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Corporation
10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF INYO
13

14 In re the Matter of the
15 L.L. Nunn Trust for the benefit of Deep
Springs College under the Deed of Trust dated
16 November 5, 1923

Case No. SI CV PM 1253232

**RESPONDENTS' REPLY
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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1 **I. SUMMARY OF ARGUMENT**

2 The Deep Springs Corporation (“Corporation”) is either an alter ego or an agent of the
3 Trustees of the L. L. Nunn Trust, or is a necessary party and should therefore be joined to this
4 litigation. This Court may choose any one of those three theories to compel participation of the
5 Corporation in the matter. The substantial evidence Respondents provided supports whichever
6 theory this Court employs.

7 Petitioner fails to grasp a significant concept enshrined in both the statutory and common
8 law of charities in California: that gifts received that are otherwise not restricted by the donors are
9 received in trust to be held and used for the specific purposes for which the charity was founded.
10 Those specific purposes are found in the statements of purpose available publicly through the
11 Articles of Incorporation and even tax forms. The evidence Respondents provided more than
12 adequately supports the Corporation’s participation in this litigation. Cumulatively this evidence
13 supports piercing the veil of the Corporation for the purposes of this proceeding. Petitioner fails
14 to rebut any of the documentary evidence Respondents provided showing that on an ongoing
15 basis and at key moments, all parties failed to maintain sufficient separateness between the
16 Trustees and the Corporation. Petitioner also fails to address adequately Respondents’ alternative
17 arguments for an agency relationship between the Corporation and the Trust. Lastly, the Court
18 should alternatively join the Corporation because without joinder, complete relief cannot be
19 accorded to Respondents and there will be an unnecessary multiplicity of suits resulting.

20 **II. THE CORPORATION WAS FORMED TO ADMINISTER THE PURPOSES OF**
21 **THE TRUST EITHER IN WHOLE OR IN PART**

22 Petitioner makes an unsubstantiated claim that the Corporation “was not formed to
23 administer the trust and is not a trustee of the Trust.” (Pet’r’s PI Opp., at p. 7:21.) However, the
24 original incorporators formed the Corporation to administer the trust (whether in whole or in
25 part), as letters from two of these incorporators establish. In a March 18, 1961 letter written by
26 Harold Waldo (also co-writer of the Deed of Trust with L. L. Nunn), he explains

27 what I think [paragraph 2 (b) of the Deed of Trust] . . . permits us to do . . . is to
28 provide for organizing a non-profit corporation with sufficient powers to
authorize it to receive the trust estate and *carry out the purposes of the trust as set*

1 *forth in the trust deed.*

2 Having worked with Mr. Nunn in the drafting of this trust deed, I know that his
3 purpose in including this provision was to enable just such a move as I now have
4 in mind since he recognized that changing conditions might indicate the
 desirability of a change in the organizational set up *to carry out the purposes of*
 his trust . . .

5 (Kinch Hoekstra’s Declaration in Support of Respondents’ Reply to Petitioner’s Joinder
6 Response (“Hoekstra Decl. 2d”) Ex. 76, at p. 051130. Emphases added.) In a July 13, 1965
7 Letter from Ralph Kleps to George Lyon, Kleps makes clear that the implicit dedication of the
8 Corporation to the Trust purpose should be made explicit: “The property held by the corporation
9 should be subjected to trust purposes by a specific cross-reference to the trust instrument.”
10 (Hoekstra Decl. 2d, Ex. 77, at p. 051170.) As a result, when those individuals finally
11 incorporated the corporation, the amended Articles of Incorporation from 1968, which declarant
12 Elias J. Barrios states are the same Articles on file with the Secretary of State as of October 15,
13 2012, declare that

14 The specific and primary purpose for which this corporation is formed is to
15 provide for educational work for the education of promising young men in a
16 manner emphasizing the need and opportunity for unselfish service in uplifting
17 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 work shall be carried on not
 for profit but solely for the advancement of the purposes hereinabove mentioned.

18 As this is an abridged quotation of the language of the Deed’s Purpose Statement (with the
19 notable exceptions that the Corporation is not granted the same administrative discretion and is
20 not empowered to “carry on” the educational work but only to “provide for” it), Respondents fail
21 to see where Petitioner gets his ideas that the Corporation was not formed to administer the Trust
22 for the Trustees and is not limited by the language of its instrument. The act of incorporation did
23 not constitute the charity; it was born entirely from the Trust. It did not enlarge the Trustees’
24 inherent powers, nor exempt them from their duties under the Trust Deed. As a result, the
25 Corporation cannot act in direct defiance of the Trust’s provisions.

