UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	EDCV 17-965-GW(DTBx)	Date	April 26, 2018
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	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
M. Cris Armenta	Amie L. Medley Stepan A. Haytayan

PROCEEDINGS: **PLAINTIFFS' MOTION FOR CONTEMPT OR, IN THE ALTERNATIVE FOR RECONSIDERATION OF THE COURT'S DECEMBER 22, 2017 ORDER ON PRELIMINARY INJUNCTION [86];**

DEFENDANTS' MOTION TO DISMISS CERTAIN CLAIMS IN FIRST AMENDED COMPLAINT [88]

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. The Court would DISMISS Plaintiffs' first, second, third, fourth, and fifth claims (except for the facial due process component of the fourth claim for relief) WITHOUT PREJUDICE to allow Plaintiffs' an opportunity to amend them to conform to this Order. As to the sixth and seventh claims for relief (the Supremacy Clause claim and the Takings Clause claim), the Court would DISMISS those claims WITH PREJUDICE. Plaintiffs will have until May 17, 2018 to file a Second Amended Complaint. Defendants will have statutory time to respond.

As to Plaintiffs' motion for contempt, or in the alternative, for reconsideration of the December 22, 2017 Order, the Court would DENY that motion.

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Vanguard Medical Management Billing, Inc., et al v. Baker, et. al., Case No. CV-17-00965-GW-(DTBx)); Tentative Rulings on: (1) Plaintiffs' Motion for Contempt or, in the Alternative, for Reconsideration of the Court's December 22, 2017 Order on Preliminary Injunction;, and (2) Defendants' Motion to Dismiss Certain Claims in the First Amended Complaint

I. Background

A. Procedural History

On February 21, 2018, Plaintiffs David Goodrich, as Chapter 11 Trustee ("Goodrich"), Vanguard Medical Management Billing, Inc. ("Vanguard"), 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"), Mesa Pharmacy, Inc. ("Mesa"), a California corporation ("Mesa"), and Eduardo Anguizola, M.D. ("Anguizola," and, together with Goodrich, Vanguard,[1] OSM, OST, Nor Cal, and Mesa, "Plaintiffs") filed the First Amended Complaint ("FAC"), suing 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 a putative civil rights litigation. *See generally* FAC, Docket No. 82. Plaintiffs, save for Mesa (and Trucare if considered a new party), had filed the original Complaint on May 17, 2017. *See generally* Complaint ("Compl."), Docket No. 1.

Plaintiffs filed a Motion for a Preliminary Injunction 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 asked 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 generally* FAC.

[1] Plaintiffs mention "Trucare" in the FAC though they do not mention that entity in the Complaint. *See generally* FAC; *see also* Complaint. Other than in the first reference where the FAC alleges that "Vanguard . . . owns and collects for a pharmacy known as 'Trucare,'" the rest of the FAC always mentions Trucare as "Vanguard/Trucare." FAC ¶¶ 13, 25, 27, 31 n.1, 43. It is unclear if Trucare is a co-plaintiff in this action or if it merely falls under the umbrella of Vanguard.

The Court heard oral argument on the Motion on July 13, 2017, and issued a Tentative Ruling. *See* Civil Minutes July 13, 2017 ("July 13, 2017 Order"), Docket No. 40. In its Tentative Ruling 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, (2) the Contract Clause, (3) Substantive Due Process, and (4) the Supremacy Clause. *See* Ruling at 14 (Sixth Amendment), 19 (Contract Clause), 21 (substantive due process), 28 (Supremacy Clause).

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 liens." July 13, 2017 Order 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 on an alternative substantive due process challenge not argued in their initial moving papers: *i.e.* that Section 4615 interferes with Plaintiffs' fundamental right of Access to the Courts.

The Court ultimately granted Plaintiffs' motion in part on October 19, 2017. *See* Civil Minutes October 19, 2017 ("October 19, 2017 Order"), Docket No. 64. Then, on December 22, 2017, the Court ordered that Defendants, their agents, employees, and all others acting in active concert or participating with them, were enjoined and restrained as follows:

> 1) The name of any medical provider or lien claimant whose liens have been identified by Defendants as subject to the stay mandated by California Labor Code Section 4615(a) shall be included on the public list posted on the Department of Industrial Relations website pursuant to Labor Code Section 4615(b). Defendants may comply with the order by maintaining the current (and updated as necessary) list of criminally charged providers, currently available at: https://www.dir.ca.gov/Fraud_ Prevention/List-of-Criminally-Charged-Providers.pdf, and posting an additional list of other lien claimants believed to have filed liens on behalf of changed providers and whose liens may be subject to the stay. The additional list as ordered herein shall be posted on the website within three (3) working days after the date of entry of this Order, and shall be updated as necessary concurrently with any updates to the workers' compensation Electronic Adjudication Management System (EAMS) identifying additional providers and lien claimants subject to the Section 4615 stay. The lists/website shall be accessible 24 hours a day.
>
> 2) The processing and adjudication of any lien shall not be treated as

> stayed pursuant to California Labor Code Section 4615(a) unless the lien claimant has been provided with notice via the lists posted on the Department of Industrial Relations website.
>
> 3) Lien claimants shall be given the opportunity to be heard within any workers' compensation case at a lien conference and/or lien trial, as appropriate under usual WCAB adjudication procedures, if any dispute or question is raised or arises as to whether any lien at issue in the case falls within the provisions of Labor Code Section 4615 such that a stay of the lien is required. The purpose of such hearings, if requested by lien claimants, shall be solely to prevent the erroneous application of Section 4615 by its own terms, and not for the purpose of allowing any challenge by a lien claimant to the propriety of the underlying criminal charges giving rise to the stay, or for the purpose of disputing whether a lien arises from the alleged conduct giving rise to the criminal charges.

See December 22, 2017 Ruling ("the December 22, 2017 Order"), Docket No. 81.

Now before the Court are two motions, the first of which is Plaintiffs' motion for contempt, or in the alternative, for reconsideration of the Court's December 22, 2017 Order.[2] *See* Plaintiff's Motion for Contempt, or, in the Alternative, for Reconsideration of the Court's December 22, 2017 Order on Preliminary Injunction ("MFC"), Docket No. 86. In support of the MFC, Plaintiffs filed a request for judicial notice.[3] *See* Plaintiffs' Request for Judicial Notice in Support of the MFC ("Pls.' RJN"), Docket No. 87. Defendants filed their opposition to the MFC. *See* Defendants' Opposition to the MFC ("MFC Opp'n"), Docket No. 90. In support of their opposition to the MFC, they filed a request for judicial notice.[4] *See* Defendants' Request for Judicial Notice in Support of Their Opposition to the MFC ("Pls.' RJN"), Docket No. 90-1. Plaintiffs' filed their reply in support of the MFC. *See* Reply in Support of the MFC ("MFC

[2] Plaintiffs address their motion for contempt issue in roughly 17 of 19 pages in its brief. *See generally* MFC. In a quarter-page, Plaintiffs request that the Court reconsider its December 22, 2017 Order. *Id.* at 18. With no legal standard and nearly zero analysis included in Plaintiffs' brief on its "alternative" motion to reconsider, the Court declines to entertain reconsideration of the December 22, 2017 Order. Plaintiffs argue in their Reply that one line from the MFC is sufficient; the MFC states that "[t]he Plaintiffs have satisfied the standard set forth in Local Rule 7-18, presenting to this Court new material facts that could not have bee[n] previously consider." MFC Reply at 14 (citing MFC at 18). The Court disagrees and would thus deny the motion for reconsideration.

[3] Plaintiffs attached four exhibits, though the exhibit numbers do not entirely mirror the way the documents are broken up by docket number. Pls.' RJN Exs. 1-4, Docket No. 86-1, 86-2, 86-3, 86-4. The Court will refer to the page numbers located on the bottom right of the exhibits. Defendants only object to two pages from Exhibit 3 and all of Exhibit 4. Defendants' Opposition to Plaintiffs' RJN ("Defs.' Opp. Pls.' RJN") at 2, Docket No. 91. The Court agrees that Exhibit 4, the complaint filed against Senator Tony Mendoza, does not relate to this case and thus it will not take judicial notice of it. *See U.S. v. Southern California* Edison, 300 F. Supp. 2d 964, 973 (E.D. Cal. 2004). The other documents in Plaintiffs' RJN are either appropriate for judicial notice or proper to consider as part of a motion for contempt.

[4] Defendants request judicial notice as to six exhibits. Defs.' RJN Exs. 1-6, Docket No. 90-1. These documents are either appropriate for judicial notice or proper to consider as part of a motion for contempt.

Reply"), Docket No. 93.

The second motion before the Court is Defendants' motion to dismiss certain claims in the FAC. *See* Motion to Dismiss Certain Claims in the FAC ("MTD"), Docket No. 88. Plaintiffs filed an opposition to the MTD. *See* Plaintiffs' Opposition to the MTD ("MTD Opp'n"), Docket No. 89. Defendants filed a reply in support of the MTD. *See* Reply in Support of the MTD ("MTD Reply"), Docket No. 92.

B. Background on Workers' Compensation System and Medical Treatment Liens

The following is a synopsis of California Workers' Compensation laws, as delineated in Rassp & Herlick, *California Workers' Compensation Law* § 1.03 (Lexis 2017):

> The California law provides for medical treatment, temporary disability indemnity, permanent disability indemnity, and death benefits . . . as a result of industrial injuries. Workers are assured of receiving these benefits because employers are required to secure the payment of benefits required by the Workers' Compensation laws. An employer may be insured for this program or be self-insured by obtaining from the Director of the California Department of Industrial Relations a certificate for self-insurance [Lab. Code, § 3700] . . . . The workers' compensation program was originally intended to be self-administered by employers or their insurers with a minimum of state government participation in the administration of the system. However, recent amendments to the code and to the rules have increased the state regulation of the workers' compensation system and have made it a very tightly controlled program.

