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17 EDWARD WAYNE SIMMONS

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
19 COUNTY OF SAN BERNARDINO

20 In re the Matter of:

21 THE BILLY W. SIMMONS FAMILY  
22 TRUST OF 1990 dated March 6, 1990,  
23 as AMENDED AND RESTATED on  
24 May 25, 2005

Case No. TRUSB2300024  
Judge: Honorable Michelle H. Gilleece

**NOTICE OF MOTION AND MOTION OF  
RESPONDENT EDWARD WAYNE SIMMONS  
TO EXPUNGE LIS PENDENS RECORDED  
AGAINST 36475 COUNTY LINE RD.,  
YUCAIPA, CA; REQUEST FOR ATTORNEY  
FEES AND COSTS**

[Filed Concurrently with  
1. Declaration of Edward Wayne Simmons; and,  
2. Declaration of Jerry R. Dagrella.]

Hearing:  
Date: Aug. 1, 2023  
Time: 8:30 a.m.  
Dept.: S36

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:


PLEASE TAKE NOTICE that on Aug. 1, 2023, at 8:30 a.m., or as soon as thereafter as the matter may be heard in Department S36 of the above-entitled Court, located at 247 W. Third St., San Bernardino, CA 92415, Respondent Edward Wayne Simmons (“Respondent”) will and does hereby move the Court for an order to expunge the following Notice of Pending Action (Lis Pendens) recorded by Petitioner Margit Simmons:

Notice of Pendency of Action (Lis Pendens) recorded against 36475 County Line Rd., Yucaipa, CA (also identified as 34675 County Line Rd.), APN 1242-561-25-0000, on 03/29/2023, in the Official Records of San Bernardino County, as Document No. 2023-0073803.

The Motion is made pursuant to *Code of Civil Procedure* section 405.30 on the grounds that (1) the petition does not state a real property claim and (2) any claim lacks probable validity. (*Code of Civil Procedure* §§ 405.31–32.) Pursuant to *Code of Civil Procedure* section 405.38, Respondent also moves for an award of attorney’s fees and costs in the amount of \$3,406 (per motion) against Petitioner Margit Simmons and the Billy W. Simmons Family Trust of 1990 dated March 6, 1990, as Amended and Restated on May 25, 2005.

The Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the concurrently-filed declarations of Edward Wayne Simmons and Jerry R. Dagrella, and the pleadings and records on file in this action, and upon such further documents and evidence as may be presented at the hearing of this motion.

Dated: May 22, 2023                      DAGRELLA LAW FIRM, PLC

By:   
\_\_\_\_\_  
JERRY R. DAGRELLA  
Attorney for Respondent Edward Wayne Simmons

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Petitioner Margit Simmons improperly recorded Notices of Pendency of Action (lis  
4 pendens) against every property associated with Respondent for the sole purpose of using them as  
5 a weapon against him in this probate action. This Motion concerns Respondent’s house at 36475  
6 County Line Rd., Yucaipa, CA, which he purchased with his wife twenty years ago, and is listed  
7 on the market. The lis pendens is making it impossible to close escrow on the sale of the house.

8 Respondent sent three letters detailing why the lis pendens were improper and politely  
9 requesting their withdrawal. In response, Petitioner’s attorney gave no justification for recording  
10 the lis pendens, but nonetheless sought to use them as chips for negotiation. *Petitioner’s attorney*  
11 *actually blackmailed Respondent by demanding concessions in exchange for withdrawal of one*  
12 *lis pendens, and even threatened to sue Respondent’s wife and daughter if the demands were*  
13 *not met*. Such brazen actions demonstrate exactly what is meant by the oft-quoted statement that  
14 “the lis pendens procedure [is] susceptible to serious abuse, providing unscrupulous plaintiffs  
15 with a powerful lever to force the settlement of groundless or malicious suits[.]” (*BGJ Associates*  
16 *v. Superior Court* (1999) 75 Cal.App.4th 952, 969.)

17 The Court *must* expunge a lis pendens if either: (1) the petition does not state a "real  
18 property claim" or (2) the petitioner fails to establish the probable validity of her real  
19 property claim. (C.C.P. §§ 405.31–32.) Petitioner cannot satisfy the “real property claim”  
20 requirement because she has failed to allege any legal basis that would entitle her to obtain  
21 ownership of Respondent’s house. Moreover, she cannot satisfy the “probable validity”  
22 requirement because even if she alleged a real property claim, she has no evidence to support  
23 such a baseless claim. Therefore, the lis pendens against Respondent’s house must be expunged.

