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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12 GEORGE CLINTON, an individual,
 13 Plaintiff,
 14 vs.
 15 WILL ADAMS, *et al.*,
 16 Defendant.

) Case No. CV 10-09476-ODW-PLA
)
) **RESPONSE OF JUDGMENT**
) **LIENHOLDER HENDRICKS &**
) **LEWIS TO PLAINTIFF'S MOTION**
) **FOR DISTRIBUTION AND**
) **DIVISION OF SETTLEMENT**
) **FUNDS AND REQUEST FOR**
) **ALTERNATE DISTRIBUTION**
) **WITH EXHIBIT A**

) Date: July 16, 2012
) Time: 1:30
) Location: Courtroom 11

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1 Hendricks & Lewis PLLC (“H&L”), judgment lienholder and former counsel
2 to Plaintiff George Clinton (“Clinton”), herein appears pursuant to CAL. CODE CIV.
3 PRO. § 708.430(b) and responds to Clinton’s proposal for distribution and division
4 of the proceeds of this action (the “Action”) among four claimants: Clinton; his
5 current counsel, Jeffrey P. Thennisch (“Thennisch”); his former counsel, Allan Law
6 Group (“ALG”); and H&L.

7 INTRODUCTION

8 Although Clinton suggests that the Internal Revenue Service (“IRS”) is a
9 priority lien claimant, the IRS has not appeared or asserted a lien. Moreover,
10 Clinton has not offered evidence of a tax *lien*, but rather only a notice of back taxes
11 he owes. (*See* Clinton’s Motion for Distribution and Division of Settlement Funds
12 (“Motion”), Ex. D.) While Clinton suggests that he will not receive *any* money
13 (“hardly a windfall,” Motion at 4), the IRS obligation is *his* obligation and thus, any
14 distribution for it would be to and for his benefit.

15 To claim proceeds ahead of H&L, Clinton was required to claim an
16 exemption after H&L filed its notice of lien under CAL. CODE CIV. PRO.
17 § 708.450(a). Because he failed to do so, he waived any exemption he may have
18 had. He offers no other legitimate legal or equitable basis for a distribution to him.

19 Similarly, there is no basis for a distribution to Thennisch. Under California
20 law, the claim of an attorney who undertakes a client’s representation *after* a case is
21 initiated and a judgment lien creditor has given notice of lien is subordinate to the
22 judgment lien. *Fleet Credit Corp. v. TML Bus Sales, Inc.*, 65 F.3d 119 (9th Cir.
23 1995); *Del Conte Masonry Co. v. Lewis*, 16 Cal. App. 3d 678, 94 Cal. Rptr. 439
24 (1971). H&L’s service to Clinton, its judgment, lien and notice of lien all predate
25 Thennisch’s appearance. Thus, H&L’s claim has clear priority over Thennisch.
26 Moreover, Thennisch has not offered any documentation of his contingent fee and
27 lien agreement or set forth the hours expended and a description of services that
28 would permit the Court even to assess the reasonableness of his claim.

1 ALG asserts a lien for attorneys' fees and costs for matters other than this
2 Action of \$107,097.67. (Motion, Ex. B.) Contrary to Clinton's assertion (Motion
3 at 5), ALG also "claims a lien for attorneys' fees and costs incurred in this case" of
4 \$117,470.05 (Motion, Ex. B). ALG also claims a security interest in this Action
5 under the Uniform Commercial Code ("UCC"), having filed a Financing Statement
6 with the California Secretary of State. (Declaration of O. Yale Lewis, Jr. in Support
7 of Opposition of Judgment Lienholder Hendricks & Lewis ("Lewis Decl.") ¶ 26,
8 Ex. H.) However, ALG's security interest is not perfected because it was not
9 recorded in Clinton's state of residence, Florida. ("Lewis Decl. ¶ 28, Ex. J.) There
10 is, moreover, no actual security agreement; Clinton executed only an "Assignment
11 of Monies," which creates neither a lien nor a security interest. The collateral ALG
12 claims – namely, this Action – is not covered by the Assignment of Monies in any
13 event, and the described collateral – namely, payment intangibles and judgment
14 proceeds – are not protected under UCC Article 9.

15 ALG does not have a sound basis for claiming an equitable lien for its fees
16 and costs because it was not looking to the proceeds of this Action (initiated on
17 December 10, 2010) when it undertook representation of Clinton on an hourly basis
18 in December 2009. Moreover, ALG was substituted out before it concluded this
19 Action. In addition, the Assignment of Monies does not create an enforceable lien
20 and does not comply with Rule 3-300, Rules of Professional Conduct.

21 H&L is a judgment creditor lienholder of Clinton, having given notice of lien
22 under CAL. CODE CIV. PRO. §§ 708.410 and 708.420 on January 3, 2011, for
23 payment of its judgment of \$1,675,639.82, of which \$1,405,685.35 remains owing
24 as of June 22, 2012. Under applicable California law, the case proceeds should be
25 applied to H&L's long-outstanding judgment.

