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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 ANGELOTTI CHIROPRACTIC, INC., et) Case No.: 8:13-cv-01139-GW-JEM
13 al.)
14 Plaintiffs,)
15 vs.)
16 CHRISTINE BAKER, *in her official*)
17 *capacity as Director of the California*)
18 *Department of Industrial Relations,*)
19)
20 RONNIE CAPLANE, *in her official*)
21 *capacity as Chair of the California*)
22 *Workers' Compensation Appeals Board,*)
23 and)
24 DESTIE OVERPECK, *in her official*)
25 *capacity as Acting Administrative director*)
26 *of the California Division of Workers'*)
27 *Compensation,*)
28 Defendants.)

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I. NOTICE OF INTERESTED PARTIES

The undersigned, counsel of record for California Chamber of Commerce, certifies that the following listed party (or parties) may have a pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal.

➤ NONE

Dated: October 14, 2013

Respectfully submitted,

FINNEGAN, MARKS, THEOFEL & DESMOND
A Professional Corporation

/s/ Ellen Sims Langille

Ellen Sims Langille

II. STATEMENT OF INTEREST OF AMICUS CURIAE

The California Chamber of Commerce (“CalChamber”) submits this Proposed Amicus Curiae brief in support of Defendants’ Motion to Dismiss, scheduled for hearing in this Court on October 24, 2013.

CalChamber is a nonprofit organization comprised of over 13,000 member employers, both large and small. CalChamber is dedicated to improving California's business climate by providing businesses with a voice in state politics, legislative activities, and judicial matters. CalChamber is interested in administrative, statutory, and judicial matters that substantively affect the system of workers' compensation created by Article XIV, Section 4, of the California Constitution of the State of California.

CalChamber has been granted amicus curiae status in numerous workers' compensation cases, most recently in *Valdez v. WCAB*, *Baxter v. WCAB (XYZZX)*, *Environmental Services v. WCAB (Almaraz)*, *Milpitas Unified School District (Guzman)*, and *City & County of San Francisco v. WCAB (Ogilvie)*.

Petitioners in this case seek the extraordinary and drastic remedy of injunctive relief based on claims of an unconstitutional government taking. But even a cursory review of the facts and legislative history surrounding the enactment of lien activation fees demonstrates that the new law does not constitute a “taking” because there is no protected property interest that can be asserted.

CalChamber urges this Court to grant the Motion to Dismiss in this case.

III. INTRODUCTION

SB 863 was a negotiated, bipartisan legislation widely supported by both business and labor.¹ As part of that legislation, in order to achieve real reform and in hopes of meeting the constitutionally mandated goal of providing compensation to injured workers in an expeditious, inexpensive, and unencumbered manner,² the bill imposed a \$100 *reimbursable* “lien activation” user fee upon lien claimants. The lien activation fee is not a penalty; rather, but it constitutes user funding actually payable³ to fund the very system in which lien claimants seek to participate.⁴ Such user-funded reform was necessitated by the severe overcrowding of the WCAB calendars that has threatened to completely derail the entire system.⁵

Against this background, Plaintiffs have filed for declaratory and injunctive relief. Defendants have motioned this court for dismissal of the Complaint, and opposed the request for a preliminary injunction. Because Plaintiffs have failed to state a claim upon

¹ See, e.g., Exh. B to Defendants' Request for Judicial Notice, at pp. 13-15.

² Cal. Const., art. XIV, § 4.

³ The fees generated by the lien activation fee and lien filing fee are deposited into the Revolving Fund, used to administer California's workers' compensation program. Lab. Code §§ 62.5(a)(1)(A), 4903.06(c)(3).

⁴ Incredibly, while paying lip service to the plight of small lien holders, plaintiffs actually admit to being among the primary players in the creation of the backlog currently burdening the system. Keeping in mind that “relatively few lien claimants account for a disproportionately large share of the medical liens filed,” (CHSWC Report at p. 47), it is noted that just one medical group plaintiff holds over 20,000 liens (Declaration of Jeffrey Gaines), while another individual plaintiff admits to holding 1500 workers’ compensation liens (Declaration of David Payne, M.D.).

