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14
15 UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
17

18 ANGELOTTI CHIROPRACTIC,
19 INC. d/b/a TAFT
20 CHIROPRACTIC,

21 MOONEY AND SHAMSBOD
22 CHIROPRACTIC, INC.,

23 CHRISTINA-ARANA &
24 ASSOCIATES, INC.,

25 JOYCE ALTMAN
26 INTERPRETERS, INC.,

27 SCANDOC IMAGING, INC.,

28 BUENA VISTA MEDICAL
SERVICES, INC., and

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

First Amended Complaint for
Declaratory, Injunctive, and Other
Relief

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1 DAVID H. PAYNE, M.D. INC.,
2 d/b/a INDUSTRIAL
3 ORTHOPEDICS SPINE &
SPORTS MEDICINE

4 Plaintiffs,

5 v.

6 CHRISTINE BAKER, *in her official*
7 *capacity as Director of the California*
8 *Department of Industrial Relations,*

9 RONNIE CAPLANE, *in her official*
10 *capacity as the Chair of the Workers'*
Compensation Appeals Board, and

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

14 Defendants.

15
16 **I. INTRODUCTION**

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

21 2. The challenged provisions of SB863 retroactively impose a \$100 "activa-
22 tion" fee on workers' compensation liens filed prior to January 1, 2013. Cal. Labor
23 Code § 4903.06.1 Under the challenged provisions of SB863, if the \$100 "activation"
24 fee is not paid by the time of a lien conference, the lien "shall be dismissed with prej-

25
26 ¹ SB 863 also imposes a \$150 "filing" fee on workers' compensation liens filed after
27 January 1, 2013. *See* Cal. Labor Code §§ 4903.05(c). This action does not challenge
28 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.

1 udice.” Cal. Labor Code § 4903.06(a)(4). In addition, all liens filed prior to January 1,
2 2013 are “dismissed by operation of law” if the \$100 “activation” fee is not paid by
3 January 1, 2014. Cal. Labor Code §§ 4903.06(a)(5).

4 3. Plaintiffs are providers of medical services and ancillary goods and ser-
5 vices to workers’ compensation claimants. Plaintiffs provided costly and valuable ser-
6 vices and goods to workers without immediate payment in reliance on their right to
7 obtain compensation through liens on the patients’ workers’ compensation claims.

8 4. Plaintiffs filed valid workers’ compensation liens prior to December 31,
9 2012. Those liens constitute vested property rights. Unless the new “activation” fee
10 imposed by SB863 is paid on each of these liens by December 31, 2013, the liens will
11 be forfeited. Even to the extent plaintiffs are able to pay the “activation” fee on their
12 larger liens, the challenged provisions of SB863 substantially reduce the economic
13 value of those liens and interfere with the plaintiffs’ reasonable investment-backed
14 expectations when they provided services to workers’ compensation claimants with-
15 out immediate payment in reliance on their right to obtain compensation through the
16 lien system.

17 5. SB863’s lien activation fee is not a general revenue measure. Indeed, in-
18 surance companies, health maintenance organizations (“HMOs”), labor union benefit
19 plans and a host of other large holders of workers’ compensation liens are arbitrarily
20 exempted from the fee. Cal. Labor Code § 4903.06(b). Rather, the challenged provi-
21 sion of SB863 specifically targets independent providers of services to workers’ com-
22 pensation claimants and was adopted with the purpose of destroying their liens.

23 6. In many cases, the value of the services that have been provided by
24 plaintiffs to individual workers is relatively small in relation to the new “activation”
25 fee imposed by SB863. As a consequence, it is not economically rational or feasible
26 for plaintiffs to pay the activation fee on all their liens. The challenged provision of
27 SB863 will therefore have the effect of taking valuable property from the plaintiffs.
28 In the aggregate, the impact on the plaintiffs will be enormous. In some cases, it will

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1 effectively wipe out their accounts receivable and challenge their very ability to con-
2 tinue as going concerns.

