

1 ELLEN SIMS LANGILLE (SBN: 154329)  
 2 *ellen.langille@fmtdlaw.com*  
 3 FINNEGAN, MARKS, THEOFEL & DESMOND  
 4 A Professional Corporation  
 5 P.O. Box 478011  
 6 San Francisco, CA 94147-8011  
 7 T: (415) 931-9284  
 8 F: (415) 931-6247  
 9 Attorneys for Amicus Curiae California Chamber of Commerce

10 UNITED STATES DISTRICT COURT  
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 ANGELOTTI CHIROPRACTIC, INC., et ) Case No.: 8:13-cv-01139-GW-JEM  
 13 al. )

14 )  
 15 ) Plaintiffs,  
 16 ) vs. )

17 ) CHRISTINE BAKER, *in her official*  
 18 ) *capacity as Director of the California*  
 19 ) *Department of Industrial Relations,*  
 20 )

21 ) RONNIE CAPLANE, *in her official*  
 22 ) *capacity as Chair of the California*  
 23 ) *Workers' Compensation Appeals Board,*  
 24 ) and )

25 ) DESTIE OVERPECK, *in her official*  
 26 ) *capacity as Acting Administrative director*  
 27 ) *of the California Division of Workers'*  
 28 ) *Compensation,*  
 )

Defendants. )

**MOTION FOR LEAVE TO FILE  
 AMICUS CURIAE BRIEF and  
 PROPOSED AMICUS BRIEF IN  
 SUPPORT OF DEFENDANTS'  
 MOTION TO DISMISS**

**Dept.:** Courtroom 10  
**Judge:** Hon. George H. Wu  
**Date:** October 24, 2013  
**Time:** 8:30 a.m.

**TABLE OF CONTENTS**

1

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28

TABLE OF CONTENTS .....ii

TABLE OF AUTHORITIES .....iii

I. NOTICE OF INTERESTED PARTIES ..... 1

II. STATEMENT OF INTEREST OF AMICUS CURIAE..... 2

III. INTRODUCTION ..... 3

IV. LEGAL ARGUMENT ..... 4

    A. The Lien Activation Fee in SB 863 Is a Rational Response to an Escalating  
    Crisis at the WCAB. .... 4

    B. Plaintiffs Have Failed to Demonstrate a “Taking” of  
    a Protected Property Interest..... 7

        1. THERE IS NO VESTED PROPERTY RIGHT REQUIRING CONSTITUTIONAL  
        PROTECTION..... 7

        2. CALIFORNIA DOES NOT CONSIDER RIGHTS BASED ON STATUTES TO BE  
        VESTED PROPERTY RIGHTS..... 8

        3. THE SAME RULES APPLY IN WORKERS’ COMPENSATION CASES,  
        INCLUDING THIS ONE..... 9

V. CONCLUSION ..... 12

**TABLE OF AUTHORITIES**

**Cases**

*Callet v. Alioto* (1930) 210 Cal. 65, 290 P. 438..... 8

*Graczyk v. WCAB* (1986) 184 Cal. App.3d 997, 229 Cal. Rptr. 494, 51 CCC 408...*passim*

*Justus v. Atchison* (1977) 19 Cal.3d 564, 139 Cal. Rptr. 97..... 9, 10

*Rio Linda Union School Dist. v. WCAB (Scheftner)* (2005)  
131 Cal.App.4th 517, 31 Cal. Rptr. 3d 789, 70 Cal. Comp. Cases 999..... 11, 12

*Sierra Pacific Industries v. WCAB* (2006)  
140 Cal. App. 4<sup>th</sup> 1498, 45 Cal. Rptr. 3d 550..... 12

**Statutes**

Evidence Code section 452(c)..... 4

Labor Code section 62.5(a)(1)(A)..... 3

Labor Code section 75..... 4

Labor Code section 77..... 4

Labor Code section 3201..... 12

Labor Code section 3352(k)..... 9

Labor Code section 4903.06(c)(3) ..... 3

**Constitutional Provisions**

Cal. Const., art. XIV, § 4..... 3, 12

**Other Authorities**

Senate Bill No. 863 (2011-2012 Reg. Sess.) ..... *passim*

Liens Report of California Commission on Health and Safety and Workers’  
Compensation..... *passim*