As further stated:

> Under the California plan, employers or their insurance carriers make the initial determination of the validity of a claim. Government enters the picture by requiring certain notices, by encouraging prompt action, by auditing claims handling procedures, and by providing for the resolution of disputed claims. Litigated cases are heard and determined by the Workers' Compensation Appeals Board, which is one of California's regularly constituted courts of law . . . .

Id. at § 1.05.

An informative overview of California's workers' compensation system, including liens, is also set forth in *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1078-79 (9th Cir. 2015), as follows:

> Employers in California typically provide medical care and other services to employees for work-related injuries. *See generally* Cal. Lab.Code §§ 3600, et seq. An employer or its workers' compensation insurer may choose to provide medical care to workers through the employer's Medical Provider Network ("MPN"), 2 Witkin, *Summ. Cal. Law, Work. Comp*. § 262 (10th ed. 2005), its

> Health Care Organization ("HCO"), Cal. Lab.Code § 4600.3, or neither of these . . . .
>
> In certain cases, an employer or its insurer might decline to provide medical treatment to an injured employee on the grounds that an injury is not work-related or the treatment is not medically necessary. An injured worker may then seek medical treatment on his or her own, and, if the injury is later deemed work-related and the treatment medically necessary, the employer is liable for the "reasonable expense" incurred in providing treatment . . . . Cal. Lab. Code § 4600(a), (f); 2 Witkin, Summ. Cal. Law, Work. Comp. § 264 . . . .
>
> A provider of services − whether for medical treatment, ancillary services, or medical-legal services − may not seek payment directly from the injured worker. *Id.* § 3751(b).[5] Nor may a provider seek payment through the filing of a civil action against the employer or its insurer. *Vacanti v. State Comp. Ins. Fund*, 24 Cal.4th 800, 815, 102 Cal.Rptr.2d 562, 14 P.3d 234 (2001) ("[C]laims seeking compensation for services rendered to an employee in connection with his or her workers' compensation claim fall under the exclusive jurisdiction of the [Workers' Compensation Appeals Board]."). Instead, these providers may seek compensation by filing a lien in the injured employee's workers' compensation case. *See generally* Rassp & Herlick, *Cal. Workers' Comp. Law* ch. 17 (Lexis 2014). The filing of a lien entitles a provider to participate in the workers' compensation proceeding in order to protect its interests. *Id*. § 17:111[5]. After the underlying workers' compensation case is adjudicated, a "lien conference" is held to discuss the liens that have not already been resolved through settlement. *Id*. § 17:113. Any issues not resolved at the lien conference will be set for a "lien trial." *Id.*
>
> Whether a provider of medical or ancillary services obtains payment on its lien depends on the result reached in the underlying case. These providers are entitled to payment of their liens if the injured worker establishes that the injury was work-related and that the medical treatment provided was "reasonably required to cure or relieve the injured worker from the effects of his or her injury." Cal. Lab.Code § 4600; *see also id*. § 4903.

See also Chorn v. Workers' Compensation Appeals Bd., 245 Cal.App.4th 1370, 1376-78 (2016).

C. California Labor Code Section 4615

Enacted in 2016 and effective on January 1, 2017, California Labor Code Section 4615 ("Section 4615," or the "Statute") marks a change in law with respect to the workers' compensation lien system. *See* Cal. Stats. 2016, c. 868 (S.B. 1160), § 7. AB 1422 amended Section 4615 effective January 1, 2018. Section 4615 now reads as follows:

[5] Cal. Lab. Code § 3751(b) provides that: "If an employee has filed a claim form pursuant to Section 5401, a provider of medical services shall not, with actual knowledge that a claim is pending, collect money directly from the employee for services to cure or relieve the effects of the injury for which the claim form was filed, unless the medical provider has received written notice that liability for the injury has been rejected by the employer and the medical provider has provided a copy of this notice to the employee."

(a) Upon the filing of criminal charges against a physician, practitioner, or provider for any crime described in subparagraph (A) of paragraph (1) of subdivision (a) of Section 139.21 , the following shall occur:

(1) Any lien filed by, or on behalf of, the physician, practitioner, or provider or any entity controlled, as defined in paragraph (3) of subdivision (a) of Section 139.21, by the physician, practitioner, or provider for 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.

(2) Except as provided in subdivisions (b) and (c), the stay shall be in effect from the time of the filing of the charges until the disposition of the criminal proceedings.

(b) Upon conviction, as defined in paragraph (4) of subdivision (a) of Section 139.21, of the physician, practitioner, or provider for any crime described in subparagraph (A) of paragraph (1) of subdivision (a) of Section 139.21, the automatic stay shall remain in effect for any liens not dismissed pursuant to paragraph (1) of subdivision (e) of Section 139.21 until the commencement of lien consolidation procedures under paragraph (2) of subdivision (e) of Section 139.21.

(c) The automatic stay required by this section shall not preclude a physician, practitioner, or provider from requesting the dismissal with prejudice and forfeiture of sums claimed therein of any liens subject to the stay. Upon the receipt of that request and for good cause shown, the chief judge of the Division of Workers Compensation or his or her designee may lift the stay as to one or more of those liens and order that they be dismissed with prejudice.

(d) 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.

(e) Notwithstanding this section, the filing of new or additional criminal charges against a physician, practitioner, or provider who has been suspended pursuant to subparagraph (A) of paragraph (1) of subdivision (a) of Section 139.21 shall not stay liens that are subject to consolidation and adjudication pursuant to subdivisions (e) to (i), inclusive, of Section 139.21, unless a determination has been made pursuant to subdivision (i) of Section 139.21 that a lien did not arise from the conduct that subjected the physician, practitioner, or provider to suspension.

> (f) The administrative director may adopt rules for the implementation of this section.
>
> (g) Notwithstanding this section, the filing of new or additional criminal charges against a physician, practitioner, or provider who has been suspended pursuant to subparagraph (A) of paragraph (1) of subdivision (a) of Section 139.21 shall not stay liens that are subject to consolidation and adjudication pursuant to subdivisions (e) to (i), inclusive, of Section 139.21, unless a determination has been made pursuant to subdivision (i) of Section 139.21 that a lien did not arise from the conduct that subjected the physician, practitioner, or provider to suspension.

Cal. Lab. Code § 4615 (effective Jan. 1, 2018).

D. Factual Allegations[6]

1. Section 4615 Allegations

The FAC makes a number of factual allegations related to Section 4615, described as background. FAC ¶¶ 28-32. More than 110 criminally charged providers and numerous other providers associated with those providers are unable to collect on their receivables, and Section 4615 provides no right to a hearing. FAC ¶¶ 7, 10. Plaintiffs allege that the lien freeze came in through last minute amendments to placate insurance companies, demonstrating "out-of-session influence." *Id.* ¶¶ 33-38. A "vague reference to combating fraud was made when the Assembly voted on the bill on August 30, 2016" and it was also listed in legislative recitals. *Id.* ¶ 38. When the law took effect on January 1, 2017, providers, lien purchasers, and a bankruptcy trustee could not enforce contractual obligations to pay for previously approved treatments, including for treatments unrelated to alleged misconduct. *Id.* ¶ 39.

2. Plaintiff Vanguard

Plaintiff Vanguard purchased certain receivables related to treatment rendered to workers' compensation patients. *Id.* ¶ 13. Vanguard purchased some of these receivables from medical providers charged with, but not convicted of, crimes related to medical fraud. *Id.* Vanguard has been unable to collect on those liens since Section 4615 went into effect. *Id.* Most of those liens represent insurers' contractual agreements to pay for medical treatment given to California workers. *Id.* On May 23, 2013 Vanguard purchased receivables from Proove

[6] The FAC alleges all factual allegations referenced in this section.

Biosciences Incorporated, which included billings for diagnostic tests performed by medical providers. *Id.* ¶ 41. Among the providers who performed the tests, two were later charged with offenses related to medical fraud. *Id.* As a result, the liens Vanguard purchased have been stayed indefinitely. *Id.*

3. Plaintiff Eduardo Anguizola, M.D.

Plaintiff Anguizola lives and practices medicine in California. *Id.* ¶ 14. On June 14, 2014, Anguizola was indicted on one count of insurance fraud. *Id.* The indictment expanded to 149 felony counts, but those counts were dismissed on June 28, 2016. *Id.* Following that, the Orange County District Attorney filed 80 counts against Anguizola and others. *Id.* Though Anguizola has not pleaded guilty or has had a preliminary hearing, all lien debt owed to him has been frozen. *Id.* Anguizola's "financial situation is dire, and he cannot afford to hire counsel of his choice to mount a defense to the charges." *Id.* The cost of his defense is estimated at a minimum of $250,000-$300,000, plus other fees and costs. *Id.* Anguizola "must plead to what appear to be meritless charges . . . ." *Id.*

