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CHRISTINE BAKER, RONNIE CAPLANE, and
DESTIE OVERPECK, in their official capacities

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANGELOTTI CHIROPRACTIC, INC. d/b/a TAFT CHIROPRACTIC,

MOONEY & SHAMSBOD CHIROPRACTIC, INC.,

CHRISTINA-ARANA & ASSOCIATES, INC.,

JOYCE ALTMAN INTERPRETERS, INC.,

SCANDOC IMAGING, INC.,

BUENA VISTA MEDICAL SERVICES, INC., and

DAVID H. PAYNE, M.D. INC. d/b/a/ INDUSTRIAL ORTHOPEDICS SPINE & SPORTS MEDICINE,

Plaintiffs,

v.

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

RONNIE CAPLANE, *in her official capacity as Chair of the California Workers' Compensation Appeals Board,* and

CASE NO.: 8:13-cv-01139-GW-JEM

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
[Fed. R. Civ. P. 12(b)(6)]

Dept.: Courtroom: 10
Judge: Hon. George H. Wu
Date: October 24, 2013
Time: 10:00 a.m.

Filed Concurrently:

1. Proposed Order
2. Request for Judicial Notice and Proposed Order
3. Declaration of Harold L. Jackson in Support of Request for Judicial Notice

DESTIE OVERPECK, *in her official capacity as Acting Administrative Director of the California Division of Workers' Compensation,*

Defendants.

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 24, 2013, at 10:00 a.m. before Honorable George H. Wu, United States District Court Judge, in Courtroom 10, 312 North Spring Street, Los Angeles, California 90012-4701, Defendants Christine Baker ("Baker"), Ronnie Caplane ("Caplane"), and Destie Overpeck ("Overpeck") (collectively, "Defendants"), will move and hereby do move to dismiss, with prejudice, all claims alleged against them as set forth in the First Amended Complaint. Specifically, Defendants seek dismissal pursuant to Federal Rule of Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

In support of this motion, Defendants rely upon the statement of facts, authorities, and argument set forth in the accompanying memorandum, pleadings and records on file in this action, and any other arguments and evidence presented to this Court at or before the hearing on this motion.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on and after August 15, 2013.

Dated: September 12, 2013

Respectfully submitted,

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR-LEGAL UNIT

/s/ Harold Jackson
Harold L. Jackson
Mi Kim
Kumani Armstrong
Attorneys for Defendants Christine Baker, Ronnie Caplane, and Destie Overpeck

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this action, Plaintiffs complain that a $100 processing fee ("lien activation fee") established by the California legislature in 2012 for pending workers' compensation bill disputes ("liens") over payment for certain goods and services provided for injured workers offends the takings, due process, and equal protection clauses. The legislature adopted the lien activation fee as part of a major reform to help resolve a massive backlog of liens that threatened the functioning of the entire workers' compensation system. The lien activation fee, which is deposited in the very account that funds the system that Plaintiffs use, is a rational response designed, in part, to weed out frivolous lien disputes. Further, the legislature was careful to provide a process by which Plaintiffs could recoup any paid fee. As will be seen, Plaintiffs have no protected property interest to which the takings and due process clauses apply. The lien activation fee is a measured and constitutional remedy to the crisis facing the legislature.

To the extent Plaintiffs allege that the lien activation fee discriminates against both holders of smaller liens due to disproportionate impact on them and against independent providers of goods and services as a class because other specified entities are exempted from paying the fee, these arguments fail because the classifications complained of readily pass the rational basis test. Finally, Defendants Christine Baker ("Baker") and Ronnie Caplane ("Caplane") must be dismissed. Baker, as Director of the Department of Industrial Relations ("DIR"), has immunity from this suit because she lacks enforcement authority over the workers' compensation system and the particular fee at issue. Caplane, as a judicial officer, should be dismissed because under relevant authority, the presence of Defendant Destie Overpeck in the case provides any relief that might be accorded Plaintiffs.

As is detailed below, the First Amended Complaint ("FAC") should be

dismissed as a matter of law because Plaintiffs fail to state a claim upon which relief can be granted.

II. BACKGROUND-REGULATORY SETTING

A. Overview of the California Workers' Compensation Law

The California legislature enacted the workers' compensation law under the constitutional grant of plenary power to establish a complete system of workers' compensation. Cal. Const. art. XIV, § 4. As the California Supreme Court long ago explained, it is an expression of police power:

> 'Under it, the state may "prescribe regulations promoting the health, peace, morals, education, and good order of the people, and legislate so as to increase the industries of the state, develop its resources and add to its welfare and prosperity." In fine, when reduced to its ultimate and final analysis, the police power is the power to govern.'

W. Indem. Co. v. Pillsbury, 170 Cal. 686, 694, 151 P. 398 (1915) (citations omitted).

The Division of Workers' Compensation ("DWC"), an agency within the DIR, administers the workers' compensation system. Except for the exercise of the judicial power that is vested in the Workers' Compensation Appeals Board ("WCAB"), section 111(a) places the authority for overseeing the operation of DWC under the control of the Administrative Director (presently, Defendant Acting Administrative Director Overpeck). The legislature invested the DWC Administrative Director, appointed by the Governor subject to Senate confirmation, with the authority to adopt the rules and regulations at issue in this case. *See, e.g.*, Cal. Labor Code §§ 138.1(a) (West 2013); 4603.5 (regulations to make effective requirements of the article); and 4903.06(a)(3) (regulations regarding lien activation fees).[1]

Pursuant to the plenary power granted by the California Constitution, the workers' compensation law establishes various requirements on the provision of

[1] All further references to statutory provisions are to the California Labor Code, unless otherwise indicated.

services for workplace injuries. *See, e.g.,* § 4603.2(b). It allows certain claims for payment for goods, services and benefits provided to or on behalf of injured workers to be filed as liens. § 4903. These liens include claims for payment for medical treatment, including ancillary services such as interpreting or translation services and photocopy services. §§ 4600, 4620-22, 4903, 5811. Unlike conventional liens secured by property, a "typical" workers' compensation lien is a direct claim against the employer or its insurer for a benefit which is not otherwise payable to the injured worker. *See*, Liens Report of California Commission on Health and Safety and Workers' Compensation ("CHSWC Report") (January 5, 2011), attached as Exhibit A to the Defendants' Request for Judicial Notice ("Exh. A to RJN"), at p. 14.

