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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CENTRAL CIVIL WEST

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

Plaintiffs,

v.

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

Defendants.

5:17-cv-00965

DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PRELIMINARY INJUNCTION MOTION

Date: September 28, 2017
Time: 8:30 a.m.
Courtroom: 9D
Judge: Hon. George H. Wu

The Court's August 31, 2017 Tentative Ruling allowed Plaintiffs to submit evidence on the narrow issue of "[w]hether lien holders affected by Section 4615 are currently denied access to the procedures afforded by pre-existing regulations." Tentative Ruling ("T.R.") at 6. Despite submitting 10 declarations and 53 exhibits, Plaintiffs have still failed to establish that due process is being denied to the parties in this case or to lien claimants more broadly. Plaintiffs continue to confuse (1) whether existing procedures permit a lien claimant to challenge whether its liens fall within the parameters of Section 4615 and are thus subject to the stay (existing procedures do) with (2) whether a workers' compensation administrative law judge ("WCALJ") has the discretion to determine that the stay should not apply to a particular lien notwithstanding the provisions of the statute (no, the stay is automatic for liens within the statute's parameters). Plaintiffs' declarations largely contain conclusory allegations that there "do not appear" to be procedures available to lien claimants wishing to challenge the application of a stay to their liens. Not one declaration demonstrates that a lien claimant *followed proper procedures* for requesting adjudication of an issue of law or fact by a workers' compensation judge, and was wrongly denied that adjudication.[1] Further, not one declaration demonstrates that any party claiming that a workers' compensation judge wrongly refused to hear a Section 4615 lien issue *followed proper procedures* and filed either a petition for reconsideration or a petition for removal to the workers' compensation appeals board ("WCAB") to challenge the judge's action or lack

[1]See Cal. Code Regs., tit. 8, § 10450 ["A request for action by the Workers' Compensation Appeals Board, . . . ***shall be made by petition***. The caption of each petition shall . . . indicate the type of relief sought."], emphasis added; § 10414 ["Except when a hearing is set on the Workers' Compensation Appeals' Board's own motion, no matter shall be placed on calendar ***unless one of the parties has filed and served a declaration of readiness*** to proceed in the form prescribed by the appeals board."], emphasis added; § 10348 ["In any case that has been regularly assigned to a workers' compensation judge, ***the judge shall have the full authority to hear and determine all issues of fact and law presented*** and to issue any interim, interlocutory and final orders, finding, decisions, and awards as may be necessary …."], emphasis added.)

thereof.[2] Even after this latest of three rounds of briefing, Plaintiffs have failed to demonstrate that they are entitled to the preliminary injunctive relief that they seek. Their motion should be denied.

I. CONFUSION ABOUT THE NARROW QUESTION AT ISSUE PERSISTS.

Throughout the briefing, Plaintiffs have repeatedly conflated two separate issues. The first is whether Section 4615 gives a medical provider charged with fraud, or any entity filing a lien "on behalf of" that provider, the opportunity to argue that some liens should not be stayed because they do not relate to the charged criminal activity. The answer is no—*if* the provisions of the statute apply, the stay is automatic, *not* discretionary, and it applies to *all* liens "filed by or on behalf of" charged medical providers. Lab. Code, § 4615. The second, and separate, issue is whether a lien claimant may challenge *whether* the provisions of Section 4615 apply to a particular lien in a particular case, i.e., to raise the issue of whether the lien was filed "by or on behalf of" a provider who has been charged with one of the specified crimes. The answer is *yes*. The question regarding such lien claimants is not whether a lien is "tainted" or "untainted," to borrow Plaintiffs' preferred parlance, but simply whether the provisions of the statute apply to the lien in question. This confusion persists in Plaintiffs' most recent submission (*see, e.g.*, Renetzky Decl., Dkt. 53 at 31, ¶ 10) even though the Court has expressly stated it is interested in the latter question only. T.R. at 6.

This confusion extends into misunderstandings of the list of charged providers posted on DIR's website and the notice required for lien claimants. Several declarations state that an entity with stayed liens has not itself been indicted or charged with a fraud-related offense or does not appear on DIR's posted list.

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[2] See Lab. Code § 5900 ["Any person aggrieved directly or indirectly by any final order, decision or award made and filed by the appeals board or a workers' compensation judge … may petition the appeals board for reconsideration ...."]; Cal. Code Regs., tit. 8, § 10843 [authorizing petitions for removal to challenge interim orders].

Renetzky Decl., Dkt. 53 at 31, ¶ 9; Lower Decl., Dkt. 53 at 13, ¶ 4; Pina Decl., Dkt 53 at 25, ¶ 4(b). Only the individual providers actually charged with one of the crimes listed in Section 4615 are included on the list on DIR's website (because that is what is required by subdivision (b) of Section 4615). But, other lien claimants, such as billing entities, medical corporations, fictitious business names, etc., may have filed liens "*on behalf of*" a criminally charged provider appearing on the DIR list, and those liens, under the plain language of Section 4615, are stayed in the same manner as liens filed directly in the name of the charged provider.[3]

Plaintiffs refer several times to the so-called "secret list" created by DIR's staff attorneys to flag for the WCALJs that a specific lien might be subject to a stay, inaccurately describing the flagging process itself as the imposition of the stay and claiming notice is required when someone is placed on that list. Korechoff Decl., Dkt. 53 at 16, ¶ 7[4] ("the Judge pulls out the DIR Secret List and affirms the existence of a stay."); Renetzky Decl., Dkt. 53 at 30, ¶ 11 ("[t]he decision to impose a stay is made by clerical staff in the EAMS unit."). To the contrary, as Judge Levy described in her declaration (Dkt. 42-1 at 4, ¶ 8), the list is merely an administrative tool to alert WCALJs to the relationships between providers and billing and business entities so that they know a lien might be subject to a stay because it was filed by "on behalf of" a charged medical provider. But notwithstanding that list, WCALJs both can and should, in the course of the usual workers' compensation proceedings, determine *whether* the stay actually applies to liens by considering evidence regarding who filed the lien, on whose behalf it was filed, and whether a provider is in fact charged with a specified crime.[5]

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[3] Plaintiffs argue that because the list on DIR's website does not include corporate entities, those entities have no notice that their liens might subject to the Section 4615 stay. Dkt. 54 at 5. But those entities know on whose behalf they have filed liens. To argue otherwise would strain logic.