26 The case at bar is one of those instances where the corporation, although a
27 separate entity for all purposes to facilitate the administration and execution of the
28 trust, does not afford a shield to the managers in any of their trust responsibilities
 to the court . . . The court will look through the corporate form in order to hold
 the individual members to the responsibilities and duties resting on trustees in

1 their natural capabilities.

2 (*City of Boston v. Curley* (1931) 276 Mass. 549, 558.)

3 **III. ALL DONATIONS ACCEPTED BY THE CORPORATION ARE RESTRICTED**
4 **TO THE EDUCATION OF PROMISING YOUNG MEN AS STATED IN THE**
5 **DEED OF TRUST**

6 In addition to being born from the Trust and resultantly unable to defy its restrictions, the
7 Corporation's declared purposes are also limited to the education of promising young men.
8 California regards a gift to a charitable corporation as being in trust for the accomplishment of the
9 charitable purpose or purposes of that corporation, and no technical words of trust need be used to
10 restrict the assets. (*Estate of Connolly* (1975) 48 Cal.App.3d 129, 133.) Even where a donor
11 imposes no express restriction, the assets a nonprofit corporation accepts are restricted by
12 operation of law and may be used only for the specific charitable purposes set forth in the
13 corporation's Articles of incorporation at the time the assets are received. (See *Metropolitan*
14 *Baptist Church of Richmond, supra*, 48 Cal.App.3d at 857; see also, *L.A. County Pioneer Society,*
15 *supra*, 40 Cal.2d at 860 ["A devise to a society organized for a charitable purpose without a
16 declaration of the use to which the gift is to be put is given in trust to carry out the objects for
17 which the organization was created."].)

17 **A. The Articles Of Incorporation And The Restated Bylaws Limit The Use Of**
18 **All Funds Collected And All Revenue Earned To The Specific Purpose Of**
19 **The Corporation Regardless Of An Alleged Policy To Accept Only**
20 **Unrestricted Gifts**

21 Regardless of what Petitioner and his Declarants may claim to the contrary, an alleged
22 policy not to accept gifts restricted to the gender makeup of the student body has no effect on
23 whether those gifts are accepted in trust for the stated purposes of the Corporation. Had the
24 Corporation accepted such restricted donations, those restrictions would have been otherwise
25 redundant to the specific and primary purpose of the Corporation as stated in its publicly filed
26 Articles of Incorporation, which specifically limits the Corporation's purpose to provide for
27 educational work for the education of promising young men. (Barrios Decl., Ex. A, at p. 1 of the
28 1968 Amendments.) Under California law the "acceptance of charitable contributions by a
charity . . . establishes a charitable trust and a duty on part of that charity . . . to use those

1 charitable contributions for the declared purposes for which they are sought.” (Cal. Bus. & Prof.
2 Code § 17510.8.) These declared charitable purposes are found in the Deed of Trust’s language
3 which, excepting the right to “carry on educational work” or any mention of discretion, the Board
4 incorporated verbatim in the Corporation’s statement of “specific and primary purpose” in its
5 Articles of Incorporation and its Restated Bylaws (Hoekstra Decl., Ex. 25 at p. 1.) (*Lynch v*
6 *Spilman* (1967) 67 Cal.2d 251, 263; *Queen of Angels Hosp. v. Younger* (1977) 66 Cal.App.3d
7 359, 366.)

8 Respondents presented the above arguments more fully in their Memorandum in Support
9 of Motion to Join Deep Springs Corporation as a Party (hereinafter “Resp’ts’ Joinder Memo.”)(*Id.*
10 at pp. 15-19.) **Petitioner fails to address any of them** in his Memorandum of Points and
11 Authorities in Opposition to Respondents’ Motion to Join Deep Springs Corporation as a Party
12 (hereinafter “Pet’r’s Joinder Opp.”) and instead, spends much of his time and effort trying to
13 prove an irrelevant point: that the donors from 1995 onward did not place additional restrictions
14 on their donations, and therefore those donations are not restricted to the all-male requirement
15 stated in the Deed of Trust and the Articles of Incorporation. Petitioner’s argument does not hold
16 up in the face of established common and statutory law both in California and elsewhere:

17 Where no conditions were imposed by the donor, then [the college] holds and
18 must apply the property in carrying out the charitable object for which it was
19 incorporated. . . .Property conveyed unconditionally to a charitable corporation is
20 impressed with a trust for the accomplishment of the corporate purposes, and if it
could be said a trust in accordance with the terms and conditions of the charter
was created upon the receipt of the property.

