

# EXHIBIT A

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#236

**CIVIL MINUTES - GENERAL**

Case No. CV 07-0672 PSG (JWJx) Date July 16, 2012

Title George Clinton v. Universal Music Group, Inc., et al.

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy K. Hernandez

Not Present

n/a

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

**Proceedings: (In Chambers) Order GRANTING in part and DENYING in part  
Motion for Distribution and Division of Settlement Funds**

Before the Court is Plaintiff's motion for distribution and division of settlement funds. Dkt. # 236. The Court heard oral argument on the matter on July 16, 2012. After considering the supporting and opposing papers, as well as the arguments made at the hearing, the Court GRANTS in part and DENIES in part the motion for distribution and division of the settlement funds.

I. Background

Plaintiff George Clinton ("Plaintiff") brought this action against Universal Music Group, Inc. and UMG Recordings, Inc. (collectively "UMG") claiming UMG had failed to pay all royalties due for music created by Plaintiff. Plaintiff's original counsel in this action was the law firm of Hendricks & Lewis, PLLC ("H&L"). *Lewis Decl.* ¶ 7. In July 2008, H&L moved to withdraw as Plaintiff's counsel. *Lewis Decl.* ¶ 7. The Court granted the motion to withdraw. Dkt. # 108. Plaintiff was then represented by various counsel until September 2011, when Jeffrey Thennisch ("Thennisch") became his counsel. Dkt. # 223.

When H&L resigned as Plaintiff's counsel, H&L claimed Plaintiff was indebted to H&L for more than \$1.5 million in unpaid attorney fees and costs from several cases, including fees and costs of approximately \$550,000 in this action. *Lewis Decl.* ¶ 9. Plaintiff and H&L entered into arbitration over the debt. *Lewis Decl.* ¶ 11. The arbitration panel awarded H&L approximately \$1.5 million, plus attorney fees and costs. *Lewis Decl.* ¶ 12. Subsequently, a

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federal district court confirmed the arbitration award and entered judgment in H&L's favor. *Lewis Decl.* ¶¶ 14, 15. In September 2010, H&L filed a notice of lien in this action based on the judgment from the arbitration. Dkt. # 169. H&L avers that, as of June 2012, more than \$1.4 million is still outstanding on its judgment. *Lewis Decl.* ¶ 18.

In April 2012, Plaintiff and UMG settled for \$80,000. *Thennisch Decl.* ¶ 2. Plaintiff now moves for an order approving the distribution and division of the settlement fund. Dkt. # 236. Plaintiff requests the following distribution: \$20,000 to H&L; \$26,099.31 to Plaintiff's attorney Thennisch for the fees and costs Thennisch has incurred in this matter; \$11,000 to the accounting firm Wlodinguer, Erk & Chanzis ("Wlodinguer") for audit services related to this action; and \$22,900.69 to Plaintiff. *Mot.* 9:21-26. H&L opposes Plaintiff's proposed distribution and requests instead that the entire \$80,000 be distributed to H&L. *Opp.* 1:8-21.

## II. Discussion

The Court must determine the priority of the competing interests to the settlement fund. California Civil Code § 2897 provides that "[o]ther things being equal, different liens upon the same property have priority according to the time of their creation." Under this statute, "[t]he time of creation . . . is the last element for consideration when determining the priority of equitable claims, and a claim can predominate by reason of antedating another equity only if the two interests are *in all other respects equal.*" *Del Conte Masonry Co., Inc. v. N.T. Lewis*, 16 Cal. App. 3d 678, 681, 94 Cal. Rptr. 439 (1971). "Interests are equal in equity when each is entitled to the same recognition and protection by reason of possessing to an equal degree those elements of right and justice which are recognized and aided by courts of equity." *Nicoletti v. Lizzoli*, 124 Cal. App. 3d 361, 369, 177 Cal. Rptr. 685 (1981).

The Court will weigh each competing interest in turn.

