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9 L.L. Nunn Trust

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

13 In re the Matter of the  
14 L.L. Nunn Trust for the benefit of Deep  
15 Springs College under the Deed of Trust dated  
November 5, 1923  
16  
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21

Case No. SI CV PM 1253232  
**RESPONDENTS' REPLY  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION**  
**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 In their Response to Petitioner’s Opening Brief on Interpretation of the L. L. Nunn Trust  
3 (“Resp’ts’ Interp. Resp.”), Respondents clearly established that Petitioner and the Trustees have  
4 abused the discretion afforded them under the Deed of Trust, and will continue to abuse their  
5 discretion unless this Court stops them (See Hoekstra Decl., Exs. 1, 2, 3, 4, 5.) Petitioner claims  
6 the Trustees have “unfettered discretion,” and that there are absolutely no restrictions in the Deed  
7 (and almost no restrictions in trust law) on the actions that he and the Trustees can take in  
8 furtherance of any one of the many generic purposes that he has claimed are “the” purpose of the  
9 Trust or Corporation. As if that were not enough, Petitioner attempts to reduce the Trust Deed to a  
10 mere recipe, an amalgam of wishes or suggestions from L. L. Nunn. This is a betrayal of  
11 fiduciary duty, and an embarrassment to one of the best and most unique colleges in the country.

12 Petitioner’s reading of the Trust Deed is not warranted by the text, by the law, by the  
13 institutional history of Deep Springs, or by the discernible intentions of L. L. Nunn. Respondents  
14 are struck that Petitioner insists that this Court defer to the interpretive decisions of the majority  
15 Trustees he represents in the same documents in which he adduces on their behalf a series of  
16 distorted interpretations of the Deed of Trust, misrepresentations of case law, and misstatements  
17 of Respondents’ arguments. Throughout his papers and in his memorandum opposing the  
18 preliminary injunction, Petitioner makes conclusory erroneous statements about the law and facts.

19 Respondents have established that they are likely to win on the merits because Petitioner’s  
20 interpretation of the Deed of Trust runs afoul of common sense and the canons of interpretation.  
21 Respondents are also likely to win on the merits of *cy prè*s and equitable deviation because the  
22 entirety of Petitioner’s rebuttal arguments are (1) a claim that the Trustees “have determined” that  
23 they meet the *cy prè*s standard (6:20-22) and that, (2) although citing no law to support their  
24 contention, equitable deviation apparently permits modification of the purpose of a trust (5:19-  
25 21). Finally, any harm Petitioner claims he or the Trustees may suffer should this Court enjoin  
26 their actions is entirely self-inflicted (13-14) and therefore does not rise to the level of irreparable  
27 harm. (*U.S. v. Superior Court* (1941) 19 Cal.2d 189, 197.)

28 After joining the Corporation to this action, this Court should enjoin the Trustees and

1 Directors from abusing their discretion under the Trust Deed and the Articles of Incorporation.  
2 The Trustees have neither the authority nor right to implement coeducation unless this Court  
3 grants that right under *cy præs*; they cannot unilaterally change the purpose of the Deed of Trust,  
4 nor may they apply *any* assets they have ever acquired as a trust or a corporation unless a court  
5 permits them to do so under *cy præs*.

6 **II. THE COURT SHOULD GRANT RESPONDENTS' REQUEST FOR**  
7 **PRELIMINARY INJUNCTION AS RESPONDENTS ARE LIKELY TO SUCCEED**  
8 **ON THE MERITS**

