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.

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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 lien-holders[2] are specifically exempted from the activation fees. *See id.* ¶¶ 5, 34-35.

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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).

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 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]

[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).

"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 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' liens 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 (1993) ("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 judgment in her favor, the lien would

[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).

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 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.*

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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. 2001)), *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.

[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 here.

[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).

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. 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 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

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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 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.

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 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 1003 ("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 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

[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*).

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 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 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

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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.

[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.

[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

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, 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 943, 955-56 (9th Cir. 2005); *Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1997); *Dodd v. Hood*

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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.

[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.

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 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

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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.

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 their 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 this case specifically does not apply to any lien filed by a health care service plan licensed pursuant to [Cal. Health & Safety Code § 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

[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).

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 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

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

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 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 other inadmissible evidence in deciding whether to issue a preliminary injunction. *See Johnson v. Couturier*, 572 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,

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[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 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*, 479 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 – 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); *Pimentel 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.

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 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 clear the *back*log 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 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

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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 Cal.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.

[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.

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 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, 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

[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.

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 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, over time, 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

[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.

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]

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.

[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.