21 (*Wellesley College v. Attorney General* (1943) 313 Mass. 722, 727.) The “unrestricted gifts” do
22 not carry additional restrictions by donors, but they are restricted by law and may only be used in
23 furtherance of the specific and primary purposes of the Corporation as stated in its publicly
24 available Articles of Incorporation and as limited by the Trust.¹

25 _____
26 ¹ There is a reasonable rationale behind this rule. Say a potential donor learns about Deep Springs College;
27 she is inspired by its commitment to service, its student self-government, and its isolated location in Deep Springs
28 Valley in the dramatic White Mountains. Say that donor is also inspired by its being one of the few remaining all-
male colleges in the United States. Being a prudent person, this donor obtains the College’s Articles of Incorporation
from the Secretary of State and retrieves the College’s Tax Filings from the Attorney General’s office. These public
documents make clear that the College’s purpose is limited to the education of promising young men, and that all the
elements the donor finds inspiring are located in those publicly available documents. Satisfied, the donor writes a

1 **B. The Trustees Respect Donor Intent When It Suits Them.**

2 Now Petitioner claims that donor intent is the controlling principle in the management of
3 nonprofit assets, and that since all donations received since 1996 were without additional
4 restrictions, those assets may now be used for activities that are not permitted by the Articles of
5 Incorporation or the Deed of Trust. (Pet'r's Joinder Opp. at p. 3.) As discussed above, this is
6 legally wrong. However, even taking this argument at face value, applying the reasoning
7 Petitioner applies to the Trust's restriction to educate promising young men, there should be some
8 evidence of donor intent from those post-1996 donors who "intended that the board maintain full
9 discretion to make decisions on coeducation" regardless of the restrictions in the Deed of Trust
10 and Articles of Incorporation. (Pet'r's Joinder Opp., at p. 5:4.) If every donor "since 1995
11 explicitly understood that their contributions were not limited to supporting" an all-male Deep
12 Springs, according to Petitioner's rule, there should be evidence of such intent. (*Id.* at p. 4:7-8.)
13 Yet, there is none.

14 Although Respondents do not believe such reasoning holds up to scrutiny, it illustrates
15 Petitioner's double standards. According to Petitioner, he need not respect Mr. Nunn's intent as
16 written in the Deed of Trust because of an alleged absence of evidence. (See Petitioner's Opening
17 Brief on Interpretation of the L. L. Nunn Trust, at p. 16-19 (hereinafter "Pet'r's Interp. Br.")).
18 Yet, he provides no documentary evidence for his donor intent argument, besides proclaiming
19 conclusorily that "the facts show" it to be true. He offers mere conjecture that the post-1996
20 donors "specifically intended to allow the governing board the discretion to govern," by which
21 he means the discretion to ignore the specific charitable purpose for which the Corporation was
22 founded in 1966. (Pet'r's Joinder Opp. at p. 3:16-17.) If this Court is to give greater deference to
23 the speculative "specific" donor intent for Board discretion that Petitioner alleges, than to the

24 nice check to the Trustees of Deep Springs. The College accepts it and deposits the money. All public
25 representations made to this donor indicate that the College's purpose is exactly what is stated on its public filings: it
26 is dedicated to the education of promising young men. In such a circumstance, and not an unlikely one at that, it
27 would be unjust to expect the donor to know that there exists a policy to accept only unrestricted gifts, where
28 according to the alleged personal understanding of 15 or so people in 1995, "unrestricted" actually means "not even
restricted to the purpose as laid down in our founding and publicly available documents whether they be the Deed of
Trust or the 1968 Amended Articles of Incorporation." Thankfully, the law recognizes the inherent inequity in such a
situation, and thus imposes on charitable corporations a duty to use otherwise unrestricted funds only for their
publicly stated specific purposes. (See Resp'ts' Joinder Memo, at pp. 15-19.)

