . [a prisoner] must weigh the importance of redress before resorting to the legal system"). For these reasons, we conclude that the lien activation fee does not burden any substantive due process right to court access.

We also reject plaintiffs' claim that the retroactive nature of the lien activation fee violates the Due Process Clause. While courts will presume that statutes are intended to operate prospectively, *Landgraf v. USI Film Products*, 511 U.S. 244, 265–73 (1994), and "stricter limits may apply to [a legislature's] authority when legislation operates in a retroactive manner," *Eastern Enters. v. Apfel*, 524 U.S. 498, 524 (1998) (plurality opinion), a statute that the legislature clearly intended to operate retroactively will be upheld if its retroactivity is "justified by a rational legislative purpose." *United States v. Carlton*, 512 U.S. 26, 31 (1994) (quoting *Pension Benefit Guaranty*

Corporation v. R.A. Gray & Co., 467 U.S. 717, 729–30 (1984)).

Here, there is no dispute that the California Legislature intended for the lien activation fee to operate retroactively. *See* Cal. Lab. Code § 4903.06(a) (requiring payment of activation fee for "[a]ny lien filed . . . prior to January 1, 2013"). And, as discussed below in our analysis of the Equal Protection claim, the lien activation fee provisions are "justified by [the] rational legislative purpose" of clearing the lien backlog. *See Carlton*, 512 U.S. at 31. We thus conclude that the retroactivity of the lien activation fee does not violate the Due Process Clause.

Plaintiffs' reliance on *Untermyer v. Anderson*, 276 U.S. 440 (1928) and *Nichols v. Coolidge*, 274 U.S. 531 (1927), is unpersuasive. In those cases, the Supreme Court invalidated taxes that operated retroactively. The Court recently cited those cases for the proposition that the retroactive application of a "wholly new tax" may be constitutionally problematic. *See Carlton*, 512 U.S. at 34. However, the Court also expressed skepticism as to the degree to which *Nichols* and *Untermyer* still apply, since "those cases were decided during an era characterized by exacting review of economic legislation under an approach that has long since been discarded." *Id.* (internal quotation marks omitted). The Court emphasized that the modern framework for evaluating retroactive taxation "'does not differ from the prohibition against arbitrary and irrational legislation' that applies generally to enactments in the sphere of economic policy." *Id.* (quoting *Pension Benefit Guaranty Corp.*, 467 U.S. at 733). Thus, even assuming, without deciding, that the

lien activation fee is analogous to a tax, its retroactive effect does not violate due process because its retroactivity is justified by a rational legislative purpose.

C. Equal Protection

Finally, we turn to defendants' claim that the district court abused its discretion in issuing a preliminary injunction on the ground that the lien activation fee violates the Equal Protection Clause, and that the court further erred in denying their motion to dismiss this same claim.

1. Preliminary Injunction

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Plaintiffs contend that Labor Code § 4903.06(b)'s exemption of certain entities other than plaintiffs from having to pay the lien activation fee violates the Equal Protection Clause. Plaintiffs also argue that strict scrutiny applies in evaluating the exemption because the activation fee trenches on a fundamental right of access to the courts. As an initial matter, we reject plaintiffs' argument that strict scrutiny applies because, as discussed above, the lien activation fee does not implicate any fundamental right. Moreover, it is well settled that equal protection challenges to economic legislation such as SB 863 are evaluated under rational basis review. *See, e.g.*, *FCC v. Beach Comm'cns, Inc.*, 508 U.S. 307, 313 (1993). We accordingly apply rational basis review in considering

whether Labor Code § 4903.06(b) violates the Equal Protection Clause.

Under rational basis review, legislation that does not draw a distinction along suspect lines such as race or gender passes muster under the Equal Protection Clause as long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Comm'cns, Inc.*, 508 U.S. 307, 313 (1993). Thus, a legislative classification must be upheld

> so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (citations omitted); *see also Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2079–80 (2012).

Here, one "plausible policy" goal, *see Nordlinger*, 505 U.S. at 11, for the imposition of the lien activation fee is to help clear the lien backlog by forcing lienholders to consider whether a lien claim is sufficiently meritorious to justify spending $100 to save it from dismissal. In turn, the California Legislature's decision to impose the activation fee on entities like plaintiffs, while exempting other entities, is rationally related to the goal of clearing the backlog because the Legislature might have rationally concluded that the non-exempt entities are primarily responsible for the

backlog. In this regard, the Commission Report states that ten of the eleven top electronic lien filers are independent providers. Thus, the Legislature could have rationally found that independent service providers bore primary responsibility for the lien backlog, and therefore elected to focus on those entities in imposing the activation fee.

The Legislature's approach also is consistent with the principle that "the legislature must be allowed leeway to approach a perceived problem incrementally." *Beach Commc'ns*, 508 U.S. at 316; *see also Silver v. Silver*, 280 U.S. 117, 124 (1929) (stating that "[i]t is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs."). Targeting the biggest contributors to the backlog—an approach that is both incremental, *see Beach Commc'ns*, 508 U.S. at 316, and focused on the group that "most frequently" files liens, *see Silver*, 280 U.S. at 124,—is certainly rationally related to a legitimate policy goal. Therefore, on this record, "the relationship of the classification to [the Legislature's] goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11.

Moreover, on rational basis review, the burden is on plaintiffs to negate "every conceivable basis" which might have supported the distinction between exempt and non-exempt entities. *See Armour*, 132 S. Ct. at 2080–81. The district court did not put plaintiffs to their burden of demonstrating a "likelihood" or "serious question" that they would be able to refute all rationales for this distinction and its relationship to the goal of clearing the backlog. *See Winter v. Natural*

Resources Def. Council, 555 U.S. 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). Rather, the district court rejected defendants' argument that the activation fee was aimed at clearing the lien backlog, stating:

> the backlog is the backlog, and if clearing it is your purpose, then you attempt to clear it. It makes little sense to clear only part of it. The Court might also question the basis for the legislature's belief in its apparent conclusion that the exempted entities, in particular, are not major contributors to the backlog (and why other contributors who might also not be major contributors are not also exempted from the activation fee).

This reasoning runs contrary to *Beach Communications* and *Silver* because it denies the Legislature the leeway to tackle the lien backlog piecemeal, focusing first on a source of liens that it could have rationally viewed as the biggest contributor to the backlog. Also, the district court's skepticism of the notion that the exempted entities were not major contributors of the backlog ran afoul of the principle that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *See Beach Commc'ns*, 508 U.S. at 315; *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (stating that "rational [legislative] distinctions may be

made with substantially less than mathematical exactitude").[3]

Finally, we are not persuaded by plaintiffs' reliance on *Lindsey v. Normet*, 405 U.S. 56, 77–80 (1972). In *Lindsey*, an Oregon statute required tenants wishing to appeal an order of eviction to file "an undertaking with two sureties for the payment of twice the rental value of the premises." *Id.* at 75–76. This amount would be forfeited by the tenant if the appeal was unsuccessful. *Id.* Oregon law imposed no such double surety requirement on any other litigants in any other civil proceedings. *Id.* The Supreme Court held that this requirement, imposed only on defendants appealing from eviction proceedings in which they did not prevail in the trial court, was arbitrary and irrational because no other appellant in Oregon was "subject to automatic assessment of unproved damages," the landlord was already protected by traditional appeal bond requirements, and the double-bond requirement did not operate to screen out frivolous appeals because it "not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.* at 78. The Court focused on the fact that "the discrimination against the

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[3] Plaintiffs cite a portion of the oral argument transcript in the district court in which plaintiffs' counsel asserted, based on a public records request, that Kaiser Foundation Hospitals and Anthem Blue Cross, both exempt entities, rank at number six and number seven on a list of the state's largest lienholders. This assertion of counsel has no documentary support in the record before us. And, even if it did, the fact that the distinction drawn by the Legislature is imperfect because it exempts some large lienholders will not render it invalid on rational basis review. *See Dukes*, 427 U.S. at 303.

poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious," and the traditional bond requirements were sufficient to protect the landlord's interests. *Id.* at 77–79. Indeed, *Lindsey* relies on a line of Supreme Court cases, including *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) that looks with particular disfavor on laws that erect barriers to an indigent litigant's access to the appellate process. *See Lindsey*, 405 U.S. at 77 (citing cases). By contrast, this case does not present issues of indigency or discrimination against the poor, and thus *Lindsey* does not guide our analysis.

In sum, we conclude that the district court abused its discretion in finding that a "serious question" exists as to the merits of plaintiffs' Equal Protection claim. In the absence of a "serious question" going to the merits of this claim, the preliminary injunction must be vacated. *See Alliance for the Wild Rockies*, 632 F.3d at 1134–35.

2. Motion to Dismiss

In addition to challenging the preliminary injunction, defendants seek reversal of the district court's denial of their motion to dismiss plaintiffs' Equal Protection claim because it is "inextricably intertwined" with the resolution of the court's ruling on the preliminary injunction.

Denial of a motion under Federal Rule of Civil Procedure 12(b)(6) is "generally . . . not a reviewable final order." *Jensen v. City of Oxnard*, 145 F.3d 1078, 1082 (9th Cir. 1998). While an appellate court reviewing an appealable order may exercise pendent appellate jurisdiction over an otherwise non-appealable

order, the two orders must be "inextricably intertwined." *Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001). In other words, the two orders must "raise the same issues, use the same legal reasoning, and reach the same conclusions." *Id.* Two issues (or orders) are not "inextricably intertwined" if they are governed by different legal standards. *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000).

"Although the standards for a motion for preliminary injunctive relief and dismissal under Rule 12(b)(6) are not conterminous, they overlap where a court determines that the plaintiff has no chance of success on the merits." *Arc of Cal. v. Douglas*, 757 F.3d 975, 993 (9th Cir. 2014) (exercising pendent appellate jurisdiction over dismissal under Rule 12(b)(6) where the district court ordered dismissal "for the selfsame reason" that it denied a preliminary injunction). This is so because a complaint cannot state a plausible claim for relief if there is "no chance of success on the merits." *Id.* (quoting *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990 (9th Cir. 2006)). Here, our conclusion that the exemption provision is rationally related to the purpose of clearing the lien backlog amounts to a determination that plaintiffs have no chance of success on the merits because, regardless of what facts plaintiffs might prove during the course of litigation, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *See Beach Commc'ns*, 508 U.S. at 315. Thus, the presence in the Commission Report of evidence suggesting that non-exempt entities are the biggest contributors to the backlog is sufficient to

eliminate any chance of plaintiffs succeeding on the merits. Accordingly, we exercise pendent appellate jurisdiction over the district court's denial of the motion to dismiss, and reverse.

CONCLUSION

The district court properly dismissed plaintiffs' Takings and Due Process claims. We likewise conclude dismissal without leave to amend is proper because "it is clear, upon de novo review, that the [claims] could not be saved by . . . amendment." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998). However, because the district court abused its discretion in concluding that "serious questions" exist as to the merits of plaintiffs' Equal Protection claim, we vacate the preliminary injunction. We also reverse the district court's denial of defendants' motion to dismiss the Equal Protection claim because our ruling on the preliminary injunction necessarily resolves the motion to dismiss.

AFFIRMED in part, VACATED in part, and REVERSED in part.

Costs are awarded to defendants.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 8, 2015]

No. 13-56996

D.C. No. 8:13-cv-01139-GW-JEM
Central District of California, Santa Ana

ANGELOTTI CHIROPRACTIC, INC.; et al.	)
Plaintiffs - Appellants,	)
v.	)
CHRISTINE BAKER, in her official capacity as Director of the California Department of Industrial Relations; et al.,	)
Defendants - Appellees.	)

No. 13-57080

D.C. No. 8:13-cv-01139-GW-JEM
Central District of California, Santa Ana

ANGELOTTI CHIROPRACTIC, INC.; et al.,	)
Plaintiffs - Appellees,	)
v.	)
CHRISTINE BAKER, in her official capacity as Director of the California Department of Industrial Relations; et al.,	)
Defendants - Appellants.	)

ORDER

Before: SCHROEDER and NGUYEN, Circuit Judges and ZOUHARY,[*] District Judge.

The panel has voted to deny the petition for rehearing filed July 13, 2015. Judge Nguyen has voted to deny Petitioners' petition for rehearing en banc, and Judges Schroeder and Zouhary have so recommended.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested

[*] The Honorable Jack Zouhary, District Judge for the U.S. District Court for the Northern District of Ohio, sitting by designation.

a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 13-1139-GW(JEMx)	Date	November 4, 2013
Title	*Angelotti Chiropractic, Inc., et al. v. Kamala D. Brown, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	Deborah Gackle	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Mark J. Nagle Sundeep K. Addy Glen E. Summers	Mi K. Kim Harold L. Jackson

PROCEEDINGS: PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [24];

DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT [23]

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, the above-entitled motions are TAKEN UNDER SUBMISSION and continued to **November 7, 2013 at 8:30 a.m.** Parties may appear telephonically provided that notice is given to the clerk.

_____ : 35

Initials of Preparer JG

Angelotti Chiropractic, Inc., et al. v. Baker, et al.,
Case No. CV 13-cv-01139 GW (JEMx)
Tentative Rulings on: 1) Defendants' Motion to Dismiss First Amended Complaint, and (2) Plaintiffs' Motion for Preliminary Injunction

I. Background

Plaintiffs Angelotti Chiropractic, Inc. ("Angelotti"), Mooney & Shamsbod Chiropractic, Inc. ("Mooney"), Christina-Arana & Associates, Inc. ("Christina-Arana"), Joyce Altman Interpreters, Inc. ("Altman"), Scandoc Imaging, Inc. ("Scandoc"), Buena Vista Medical Services, Inc. ("BVMS"), and David H. Payne, M.D., Inc., d/b/a Industrial Orthopedics Spine and Sports Medicine ("Payne") (collectively "Plaintiffs") sue Christine Baker, in her official capacity as Director of the California Department of Industrial Relations ("Baker"), Ronnie Caplane, in her official capacity as Chair of the Workers' Compensation Appeals Board ("Caplane"), and Destie Overpeck, in her official capacity as Acting Administrative Director of the California Division of Workers Compensation ("Overpeck") (collectively "Defendants") in connection with recent legislation impacting non-exempted holders of workers' compensation-related liens. Plaintiffs allege that certain provisions of California law, Senate Bill 863 ("SB863") violate the Takings, Due Process, and Equal Protection clauses of the United States Constitution.

Plaintiffs are providers of medical services and ancillary goods and services (such as interpreter services) to workers' compensation claimants. *See* First Amended Complaint ("FAC") ¶¶ 9-15, 23-26. Plaintiffs provide their goods and services to patients without

immediate payment, in reliance on their right to obtain payment through liens on the patients' workers' compensation claims. *See id.* SB863, *inter alia,* institutes a $100 "activation fee" on all such liens filed prior to January 1, 2013. *See id.* ¶¶ 2, 30-31. In the event that the fee is not paid within the relevant time limit,[1] the lien is dismissed. *See id.* ¶¶ 2, 32-33. Certain lienholders[2] are specifically exempted from the activation fees. *See id.* ¶¶ 5, 34-35.

Plaintiffs contend that the liens are vested property rights, and the challenged provisions of SB863 would potentially lead to the forfeiture of those rights, or substantially reduce their economic value and interfere with the Plaintiffs' reasonable investment-backed expectations arising from the services which they provided to the workers' compensation claimants. *See id.* ¶ 4. Specifically, Plaintiffs allege that the $100 activation fee attached to liens may make provision of services to workers compensation patients cost-prohibitive due to (1) the low value of many liens relative to the activation fee and (2) the uncertainty of recovery on each lien, which is only possible if the

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[1] As discussed in further detail below, the relevant time limit here is either January 1, 2014 or by the time of a "lien conference," whichever is earlier.

[2] "Health care service plans" licensed pursuant to Cal. Health & Safety Code§ 1349, "group disability insurers" under a policy issued in California pursuant to the provisions of Cal. Ins. Code § 10270.5, "self-insured employee welfare benefit plans," as defined in Cal. Ins. Code§ 10121, that are issued in California, "Taft-Hartley health and welfare funds," or "publicly funded program providing medical benefits on a nonindustrial basis." *See* Cal. Lab. Code § 4903.06(b).

worker recovers on the workers compensation claim, an issue that is typically beyond the knowledge or control of the service provider. *See id.* ¶¶ 38-39. The seven Plaintiffs collectively currently hold tens of thousands of liens, requiring them – as a result of SB863 – to pay millions of dollars to the State in order to have any chance of collecting payment for services already provided and liens already obtained as of January 1, 2013. *See id.* ¶ 45.

II. Analysis

A. Defendants' Motion to Dismiss

1. Governing Standard

Under Rule 12(b)(6), concerning whether a complaint has properly stated a claim, a court is to (1) construe the complaint in the light most favorable to the plaintiff, and (2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them. *See Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir.), *amended on denial of reh'g,* 275 F.3d 1187 (9th Cir. 2001); *Pareto v. F.D.I.C.,* 139 F.3d 696, 699 (9th Cir. 1998); *see also Fleming v. Pickard,* 581 F.3d 922, 925 (9th Cir. 2009). The court need not accept as true "legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.,* 328 F.3d 1136, 1139 (9th Cir. 2003). A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556 (2007)).

Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal

theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990); *Johnson v. Riverside Healthcare Sys., LP,* 534 F.3d 1116, 1121-22 (9th Cir. 2008); *see also Twombly*, 550 U.S. at 562-63 (dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief). However, a plaintiff must also "plead 'enough facts to state a claim to relief that is plausible on its face.'" *Johnson,* 534 F.3d at 1122 (quoting *Twombly,* 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678.

In its consideration of the motion, the court is limited to the allegations on the face of the complaint (including documents attached thereto), matters which are properly judicially noticeable and "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *See Lee v. City of Los Angeles,* 250 F.3d 668, 688-89 (9th Cir. 2001); *Branch v. Tunnell,* 14 F.3d 449, 453-54 (9th Cir.), *cert. denied,* 512 U.S. 1219 (1994), *overruled on other grounds in Galbraith v. County of Santa Clara,* 307 F.3d 1119 (9th Cir. 2002); *see also Marder v. Lopez,* 450 F.3d 445, 448 (9th Cir. 2006) (indicating that a court may consider a document "on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion").

2. Takings

The Fifth Amendment to the United States Constitution – which applies to the states by way of the Fourteenth Amendment, *see Engquist v. Or. Dep't of Agric.,* 478 F.3d 985, 1002 n.16 (9th Cir. 2007), *aff'd,* 553 U.S. 591 (2008) – states that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Here, Plaintiffs' theory is that SB863 effects a "taking" because of its imposition of the $100 activation fee, with failure to pay that fee by, at the latest, the beginning of next year punished by dismissal of any subject lien. *See* Cal. Lab. Code § 4903.06(a)(1), (4)-(5); *see also id.* § 4903.6(c). The lien, in that theory, is the property the California legislature has "taken." *See* FAC ¶¶ 49, 57, 64.[3]

"In order to state a Claim under the Takings Clause, a plaintiff must first establish that he possesses a constitutionally protected property interest." *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement Sys.,* 568 F.3d 725, 740 (9th

[3] Plaintiffs also theorize that the underlying goods and services they provided to the injured employee are property for purposes of their claims. *See* FAC ¶¶ 50, 58, 65. They spend little attention to developing that theory, perhaps because of the likely conclusion that no governmental entity effected any "taking" of *that* property. Indeed, Plaintiffs willingly "gave" that property to the employees receiving the services, not to the State of California. Moreover, Defendants point out that such goods and services could not have been "taken" by way of SB863, because they were provided *before* its enactment. Property theories not advanced by Plaintiffs, but only by amici, *see* Docket No. 35-1, will not be considered herein. *See, e.g., Bell v. Wolfish,* 441 U.S. 520, 531 n.13 (1979); *Russian River Watershed Protection Comm. v. City of Santa Rosa,* 142 F.3d 1136, 1141 n.1 (9th Cir. 1998).

