

RECORDING REQUESTED BY:  
Surfstone LLC

AND WHEN RECORDED MAIL TO:  
Erick R. Altona, Esq.  
Lounsbury Ferguson Altona & Peak LLP  
960 Canterbury Place, Suite 300  
Escondido, CA 92025

**6737**

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MAY 30, 2006 11:30 AM

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GREGORY J. SMITH, COUNTY RECORDER  
FEES: 30.00  
PAGES 8



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2006-0378821

**Order to Exponge Lis Pendens  
Proof of Service and Attorney Declaration**

(Please fill in document title(s) on the this line)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

6738

CALENDAR NO. 1

NUMBER GIC859736	COMPLAINT DATE 01-13-06	HEARING DATE 05/05/06	HEARING TIME 11:00AM	DEPT 70	COURT USE ONLY <b>F I L E D</b> Clerk of the Superior Court  MAY 05 2006  By: L. ROCKWELL, Deputy
JUDGE/COMMISSIONER HON. JAY M. BLOOM		CLERK L. ROCKWELL		CSR #9279	
REPORTER NONA MAESTAS P.O. BOX 120128, SAN DIEGO, CA 92112-0128					
PLAINTIFF/PETITIONER TODD LESSER		DEFENDANT/RESPONDENT SURFSTONE LLC			
ATTORNEY FOR PLAINTIFF/PETITIONER JOSEPH G. DICKS		ATTORNEY FOR DEFENDANT/RESPONDENT ERICK R. ALTONA (1)			
1. DEFENDANT Expunge lis pendens					

THIS MATTER HAVING COME BEFORE THE COURT THIS DATE, THE COURT ORDERS:

- PRIOR TO CALENDAR CALL     OFF-CALENDAR     GRANTED     BONDS \_\_\_\_\_
- DENIED     WITH/WITHOUT PREJUDICE
- PRIOR TO CALENDAR CALL     CONT. TO \_\_\_\_\_ IN DEPT \_\_\_\_\_ AT \_\_\_\_\_
- TRO     CONTINUED     VACATED
- ALL PREVIOUS ORDERS REMAIN IN FULL FORCE AND EFFECT.
- ORAL ARGUMENT    TENTATIVE DATED 5-5-06     CONFIRMED     MODIFIED
- DISPOSES OF ENTIRE ACTION     DOES NOT DISPOSE OF ENTIRE ACTION
- PREVAILING PARTY TO PREPARE AND FILE FORMAL ORDER PURSUANT TO CRC 391.
- OTHER

The Court takes this matter under submission.

At 3:30 pm, the Court issues its final ruling,  
- see Court's ruling & order - attached 2 pages

Dated: 05/05/06

*Jay M. Bloom*  
\_\_\_\_\_  
JUDGE/COMMISSIONER OF THE SUPERIOR COURT

**The MOTION TO EXPUNGE LIS PENDENS by defendant/cross-complainant Surfstone LLC is GRANTED.**

A lis pendens may be ordered removed because either the complaint does not contain a real property claim (CCP § 405.31) or plaintiff cannot establish the probable validity by a preponderance of the evidence (CCP § 405.32). Plaintiff bears the burden of proof to show that it is more likely than not he will obtain judgment against Surfstone. (CCP § 405.3) If the court finds the probable validity has not been established, it must order the lis pendens expunged. (CCP §§ 405.31, 405.32)

Defendant/cross-complainant Surfstone LLC owns a 20% interest in an industrial building located at 10730 Thornmint Road in San Diego.

The evidence presented to the court shows that Surfstone's managing member, John Raymond, was presented with an offer to sell the property to Lesser. However, the offer expired as of 5:00 p.m. on January 3, 2006. Raymond signed the offer on January 6, 2006. (Raymond Declaration, Ex. A) One day later, Raymond communicated to the parties' dual agent that the offer was not to be delivered. (Raymond Declaration) However, it had already been delivered by then. (Lesser Declaration) Lesser filed this lawsuit to compel the sale on January 13, 2006 and on January 27, 2006 opened escrow. Nonetheless, by the time Raymond signed the offer on January 6, 2006, the offer had already been revoked by the express terms of the offer. (Civil Code § 1587(2); see, *Drouin v. Fleetwood Enterprises* (1985) 163 Cal. App. 3d 486, 491) Thus, there was no valid acceptance of the revoked offer.