9 The trial court's determination must be guided by a "mix" of the potential-merit and  
10 interim-harm factors. (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.) Therefore, the more  
11 likely it is that Respondents will ultimately prevail, the less severe must be the harm that they  
12 allege will occur if the injunction does not issue. This is especially true when the requested  
13 injunction maintains, rather than alters, the status quo, as requesting an injunction in the present  
14 case would do. (*14859 Moorpark Homeowner's Ass'n v. VRT Corp.* (1998) 63 Cal.App.4th 1396,  
15 1407.) Thus, "if the party seeking the injunction can make a sufficiently strong showing of  
16 likelihood of success on the merits, the trial court has discretion to issue the injunction  
17 notwithstanding that party's inability to show that the balance of harms tips in his favor."  
18 (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 447.) On the other hand, if the party  
19 seeking the injunction can make a sufficiently strong showing of relative hardship, the injunction  
20 may be issued so long as that party succeeds in raising serious questions about the merits even  
21 without showing a likelihood of prevailing. "A preliminary injunction is appropriate when a  
22 plaintiff demonstrates ... that serious questions going to the merits were raised and the balance of  
23 hardships tips sharply in the plaintiff's favor." (*Alliance for the Wild Rockies v. Cottrell* (9th Cir.  
24 2011) 632 F.3d 1127, 1134-35, quoting *Lands Council*, 537 F.3d at 987.) A party seeking  
25 injunctive relief must show the absence of an adequate damages remedy at law. (*Dept. of Fish &*  
*Game v. Anderson-Cottonwood Irr. Dist.* (1992) 8 Cal.App.4th 1554, 1565.)

26 **A. Respondents Have Demonstrated A Significant Likelihood of Success on the**  
27 **Merits of the Trust Petition.**

28 In order to demonstrate a likelihood of success on the merits, all Respondents must show

1 is that Petitioner is unlikely to carry his burden of meeting the standards required under  
2 interpretation, *cy prè*s, and equitable deviation. This is easily done.

3 1. **Petitioner’s Claims About The Meaning Of “Promising Young Men”**  
4 **And About The Unlimited Extent Of Trustee Discretion Are**  
5 **Implausible.**

6 Since the Respondents, in their Response Memorandum of Points and Authorities on  
7 Interpretation (hereinafter “Resp’ts’ Interp. Resp.”), demonstrate that any action in furtherance of  
8 coeducation is an abuse of discretion not permitted under the trust document or the articles of  
9 incorporation, the issue of whether the Trustees’ exercised their discretion reasonably or in good  
10 faith is entirely moot.

11 2. **In Order To Change The Purpose Of A Trust, Petitioner Must Satisfy**  
12 **The Requirements Under Cy Près.**

13 Petitioner provides no support for his contention that all provisions of the Trust are either  
14 dispositive or administrative. (Pet’r’s PI Opp. at p. 5.) Probate Code § 15409 makes clear that in  
15 addition to administrative and dispositive provisions, there is also a separate purpose or purposes.

16 On petition by a trustee or beneficiary, the court may modify the administrative or  
17 dispositive provisions of a trust or terminate the trust, if owing to the  
18 circumstances no known to the settlor, the continuation of the trust under its terms  
19 would defeat or substantially impair the accomplishment of the **purposes** of the  
20 trust. In this case, if necessary to carry out the **purposes** of the trust, the court  
21 may order the trustee to do acts that are not authorized or are forbidden by the  
22 trust instrument.

23 In addition to what § 15409 makes plain, in their Memorandum of Points and Authorities  
24 in Support of Motion for Preliminary Injunction (“Resp’ts’ PI Memo,” at pp. 6-7), Respondents  
25 do indeed support their contention that the alteration of a trust’s purpose is a distinct matter from  
26 the modification of a trust’s dispositive or administrative provisions. Not only is Petitioner’s  
27 statement to the contrary simply misleading, but he fails to cite any source to support his “more  
28 plausible” reading and instead expects this Court to rely on his conjectures about the law as  
authoritative.

29 3. **Petitioner Cannot Meet The Requirements Under Cy Près.**

30 In order to demonstrate that Petitioner cannot meet the requirement for this court to apply  
31 *cy prè*s, Respondents provided substantial evidence proving that the College is doing

1 extraordinarily well on all relevant metrics. (Hoekstra Decl. ¶¶ 217-269.) Petitioner fails to rebut  
2 any of these arguments or statements of fact. Petitioner provides not one iota of evidence to back  
3 up his conclusory assertion that he meets the standard for *cy prè*s relief. (*Id.* at p. 6:23-24.) He  
4 simply states that the *Trustees* “have determined . . . that it is now impracticable for Deep Springs  
5 College to continue to be single-sex” (Pet’r’s PI Opp., at p. 6: 20-22). The Trustees own  
6 determination of this matter is irrelevant. “Absent specific provisions in the trust instrument,  
7 trustees have no power of their own to decide that it has become impossible or impracticable to  
8 carry out the trust as originally planned and to frame a plan for carrying out charitable purposes  
9 different from those provided by the settlor.” (Bogert, *The Law Of Trusts And Trustees* § 435.)  
10 What is more, despite Petitioner’s claim, the Trustees never determined that they met this  
11 standard, nor even discussed whether they did so, because they never thought it applicable. (*See*  
12 Ex. 31.) Petitioner’s statement is merely an unsupported assertion.