Cir. 2009) (quoting *McIntyre v. Bayer,* 339 F.3d 1097, 1099 (9th Cir. 2003)); *see also Schneider v. Cal. Dep't of Corrections,* 345 F.3d 716, 720 (9th Cir. 2003). It is that "protected property interest" question which is at the center of the parties' debate insofar as this claim is concerned. Defendants primarily argue that Plaintiffs' liens are not protected property interests because they are a statutory creation and are inchoate/have not vested. Plaintiffs respond by directing the Court to several Supreme Court decisions engaging in a Takings analysis in the context of the elimination of liens: *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1934), *Armstrong v. United States,* 364 U.S. 40 (1960), and *United States v. Security Industrial Bank,* 459 U.S. 70 (1982). *See also Koontz v. St. Johns River Water Mgmt. Dist.,* 133 S.Ct. 2586, 2601 (2013) ("[W]e have repeatedly held that the government takes property when it seizes liens, and in so ruling we have never considered whether the government could have achieved an economically equivalent result through taxation."); *Aguirre v. S.S. Sohio Intrepid,* 801 F.2d 1185, 1190-91 (9th Cir. 1986) (discussing *Radford, Armstrong* and *Security Industrial Bank).*

It is well-understood that property rights, for purposes of a Takings claim, are defined by reference to independent sources, such as state law. *See Ward v. Ryan,* 623 F.3d 807, 810 (9th Cir. 2010) ("Property interests are not constitutionally created; rather, protected property rights are 'created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'") (quoting *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972)). California's workers' compensation system, and any rights that

flow from it, are entirely a creature of the California Constitution and the California legislature's enactments flowing therefrom. *See generally* 2 Witkin, Summary of California Law: Workers' Compensation (10th ed.) §§ 2-3, at 536-38. Here, it does not appear that Plaintiffs have identified, for purposes of their Takings claim, a property interest recognized under California law. *But see* Footnote 14, *infra.*

As an initial matter, it goes without saying that the Supreme Court's decisions in *Radford, Armstrong* and *Security Industrial Bank* (the last of which actually *avoided* the Constitutional question in the case) did not involve consideration of California law. But even assuming those cases were applicable here because of some general, overarching recognition that liens constitute property, the liens involved in those cases are distinct from the type of liens Plaintiffs hold. *See Koontz,* 133 S.Ct. at 2599 (describing *Radford, Armstrong* and *Security Industrial Bank* as "our cases holding that the government must pay just compensation when it takes a lien – a right to receive money that is *secured by a particular piece of property*") (emphasis added). Unlike those liens (which involved, respectively, a mortgagee's rights in specific property held as security, materialmen's liens secured by ships and ship-making materials, and liens on household furnishings and appliances wiped out by bankruptcy exemptions), Plaintiffs' lien are contingent upon the employee recovering on his or her workers' compensation claim. *See* Cal. Lab. Code § 4903 ("The appeals board may determine, and allow as liens against any sum to be paid as compensation, any amount determined as hereinafter set forth in subdivisions (a) through (i).... The liens that may be

allowed hereunder are as follows: ... (b) The reasonable expense incurred by or on behalf of the injured employee, as provided by Article 2 (commencing with Section 4600)...."); *id.* § 4600(a) (providing that an employer is liable "for the reasonable expense incurred by or on behalf of the employee" in receiving "reasonably required" treatment for "[m]edical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services," where the employer has "neglect[ed] or refus[ed] reasonably" to provide such services), (c)-(d) (covering employee's use of physician of his or her choice and/or personal physician), (e) (covering expenses for transportation, meals and lodging incident to reporting for an examination by a physician), (f)-(g) (covering interpreter services);[4] *see also, e.g.,* 2 Witkin, Summary of California Law: Workers' Compensation (10th ed.) §§ 193-94, at 780-83; *id.* § 271, at 877; *id.* § 344, at 959-61; *id.* § 408, at 1030; Chin, Cathcart, et al., California Practice Guide: Employment Litigation (2012) § 15:507, at 15-60.8; *id.* § 15:522, at 15-60.11; *id.* (2011) § 3:515, at 3-56 – 3-57; *cf.* 2 Witkin, Summary of California Law: Workers' Compensation (10th ed.) § 382, at 1003; *Manthey v. San Luis Rey Downs Enters., Inc.,* 16 Cal.App.4th 782, 787 0993) ("A lien on a judgment is simply a chose in action; a lien on a future interest.... Until a judgment is entered, San Luis Rey merely holds an expectancy. Had Manthey failed to obtain a

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[4] The liens subject to the $100 activation fee are liens under California Labor Code § 4903(b). *See* Cal. Lab. Code §§ 4903.06(a)(5).

judgment in her favor, the lien would simply have evaporated.").[5] Because of these liens' contingent/ derivative status, this Court cannot conclude that those cases establish the existence of a property right recognized in Takings Clause analysis.[6]

Plaintiffs assert in their briefing that most of the liens at issue in this case are "medical-legal," and that such liens do not require the employee to be found

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[5] Although providers in Plaintiffs' position are forced to proceed through the workers' compensation system – if they choose to provide services at all – rather than instituting an action at law against the injured worker, *see* Cal. Lab. Code § 3751(b), a cause of action that has not led to a Judgment equally falls short of a protected property interest for purposes of a Takings claim. *See Bowers v. Whitman,* 671 F.3d 905, 914 (9th Cir. 2012) ("'We have squarely held that although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained.'.") (quoting *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009) *and Lyon v. Agusta S.P.A..,* 252 F.3d 1078, 1086 (9th Cir. 2901)), *cert. denied sub nom., Bruner v. Whitman,* 133 S.Ct. 163 (2012); *Engquist v. Or. Dep't of Agric.,* 478 F.3d 985, 1002 (9th Cir. 2007) ("Engquist's interest in her punitive damages award is not a property right cognizable under the Takings Clause, because punitive damages awards are necessarily contingent and discretionary."). *But see In re Aircrash in Bali, Indon.,* 684 F.2d 1301, 1312 (9th Cir. 1982). Otherwise, under Plaintiffs' theory, one might argue that the mere requirement that Plaintiffs proceed through the workers' compensation system at all constitutes an unconstitutional "taking." Yet that alteration in rights by virtue of implementation of California's workers' compensation system occurred about a century ago.

[6] Moreover, the liens in each of those three Supreme Court cases were effectively wiped out or destroyed entirely, not merely made subject to a fee payment required for continued vitality.

eligible for workers' compensation benefits in order for providers such as Plaintiffs to recover on that lien. For this proposition, Plaintiffs cite Labor Code § 4620(a) and *Adams v. Workers' Compensation Appeals Board,* 18 Cal.3d 226 (1976).[7] Section 4620(a) merely defines "medical-legal" expenses,[8] and *Adams* does not appear to support the distinction Plaintiffs perceive. *See Perrillo v. Picco & Presley,* 157 Cal.App.4th 914, 929 (2007) ("[T]he payment of a physician for rendering medical-legal services *arises out of or is incidental* to the employee's right to compensation."); *id.* ("[A] lien claimant's right to medical-legal costs [is] derivative of the employee's rights.") (omitting internal quotation marks) (quoting *Beverly Hills Multispecialty Grp., Inc. v. Workers' Comp. Appeals Bd.,* 26 Cal.App.4th 789, 803 (1994)); *Zarate v. Workers' Comp. Appeals Bd.,* 99 Cal.App.3d 598, 603 (1979). *But see Meeks Bldg. Ctr. v.*

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[7] Plaintiffs offer to amend the FAC to make this distinction clear, in recognition of the fact that it is not yet spelled out in their supporting allegations. Indeed, the FAC presently alleges that lien rights are *wholly* derivative. *See* FAC ¶ 28 ("The rights of a provider of medical and ancillary services that holds a lien are also derivative of the rights of the injured worker. The lien is a claim against a possible workers' compensation recovery and without such recovery, the lienholder recovers nothing."). Given Plaintiffs' failure to show that medical-legal expenses are in any meaningful way different from other lien rights involved in this case, it is not at all clear why any amendment would make a difference.

[8] "For purposes of this article, a medical-legal expense means any costs and expenses incurred by or on behalf of any party..., which expenses may include X-rays, laboratory fees, other diagnostic tests, medical reports, medical records, medical testimony, and, as needed, interpreter's fees by a certified interpreter...for the purpose of proving or disproving a contested claim." Cal. Lab. Code § 4620(a).

Workers' Comp. Appeals Bd., 207 Cal.App.4th 219, 226 (2012). In any event, there are unquestionably threshold demonstrations that are necessary before an employee may be reimbursed for medical-legal expenses. *See* 2 Witkin, Summary of California Law: Workers' Compensation (10th ed.) § 273-74, at 878-81.

Plaintiffs also emphasize the *Penn Central*[9] factor of

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[9] In *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978), the Supreme Court identified "several factors that have particular significance" in engaging in the "essentially ad hoc, factual inquiries," that are frequently used to determine whether there has been an unconstitutional "taking" of an established property right. *Id.* at 123-24. Amongst those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* at 124. The Court also identified "the character of the governmental action," *i.e.* whether it can be "characterized as a physical invasion by government" or instead "some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* Plaintiffs also assert that *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), also added considerations of retroactivity into the *Penn Central* mix. *See id.* at 532-36; *see also id.* at 528-29 ("Our decisions...have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."). As above, whether it did or did not implement a separate factor has no impact on the question of a protectable property interest. Were this Court required to reach the *Penn Central* factors either on this motion or in connection with the preliminary injunction motion, Plaintiffs would appear to have a strong argument in connection with the "economic impact" and "interference with investment-backed expectations" factors (along with any separate retroactivity-based factor), while Defendants would seem to have the better of the arguments with respect to the "character of the governmental action" factor. *See*

interference with investment-backed expectations, highlighting the seemingly undeniable notion that they have relied upon the workers' compensation lien-based payment scheme for years in making their decisions to provide services to injured employees. But their reliance does not *create* the property interest; it only assists in the determination of whether there has been a "taking" of an established property interest.[10] *See Engquist,* 478 F.3d at 1002 n.17. In other words, Plaintiffs seek to put the cart before the horse.

Indeed, Plaintiffs themselves acknowledge that a "unilateral expectation" of a right to something does not create a property interest. Their attempt to conceptualize their liens as vested property rights for Takings purposes by way of reliance on the discussion in *Bowers v. Whitman,* 671 F.3d 905, 914-15 (9th Cir. 2012), falls short. Plaintiffs did not "pa[y] consideration for their entitlement" to their workers' compensation

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also In re Consolidated U.S. Atmospheric Testing Litig., 820 F.2d 982, 989 (9th Cir. 1987) ("The governmental action...does not abrogate the claims but subjects them to the tort claims procedure, which the plaintiffs could reasonably expect might be applied."); *Franklin Mem'l Hosp. v. Harvey,* 575 F.3d 121, 129-30 (1st Cir. 2009) (holding that there can be no unconstitutional taking where a provider "voluntarily participates in a regulated program"). Certainly, were the Court required to only conduct a Penn Central analysis in connection with this claim, a Rule 12(b)(6) dismissal would likely be much more difficult for Defendants to obtain.

[10] *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972), meanwhile, did not concern a Takings claim. The discussion of reliance in that case is, therefore, inapposite to resolution of this claim, which does not itself involve a "core" property right. Otherwise, unilateral expectations could themselves give rise to Takings Clause-respected property rights.

liens, nor did California "ma[k]e an explicit promise that the property interest would not be taken away." *Id.* at 915. Plaintiffs do not have the necessary "certainty of expectation" for purposes of alleging a Takings Clause-protected property right.

Even if the Ninth Circuit's comment in *Causey v. Pan Am. World Airways, Inc. (In re Aircrash in Bali, Indonesia on April 22, 1974),* 684 F.2d 1301 (9th Cir. 1982), that "[t]here is no question that claims for compensation are property interests that cannot be taken for public use without compensation," *id.* at 1312, does retain some measure of vitality[11] and Plaintiffs therefore could rely, to some extent, on their relative level of expectation that they would be paid for their services by way of the lien system housed by California's workers' compensation construct, the Ninth Circuit has more recently made clear that "a high threshold of certainty" is required to transform such expectations into property rights protected by the Takings Clause. *See Bowers,* 671 F.3d at 915; *Engquist,* 478 F.3d at 103 ("Another category of Takings Clause cases, which examines whether statutory changes to causes of actions can be considered takings, similarly focuses on the certainty of expectations of the person claiming a property interest."). There is no question

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[11] In *In re Consolidated U.S. Atmospheric Testing Litigation,* the Ninth Circuit characterized the key takeaway (at least for purposes of this case) from *Aircrash in Bali* as "dictum." *See* 820 F.2d at 988 n.3; *see also Graham v. Teledyne-Continental Motors, a Div. of Teledyne Indus., Inc.,* 805 F.2d 1386, 1390 & n.8 (9th Cir. 1986) (commenting, with respect to whether an appellant had "a property interest in her contribution/indemnity cause of action," that "[t]here is some doubt on this score") (citing, among other *cases, Aircrash* in *Bali*).

that the field of workers' compensation in California is heavily legislated and regulated, beginning a century ago. *See* 2 Witkin, Summary of California Law: Workers' Compensation (10th ed.) §§ 4, at 538-39. To have this Court recognize a Takings Clause-level property interest in the liens that Plaintiffs have thus far enjoyed by way of California's legislative/regulatory decisions would be to impose upon those legislative choices a rigidity that has not heretofore arisen. *See* Cal. Gov't Code § 9606 ("Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal."). The legislature's "hands" are not tied to that degree. *See generally* 2 Witkin, Summary of California Law: Workers' Compensation (10th ed.) §§ 2-3, at 536-38; *cf. Managed Pharm. Care v. Sebelius,* 716 F.3d 1235, 1252 (9th Cir. 2013) ("Because participation in Medicaid is voluntary,...providers do not have a property interest in a particular reimbursement rate."), *petition for cert. filed,* 82 U.S.L.W. 3099 (U.S. Aug. 21, 2013), and *petition for cert. filed* (U.S. Sept. 20, 2013); *id.* ("[R]egardless of when providers decide to participate in Medi-Cal, they can hardly expect that reimbursement rates will never change....Neither the State nor the federal government 'promised, explicitly or implicitly,' that provider reimbursement rates would never change."); *Cotta v. City & Cnty. of San Francisco,* 157 Cal.App.4th 1550, 1561 (2007); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.,* 129 Cal.App.4th 1228, 1261-62 (2005). Moreover, as noted above, Plaintiffs' recovery on their liens is entirely contingent upon the employee's ability to make out his or her case. In this circumstance, the Court

cannot conclude that the "high threshold of certainty" has been met or surpassed.

The parties also discuss the impact, if any, on the analysis, flowing from the fact that there is an avenue for reimbursement of any activation fees that are submitted. California Labor Code § 4903.07 reads, in full, as follows:

> (a) A lien claimant shall be entitled to an order or award for reimbursement of a lien filing fee or lien activation fee, together with interest at the rate allowed on civil judgments, only if all of the following conditions are satisfied:
>
> (1) Not less than 30 days before filing the lien for which the filing fee was paid or filing the declaration of readiness for which the lien activation fee was paid, the lien claimant has made written demand for settlement of the lien claim for a clearly stated sum which shall be inclusive of all claims of debt, interest, penalty, or other claims potentially recoverable on the lien.
>
> (2) The defendant fails to accept the settlement demand in writing within 20 days of receipt of the demand for settlement, or within any additional time as may be provide by the written demand.
>
> (3) After submission of the lien dispute to the appeals board or an arbitrator, a final award is made in favor of the lien claimant of a specified sum that is equal to or greater than the amount of the settlement demand. The amount of the

> interest and filing fee or lien activation fee shall not be considered in determining whether the award is equal to or greater than the demand.
>
> (b) This section shall not preclude an order or award of reimbursement of the filing fee or activation fee pursuant to the express terms of an agreed disposition of a lien dispute.

Cal. Lab. Code § 4903.07. Plaintiffs sum this option up as requiring that they make a settlement offer, have that offer rejected, and then proceed to litigation where they prevail in an amount in excess of their offer. Because they must prevail in an amount in excess of their settlement offer to have any prospect of getting their activation fee reimbursed, they are, in effect, required to offer to settle for less than the "true value" of their lien.

Plaintiff thus complains that the reimbursement option is, in reality, an unrealistic, and therefore largely illusory, option. Whether, in fact, the reimbursement option is a realistic one or not, however, bears only upon – for purposes of this claim – whether California has "taken" any property right.[12] As such, if indeed the Court concludes – as set forth above – that Plaintiffs have not identified a sufficient property

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[12] The same is true with respect to the relative impact of the activation fees 1) in the aggregate, on Plaintiffs' livelihoods and abilities to sustain themselves as going concerns, and 2) individually, in terms of whether it makes rational economic or business sense for the Plaintiffs to pay such a fee when it might exceed or come close to equaling the size of the lien itself.

interest, the question is merely academic, at least with respect to Plaintiffs' Takings claim.

Plaintiffs' mere allegation that their liens are vested property rights does not actually make it so, for purposes of stating a claim and/or surviving a Rule 12(b)(6) challenge. *See Sams v. Yahoo! Inc.,* 713 F.3d 1175, 1181 (9th Cir. 2013) ("Under *Iqbal,*….bald legal conclusions are not entitled to be accepted as true and thus 'do not suffice' to prevail over a motion to dismiss.") (quoting *Iqbal,* 556 U.S. at 678). Though Plaintiffs complain that Defendants are seeking a matter-of-law ruling regarding the non-existence of property rights despite the lack of directly-on-point case law, the existence of a viable property interest is, in essence, a legal question that is either satisfied or not at this stage.[13] Indeed, if Plaintiffs fail to convince the Court that they have a viable property interest, there is seemingly no purpose served by even allowing an opportunity for amendment given that it is not a

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[13] Plaintiffs argue that motions to dismiss Takings claims are "viewed with particular skepticism" because of the factual, ad hoc nature of the required inquiry. They cite *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989), *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 864 F.2d 1475, 1478 (9th Cir. 1989) and *Hall v. City of Santa Barbara,* 833 F.2d 1270, 1274 (9th Cir. 1986), for this proposition. *Moore* simply cited *Sinaloa Lake* (which in turn cited *Hall*) for this generalization. In none of the cases was the existence of a property right in question. Instead, the analysis turned on whether a "taking" had occurred, *see Moore,* 886 F.2d at 262-64 and *Hall,* 833 F.2d at 1275-80, or whether the Takings claim was even ripe, *see Sinaloa Lake*, 864 F.2d at 1478-80. Moreover, *Hall* – the wellspring from which *Sinaloa Lake* and *Moore* flow – relied on a now-outdated, pre-*Twombly* and *Iqbal*, general view of motions to dismiss as motions that are "viewed with disfavor and…rarely granted." *Hall,* 833 F.2d at 1274.

deficiency that can be cured by further *factual* allegations.

Because Plaintiffs do not appear to have identified protectable property interests for purposes of a Takings claim,[14] the Court need not proceed to the second step of the Takings analysis, or a detailed consideration of the *Penn Central* factors that are part of that consideration. *See Enquist,* 478 F.3d at 1002 & n.17 (indicating that second step – after determining whether "property" is involved – concerns "whether there has been a taking of that property, for which compensation is due" and that "[o]ne approach" to that second step "is the 'ad hoc' test enunciated in *Penn Central*"). The Court would dismiss Plaintiffs' Takings Clause claim, likely without leave to amend.

3. Due Process

Plaintiffs' FAC does not make abundantly clear whether they are pursuing a procedural due process claim or a substantive due process claim. Defendants,

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[14] Before it reaches a final ruling on Plaintiffs' Takings Clause claim, the Court would ask the parties to address the California Court of Appeal's decision in *Gilman v. Dalby,* 176 Cal.App.4th 606 (2009). In that case, the California appellate court determined – albeit not in the workers' compensation context – that a medical lien was a sufficient property interest to maintain an action for conversion: *See id.* at 616. The likely distinction is that, in that case, the injured party remained liable to the lienholder in full if the lienholder was unable to collect from any judgment or settlement reached in the injured party's lawsuit against the third-party tortfeasor. *See id.* In other words, the lienholder's right to payment was not wholly contingent upon the injured party's success in obtaining a recovery.

who addressed both types of claims in their motion, appear equally unclear.

