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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GEORGE CLINTON, an individual,

Plaintiff,

v.

WILL ADAMS, *et al.*,

Defendants.

Case No. 2:10-cv-09476-ODW-PLA

The Honorable Otis D. Wright, II

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR DISBURSEMENT OF FUNDS

I. PRELIMINARY STATEMENT

Judgment Lienholder Hendricks & Lewis PLLC ("H&L") misguidedly requests that the Court award it the entire settlement amount at issue. H&L's Opp'n. at 18, ECF No. 134. H&L does not dispute that the settlement amount exists because of the labor of Clinton's undersigned attorney ("Thennisch") on a contingency basis. Notwithstanding, H&L erroneously contends that Thennisch should receive none of the settlement amount he effectuated. *Id.*

H&L's argument is premised on two grounds: (1) H&L has "priority" over Thennisch; and (2) Thennisch is required to provide evidence to allow the Court to "assess the reasonableness" of his claim to funds from the settlement. *Id.* at 1. H&L is incorrect as to both grounds under *Gilman v. Darby*, 176 Cal. App. 4th 606, 98 Cal. Rptr. 3d 231 (2009). Under *Gilman*, because the settlement amount exists as a result of the labor of Thennisch on a

contingency basis, Thennisch is entitled to recover on his attorney lien prior to H&L. Further, under *Gilman*, Thennisch is merely required to establish the existence of an attorney lien; a burden that Thennisch has satisfied through his declaration in support of Clinton's Motion for Disbursement of Funds.

II. ARGUMENT

A. Thennisch Has Priority Over H&L

Thennisch is entitled to recover on his attorney lien prior to H&L. An attorney lien takes priority over other liens regardless of which was first in time if it is the attorney's labor that created the funds. *See Gilman*, 176 Cal. App. 4th at 619-20; *see also* Rutter, *Cal. Prac. Guide Civ. Pro. Before Trial* Ch. 1-A, A. Accepting A New Case (commenting that "[a]lthough *Gilman* [ ] deals with a medical lien, the same rationale arguably applies to any other lien predating the attorney lien whose *value depends on the attorney's efforts*"); *All Points Capital Corp. v. Architectural Metal Prods., Inc.* No. 08-04394, 2010 WL 1610013, at *2-3 (N.D. Cal. Apr. 20, 2010) (holding that a secured creditor did not have priority over a subsequent attorney lien because the funds were "achieved only after securing counsel with a fee arrangement" and "without that arrangement", the outcome "would have been dramatically different; [the debtor] and its creditors would have suffered"). In *Gilman*, a person was injured in an automobile accident. 176 Cal. App. 4th at 611. An entity obtained a medical lien on any recovery that the injured person might recover in litigation to recover damages for his injuries. *Id*. Subsequently, a law firm represented the injured person on a contingency basis in such litigation that eventually resulted in a settlement in the injured person's favor. *Id.* at 611-12. The law firm kept the settlement proceeds and the medical lienholder initiated a lawsuit for conversion. *Id.* at 612. The court held that the law firm had priority over the medical lienholder. *Id.* at 619-20. The court explained that an attorney lien is "essential" to incentivize attorneys to represent clients that do not have the funds to pay for legal representation. *Id.* at

619. The court further explained that without an attorney's services on a contingency basis, there may be no settlement from which other "lien holders can recover on their claims, and the injured party may otherwise have no funds to cover the liens." *Id.* at 619.

Here, Thennisch's attorney lien takes priority over H&L's because the settlement amount exists as a result of the labor of Thennisch on a contingency basis. The fact that H&L's lien was first in time is not relevant in the attorney lien context. Moreover, like *Gilman* and *All Points*, without Thennisch's efforts on a contingency basis, the settlement funds would likely not exist, hurting both Clinton and Clinton's creditors, including H&L. Indeed, it is unlikely that a pro se plaintiff would be able to last in any litigation against a large corporation represented by a large law firm without an attorney willing to take his case on a contingency basis.

H&L erroneously argues that it has priority over Thennisch's attorney lien under the Ninth Circuit's decision in *Fleet Credit Corp. v. TML Bus Sales, Inc.*, 65 F.3d 119 (9th Cir. 1995) and an archaic decision from the California Court of Appeals in *Del Conte Masonry Co. v. Lewis*, 16 Cal. App. 3d 678, 94 Cal. Rptr. 439 (1971) as Thennisch had "notice" of H&L's lien. H&L's Opp'n. at 9-11, ECF No. 134. Both cases are distinguishable. *Fleet Credit* does not even involve an attorney's lien. Instead, *Fleet Credit* involves a corporate entity's lien arising from a federal court's award of attorneys' fees incurred in a fraudulent conveyance lawsuit. 65 F.3d at 122. Because *Fleet Credit* does not involve an attorney's lien created through a contingency arrangement, the policy considerations set forth in *All Points* and *Gilman* are not applicable. *See, e.g., Pou Chen Corp. v. MTS Prods.*, 183 Cal. App. 4th 188, 194, 107 Cal. Rptr. 3d 57 (2010) (stating that the "public policy reasons set forth" in a previous decision from the California Court of Appeals "do not apply" because the "nature of the attorney fee liens that are at issue").