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

7 8. Plaintiffs will suffer irreparable injury if the enforcement of the chal-
8 lenged provisions of SB863 is not enjoined before December 31, 2013. Claimants
9 cannot afford to pay the “activation” fee on all of their liens, yet their liens will be
10 dismissed if they are set for a lien conference and the fee has not been paid. Cal. La-
11 bor Code § 4903.06(a)(4). Moreover, all liens filed before December 31, 2012 will be
12 “dismissed by operation of law” if the \$100 activation fee is not paid prior to Decem-
13 ber 31, 2013. Cal. Labor Code § 4903.06(a)(5).

14 II. THE PARTIES

15 A. The Plaintiffs

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

22 10. Plaintiff Mooney & Shamsbod Chiropractic, Inc. (“Mooney &
23 Shamsbod”) is a provider of chiropractic services that has treated injured workers
24 without immediate payment in reliance on its right to recover compensation through
25 workers’ compensation liens. Mooney & Shamsbod holds existing workers’ compen-
26 sation liens that were filed prior to December 31, 2012. Mooney & Shamsbod is a
27 California corporation with its principal place of business at 1037 East Palmdale
28 Blvd., Suite 201, Palmdale, CA 93550.

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1 11. Plaintiff Christina Arana & Associates, Inc. (“Christina Arana”) is a pro-
2 vider of interpreting services that has provided services to injured workers without
3 immediate payment in reliance on its right to recover compensation through workers’
4 compensation liens. Christina Arana holds approximately 6,500 existing workers’
5 compensation liens filed prior to December 31, 2012. Christina Arana is a California
6 corporation with its principal place of business at 11420 Ventura Blvd, Studio City,
7 CA 91604.

8 12. Plaintiff Joyce Altman Interpreters, Inc. (“Joyce Altman”) is a provider
9 of interpreting services that has provided services to injured workers without immedi-
10 ate payment in reliance on its right to recover compensation through workers’ com-
11 pensation liens. Joyce Altman holds approximately 5,000 existing workers’ compensa-
12 tion liens filed prior to December 31, 2012. Almost 80 percent of Joyce Altman’s
13 liens are for less than \$1,000, and nearly 50 percent of them are for less than \$300.
14 Joyce Altman is a California corporation with its principal place of business at 14891
15 Yorba Street, Tustin, CA 92780.

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

24 14. Plaintiff Buena Vista Medical Services, Inc. (“Buena Vista”) is a pharma-
25 cy that has provided medications to injured workers without immediate payment in
26 reliance on its right to recover compensation through workers’ compensation liens.
27 Buena Vista holds approximately 20,888 workers’ compensation liens filed prior to
28

1 December 31, 2012. Buena Vista is a California corporation with its principal place of
2 business at 2369 Calabasas Rd. #800, Calabasas, CA 91302.

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

10 **B. The Defendants**

11 16. Defendant Christine Baker is the Director of the California Department
12 of Industrial Relations. In her official capacity, she oversees much of California’s la-
13 bor policy, including California’s Workers’ Compensation System. The Department
14 of Industrial Relations maintains one or more offices in Los Angeles.

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

21 18. Defendant Destie Overpeck is the Acting Administrative Director of the
22 California Division of Workers’ Compensation within the California Department of
23 Industrial Relations. In her official capacity, she is statutorily charged with collecting
24 and implementing the lien filing fee and lien activation fee. Defendant is also charged
25 with promulgating rules and regulations governing the collection of the fees. Cal. La-
26 bor Code § 4903.05(c)(4)-(5), 4903.06(3). The Division of Workers’ Compensation
27 maintains one or more offices in Los Angeles.

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1 **III. JURISDICTION AND VENUE**

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

6 20. This Court has personal jurisdiction over each of the Defendants. The
7 Defendants are all public officials of the State of California or its political subdivi-
8 sions. Each of the Defendants performs official duties within the State of California
9 and, therefore, maintains continuous and systematic contacts with the State of Cali-
10 fornia such that the exercise of jurisdiction does not offend traditional notions of fair
11 play and substantial justice. Further, the exercise of jurisdiction here comports with
12 Cal. Civ. Proc. Code § 410.10 as well as the Constitutional requirement of Due Pro-
13 cess.

