JOSEPH C. LIBURT (STATE BAR NO. 155507)
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, California 94025
Telephone: 650-614-7400
Facsimile: 650-614-7401
jliburt@orrick.com

HEATHER M. HOEKSTRA (BAR NO. 276197)
420 Coventry Road
Kensington, California 94707
Telephone: 510-525-1514
hmatsumoto@berkeley.edu

Attorneys for Objectors/Respondents
Kinch Hoekstra and Edward Keonjian, Trustees of the
L.L. Nunn Trust

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF INYO

In re the Matter of the

L.L. Nunn Trust for the benefit of Deep Springs College under the Deed of Trust dated November 5, 1923

Case No. SI CV PM 1253232

RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO JOIN DEEP SPRINGS CORPORATION AS A PARTY

DATE: October 30, 2012
TIME: 9:00 AM
DEPT: 4
JUDGE: Hon. Dean T. Stout

ACTION FILED: February 6, 2012

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I. INTRODUCTION

The Trustees of the L. L. Nunn Trust ("Trustees") and the Deep Springs Corporation ("Corporation") are inextricably linked and routinely indistinguishable. The Trustees exist to govern Deep Springs College ("College"), and to do so in accordance with the Deed of Trust. After doing so for over 40 years, the Trustees created the Corporation to facilitate the partial administration of the College's assets, provide tax exemptions to its donors, and to provide the College flexibility in its administration. Consistent with their fiduciary obligations to obey the Deed of Trust, the Trustees stipulated that the Corporation's specific and primary purpose was to provide for the education of promising young men in accordance with the Deed of Trust. (Hoekstra Declaration, Ex. 18.) After a 1996 restructuring, the Corporation assumed primary responsibility for the day-to-day operations of the College (e.g., vendor contracting, insurance planning and purchasing, settling employee disputes, building and plant maintenance, etc.) Respondents do not fault the Trustees for taking advantage of the structure's availability for these purposes. Indeed, incorporation of such an entity is within the bounds of the discretion afforded to the Trustees by the Deed of Trust. (Hoekstra Decl; Ex. 10, at ¶ 2 (b).)[1] However, use of the corporate form is a privilege and not a matter of right. (*See Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) Petitioner's attempt to use the corporate form as a guise to avoid the limitations of the Deed of Trust and California charitable trust law is an abuse of that privilege, and impermissible under both trust law and corporations law.

This Court can apply three alternative frameworks, all of which independently arrive at the same result, to find the Corporation subject to the determination of this proceeding and compel its participation. First, there is ample evidence to support the Court's piercing the Corporation's veil, as the Corporation and Trustees function as and put themselves out to the public as a single enterprise. This would not require compulsory joinder of the Corporation as a separate entity because the Trustees and the Corporation are one and the same. The Court would only have to find that the Corporation and the Trustees function as a single enterprise, and rule that the Corporation consequently is already a party to this proceeding and subject to the

[1] Unless otherwise stated, all citations herein to Exhibits are to exhibits to the Hoekstra Declaration, filed herewith.

determinations of this proceeding. Second, the Court should alternatively determine that the Corporation is an agent of the Trustees, thus binding it to the Court's decisions in this matter. Third, the Court should alternatively compel joinder of the Corporation as a party petitioner because its non-joinder would result in hollow or partial relief and a multiplicity of litigation.

II. STATEMENT OF FACTS

L. L. Nunn founded Deep Springs College in 1917. He conveyed the property and assets of the College to the Trustees subject to the limitations set forth in the November 5, 1923 Deed of Trust ("Deed" or "Trust Deed"), thereby limiting the Trustees' discretion as set forth in the Deed and in accordance with California charitable trust law.

On February 23, 1966, five members of the Board of Trustees[2] of the L. L. Nunn Trust incorporated the Corporation as a title holding entity. (Ex. 16, at 000540.) The Trustees created the Corporation as a vehicle to accept tax-exempt donations, but limiting its primary purpose to holding title prevented donations to the Corporation from being tax-exempt. (See Ex. 17, at 000087.) As a result, in 1968, the Directors of the Corporation amended the specific and primary purpose of the Corporation from acquiring and holding trust assets to

> provid[ing] for educational work for the education of promising young men in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the creator, in the conduct of which educational work, democratic self-government by the students themselves shall be emphasized and which shall be carried on not for profit but solely for the advancement of the purposes hereinabove mentioned.

(Ex. 18, at 000015.)[3] The pre-amendment statement was then repurposed "[a]s a means of accomplishing the foregoing purpose." (Ibid.) Thus, the explicit purpose of the Corporation is providing educational work for the education of promising young men with the means available

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[2] These five Trustees, who became the first five Directors of the Corporation, were Frank Noon, Harold Waldo, Robert Aird, Ralph Kleps, and James R. Withrow, the last of whom was the testator for the sum of money at issue in the Withrow Petition also before this Court. None of these Trustees are alive today.

[3] Originally the specific purpose of the Corporation, as stated in its 1966 Articles of Incorporation, was:

> To acquire and hold all or such portion of the trust estate and other assets of that educational institution known as Deep Springs College as shall be transferred to it by the Trustees of Deep Springs and to pay over the principal and income therefrom to the Trustees of Deep Springs, a tax-exempt trust, for the purpose of educating promising young men as set forth in the Deed of Trust dated November 5th, 1923, in which L. L. Nunn is the grantor which Deed of Trust is recorded in Inyo County, California Official Records at page 281 et seq.

being explicitly reliant on the Purpose of the Trust Deed. Indeed, it could not have been otherwise; nothing in the Trust Deed allows the Trustees to divert assets for a purpose not permitted by the Trust, and in fact, the Deed of Trust specifically prohibits any such diversion, whether through a corporate structure or some other mechanism. (Ex. 10, at ¶ 2, subd. (b).)

For over 40 years, the Corporation (in conjunction with the Trust) has operated under these express limitations and administered Deep Springs College for the purpose of educating promising young men. In March 2011, the Trustees of Deep Springs, without any recognition of separate interests or entities, undertook to consider whether the College should educate women. The Board considered this matter as a single entity, with no separate meetings or distinction between corporate or trust interests in the issue until the vote on Coed Resolution #2 was taken on September 17, 2011, when immediately before the vote, counsel recommended taking one vote as Trustees and another as Directors of the Corporation. (Hoekstra Decl., at ¶¶ 84-92.) These two votes, taken about 30 seconds apart, were understood together to mean that the College would transition to coeducation only if a court approved the to-be-filed petition to interpret or modify the Deed of Trust to permit the College to make such a transition. (*Id.*) And this is how Petitioner portrayed the decision to the wider Deep Springs Community and the public at large. (Ex. 32, at 1) Again, there was no discussion or contention whatsoever that coeducation pertained only to the Trust's assets, and then only to the extent of the College's assets held by the Trust, as Petitioner belatedly contends; rather, the legal decision about the Deed of Trust was presented as determinative for the permissibility of coeducation at the College, and that is how the Trustees/Directors understood it at the time.

On February 6, 2012, almost five months after the votes, Petitioner filed his Petition for Court Order Construing Trust Provisions, or if necessary, Modifying the Trust Instrument ("Trust Petition"). Finding Trust Petition wholly insupportable on the grounds presented, Respondents filed their Response and Objection to the Petition on May 9, 2012 ("Response").

On June 6, 2012, the Board of Trustees met by telephone after being presented with "Plan B" only four days before. Allegedly solely in their capacity as Directors of the Corporation, they voted to amend the Articles of Incorporation and Bylaws of the Corporation to permit

coeducation. Then in an attempt to strip from the Trust the real property assets that are integral to the functioning of the College, and purportedly to remove from those assets their trust limitations, the Board of Trustees, in their capacity as Trustees of the Nunn Trust, approved the sale of all remaining tangible assets owned and restricted by the L. L. Nunn Deed of Trust to the Corporation for $1.5 million based on a lengthy (though defective) appraisal document. They then voted, this time as Directors of the Corporation, to approve the purchase of the real property assets they had just agreed to sell themselves as Trustees of the Trust. According to Petitioner, the limitations placed on the use of property under the charitable Deed of Trust would disappear upon the execution of the putative sale, as if by magic. (See Ex. 1 at 1.)

