

SURROGATE'S COURT  
STATE OF NEW YORK COUNTY OF ONONDAGA

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PEARL G. SIMMONS, as Settlor of an Irrevocable  
Living Trust of Eugene M. Simmons and Pearl G. Simmons,

File No. 2023-985

Petitioner,

-v-

ALAN SIMMONS, MICHAEL SIMMONS, BRIAN  
SIMMONS, KEVIN SIMMONS, MARK SIMMONS,  
MARCIA SIMMONS CRIM and JAMES SIMMONS as  
Trustees of the Irrevocable Living Trust of Eugene M.  
Simmons and Pearl G. Simmons, PHILIP CRIM, as an  
Individual and SIMMONS FARM AT LIMELEDGE,  
L.L.C.,

**ATTORNEY  
AFFIRMATION  
IN SUPPORT OF  
MOTION TO  
DISMISS AND IN  
OPPOSITION TO THE  
ORDER TO SHOW  
CAUSE**

Respondents.

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Ann Marie Murzin, an attorney duly admitted to practice in the Courts of the State of New York, hereby states and affirms as follows:

1. I am an attorney of the law firm of Westfall Law PLLC, attorneys for Respondents ALAN SIMMONS, MICHAEL SIMMONS, MARCIA SIMMONS CRIM and JAMES SIMMONS, incorrectly referred to as "Trustees of the Irrevocable Living Trust of Eugene G. Simmons and Pearl G. Simmons," *correctly designated as*, "The Eugene and Pearl Simmons Irrevocable Income Only Trust," (hereinafter referred to as The Simmons Irrevocable Income-Only Trust hereinafter "Simmons IIOT" or "Trust"), and Respondent PHILIP CRIM, as an Individual, and SIMMONS FARM AT LIMELEDGE, L.L.C. ("the Arboretum"), in the above-captioned matter (collectively referred to herein as "the Respondents"), and as such I am fully familiar with all of the facts and circumstances of

this action. *See* Article I, Title of Trust, page 3, attached as Exhibit “A” and Petition File No. 2023-985.

2. The foregoing Respondents oppose the relief contained in the Court’s Order to Show Cause dated May 11, 2023, deny the allegations in the Petition, and file the instant Motion to Dismiss the Petition pursuant to CPLR 3211 seeking an Order dismissing the Petition in its entirety with prejudice as the Petitioner has failed to sustain her burden of proof as a matter of law including, but not limited to, pursuant to Surrogate Court Procedure Act (“SCPA”) §§ 711 and/or 719; and/or a complete defense is conclusively established by documentary evidence.
3. For the Court’s reference, upon information and belief, this matter relates to the Petition filed to probate the Last Will & Testament of the decedent, Eugene M. Simmons (D.O.D. 9/12/2011; File No.: 2022-1983), and the Petitioner, Pearl G. Simmons (Executor File - No.: 2022-1983) and the *inter vivos* Simmons Irrevocable Income Only Trust dated January 17, 2009 (not a testamentary trust - attached as Exhibit “A”), and Respondents refer to Last Will & Testament, and other Court Orders and filed documents, incorporating same by reference as the Court deems appropriate, and matter not attaching those court filed documents herewith avoid duplicity with the related matter: File No.: 2022-1983.
4. First, the Respondents oppose the Order to Show Cause naming Respondent Mark Simmons as temporary trustee, upon information and belief, who is not represented by the Petitioner’s counsel, and currently serving as the sole Simmons IIOT Trustee without representation by legal counsel, nor any requisite experience. In granting the emergency Order, the Court relied upon the allegations contained in the Verified Petition, and the exhibits thereto, to temporarily suspend the other Simmons IIOT Trustees, including those

originally named by the Decedent. *See* Exhibit “A”; *see also* a copy of the Co-Trustee acceptances, attached collectively as Exhibit “B.” However, the Respondents were properly administering the Simmons IIOT under the guidance of counsel, utilizing a majority rule administration method, maintaining Trust Minutes, and otherwise upholding their fiduciary duties as Trustees. *See* Trust Attorney Engagement Letter, attached as Exhibit “C”; *see also* Example Trust Minutes attached as Exhibit “D.”

