

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 1, Honorable Le Jacqueline Duong, Presiding**  
Mai Jansson, Courtroom Clerk

191 North First Street, San Jose, CA 95113  
Telephone 408.882-2120

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

**PROBATE LAW AND MOTION TENTATIVE RULINGS**

**DATE: July 3, 2022      TIME: 10:00 A.M.**

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LINE #	CASE #	CASE TITLE	RULING
<a href="#">LINE 1</a>	24PR196617	The Thomas Family Trust, Dated May 27, 1994	Click on <a href="#">LINE 1</a> or scroll down for attached Tentative Ruling.
<a href="#">LINE 2</a>	24PR196618	Thomas Legacy Trust, Dated February 4, 2021	Click on <a href="#">LINE 2</a> or scroll down for attached Tentative Ruling.
<a href="#">LINE 3</a>			
<a href="#">LINE 4</a>			
<a href="#">LINE 5</a>			

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**PROBATE LAW AND MOTION TENTATIVE RULINGS**

[LINE 6](#)

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Line 1

## INTRODUCTION

In 1994, settlors Mark Thomas (“Mark”) and Marjolie Thomas (“Marjolie”) established the Thomas Family Trust, dated May 27, 1994 (“Family Trust”).<sup>1</sup> The Family Trust was amended several times. In 2008, the settlors restated the Family Trust. According to Petitioner Eileen Warner (“Petitioner”), the 2008 version of the Family Trust held the following real property: (1) 2252 and 2254 Cherry Avenue, San Jose, CA (“Cherry Ave. Property”), (2) 1439 Mercer Avenue, San Jose, CA (“Mercer Ave. Property”); (3) A partial interest in the real property located at 845 Capitolio Way, San Luis Obispo, CA (“Capitolio Way Property”); and (4) 18 North San Pedro Avenue, San Jose, CA (“San Pedro Ave. Property”) (collectively, “Subject Properties”).

When Mark passed away in 2010, the Family Trust split into a Bypass Trust and a Survivor’s Trust. The Bypass Trust held the partial interest in the Capitolio Way Property, the Cherry Ave. Property and a 50 percent interest in the San Pedro Ave. Property. The Survivor’s Trust held the Mercer Ave. Property and a 50 percent interest in the San Pedro Ave. Property.

Marjolie amended the Survivor’s Trust. Under the terms of the fourth amendment, after certain gifts to the settlors’ grandchildren, the personal property was to be divided amongst the settlors’ children, including Petitioner and Respondent Ward Thomas (“Respondent”). The fifth amendment named Marjolie and Respondent co-trustees.

On February 4, 2021, Marjolie executed the irrevocable Thomas Legacy Trust (“Legacy Trust”). The beneficiaries are Marjolie’s children, including Petitioner and Respondent. Petitioner contends that Marjolie also executed an agreement of reserved rights with the Legacy Trust on that same date. That agreement stated that Marjolie reserved the right to possess the Legacy Trust property and to receive income from the property as needed for her health, education, support, and maintenance. Petitioner asserts that the Mercer Ave. Property and the 50 percent interest in the San Pedro Ave. Property were transferred from the Survivor’s Trust to the Legacy Trust.

In 2022, Marjolie was diagnosed with vascular dementia. She lives at home and requires 24-hour per day care, costing the trust approximately \$311,040.00 annually.<sup>2</sup> Respondent is currently the sole trustee of the Bypass Trust of the Thomas Family Trust, the Survivor’s Trust of the Thomas Family Trust, and the Thomas Legacy Trust.

On August 31, 2021, Marjolie, as trustee of the Legacy Trust and the Bypass Trust, executed the General Partnership Agreement of Thomas Legacy Partnership (“Partnership”). Respondent is currently the managing partner for the Partnership.