26 **BACKGROUND FACTS**

27 *H&L and Clinton.* From spring 2005 through August 2008, H&L represented
28 Clinton in numerous matters and cases. (Lewis Decl. ¶ 5.) When H&L resigned as

1 Clinton's counsel in August 2008, Clinton owed more than \$1.5 million in unpaid
2 attorneys' fees and costs. (Lewis Decl. ¶ 6.) Because Clinton failed to pay or make
3 any arrangement to pay, or even respond to H&L's settlement proposals, H&L
4 initiated arbitration before the American Arbitration Association in March 2009
5 under its agreement with Clinton. (Lewis Decl. ¶¶ 7-8.) After a hearing on the
6 merits, the arbitration panel awarded H&L \$1,519,712.74 plus attorneys' fees and
7 costs of \$155,927. (Lewis Decl. ¶ 10.) Again, Clinton failed to pay or make any
8 arrangement to pay. (Lewis Decl. ¶ 11.) Consequently, H&L petitioned the United
9 States District Court for the Western District of Washington for an order confirming
10 the arbitration award and for judgment thereon, which Clinton unsuccessfully
11 opposed. (Lewis Decl. ¶ 12.) On May 28, 2010, the court entered judgment in
12 favor of H&L for \$1,675,639.82 plus interest. (Lewis Decl. ¶¶ 2, 14, and Ex. A.)
13 On August 10, 2010, H&L registered its judgment in this Court. (Lewis Decl. ¶ 3,
14 Ex. B.) On January 3, 2011, H&L filed a notice of lien in this Action based on its
15 judgment. (Lewis Decl. ¶¶ 4, 167, Ex. C.) Then, Clinton sued H&L for alleged
16 malpractice in the Western District of Washington, and sought to use the
17 malpractice case as a shield against H&L's judgment collection efforts. (Lewis
18 Decl. ¶ 23.) All of Clinton's claims have been dismissed for failure to state claims
19 upon which relief can be granted and because of the applicable statute of
20 limitations. (Lewis Decl. ¶ 25.) As of June 22, 2012, \$1,405,685.35 remains
21 unpaid. (Lewis Decl. ¶ 17.)

22 *The Allan Law Group.* ALG states that it was retained by Clinton on
23 December 27, 2009. (Lewis Decl. ¶ 26, Ex. H.) It appeared in the H&L/Clinton fee
24 arbitration (*see* Motion, Ex. C), and thereafter unsuccessfully defended Clinton in
25 the action to confirm H&L's arbitration award. (Lewis Decl. ¶ 26, Ex. H.) ALG
26 also states that it represented Clinton in general business matters and licensing,
27 provided advice in *Clinton v. Universal Music Group, Inc.*, No. CV 07-00672 PSG
28 (JWJx) (C.D. Cal.) (but did not actually appear), and defended Clinton in

1 *Wlodinguer & Erk CPA's, PLLC v. Clinton*, Case No. 10-04394 (S.D.N.Y.), an
2 action brought by his accountants for payment for their services on June 3, 2010.
3 (Motion, Ex. C; Lewis Decl. ¶ 26, Ex. H.) ALG initiated this Action on December
4 10, 2010, and represented Clinton for approximately seven months until it
5 substituted out as counsel in July 2011. (Lewis Decl. ¶ 27, Ex. I (Dkt. 1, 47).)

6 Although Clinton executed only an “Assignment of Monies” on November
7 30, 2010, ALG claims a UCC security interest in this Action for its fees and costs.
8 (Lewis Decl. ¶ 26, Ex. H.) On December 1, 2010, ALG filed a UCC-1 Financing
9 Statement with the California Secretary of State, claiming this Action and its
10 proceeds as collateral. (*Id.*) ALG does not claim to have filed the financing
11 statement in Florida where Clinton resides. (*Id.*) (Lewis Decl. ¶ 29, Ex. K.)

12 On July 19, 2011, ALG filed a notice of lien for outstanding fees and costs
13 consisting of \$107,097.67 in other matters in which it represented Clinton, and
14 \$117,470.05 in this Action. (*See* Motion Ex. B; Lewis Decl. ¶ 27, Ex. I (Dkt. 43).)

15 *Jeffrey P. Thennisch*. Thennisch was permitted to appear here *pro hac vice*
16 on August 2, 2011, approximately one year after H&L filed its judgment lien, and
17 one month after ALG filed its notice of lien. He “readily admits” that he was aware
18 of the liens when he became involved in this Action. (Motion at 12.)