13 **4. Petitioner Cannot Meet The Requirements For Equitable Deviation.**

14 Petitioner claims that he will be able to demonstrate under the Probate Code that the  
15 “accomplishment of the purposes of the trust” is “defeat[ed] or substantially impair[ed]”; he  
16 further claims that he can show that this defeat or substantial impairment is due “to circumstances  
17 not known to the settlor and not anticipated by the settlor[.]” (Pet’r’s PI Opp, p. 5, quoting Cal.  
18 Prob. Code § 15409.) But he does not here provide or even refer to arguments or evidence to  
19 support such claims, and gives this Court no reason to accept them. The case made by  
20 Respondents that the requirements for this Court to apply *cy prè*s cannot be met also serves to  
21 demonstrate the falsity of Petitioner’s suggestion that the Trust purposes cannot be accomplished;  
22 in addition, Respondents have provided substantial specific evidence of this. (Hoekstra Decl. ¶¶  
23 270-305.) Petitioner cannot hope to prevail without refuting this evidence, but does not even  
24 attempt to do so.

25 Indeed, in his Opening Brief on Interpretation of the L. L. Nunn Trust (hereinafter “Pet’r’s  
26 Interp. Br.”), Petitioner admits several key facts detrimental to his request for modification  
27 (Pet’r’s Interp. Br., at pp. 16-17.) Much of Petitioner’s argument in support of equitable  
28 deviation from the Trust terms depended on his claim that L. L. Nunn did not know or was unable

1 to anticipate that women would be attending college in large numbers and becoming leaders in  
2 society. Because Respondent Hoekstra's Declaration presents substantial evidence to the  
3 contrary, Petitioner now admits that Mr. Nunn "was aware of the growing trend of participation  
4 by women *in all aspects of higher education.*" (Id. at p. 16 [emphasis added].) Not only does this  
5 undercut Petitioner's arguments for equitable deviation based on Probate Code section 15409, it  
6 also undermines his arguments that "peculiar" or "exceptional" circumstances exist to support  
7 equitable deviation where he has characterized those circumstances as

8 women [being] able to attend all of the public, and most of the private, colleges  
9 and universities in the United States. They are enrolling in and graduating from  
college in greater numbers than men.

10 (Petn. P & A, at p. 17.) Furthermore, the language of Probate Code section 15409 does not  
11 authorize any court to modify or violate the purpose of a trust, it only allows the court to permit  
12 actions not authorized or otherwise forbidden by the instrument to carry out the instrument's  
13 purpose. For example, where a trust stipulates a schedule under which a trustee is to provide  
14 income to the beneficiary or where the trust instrument forbids delving into the principal to  
15 benefit the beneficiary, a court has the discretion to permit the trustee to deviate from said  
16 schedule or delve into the principal even though the administrative or dispositive terms of the  
17 trust instrument prohibit it. The trustee is not permitted however, to decide that he or she would  
18 rather benefit a person other than the stated beneficiary. That would change the purpose of the  
19 trust and such a change requires application of *cy præs*.

20 B. **All Assets And Actions Of The Deep Springs Corporation Must Be Dedicated**  
21 **To The Purpose Of The L. L. Nunn Trust, And Their Disposition Should**  
22 **Thus Be Required To Conform To That Purpose.**

23 all actions of the Deep Springs Corporation are necessarily limited by the Deed of Trust.  
24 The arguments set forth in Respondents' Memorandums in Support of Joinder and their Reply to  
Petitioner's Joinder Response are incorporated herein by this reference.

