UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	EDCV 17-965-GW(DTBx)	Date	October 30, 2017
Title	*Vanguard Medical Management Billing, Inc., et al. v. Christine Baker, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: IN CHAMBERS - FINAL RULING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [13]

Attached hereto is the Court's Final Ruling on Plaintiffs' Motion for Preliminary Injunction [13].

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Initials of Preparer JG

Vanguard Medical Mgmt. Billing Inc., et al., Case No. 5:17-cv-0965-GW-(DTBx)
Final Ruling on Plaintiffs' Motion for Preliminary Injunction

I. Background

On May 17, 2017, Plaintiffs David Goodrich, as Chapter 11 Trustee ("Goodrich"), Vanguard Medical Management Billing, Inc. ("Vanguard")[1], One Stop Multi-Specialty Medical Group, Inc., a California corporation ("OSM"), One Stop Multi-Specialty Medical Group & Therapy, Inc., a California corporation ("OST"), Nor Cal Pain Management Medical Group, Inc., a California corporation ("Nor Cal"), and Eduardo Anguizola, M.D. ("Anguizola," and, together with Goodrich, Vanguard, OSM, OST, and Nor Cal, "Plaintiffs") sued Defendants Christine Baker, in her official capacity as Director of the California Department of Industrial Relations ("Baker") and George Parisotto, in his official capacity as Acting Administrative Director of the California Division of Workers Compensation ("Parisotto," and, together with Baker, "Defendants") in this putative "civil rights" litigation. *See generally* Complaint ("Compl."), Docket No. 1. Plaintiffs are physicians and/or providers of medical treatment services (or related entities) who have liens within the California workers' compensation system.[2] Plaintiffs' facial constitutional challenge to California Labor Code § 4615[3] raises claims for injunctive and

[1] On May 22, 2017, Plaintiffs filed a Notice of Errata to clarify a typographical error on part of counsel in relation to Plaintiff Vanguard Medical Billing Management, LLC. *See generally* Notice, Docket No. 16. Plaintiffs noted that Vanguard "should properly be identified as *Plaintiff Vanguard Billing Management LLC* throughout the complaint," and averred that the error "does not affect the jurisdictional basis for the Complaint." *Id.* at 3:5-8 (emphasis added).

[2] For a brief overview of the role of liens in the California workers' compensation program and the "lien crisis" within the system, *see Angelotti Chiropractic v. Baker*, 791 F.3d 1075, 1078-80 (9th Cir. 2015).

[3] California Labor Code § 4615 states:

> (a) Any lien filed by or on behalf of a physician or provider of medical treatment services under Section 4600 or medical-legal services under Section 4621, and any accrual of interest related to the lien, shall be automatically stayed upon the filing of criminal charges against that physician or provider for an offense involving fraud against the workers' compensation system, medical billing fraud, insurance fraud, or fraud against the Medicare or Medi-Cal programs. The stay shall be in effect from the time of the filing of the charges until the disposition of the criminal proceedings. The administrative director may promulgate rules for the implementation of this section.
>
> (b) The administrative director shall promptly post on the division's Internet Web site the names of any physician or provider of medical treatment services whose liens were stayed pursuant to this section.

declaratory relief, pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202, respectively.[4] *See id.* ¶ 1.

Plaintiffs filed a Motion for a Preliminary Injunction ("Motion") to bar enforcement of Section 4615 on May 19, 2017. *See* Docket No. 13. Defendants timely filed their Opposition to the Motion *see* Docket Nos. 27-29, and Plaintiffs responded with a timely Reply, *see* Docket No. 31-32. Plaintiffs' motion asks the Court to enjoin enforcement of Section 4615 on five distinct constitutional grounds: (1) the Sixth Amendment Right to Counsel, (2) the Contract Clause, (3) Substantive Due Process, (4) "Procedural" Due Process, and (5) the Supremacy Clause. *See* Motion at 3-4.

The Court heard oral argument on the Motion on July 13, 2017 and issued a Tentative Ruling. *See* Civil Minutes July 13, 2017 ("Ruling"), Docket No. 40. Therein, the Court indicated that it was inclined to deny the Motion with respect to four of the five claims asserted, including Plaintiffs' challenges brought under (1) the Sixth Amendment Right to Counsel (*see* Ruling at 14), (2) the Contract Clause (*Id.* at 19), (3) Substantive Due Process (*Id.* at 21), and (4) the Supremacy Clause (*Id.* at 28).

The Court also indicated that it was inclined to grant Plaintiffs' Motion on "procedural due process" grounds, unless Defendants could demonstrate that "the Statute provides a charged lien holder with an opportunity to be heard to challenge Section 4615's application to his or her liens." *Id.* at 26. At oral argument, Defense Counsel was unable to explain whether or not Section 4615 provides such an opportunity; so the Court permitted Defendants to submit additional briefing and evidence on this issue. The Court also permitted Plaintiffs to submit additional briefing in response and also on an alternative substantive due process challenge not argued in their initial moving papers: *i.e.* that Section 4615 interferes with Plaintiffs'

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[4] Specifically, Plaintiffs describe the action as:

> *[A] facial challenge to the constitutionality of California Labor Code Section 4615* . . . based upon continuing violations of [their] rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the Contract Clause of the United States Constitution, and the Supremacy Clause of the United States Constitution, along with the corresponding provisions of the California Constitution, Article I, § 15 (Right to Counsel), Article I, § 9 (Contract Clause), Article I, § 7 (Due Process Clause), and Article I, § 19 (Takings Clause).

Compl. ¶ 1 (emphasis added); *see also id.* ¶¶ 22-24.

fundamental right of "Access to the Courts."

Plaintiffs filed their first Supplemental Brief ("Supp. Mot.") on July 18, 2017. *See* Docket No. 41. Defendants filed a Supplemental Opposition ("Supp. Opp'n") on August 8, 2017 that responded to Plaintiffs' new due process arguments and attempted to address the Court's concerns regarding procedural due process.[5] *See* Docket No. 42. Plaintiffs filed a Response to Defendants' Supplemental Opposition on August 15, 2017. *See* Pls.' Response in Support of Motion ("Response"), Docket No. 43.

After the Court reviewed the parties' first round of supplemental briefing, it conducted a second hearing. The Court indicated that Plaintiffs would be permitted to introduce evidence as to how Section 4615 is currently being applied procedurally in response to evidence of that nature provided by Defendants. For that reason, the Court continued the hearing to September 28, 2017. Plaintiffs supplied written evidence as well as additional briefing on September 12, 2017. *See* Plaintiffs' Submissions of Evidence in Support of Pending Motion for Preliminary Injunction ("Pls.' Evid.") Docket No. 53; Plaintiff's Second Supplemental Brief in Support of Motion for Preliminary Injunction ("Second Supp. Mot."), Docket No. 54. Defendant submitted responsive briefing ("Second Supp. Opp'n") on September 20, 2017. *See* Docket No. 55.