19 A chronology of the foregoing pertinent events is attached as Exhibit A.

20 ARGUMENT

21 I. THERE IS NO LEGITIMATE BASIS TO ALLOCATE ANY 22 PROCEEDS TO CLINTON.

23 Clinton requests \$37,175.72 to pay back taxes. He claims a tax lien but has
24 not offered evidence of a lien, only a notice of back taxes.¹ (*See* Motion, Ex. D.)
25 He failed to timely claim and therefore waived any exemptions he may have had.
26

27 _____
28 ¹ 26 U.S.C. § 6321 provides for a lien for taxes if the person liable neglects or
refuses to pay after demand. But the lien imposed by Section 6321 “shall not be
valid as against any . . . judgment lien creditor until notice thereof . . . has been filed

1 **A. Clinton Failed to Claim and Therefore Waived any Exemption.**

2 CAL. CODE CIV. PRO. § 708.450(a) provides that when a judgment lien is
3 created under § 708, as H&L's was, the judgment debtor may claim certain
4 exemptions by application "not later than 30 days after the judgment debtor has
5 notice of the creation of the lien." Clinton has not made any claim of exemption
6 since the lien was filed 18 months ago. Section 708.450 provides that "[t]he failure
7 of the judgment debtor to make a claim of exemption under this section constitutes
8 a waiver of the exemption." CAL. CODE CIV. PRO. § 708.450(a). Consequently,
9 there is no basis for allocating a portion of the Action's proceeds to Clinton.

10 **B. The Authorities Clinton Cites Do Not Aid Him Because Their Focus is**
11 **Wages, Not Copyright Infringement Damages.**

12 Clinton argues for a portion of the case proceeds based upon 15 U.S.C.
13 § 1673(a)(1) and CAL. CODE CIV. PRO. § 704.070(b)(2), neither of which is
14 applicable. Those provisions address "earnings" which are not a subject of this
15 Action which, as Clinton acknowledges, dealt with infringement damages or
16 royalties equivalents. (Motion at 7-8.)

17 The California Legislature has enacted a "comprehensive and precisely
18 detailed scheme governing enforcement of money judgments." *Ford Motor*, 166
19 Cal. App. 4th Supp. at 7. "As a general rule, all property of the judgment debtor is
20 subject to enforcement of a money judgment." *Id.* at 8. As Clinton notes (Motion
21 at 6), Article 20 § 1.5 of the California Constitution provides that the "Legislature
22 shall protect, by law, from forced sale a certain portion of the homestead and other
23 property of all heads of families." To satisfy this mandate, the Legislature enacted
24 statutes specifically exempting certain property from levy as set forth in CAL. CODE
25 CIV. PRO. §§ 704.010 through 704.210. *Ford Motor*, 166 Cal. App. 4th at 8. These
26 exemptions "are wholly statutory and cannot be enlarged by the courts." *Id.* at 8.

27 by the Secretary" as provided in 26 U.S.C. § 6321(f). Clinton has not provided
28 evidence of any filing of a notice of lien.

1 Accordingly, contrary to Clinton’s contention (Motion at 6), Article 20 of the
2 California Constitution does not represent a basis to permit the exemption of
3 property which is not otherwise exempted by statute.²

4 CAL. CODE CIV. PRO. § 704.070(b)(2) shields a percentage of “paid earnings
5 that are levied upon or otherwise sought to be subjected to the enforcement of a
6 money judgment . . . if prior to payment to the employee they were not subject to an
7 earnings withholding order or an earnings assignment order for support.”³

8 However, royalties do not fall within Section 704.070’s definition of “paid
9 earnings,” and are not exempt under it. *In re Hurdle*, 240 B.R. 617, 624-25 (Bankr.
10 C.D. Cal. 1999) (rejecting the debtor’s claimed exemption over music royalty
11 payments). “Paid earnings” are “compensation payable by an employer to an
12 employee for personal services performed by such employee,” while “royalty”
13 commonly refers to a payment made to the owner of property for permitting another
14 to use the property, and does not include personal services.” *Id.* at 624-25 (internal
15 quotation marks omitted).

16 *Ford Motor* does not alter *Hurdle*. *Ford Motor* starts from the premise that
17 some amount was exempt because the funds in the levied account were traceable to
18 wages, the quintessential “paid earnings” under Section 704.070.⁴ By contrast,
19

20 ² Moreover, Article 20 § 1.5 does not lend Clinton much assistance even as a
21 matter of policy. The constitutional provision was aimed at protecting families
22 from the disruption of their physical living situations through the seizure of real
23 property. *See San Diego County Carpenters Group Ins. v. Lorea*, 112 Cal. App. 3d
24 221, 223, 169 Cal. Rptr. 157 (1980) (homeowner may exempt his home from
25 execution of a judgment and forced sale); *see also Johnson v. Brauner*, 131 Cal.
26 App. 2d 713, 719, 281 P.2d 50 (1955) (explaining that the “policy underlying all
27 homestead legislation” stemming from the California Constitution is “to provide a
28 place for the family and its surviving members”). The allocation of judgment
proceeds for royalties cannot be equated to the seizure of a personal residence.

³ “Paid earnings” are expressly defined as earnings “that were paid to the
employee during the 30-day period ending on the date of the levy.” CAL. CODE CIV.
PRO. § 704.070(a)(2).