4. Plaintiff David Goodrich

Entities who purchase these liens under contract cannot enforce their contractual rights. *Id.* ¶ 8. At least one United States Bankruptcy Court appointed trustee, Goodrich, is impaired from collecting on receivables owed to debtor Allied Medical Management Billing, Inc. *Id.* ¶¶ 9-10. Goodrich is a Chapter 11 trustee in a Chapter 11 case involving a debtor alleging a contractual right to collect on workers' compensation liens arising out of professional services rendered by Anguizola's medical groups (OSM, OST, and Nor Cal) and others. *Id.* ¶ 42. Prior to enacting Section 4615, the Allied Estate collected approximately $100,000 per month, and now collections have dropped to below $30,000 per month. *Id.*

5. Plaintiffs OSM, OST, and Nor Cal

Plaintiffs OSM, OST, and Nor Cal are health care providers operating as billing entities for Anguizola and others. *Id.* ¶¶ 15-17. They have filed workers' compensation liens related to Anguizola's and others' treatment. *Id.* As a result of Section 4615, all of their liens have been frozen, including those for treatment by doctors who have not been charged with wrongdoing. *Id.* Goodrich is pursuing these liens. *Id.*

II. The MFC

A. Legal Standard

"A court has wide latitude in determining whether there has been contemptuous defiance of its order." *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984). To determine contempt, the Ninth Circuit standard "has long been whether the defendants have performed all reasonable steps within their power to insure compliance with the court's orders." *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992) (internal citations omitted). "The party moving for contempt bears the burden of establishing by clear and convincing evidence that the contemnor has violated a specific and definite order of the court." *Bademyan v. Receivable Management Services Corp.*, Case No. CV 08-00519 MMM (RZx), 2009 WL 605789, *2 (C.D. Cal. Mar. 9, 2009) (citing *Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322 (9th Cir. 1997)). If the moving party can demonstrate by clear and convincing evidence "that the contemnor has violated a specific and definite order of court, the burden shifts to the contemnor to demonstrate that he or she took every reasonable step to comply, and to articulate reasons why compliance was not possible. *Bademyan*, 2009 WL 605789, at *2 (citing *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983)). Compliance, rather than intent, is the sole issue in contempt proceedings. *Donovan*, 716 F.2d at 1240.

B. Analysis

Plaintiffs argue that Defendants failed to adhere to subsection (3) of the December 22, 2017 Order:

> Lien claimants shall be given the opportunity to be heard within any workers' compensation case at a lien conference and/or lien trial, as appropriate under usual WCAB adjudication procedures, if any dispute or question is raised or arises as to whether any lien at issue in the case falls within the provisions of Labor Code Section 4615 such that a stay of the lien is required. The purpose of such hearings, if requested by lien claimants, shall be solely to prevent the erroneous application of Section 4615 by its own terms, and not for the purpose of allowing any challenge by a lien claimant to the propriety of the underlying criminal charges giving rise to the stay, or for the purpose of disputing whether a lien arises from the alleged conduct giving rise to the criminal charges.

MFC at 1 (quoting December 22, 2017 Order). In sum, Plaintiffs assert that "Defendants have refused to comply with this Order and to ensure lien claimants [are] to 'be given an opportunity to be heard.'" *Id.*

1. Application of Usual Procedures to Lien Claimants' Opportunity to be Heard

on Section 4615 Issue in a Lien Conference or Trial

Plaintiffs argue that Defendants have "employed new, bizarre, and unprecedented procedures, which they recently manufactured to continue the farce that the Section 4615 provides due process to aggrieved lien claimants." MFC at 5. Plaintiffs proffer a number of arguments toward this end, and the Court will address those arguments in turn.

a. ODAU's Notification, Appearance, and Presentation of Evidence

First, Plaintiffs aver that the Office of the Director's Anti-Fraud Unit ("ODAU" or "AFU") has instructed WCAB judges to notify the ODAU prior to holding a lien conference or trial on the issue of the applicability of Section 4615, in violation of the December 22, 2017 Order and usual procedures. MFC at 5. Plaintiffs also argue that in these notices the WCAB judges instruct the ODAU to appear as a party, pointing to apparently standard orders that state, for example:

> **IT FURTHER APPEARING** that since the DWC Web site failing to disclose what information or evidence the DWC relies upon to 'flag' in EAMS why Mesa Pharmacy, Inc., is 'potentially subject to a stay under Labor Code 4615' **it is necessary that the DWC by its attorney DIR Anti-Fraud Unit appear as the party** statutorily charged with maintaining the DWC Internet Web site the names of any physician, practitioner, or provider of medical treatment services whose liens are stayed pursuant to Labor Code 4615(a)(1) and (a)(2)[.]

MFC at 5 (quoting Pls.' RJN, Ex. 2 at 21, Docket No. 86-1 (Order Setting Lien Matter to Address L.C. § 4615 Re Mesa Pharmacy, Notice of Hearing, Order to Appear, *Serrano v. Loewy Enterprise, Inc.*, ADJ 9326585) (emphasis added)). The same order instructs "DWC OD Legal" to appear at the Section 4615 lien trial, and gives notice of the Section 4615 lien trial. *Id.* at 22. Plaintiffs cite, and include in their exhibits, over 15 notices of hearings addressing the applicability of Section 4615 to particular liens. MFC at 6 (citing Pls.' RJN, Exs. 2-3 at 27, 31-32, 34-40, 42, 45, 51, 53, 56, 59, 71)).

Plaintiffs argue that the aforementioned procedures are not within WCAB's usual procedures. MFC at 8-9. Plaintiffs also argue that Defendants did not communicate these procedures to the Court nor to Plaintiffs. *Id.* They point to the WCAB Rules of Practice and Procedure, and include the definition of a "party" in Section 10301 of Title 8 of the California Code of Regulations:

> (dd) 'Party' means: (1) a person claiming to be an injured employee or the dependent of a deceased employee; (2) a defendant; (3) an appellant from an independent medical review or independent bill review decision or an injured

> employee or provider seeking to enforce such a decision; (4) a medical-legal provider involved in a medical-legal dispute not subject to independent bill review; (5) an interpreter filing a petition for costs in accordance with section 10451.3; or (6) a lien claimant where either (A) the underlying case of the injured employee or the dependent(s) of a deceased employee has been resolved or (B) the injured employee or the dependent(s) of a deceased employee choose(s) not to proceed with his, her, or their case.

MFC at 9 (quoting 8 Cal. Code Reg. § 10301(dd)). Plaintiffs state that "the DIR, OD Legal or the Anti-Fraud Unit" do not fall under this definition. MFC at 9. They further assert that lien conference proceedings do not allow nonparties to participate, as per the following provision:

> (aa) "Lien conference" means a proceeding, including a proceeding following an order of consolidation, held in accordance with section 10770.1 for the purpose of assisting the parties in resolving disputed lien claims or claims of costs filed as liens or, if the dispute cannot be resolved, to frame the issues and stipulations and to list witnesses and exhibits in preparation for a lien trial.

Id. (quoting 8 Cal. Code Reg. § 10301(aa). Plaintiffs assert that the DIR has no standing to argue for Section 4615's application and that OD Legal is not a party. MFC at 9-10.

Defendants rebut, arguing that "strong public interests are more than sufficient to support the AFU's submission of evidence in lien conferences and lien trials." MFC Opp'n at 10. As Defendants point out, the Court stated in its July 13, 2017 Order that the State indeed "has a strong interest in the lien and in ensuring the conditions precedent to its enforcement are met." MFC Opp'n at 10 (citing July 13, 2017 Order at 12). Defendants argue that requiring WCAB judges to rely on the claimant's evidence on whether a lien was filed by or on behalf of a provider charged with specified crimes would go against the intent and purpose of Section 4615. MFR Opp'n at 11. Defendants also argue that that WCAB judges "always had an affirmative duty to ensure that their decisions are based on a complete, developed record, even if that involves obtaining evidence not presented by any party to the proceedings." MFC Opp'n 6.

Defendants are correct that WCAB judges have a wide latitude to develop the record and obtain evidence. WCAB judges "may not leave undeveloped matters which [their] acquired specialized knowledge should identify as requiring further evidence." *Glass v. Workers' Comp. Appeals Bd.*, 105 Cal. App. 3d 297, 308 (1980) (internal quotation marks and citation omitted); *see also W. M. Lyles Co. v. Workmen's Comp. App. Bd.*, 3 Cal. App. 3d 132, 138 (1969). WCAB judges follow different procedures than state and federal courts; they are not "bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the

manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." Cal. Lab. Code § 5708. In fact, due process dictates that if "an unaddressed and determinative issue arises during trial, it is proper for the WCJ to develop the record." *Kuykendall v. Workers' Comp. Appeals Bd.*, 79 Cal. App. 4th 396, 406 (2000).

Though California Labor Code § 5502(d)(3) states that "[d]iscovery shall close on the date of the mandatory settlement conference," the WCAB judges can permit "evidence to be admitted after the MSC and even after trial when necessary to accomplish substantial justice." *Kukendall*, 79 Cal. App. 4th at 405 (discussing cases mentioning that rule). Defendants also argue that a WCAB judge can, under these rules, provide notice to the AFU so it can provide information like why a lien claimant was flagged in the EAMS system or order an AFU attorney to appear to provide information. MFC Opp'n at 6.