Likewise, *Del Conte Masonry* is equally distinguishable. In *Del Conte*, a subcontractor initiated an action against a general contractor through an attorney without a contingency arrangement. 16 Cal. App. 3d at 679. The subcontractor itself was a judgment debtor of a third party in connection with a previous transaction. *Id.* The third party filed a motion in the subcontractor's lawsuit under California Code of Civil Procedure § 688.1 requesting a lien against any judgment that he subcontractor may receive against the general contractor. *Id.* at 680. Upon receipt of notice of the third party's motion and before the motion could be heard, the subcontractor granted a lien to the same attorney who initiated the lawsuit without a contingency agreement both personally to secure payment of attorney fees and as trustee to secure payment for other persons whom the subcontractor was indebted to. *Id.* The court held that the trial court did not err in concluding that third party had priority over the subcontractor's attorney. *Id.* at 681. *Del Conte Masonry* was later distinguished by the California Court of Appeals in *Niccoletti v. Lizzoli*, 124 Cal. App. 3d 361, 689 177 Cal. Rptr. 685 (1981). In *Niccoletti*, the court explained that the "prime purpose" of California Code of Civil Procedure § 688.1 was to "prevent collusion between the debtor and another to the detriment of the judgment creditor." The court then found that such purpose "appear[ed] to be applicable to circumstances existing in the *Del Conte* case." *Id.* at 689 (italics added). Because there were "no factors to indicate that any possible collusion existed" on the facts of *Niccoletti*, the court rejected the appellants argument in reliance on *Del Conte*. *Id.* at 688-69. Here, like *Niccoletti* and unlike *Del Conte*, there are no factors to indicate that any possible collusion existed between Thennisch and Clinton to the detriment of H&L.

Even if *Del Conte* and *Fleet Credit* were not entirely distinguishable, *Gilman* is the most recent controlling pronouncement on attorney liens. *Gilman* was decided in 2009; *Fleet Credit* in 1995; and *Del Conte* in 1971. The policy considerations that are present in *Gilman* in 2009 were not as prevalent, if present at all, in 1995 and 1971. As *Gilman* explained, "[i]n

many cases *today*, the costs of litigation can reach tens of thousands of dollars, far beyond the out-of-pocket resources of most plaintiffs in our society." 176 Cal. App. 4th at 619 (emphasis added). For instance, it cannot be disputed that the advent of electronic discovery is an enormous expense for plaintiffs in litigation that simply was not as prevalent, if present at all, in 1995 and 1971 when *Fleet Credit* and *Del Conte* were respectively decided. Of record in *Gilman* was the fact that the law firm had notice of a prior lien at the time the patient retained the law firm to represent him in his personal injury action. *Id.* at 611-12. Thus, under *Gilman*, the fact that Thennisch had notice of H&L's prior lien at the time Clinton retained Thennisch to represent him in this lawsuit is not dispositive. *Gilman* is the law to this day; H&L's failure to rely on any case after *Gilman* is not surprising.

Under *Gilman*, because the settlement amount exists as a result of the labor of Thennisch on a contingency basis, Thennisch is entitled to recover on his attorney lien prior to H&L.

B. Thennisch Has Provided Adequate Evidence Of His Attorney Lien

Thennisch has provided sufficient evidence of his contingency arrangement with Clinton in this action. Relying on *Gilman*, H&L argues that Thennisch is required to provide evidence to allow the Court to "assess the reasonableness" of his claim to funds from the settlement. H&L's Opp'n. at 1, ECF No. 134 However, *Gilman* does not stand for this proposition. *Gilman* merely held that upon motion for summary judgment, a movant must establish "by declarations and evidence" the existence of an attorney lien. 176 Cal. App. 4th at 620.

Here, Thennisch has submitted a declaration in support of Clinton's initial Motion for Disbursement of Funds that establishes the existence of his attorney lien.

See Thennisch Decl. ¶ 2. Accordingly, under *Gilman*, Thennisch has provided adequate evidence of his attorney lien.

III. CONCLUSION

For the foregoing reasons as well as those in its initial Motion for Disbursement of Funds, Clinton respectfully requests that the Court disperse the settlement amount in accordance with the plan detailed in Clinton's initial Motion.

Dated: July 10, 2012

Respectfully submitted,

GEORGE CLINTON

By: /s/ Jeffrey P. Thennisch
One of his Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012, a copy of the foregoing PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR DISBURSEMENT OF FUNDS was filed with the Clerk of the Court electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail.

/s/ Jeffrey P. Thennisch
Jeffrey P. Thennisch