The lien rights of a provider of medical and ancillary services are "derivative of the rights of the injured worker. The lien is a claim against a possible workers' compensation recovery and without such recovery, the lienholder recovers nothing." FAC, ¶ 28. The providers of ancillary services such as translation are further "dependent both on the workers' success in establishing that the injury was work-related and on a determination that the medical treatment provided was necessary and appropriate." FAC, ¶ 38. In particular, recovery of medical treatment costs requires proof that the worker was employed by the defendant employer, the injury was compensable, *i.e.*, it arose out of and in the course of employment, and that the medical treatment was reasonably required to cure or relieve the effects of the injury. *See, e.g.,* §§ 3600, 4600, 4903(b).

Workers' compensation liens have historically been a subject of significant regulation by the legislature. *See, e.g.*, former §§ 4903(b) (limiting certain liens); 4903.4(a) & (b) (lien hearings); 4903.6 (prerequisites to lien filings); 4903.5(a) (limitations period for liens for medical services); 4600 (medical treatment that is "reasonably required"); 4622 (provider reimbursement of unreasonable charges);

5307.6 (medical-legal fee schedule); and 5307.1 (medical treatment fee schedule).[2]

Senate Bill No. 863 (2011-2012 Reg. Sess.), chapter 363, amended section 4903, among other statutes, adding, amending and retaining significant due process protections for Plaintiffs' liens. These include the right to present their claims in a lien hearing or arbitration, § 4903.4; right to seek review of an adverse employer determination of the reasonableness and necessity of fees, services, and expenses; and right to WCAB reconsideration (§ 5900) and judicial review (§ 5810). Of note in this case, Plaintiffs' rights include the right to obtain reimbursement of the $100 lien activation fee through a hearing process. § 4903.07.

B. California's Lien Crisis

The FAC alleges that SB 863 was "passed in response to a 2011 report by the California Commission on Health and Safety and Workers' Compensation." FAC, ¶ 36; Exh. A to RJN.[3] The CHSWC Report described California's lien crisis in stark terms, stating that liens were "choking" California workers' compensation system. Exh. A to RJN, at p. 1. CHSWC reported to the legislature that more than an estimated 350,000 liens were filed in 2010, and over 470,000 were expected to be filed in 2011. Exh. A to RJN, at p. 7. The prevalence of liens, unique to California, "create[d] a heavy burden" on the workers' compensation system by "interfering with injured workers' access to the courts[] and imposing substantial costs on employers." Exh. A to RJN, at pp. 1, 4. The workers' compensation courts "d[id] not have the capacity to handle all the lien disputes that [we]re filed."

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[2] Review of just some of the legislative efforts to deal with liens can be found in *Perrillo v. Picco & Presley*, 157 Cal. App. 4th 914, 929, 70 Cal. Rptr. 3d 29, 40 (Cal. Ct. App. 2007); *Sierra Pacific Indus. v. Workers' Comp. Appeals Bd.*, 140 Cal. App. 4th 1498, 1510-1512, 45 Cal. Rptr. 3d 550 (Cal. Ct. App. 2006); and *Ameri-Med. Corp. v. Workers' Comp. Appeals Bd.*, 42 Cal. App. 4th 1260, 1274-79, 50 Cal. Rptr. 2d 366, 375-78 (Cal. Ct. App. 1996) (describing legislature's efforts to regulate cost of liens).

[3] The California Commission on Health and Safety and Workers' Compensation ("CHSWC") operates as a research agency of DIR and consists of appointees of the Governor and legislative leaders. § 75(a).

Id., at p. 8. They lacked the resources to both process and adjudicate these claims. *Id.*, at pp. 8-9. Referring to an estimate of lien volumes, CHSWC stated: "Even if that estimate [wa]s too high, there [wa]s not enough time for the judges to hear and decide all of the disputes arriving each month, let alone to work th[r]ough the accumulated cases." *Id.*, at p. 9. "A court system that is overwhelmed by liens is unable to enforce the law." *Id.*, at p. 10.

The lien volume also imposed significant costs on employers and insurers who spent an estimated $1,000 per lien in adjustment expenses alone. Exh. A to RJN, at p. 7. CHSWC added: "If even a third of the liens filed this year could have been avoided by a better functioning system that would mean that $117 million dollars of frictional costs could have been saved." *Id.*, at p. 7.