Petitioner now asserts that the Trustees may use these unique real property assets, many of which L. L. Nunn purchased, for coeducation at Deep Springs under the aegis of an unrestricted Corporation, and that they may do so before a court decision on the merits of the Trust Petition that Petitioner filed. (See Ex. 1.) The Trustees' view is that they can unilaterally ignore the Trust's purpose in order to implement coeducation regardless of this Court's ruling. Under Petitioner's misguided understanding of California trust and corporations law, Petitioner and the Trustees have now rendered their own Petition virtually moot. Indeed, they have presumed to render the entirety of charitable trust law a nullity. In essence, their theory is that a trustee can avoid all trust limitations, trust laws, and fiduciary duties merely by selling trust assets to another entity they control, at which point trust law can do nothing about it because the trust limitations no longer restrict the assets. This they believe even though the same assets will continue to be used for the same enterprise—Deep Springs College—and the same assets will continue to be administered by the same people—the Trustees/Directors. In fact, when considering the coeducation issue in 1994, General Counsel for the Board Campbell rightly advised against it:

> The co-education decision is fundamentally one of interpreting the bequests from L. L. Nunn and from James Withrow. As such, it is fundamentally a trustee decision that must be made according to the legal standards applicable to trustees, **not a corporate board of directors.**[4]

(Ex. 69, at 1 [emphasis added].) This sale of assets is a sham, whose admitted sole purpose is to

[4] There have been no significant developments in the Trust Law since this statement what made.

defeat the Trust's limitations to which the Trustees/Directors have a fiduciary duty to adhere.

III. THIS COURT SHOULD PREVENT PETITIONER'S ATTEMPTED CIRCUMVENTION OF CHARITABLE TRUST LAW BY FINDING THAT THE CORPORATION AND THE TRUSTEES FUNCTION AS A SINGLE ENTERPRISE.

"The law respects form less than substance." (Cal. Civ. Code § 3528.) When the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, courts ignore the form of the corporate entity (i.e., pierce the corporate veil) and deem the corporation's acts to be those of its alter egos or the persons or organizations actually controlling the corporation. (*Sonora Diamond Corp. v. Super. Ct.* (2000) 83 Cal.App.4th 523, 538.) The issue is not whether the corporate entity should be disregarded for all purposes, nor whether the corporation's purpose was to defraud any parties. (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212.) Rather, the issue before the court is whether in this particular case and for purposes of this case "justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form." (*Kohn v. Kohn* (1950) 95 Cal.App.2d 708, 718.)

Under the single-enterprise rule, courts attach alter-ego liability between sister organizations. (*Las Palmas Assoc.v. Las Palmas Center Assoc.* (1991) 235 Cal.App.3d 1220, 1249–1250.)

> In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it. The court thus has constructed for purposes of imposing liability an entity unknown to any secretary of state comprising assets and liabilities of two or more legal personalities; endowed that entity with the assets of both, and charged it with the liabilities of one or both.

(*Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 512 [internal citations omitted].)

Disregarding a corporate entity is a procedural remedy rather than a claim for substantive relief. (*See Greenspan,* 191 Cal.App.4th at 516). In determining that one entity is an alter ego of another, the court need not join the non-party alter ego because its alter ego is already before it as a party. Indeed, even though a judgment obtained against an entity and its alter ego is enforceable against both separately (*Mesler*, 39 Cal.3d at 301 ["To hold otherwise would be to defeat the

policy of promoting justice that lies behind the alter ego doctrine"]; *Kohn, supra*, 95 Cal.App.2d at 718), requiring the joinder of the alter ego would run counter to the doctrine. (*See e.g., Hennessey's Tavern v. American Air Filter* (1988) 204 Cal.App.3d 1351, 1359 [disregarding corporate entity as a distinct defendant and holding alter ego individuals liable on corporations' obligations]; *Kohn*, 95 Cal.App.2d at 718 [finding that "although a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, when necessary to circumvent fraud, protect the rights of third persons and accomplish justice, disregard this distinct existence and treat them as identical."].

A. The Facts Of This Case Overwhelmingly Meet The Two-Factor Single-Enterprise Test.

Determining when to pierce the corporate veil depends on the circumstances of each case. (*Mesler*, 39 Cal.3d 290 at 300.) In California, courts disregard the corporate entity where two conditions are met: first, where there is such a unity of interest and ownership that the individuality, or separateness, of the two entities has ceased; and, second, where adherence to the fiction of the separate existence of the corporation would sanction a fraud or promote injustice (*Shaoxing County v. Bhaumik* (2011) 191 Cal.App.4th 1189, 1198), or produce an inequitable result. (*Automotriz etc. de Cal. v. Resnick* (1957) 47 Cal.2d 792, 796.)

B. Substantial Evidence Supports A Unity of Interest Among The Trust and The Corporation.

Among the factors California courts consider as to whether there is the requisite "unity of interest" are whether there is or has been (1) failure to maintain arm's length relationships among related entities, (2) disregard of corporate formalities, (3) lack of segregation or confusion of corporate records, (4) commingling of funds and other assets, (5) use of the same offices or counsel, (6) identical directors and officers, and (7) inadequate capitalization. (See *VirtualMagic Asia v. Fil–Cartoons* (2002) 99 Cal.App.4th 228, 245; *Assoc. Vendors v. Oakland Meat* (1962) 210 Cal.App.2d 825, 838-40.) No single factor is determinative and a court must examine all the circumstances to determine whether to apply the doctrine. (*Greenspan*, 191 Cal.App.4th at 513.)

Respondent Hoekstra's Declaration provides three extensive case studies providing substantial evidence of a unity of interest among the Trustees and the Corporation. (See Hoekstra

Decl. at ¶¶ 76-126.) Those case studies are incorporated herein by reference and the facts therefrom apply to one or more of the *VirtualMagic* factors stated above.

1. The Failure To Maintain Arm's Length Relationships Between Related Entities

The first Case Study regarding the L. L. Nunn, LLC raises three significant problems with Petitioner's Plan B, the success of which depends entirely on this Court actually believing the Trustees and the Corporation are separate entities.

First, in the LLC Operating Agreement, the Corporation represents that it not only owned the 277 acre parcel deeded to the LLC, it was "entitled to contribute [the parcel] free and clear of any claims or rights of third persons." (Ex. 28, at 053518.) But the Corporation certainly did not own the parcel, as evidenced by the Trustees' of the L. L. Nunn Trust granting that parcel to the LLC on December 30, 1998. (Ex. 30, at 053471-053480.) Moreover, the claim that this parcel was free and clear of any rights of third persons is troubling. Did the Trustees forget that they were (and still are) Trustees of a Trust, the equitable and beneficial owners of which are "the students in attendance receiving the benefits of the educational work being conducted" at Deep Springs (*i.e.*, third persons with rights in the property so granted)? (Ex. 10, at 31 ¶ 5.)

Second, it is highly dubious that a committee of a board of a corporate entity would resolve that the board members of another, separate trust entity shall sign away a deed granting a parcel fundamental to fulfilling the purpose of its trust to a third LLC entity to which the trust has no formal or documentary relationship and therefore no guaranty of security.[5] And then, in the agreement creating that third entity LLC, the Corporation retains for itself a right to obtain a lot split and have the LLC convey to it that property not subject to the terms of the agreement. What prudent board of trustees, charged with preserving the trust estate and carrying out the purpose of the trust, would consider participating in an agreement where they forfeit nearly all valuable assets to an entity they have no control over and receive nothing in return?