14 21. Venue is appropriate in this judicial district pursuant to 28 U.S.C.
15 § 1391(b)(1) because one or more of the Defendants performs their official duties in
16 this District, and therefore resides in this District. Furthermore, a substantial part of
17 the events or omissions giving rise to Plaintiffs' claims have occurred and will contin-
18 ue to occur in this District. 28 U.S.C. § 1391(b)(2).

19 **IV. FACTS**

20 **A. Background**

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

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

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

6 25. When an employer fails to satisfy the requirements of the Labor Code
7 relating to provision of medical services or otherwise fails to provide all medical
8 treatment “reasonably required to cure or relieve the injured worker from the effects
9 of his or her injury,” the employee is entitled to seek medical services on his or her
10 own behalf. The employer is liable for reasonable expenses incurred by or on behalf
11 of the employee for these self-procured services. Cal. Labor Code § 4600(a).

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

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

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

25 **B. Senate Bill 863**

26 29. In the fall of 2012, the California Legislature enacted Senate Bill 863
27 (“SB863”). SB863 dramatically reformed California’s workers’ compensation system
28 in a number of ways.

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

4 31. The law requires certain lien claimants who perfected liens prior to Janu-
5 ary 1, 2013 to pay a "lien activation fee" of \$100 per lien. Cal. Labor Code
6 § 4903.06(a)(1).²

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

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

11 34. The lien activation fee imposed by SB863 does not apply to all lien hold-
12 ers. Specifically exempted from the activation fee are:

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

22 Cal. Labor Code § 4903.06(b).

23 35. By exempting insurance companies, HMOs, and benefits plans spon-
24 sored by employers, unions and the public, the challenged provisions of SB863 specif-
25 ically target independent providers of medical and ancillary services to workers' com-
26

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

1 pension claimants. This targeting of independent providers of services to workers'
2 compensation claimants is arbitrary, irrational and capricious.

3 36. The purpose and intent of the challenged provisions of SB863 is to de-
4 stroy the liens of these independent lienholders. The bill was passed in response to a
5 2011 report by the California Commission on Health and Safety and Workers' Com-
6 pensation. That report explicitly advocated instituting a filing fee in order to reduce
7 the number of liens and quantified the effect such fees have on deterring the filing of
8 new liens.

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

12 38. This problem is compounded by the uncertainty of receiving any recov-
13 ery on a lien. A medical care provider's lien claim is derivative of the workers' claim
14 to workers' compensation benefits. If the workers' underlying claim is denied, for ex-
15 ample on the ground that the injury was not work related, the medical care provider
16 has no right to recover on the lien even though the medical services were provided.
17 The providers of ancillary services such as translation can be doubly at risk, dependent
18 both on the workers' success in establishing that the injury was work related and on a
19 determination that the medical treatment provided was necessary and appropriate.
20 These issues are typically beyond the knowledge or control of ancillary service provid-
21 ers. Thus, even for larger liens, the \$100 lien "activation" fee can be cost prohibitive
22 as a practical matter.

23 39. The Workers' Compensation Appeals Board and Workers' Compensa-
24 tion Administrative Law Judges have strictly enforced the challenged provisions of
25 SB863, dismissing lien claims with prejudice even in cases where the lien conference
26 was improperly scheduled. In doing so, they have noted that the lien "activation" fee
27 imposed by SB863 was "designed to specifically deal with the perceived lien crisis."
28 *See Exhibit A, Garibay v. Federated Logistics*, No. 3854111, Order Denying Petition for

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1 Reconsideration (Workers' Comp. Appeals Bd. June 27, 2013) and related Report and
2 Recommendation of Workers' Compensation Administrative Law Judge on Petition
3 for Reconsideration (June 17, 2013).

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

9 41. The \$100 amount of the lien "activation" fee for liens filed prior to De-
10 cember 31, 2012 is arbitrary and capricious.

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

13 **C. The Impact of SB863 on Plaintiffs**

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

19 44. Many of the liens held by Plaintiffs are for relatively small amounts in re-
20 lation to the \$100 "activation" fee. As a result, large numbers of liens held by Plain-
21 tiffs will effectively be taken in their entirety as a result of SB863.