⁵ See, e.g., Exh. A to Defendants Request for Judicial Notice, at pp. 1, 14.

1 which relief can be granted, *amicus curiae* CalChamber urges this Court to dismiss the
 2 case.
 3

4 **IV. LEGAL ARGUMENT**

5 **A. The Lien Activation Fee in SB 863 Is a Rational Response to an
 6 Escalating Crisis at the WCAB.**

7
 8 The California Commission on Health and Safety and Workers' Compensation
 9 ("CHSWC") is a bipartisan commission charged with conducting "a continuing
 10 examination of the Worker's Compensation system."⁶ As part of the executive branch,⁷ it
 11 is official acts may be judicially noticed.⁸ CHSWC issued a formal report on the impact
 12 of liens in the workers' compensation system, dated January 5, 2011, for which judicial
 13 notice has been requested by defendants.⁹ As the opening statement of the CHSWC
 14 Report states bluntly, "*liens are choking the system.*"
 15
 16

17 All stakeholders are suffering: With lien litigation consuming as much as 35% or
 18 more of the court's calendar,¹⁰ injured workers are delayed in obtaining adjudication of
 19 their claims; employers and insurers are compelled to compromise lien claims that should
 20 not be paid in order to achieve closure; and lien claimants are required to wait years
 21 before receiving determination of their claims.
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 26 ⁶ Lab. Code § 77.
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⁷ Lab. Code § 75.

⁸ Evid. Code §452(c).

⁹ See Liens Report of California Commission on Health and Safety and Workers' Compensation ("CHSWC Report"), attached as Exhibit A to the Defendants Request for Judicial Notice.

¹⁰ CHSWC Report, at p.1 (Exh. A to RJN).

1 The study confirmed that the previous implementation of a \$100 lien filing fee
 2 back in 2004 had an immediate and sustained effect on lien filings.¹¹ As soon as the fee
 3 was implemented, lien filings dropped precipitously and stayed at low levels -- at least
 4 until the filing fee was repealed, at which point, lien filings doubled and have continued
 5 to spiral beyond any levels in recorded history at the WCAB.¹²

8 The CHSWC Report concluded that the WCAB court system “does not have the
 9 capacity to handle all of the lien disputes that are filed.”¹³ As one of the primary
 10 solutions proposed by CHSWC, the study recommended provision of sufficient resources
 11 at the WCAB District Offices, including increased staffing.¹⁴ And the study strongly
 12 recommended reimplementation of the \$100 filing fee, listing the imposition of such a fee
 13 as the first of 28 recommendations on the lien crisis.¹⁵ So strong was the study’s
 14 recommendation for filing fee, that the recommendation was expanded in greater detail in
 15 an Appendix to the CHSWC Report.¹⁶

19 The Legislature took the documented warnings of an ongoing lien crisis from
 20 CHWSC very seriously. In light of the CHSWC Report, the Legislature undertook the
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24 ¹¹ CHSWC Report, at pp. 4-5 and Figure 1 (Exh. A to RJD).

25 ¹² *Id.*

26 ¹³ CHSWC Report, at p. 8 (Exh. A to RJD). At a CHSWC hearing in October 2010, it was said that it
 27 would take 30 years for the Los Angeles District Office to get through the backlog of recorded liens,
 28 even if not a single new lien was filed. CHSWC Report, at p. 9.

¹⁴ CHSWC Report, at pp. 9, 12.

¹⁵ CHSWC Report, at p.8.

¹⁶ CHSWC Report, Appendix 2, pp. 56-58.

1 necessary steps to bring more money into an overburdened system, and implemented
 2 both lien activation fees and lien filing fees. These fees serve the dual purposes of
 3 reducing the number of liens being filed while simultaneously increasing the amount of
 4 funding available to provide for the court staffing necessary to get through the lien
 5 backlog.