On the eve of the next hearing, Defendants informed the Court that the California Legislature passed Assembly Bill 1422 ("AB 1422") which amended Section 4615.[6] *See generally* Defendants' Notice of New Legislation and Request for Judicial Notice ("RJN"), Docket No. 56. The Court again continued the hearing and ordered each party to file a brief concerning what effect, if any, AB 1422 had on the constitutionality of Section 4615. *See* Docket No. 57. Each party complied with the Court's order. *See* Plaintiffs' Closing Brief in Support of Motion for Preliminary Injunction, Docket No. 58; *see also* Supplemental Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction ("DCB"), Docket No. 59.

For the reasons stated in the Tentative Ruling (*see* Docket No. 40 at 10-29), the Court now denies Plaintiffs' Motion on all grounds except for the following three contentions: (1)

[5] The Supp. Opp'n contained a new declaration along with approximately 100 pages of evidentiary material. *See* Docket No. 42-1.

[6] AB 1422 has an effective date of January 1, 2018. *See* Cal. Stats 2017, ch 300 § 3.

Plaintiffs' Procedural Due Process Claim, (2) Plaintiffs' Sixth Amendment Claim,[7] and (3) Plaintiffs' so-called "Access to the Courts Due Process Claim," which will be discussed below.

II. Section 4615 As Amended By AB 1422

Defendants describe AB 1422 as a "cleanup bill" that amends both Section 4615 and Cal. Lab. Code Section 139.21. *See* RJN at 2. AB 1422 adds the following provision to Section 4615 that is relevant to Plaintiffs' procedural due process claim:

> The automatic stay required by this section *shall not preclude the appeals board from inquiring into and determining within a workers' compensation proceeding whether a lien is stayed pursuant to subdivision (a)* or whether a lien claimant is controlled by a physician, practitioner, or provider.

Cal. Lab. Code § 4615(e) (emphasis added). AB 1422 also makes a change to the provision that provides for the listing of affected providers on the DWC's website.[8] Additionally, AB 1422 expands the scope of Section 4615 to include liens filed by or on behalf of "any entity controlled" by an indicted physician, practitioner, or provider of medical treatment services. *See* Cal. Lab. Code § 4615(a)(1) (effective Jan. 1, 2018). AB 1422 provides that "an entity is controlled by an individual if the individual is an officer or a director of the entity, or a shareholder with a 10 percent or greater interest in the entity." *See* Cal. Lab. Code § 139.21(a)(3).

The Governor included a Signing Message that also appears to address the procedural due process issue. RJN at 4:8-26. The Signing Message reads, in part:

> AB 1422 confirms that the Workers' Compensation Appeals Board retains jurisdiction to resolve disputes about the applicability of the automatic stay provision to specific liens. *This bill is declaratory of existing law which provides for the resolution of these disputes through the Board's current practices and procedures.* Nothing in

[7] While the Court previously indicated that it was not inclined to grant Plaintiffs' motion on Sixth Amendment grounds, at counsel's request, it allowed Plaintiffs to include additional argument on that issue in the final round of briefing.

[8] Cal. Lab. Code § 4615(b) currently states: "The administrative director shall promptly post on the division's Internet Web site the names of any physician or provider of medical treatment services whose liens *were stayed* pursuant to this section. [emphasis added]." As amended, the statute contains a nearly identical provision that reads: "The administrative director shall promptly post on the division's Internet Web site the names of any physician, practitioner, or provider of medical treatment services whose liens *are stayed* pursuant to this section." *See* Cal. Lab. Code 4615(d) (emphasis added) (effective Jan. 1, 2018).

> last year's legislation creating the stay was intended, or operated, to divest the Board from jurisdiction over these issues.

Id. at 4:19-24 (emphasis added).

Plaintiffs contend that the new language does not solve the procedural due process deficiencies in Section 4615. Alternatively, Defendants argue that the cited language confirms the validity of Defendants' central contention in opposition to Plaintiff's procedural due process claim: *i.e.* that Section 4615 affords sufficient due process through the existing procedures delineated in the worker's compensation system. The Court addresses its concerns about the original text of Section 4615 below, as well as the effect of AB 1422 in addressing those concerns.[9]

III. Whether Section 4615 Affords Sufficient Procedural Due Process

"No person shall be deprived of life, liberty, or property without due process of law." U.S. Const. AMEND. V. The Supreme Court has recognized two types of due process, one substantive and one procedural:

> The Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural due process."

U.S. v. Salerno, 481 U.S. 739, 746 (1987).

Plaintiffs argue Section 4615 violates the procedural component of the due process clause

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[9] Though AB 1422 does not take effect until January 1, 2018, the relevant portions are, in the Governor's words, "declarative of existing law." RJN at 4. As such, the Court finds the new language highly instructive as to the meaning of the pre-amended statute. *Cf. Guillen v. Schwarzenegger*, 147 Cal.App.4th 929, 945 (2007) ("Although subsequent declarations of the Legislature are not binding authority, they are appropriate for the court to consider as evidence of the original legislative intent for a measure.").

However, the Court does not find that the added language substantively alters Section 4615 so that it would moot all of the contested portions of Plaintiffs' claims once it takes effect. *See Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 875 (9th Cir. 2006) ("The test for whether intervening legislation has settled a controversy involving only declaratory or injunctive relief is 'whether the new [law] is sufficiently similar to the repealed [law] that it is permissible to say that the [government's] challenged conduct continues.'") (*quoting Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n. 3 (1993)).

because it immediately and automatically stays a provider's liens without notice or a hearing. Mot. at 24:1-19. In Defendants' initial Opposition, they argued that: (1) liens themselves are not interests protected by the Constitution, and (2) even if they are, Section 4615 affords sufficient process because Plaintiffs still have the same notice and hearing rights afforded under the worker's compensation scheme generally. Opp'n at 19:24-20:5. As explained in detail in the Court's prior Tentative Ruling, the Court would find that lien holders have a right to procedural due process in the administration of the liens. *See* Ruling at 25 ("The Court is convinced that Plaintiffs have demonstrated a substantial likelihood that medical lien holders possess a protectable interest in their liens, and the right to have those liens administered by the WBAC."); *see also Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) ("[O]ur cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, are subject to the strictures of due process."); *id.* at 15 ("The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.").