5. The Court did not have the benefit of the knowledge and information of the character of the Trustees, including, but not limited to, their education, experience, and that at all times their actions supported the care and well-being of the Petitioner as much as the terms of the IIOT Trust would allow based upon the advice of counsel for the Trust. *See* the Affidavits of Respondents attached as follows, Michael Simmons, Exhibit “E”; Marcia Simmons Crim, Exhibit “F”; James Simmons, Exhibit “G”; Alan Simmons, Exhibit “H”; and Dr. Philip Simmons and on behalf of the Arboretum, Exhibit “I.” Based upon the documentary evidence, Petition ¶¶ 11-12 are denied as to the interpretation of the Will which is not properly addressed against these Respondents, and the intent of the inter vivos Simmons Trust which speaks for itself. *See also* Exhibits “A” – “I.”
6. As such as a matter of law, the Petition must be dismissed as to its claims against the Respondents relating to the Decedent’s Last Will & Testament. *See* Petition, ¶¶ 13-26. The Respondents could not have breached any fiduciary duties of Testamentary Trusts, as upon information and belief, the Petitioner herself is the Executor, not the Respondents, the Petitioner could have elected to probate the Will at any time, and which hypothetically may have resulted in establishing the Testamentary Trusts referred to at length in the Petition. *See also* the Affidavit of Michael Simmons, ¶¶ 18-24, Exhibit “E.” Therefore,

the Respondents deny all allegations with respect to alleged actions/inactions, bad faith and gross negligence relating to the decedent's Will, and in addition, as those allegations cannot be proven as a matter of law, the Petition must be dismissed.

7. The Respondents also object to and deny the allegations of the Petition relating to the non-testamentary Trust, the Simmons IIOT, an inter vivos irrevocable income only trust. See Petition, ¶¶ 27-47. The allegations in sum of failing their fiduciary duty to protect the trust corpus, failing to provide a benefit to Petition, alleged bad faith, gross negligence are unsupported by evidence as a matter of law. *See also* Exhibits "A" – "I."
8. In addition to the foregoing, the Respondents, bring to the Court's attention specifically addressing two (2) issues which the Petitioner alleges, which are as follows: i) the leases of the Trust's real property for the Arboretum; and ii) the purchase of a parcel of the Trust's real property by Dr. Crim.
  - i. First, non-party Jim Manley leases Trust property for farming purposes, and is referred to in the Petition as a "personal reference," and fondly as "a tenant for many years." *See* Petition, Exhibit "J," ¶ 5; *see also* a copy of the Farmer's Lease, attached to this Attorney Affidavit also as Exhibit "J." More recently, after a majority vote of the Simmons Trustees, under guidance of the Trust attorney, the Trust leased Dr. Crim, the Petitioner's grandson, parcels of land for the purposes of developing the Limeledge Botanical Garden and Arboretum. *See* a copy of the Minutes approving the Arboretum Lease, and a copy of the Arboretum Lease, attached collectively as Exhibit "K"; and *see also* the Affidavit of Dr. Crim and on behalf of the Arboretum, attached as Exhibit "I." However, despite the allegations in the Petition, the documentary evidence



demonstrates that the rent of the Arboretum's Lease is objectively more income than the Farmer's Lease, even though the Petitioner appears to subjectively favor the Farmer in her Petition.

ii. In addition, contrary to the allegations in the Petition, Dr. Crim purchased one parcel of Trust property to provide income to the trust paying over market value. Therefore, this claim also fails as a matter of law. *See* the Affidavit of Dr. Crim, attached as Exhibit "I."