8 In their amicus brief, CSIMS contends that the Legislature acted improperly by
 9 enacting a lien activation fee in addition to the lien filing fee recommended by
 10 CHSWC.¹⁷ CSIMS apparently contends that the recommendations from CHSWC should
 11 have been interpreted strictly and without legislative alteration. Of course, the CHSWC
 12 Report made additional recommendations for the imposition of an automatic dismissal by
 13 operation of law for any lien which is not activated for hearing within a finite time,¹⁸ and
 14 for the imposition of strict statutes of limitations for lien filings.¹⁹ Conveniently,
 15 although these new rules and regulations also significantly impact pending lien claims
 16 and potentially represent further “takings,” the amicus brief from CSIMS ignores these
 17 explicit recommendations as they rely upon the CHSWC study.²⁰ But the fact remains
 18 that it is the Legislature that is vested with plenary authority, and not CHSWC.

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 27 ¹⁷ CSIMS’ Amicus Brief in Support of Plaintiff’s Request for Preliminary Injunctive Relief, at p. 4.
 28 ¹⁸ CHSWC Report, at p. 38.
¹⁹ CHSWC Report, at p. 39.
²⁰ CSIMS’ Amicus Brief in Support of Plaintiff’s Request for Preliminary Injunctive Relief, at p. 4.

1 Meanwhile, Petitioners complain of the “irrationality” of the \$100 lien activation
2 fee, because it has an alleged disproportionate impact on providers with smaller liens.
3
4 But it is these same small liens and so-called “zombie liens”²¹ that have clogged the
5 system, and severely restricted the opportunity for the State’s employers and injured
6 workers to obtain adjudication of their rights under the Workers’ Compensation Act.
7
8 Implementation of a \$100 user fee is a rational, reasonable, and responsible way for the
9 DWC to address the costs associated with adjudication of these liens.
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**B. Plaintiffs Have Failed to Demonstrate a “Taking” of a Protected
Property Interest.**

15 1. THERE IS NO VESTED PROPERTY RIGHT REQUIRING CONSTITUTIONAL
16 PROTECTION.

17 Plaintiffs’ claims presented to this Court fail *ab initio*: There simply is no vested
18 property right. The Complaint admits this fact plainly when it states that, separate and
19 apart from the question of a lien activation fee, the providers of services including
20 Plaintiffs “may not get paid at all until either the employer admits liability or they
21 establish the employer’s liability through adjudication.”²² The Complaint goes on to
22 admit that Plaintiff’s right to payment is merely “derivative of the rights of the injured
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28 ²¹ CHSWC Report, at pp. 34, 36-37.

²² First Amended Complaint, at 8:19-20

1 worker” and that payment is conditional upon the injured worker’s recovery of
2 compensation.²³
3

4 Plaintiffs pretend that their lien claims “were perfected long ago.”²⁴ On the
5 contrary, the liens were *requested*; they were not perfected and they were not vested.
6 Rather, the liens represent an expectation, and the Constitution does not protect hopes for
7 payment.
8

9 The fact that plaintiffs may have “had no reason to expect”²⁵ the imposition of a
10 lien activation fee does not render the imposition of such a fee unconstitutional.
11

12 2. CALIFORNIA DOES NOT CONSIDER RIGHTS BASED ON STATUTES TO BE
13 VESTED PROPERTY RIGHTS.

14 The longstanding rule in California is that rights created by statute may be altered
15 by the Legislature. Some 80 years ago, the California Supreme Court set out a rule of
16 statutory construction that had been followed for decades:
17

18 [A] cause of action or remedy dependent on a statute falls with a repeal of
19 the statute, even after the action thereon is pending, in the absence of a
20 saving clause in the repealing statute. The justification for this rule is that all
21 statutory remedies are pursued with full realization that the Legislature may
22 abolish the right to recover at any time.²⁶
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26²³ First Amended Complaint, at 8: 21-24.