Generally, due process requires notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This is normally satisfied by an administrative hearing and, depending on the circumstances, that hearing need not even be a formal one. *Pinnacle, Inc. v. United States*, 648 F.3d 708, 717 (9th Cir. 2011). "[I]dentification of the specific dictates of due process . . . requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest . . . ." *Mathews*, 424 U.S. at 335. By weighing these concerns, courts can determine whether a State has met the fundamental requirement of due process: "the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 333. "Applying this test, the [Supreme] Court usually has held that the Constitution requires some type of hearing before the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). If there are no extraordinary circumstances, then some type of prior hearing is required and an analysis of the three factors under *Matthews* determines the formality and procedural requisites of the hearing. *See Mathews*,

424 U.S. at 333-35; *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971).

As to the issue of notice, Section 4615(b) now states: "The administrative director shall promptly post on the divisions' Internet Web site the names of any physician or provider of medical treatment services whose liens *were stayed* pursuant to this sections." Cal. Lab. Code § 4615(b) (emphasis added). As amended by AB 1422, section 4615(d) provides that: "The administrative director shall promptly post on the division's Internet Web site the names of any physician, practitioner, or provider of medical treatment services whose liens *are stayed* pursuant to this section." *See* Cal. Lab. Code § 4615(d) (emphasis added) (effective Jan. 1, 2018). While clearly Section 4615(b) does not require notice either before or concurrently with the imposition of the stay, there is somewhat of a question as to the extent to which Section 4615(d) remedies that deficiency.[10]

Furthermore, as explained in greater detail below, Defendants do not appear to be consistently complying with even meager requirements of Section 4615(b).[11] In particular, Defendants only list the names of criminally charged individuals on the DWC's website, but not the names of any of the other entities or individuals whose liens have been stayed because the liens were filed "on behalf of" a charged provider. *See* California Department of Industrial Relation, *Criminally Charged Providers Whose Liens Are Stayed Pursuant to Labor Code §46115 as of 9/21/2017*, http:/ /www.dir.ca.gov/Fraud_Prevention/List-of-Criminally-Charged-Providers.pdf;[12] Declaration of Paige S. Levy ("Levy Decl"), Docket No. 42-1 ¶ 8; *see also infra* at 9. Therefore, for at least some affected lien claimants, including certain Plaintiffs in this action, Section 4615 currently affords *no* notice, and as such likely violates the Fourteenth Amendment. *See Mathews*, 424 U.S. at 348 ("The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it."). Additionally, even those individuals who have been charged with fraud (and whose names do appear on the list) do not receive pre-deprivation notice.[13]

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[10] At best, Section 4615(d) would seem to only require concurrent notice of the stay at its imposition. The sufficiency of that provision is considered below.

[11] Even though this is a facial challenge to the statute, evidence of the statute's administrative implementation is relevant to discerning legislative intent. *See Elsner v. Uveges*, 34 Cal.4th 915, 929 (2004).

[12] The Court takes judicial notice of the contents of the website. *See* Federal Rule of Evidence 201(b).

[13] According to Judge Levy, names were first added to this list "when the Administrative Director began identifying

Alternatively, and as indicated in the Court's prior Tentative Ruling, the original text of Section 4615 does not explicitly provide affected claimants with a hearing either before a lien is stayed, or after. *See* Ruling at 25-26. In coming to that conclusion, the Court noted that the Legislature did not define the term "stay." *Id.* at 26. The Court also noted that, while Section 4615 "[permits] the director to promulgate rules for the implementation of Section 4615," none appear to have been enacted. *Id.* The Court gave Defendants the opportunity to present additional argument and evidence that Section 4615 grants claimants some ability to "(1) challenge the presence of his or her name on the state's website, and . . . (2) challenge the stay on any given lien, or his or her liens generally." *Id.*

A. Declaration of Judge Levy

Defendants' supplemental briefing on this issue relied almost entirely on the declaration and concomitant materials from Judge Paige S. Levy, Chief Judge of the California Division of Workers' Compensation. *See* Levy Decl.; Docket No. 42-1 at 1-15. Judge Levy provides comprehensive testimony as to her views on the concerns the Court expressed in its Tentative Ruling related to Section 4615's lack of procedural due process. *Id.* at ¶¶ 8-9. Judge Levy also provides testimony as to how *some* WCAB judges have reacted when claimants attempt to challenge the application of Section 4615 through and within the current regulatory scheme. *Id.* at ¶ 10.

Specifically, Judge Levy testifies that, at least in her view, WCALJs have authority to consider and determine whether a Section 4615 stay applies to a particular lien through the current procedures afforded by the statutory and regulatory scheme in place before the passage of Section 4615.[14] *Id.* at ¶ 9. Judge Levy also states that, in a series of conference calls with WCALJs conducted between March and June of 2017, she personally instructed the presiding judges that:

> lien claimants have a right to challenge whether the Section 4615 stay applies to a lien in a particular case (i.e., to challenge whether it is filed "by or on behalf of" a provider charged with a crime

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physicians and providers who had been charged with crimes falling within specifications of the statute." Levy Decl. ¶ 7. According to Levy the list "expanded over time as the Administrative Director became aware of additional providers who had been criminally charged." *Id.*

[14] Judge Levy's view finds support in the amended version of the statute, as well as the Governor's Signing Message. *See generally* RJN.

> falling within the parameters of Section 4615); and…if that issue is properly raised by any party, including lien claimants, the WCALJs need to adjudicate the issue by applying the provisions of Section 4615, and any additional applicable statutory or regulatory provisions, to the facts and circumstances of the particular case.

Id.

Judge Levy also states that "per usual procedures, the Presiding Judges to whom [she] provided training and instruction on these issues, were expected to distribute the information to the WCALJs in their respective District Offices." *Id.* Judge Levy issued these instructions based on her view that under applicable statutory and regulatory provisions, workers' compensation judges have the power 'to hear and determine all issues of fact and law presented,' (Cal. Code Regs., tit. 8, §10348), and that would include whether a Section 4615 stay applies to liens in the case." *Id.* Judge Levy also acknowledges that some of her colleagues have taken the position that "they could not adjudicate any issues concerning Section 4615 and affected liens because the statute refers to the stay as 'automatic.'" *Id.* at 5:3-5. Judge Levy further acknowledges that there was initially confusion among the WCALJs as to how Section 4615 operates. *Id.* at 4:28-5:3.