For at least three reasons, however, the Court concludes that the claim must be, if anything, a procedural due process claim. First, the Fifth Amendment's Takings Clause subsumes or preempts substantive due process claims, with the exception of certain circumstances not present here. *See Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996) (en banc); *see also Crown Point Dev., Inc. v. City of Sun Valley,* 506 F.3d 851, 852 (9th Cir. 2007) ("We agree that *Armendariz* has been undermined to the limited extent that a claim for wholly illegitimate land use regulation is not foreclosed."). Second, even if the Takings Clause has not entirely subsumed or preempted a substantive due process claim here, "[r]etroactive legislation" – such as the activation fee involved in this case – at least to the extent a fundamental right is not involved,[15] "does not violate substantive due process, '[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means....'" *Bowers,* 671 F.3d at 916-17 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729 (1984)); *see also Fields v. Legacy Health Sys.,* 413 F.3d

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[15] As addressed further herein in connection with Plaintiffs' preliminary injunction motion and likelihood of success on their equal protection claim, because of both the limitations of the impact of the activation fee and the distinctions between the rights at stake and parties involved in this case and those of *Boddie v. Connecticut,* 401 U.S. 371 (1971), and *Payne v. Superior Court (South Bay Sentry Dogs, Inc.)*, 17 Cal.3d 908 (1976), no fundamental right is implicated in this case.

943, 955-56 (9th Cir. 2005); *Richardson v. City & Cnty. of Honolulu,* 124 F.3d 1150, 1162 (9th Cir. 1997); *Dodd v. Hood River Cnty.,* 59 F.3d 852, 864 (9th Cir. 1995) ("A substantive due process claim requires proof that the interference with property rights was irrational and arbitrary."). Here, there is little question that the legislature had a "legitimate" purpose – addressing the lien backlog purportedly clogging the state's workers' compensation system – and *generally* handled it by way of a "rational means" – imposing fees to require the liens in that backlog (or at least some of them[16]) to proceed.[17] Finally, Plaintiffs have structured all of their Due Process-related arguments here as procedural due process claims, even in the face of Defendants' demonstrated uncertainty.

A procedural due process claim "hinges on proof of two elements: (1) a protect[ed] liberty or property interest...and (2) a denial of adequate procedural protections." *Pinnacle Armor, Inc. v. United States,* 648 F.3d 708, 716 (9th Cir. 2011) (quoting *Foss v. Nat'l Marine Fisheries Serv.,* 161 F.3d 584, 588 (9th Cir. 1998)); *see also Lavan v. City of Los Angeles,* 693 F.3d 1022, 1031 (9th Cir. 2012) ("'Application of this prohibition requires the familiar two-stage analysis: We must first ask whether the asserted individual

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[16] The Exemptions present in Cal. Lab. Code § 4903.06(b) will be addressed in the context of Plaintiffs' equal protection claim, *infra.*

[17] Plaintiffs' continued insistence that the purpose and intent behind the activation fee is simply to destroy existing liens of lienholders in Plaintiffs' position – as opposed to helping to unclog a backlogged system – does not stand up under a *Twombly / Iqbal* analysis.

interests are encompassed within the Fourteenth Amendment's protection of life, liberty or property; if protected interests are implicated, we then must decide what procedures constitute due process of law.'") (omitting internal quotation marks) (quoting *Ingraham v. Wright,* 430 U.S. 651, 672 (1977)); *Kimes v. Stone,* 84 F.3d 1121, 1129 (9th Cir. 1996) (indicating that a Section 1983 claims based upon procedural due process has three elements: "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process"). Plaintiffs argue that the lack of a *Takings Clause*-protected property interest does not necessarily doom a *Due Process* claim founded upon deprivation of property. *See Lavan,* 693 F.3d at 1031 ("'Any significant taking of property by the State is within the purview of the Due Process Clause.'") (quoting *Fuentes v. Shevin,* 407 U.S. 67, 86 (1972)), *cert. denied,* 133 S.Ct. 2855 (2013); *Bowers,* 671 F.3d at 912-13 & n.4; *Fields,* 413 F.3d at 956. Even if Plaintiffs are correct that the Court's property-based analysis in the context of the Takings claim does not doom a procedural due process claim, their procedural due process claim would fail in any event.

Put simply, Plaintiffs have not been denied "adequate procedural protections" in connection with any deprivation of their liens. First, they have not, in fact, been deprived of their liens *at all.* They have only had the continued existence of those liens conditioned on payment of a $100 fee. That they might not choose to pay that fee for all of their liens does not mean that they cannot pay the fee for some or all of the liens for which it is economically worthwhile to do so. What is important, in any event, is that they have that choice,

one they are free to make or not make, according to their own economic interests and circumstances. *See, e.g., Murray v. Dosal,* 150 F.3d 814, 17-18 (8th Cir. 1998) ("Requiring prisoners to make economic decisions about filing lawsuits does not deny access to the courts; it merely places the indigent prisoner in a position similar to that faced by those whose basic costs of living are not paid by the state.... If a prisoner determines that his funds are better spent on other items rather than filing a civil rights suit, he has demonstrated an implied evaluation of that suit that the courts should be entitled to honor.") (quoting *Roller v. Gunn,* 107 F.3d 227, 233 (4th. Cir. 1997)) (omitting internal quotation marks and other punctuation); *see also generally Ortwein v. Schwab,* 410 U.S. 656, 659 (1973).

Second, there is a mechanism in place for recovery of any such fee, by way of California Labor Code § 4903.07. Although Plaintiffs complain about the limits on the practical helpfulness of that provision, Due Process attacks have failed even without discussing the issue of recompensability. *See United States v. Kras,* 409 U.S. 434 (1973), *Ortwein,* 410 U.S. at 658-60; *Boyden v. Comm'r of Patents,* 441 F.2d 1041, 1044 (D.C. Cir. 1971).

Third, Plaintiffs not only still have access to the workers' compensation system for resolution of their liens (distinguishing them, for that reason amongst others, from the plaintiffs in *Boddie v. Connecticut,* 401 U.S. 371 (1971), and *Payne v. Superior Court (South Bay Sentry Dogs, Inc.*), 17 Cal. 3d 908 (1976)), they also have a right to petition for reconsideration of a final decision in the employee's case-in-chief and, if

unsatisfied by the result from that maneuver, to petition for writ of review in the courts. *See* 2 Witkin, Summary of California Law: Workers' Compensation (10th ed.) § 351, at 965-66; *id.* § 418, at 1043-44; Cal. Lab. Code § 5810.

Fourth, Plaintiffs continue to have the option open to them of resolving their liens without having to pay any activation fee. *See*, *e.g.,* Cal. Lab. Code § 4903.6(a) (providing that lien claim shall not be filed until 60 days have elapsed after the date of acceptance or rejection of liability for the claim); *id.* § 4903.07(b) ("This section shall not preclude an order or award of reimbursement of the...activation fee pursuant to the express terms of an agreed disposition of a lien dispute."); *see also Kras,* 409 U.S. at 445 ("In contrast with divorce [as in *Boddie*], bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors.... However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors.... Resort to the court, therefore, is not Kras's sole path to relief."). Plaintiffs attempt to distinguish *Kras* under the theory that once their liens are wiped out (if they do not pay activation fees by, at the latest, the beginning of next year) they will have no leverage with which to bargain. While that may be true *as of that time,* as of now, and ever since SB863 was passed, they have had such leverage, even if their position has been weakened by the upcoming deadline(s). Moreover, they will continue to have a position from which to negotiate if they pay the $100 fee(s) by the applicable deadline(s).

The Court's conclusion in this regard would be the same even if the *Mathews v. Eldridge* test provided the proper lens through which to view the claim. *See generally* 424 U.S. 319, 334-35 (1976); *see also Wynar v. Douglas Cnty. Sch. Dist.,* 728 F.3d 1062, 1073 (9th Cir. 2013). As Defendants argue, while it is Plaintiffs' pocketbooks and their accounts receivable that will be affected by the activation fee, the fees are being used to support the system Plaintiffs have used (and can continue to use) to resolve then lien claims; the fees do not close off the only possible avenue for resolving their liens (in fact, they do not "close off" any avenues, making application of the *Mathews* test in this situation – as opposed to a straightforward application of a case such as *Kras* – somewhat strange in the first place); and Plaintiffs have reimbursement/ reconsideration/appellate rights.

Plaintiffs have provided the Court with no reason to believe that, for purposes of their due process claim, they can somehow amend around the effects of cases such as *Kras, Murray* and *Ortwein,* or that they can somehow make their case more like *Boddie* or *Payne.* As such, the Court would dismiss the claim, without leave to amend.

4. Equal Protection

"To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a Plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Lee v. City of Los Angeles,* 250 F.3d 668, 686 (9th Cir. 2001) (quoting *Barren v. Harrington,* 152 F.3d 1193, 1194 (9th Cir.

1998)). Where the group excluded or discriminated against does not constitute a suspect class a plaintiff may still state a claim, but "for equal protection purposes, a governmental policy that purposefully treats" groups differently "need only be 'rationally related to legitimate legislative goals' to pass constitutional muster." *Id.* at 687 (quoting *Does 1-5 v. Chandler,* 83 F.3d 1150, 1155 (9th Cir. 1996)); *see also McQueary v. Blodgett,* 924 F.2d 829, 834 n.6 (9th Cir. 1991). As with suspect classes, differential treatment impinging on a fundamental right will "draw strict scrutiny" attention under the Equal Protection Clause. *See City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439-40 (1985) (explaining that equal protection claims based on membership in a protected class or unequal burdening of a fundamental right are reviewed under strict scrutiny); *OSU Student Alliance v. Ray,* 699 F.3d 1053, 1067 (9th Cir. 2012), *cert denied,* 2013 WL 1808554 (U.S. Oct. 7, 2013). The existence of a vested property right is irrelevant to an equal protection challenge. *See Outdoor Media Group, Inc. v. City of Beaumont,* 506 F.3d 895, 903 (9th Cir. 2007).

The retroactive[18] $100 lien activation fee at issue in is case specifically does not apply

> to any lien filed by a health care service plan licensed pursuant to [Cal. Health & Safety Code

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[18] The Court joins Defendants' rejection of Plaintiffs' argument directed at convincing the Court that the activation fee is not, in fact, intended to operate retroactively, in an effort to take advantage of the Constitutional issue-avoiding approach taken up in the Supreme Court's *Security Industrial Bank* decision. *See United States v. Sec. Indus. Bank,* 459 U.S. 70, 74, 78, 82 (1982).

> § 1349], a group disability insurer under a policy issued in this state pursuant to the provisions of [Cal. Ins. Code § 10270.5], a self-insured employee welfare benefit plan, as defined in [Cal. Ins. Code § 10121], that is issued in this state, a Taft-Hartley health and welfare fund, or a publicly funded program providing medical benefits on a nonindustrial basis.

Cal. Lab. Code § 4903.06(b). For purposes of a Rule 12(b)(6) challenge, "an equal-protection claim must assert that a plaintiff was treated differently than other similarly situated persons and that the disparate treatment was intentional. To avoid dismissal, a plaintiff must plausibly suggest the existence of a discriminatory purpose." *Recinto v. U.S. Dep't of Veterans Affairs,* 706 F.3d 1171, 1177 (9th Cir.), *cert. denied,* 2013 WL 1904100 (U.S. Oct. 7, 2013); *see also Whitmire v. Arizona,* 298 F.3d 1134, 1136 (9th Cir. 2002) ("A dismissal on the pleadings, without requiring any evidence corroborating that a rational connection exists between the visitation policy and correctional safety, is appropriate only when a common-sense connection exists between the prison regulation and the asserted, legitimate governmental interest."). Section 4903.06(b) makes plain the intentional differential treatment of other lienholders by way of their exemption. The only question the Court might have is whether Plaintiffs have sufficiently pled a "discriminatory purpose." Arguably, they have – the protection of large, well-represented business interests to the detriment of small, independent, lienholders such as Plaintiffs. Because, in this instance, resolution of that issue would appear to be somewhat bound-up with the question of whether the exemptions in section

4903.06(b) can survive rational basis review,[19] and that rational basis review is discussed in more detail in connection with the preliminary injunction motion, the Court would deny Defendants' Rule 12(b)(6) challenge to Plaintiffs' equal protection claim and then proceed to an assessment of the preliminary injunction motion.

5. Proper Defendants?

Defendants argue that Baker and Caplane are not proper party defendants because of their lack of direct connection to enforcement of the activation fees. As an initial matter, the Court notes that Defendants are only seeking the dismissal of two of the three individual defendants. As such, in light of the fact that they appear to agree that at least Overpeck is a proper defendant here, the urgency behind a dismissal of Baker and/or Caplane at this stage is somewhat questionable. At the same time, so is the opposition thereto. In any event, given that at least one of the three defendants will remain a defendant in this case, the focus for purposes of the instant proceedings will be on the sufficiency of the pleadings and, if necessary, the merits of the claims under a preliminary injunction analysis.[20] The Court will return to the question of

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[19] As discussed in more detail in connection with the preliminary injunction motion, the Court concludes that rational basis review, not strict scrutiny, is the appropriate framework to assess this claim in this case.

[20] If the Court issues a preliminary injunction, Baker and Caplane would seemingly unquestionably fall within the types of people who would have to comply with any such injunctive relief (assuming they received "actual notice" of any such order),

Baker's and Caplane's continued role, if any, in this lawsuit, if it concludes (as currently set forth above) that at least one of the claims survives the pleadings.

6. Conclusion re Motion to Dismiss

Assuming that the Court maintains the views it has expressed above, it will grant Defendants' motion to dismiss Plaintiffs' Takings Clause and Due Process claims, without leave to amend, but will deny the motion insofar as Plaintiffs' Equal Protection claim is concerned.

B. Plaintiffs' Motion for a Preliminary Injunction

1. Governing Standard

Since 2008, it has been clear that to obtain a preliminary injunction, Plaintiffs must show that they are "likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).[21] However, "[u]nder [the Ninth

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regardless of whether they are parties or not. *See* Fed. R. Civ. P. 65(d)(2).

[21] This case is not a class action, and there are seven plaintiffs. The Court would ask the parties what effect that observation has in two regards: 1) does the *Winter* analysis have to be separately-performed for each of the seven plaintiffs?; and 2) if an injunction is issued, would the injunction be limited to the seven plaintiffs or would it include any non-exempt lienholder with liens pre-dating

Circuit's] 'sliding scale' approach to evaluating the first and third *Winter* elements, a preliminary injunction may be granted when there are 'serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff,' so long as 'the other two elements of the *Winter* test are also met.'" *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris,* 729 F.3d 937, 944 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131-32 (9th Cir. 2011)).[22] A district court may consider hearsay and

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January 1, 2013? *Cf. Los Angeles Haven Hospice, Inc. v. Sebelius,* 638 F.3d 644, 664-65 (9th Cir. 2011).

[22] This Court continues to believe that there is an argument to be made that the "sliding scale" standard recognized in *Alliance for Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131-35 (9th Cir. 2011), as still viable in this Circuit post- *Winter* is, in fact, no longer the law. In *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009), the Ninth Circuit made clear that the Supreme Court's *Winter* decision had announced the applicable standard governing injunctive relief: "To the extent that our cases have suggested a lesser standard [than that announced in *Winter*], they are no longer controlling, or even viable." *American Trucking,* 559 F.3d at 1052. In making that announcement, the *American Trucking* panel cited directly, as an example of "a lesser standard," to a pin-cited page of its earlier decision in *Lands Council v. Martin,* 4 79 F.3d 636 (9th Cir. 2007), in which it had earlier set forth both the "possibility of irreparable injury" standard that *Winter* specifically addressed *and* the Ninth Circuit's sliding scale approach. *See id.* at 639. It is a commonplace observation that one three-judge panel of the Ninth Circuit – such as the *Alliance for Wild Rockies* panel – may not overrule an earlier three-judge panel in the absence of intervening controlling Supreme Court precedent. *See United States v. Mayer,* 560 F.3d 948, 964 (9th Cir. 2009); *see also* Schwarzer, Tashima, et al., California Practice Guide: Federal Civil Procedure Before Trial (2012) §§ 13:45.5-45.7, at 13-20 – 13-21. Nevertheless, a number of courts within the Ninth Circuit –

other inadmissible evidence in deciding whether to issue a preliminary injunction. *See Johnson v. Couturier*, 512 F.3d 1067, 1083 (9th Cir. 2009); *Flynt Distrib. Co. v. Harvey,* 734 F.2d 1389, 1394 (9th Cir. 1984).

a. Likelihood of Prevailing on the Merits

If, as the Court has concluded above in connection with Defendants' motion to dismiss, Plaintiffs have not sufficiently demonstrated (or sufficiently alleged) the existence of a protectable property right, and therefore cannot state a Takings Clause-based claim, they have no likelihood of prevailing on the merits of such a claim. Likewise, if they have not sufficiently stated a Due Process-based claim, they have no likelihood of prevailing on that claim either. As such, the analysis of Plaintiffs' motion for a preliminary injunction will be limited to their equal protection claim.

To begin – as foretold above – the Court does not believe that strict scrutiny applies to the section

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including subsequent Ninth Circuit decisions involving equal protection claims -- have followed *Alliance for Wild Rockies* without questioning its apparent conflict with earlier Circuit authority. *See, e.g., Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012); *Pimental v. Dreyfus*, 670 F.3d 1096, 110-06 (9th Cir. 2012) ("[A]t an irreducible minimum, though, 'the moving party must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation.'") (quoting *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009), a pre-*American Trucking* decision). That trend, combined with Defendants' failure to argue that the "sliding scale" approach is now extinct, leads this Court to presume (for purposes of this case only) the vitality of that approach for the necessary analysis on Plaintiffs' preliminary injunction motion.

4903.06(b) exemption or the resulting implementation of activation fees only upon entities in Plaintiffs' position. Plaintiffs' case for applying strict scrutiny rests upon *Boddie* and *Payne.* Those two cases, however, both involved a fee-based wholesale preclusion of indigents' access to the only possible method for resolving fundamental rights. In *Boddie,* it was access to Connecticut's divorce courts. *See* 401 U.S. at 380-81. In *Payne,* it was access to the courts by a prisoner made defendant in a civil action. *See* 17 Cal.3d at 913, 916-17. Here, as partly discussed above, Plaintiffs are 1) not indigent, 2) not prisoners, 3) not concerned with the fundamental right to marry, 4) not completely cut off from accessing the workers' compensation system, and 5) not even cut off from resolving their disputes outside of the workers' compensation system. *Boddie* and *Payne,* in sum, are not a pathway to strict scrutiny assessment in this case. Instead, only rational basis review is at issue.

"Under rational basis review, the Equal Protection Clause is satisfied if: (1) 'there is a plausible policy reason for the classification,' (2) 'the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker,' and (3) 'the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.'" *Bowers,* 671 F.3d at 917 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)); *see also Armour v. City of Indianapolis, Ind.,* 132 S.Ct 2073, 2080 (2012) ("This Court has long held that 'a classification neither involving fundamental rights nor proceeding along suspect lines ...cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of

treatment and some legitimate governmental purpose.'") (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)). Here, while in the end Defendants may prevail, Plaintiffs have at least a "fair chance of success on the merits," if not also a "likely" ability to prevail.

There is no question that the legislature has a legitimate legislative goal in its implementation of fees to the extent those fees have a purpose of funding the workers' compensation adjudicative system and/or deterring lien filings so as to not clog the system. The question is whether a *retroactive* fee like the activation fee herein involved, that is designed to a clear the *backlog* currently in the system (as well as provide funding for the system) can, while accomplishing those purposes, also discriminate amongst lienholders. If it cannot, then the case for a *rational* relationship to that (or those) legitimate governmental interest(s) is severely weakened. Indeed, as Plaintiffs point out, the study that the legislature commissioned from the Commission on Health and Safety and Workers' Compensation to come up with responses to the backlog proposed 28 recommendations, and the activation fee – let alone a *discriminatory* activation fee – was *not* among them (though a *prospective* filing fee, which the legislature also enacted – and which is not at issue in this case – was). Using the *Bowers* analysis, Defendants would appear to face their biggest hurdles with respect to whether "there is a plausible policy reason" for the distinction in lienholders when it comes to a retroactive application fee, and with whether "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."

Defendants contend that the exempted entities are not major contributors to the backlog. However, if they are not major contributors to the backlog, and if one of the purposes behind the imposition of fees is to fund the system, why any lienholder whose liens are tied up in the "backlog" would be exempted is somewhat curious, especially ones who would not be greatly impacted because they are not major contributors to the backlog. The backlog is the backlog, and if clearing it is your purpose, then you attempt to clear it. It makes little sense to clear only part of it. The Court might also question the basis for the legislature's belief in its apparent conclusion that the exempted entities, in particular, are not major contributors to the backlog (and why other contributors who might also not be major contributors are not also exempted from the activation fee).