⁴ Ford levied against Waters’ checking account which contained funds
traceable to her net wages. *Ford Motor*, 166 Cal. App. 4th Supp. at 5. The parties

1 Clinton has failed to identify any statutory exemption for which he qualifies. As
2 Clinton acknowledges, the proceeds of this Action are royalties (Motion at 6), not
3 paid earnings and are not exempt. *See In re Hurdle*, 240 B.R. at 624-25.

4 Unable to rely on the holding of *Ford Motor*, Clinton cites to language
5 explaining that exemptions are designed to “facilitate the debtor’s financial
6 rehabilitation and have the effect of shifting social welfare costs from the
7 community to judgment creditors.” *Ford Motor*, 166 Cal. App. 4th Supp. at 8.
8 However, nothing suggests that the Legislature intended to encourage debtors to
9 access lien-ed funds for speculative attempts at financial rehabilitation through
10 litigation, as Clinton proposes. (Motion at 8.) Exemptions are “wholly statutory
11 and cannot be enlarged by the courts.” *Ford Motor*, 166 Cal. App. 4th Supp. at 8.
12 “[T]he public policy, expressed in the exemption statutes,” is one of “allowing a
13 judgment debtor to retain funds to take care of basic necessities of life, and to have
14 something to live on until the next paycheck.” *Id.* at 15.

15 Clinton’s reliance on 15 U.S.C. § 1673(a)(1) is similarly misplaced because
16 this statute concerns only wage *garnishments*. The “legislative history reveals the
17 statute’s dominant purpose as being the preservation of an employee’s job.”
18 *Donovan v. S. Cal. Gas Co.*, 715 F.2d 1405, 1408 (9th Cir. 1983). “Congress
19 [aimed] to protect employees from the adverse effects of garnishment proceedings
20 and discharges based upon them.” *Id.* *See also Usery v. First Nat’l Bank of Ariz.*,
21 586 F.2d 107, 110 (9th Cir. 1978) (the Consumer Credit Protection Act was
22 motivated by a “concern for preserving the stability of the employer-employee
23 relationship in the face of . . . garnishment”). Given that § 1673(a)(1) is firmly
24 rooted in the context of wages and the preservation of employment, it has no
25 bearing on royalty proceeds.

26
27
28 agreed that § 704.070’s 75 percent exemption on levies against paid earnings
applied, but disagreed about how to calculate the exempt amount. *Id.* at 6.

1 CAL. CODE CIV. PRO. § 703.610(b) also does not aid Clinton. “[W]hile the
2 exemption proceedings are pending,” this provision allows a court to make orders
3 for the disposition of property that “may be proper under the circumstances of the
4 case.” CAL. CODE CIV. PRO. § 703.610(b). Fundamentally, a statutory exemption
5 must apply for this provision to be triggered. Clinton’s failure to make an
6 exemption claim “constitutes a waiver of the exemption.” CAL. CODE CIV. PRO.
7 § 708.450(a). Thus, no exemption is triggered and no distribution to Clinton is
8 warranted.

9 **C. The Equities Favor Hendricks & Lewis.**

10 Clinton asserts that because of a hodgepodge of overlapping “equitable”
11 considerations, established statutory priorities do not apply. Thus, he suggests
12 financial distress and claims that: (1) to rehabilitate himself financially he is
13 equitably entitled to \$37,175.72 to pay the IRS, and \$31,922 for Thennisch, so that
14 he can pursue other litigation against unidentified third parties (Motion at 6, 9, 10)
15 from which H&L would significantly benefit (Motion at 7-8, 18-19); and
16 (2) enforcing H&L’s statutory priority would preclude Clinton from obtaining
17 future representation (Motion at 9, 19). These assertions are inaccurate and
18 irrelevant under the controlling case law and statutory framework discussed above,
19 and in fact, the equities, on balance, favor H&L.

20 Clinton’s suggestion of limited income and resources is wildly disingenuous.
21 Records provided by Clinton’s two tour booking agencies, Monterrey International
22 and Georg Leitner Productions, show that Clinton received gross revenue from
23 touring of \$1,880,664.22 in 2009 and \$1,879,816.91 in 2010. (Lewis Decl. ¶ 21,
24 Ex. F (¶¶ 21-22, Exs. 7-8).) In addition to the more than \$3.7 million in gross
25 touring revenue in 2009 and 2010, Clinton also accrued royalties in those same
26 years totaling \$212,657.53 from UMG, \$82,092.64 from Capitol Records, and
27 \$18,813.78 from Sound Exchange. (Lewis Decl. ¶ 21, Ex. F (¶¶ 18, 19, 24, Exs. 5,
28 6, 10).) In addition, in May 2010 – after H&L received an arbitration award against

1 Clinton and just days before H&L’s judgment was entered – Clinton took a
2 \$250,000 advance against his future royalties from BMI. (*Id.*) BMI records suggest
3 that in 2009 and 2010, Clinton accrued royalties at an average of \$123,686.73 per
4 year. (Lewis Decl. ¶ 21, Ex. F (¶ 23, Ex. 9).) In addition, Clinton is quoted in an
5 article on www.huffingtonpost.com on April 27, 2012, that he actually makes more
6 money selling his music online than he does from the music labels, suggesting that
7 he receives significant income in addition to the royalties he receives from Capitol
8 and UMG. (Lewis Decl. ¶ 20, Ex. E.) Clinton also acknowledges receiving Social
9 Security benefits. (Motion at 19.)

