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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF INYO, MAIN COURTHOUSE

In re the Matter of the

L.L. NUNN TRUST for the benefit of DEEP SPRINGS COLLEGE under Deed of Trust dated November 5, 1923

Case No. SICVPB 12-53232
Assigned for All Purposes to:
Hon. Dean T. Stout

RESPONDENTS' SUPPLEMENTAL BRIEF IN SUPPORT OF OBTAINING TESTIMONY FROM OFFICE OF ATTORNEY GENERAL

Judge: Hon. Dean T. Stout
Date: May 13, 2014
Time: 10:30 a.m.
Dept.: 1

Date Action Filed: February 6, 2012
Trial Date: April 28, 2014

Respondents/objectors Kinch Hoekstra and Edward Keonjian ("Respondents") submit the following points and authorities pursuant to the orders made by the Court at the hearing at 9:00 a.m. on May 8, 2014 on the *ex parte* application brought by Respondents for leave to serve notice to appear at trial on the Attorney General or her designated representative on shortened time.

The Legislature requires the Attorney General to be a party in this action – not a mere bystander – and the Attorney General therefore has all of the obligations of a party in any litigation. The Attorney General's arguments as to why she should be excused from offering her testimony or that of her designee are inapposite because (1) Respondents do not require testimony from a "top government official" unless the Attorney General is the only person with personal knowledge of the admissible facts in this case; (2) the Attorney General herself created the need for Respondents to take her (or her designee's) testimony by affirmatively offering consent to modification of the L.L. Nunn Trust, and created the present urgency for doing so by submitting that consent on the Friday before the commencement of a Monday trial; and (3) Respondents seek testimony from a person with personal knowledge of the admissible facts, whether or not that person is the Attorney General. Respondents have a right to inquire into the whether procedural due process was given by the Attorney General in consenting to modification of the Trust, and into how the Attorney General is carrying out her charge as the primary guardian of the general public's interest in the Trust. For these reasons, as discussed in greater detail below, Respondents submit that they should be entitled to take testimony from the Attorney General or her designee on the topics described in the last section of this brief.

I. RESPONSE TO ATTORNEY GENERAL'S BRIEF.

The Attorney General, in her brief dated May 7, 2014, asserts that a high standard applies to a request to obtain testimony from a "top government official." Setting aside whether Senior Assistant Attorney General Tania Ibanez is a "top government official," the fact remains that Respondents are seeking testimony from the Attorney General or her designated representative with knowledge of the facts of this case and actions taken by the Office of the Attorney General in connection therewith. (See *Ex Parte* Application, filed May 7, 2014 ("Application"), Ex. D [form

of notice to appear at trial].) Thus, it is not at all clear that the "top government official" standard applies to Respondents' request for the testimony.

More germane, however, is that this is not a case, as in the authorities cited by the Attorney General, in which the Attorney General played only a nominal role or was a third party. The Legislature plainly contemplated that the Attorney General must be a "party" to any action to modify a charitable trust of property (like the L.L. Nunn Trust). (Gov. Code, § 12591.)[1] The Legislature knew full well that a party has the right to demand testimony from another party. (See, e.g., Code Civ. Proc., § 1987, subd. (b).) The Legislature could have required a lesser degree of participation by the Attorney General, such as that the parties be required to serve papers on the Attorney General. (See, e.g., Bus. & Prof. Code, § 17209.) Or, it could have extended immunity from discovery or otherwise) to the Attorney General under such circumstances. It did neither. There is no reason to believe that the Legislature considered the Attorney General or her representative immune from a party's obligation to participate in discovery and render admissible evidence when it required that the Attorney General be a party to an action such as this one.[2]

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[1] At the *ex parte* hearing on May 8, 2014, the Attorney General characterized the need to comply with this requirement as "concern over a code section."