1 clear, explicit, and unambiguous restrictions written in the Deed of Trust and likewise
2 incorporated into the Articles of Incorporation and Bylaws, such intent must, following
3 Petitioner's line of argumentation, be supported by documentary evidence from those donors.
4 Petitioner fails to provide any.²

5 Respondents did expect to see, however, some explicit documentary evidence of the
6 alleged policy itself. Again Petitioner provides none. In a thorough search of the Minutes of the
7 Board of Trustees from the years 1994 through 1997, there is no mention of a single resolution to
8 the effect that Petitioner claims. The only resolution Respondents have identified that could be
9 considered a relative of such a policy comes from the October 1994 Trustees' Meeting. Josh
10 Breitbart (a student Trustee) introduced the resolution, later approved, which states in full: "TDS
11 will not accept gifts that unduly restrict the operation of the college." (Hoekstra Decl. 2d, Ex. 79.
12 at p. 003349.) Such a broadly worded resolution lacks the specificity that Petitioner now wants to
13 claim. Furthermore, only a few months after Jim Olin allegedly stated his guiding principle at the
14 Fall 1995 Trustees Meeting, he wrote resolutions that, although meant to secure donations from
15 large donors in the rebuilding of Deep Springs, make no mention of foregoing any restrictions,
16 much less those regarding the gender composition of the student body; nor do they mention any
17 intent to grant the Board full discretion to do things that are not permitted by the Articles of
18 Incorporation; nor do any mention anything else Petitioner now claims. (See Hoekstra Decl. 2d,
19 Ex. 80, at p. 003555.)

20 C. **Assets Must Be Used For The Charity's Stated Specific Purpose, Not Some**
21 **General Purpose Invented By Trustees.**

22 Regardless of Petitioner's contentions, the Corporation is a California Public Benefit
23 Corporation dedicated to all purposes listed in its purpose paragraph. Claiming that Corporation
24 assets will now be used for or dedicated to "educational work at Deep Springs"³ will not suffice.

25 _____
26 ² And to be quite clear, Respondents reiterate that Petitioner's argument is legally frivolous, in that a specific
27 donor intent cannot trump the purpose of the donee institution and the legal limitations imposed by trust law and
28 charitable corporations law.

³ Below are just some of the different purposes of the Deed of Trust or the Corporation as claimed by
Petitioner:

"to achieve the educational goals he enunciated" (Petn., at p. 8:21-22.)

"to train promising students who desire to be of service to society" (Petn. P & A, at p. 11);

1 (Pet'r's Joinder Opp. at p. 6:2-3.) Deciding for themselves that either the Trust or the
2 Corporation should work towards coeducation is a unilateral application of *cy près*; this is a
3 power that the Trustees do not have. The *cy près* power is judicial and cannot vest in trustees. A
4 charitable trustee has no power to apply the *cy près* doctrine to change unilaterally the trust under
5 which it holds property, rather the trustee must seek the authorization of the court of equity.
6 (*Cody v. Buffalo Bill Mem'l Ass'n* (Wyo. 1948) 196 P.2d 369.)

7 **IV. THIS COURT SHOULD FIND THAT THE CORPORATION AND TRUST**
8 **FUNCTION AS A SINGLE ENTERPRISE**

9 In Kinch Hoekstra's Declaration in Support of the Motions for Joinder and Preliminary
10 Injunction ("Hoekstra Decl."), Respondents provided an extraordinary amount of evidence
11 demonstrating that the Trustees have consistently failed to treat the two organizations separately
12 since the restatement of their Bylaws on February 3, 1996. As a result, Respondents' evidence
13 more than adequately supports the Corporation's participation in this litigation as the Trustees'
14 alter ego.

15 **A. California Courts May Apply The Alter Ego Doctrine To Nonprofits**

16 California law is among the most frequently applied to veil-piercing cases, featuring an
17 application rate of 50.86 percent. (Peter B. Oh, *Veil-Piercing* (2010) 89 TEX. L. REV. 81, 118.)
18 While alter ego is not specifically mentioned in the Nonprofit Public or Mutual Benefit
19 Corporation Law (Corp. Code §§ 5110 et seq., 7110 et seq.), it is an equitable doctrine and its
20 application turns on the facts of each case. (*See Mesler v. Bragg Mgmt. Co.* (1985) 39 Cal.3d 290,
21 300.) Although no case in California applies the alter ego doctrine specifically to a nonprofit
22

23 "to prepare individuals for societal, professional, and political leadership" (Id. at p. 12);
24 "to provide for and carry on educational work emphasizing the need and opportunity for unselfish service in
25 uplifting mankind from materialism to idealism, to a life in harmony with the Creator." (Id. at pp. 16-17);
26 "to improve mankind" (Pet'r's Interp. Br., at p. 19);
27 "to provide essentially "an unambiguous grant of discretion" to Trustees (Id. at pp. 4-7);
28 "to provide for the continuation of Deep Springs" (Id. at p. 12);
"to support Deep Springs and to develop it as an educational institution" (Id. at p. 9);
"to entrust his assets to the Trustees to continue his educational experiment at Deep Springs—with great
deference given to the Trustees[.]" (Pet'r's PI Opp. at pp. 5-6);
"to provide for educational work." (Id. at p. 7)
"education" (Id. at p. 7.)
"educational purposes" (Id. at p. 7.)