If, instead (or, in addition to), the purpose behind imposing the retroactive activation fee is to clear not just liens generally, but fraudulent or trumped-up liens, there is seemingly even less of a reason for the differentiation drawn by the exempt/non-exempt dividing line. The conclusion that the non-exempt lienholders are wholly responsible for any fraudulent or trumped-up liens is entirely speculative, nor is there any reason in particular to suspect that already-filed liens of small value (the ones most likely to be dissuaded by a retroactive $100 activation fee) are any more likely to be fraudulent or trumped-up than high-value already-filed or to-be-filed liens. Moreover, as Plaintiffs argue, there are much more direct methods of weeding out fraudulent liens and dissuading future fraudulent liens – sanctions and fines. *See, e.g., Boddie,* 401 U.S. at 381-82. This is not to say that the

legislature must elect the least-restrictive path; instead, it simply drastically weakens the strength of the reasoning behind the purpose-implementation link.

If Defendants' reasoning is instead (or partially) that exempted entities are in a different position because of their contractual obligation to treat non-occupational conditions without waiting to investigate the *bona fides* of the industrial injury, *Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board,* 87 Cal.App.3d 336, 360-61 (1978),[23] this is only true depending upon at what level the Court examines the idea of an "obligation." Like the non-exempted entities, the exempted entities (or at least some of them) had a choice: they were not forced into the so-called "obligatory" position Defendants posit. They had a choice to get into their line of business, just as Plaintiffs had a choice to provide goods or services to injured employees. In fact, the *Kaiser Foundation* decision recognized that the "Group Health Care Plans" involved in that case *"can* exclude from coverage treatment for injuries that are compensable under the workers' compensation laws." *Id.* at 361. *Neither* of the exempt/non-exempt groups had any reason to suspect that a *retroactive* application fee would ever be imposed upon them because of their choices.[24] Moreover, while

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[23] Whatever impact it might have here, the *Kaiser Foundation* decision did *not* encompass all of the groups that are exempted under section 4903.06(b). *See* 87 Ca.App.3d at 359-60.

[24] Though there was a filing fee for several years last decade (and one that apparently had an impact upon the number of lien filings), Defendants have not demonstrated that there has ever been a retroactive application/filing fee.

this distinction between the groups, if it is a valid one,[25] might explain exempting such entities from paying the filing fee for *future* lien filings, to the extent already-filed liens are at issue, again, the backlog is the backlog – why the liens exist in the first place is seemingly somewhat beside the point.

Under the Ninth Circuit's preliminary injunction standard, the Court stands by the foregoing analysis notwithstanding the notion that "in the area of economic and social welfare [legislation], a State does not violate the Equal Protection Clause merely because the classifications made by the law are imperfect," *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), and the rule that a classification with "some rational basis ...will 'not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.'" *Bowers,* 671 F.3d at 918 (quoting *U.S. R.R. Bd. v. Fritz,* 449 U.S. 166, 175 (1980)). The general presumption of the validity of a statute, see, *e.g., Kaiser Foundation,* 87 Cal.App.3d at 360, is similarly not dispositive of this claim at this stage in the case. Upon a closer examination of the merits after further development of this case, Defendants may yet prevail along the lines of these concepts. But where the question is whether Plaintiffs have a "fair chance of success on the merits," *Pimentel v. Dreyfus,* 670 F.3d 1096, 110-06 (9th Cir. 2012), or whether a balance of hardships strongly in their favor (as set forth further below) buttresses something less than a "likelihood" of prevailing on the

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[25] That it was a meaningful distinction for the legislation at issue in *Kaiser Foundation* does not necessarily mean that it is a meaningful distinction for purposes of the activation fees.

merits, the result of this proceeding, at this stage, is favorable to the Plaintiffs.

b. Likelihood of Irreparable Harm

There is not just a likelihood of irreparable harm here, but almost a certainty (for at least some of the Plaintiffs). Plaintiffs' finances threaten to be stretched to – or past – the breaking point if they are to pay all[26] of the fees that would be due. *See* Altman Decl. (Docket No. 27) ¶¶ 5, 8, 12 (5,054 fee-unpaid liens totaling roughly $3.8 million worth of services for interpreting business); Calhoun Decl. (Docket No. 28) ¶¶ 5, 8, 12 (6,500 fee-unpaid liens totaling roughly $3 million worth of services for interpreting business); Payne Decl. (Docket No. 29) ¶¶ 5, 8, 12 (1,500 fee-unpaid liens totaling roughly $8 million worth of services for spinal surgeon/physician); Gaines Decl. (Docket No. 30) ¶¶ 5, 8, 11 (approximately 21,000 fee-unpaid liens totaling roughly $62 million worth of goods and services for pharmacy); Vatandoust Decl. (Docket No. 31) ¶¶ 5, 8, 12 (2,200 fee-unpaid liens totaling roughly $1.9 million worth of services for subpoena and copying service business). *But see* Footnote 21, *supra.* Either they must pony up scores, or hundreds, or thousands, of $100 fees,

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[26] To the extent that Defendants argue that irreparable harm is lacking because Plaintiffs could pick-and-choose which lien-fees to pay and which not to pay, irreparable harm would still be present in the case of a Constitutional injury (or "likely" one), as discussed further *infra.* To the extent they argue irreparable harm because a) Plaintiffs should be able to get financing to front the fees, the Court cannot reach that conclusion at this stage (though perhaps later discovery would support it), or b) Plaintiffs can get fees reimbursed, the Court agrees with Plaintiffs that the reimbursement avenue is fairly circumscribed.

or they simply lose their liens. Those liens are, in essence, accounts receivable for Plaintiffs, at least some of which have purportedly been used – in the case of amici, *see* Docket No. 35-1, at 6:3-24 – to secure business financing.[27] This is irreparable harm. *See Perfect 10, Inc. v. Google, Inc.,* 653 F.3d 976, 981 (9th Cir. 2011) ("[B]eing forced into bankruptcy qualifies as a form of irreparable harm."), *cert. denied,* 132 S.Ct. 1713 (2012); *Am. Passage Media Corp. v. Cass Commc'ns, Inc.,* 750 F.2d 1470, 1474 (9th Cir. 1985) ("The threat of being driven out of business is sufficient to establish irreparable harm."); *Performance Unlimited, Inc. v. Questar Publishers, Inc.,* 52 F.3d 1373, 1382-83 (6th Cir. 1995); *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1058-59 (9th Cir. 2009); *Miss Am. Org. v. Mattel, Inc.,* 945 F.2d 536, 546 (2d Cir. 1991). That such harm is "likely" is, if anything, an understatement. In addition, Constitutional injuries are usually presumed to constitute irreparable harm. *See, e.g., Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1138 (9th Cir. 2009); *Goldie's Bookstore v. Superior Court (Waters),* 739 F.2d 466, 472 (9th Cir. 1984).

c. Balance of Equities

The balance of equities tips sharply in Plaintiffs' favor. As noted above, Plaintiffs' businesses are likely to suffer grievous harm, if not outright elimination. *But see* Footnote 21, *supra.* Meanwhile, if Defendants are

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[27] The use of these accounts receivable to obtain financing, as to which there is no actual evidence in the record, is not determinative of the Court's analysis of the irreparable harm factor.

not able to impose the retroactive activation fee, the system will proceed as it has been, and will not be deprived of any funding (as the fees are simply designed to offset other funding sources). Even if that means a continued "backlog" and continued frustratingly-slow developments in workers' compensation proceedings, it will not be a change in the *status quo*. Moreover, the implementation of the filing fee for *newly-filed* liens will, overtime, begin to lessen the influx of liens coming into the system. As such, this factor clearly favors an award of preliminary injunctive relief, and the balance is tipped so sharply in Plaintiffs' favor that it outweighs any shortfall Plaintiffs might have in reaching the "likely" level in terms of their prevailing on the merits.

d. Public Interest

While it is true that an injunction would negatively impact the public interest in general by way of an effect on the overall workers' compensation adjudicative system in favor of a positive impact on Plaintiffs' businesses, ultimately the public interest factor favors a preliminary injunction here as well. "Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi,* 422 F.3d 815, 826 (9th Cir. 2005); *see also Rodriguez v. Robbins,* 715 F.3d 1127, 1146 (9th Cir. 2013) ("It stands to reason that the public interest also benefits from a preliminary injunction that ensures that federal statutes are construed and implemented in a manner that avoids serious constitutional questions."); *Melendres v. Arpaio,* 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the

public interest to prevent the violation of a party's constitutional rights.") (omitting internal quotation marks) (quoting *Sammartano v. First Judicial Dist. Court,* 303 F.3d 959 (9th Cir. 2002)).

e. Conclusion re Preliminary Injunction

There is no question that the likelihood of irreparable harm, balance of equities and public interest factors weigh in favor of a preliminary injunction here. In addition, the balance of equities tips so sharply in Plaintiffs' favor that, even if the Court were to conclude that they fell short of demonstrating that it was "likely" that they would prevail on the merits of their equal protection claim, the Ninth Circuit's apparent "sliding scale" test for preliminary injunctive relief indicates that such relief is warranted here in any event. As such, the Court would grant the request for preliminary injunctive relief concerning the implementation of SB863's "activation fee," and should discuss with the parties the appropriate scope of such an injunction. *See* Footnote 21, *supra*.[28]

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[28] If the injunction stems solely from Plaintiffs' Equal Protection claim (and not from their Takings and Due Process claims), one question the Court might consider is whether it should simply enjoin section 4903.06(b)'s exemption from the activation fee, or whether it should enjoin the activation fee in general. The latter seems by far the more likely option considering the Court's discussion of irreparable harm and balance of the equities, in addition to the fact that the previously-exempt entities would have only a few weeks' worth of notice to prepare for implementation of the activation fees.

III. Conclusion

The Court would grant Defendants' motion to dismiss Plaintiffs' Takings Clause and due process claims, without leave to amend. It would deny that motion insofar as Plaintiffs' equal protection claim is concerned. It would also grant Plaintiffs' motion for preliminary injunction, and discuss with the parties the appropriate scope of preliminary injunctive relief.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 13-1139-GW(JEMx)	Date	November 7, 2013
Title	*Angelotti Chiropractic, Inc., et al. v. Kamala D. Brown, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	Wil Wilcox	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Glen E. Summers Paul D. Murphy	Mi K. Kim Harold L. Jackson

PROCEEDINGS: PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [24];

DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT [23]

The Court's Further Thoughts on Defendants' Motion to Dismiss and Plaintiffs Motion for Preliminary Injunction is circulated and attached hereto. Court hears oral argument. A Proposed Preliminary Injunction Order will be filed by November 12, 2013. For reasons stated on the record, the above-entitled motions are. TAKEN UNDER SUBMISSION. Court to issue ruling.

_____ : 45

Initials of Preparer JG

Angelotti Chiropractic, Inc., et al. v. Baker, et al.,
Case No. CV-13-cv-01139 GW (JEMx)
Further Thoughts on Defendants' Motion to Dismiss First Amended Complaint and Plaintiffs' Motion for Preliminary Injunction

Considering the arguments made at the Monday, November 4, 2013 hearing held in connection with the above-listed motions, the Court has the following comments/views:

First, the Court is inclined to maintain its Tentative Ruling with respect to at least Plaintiffs' motion for preliminary injunction – *i.e.,* it will grant the preliminary injunction, but only with respect to the Equal Protection claim. Notwithstanding the fact that this is not a class action, the Court is strongly inclined to prohibitively enjoin operation or implementation of the activation fee throughout the State of California.

Second, the Court would *consider* the possibility of inviting supplemental briefing focused solely[1] on a

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[1] Though Defendants presented a number of reasons they felt further supported the distinction drawn between the exempted and non-exempted lienholders for purposes – in connection with the Equal Protection claim – of demonstrating both that those two categories were not similarly situated and that there was a rational reason for the distinction, the Court already rejected – for purposes of this early procedural setting – the reasons offered in the briefing, and finds telling the decision not to include in the briefing those explanations that were advanced for the first time at oral argument. In terms of being "similarly situated" in connection with lien backlogs or fraudulent/false liens, the only germane factor would appear to this Court to be status as a workers' compensation-related lienholder, In addition, given the "sliding scale" approach applied here, none of the reasons-for-

robust and more-thorough discussion of what makes medical-legal liens distinct from other liens encompassed by this action. Such a discussion might affect whether or not the Court grants Defendants motion to dismiss *with* leave to amend (as opposed to without leave) in connection with Plaintiffs' Takings Clause claim. For reasons addressed in the Tentative Ruling, the Court remains skeptical of Plaintiffs' Due Process claim irrespective of the existence of a property right. As such, the Court is leaning towards dismissing that claim without leave to amend even if it were to offer an opportunity for further briefing regarding the medical-legal distinction.

Before going down that supplemental briefing road, however, the Court would invite the parties to consider and discuss their appellate plans under 28 U.S.C. § 1292(a)(1), and how best to proceed. Obviously, if useful injunctive relief is to issue, it must occur quickly. If, however, the parties are still engaged in drawn-out, supplemental-briefing-based, proceedings in connection with the Takings Clause and/or Due Process claims at the time their appellate rights expire with respect to any issued injunction, they may lose out on the opportunity to have the Ninth Circuit consider those Claims at this early stage in the case. If, instead, the Court were to, at this time (or at the same time it issues the Equal Protection-based injunction), dismiss both the Takings Clause and Due Process claims without leave to amend, and then issue a final judgment pursuant to Federal Rule of Civil Procedure

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distinction mentioned for the first time at oral argument were sufficiently convincing to deny Plaintiffs preliminary injunctive relief.

54(b), the parties may be able to have all three of the claims up for the Ninth Circuit's perusal and decision at the same time. *See, e.g., Cotter v. Desert Palace, Inc.,* 880 F.2d 1142, 1144 (9th Cir. 1989)("We have jurisdiction to review the denial of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). Dismissal of portions of a complaint, on the other hand, is an interlocutory order which is generally not reviewable unless the trial court certifies it as final under Fed. R. Civ. P. 54(b)."); *Premier Commc'ns Network, Inc. v. Fuentes,* 880 F.2d 1096, 1099 (9th Cir. 1989). They might also believe, however, that the mere decision of the Court to grant injunctive relief *only* with respect to the Equal Protection claim (though Plaintiffs had requested it with respect to all three claims) itself sufficiently presents the issues for full Ninth Circuit consideration irrespective of what this Court does with Defendants' Rule 12(b)(6) motion. *See, e.g.,* Goelz & Watts, Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice (2006) § 2:247.5, at 2-60 (concerning appellate jurisdiction over orders "inextricably bound up" with appealable injunctive order); *id.* (2007) § 2:259, at 2-62; id. (2010) § 7:51, at 7-13 – 7-14; *cf. id.* § 7:56.5, at 7-16 (considering reviewability of *denial* of motion to dismiss in correction with appeal of injunctive order).

Finally, following consideration of these issues, the Court invites the parties to address whether or not there is a need to resolve the question of the continued involvement of defendants Baker and Caplane before (or at the same time as) any of the above-mentioned rulings, or whether the outcome of that question can await further proceedings concurrent with or following any potential Ninth Circuit proceedings.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 13-1139-GW(JEMx)	Date	November 12, 2013
Title	*Angelotti Chiropractic, Inc., et al. v. Kamala D. Brown, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Glen E. Summers Paul D. Murphy Sundeep K. Addy	Harold L. Jackson

PROCEEDINGS: PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [24];

DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT [23]

Hearing is held off the record.

Plaintiff's Motion for Preliminary Injunction is GRANTED. Defendant's Motion to Dismiss is GRANTED. The Court dismisses the Takings Clause and Due Process claims without leave to amend. Court to issue order re Preliminary Injunction.

A Status Conference is set for **December 23, 2013 at 8:30 a.m.**

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Initials of Preparer JG

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HONORABLE GEORGE H. WU, DISTRICT JUDGE PRESIDING

No. CV 13-1139-GHW

[Dated November 4, 2013]

ANGELOTTI CHIROPRACTIC, INC. ,

Plaintiff,

vs.

KAMALA D. BROWN, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, NOVEMBER 4, 2013

MOTIONS

DEBORAH K. GACKLE, CSR, RPR
United States Courthouse
312 North Spring Street, Room 402A
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U.S. DISTRICT COURT, CENTRAL DISTRICT
OF CALIFORNIA
COURT REPORTER DEBORAH K. GACKLE

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LOS ANGELES, CALIFORNIA; MONDAY, NOVEMBER 4, 2013; 10:05 A.M.

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THE COURT: Let me call Angelotti Chiropractic, Inc. v. Kamala D. Brown, et al.

Let me have appearance of counsel.

MR. SUMMERS: Your Honor, Glen Summers and Rob Addy on behalf of the plaintiffs, and with me is Paul Murphy.

MR. ADDY: Good morning, Your Honor.

THE COURT: And for the defense.

MR. JACKSON: Good morning, Your Honor. Harold Jackson and Mi Kim for the defendants.

THE COURT: We have the defendant's motion to dismiss and the plaintiff's motion for preliminary injunction. I've issued a tentative on these, and it is a tentative tentative, but it is what it is at this point.

Let me ask both sides: Have you had an opportunity to read it?

MR. SUMMERS: We have, Your Honor.

MR. JACKSON: Yes, Your Honor.

THE COURT: Somebody want to argue something?

MR. SUMMERS: Yes, Your Honor.

THE COURT: Only the plaintiffs?

MR. JACKSON: Oh, no. I have my independent point's, and I may respond to theirs.

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THE COURT: Let me hear the plaintiffs first.

MR. SUMMERS: Your Honor, before we begin may, I ask how we are set on time? I know --

THE COURT: Well, we're set for time but how much time do you want?

MR. SUMMERS: As much time as we can get. I think we'll be fine.

Let me start by addressing the takings-clause issues. Respectfully, I think the court has focused far too narrowly on the issue of the lien and whether a lien constitutes a protective property interest and has sort of missed the big picture.

The plaintiffs in this case have provided millions of dollars worth of goods and services, and they've given those services to injured workers, but they didn't do so because they -- you know, they didn't do so out of the goodness of their hearts, they did so because the state induced them to do so by creating a system and offering them in return for their services something the state voluntarily chose to call a lien, knowing that for decades, if not centuries, liens have been thought of as a traditional form of property interest protected by the Constitution. But the state induced --

THE COURT: Let me stop -- titles of things are more or less meaningless. You have to look at what it

is. I've discussed what it is so are you saying that the court's

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discussion of what it is is somehow wrong?

MR. SUMMERS: Yes, and I will get to that. But I think the court has overlooked the fact that their underlying goods and services, we have to look at the totality of the state's conduct, not just at the implementation of SB863, but at the totality of the state.'s conduct. For years the state said, Provide these services to injured workers -- that is a public benefit -- provide this public benefit, and we will compensate you reasonably for your services.

THE COURT: Well, as long as certain things occur. It's not a regular lien as most liens are, it's a contingency lien. In other words, in order to get a recovery, there has to be certain things that -- either the underlying claim on which it was based has to prevail, or there has -- there are other means by which, for example, there could be settlements and things of that sort where, if both sides agree, something else can transpire where the particular plaintiff entity gets money back for the services that it provides.

MR. SUMMERS: True.

THE COURT: But it is what it is.

MR. SUMMERS: True. Now, we've shifted into another subject, though, and I think we're again missing the big picture about what is happening as a result of the state's conduct in its entirety; but let me fast forward to the issues you just raised.

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Number one, if you look at the -- look at this lien, the lien is -- a lien is traditionally a property -- it's a traditional property interest, but it is a security interest. Getting a lien does not mean that the underlying claim is valid. If you look at a materialman's lien or a mechanic's lien, the lienholder files a lien, but the lienholder must still later prove that they're entitled to underlying claim for compensation. So the materialmen in *Armstrong,* it was not a certainty that they were entitled to 100 percent of the value of their liens. The shipbuilder could have said no, you charged too much for the steel or I didn't receive that much steel or whatever the materials were. There are always defenses to liens to the underlying claims. It is the security interest, though, which is a property right.

Also, if you fast forward, we turn to the issue of the contingencies to success on a lien, there's no discretion; there's no speculation; these are not lottery tickets. The requirements for prevailing on a lien are fairly ministerial and fairly simple, and they are objectively verifiable. If it's a medical lien, the issue is whether the worker was employed, whether he suffered an industrial injury and whether the treatment was reasonably required to treat or relieve the effects of the injury.