Third, General Counsel Christopher Campbell admits that the inconvenience and cost of a

[5] Petitioner claims that the Trust retains an "approximately $305,000 interest, based in the depreciated value of building renovations that were funded by the Trust prior to transferring the parcel to the LLC." Since neither the Operating Agreement nor the Lease Agreement mention the Trust at all, Respondents question the veracity of this unsupported claim.

lot split surmounts the trustees' need to exercise their fiduciary duties of care and loyalty by protecting their rights in the property conveyed. Surely if they were two separate entities and viewed themselves as such, the Trustees of the Trust would have demanded the parcel split, the cost of which could even have been decent consideration for such a parcel fundamental to running the College. The one parcel owned by the LLC includes essentially all of the College and Ranch buildings and fixtures at the 'upper ranch' and 'lower ranch'. (See Ex. 29, at 003820.) The Trustees received no consideration for this real property. The only face-saving explanation of this state of affairs is that all involved parties understood the Corporation and the Trustees to be a unified enterprise with identical interests.

2. Disregard Of Corporate Formalities

Since the Trustees are unpracticed at maintaining the arm's length relationship required to find shelter as a separate entity, their attempts to adhere to corporate formalities are sophomoric. They fail to hold separate annual meetings for the trust as required by the Deed of Trust. (See Hoekstra Decl. at ¶ 128-130; Keonjian Decl. at ¶ 9.)

Their Trustee Handbook, created in 2005, has the wrong version of the Articles of Incorporation. Although the copy of the Amended Articles is unsigned, Respondents believe that these are the current Articles, as the I.R.S. granted the Corporation's 501(c)(3) status on the basis of these Amended Articles. (See Ex. 19 and 20.) As a result, the Board has not had an updated version of its own Articles to reflect upon when conducting its business since at least 2005. This is the first time that Respondents have seen these Amended Articles; however, this development more greatly supports their belief that the Corporation is controlled by the limitations of the Trust.

Furthermore, as Respondent and Declarant Hoekstra discusses in his Declaration, the discussions leading to the coed and Plan B votes are peppered with similar failures: from non-trustee Directors listening to and participating in Trust business to the wrong entities voting for the resolutions. (See Hoekstra Decl. at ¶ 84 et seq.)

In addition, the lack of a written contract for the Corporation to run the College for the Trustees is downright astonishing, not to mention violative of the statute of frauds. (See Hoekstra Decl. at ¶ 133.) When questioned about the arrangement between the Corporation and the

Trustees whereby the Corporation agreed by "simple agreement" to "essentially manage the assets including running the college." Petitioner replied that there is

> no formal written documentation of the arrangement between the Trust and the Corporation for the continued use of the property by the Corporation, minutes of meetings of the respective governing bodies indicate that the L.L. Nunn Trust and the Deep Springs Corporation mutually intend that the Trust has given a License to the Corporation to utilize the Trust property in the operation of Deep Springs College. . . . The Trust chose to retain title to the real estate because licensing the land to the Corporation was sufficient to allow the Corporation to take over College operations.

(Ex. 38 at No. 1.) The statute of frauds requires that certain contracts be in writing to be valid. One such agreement is a contract that cannot be performed within one year. While a writing is not required for a license to use land, an agreement to manage assets for a period of time exceeding a year is. If these two organizations were separate, any court would deem such an agreement void for failure to be in writing.

3. Lack Of Segregation And/Or Confusion Of Corporate Records

In its most recent publicly available 990 tax filings, Deep Springs Corporation states that it has 13 voting members of its governing body of which all 13 are independent. Yet the corresponding filing for the Deep Springs Free Educational Trust ("DSFET") also states that it has 13 voting members of its governing body, all of which are independent. (Ex. 39 at 1; Ex. 40 at 1.) This indicates confusion about the nature of the two entities or admits that they are really viewed as the same entity, since there are actually only 9 Trustees.

Not only is the administration confused about the nature of the relationship, it appears that the former independent auditor, Don Porter, is as well. In 2001, the audit cover letter calls the Trust a subsidiary (Ex. 41.) However, the remaining Audit notes refer to the Trust merely as a related party transaction. (Ex. 50.) A memorandum from Porter demonstrates his unclarity regarding the Trust/Corporation relationship. (Ex. 42.) A year later, on October 3, 1997, he remains unclear as he still "[n]eed[s] final details [about] the relationship between the two entities, the parent entity, and governing board." (Ex. 43.) Finally, when the Trustees restructured the College in 1995-1996, even the Trustees at the time appear to have had a different understanding of the relationship than what Petitioner would like this Court to believe. When one

trustee asked whether one of the two bodies was of "higher status", another replied that they were "at an equal". (See Ex. 22 at 000056.)

The Directors consistently refer to themselves as Trustees (as provided for in the Restated Bylaws), resulting in confusion and misunderstanding. Hence Respondents' surprise at Plan B. While Petitioner may claim that everyone knew all along that the entities were separate, the declarations and evidence provided by Respondents rebut any such self-serving statements.

Respondents understandably thought of themselves as Trustees of a Trust whose powers and authority derive from their 1923 Deed of Trust because several managing documents explicitly state as much. For example, according to the TDS 2007-2017 Financial Planning Document (Ex. 44, at 1-3.)

> The management of the Deep Springs endowment is governed by the original deed of trust and other institutional documents, as well as by California trust law.
>
> *The Deed of Trust.* The 1923 Deed of Trust of Lucien L. Nunn which conveyed the property of the college to the original Trustees placed very few restrictions on the financial management of the Trust. The following excerpts demonstrate that the Trust document allows the Trustees to spend both the trust income as well as the main body of the trust. [. . .]
>
> In the absence of any clear guidance from the institution's foundation documents, the Trustees have recently administered the Trust within the guidelines of California Trust Law. If a gift or bequest is received without disclaimer by the College, it assumes the legal obligation to administer the gift or bequest in a manner consistent with the terms specified by the donor. This obligation arises under an area of the law known as the law of charitable trusts, and is subject to enforcement on behalf of the public by the Attorney General of California.
>
> According to the **Corporation** Minutes of the April 5-7, 2002 Meeting:
>
> B. Trustee Training:
>
> 1). Campbell provided an orientation on fiduciary responsibilities of trustees under the State of California.
>
> 2). Campbell has agreed to provide training for the Trustees to better equip them to carry out their duties on behalf of the trust. (Ex. 45 at 004427 [emphasis added].)

Yet, "[t]he Deep Springs College Board of Trustees conducts the majority of its oversight and management of College affairs through a number of standing and ad hoc committees." (Ex. 46 at

pg. 1.) In addition, on Sep. 4, 2001, the Trustees unanimously approved a statement of clarification entitled "Responsibilities of the Trustees of Deep Springs, and the President, Vice President, and Academic Dean."

> **The Deed of Trust charges the trustees with responsibility to maintain the strength the college over the long run**. . . . There are thirteen trustees and, according to guidelines laid down by L.L. Nunn, the ten who serve at large should bring professional expertise from the following walks of life: education, engineering, law, and management/finance. (Ex. 59.)

Furthermore, records attached to Hoekstra's Declaration manifestly demonstrate that the two entities are consistently confused. (See Hoekstra Decl. at ¶¶ 70-135.)

4. Commingling Of Funds And Other Assets

Donations to a trust are made to the trustees because they are the legal title holders, whereas donations to charitable corporations are made to the corporation as the legal title holder. (*See Weingand v. Atlantic S&L Assn.* (1970) 1 Cal.3d 806, 818.) Accordingly, donations to "The Trustees of Deep Springs" cannot be understood to be donations to the Directors of the Corporation, and resultantly cannot be understood as donations to the Corporation. Money given to and checks written out to the "Trustees of Deep Springs"—the form of a significant proportion of the donations[6]—should have been deposited into the Trustees' account, not that of the Corporation—unless they are effectively the same organization. Records and Keonjian's Declaration confirm that checks made out to Trustees of Deep Springs have been systematically deposited in Corporation accounts. (See Keonjian Decl.; Ex. 47 at 30264.)