25 C. **This Court Should Not Recognize Petitioner's Abuse Of Discretion Under**  
26 **Trust Law As A Genuinely Academic Decision Deserving Of Deference.**

27 Petitioner presents a fanciful argument that Respondents implicate the Constitution by  
28 infringing on Petitioner's Freedom of Speech. There are several reasons why this argument is



1 incorrect and irrelevant.

2 First, as Petitioner rightly noted, this freedom is only implicated with state action.  
3 Moreover, Respondents are not outside parties, and so do not meet a necessary relevant condition  
4 for infringement of academic freedom. It is preposterous to say that a trustee is infringing on the  
5 speech rights of his co-trustees by trying by legitimate legal means to prevent them from breaking  
6 the law. The Constitution does not guarantee a freedom to abuse discretion or freedom to breach a  
7 contract without legal challenge. Where a party has agreed to restrict his actions through a  
8 contract, as Petitioner did when he became a Trustee, the Constitution provides no refuge from  
9 enforcement of that contract.

10 Second, Petitioner misleads this Court by trying to pass as authority what is actually  
11 dictum from a concurring opinion in *Sweezy v. State of N.H. by Wyman* (1957) 354 U.S. 234.  
12 Chief Justice Warren expressly stated that the case was decided on other grounds. (*Sweezy*, 254  
13 U.S. at p. 255.) Thus, the *Sweezy* holding does not establish academic freedom as a constitutional  
14 right vested in the academic institution itself. (Richard H. Hiers, *Institutional Academic Freedom*  
15 *vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*  
16 (2002) 29 J.C. & U.L. 35, 43.)

17 Third, because the statutory and common law of charitable trusts and corporations entirely  
18 govern this matter, this Court should not construe this case in such a way that it raises  
19 Constitutional questions. This is known as the doctrine of Constitutional avoidance.

20 Well-settled principles of judicial restraint establish that when a case must be  
21 decided upon constitutional grounds, a court should strive to resolve the matter as  
22 narrowly as possible, and should avoid expansive constitutional pronouncements  
23 that inevitably prejudice future controversies and may have unforeseen and  
24 questionable consequences in other contexts.

25 (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 116.) California trust law clearly favors a  
26 finding that the Corporation's assets, whether original to the 1923 Trust or donated to the  
27 Corporation yesterday, are restricted to the specific and primary purpose of educating promising  
28 young men as stated in the Articles of Incorporation, the Bylaws, and by direct reference, the  
Deed of Trust. This Court cannot invalidate established trust law in favor of some loosely

1 defined doctrine stated out of context in the concurring opinion of a case that never reached the  
2 issue of institutional academic freedom.

3 Even if this Court were to consider such an argument, it should recognize that courts do  
4 intervene in the management of a school's internal affairs if there has been an abuse of discretion,  
5 as here. (*Paulsen v. Golden Gate Univ.* (1979) 25 Cal.3d 803, 808-09; see also *Shuffer v. Bd. of*  
6 *Trustees* (1977) 67 Cal.App.3d 208, 219-220; and *Wong v. Regents of Univ. of Cal.* (1971) 15  
7 Cal.App.3d 823, 830-832.) Genuinely academic decisions regarding who an institution may  
8 admit include "judgments as to the academic performance of students and their entitlement to  
9 promotion or graduation" (*Bd. of Curators v. Horowitz* (1978) 435 U.S. 78, 96, n. 6 (Powell, J.,  
10 concurring). Violating the terms of a deed of trust that one is charged with administering is not  
11 one of those genuinely academic decisions.

12 Moreover, it is certainly within the province of a probate court to decide on matters  
13 relating to the purpose of trusts either held by or controlling colleges or universities. "The college  
14 is a charitable corporation and all its property is held in trust in furtherance of the purpose for  
15 which it was organized." (*Wellesley College v. Attorney General* (1943) 313 Mass. 722, 723-24 .)