27²⁴ Plaintiff’s Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, at
1:16.

28²⁵ *Ibid.*

²⁶ *Callet v. Alioto* (1930) 210 Cal. 65, 67-68, 290 P. 438 [citations omitted].

1 Thus, it is well-established that if the Legislature acts to amend or affect a cause of
 2 action granted only by statute, such amendment will be effective against all such causes
 3 of action still awaiting a final adjudication.²⁷

5 3. THE SAME RULES APPLY IN WORKERS' COMPENSATION CASES,
 6 INCLUDING THIS ONE

7 On at least two occasions, the California Court of Appeal has addressed the
 8 question of "vested rights" in the context of a newly enacted workers' compensation
 9 statute. In both instances, the California Courts determined that the statutory rights were
 10 not vested until and unless those rights had been reduced to judgment.

13 In *Graczyk v. WCAB*,²⁸ Ricky Graczyk was a university student on athletic
 14 scholarship. Graczyk was injured in a university football game and claimed that he was
 15 an employee of the university with a vested right to receive workers' compensation
 16 benefits. The Court of Appeal ruled against him, finding that a new Labor Code section
 17 excluded student athletes as employees.²⁹ Although the new section was enacted *after*
 18 Graczyk's injury, the Court of Appeal explained that in order to determine whether there
 19 is a vested right in a workers' compensation action, a court must look at the unique nature
 20 of workers' compensation law in California.

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 27 ²⁷ *Justus v. Atchison* (1977) 19 Cal.3d 564, 575, 139 Cal. Rptr. 97 (statutory cause of action exists only
 so far and in such favor of such person as the legislative power may declare).

28 ²⁸ *Graczyk v. WCAB* (1986) 184 Cal. App.3d 997, 229 Cal. Rptr. 494, 51 CCC 408.

29 ²⁹ Lab. C. § 3352(k).

1 In California, the *Graczyk* Court explained, the right to workers' compensation
 2 benefits is wholly statutory and is not derived from common law.³⁰ This statutory right is
 3 exclusive of all other statutory and common law remedies, and substitutes a new system
 4 of rights and obligations for the common law rules governing liability of employers for
 5 injuries to their employees.³¹ Because it is a creature of statute, a right of action under
 6 workers' compensation laws exists only so far and in favor of such person as the
 7 legislative power may declare.³²

11 The *Graczyk* court concluded that there are no workers' compensation rights that
 12 exist beyond what is provided by the Legislature in the workers' compensation statutes,
 13 and that repeal of the authorizing statute eliminated the claim.³³ Thus, because *Graczyk*'s
 14 inchoate right to benefits under the workers' compensation law was not reduced to final
 15 judgment before the Legislature's enactment of new laws regarding employee status of
 16 athletes, he did not have a vested right and his constitutional objections had no bearing on
 17 the issue.

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 23 ³⁰ *Graczyk, supra*, 184 Cal. App.3d at 1002.

24 ³¹ *Ibid.*

25 ³² *Id.* at 1008; *see also Justus v. Atchison, supra*, 19 Cal.3d at 575.

26 ³³ *Graczyk v. WCAB, supra*, 184 Cal. App.3d at 1007 "Where a right of action does not exist at common
 27 law, but depends solely on statute, the repeal of the statute destroys the inchoate right unless it has been
 28 reduced to final judgment, or unless the repealing statute contains a saving clause protecting the right in
 pending litigation. Because it is a creature of statute, the right of action exists only so far and in favor of
 such person as the legislative power may declare....This justification for the rule that a statutory right of
 action may be repealed is that all statutory remedies are pursued with full realization that the Legislature
 may abolish the right to recover at any time [citations omitted, emphasis added]."