1 corporation through trustees of an interrelated educational trust, the doctrine generally applies to
2 nonprofit corporations to the same extent it applies to for-profit corporations. (*HOK Sport, Inc. v.*
3 *FC Des Moines, L.C.* (8th Cir. 2007) 495 F.3d 927, 935.) And Petitioner provides no rationale
4 for why it shouldn't. Indeed, the facts of this case are ample evidence of why it must.

5 Furthermore, a court has authority to impose liability under a judgment on an alter ego
6 who controls the litigation. (*Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1075.) Since the
7 litigation committee of the Corporation controls the Trustees' litigation, this Court has authority
8 to impose alter ego liability on the Corporation. In addition, Corporations Code section 18630
9 permits court application of alter ego liability to nonprofit associations. Under Cal. Corp. Code §
10 18630, "a member of a nonprofit association may be subject to liability for a debt, obligation, or
11 liability of the association under common law principles governing alter ego liability *now*
12 *generally applicable to corporations.*" (CA B. An., S.B. 1746 Sen., 4/13/2004, California Bill
13 Analysis, S.B. 1746 Sen., 4/13/2004 [emphasis added].) This allows "a court to disregard a
14 nonprofit association's form if a member is misusing that form to defraud others or work an
15 injustice." (Recommendations on Unincorp. Assocs. (Sept. 2003) 33 Cal. Law Revision Com.
16 Rep. (1980) p. 741.) If California specifically legitimizes alter ego liability for unincorporated
17 associations, does not forbid its application to nonprofit corporations through statute, and
18 acknowledges that such liability is *generally applicable to corporations*, this Court can rest
19 assured that its application of the doctrine to the facts before it will be entirely proper.

20 **B. The Material Facts Presented By Respondents And Unchallenged By**
21 **Petitioner Establish That The Corporation Is Largely Indistinguishable From**
22 **The Trustees**

23 Respondents present three detailed case studies involving the Trustees and the
24 Corporation where genuinely independent organizations would have made their separateness
25 explicit: (1) the transfer of assets involving the L. L. Nunn LLC, (2) the September 2011
26 Coeducation vote, and (3) Plan B. In addition to these undisputed case studies, other evidence
27 Respondents provided cumulatively supports this Court's piercing the Corporation's veil.

28 Other than calling Respondents' production "insufficient," and claiming (without any
legal support) that each factor Respondents proved with evidence is "not critical," Petitioner fails

1 to respond materially. (Pet'r's Joinder Opp., at p. 10:9, 23.)

2 Rather, Petitioner speaks at length about the scenario facing the college in 1994, and then
3 claims that this necessitated transfer of all activities to the Corporation. Respondents fail to see
4 exactly why shifting assets and activities to the Corporation was necessary, or that the Trustees
5 did not retain ultimate control. To increase the size of the board as suggested in 1994 by Trustee
6 Chuck Christenson, the Trustees could have easily applied to this Court for equitable deviation of
7 an administrative provision based on changed circumstances under Probate Code section 15409,
8 but that is neither here nor there. Given the length of time it took to rewrite the Bylaws (they
9 were officially approved on February 3, 1996), such an application to the Court may have been
10 faster.

11 As Petitioner notes (though his date conflicts with Respondents' understanding), the
12 Trustees transferred all remaining non-real property assets to the Corporation on September 20,
13 1996, subject to their power granted by paragraph 2 (b) of the Deed of Trust. (Pet'r's Joinder
14 Opp., at p. 7:1-17; *contra*. Hoekstra Decl., Ex. 26.) Paragraph 2 (b) allows the Trustees to
15 transfer or turn over any and all of the trust estate

16 provided that under no circumstances shall any of the trust estate be so transferred
17 or turned over . . . for use otherwise than in the accomplishment of the purpose of
18 the trust; and, upon such transfer of said trust estate, *the Grantee or Grantees*
19 *thereof shall be substituted for the said Trustees and shall be subject to all their*
20 **duties and responsibilities hereunder and vested with all their rights and**
21 **powers subject**, however, to such additional conditions and limitations as may be
22 imposed by said Trustees[.]

23 (Hoekstra Decl. 2d, Ex. 81 at p. 000088, ¶ 2 (b).)⁴

24 While Petitioner is correct that the Trustees need not place *additional* conditions and
25 limitations on the recipients of assets transferred under paragraph 2 (b), the Corporation is
26 absolutely subject to all the Trustees' duties and responsibilities in the Deed of Trust with regard
27 to those assets and all assets acquired following said transfer, as Respondents explained in their
28 opening brief.