CHSWC reported to the legislature that "[a] filing fee clearly deters filing liens." Exh. A to RJN, at p. 11. CHSWC analyzed the impact of a 2003 lien filing fee statute. It reported there were about 500,000 lien filings in 2003. *Id.* at pp. 5, 56 (Appendix 2). A $100 filing fee for medical liens was enacted in September of 2003 to become effective January 1, 2004. *Id.* at p. 5. In 2005, there were 224,205 lien filings. *Ibid.* The filing fee, however, was repealed effective July 12, 2006. Upon its repeal, "the monthly filings immediately doubled" so that "[n]early 700,000 liens were filed in 2007." *Ibid.*

C. SB 863's Provisions Related to Lien Filing and Activation Fees

SB 863 imposes a filing fee of $150 for certain liens filed on or after January 1, 2013, and a $100 lien activation fee for certain liens filed before January 1, 2013, but activated for a lien conference after January 1, 2013. The fees are deposited in the Workers' Compensation Administration Revolving Fund, to be expended by DIR for the purpose of administering the state's workers' compensation program. §§ 62.5(a)(1)(A), 4903.05(c)(4), and 4903.06(a)(3).

The legislative history of SB 863 demonstrates that the legislature

considered the problem of the "growing volume of problem liens."[4] It recognized that the "current lien system in workers' compensation is out of control," with "hundreds of thousands of backlogged liens, possibly in excess of a million, many . . . related to long-since closed cases," and common "lien abuse." The legislative analysis expressly stated:

> To address this growing volume of problem liens, the bill proposes to re-enact a lien filing fee, so that potential filers of frivolous liens have a disincentive to file. This approach worked well in the past before it sunset (due to the DWC's inability to track the fees – a problem DWC says no longer exists). The lien filing fee is refundable if the lien-claimant prevails. In addition for liens that are pending and were filed after the prior filing fee sunset, the bill provides for the payment of an activation fee. Again, the purpose is to provide a disincentive to file frivolous liens.

Exhs. B, C, D to RJN, at pp. 11, 12, and 16-17, respectively. SB 863 left intact the ability of providers of goods and services to resolve lien claims with employers both before and after the filing of liens. *See* §§ 4903 (arbitration) and 4903.6 (demand and settlement short of hearing). For liens filed after January 1, 2013, SB 863 requires a $150 filing fee. For liens filed before January 1, 2013, a lien activation fee of $100 must be paid at the time a lien claimant files a "Declaration of Readiness" that sets up a conference and hearing on the lien before a workers' compensation administrative law judge. § 4903.06.

SB 863 also provides that lien claimants "shall be entitled to an order or award for reimbursement of a lien filing fee or the lien activation fee, together with interest at the rate allowed on civil judgments," by making a written demand for settlement of the lien claim not less than 30 days before filing the lien or a

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[4] Assem. Comm. on Insurance, analysis of S. 863, 2011-2012 Reg. Sess. (August 31, 2012), p. 11; Assem. Floor Analysis of S. 863, 2011-2012 Reg. Sess. (September 1, 2012), p. 11; S. Floor Analysis of S. 863, 2011-2012 Reg. Sess. (August 31, 2012), p. 16. These documents are attached as Exhibits B, C, and D, respectively, to the Defendants' Request for Judicial Notice.

declaration of readiness to proceed, where the employer or insurer fails to accept the settlement demand within 20 days of receipt of the demand. In that event, the lien claimant may proceed to a hearing before a workers' compensation judge or arbitrator in order to obtain an award that includes the lien amount and the lien filing fee or lien activation fee if a final award is made in favor of the lien claimant in a sum that is equal to or greater than the amount of the demand. § 4903.07(a). Lien claimants also may recover the filing fee or activation fee "pursuant to the express terms of an agreed disposition of a lien dispute." § 4903.07(b).

III. ARGUMENT

A. Standard of Review for Motion to Dismiss

For a Rule 12(b)(6) motion, the Court is limited to the allegations on the face of the complaint, including documents attached thereto, matters which are properly judicially noticeable and "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *See Marder v. Lopez,* 450 F.3d 445, 448 (9th Cir. 2006); *Lee v. City of Los Angeles,* 250 F.3d 668, 688-89 (9th Cir. 2001). Dismissal is proper where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990); *see also, Bell v. Twombly*, 550 U.S. 544, 561-63, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

B. SB 863 Does Not Violate the Takings Clause

1. Plaintiffs lack a protected property interest

In order to state a claim under the Fifth Amendment's takings clause, "a plaintiff must establish that he possesses a constitutionally protected property interest" and that his property was taken without just compensation. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984). Two categories of regulatory action generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a

permanent physical invasion of its property, it must provide just compensation. A second categorical rule applies to regulations that completely deprive an owner of "*all* economically beneficial us[e]" of the property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (internal citation and quotations omitted; emphasis in original). Apart from "these two relatively narrow categories [. . .], a regulatory takings challenge is governed by the standards set forth in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)." *Id.* A "taking may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (internal citations and quotations omitted). Plaintiffs' FAC constitutes a *Penn Central* regulatory takings challenge.

Before reaching the *Penn Central* standard, (*see infra,* at pp. 10-13), Plaintiffs must first prove the existence of a protected property right. *Penn Central, supra,* 438 U.S. at 124. The Constitution itself does not create property rights. Instead, property rights must stem from an independent source, such as state law. *Ruckelshaus, supra,* 467 U.S. at 1001. Hence, the Court must determine whether the Plaintiffs' alleged vested property rights (*see* FAC, ¶¶ 4, 49, 50, 57, 58) are recognized under California law. *See generally, Phillips v. Washington Legal Found.,* 524 U.S. 156, 164, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998) (applying state law to analyze property rights in takings claim).

California's workers' compensation system "is exclusive of all other statutory and common law remedies, and substitutes a new system of rights and obligations for the common law rules governing liability of employers for injuries to their employees." *Vierra v. Workers' Comp. Appeals Bd.,* 154 Cal. App. 4th 1142, 1147, 65 Cal. Rptr. 3d 423 (Cal. Ct. App. 2007) (citation and quotation omitted). The right to receive benefits is "wholly statutory." *See, e.g., DuBois v.*

Workers' Comp. Appeals Bd., 5 Cal. 4th 382, 388, 853 P. 2d 978 (1993); *Longval v. Workers' Comp. Appeals Bd.*, 51 Cal. App. 4th 792, 799-800, 59 Cal. Rptr. 2d 463 (Cal. Ct. App. 1996).