On February 8, 2024, Petitioner filed a petition (“Family Trust Petition”) in docket 24PR196617 (“Family Trust Action”). The petition alleged that the San Pedro Ave. Property was occupied by Togo’s, Inc. until its lease expired in December 2022. Thereafter, Respondent, acting as trustee, entertained letters of intent from potential occupants for the San Pedro Ave. Property. Respondent ultimately selected the Thai Group to occupy the property rather than Petitioner’s choice of Voyager Coffee. Petitioner alleges that a significant amount of funds from the Survivor’s Trust will be used for infrastructure improvements to the San Pedro Ave. Property, which would not be necessary if Voyager Coffee had been selected as the tenant. Under the terms of the lease agreement with the Thai Group, the trust will not collect rental income for somewhere between 18 and 24 months before the start of the leasehold, whereas, with Voyager Coffee, the rent would have begun to be paid at month 11. Petitioner estimates that choosing the Thai Group over Voyager Coffee as the tenant has the potential to cost the trust more than \$600,000. Petitioner also mentions that the Thai Group has recently been involved in litigation.

The Family Trust Petition asserts causes of action for (1) removal of Respondent as trustee; (2) breach of fiduciary duty, alleged against Respondent; (3) request for accountings; (4) constructive trust; (5) request for instructions that Respondent be surcharged and ordered to pay Petitioner’s attorney fees; and (6) declaratory relief.

Also on February 8, 2024, Petitioner filed a petition (“Legacy Trust Petition”) in docket 24PR196617 (“Family Trust Action”). The Legacy Trust Petition largely repeats the allegations of the Family Trust Petition. It asserts causes of action for (1) removal of Respondent as trustee; (2) breach of fiduciary duty, alleged against Respondent; (3) request for accountings; (4) constructive trust; (5) request for instructions that Respondent be surcharged and ordered to pay Petitioner’s attorney fees; and (6) declaratory relief.

Currently before the court are two motions by Respondent to expunge lis pendens, one in each action. Both motions are opposed and Respondent has filed replies.

## DISCUSSION

### I. Requests for Judicial Notice

#### A. Respondent’s Requests for Judicial Notice

With respect to the motion filed in the Family Trust Action, Respondent requests judicial notice of:

1. The Grant Deed dated August 31, 2021 and recorded as Document No. 25099319 with the Santa Clara County Recorder's Office on September 14, 2021 (attached to the request for judicial notice as Exhibit A)
2. The Notice of Pendency of Action dated Mach 5, 2024 and recorded as Document No. 25606815 with the Santa Clara County Recorder's Office on March 7, 2024 (attached to the request for judicial notice as Exhibit B)
3. The Grant Deed dated February 4, 2021 and recorded as Document No. 24819173 with the Santa Clara County Recorder's Office on February 5, 2021 (attached to the request for judicial notice as Exhibit C)
4. The Notice of Pendency of Action dated Mach 5, 2024 and recorded as Document No. 25606813 with the Santa Clara County Recorder's Office on March 7, 2024 (attached to the request for judicial notice as Exhibit D)
5. The Grant Deed dated February 9, 2024 and recorded as Document No. 25596971 with the Santa Clara County Recorder's Office on February 9, 2024 (attached to the request for judicial notice as Exhibit E)
6. The Notice of Pendency of Action dated Mach 5, 2024 and recorded as Document No. 25606814 with the Santa Clara County Recorder's Office on March 7, 2024 (attached to the request for judicial notice as Exhibit F)
7. The Grant Deed dated June 23, 2011 and recorded as Document No. 2011030362 with the San Luis Obispo County Recorder's Office on June 27, 2011 (attached to the request for judicial notice as Exhibit G)
8. The Notice of Pendency of Action dated Mach 5, 2024 and recorded as Document No. 2024005945 with the San Luis Obispo County Recorder's Office on March 7, 2024 (attached to the request for judicial notice as Exhibit H)

With respect to the motion filed in the Family Trust Action, Respondent requests judicial notice of:

1. The Grant Deed dated August 31, 2021 and recorded as Document No. 25099319 with the Santa Clara County Recorder's Office on September 14, 2021 (attached to the request for judicial notice as Exhibit A)
2. The Notice of Pendency of Action dated Mach 5, 2024 and recorded as Document No. 25606816 with the Santa Clara County Recorder's Office on March 7, 2024 (attached to the request for judicial notice as Exhibit B)