Plaintiffs argue that the fact AFU notification is a new procedure, it is therefore an unusual procedure, falling outside of the December 22, 2017 Order. MFC Reply at 6. What Plaintiffs fail to recognize is that the preliminary injunction required lien claimants an opportunity to be heard on the 4615 issue, so prior to that situation the AFU would have little reason to be notified, appear, or provide evidence to develop the Section 4615 issue before the WCAB judge. It therefore makes sense that WCAB judges might notify a party of the proceeding, order them to appear, or order them to present evidence. Cutting in favor of this point, Plaintiffs themselves include handwritten minutes of a hearing in *Cordon v. Jax Market*, ADJ9055889, where Judge DeWeese found that:

> Parties here for lien trial re application of LC 4615 to Firstline Health, Inc. Anti-Fraud unit was notified of hearing; but has not opposed or filed anything. Defendant has produced an amended indictment and some documentation that appears to show a connection between indicted individuals and Firstline. However**, the documents do not definitely establish a link sufficient to find that 4615 applies**. There is enough to order the record developed.
>
> Firstline is ordered to review the documentation offered by defendant and appear at next hearing with any documents and/or testimony it has to offer to explain why there is insufficient connection between indicted individuals and Firstline to apply 4615. In the meantime, WCJ will order Anti-Fraud Unit to produce evidence supporting the application of 4615 to Firstline.

MFC at 8 (citing Pls.' RJN, Ex. 3 at 69 (punctuation altered and emphasis added)).

The Court finds that WCAB judges actions in notifying the AFU of proceedings, ordering

them to appear at proceedings, or ordering them to present evidence, do not violate the December 22, 2017 Order. These actions are at the very least helpful to WCAB judges in addressing the Section 4615 issue in a given case.

b. Granting Continuances

Second, Plaintiffs argue that "[d]espite the absence of any procedure or rule for doing so, the judges are repeatedly continuing the lien conference hearings that are required under this Court order and under the Fourteenth Amendment until such time as they can provide the following notice to Director Baker's office, the Anti-Fraud Unit, per her direction to the judges." MFC at 7. Plaintiffs cite four sets of WCAB minutes that show judges continuing lien trials because of an apparent requirement to notify the ODAU. *Id.* (citing Pls.' RJN, Ex. 3 at 65-66, 72, 79). Though Defendants do not dispute that continuances have been granted, they indicate that numerous lien trials are scheduled for dates before today's date, as indicated in documents Plaintiffs put forward. MFC Opp'n at 4 (citing Pls.' RJN, Ex. 1 at 1-2, 4, 7-8, 13, 15, 18, 21, 31-36). Defendants also argue that "[s]everal lien trials on the issue [of Section 4615's applicability to particular liens] have gone forward." MFC Opp'n at 4-5.

WCAB judges may grant "continuances and further hearings . . . in the sound discretion of the trier of fact." *Edgar v. Workmen's Comp. Appeals Bd.*, 246 Cal. App. 2d 660, 665-66 (1966); MFC Opp'n at 7. Those continuances may be granted "upon any terms as are just upon a showing of good cause." Cal. Lab. Code § 5502.5. The Court defers to the sound discretion of the WCAB judges in granting continuances for good cause, including as applied to proceedings involving Section 4615. Granting continuances to allow time to develop the record, including by notifying the AFU to present important information on the flagged lien claimant, is not an abuse of that discretion. After all, the December 22, 2017 Order was recent in the scheme of judicial proceedings, and a continuance to assist a judge in holding a lien hearing on Section 4615 is understandable. On the other hand, if there is evidence that judges are granting these continuances to perpetually delay these proceedings as a means to render them meaningless, that would violate the December 22, 2017 Order.

At this point, the Court finds an absence of clear and convincing evidence that Defendants violated the December 22, 2017 Order through the continuances of lien proceedings addressing the Section 4615 issue.

c. Ex Parte Communications

Third, Plaintiffs argue that "the Judges and the DIR's Legal Unit" have engaged in improper ex parte communications with OD Legal. MFC at 10. Through a Public Records Act request, Plaintiffs received documents they believe demonstrate this. *Id.* at 10-12 (citing Ex. 2 at 25-26, 28, 29, 50).

Cal. Code Regs. tit. 8, § 1032 governs ex parte communications in WCAB lien proceedings. Section 1032 prevents the filing of documents, letters or writing without serving other parties. *Id.* § 1032(a). If WCAB judges receive ex parte communications in violation of Section 10324, they should serve copies of the letter on the parties. *Id.* § 1032(b). Except as provided by the rules, parties or lien claimants cannot discuss the merits of a pending case without necessary parties to the proceeding being present. *Id.* § 1032(c).

Plaintiffs aver that under 8 California Code of Regulations § 10324(b)-(c), emails to the WCAB judges, if viewed as "letters" must be served on the parties (including the lien claimants). MFC Reply at 13-14. If viewed as "discussions," Plaintiffs argue that the emails violate Section 10324 because they discuss the merits of the case. *Id.* at 14. Defendants argue that no email communications provided by Plaintiffs to the Court constitute discussions about the merits of cases pending before a WCAB judge. MFC Opp'n at 14. Instead, Defendants assert that any communications "have to do with general case management issues and procedural questions. . . ." *Id.* According to Defendants, Mi Kim (head of the AFU and hereafter "Kim") and Judge Levy took precautions to avoid any improper ex parte communications. *Id.* at 14-15. Defendants further assert that four out of five emails cited in Plaintiff's MFC are from WCAB judges to DIR, rather than vice versa. *Id.* at 14.

Here, the only rule in Section 1032 implicated by the communications that Plaintiffs cite is Section 1032(c), prohibiting discussion of the merits of a pending case without necessary parties to the proceeding being present. The first batch of emails more clearly constitute discussions outside the merits. In those emails, one communication involves questions about who will make an appearance at a lien proceeding. Pls.' RJN Ex. 2 at 25. Another communication asks how a WCAB judge should go about telling the DIR which cases on calendar pertain to the Section 4615 issue. *Id.* at 26. A third communication is about calendaring a hearing on the Section 4615 issue to ensure there is sufficient time for the DIR to appear. *Id.* at 28. These communications do not violate Cal. Code Regs. tit. 8, § 1032.

On the other hand, two communications noticed to the Court are more troubling. The

first email is from Skip Blas ("Blas") to Kim, which Kim forwarded to Judge Levy. Pls.' RJN Ex. 2 at 50. It reads as follows:

> I just got a removal from Mesa Rx because I refused to hear their lien trial because of their 4615 status. My PJ is suggesting to blow up the OTOC order and set for a Lien MSC. The memo we got regarding the Anti-Fraud aspect is that we give you notice of the hearing and you will offer evidence at the trial.
>
> My question is whether you will be attending the Lien MSC because that is when discovery closes. If you don't participate at that hearing your evidence could be excluded at the trial. What are your thoughts?

Id. Notably, Kim did not respond to Blas but instead forwarded the email to Judge Levy. The Court finds it important that Kim did not respond and did not engage in any discussion back. As such, Defendants themselves are not in contempt for this ex parte communication, but the Court orders that Defendants comply with Section 10324 in all future communications.

The second troubling communication is from Kim to Judge Levy on January 26, 2018. Pls.' RJN Ex. 2 at 29. In that email, Kim tells Judge Levy "the court may accept the exhibits on its own motion," that AFU need not "participate in drafting stips and issues," and the possibility of transferring lien conferences to the SAU. *Id.* These issues touch close to the merits, as prohibited under Cal. Code Regs. tit. 8, § 1032(c). The Court is hesitant to consider this to be clear and convincing evidence that Defendants have deviated from usual procedures, but the Court might consider any further communications of this ilk as being in violation of the December 22, 2017 Order.

2. Whether the Aforementioned Procedures Required Defendants to Follow California's Mandatory Rule-Making Procedures

Plaintiffs argue that the following procedures, as characterized by them, unlawfully circumvented existing rule-making procedures: "(1) giv[ing] notice of lien conferences to the Anti-Fraud Unit before proceeding with a lien conference; (2) allow[ing] the Anti-Fraud Unit the opportunity to appear and present evidence, despite the fact that it is not a party; [and] (3) grant[ing] continuances if the defense or the Anti-Fraud Unit so desires, or lacks evidence to support the application of the stay." MFC at 13. They argue that the Administrative Director had to follow procedures set out in the Administrative Procedure Act, California Government Code § 11340, *et seq.* *Id.* at 14. More specifically, Plaintiffs assert that the Administrative Director had to file any proposed regulations with the Secretary of State, post the proposed regulation to the agency's website, publish the proposed regulations, and allow for public

comment. *Id.* (citing Cal. Govt. Code §§ 11340, 11343, 11344). Plaintiffs also assert that Section 4615(f) provides for the Administrative Director to implement new regulations and that any other rule in the WCAB Rules and Regulations followed the aforementioned protocol. MFC at 14.

Defendants rebut, arguing that rule-making provisions do not apply because there have been no instructions from DIR to AFU regarding any of the three actions above. MFC Opp'n at 12. Defendants note that "the only document that could even be construed as an instruction regarding notice is Chief Judge Levy's email to the Presiding Judges regarding AFU's request to be notified of hearings on Section 4615 issues." *Id.* at 11 (citing Defs.' RJN Ex. 3 at 17, Docket No. 90-1). Defendants also argue that if Judge Levy's email were considered a rule or regulation falling under the California Administrative Procedure Act, Plaintiffs should put forward a state law cause of action instead of including that argument in this motion. MFC Opp'n at 13. In that email, Judge Levy tells the WCAB judges not to order joinder of AJU as a party, but to put them "on notice to submit the documentation [related to the Section 4615 issue]." Defs.' RJN Ex. 3 at 17.

The question at hand is whether Defendants' actions fall under usual procedures, as per the December 22, 2017 Order. WCAB judges already have the power to grant continuances and develop the record in the ways discussed, including through notification of a party in order to obtain relevant evidence. Therefore, the Court need not address the rule-making issue further.

