**UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA**

**TAMPA DIVISION**

**Case No. 8:20-cv-00325-T-35AEP**

**SECURITIES AND EXCHANGE COMMISSION,**

**Plaintiff,**

**v.**

**BRIAN DAVISON, et al.,**

**Defendants.**

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**SUPPLEMENTAL SUBMISSION OF MOSES SINGER RELATING TO COURT'S ORDER (ECF 804)**

## INTRODUCTORY STATEMENT

Brian Davison ("Davison") does not contest that he received every invoice from Moses Singer (the "Firm") relating to his engagement of the Firm in this matter. Nor does he dispute that, on November 8, 2020, he agreed that he owed $746,208 to the Firm and executed an agreement to pay the fees owed. *See* Doc. 795 Ex. B. Nor does he challenge the fact that his engagement of the Firm is governed by his engagement letter, which requires him to arbitrate any purported disputes relating to those fees. Nor does he question the propriety of the Firm's charging lien in this matter.

Rather, in his Supplemental Brief (Doc. 848, the "Supplemental Brief" or "Supp. Br."), Davison argues that by asserting a charging lien in this case "without invoking its right to arbitration," the Firm somehow waived the contractual requirement that fee disputes be arbitrated. Supp. Br., p. 5-8. Davison further argues that, regardless of the waiver issue, to arbitrate the amount of fees owed as per the contract would allow the Firm "to interfere with the administration of the Receivership estate." *Id.*, p. 8-10. In other words, Davison seemingly

takes the position that, one way or another, by properly invoking a charging lien against a settlement corpus located in the Middle District of Florida, the Firm forfeited its contractual right to arbitrate. This illogical position has no basis in rationality or the law.

The undisputed fact is, the Firm properly filed a charging lien in the jurisdiction presiding over the settlement. The undisputed fact is, the parties contractually agreed to arbitrate, in New York, any dispute concerning attorneys' fees. ***These two facts are not in conflict***. The sought-after charging lien simply secures the settlement corpus pending a determination on the proper amount of fees. Under the law of Florida, which applies to the issue of the validity of the charging lien, the Firm should be granted a charging lien over the full amount that Davison admittedly owes the Firm, or $571,208.08. To the extent Davison now disputes the amount of fees or claims that they are "unreasonable" notwithstanding his repeated assent to such fees, that issue must be arbitrated in New York under New York law pursuant to the parties' engagement letter.

## ARGUMENT

### 1. The Firm Properly Asserted a Charging Lien Over Davison's Settlement Proceeds

An attorney's lien is either "the right of an attorney to hold or retain a client's money or property (a retaining lien) or to encumber money payable to the client (a charging lien) until the attorney's fees have been properly determined and paid." Attorney's Lien, Black's Law Dictionary (11th ed. 2019). A charging lien ensures "the right of an attorney to have the expenses and compensation due him for his services in a suit secured to him in the judgment, decree or award for his client." *Leiby Taylor Stearns Linkhorst and Roberts, P.A. v. Wedgewood Air Conditioning, Inc,. et al*, 801 So.2d 127 (Fla. 4th DCA 2001) (*citing Miles v. Katz*, 405 So.2d 750 (Fla. 4th DCA 1981).

Under Florida law, which applies to the validity of the lien, in order for a court to

properly impose a charging lien over a settlement recovery, an "attorney must show: (1) an express or implied contract between attorney and client; (2) an express or implied understanding for payment of attorney's fees out of the recovery; (3) either an avoidance of payment or a dispute as to the amount of fees; and (4) timely notice." *Daniel Mones, P.A. v. Smith*, 486 So.2d 559, 561 (Fla.1986) (*citing Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So.2d 1383, 1385 (Fla.1983)). Timely notice is the only requirement for perfecting a charging lien. *See Sinclair*, 428 So.2d at 1385. "In order to give timely notice of a charging lien an attorney should either file a notice of lien or otherwise pursue the lien in the original action." *Daniel Mones, P.A.*, 486 So.2d at 561 (citations omitted). There is no relevant authority that a Court should or must determine the "reasonableness" of the amount owed in imposing a charging lien.

Here, the elements of a charging lien are so clearly met (*see* Doc. 794. at 8), that Davison does not contest the lien's validity. Instead, Davison seeks to distract the court with an ancillary matter outside this Court's purview, namely, by retroactively claiming, over two years after agreeing to pay the fees he owed to counsel, that those fees were "unreasonable." This *ex post facto* challenge, and Davison's insistence that it be adjudicated here, amounts to a radical restructuring of the law of contracts and the attorney-client relationship. In effect, what Davison seeks to do is void a freely-entered engagement letter because the Firm is seeking to secure payments indisputably owed to it. This effort should be rejected. The charging lien is undoubtedly valid.