Even in rare instances where donors write checks to the DSFET, as one of the College's largest foundation donors does regularly, their donations are not accounted for in tax filings (the only activity for the DSFET is annual depreciation according to a set schedule [see Ex. C attached to Petitioner's Opening Brief]; see Ex. 40) because they are deposited into the Corporation's accounts. (See Ex. 47.) If these entities are truly separate, any and all donations made to the Trustees of Deep Springs must be returned by the Corporation to the Trustees with apologies.

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[6] Up until February 2008, the website had requested that checks should be made out to "The Trustees of Deep Springs." (Ex. 57.) Since many donors write checks on an annual basis without checking the website, Respondents believe that a large portion of the checks from annual donors are still written out to the Trustees of Deep Springs. (See Hoekstra Decl., at ¶¶ 149-150).

Most significantly however, is Respondent Hoekstra's in-depth discussion about the commingling of assets and its implications for the June 6, 2012 asset scheme. (See "Case Study 3 – Plan B", Hoekstra Decl. at ¶¶ 96-127.) The commingling of assets among the Corporation, Trust, and LLC results in the Trustees receiving far less than the true market value for their assets in the "sale" to themselves. The main point underlying Hoekstra's dissection of the appraisal is that no one on the Board actually cares whether the assets are priced correctly, raise environmental concerns, or actually belong to one entity or another because the sale is a sham.

5. Use Of The Same Offices and Counsel

The primary offices for both the Trustees and the Corporation are at the College. (Ex. 25 at 3; Ex. 39, at 1; Ex. 40, at 1.) They both use the same counsel. (Ex. 26.)

6. Identical Directors And Officers

The Directors of the Corporation are known as Trustees. Indeed it is "in accordance with the tradition and practice of the institution" that they are called Trustees. (Ex. 25, Art. V, § 5.01.) This is confusing for all parties involved. (See Ex. 58; Hoekstra Decl. at ¶ 135-136; Johnson Decl. at ¶ 11-16.)

It also confuses the College's administration. On the pages 7 of both the Corporation's and Trust's IRS 990 Forms, the President lists the names of all 13 members of the Corporation's Board for both forms even though the Trust only has 9 Board Members. (See Ex. 39 & 40.) Therefore, it appears that the College's administration views and treats them as a single enterprise. However, this also supports a confusion of corporate records.

Regardless of what College President David Neidorf may claim in emails to the community, his entries on the I.R.S. forms cast doubt on his statements:

> It can confuse, I know, to use the acronym "TDS" for both trustees of the L.L. Nunn Trust, and also for directors of the Deep Springs Corporation. When the trustees transferred operations to the corporation in 1996, they passed a resolution directing that corporation board members should also be called "trustees." So these days, "trustees" almost always refers to the corporation board members. (Ex. 4.)

7. Inadequate Capitalization

The 2009 990 IRS Tax filing for the DSFET states that "Deep Springs Free Educational

Trust provides assets to operate Deep Springs Corporation." (Ex. 40, at 1.) The only monetary event on that filing is the annual depreciation of the physical plant by about $20,000. This indicates that the Trust is not being adequately capitalized and that the Corporation is failing to administer the Trust as required in its Articles of Incorporation wherein they are required to pay into the Trust income from the investments managed by the Corporation. (See Articles of Incorporation, Ex. 18, at 000015.)

8. "He who takes the benefit must bear the burden." (Civ. Code § 3521.)

The Trustees and the Corporation have consistently failed to maintain formalities required to find two separate legal entities. Whether it was confusion, sheer unwillingness to attend to the rigmarole required to maintain separation, or just poor attention to detail, the Trustees and the Corporation cannot now claim refuge in corporate law to avoid their trust obligations. Regardless of what Petitioner may claim to the contrary, it is the actions and statements made when not under scrutiny that are most telling of the true nature of the enterprise. Substantial evidence supports a finding that the entities are not separate; that the Director/Trustees conflate their roles; and that the current attempt to sell property from the Trustees to the Corporation is not a normal order of business and should not be permitted as a means to avoid their duties under the Deed of Trust.

C. Adherence To A Separate Corporate Existence Of The Deep Springs Corporation In These Circumstances Will Inequitably Result in Sanctioning Fraud and Promoting Injustice.

As mentioned above, there are two main elements required for courts to disregard the corporate entity. With regard to the second requirement, it is "sufficient that it appear that recognition of the acts as those of a corporation only will produce inequitable results." (*Stark v. Coker* (1942) 20 Cal.2d 839, 846.) Courts apply the doctrine of piercing the corporate veil in cases of fraud or certain other exceptional circumstances. (*Dole Food v. Patrickson* (2003) 538 U.S. 468, 475.) One such exceptional circumstance is where the corporate entity uses the corporation to circumvent a statute. (*See e.g., H. A. S. Loan Svc v. McColgan* (1943) 21 Cal.2d 518, 523 [two corporations purportedly independent, actually operated as single agency, evading usury law and franchise tax]; *Say & Say v. Ebershoff* (1993) 20 Cal.App.4th 1759, 1769 [corporation formed to evade vexatious litigant law; citing *H.A.S. Loan Service*].)

1. "Plan B" is Petitioner's Desperate Attempt to Circumvent California Trust Law.

One commentator has described the development of the law regarding preventing the circumvention of a statute as follows:

> [T]he issue of alter ego has been discussed in the context of the interpretation of a statutory provision, where the strict application of the concept of separate corporate personality would render a statute inapplicable. . . . The significant factors in this type of case are the strength of the policy behind the statutory regulation as perceived by the court, and the indications from the legislative history of the statute as to whether the omission of certain affiliated parties was merely inadvertent or perhaps deliberate on the part of the legislative body.

(1 Marsh, Cal. Corporation Law (3rd ed. 1993) § 5.8, pp. 297–298.) As trust law in California is governed by both common law and statutes, Petitioner's attempt to avoid the limitations imposed by the Deed of Trust and California charitable trust law is a manifest attempt to circumvent those statutes. And Petitioner's intent is evident in his proposals and arguments for "Plan B" (See Respondents' Case Management Statement & email correspondence attached thereto). A finding of bad faith, however, is not prerequisite to application of the alter ego doctrine. (*See RRX Industries v. Lab-Con* (9th Cir. 1985) 772 F.2d 543, 546 [*citing Automotriz,* 47 Cal.2d at 797].)

2. The Charitable Trust Doctrine Applies to All Assets of Charitable Corporations

California has expressed a strong public policy that trust property of a nonprofit charitable corporation must not be diverted from its declared purpose. (*In re Metropolitan Baptist Church* (1975) 48 Cal.App.3d 850, 857.) Thus, California courts have adopted a strict construction of the charitable trust doctrine when applying it to charitable corporations. A charitable corporation organized exclusively for charitable purposes holds its assets—including any subsequent donations and revenues—in trust for the purposes enumerated in its articles of incorporation. (*Lynch v. Spilman* (1967) 67 Cal.2d 251, 263; *Holt v. College of Osteopathic Physicians* (1964) 61 Cal.2d 750, 756; *Pacific Home v. County of L.A.* (1953) 41 Cal.2d 844, 852; *In re L.A. County Pioneer Society* (1953) 40 Cal.2d 852, 860.) The California Supreme Court has held:

> [A]ll the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation's purposes, and notwithstanding the absence of any express declaration by those who contribute such assets as to the purpose for which the contributions are made. In other words, the acceptance of such assets under these

> circumstances establishes a charitable trust for the declared corporate purposes as effectively as though the assets had been accepted from a donor who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes.