### a. Clinton

Plaintiff requests that \$22,900.69 of the settlement fund be distributed to him. Plaintiff argues that the settlement fund is in essence wages that were due to him, and as such H&L is not entitled to take the entire fund. *Mot.* 6:3-7:27. Plaintiff also contends that distributing a portion of the settlement fund to him will help him to generate more income to repay his creditors and prevent his financial collapse. *Mot.* 8:12-9:4. Plaintiff proposes he can use the proceeds of this

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settlement to prosecute more copyright actions against third parties and to finance his live concert tours. *Id.*

The Court finds H&L's lien against the settlement fund has priority over the claims of Plaintiff. The federal and state statutes Plaintiff relies on for the principle that H&L's "garnishment" should be limited are not applicable here. Those statutes apply to wages, not royalties.<sup>1</sup> 15 U.S.C. § 1673(a)(1) provides that the "maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed . . . 25 per centum of his disposable earnings for that week." California Civil Code 704.070(b)(2) provides that seventy-five percent of "paid earnings" can be exempt from a garnishment order. Paid earnings are defined as "compensation payable by an employer to an employee for personal services performed by such employee, whether denominated as wages, salary, commission, bonus, or otherwise." *See* Cal. Civ. Proc. Code § 706.011.<sup>2</sup>

Plaintiff admits that these statutes pertain to wages while the settlement fund represents "past royalties." *Mot.* 6:25-28. While Plaintiff argues the statutes can "function[] as a useful guide," royalties are not the same as paid wages under California Code of Civil Procedure § 704.070 and 15 U.S.C. § 1673. *See Cusano v. Klein*, No. 06-56871, 2012 WL 2153947, \*1 (9th Cir. June 14, 2012) (unpublished); *In re Hurdle*, 240 B.R. 617, 625 (Bankr. C.D. Cal. 1999) (analyzing the definition of wages under California Code of Civil Procedure § 704.070 and finding "[r]oyalties . . . do not fall within the statutory definition of paid earnings").

Plaintiff presents no other authority for the proposition that he is entitled to any amount of the settlement ahead of the claims of H&L. Therefore, Plaintiff's motion to distribute \$22,900.69 to himself is DENIED. Because the Court finds H&L's lien has priority over Plaintiff, the \$22,900.69 is to be distributed to H&L.

<sup>1</sup> The case cited by Plaintiff also concerned garnishment of wages, not royalty payments. *See Ford Motor Credit Co. v. Waters*, 166 Cal. App. 4th Supp. 1, 5, 83 Cal. Rptr. 3d 826 (2008) (explaining that the checking account funds at issue were "direct payroll deposits from [defendant's] employer").

<sup>2</sup> In addition, Plaintiff did not claim an exemption within 30 days of the date H&L filed its lien. Thus, under California Code of Civil Procedure § 708.450(a), Plaintiff waived any claim to an exemption. *See* Cal. Civ. Proc. Code § 708.450(a) ("The failure of the judgment debtor to make a claim of exemption under this section constitutes a waiver of the exemption.").

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b. Wlodinguer, Erk & Chanzis

Next, the Court considers Plaintiff's requested distribution of \$11,000 to the accounting firm of Wlodinguer. In support of this request, Plaintiff submits a letter agreement in which Wlodinguer agreed to conduct an accounting of the royalties due to Plaintiff from UMG. *Mot.*, Ex. C. In exchange, Wlodinguer was to be paid twenty percent "of any and all economic benefit derived by [Plaintiff] as a result of the outcome of the examination." *Id.* The letter also states Wlodinguer would require a \$5,000 retainer fee, which would then be applied to their contingency fee. *Id.* Thus, Plaintiff calculates Wlodinguer is due twenty percent of the \$80,000 fund, minus the \$5,000 retainer fee. This would yield an \$11,000 distribution to Wlodinguer. Plaintiff argues this fee must take priority over H&L's 2010 lien, because the agreement between Wlodinguer and Plaintiff is from 2003. *Mot.* 10:1-28.

In opposition, H&L presents evidence suggesting that Wlodinguer may have already settled any claim it had to fees from this action.<sup>1</sup> The evidence submitted by H&L shows that Wlodinguer sued Plaintiff in the Southern District of New York for fees under the audit agreement in 2010. *Lewis Decl.* ¶¶ 20-21, Exs. D, E. In December 2010, Plaintiff and Wlodinguer filed a notice informing the court they had reached a settlement. *Lewis Decl.*, Ex. D. Then, in January 2011, the parties stipulated to dismiss the case with prejudice. *Id.*

Wlodinguer itself has not made an appearance in this action to claim any portion of the settlement fund. Only Plaintiff has requested a distribution to Wlodinguer. In his reply brief, Plaintiff did not respond to any of the evidence provided by H&L, nor did Plaintiff add any argument in favor of the distribution to Wlodinguer. In light of the documents filed by H&L, the Court finds there is insufficient evidence to establish that Wlodinguer has a claim in priority over H&L. Therefore, the proposed distribution of \$11,000 to Wlodinguer is DENIED. Because there is only sufficient evidence of H&L's claim to this amount, the \$11,000 is to be distributed to H&L.

c. Thennisch

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<sup>1</sup> The Court takes judicial notice of the court documents submitted by H&L. *See* Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002) (taking judicial notice of court documents).