As to the amount of the charging lien, a charging lien is an equitable enforcement mechanism that attaches to the "tangible fruits" of an attorney's labor. *Sinclair*, 428 So.2d at 1383. "The equitable enforcement of charging liens in the proceeding in which they arise best serves to protect the attorney's right to payment for services rendered while protecting the

confidential nature of the attorney-client relationship." *Id.* Like any other lien (mechanic's lien, mortgage lien, etc.), it does not attach to whatever a judge deems a "reasonable portion" of the corpus, but rather secures the total "until the attorney's fees have been properly determined and paid." Attorney's Lien, Black's Law Dictionary (11th ed. 2019). Accordingly, here, a charging lien should be entered in the amount of the outstanding fees indisputably owed to Moses & Singer, or $ 571,208.08.

**2. <u>Any Dispute over the Amount of Fees Should be Resolved, If At All, At Arbitration</u>**

As set forth above, the factual question of whether the Firm is entitled to a charging lien over Davison's settlement proceeds is undoubtedly before this Court. However, that does not confer subject matter jurisdiction to the Court in disputes between client and attorney. *See, e.g., See also, e.g., Richman Greer Weil Brumbaugh Mirabito & Christensen, P.A. v. Chernak.*, 991 So.2d 875 (Fla. 4DCA 2008) ("whether the attorney's services produced 'tangible fruits' is an issue of proof, but it is not an issue of subject matter jurisdiction."). To the extent there is any dispute over the separate question of how much money Davison actually owes the Firm – and the Firm contends there is no such dispute – pursuant to the engagement letter, that dispute is properly determined by arbitration as per the parties' agreement, with the charging lien acting as security toward that amount. This is true under the laws of both Florida and New York, which both enforce forum selection clauses absent extraordinary circumstances not present here. *See, e.g., Aqua Sun Management, Inc. v. Divi Time Limited, etc.*, 797 So.2d 24, 24-25 (Fla. 4DCA 2001) ("as a general principle, a trial court must honor a mandatory forum selection clause in a contract in the absence of a showing that the clause is unreasonable or unjust.") *accord Management Computer Controls, Inc. v. Charles Perry Const., Inc.*, 743 So.2d 627, 631 (Fla. 1st DCA 1999); N.Y.C.P.L.R. 7503 ("where there is no substantial question whether a valid [arbitration] agreement was made or complied with…the court shall direct the parties to

arbitrate."); *accord Harris v. Shearson Hayden Stone, Inc.*, 82 A.D.2d 87, 93, 441 N.Y.S.2d 70 (1981), aff'd, 56 N.Y.2d 627, 435 N.E.2d 1097 (N.Y. 1982) ("where parties enter into an agreement and, in one of its provisions, promise that any dispute arising out of or in connection with it shall be settled by arbitration, any controversy which arises between them and is within the compass of the provision must go to arbitration.").

To be certain, although Davison's Supplemental Brief points to certain instances where the amount of the charging lien is litigated in tandem with the amount or "reasonableness" of fees (*e.g.*, where there is no arbitration provision, or there is a fee shifting provision, or the Court otherwise has subject matter jurisdiction over such dispute), these are nevertheless separate issues. Simply because there is a charging lien by a former lawyer on settlement proceeds in one jurisdiction, does not give that Court subject matter jurisdiction to adjudicate a fee dispute governed by a valid arbitration provision. *See Pandisc Music Corp. v. 321 Music, L.L.C.*, 2010 WL 1531479 (S.D. Fl., April 16, 2010) ("that dispute alone, however, does not give this Court subject matter jurisdiction to adjudicate fee disputes between counsel and clients outside of the equitable ancillary jurisdiction that arises from a properly enforced charging lien."). Rather, "such a dispute may result in a separate breach of contract action in state court, assuming that a charging lien procedure is unavailable, or possibly arbitration given the apparent arbitration clause included in the parties' retainer agreement here." *Id.*

Meanwhile, all citations by Davison purportedly supporting the contention that determining a "reasonable" amount of fees is an essential component of any charging lien litigation (Doc. 849 at 3-4), are utterly inapplicable to the case at bar. For example, in *Sinclair*, 428 So.2d 1383, the client reached a settlement in a divorce with her ex-husband without involvement of counsel and with no provision for the payment of fees, and then counsel sought payment of fees from the ex-husband. Nothing in that case stood for the premise that the court

must determine the "reasonableness" of an attorney's fees in order to impose a charging lien. In *Riviero v. J. Cheney Mason, P.A.*, 82 So.3d 1094 (Fla. 2 DCA 2012), the court upheld a charging lien against real and personal property received by attorney's client in a divorce proceeding. The amount of fees (but not the propriety of the lien) was at issue there because – in sharp contrast to the case at bar – the attorney's time records lacked sufficient detail. Crucially, in that case, the propriety of the lien and any dispute over the amount of fees due the lawyer, were addressed separately.