1 **I. NOTICE OF INTERESTED PARTIES**

2 The undersigned, counsel of record for California Chamber of Commerce, certifies  
3 that the following listed party (or parties) may have a pecuniary interest in the outcome of  
4 this case. These representations are made to enable the Court to evaluate possible  
5 disqualification or recusal.  
6  
7

8 ➤ NONE  
9  
10

11 Dated: October 14, 2013

Respectfully submitted,

12 FINNEGAN, MARKS, THEOFEL & DESMOND  
13 A Professional Corporation  
14

15 /s/ Ellen Sims Langille

16 Ellen Sims Langille  
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### III. INTRODUCTION

SB 863 was a negotiated, bipartisan legislation widely supported by both business and labor.<sup>1</sup> As part of that legislation, in order to achieve real reform and in hopes of meeting the constitutionally mandated goal of providing compensation to injured workers in an expeditious, inexpensive, and unencumbered manner,<sup>2</sup> the bill imposed a \$100 *reimbursable* “lien activation” user fee upon lien claimants. The lien activation fee is not a penalty; rather, but it constitutes user funding actually payable<sup>3</sup> to fund the very system in which lien claimants seek to participate.<sup>4</sup> Such user-funded reform was necessitated by the severe overcrowding of the WCAB calendars that has threatened to completely derail the entire system.<sup>5</sup>

Against this background, Plaintiffs have filed for declaratory and injunctive relief. Defendants have motioned this court for dismissal of the Complaint, and opposed the request for a preliminary injunction. Because Plaintiffs have failed to state a claim upon

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<sup>1</sup> See, e.g., Exh. B to Defendants’ Request for Judicial Notice, at pp. 13-15.

<sup>2</sup> Cal. Const., art. XIV, § 4.

<sup>3</sup> The fees generated by the lien activation fee and lien filing fee are deposited into the Revolving Fund, used to administer California’s workers’ compensation program. Lab. Code §§ 62.5(a)(1)(A), 4903.06(c)(3).

<sup>4</sup> Incredibly, while paying lip service to the plight of small lien holders, plaintiffs actually admit to being among the primary players in the creation of the backlog currently burdening the system. Keeping in mind that “relatively few lien claimants account for a disproportionately large share of the medical liens filed,” (CHSWC Report at p. 47), it is noted that just one medical group plaintiff holds over 20,000 liens (Declaration of Jeffrey Gaines), while another individual plaintiff admits to holding 1500 workers’ compensation liens (Declaration of David Payne, M.D.).

<sup>5</sup> See, e.g., Exh. A to Defendants Request for Judicial Notice, at pp. 1, 14.

1 which relief can be granted, *amicus curiae* CalChamber urges this Court to dismiss the  
2 case.  
3

#### 4 IV. LEGAL ARGUMENT

##### 5 A. The Lien Activation Fee in SB 863 Is a Rational Response to an 6 Escalating Crisis at the WCAB.

7  
8 The California Commission on Health and Safety and Workers' Compensation  
9 ("CHSWC") is a bipartisan commission charged with conducting "a continuing  
10 examination of the Worker's Compensation system."<sup>6</sup> As part of the executive branch,<sup>7</sup> its  
11 official acts may be judicially noticed.<sup>8</sup> CHSWC issued a formal report on the impact  
12 of liens in the workers' compensation system, dated January 5, 2011, for which judicial  
13 notice has been requested by defendants.<sup>9</sup> As the opening statement of the CHSWC  
14 Report states bluntly, "*liens are choking the system.*"  
15  
16

17  
18 All stakeholders are suffering: With lien litigation consuming as much as 35% or  
19 more of the court's calendar,<sup>10</sup> injured workers are delayed in obtaining adjudication of  
20 their claims; employers and insurers are compelled to compromise lien claims that should  
21 not be paid in order to achieve closure; and lien claimants are required to wait years  
22 before receiving determination of their claims.  
23  
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25 <sup>6</sup> Lab. Code § 77.