24 **II. FACTUAL SUMMARY**

25 **A. Petition is Filed Without Apparent Client Authority**

26 On February 15, 2023, a Petition was filed by Attorney William Nassar purportedly to act  
27 on behalf of Petitioner Margit Simmons. The Petition accuses Respondent of mishandling the  
28 family trust in his capacity as trustee. The allegations in the Petition have been proven false and

1 may have been stirred up by delusions experienced by Petitioner, as she has late-stage  
2 Alzheimer’s disease and suffers extreme bouts of paranoia, delusions and hallucinations. (See  
3 Amended Verified Response to Petition filed April 26, 2023; Simmons Decl. ¶ 3.) On January  
4 26, 2018, the attorney who prepared the family trust—Scott Reynolds—procured a Physician’s  
5 Certification that was signed by Dr. Michael Will, declaring Petitioner mentally incapacitated.  
6 (Simmons Decl., ¶ 3.) Petitioner’s new attorney is aware of this; he attached to the Petition, as  
7 Exhibit C, a letter from his office that says “MARGIT lacked capacity” and makes specific  
8 reference to a “Capacity Declaration”. (Exhibit C to Petition filed February 15, 2023.)

9 Despite repeated requests, Petitioner’s attorney has offered no explanation for how he  
10 derives authority to file this Petition on behalf of an incapacitated adult. (Dagrella Decl., ¶ 5.) It  
11 is highly unlikely, given her diagnosis, that Petitioner has recovered her cognitive functions such  
12 that she is capable of reading, understanding and verifying the incredibly harsh (and false)  
13 allegations in the Petition against her son, with whom she had a wonderful and loving relationship  
14 for over 60 years. (Simmons Decl., ¶ 3.) Such a miraculous recovery from late-stage  
15 Alzheimer’s is unheard of in the medical community.

16 "Perhaps the most basic factual contentions implicit in a complaint are that the plaintiff  
17 consents to the filing of suit and prays for the relief requested,... a complaint cannot be 'well  
18 grounded in fact' if a client does not authorize its filing." (*In re Deep Vein Thrombosis*, No. 04-  
19 1606, 2008 U.S. Dist. LEXIS 48641, 2008 WL 2568269 (N.D. Cal. 2008)).) Considering  
20 Petitioner’s incapacity, the Petition appears to have been filed without proper authority in  
21 violation of *Business and Professions Code* § 6104. (*Sullivan v. Dunne* (1926) 198 CA. 183, 192  
22 [“...incapacity of the client will, therefore operate as a termination of the authority of the  
23 attorney.”]; *Caldwell v. State Bar* (1975) 13 Cal.3rd 488 [criticizing attorney who spent client funds  
24 after client adjudicated incompetent]; *Conservatorship of Chilton* (1970) 8 Cal.App.3rd 34  
25 [finding client lacked capacity to enter into an attorney-client relationship].)

26 **B. Petition Falsely Accuses Respondent of Mismanaging Trust Assets**

27 The Petition filed on February 15, 2023 falsely accused Respondent of mismanaging and  
28 misappropriating the Trust assets. This was shocking because Respondent was not even in

1 control of the Trust assets at the time—his sister, Petitioner Susan Krug (“Susan”) had full  
2 control. (Simmons Decl., ¶ 4.) Over time, Susan sought full control of the Trust’s assets and  
3 Respondent was willing to accept this so long as she was handling the caregiving for their mother.  
4 (*Ibid.*) By year 2022, Susan was managing all the real estate of the Trust and receiving all the  
5 income. (*Ibid.*) Despite this, upon filing the Petition, Petitioner’s attorney appeared *ex parte*  
6 before the court to obtain an interim order of suspension and for Respondent to provide an  
7 accounting, based on the false allegations. (*Ibid.*) Respondent was not represented by counsel at  
8 the *ex parte* hearing and filed an initial Response to the Petition in *pro per.* (*Ibid.*) Respondent  
9 eventually retained a probate attorney and, **on April 26, 2023, Respondent filed a detailed, 42-**  
10 **page Amended Verified Response to Petition that contains exhibits proving the allegations in**  
11 **the Petition false.** (*Ibid.*)