⁴ This rediscovered clause is in boldface type above. Respondents therefore respectfully request that this Court accept as a true and original copy of the Deed of Trust included as Exhibit 81 attached to the Hoekstra Reply Declaration.

1 **C. Petitioner Rebut Little And Admits Much**

2 Because courts do consider all the facts available when considering the alter ego doctrine,
3 and no one unity-of-interest factor is determinative, Respondents were meticulous about
4 presenting evidence (that Petitioner does not deny) to support the various factors . Yet
5 Petitioner’s opposition mainly tries to say only that each individual factor is not enough. This is
6 not the test. Cumulatively, these factors provide ample support to find a unity of interest for an
7 alter ego determination.

8 **1. Petitioner Slavishly Adheres To The Ownership Factor When**
9 **Attempting To Rebut Respondents’ Evidence Supporting A Unity Of**
10 **Interest**

11 Petitioner focuses on the Corporation’s lack of ownership as undermining a unity of
12 interest finding. Yet the alter ego doctrine does provide a viable legal theory for creditors vis-à-
13 vis trustees. (*Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 522.) Clearly if the doctrine
14 applies generally to corporations in California, then it applies to non-membership nonprofit
15 corporations. Since non-membership nonprofit corporations, by their very nature lack
16 “ownership” because they cannot issue equity, this factor is simply not applicable to nonprofit
17 corporations, and it is unnecessary to find a unity of interest between the Trustees and the
18 Corporation.

19 **2. The Corporation Unconditionally Assumed All Of Trustees’ Liabilities**
20 **And Responsibilities For The College**

21 In his section III.B. heading, Petitioner argues that no management or other agreement
22 was necessary between the trustees and the Corporation because the Corporation “unconditionally
23 assumed all liabilities and responsibilities for Deep Springs.” (Pet’r’s Joinder Opp., at p. 6:26.)
24 Use of a corporation to transfer to it the existing liabilities of another entity is one of the fifteen
25 factors considered by courts when asked to disregard a corporate entity. (*Associated Vendors,*
26 *Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 838-40; *Shea v. Leonis* (1939) 14 Cal.2d
27 666; *Engineering etc. Corp. v. Longridge Investment Co.* (1957) 153 Cal.App.2d 404]; see also
28 *Virtualmagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 Cal.App.4th 228, 245 [“holding out by
one entity that it is liable for the debts of the other”].) Although Respondents do not allege fraud

1 or breach of duty on this fact alone, failing to disregard the corporate entity where the
2 Corporation has unconditionally assumed all of trustees' liabilities and responsibilities for the
3 College, and yet refuses to acknowledge the restrictions of placed on assets by the Trust Deed,
4 would be inequitable. The Corporation cannot choose which restrictions it will uphold when
5 those restrictions followed the trust assets acquired by the Corporation.

6 **3. The Trustees See No Utility In Maintaining Corporate Formalities**

7 In his Declaration in Support of Petitioner's Opposition to Motions for Preliminary
8 Injunction and Motion to Join Deep Springs Corporation as a Party (hereinafter "Newell Decl.
9 2d"), Declarant L. Jackson Newell even admits that the Trustees failed to maintain the formality
10 of holding separate meetings because they "saw no utility in" holding separate meetings for the
11 Trust and the Corporation. (Newell Decl. 2d, at p. 7:5-6.) The Deed of Trust requires an annual
12 meeting the Trustees. (Hoekstra Decl. 2d, Ex. 81, at ¶ 6.) Possibly in 1995, when all members of
13 the board had just approved the restated Bylaws, they felt there was no utility in separating the
14 entities. But by the time the Respondents joined the Board, none of the 1995 Board members
15 remained and the failure to hold separate meetings created a lasting impression that entities were
16 functionally and legally intertwined. Regardless of Petitioner's unsupported claim to the
17 contrary, adhering to formalities is a factor courts consider to find the requisite unity of interest.