Moreover, in both cases, there was no arbitration provision. That is not the case here, where the parties submitted to arbitration on that issue and expressly waived the right to have such a dispute resolved in court. Moreover, both these cases involved marriage dissolutions where attorneys' fees would be paid from the marital estate. Here, by contrast, a sophisticated businessman agreed to pay set hourly fees to experienced securities counsel in a major enforcement case by a federal law enforcement agency, with no statutory or contractual fee shifting provision that would require an analysis of "reasonableness."

Nor would this Court, in granting an attorney's lien in the amount owed ($571,208.08), be implicitly determining the "reasonableness" of that amount. Rather, that is simply the amount that is indisputably due. Indeed, even Davidson does not dispute that that is the amount presently owed. To the extent there is an argument to be made that such amount is not "reasonable" (or that "reasonableness" is even relevant in light of the unambiguous contract, invoices, and re-affirmation of said contract), that argument must be made, if at all, at arbitration. However, there is no factual dispute over the amount of the fees that were invoiced and are presently due, as reflected in the itemized invoices that were indisputably sent to Davidson detailing each and every charge, which he specifically reaffirmed and agreed to pay. Granting the Firm a charging lien in the amount indisputably owed to it, is not an explicit or

implicit decree as to the "reasonableness" of the Firm's fees, nor does any authority dictate otherwise.

**3. There Clearly Was No Waiver**

The argument that somehow Moses Singer waived the arbitration clause in its engagement letter with Davison [Doc. 795, Ex. A] because it filed a notice of charging lien here in the Middle District of Florida, is based on a fundamental misstatement about the scope of this hearing and the nature of a charging lien. Nor do any of the cases cited by Davison support the argument that by filing a charging lien in this jurisdiction, the Firm somehow waived its right to enforce the arbitration agreement in the engagement letter. The cases are either inapplicable, or do not support the claims asserted.

In large part, these cases involved parties litigating a specific issue and then, after that litigation had proceeded for some time turning around and seeking to compel arbitration. Thus, *Morgan v. Sundance, Inc.*, 142 S.C.t 1708 (2022), did not relate to an agreement to arbitrate knowingly entered into by a sophisticated businessman with his counsel. The issue there was whether a company knowingly waived its right to arbitrate a dispute between it and its employee by litigating the employee's lawsuit for 8 months before seeking arbitration pursuant to the parties' agreement. In *Green Tree Servicing, LLV v. McLeod*, 15 So. 3d 682 (Fla. 2 DCA 2009), the party seeking arbitration litigated the case, including engaging in discovery, before seeking to compel arbitration. In *Lapidus v. Arlen Beach Condominium Assoc.*, 394 So.2d 1102 (Fla. 3d DCA 1981), the party engaged in summary judgment proceedings before seeking arbitration. In *Klosters Rederi A/S v. Arison Shipping Co.*, 280 So.2d 678 (Fla. 1973) the party engaged in substantial litigation of the issues it sought to arbitrate. And in *Price v. Fax Recovery Sys., Inc.*, 49 So.3d 835 (Fla. 4th DCA 2010), the court held that participating in a litigation did not waive the right to arbitration when its early submissions reference the arbitration agreement, as is the

case here.

Notably, Davison concedes that federal cases don't favor his position, noting that in *Amargos v. Verified Nutrition, LLC*, 2023 WL 1331261 (S.D. Fla. Jan 31. 2023), the court held federal law favoring arbitration applied in federal court, not state law, and that the only issues to be determined were (1) whether a valid agreement to arbitrate existed, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration was waived. *Id*., *2. In *Warrington v. Ricky Patel Premium Cigars, Inc*., 2023 WL 1818920 (11th Cir. Feb. 8, 2023), the party seeking arbitration had actually started a litigation relating to the rights he then sought to have arbitrated. This stands in sharp contrast to the case at bar, as Moses Singer is not seeking to litigate the issue of the amount of what fees are owed (especially since that issue is settled by Davison's November 8, 2020 affirmation of his obligation to pay those fees). Rather, it is simply filing a lien to secure payment of them. If Davison wants to litigate the amount fees owed (or the purported "reasonableness" of the amount of fees owed), he must file an arbitration pursuant to the parties' agreement.