(*Pacific Home*, 41 Cal.2d at 852.) Under trust law, trustees owe a duty of obedience to the trustor's directions.[7] In California, courts apply this trust principle to charitable corporations by enforcing a duty of obedience to the corporation's declared purpose.[8] (*See Queen of Angels Hosp. v. Younger* (1977) 66 Cal.App.3d 359 [holding not-for-profit that used funds to operate medical clinics instead of hospital breached duty of obedience to its stated purpose]; *Holt*, 61 Cal.2d at pp. 759-60 [proposed change of medical college from osteopathic to allopathic medicine was outside allowable scope of college's purpose].) What is more, the Business and Professions Code strictly applies this duty of obedience to the stated purpose of charitable corporations by explicitly creating a fiduciary relationship between a solicitor and donor:[9]

> [T]here exists a fiduciary relationship between a charity . . . and the person from whom a charitable contribution is being solicited. The acceptance of charitable contributions by a charity . . . establishes a charitable trust and a duty on the part of the charity . . . to use those charitable contributions for the declared charitable purposes for which they are sought. This section is declarative of existing trust law principles.

(Cal. Bus. & Prof. Code § 17510.8 [emphasis added].)

Importantly, when a corporation is created to administer a trust, the law treats it as a trustee of the assets it holds in furtherance of the trust purposes. (Cal. Gov. Code § 12582, subd. (c) [Trustee means "a corporation or unincorporated association formed for the administration of

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[7] Rob Atkinson, Obedience As the Foundation of Fiduciary Duty (2008) 34 J. CORP. L. 43, 46. "The duty of obedience is the source not only of the duties of care and loyalty, but also of a peculiar but widely ignored obligation. This is the duty of private and charitable trustees to follow the directions of principals who are dead."

[8] See Peggy Sasso, Searching for Trust in the Not-for-Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability (2003) 50 UCLA L. REV. 1485. "The not-for-profit director is held to three fiduciary duties: the duty of care, the duty of loyalty and the duty of obedience." California courts have recognized the duty of obedience in directors of a corporation in addition to trustees of a trust. (*citing Queen of Angels Hosp. v. Younger* (1977) 66 Cal.App.3d 359.)

[9] In thoroughly analyzing the duty of obedience, a New York court in *Manhattan Eye, Ear & Throat Hosp. v. Spitzer* (N.Y. Sup. Ct. 1999) 186 Misc.2d 126, 155-56 stated:

> [T]he duty of obedience . . . mandates that a [charitable corporation's] Board, in the first instance, seek to preserve its original mission. Embarkation upon a course of conduct which turns it away from the charity's central and well-understood mission should be a carefully chosen option of last resort. Otherwise, a Board facing difficult financial straits might find sale of its assets, and "reprioritization" of its mission, to be an attractive option, rather than taking all reasonable efforts to preserve the mission which has been the object of its stewardship.

a charitable trust[.]"].) In fact, the incorporation of a charitable trust

> does not vary the powers or the duties of the trustees, or change the character of the school placed under their management. It enables them to act in a corporate name, and to have a corporate seal; and it affords them the facility of taking conveyances, obligations and securities, in their corporate name, and avoids the necessity of changing such securities upon a change of individual members composing the board. **The act of incorporation did not constitute this charity. It did not enlarge or diminish the powers of the trustees, except as to the mode of acting in certain particulars, and it did not exempt them from the duties and responsibilities, which would have devolved upon them as trustees acting in their natural capacities.**

(*City of Boston v. Curley (1931) 276 Mass. 549, 558* [emphasis added; citations omitted].)

Because one cannot generally transfer a greater property interest than that which one holds, the formal written purpose statements in the Deed of Trust, Articles, and Bylaws limit the use of the Corporation's funds and assets to those purposes. Here, not only are all donations accepted by the College and held by the Corporation restricted to these purposes, but so are all assets transferred to the Corporation from the Trust (*see Lynch*, 67 Cal.2d at 260), and all revenues from investments (*see, e.g., Queen of Angels*, 66 Cal.App.3d. at 367) and the sale of assets (*see, e.g., Pacific Home*, 41 Cal.2d at 854.) Petitioner's contention (in section IV(a) of his "Reply" filed on June 12, 2012) that Corporation assets are "unrestricted" is therefore wholly without merit, as all of the Corporation's assets are restricted to the purpose of "educating promising young men" as specified in the Deed of Trust and the Articles. Therefore, this Court's decision on the Petition will also decide whether the Corporation can dispose of any assets for the purpose of coeducation, and the Corporation must be required to await and respect that decision.

3. All Donations Accepted and All Revenue Earned by The College And Held By The Corporation Are Restricted To The Education of Promising Young Men.

Even where a donor imposes no express restriction, assets a nonprofit corporation accepts are restricted by operation of law and may only be used for the specific charitable purposes set forth in the corporation's articles of incorporation at the time the assets are received. (*See Metro. Baptist*, 48 Cal.App.3d at 857; see also, *L.A. Pioneer*, 40 Cal.2d at 860 ["A devise to a society organized for a charitable purpose without a declaration of the use to which the gift is to be put is given in trust to carry out the objects for which the organization was created."].) Moreover, an

institution's character "is to be determined, not alone by the powers of the corporation as defined in its charter, but also by the manner of conducting its activities." (*Queen of Angels*, 66 Cal.App.3d at 366 [finding that Queen's representations to the public that it was a hospital "further [bound it] to its primary purpose of operating a hospital."].)

> The Corporation's Articles say that the specific and primary purpose of the Corporation is
>
> to provide for educational work for the education of promising young men in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the creator, in the conduct of which educational work, democratic self-government by the students themselves shall be emphasized and which shall be carried on not for profit but solely for the advancement of the purposes hereinabove mentioned.

(Ex. 18, at 000015.) The founding Directors of the Corporation (quite properly) explicitly tied the Corporation's purposes in the Articles of Incorporation to the language of the Deed of Trust. When the Trustees amended the Corporation's Bylaws in 1995, they inserted the Purpose paragraph of the Deed of Trust to assure the wider community that the Corporation was still subject to and limited by the Deed of Trust's purpose. (See Ex. 23 ["To prevent any concern that we were trying to do something tricky, we included paragraph 1 of the Deed of Trust verbatim in the purpose paragraph of the bylaws."].)

Indeed, at the start of his new term as President, L. Jackson Newell recommended a resolution for the Board to transfer all remaining assets to the Corporation merely in order to "simplif[y] bookkeeping, financial statements, IRS reporting, and save money." (Ex. 27, at 000073.) In its most recent 990 tax filing, Deep Springs Corporation states that its mission is "[t]o provide young men with a liberal arts education through academics, labor, and self-governance." (Ex. 39, at 1; *see also Queen of Angels*, 66 Cal.App.3d at 366 [placing emphasis on the statements made on I.R.S. filings].) In soliciting and accepting donations, Deep Springs College has continuously held itself out to the public as an institution dedicated to the education of promising young men as specified in the Deed of Trust. (See, e.g., Ex. 75; Keonjian Decl.) Such acts, along with the explicit statements in the Trust Deed, Articles, and Bylaws, further bind Deep Springs Corporation to its primary purpose of providing for educational work for the education of promising young men as set forth in the Deed of Trust. (See *Holt*, 61 Cal.2d at 758.)

As a result, all assets of Deep Springs College (approximately $27 million), whenever acquired, may be used only for the express purposes stated in the articles of incorporation, which are inarguably limited to the express purpose of the L. L. Nunn Deed of Trust.

4. "Trustees Of Deep Springs" Implies A Construction Formed Pursuant To And Limited By Trust Law.