Judge Levy goes on to provide what essentially amounts to her own legal analysis concluding that regulations pre-dating passage of Section 4615 afford affected claimants notice rights, the right to be heard, and appeal rights. *Id.* at ¶¶ 15-16. Similarly, Judge Levy states that lien claimants wishing to challenge their inclusion on the DWC's list (or the applicability of the stay to a given lien) may do so in a variety of ways, including a Declaration of Readiness ("DOR"), a Petition, or simply sending a letter to the WCALJ on their case. *Id.* at ¶ 18. Additionally, Judge Levy states that many WCALJs have considered challenges to the application of Section 4615 through these pre-existing procedures. *Id.* at ¶ 10. Defendants submit several orders and decisions of WCALJs and the WCAB, in which the applicability of Section 4615 was in fact challenged, heard, and adjudicated by WCALJs and the WCAB. *See* Docket 42-1 at pp. 17-117.

Importantly, nothing in Judge Levy's declaration demonstrates that, prior to the passage of AB 1422, the WCALJs were uniformly adjudicating challenges to Section 4615 in the manner she endorses, or that any court precedent required them to do so. Moreover, nothing in Judge Levy's declaration demonstrates that the agency provides notice to affected lien claimants

beyond the list of criminally charged providers found on the DWC site. Nonetheless, Defendants argue that Judge Levy's testimony proves the merit of Defendants' initial legal argument in opposition to Plaintiffs' procedural due process claim: *i.e.* that pre-existing regulations afford claimants sufficient due process. *See* Supp. Opp'n at 4:14-5:7; 5:25-6:9. Defendants further argue that, in light of these procedures, Section 4615 survives any *Mathews* challenge. *Id.* at 14.

Judge Levy's declaration also alerted the Court, for the first time, of certain details about the process by which the DWC identifies and "flags" liens subject to Section 4615. Levy Decl. at 4:11-27. According to Judge Levy, the list posted on the DWC only includes the names of criminally charged providers. *Id.* at 4:11-16; 4:18-22. After the initial list posted, DWC staff identified liens filed by those charged providers, as well as other liens "believed to be . . . filed on behalf of" indicted providers. *Id.* DWC staff then drafted another, more comprehensive list from which they flagged liens within EAMS, the DWC's case management system. *Id.* at 4:20-24. WCALJs received this second list at some point. *Id.* at 4:17-18. Judge Levy does not explain the criteria used by DWC staff, or why the holders of the liens filed "on behalf" of the charged providers were not initially added to the public list. She also does not disclose when, or if, the holders of these flagged liens receive notice during this process. Judge Levy does explain that the creation of what Plaintiffs rightly refer to as "the secret list" was part of a "clerical process." *Id.* at 4:22-27. To date, the only publically available list does not contain the names of any of the additional entities whose liens have been flagged in the clerical process that Judge Levy describes. *See* California Department of Industrial Relation, *Criminally Charged Providers Whose Liens Are Stayed Pursuant to Labor Code §46115 as of 9/21/2017*, http://www.dir.ca.gov/Fraud_Prevention/List-of-Criminally-Charged-Providers.pdf. There is also no evidence on the record that the "flagging" process Judge Levy describes generates any type of automatic notification to the affected lien claimants.

B. Plaintiffs' Evidence in Response to Judge Levy's Declaration

Plaintiffs counter with ample evidence that rebuts Judge Levy's testimony as it pertains to the general treatment of lien claimants affected by Section 4615. *See generally* Pls.' Evid. For example, Plaintiffs demonstrated that some WCALJs simply take the matter off calendar once a lien is flagged. *See* Pls.' Evid. Exs. 7-10 (WCALJ orders continuing requests for discovery because claimant's liens were subject to Section 4615). On occasion, the matters are

continued without explanation or rationale apart from handwritten notations that the lien was "stayed." *Id.* Plaintiffs also proffered declarations from several hearing representatives who work for lien holders affected by Section 4615. *See, e.g.*, Pls.' Evid. at 12 (Declaration of Edwin Liu); *id.* at 25 (Declaration of Leonard Pina); *id.* at 13-15 (Declaration of Donald Lower, CEO of Pinnacle Lien Services); *id.* at 28-29 (Declaration of Chris Pinker). These representatives testify that when they appear for Lien Conferences on behalf of holders of stayed liens, the matters are generally taken off calendar; they are denied the opportunity to make argument as to Section 4615's application to their client's liens; and/or they are sometimes prohibited from making an appearance on the record even though their clients' names do not appear on the DWC published list. *See* Pls.' Evid. at 12 (Declaration of Edwin Liu); *id.* at 25 (Declaration of Leonard Pina); *id.* at 13-15 (Declaration of Donald Lower, CEO of Pinnacle Lien Services); *id.* at 28-29 (Declaration of Chris Pinker). Indeed, some claimants first learn about the stay when they show up at a lien conference. *Id.* at 31:5-17. Plaintiffs also submit testimony: (1) from at least one provider whose liens have been stayed erroneously because he has the same name as an indicted provider (*Id.* at 33-34), and (2) from an entity whose liens were stayed even though the criminal charges brought against its Chief Executive Officer had been dropped (*Id.* at 35-39). The latter testimony also included details of failed attempts to have the stay lifted. *Id.*

At the very least, Plaintiffs' evidence establishes: (1) erroneous applications of Section 4615 have occurred, (2) there is currently no uniform practice or procedure allowing affected claimants to challenge the stay imposed by Section 4615, and (3) entities whose names do not appear on the public DWC list (and thus have not received any notice) have been subjected to the stay. Moreover, Plaintiffs' evidence demonstrates that the "initial confusion" which Judge Levy acknowledges surrounded the implementation of Section 4615 has not necessarily been remedied by her internal instructions. In other words, Plaintiffs' evidence also indicates Judge Levy's interpretation of Section 4615 − that challenges to its application can and must be considered by WCALJs – is hardly universal.[15]

Plaintiffs also argue that Judge Levy's Declaration testimony is of limited relevance to what is a *facial* challenge to Section 4615. *See* Response at 23:1-24:20. According to Plaintiffs, the fact that Judge Levy's interpretation of Section 4615 comports with Defendants', and the fact

[15] While the amendment to the statute clearly recognizes that WCALJs have the authority to entertain such challenges, it does not provide any uniform procedures or standards for doing so. *See generally* AB 1422.

some WCALJs have acted accordingly, should not save the statute. *Id.* at 14:16-20. The Court generally agrees with Plaintiffs on this point. Section 4615 either affords sufficient due process on its face or it does not, and Judge Levy's statutory interpretation, or the behavior of some − but not *all* of − her colleagues does not determine the constitutionality of Section 4615.[16] Moreover, Section 4615 empowers the director to promulgate rules to enforce Section 4615, not the Chief Judge of the WCAB. *See* Cal. Lab. Code § 4615.