10 Clinton’s argument that recognition of H&L’s statutory priority will preclude
11 Clinton from obtaining counsel in the future is specious. Application of the
12 statutory framework in this case will provide a clear roadmap – at least under
13 California law – to future Clinton counsel.

14 Clinton also urges that “enforcement efforts” may be the “best, if not only
15 chance that [Hendricks & Lewis] will actually collect . . .” (Motion at 19.) But this
16 now settled action is one of the enforcement actions from which H&L should be
17 paid; and Clinton’s position here provides no comfort that H&L would ever receive
18 any significant payments from future lawsuits against unidentified third parties even
19 if the future litigation were successful.

20 **II. THERE IS NO BASIS FOR A DISTRIBUTION TO THENNISCH**
21 **AHEAD OF HENDRICKS & LEWIS.**

22 Thennisch did not become counsel of record until approximately eight
23 months after H&L’s lien was filed on January 3, 2011. (Lewis Decl. ¶ 27, Ex. I,
24 (Dkt. 9, 51).) Consequently, H&L’s lien takes priority over any lien related to
25 Thennisch’s fees. Moreover, Thennisch has not provided a fee agreement
26 supporting a 30 percent contingency or reflecting the creation of a lien relating to
27 his fees.
28

1 **1. Under Fleet Credit Corp. v. TML Bus Sales and Del Conte**
2 **Masonry Co. v. Lewis, Hendricks & Lewis’s Judgment**
3 **Creditor Lien has Priority over Thennisch’s Claim; None of**
4 **Clinton’s Cited Cases Are to the Contrary.**

5 In *Del Conte Masonry*, the court held that the judgment creditor’s statutory
6 lien had priority over the attorney’s lien because the attorney’s lien was created
7 *after* the judgment creditor gave notice of its intended lien on the anticipated
8 judgment. 16 Cal. App. 3d at 681. Similarly, in *Fleet Credit*, the Ninth Circuit held
9 that a judgment creditor’s lien, filed under CAL. CODE CIV. PRO. § 708.210, had
10 priority over Fleet’s attorneys’ fees. 65 F.3d at 122. Clinton attempts to distinguish
11 *Fleet* on the basis that Thennisch had a “complete arrangement for fees and costs at
12 the time of retention by Clinton” (Motion at 14), but his retention was nonetheless
13 *after* creation of H&L’s judgment creditor’s lien and his notice of it. Consequently,
14 Thennisch’s claim is subordinate to H&L’s lien.

15 None of Clinton’s authorities support a contrary view. In *Gilman v. Dalby*,
16 176 Cal. App. 4th 606, 609, 98 Cal. Rptr. 3d 231 (2009), on which Clinton relies
17 heavily (*see* Motion at 11, 17, 18), the court considered the relative priorities of a
18 contractual medical lien (given to Gilman who was in the business of factoring
19 medical accounts) and a presumptive contractual attorney lien for fees and costs.
20 *Gilman* held that an attorney lien has priority over a medical lien as a matter of
21 public policy. “[A] medical lien against the recovery in a personal injury lawsuit is
22 not equal in equity to an attorney lien for fees and costs created by a retainer
23 agreement to litigate the [personal injury] lawsuit.” *Gilman*, 176 Cal. App. 4th at
24 618. *Gilman* did not address priority between a first in time judgment creditor’s
25 lien and an attorney’s lien as Clinton suggests. (Motion at 11, 17.)

26 Clinton also cites *Pangborn Plumbing Corp. v. Carruthers & Skiffington*, 97
27 Cal. App. 4th 1039, 1053, 119 Cal. Rptr. 2d 416 (2002), (Motion at 15), which is
28 readily distinguishable because there the “[c]reditor did not file notice of its lien

1 before Debtor and [the law firm] entered into their fee agreement.” *Pangborn* also
2 explicitly recognizes that in the circumstances here the judgment creditor prevails:
3 “Of course, if an attorney does not enter into an agreement for a contractual lien
4 upon litigation proceeds until *after* the action has been filed, and *after* a judgment
5 creditor has given notice pursuant to sections 708.410 and 708.420, the judgment
6 creditor’s lien will have priority.” 97 Cal. App. 4th at 1051 (citing *Del Conte*
7 *Masonry*, 16 Cal. App. 3d at 681).

8 *Waltrip v. Kimberlin*, 164 Cal. App. 4th 517, 79 Cal. Rptr. 3d 460 (2008),
9 does not aid Thennisch because it addressed priority between an attorney’s lien and
10 a *subsequent* judgment creditor, as is reflected in the language Clinton quotes.
11 (Motion at 17-18.) *Waltrip* also recognizes that “[a]n attorney lien does not always
12 have priority over other liens; it does *not* have priority over prior liens on the same
13 property.” *Id.* at 526 (emphasis added).