16 **III. THE BALANCING OF INTERIM HARMS FAVORS THIS COURT'S**  
17 **GRANTING OF THE PRELIMINARY INJUNCTION**

18 **A. The Interim Harm To the College and Respondents Will Be Profound Should**  
19 **The Preliminary Injunction Be Denied.**

20 The harms to the Respondents should the motion be denied will be far-reaching,  
21 Petitioner's rejection of Respondents' harms is based entirely on his narrow view of their role as  
22 trustee funders. (Pet'r's PI Memo at pp. 10-13.) A preliminary injunction is necessary for the  
23 Respondents to fulfill their fiduciary obligations as Trustees and Directors. Without an  
24 injunction, Respondents cannot ensure that the Trust purpose is respected, or even ensure that the  
25 question of the definition of that purpose is determined by this Court. Without an injunction,  
26 Respondents have no way to prevent their fellow Trustees from engaging in breach of trust,  
27 prevention of which is one of their fiduciary obligations. The balance of equities is such that this  
28 Court should hear all relevant parts of this case before permitting the central action at issue in this  
Motion: the imminent implementation of coeducation at Deep Springs College.

1                   **1. The Trustees Will Continue to Breach Their Fiduciary Duties**

2                   Respondents, as Trustees and Directors, have fiduciary obligations to the beneficiaries of  
3 the Trust, and the class of beneficiaries is defined in the Deed as promising young men. The  
4 number of promising young men to be educated under the Deed will be cut in half by Petitioner's  
5 plan. Further, Respondents have fiduciary obligations to ensure that the beneficiaries receive the  
6 education as laid out in the Deed's purpose, and they will be unable to fulfill these duties if Deep  
7 Springs is allowed to transition to coeducation without a compete legal determination of the  
8 purpose.

9                   **2. Plan B Damages The College's Reputation**

10                  Respondents continue to argue that the reputation of Deep Springs will suffer if it is  
11 allowed to proceed with coeducation under the transparent ruse of Plan B. The longer that the  
12 Trustees proceed in this lawless manner, the worse it will be for the institution's reputation. Deep  
13 Springs' reputation will also suffer if it is allowed to proceed with coeducation without a final  
14 legal determination in hand, given the very real possibility that that final legal determination will  
15 be that coeducation is legally impermissible for Deep Springs College, whether under the aegis of  
16 the Trust or the Corporation. The damages entailed by a reversal of a coeducational policy  
17 already implemented will obviously be much greater than those, if any, that may attend a  
18 warranted delay of that policy until the legal determination is made.

19                  **3. Lawsuits Remain A Serious Threat**

20                  Not only is Deep Springs making representations that it will be coeducational in 2013  
21 without caveats about the legal uncertainty (for example, in a recent job advertisement), but the  
22 many improprieties involved in the decision-making process to date provide ample opportunities  
23 for legal complaints from donors, alumni, applicants, and future students. Nor would female  
24 applicants or students be the only ones who may have grounds for a lawsuit, as some male  
25 applicants may also have been encouraged to apply under false pretenses. As all funds raised by  
26 the Corporation are limited to the purpose in the Articles of Incorporation at the time that those  
27 funds were raised, they cannot legitimately be expended on coeducation until the Court  
28 determines that they may be, and any such expenditure invites dozens of lawsuits.

1                   4.       **There Are No Legal Remedies Available To Respondents Because The**  
2   **Assets Are Unique**

3                   Lastly any monetary remedy will not afford full relief where the Trustees are breaching an  
4                   obligation arising from a trust.

5                   B.       **The Interim Harm To The College And The Trustees Will Be Negligible**  
6   **Should The Preliminary Injunction Be Granted.**

7                   1.       **Every Instance Of "Harm" Presented By The Petitioner Is Self-Caused**

8                   This is critical, because under California law, if the harm complained of is self-inflicted, it  
9                   does not qualify as irreparable. (U.S. v. Super. Ct. (1941) 19 Cal.2d 189, 197.) The "significant  
10                  harm[s]" Petitioner complaint about on behalf of the majority Trustees are entirely caused by the  
11                  majority Trustees and could have been prevented by them; therefore, they should not be treated  
12                  by this Court as irreparable, and do not qualify as harms that may be considered in the balancing  
13                  of harms test for preliminary injunction. Had the Trustees not imprudently committed themselves  
14                  to ensuring that Deep Springs would be coeducational by 2013 regardless of the pending legal  
15                  proceeding to determine whether they may legally do so, none of the concerns they raise as  
16                  potential harms would have arisen.