That being said, Judge Levy's testimony still informs the Court's interpretation of Section 4615 as well as the constitutionality of its current implementation. This is because established principles of interpretation permit the Court to look to extrinsic evidence to further discern the meaning of the statute if the statute is ambiguous on its face, including the statute's legislative history, and its administrative implementation. *See Elsner v. Uveges*, 34 Cal.4th 915, 929 (2004) ("To the extent a statutory text is susceptible of more than one reasonable interpretation, we will consider a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part."); *United States v. Combs*, 379 F.3d 564, 569 (9th Cir. 2004) ("We are not required to interpret a statute in a formalistic manner when such an interpretation would produce a result contrary to the statute's purpose or lead to unreasonable results."). This is especially the case where a statute is challenged on procedural due process grounds. *See Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("It is by now well established that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (internal quotation marks omitted); *Zinermon*, 494 U.S. at 12 ("Due process, as this Court often has said, is a flexible concept that varies with the particular situation."). Judge Levy's declaration, as well as the materials Plaintiffs submitted, are examples of such evidence. The same is true of both the text of AB 1422, and, to a lesser extent the accompanying Signing Message. *See Cal. Emp't Stabilization Comm'n v. Payne*, 31 Cal.2d 210, 213–14 (1947); *Guillen*, 147 Cal.App.4th at 945 ("Although subsequent declarations of the Legislature are not binding authority, they are appropriate for the court to consider as evidence of the original legislative intent for a measure."); *see also In re Carr*, 65 Cal.App.4th 1525, 1535 (1998) ("A governor's written

[16] As noted in the Court's prior Tentative Ruling, the Court may treat Plaintiff's challenge as an "As-Applied Challenge" and fashion relief accordingly. *See* T.R. at 8 (quoting *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995)).

memoranda issued upon signature of a bill is admissible on the issue of the Legislature's intent."); *People v. Ledesma*, 16 Cal.4th 90, 100 (1997) (considering Governor's signing statement in interpreting amendment to statute).

The evidence on record that concerns the DWC's creation of the "secret list" is also relevant. As mentioned above, Judge Levy's declaration and the parties' supplemental briefing establishes that, as currently implemented, Section 4615 does not afford notice to all of the lien holders affected by the stay. For example, those claimants who are not charged with crimes themselves, but have filed liens "on behalf of" charged physicians or providers are not on the public list, and therefore receive no notice of the stay. Pls.' Evid. at 18:2-6. Defendants all but admit that the Statute does not afford these claimants with adequate notice. *See* Second Supp. Opp'n at 3, n. 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. But those entities know on whose behalf they have filed liens. To argue otherwise would strain logic.").

C. Application

After reviewing both parties' second and third round of supplemental briefing, considering the relevant portions of AB 1422, and for the reasons stated below, the Court finds that Section 4615, even as amended, does not provide *all* affected lien claimants with a meaningful opportunity to be heard to challenge an erroneous application of the stay. *See* T.R. at 25-26. Specifically, the Court finds that lien claimants, whose names do not appear on the DWC public Web site but whose liens are nonetheless stayed pursuant to Section 4615, do not currently receive the fair process which the Constitution requires. The Court also concludes that this deficiency is not solved through any existing WCAB procedures.

1. Section 4615 Does Not Provide Specifically Provide Process to Challenge the Automatic Stay

Nothing in the original language of Section 4615 suggests that the imposition of the stay delineated therein is discretionary or subject to any mandatory review by the WCAB, or by the individual WCALJ administering the case. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Section 4615 automatically stays liens "upon the filing

of criminal charges . . . *until* the disposition of the proceedings." (emphasis added). Additionally, Section 4615(b)'s use of the past tense indicates the stay takes effect immediately upon the filing of criminal charges, not upon the order of a WCALJ.[17] *See* Cal. Lab. Code §4615(b) (directing publication of the names of lien holders "whose liens *were* stayed" pursuant to Section 4615). The statue also empowers the administrative director to promulgate rules to implement Section 4615, but to date the director has failed to do so.

Prior to the enactment of AB 1422, the Court intended to find that Section 4615 did not in fact incorporate pre-existing WCAB procedures as a means to challenge the stay. Presumably, if the Legislature intended a Section 4615 stay to require notice and hearing rights, it would have included statutory language to that effect. The Legislature did just that when it enacted Cal. Lab. Code § 139.21, a related provision which deals with providers or physicians once they are actually convicted of fraud. Pursuant to Section 139.21(a), the administrative director must "promptly" suspend providers convicted of fraud or abuse of the Medi-Cal or Medicare programs or the workers' compensation system. *See* Cal. Lab. Code § 139.21(a)(1)(A). Unlike Section 4615, Section 139.21 explicitly grants these providers notice and the ability to request a hearing. *See* Cal. Lab. Code § 139.21(b)(2). Such a request stays the suspension until the completion of the hearing. *Id.* In addition to suspending convicted providers, Section 139.21 also provides for a special lien proceeding to adjudicate any liens previously filed by the convicted provider. Cal. Lab. Code § 139.21(f). Unlike Section 4615, Section 139.21(h) specifically provides "the special lien proceedings shall be governed by the same laws, regulations, and procedures that govern all other matters before the appeals board." Cal. Lab. Code § 139.21(h).

Section 4615 does not have the detailed notice and hearing protections contained in Section 139.21(b), nor did it initially include any language that incorporates the general rules and regulations that govern in WCAB proceedings in the manner that Section 139.21(h) does. The only reasonable conclusion to be drawn from a comparison of the two statutes was that the Legislature provided notice and hearing rights to providers facing a suspension under Section 139.21, but not to providers affected by an "automatic stay" under Section 4615. *See Bailey v.*

[17] Judge Levy's testimony comports with this interpretation in that nameless DWC staff members appear to be the sole arbitrators of whether or not a given lien is subject to Section 4615. *See* Levy Decl. ¶ 8.

U.S., 516 U.S. 137, 145 (1995) ("The meaning of statutory language, plain or not, depends on context."); *see also id.* ("The difference between the two provisions demonstrates that, had Congress meant to broaden application of the statute beyond actual 'use,' Congress could and would have so specified, as it did in [the other provision]"). Similarly, Section 139.21(i) specifically assigns the adjudication of the convicted provider's liens to a WCALJ. Cal. Lab. Code § 139.21(i). The fact that Section 4615 initially conferred no specific authority over liens subject to an automatic stay suggested no WCALJ review was statutorily required, or even permitted.

