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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF INYO

In re the Matter of L. L. Nunn Trust for the benefit of Deep Springs College under the Deed of Trust dated November 5, 1923 Deceased.	CASE No. SICVPB1253232 **PETITIONER'S RESPONSE TO RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO JOIN DEEP SPRINGS CORPORATION AS A PARTY** **[Probate Code §§ 17200 and 15409]** **DATE: June 22, 2012** **TIME: 9:00 A.M.** **DEPT: 1** **JUDGE: Dean T. Stout** **Action Filed: February 6, 2012**

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I.
SUMMARY OF ARGUMENT

The Corporation is not an alter-ego or agent for the L. L. Nunn Trust. The Corporation assumed control of the College because, by the mid 1990's, the Trust was nearly bankrupt and not viable. In a last-ditch effort to save the College, the Trustees transferred assets to the Corporation under their powers set forth in Section 2B of the Trust. The Trustees could have put restrictions on the transferred assets, but they did not. In fact, the lack of restrictions was a critical element in the Corporation's success in saving the College in any form.

The primary fiduciary duty of the trustee of a trust, or a director of a non-profit corporation ,is to honor donor intent. Donations to the Corporation since 1995 have not been subject to restrictions. The fundraising campaign commenced in 1995 that saved the College was successful precisely *because* donors understood that there was no single-sex restriction. In the early nineties, there was an extremely contentious debate about coeducation. That debate was essentially put on hold because the College was almost bankrupt. Fundraising could be successful only if donors understood that coeducation was undecided. The campaign was explicit that no donations would be allowed to tie the hands of the current or future governing board. One early donor, a Trustee who opposed coeducation, pledged $500,000 and was the head of the major gifts campaign on the explicit condition that the college *not* accept any donations with coed, single sex or other restrictions on the Board. He and the rest of the campaign team convinced other donors to drop any proposed restrictions. The evidence indicates that Deep Springs College probably would not have survived if it were still run or restricted by the Trust. Deep Springs fundraising since 1995 has raised over $31 million in capital donations with no restrictions on the governing board's discretion.

The Corporation, a separate legal entity from the Trust, has operated Deep Springs independent from the Trust since July 1, 1995 when the Trust transferred all operations to the

Corporation. Therefore it should not be joined in the Trust Petition. Notwithstanding that, some Corporation assets may be subject to a single-sex restriction. That question is the subject of the Withrow Petition already filed by the Corporation. Petitioner is not aware of any other Corporation assets are potentially subject to such a restriction. Even if some are, that is no reason to join the Corporation. Any potentially restricted assets can be segregated, pending the ruling on Trust interpretation, just as the Corporation has voluntarily done in the Withrow Petition.

Similarly, even if this Court finds that there is some basis for joinder of the Corporation with the Trust on some theory or for some purpose(s), joinder is improper for the purposes sought by the Respondents. Respondents request this Court to find that funds managed by the Corporation for the benefit of Deep Springs College are subject to restrictions that they argue were imposed by L. L. Nunn on his donations. Whether donated funds are subject to a restriction is not a question of corporate governance, it is a question of the intent of each donor. Because the facts show that the donors who gave to rebuild the college and endow it for its second century specifically intended to allow the governing board the discretion to govern, joinder of the Corporation in the Trust petition should not be ordered.

II.

Donor Intent is the Controlling Principle in Management of Non-Profit Assets.

The Corporation's management of the funds its receives is subject to the provisions of the Uniform Prudent Management of Invested Funds Act ("UPMIFA") that has been adopted by California. (Cal. Probate Code 18501). UPMIFA clearly establishes that the primary determinants of donor intent are the writings of the donor and the terms of the solicitation to which the donor responds. Donor intent is the governing principle on how charitable contributions should be used. (See, e.g., Probate Code section 18503(a) (a charitable institution, in managing and investing institutional funds, shall consider the purposes of the charitable institution and

institutional funds "[s]ubject to the intent of a donor expressed in a gift instrument"); *Estate of Tarrant,* 38 Cal. 2d 42, 46 (1941) ("It is the policy of the law to favor gifts for charitable purposes, and a will providing for such gifts will be liberally construed in order to accomplish the intent of the donor"); *Estate of Heil*, 210 Cal.App.3d 1503, 1510-11 (1989) ("liberally construing the trust instrument" to effect the testator's intent).)