26 <sup>7</sup> Lab. Code § 75.

27 <sup>8</sup> Evid. Code §452(c).

28 <sup>9</sup> See Liens Report of California Commission on Health and Safety and Workers' Compensation ("CHSWC Report"), attached as Exhibit A to the Defendants Request for Judicial Notice.

<sup>10</sup> CHSWC Report, at p.1 (Exh. A to RJN).

1 The study confirmed that the previous implementation of a \$100 lien filing fee  
2 back in 2004 had an immediate and sustained effect on lien filings.<sup>11</sup> As soon as the fee  
3 was implemented, lien filings dropped precipitously and stayed at low levels -- at least  
4 until the filing fee was repealed, at which point, lien filings doubled and have continued  
5 to spiral beyond any levels in recorded history at the WCAB.<sup>12</sup>

6  
7  
8 The CHSWC Report concluded that the WCAB court system “does not have the  
9 capacity to handle all of the lien disputes that are filed.”<sup>13</sup> As one of the primary  
10 solutions proposed by CHSWC, the study recommended provision of sufficient resources  
11 at the WCAB District Offices, including increased staffing.<sup>14</sup> And the study strongly  
12 recommended reimplementing of the \$100 filing fee, listing the imposition of such a fee  
13 as the first of 28 recommendations on the lien crisis.<sup>15</sup> So strong was the study’s  
14 recommendation for filing fee, that the recommendation was expanded in greater detail in  
15 an Appendix to the CHSWC Report.<sup>16</sup>

16  
17  
18 The Legislature took the documented warnings of an ongoing lien crisis from  
19 CHWSC very seriously. In light of the CHSWC Report, the Legislature undertook the  
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24 <sup>11</sup> CHSWC Report, at pp. 4-5 and Figure 1 (Exh. A to RJN).

25 <sup>12</sup> *Id.*

26 <sup>13</sup> CHSWC Report, at p. 8 (Exh. A to RJN). At a CHSWC hearing on October 20, 2010, it was said that it  
27 would take 30 years for the Los Angeles District Office to get through the backlog of recorded liens,  
28 even if not a single new lien was filed. CHSWC Report, at p. 9.

<sup>14</sup> CHSWC Report, at pp. 9, 12.

<sup>15</sup> CHSWC Report, at p.8.

<sup>16</sup> CHSWC Report, Appendix 2, pp. 56-58.



1 necessary steps to bring more money into an overburdened system, and implemented  
2 both lien activation fees and lien filing fees. These fees serve the dual purposes of  
3 reducing the number of liens being filed while simultaneously increasing the amount of  
4 funding available to provide for the court staffing necessary to get through the lien  
5 backlog.  
6  
7

8 In their amicus brief, CSIMS contends that the Legislature acted improperly by  
9 enacting a lien activation fee in addition to the lien filing fee recommended by  
10 CHSWC.<sup>17</sup> CSIMS apparently contends that the recommendations from CHSWC should  
11 have been interpreted strictly and without legislative alteration. Of course, the CHSWC  
12 Report made additional recommendations for the imposition of an automatic dismissal by  
13 operation of law for any lien which is not activated for hearing within a finite time,<sup>18</sup> and  
14 for the imposition of strict statutes of limitations for lien filings.<sup>19</sup> Conveniently,  
15 although these new rules and regulations also significantly impact pending lien claims  
16 and potentially represent further “takings,” the amicus brief from CSIMS ignores these  
17 explicit recommendations as they rely upon the CHSWC study.<sup>20</sup> But the fact remains  
18 that it is the Legislature that is vested with plenary authority, and not CHSWC.  
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27 <sup>17</sup> CSIMS’ Amicus Brief in Support of Plaintiff’s Request for Preliminary Injunctive Relief, at p. 4.

28 <sup>18</sup> CHSWC Report, at p. 38.

<sup>19</sup> CHSWC Report, at p. 39.

<sup>20</sup> CSIMS’ Amicus Brief in Support of Plaintiff’s Request for Preliminary Injunctive Relief, at p. 4.