Plaintiffs allege the property taken by the $100 processing fee is their workers' compensation liens filed prior to December 31, 2012. FAC, ¶ 49. Plaintiffs also allege the "medical services and ancillary goods and services" are "valuable private property." FAC, ¶ 50. Yet, Plaintiffs' liens are not *protected* property rights for purposes of the takings clause because, under California law, Plaintiffs' rights to recover on the liens are not vested interests for several reasons.

First, because any entitlement to workers' compensation benefits is entirely statutory, a right of action based on a workers' compensation statute "exists only so far and in favor of such person as the legislative power may declare." *Graczyk v. Workers' Comp. Appeals Bd.*, 184 Cal. App. 3d 997, 1006-1007, 229 Cal. Rptr. 494 (Cal. Ct. App. 1986). Unlike a common law right, "[a] statutory remedy does not vest until final judgment." *South Coast Reg'l Com. v. Gordon,* 84 Cal. App. 3d 612, 619, 148 Cal. Rptr. 775 (Cal. Ct. App. 1978). A statutory right that has not vested remains "'inchoate, incomplete, or unperfected.'" *People v. One 1953 Buick 2-Door,* 57 Cal. 2d 358, 365, 369 P.2d 16 (1962) (citation omitted).

Second, when a pending workers' compensation claim rests solely on a statutory basis, and when the rights under the statute have not vested in a final judgment, the legislature can modify or entirely repeal the right at any time. *See In re Consol. U.S. Atmospheric Testing Litig.,* 820 F.2d 982, 989 (9th Cir. 1987), where the court stated:

> No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. . . . This is true after suit has been filed and continues to be true until a final unreviewable judgment is obtained.

(Internal citations and quotations omitted); *Governing Bd. v. Mann*, 18 Cal. 3d 819, 829-831, 558 P.2d 1 (1977); *Beverly Hilton Hotel v. Workers' Comp. Appeals*

Bd., 176 Cal. App. 4th 1597, 1604, 99 Cal. Rptr. 3d 50 (Cal. Ct. App. 2009).

Third, a workers' compensation lien claimant for goods or services rendered an injured worker cannot recover unless it has been shown that the worker was employed by the subject employer, an industrial injury was sustained, and that the goods or services were reasonably required for that injury. §§ 4600, 4620, 4621, 4903. Plaintiffs' right to recovery on their liens, therefore, is an "inchoate" or a "contingent" right, subject to legislative modification until the employee effects a settlement or recovers a judgment against the employer. *See, e.g., Perrillo, supra,* 157 Cal. App. 4th at 929; *Sierra Pacific Indus., supra,* 140 Cal. App. 4th at 1510.

In portraying the property being taken as their liens instead of the $100 fee itself, Plaintiffs attempt an end run around settled law that claims over payment of money or reasonable user fees are not cognizable under the takings clause. *United States v. Sperry Corp.,* 493 U.S. 52, 63, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989) ("a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services"; *Vance v. Barrett,* 345 F.3d 1083, 1089 (9th Cir. 2003) (deduction of expenses incurred in creating and maintaining inmate accounts not a taking); *Figueroa v. United States,* 57 Fed. Cl. 488, 503 (Cl. Ct. 2003) (increase in patent fees not a taking); *Commonwealth Edison Co. v. United States,* 271 F.3d 1327, 1329 (Fed. Cir. 2001) ("Takings Clause does not apply to legislation requiring the payment of money").[5]

Even accepting the allegation that the property Plaintiffs seek to protect under the takings clause is the liens they filed with the DWC, because those liens are inchoate and contingent by law, no takings claim can be brought.

[5] To the extent Plaintiffs allege the property rights being taken are the "medical services and ancillary goods and services provided by Plaintiffs," that property, if it can be so called, does not stand apart from the lien mechanism by which payment for the associated bills can be obtained. FAC, ¶¶ 50, 51. The goods and services were rendered before the adoption of the lien processing fee and, logically, are not thereafter taken by virtue of a subsequent fee for processing the associated bills. FAC, ¶¶ 2, 4.

2. Plaintiffs cannot show a taking under *Penn Central*

Even assuming Plaintiffs can prove that their workers' compensation liens constitute a protected property right, Plaintiffs face an "uphill battle" with their takings claim, which is a facial attack of the statute implementing the lien activation fee. *Hotel & Motel Ass'n v. City of Oakland,* 344 F.3d 959, 965 (9th Cir. 2003) (explaining the distinction between a facial takings challenge and an "as applied" takings challenge).

Three factors for a takings claim set forth in *Penn Central, supra,* 438 U.S. at 124, are: (1) the economic impact of the regulation; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the regulation. *Lingle, supra*, 544 U.S. at 538-39. The analysis turns in large part on "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.,* at 540. Not all factors need be examined. Rather, a court may dispose of a takings claim on the basis of one or two of them. *See Ruckelshaus, supra,* 467 U.S. at 1005; *Maritrans Inc. v. United States,* 342 F.3d 1344, 1359 (Fed Cir. 2003) (where nature of governmental action and the economic impact of the regulation did not establish a taking, the court need not consider investment-backed expectations).