3. Remedies for Contempt

The Court need not discuss remedies because the Court does not find clear and convincing evidence that Defendants are in contempt of the December 22, 2017 Order. Nonetheless, Defendants should be careful to comply with Cal. Code Regs. tit. 8, § 1032 when engaging in ex parte communications with WCAB judges or their staff.

In sum, the Court does not find clear and convincing evidence to hold Defendants in contempt of the December 22, 2017 Order.

III. Motion to Dismiss

A. Legal Standard

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient

facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) ("Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.").

In deciding a 12(b)(6) motion, a court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court must construe the complaint in the light most favorable to the plaintiff, accept all allegations of material fact as true, and draw all reasonable inferences from well-pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002); *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); *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a plaintiff facing a 12(b)(6) motion has pleaded "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the motion should be denied. *Id.*; *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013). But if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] . . . the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (citations omitted).

B. Facial Challenge vs. "As Applied" Challenge

Plaintiffs purport to challenge Section 4615 on its face. *See* FAC ¶ 1. The parties disagree on the proper standard for such challenges. In *City of L.A. v. Patel*, the Supreme Court described and affirmed the validity of facial challenges as follows:

> A facial challenge is an attack on a statute itself as opposed to a particular application. While such challenges are the most difficult . . . to mount successfully the Court has never held that these claims cannot be brought under any otherwise enforceable provision of the Constitution. Instead, the Court has allowed such challenges to proceed under a diverse array of constitutional provisions.

135 S. Ct. 2443, 2449 (2015) (citations and quotations omitted).

To succeed in a facial challenge to a statute "a plaintiff must establish that a 'law is unconstitutional in all of its applications.'" *Id.* at 2451 quoting *Washington State Grange v.*

Washington State Republican Party, 552 U.S. 442, 449 (2008). Because facial constitutional challenges "often rest on speculation," they are disfavored. *See, e.g.*, *Jackson v. City and County of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014) (citation omitted). Moreover, plaintiffs must meet a high bar to prevail on a facial challenge, as a facial challenge succeeds only "by 'establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.*, that *the law is unconstitutional in all of its applications*." *Washington State Grange*, 552 U.S. at 449 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (emphasis added); *Morrison v. Peterson*, 809 F.3d 1059, 1064 (9th Cir. 2015) (citation omitted). Thus, the fact that a statute "might operate unconstitutionally *under some circumstances* is not enough to render it invalid against a facial challenge." *Patel*, 135 S. Ct. at 2451. "When assessing whether a statute meets this standard, the Court…[considers] only applications of the statute in which it actually authorizes or prohibits conduct." *Id.*

However, the Court "neither want[s] nor need[s] to provide relief to nonparties when a narrower remedy will fully protect litigants," and follows a "policy of avoiding unnecessary adjudication of constitutional issues[.]" *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) (limiting relief to the parties before the Court in light of plaintiffs' constitutional challenge to validity of statute). Thus, the Court may consider Plaintiffs' facial challenge to Section 4615 only with respect to the parties in the instant action, *i.e.*, as an as-applied challenge, under prevailing precedent. *See, e.g.*, *id.*[7]

C. Analysis of Claims

Defendants move to dismiss in full the first, second, third, fifth, sixth, and seventh claims

[7] Here, to prevail on their facial challenge to Section 4615, Plaintiffs must show that staying all liens associated with an accused, irrespective of the lien's relationship to the fraud alleged, violates the constitution. While the scope and character of liens associated with any given provider will inevitably vary in number and character, Plaintiffs' facial challenge concerns only those accused providers who actually have liens frozen by the Statute. This is because the government action actually permitted by the Statute, the stay of a provider's liens regardless of any connection between that lien and the crime alleged, is the focus of the inquiry. In other words, the fact the statute would have no effect on the constitutional rights of an uncharged provider, or a charged provider with no outstanding liens, will not necessarily save the statute from a facial challenge. *See Patel*, 135 S. Ct. at 2451. Similarly, just because a provider may exist whose only outstanding liens all stem from the actual criminal charges, a facial challenge is not defeated if his or her rights are not affected by the statute. *Id.* Presumably even without the statute, the state may stay or otherwise encumber liens directly at issue in the criminal proceedings through other means. If that is indeed the case, then under *Patel*, the statute's effect on those liens is irrelevant to the Court's analysis of Plaintiffs' facial challenge. *Id.*

for relief. *See generally* MTD.[8] Defendants move to dismiss only the substantive due process component of the fourth claim for relief. The Court will analyze these claims in turn.

1. First Claim for Relief – Facial Challenge Under the Right to Counsel

Anguizola alleges that Section 4615 violates his Sixth Amendment right to counsel because, as a result of his medical fraud charges, the Statute has frozen all lien debt owed to any of his medical practices, rendering him incapable of retaining counsel in his defense. FAC ¶¶ 14, 49-52.

Defendants argue that Anguizola's facial challenge to the Statute fails for not alleging facts that show the statute is unconstitutional in all situations. MTD at 9. They assert that under *Patel*, the Court should only analyze applications of the Statute that authorize or prohibit conduct. *Id.* (citing *Patel*, 135 S. Ct. at 2451). Because the Statute stays the liens of medical providers charged with fraud, the Court should consider Section 4615 with respect to those charged providers. *Id.* Defendants further argue that because Section 4615 applies to some providers who could pay for legal counsel using sources other than the liens at issue, the facial challenge fails. *Id.* at 10.

Plaintiffs rebut, arguing that "the Sixth Amendment is offended when the State takes a criminal defendant's **income stream** that is unrelated to his alleged wrongdoing . . . rendering him unable to retain counsel." MTD Opp'n at 4 (emphasis added). In making this argument, Plaintiffs primarily rely on their interpretation of *Luis v. United States*, 136 S. Ct. 1083 (2016). MTD Opp'n at 4-6.

a. Analyzing *Luis*

"[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Luis*, 136 S. Ct. at 1089. This right is fundamental. *Id.*

In *Luis*, the Supreme Court held that pretrial restraint of a criminal defendant's untainted assets infringes on the Sixth Amendment where those assets are needed to retain counsel. *Id.* at 1096. Importantly, *Luis* involved an *as-applied* challenge to a single court order that froze assets that were, as a matter of undisputed fact, (1) unrelated to any criminal activity, and (2) necessary in order for the defendant to retain the counsel of her choosing. *Id.* at 1088. In evaluating the

[8] These causes of action hinge on the following constitutional grounds: the Sixth Amendment Right to Counsel, (2) the Contracts Clause, (3) Substantive Due Process, (4) Procedural Due Process, (5) the Supremacy Clause, and (6) the Takings Clause. Plaintiffs oppose dismissal of those claims. *See generally* MTD Opp'n.

constitutionality of the order the Court recognized that the seizure of the assets itself "does not, deny Luis' right to be represented by a qualified attorney whom she chooses and can afford." *Id.* at 1089. However, the order would still violate the Sixth amendment right to counsel if it "would undermine the value of that right by taking from Luis the ability to use the funds" needed to pay her chosen attorney. *Id.* The Court ultimately struck down the order on Sixth Amendment grounds. *Id.* at 1093.

The thrust of the Court's analysis focused on the so-called, "untainted" nature of the assets subject to the order. *Id.* 1090-91. In reversing the lower court's order, the Court held, in part, that the state's interest in the property – to ensure its punishment of choice through criminal fines – was outweighed by Luis' right to use her untainted assets to the extent she needed them to select counsel of her choosing.[9] *Id.* at 1093.

The Court distinguished the *Luis* case from *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989) and *United States v. Monsanto*, 491 U.S. 600, 615 (1989) − in which it had rejected Sixth amendment challenges to criminal forfeiture laws - based on differences in the nature of the assets involved. *See id.* at 1089-90 ("In our view, however, the nature of the assets at issue here differs from the assets at issue in those earlier cases. And that distinction makes a difference.") The Court observed that unlike in the case before them, the Court's prior rulings had dealt only with seizure of property "tainted" with crime. *Id.* at 1090-1091; *see also Caplin & Drysdale*, 491 U.S. at 630; *Monsanto*, 491 U.S. at 615. The Court found this distinction was crucial because both *Caplin & Drysdale* and *Monsanto* placed great significance on the "tainted" nature of the assets in question. *Luis*, 136 S. Ct. at 1091-92; *Caplin & Drysdale*, 491 U.S. at 626-628. The Court noted that in those cases, it had borrowed principles from property law and found that (1) the government gains a property interest in tainted assets at the time those assets are used for criminal purposes, and (2) the criminal defendant's ownership interest in tainted assets was itself imperfect. *Id.* at 1092; *see also Caplin & Drysdale*, 491 U.S. at 619-620.