12 Specifically, the Petition alleges that the Trust “formerly possessed Apple Stock and Bank  
13 of America accounts” and accuses Respondent of “cashing out” the stock to “finish a construction  
14 project.” (Petition, ¶¶ 5 & 8.) Petitioner’s attorneys relied heavily on this allegation at the *ex*  
15 *parte* hearing to persuade the court to suspend Respondent as trustee. (Simmons Decl., ¶ 4(a).)  
16 Respondent repeatedly informed Petitioner’s attorney that this allegation was false and provided  
17 evidence, to no avail. (*Ibid.*) On April 21, 2023, Respondent’s attorney sent a detailed letter to  
18 Petitioner’s attorney that included documentary proof that the stock was never liquidated and  
19 explained that account statements were mailed to Susan on a regular basis, so she was aware, or  
20 should have been aware, that the allegation was false. (Dagrella Decl., ¶ 4.)

21 The Petition also alleges that Respondent’s son operates “3 Peaks LLC” and pays only  
22 \$875.00 in rent, which is \$4,000 under market value to the detriment of the trust. (Petition, ¶ 13.)  
23 In a telephone call on April 20, 2023, Petitioners’ attorney demanded that Respondent’s son  
24 vacate the property because he had no lease and no right to occupy the premises. (Dagrella Decl,  
25 ¶ 3.) On April 21, 2023, in a detailed letter, Respondent’s counsel supplied a copy of a lease  
26 agreement executed by Susan, acting as landlord and trustee, authorizing Respondent’s son to  
27 occupy the property thru March 31, 2024. (Dagrella Decl., ¶ 4, Exh. 2.) The rent is  
28 \$3,500/month and was negotiated by Monarch Management, the property management company

1 retained by Petitioner’s law firm. (*Ibid.*) Once again, it appeared Petitioner’s attorney was  
2 making completely baseless accusations without conducting any due diligence whatsoever and  
3 then forcing Respondent to prove those accusations false.

4 In the same April 21, 2023 letter, Respondent’s counsel supplied evidence that bank and  
5 financial statements were previously provided to Petitioner’s attorney and that he signed a written  
6 acknowledgement verifying receipt of those documents. (*Ibid.*) The letter requests that  
7 Petitioner’s attorneys “let us know if there is something else you are seeking that was not in that  
8 disclosure.” (*Ibid.*) The letter contains the following offer to provide any further information  
9 requested by Petitioners—all they had to do was ask:

10 “The Petition contains serious allegations of misconduct, many of  
11 which appear to be false based on the records we have seen so far.  
12 It is unclear to us if these allegations come from an honest  
13 misunderstanding of the history and/or reliance on the memory of a  
14 person with Alzheimer’s disease. In the normal course, we would  
15 be noticing Margit’s and Susan’s depositions so that could explore  
16 what evidence they have to substantiate the allegations. Equally so,  
17 I imagine you are interested in deposing or examining Wayne.  
18 Those formal proceedings cost a lot of money and have a tendency  
19 to raise the emotions of the parties. I propose that we continue  
20 communicating and exchanging information informally so that the  
21 ramping up this litigation will be unnecessary. To that end, you and  
22 Ms. Daniel should feel free to call me or Mr. Dagrella at your  
23 convenience if you need any further information or need additional  
24 documents concerning these matters.”

19 **C. Petitioner’s Attorney Records Lis Pendens, Uses It to Blackmail Respondent**

20 The Petition does not state a real property claim and explicitly acknowledges that any  
21 such claim would be based entirely on speculation and conjecture. In paragraph 4, the Petition  
22 speculates that Respondent holds title to real estate that was “possibly wrongly procured (outside  
23 the Trust) by Wayne or his assigns with Trust Assets.” In paragraph 18a, the Petition alleges,  
24 “There are numerous properties where it is *unclear* if the property was secured by Trust Assets.”  
25 (Emphasis added.)