1           Meanwhile, Petitioners complain of the “irrationality” of the \$100 lien activation  
2 fee, because it has an alleged disproportionate impact on providers with smaller liens.  
3  
4 But it is these same small liens and so-called “zombie liens”<sup>21</sup> that have clogged the  
5 system, and severely restricted the opportunity for the State’s employers and injured  
6 workers to obtain adjudication of their rights under the Workers’ Compensation Act.  
7  
8 Implementation of a \$100 user fee is a rational, reasonable, and responsible way for the  
9 DWC to address the costs associated with adjudication of these liens.  
10

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12           **B. Plaintiffs Have Failed to Demonstrate a “Taking” of a Protected**  
13           **Property Interest.**

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15           1. THERE IS NO VESTED PROPERTY RIGHT REQUIRING CONSTITUTIONAL  
16           PROTECTION.

17           Plaintiffs’ claims presented to this Court fail *ab initio*: There simply is no vested  
18 property right. The Complaint admits this fact plainly when it states that, separate and  
19 apart from the question of a lien activation fee, the providers of services including  
20 Plaintiffs “may not get paid at all until either the employer admits liability or they  
21 establish the employer’s liability through adjudication.”<sup>22</sup> The Complaint goes on to  
22 admit that Plaintiff’s right to payment is merely “derivative of the rights of the injured  
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28 <sup>21</sup> CHSWC Report, at pp. 34, 36-37.

<sup>22</sup> First Amended Complaint, at 8:19-20

1 worker” and that payment is conditional upon the injured worker’s recovery of  
2 compensation.<sup>23</sup>  
3

4 Plaintiffs pretend that their lien claims “were perfected long ago.”<sup>24</sup> On the  
5 contrary, the liens were *requested*; they were not perfected and they were not vested.  
6 Rather, the liens represent an expectation, and the Constitution does not protect hopes for  
7 payment.  
8

9 The fact that plaintiffs may have “had no reason to expect”<sup>25</sup> the imposition of a  
10 lien activation fee does not render the imposition of such a fee unconstitutional.  
11

12 2. CALIFORNIA DOES NOT CONSIDER RIGHTS BASED ON STATUTES TO BE  
13 VESTED PROPERTY RIGHTS.

14 The longstanding rule in California is that rights created by statute may be altered  
15 by the Legislature. Some 80 years ago, the California Supreme Court set out a rule of  
16 statutory construction that had been followed for decades:  
17

18 [A] cause of action or remedy dependent on a statute falls with a repeal of  
19 the statute, even after the action thereon is pending, in the absence of a  
20 saving clause in the repealing statute. The justification for this rule is that all  
21 statutory remedies are pursued with full realization that the Legislature may  
22 abolish the right to recover at any time.<sup>26</sup>  
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26 <sup>23</sup> First Amended Complaint, at 8: 21-24.

27 <sup>24</sup> Plaintiff’s Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, at  
1:16.

28 <sup>25</sup> *Ibid.*

<sup>26</sup> *Callet v. Alioto* (1930) 210 Cal. 65, 67-68, 290 P. 438 [citations omitted].

1 Thus, it is well-established that if the Legislature acts to amend or affect a cause of  
2 action granted only by statute, such amendment will be effective against all such causes  
3 of action still awaiting a final adjudication.<sup>27</sup>

4  
5 3. THE SAME RULES APPLY IN WORKERS' COMPENSATION CASES,  
6 INCLUDING THIS ONE

7 On at least two occasions, the California Court of Appeal has addressed the  
8 question of "vested rights" in the context of a newly enacted workers' compensation  
9 statute. In both instances, the California Courts determined that the statutory rights were  
10 not vested until and unless those rights had been reduced to judgment.  
11

12  
13 In *Graczyk v. WCAB*,<sup>28</sup> Ricky Graczyk was a university student on athletic  
14 scholarship. Graczyk was injured in a university football game and claimed that he was  
15 an employee of the university with a vested right to receive workers' compensation  
16 benefits. The Court of Appeal ruled against him, finding that a new Labor Code section  
17 excluded student athletes as employees.<sup>29</sup> Although the new section was enacted *after*  
18 Graczyk's injury, the Court of Appeal explained that in order to determine whether there  
19 is a vested right in a workers' compensation action, a court must look at the unique nature  
20 of workers' compensation law in California.  
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27 <sup>27</sup> *Justus v. Atchison* (1977) 19 Cal.3d 564, 575, 139 Cal. Rptr. 97 (statutory cause of action exists only  
so far and in such favor of such person as the legislative power may declare).