If an injured worker comes in to a doctor, the doctor asks a series of questions: Sir, are you employed? Who is

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your employer? Were you injured on the job? What is your injury? The doctor is then in a position to determine what treatment is reasonable under the guidelines and the specific schedules that have been provided by the department. So again, this is not -- let's turn -- you know, if you look at the *Engquist* case, the Ninth Circuit said that there's no --

THE COURT: Let me stop you. I understand your argument at this point. Let me hear a response from the defense on this particular point only.

MR. JACKSON: Your Honor, I think both parties adequately addressed all these points in our briefs. Briefly I'll say --

THE COURT: Again, when I ask you to do something and you respond that you don't need to respond to the court's question because it's adequately responded to doesn't particularly help me. I want you to respond to his argument.

MR. JACKSON: Their point is that it's a security lien. If you look to California law, under California law it's not a security lien. He refers to mechanic's lien. Under California law, the California Constitution created a security interest. It is recordable. In the case they cited, it was recorded. That doesn't happen with Workers' Compensation liens.

Further, the determinations for whether or not a lien is ultimately no longer contingent but vested are not just

[p.8]

ministerial. There are many cases where no recovery occurs because there's no employment. The injury is not compensable at all and further. . .

THE COURT: Okay.

MR. SUMMERS: Well, let me turn also to the issue of the medicolegal liens. The court's tentative suggests that they are dependent on the worker recovering. That is not so; it is undisputed that it is not so. The statutes that are pertinent -- we did cite 4620, which defines medicolegal liens, but if you look at 4621 and 4622, they require payment on those liens regardless of whether the claimant prevails. So for medicolegal liens, the prerequisites for recovery are very minor. It's simply whether the services provided were given to prove or disprove a disputed claim. So if a worker comes in, has a claim, or if a lawyer calls, and they have a claim, that's all that's required.

Again, this idea that these are somehow incredibly contingent, speculative, discretionary recoveries is not the case, and I'd ask the court to apply some common sense. There are $6 billion worth of outstanding liens in the system right now. Would these people have provided millions of dollars worth of benefits to injured workers if they thought that the right to recovery could just be taken away? They absolutely --

THE COURT: They said yes, because they have to comply. Things have to happen which are -- although you've

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contested that it's not contingent if certain things don't happen, there's no guarantee that they're going to get the money they spend, so, yes.

MR. SUMMERS: There's no guarantee that they will recover on every single lien, but when patients come in, they can make reasonable determinations to minimize the risks of that. They had no idea the state would come in years later, after they'd been providing benefits for decades, come in and say, You know what? We have the right to take away these liens in their entirety.

One thing you have to consider, Your Honor, is the potential shock waves that would result from your tentative ruling.

THE COURT: There's not going to be a particular shock wave because -- again, you say that it's a particular shock wave, but I've already indicated that insofar as the future is concerned -- in other words, the plaintiffs aren't, apparently, objecting to the imposition of the fee for newly-created liens so, therefore, it's not going to be a shock wave, it's going to be the normal course that's going to transpire. So it's just -- the issue at this point in time that's in controversy is the situation where this assessments fee is being applied, you know, not retroactively per se, but to liens that are already in the pipeline, and so in that situation what transpires -- and I think I've dealt with that

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insofar as my tentative is concerned.

MR. SUMMERS: Turning again to the big picture, the state induced the plaintiffs to provide these benefits to the public, now they're changing the game retroactively. The effect of that collectively is to take the underlying goods and services and to deny them payment. This is not like adjusting a fee schedule saying you know, we're going to make a minor adjustment to what is recoverable. It's not in that nature.

This is a wholesale confiscation of property. It is very profound. And the tentative, the proposed tentative, would give the state carte blanche to wipe out all of these liens, all $6 billion worth of them. To say that it's not --

THE COURT: If they did so on a basis that didn't raise due pro -- I'm sorry -- equal-protection issues, then my response would be probably, yeah.

MR. SUMMERS: Your Honor, I would direct you again to the Ninth Circuit controlling authority on what the test is here. The touchstone for determining whether there's a property interest protected by the takings clause under Ninth Circuit law is the certainty of expectation. We look at, for example, questions like whether consideration was paid or whether an explicit promise was made. Those are examples, and we say, In cases like that, a protected property interest has been found. In cases where the government is providing largess, when it's just benefits that the state voluntarily

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chooses to provide, the courts have held that there is no constitutionally protected property interest.

Here, the situation falls much more closely in the category of something where consideration has been paid or a promise has been made. The state created a system. For years and years and years, it depended on these plaintiffs to provide the public with necessary medical care. It made at least an implicit promise by calling these liens that some reasonable compensation would be provided.

Sure, we can quibble about what reasonable is and whether a guideline should be changed or a schedule should be adjusted, but there was an implicit -- if not explicit -- promise of reasonable compensation, and these plaintiffs certainly provided something akin to compensation or consideration, millions and millions and millions of dollars worth, and they built businesses based on it; and now the state says it has the power to pull the rug out from under them and destroy their entire livelihood. If that is not a taking, I don't know what is, Your Honor.

Now the court quibbled -- or suggested that the language in *In re air crash in Bali* holding that there is no question that claims for compensation are property interest and cannot be taken for public use without compensation. The court dismisses that as dicta, but that language has been reiterated by the Ninth Circuit on several occasions, including in

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Engquist in 2007 and in the *Bowers v. Whitman* decision itself in 2012.

That language may have been overstated, but I think if you look at the cases, you will see that there are certain types of claims which can be taken away

fairly and certain types of claims which cannot. The claim for punitive damages the court said in *Engquist* is inherently speculative, inherently rests on the discretion of a jury. That's the sort of thing we say is not protected by the takings clause. But claims for compensation that are based on well-established, well-protected entrenched common law principles like contract --

THE COURT: Let me just ask --

MR. SUMMERS: Those are protected.

THE COURT: I think you're basing your argument on your reading of Labor Code Section 4620(a), and if the court disagrees with your reading of 4620(a), then don't you think that that argument has -- is very problematic at this point?

MR. SUMMERS: I'm not sure I understand the court's question. You're talking about medicolegal expenses?

THE COURT: Yes.

MR. SUMMERS: I would ask the court to ask the other side it they agree that medicolegal expenses -- that is the way the system -- that's the way the statutes have been interpreted for years and years and years. That is the practice, and I

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don't think --

THE COURT: Well, first of all, not everything the plaintiffs provide would fall within the definition of 4620 and even if it does fall within the definition of

4620, it still would require certain things to be met before compensation would be provided even in as to 4620(a) situation; isn't that correct?

MR. SUMMERS: No. 4620 says -- defines medico expenses as "Any cost and expenses occurred by, or on behalf of, any party" -- and then it continues -- "for the purpose of proving or disproving a contested claim."

THE COURT: Let me hear from the defense. What's your position in that regard?

MR. JACKSON: Well, our position is that -- according to the case law and how medicolegal liens have always been interpreted, there are predicate showings before these liens can be considered vested; employment -- and I don't want to get too granular -- but there are so many instances where the medical lien would not be payable at all. For instance, if you were talking about a medical report, if the injured worker provides incorrect or false information that is the basis for that medical lien report, the report is not admissible, nor is the report compensable. It goes on and on. There are so many hurdles that -- it's not just a question of the value of the services. It's a question of the very eligibility and

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entitlement. And there is no entitlement in terms of whether or not this is sufficient to make it a protected property interest for takings purposes.

MR. SUMMERS: Your Honor, he has not addressed the question. The point is claimant does not need to prevail. If one of the plaintiffs provides diagnostic services in an attempt to --

THE COURT: I understand your argument. I'll take another look at the issue.

What else?

MR. SUMMERS: And I would direct you to 4621, which says "The employees shall be paid," and 4622, which says "Anyone else to whom services have been performed" -- "by whom services have been performed shall be paid without further condition."

THE COURT: All right. What else do you want to argue?

MR. SUMMERS: Your Honor, I'd also like to attempt to distinguish the cases that the state relies upon. The state has cited a number of cases holding that changes in fee schedules or changes in the guidelines for what is reasonably necessary, that those sorts of changes can be applied to pending cases without problem. None of those cases address the takings clause challenge all. Of those cases address solely the question of application dependent cases.

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It has been well established that you can have -- the state can do many things and the state may have the preliminarily power to do things which might result in a taking. The fact that it has the power to do so or that the legislature expressed an intent that a statute apply retroactively does not necessarily mean that it doesn't violate the takings clause. None of the state court decisions they've cited address the takings clause challenge.

The other thing that's important is one of those cases, the one that -- the only one that involved a

provider services, the *Sierra Pacific* case, the court in that case made a very good point. It said, essentially, "If something is not covered by the Workers' Compensation system, the provider may have a right to recover outside of the Workers' Compensation system."

So there's -- the adjustments to the schedules -- for example, let's say a schedule provides for a certain type of treatment or a certain number of visits, the Workers' Compensation court later determines that the chiropractor performed more than that, the chiropractor may then, once that determination is made, have recourse to the individual for that further compensation. So these cases do not support the idea that you can take something -- take something from the provider.

THE COURT: Well, but here it would mean that if he

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has another basis for getting that which was provided, it's not a taking at that point because still there's an avenue of redress.

MR. SUMMERS: Exactly, that's my point. In those cases there was no taking, and even -- and minor adjustments to schedules and so on in a regulated industry --

THE COURT: But I thought you said that in this particular situation, the plaintiff providers here have another recourse.

MR. SUMMERS: No, no, not here. I'm talking about in the cases cited by the defendants.

THE COURT: Okay.

MR. SUMMERS: Here the plaintiffs generally have no recourse because, again, the state is not saying go outside the Workers' Compensation system. It's not saying this is not covered by Workers' Compensation.

THE COURT: I thought there was a means by which the parties can attempt to reach a resolution of the matter.

MR. SUMMERS: Well, no. The way things work is when a provider provides goods or services, it sends the employer or the employer's carrier a bill and the employer has 60 days to either pay the bill or dispute the bill. And once the bill is disputed, then the provider can file a lien. But if you have no right to file a lien and no way to seek compensation later, that is an illusory -- the idea that these insurance companies

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which routinely deny every claim are going to start paying is silly.

And if nothing else, Your Honor, that's not the sort of issue that should be addressed on the pleadings. The takings claim here under *Twombly* does survive the pleading stage. We would respectfully ask the court to allow it to survive the pleading stage. These are complicated and novel issues. We can brief them further. But there's no reason to dismiss them at this stage.

THE COURT: I understand your arguments. What else do you want to argue?

MR. SUMMERS: All right. Turning to the equal protection issue, Your Honor, I think the court has correctly concluded that a claim has been stated but --

THE COURT: I don't need an equal protection argument from you, I need the equal protection argument from them.

MR. SUMMERS: Well, I do think the court -- I want to just make one small point here -- I do think the court has erred in concluding that strict scrutiny would not apply. The court correctly states at one point in the tentative --

THE COURT: On what basis would strict scrutiny apply in this instance?

MR. SUMMERS: There is discrimination in the exercise of a fundamental right. The right of access to the courts is a fundamental right. It is on an equal plane with the right to

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marriage; it is on the same plane as the right to travel, interstate movement. Those are recognized constitutional rights.

THE COURT: Doesn't even come close.

MR. SUMMERS: Your Honor, I respectfully disagree. The California Supreme Court in *Payne* said, The right to protect one's property interest equals, in constitutional significance, the right to dissolve a marriage that was protected in *Boddie*. And the court said, quote, "To be heard in court to defend one's property is the right of fundamental constitutional dimension. In order to justify granting the right to one

group while denying it to another, the state must show a compelling government interest." So the argument was apparently good enough for the California Supreme Court in Payne and --

THE COURT: It's not the same situation here.

MR. SUMMERS: Well, it's certainly not the same situation but the basic principles apply here. If this court imposed a fee for filing or to go to trial, we're going to have a new activation fee you have to pay before you go to trial, but we're going to exempt all Fortune 500 companies, there would be blood in the streets, and there's no question the Ninth Circuit would reverse it.

THE COURT: That's because you don't need -- but you don't need strict scrutiny for that.

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MR. SUMMERS: The Supreme Court has routinely applied strict scrutiny where there's an impingement, some discrimination, in the exercise of fundamental right implicitly or explicitly recognized by the Constitution.

Now, we don't need to reach that issue today because I think the court correctly concludes that we stated a claim based on rational basis review, but we would like to have a chance to discuss this further with you down the line.

THE COURT: All right. Let me hear from the defense.

MR. JACKSON: Your Honor, with respect to the equal protection points, first of all, a point that -- there

was really no evidence whatsoever in the plaintiff's declarations about how they were similarly situated to the five exempted entities. In fact, if you look at the briefing, there is very little, if any, even argument that they are similarly situated. The only thing they said as far as I could tell from the brief is that these exempted entities may file liens. That is not sufficient to show that they are in all relevant respects alike.

Second of all -- I mean, the fact of the matter is, as we've argued and the court has cited the Kaiser case, 87 Cal.App, a number of the entities by statute are not similarly situated. You noted in the tentative that that case only involved one of the five exemptees. But if you look at that case, it cited Labor Code 4903.1, which covers four of the five

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before SB893, four of the five exempt entities.

In fact, the way the court -- I'm sorry -- the way the Workers' Comp courts address the medical disputes, if any, of the five entities is much more clear cut according to -- now the Labor Code section is 4903.184. Again, that applies to the five exemptees, not just the one addressed in *Kaiser*. So what they do is if there's a settlement, which in the Workers' Comp world is called a compromise in release, that statute allows the Workers' Compensation judge for just those exempt entities to impose a ratio in terms of valuing the lien. It's not a question of having to go to a lien trial like the plaintiffs would be able to do in terms of their liens, rather it's imposed according to a ratio. So that makes for less liens, less lien disputes, less contributions to the lien backlog.

Similarly, if there's not a settlement, it goes to what they call a Workers' Comp trial on the case in chief, and it reaches a findings and award. That statute, 4903.1A, provides that the Workers' Comp judge is required to allow the lien after the F and A. So you don't -- just the statutory system itself show, that there is a totally different treatment, a totally different experience with exempt entities which provides a rational basis for the legislature to exempt those five entities.

Another point about the equal protection and the possible injunction, the court in its reasoning on page 22

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notes that the balance of the equities favors the plaintiffs because, after all, these other lien filing fees are still there. So at least on an ongoing basis, you're not going to have the influx of liens.

THE COURT: Well, influx of arguably frivolous liens.

MR. JACKSON: Arguably frivolous liens. The fact of the matter is this new lien filing fee also exempts these five entities that are exempted from the lien activation fee and so I wanted the court -- to draw that to the court's attention because the implications are that this will open up yet another front here before you if that reason is important.

THE COURT: You know, again, it's the situation where there's nobody making an argument that the -- state cannot change the system perspectively because it's free to do so. And if it decides to do it in that

particular fashion, they can do it in that particular fashion. The parties can't complain that they engaged in some sort of expectation vis-a-vis their property interests, assuming they have one, et cetera. So unless I do find a suspect class, which I can't quite see it here, but unless I do so, the state would be free to engage in this type of formulation of its program.

MR. JACKSON: Well, I would agree with that. If the court wants me to address the strict scrutiny, I will, but I think -- I agree that there's really no basis to apply strict scrutiny because the prisoner in *Payne*, indigent at that, the

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indigent divorce clients in *Boddie* are in a totally different situation than all these businesses who obviously are not indigent and voluntarily came to the system knowing since the very beginning that these were contingent interests.

The last thing I'd say in terms of the equal protection part is that the point of the lien activation fee in that it -- which works in tandem with the reimbursement mechanism because to get reimbursement, it's important not to inflate the bill so that the defendant might accept it. Because the exempt entities have very different rules in the valuation of their liens, that provides itself a rational basis to exempt them.

THE COURT: I'll take the matter under submission. Let me think about it some more.

MR. SUMMERS: Your Honor, did you want to address the scope of the injunction? There are two footnotes in the tentative.

THE COURT: Yeah, there are two footnotes in the tentative.

MR. SUMMERS: Footnotes 21 and 28.

THE COURT: Why don't you address those. Let me have both sides really briefly address those.

MR. SUMMERS: Very briefly, Your Honor. The injunction, number one, should apply to everyone and to all pending liens. It should not just apply to the named

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plaintiffs. in this case.

I think that since the filing of this complaint, there's been a tremendous amount of interest shown in the case. I think if you look in the courtroom, you'll see a lot of people that are here because their livelihoods depend on the outcome of this case; and I think for purposes of efficiency and judicial economy, rather than encouraging a proliferation of litigation by various plaintiffs, it would be desirable for the injunction to cover everyone in this case. I don't know if the state has any objection or the defendants have any objection to that. If they do, we would seek leave to amend to add class allegations, and we could do that very promptly.

MR. JACKSON: Two points: One, because the equal protection arguments subsume just a very, very small portion of the briefs, I would suggest that both parties be accorded leave to submit briefs about that argument

given that this is the sole basis for the proposed injunction. I understand that the court is applying the sliding rule approach to the injunction and in note of that, defendants didn't say it was extinct. I came here today to refer to the *Lopez* case, which does suggest it's extinct, but I notice the court --

THE COURT: The problem is the Ninth Circuit is a little bit uncertain as to what the Supreme Court said, and whenever that happens, there's not much I can do about that. Although frankly, if I were to look at the issue and if I could

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indicate I agree that it's -- the sliding scale in my understanding was the Supreme Court wanted to get rid of the sliding scale to a certain extent, and I think it was Judge Fletcher revived it after the Supreme Court decision and also in contravention to an earlier Ninth Circuit case as well. So I don't really know what's happening in that regard.

But the problem is that I didn't think that the defendants were arguing against it, and so in that situation I said for purposes of this case only, in light of the uncertainty that I would view it in terms of the sliding scale.

MR. JACKSON: And that's why -- I appreciate that and that's why I want to at least put on the record during oral argument that we do oppose the sliding scale. But in terms of the scope of the proposed injunction, that's another thing that the court might benefit by a little bit more briefing by the parties.

THE COURT: Let me do this. I will inform the parties, you know, as to what I want next, and what I will do is I will indicate to you by the 14th as to what I want. And if I want further briefing, I'll indicate to you either on the 14th or earlier.

MR. SUMMERS: One quick thing, Your Honor. There is a timing issue. Under the statutes that govern, the activation fees must be paid electronically via a website. I don't want to make any analogies to the healthcare website, but the system

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has been crashing. The system we believe is frail. Each individual lien has to be paid individually by credit card or other electronic method, and we have clients that have up to 20,000 liens that have to be paid individually. Timing is critical here and it's important that the parties have certainty as soon as possible.

THE COURT: I'll tell you what I'll do: I will put the matter back on calendar on the 7th, and I'll indicate what my thoughts are at that point in time.

MR. SUMMERS: Would we need to appear personally for that, Your Honor?

THE COURT: No, you can appear telephonically.

MR. SUMMERS: One other thing on the other issue on the injunction, the court should issue a negative injunction prohibiting enforcement of the activation fee entirely. The court should not try to fashion a mandatory injunction requiring the exempt entities to pay. It's unclear what the legislature would have done if it had known or been thinking of the constitutional

infirmity of the exemption, and the system will certainly crash and burn if the exempt entities attempt to pay, and they've really had very little notice on that.

THE COURT: The deadline is January what?

MR. SUMMERS: January 1.

MR. JACKSON: January 1, yes, Your Honor. And I've heard nothing about the sy5tem crashing. But I -- I would

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certainly-- I guess I'm one of the few in the room.

THE COURT: You probably haven't used it.

MR. JACKSON: No, no, not lately. But yeah, I have -- I believe my client will have no problem with restraining from imposing a fee on the exempt entities.

THE COURT: All right. I don't understand that last comment, but be that as it may, as I said, I will let you know my further thoughts on the 7th of November, and that will be at 8:30. Thank you. Have a nice day.

MR. JACKSON: Thank you, Your Honor.

MR. SUMMERS: Thank you, Your Honor.

(Proceedings concluded at 10:40 a.m.)

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C E R T I F I C A T E

I hereby certify that pursuant to Section 753, Title 18, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: December 13, 2013

/S/ _____

Deborah K. Gackle
CSR No. 7106

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HON. GEORGE H. WU,
JUDGE PRESIDING

No. CV 13-1139-GHW

[Dated November 7, 2013]

ANGELOTTI CHIROPRACTIC, Inc. ,

Plaintiff,

vs.