The economic impact of the challenged $100 fee is minor because Plaintiffs can obtain an order that the fee be reimbursed by the employer or insurer by using the statutory mechanism for a hearing to prove up the lien after nonpayment by the employer. *See* § 4703.07(a). Even if the $100 fee was non-recoverable, this fee would not "destroy[]" or "substantially impair[] the values of all liens," (FAC, ¶ 52), within the meaning of the takings clause, because "[m]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for S. California,* 508 U.S. 602, 645, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993), citing *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384, 47 S. Ct. 114, 71

L. Ed. 303 (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian,* 239 U.S. 394, 405, 36 S. Ct. 143, 60 L. Ed. 348 (1915) (92.5% diminution in value); *MHC Fin. Ltd. P'ship v. v. City of San Rafael,* 714 F.3d 1118, 1127 (9th Cir. 2013) (81% diminution in value would not have been sufficient economic loss).

The factor relating to the character of the regulation similarly undermines Plaintiffs' taking claim. SB 863, supported by a lengthy and varied list of business, labor, and medical provider organizations (*see, e.g.,* Exh. B to RJN, at pp. 13-15), embodied the conclusion of a bipartisan and supermajority of both houses of the legislature that an overcrowded workers' compensation system required reform of the processing of liens in order to discourage frivolous liens. The bill achieved that reform not by destroying liens, as Plaintiffs allege (FAC, ¶ 54), but by imposing a modest processing fee that: (a) could be reimbursed to the lien claimant by an employer or insurer when the lien claimant proved up its entitlement to payment; and (b) would be deposited in the account that funds the very system that allows lien claimants to pursue payment of their bills using the workers' compensation system. §§ 62.5(a)(1)(A), 4903.06(c)(3). Unlike takings cases that involve physical invasion by the government, the adoption of the lien activation fee took place against the backdrop of a well-researched study that identified a crisis in the workers' compensation system. The study led to a major reform that balanced competing interests to correct a serious backlog in cases that interfered with workers' access to the courts. Exh. A to RJN, at pp. 1, 14. As to the last *Penn Central* factor, Plaintiffs' liens lack investment-backed expectations. For many years, California has heavily regulated Plaintiffs' entitlement to recovery on their bill disputes. *See discussion*, at pp. 3-4 & n. 2, *supra*; *Kaiser Found. Hospitals v. Workers' Comp. Appeals Bd.,* 87 Cal. App. 3d 336, 347, 151 Cal. Rptr. 368 (Cal. Ct. App. 1978). Continuing regulatory change was an expectable occurrence.

As recent as 2003, the legislature imposed a lien filing fee. Although it was repealed in 2005, the 2003 filing fee further erodes any expectation that California would not do so once again. CHSWC Report, Exh. A to RJN, at pp. 5, 11, 56, Appendix 2.

Due to a lack of a protected property interest in the liens and under the *Penn Central* factors, Plaintiffs' takings claim must be dismissed.

C. SB 863 Does Not Violate the Due Process Clause

1. No violation occurred because Plaintiffs have not been deprived of a protected interest

The Fifth and Fourteenth Amendments prohibit governmental action that would deprive a person of "life, liberty, or property without due process of law." U.S. Const. Amends. V and XIV. A procedural due process claim "has three elements: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process." *Portman v. County of Santa Clara,* 995 F.2d 898, 904 (9th Cir. 1993). Similarly, for substantive due process, a plaintiff must show "as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest." *Shanks v. Dressel,* 540 F.3d 1082, 1087 (9th Cir. 2008) (internal citation and quotation omitted).

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 59, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) ("*Sullivan*") (finding no protected property interest in medical treatment in context of workers' compensation case). Plaintiffs do not appear to allege a liberty interest. Instead, they allege a property right in their workers' compensation liens and in particular goods and services they already provided. FAC, ¶¶ 57, 58.

The due process clause does not protect every property interest: mere expectancies and contingent interests do not fall within its protection. For this

reason, retroactive application of law is not of concern, except when it would impair protected property interests. In other words, procedural due process applies only where there is a "legitimate claim of entitlement...." *See, e.g., Board of Regents v. Roth,* 408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Legislation readjusting rights and burdens, however, is not unlawful solely because it upsets otherwise settled expectations. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15-16, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976) (due process clause poses no bar to requiring a mine operator to provide compensation for a former employee's death or disability, even if the former employee terminated his employment in the industry before the law was passed); *see also, Ass'n of Orange Co. Dep. Sheriffs v. Gates,* 716 F.2d 733, 734 (9th Cir. 1983), *cert. denied,* 466 U.S. 937, 104. S. Ct. 1909, 80 L. Ed. 2d 458 (1984), 632 F. Supp. 2d 983, 988 (C.D. Cal. 2009) ("A reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms").

As discussed, *supra,* at pp. 3, 8-10, Plaintiffs lack a protected interest in the workers' compensation liens because the right to their property interest is dependent on recovery by the injured worker, as Plaintiffs allege. *See* FAC, ¶ 28. Unless and until the threshold findings have been made (as summarized below), Plaintiffs' liens are inchoate and contingent. Under state law, to recover on their liens, Plaintiffs must prove that the worker was employed and had a compensable injury, and the medical treatment was reasonable and necessary. *See, e.g.,* §§ 3600, 4600(a), 4620(a), 4621, 4903, 5705. Thus, as to the legislature's adoption of the lien activation requirement, Plaintiffs lack the property right to which due process protections extend.