3. The Grant Deed dated February 4, 2021 and recorded as Document No. 24819173 with the Santa Clara County Recorder's Office on February 5, 2021 (attached to the request for judicial notice as Exhibit C)

4. The Notice of Pendency of Action dated March 5, 2024 and recorded as Document No. 25606817 with the Santa Clara County Recorder's Office on March 7, 2024 (attached to the request for judicial notice as Exhibit D)

Recorded deeds are the proper subject of judicial notice. (See *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549 [“The court may take judicial notice of recorded deeds.”].) Similarly the recorded notices of pendency of action are also proper subjects of judicial notice. (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1.) Accordingly, both Respondent's requests for judicial notice are granted.

#### B. Petitioner's Requests for Judicial Notice

Petitioner's requests for judicial notice in opposition to each motion are identical. In connection with her opposition to both motions, Petitioner requests judicial notice of the Legacy Petition, which she labels Exhibits A through H. There are no exhibits attached to the request for judicial notice.

She also requests judicial notice of four additional court filings: (1) the Declaration of Urgency of Eileen Werner in Support of Ex Parte Application to Suspend Trustee Powers, filed May 10, 2024; (2) Petitioner Eileen Werner's Supplemental Declaration of Urgency in Support of Ex Parte Application to Suspend Trustee, filed June 3, 2024; (3) Declaration of Samantha Farren, Esq. in Support of Petitioner Eileen Werner's Ex Parte Application to Suspend Trustee Powers, filed May 10, 2024; (4) Supplemental Declaration of Samantha Farren, Esq. in Support of Petitioner Eileen Werner's Ex Parte Application to Suspend Trustee, filed June 3, 2024.<sup>3</sup> None of these documents are attached to the request for judicial notice.

The court will deny the request for judicial notice as to the Legacy Petition as the court is required to consider it in connection with the instant motion. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [denying as unnecessary a request for judicial notice of pleading under review on demurrer].)

Respondent opposes Petitioner's request for judicial notice on the ground that the court cannot take judicial notice of the hearsay content of court documents. This argument is well-taken. However, the court will grant the request as to the four remaining documents with the caveat that while the court is free to take judicial notice of the existence of a document in a court file, it may not take judicial notice of the truth of hearsay statements contained therein. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882; see also

Intengan v. BAC Home Loans Servicing LP (2013) 214 Cal.App.4th 1047, 1057 [court may take judicial of existence of declaration but not of facts asserted in it].)

## II. Motions to Expunge Lis Pendens

As the petitions and the motions to expunge in each docket are substantially similar, they will be discussed together. In each case, Respondent seeks to expunge the lis pendens on the

ground that the petition does not state a real property claim within the meaning of Code of Civil Procedure section 405.4.4

### A. Legal Background

As explained by the California Supreme Court in Kirkeby v. Superior Court (2004) 33 Cal.4th 642, 647,

“A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice.” (Urez Corp. v. Superior Court (1987) 190 Cal. App. 3d 1141, 1144.) A lis pendens may be filed by any party in an action who asserts a “real property claim.” (Code Civ. Proc., § 405.20.) Section 405.4 defines a “ ‘Real property claim’ ” as “the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property ... .” “If the pleading filed by the claimant does not properly plead a real property claim, the lis pendens must be expunged upon motion under CCP 405.31.” [Citation.]

Section 405.30 allows the property owner to remove an improperly recorded lis pendens by bringing a motion to expunge. There are several statutory bases for expungement of a lis pendens, including the claim at issue here: claimant’s pleadings, on which the lis pendens is based, do not contain a real property claim. (See § 405.31.) Unlike most other motions, when a motion to expunge is brought, the burden is on the party opposing the motion to show the existence of a real property claim. (See § 405.30.)

(Fns. omitted.)

A court shall order a notice of lis pendens expunged if it determines (1) that the pleading on which the notice is based does not contain a real property claim (§ 405.31); (2) that the claimant has not established, by a preponderance of the evidence, the probable validity of a real property claim (§ 405.32); or (3) that adequate relief can be secured by an undertaking. (§ 405.33.)