Further, as Plaintiffs point out, the only other regulation or statute in the Workers' Compensation scheme that imposes an "automatic stay" on liens does so in the context of so-called "vexatious litigants." *See* Response at 8:21-9:25; 8 C.C.R. § 10782(a-g). In that setting, unlike in Section 4615, the regulatory scheme specifically affords a right to notice and hearing before such an automatic stay is implemented. *See* 8 C.C.R. § 10782(c) ("No party or lien claimant shall be declared a vexatious litigant without being given notice and an opportunity to be heard."). If Defendants are correct that the general procedures afforded to lien claimants permit challenges to any "automatic stay," there would be no need for the protections delineated in Section 10872(c), or those specifically included in Section 139.21. Put differently, in the past, when the Legislature and/or the DWC has intended to provide notice and hearing rights, they have done so explicitly.

Still, AB 1422 amends Section 4615 to address the role of the WCAB specifically and states that the automatic stay required by Section 4615 "shall not *preclude* the appeals board from inquiring into and determining within a workers' compensation proceeding" whether Section 4615 applies to a given lien or given provider. Cal. Lab. Code § 4615(e) (emphasis added). The Signing Message declares the same. *See supra* at 4-5 (quoting full Signing Message); *see also* RJN at 4. According to Defendants, this language confirms that Section 4615 allows a claimant to challenge the application of Section 4615 to a given lien through existing procedures. *See* DCB at 2:12-5:26. The Court would agree that the added language provides affected lien holders with some ability to challenge the imposition of the stay within the existing lien system. This is because the added language clarifies that the "automatic" nature of the stay does not preclude the WCAB from inquiring into the applicability of the stay to a given lien. The Court's finding is also consistent with both the Signing Message and Judge Levy's

interpretation and administration of Section 4615. *See* RJN at 4; Levy Decl. ¶¶ 9, 10(a-c).

In sum, the Court finds that Section 4615 (both currently and as amended) deprives certain lien claimants of a protectable interest without affording them any independent right to a meaningful, pre-deprivation hearing. However, the Court also finds that Section 4615 permits challenges to the stay to be brought through existing procedures. As a result, the Court must address whether those pre-existing procedures comport with the basic notice and hearing requirements of Due Process. *See Mathews*, 424 U.S. at 348 ("The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it."); *see also* Ruling at 26 ("Generally due process requires notice and an opportunity to be heard.") (quoting *Mathews*, 424 U.S. at 333).

2. Preexisting Process Do Not Afford Sufficient Process for Unlisted Claimants

As stated above, the Court would agree with Defendants that AB 1422 confirms that the WCAB has the ability to correct potential erroneous applications of Section 4615. The Court would also agree that the WCAB could perform such an inquiry through the rules and regulations already governing "workers' compensations proceeding[s]." Cal. Lab. Code § 4615(e). The Court would further hold that that preexisting rules and regulations permit claimants to raise the issue with the WCAB, and that the WCAB would be required to consider the issue. However, even if the Court accepts all these premises, the incorporation of preexisting procedural rights would not necessarily solve the all of the procedural due process issues. This is because the Court must still assess whether or not the preexisting procedures "within a workers' compensation proceeding" afford a constitutional level of process given the rights affected by the stay. *See Gilbert*, 520 U.S. at 930 ("It is by now well established that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (internal quotation marks omitted); *Zinermon*, 494 U.S. at 127 ("Due process, as this Court often has said, is a flexible concept that varies with the particular situation."). At its most basic level this requires notice and the right to be heard at a meaningful time and place. *See Mathews*, 424 U.S. at 335.

For the reasons stated below, the Court would find that Section 4615 does not afford lien claimants *whose names do not timely appear on the DWC website* with adequate notice and/or a meaningful right to be heard. Alternatively, the Court would find that criminally charged

providers whose names *do appear on the list* are provided sufficient due process through the existing procedures governing Lien Conferences and Lien Trials.

a. *Declaration of Readiness and Lien Trial/Conference Procedures*

Per statute, a lien claimant is entitled to a hearing within 60 days of filing a declaration of readiness to proceed ("DOR"). *See* Cal. Lab. Code § 5502; *see also* 8 CCR § 10770.1 ("A lien conference shall be set: (A) when any party, including a lien claimant who is a 'party' as defined by section 10301(dd)(6), files a declaration of readiness . . . in accordance with section 10414 on any issue(s) directly relating to any lien claim"). When a lien claimant files a DOR, the WCAB schedules a lien conference, at which time "all unresolved lien claims and lien issues" are to be addressed. 8 CCR § 10770.1(3). If any lien claim or issue cannot be resolved at the lien conference, the WCAB must take one the following actions: (1) set a lien trial; (2) upon a showing of good cause, allow a one-time continuance; or (3) upon a showing of good cause, order the lien conference off calendar. *See* 8 CCR § 10110.1(b)(1-2). In the event the conference is taken off calendar or continued, a lien claimant is precluded from filing a new DOR for at least 90 days. 8 CCR § 10110.1(k).

In the case of a provider whose name appears on the DWC site, a DOR and the subsequent lien conference/lien trial procedures it triggers supply sufficient due process as to the issue of the imposition of the stay to said provider's lien. First, the Cal. Lab. Code § 5502 and its implementing regulations provide for a hearing on "all issues." While the hearing is technically post-deprivation, for all practical purposes, the stay of a lien is not functionally implemented until the provider seeks to enforce it at a lien conference and/or lien trial. As explained below, such a claimant also has appeal rights to challenge any order issued by the WCALJ at the lien conference or trial.

In comparison, for *unlisted* claimants, the DOR and the rights it triggers do not provide sufficient due process. This is because such claimants do not necessarily receive notice that their liens are subject to the stay. As a result, Section 4615 does not guarantee that all affected claimants will even be aware of the stay when the claimant shows up at a lien conference. According to Plaintiffs' evidence, this appears to have been the case for many affected lien claimants. *See, e.g.*, Pls. Evid. at 13:23-15:7 (declaration testimony concerning minute orders prohibiting First Choice Medical Group from prosecuting liens even absent pre-hearing notice);

Id. at 25:22-26:21 (declaration testimony concerning liens filed by an entities not listed on the DIR websites stayed by minute orders issued at lien conference); *Id.* at 31:5-17. Without prior notice of the stay, a lien conference does not offer a claimant a meaningful opportunity to challenge the stay's application to a given lien. This is particularly true given that discovery closes at the time of the lien conference. *See* 8 CCR § 10110.1(h).