The *Luis* Court observed that assets tainted with criminal activity are decidedly different

[9]Justice Breyer's majority opinion cited two other rationales. *Id.* at 1093-94. Justice Breyer first discussed 19th century common law and historical practice whereby an accused's chattels were not said to be possessed by the crown until after a conviction was entered. *Id.* Justice Breyer's final rationale was that to allow seizure of untainted assets in the case at bar would provide the government with a wide-reaching tool to use against criminal defendants accused of a wide-range of crimes. *Id.* at 1094-95. Such a development, if it were to occur would render a greater and greater class of criminal defendants indigent and in need of publicly funded counsel. *Id.*

from the assets owned, "pure and simple" by Luis. *Luis*, 136 S. Ct. at 1090. In other words, the government's interest in untainted assets was substantially less than in assets tainted by criminal activity. The takeaway from *Luis*, and its discussion of the Court's prior precedent, is that: (1) the nature of the assets at issue, and the government's interest in those assets are crucial in determining whether a pretrial restraint on property will undermine the Sixth Amendment, (2) the government's interest − acquired through property law at the time of the crime − in tainted assets generally outweighs a criminal defendant's right to use those assets to obtain counsel, and (3) the government's interest in untainted assets does not outweigh a criminal defendant's right to use those funds to the extent they are required in order to pay for an attorney of his or her choosing. *Id.* at 1093. In short, pretrial restraint of tainted assets does not violate the Sixth Amendment; restraint on untainted assets, owned free and clear by a criminal defendant may. *Id.*

Plaintiffs rely heavily on *Luis* and argue that because Section 4615 stays all liens associated with a charged provider, and not just those liens related to criminal activity, it restrains the same type of untainted assets at issue in *Luis*. MTD Opp'n at 4-6. Plaintiffs further contend that, like in *Luis*, Anguizola, and other charged providers are unable to afford counsel of their choosing as a result of the lien freeze. *Id.* Thus Plaintiffs argue, the Statute places a pretrial restraint on untainted assets that, under *Luis*, violates Plaintiffs' Sixth Amendment right to counsel. *Id.*

Plaintiffs' legal theory is not without some appeal. Like the court order in *Luis*, Section 4615 freezes assets (in this case liens representing services rendered) "untainted" by fraud until the conclusion of criminal proceedings. Cal. Lab. Code § 4615. Also like *Luis*, staying all of Anguizola's liens could, at least plausibly limit his ability to retain counsel. Additionally, nothing in *Luis* suggests its holding should be strictly limited to liquid assets in a bank account. *See United States v. Stein*, 541 F.3d 130, 157 (2nd Cir. 2008) ("In a nutshell, the Sixth Amendment protects against unjustified governmental interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain."); *see also U.S. v. One Residential Property*, 733 F.Supp. 1382, 1386 (S.D. Cal. 1990) (applying Supreme Court's criminal forfeiture jurisprudence to civil litigation). Finally, comments from the legislative record indicating that the lien freeze provision contained in Section 4615 was added late in the legislative process at the direct request of district attorneys is troubling, as is the fact the Statute freezes the liens only for the duration of the criminal proceeding. Cal. Lab. Code §

4615.

On the other hand, there are significant factual differences in the nature of the assets seized in *Luis*, owned "plain and simple by the criminal defendant," and the liens at issue here, despite the fact both may be "untainted" by crime. As discussed above, understanding these differences is crucial to determine if the pretrial restraint imposed by Section 4615 violates the Sixth Amendment.

A workers' compensation lien is a statutory creation of the state of California and heavily subject to regulation. *See Angelloti*, 791 F.3d at 1081 ("The right to workers' compensation benefits is 'wholly statutory.'"); *see also id.* at 1078-79 (describing statutory basis for worker's compensation liens and procedures for enforcement); Cal. Lab. Code § 4903(b) (permitting lien for reasonable expenses for medical treatment to injured workers); Cal. Lab. Code § 4600(a), (f). The statutory origin of the liens at issue has several consequences. First, it means the state has a strong interest in the lien and in ensuring the conditions precedent to its enforcement are met. This interest predates and is unrelated to any criminal act a provider commits within the lien system but instead grows out of the state's establishment and maintenance of the workers' compensation system.

Second, *almost by definition* a lien is not owned "plain and simple" by an accused provider. *See* Cal. Lab. Code § 3600 (listing preconditions for collection on a lien). The lien is simply a statutory means by which the state helps ensure workers can access medical care. The provider, the state, and the worker treated, therefore have an interest in the liens frozen by the Statute. *See* Cal. Code Regs. Tit.8, § 10301(dd) (listing the parties capable of initiating a lien conference to resolve pending liens, including worker's, the state, and certain lien holders); Cal. Code Regs. Tit. 8, § 10770.1 (a)(1) (allowing a lien claimant, who is also a "party" to initiate a lien conference). As such, a provider's interest in a given lien is imperfect at best. For these reasons the Court does not agree with Plaintiff's argument that the line drawn in *Luis* between tainted and untainted assets, is determinative here. Indeed, *Luis* makes clear that the nature of the property, and the state's interest therein is crucial to the Sixth Amendment analysis. *See* Luis, 136 S Ct. at 1090; *see also supra* 10-11 (discussing *Luis'* treatment of prior Supreme Court precedent). In short, a lien filed within the state's already complicated regulatory framework is simply not the equivalent to money held, free and clear in a personal bank account.

Additionally, *Luis* concerns a court order pertaining to single criminal defendants whose

assets were seized pursuant to facially constitutional criminal forfeiture statutes. Nonetheless, Plaintiffs ask this Court to strike down an entire piece of legislation because one accused medical provider potentially cannot afford an attorney. The legal coherence of Plaintiffs' Sixth Amendment claim, particularly when it is considered as a facial challenge is fragile at best.

Further, *Luis* involved an "as applied" challenge to a single court order freezing assets that, the record established were not connected to criminal activity, and necessary for the defendant to obtain counsel. Here, Plaintiffs bring a facial challenge, and must meet a higher burden than the defendant in *Luis*. *See supra* Section III.B (describing standard or As-Applied challenges). To that end, Plaintiffs allege insufficient evidence that the economic effects of the Statute on Anguizola are in any way typical of the providers that the Statute affects generally. *See generally* FAC. Presumably, not every affected physician's sole means of attaining counsel is through the enforcement of pending liens. For these reasons, the Court would find that the first cause of action (a facial challenge to Section 4615 based on the Sixth Amendment right to counsel) FAC fails to state a claim on which relief can be granted.

b. Malicious Intent

Plaintiffs characterize comments made by Baker as "public announcements of the State's intention to strip Plaintiffs of their Sixth Amendment rights . . . ." MTD Opp'n at 7; FAC ¶ 31. As stated in the July 13, 2017 Order, Plaintiffs' evidence and argument concerning the purposes of Section 4615 do not change much about the merits of this case. First, unlike the Equal Protection challenges at issue in the recent swath of constitutional challenges to President Trump's "Travel Ban," Plaintiffs point to no authority giving legal significance to the potential presence of nefarious intent in a Sixth Amendment challenge. *Id.* at 7-9. Second, the Court still does not necessarily share Plaintiffs' reading of Director Baker's comments which could just have easily related to concerns that charged lien-holders were spending ill-gotten gains on their defense. FAC ¶ 31. As the MTD stands, there are insufficient factual allegations to illustrate a violation of Plaintiffs' Sixth Amendment rights through Baker's comments.

2. Second Claim for Relief – As-Applied Challenge under the Right to Counsel

In the second claim for relief, Anguizola alleges an as-applied violation of his Sixth Amendment right to counsel. FAC ¶¶ 14, 53-58. Defendants move to dismiss this claim, arguing that the nature of liens is an imperfect property interest falling outside of *Luis*. MTD at 12-13. In response, Plaintiffs again argue that *Luis* applies to the liens at issue. MTD Opp'n at

10-13.

The Court incorporates its analysis as to the first claim for relief into this section. As already discussed, the Court does not consider the liens at issue to fall under *Luis*. Moreover, Plaintiffs fail to sufficiently plead that Anguizola could not afford counsel as a result of implementing Section 4615. Though the FAC alleges that Anguizola's "financial situation is direct, and he cannot afford to hire counsel of his choice," it does not sufficiently allege that he could not afford payment despite the freezing of liens. FAC ¶ 14. The FAC does not delve into Anguizola's other assets, such as his bank accounts or other property interests, and his inability to pay using those other assets. *See generally* FAC. The Court thus finds that Plaintiffs' second claim for relief therefore fails.

3. Third Claim for Relief – Contracts Clause

In Plaintiffs' third claim for relief, they allege that "Section 4615 unconstitutionally impairs the obligations of contracts in violation of Plaintiffs rights . . . ." FAC ¶¶ 60. Defendants move to dismiss that claim. MTD at 13-16.

The Contract Clause prohibits states from passing "[l]aw[s] impairing the Obligation of Contracts[.]" U.S. Const., art. I, § 10, cl. 1 (West 2017); *see also, e.g.*, *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 886-87 (9th Cir. 2003). In determining the constitutionality of a statutory provision under the Contract Clause, courts consider "whether the change in state law has 'operated as a *substantial impairment* of a contractual relationship.'" *Gen. Motors Corp. v. Romien*, 503 U.S. 181, 186 (1992) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)) (emphasis added). That inquiry includes: (1) whether a contract exists as to the specific terms allegedly at issue; (2) whether a change in law impairs an obligation under the contract; and (3) whether the impairment is fairly characterized as substantial. *See id.*; *see also RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004) (quoting *Allied Structural Steel Co.*, 438 U.S. at 244); *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement Sys.*, 358 F.3d 725, 736-37 (9th Cir. 2009) (citations omitted).

Generally speaking:

> [T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage.

> Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Allied Structural Steel Co., 438 U.S. at 2722-23. "The severity of the impairment" increases "the level of scrutiny to which the legislation will be subjected," although "[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment," and "state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (citations omitted). Moreover, in ruling on the substantiality of any discernable impairment of contractual obligations imposed by the challenged statute, the court should "consider whether the industry the complaining party has entered has been regulated in the past." *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242 n.13).