28 <sup>28</sup> *Graczyk v. WCAB* (1986) 184 Cal. App.3d 997, 229 Cal. Rptr. 494, 51 CCC 408.

<sup>29</sup> Lab. C. § 3352(k).

1 In California, the *Graczyk* Court explained, the right to workers' compensation  
 2 benefits is wholly statutory and is not derived from common law.<sup>30</sup> This statutory right is  
 3 exclusive of all other statutory and common law remedies, and substitutes a new system  
 4 of rights and obligations for the common law rules governing liability of employers for  
 5 injuries to their employees.<sup>31</sup> Because it is a creature of statute, a right of action under  
 6 workers' compensation laws exists only so far and in favor of such person as the  
 7 legislative power may declare.<sup>32</sup>

8 The *Graczyk* court concluded that there are no workers' compensation rights that  
 9 exist beyond what is provided by the Legislature in the workers' compensation statutes,  
 10 and that repeal of the authorizing statute eliminated the claim.<sup>33</sup> Thus, because *Graczyk*'s  
 11 inchoate right to benefits under the workers' compensation law was not reduced to final  
 12 judgment before the Legislature's enactment of new laws regarding employee status of  
 13 athletes, he did not have a vested right and his constitutional objections had no bearing on  
 14 the issue.  
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23 <sup>30</sup> *Graczyk, supra*, 184 Cal. App.3d at 1002.

24 <sup>31</sup> *Ibid.*

25 <sup>32</sup> *Id.* at 1008; *see also Justus v. Atchison, supra*, 19 Cal.3d at 575.

26 <sup>33</sup> *Graczyk v. WCAB, supra*, 184 Cal. App.3d at 1007 "Where a right of action does not exist at common  
 27 law, but depends solely on statute, the repeal of the statute destroys the inchoate right unless it has been  
 28 reduced to final judgment, or unless the repealing statute contains a saving clause protecting the right in  
 pending litigation. Because it is a creature of statute, the right of action exists only so far and in favor of  
 such person as the legislative power may declare....This justification for the rule that a statutory right of  
 action may be repealed is that all statutory remedies are pursued with full realization that the Legislature  
 may abolish the right to recover at any time [citations omitted, emphasis added]."

1 More recently, following a major workers' compensation reform (SB 899),  
2 California courts again addressed the question of whether that reform legislation could  
3 properly eliminate an employee's right to compensation for an injury that existed prior to  
4 the reform legislation. In holding that the Legislature had properly abolished rights of  
5 injured workers to compensation for a particular type of injury, the court in *Rio Linda*  
6 *Union School Dist. v. WCAB (Scheftner)* opined:  
7

8  
9  
10 Given the complete statutory nature of the workers' compensation system, it  
11 is apparent the specific right to compensation under such system for any  
12 industrial injury resulting in permanent disability because of the  
13 acceleration, aggravation, or "lighting up" of a prior nondisabling disease  
14 was a purely statutory right.... In its place, the Legislature substituted a new  
15 statutory right to compensation for the percentage of permanent disability  
16 directly caused by an industrial injury.<sup>34</sup>

17 Thus, it has been established that the Legislature has plenary authority to eliminate,  
18 abrogate, or modify the rights of parties to a pending workers' compensation case; the  
19 same must be said for the rights of lien claimants, whose liens are inchoate, unproven,  
20 and unresolved.

21 A subsequent case also interpreting the reforms engendered under SB 899 provides  
22 further illustrative language regarding the non-viability of a statutory remedy in workers'  
23 compensation cases following legislative action. In *Sierra Pacific Industries v. WCAB*,

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<sup>34</sup> *Rio Linda Union School Dist. v. WCAB (Scheftner)* (2005) 131 Cal.App.4th 517, 528, 31 Cal. Rptr. 3d 789, 70 Cal. Comp. Cases 999.