9. Moreover, the plain reading of this carefully drafted IIOT supports the Respondents' actions in leasing parcels of Trust property to Dr. Crim and the Farmer, selling property to Dr. Crim (and others), and the creation of "parks," is even specifically mentioned aligning the Trustees' vote with the Arboretum project. *See* Article VIII Powers of Trustees (Sell and Lease, Establish and Maintain Reserves, Manage Realty including Donations, Dedicate Parks), pages 15-21, attached as Exhibit "A." Therefore, based upon the foregoing documentary evidence, the allegations in the Petition cannot be proven as a matter of law and must be dismissed.
10. The Respondents also object to and deny the allegations of the Petition relating to the demand for an accounting for the non-testamentary Trust, the Simmons IIOT, an inter vivos irrevocable income only trust. *See* Petition, ¶¶ 48 – 67. However, in compliance with the Court's Order dated May 11, 2023, the foregoing Respondents also attached the Verified Accounting prepared by one of the originally named Trustees, CPA Respondent MICHAEL SIMMONS, which provides all of the Simmons IIOT bank statements (an *inter vivos* trust). *See* a copy of the Simmons IIOT, attached as Exhibit "A;" *see also* a copy of the Verification of MICHAEL SIMMONS, attached as "Exhibit "L," with supporting

Exhibits “1,” and “2.” Upon information and belief, the Schedule “A,” the last page of the Simmons Trust is not updated (which based upon counsel’s experience is not unusual), nevertheless, the Petition and Respondents refer to the real property held by the Simmons Trust which consists of over 200 acres in various parcels located at 1686 State Route 32, Elbridge, New York. *See* Petition, Para. 54; *see also* Onondaga Office of Real Property Services, Town of Elbridge, Property Detail, attached as Exhibit “M.”

11. Upon information and belief, contrary to the allegations contained in the OTCS/Petition, the Petitioner and Respondents herein, Mark Simmons, Kevin Simmons and Brian Simmons, have not acted in a fiduciary capacity by their actions by engaging in self-dealing with Trust Property; and even more significantly, upon information and belief, the foregoing brothers have engaged in a pattern of behavior which, as evidenced by this instant OTSC/Petition, appears to attempt to take advantage of the Petitioner by asking the Court to appoint Mark Simmons as sole Trustee, who is wholly unqualified to do so based upon his experience as compared with Respondent Michael Simmons, CPA and MBA. *See* the Respondents’ Affidavits attached as Exhibits “E” – “I.”
12. Therefore, the Petition must be dismissed as a matter of law and based upon the documentary evidence as a) the Respondents have no fiduciary duty as a matter of law for the allegations relating to the Decedent’s Last Will & Testament, as the Petitioner is the Executor; b) as to the *inter vivos* non-testamentary trust, there is no evidence of undue influence, mismanagement of the Trust property, nor any alleged self-dealing or any other breach of fiduciary duty by the Trustees/Respondents.
13. As demonstrated herein, the Respondents actions demonstrate their love and care for the Petitioner; they have sought to honor the intent and terms of the Simmons IIOT at issue in

this Petition, including but not limited to seeking and following the advice of well-respected Trust counsel, and never took any actions which could ever come close to an appearance of bad faith or alleged elder abuse of the Petitioner.

14. On the other hand, the Respondents bring to the Court's attention the Order of Protection, and the Fire Reports for additional background and history, in opposition to the relief demanded in the Order to Show Cause, and in further support of the Respondents' Motion to Dismiss the Petition. *See* Petition generally and also ¶¶ 54-55; *see also* attached Exhibits "N," and "O."

**WHEREFORE**, the Respondents seek an Order restoring the originally named Trustees; dismissing the Petition in its entirety with prejudice; and an Order preventing the Respondents Mark Simmons, Brian Simmons, and Kevin Simmons from interfering with the Arboretum; for such other and further relief as this Court deems just and proper.

DATED: June 14, 2023

WESTFALL LAW PLLC

BY:



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ANN MARIE MURZIN