KAMALA D. BROWN, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, November 7, 2013, 10:44 A.M.

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Wil S. Wilcox, CSR 9178
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UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT

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LOS ANGELES, CA.; THURSDAY, NOVEMBER 7, 2013; 10:44 A.M.

-oOo-

THE COURT: All right. Let me call the matter of Angelotti Chiropractic versus Baker, et al.

Let me have appearances of counsel.

MR. SUMMERS: Good morning, Your Honor. Glen Summers of Bartlit Beck and Paul Murphy on behalf of plaintiffs.

MR. JACKSON: Good morning, Your Honor. Harold Jackson and Mi Kim on behalf of defendants.

THE COURT: All right. I've handed out some further thoughts on the motions. And I presume both sides have seen it?

MR. SUMMERS: We have, Your Honor.

MR. JACKSON: Yes.

THE COURT: All right. Have you discussed it?

MR. JACKSON: Yes.

MR. SUMMERS: We have.

THE COURT: All right. What's the parties' positions or position? Hopefully, there is only one.

MR. JACKSON: Well, it depends on which part you are talking about. I think for the defendants we would like to have a good chance to give some input on the equal protection portion.

THE COURT: Okay.

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MR. SUMMERS: Your Honor, I think the parties came in with us hoping to argue again about the property interest issue and the defendants hoping to argue about the equal protection issue, but we have -- in addition to doing that, we have read the tentative. We have conferred about it. I do think we have thoughts. And we can take those issues in whatever order.

THE COURT: Why don't we take them in the order that I put them on this most recent filing.

MR. SUMMERS: Yes.

THE COURT: First of all, I've indicated that I'm inclined and I'm still inclined to issue the injunction, the preliminary injunction on the basis of equal protection. And the question, though, is if I do, do I limit it to just the named plaintiffs here or do I attempt to broaden it to basically enjoin the application of the statute period.

MR. SUMMERS: Your Honor, we've conferred about that issue specifically and I believe that we are in agreement that the injunction should cover all lien holders subject to the activation fee.

THE COURT: Well, that's what I meant. Obviously, that's the only portion where there is a violation of equal protection.

MR. SUMMERS: For a number of reasons. One, I think if we don't do that, there will be a proliferation of

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action very quickly. Number two, we've had lots of calls and lots of interest and there are other attorneys looking to bring cases.

The other thing is in terms of the administration of the statute, I think it would be beneficial to the state and obviously opposing counsel to address that issue.

In terms of the details of how that would be accomplished, what we would propose in an abundance of caution is that we file a motion for leave to amend, ask to convert the case to a class action. The amendment would only address that, obviously, and that we simultaneously file a motion to certify the class.

Based on prior discussions, I think the state would consent to those motions and it could be done quickly.

THE COURT: I don't know. I mean, there is -- I had another case where the case was originally brought against the enforcement of a particular -- I think it was a regulation. And even though it was not brought as a class action, I did in that situation issue an injunction against the operation of the regulation.

Although my memory is so bad now. I can't remember if I originally made it nationwide and I got reversed insofar as making it nationwide and it was

limited to the Ninth Circuit or whether or not I issued it only to cover the Ninth Circuit and I was affirmed because I limited

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it to the Ninth Circuit. I think probably the former.

But be that as it may, the upshot of that was that there wasn't a necessary requirement of the class certification process if I were to issue an injunction.

And, frankly, I think both sides would recognize that the injunction would only be obviously to the state of California. In other words, if I brought it past the name plaintiffs, it would obviously be just in the state of California because it's a state statute.

And since I envision one side or the other going to the appellate court anyway, it would be there and they would view it. And if I was wrong on doing that, then I would get reversed on that.

And, frankly, I would think that both sides would agree that even if I were to limit the extent of my ruling on just the named plaintiff, you are right, there would be attempts at lawsuits everywhere and I don't think the state would want to go to all these other courts where those things are going to be filed at this point in time.

So what I would probably do is even though I raised that as a question, I think in the end I could very easily be convinced to make it a state-wide injunction, enjoin the operation of the statute solely insofar as this -- we will refer to it as a hundred dollar restoration fee or reinstatement fee, however you want to phrase it.

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MR. SUMMERS: Activation fee.

THE COURT: Activation fee, and just limit it only to that because I'm not ruling any other portion of the statute to be problematic.

MR. JACKSON: Right. We would agree to that. I see no need for an amendment for a class allegation.

THE COURT: Sure. Okay.

MR. SUMMERS: Just, Your Honor, it would be good just in an abundance of caution --

THE COURT: Sorry. What?

MR. SUMMERS: I think it would be good for us --

THE COURT: Well, no. Let me put it this way. I don't care if you guys want to do that later on. But for purposes of doing this now, let's just limit it to that. I'm not precluding.

And, in fact, let me also indicate to the parties, I'm not going to stay this matter either. I mean, I want this matter to proceed because obviously once I've issued my injunction, that doesn't mean the case stops. The case goes forward. Because I do think that ultimately this issue can be resolved fully on the merits in a relatively short period of time. But because of the fact that the -- what do you call the fee again?

MR. SUMMERS: Activation.

THE COURT: -- the activation fee is triggered to

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start on January the 1st, that there's limited time for that. But insofar as the underlying case is concerned, I think it can be resolved on the merits in a relatively short period of time.

MR. SUMMERS: And there may be some very limited discovery.

THE COURT: No, I agree. There would have to be some limited discovery, but I'm going to allow some discovery to go forward.

MR. JACKSON: Your Honor, with reference to the state-wide effect, it makes sense to us because the administration of the fee is very difficult if it's just limited to the named plaintiffs.

THE COURT: Yes.

MR. JACKSON: And -- but nonetheless, because this operates by way of software and the internet, we need some lead time to be able to shut it down.

THE COURT: Yes.

MR. JACKSON: I am told that -- so I'm not quite sure what the court was thinking about in terms of the effective date of your order.

THE COURT: Well, you need to tell me how long it would take to effectively shut it down.

MR. JACKSON: Well, I am told that a week should be sufficient.

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THE COURT: Okay. I would have it operate starting a week from today. All right.

MR. SUMMERS: One additional issue that was addressed in the tentative, Your Honor. The court asked whether supplemental briefing would be requested. I think that we are in agreement that the more important thing is that we get this case up on appeal to the extent that there are issues --

THE COURT: I understand that. But the real question is this: As I indicated, I would go along and issue the preliminary injunction as to the equal protection argument. I probably will grant the motion to dismiss the due process one. I'm not going to give you leave to amend because, no offense, but that one doesn't fly.

And insofar as the Takings portion, the question is -- I leave that up to the parties at this point in time because the medical/legal stuff could be briefed further.

But in a way, if the case is going to go up to the appellate court, should I just do it in some way where it's all there simultaneously and if I reserve further briefing on the issue of the Takings, I haven't issued something that's final and so they may not think that -- even though I'm denying the preliminary injunction as to that aspect, they may not take the issue unless I make a decision in such a way that, in other words, that whatever I've issued

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completely covers all three issues.

So that's the question. I'm kind of inclined -- well, let me hear from counsel. What do you guys think?

MR. SUMMERS: Well, obviously, we don't think that the Takings claim should be dismissed on the pleadings, and we would like an opportunity first and foremost --

THE COURT: Let me put it this way. If I did dismiss it on the pleadings, it would be a lot easier to litigate on appeal because either I'm absolutely right or absolutely wrong and it can't be anything in between.

MR. SUMMERS: On that point, Your Honor, I agree. And certainly, if the court decides that it's appropriate to dismiss on the pleadings, we would ask the court to certify under Rule 54(b) so that we --

THE COURT: Oh, no. I would dismiss it with prejudice. So, in other words, as I'm dismissing the due process with prejudice, I would -- in other words, I wouldn't dismiss without prejudice at this point in time because I would just leave it in if I wanted to continue on with further briefing. But I can see doing that. I leave it up to counsel.

Do you guys want me to make the ruling or what?

MR. JACKSON: Well, for the state, of course, we'd like a ruling in terms of judicial economy. It just makes sense because, obviously, these issues are going to have to

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be addressed by the Ninth Circuit. Let's just get it over with.

THE COURT: Yes.

MR. SUMMERS: We agree, Your Honor.

THE COURT: Okay. In that case, then, I will make the Takings -- I will grant the motion to dismiss the Takings argument with prejudice at that point in time. So as to due process and as to Takings, I'm granting the motion with prejudice without leave to amend.

As to the equal protection, I'm denying the motion to dismiss but granting the motion for preliminary injunction on the activation fee aspect only.

MR. JACKSON: Your Honor, subject to the --

THE COURT: Yes, you can try to give me another pitch, but as you can see -- not that my mind is absolutely made up, but I think I have read everything already.

MR. SUMMERS: Yes. On the second pitch, who would you like to proceed? Me on the property interest and Takings or opposing counsel?

THE COURT: You can. But let's not belabor the point too much because I think I've discussed it in my original tentative somewhat to the point.

MR. SUMMERS: Let me just do it very briefly, Your Honor.

THE COURT: All right. So you're going to be

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arguing Takings first?

MR. SUMMERS: If I might, Your Honor.

THE COURT: Okay. All right.

MR. SUMMERS: And I will be brief.

THE COURT: Okay.

MR. SUMMERS: As you understand, Your Honor, there is the case of *Bowers vs. Whitman* from the Ninth Circuit and the prior *Inquest* case, and I think the court was trying to follow those Ninth Circuit decisions dutifully. But I think the court has -- and I'm not blaming the court because the cases are not very clear, but I think the court has --

THE COURT: I would never say that about Ninth Circuit cases. But I will note to the Ninth Circuit that you said it first and I just nodded my head.

MR. SUMMERS: I have worked on the court so I have a basis for making that statement.

THE COURT: Okay.

MR. SUMMERS: But I think the court has slightly misconstrued the applicable law. And in the *Bowers* case, the court said that you are to consider the, quote, certainty of one's expectation in the property interest at issue.

And the court went on to talk about factors such as whether consideration had been paid or a promise had been made, and the court said: We look at whether the

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circumstances have, quote, imparted a certainty that property owners were entitled to a particular use of their property, to compensation or to some other property interest cognizable by the Takings clause. The

court did not say you look at the certainty of outcome. The court did not say you look at the certainty of value. The court did not say you look at the certainty of recovery. You look at the certainty of expectation as to the property interest.

Let me explain what I mean. Let's say you buy a ticket to game seven of the World Series. Is it property? It is contingent. You will only get to go to game seven if the first six games turn out in a certain way. But it is definitely property.

And you definitely have a legitimate expectation that if the first six games pan out in such a way that there is a game seven, you will get to go. The existence of a contingency does not defeat the existence of a property right.

Now, let's look at another example. A patent case comes before the court. I'm sure you've had many. You get a patent from the patent office. It is definitely property. Is your right to recover your ability to recover in the patent litigation certain? Absolutely not. You have to prove or subject to the defense that the patent is invalid.

THE COURT: Let me stop you. You are talking

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about two different things. Again, in that situation, the property is separate from the litigation in regards to the property.

MR. SUMMERS: Well, but the property only has value to the extent it can be enforced, either by way of injunction or infringement litigation.

Let me give you another example. A lottery ticket. You pay a dollar for the lottery ticket. Can the state just come by and take everyone's lottery tickets?

They are very speculative, very contingent, but they are definitely property. Why? You've paid consideration. You have every expectation that you're entitled if your number comes up to win.

What I'm getting at, Your Honor, is the court is looking -- you are looking at certainty of recovery. That is not the analysis. The analysis, certainty of expectation as to your ownership of whatever you have, no matter how contingent it is.

Looking at the other side of the equation where the government is providing largess. It is a gift. You have no legitimate claim of entitlement. That is why the court's say it can be taken away.

Now, let's talk about the security interests in *Radford, Armstrong* and *Security Pacific.* I believe the court again is misconstruing those cases. A lien is only a

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security interest. The holder of that security interest still has to prove an underlying claim. That is always the case. The degree of uncertainty may depend on the nature of the lien and the nature of the claim, but there is always uncertainty. And this lien is no different in kind than those others. It may be different in degree, but not in kind.

And the supreme court has indicated that the taking of any lien, any lien, because it is a security interest in property by definition is a taking per se.

But let me give you some examples. Let's say it's a mortgage. The mortgage holder has defenses. Maybe the rate was usurious. Maybe there was fraud in the inducement. Maybe there was a robo signature. Maybe there is a court in satisfaction. Maybe he's paid what is due.

Look at a mechanic's lien or a materialman's lien. There could be disputes of the quality of the workmanship, whether the materials are as good as they were supposed to be, whether the labor performed was up to snuff. What about the amount billed? Was it appropriate? The fact that someone has a lien does not mean they prevail on the underlying claim. So those liens are no different than the liens we are dealing with here.

Finally, the court very astutely cited the *Gilman* versus *Dalby* case at footnote 14 of its tentative. We did

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not see the case previously. That case is on all fours with this and cannot be distinguished.

In *Gilman,* the issue was a medical lien and whether the doctor or the assignee of the doctor had a right, a property interest, sufficient to support a claim for conversion. And the California Court of Appeals said yes, even though that claim is contingent, even though that lien is contingent on the outcome of the civil litigation which is uncertain, it is a property interest protected by the law of conversion which is

very analogous to Takings. Takings is essentially conversion by the government without compensation.

The court in the footnote, footnote 14, suggests there might be a distinction based on the thought that in *Gilman* the assignee of the lien could also proceed personally against the plaintiff in the case. That is not a distinction. That is the case in the workers' compensation rule as well.

If, for example, in a workers' compensation case, it is determined that the employee's problem is not the result of an industrial injury, what happens? The claim is kicked out of the workers' compensation system entirely.

But at that point in time, the provider of services has the right to go against the employer under theories of quantum meruit or against the employer's -- the

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employee's insurance company perhaps. So once the case is out of -- once the prerequisites to recovery in the workmans' compensation system have not been met, the provider does have other rights, at least in theory, whether they pursue them in practice or not is a different matter.

THE COURT: So you are saying that, for example, if there is a lien and it's contingent and not vested at the point in time but has to go through some sort of administrative process that, for example, if it had not been like for a hundred dollar activation fee, let's say it was a dollar activation fee, you are saying that that would be a taking?

MR. SUMMERS: That's a different issue, Your Honor.

THE COURT: Why?

MR. SUMMERS: Now we're getting to the second -- well, there is two questions. The threshold question: Is there a property interest? And the second question: If there is a property interest, has there been a taking?

When you get to the second phase of the inquiry, then we look at: Does the $1 defeat people's reasonable expectations? Maybe not. Does it have some propound economic impact on them? Maybe not. That is a question of degree.

And that's why, Your Honor, the court's concern

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stated in the tentative about the effects of a ruling that there is a property interest, those concerns are unfounded.

If the court holds that there is a property interest, the state can still make reasonable adjustments to the tables, the guidelines and schedules that provide for what treatment is available. They can still make reasonable adjustments without necessarily causing a taking to occur.

THE COURT: But you are saying that the property interest is based on the expectations of the persons participating in the program. So --

MR. SUMMERS: No, no. It is not, Your Honor. The language that other circuits use is whether there is a legitimate claim of entitlement. The language of the

supreme court is whether there is a legitimate claim of entitlement as opposed to a unilateral expectation.

And so the question is not getting into the minds of someone and what they anticipate. The question goes to the legitimacy of their claim, of the basis for their property interest.

When you pay money for something, whether it's a dollar for a lottery ticket or a hundred dollars to the game seven of the World Series, you've paid money. In the eyes of the law, you have some rights. In the eyes of the constitution, you have done something to your detriment and you have a legitimate right to say this is my property, I

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paid for it.

And the same is true in the workers' compensation system when you give up millions of dollars of treatment to the state's injured workers because the state has created a system and said we will pay you fair compensation and then they say, you know what, times are tough, we've got the right to take away your compensation entirely.

That's not what they are doing here, but that is the import of their argument when they say not a property interest. It's a very dangerous precedent.

What about attorneys' liens, can they wipe them all out? Doctor's liens, wipe them all out?

THE COURT: I'm smiling.

MR. SUMMERS: Well, other people wouldn't be smiling.

THE COURT: That's because I'm not a doctor or a lawyer anymore.

MR. SUMMERS: But the point is people have settled expectations based on the law, not because of some unilateral wish.

THE COURT: Let me stop you. I understand your argument.

MR. SUMMERS: Thank you.

THE COURT: Let me hear from the defense insofar as that argument is concerned.

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MR. JACKSON: All right. So you want to hear from me as to that argument only?

THE COURT: Only.

MR. JACKSON: Well, basically, I agree to the extent that the question is the certainty of expectation. And if you look at this and adhere to the rule that the property interest is created by state law, the plaintiffs have cited nothing in workers' compensation law, either the statute or the case law that says that when they provided their goods and services they had a certainty of expectation in their liens.

With reference to the baseball ticket and the lottery ticket, it's a little different context and so I'm trying to wrap my arms around it. But probably the back of that lottery ticket describes exactly what they get and so that creates the expectation. So if they don't get

anything, they don't get anything but they have that ticket.

THE COURT: What you are saying is that on the back of the lottery ticket, if it said you can go into game seven, but we can decide that you won't go into game seven. Even if there is a game seven, we can impose whatever conditions we want. And would there be a property interest in that?

MR. SUMMERS: If the ticket were that clear, no, there would not. But when the state says we are giving you

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this ticket and if you do the right things and the conditions are met, you get compensated fairly, they can't then just take it away.

THE COURT: Well, I don't think it says that.

MR. JACKSON: It does not say that, Your Honor, not at all. Because the statute says the med -- just confined to med/legal, assuming there is employment, that has to be the threshold they have to pass, that the services must be reasonably, actually and necessarily needed or necessarily provided.

And there's a number of board cases that explicate each one of those showing that the med-lien claimant may not get anything from their lien because the threshold is not met.

For instance -- and in oral argument last time I mentioned a couple. The typical situation is that -- and I know of a specific reported -- not officially reported, but in the Cal. Comp. Cases reported a board panel

decision that said that because an injured worker did not disclose to the med/legal doctor that he had a prior automobile injury, that made that report not only inadmissible but there is no recovery on the med/legal lien for that.

That is just one example besides employment of the various hoops that lien claimants on med/legal liens have to jump through in order for the lien to be payable before you

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even get to the point that counsel refers to that you are arguing about the amounts. There is no certainty of expectation whatsoever.

California has a system and it's worked the same for almost a century. These liens are contingent. And they are derivative and dependent on the fact that there is a claim by the employee and there's nothing vested for Takings.

THE COURT: I think what he's saying, for example, is when you have your World Series game seven, when you purchase the ticket, normally there is not anything else that needs to be done. You purchase the ticket, you get to go in. So, therefore, if someone purchases the ticket, they've taken the property interest from you because there is that.

However, if it's a situation where like in the workers' compensation system you don't have a right to the money. You have to proceed under a particular process before you even can hope to collect and that process requires certain other things as well.

And so, therefore, it's not the same as either a patent that you were referring to earlier because once you get a patent you have to recognize certain rights. Once you buy a ticket, you have certain rights.

But if you provide these services, what you have

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is you have a right to go through this process and it's a contingency of not only going through the process successfully, but it's a contingency that the process could be changed and also that you have to meet certain preliminary things, for example, the person you are providing the services to having to be an employee in some other initial circumstances you have to meet as well.

MR. SUMMERS: May I address that briefly?

THE COURT: Sure.

MR. SUMMERS: Three points on that, Your Honor. First, in terms of the requirements, there are three requirements: One, employment; two, an industrial injury; and three, that the services be reasonably required.

These are simple, objective things. The key is that none of them involve discretion. These are contingencies -- no question -- to recovery. But they are not uncertain.

As to the third, the reasonable necessity. The state promulgates, the DR promulgates guidelines and schedules that establish what treatment is reasonable.

The second thing is that --

THE COURT: Let me stop you. The provision of those services. For example, does not give the right to the provider of those services to go into court to enforce them.

MR. SUMMERS: Oh, it does, absolutely.

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THE COURT: No. You have to go through the administrative process.

MR. SUMMERS: With the filing of a lien -- well, with the filing of a lien, certain rights attach. You have the right to due process. You have the right to notice and to appear. You have the right to take over the case if the employee or the worker does not pursue it. You have the right to come in and assume the litigation, if necessary, to secure recovery. So rights do attach and vest at the moment that the lien is filed.