1 the court underscored the transitory nature of statutory remedies, which necessarily rise  
 2 and fall with legislative enactments:  
 3

4 The rule, however, may also include amendments. Where, as here, the  
 5 Legislature has conferred a remedy and withdraws it by amendment or  
 6 repeal of the remedial statute, the new statutory scheme may be applied to  
 7 pending actions without triggering retrospectivity concerns; as a general  
 8 rule, ... a cause of action or remedy dependent on a statute falls with a repeal  
 9 of a statute, even after the action thereon is pending, in the absence of a  
 10 saving clause in the repealing statute. ***The justification for this rule is that  
 all statutory remedies are pursued with full realization that the legislature  
 may abolish the right ... at any time.***<sup>35</sup>

11 Like *Graczyk*, *Scheftner*, and *Sierra Pacific*, this present case involves the  
 12 application of a new workers' compensation statute to pending claims. But because these  
 13 lien claims were not reduced to final judgment before the enactment of SB 863, there was  
 14 no vested right of the Plaintiffs to maintain their litigation *status quo*, and SB 863 fairly  
 15 and properly applies in full to these liens.  
 16  
 17

## 18 V. CONCLUSION

19 The Legislature has been constitutionally vested with "plenary power" to establish  
 20 a complete and exclusive system of workers compensation,<sup>36</sup> and this includes the power  
 21 to address an extraordinary crisis by means of a moderate user fee.  
 22  
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27 <sup>35</sup> *Sierra Pacific Industries v. WCAB* (2006) 140 Cal. App. 4<sup>th</sup> 1498, 1508 [emphasis added] [internal  
 28 citations and quotations omitted].

<sup>36</sup> Cal. Const., art. XIV, § 4; Lab. Code § 3201.

1           Because the Plaintiffs cannot establish that there has been a taking of a vested  
2 property right, they are not entitled to injunctive relief. Defendants' Motion to Dismiss  
3 should be granted.  
4

5  
6  
7 Dated: October 14, 2013

Respectfully submitted,

8 FINNEGAN, MARKS, THEOFEL & DESMOND  
9 A Professional Corporation

10  
11 /s/ Ellen Sims Langille

12 Ellen Sims Langille

13 *ellen.langille@fntdlaw.com*

14 Finnegan, Marks, Theofel and Desmond

15 P.O. Box 478011

16 San Francisco, CA 94147 – 8011

17 Tel: 415-931-9284

18 Fax: 415-931-6247

19 Attorneys for *amicus curiae* CalChamber  
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2 FOR THE CENTRAL DISTRICT OF CALIFORNIA

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5 ANGELOTTI CHIROPRACTIC, INC., et ) Case No.: 8:13-cv-01139-GW-JEM  
6 al. )

7 Plaintiffs, )  
8 vs. )

**[proposed] ORDER GRANTING  
LEAVE TO FILE AMICUS BRIEF**

9 CHRISTINE BAKER, *in her official* )  
10 *capacity as Director of the California* )  
11 *Department of Industrial Relations,* )

**Dept.:** Courtroom 10  
**Judge:** Hon. George H. Wu  
**Date:** October 24, 2013  
**Time:** 8:30 a.m.

12 RONNIE CAPLANE, *in her official* )  
13 *capacity as Chair of the California* )  
14 *Workers' Compensation Appeals Board,* )  
15 and )

16 DESTIE OVERPECK, *in her official* )  
17 *capacity as Acting Administrative director* )  
18 *of the California Division of Workers'* )  
19 *Compensation,* )

20 Defendants. )  
21 \_\_\_\_\_ )

22 Motion having been made by California Chamber of Commerce, and GOOD  
23 CAUSE APPEARING based upon the Application for Leave to File Amicus Curiae  
24 Brief, the proposed Amicus Curiae Brief submitted by the California Chamber of  
25 Commerce is hereby ALLOWED.

26 DATED:

27 by \_\_\_\_\_  
28 Hon. George H. Wu