14 *Cetenko v. United Cal. Bank*, 30 Cal. 3d 528, 638 P.2d 1299, 179 Cal. Rptr.
15 902 (1982), is to the same effect as *Waltrip*, holding that an attorney’s prior lien for
16 fees took precedence over a *subsequent* judgment creditor’s lien, but recognizing
17 that when a judgment creditor’s lien is prior to an attorney’s lien, the judgment
18 creditor’s lien has priority. *Id.* at 535 (citing *Del Conte Masonry*, 16 Cal. App. 3d
19 678).

20 Neither *Nicoletti v. Lizzoli*, 124 Cal. App. 3d 361, 177 Cal. Rptr. 685 (1981)
21 nor *Haupt v. Charlie’s Kosher Mkt.*, 17 Cal. 2d 843, 112 P.2d 627 (1941) assists
22 Clinton or Thennisch with the priorities or equities. (Motion at 16-17.) In *Nicoletti*,
23 a personal injury action, the court subordinated a judgment creditor’s lien to the
24 consensual liens of certain medical professionals who performed services when the
25 plaintiff was injured and whose claims were created first but were not perfected.
26 The court concluded that as a matter of public policy, medical professionals should
27 not be required to perfect their liens because such a requirement would discourage
28 them from providing emergency medical care. *Nicoletti*, 124 Cal. App. 3d at 368-

1 70. In *Haupt*, also a personal injury action, plaintiff's attorneys proceeded under a
2 contingent fee contract that provided for a lien on proceeds. At the time of the
3 verdict, a creditor of the client attempted to levy on case proceeds. The court held
4 the attorney's contractual lien had priority over the subsequent attachment. *Haupt*,
5 17 Cal. 2d at 844, 846.

6 **2. Thennisch Has Failed to Provide Adequate Evidence to**
7 **Support His Claim.**

8 Apart from relative priorities, Thennisch should not receive any proceeds
9 because, like the defendant attorneys in *Gilman*, he has "presented no evidence that
10 [he] ha[s] an attorney lien entitling [him] to deduct [his] litigation costs from the
11 settlement recovery." 176 Cal. App. 4th at 620. It is not sufficient that "[i]f
12 requested by the Court, I will produce and file under seal my representation and
13 retainer agreement with the Plaintiff in this action." (Declaration of Jeffrey P.
14 Thennisch ¶ 3.) It was his burden to provide evidence to support his claim at the
15 time he requested a portion of the proceeds so that other claimants would have an
16 opportunity to address the sufficiency thereof. Having failed to do so, his claim
17 should also be denied for lack of evidence. *See Gilman*, 176 Cal. App. 4th at 620.

18 **III. ALG DOES NOT HAVE A PERFECTED SECURITY INTEREST IN**
19 **COLLATERAL PROTECTED BY UCC ARTICLE 9 AND ITS**
20 **EQUITABLE LIEN CLAIMS FAIL.**

21 **A. ALG Does Not Have a Perfected UCC Security Interest.**

22 ALG filed a UCC financing statement with the California Secretary of State's
23 office, claiming a UCC Article 9 security interest in this Action. However, this
24 claim does not give ALG priority over H&L. First, even if ALG had a security
25 interest – which it does not – its interest is clearly unperfected and therefore
26 subordinate to H&L's judgment lien. ALG filed in California, but was required to
27 file in Florida where Clinton resides. Second, Clinton did not grant a security
28 interest; he merely assigned and agreed to pay from proceeds that might accrue in

1 the future. Moreover, the claimed collateral – money to be acquired in the future –
2 is not collateral that is subject to protection under UCC Article 9. Article 9
3 expressly excludes from protected collateral payment intangibles and rights in
4 judgments. *See* FSA § 679.1091 (“This chapter does not apply to F.S.A.
5 § 679.1091(e) . . . [a]n assignment of . . . payment intangibles . . . which is for the
6 purpose of collection only [or] (i) [a]n assignment of a right represented by a
7 judgment[.]”). *See also* CAL. COMM. CODE § 9109(d)(7), (9).

8 **1. ALG Failed to Perfect Any Security Interest It Claims.**

9 To obtain priority over other claimants, ALG had to “perfect” its claimed
10 security interest; that is, provide public notice of its interest in the collateral.

11 UCC § 9-301(1) specifies the law governing perfection and priority of
12 security interests in both tangible and intangible property. “[W]hile a debtor is
13 located in a jurisdiction, the local law of that jurisdiction governs perfection, the
14 effect of perfection or nonperfection, and the priority of a security interest in
15 collateral.” FSA § 679.3011(1); CAL. COMM. CODE § 9301(1). A debtor who is an
16 individual like Clinton is “located” in the state of his principal residence. FSA
17 § 679.3071(2)(a); CAL. COMM. CODE § 9307(b)(1). Clinton’s principal residence is
18 in Florida, and thus, Florida law governs perfection and priority.