In *Soriano v. Experian Information Solutions*, 2022 WL 17551786 (S.D.Fla. Dec. 9, 2022), five or six months passed before defendant raised the issue of arbitration, and in the meantime it filed pleadings, engaged in discovery, participated in mediation, and attended pretrial conferences. Lastly, in *Gaudreau v. My Pillow, Inc.*, 2022 WL 3098950 (M.D. Fla. July 1, 2022), among other things, the party claiming the obligation to arbitrate could not point to a "valid, written agreement between the parties" (2022 WL 3098950 at *4-5) or a claim related to an arbitration agreement. *Id*. at *5. Finally, the party seeking arbitration had actively participated in the litigation.

Notably, Davison's interpretation of the law would lead to absurd results. It would require law firms with arbitration clauses in their engagement agreements to either initiate

arbitrations before seeking a charging lien (which Davison simultaneously claims "interferes" with the Receivership), or to waive arbitration whenever they wish to assert a charging lien. Moreover, Davison's arguments are clearly not in line with Florida's policy of enforcing charging liens in order to "afford [members of the bar] protection and every facility in securing their remuneration for their services." *Sinclair*, supra, at 1385 (*citing Carter v. Bennett*, 6 Fla. 214, at 258 (1855]). Notably, Davison cannot cite to a single case where, as here, the parties have an arbitration agreement and are nevertheless subjected to a Court hearing on the "reasonableness" of fees in the context of obtaining a charging lien. Such would violate the policy of this state, the equitable nature of charging liens, and the sanctity of contract.

**4. Any Arbitration Will Not Interfere with the Receivership**

Finally, the claim that any arbitration over fees will somehow interfere with the Receivership deserves short shrift. Granting a lien on assets that are set to be released to Davison is irrelevant to the Receiver. It concerns moneys already destined to be released from the receivership estate, and indeed, the receivership's own law firm does not argue otherwise. Nor does the SEC, which "takes no position on Moses & Singer LLP's Notice of Charging Lien" and said it "is important to note that the charging lien does not involve the SEC, the money it is owed by Davison, or the Final Judgment." Doc. 848.

In fact, the original proposed order (Doc. 746) had these assets being sent to Mr. Padgett. *See* Doc. 746 ¶ 1.[1] It is hard to understand how providing these fees to one lawyer is less of an interference than giving them to another. Nor should credence be given to claims that 15 U.S.C.§ 78u(g) (incorrectly cited as § 77u(g)), which bars private parties from intervening in



[1] This proposed order provided that: "The account held at Bank of America, Account number XXXXX8041, held in the name of The Brian D. Davison Revocable Trust, is no longer frozen. Bank of America is directed to mail a check for the proceeds of that account made payable to Brian Davison, to Davison's counsel, Stanley T. Padgett, Padgett Law, P.A., 201 E. Kennedy Blvd., Ste. 600, Tampa, FL 33602, and close the account."

enforcement actions, somehow bars the lien. This section (which the undersigned, as former SEC Senior Trial Counsel, litigated multiple times) simply prevents private parties from seeking relief under the securities laws in an action commenced by the SEC unless the SEC consents. For example, a private securities class action cannot be combined with an SEC enforcement action. It does not relate to actions relating to the disposition of the receivership property.

Meanwhile, to the extent Davison claims that the amount of the lien is somehow in excess of what he owes Moses Singer, or is "unreasonable" in his mind's eye, he is free to pursue arbitration. Any such arbitration will not involve the Receiver, will not interfere with the Receivership, will not cost the Receivership anything, and will not cost the Court anything. Indeed, the speed and efficiency of arbitration is the very reason parties elected to resolve such disputes via arbitration, as the parties did here.

## CONCLUSION

Davison retained my firm in his defense of the SEC's enforcement action against him, and did so in writing that included a provision that he would arbitrate, in New York, any issues relating to those fees. He agreed to pay the fees charged, received notice of every invoice in a timely manner, and received detailed descriptions of the services provided. Then, in November 2020, he affirmed his obligation to pay those fees, and never once sought to reduce his obligation under that November 2020 affirmation.

Davison's tactics here would create a precedent that anytime a Florida client doesn't pay the legal fees of a firm outside Florida, that firm cannot file a lien in the jurisdiction where the client's assets are found, because doing so gives the client extracontractual rights to challenge those fees in another, unbargained-for forum. Neither fairness nor the law countenance such a result.

Dated: New York, New York
March 16, 2023

Respectfully submitted,
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