(Shoker v. Superior Court (2022) 81 Cal.App.5th 271, 277 (Shoker).)

In making this determination, the court must engage in a demurrer-like analysis. “Rather than analyzing whether the pleading states any claim at all, as on a general demurrer, the court must undertake the more limited analysis of whether the pleading states a real property claim.” [Citation.] Review “involves only a review of the adequacy of the pleading and normally should not involve evidence

from either side, other than possibly that which may be judicially noticed as on a demurrer.” [Citation.]

(*Kirkeby v. Superior Court*, supra, 33 Cal.4th at pp. 647-648.)

## B. Merits of the Motions

Here, Petitioner has filed notices of pendency of action in the Family Trust Action for (1) the San Pedro Ave. Property, (2) the Mercer Ave. Property, (3) the Cherry Ave. Property, and (4) the partial interest in the Capitolio Property. In the Legacy Trust Action, Petitioner has filed notices of pendency of action related to (1) the San Pedro Ave. Property and (2) the Mercer Ave. Property.

As mentioned above, both the Family Trust Petition and the Legacy Trust Petition raise causes of action for (1) removal of Respondent as trustee; (2) breach of fiduciary duty, alleged against Respondent; (3) request for accountings; (4) constructive trust; (5) request for instructions that Respondent be surcharged and ordered to pay Petitioner’s attorney fees; and (6) declaratory relief.

Petitioner argues that her constructive trust claims are considered real property claims. She relies on *Shoker*, supra, 81 Cal.App.5th at p. 282, in which the Court of Appeal held that the constructive trust claim in the case before it constituted a real property claim. In *Shoker*, supra, 81 Cal.App.5th at p. 278, the Court of Appeal was faced with the question of whether a claim for constructive trust involving certain specific parcels of real property alleged a real property claim for the purposes of sections 405.31 and 405.4. The court explained, “Some actions present easy questions under the statute. A buyer’s suit seeking specific performance of a real property purchase and sale agreement is obviously a real property claim. On the other hand, an action for money damages alone is not a real property claim—even if it involves real property in some way. [Citation.]” (*Ibid.*) The court stated, “section 405.4 does not restrict a *lis pendens* to actions where a real property claimant only seeks title to, or possession of, specific real property. In fact, it defines a ‘ “[r]eal property claim” ’ to mean ‘the cause or causes of action in a pleading which would, if meritorious, affect ... title to, or the right to possession of, specific real property.’ ” (*Id.* at p. 282.)

With respect to the case before it, the court stated, “The Shokers’ causes of action against Phangureh allege that he wrongfully acquired their properties via a



conspiracy (with Ghuman) involving fraud and breach of fiduciary duties. The Shokers further allege that they are entitled to a constructive trust returning those same real properties to them. [Citation.] [T]he Shokers' claim falls squarely within the plain language of the statute: it "would, if meritorious, affect ... title" to real property. [Citations.]" (Shoker, *supra*, 81 Cal.App.5th at p. 282, italics added.) Thus, in Shoker, the constructive trust claim requested return of certain real property.

Here, the constructive trust causes of action in both the Family Trust Petition and the Legacy Trust Petition allege that Respondent holds rental proceeds from the Subject Properties in a constructive trust, not the Subject Properties themselves.

In *Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 908-909 (Campbell), the plaintiff raised claims for equitable lien and constructive trust, alleging that the defendant had unduly influenced the plaintiff's deceased father to pay for remodeling of the defendant's house. The plaintiff filed a *lis pendens* on the defendant's house. (*Id.* at p. 908.) The Court of Appeal held that neither cause of action could support a *lis pendens*.