19 A security interest is perfected in Florida by filing with the Florida Secured
20 Transaction Registry. FSA § 679.5011(b). *See also* CAL. COMM. CODE
21 § 9501(a)(2). ALG filed in California, not Florida as it should have, and
22 consequently, any security interest it may have acquired is unperfected.

23 Because ALG’s security interest, if any, is unperfected, it is subordinate to
24 H&L’s judgment lien. FSA § 679.3171(1)(b)(1) (“A security interest . . . is
25 subordinate to the rights of the following: . . . a person who becomes a lien creditor
26 before the earlier of the time . . . the security interest . . . is perfected.”). *See also*
27 CAL. COMM. CODE § 9317(a).

28

1 statement is not evidence of the debtor's intention because it was not signed by
2 Clinton. *See In re Sabol*, 337 B.R. 195.

3 Even if Clinton had granted a security interest in proceeds of this Action, it
4 would not have been a protectable interest under UCC Article 9. Section 109(d)(5)
5 and (9) expressly exclude from collateral protected by the UCC, among others, an
6 assignment of "payment intangibles" for "the purpose of collection only"; and "an
7 assignment of a right represented by a judgment, other than a judgment taken on a
8 right to payment that was collateral." ALG obtained an assignment of payment
9 intangibles (that is, money to be paid in the future) that did not concern a
10 commercial financing transaction and therefore is excluded (*see* cmt. 12), or a right
11 represented by a judgment, both of which are excluded from protection. *Id.*

12 **B. ALG Should Not Be Granted an Equitable Lien in the Proceeds for its**
13 **Fees and Costs.**

14 "An equitable lien is the right to subject property not in the possession of the
15 lienor to the payment of a debt as a charge against that property." 42 Cal. Jur. 3d
16 Liens § 10, p. 621. For the reasons set forth hereinafter, ALG should not be granted
17 an equitable lien.

18 **1. ALG is Not Entitled to an Equitable Lien under County of**
19 **Los Angeles v. Construction Laborers Trust Funds for its**
20 **Fees and Costs in the Action or Matters Other than the**
21 **Action.**

22 ALG claims an equitable lien under *County of Los Angeles v. Construction*
23 *Laborers Trust Funds*, 137 Cal. App. 4th 410, 413-15 (2006), which permitted an
24 attorney an equitable lien on case proceeds for the attorney's services on other
25 matters as well as the case covered by the retainer agreement, which expressly
26 granted a lien on "any and all claims or causes of action which are [the] subject of
27 Attorney's representation of client in the Matter" and the attorney undertook to
28 represent the client on the other matters "under the same terms." ALG's claim is

1 distinguishable from the attorney's claim in *Construction Laborers* in important
2 respects that compel the conclusion that ALG should not be granted an equitable
3 lien.

4 First, unlike the attorney in *Construction Laborers*, ALG has not suggested
5 that its *fee agreement* with Clinton expressly granted ALG a lien in *any* causes of
6 action. ALG references only the Assignment of Monies executed 10 months later,
7 after ALG had undertaken Clinton's representation on the other matters. In
8 *Construction Laborers*, the lien agreement was in place before the attorney agreed
9 to undertake the representation and before the services in question were provided.
10 Thus, considerations of detrimental reliance or unjust enrichment were implicated.
11 By contrast, ALG undertook Clinton's representation almost a year *before* this
12 Action was initiated and before Clinton signed the November 30, 2010 assignment
13 agreement. (Lewis Decl. ¶ 26, Ex. H.) ALG had already undertaken Clinton's
14 representation in the other matters and could not have been relying on this Action's
15 proceeds. (Lewis Decl. ¶ 19, Ex. D, ¶¶ 26, 27, Exs. H, I.)⁶

16 Second, ALG was not relying on case proceeds for its fees and costs when it
17 began representing Clinton because those matters were *defenses* of Clinton (H&L
18 and Wlodinger & Erk each sued Clinton) and general business representation from
19 which proceeds could not reasonably be expected. Moreover, ALG was
20 representing Clinton on an hourly basis. Thus, ALG cannot claim the substantial
21 detrimental reliance that favored the equitable lien in *Construction Laborers*.

22 Third, the Assignment of Monies upon which ALG relies did not expressly
23 create a lien. *See Maze*, 230 Cal. App. 2d at 754 (assignment of monies "in no
24
25

26 ⁶ Courts may take judicial notice of proceedings in other courts. *Bennett v.*
27 *Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002).
28

1 manner constituted a lien” and “was not a true ‘security’ for the repayment”);
2 *Weaver*, 27 Ariz. App. at 642-43; *In re Radice*, 88 B.R. at 425-26.