If the presiding WCALJ were nonetheless to schedule a lien trial to permit the affected claimant the opportunity to challenge the stay's application, that claimant could receive a meaningful opportunity to be heard. However, no statute, regulation, or material on the record ensures such a result. Instead, the WCALJ could (as many have) take the lien conference off calendar because of the stay, or continue the conference because of the stay. *See, e.g.*, Pls. Evid. at 13:23-15:7; 25:22-26:21. Absent a successful appeal,[18] a claimant whose matter is continued or taken off calendar may not file a new DOR for at least 90 days. *See* 8 CCR § 10110.1(k).

For these reasons, the Court finds that the ability to file a DOR does not provide sufficient due process to all claimants affected by Section 4615.

b. *Petitions for Reconsideration under Cal. Lab. Code 5900 et. seq.*

Judge Levy also identifies Cal. Lab. Code § 5900 as a source of procedural due process for lien claimants, which authorizes "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" to file a "petition for reconsideration with the WCAB." The petition must be filed within twenty days of the decision. *Id.* The Board may then "affirm, rescind, alter, or amend" the challenged decision or order. Cal. Lab. Code § 5906. Importantly, that petition does not ensure a hearing. *Id.*

Further, for the purposes of a Section § 5900 petition, "a final order, decision, or award, in the commonly accepted sense is one which determines any substantive right or liability of those involved in the case." *Kaiser v. Foundation Hospitals v. Workers' Comp. Appeal Bd.*, 82 Cal.App.3d 39, 45 (1978). Plaintiffs point out, and the Court largely agrees, that the imposition of the Section 4615 stay does not itself constitute the type of order, decision or award that gives rise to a Petition for Reconsideration. This is primarily because the imposition of the stay is not

[18] As explained below, a claimant's ability to appeal such a decision through a petition for reconsideration does not itself provide the right to be heard.

a judicial act by the WCALJ in charge of a case. *See* Levy Decl. ¶ 8; *see also* Pls.' Evid. at 22-23 ("the issuance of a stay is not a dated court order that bears a judge's signature"). Section 4615 imposes the stay upon the filing of criminal charges, not upon a WCALJ's order. *See* Cal. Lab. Code § 4615; *but see* 8 CCR § 10570 ("Minute Orders are orders of the WCAB"). Almost by definition, the imposition of a stay does not "determine any substantive right or liability of those involved in the case." *Kaiser*, 82 Cal.App.3d at 45. As a result, Section 4615 imposes a stay without a "final order, decision, or award" for the claimant to challenge. The lack of an appealable order also renders the other appellate procedures that Levy identifies ineffective as a means to challenge an erroneous application of Section 4615.

On the other hand, a claimant may challenge the WCALJ's decision to continue the lien conference, take it off calendar, or set the matter for trial. *See* 8 CCR § 10570 ("Minute Orders are orders of the WCAB"). But again, a petition for reconsideration does not actually afford the right to a hearing. *See* Cal. Lab. Code § 5906 ("Upon the filing of a petition for reconsideration . . . the appeals board may, *with or without further proceedings* and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge . . . .") (emphasis added).

3. Some Preliminary Injunctive Relief Is Warranted Herein

In light of the above discussion, the Court finds that Section 4615 deprives certain lien claimants (*i.e.* those not listed on the DWC site) of a protectable interest without affording them notice and/or the right to a meaningful hearing. As such, Section 4615, as currently implemented, does not comport with the basic notice and hearing requirements of Due Process. *See Mathews*, 424 U.S. at 348 ("The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it."); *see also* T.R. at 26 ("Generally due process requires notice and an opportunity to be heard") (quoting *Mathews*, 424 U.S. at 333).

Moreover, the evidence on record establishes that the risk of an erroneous application of Section 4615 is high. *See Mathews*, 424 U.S. at 335. As currently implemented, the statute is being applied by DWC staff, behind the scenes, and with no published criteria. *See* Levy Decl. ¶ 8. The DWC also currently fails to afford notice to all affected lien holders, which only increases the likelihood of an erroneous deprivation. *See* Levy Decl. ¶ 8; *supra* at 6-7 (finding

current implementation of Section 4615 provides deficient notice). Furthermore, according to Judge Levy's testimony, if afforded a hearing, the misapplication of Section 4615 would be easily remedied. *See* Levy Decl. ¶ 17 ("If such an error did occur, however, (*e.g.*, John B. Smith is listed instead of John A. Smith), there would be various ways the affected (wrongly named) provider could seek to correct the situation . . . . There is no reason of which I am aware for why the Administrative Director would not promptly correct an error brought to his attention."). Lastly, Defendants do not contend that providing notice and hearing would impose a fiscal or administrative burden on the state.[19] *See generally* Levy Decl; *see also Mathews*, 424 U.S. at 335.

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

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[19] In the case of listed providers, the fact that the notice and hearing are technically post-deprivation, requiring pre-deprivation notice and hearing would have no actual effect in terms of preventing erroneous deprivations. This is because the stay's practical impact is not felt until claimant attempts to adjudicate the lien.

[20] 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). 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);

In conclusion, the Court would find that Plaintiffs have demonstrated a high likelihood of prevailing on the merits of their procedural due process challenge to Section 4615 as it applies to lien holders whose names do not appear on the DWC list. As to those lien holders, the balance of equities/hardships tips sharply in their favor. On the other hand, Plaintiffs are unlikely to succeed on the same claim as it concerns indicted providers whose names do appear on the list.[21]

IV. Substantive Due Process – Fundamental Right to Access the Courts

Plaintiffs also contend that Section 4615 infringes on Plaintiffs' right of "Access to the Courts," a right Plaintiffs argue is "fundamental" and thus subject to a strict scrutiny analysis. *See* Supp. Mot. 3:10-4:12. Specifically, Plaintiffs argue that Section 4615 operates as an automatic stay that leaves claimants "no redress whatsoever in any judicial tribunal" and results in claimants being "left indefinitely with no recourse and no forum." *Id.* at 4:18-23.

There are a number of problems with Plaintiffs' "Access to the Courts" argument. First, this argument fails because Section 4615 does not actually bar Plaintiffs from the courts.[22] As detailed above, AB 1422 affirms that affected lien claimants may challenge the stay in front of the WCAB though existing procedures. *See supra* at 16-17 (finding that Section 4615 permits challenges to the stay to be brought through existing procedures).[23] Moreover, Plaintiffs are currently being heard in a judicial forum. Thus, contrary to their assertions otherwise, Plaintiffs are not left with "no redress whatsoever in any judicial tribunal." Nothing in Section 4615 prevents Plaintiffs from gaining meaningful access to a judicial forum to seek redress for harms

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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 the vitality of that approach for the necessary analysis on Plaintiffs' preliminary injunction motion.