The conclusion that Plaintiffs lack a protected property interest finds support in case law applying workers' compensation laws of other jurisdictions. *See, Sullivan, supra,* 526 U.S. at 61. There, no due process violation was found as

to Pennsylvania workers' compensation law because claimant-employees lacked property interest in payments for medical treatments for which they were eligible but to which they were not yet entitled because employer liability and reasonableness and necessity of medical treatment were not yet proven. *See also, Duncan v. Dep't of Labor,* 313 F.3d 445, 446-47 (8th Cir. 2002) (under federal workers' compensation law, no due process violation where claimant never had a property interest in workers' compensation "request" where there had been no finding of entitlement and the federal government had not paid out benefits).

2. SB 863's lien activation fee procedures comport with due process

Even assuming that Plaintiffs have a protected property interest, SB 863's lien activation procedures comport with due process for several different but equally compelling reasons. First, when dealing with economic regulation such as SB 863, the regulation "come[s] to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *E. Enterprises v. Apfel,* 524 U.S. 498, 524, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (internal citations and quotations omitted); *Usery, supra,* 428 U.S. at 15; *In re Consol. U.S. Atmospheric Testing Litig., supra,* 820 F.2d at 991-92. Indeed, the circumstances show the legislature faced a crisis and acted rationally in adopting the lien activation fee. *See, supra,* pp. 4-7 & 12 and pp.19-20, *infra.*

Second, Plaintiffs have not been denied any present entitlement. In *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 197, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001), a public works contractor alleged a due process violation by the state when, without holding an administrative hearing, the state served a notice on an awarding body to withhold contract payments. The Supreme Court found the contractor had no present entitlement to the contract payments, adding, "if California makes ordinary [breach-of-contract] judicial process available to [the

contractor] for resolving its contractual dispute, that process is due process." *Lujan,* 532 U.S. at 196-97. Plaintiffs' liens are similarly protected by procedures under SB 863. Simply by paying the lien activation fee (regardless of the value of the lien), Plaintiffs have access to the workers' compensation courts and the lien adjudication process. If the Plaintiffs prevail in the workers' compensation courts on their liens after demand and nonpayment by employers, they are entitled not just to the value of their lien, but also to a reimbursement of the lien activation fee. § 4903.07(a)(3). No lien claimant is precluded from pursuing its claim in the workers' compensation courts. Hence, as with the Respondent in *Lujan,* Plaintiffs have not been denied any present entitlement because their lien claims can be fully protected by the existing process available in the workers' compensation courts. *Accord, Duncan, supra,* 313 F.3d. at 447 (even if property right existed, workers' compensation claimant "received the process to which he was entitled: notice and the right to be heard"); *see also, California-Western States Life Insur. Co. v. Indus. Acc. Com'n,* 59 Cal. 2d 257, 266, 379 P.2d 328 (1963) (no due process violation where lien claimant had right to petition for reconsideration and judicial review as well as "participate in specific process of settlement").

Third, SB 863 does not deny Plaintiffs access to the only effective means to resolve their liens. Where another effective means for resolving the dispute exists, filing fees for a legal action do not raise a due process concern. *See, United States v. Kras*, 409 U.S. 434, 445-446, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973) ("However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors"). Plaintiffs have the ability to adjust their liens in negotiated settlements with the employers and/or their carriers. Indeed, Plaintiffs need not even file a lien in any pending workers' compensation case in order to recover on their bills. If they have a pending lien, they can negotiate a settlement before the need to pay a lien activation fee. § 4903.07(b).

3. If SB 863 provokes economic decisions about paying lien activation fees, that fact does not deny access to the workers' compensation courts

Requiring Plaintiffs to make economic decisions about proceeding in the lien adjudicatory process by paying the lien activation fee does not deny access to the workers' compensation courts. *See Murray v. Dosal*, 150 F.3d 814, 817-18 (8th Cir. 1998) (imposition of a filing fee does not unconstitutionally burden prisoner's right to court access) (citations omitted). Indeed, moderate filing fees, like SB 863's $100.00 lien activation fee, have been sustained against due process attack. *See, e.g., Kras, supra*, 409 U.S. at 436, 447 ($50.00 bankruptcy filing fee); *Ortwein v. Schwab*, 410 U.S. 656, 659, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973) (appellate filing fee); *Boyden v. Comm'r of Patents*, 441 F.2d 1041, 1044 (D.C. Cir. 1971) ($95.00 patent filing fee); *Schilb v. Kuebel*, 404 U.S. 357, 370, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1971) (bail-bond charge even when defendant later acquitted). One of the legitimate purposes of filing fees is "to make the system self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large." *Kras, supra,* 409 U.S. at 448. The $100 lien activation fee is deposited in the fund used to administer the workers' compensation system Plaintiffs rely upon for their liens, large and small. §§ 62.5(a)(1)(A), 4903.06(a)(3). It does not deny Plaintiffs access to workers' compensation courts.

4. SB 863 passes the *Mathews v. Eldridge* due process test

The process provided in SB 863 passes the due process test outlined in *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Under *Mathews*, a court considers three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest.[6]

[6] *Mathews* also recognized that the requirements of due process are flexible.

Here, Plaintiffs are not absolutely deprived of the use of the activation fees because the fees are being used for the Plaintiffs' benefit to fund the workers' compensation system. In that way, SB 863 makes ordinary workers' compensation adjudicatory process available to Plaintiffs for resolving their lien claims. *See Sperry Corp., supra,* 493 U.S. at 63 ("A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost....") (internal citation and quotation omitted). Further, as discussed above, the workers' compensation lien process is not the Plaintiffs' sole path to relief because Plaintiffs can avoid a fee by way of a negotiated settlement or arbitration. §§ 4903.4(a), 4903.07(b). Plaintiffs enjoy due process protections via access to the reconsideration process at the WCAB for lien activation fee disputes (§ 5900), as shown by Exhibit A to the FAC, a WCAB panel decision. *See also, Perrillo, supra,* 157 Cal. App. 4th at 930. Judicial review, as well, is available for any WCAB decision on the topic. § 5810.