The evidence does not suggest that Lesser waived the late acceptance because of the short time frame involved between the purported acceptance and Surfstone's communication of its position that there had been no valid acceptance. (See, Ex. C) Unlike the facts presented in the case of *Sabo v. Fasano* (1984) 154 Cal. App. 3d 502, Lesser did not open escrow until after he filed his lawsuit and after he already knew Surfstone decided not to proceed with the sale of the property. Therefore, there is insufficient evidence before the court to conclude that any late acceptance was waived by Lesser. Because the offer had been revoked by the time Raymond signed the offer and there are no facts to suggest waiver, Lesser has not shown the probable validity of his claims on the property.

At oral argument, Lesser's counsel brought the court's attention to an e-mail of January 6, 2006. It is argued this e-mail shows Lesser waived late acceptance. However, the comments in the e-mail do not rise to this level. Indeed, at one point Lesser comments that, "... and I may end up not wanting the building because it is contaminated." This does not amount to a waiver of late acceptance. Rather, it appears Lesser is still negotiating.

By contrast, in Sabo v. Fasano, supra at 504, Sabo told the attorney for the Fasanos he believed he and the Fasanos had a contract and indicated he intended to go forward with the transaction. Consequently, Lesser has failed to establish the probable validity of his property claims.

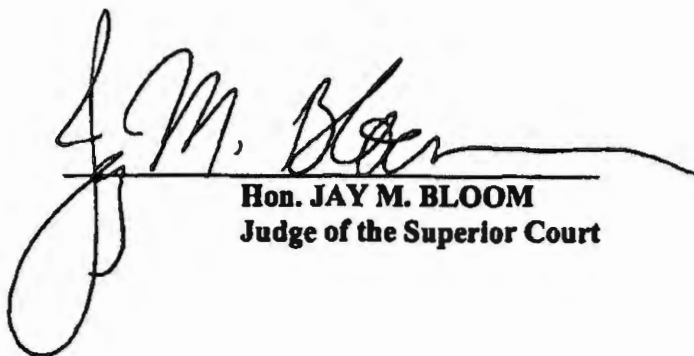
Lesser's request for a continuance is denied. Lesser's objections are overruled.

Accordingly, the court will expunge the notice of pendency of the action affecting real property at 10730 Thornmint Road in San Diego. This order is subject to the provisions of CCP 405.35.

Further, the court awards defendants their reasonable attorneys' fees and costs in the amount of \$1000. (CCP § 405.38)

IT IS SO ORDERED.

Dated: May 5, 2006

  
Hon. JAY M. BLOOM  
Judge of the Superior Court



DATE: MAY 23 2006  
First: A true copy,  
Clerk of the Superior Court  
By C. Spies Deputy  
C SPIES

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):  
 Judith Hartwig, Esq./SBN 162763  
 LOUNSBERY FERGUSON ALTONA & PEAK LLP  
 960 Canterbury Place, Suite 300  
 Escondido, CA 92025-3870  
 TELEPHONE NO.: 760-743-1201 FAX NO. (Optional): 760-743-9926  
 E-MAIL ADDRESS (Optional):  
 ATTORNEY FOR (Name): SURFSTONE, LLC

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO  
 STREET ADDRESS: 220 West Broadway  
 MAILING ADDRESS: P.O. Box 122724, San Diego, CA 92112-2724  
 CITY AND ZIP CODE: San Diego, CA 92101  
 BRANCH NAME: CENTRAL DIVISION

PETITIONER/PLAINTIFF: TODD LESSER

RESPONDENT/DEFENDANT: SURFSTONE, LLC

**PROOF OF SERVICE—CIVIL**

Check method of service (only one):

By Personal Service     By Mail     By Overnight Delivery  
 By Messenger Service     By Facsimile     By E-Mail/Electronic Transmission

FOR COURT USE ONLY

6741

CASE NUMBER:  
GIC859736

JUDGE: Jay M. Brown  
DEPT.: 70

(Do not use this Proof of Service to show service of a Summons and Complaint.)