[4] Defendants object to the Declaration of Victor Korechoff on the ground that it consists mostly of improper attorney argument rather than facts within his personal knowledge. Fed. R. Evid. rule 602, C.D. Cal. R. 7-7.

[5] *See Enciso v. Toys "R" Us*, 2017 WL 2634176 (WCAB June 7, 2017); (continued…)

II. CONCLUSORY ALLEGATIONS ARE INSUFFICIENT TO SUPPORT A PRELIMINARY INJUNCTION.

"[A] district court should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by plaintiff." *Atari Games Corp. v. Nintendo of Am.*, 897 F.2d 1572 (Fed. Cir. 1990) (citing *Am. Passage Media Corp. v. Cass Comm'ns*, 750 F.2d 1470 (9th Cir. 1985)). Several of the declarations state that there is no process, or there does not "appear to be" any process that would allow them to challenge the application of the Section 4615 stay to their liens.[6] Missing from the declarations are any examples of lien claimants who attempted to raise Section 4615 issues using the proper procedures provided in the regulations and described in Judge Levy's declaration, and who have had those efforts rejected. The minute orders Plaintiffs provided do not actually show whether the issue of the stay's applicability was properly raised before a WCALJ. Plaintiffs contend that some judges (naming only two specifically) have told lien claimants or their representatives that they should no longer appear or sign in at lien conferences (Goodrich Decl., Dkt. 53 at 10, ¶ 4; Lu Decl., Dkt. 53 at 12, ¶ 4; Pina Decl., Dkt. 53 at 25, ¶ 3; Pinkernell Decl., Dkt. 53 at 28, ¶ 3), but they do not describe any petitions or other written submissions made to these judges to obtain actual rulings, or any steps taken to follow proper procedures in challenging orders of the judges.

Similarly, some of the declarants state that WCALJs have stated that they do not have jurisdiction to decide whether the liens are properly stayed. Lower Decl.,

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(…continued)
McNeill v. Marina Shipyard, 2017 WL 2179128 (WCAB May 5, 2017); *Aguirre v. Cty. of Los Angeles*, 2017 WL 1449528 (WCAB Apr. 13, 2017).

[6] See Lu Decl., Dkt. 53 at 12, ¶ 4 ("there ***appears to be*** neither any procedure to address the issue of whether the liens are appropriately stayed"); Lower Decl., Dkt. 53 at 12, ¶ 4 ("There ***appears to be*** no procedure for challenging the lien stays."); Renetzky Decl., Dkt. 53 at 31, ¶ 10 ("There is no procedure . . . to argue that [the] liens should not be stayed."); Rudolph Decl., Dkt. 53 at 34, ¶ 9 ("I have . . . learned that there ***does not appear to be*** any system or procedure to address the fact that I am the victim of mistaken identity . . ."); Yeh Decl., Dkt. 53 at 41, ¶ 5 ("There ***does not appear to be*** a meaningful way to access the courts or the DIR to explain why the stay should not be imposed." Emphasis added in all.

Dkt. 53 at 15, ¶ 10; Pinkernell Decl., Dkt. 53 at ¶ 3; Yeh Decl., Dkt. 32 at ¶ 5. But the declarations offer only isolated examples of WCALJs who apparently believed (wrongly) that they had no jurisdiction to consider the applicability of the stay; several of those occurred in the early spring shortly after Section 4615 went into effect (*see* Yeh Decl., Dkt. 32 at ¶ 5), and before there was additional training for the WCALJs on Section 4615. Levy Decl., Dkt. 42-1 at 4-5, ¶ 9. Most importantly, notwithstanding that some WCALJs may have made errors in the handling of these issues, not one declarant states that he or she followed proper procedures and filed either a proper petition to the judge requesting an adjudication of the issue, or a petition for reconsideration or petition for removal to the WCAB challenging the judge's action. Simple appealable error does not amount to a due process violation.

These conclusory allegations are insufficient to establish the violation of lien claimants' due process rights by operation of Section 4615 and cannot support a preliminary injunction invalidating the statute on its face. They also fail to establish a likelihood of irreparable harm. To the extent Plaintiffs' allege irreparable harm stemming solely from the deprivation of Plaintiffs' due process rights, their failure to offer sufficient evidence to support their procedural due process claims also dooms their claim of irreparable harm. *Associated Gen. Contactors v. Coal. For Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) (declining to determine whether plaintiff's allegations "would be entitled to such a presumption of harm" because "the organization has not demonstrated a sufficient likelihood of success on the merits . . .")

Plaintiffs have now had several opportunities to demonstrate that Section 4615 on its face deprives them of their due process rights, and have been unable to do so. Defendants respectfully request that the Court deny Plaintiffs' motion for preliminary injunction.

Dated: September 20, 2017

Respectfully submitted,

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/s/ *Amie L. Medley*
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