Moreover, there is little risk of an erroneous deprivation because if the Plaintiffs prevail on their claims in the underlying workers' compensation cases, the lien activation fees are recoverable. § 4903.07(a). Therefore, requiring additional procedures is not necessary.

As discussed, *supra*, at pp. 4-7, California legislature has a legitimate interest in reducing frivolous lien claims to relieve the strain that litigation is placing on workers' compensation system. This interest, combined with the satisfactory procedures provided and the weak private right in this case, compel the conclusion that SB 863 does not violate Plaintiffs' right to due process.

5. Given its legislative purpose, SB 863 is neither arbitrary nor irrational

Assuming that Plaintiffs have a protected property interest in the liens, they cannot meet their burden of establishing that the legislature has acted in an

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Mathews, supra, 424 U.S. at 334-35.

arbitrary and irrational way in enacting the lien activation fee so as to violate due process. *See, e.g., Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 730, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984) (due process analysis investigates whether legislative act is arbitrary or lacks a "rational legislative purpose"); *Fields v. Legacy Health Sys.,* 413 F.3d 943, 956 (9th Cir. 2005). Plaintiffs allege a retroactive application of the lien activation fee that burdens their right to seek administrative and judicial vindication of their liens, and irrationally exempts certain entities. *See, e.g.*, FAC, ¶¶ 59, 60, 61. Yet, the due process test is met simply by showing that retroactive application of economic legislation itself is justified by a rational legislative purpose. *See, e.g., Sperry Corp., supra,* 493 U. S. at 64; *General Motors Corp. v. Romein,* 503 U. S. 181, 191, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992).

SB 863 constitutes a measured response to a lien crisis in California's workers' compensation system. *See, e.g., supra,* pp. 4-7, 12. The lien crisis was well-documented and studied. *See* Exh. A to RJN. The legislature's goal of relieving the pressure of excessive lien filings on the overburdened workers' compensation system is a constitutionally legitimate one and the means chosen by the legislature is plainly rational. The imposition of a lien filing fee "worked well in the past" to deter the filing of frivolous liens, and it can be expected to do so again. Exhs. B, C, D to RJN, at pp. 11, 11, and 16, respectively; *see also,* CHSWC Report at pp. 5, 11, Appendix 2.[7]

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[7] Case law supports the conclusion that a rational legislative purpose supports retroactive legislation.. *See, e.g., General Motors Corp., supra,* 503 U.S. at 191, (upholding retroactive legislation affecting Michigan's compensation benefits law because of the legislation's curative nature); *Sperry Corp., supra,* 493 U.S. at 64 (upholding retroactive effect of federal legislation with respect to the costs of an international claims tribunal); *Paramino Lumber Co. v. Marshall,* 309 U.S. 370, 378, 60 S. Ct. 600, 84 L. Ed. 814 (1940) (upholding legislation that reopened a workers' compensation proceeding after the time for judicial appeal had expired).

Plaintiffs' right to be heard continues, irrespective of the value of liens. The fee imposes no unreasonable burden but, instead, is a moderate user fee. Moreover, it is fully recoverable by the lien claimant. § 4903.07(a). As to the exemption of others from the fee, the legislature had a rational basis for the classification. *See discussion*, at pp. 21-22, *infra*.

The legislature had an enormous backlog of lien cases that interfered with the injured workers' access to the courts. Exh. A to RJN, at pp. 1, 4. The lien activation fee, meant to weed out frivolous liens and clear up the backlog, constitutes a rational response. Plaintiffs' due process claim must be dismissed.

D. SB 863 Does Not Violate the Equal Protection Clause

"Even in the context of a motion to dismiss, a plaintiff alleging an equal protection violation must plead a claim that establishes that there is not 'any reasonable conceivable state of facts that could provide a rational basis for the classification.'" *Dairy v. Bonham*, 2013 WL 3829268, *6. (N.D. Cal., July 23, 2013) (citing and quoting *Hettinga v. United States,* 677 F.3d 471, 479 (D.C. Cir. 2012)). Plaintiffs allege that the enforcement of the lien activation fee violates the equal protection clause based on disproportionate impact on holders of smaller liens and because certain entities are exempted from paying the fee. FAC, ¶¶ 66, 67. Plaintiffs are wrong on both counts.

The equal protection clause does not forbid all classifications, but rather "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn,* 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992). The legislature may make different laws for different classes of persons, provided that the classification is based on some rational ground of differentiation. Because Plaintiffs do not allege that SB 863 burdens a suspect class or a fundamental interest, the classification scheme will be upheld if it is rationally related to a legitimate state interest. *See, e.g., Sperry Corp., supra,* 493 U.S. at 65. Unless the classification is manifestly without support in reason, it

will be sustained. *Miller v. Wilson,* 236 U.S. 373, 383-384, 35 S. Ct. 342, 59 L. Ed. 628 (1915). Further, economic legislation like SB 863 "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 U.S. 314, 331-332, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981).

SB 863 easily passes the rational basis test. SB 863's lien activation fee does not have a "disproportionate impact" on holders of smaller liens as the Plaintiffs allege. *See* FAC, ¶ 66. Since the $100 activation fee can either be avoided or fully recovered on valid lien claims (*see* § 4903.07), the monetary value of the lien is wholly unaffected by the activation fee. The lien activation fee does not impair the value of any valid lien claim, whether large or small. Hence, SB 863 does not discriminate against holders of smaller liens.