26 **Respondent’s house at 36475 County Line Rd., Yucaipa, CA, was purchased by**  
27 **Respondent and his wife twenty years ago, on December 15, 2003. (Simmons Decl., ¶ 2(a).)**  
28 **That house was never held by the Trust, which can be verified from San Bernardino**

1 **transaction records.** (*Ibid.*) Nonetheless, Petitioner’s attorney recorded a lis pendens against  
2 Respondent’s house, along with four other properties, without legal justification.

3 In the same April 21-letter, Respondent’s attorney provided Petitioner’s attorney with the  
4 full transaction history on all five properties to prove they belong to Respondent and not the  
5 Trust. (Dagrella Decl., ¶ 4.) The letter outlined in detail why the lis pendens were improper and  
6 politely requested that they be withdrawn. (*Ibid.*) ***On May 11, Petitioners’ attorney responded***  
7 ***with a letter (dated May 9) in which he used the lis pendens as a chip in negotiations, offering***  
8 ***to withdraw one lis pendens if Respondent agreed to a series of demands—which included that***  
9 ***he resign as trustee, giving his sister full control. (Id., ¶ 5.) He threatened to sue Respondent’s***  
10 ***wife and daughter (by adding them as Doe defendants) if Respondent didn’t comply. (Ibid.)***  
11 The letter did not respond to any of the information and material Respondent supplied that  
12 discredited the Petition. (*Ibid.*)

13 Respondent’s attorney replied to the May 11-letter that same day with another plea for  
14 withdrawal of the lis pendens, emphasizing the effect on Respondent’s financial situation. (*Ibid.*)  
15 In a phone call on May 17, Petitioner’s attorney repeated his offer to withdraw one lis pendens on  
16 a property in Idaho, *if and only if*, his demands were met; and he repeated the threats to sue  
17 Respondent’s wife and daughter, again offering no legal basis for suing them; he also said he  
18 would “find” something in the accounting if his demands were not met. (*Ibid.*) Later on May 17,  
19 Respondent’s attorney sent a third letter expressing regret that he would have to file motions to  
20 expunge due to Petitioner’s attorney’s refusal to withdraw the lis pendens. (*Ibid.*)

### 21 **III. LEGAL ANALYSIS**

22 The Court *must* expunge a lis pendens if either: (1) the petition does not state a "real  
23 property claim" or (2) the petitioner fails to establish the probable validity of her real  
24 property claim. (C.C.P. §§ 405.31–32.)

#### 25 **A. The Petition Fails To Allege A Real Property Claim**

26 A "real property claim" is "the cause or causes of action in a pleading which would, if  
27 meritorious, affect ... title to, or the right to possession of, specific real property," or "the use  
28 of an easement identified in the pleading." (C.C.P. § 405.4.) If the pleading filed by the

1 claimant does not properly plead a real property claim, the lis pendens must be expunged upon  
2 motion under C.C.P. § 405.31. “[U]nlike most other motions, when a motion to expunge is  
3 brought, the burden is on the party opposing the motion to show the existence of a real property  
4 claim.” (*Campbell v. Superior Ct.* (2005) 132 Cal.App.4th 904, 911; C.C.P. § 405.30.)

5 Here, it is obvious from the face of the Petition that Petitioner has not alleged a real  
6 property claim. Petitioner has not alleged any specific facts which would entitle her to "title,"  
7 "possession," or "the use of an easement" on any of Respondent’s properties. All that  
8 Petitioner has alleged are causes of action to remove Respondent as trustee and damages  
9 for unsubstantiated elder abuse. There is no cause of action for title to any real estate; in  
10 fact, none of Respondent’s property addresses are even identified in the Petition.

11 The Petition alleges, through pure speculation, that Respondent “may” have used  
12 trust assets to procure properties. However, such spurious allegations of stolen funds,  
13 even if proven true, do not permit the recording of a lis pendens. (*Lewis v. Superior Ct.*  
14 (1994) 30 Cal.App.4th 1850, 1863 [“The fact that someone buys property with stolen money  
15 does not make the victim the owner of that property as a matter of real property law. It merely  
16 entitles the victim the pursue the thief to recover a money judgment.”]; *Urez Corp. v.*  
17 *Superior Court* (1987) 190 Cal.App.3d 1141, 1149 [“allegations of equitable remedies, even if  
18 colorable, will not support a lis pendens if, ultimately, those allegations act only as a collateral  
19 means to collect money damages.”]; *BGJ Associates, supra* 75 Cal.App.4th at 972 [“[i]n a case  
20 such as this where the pleading combines theories of liability for monetary damages and for a  
21 constructive trust, we hold that plaintiffs should not be able to maintain a lis pendens.”]; *La Paglia*  
22 *v. Superior Ct.* (1989) 215 Cal.App.3<sup>rd</sup> 1322, 1329 [“the constructive trust [plaintiff] has alleged  
23 is not an action affecting title to or possession of the Riverside property.”].)