With respect to the equitable lien claim, the Campbell court explained, "In his complaint, Campbell requested 'an equitable lien against the Grandee House equal to the amount of the assets of the Trust used to improve the Grandee House in any way.' In other words, Campbell, sought an interest in [the defendant's] real property 'for the purpose of securing a claim for money damages.' [Citation.] . . . Campbell's claim is not dependent upon the uniqueness of the defendant's property in the underlying suit, and Campbell will be fully compensated for any damages he has suffered by a money judgment. We conclude such an action does not 'affect ... title to ... specific real property' (§ 405.4), and, therefore, does not support the recording of a *lis pendens*. [Citation.]" (Campbell, *supra*, 132 Cal.App.4th at p. 919.)

With respect to the constructive trust claim, which requested that a constructive trust be imposed on a specific parcel, the Campbell court concluded that the complaint failed to adequately plead facts that would support a constructive trust remedy. (Campbell, *supra*, 132 Cal.App.4th at p. 922.) It also concluded that, to the extent the constructive trust remedy was sought merely to establish an interest in the defendant's property to secure a money judgment, such a prayer for relief would not support the filing of a *lis pendens*. (*Ibid.*)

Here, the constructive trust causes of action specifically indicate that they are related to money, in the form of rental proceeds from the Subject Properties and not the Subject Properties themselves. Thus, the constructive trust claims in this case are more similar to those held insufficient to state a real property claim in Campbell. Petitioner also points to the following sentence, which appears in both petitions: "In the event the Court removes the Respondent as Trustee of the operative Trust estate, the Petitioner respectfully requests that the Court rule that the Respondent holds any

and all said Trust assets as constructive trustee, pending appointment of a new trustee.” Petitioner appears to contend that, if the trustee changed, title to the Subject Properties would also change. However, the fact of the change in trustee would not actually affect title to the Subject Properties as the properties would still be titled to the trust. The fact that the current trustee would change if Petitioner’s attempt to remove Respondent as trustee, would not change the fact that the properties belong to the trust.

“[L]is pendens is a provisional remedy which should be applied narrowly” and the claims raised in this case do not support such a remedy. (*Urez Corp. v. Superior Court* (1987) 190 Cal.App.3d 1141, 1145.) The court finds that the petitions do not state a claim for real property as to the constructive trust claims.

Petitioner also argues that he requests rescission of the lease agreement between the Partnership and the Thai Group in his prayer for relief in the Legacy Trust Action. He does not contend that such a request appears in the Family Trust Action. As Petitioner has not shown that

the Family Trust Petition states a real property claim, the court need not address probable validity. Accordingly, the motion to expunge filed in the Family Trust Action is granted.

With respect to the request for rescission in the Legacy Trust Petition, Petitioner has not argued that the request for rescission is tied to any particular cause of action. However, Respondent points out in her motion in the Legacy Trust Action that the petition for instructions cause of action seeks rescission of the lease agreement.<sup>5</sup>

The court agrees with Petitioner that the request for rescission states a real property claim with respect to the San Pedro Ave. Property only. The motion to expunge filed in the Legacy Trust Action is granted to the extent it seeks expungement of the lis pendens attached to the Mercer Ave. Property.<sup>6</sup>

Accordingly, the sole remaining issue is whether Petitioner has established the probable validity of the request for rescission in the petition for instructions cause of action in the Legacy Trust Petition. As mentioned above, the Legacy Trust Petition asserts that Respondent’s decision to lease the San Pedro Ave. Property to the Thai Group rather than Voyager Coffee “had the potential to cost the Trust estate approximately \$600,000.00 more than renting the space to a business such as Voyager Coffee.” (Legacy Trust Petition at ¶ 20.) That petition further alleges that “while the Thai Group might prove to be a profitable tenant for the N. San Pedro Commercial Space in the long-term, the immediate financial burden” was unreasonable due to the need to continue to pay expenses for the care of Marjolie out of trust funds. (Id. at ¶ 19.) The petition also states, “While The Thai Group told

the Respondent that it would be using approximately one million dollars of its own capital for the improvements to the N. San Pedro

Commercial Space, the Respondent also agreed for the Survivor's Trust to absorbing a large portion of the cost the infrastructure improvements. Worse, under the proposed lease agreement between the Survivor's Trust and The Thai Group, said Trust would not collect rental income for the N. San Pedro Commercial Space for a period between 18 months and 24 months." (Id. at ¶ 18.)