Second, SB 863's exemption of certain entities from paying the activation fee is rationally related to a legitimate governmental interest. The entities exempted from the activation fee are generally medical insurers - a health care service plan, a group disability insurer, an employee benefit plan or a publicly funded program that pays for non-occupational health care. *See* § 4903.06(b). This classification cannot be said to be arbitrary because these entities are in a different position than independent providers of services for several reasons.

As authorized by California's workers' compensation laws, the DWC Administrative Director has recognized the exempt entities as Medical Provider Networks ("MPNs") pursuant to sections 4616 to 4616.7. CHSWC reported that MPNs "largely avoid lien disputes arising from in-network providers." Exh. A to RJN, at p. 2. Moreover, the exempt entities occupy a different relationship to injured workers than do independent providers of medical services. For example, the exempt entities have a contractual obligation to the patient to pay for non-occupational conditions without waiting to investigate other potential sources of payment, unlike direct providers such as Plaintiffs. Because of their contractual

obligation, the exempt entities have "no discretion to deny treatment to a person" covered in their respective plans or programs while the workers' compensation claim is being litigated, whereas direct providers do have such discretion. *See, e.g., Kaiser Found. Hospitals, supra,* 87 Cal. App. 3d at 360 (insurance companies have no discretion to deny treatment to covered person); *see also*, Exh. A to RJN, at pp. 38-39 (recognizing the "vital role" the exempt entities play for injured workers). With these distinctions, Plaintiffs cannot show that in exempting the named entities from the fee requirement California is "treating differently persons who are in all relevant respects alike." *Nordlinger, supra,* 505 U.S. at 10; *see, Kaiser Found. Hospitals, supra,* 87 Cal. App. 3d at 361. No equal protection violation exists.

E. Section 1983 Claim Carries No Independent Weight

To state a cognizable claim under 42 U.S.C. section 1983, Plaintiffs must plead that the Defendants deprived them of a right secured by the Constitution or law of the United States and acted under color of state law. *Marsh v. County of San Diego,* 680 F.3d 1148, 1152 (9th Cir. 2012). States are not "persons" for purposes of section 1983. *See Arizonans for Official English v. Arizona,* 520 U.S. 43, 69, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating other federal rights. *See Graham v. Connor,* 490 U.S. 386, 393-394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Based on the argument made, *supra* pp. 7-22, defenses eliminating the constitutional claims will necessarily defeat the 1983 action.

F. Defendants Baker and Caplane Must Be Dismissed Because They Are Improper Parties under Section 1983

A "court should not enjoin judges from applying statutes when complete relief can be afforded by enjoining other parties, because it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion." *Wolfe v. Strankman,* 392 F.3d 358, 366 (9th Cir.

2004), (internal citations and quotations omitted.) The WCAB exercises "judicial power." § 111; *see, e.g., Hand Rehab. Center v. Workers' Comp. Appeals Bd.*, 34 Cal. App. 4th 1204, 1214, 40 Cal. Rptr. 2d 734 (Cal. App. Ct. 1995) ("[The WCAB] . . . in legal effect is a court") (internal citations and quotations omitted). As a Commissioner of the WCAB, Caplane sits on three-member panels of the WCAB that decide petitions for reconsideration of adjudicatory trial level decisions. §§ 115 and 5900 *et seq*. Plaintiffs sue Caplane in her official capacity as a judicial officer. FAC, ¶ 17. Yet, Defendant Overpeck is the only defendant responsible for the administration of the challenged fee. *See* p. 2, *supra.* The presence of Defendant Overpeck in the case provides any relief that might be accorded Plaintiffs, and, under *Wolfe*, the FAC against Defendant Caplane should be dismissed.

Official capacity suits filed against state officials are merely an alternative way of pleading an action against the state entity within which the defendant is an officer. Such suits are subject to the same sovereign immunity defenses that the government entity may possess. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). The Eleventh Amendment prohibits federal jurisdiction over claims against a state unless the state has consented to suit or Congress has abrogated the state's immunity. The State of California has not consented to be sued under 42 U.S.C. section 1983 in federal court. *See Dittman v. California*, 191 F.3d 1020, 1025-26 (9th Cir. 1999).

An exception to the Eleventh Amendment exists pursuant to *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908) for a suit against a state officer which seeks prospective equitable relief. *See Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999). However, the state official who Plaintiffs seek to enjoin under *Ex parte Young* "must have some connection with the enforcement of the act to avoid making that official a mere representative of the state." *Id.*, at 619 (citation and quotation omitted). "This

connection must be fairly direct; . . . general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). To determine the requisite connection element, the Court looks to relevant state law. *See Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998).

Defendant Baker is the Director DIR, but sections 60 and 111(a) provide that DWC, now headed by Defendant Overpeck, administers and enforces the workers' compensation laws. The operation of DWC falls under the control of the Administrative Director, who is instructed to adopt the rules and regulations applicable to this case and otherwise oversees the DWC. § 4903.06(a)(3). *See* p. 2, *supra.*

Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior* in an action brought under section 1983. *See Ashcroft v. Iqbal,* 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Plaintiffs allege Defendant Baker oversees "California's Workers' Compensation System," FAC, ¶ 16, but this general duty "does not establish the requisite connection between [her] and the unconstitutional acts alleged by" Plaintiffs, and therefore the claims against her should be dismissed. *See Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 714 F.2d 946, 953 (9th Cir. 1983).

Plaintiffs' allegations against both Defendants Baker and Caplane fail to state a claim under section 1983.

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IV. CONCLUSION

For the foregoing reasons, the FAC should be dismissed with prejudice as to all Defendants.

Dated: September 12, 2013 Respectfully submitted,

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR-LEGAL UNIT

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