A. All Major Donors to the Corporation Since 1995 Explicitly Understood that their Contributions Were not Limited to Supporting a Single Sex Male Student Body at Deep Springs.

The Corporation has been the sole entity operating Deep Springs College and soliciting funds since July 1, 1995. Mr. Newell states the policy specifically that the Corporation would only accept funds without donor restrictions on the future exercise of discretion by the board—explicitly including the discretion to institute coeducation. (Declaration of L. Jackson Newell in Support of Petitioner's Opposition To: Respondents' Motion for A Preliminary Injunction, and Respondents' Motion to Join Deep Springs As A Party ("Decl. of L. Jackson Newell").) The Campaign for Deep Springs that raised over $18 million by 2000 and the subsequent campaign that raised over $13 million more, (see Declaration of David Neidorf in Support of Petitioner's Opposition To: Respondents' Motion For A Preliminary Injunction, and Respondents' Motion to Join Deep Springs As A Party ("Decl. of David Neidorf")) and thereby saved Mr. Nunn's educational experiment, were successful, in large part, because they adhered to the policy of not accepting gifts that restrict the Board of Directors' discretion on coeducation or other policy matters. None of the funds raised from and after 1995 were solicited or accepted subject to an expressed or implied condition that the College not admit women students.

B. The Intent of Donors to Deep Springs Following 1995 was to Afford the Governing Board the Discretion to Decide on Coeducation and all other Matters of College Policy and Governance.

Respondents argue that both the Trustees of the Trust and the directors of the Corporation

would fraudulently violate their duties if they do not bind all Corporation assets to Respondents' interpretation of the 1923 Deed of Trust. However, the vast majority of the funds currently held by the Corporation and the majority of the value of the renovated campus was contributed by donors who intended that the board maintain full discretion to make decisions on coeducation and other matters of educational policy. The evidence indicates that no donors to Deep Springs since 1995 have placed any written restrictions on the Board's discretion to use those funds for coeducation. Mr. Newell and Mr. Neidorf establish that the policy of the College during their tenures as President, and during the intervening period when Mr. Neidorf was Vice President, was to not solicit or accept donations that restricted Board discretion. In addition, Mr. Neidorf's declaration states that hundreds of alumni and other donors he personally talked to both during the consideration of coeducation and following the decision on coeducation support the Board's right to decide to utilize their donations either for a single sex male or a coeducational Deep Springs. The Respondents cannot ask this Court to disregard the actual intent of those donors who can and have spoken for themselves. (See Declaration of David Hitz in Support of Petitioner's Opposition To: Respondents' Motion For A Preliminary Injunction: And Respondents' Motion To Join Deep Springs Corporation As A Party ("Decl. of David Hitz).)

III.
THERE IS INSUFFICIENT BASIS TO TREAT THE CORPORATION AS PART OF THE TRUST.

Respondents ask the Court to disregard the Corporation's form and treat it as part of the Trust under an alto ego analysis or an agency theory. They recognize, however, that regardless of which rubric is applied, such an equitable remedy is extraordinary, and "[d]etermining whether to pierce the corporate veil depends on the circumstances of each case." (Resp. Brief at 7:10-11, citation omitted.) The material facts in this case establish that the Corporation is an independent entity and that there is no legal basis for combining the Corporation with the Trust.

A. The Deep Springs College Corporation Has Been The Sole Operator Of Deep Springs College For Seventeen Years.

The Corporation is a California Public Benefit Corporation dedicated to educational work at Deep Springs. The Corporation was formed as a supporting organization for Deep Springs in 1966, but circumstances in the 1990's required that it assume full responsibility for the College. The Corporate documents on file with the California Secretary of State are attached to the Declaration of Elias J. Barrios In Support Of Petitioner's Opposition To Respondents' Motion To Join Deep Springs Corporation As A Party.

By 1993, the Trust and the college campus were both in dire straits and threatened with collapse. Mr. Newell describes pivotal Trustee meetings in 1994. That January, Trustee Christenson explained the institution was close to bankruptcy. The Trustees could have responded by selling the remaining assets and donating the proceeds to another non-profit institution. Or, also consistent with their fiduciary duties, they could have allowed the College to continue to operate until it was physically or financially impossible to go on. As described by Mr. Newell, Trustees instead chose to make heroic efforts to rescue L. L. Nunn's ongoing educational experiment in its original isolated location of Deep Springs Valley.