[2] The Attorney General relies on the authorities discussed in this footnote, all of which are readily distinguishable. In *Nagle v. Superior Court* (1994) 28 Cal.App.4th 1465, the Court of Appeal quashed deposition notices directed at the Directors of the California Employment Development Department ("EDD") and the California Department of Health Services, in an action by a plaintiff who sued the Directors alleging that they and their departments improperly obtained her health records while pursuing discipline against the plaintiff's son, who was an employee of EDD. In *Deukmejian v. Superior Court* (1983) 143 Cal.App.3d 632, 635, the court quashed a notice to appear at trial directed to the Governor, who was named as a defendant in an action and was asked to testify at trial on policy matters and questions of law – "(1) whether the conditions at San Quentin violate constitutional safeguards, (2) whether the court may and should act to remedy the conditions, and (3) what remedies should be ordered." In *State Bd. of Pharmacy v. Superior Court* (1978) 78 Cal.App.3d 641, 644, the court quashed a deposition subpoena addressed to the Attorney General in a case brought against the California State Board of Pharmacy (and not against the Attorney General) in which "the Attorney General's services as an expert witness on the subject of reasonable attorneys' fees were desired, and sought." In *Civiletti v. Municipal Court* (1981) 116 Cal.App.3d 105, the court quashed a trial subpoena issued to non-party the United States Attorney General on, among other grounds, sovereign immunity. In none of those cases (footnote continued)

Even more critical in this case is the fact that the Attorney General went beyond being a mere party standing on the sidelines, but took affirmative action. The Attorney General affirmatively consented to the modification of the L.L. Nunn Trust, when it could have taken no position, as it did before trial in *Boys and Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049, 1059, fn. 7. Because the Attorney General has injected herself into these proceedings, Respondents have a right to obtain evidence from the Attorney General (or her representative) regarding that consent, as it did at trial regarding the consent of the students currently attending Deep Springs College.

This case is not unlike the federal case *Detoy v. City and County of San Francisco* (N.D. Cal. 2000) 196 F.R.D. 362, in which the court permitted the plaintiff to take the deposition of the Chief of Police of the defendant city. The Chief had intervened in the discipline of a police officer who shot and killed the plaintiff's daughter. (*Id.* at p. 368.) The defendant objected on the ground that the Chief was a "high public official" and that the plaintiff had not shown a "compelling need and exceptional circumstances" warranting the deposition, citing many of the cases relied upon here by the Attorney General. (*Id.* at pp. 369 & fns. 6, 9.) The court permitted the deposition because "[a] chief of police is not necessarily a high government official" and because the Chief's "personal action" with respect to the officer's discipline was directly relevant to the plaintiff's claims regarding the officer's training and discipline. (*Id.* at pp. 369-370.) Here, the Attorney General's designee is "not necessarily a high government official," so the heightened standard demanded by the Attorney General may not apply here. Moreover, as shown below, Respondents will seek testimony from the Attorney General or her designee that is directly relevant to this action, *inter alia*, going to the validity of the consent affirmatively offered by the Attorney General to the modification of the Trust.[3]

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was it established that the Attorney General was a party at the command of the Legislature or that the Attorney General took any affirmative action to inject himself or herself into the case.

[3] Only in the event that the Attorney General's designee denies personal knowledge of the admissible facts inquired into at trial would it be the case that testimony from a higher-placed member of her staff would be required.

The Court has held that the Attorney General is "'the primary guardian of the general public's interest in charitable trusts.'" (Ruling and Order, filed in this action on Nov. 13, 2013, quoting *In re Veterans' Indus., Inc.* (1970) 8 Cal.App.3d 902, 919-920.) Thus, the Attorney General has an interest in this case, even absent the Legislature's command that she be joined as a party, and Respondents should be entitled to obtain the Attorney General's testimony regarding the general public's interest in the L.L. Nunn Trust.

In response to the Court's suggestion at the hearing on May 8, 2014 that the public may not be deprived of a property interest should the Trust be modified, Respondents offer the following: The Trust is currently used to educate approximately 28 young men each year, and the Trustees have expressed no desire to increase the number of students at Deep Springs College should it become coeducational. If, on average, each class is half men and half women, then approximately 14 men will be deprived of an education at Deep Springs College each year. The Attorney General represents the interests of these approximately 14 men in each of the subsequent years in her role as the primary guardian of the general public's interest in charitable trusts.

Had the Attorney General joined as a party or offered her consent to modify the Trust in the two years between the filing of this action and the commencement of trial, Respondents would have had an opportunity to take evidence from the Attorney General via written discovery and subsequently determine whether a deposition or trial testimony was necessary. The fact that the Attorney General did not purport to give consent until the court day before trial commenced, and did not join as a party until trial was underway, eliminated the possibility of taking written discovery, and, frankly, the absence of consent before trial minimized Respondents' need for any discovery whatsoever from the Attorney General. But having joined and consented so late in the process, Respondents submit that trial testimony is the only way to obtain the evidence they need from the Attorney General (which is described below).