And in terms of the expectations, the system has been around for a long time. The test ultimately is reasonable compensation, and that's the same test as the Takings Clause, just compensation.

The people who provide benefits know that the schedule, these schedules may be adjusted over time. They know that guidelines in terms of what precise treatments are appropriate may change over time.

They do not expect that the state will fundamentally change the system and say that they have the right to take away their entitlement to compensation entirely.

THE COURT: But if the fee they get can be adjusted even after they've provided these services, why can't -- well, why couldn't the state have said we are going

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to adjust the fees and we are going to take a hundred dollars off the fee.

MR. SUMMERS: Well, the state could do that but then we would come back to the question whether that amounts to a taking or not under the second prong of the analysis. And we are putting what should be -- this case should involve the second prong of the analysis.

THE COURT: Let me just put it this way. I don't think this is an easy question. You seem to have said that it was at the start.

MR. SUMMERS: Whether there's a property interest?

THE COURT: No. I said I don't think the question is that easy. You said --

MR. SUMMERS: I think this would be 9/0 in the supreme court on whether there is a property interest.

MR. JACKSON: Absolutely not.

THE COURT: Which way?

MR. SUMMERS: In our way. In our way.

THE COURT: In front of this supreme court?

MR. SUMMERS: The united States Supreme Court. 9/0.

THE COURT: I would beg to differ with that.

MR. SUMMERS: Again, Your Honor, but we are going back to the question are there contingencies. That's not the test under Ninth Circuit law.

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One last thing, Your Honor. The state says look at the workers' compensation system. We've never held that these are property rights.

The question whether an interest created by -- property interests are created by state law. We all agree to that. The question whether interests created by state law is a property right protected by a Takings clause is a question of federal constitutional law. It's not a question of state law.

We've cited those cases in a footnote to our opening brief on the motion for PI. And none of the cases they've cited, none of the WCAB appeals that they've cited ever addressed the Takings Clause challenge. None of those cases.

They deal with the legislature's power to make retroactive changes and whether the legislature has intended to do so, and that's a very different question, that when the -- the second question is when the legislature does so, if it does so, does that amount to a taking? And none of those cases address that question in any way.

MR. JACKSON: And I'd respond, Your Honor, that those cases don't have to just be restricted to a Takings context. It's not solely a question of federal law because federal law says that the constitution does not create property interests. Rather, you look to state law for

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creation of the property interest.

And plaintiffs have not pointed to one state court case that shows that their interests are vested. At the time that the goods and services were put --

THE COURT: Let me ask you this question that the plaintiff's counsel does not phrase it in this way, but let me ask you this question.

The court has discussed the equal protection arguments and it's indicated that it's more inclined insofar as the equal protection argument. But wouldn't in the equal protection argument there have to be some sort of property interest?

Because if we are not even talking about a protected property interest, how could there be a denial of equal protection in something where there is no protectable property interest?

MR. SUMMERS: Would you like me to address that, Your Honor?

THE COURT: Well, I'm making the argument for you now. You can sit down.

MR. SUMMERS: Oh.

MR. JACKSON: In other words, is the fact of the property interest --

THE COURT: In other words, wouldn't it be inconsistent for the court to say that since I have not

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found a suspect class, since I have not found -- it's only a rational basis at this point, but wouldn't I have to at least find some protectable property interest or something of that sort because if it's something that is not -- if what we're concerned about is something that's kind of like not a protectable property interest, and we are not dealing with a suspect class, on what basis could I base an equal protection problem if we don't even have that?

I mean, what is the --

MR. JACKSON: Well, the --

THE COURT: In other words, if it was something so trivial that if the government differentiates in something that's not a protected property interest, how could it be a denial of equal protection?

MR. JACKSON: Well, I'm not sure if this goes to the judge's concern. However, the -- certainly with due process and the Takings Clause, there is a discussion throughout the cases about a property interest. Equal protection, rather, goes to classifications.

THE COURT: Let me just stop you. What I'm thinking is I may not grant the motion to dismiss without leave to amend as to the Takings because I do think that it is a close issue. And even though we'd like to get everything up to the Ninth Circuit in one period of time, I don't want to go up on something that I have a question on.

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MR. JACKSON: Well, let me explore that, then.

THE COURT: Although let me just put it this way. The denial of a preliminary injunction on the basis of the Takings, I suppose one could make an argument that that should be basis enough to raise it to the circuit court.

MR. JACKSON: If the court wants to retain some of the lawsuit here while we go up on the Ninth Circuit, we can litigate in both forums, I suppose.

THE COURT: Well, you are going to be litigating in both forums in the sense that the issue of a preliminary injunction does not stop the case. The case can still go forward on the underlying merits. It's just a question as to what the court's view insofar as whether or not the matter should stay while the matter is going to the court of appeal.

MR. JACKSON: Can I finish responding to counsel's remarks?

THE COURT: Sure.

MR. JACKSON: Because he referred to the *Armstrong* trilogy at the supreme court and he referred to *Gilman,* and the court asked about *Gilman* in a footnote so I would like to answer that.

The trilogy. In each one of those cases, there was identified collateral that secured the property interest. That doesn't exist here. There is no collateral.

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That's why these liens are different.

At the time the goods and services are presented, what did the plaintiffs get? They got a contingent

interest subject to the rules that are well known that a lot of these just don't pan out because you do not pass the thresholds.

In each one of those cases, the materialman's lien in the ship hull. The ship hull was a defined collateral in *Radford.*

THE COURT: Well, but does that make any difference because even though -- obviously, the whole purpose of a lien is because of the fact that somebody has provided money or services and it's secured by the lien on a particular piece of property or something else, some other itemized piece of property.

MR. JACKSON: Yes.

THE COURT: That's not to say that even if there weren't the lien per se that the person's entitlement to get back the loan or get paid for the services provided irrespective of the existence of the lien is not a property interest. In other words, it's the right to get back those expenditures. Why can't that be a protectable property interest?

MR. JACKSON: Well, excuse me, Your Honor. For the same reason you stated in the first tentative. Because there is nothing in workers' comp law that reaches that high

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degree of expectation that the Ninth Circuit expects. They do not --

THE COURT: The answer would be that in that situation, the recovery is not from the person to whom the services were provided. In other words, it's not to

the injured employee but he's seeking to do a recovery from the compensation fund itself or the employer who is not the beneficiary of the receipt of the services. I guess that's what you are saying; right?

MR. JACKSON: What I'm saying is there is no race. In the trilogy at the supreme court, there was a race which secured the lien. There is no race here. In the mechanics' lien, counsel cited the mechanics' lien, the materialman works on a house, remodels it. There is one case that they cited and there is -- under the California Constitution, created a mechanics' lien that is recordable. And the very property that is improved is the collateral and that property can be foreclosed upon.

There is nothing here that contingent workers' compensation claims can foreclose upon.

THE COURT: Let me stop. I understand the arguments of both counsel. Is there anything else?

MR. JACKSON: Well, *Gilman.*

THE COURT: Yes.

MR. JACKSON: Your footnote. We believe that

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Gilman supports the fact because in *Gilman,* that was not a workers' compensation context. That was a medical lien in the context of a lawsuit.

But the court stated that the reason there is -- and they did use the term property interest. But there was a creation of a fund out of which the payment of the claims would flow. You don't have that here. And that

is the distinction I would make, assuming that you extend that property interest in *Gilman* to the Takings setting.

THE COURT: All right. Equal protection. You wanted to argue something about equal protection?

MR. JACKSON: Yes. With reference to your footnote, I noticed you were concerned that it was only in oral argument that we presented our argument about not similarly situated.

And I just want to draw the court's attention to page 20 of our opposition brief because there we say that the plaintiffs -- or I'm sorry. The exempt entities are in a different position than independent providers like plaintiffs. The exempt entities operate under a contractual obligation to pay for nonoccupational conditions. And I refer to both Kaiser that we talked about as well as the statute Kaiser was based on.

If you look at the actual definitions of these exempt entities, they are not direct providers at all like

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plaintiffs. And, in fact, in paragraph 5 and I think 36 of the complaint, plaintiffs allege how different they are.

The exempt entities are large exempt entities and they are independent providers of goods and services. We accept that characterization. And so I propose that they have not carried their burden to show that there is a similar situation. It's not our burden to show that they are not similarly situated. It's plaintiff's burden to show that they are.

And who are these exempt entities? The exempt entities are not providers of medical services. They, according to the statute -- and if you look at 4903.06, it refers to other statutes defining each one of the exempt entities.

And they are plans and programs. They arrange to pay for providers. But they are not the providers themselves. And that is a rational basis, for one, for the legislature to exempt them.

These exempt entities -- look at their -- they are insurance companies and look at what they do. Their business model, unlike the plaintiffs, do not depend on getting paid out of the workers' compensation service.

THE COURT: Yeah, but if the whole purpose behind having this hundred dollar activation fee is to pay for the system that has become unworkable because of the number of

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these claims, why are these -- these exempt lien holders are a sizable portion of the claims process to some extent.

MR. JACKSON: No, there is no evidence that they are a sizable proportion at all. If you look at the legislative record here that we submitted, the problem with the lien backlog are with people who look to the system to get paid for their liens.

They are people who -- such as plaintiffs who sell their books of business. And then the buyer of the book of business will then file a lien and then try to seek and argue for the board for the value of the services that

have been presented. That's the business model. They provide services knowing they are going to be going to argue about value.

What do the exempt entities do? The exempt entities are obligated by contract. They negotiate with employers to provide a group healthcare plan.

And so what they do is they establish a premium schedule that they charge and they negotiate rates with doctors. And so when they have to pay -- and they are obligated by a contract to provide services, unlike the plaintiffs, what they do is they -- they have a set amount that they have paid because it's all according to negotiated rates.

And so once they have the -- if it's later

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determined that the services that their providers that they have paid for turn out to be an industrial injury, yes, they could file a lien.

However, the lien is for a set amount. There's no argument at the board for what is the value of the lien and so they don't contribute to the lien backlog. Whereas plaintiffs contribute to the lien backlog because there are ongoing disputes about what is the value of the lien.

THE COURT: Let me ask plaintiff's counsel: Do you agree with that?

MR. SUMMERS: I'm sorry?

THE COURT: Do you agree with what he just said?

MR. SUMMERS: Absolutely not.

THE COURT: I didn't think you did.

MR. SUMMERS: May I just briefly respond?

THE COURT: Sure.

MR. SUMMERS: First, Your Honor, we made a public record -- I'm going beyond the record here. We made a public record's request to get data on lienholders. The ones I've highlighted yellow, these are the top lienholders in the state. The ones highlighted in yellow are exempt entities. Number 6 on the list is Kaiser Foundation Hospital. Number 7 is Anthem Blue Cross.

THE COURT: What's number one, just out of curiosity?

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MR. SUMMERS: Number 1 is Pacific Hospital of Long Beach.

But the key thing here is insurance companies and HMOs have a powerful incentive to file liens and they are major players in the lien business. Why?

If someone comes in and they provide treatment, they go out of pocket. But if they can file a workers, compensation lien and then get compensation through the workers' compensation system, they get a recovery of that money.

They have the same incentive to file liens that everyone else has and they have the same incentive to file liens that are questionable or debatable, and those liens are litigated just like all other liens.

There is nothing, no evidence here, nothing they've been able to cite that there is any distinction in terms of the nature or quality of their liens versus the liens of independent providers. It's simply attorney argument after the fact.

The other thing that's very important, Your Honor. They did have a footnote in their brief. In footnote 11 they cited some material in the Chiswick report. I looked at every single cite. There is nothing in the Chiswick report that says that exempt entities are less likely to file frivolous liens or that they do not contribute as much

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to the lien crisis. There's nothing in Chiswick to that effect.

It's also important there are no legislative findings --

THE COURT: I understand that point now.

MR. SUMMERS: There are also no legislative findings in the statute which is very unusual. Normally they --

THE COURT: I understand that because my understanding is the legislation didn't initially include in this particular provision in this particular fashion.

MR. SUMMERS: Finally, they point to all these differences. They say, well, the HMOs have a contractual obligation, they are big versus small, they are plans, not providers, which isn't true. None of those distinctions are germane to the activation fee. Those

are things that are of no consequence to the activation fee.

The other thing that is important. They say that a lienholder who is one of these exempt entities doesn't have a dispute over the amount of payment, not true. They get paid just like anyone else based on the fee schedule.

THE COURT: I understand the arguments. This is what I'm going to do. I want the parties to get together to see if you guys can agree upon the language of the preliminary injunction.

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I will dismiss out the due process claim without leave to amend.

As to the Takings, I need to think about that some more, but I will issue -- when I issue the order, I will issue it with a decision as to the Takings one way or the other. Okay.

MR. SUMMERS: Thank you, Your Honor.

THE COURT: All right. When do you think you can get me a copy of that, a proposed preliminary injunction order?

MR. SUMMERS: We have a draft ready and can run it by opposing counsel and can get it to you soon. It's up to them.

MR. JACKSON: Is a week enough?

MR. SUMMERS: I think we can do it in two days.

THE COURT: I'd like to get it on Tuesday if possible because I might be out of the office for a while thereafter.

MR. SUMMERS: We will confer with opposing counsel and submit it by Tuesday.

THE COURT: All right. By noon on Tuesday. And notify my clerk when you submit it.

Okay. Thank you very much.

MR. SUMMERS: Thanks, Your Honor.

THE COURT: A very interesting argument.

[p.39]

(At 11:30 a.m. proceedings were adjourned.)

--oOo–

CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: January 2, 2014

/s/ WIL S. WILCOX
U.S. COURT REPORTER
CSR NO. 9178

APPENDIX H

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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 8:13-cv-01139-GW-JEM

[Filed September 6, 2013]

ANGELOTTI CHIROPRACTIC, INC. d/b/a TAFT)

CHIROPRACTIC,)
)
MOONEY AND SHAMSBOD)
CHIROPRACTIC, INC.,)
)
CHRISTINA-ARANA &)
ASSOCIATES, INC.,)
)
JOYCE ALTMAN)
INTERPRETERS, INC.,)
)
SCANDOC IMAGING, INC.,)
)
BUENA VISTA MEDICAL)
SERVICES, INC., and)
)
DAVID H. PAYNE, M.D. INC.,)
d/b/a INDUSTRIAL)
ORTHOPEDICS SPINE &)
SPORTS MEDICINE)
)
Plaintiffs,)
)
v.)
)
CHRISTINE BAKER, *in her*)
official capacity as Director of)
the California Department)
of Industrial Relations,)
)
RONNIE CAPLANE, *in her*)
official capacity as the Chair of)
the Workers' Compensation)
Appeals Board, and)

DESTIE OVERPECK, *in her official capacity as Acting Administrative Director of the California Division of Workers' Compensation*,

Defendants.

First Amended Complaint for Declaratory, Injunctive, and Other Relief

I. INTRODUCTION

1. This is an action for declaratory, injunctive, and other relief against officers of the State of California who administer the State's Workers' Compensation system. The action challenges the constitutionality of certain provisions of a California law known as Senate Bill 863, Chapter 363, Stats. 2012 ("SB863").

2. The challenged provisions of SB863 retroactively impose a $100 "activation" fee on workers' compensation liens filed prior to January 1, 2013. Cal. Labor Code § 4903.06.[1] Under the challenged provisions of SB863, if the $100 "activation" fee is not paid by the time of a lien conference, the lien "shall be dismissed with prejudice." Cal. Labor Code § 4903.06(a)(4). In addition, all liens filed prior to January 1, 2013 are "dismissed by operation of law" if

[1] SB 863 also imposes a $150 "filing" fee on workers' compensation liens filed after January 1, 2013. *See* Cal. Labor Code §§ 4903.05(c). This action does not challenge the validity of the filing fee for new liens but is instead limited to the constitutionality of the retroactive "activation" fee imposed on previously perfected liens.

the $100 "activation" fee is not paid by January 1, 2014. Cal. Labor Code §§ 4903.06(a)(5).

3. Plaintiffs are providers of medical services and ancillary goods and services to workers' compensation claimants. Plaintiffs provided costly and valuable services and goods to workers without immediate payment in reliance on their right to obtain compensation through liens on the patients' workers' compensation claims.

4. Plaintiffs filed valid workers' compensation liens prior to December 31, 2012. Those liens constitute vested property rights. Unless the new "activation" fee imposed by SB863 is paid on each of these liens by December 31, 2013, the liens will be forfeited. Even to the extent plaintiffs are able to pay the "activation" fee on their larger liens, the challenged provisions of SB863 substantially reduce the economic value of those liens and interfere with the plaintiffs' reasonable investment-backed expectations when they provided services to workers' compensation claimants without immediate payment in reliance on their right to obtain compensation through the lien system.

5. SB863's lien activation fee is not a general revenue measure. Indeed, insurance companies, health maintenance organizations ("HMOs"), labor union benefit plans and a host of other large holders of workers' compensation liens are arbitrarily exempted from the fee. Cal. Labor Code § 4903.06(b). Rather, the challenged provision of SB863 specifically targets independent providers of services to workers' compensation claimants and was adopted with the purpose of destroying their liens.

6. In many cases, the value of the services that have been provided by plaintiffs to individual workers is relatively small in relation to the new "activation" fee imposed by SB863. As a consequence, it is not economically rational or feasible for plaintiffs to pay the activation fee on all their liens. The challenged provision of SB863 will therefore have the effect of taking valuable property from the plaintiffs. In the aggregate, the impact on the plaintiffs will be enormous. In some cases, it will effectively wipe out their accounts receivable and challenge their very ability to continue as going concerns.

7. These provisions of SB863 are unconstitutional under the Takings, Due Process and Equal Protection Clauses of the United States Constitution. Accordingly, this action seeks a preliminary and permanent injunction preventing Defendants from enforcing these provisions of SB863.

8. Plaintiffs will suffer irreparable injury if the enforcement of the challenged provisions of SB863 is not enjoined before December 31, 2013. Claimants cannot afford to pay the "activation" fee on all of their liens, yet their liens will be dismissed if they are set for a lien conference and the fee has not been paid. Cal. Labor Code § 4903.06(a)(4). Moreover, all liens filed before December 31, 2012 will be "dismissed by operation of law" if the $100 activation fee is not paid prior to December 31, 2013. Cal. Labor Code § 4903.06(a)(5).

II. THE PARTIES

A. The Plaintiffs

9. Plaintiff Angelotti Chiropractic, Inc., d/b/a Taft Chiropractic, ("Angelotti") is a provider of chiropractic services that has treated injured workers without immediate payment in reliance on its right to recover compensation through workers' compensation liens. Angelotti holds existing workers' compensation liens filed prior to December 31, 2012. Angelotti is a California corporation with its principal place of business at 20315 Ventura Blvd., Suite A, Woodland Hills, CA 91364.

10. Plaintiff Mooney & Shamsbod Chiropractic, Inc. ("Mooney & Shamsbod") is a provider of chiropractic services that has treated injured workers without immediate payment in reliance on its right to recover compensation through workers' compensation liens. Mooney & Shamsbod holds existing workers' compensation liens that were filed prior to December 31, 2012. Mooney & Shamsbod is a California corporation with its principal place of business at 1037 East Palmdale Blvd., Suite 201, Palmdale, CA 93550.

11. Plaintiff Christina Arana & Associates, Inc. ("Christina Arana") is a provider of interpreting services that has provided services to injured workers without immediate payment in reliance on its right to recover compensation through workers' compensation liens. Christina Arana holds approximately 6,500 existing workers' compensation liens filed prior to December 31, 2012. Christina Arana is a California corporation with its principal place of business at 11420 Ventura Blvd, Studio City, CA 91604.

12. Plaintiff Joyce Altman Interpreters, Inc. ("Joyce Altman") is a provider of interpreting services that has provided services to injured workers without immediate payment in reliance on its right to recover compensation through workers' compensation liens. Joyce Altman holds approximately 5,000 existing workers' compensation liens filed prior to December 31, 2012. Almost 80 percent of Joyce Altman's liens are for less than $1,000, and nearly 50 percent of them are for less than $300. Joyce Altman is a California corporation with its principal place of business at 14891 Yorba Street, Tustin, CA 92780.

13. Plaintiff Scandoc Imaging, Inc. ("Scandoc") is a provider of subpoena and copying services that has provided services to injured workers without immediate payment in reliance on its right to recover compensation through workers' compensation liens. Scandoc holds approximately 2,200 existing workers' compensation liens filed prior to December 31, 2012. Scandoc's liens range in value from $47 to $8,600. Forty percent of Scandoc's liens are for less than $500 and nearly 60 percent of them are for less than $750. Scandoc is a California corporation with its principal place of business at 1535 Scenic Ave., Suite 150, Costa Mesa, CA 92626.