1. At the time of service I was over 18 years of age and not a party to this action.

2. My address is (specify one):

a.  Business: 960 Canterbury Place, Suite 300, Escondido, CA 92025-3870    b.  Residence:

3. On (date): MAY 10, 2006 I served the following documents (specify): NOTICE OF RULING ON SURFSTONE, LLC'S MOTION TO EXPUNGE LIS PENDENS AND FOR ATTORNEYS' FEES

The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

4. I served the documents on the persons below, as follows:

- a. Name of person served: Joseph G. Dicks, Esq.
- b. Address of person served: 750 B Street, Suite 2720 San Diego, CA 92101
- c. Fax number or e-mail address of person served, if service was by fax or e-mail:
- d. Time of service, if personal service was used:

The names, addresses, and other applicable information about the persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

5. The documents were served by the following means (specify):

- a.  By personal service. I personally delivered the documents to the persons at the addresses listed in item 4.  
 (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

CASE NAME LESSER v. SURFSTONE, LLC, et al.

CASE NUMBER:  
GIC859736

5 b.  By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and (specify one):

- (1)  deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2)  placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state):

c.  By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 4. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

d.  By messenger service. I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 4 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)

e.  By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 4. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

f.  By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed in item 4. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: MAY 10, 2006

Nancy L. Pasulka  
(TYPE OR PRINT NAME OF DECLARANT)

  
(SIGNATURE OF DECLARANT)

(If item 5d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

#### DECLARATION OF MESSENGER

By personal service. I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 4. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (date): MAY 10, 2006 2:59 P.M.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: MAY 10, 2006

Bob Devine  
(NAME OF DECLARANT)

  
(SIGNATURE OF DECLARANT)

1 Erick R. Altona/SBN 120452  
 Judith Hartwig/SBN 162763  
 2 Alena Shamos/SBN 216548  
 LOUNSBERY FERGUSON ALTONA & PEAK LLP  
 3 960 Canterbury Place, Suite 300  
 Escondido, CA 92025-3870  
 4 760-743-1201  
 FAX: 760-743-9926  
 5  
 6 Attorneys for Defendant/Cross-Complainant  
 Surfstone, LLC

7  
 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 9 FOR THE COUNTY OF SAN DIEGO

10  
 11 TODD LESSER,  
 12 Plaintiff,  
 13 vs.  
 14 SURFSTONE, LLC, and DOES 1 through,  
 100, inclusive,  
 15 Defendants.

CASE NO. GIC859736  
**DECLARATION OF ERICK R. ALTONA  
 REGARDING RECORDING OF NOTICE OF  
 RULING (CCP§405.35, 405.39, & 405.60**

Dept.: 70  
 Judge: Hon. Jay M. Bloom

16  
 17 AND RELATED ACTION

Action filed: January 13, 2006

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 19 I, Erick R. Altona, declare:  
 20 1. I am a member in good standing with the California Bar Association and an  
 21 attorney duly licensed to practice law in the State of California. I am a partner in the Law  
 22 Firm of Lounsbery Ferguson Altona & Peak, LLP, attorneys of record for Surfstone, LLC,  
 23 defendant/cross-complainant herein. The following facts are based on my personal  
 24 knowledge and if called upon to do so I would competently testify to them.  
 25 2. This declaration is offered for the purposes of recordation of the Notice of  
 26 Ruling on Surfstone, LLC's Motion to Expunge Lis Pendens and for Attorney's fees.  
 27 3. On or about May 5, 2006 at 3:30 p.m. the Court granted the Motion of  
 28 Defendant Surfstone, LLC to expunge the Notice of Pendency of Action recorded by

1 Plaintiff Todd Lesser in the Office of the County Recorder of San Diego County as  
2 Document No. 2006-0064799, and ordered Plaintiff Todd Lesser to pay Defendant  
3 Surfstone, LLC the sum of \$1,000.00 in attorney's fees and costs. A true & correct copy  
4 of the Court's order is attached as ~~Exhibit A (the "Order")~~ *ke*

5 4. The time period of 20 days as provided by CCP§405.35 to appeal the Order  
6 by filing a Writ of Mandate has expired.

7 5. Additionally, the court has not granted Plaintiff an extension of time to  
8 appeal by Writ of Mandate as provided by CCP§405.39.

9 6. I therefore request, on behalf of Surfstone, LLC, that the certified copy of the  
10 Order submitted concurrently with this Declaration be immediately recorded in the Official  
11 Records of San Diego County.

12 I declare under penalty of perjury under the laws of the State of California that the  
13 foregoing is true and correct.

14 Executed this 30<sup>th</sup> day of May 2006 at Escondido, California.

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17 Erick R. Altona, Esq.  
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