3 Finally, the conduct of the lawyer in *Construction Laborers* was said to
4 deserve the protection of a court in equity because the attorney “continued to work
5 for [the client] in trying to, and eventually succeeding, in settling,” despite the
6 client’s cash flow problems. 137 Cal. App. 4th at 413. Here, by contrast, ALG
7 substituted out of this Action six months after Clinton executed the assignment and
8 nearly a year before the matter concluded.

9 **2. ALG is Not Entitled to an Equitable Charging Lien for its**
10 **Fees and Costs in this Action.**

11 In California, unlike most jurisdictions, an attorney’s lien generally is created
12 only by contract, and not by the mere fact of performing services in a case.
13 *Fletcher v. Davis*, 33 Cal.4th 61, 66 (2004) (citing *Carroll v. Interstate Brands*
14 *Corp.*, 99 Cal. App. 4th 1168, 1172, 121 Cal. Rptr. 2d 532 (2002)); *Haupt*, 17
15 Cal.2d at 845. An attorney who secures payment of hourly fees by acquiring a
16 charging lien against a client’s future judgment or recovery acquires an interest
17 adverse to the client, and therefore must comply with Rule 3-300, Rules Prof.
18 Conduct (“Rule 3-300”).⁷ *Fletcher*, 33 Cal. 4th at 71. Attorney liens that fail to
19 meet the requirements of Rule 3-300 are unenforceable. *Id.* at 71-72.

20 As an agreement entered into 11 months after Clinton retained ALG, the
21 “Assignment of Monies” must comply with Rule 3-300 to be enforceable. *See*
22 *Fletcher*, 33 Cal. 4th at 68-70. The terms must be fair, reasonable, and fully
23 disclosed in writing, the client must be advised in writing that the advice of an
24 independent lawyer may be sought and the client must consent in writing to the
25 terms. Rule 3-300. ALG has the burden of demonstrating compliance with these

26
27 ⁷ “Rule 3-300 is intended to apply where the member wishes to obtain an
28 interest in client’s property in order to secure the amount of the member’s part due
or future fees.” Rule 3-300 (Discussion, 3rd para.).

1 requirements. *Hunnicutt v. State Bar*, 44 Cal.3d 362, 372, 243 Cal. Rptr. 699
2 (1988) (citing *Clancy v. State Bar*, 71 Cal.2d 140, 146, 77 Cal. Rptr. 657 (1969)).

3 The Assignment of Monies does not satisfy Rule 3-300. For example, it does
4 not advise Clinton that he is – at least by ALG’s interpretation – granting a UCC
5 security interest; it does not contain authorization for the filing of a UCC financing
6 statement; it does not state expressly that by virtue of the assignment ALG would be
7 claiming a lien in the proceeds under the assignment. It also misstates the date of
8 filing of the so-called “Erk Case” as September 15, 2010, when in fact the action
9 was filed on June 3, 2010, and by September 7, 2010, the court had ordered plaintiff
10 to move for default against Clinton by September 20, 2010. The assignment does
11 not contain a written statement that Clinton may seek the advice of an independent
12 lawyer of his choice. Unless this statement is supplied from some other pertinent
13 document, the assignment violates Rule 3-300, rendering any equitable charging
14 lien unenforceable.

15 **CONCLUSION**

16 Clinton has no legal or equitable basis for a share of the proceeds. Under
17 California law, as reflected in *Del Conte Masonry* and even the cases cited by
18 Clinton, Thennisch’s claim is clearly subordinate to H&L’s first-in-time judgment
19 creditor lien. ALG does not have either a perfected security interest or a valid lien.
20 For all these reasons, as stated above, the proceeds in this Action should be awarded
21 to H&L.

22 Respectfully submitted this ___ day of June, 2012.

23 DATED: June 25, 2012

24 DAVIS WRIGHT TREMAINE LLP
25 MARY H. HAAS

26 By: /s/ Mary H. Haas
27 Mary H. Haas

28 Attorneys for Judgment Lien Holder
HENDRICKS & LEWIS PLL

EXHIBIT A

TIMELINE

CHRONOLOGY

2005 -- 2008	H&L represented Clinton
March 2009	H&L initiated arbitration against Clinton
12/27/09	Clinton retained ALG
12/27/09 – 05/28/11	ALG defended Clinton in action to confirm judgment
02/04/10	Final arbitration award issued
05/28/10	Judgment entered against Clinton in W.D. Wash.
06/03/10	Wlodinguer, Erk filed action against Clinton
08/10/10	H&L judgment against Clinton registered in C.D. Cal.
09/17/10	ALG moved to appear on Clinton's behalf in action brought by Wlodinguer, Erk against Clinton
11/30/10	Clinton executed Assignment of Monies
12/01/10	ALG filed UCC financial statement
12/10/10	Clinton initiated this Action against Will Adams, et al.
01/03/11	H&L notice of lien as judgment creditor
01/10/11	Wlodinguer, Erk and Clinton settled
07/19/11	ALG filed notice of lien for ALG in this Action
07/19/11	First request to substitute Larry Clough for attorney
08/02/11	Thennisch appeared in this Action