22 45. Because Plaintiffs hold tens of thousands of liens subject to SB863's
23 \$100 lien "activation" fee, the aggregate cost of the lien activation fees will be enor-
24 mous. For example, Plaintiffs Christina Arana and Joyce Altman each hold over
25 4,500 liens subject to the "activation" fee. The aggregate cost to preserve their liens
26 will thus exceed \$450,000 each. Plaintiff Buena Vista holds over 20,000 liens, and its
27 aggregate cost to preserve its liens will be more than \$2 million. Plaintiffs presently
28

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1 lack the ability to pay the lien “activation” fee on all of the liens they hold that are
2 subject to the fee.

3 46. As a result of these new lien “activation” fees, Plaintiffs are put in a
4 Catch-22. They must either pay enormous sums that were not previously anticipated,
5 or effectively suffer a forfeiture of virtually their entire accounts receivable.

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

14 **COUNT I**

15 **VIOLATION OF UNITED STATES CONSTITUTION,**
16 **AMENDMENT V, TAKINGS CLAUSE**

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

19 49. Workers’ compensation liens filed prior to December 31, 2012 are vest-
20 ed property rights.

21 50. The medical services and ancillary goods and services provided by Plain-
22 tiffs to the State’s injured workers also constitute valuable private property.

23 51. The retroactive application of SB863’s lien “activation” fee results in a
24 taking of these property rights for public use without just compensation.

25 52. Plaintiffs provided valuable medical and ancillary services to injured
26 workers without immediate payment in reliance on a reasonable, legally-backed expect-
27 ation that they would be able to recover compensation through a lien on the patients’
28 workers’ compensation claims. The retroactive application of SB863’s lien “activa-

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1 tion” fee interferes with these reasonable investment-backed expectations. The stat-
2 ute destroys previously perfected liens unless the activation fee is paid and substantial-
3 ly impairs the value of all liens.

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

7 54. SB863 provides no discretion to allow the government to excuse the
8 “activation” fee or to provide compensation to those whose property interests in their
9 liens are destroyed or diminished. SB863 also does not provide for a smaller activa-
10 tion fee to be imposed on smaller liens.

11 55. Consequently, enforcement of the lien “activation” fee constitutes a tak-
12 ing of private property for public use without just compensation in violation of Plain-
13 tiffs’ rights under the Takings Clause of the Fifth Amendment and the Due Process
14 Clause of the Fourteenth Amendment to the United States Constitution.

15 **COUNT II**

16 **VIOLATION OF UNITED STATES CONSTITUTION,**
17 **AMENDMENT XIV, DUE PROCESS CLAUSE**

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

20 57. Workers’ compensation liens filed prior to December 31, 2012 are vest-
21 ed property rights.

22 58. The medical services and ancillary goods and services provided by Plain-
23 tiffs to the State’s injured workers in reliance on their right to obtain compensation
24 through workers’ compensation liens also constitute valuable private property.

25 59. The retroactive application of the lien “activation” fee to liens filed prior
26 to December 31, 2012 effectively eliminates Plaintiffs’ right to seek administrative and
27 judicial vindication of the property rights secured by Plaintiffs’ liens and compensa-
28

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1 tion for the medical services and ancillary services provided to the State’s residents in
2 reliance on the lien system.

3 60. The expense of the lien “activation” fee in relation to the value of Plain-
4 tiffs’ claims imposes an unreasonable burden on Plaintiffs’ exercise of their right to be
5 heard in support of their claims. It also renders Plaintiffs’ claims essentially valueless
6 in light of the absence of any alternative remedy for vindicating their claims.

7 61. SB863’s lien “activation” fee is arbitrary, capricious, and not rationally
8 related to any legitimate governmental interest. There is no rational, non-capricious
9 basis to target independent providers of medical and ancillary services and to exempt
10 insurance companies, HMOs, and benefits plans sponsored by employers, unions and
11 the public.