[21] The Court would find that due process only requires that claimants get the ability to challenge Section 4615's applicability to a given lien. In the case of individuals holding liens that the DWC has flagged or identified as having been filed "on behalf of a charged physician or provider," the lien holder must be listed on the DWC site and then get the opportunity to challenge whether the lien was in fact filed "on behalf" of a charged physician or provider. Plaintiffs have not established that procedural due process requires Defendants to entertain challenges to the validity of the underlying charge outside of the criminal proceedings, or whether the specific lien at issue was or was not the product of fraud.

[22] As recognized by the Plaintiffs, access to courts arises "whether a tribunal is judicial or administrative in nature." *See* Supp. Mot. at 4, Docket No. 41.

[23] Whether or not those procedures are themselves constitutionally sufficient is a separate question addressed above. *See Salerno*, 481 U.S. at 746 (defining procedural and substantive aspects of due process).

potentially caused by the stays. Indeed, this Court is one such forum, as is the WCAB.

Further, Plaintiffs fail to provide authority for their contention that any impediment to a judicial forum must pass strict scrutiny. Instead, Plaintiffs cite to cases that address the government's ability, or lack thereof, to deny criminal defendants' *meaningful* access to the court. Plaintiffs first quote *Hart v. Gaioni*, 354 F.Supp.2d 1127, 1130-31 (C.D. Cal. 2005), a district court case in which the court denied a 12(b)(6) motion to dismiss a *Bivens* action based on allegations that government actors leaked Grand Jury information about plaintiff's counsel to the press in an attempt to disqualify counsel from the case. It was in that context − both factually and procedurally distinct from the present case − that the court found that defendants' conduct impermissibly interfered with the plaintiff's right of access to the court. *Id.* at 1131.

Plaintiffs also cite *Bounds v. Smith*, 430 U.S. 817, 821-822 (1977), in which the Supreme Court affirmed that prisoners have a constitutional right to meaningful access to the courts. This right secures prisoners the ability to access prison law libraries and other legal resources. *Id.* However, nothing in *Bounds* remotely suggests that this right extends with equal force to participants in a workers' compensation system, or that *any* impediment to accessing the workers' compensation lien payment system must pass strict scrutiny. *Bounds* itself does not apply the type of strict scrutiny Plaintiffs ask this Court to apply, nor do other cases examining claims brought to enforce a right of Access to the Courts. *See, e.g.*, *United States v. Kras*, 409 U.S. 434, 446 (1973) (applying rationale basis review in a challenge to filing fees in the Bankruptcy Code). In fact, the Ninth Circuit recently applied rationale basis review, not strict scrutiny, when it upheld a legislatively created impediment (the imposition of a lien filing fee) to California lien claimants' ability to access the WCAB. *See Angelotti Chiropractic v. Baker*, 791 F.3d 1075, 1086 (9th Cir. 2015). This Court would apply the same rational basis review to Section 4615, which temporarily impedes certain lien claimants from adjudicating their liens through the WCAB.[24]

Plaintiffs' only California authority for its proposition that workers' compensation participants have a fundamental right to access that triggers strict scrutiny is *Kaiser Co. v.*

[24] The Ninth Circuit has also expressly refused to "[recognize] a right to judicial determination of a civil claim within a prescribed period of time as an element" of any right to access the courts. *Los Angeles County Bar Assn'n v. March Fong Eu*, 979 F.2d 697, 706 (9th Cir. 1992). Plaintiffs' concede, as they must, that the stay imposed by Section 4615 is limited in time until the resolution of the underlying criminal matter. *See* Cal. Lab. Code § 4615. Civil litigants must weather such delays in a variety of contexts, none of which require a strict scrutiny analysis.

Industrial Acci. Com., 109 Cal.App.2d 54, 57-58 (1952). However, *Kaiser* merely recognizes what this Court already has: that participants appearing before administrative tribunals have certain procedural due process protections. *See id.* ("Even if regarded as a purely administrative agency, however, in exercising adjudicatory functions the commission is bound by the due process clause of the Fourteenth Amendment to the United States Constitution to give the parties before it a fair and open hearing."). Given Plaintiffs' inability to provide authority for its proposition that strict scrutiny applies to any law that potentially affects a participant in a state created worker's compensation system, the Court will apply rational basis review, as the Ninth Circuit has done in previous constitutional challenges to changes in the lien system. *See, e.g.*, *Angelotti*, 791 F.3d at 1086 (upholding lien filing fees on rational basis review).

In sum, the Court would not apply strict scrutiny to Section 4615 on the grounds urged by Plaintiffs. As a result, the Court's analysis of Plaintiffs' substantive due process challenge contained in its Tentative Ruling stands. *See* Ruling at 22 (finding Section 4615 to be rationally related to fraud prevention).

V. Plaintiff's Renewed Sixth Amendment Challenge

For the reasons stated in the Court's Prior Tentative Ruling, the Court finds that Plaintiffs have failed to demonstrate that they are entitled to a preliminary injunction on Sixth Amendment grounds. *See* Ruling at 9-14. Plaintiffs' additional briefing attempts to recast the Sixth Amendment claim as one that also implicates procedural due process. However, Plaintiffs new argument still relies on a contention the Court rejects: *i.e.* that the state may not stay liens without first showing that the liens are actually related to fraud. *See id.*

VI. Conclusion

Section 4615, as currently implemented, does not provide adequate notice or the right to a meaningful hearing before or after it deprives certain lien claimants of a protectable interest. Because the Fourteenth Amendment requires basic notice and hearing rights that Defendants are currently denying Plaintiffs, the Court would GRANT Plaintiffs' Motion for a Preliminary Injunction but only in part.

The relief granted would be narrow and targeted to solve the specific procedural due process defects identified above. *See supra* 19-21. The Court would prohibit Defendants from

preventing the adjudication of any lien pursuant to Section 4615 unless the lien holder is provided notice via the DWC Web site and given the opportunity to be heard as to whether that lienholder falls within the statute at a lien conference and/or lien trial. As stated above, the sole purpose of the hearing is to prevent the erroneous application of Section 4615, by its own terms, not the propriety of the underlying criminal charges or whether or not a given lien arises from fraud.

The Court would order the parties to submit a proposed order that comports with the scope of relief the Court has described.

Additionally, the parties have not adequately addressed the issue of whether a bond is required herein and, if so, what the amount should be. *See* Fed. R. Civ. P. 65(c) ("The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."). The parties are ordered to file a stipulation or briefs on the issue if they cannot agree on the point.