If the court determines that a change in state law works to the "substantial impairment of a contractual relationship," *see Gen. Motors Corp.*, 503 U.S. at 186, the court addresses whether "the State's police power permits the impairment because it is 'reasonable and necessary to serve an important purpose,'" *California Hosp. Ass'n v. Maxwell-Jolly*, 776 F. Supp. 3d 1129, 1141 (E.D. Cal. 2011) (quoting *State of Nevada Emps. Ass'n v. Keating*, 903 F.2d 1223, 1226 (9th Cir. 1990)).

Similarly, the Contract Clause of the California Constitution provides that "law[s] impairing the obligation of contracts may not be passed." Cal. Const. art. 1, § 9 (West 2017). Courts adjudicate California Contract Clause claims under the same standard as the federal Contract Clause. *See, e.g.*, *Campanelli v. Allstate Life Ins.*, 322 F.3d 1086, 1097 (9th Cir. 2003) ("The California Supreme Court uses the federal Contract Clause analysis for determining whether a statute violates the parallel provision of the California Constitution.") (citing *Calfarm Ins. Co. v.* Deukmejian, 771 P.2d 1247, 1262-63 (Cal. 1989) (en banc)); *Retired Emps. Ass'n of Orange County, Inc. v. County of Orange*, 610 F.3d 1099, 1102 (9th Cir. 2010); *De Zewart v. Victorville Water Dist.*, No. CV 12-03087-MWF (SPx), 2012 WL 12887750, at *2 (C.D. Cal. Nov. 26, 2012). For the purpose of this analysis, the Court follows the previously elucidated federal standard.[10]

Plaintiffs do not allege that Section 4615 violates the Contract Clause "in all of its

[10] *See supra* Part III(B)(2).

applications." *Morrison v. Peterson*, 809 F.3d 1059, 1064 (9th Cir. 2015) (citation omitted). Instead, Plaintiffs allege that "Section 4615 unconstitutionally impairs the obligation of contracts in violation of Plaintiffs' rights . . . ." FAC ¶ 60. Plaintiffs also aver that "[e]ntities or third parties who purchased receivables for good value under valid contracts" now cannot "enforce[e] their contractual rights, violating the Contract Clause of the United States Constitution and the California Constitution." *Id.* ¶ 8. As Defendants argue, Plaintiffs do not identify specific contracts or contractual terms at issue. *See* MTD at 14; *see generally* FAC. Plaintiffs do not rebut this point, or any other point related to the third claim for relief, in the opposition to the MTD. *See generally* MTD Opp'n. The most substantial reference Plaintiffs make to this claim is under its analysis of the procedural due process claim, quoting one paragraph of the FAC:

> Since the implementation of Labor Code Section 4615, Vanguard has been prevented from collecting on those liens, most of which represent various insurers' contractual agreements to pay for medical treatment rendered to injured California workers. Vanguard, which owns and collects for a pharmacy known as 'Trucare' has also been denied due process in the Workers' Compensation courts, despite the existence of an order of this Court requiring that due process be afforded.

MTD Opp'n at 18 (quoting FAC ¶ 13).[11]

As the FAC currently stands, Plaintiffs fail to state a claim under the Contracts Clause because they fail to cite to the specific terms of any contract or contracts allegedly impaired by Section 4615.[12] Furthermore, the industry Plaintiffs have entered into – the medical service industry – "has been regulated in the past," thereby subjecting Plaintiffs to a heightened burden with respect to the substantiality of any discernable impairment to existing contractual obligations. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). Plaintiffs fail to state a Contract Clause claim with respect to their alleged individual contracts, let alone with respect to "all applications of [Section 4615] in which the statute actually authorizes or prohibits conduct[.]" *See Patel*, 135 S. Ct. at 2451 (citation omitted).

As such, Plaintiffs' third claim for relief based in the Contracts Clause fails.

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[11] Indeed, Plaintiffs only mention the word "contract" twice in their opposition. MTD Opp'n at 2, 18.

[12] In a declaration in support of Plaintiffs' previous motion for a preliminary injunction, Korechoff references a single contract between Vanguard and "Proove Biosciences, Inc." for the right to purchase receivables in the form of medical treatment liens. Declaration of Victor Korechoff ("Korechoff Decl.") ¶ 3, Docket No. 13-1. That contract is also referenced in the FAC. FAC ¶ 41. As discussed in the July 13 2017 Order, that contract does not suffice. July 13, 2017 Order at 18.

4. Fourth Claim for Relief – Due Process Facial Challenge

Plaintiffs allege a facial due process challenge, rooted in both substantive and procedural due process, in their fourth claim for relief. FAC ¶¶ 63-66. Defendants move to dismiss only the substantive due process facial challenge, separate and apart from the procedural due process challenge.[13] MTD at 17. Plaintiffs allege that the Statute violates substantive due process because it is retroactive in nature in that it stays liens that predate its passage. FAC ¶¶ 64, 68.

The government violates substantive due process rights when the action shocks the conscience, or is not justified by a rational, non-punitive justification. *Salerno*, 481 U.S. at 746. To survive rational basis, the government need only show that the challenged statute could conceivably further a state interest. *See Angelotti*, 791 F.3d at 1086 ("On rational basis review, the burden is on plaintiffs to negate every conceivable basis… [for the statute"); *see also Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080-81 (2012) ("Because the classification is presumed constitutional, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.").

Generally, retroactive legislation raises due process concerns. However, "a statute does not operate retrospectively 'merely because it is applied in a case arising from conduct antedating the statute's enactment, rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. Usi Film Prods.* 511 U.S. 244, 269-70 (1994). Furthermore, even if a statute is retroactive it is still constitutional if it is justified by a rational purpose. *Angelotti*, 791 F.3d at 1084.

As to Section 4615's retroactivity, Plaintiffs assert that the Statute "violates the Due Process Clause on the grounds of its far-reaching retroactivity . . . ." FAC ¶ 32. Defendants argue that it is not retroactive. MTD at 18. It is unclear whether Section 4615 is truly retroactive: it simply stays currently pending liens. *See* Cal. Lab. Code § 4615. The only liens effected by the Statute have yet to be resolved through the system. The Statute has no effect on liens that have already been adjudicated and whose benefits have already vested. *See Angelloti*, 791 F.3d at 1082-83 (holding that liens do not vest until final judgment in the WCAB proceeding). The fact pending liens arise out of treatment previously provided does not render

[13] The court agrees with Defendants that the Court may dismiss the substantive due process claim, but not the procedural due process claim, despite that they are both stated under the fourth claim for relief. *See Hill v. Opus Corp.*, 841 F. Supp. 2d 1070, 1081-82 (C.D. Cal. 2011) (dismissing separable claims, though alleged together). Plaintiffs do not oppose this. *See generally* MTD Opp'n.

changes to the procedures for lien enforcement necessarily retroactive. *See Landgraf*, 511 U.S. at 269-70. "The result of the tension between alleging a plausible claim and rational-basis review is that to survive a motion to dismiss, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *A.J. California Mini Bus, Inc. v. Airport Comm'n of the City & Cty. of San Francisco*, 148 F. Supp. 3d 904, 918 (N.D. Cal. 2015) (citation omitted).

Also, even assuming Section 4615 is retroactive, the state has justified its "retroactivity" as a means to prevent fraud. *See* 2016 Cal. Stat. ch 868 § 7. Here, Defendants contend the stay is necessary to serve "the rational purpose of temporarily halting the ability of criminally-charged providers to profit from already-filed workers' compensation claims that may be fraudulent." *See* MTD at 18 (describing anti-fraud purpose of Section 4615); *see also* 2016 Cal. Stat. ch 868 § 7 (SB 1160).[14] Indeed, Plaintiffs themselves recite in the FAC that combating fraud was referenced when Section 4615 was voted upon. FAC ¶ 38 ("a vague reference to combating fraud was made when the Assembly voted on the bill . . . [and] [c]ombating fraud was also included in the legislative recitals."). Plaintiffs fail to negate in the FAC every conceivable basis which might support the retroactivity of Section 4615, and they in fact admit Defendants' basis. *See Angelotti*, 791 F.3d at 1086 ("On rational basis review, the burden is on plaintiffs to negate every conceivable basis… [for the statute]"); *see also Armour*, 132 S. Ct. at 2080-81. Defendants contend that Section 4615 "serves the rational purpose of temporarily halting the ability of criminally-charged providers to profit from already-filed workers' compensation claims that may be fraudulent." MTD at 18. As a result, staying the enforcement of the thousands of liens already in the system advances the anti-fraud purposes of the statute by preventing collection on potentially fraudulent liens. *See Angelloti*, 791 F.3d at 1084 (upholding lien fee statute's retroactivity based state interest in clearing backlog of liens). Moreover,

[14] Section 16 states as follows:

> Therefore, in order to ensure the efficient, just, and orderly administration of the workers' compensation system, and to accomplish substantial justice in all cases, the Legislature declares that it is necessary to enact legislation to provide that any lien filed by, or for recovery of compensation for services rendered by, any provider of medical treatment or other medical-legal services shall be automatically stayed upon the filing of criminal charges against that provider for an offense involving fraud against the workers' compensation system, medical billing fraud, insurance fraud, or fraud against the federal Medicare or Medi-Cal programs, and that the stay shall remain in effect until the resolution of the criminal proceedings.

Id.

Plaintiffs bear the burden of alleging that there is no conceivable basis for the retroactive nature of Section 4615. They have thus far failed to do so.

In turn, the Court finds that Plaintiffs fail to state a claim as to the substantive due process component of their fourth claim for relief because they did not sufficiently allege that Section 4615 does not serve a conceivable rational purpose. The Court leaves the procedural due process claim in place, as Defendants did not move to dismiss it.