18 **4. The Trustees Fail To Acknowledge Their Own Equitable Ownership**
19 **In The Lands Held By The L. L. Nunn, LLC**

20 In his account of the LLC, Petitioner claims that the transfer to the LLC made the Trust
21 "passive". Although he fails to provide any legal support for the concept of a passive trust, and
22 Respondents cannot locate any, Petitioner forgets that the Trust retained an equitable interest in
23 the land and a right to subdivide the parcel holding much of the College's valuable realty. (See
24 Hoekstra Decl., Ex. 29.) As emphasized more thoroughly in their Joinder Memorandum,
25 Respondents discuss how this fits the unity of interest factor of asset commingling. (Resp'ts'
26 Joinder Memo. at p. 13.) Moreover, Petitioner misrepresents to the Court when he claims that the

27 Trustees of the Trust convened a separate meeting to vote on coeducation because
28 the Respondents questioned whether the terms of the Trust allowed the Trustees
to utilize the remnant of Mr. Nunn's gifts to implement coeducation. Due to their

1 objection, Petitioner filed the Trust Petition on behalf of the Trustees.
2 (Pet'r's Joinder Opp., at p. 7:27-8:2.) First, the Trustees did not convene a separate
3 meeting to vote on coeducation in September 2011. (See Hoekstra Decl., Ex. 31.) No one said
4 anything to the effect “. . . and now we convene as Trustees of the Trust”, and the votes of the
5 Corporation and the Trustees were 30 seconds apart. Second, this fictitious second meeting was
6 not convened because of Respondents' arguments. The nearly simultaneous vote by the separate
7 entities was likely a surprise to most of the Trustees as it was to Respondents', excepting of
8 course Petitioner, who was the only person who even mentioned the asset allocation between the
9 Corporation and the Trust. Third, no one knew the value of any assets or “remnants of Mr.
10 Nunn's” endowment since there was no appraisal in advance of the September 2011 Trustees'
11 Meeting. Fourth, Petitioner filed the Trust Petition because he planned to file the Petition.
12 Respondents had no idea they could file a Response until after Petitioner set to work. Being
13 level-headed, Respondents gave Petitioner the benefit of the doubt and waited until he filed to
14 scrutinize his arguments. They were unimpressed. He pled the wrong standard, he provided little
15 evidence in support of his prayers for relief, and his arguments did not rise to the standard
16 required to change an otherwise thriving College. Knowing nothing of trust litigation, the
17 Respondents gathered the few resources they had and opposed the Petition. That is the truth of the
18 matter.

19 Because of the reasons foregoing and those provided more thoroughly in Respondent
20 Hoekstra's Declaration (¶¶ 70-163) and Respondents' Joinder Memorandum (pp. 6-14), this
21 Court has a sufficient facts before it supporting its finding a unity of interest between the Trustees
22 and Corporation. Furthermore, as fully laid out in their Joinder Memorandum, adherence to a
23 separate corporate existence of the Corporation will result in sanctioning fraud and promoting
24 injustice. As a result, the Court it should find that the Corporation and Trustees function as a
25 single enterprise.

26 **V. THE CORPORATION HAS NO INHERENT POWER TO CARRY ON THE**
27 **EDUCATIONAL WORK FOR THE EDUCATION OF PROMISING YOUNG**
28 **MEN AND THEREFORE DOES SO ONLY AS AN AGENT OF THE TRUST.**

Petitioner's argument challenging the existence of an agency relationship between the

1 Corporation and the Trustees is brief, unpersuasive, and unintelligible.

2 The documentary evidence Respondent Hoekstra's Declaration provides supporting an
3 agency relationship between the Corporation and Trustees is hardly "[n]onsense." (Pet'r's Joinder
4 Opp., at p. 13.) In the purpose statement of the Deed of Trust, the Trustees are given two
5 overarching powers or functions: providing for (i.e., "to make provision", fund) and carrying on
6 (i.e., "to manage, conduct, or prosecute, as a business or trade") educational work at Deep
7 Springs. In his discussion of the Deed of Trust, Petitioner focuses on only the first of those
8 functions, that of providing for (funding) said work. As a result, he tries with all his might to
9 limit the scope of the matter before this Court by trying to portray the Trust as "dormant" non-
10 entity merely passively supporting what he hopes will soon be a coeducational college. However,
11 only the Trustees have the power to carry on the educational work started by Mr. Nunn. This
12 power is not provided in the Articles of Incorporation of the Corporation; the specific and primary
13 purpose for which the Corporation was formed is "to provide for educational work for the
14 education of promising young men[.]" As a result, whatever acts the Corporation does in
15 managing, conducting, or prosecuting the educational work at Deep Springs is solely the result of
16 a direct delegation by the Trustees, and it is a delegation that they control.