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Lastly, the Court considers the proposed distribution of \$26,099.31 to Plaintiff's attorney, Thennisch, who represented Plaintiff from September 2011 until the case was settled in April 2012. *Mot.* 11:1-19:26. Thennisch declares he entered into a retainer agreement with Plaintiff for a contingency fee of thirty percent. *Thennisch Decl.* ¶ 2. Thirty percent of the settlement fund would yield a fee of \$24,000. Thennisch also seeks to recoup \$2,099.31 in costs. *Thennisch Decl.* ¶ 2, Ex. A. H&L contends it should be paid prior to Thennisch, because H&L filed its lien in this matter before Thennisch agreed to represent Plaintiff. *Opp.* 10:10-13:12. Thus, H&L argues its lien must have priority over Thennisch's later agreement with Plaintiff. The Court disagrees and finds Thennisch's fee and costs take priority over H&L's lien.

A strong public policy interest in California favors giving effect to an attorney's claim to a portion of a judgment pursuant to a fee agreement. *See Pangburn Plumbing Corp. v. Carruthers & Skiffington*, 97 Cal. App. 4th 1039, 1054, 119 Cal. Rptr. 2d 416 (2002). If such attorney claims were not given priority, "persons with meritorious claims might well be deprived of legal representation because of their inability to pay legal fees or to assure that such fees will be paid out of the sum recovered in the latest lawsuit." *Cetenko v. United Cal. Bank*, 30 Cal. 3d 528, 536, 179 Cal. Rptr. 902 (1982). The deprivation of legal representation would not only be a detriment to the litigant, but also ultimately to the creditors, who would be less likely to receive any funds at all. *Id.*

Here, it is not disputed that Thennisch undertook to represent Plaintiff after H&L had obtained its judgment against Plaintiff and filed the lien in this action. However, Thennisch's representation of Plaintiff made it more likely that there would be a recovery from which to make payment to H&L. Denying Thennisch his fees and costs would deter attorneys from representing debtors, thus harming the debtors and ultimately their creditors. In addition, equity favors awarding an attorney priority of payment from a fund the attorney created. *See Pangborn Plumbing*, 97 Cal. App. 4th at 1054 ("[T]hose whose labor, skills and materials resulted in the creation of a fund should be entitled to priority in the payment of their claims from such source."). Therefore, the circumstances of Thennisch's claim and H&L's claim are not equal and the equities favor allowing Thennisch to recover his fees and costs.

In opposition, H&L relies heavily on a Ninth Circuit case and a California Court of Appeal case. The Court finds both distinguishable from the present facts. First, in *Fleet Credit Corp. v. TML Bus Sales, Inc.*, 65 F.3d 119 (9th Cir. 1995), the Ninth Circuit determined lien priorities between two creditors. The Ninth Circuit declined to allow one creditor to collect its attorney fees from a fund before a second creditor was paid out of the same fund. *Id.* at 122.

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The question in *Fleet* over whether a creditor may recover the money it has paid in attorney fees in pursuing a lien, is different than the present question over whether an attorney may secure his contingency fee from a fund that his efforts helped to create. Second, in *Del Conte Masonry Co., Inc. v. N.T. Lewis*, 16 Cal. App. 3d 678, 94 Cal. Rptr. 439 (1971), the California Court of Appeal considered lien priorities between an attorney and a creditor. The Court of Appeal gave the creditor priority over the attorney. *Id.* at 535. However, the outcome of *Del Conte* appeared to rest on circumstances that suggested collusion between the attorney and the debtor to prevent the creditor from being paid. *Id.* at 680; see *Nicoletti v. Duillio Lizzoli*, 124 Cal. App. 3d 361, 368, 177 Cal. Rptr. 685 (1981) (distinguishing *Del Conte* because of the element of collusion). Here, there is no suggestion of collusion between Thennisch and Plaintiff to prevent H&L from being paid. To the contrary, Plaintiff himself requests that the Court distribute \$20,000 to H&L.

The Court finds Thennisch's claim has priority over H&L's claim. Plaintiff's request to distribute \$26,099.31 to Thennisch is GRANTED.

III. Conclusion

For the foregoing reasons, the motion for distribution and division of settlement funds is GRANTED in part and DENIED in part. \$26,099.31 is to be distributed to attorney Jeffrey Thennisch. \$53,900.69 is to be distributed to Hendricks & Lewis, PLLC.

**IT IS SO ORDERED.**