17                  2.       **The Plan B Power Grab, Not Prudently Awaiting A Legal**  
18   **Determination On The Merits Damages The College's Credibility**

19                  Petitioner claims that that an injunction would "greatly harm the institution's reputation."  
20                  He bases this on the fact that the College "has made a public commitment to transition to  
21                  coeducation" and that "failure to move forward . . . will cause it to lose credibility." (Pet'r's PI  
22                  Opp. at p. 13.) The Trustees could have and should have proceeded more prudently by following  
23                  through on their undertaking that they could not progress without court approval. When  
24                  Respondents recommended a policy of proceeding circumspectly so as to keep all supporters  
25                  behind Deep Springs regardless of the legal outcome, the majority Trustees rejected the proposal.

26                  Rather than speculate about what some outside organization like the Telluride Association  
27                  might say if they were to await the legal determination that they requested, the Trustees should  
28                  have done the right thing and waited until this Court decided this matter. Had they done so, this  
29                  matter would have been much further advanced than it currently is, and they would not have

1 presented themselves to the public as willing to embrace highly questionable means to bring  
2 about their preferred outcome. The majority Trustees chose instead to concoct an asset  
3 laundering scheme, which by itself has postponed litigation at least five months because  
4 Respondents had to wait for Petitioner to produce the proper documentation to establish the  
5 inseparability of Trust and Corporation (which Petitioner produced more than a month late).

6 Petitioner expresses his concern for Deep Springs' reputation. Yet the grave threat to that  
7 reputation is caused by Petitioner and the majority Trustees. First, Plan B has opened up their  
8 operations to public scrutiny, and is in itself a sophisticated evasion of institutional responsibility.  
9 Second, it is unseemly for the Trustees to charge ahead with a policy that they themselves had  
10 insisted required legal approval *before* implementing. Third, it will be devastating to the  
11 College's reputation if the Trustees implement coeducation and then have to reverse that policy  
12 because it is determined to be illegal. These harms are all serious and irreparable.

13 3. **Plan B Impairs Recruitment Of Students And Faculty Because It**  
14 **Demonstrates Trustees And The Administration's Lack Of Reasonable**  
15 **Judgment**

16 Petitioner asserts that a preliminary injunction will harm the College's ability to recruit  
17 faculty and students and raise funds. (Pet'r's PI Opp., at pp. 13-14.) To the extent that such  
18 claims are anything other than speculative and implausible, they are based on the actions and  
19 decisions of Petitioner and the majority Trustees. Respondents have shown in detail that even  
20 according to Petitioner, Deep Springs currently is in an excellent position on all of these fronts  
21 and has every reason to be confident about all of them going forward. (Hoekstra Decl., ¶¶ 218-  
22 269.) Any hand-wringing for the Court's benefit is in response to difficulties Petitioner  
23 discovered upon learning of the legal standards for modification and *cy prè*s.

24 In particular, Petitioner identifies the institutional harms having to do with the attitudes of  
25 potential faculty members, students, and donors. Petitioner makes clear that the damaging  
26 attitude would come from uncertainty about the future of Deep Springs. (Pet'r's PI Opp. at p. 14.)  
27 This uncertainty has been created entirely by the majority Trustees' vote to petition this Court to  
28 allow them to institute coeducation despite the Trust's express purpose, by Petitioner's Plan B  
which has led to this motion for preliminary injunction, and by Petitioner's implementation and

1 communications strategy, which has rejected every prudent warning to await the legal outcome of  
2 this suit and communicate that Deep Springs will transition to coeducation only if and when it is  
3 has been determined by a court to be legitimate to do so. If there are harms here, therefore, they  
4 are self-caused and thus should not be considered in the balances of harms and equities.

5 Petitioner's view of the harms to be suffered by Deep Springs College should the motion  
6 for preliminary injunction be granted depends on an incredible assessment: that whereas it would  
7 be just fine to transition to coeducation immediately and then transition back to being an all-male  
8 college should Respondents ultimately prevail at law, it would be gravely damaging to delay a  
9 transition to coeducation until the legal determination is complete. The latter damages are of the  
10 vaguest kind: there would be a kind of "limbo" or "drift," which while intangible in itself may  
11 have some tangible effects.