17 **VI. IN THE ALTERNATIVE, THIS COURT SHOULD COMPEL JOINDER OF THE**
18 **CORPORATION**

19 This Court should compel participation of the Corporation because without joinder,
20 complete relief cannot be accorded to Respondents, and there will be an unnecessary multiplicity
21 of suits. Also, the Withrow gift matter is limited to that one asset because it involves a forfeiture
22 clause tying it to the gender makeup of the student body. Therefore the analysis applied by this
23 Court in determining the fate of the Withrow gift will largely mirror some cases cited by
24 Petitioner elsewhere. Here, however, the issue is whether the Trustees, as Trustees or as
25 Directors of the Corporation, have the authority to admit women as well as men to the College.
26 As the Corporation is born entirely from the Trust, its specific and primary purpose is limited by
27 reference to and incorporation of purpose statement in the Trust Deed, the Directors are restricted
28 to the terms and conditions of the Trust by virtue of any asset the Corporation holds as a result of

1 a paragraph 2 (b) transfer, and it derives much of its powers from the Trust either directly or
2 through the Trustees' delegation of said powers, the proper forum to settle the rights and duties of
3 the Trustees and the Corporation together and in full is *In the Matter of the L. L. Nunn Trust*
4 presently adjudicated before this Court.

5 **VII. THE TRUSTEES' DEROGATION OF THEIR DUTIES UNDER THE DEED OF**
6 **TRUST MAY IMPLICATE THEIR TAX EXEMPT STATUS**

7 Respondents included the 1968 IRS Determination Letter from July 31, 1968 because in
8 all the documents Petitioner provided in response to the document request from Respondents, no
9 filed copy of the 1968 Amendments was provided. Knowing that this Court would need
10 documentary proof that those Amendments were indeed filed and effective (rather than relying on
11 Respondents' unsupported claims), Respondents attached as Exhibit 19 to Respondent Hoekstra's
12 Declaration two IRS Determination Letters from 1968 to show that these Amendments were
13 indeed filed. Rather than attempting to make veiled threats of tax fraud, Respondents were
14 competently laying a foundation for admissibility of an unfiled copy of the 1968 Amendments.

15 However, since Petitioner raises the issue, Respondents do deny Petitioner's claims that
16 the Corporation has not engaged "to a substantial degree" in any activities unrelated to the
17 purposes as specified in the Articles of Incorporation. The short-lived "experiments" in
18 coeducation in the 1990s and late 1980s (which the 1988 Trustees concluded were "merely
19 unsuccessful to abject failure[s]") occurred without approval by a court so were possibly such
20 unrelated activities. The Trustees at the time may have thought themselves clever by requiring
21 the female students to pay a \$1000 stipend and not receive real grades in order to avoid
22 implicating the Trust's restrictions. However, the women benefitted from the Trust lands.
23 Moreover, as stated more fully in their Reply to Petitioner's Opposition to the Motion for
24 Preliminary Injunction (hereinafter "Resp'ts' PI Reply"), claiming that women attended Deep
25 Springs during two short-lived periods (in violation of the Deed of Trust, and seemingly not in the
26 spirit of dropping the coeducation issue to focus on fundraising) it is not an affirmative defense to
27 preliminary injunction. Finally, Petitioner's claims that the Trustees "are not legally required to"
28 carry out the specific purposes of the Trust, and by reference, the specific purposes of the

1 Corporation, present a serious lapse in Trustee judgment, since such proclamations do potentially
2 implicate the Corporation's tax-exempt status. (Pet'r's Interp. Br., at p. 5:13.)

3 In all cases where the corporation is designed to qualify for exemption under
4 I.R.C. § 501(c)(3), the references [in the Articles of Incorporation] to these more
5 specific purposes should be carefully drafted to make it clear that they are
6 purposes within that section because the IRS has taken the position that an
7 unqualified reference to "educational" or other purposes expressly listed in I.R.C.
8 § 501(c)(3) is not necessarily or generically charitable in nature. Thus, for
9 example, an educational purpose could be either charitable or noncharitable
10 depending on the circumstances.

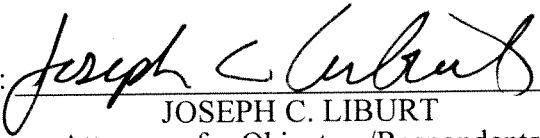
11 (3-19 Ballantine and Sterling California Corporation Laws § 404 "Corporate Formation".)

12 **VIII. CONCLUSION**

13 Respondents have presented this Court with three independently valid theories upon
14 which it should compel joinder of the Corporation, and asks that the Court do so.

15 Dated: October 20, 2012

16 JOSEPH C. LIBURT
17 Orrick, Herrington & Sutcliffe LLP

18 By: 
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