1 More recently, following a major workers' compensation reform (SB 899),
 2 California courts again addressed the question of whether that reform legislation could
 3 properly eliminate an employee's right to compensation for an injury that existed prior to
 4 the reform legislation. In holding that the Legislature had properly abolished rights of
 5 injured workers to compensation for a particular type of injury, the court in *Rio Linda*
 6
 7 *Union School Dist. v. WCAB (Scheftner)* opined:

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 9 Given the complete statutory nature of the workers' compensation system, it
 10 is apparent the specific right to compensation under such system for any
 11 industrial injury resulting in permanent disability because of the
 12 acceleration, aggravation, or "lighting up" of a prior nondisabling disease
 13 was a purely statutory right.... In its place, the Legislature substituted a new
 14 statutory right to compensation for the percentage of permanent disability
 directly caused by an industrial injury.³⁴

15 Thus, it has been established that the Legislature has plenary authority to eliminate,
 16 abrogate, or modify the rights of parties to a pending workers' compensation case; the
 17 same must be said for the rights of lien claimants, whose liens are inchoate, unproven,
 18 and unresolved.

19
 20 A subsequent case also interpreting the reforms engendered under SB 899 provides
 21 further illustrative language regarding the non-viability of a statutory remedy in workers'
 22 compensation cases following legislative action. In *Sierra Pacific Industries v. WCAB*,
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 28 ³⁴ *Rio Linda Union School Dist. v. WCAB (Scheftner)* (2005) 131 Cal.App.4th 517, 528, 31 Cal. Rptr. 3d
 789, 70 Cal. Comp. Cases 999.

the court underscored the transitory nature of statutory remedies, which necessarily rise and fall with legislative enactments:

The rule, however, may also include amendments. Where, as here, the Legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied to pending actions without triggering retrospectivity concerns; as a general rule, ... a cause of action or remedy dependent on a statute falls with a repeal of a statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute. *The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right ... at any time.*³⁵

Like *Graczyk*, *Scheftner*, and *Sierra Pacific*, this present case involves the application of a new workers' compensation statute to pending claims. But because these lien claims were not reduced to final judgment before the enactment of SB 863, there was no vested right of the Plaintiffs to maintain their litigation *status quo*, and SB 863 fairly and properly applies in full to these liens.

V. CONCLUSION

The Legislature has been constitutionally vested with “plenary power” to establish a complete and exclusive system of workers compensation,³⁶ and this includes the power to address an extraordinary crisis by means of a moderate user fee.

³⁵ *Sierra Pacific Industries v. WCAB* (2006) 140 Cal. App. 4th 1498, 1508 [emphasis added] [internal citations and quotations omitted].

³⁶ Cal. Const., art. XIV, § 4; Lab. Code § 3201.

1 Because the Plaintiffs cannot establish that there has been a taking of a vested
2 property right, they are not entitled to injunctive relief. Defendants' Motion to Dismiss
3 should be granted.
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7 Dated: October 14, 2013

Respectfully submitted,

8 FINNEGAN, MARKS, THEOFEL & DESMOND
9 A Professional Corporation
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/s/ *Ellen Sims Langille*

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANGELOTTI CHIROPRACTIC, INC., et al. Case No.: 8:13-cv-01139-GW-JEM)

Plaintiffs,) [proposed] ORDER GRANTING
vs.) LEAVE TO FILE AMICUS BRIEF

CHRISTINE BAKER, *in her official capacity as Director of the California Department of Industrial Relations,*) **Dept.:** Courtroom 10) **Judge:** Hon. George H. Wu)

RONNIE CAPLANE, in her official capacity as Chair of the California Workers' Compensation Appeals Board,) Time: 8:30 a.m.))

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

Motion having been made by California Chamber of Commerce, and GOOD CAUSE APPEARING based upon the Application for Leave to File Amicus Curiae Brief, the proposed Amicus Curiae Brief submitted by the California Chamber of Commerce is hereby ALLOWED.

DATED: by _____
Hon. George H. Wu