The Trustees engaged Chuck Thompson, recently retired lead fundraiser for Harvard, to craft a strategy. He insisted that the key place to start was the governance structure and board of the corporation. He insisted that a large board, with significant non-Deep Springs alumni representation, was essential to effective fundraising. In response, the directors amended the bylaws to increase the board to 13 (from 9) including two student representatives. The Corporation also recruited new board members with fund raising in mind.

B. No Management or Other Agreement was Necessary Between the Trust and the Corporation because the Corporation Unconditionally Assumed all Liabilities and Responsibilities for Deep Springs.

The Trustees properly transferred all then remaining trust assets, except the real estate, and

all operational responsibility to the Corporation as of July 1, 1995 pursuant to the explicit authorization in Section 2 of the Deed of Trust. The Trust remained a passive landlord which licensed its lands to the Corporation to facilitate the Corporation's operation of the College. The Trustees determined that there was sufficient consideration because the Corporation is committed to continue to develop L. L. Nunn's educational work to the best of its ability and in its sole discretion. Thereafter, the Trust has played no role in the operation of or decision making concerning Deep Springs College.

Neither the fiduciary duties of the Trustees nor the Trust terms of required the Trustees to direct governance of another entity qualified to receive a grant from the Trustees pursuant to Section 2(b) of the Deed of Trust. Section 2(b) allows but does not require, the Trustees to further condition assets granted to another entity. Similarly, Corporation directors did not breach their fiduciary duties when they determined that it was appropriate in light of their mission and goals to assume the assets and liabilities of Deep Springs College without any guaranty from, or agreement with the essentially bankrupt Trust. Respondents have made no legal or factual argument why the lack of a formal written agreement was either a breach of duty or fraudulent.

C. The Transfer of the Campus Real Estate to Secure the Telluride Association Investment Made the Trust Entirely Passive.

As described in Mr. Newell's declaration, a promised major gift from the Telluride Association (TA) was challenged by members of TA because the Trustees had voted down coeducation. To obtain the $1.8 million low interest loan from TA the land underlying the college campus had to be transferred to the L. L. Nunn LLC owned 65% by the Corporation and 35% by TA. Since that transfer, all meetings, votes and discussions concerning the operation of Deep Springs have been taken by the Corporation Board of Directors. The one exception was the vote on coeducation. The Trustees of the Trust convened a separate meeting to vote on coeducation because the Respondents, as Trustees, questioned whether the terms of Mr. Nunn's 1923 Deed of

Trust allowed the Trustees to utilize the remnant of Mr. Nunn's gifts to implement coeducation. Due to their objection, the Petitioner filed the Trust Petition on behalf of the Trustees.

D. The Corporate Form was Followed Without Intermixing with the Trust Because all Governance of Deep Springs Since 1995 Has been by the Corporation.

Since it took on the operation of the College, the Corporation has held regular meetings, maintained minutes of those meetings, appointed successor board members, appointed officers and made all required filings with the State and Federal Governments. Respondents and Declarant Mr. Paul Jeffrey Johnson, all have provided valuable service as members of the Corporation Board of Directors. During their tenure there have been few Trust meetings because there has been essentially no Trust business. All observed that the Corporation meetings involved 11 appointed Trustees and two student representatives. All were also aware that the Deed of Trust provided for 8 successor trustees and 1 student representative (as was the case when they were students) and that the Deed of Trust had not been amended to add 4 additional trustee positions.

IV.
THE ALTER EGO DOCTRINE IS INAPPLICABLE

Respondents argue that this Court should pierce the corporate veil of the Corporation (a 501(c)(3) non-profit), disregard the 45-year separation between the Corporation and the Trust, and treat the Corporation as the alter ego of the Trust. However, they cite no case where a court has disregarded a non-profit corporation's corporate existence and treated it as the alter ego of an educational trust.