The petition for instructions cause of action request rescission of the lease agreement under Civil Code section 1689, which provides, in full:

(a) A contract may be rescinded if all the parties thereto consent.

(b) A party to a contract may rescind the contract in the following cases:

(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

(2) If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds.

(3) If the consideration for the obligation of the rescinding party becomes entirely void from any cause.

(4) If the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause.

(5) If the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault.

(6) If the public interest will be prejudiced by permitting the contract to stand.

(7) Under the circumstances provided for in Sections 39, 1533, 1566, 1785, 1789, 1930 and 2314 of this code, Section 2470 of the Corporations Code, Sections 331, 338, 359, 447, 1904 and 2030 of the Insurance Code or any other statute providing for rescission.

(Civ. Code, § 1689.) The petition states that rescission is sought because the lease agreement is inconsistent with the purposes of the Legacy Trust.

Petitioner has the burden of showing the probable validity of her claim by a preponderance of the evidence. (Howard S. Wright Construction Co. v. Superior Court (2003) 106 Cal.App.4th 314, 318, citing § 405.32.) Here, Petitioner does not explain how either the allegations in the verified petition or the documents for which she sought judicial notice establish the probable validity of a rescission claim.<sup>7</sup> In opposition to the motion for expungement in the Legacy Trust Action, Petitioner states only, “Petitioner has shown a probability that Trustee and Respondent Ward Thomas has engaged in self-dealing and misrepresentation to the courts, in connection with his mismanagement of the real property assets of the Legacy Trust, which includes the commercial property located at 18 N. San Pedro Ave., San Jose, CA 95113, APN 259-34-049 (the ‘San Pedro Property’). There is highly likely [sic] that Petitioner will obtain a judgment in this case.” But, the basis for the request for rescission is that the lease agreement between the Partnership and the Thai Group is inconsistent with the purposes of the trust, namely, to care for Marjolie out of trust funds.

Based solely on the evidence before the court at this time and the arguments made by the parties in connection with the motion to expunge, the court finds that Petitioner has not established the probable validity of the rescission claim. Petitioner has not presented any evidence that the decision to lease the San Pedro Ave. Property to the Thai Group has actually resulted or is likely to result in any impact on the trust’s ability to pay for Marjolie’s care. The fact that rent will be paid by the Thai Group later in the term of the lease agreement than it would

have if Voyager Coffee had been selected as the tenant and the fact that the trust may have to make more up front expenditures based on the lease agreement do not necessarily mean that there is any detriment to the trust’s ability to pay for Marjolie’s care. Accordingly, the motion is granted.

### C. Requests for Reimbursement of Costs

#### i. Respondent’s Request

Respondent requests reimbursement of his costs in seeking to expunge the lis pendens. He seeks \$8,295.00 in attorney fees and costs in connection with the motion in the Family Trust Action and \$4,610.00 in connection with the motion in the Legacy Trust Action.

Section 405.38 provides that “[t]he court shall direct the party prevailing on [a motion to expunge lis pendens] be awarded the reasonable attorney’s fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney’s fees and costs unjust.” (Italics added.)

Here, Respondent is the prevailing party on the motions. However, the court finds that Petitioner acted with substantial justification in arguing that the Legacy Trust Petition contained a real property claim. Further, the attorney fee requests are unreasonably high. The court grants Respondent's requests for reimbursement in part, in the amount of \$8,000 for both motions. Petitioner is ordered to pay to Respondent's counsel \$8,000 within 30 days of the date of this court's order.

ii. Petitioner's Request

Petitioner also requests reimbursement of her costs but, as she is not the prevailing party, that request is denied.

CONCLUSION

The motions to expunge lis pendens are GRANTED. Respondent's requests for costs are GRANTED IN PART, in the amount of \$8,000 for both motions. Petitioner is ordered to pay to Respondent's counsel \$8,000 within 30 days of the date of this court's order. Petitioner's requests for costs are DENIED.

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