II. RESPONDENTS ARE PERMITTED TO INQUIRE INTO WHETHER THE ATTORNEY GENERAL'S CONSENT COMPLIED WITH PROCEDURAL DUE PROCESS REQUIREMENTS.

At the May 8, 2014 hearing, the Court observed that the procedural due process argument raised by Respondents in their *ex parte* application was based on a concurrence by United States Supreme Court Justice O'Connor. Setting aside that Justice O'Connor was joined by three other Justices, the majority did not reject a procedural due process requirement but held merely that the procedures demanded by the prisoner seeking clemency were not required. (*Ohio Adult Parole Auth. v. Woodard* (1998) 532 U.S. 272, 285, 118 S.Ct. 1244, 140 L.Ed.2d 387.) Specifically, the majority held: "Procedures mandated under the Due Process Clause should be consistent with the nature of the governmental power being invoked. Here, the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges." (*Ibid.*)

The California Supreme Court applied a standard similar to that of Justice O'Connor in analyzing the Governor's policy regarding parole in California. In *In re Rosenkrantz* (2002) 29 Cal.4th 616, a prisoner had been denied parole repeatedly and claimed that the Governor had "a blanket policy of denying parole to all prisoners who have been convicted of murder." (*Id.* at pp. 683-684.) The Court held: "It is well established that a policy of rejecting parole solely on the basis of the type of offense, without individualized treatment and due consideration, deprives an inmate of due process of law. [Citation.] Admissible evidence indicating that a Governor made a parole decision in accordance with a blanket no-parole policy properly could be considered by a court in determining whether the decision satisfies due process requirements." (*Id.* at p. 684.)

Here, as discussed below, Respondents seek testimony as to the procedures employed by the Attorney General or her staff in deciding whether to consent to a proposed modification of a trust, and whether and how those procedures had been followed in this case. Just as such "process" evidence would admissible with respect to the Governor's decision whether to allow an inmate to be paroled, so should the evidence sought by Respondents be admissible with respect to the Attorney General's decision to consent to the modification of the L.L. Nunn Trust. And

plainly, such evidence is not available elsewhere: neither Petitioner nor any other witness known to Respondents has personal knowledge of the procedures prescribed by the Attorney General and whether or how they were applied in this case. Thus, Respondents should be permitted to take testimony from the Attorney General or her designee on the matters listed below.

III. OFFER OF PROOF.

Respondents offer the following general categories of testimony they would seek from the Attorney General or her designee should she (or he) be called to testify in this case pursuant to a notice to appear at trial:

- The procedures prescribed or generally employed by the Attorney General in determining whether to consent to the modification of a trust pursuant to Probate Code section 15403.
- Whether and how these procedures were applied by the Attorney General in reaching her decision to consent to modification of the L.L. Nunn Trust.
- Whether the Attorney General has ever denied consent under Probate Code section 15403 to modification of a trust when requested.
- Communications by the Office of the Attorney General with persons outside of the Office of the Attorney General with regard to the L.L. Nunn Trust.
- Actions taken by the Attorney General to evaluate the impact of modification of the L.L. Nunn Trust on future beneficiaries of the Trust.
- Considerations given by the Attorney General to the general public's interest in the L.L. Nunn Trust.

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- All facts considered by the Attorney General regarding the benefits and harms of single-sex college education . . . regarding the relative merits of single-sex and coeducational environments on leadership training . . . regarding the L.L. Nunn Trust, and . . . regarding Deep Springs College.

DATED: May 8, 2014

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HEATHER M. HOEKSTRA

By _____
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 2121 Avenue of the Stars, Suite 2400, Los Angeles, CA 90067.

On May 8, 2014, I served true copies of the following document(s) described as **RESPONDENTS' SUPPLEMENTAL BRIEF IN SUPPORT OF OBTAINING TESTIMONY FROM OFFICE OF ATTORNEY GENERAL** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Browne George Ross LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on May 8, 2014, at Los Angeles, California.

Claudia Bonilla

SERVICE LIST

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

INYO SUPERIOR COURT, Case No. SICVPB 12-53232

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