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

14 **COUNT III**

15 **VIOLATION OF UNITED STATES CONSTITUTION,**
16 **AMENDMENT XIV, EQUAL PROTECTION CLAUSE**

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

19 64. Workers’ compensation liens filed prior to December 31, 2012 are vest-
20 ed property rights.

21 65. The medical services and ancillary goods and services provided by Plain-
22 tiffs to the State’s injured workers in reliance on their right to obtain compensation
23 through workers’ compensation liens also constitute valuable private property.

24 66. SB863’s one-size-fits-all \$100 lien activation fee is not rationally related
25 to the value of the underlying claims. As a result, the fee has a disproportionate im-
26 pact on providers of medical services and ancillary goods and services who hold liens
27 of small individual values. This discrimination against holders of smaller liens is arbi-
28 trary, capricious and not rationally related to any legitimate government interest.

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1 67. SB863 expressly exempts from the lien “activation” fee most insurance
2 companies, HMOs, and benefits plans provided by employers, unions and the public.
3 Cal. Labor Code § 4903.06(b). The burdens of the “activation” fee thus fall almost
4 exclusively on independent providers of medical care and ancillary goods and services
5 to workers’ compensation claimants. This discrimination against independent
6 lienholders is arbitrary, capricious and not rationally related to any legitimate govern-
7 mental interest.

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

10 **COUNT IV**
11 **VIOLATION OF 42 U.S.C. § 1983**

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

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

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiffs respectfully request:

20 A. A declaratory judgment, pursuant to 28 U.S.C. § 2201, that the lien “ac-
21 tivation” fee imposed by Cal. Labor Code § 4903.06 violates the Takings Clause of the
22 Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, the Equal
23 Protection Clause of the Fourteenth Amendment, and 42 U.S.C. § 1983;

24 B. A preliminary and permanent injunction to preclude Defendants from
25 collecting the lien “activation” fee and to preclude Defendants from dismissing or de-
26 claring invalid any lien for failure to pay such fees;

27 C. An award of costs, including reasonable attorneys’ and expert fees under
28 42 U.S.C. § 1988; and

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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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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.

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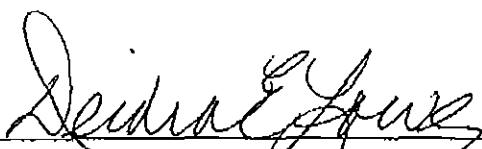
1 For the foregoing reasons,

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

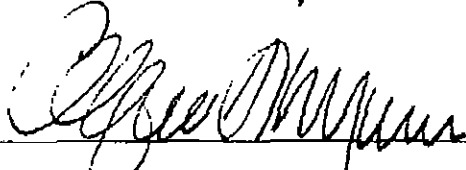
3
4 **WORKERS' COMPENSATION APPEALS BOARD**

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6 
7 **MARGUERITE SWEENEY**

8 **I CONCUR,**

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10 
11 _____
12 **DEIDRA E. LOWE**



13 
14 _____
15 **ALFONSO J. MORESI**

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17 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

18 **JUN 27 2013**

19
20 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
21 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

22 **MEDICAL RECOVERY**
23 **ORTHOGEAR**
24 **PAULA DIONNE**

25 sye



STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ3854111

(Long Beach District Office)

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 [redacted], 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.

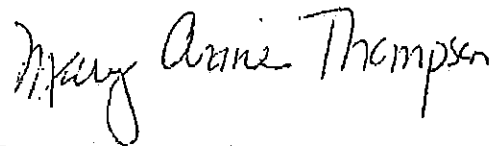
Therefore, because Labor Code §4903.6 was enacted as part of Legislation designed to specifically deal with the perceived lien crisis overwhelming the workers' compensation system and because Labor Code §4903.06 is very clear that the lien activation fee shall be paid, it is the understanding of this 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.



Mary Anne Thompson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

DATE: 06/17/2013

SERVICE:
MEDICAL RECOVERY GARDENA, US Mail (Representative for Orthogear)
PAULA DIONNE LOS ANGELES, US Mail

ON: 06/17/2013
BY: Del Reyes