By putting themselves forward as "The Trustees of Deep Springs," the donees represent that they are actors controlled by the Deed of Trust. This is so not only because the Trustees are called such, but as a matter of law. Corporations cannot file articles of incorporation with names "in which 'bank,' 'trust,' 'trustee' or related words appear, unless the certificate of approval of the Commissioner of Financial Institutions is attached thereto." (Corp. Code § 5122.) The reason behind this rule is that the words "bank," "trust," and "trustee" indicate that the entity is controlled by another set of laws other than corporations law. The name of a corporation cannot create a false implication that the entity is formed pursuant to a different law other than that under which it is actually formed. (Cal. Code Regs. tit. 2, § 21005(b)(3).)

While Respondents do not claim that the Corporation is in violation of this statute or regulation, these rules speak to the issue at hand. When a donor writes a check to the "Trustees of Deep Springs" (most cash gifts to the College have endorsed in this manner, pursuant to the instructions that appear on solicitations and on the website until 2008 [see Ex. 57]), that donor is under the impression that the donation is being given to trustees governed by California Trust Law and the Deed of Trust. That the Restated Bylaws of the Corporation state that the Directors of the Corporation are to be known as Trustees (Ex. 25, Art. V, § 5.01) does not mitigate this belief. Non-institutional donors familiar with the College and its governing Deed of Trust are not generally familiar with the Bylaws, nor would it be reasonable to expect them to be. Furthermore, neither the College, nor the Trustees, nor the Directors have ever indicated that donations would go to an entity that was not governed by trust law or the Deed of Trust. Indeed, Petitioner admits as much in his interrogatory responses. (Ex. 38, at Nos. 17, 18, and 19.)

Even if any donors had read the Bylaws or the Articles, these donors would be reassured that the specific purposes of the Corporation were entirely the same as the Deed of Trust and

clearly state that the specific and primary purpose of the Corporation is for "the education of promising young men." (Ex. 18, at ¶ 1.) As a result, that donor would (as it happens, rightly) believe that the donation is subject to the Deed of Trust and California trust law.

5. Petitioner and Trustees of Deep Springs Have Placed Themselves in an Untenable Position and Are Asking The Court to Sanction A Fraud.

In adopting "Plan B" as a way to implement coeducation regardless of this Court's decision on the Petition, the Trustees have unwittingly created a grave dilemma for themselves and the College. If Petitioner is right in his recent concoction that the Trustees and Corporation are significantly independent of each other, and that the latter is not bound by the Purpose Statement of the Deed, both Boards face serious charges of ongoing fraud and misrepresentation, since the Trustees/Directors are depositing in the Corporation's account donor checks made out to the Trustees. (See Cal. Gov. Code § 12599.6, subd. (a) ["Charitable organizations . . . shall not misrepresent the purpose of the charitable organization or the nature or purpose . . . of a solicitation. A misrepresentation may be accomplished by words . . . or failure to disclose a material fact"].) Respondents acknowledge that under certain circumstances directors of a corporation may call themselves trustees even though they are not trustees in a "strict sense." (R.2d of Trusts § 16A (1959).) However, where as here, there is actually a deed of trust in existence and the corporation was "formed for the administration of that charitable trust . . . at the instance of the trustee[,]" failure to disclose the material fact to donors that the Trust Purpose does not limit the directors' discretion constitutes fraud and misrepresentation. (Gov. Code §§ 12582; 12599.6, subd. (a).)

Happily, however, the Trustees have not actually in the past been nor are they currently guilty of fraud or misrepresentation to donors; and this is precisely because the Corporation and the Trustees function as a single enterprise, and because the Corporation is bound by the terms, conditions, and stipulations of the Trust Deed and its Articles and Bylaws. The way out of this dilemma is plain: Petitioner's recently invented fiction regarding the Corporation must be rejected, and the Trustees/Directors must renounce or be required to renounce any and all claims to be able to proceed with policies that are not in keeping with the legally defined purpose of the

Trust Deed, regardless of whether they purport to do so as Trustees or the Corporation.

IV. IN THE ALTERNATIVE, THIS COURT SHOULD JOIN THE CORPORATION AS A PRINCIPLE OR AGENT OF THE TRUSTEES.

Even if the Court does not find the Deep Springs Corporation to be the alter ego of the Trustees, there is considerable evidence that the Corporation is the agent of the Trustees. The deep unclarity of this relationship above all suggests that the entities are indissociable alter egos. But if the Court instead finds that an agency relationship exists between Corporation and Trustees, it should find both entities to be parties in this dispute.

In addition to alter ego, California recognizes several other alternative theories of liability including agency, the "representative services doctrine" (a form of agency), aiding and abetting, and ratification. (*See, e.g., Dorel Indus. v. Super. Ct.* (2005) 134 Cal.App.4th 1267, 1275-80 [explaining agency and the representative services doctrine]; *Bowoto v. Chevron Texaco* (N.D. Cal. 2004) 312 F.Supp.2d 1229, 1241-48 [explaining agency, aiding and abetting, and ratification theories].) Moreover, demonstrating agency is in principle straightforward, since "agency liability does not require the court to disregard the corporate form." (*Bowoto*, 312 F.Supp.2d at 1238.) Evidence that the party for whom the work is performed has the right to control the activities of the alleged agent proves the existence of the agency. (*See Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 983.)

An agent is a "fiduciary." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566.) An agency relationship may be formed when the agent has either actual or ostensible authority. (*Deutsch v. Masonic Homes* (2008) 164 Cal.App.4th 748.) Actual authority is generally expressly conferred by agreement. (*Van't Rood v. Santa Clara* (2003) 113 Cal.App.4th 549, 571.) Agents act with actual authority whenever a "principal intentionally confers [such authority] upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess" such authority. (Civ. Code § 2316.) Courts find ostensible authority, on the other hand, where a "principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess" such authority. (Civ. Code § 2317.) While actual authority focuses on what the principal leads the agent to believe, ostensible authority focuses on what the principal

leads a third person to believe. Thus, an essential element of proving ostensible authority is the third party's reasonable belief in the agent's authority. (*Assoc. Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399; *Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 747.) Insofar as the Corporation is regarded as a distinct entity, it has actual authority, ostensible authority, or both, and is thus an agent of the Trustees and must be bound by any determination as to the Trustees.

A. The Corporation is an Actual Agent of the Trustees

According to its Articles, in order to accomplish its purpose, the Corporation holds title to Trust assets for the benefit of the Trustees, thereby paying over any principal or income to the Trustees for the purpose of educating promising young men. (Ex. 18, Art. III, ¶ (B)(1) at 000015.) In addition, it solicits and receives contributions on behalf of the Trust; acquires and holds real property and other property and earns interest on behalf of the Trust; and solicits and receives money and other property, sells property, and uses the funds of the Corporation and the proceeds from any of its property for the benefit of the Trust. (*Id.* at Art. III, ¶ (B)(2)-(4) at 000015-16.) In other words, there exists a fiduciary relationship between the Trustees of the Trust and the Corporation. As noted above, accepting a contribution solicited from a donor, as the Corporation does for the Trust according to its Articles, creates a fiduciary relationship between the Trustees of the Trust and the donor. (Cal. Bus. & Prof. Code § 17510.8.) As the Corporation solicits and accepts donations for the Trustees, thereby creating a fiduciary relationship between the donor and the Trustees, it alters the legal relations between the Trustees and third parties.

The 1996 Notes to the Financial Statements state that the Trust "retained ownership of the real property located in Deep Springs Valley, California." Note 13 is particularly interesting because the auditor states that

> The Trust has engaged Deep Springs, Inc., by contract, to utilize these assets to operate Deep Springs College on behalf of the Trust. The Corporation is obliged to return the assets upon termination of the operation.