24 **B. Petitioner Cannot Prove by “Clear and Convincing Evidence” that Her**  
25 **Claim is Probably Valid**

26 In addition to the fact that Petitioner does not allege a "real property claim" under  
27 C.C.P. §405.31, which provides a standalone basis for expunging the lis pendens, Petitioner  
28 also cannot show the "probable validity" of her claims under C.C.P. § 405.32, providing an



1 additional basis for expungement. Section 405.32 provides for an evidentiary hearing on the  
2 "probability the proponent will be able to establish a valid real property claim." (*BGJ*  
3 *Associates, supra* 75 Cal.App.4th at 956-57.) To prove "probable validity," Petitioner  
4 must show more than a prima facie case—she must show that it is more likely than not  
5 that she will obtain a judgment against Respondent on her claims. (C.C.P. § 405.32.) “The  
6 phrase ‘probable validity’ in section 405.32 was obviously written from the perspective of a trial  
7 court judge trying to forecast, at some point before trial, the “probable” outcome in the *trial*  
8 court.” (*Mix v. Superior Court*, (2004) 124 Cal. App. 4th 987, 995.) “This section expressly  
9 concerns factual merit” and “is intended to require a hearing on the merits of the same type as  
10 those conducted in the attachment and claim and delivery proceedings.” (Comments 3-4 to Code  
11 Civ. Proc., § 405.32.)

12 It is important to note Petitioner's burden here is particularly heavy. It is not sufficient for  
13 Petitioner to prove her case by a preponderance of the evidence. Under *Evidence Code* section  
14 662, “[t]he owner of the legal title to property is presumed to be the owner of the full beneficial  
15 title. *This presumption may be rebutted only by clear and convincing proof.*” (Emphasis  
16 added.) Thus, to demonstrate the probable validity of her claims, Petitioner must establish her  
17 case through clear and convincing evidence.

18 Petitioner cannot come close to meeting her weighty burden. The facts show that  
19 Respondent’s personal residence was acquired by him and his wife twenty years ago on  
20 December 15, 2003. (Simmons Decl., ¶ 2(a).) Respondent was not a trustee of the Trust in  
21 2003, so he could not possibly have used Trust assets to acquire his own house. (*Ibid.*)  
22 Moreover, stating the obvious, the statute of limitations has clearly run on any claim  
23 challenging an acquisition from twenty years ago.

24 **C. Respondent is Entitled to Recover His Attorney’s Fees and Costs**

25 C.C.P. §405.38 provides for an award of attorney fees to the prevailing party unless the  
26 court finds that the other party acted with substantial justification or that other circumstances  
27 make the imposition of attorney’s fees and costs unjust. Those exceptions are not present here,  
28 for the numerous reasons discussed above. Petitioner has no real property claim, and no realistic

1 prospect of prevailing on a real property claim on the merits. Her attorney recorded a lis pendens  
2 solely to leverage Respondent and extract concessions from him. The Court should award  
3 Respondent the fees and costs he was forced to incur by having to bring this motion in the  
4 amount of \$3,406, as described in the Declaration of Jerry R. Dagrella.

5 **IV. CONCLUSION**

6 The law places a heavy burden on Petitioner. This is intentionally so because it is neither  
7 right nor just for one party to be able to tie up another person's property by simply recording a  
8 piece of paper with the County Recorder. Based upon the above-stated statutory mandate, the lis  
9 pendens on Respondent's house should be expunged and the statutory attorney's fees in the  
10 amount of \$3,406 awarded to Respondent.

11 Dated: May 22, 2023

DAGRELLA LAW FIRM, PLC

12  
13 By: \_\_\_\_\_

JERRY R. DAGRELLA

Attorney for Respondent Edward Wayne Simmons