Alter ego "is an extreme remedy, sparingly used." *Sonora Diamond Corp. v. Superior Court*, 83 Cal.App.4th 523, 539 (2000). Its purpose is to enable a court to prevent two parties with the *same interest* from *inequitably* using corporate form to thwart third party rights. *Communist Party v. 522 Valencia,* 35 Cal.App.4th 980, 995 (1995) (emphasis added). As the California Supreme Court explained:

> "The alter ego doctrine arises when a plaintiff comes to court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests. [Citation.] In certain circumstances the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation: 'As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded.'"

Mesler v. Bragg Management Co., 39 Cal.3d 290, 300 (1985).

For alter ego to apply, there are two general requirements. "First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone." *Sonora Diamond Corp. v. Superior Court*, *supra,* 83 Cal.App.4th at 538. Neither requirement is met here.

A. <u>There is not "such a unity of interest and ownership" between the Corporation and Trust that the Corporation's form should be disregarded</u>

A court "must look at all the circumstances to determine whether the [alter ego] doctrine should be applied." *Sonora Diamond, supra,* at 539; quoted with approval in *Shaoxing County Huayue Import & Export v. Bhaumik*, 191 Cal.App.4th 1189, 1198 (2011). Looking at "all the circumstances," the Corporation and Trust lack sufficient "unity of interest and ownership" to warrant application of the alter ego doctrine.

1. <u>No unity in ownership</u> – Here no one owns either the 501(c)(3) Corporation or the Trust. There is no ownership at all, much less the requisite "identical equitable ownership in the two entities." *Sonora Diamond, supra*, 83 Cal.App.4th at 538. Respondents have cited no case, and we are not aware of any, where a court has pierced the corporate veil of a non-profit corporation with no ownership to reach a non-profit trust with no ownership.

2. <u>No sufficient unity in interest</u> – Moreover, Respondents, they have not and cannot show that the interests of the Trust and the Corporation are the same. The Trust was established in 1923 to continue L.L. Nunn's educational experiment at Deep Springs. The purpose of the Trust has not changed.

By contrast, the Corporation was formed over 40 years later solicit charitable donations for Deep Springs and to operate Deep Springs . The desperate financial circumstances facing Deep

Springs in the 1990s forced the Corporation's interest to diverge substantially from those of the Trust. A successful capital campaign and fundraising effort could only be carried out on a basis of a possible co-educational future for Deep Springs College and generally freeing the Corporate Board of Directors from management by the dead hand of donors. The Corporation's interest was the successful completion of the capital campaign and safeguarding the future of Deep Springs College without becoming mired in a debate over the meaning of the reference to "young men" in the L. L. Nunn Trust

3. Respondents Cite Insufficient Factors to Demonstrate Unity of Ownership and Interest Sufficient to Destroy the Individuality of the Corporation –The courts have considered a "variety of factors" to determine "under the particular circumstances of each case" whether there was "such a unity of interest and ownership…as to destroy the individuality of such corporations." *Associated Vendors, Inc. v. Oakland Meat Co.,* 210 Cal.App.2d 825, 838, 841 (1962) (relied on in Resp. Brief at 6). Respondents seize on seven minor considerations, but – either alone or in combination – creates sufficient unity of interest to justify applying the alter ego doctrine.

Respondents first claim the Corporation and Trust have not always acted at arms length. They cite no case however, and we are not aware of any, where a court applied the alter ego doctrine based on this factor. In *Sonora Diamond, supra,* for example, the court refused to treat a Canadian parent company and its California subsidiary as alter egos even though they had overlapping directors and officers, consolidated annual reports, and the parent made unsecured and unmemorialized loans to the subsidiary. 83 Cal.App.4th at 533-34.

Respondents complain of a failure to follow all corporate formalities. Again, strict adherence to formalities is not critical.

Third, Respondents complain that the Corporation's records are not completely segregated. Again, as in *Sonora Diamond*, this factor is not critical.

Respondents' fourth assertion -- that the funds and assets of the Trust and Corporation are hopelessly intermingled – is erroneous. While the Corporation and Trust have maintained

consolidated financial statements this does not trigger application of the alter ego doctrine. *Sonora Diamond, supra,* at 533. Moreover, there is no evidence that funds and assets of the Trust have been comingled with those of the Corporation. The facts show that following the transfer of funds from the Trust to the Corporation as of July 1, 1995, the Trust did not have funds to commingle with the Corporate funds.