(*Id.* at 003665.) This statement is repeated over *10 years* in the Notes to the Audits of the College. (See Ex. 50.) The Corporation approved and endorsed these financial statements every year. In 2007, the College changed auditors and reference to the purported contract disappears (without explanation) from that and all subsequent audits. (See Ex. 51.) Because this purported

contract allows the Corporation to operate the College on behalf of the Trustees, it creates in the Corporation the power to alter legal relations between the Trustees and third persons and between the Trustees and the Corporation. The authority of the Corporation's litigation committee to manage and control the Trustees' litigation in the present matter is an example of this agency relationship in action. (See Hoekstra Decl., ¶ 19.) The Corporation formed this committee to implement coeducation. (See Ex. 31.) However, it controls the litigation decisions of the Trustees. If they are truly separate, as Petitioner now contends, then the Corporation's litigation committee should not determine the strategies taken by the Trustees unless the Trustees have broadly authorized the Corporation, as its agent, to do so.

Also, by engaging the Corporation to operate the College on behalf of the Trustees, the Trustees retain the right to control the Corporation's conduct with respect to matters entrusted to it. The Trustees' right of control is further underscored by the provision for requiring return of all assets upon termination of the Corporation. This provision signals that this relationship is not a surrender of the Trustees' rights or authority, but rather a conditional and limited authorization of the Corporation. The Corporation therefore has its authority and powers only to further the express purpose of the Trust Deed, and only insofar as authorized as a general agent by the Trustees. In sum, the Trustees employ the Corporation as an actual agent the better to accomplish the purpose of the Trust to educate promising young men.

B. <u>The Corporation is an Ostensible Agent of the Trustees, The Same Entity, Or in Gross Violation Of Their Fiduciary Duty of Care</u>

Respondents have not seen the actual contract, and cannot directly prove it exists in written form. If it does exist—and Respondents doubt that the Trustees/Directors were deceiving the auditor in this regard— even if only as an oral agreement, then there is substantial evidence supporting an actual agency relationship between the Corporation and the Trustees. By virtue of this general agency (as understood by Respondents), the Court should compel the joinder of the College Corporation (See compulsory joinder analysis, *infra.*) If the contract does not exist, and the Trustees/Directors were deceiving the auditors and anyone else who read the Financial Statements, then this Court is left with three options.

First, the Court can look to see if third parties believe that the Corporation is an authorized agent of the Trustees. Relevant third parties would include Donald Porter, the independent auditor for the Corporation from 1996-2006 who clearly believed that such an agency existed (See Ex. 50); and donors who gave money to the Corporation believing that their donations were going to the Trustees and were subject to the limitations in the Deed of Trust. (See Keonjian Decl. at ¶¶ 6-8.) Respondents maintain that the minority of donors who had any awareness of the Corporation before the present litigation would have either regarded it as the alter ego of the Trust or as the agent of the Trust. (See Keonjian Decl. at ¶ 7.)

Second, as counsel for Petitioner has confirmed that he knows of no such written contract (Ex. 38. at 5) the Court can determine that the absence of such a fundamental document between the Corporation and the Trustees substantially supports the position that the Corporation and Trustees function as a single entity. (See Alter Ego Analysis, *supra.*) Surely an entity that transfers such extensive assets and powers to another entity would only do so according to a careful contract—unless they were effectively the same enterprise.

For their part, the Trustees could not have legitimately permitted an independent entity to manage Deep Springs College without express and legal undertakings to do so in accordance with the purpose of the Trust as stipulated in the Deed. And they would not have acted in accordance with their fiduciary duties if they had turned over significant assets and responsibilities without having in place contractually binding conditions. Unless, of course, both organizations were part and parcel of the same enterprise and bound by the same Trust limitations.

The Directors of the Corporation, for their part, would also have required a careful contract in order to fulfill their duties under the Corporations Code. For each director must perform his or her duties "with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." (Corp. Code, § 5231.) No prudent person would, without an extensive written agreement and due diligence, legitimately agree to bind their corporation to operating a college on behalf of another separate entity, as such a relationship would involve (1) the consolidation and acceptance of all non-real-property assets and liabilities (See Ex. 26.); (2) acceptance of full administrative control including obtaining all

necessary permits for any development on Trust property; (3) full assumption of operational duties and liabilities for students, staff, and visitors; (4) full assumption of liabilities to creditors and vendors; (5) accepting, holding, managing income on investments, donations, sales of cattle and hay; and (6) shaping and controlling the Trustees' and the College's goodwill. That is unless, again, it is not a truly independent entity, but effectively the same entity.

Or third, the Court can determine that the Corporation, while extensively involved in Trust business, is a substantially independent entity. In that case, the Trustees should be found to have been in grave violation of their fiduciary duties not to mention making misleading statements on their audits (copies of which institutional donors request and upon which they rely) and failing to correct them for a decade. If this is the case, the Trustees and the Corporation have opened themselves to charges of misrepresentation and fraud, mismanagement, and other violations of charitable trust and non-profit law. Respondents believe that these charges would be largely baseless, but only because the entities in question are effectively one and the same, or at least integral and inextricable components of a single enterprise. Petitioner's contention to the contrary must be seen for what it is: an expedient falsehood invented solely to advance the holy grail of coeducation without regard for the consequences.

V. IN THE ALTERNATIVE, THIS COURT SHOULD ORDER THE COMPULSORY JOINDER OF DEEP SPRINGS CORPORATION AS A PARTY PETITIONER.

Compulsory joinder allows the court, by the Respondents' or its own motion, to compel a person not originally named by the plaintiff to be joined into the lawsuit. The concept of compulsory joinder arose from the equitable notion that courts should not do justice "by halves," but rather should seek to bring all interested parties together and resolve conflicts as a whole in one action. (See John W. Reed, Compulsory Joinder of Parties in Civil Actions, 55 MICH. L. REV. 327, 335 (1957).) Through its evolution, compulsory joinder has developed a two-tiered classification of potentially interested persons: "necessary" and "indispensable." A necessary party is a person who should be joined if feasible, and an indispensable party is a person without whom the court cannot proceed.

Since Petitioner did not name the Corporation as a party, he should have stated the

Corporation's name and the reasons for its nonjoinder in the Petition. (Code Civ. Proc. § 389, subd. (c).) As Petitioner failed to do this and then made the Corporation relevant to this proceeding by his and the Trustees' actions, Respondents are left having to move for joinder.[10]

C.C.P. Section 389[11] sets forth the standard for compulsory joinder of a necessary party:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Section 389 requires joinder of persons materially interested in an action whenever feasible. (10 Cal. L. Revision Comm. Reports 501 (1971).) This rule provides courts with a two-prong analysis to determine if an absent party is necessary. First, the court must consider if complete relief is possible among those parties already in the action. Second, the court must consider whether the absent party has a legally protected interest in the outcome of the action. (*Confederated Tribes v. Lucan* (9th Cir. 1991) 928 F.2d 1496, 1998.) If the absent entity satisfies either of these two prongs, it is a necessary party and must be joined if feasible. (*Paiute-Shoshone Indians v. City of LA* (9th Cir. 2011) 637 F.3d 993, 997.)

A. <u>This Court Can Feasibly Compel Joinder of the Corporation.</u>

If the Corporation can be joined, it should be joined. (See Advisory Comm. Notes on Fed. Rules Civ. Proc., rule 19 (1966) 28 U.S.C.A.) Joinder is feasible where the non-party entity to the action (1) is subject to service of process and (2) its addition to the action will not deprive the Court of subject matter jurisdiction. Both of these elements are easily satisfied. First, Deep Springs College is located in Inyo County, California so the principal place of business for both

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[10] Obviously, the reason Petitioner did not name the Corporation as a party is because at the time Petitioner filed his Petition, he did not consider the Trust and the Corporation as substantially separate entities. Only after Respondents explained in their Response that Petitioner cannot prevail on the merits did Petitioner devise his "Plan B" scheme that involves the stratagem of contending that the Corporation is not bound by the Trust.