14. Plaintiff Buena Vista Medical Services, Inc. ("Buena Vista") is a pharmacy that has provided medications to injured workers without immediate payment in reliance on its right to recover compensation through workers' compensation liens. Buena Vista holds approximately 20,888 workers' compensation liens filed prior to December 31, 2012. Buena Vista is a California corporation with its

principal place of business at 2369 Calabasas Rd. #800, Calabasas, CA 91302.

15. Plaintiff David H. Payne, M.D., Inc., d/b/a Industrial Orthopedics Spine & Sports Medicine ("Industrial Orthopedics") is medical practice that has provided surgical and other services to injured workers without immediate payment in reliance on its right to recover compensation through workers' compensation liens. Industrial Orthopedics holds approximately 1,500 workers' compensation liens filed prior to December 31, 2012. Industrial Orthopedics is a California corporation with its principal place of business at 1530 E. 1st Street, Santa Ana, CA 92701.

B. The Defendants

16. Defendant Christine Baker is the Director of the California Department of Industrial Relations. In her official capacity, she oversees much of California's labor policy, including California's Workers' Compensation System. The Department of Industrial Relations maintains one or more offices in Los Angeles.

17. Defendant Ronnie Caplane is the Chair of the Workers' Compensation Appeals Board ("WCAB"). In her official capacity, she leads the WCAB, which can reconsider the decisions of a workers' compensation judge and can also hear workers' compensation cases in the first instance. The WCAB has and will continue to dismiss liens that are set for a lien conference if the lien "activation" fee has not been paid. The WCAB maintains one or more offices in Los Angeles.

18. Defendant Destie Overpeck is the Acting Administrative Director of the California Division of Workers' Compensation within the California

Department of Industrial Relations. In her official capacity, she is statutorily charged with collecting and implementing the lien filing fee and lien activation fee. Defendant is also charged with promulgating rules and regulations governing the collection of the fees. Cal. Labor Code § 4903.05(c)(4)-(5), 4903.06(3). The Division of Workers' Compensation maintains one or more offices in Los Angeles.

III. JURISDICTION AND VENUE

19. This complaint seeks declaratory and injunctive relief against state officers for violations of rights secured by the Fifth and Fourteenth Amendments to the United States Constitution. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

20. This Court has personal jurisdiction over each of the Defendants. The Defendants are all public officials of the State of California or its political subdivisions. Each of the Defendants performs official duties within the State of California and, therefore, maintains continuous and systematic contacts with the State of California such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. Further, the exercise of jurisdiction here comports with Cal. Civ. Proc. Code § 410.10 as well as the Constitutional requirement of Due Process.

21. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(b)(1) because one or more of the Defendants performs their official duties in this District, and therefore resides in this District. Furthermore, a substantial part of the events or omissions giving rise to Plaintiffs' claims have occurred

and will continue to occur in this District. 28 U.S.C. § 1391(b)(2).

IV. FACTS

A. Background

22. Under the workers' compensation system, employers generally have a duty to make medical care available to workers who are injured on the job. They generally may do so by providing the injured worker access to a health care provider that is within the employer's chosen Medical Provider Network (MPN).

23. Where an employer fails to make medical treatment available to a worker, refuses to acknowledge that the employee's injury was the result of a work injury, or does not offer the specific treatment needed by the worker, the injured worker is often forced to seek care from outside medical providers.

24. The worker may also obtain ancillary goods or services that are needed by the injured worker in connection with medical treatment or to determine if the injury was work-related. Such ancillary goods and services can include medicines, medical supplies, diagnostic services, the assistance of an interpreter, and copying of medical and employment records.

25. When an employer fails to satisfy the requirements of the Labor Code relating to provision of medical services or otherwise fails to provide all medical treatment "reasonably required to cure or relieve the injured worker from the effects of his or her injury," the employee is entitled to seek medical services on his or her own behalf. The employer is liable for reasonable expenses incurred by or on behalf

of the employee for these self-procured services. Cal. Labor Code § 4600(a).

26. When an injured employee self-procures medical services, and assuming that the employee follows the requirements of Cal. Labor Code § 4600 et seq. in procuring such services, the medical service provider may file a lien with the Workers' Compensation Appeals Board securing payment of the reasonable expenses incurred by the provider on behalf of the injured employee. Cal. Labor Code § 4903(b).

27. Medical and ancillary service providers take a significant risk when they provide treatment and services for injured workers outside of the employer's specified MPN. They may not get paid at all until either the employer admits liability or they establish the employer's liability through adjudication.

28. The rights of a provider of medical and ancillary services that holds a lien are also derivative of the rights of the injured worker. The lien is a claim against a possible workers' compensation recovery and without such recovery, the lienholder recovers nothing.

B. Senate Bill 863

29. In the fall of 2012, the California Legislature enacted Senate Bill 863 ("SB863"). SB863 dramatically reformed California's workers' compensation system in a number of ways.

30. Among other things, SB863 imposed substantial new fees specifically intended to destroy certain existing workers' compensation liens and deter the filing of certain future liens.

31. The law requires certain lien claimants who perfected liens prior to January 1, 2013 to pay a "lien activation fee" of $100 per lien. Cal. Labor Code § 4903.06(a)(1).[2]

32. If the lienholder does not pay this fee by the time of a "lien conference" the lien "shall be dismissed with prejudice." Cal. Labor Code § 4903.06(a)(4).

33. Additionally, if the lienholder does not pay this fee by January 1, 2014, the lien is "dismissed by operation of law." Cal. Labor Code § 4903.06(a)(5).

34. The lien activation fee imposed by SB863 does not apply to all lien holders. Specifically exempted from the activation fee are:

- "a health care service plan licensed pursuant to Section 1349 of the Health and Safety Code,"
- "a group disability insurer under a policy issued in this state pursuant to the provisions of Section 10270.5 of the Insurance Code,"
- "a self-insured employee welfare benefit plan, as defined in Section 10121 of the Insurance Code, that is issued in this state,"
- "a Taft-Hartley health and welfare fund," and
- "a publicly funded program providing medical benefits on a nonindustrial basis."

Cal. Labor Code § 4903.06(b).

---

[2] Claimants filing liens after January 1, 2013 must pay a "filing fee" of $150 per lien. Failure to pay the filing fee renders a lien invalid. Cal. Labor Code § 4903.05(c).

35. By exempting insurance companies, HMOs, and benefits plans sponsored by employers, unions and the public, the challenged provisions of SB863 specifically target independent providers of medical and ancillary services to workers' compensation claimants. This targeting of independent providers of services to workers' compensation claimants is arbitrary, irrational and capricious.

36. The purpose and intent of the challenged provisions of SB863 is to destroy the liens of these independent lienholders. The bill was passed in response to a 2011 report by the California Commission on Health and Safety and Workers' Compensation. That report explicitly advocated instituting a filing fee in order to reduce the number of liens and quantified the effect such fees have on deterring the filing of new liens.

37. This sensitivity in the payment of lien filing fees is partially due to the fact that many liens are for only small amounts, often between one hundred and a few hundred dollars. For these smaller liens, the $100 "activation" fee is cost prohibitive.

38. This problem is compounded by the uncertainty of receiving any recovery on a lien. A medical care provider's lien claim is derivative of the workers' claim to workers' compensation benefits. If the workers' underlying claim is denied, for example on the ground that the injury was not work related, the medical care provider has no right to recover on the lien even though the medical services were provided. The providers of ancillary services such as translation can be doubly at risk, dependent both on the workers' success in establishing that the injury was work

related and on a determination that the medical treatment provided was necessary and appropriate. These issues are typically beyond the knowledge or control of ancillary service providers. Thus, even for larger liens, the $100 lien "activation" fee can be cost prohibitive as a practical matter.

39. The Workers' Compensation Appeals Board and Workers' Compensation Administrative Law Judges have strictly enforced the challenged provisions of SB863, dismissing lien claims with prejudice even in cases where the lien conference was improperly scheduled. In doing so, they have noted that the lien "activation" fee imposed by SB863 was "designed to specifically deal with the perceived lien crisis." *See* Exhibit A, *Garibay v. Federated Logistics*, No. 3854111, Order Denying Petition for Reconsideration (Workers' Comp. Appeals Bd. June 27, 2013) and related Report and Recommendation of Workers' Compensation Administrative Law Judge on Petition for Reconsideration (June 17, 2013).

40. Moreover, because the Worker's Compensation Appeals Board has recently held that a lienholder cannot recover by filing a claim as a petition for costs rather than as a lien, many lienholders will be left with no effective remedy whatsoever to vindicate their property interest. *Martinez v. Terrazas*, No. ADJ7613459 (Workers' Comp. Appeals Bd. May 7, 2013) (en banc).

41. The $100 amount of the lien "activation" fee for liens filed prior to December 31, 2012 is arbitrary and capricious.

42. The lien "activation" fee retroactively imposed on existing liens by SB863 is entirely new. No such fee has ever been required in the past.

C. The Impact of SB863 on Plaintiffs

43. Plaintiffs hold large numbers of workers' compensation liens filed prior to December 31, 2012. Virtually all of these liens are for medical services and ancillary goods and services provided to injured workers before the enactment of SB863, without any notice of the possibility that they might later be subjected to SB863's novel, retroactive "activation" fee.

44. Many of the liens held by Plaintiffs are for relatively small amounts in relation to the $100 "activation" fee. As a result, large numbers of liens held by Plaintiffs will effectively be taken in their entirety as a result of SB863.

45. Because Plaintiffs hold tens of thousands of liens subject to SB863's $100 lien "activation" fee, the aggregate cost of the lien activation fees will be enormous. For example, Plaintiffs Christina Arana and Joyce Altman each hold over 4,500 liens subject to the "activation" fee. The aggregate cost to preserve their liens will thus exceed $450,000 each. Plaintiff Buena Vista holds over 20,000 liens, and its aggregate cost to preserve its liens will be more than $2 million. Plaintiffs presently lack the ability to pay the lien "activation" fee on all of the liens they hold that are subject to the fee.

46. As a result of these new lien "activation" fees, Plaintiffs are put in a Catch-22. They must either pay enormous sums that were not previously anticipated,

or effectively suffer a forfeiture of virtually their entire accounts receivable.

47. Plaintiffs will suffer irreparable harm if the lien "activation" provisions of SB863 are not preliminarily and permanently enjoined. Pursuant to the challenged provisions of SB863, any liens for which these "activation" fees are not paid in their entirety by December 31, 2013 are "dismissed by operation of law." In the interim, if an "activation" fee has not been paid when a lien is set for a lien conference, the lien is also to be dismissed. With their liens dismissed, workers' compensation claimants and other lienholder will be paid and Plaintiffs will lose any effective way to obtain compensation for the services and good they provided.

COUNT I

VIOLATION OF UNITED STATES CONSTITUTION, AMENDMENT V, TAKINGS CLAUSE

48. Paragraphs 1 through 47 are hereby incorporated as though fully set forth herein.

49. Workers' compensation liens filed prior to December 31, 2012 are vested property rights.

50. The medical services and ancillary goods and services provided by Plaintiffs to the State's injured workers also constitute valuable private property.

51. The retroactive application of SB863's lien "activation" fee results in a taking of these property rights for public use without just compensation.

52. Plaintiffs provided valuable medical and ancillary services to injured workers without

immediate payment in reliance on a reasonable, legally-backed expectation that they would be able to recover compensation through a lien on the patients' workers' compensation claims. The retroactive application of SB863's lien "activation" fee interferes with these reasonable investment-backed expectations. The statute destroys previously perfected liens unless the activation fee is paid and substantially impairs the value of all liens.

53. Because the lien "activation" fee is entirely new, plaintiffs could not have reasonably anticipated that their liens would be subject to these fees and the resulting destruction or impairment of their value.

54. SB863 provides no discretion to allow the government to excuse the "activation" fee or to provide compensation to those whose property interests in their liens are destroyed or diminished. SB863 also does not provide for a smaller activation fee to be imposed on smaller liens.

55. Consequently, enforcement of the lien "activation" fee constitutes a taking of private property for public use without just compensation in violation of Plaintiffs' rights under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

COUNT II

VIOLATION OF UNITED STATES CONSTITUTION, AMENDMENT XIV, DUE PROCESS CLAUSE

56. Paragraphs 1 through 55 are hereby incorporated as though fully set forth herein.

57. Workers' compensation liens filed prior to December 31, 2012 are vested property rights.

58. The medical services and ancillary goods and services provided by Plaintiffs to the State's injured workers in reliance on their right to obtain compensation through workers' compensation liens also constitute valuable private property.

59. The retroactive application of the lien "activation" fee to liens filed prior to December 31, 2012 effectively eliminates Plaintiffs' right to seek administrative and judicial vindication of the property rights secured by Plaintiffs' liens and compensation for the medical services and ancillary services provided to the States residents in reliance on the lien system.

60. The expense of the lien "activation" fee in relation to the value of Plaintiffs' claims imposes an unreasonable burden on Plaintiffs' exercise of their right to be heard in support of their claims. It also renders Plaintiffs' claims essentially valueless in light of the absence of any alternative remedy for vindicating their claims.

61. SB863's lien "activation" fee is arbitrary, capricious, and not rationally related to any legitimate governmental interest. There is no rational, non-

capricious basis to target independent providers of medical and ancillary services and to exempt insurance companies, HMOs, and benefits plans sponsored by employers, unions and the public.

62. SB863 therefore violates Plaintiffs' right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

COUNT III

VIOLATION OF UNITED STATES CONSTITUTION, AMENDMENT XIV, EQUAL PROTECTION CLAUSE

63. Paragraphs 1 through 62 are hereby incorporated as though fully set forth herein.

64. Workers' compensation liens filed prior to December 31, 2012 are vested property rights.

65. The medical services and ancillary goods and services provided by Plaintiffs to the State's injured workers in reliance on their right to obtain compensation through workers' compensation liens also constitute valuable private property.

66. SB863's one-size-fits-all $100 lien activation fee is not rationally related to the value of the underlying claims. As a result, the fee has a disproportionate impact on providers of medical services and ancillary goods and services who hold liens of small individual values. This discrimination against holders of smaller liens is arbitrary, capricious and not rationally related to any legitimate government interest.

67. SB863 expressly exempts from the lien "activation" fee most insurance companies, HMOs, and benefits plans provided by employers, unions and the public. Cal. Labor Code § 4903.06(b). The burdens of the "activation" fee thus fall almost exclusively on independent providers of medical care and ancillary goods and services to workers' compensation claimants. This discrimination against independent lienholders is arbitrary, capricious and not rationally related to any legitimate governmental interest.

68. SB863 therefore violates Plaintiffs' right to Equal Protection under the Fourteenth Amendment to the United States Constitution.

COUNT IV

VIOLATION OF 42 U.S.C. § 1983

69. Paragraphs 1 through 68 are hereby incorporated as though fully set forth herein.

70. Insofar as they are enforcing the lien "activation" fee imposed by Cal. Labor Code § 4903.06(a), Defendants, acting under color of state law, are depriving and will continue to Plaintiffs of their rights under the Fifth and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request:

A. A declaratory judgment, pursuant to 28 U.S.C. § 2201, that the lien "activation" fee imposed by Cal. Labor Code § 4903.06 violates the Takings Clause of the Fifth Amendment, the Due Process Clause of the

Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and 42 U.S.C. § 1983;

B. A preliminary and permanent injunction to preclude Defendants from collecting the lien "activation" fee and to preclude Defendants from dismissing or declaring invalid any lien for failure to pay such fees;

C. An award of costs, including reasonable attorneys' and expert fees under 42 U.S.C. § 1988; and

D. Any further relief to which Plaintiffs may be justly entitled.

Dated: September 6, 2013

BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP

MURPHY ROSEN LLP

By: */s/ Paul Murphy*

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Attorneys for Plaintiffs

EXHIBIT A

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case No. ADJ3854111 (MON 0353849)
(Long Beach District Office)

ALICIA GARIBAY,	)
	)
Applicant,	)
	)
vs.	)
	)
FEDERATED LOGISTICS,	)
doing business as MACY'S,	)
permissibly self-insured,	)
	)
Defendants.	)
	)

ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that said Petition for Reconsideration be, and it hereby is, **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/Marguerite Sweeney
MARGUERITE SWEENEY

I CONCUR,

/s/Deidra E. Lowe
DEIDRA E. LOWE

/s/Alfonso J. Moresi
ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 27 2013

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

MEDICAL RECOVERY
ORTHOGEAR
PAULA DIONNE

sye

GARIBAY, Alicia

STATE OF CALIFORNIA

Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ3854111

(Long Beach District Office)

[Dated June 17, 2013]

ALICIA GARIBAY	)
	)
-vs.-	)
	)
FEDERATED LOGISTICS;	)
MACYS REDONDO BEACH;	)
	)

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: Mary Anne Thompson

DATE: 06/17/2013

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Lien Claimant, Orthogear, has filed a timely and verified Petition for Reconsideration to the 4-19-2013 Order which dismissed the lien for non-payment of the lien activation fee pursuant to Labor Code §4903.06. Lien Claimant asserts that it was improper for the lien conference to be scheduled and that lien claimant

assumed that the lien conference would be taken off calendar and therefore the order dismissing the lien is improper. No Answer has been received.

II

BASIC FACTS

Applicant, born , alleged a CT from 2-28-2006 thru 5-2007 while employed by Macy's, permissibly self-insured, as a merchandise processor.

The underlying case has not been resolved by settlement or trial or dismissal.

On 8-1-2012, another lien claimant filed a Declaration of Readiness (DOR) for a lien conference including verification under Rule 10770.6. Thus, the case was set for a lien conference on 3-14-2013. The Board file appears to reflect notice to Orthogear.

Applicant's attorney filed an objection by letter dated 9-27-2012. He did not serve lien claimants with the objection. Orthogear did not object to the lien conference. Nevertheless, the lien conference was scheduled for 3-14-2013.

At the 3-14-2012 lien conference, many lien claimants appeared. Orthogear did not pay the lien activation fee per review of the EAMS system and therefore, the lien was dismissed on 4-19-2013.

III

ISSUES AND ARGUMENTS

A. BECAUSE THE LIEN CONFERENCE WAS SET BEFORE THE UNDERLYING CASE WAS RESOLVED SHOULD LIEN CLAIMANT BE EXCUSED FROM FILING THE LIEN ACTIVATION FEE?

As lien claimant so eloquently states, the lien conference was set because of a "bogus" Declaration of Readiness to Proceed (DOR).

Rule 10770.1 (a) provides in relevant part that a lien conference shall be set if a lien claimant who is a party under Rule 10301 (x)(3) files a DOR. Rule 10301 (x) (3) makes a lien claimant a party if the underlying case has been resolved. Here, clearly, the DOR was filed by a lien claimant when the underlying case was not resolved.

So what shall we do when faced with a "bogus" Declaration of Readiness (DOR)?

Labor Code §4903.06 provides that a lien activation fee shall be paid prior to the lien conference. Recently, in Figueroa v. Employers Comp Ins, the WCAB en banc held that Labor Code Section 4903.06 states that a lien shall be dismissed for failure to pay the lien activation fee prior to the lien conference and found that breach of Defendant's duty to serve medical reports did not excuse the requirement of payment of the lien activation fee.

Therefore, because Labor Code §4903.6 was enacted as part of Legislation designed to specifically deal with

the perceived lien crisis overwhelming the workers' compensation system and because Labor Code §4903.06 is very clear that the lien activation fee shall be paid, it is the understanding of this WCJ that even though the lien conference was set inappropriately, that the lien should be dismissed for failure to pay lien activation fee.

Remember, lien claimant admits to notice of the lien conference, but just assumed that it would go off calendar. This is not some unintentional mistake. Lien Claimant deliberately assumed that it didn't have to pay the lien activation fee and did not have to appear at a lien conference!!!! This shows a complete disregard for the authority of the WCAB and Rules 10770.1(d) and 10562.

IV

CONCLUSION

It is respectfully requested that the Petition for Reconsideration be dismissed. It is further suggested that sanctions may be in order.

DATE: 06/17/2013

/s/Mary Anne Thompson
Mary Anne Thompson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:
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ON: 06/17/2013
BY: *Del Reyes*