5. Fifth Claim for Relief – Due Process As-Applied Challenge

In the fifth claim for relief, Plaintiffs allege that Defendants violated Vanguard/Trucare's and Mesa's Fifth and Fourteenth Amendment due process rights. FAC ¶¶ 18, 23, 67-71. More specifically, they allege that Mesa's liens have been frozen, and that WCAB refuses hearings pending notification of the DIR of those hearings. *Id.* ¶ 18. Plaintiffs also allege that a "secret list" of lien claimants has been circulated to WCAB judges, directing them to apply the automatic stay to hundreds of uncharged individuals and entities. *Id.* ¶ 43. Plaintiffs further allege that there is no protocol, criteria, or procedure for appearing on this list that is now published on the DIR's website. *Id.*

Defendants move to dismiss the fifth claim for relief on two grounds. MTD at 19-22. The first is that Plaintiffs violated Rule 15(d) of the Federal Rules of Civil Procedure ("Rule 15(d)") by failing to seek leave before adding the cause of action. *Id.* at 19-21. The second is that Vanguard/Trucare and Mesa have not sufficiently alleged a procedural due process claim. *Id.* at 21-22. The Court will address the two arguments in turn.

a. Violation of Rule 15(d) of the Federal Rules of Civil Procedure

First, Defendants argue that the FAC adds two parties to the mix, Mesa and Trucare, who assert a new as-applied cause of action based in procedural due process violations. MTD at 19. They argue that a supplemental pleading must be filed to add parties, and that without leave of court, Plaintiffs cannot add a distinct cause of action based on facts occurring since the original complaint was filed. *Id.*

The Federal Rules of Civil Procedure 15(d) states as follows:

> **(d) Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Fed. R. Civ. P. 15(d). Pleadings "may be 'supplemented' where the pleader desires to set forth allegations concerning matters which have taken place *since* the original pleading was filed." *See* O'Connell & Stevenson, RUTTER GROUP PRAC. GUIDE: FEDERAL CIV. PRO. BEFORE TRIAL, CALIF. & 9TH CIR. EDITIONS § 8:1377 (The Rutter Group 2017) (text cited in *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010)).

It is undisputed that Plaintiffs added for the first time the now labeled fifth claim for relief in the FAC.[15] As Defendants point out, the cause of action hinges substantially on DIR actions taken after the original Complaint was filed. FAC ¶¶ 43-45. Though the Court might ultimately grant a motion to permit Plaintiffs to file a supplemental pleading, the Court may only do so "[o]n motion and reasonable notice . . . ." Fed. R. Civ. P. 15(d). For now, the Court would dismiss the fifth claim for relief, though the Court expects a potential motion to permit Plaintiffs to file a supplemental pleading in the future. After doing so, the Court can then consider the parties' arguments as to whether a supplemental pleading is warranted in this case.

b. Whether Plaintiffs Sufficiently Allege a Procedural Due Process Claim

Second, Defendants argue that Plaintiffs fail to sufficiently allege an as-applied procedural due process claim. MTD at 21-22. The Court will decline to dive deeply into whether Plaintiffs sufficiently allege a procedural due process claim in this instance because of the aforementioned Rule 15(d) issue. Taking only facts occurring before the date of the original Complaint, Plaintiffs make insufficient factual allegations to survive the MTD on this claim.

6. Sixth Claim for Relief – Supremacy Clause

Plaintiffs allege their sixth claim for relief based in the Supremacy Clause. FAC ¶¶ 72-75. Plaintiff contends that the Statute violates the Supremacy clause because it conflicts with federal bankruptcy law. *Id.* ¶¶ 73-74. Defendants move to dismiss that claim. MTD at 22-23.

Pursuant to the Supremacy Clause, federal laws are the supreme law of the land, notwithstanding state laws to the contrary. U.S. Const. art. VI, cl. 2. Accordingly, it is axiomatic that state law that conflicts with federal law is without effect.

Article I, section 8 of the Constitution empowers Congress "to establish uniform laws on the subject of bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4.

[15] Also, if "Vanguard/Trucare" is considered a separate entity from Vanguard, the sole Plaintiffs listed under the fifth claim for relief (Mesa and Vanguard/Trucare) were not previously part of this action. FAC ¶¶ 67-71. Adding them as parties would require a supplemental pleading under Rule 15(d).

However, Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. *Butner v. United States*, 440 U.S. 48, 55 (1979); *see also Barnhill v. Johnson*, 503 U.S. 393, 398 (applying state law to define the nature and extent of property interests in a bankrupt estate in the absence of federal authority to the contrary). This is because "property interests are created and defined by state law." *Id.* Similarly, Congress explicitly directs bankruptcy "[trustees] to 'manage and operate the property in his possession according to the requirements of the valid laws of the state.'" *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 504 (1986) citing 28 U.S.C. § 959(b).

In support of their claim, Plaintiffs allege that Section 4615 prevents Goodrich, a Chapter 11 bankruptcy trustee, from collecting on liens on behalf of Allied Medical Management. FAC ¶¶ 12, 16. Plaintiffs further allege that the Statute "interferes with the administration of federal bankruptcy cases where the liens represent assets and income to the estate in violation of the Supremacy Clause. *Id.* ¶ 32. Defendants point the Court to its July 13, 2017 Order where the same issue was posed. Plaintiffs provide no argument opposing dismissal of this claim and seemingly rest their hats on the allegations made in the FAC. *See generally* MTD Opp'n.

The Court echoes its July 13, 2017 Order. Plaintiffs provide no authority for the proposition that changes to California's Workers' Compensation laws violate the Supremacy Clause if they alter the value or enforceability of liens under the possession of a bankruptcy trustee. That is wholly different from Section 4615's potential effect on an estate that happens to contain liens subject to a stay. As Defendants rightly point out, were Plaintiffs correct, any state law or regulation potentially affecting property in a bankruptcy estate would violate the supremacy clause. The law says just the opposite. *See Butner*, 440 U.S. at 55.

As such, the Court finds that Plaintiffs fail to state a claim in their sixth claim for relief based in the Supremacy Clause.

7. Seventh Claim for Relief – Takings Clause

In Plaintiffs' seventh claim for relief, they allege that Section 4615 violates the Takings Clause of the United States Constitution and the California Constitution. FAC ¶¶ 59-63. Defendants move to dismiss this claim on both state and federal grounds. MTD at 24-25. Plaintiffs do not address this claim in their opposition to the MTD. *See generally* MTD Opp'n.

a. U.S. Constitution Takings Clause

The Takings Clause of the Fifth Amendment prohibits the taking of private property "for

public use, without just compensation." U.S. Const. amend. V. Indeed, the Takings Clause provides protection for property interests of other independent sources such as state law, but the clause itself does not create property interests. *Bowers v. Whitman*, 671 F.3d 905, 912-14 (9th Cir. 2012). For the Takings Clause to apply, "[t]he property interest must be vested. In other words, if the property interest is contingent and uncertain or the receipt of the interest is speculative or discretionary, then the government's modification or removal of the interest will not constitute a . . . taking." *Angelotti*, 791 F.3d at 1081 (citation and quotation marks omitted). Directly on point in this case, as Defendants point out, is the fact that "workers' compensation liens are not property interests protected by the Takings Clause." MTD at 24 (quoting *Angelotti*, 791 F.3d at 1081). Such liens are "wholly statutory" and not vested property rights to which the Takings Clause applies until they are reduced to final judgment. *Angelotti*, 791 F.3d at 1081.

Plaintiffs allege in support of their claim, and contrary to the above established law, that Section 4615 "takes and/or damages . . . the professional fees represented by the liens" without just compensation. FAC ¶ 77. The Court finds that Plaintiffs fail to state a claim under the Takings Clause of the United States Constitution, as they allege the taking of a lien, which is not a vested property interest.

b. California Constitution Takings Clause

The California Constitution dictates that "[p]rivate property may be taken or damaged for a public use and only when just compensation . . . has first been paid to, or into court for, the owner." Cal. Const., art. I, § 19. "Although the California Constitution affords somewhat broader protection [than the federal Constitution] by also requiring compensation when property is damaged by public use, apart from this difference, the state takings clause is construed congruently with the federal clause." *Shaw v. Cty of Santa Cruz*, 170 Cal. App. 4th 229, 260 (2008) (citation omitted); *Monks v. City of Rancho Palos Verdes*, 167 Cal. App. 4th 263, 294 (2008) ("courts have analyzed takings claims under decisions of both the California and United States Supreme Courts.").

Defendants therefore argue, and the Court agrees, that the analysis under the California Constitution's Takings Clause in this instance should mirror the Court's analysis under the United States Constitution's Takings Clause. MTD Opp'n at 25. Plaintiffs again allege that Section 4615 "takes and/or damages . . . the professional fees represented by the liens . . . ." FAC ¶ 78. Under the same analysis employed above, the Court finds that the FAC fails to state a

claim under the Takings Clause of the California Constitution because a lien is not a vested property interest.

IV. Conclusion

For the aforementioned reasons, as to Defendants' motion to dismiss, the Court would **DISMISS** Plaintiffs' first, second, third, fourth, and fifth claims (except for the facial due process component of the fourth claim for relief) **WITHOUT PREJUDICE** to allow Plaintiff an opportunity to amend them to conform to this Order. As to the sixth and seventh claims for relief (the Supremacy Clause claim and the Takings Clause claim), the Court would **DISMISS** those claims **WITH PREJUDICE**.

As to Plaintiffs' motion for contempt, or in the alternative, for reconsideration of the December 22, 2017 Order, the Court would **DENY** that motion.