[11] In 1971, C.C.P. section 389 was revised substantially to conform with the Federal Rules of Civil Procedure. California courts have recognized the propriety of using federal precedents 'as a guide to application of the statute....' (*County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1152.)

the Trustees of Deep Springs and the Deep Springs Corporation is in Inyo County. (Ex. 18 at Art. IV.) Indeed, this issue is not debatable as the Corporation has admitted that it is subject to the jurisdiction of this Court by bringing the Withrow Petition. Therefore, since the Corporation can be joined, it should be joined if:

> (1) in [its] absence complete relief cannot be accorded among those already parties or (2) [it] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest.

(Code of Civ. Proc. § 389, subd. (a).) Both of these circumstances apply here.

B. Failure To Compel Joinder of the Deep Springs Corporation As A Necessary Party Will Result In Incomplete Relief Accorded to the Present Parties.

If this Court does not join the Corporation, it cannot accord complete relief to the present parties. The "complete relief" clause "requires joinder when nonjoinder precludes the court from effecting relief . . . between extant parties. In other words, joinder is required only when the absentee's nonjoinder precludes the court from rendering complete justice among those already joined." (*Countrywide Home Loans, Inc. v. Super. Ct.* (1999) 69 Cal.App.4th 785, 793-94.) Clause (1) of section 389, subdivision (a)

> stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the [current] parties, but also that of the public in avoiding [duplicative litigation].

(*Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1100.)

In *Paiute-Shoshone,* 637 F.3d at 998, the Ninth Circuit held that an affirmative answer to the "complete relief" prong of the inquiry was sufficient to make the United States a required party to the litigation (Necessary Parties under the California Rules are equivalent to Required Parties under the Federal Rules). There, where the movant would have required an additional, separate order to receive the complete relief requested; so here, the Respondents would have to file an entirely separate legal action against the Corporation to enjoin it from using the College's assets in violation of the terms of the charitable trust under which those assets are held.

Furthermore, courts can and do use the "complete relief" clause as the sole basis for

joinder "where an absentee's participation is required to provide injunctive relief to an existing party." (*Countrywide,* 69 Cal.App.4th at 794, n. 6; *see also Assoc. Dry Goods v. Towers Fin.* (2d Cir. 1999) 920 F.2d 1121, 1124.) Here, the Corporation's participation is necessary to afford the Respondents the injunctive relief they request. (*Countrywide*, 69 Cal.App.4th at 794, n. 6.) The Trustees are attempting to execute as corporate directors actions that are impermissible in their capacities as Trustees (or as Directors, explained above). They say that by acting as corporate directors they may avoid their fiduciary responsibilities as Trustees, and they have demonstrated that they will therefore act in a manner inconsistent with the legally determined purpose of the Trust. (Ex. 4 & 5.) These actions, taken in contravention to the Trust instrument, will result in irreparable harm to the Trust, as they would altogether thwart the Trust's lawful purpose.

Should this Court fail to compel joinder of the Corporation, the Respondents will have to bring a separate legal action against the Corporation to enjoin the actions mentioned above. Joinder would further the policy goal of avoiding wasteful duplicative litigation. Clearly complete relief is not possible between the parties present since in the absence of joinder, and in light of the Trustees/Directors insistence that any judgment pertaining to the Trustees will not bind them as Directors, any judgment against the Petitioner would effectively limit only the actions of the Trustees *qua* Trustees, since these same actors will insist that as Directors they are free to ignore this Court's orders.

The Court cannot grant truly complete relief among the present parties because, based on the Petitioner's representations, Respondents must enjoin the actions of the Board, both as Trustees and as Directors. Therefore, the Court must compel joinder of the Corporation.

C. Deep Springs Corporation Claims A Legally Protected Interest That Would Be Directly And Immediately Affected By The Outcome Of This Case

Section 389(a)(2) "requires joinder, if feasible, where an absentee claims an interest relating to the subject of the action, and nonjoinder could pose a risk of harm to the absentee or an existing party." (*Countrywide*, 69 Cal.App.4th at 794.) The interest must be "'directly and immediately' impacted by the outcome of the case," (*Ibid.*), and must be "legally protected." (*Northrop v. McDonnell Douglas* (9th Cir. 1983) 705 F.2d 1030, 1043.)

The Corporation has an interest in the control of Deep Springs College that would be directly and immediately impacted by the outcome of this case. (Ex. 18.) For example, the Corporation is given the power to acquire real and personal property, to dispose of such property in various ways, to borrow money, and more. (Id. at 2.) Therefore, the Corporation is given the legal right to generally manage the affairs and the property of the College.

As the purpose of this action is to determine what actions are permissible for the Trustees and for what purposes the Trustees may use the College's property, this action's outcome will have the practical effect of determining the Corporation's rights and obligations vis-à-vis its relation to the College. Thus, the Corporation has a "legally protected" interest in the outcome of the action which may be "directly and immediately impacted by the outcome of the case."

More importantly, if this Court decides that it can neither construe nor modify the Deed of Trust as Petitioner requests, the proper understanding of the relevant obligations of the Corporation follows as a matter of course, and as a practical matter this decision will substantially affect the Corporations' interests.

D. <u>Failure To Join Deep Springs Corporation As A Necessary Party Will Risk the Imposition of Inconsistent Obligations Upon The Trustees Of Deep Springs.</u>

Under subsection 389 (a)(2)(ii) (the "multiple liability" clause), a court shall join an absent party because "the disposition of the action in his absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." Where there are conflicting claims to property, including a trust corpus, courts compel joinder. (See *Bank of Cal. Nat. Ass'n v. Super. Ct.* (1940) 16 Cal.2d 516, 521; *see also, Wicheta & Affiliated Tribes v. Hodel* (D.C. Cir. 1986) 788 F.2d 765, 774.) Since a judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others, any judgment in the action would inevitably affect their rights. (*Bank of Cal. Nat. Ass'n,* 16 Cal.2d at 521.) Under section 389 (a), an inconsistent obligation is one in which "a party is unable to comply with one court's order without breaching another court's order" concerning the same facts. (*Delgado v. Plaza Las Americas, Inc.* (1st Cir.1998) 139 F.3d 1, 3; *see also Makah Indian*

Tribe, 910 F.2d at 558 ["The court must also determine whether risk of inconsistent rulings will affect the parties present in the suit."].)

Should this Court fail to compel joinder of the Corporation, Respondents would need to commence a separate suit, before the same court, against the same individuals to prevent the Corporation from acting in a manner inconsistent with the purpose of its Articles of Incorporation and the Trust. In such a situation, this Court could determine that the Trustees cannot use Trust property or current corporate assets to educate female students, but find that assets acquired after the proceeding may be so used. If this outcome were to happen, the Trustees would be left with inconsistent obligations as to managing the College. This circumstance is not hypothetical, as Respondents believe it is their duty under both Trust and Corporate law to file a separate suit if this Court fails to join the Corporation.

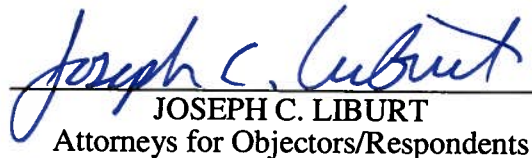
VI. PETITIONER'S NEW THEORY IS FUNDAMENTALLY FLAWED.

As stated in their February 6, 2012 Petition, the Trustees had decided to transition to coeducation contingent on this Court's approval of their Petition. Facing a series of legal impediments as laid out in the Response to the Petition, Petitioner changed course, proposing a desperate pre-emption of the legal process that he had himself initiated to resolve the question of coeducation. Petitioner has decided that introducing coeducation is more important than adhering to the founding and guiding principles of Deep Springs as laid down in the Deed of Trust currently in force. Petitioner has lost the plot.

For one or more of these reasons, this Court should find the Corporation subject to the determination of this proceeding and compel its participation as a party petitioner to the L. L. Nunn Trust litigation.

Dated: October 2, 2012

ORRICK, HERRINGTON & SUTCLIFFE

By: 

JOSEPH C. LIBURT
Attorneys for Objectors/Respondents
Kinch Hoekstra and Edward Keonjian

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