Respondents' fifth and sixth claims – that the Trust and Corporation use the same offices and counsel and their directors and officers overlap – are equally undeterminative. *See, e.g. Sonora Diamond, supra,* 83 Cal.App.4th at 533 (application of the doctrine not justified despite overlapping officers and directors).

Finally, Respondents charge that the Trust is inadequately capitalized. This argument is misdirected because it is the Corporation whose form Respondents seek to disregard, not the Trust. Also the pertinent standard is capitalization at the time the Trust was formed and not the value of the Trust today. Moreover, "[e]vidence of inadequate capitalization is, at best, merely a factor to be considered in deciding whether or not to pierce the corporate veil." *Associated Vendors, Inc. v. Oakland Meat Co., supra,* 210 Cal.App.2d at 841.

Thus none of the factors Respondents rely on is sufficient either individually or collectively to demonstrate that there is "such unity in ownership and interest" between the Corporation and Trust that relief is justified.

B. <u>The Corporation Has Not Engaged in Conduct Amounting to Bad Faith and Creating an Inequitable Result</u>

The corporate veil should *only* be pierced "in cases of fraud or other exceptional circumstances," as Respondents also acknowledge. (Resp. Brief at 14:22-23.) The *Sonora Diamond* court explained:

> "The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where *some conduct amounting to bad faith* makes it inequitable

for the corporate owner to hide behind the corporate form."

Sonora Diamond, supra, 83 Cal.App.4th at 539, also relied on by Respondents (*see* Resp. Brief at 6:9-1),[1] "there must be an inequitable result if the acts in question are treated as those of the corporation alone." *Id. at* 538.

Here, the Corporation did not act in bad faith. Rather the Corporation did whatever was necessary to save Deep Springs from closing, including accepting contributions not subject to any possible single sex restriction.

There is no inequitable result if the sanctity of the Corporation is maintained. The major donors who funded the Corporation specifically contemplated and intended that their funds could be used for the education of men *and women*. Denying Respondents' request to disregard the Corporation's form will allow it to honor its donors' intent. That cannot be inequitable.

Neither the Trust nor the Corporation has committed any fraud, or done anything in contravention of trust or corporations law. All assets are intact. Nothing has been dissipated or wasted and all assets have been used for their intended purpose: operating and maintaining Deep Springs College. Presently, the Trust owns unimproved desert land that independent appraisers have valued at $915,000 and some interests in College buildings . Plan B, is the agreement between the Corporation and the Trust to convert these illiquid assets into cash for the Trust. That will strengthen the Trust.

C. Justice is Served by Preserving the Corporation's Form

Respondents also argue that "justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form." (Resp. Brief at 6:13-14.) Justice, equity and fairness are best accomplished by maintaining the separation between the Corporation and the Trust, so that the intent of the major Corporation donors can be

[1] A court need not make an explicit finding of bad faith, however, to apply the alter ego doctrine, as Respondents point out (Resp. Brief at 15:12-14, citation omitted).

honored.

D. The Principal/Agency Doctrine is Inapplicable

Respondents then argue in the alternative that "this Court should join the Corporation as principle [sic] or agent of the trustees." (Resp. Brief at 21:2-3.) Nonsense.

As demonstrated in the previous section there is no basis for an agency or agent. Secondly, Respondents' suggestion that the Corporation breached of an agency or principal fiduciary duty lacks foundational basis.

V.
COEDUCATION DOES NOT JEOPARDIZE THE CORPORATION'S TAX EXEMPT STATUS.

The determination letter of the Internal Revenue Service dated July 31, 1968 (the "Determination Letter"), indicates that the IRS found the Corporation to be exempt from Federal income tax.[2] The Determination Letter cautions are similar to the admonitions applicable to all exempt organizations, the IRS has published. (Rev. Proc. 2012-0, § 11.02, 2012-2 IRB 261, *superseding* Rev. Proc. 2007-52, § 11.02, 2007-30 IRB 222.)

Here, the Corporation has not at any time engaged "to a substantial degree" in any activities unrelated to the purposes specified in the Articles of Incorporation, nor has there been any material change in the character, purpose, or method of its operations. Rather, from the date of its inception in 1966 through today, the Corporation has been operated exclusively for educational and charitable purposes—purposes specifically enumerated under section 501(c)(3) of the Code.

[2] Before the enactment of the Tax Reform Act of 1969 (effective as of October 9, 1969), organizations exempt from Federal income tax under section 501(a) of the Internal Revenue Code and described in 501(c) of the Code were not statutorily required to notify the IRS of their exempt status or obtain formal recognition from the IRS of exempt status. As a result, audits were the primary means by which the IRS determined eligibility for exemption. (See HR Rep. No. 413 (Part 1), 91st Cong., 1st Sess. 38 (1969). Thus, in obtaining formal recognition of its exempt status, the Corporation went further than what was then required by statute.

VI.
THE COURT MAY NOT COMPEL THE JOINDER OF DEEP SPRINGS CORPORATION TO THIS ACTION.

Since the joinder of the Corporation is not required to accord complete relief among those already parties to this action, and the Corporation has not claimed an interest relating to this action, Respondent's assertion that the joinder of the Corporation is required under section 389(a) of the Code of Civil Procedure is without merit. (Code Civ. Proc., § 389(a)(1), (a)(2).)[3]

This action concerns only interpretation of the Trust terms whether such an interpretation affects Corporate asses is already before the court in the Petition for Court Order Interpreting Endowment Gift Instrument in *In re the Matter of James R. Withrow, et al.* filed in on March 9, 2012 (Case No. SI CV PB 1253233). Judicial economy favors waiting to adjudicate any similar questions regarding other assets now held by the Corporation. Accordingly, complete relief in this action may be accorded to the parties without joining the Corporation, and a failure to join the Corporation will not prejudice Respondents (*see* Code Civ. Proc., § 398(b)).

Second, the purpose of section 389(a)(2) of the Code of Civil Procedure is to protect a person not party to the action from "practical prejudice to him which may arise through a disposition of the action in his absence" and to avoid subjecting such person "to a double or otherwise inconsistent liability" after adjudication. (2004 Advisory Committee's Note to § 389(a)(2).) Thus, Joinder under section 389(a)(2) not the person seeking relief. Since the Corporation has not claimed any interest in this action, and the status of any Corporate assets may be fully adjudicated at the conclusion of this action, there is no reason to compel joinder under section 389(a)(2).

[3] Further, contrary to Respondent's assertions, Petitioner has at all relevant times viewed the Trust and the Corporation as separate legal entities, and nothing with respect to Petitioner's filing of the Petition in the absence of the Corporation compels a different conclusion.

VII.
CONCLUSION

The Motion to bring the Corporation into the Trust Petition is unfounded and unnecessary. The respondents claim that they are trying to protect the integrity of L. L. Nunn's 1923 Deed of Trust. Petitioner's "Plan B," however, fully protects the Trust and the Trust assets. The Corporation has committed that any Trust assets or assets that are subject to the Trust terms will be segregated pending the Court's determination in the Trust's Petition. Should Respondents believe that the Corporation has any assets, in addition to the Withrow bequests, that may be subject to the trust provisions, the Respondents can make that claim in response to the existing petition filed by the Corporation.

The record is clear, however, that most, if not all of the Corporate assets are free from any restrictions or purposes set forth in the L. L. Nunn Trust. Respondents' motion is an overreaching attempt to interfere with the supermajority's ability to govern the Corporation because the Respondents simply oppose coeducation.

DATED: October 15, 2012

Respectfully submitted,

BAKER MANOCK & JENSEN, PC

By: _____

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Jeffrey A. Jaech
Peter Tracy
Attorneys for Petitioner David Hitz,
Chairman of the Board of Trustees of the
L. L. Nunn Trust, acting on behalf of
the Board of Trustees

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 5260 North Palm Avenue, Fourth Floor, Fresno, CA 93704.

On October 15, 2012, I served the original of the following document(s) described as **PETITIONER'S RESPONSE TO RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO JOIN DEEP SPRINGS CORPORATION AS A PARTY**on the interested parties in this action as follows:

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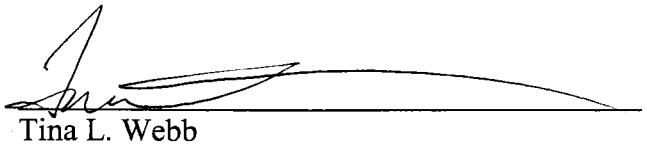
BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

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

Executed on October 15, 2012, at Fresno, California.



Tina L. Webb