12 **IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST.**

13 Petitioner and the majority Trustees are attempting to proceed with an action the  
14 legitimacy of which is currently before the Court. Following Petitioner's reasoning, the Trustees  
15 could simply assert discretion to unilaterally alter or overturn trust purposes, or trustees could  
16 simply transfer assets to a charitable corporation for which the articles of incorporation do away  
17 with any trust restrictions they find inconvenient. Petitioner misunderstands when he suggests  
18 that Respondents need to name the parties who will do this as a result: the point is rather that,  
19 should the law allow Petitioner to get away with this, no principled way remains that is consistent  
20 with this that would uphold the integrity and public value of trusts.

21 **V. THIS COURT CAN AND SHOULD ADDRESS AND PREVENT PETITIONER'S**  
22 **MISINTERPRETATION AND ABUSE OF DISCRETION**

23 As Petitioner repeatedly attempts to deter the Court from intervening in this case (despite  
24 being the one who brought it before the Court), it is worth noting that the Trustees' much-vaunted  
25 discretionary powers provide no reason for this Court not to enjoin its actions. Courts will  
26 intervene to prevent trustees from acting without due regard to the terms and purposes of  
27 discretionary power, or under a mistaken interpretation of trust terms, or according to a  
28 misunderstanding of applicable fiduciary law. (*See Rest.3d Trusts § 87, cmt. c.*) Here, this Court

1 is fully warranted to intervene on each of these bases. The Trustees are abusing their discretion  
2 under the Deed by (1) aggrandizing their powers and the scope of their discretion, (2) attempting  
3 to avoid their Trust obligations by misconstruing the Trust Deed, and (3) unilaterally acting on  
4 “Plan B” without this Court’s requisite consent.<sup>1</sup> These actions are breaches of trust, and they are  
5 unreasonable. (*See* Prob. Code, § 16400.) They are not in accordance with the Trust document  
6 and are motivated by a purpose contrary to that specified in the Deed of Trust.

7         Petitioner contends that the Court cannot interfere with the Trustees’ determination except  
8 in a case of gross abuse. (Pet’r’s Interp. Br., at p. 8.) This false claim is based solely on  
9 misrepresenting as a general criterion what is instead a particular and limited statement in  
10 *Hallinan v. Hearst* (1901) 133 Cal. 645, 648, a case which did not even involve a trust  
11 instrument: Hearst was found to be bound by the stated broad purpose for which funds were  
12 raised, but was not bound to any more particular trust terms because there were none. Here, on  
13 the contrary, the Court should intervene to prevent the Trustees from acting inconsistently with  
14 the Trust purpose, from acting on a misinterpretation of or disregard for the Trust restrictions, or  
15 from abusing their discretion. (*See* Rest.3d Trusts, § 87, cmt. c.)

16         Indeed, this Court has the authority to intervene even in the absence of Respondents’  
17 allegations. Petitioner, in his “Petition for Court Order Construing Trust Provisions, Or, If  
18 Necessary, Modifying the Trust Instrument” (hereinafter “Pet.”), petitioned this Court under  
19 Probate Code section 17200 to adjudicate a matter concerning the internal affairs of the trust.  
20 (Pet., at p. 2.) These internal affairs include court discretion to “sett[e] the accounts and pass[]  
21 upon the acts of the trustee, including the exercise of discretionary powers.” (Prob. Code, §  
22 17200, subd. (b)(5).) As a result, this Court may also exercise its authority under the Petitioner’s  
23 original request for relief to pass upon the Trustees’ exercise of their discretionary powers. Given  
24 the equitable issues at stake, it should do so.

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25  
26         <sup>1</sup> It is striking that it is putatively *on behalf of the Board of Trustees of the L. L. Nunn Trust* that Petitioner  
27 argues that the Trustees own and control as little as possible, and tries to convince this Court of the Trust’s  
28 insignificance (see esp. Pet’r’s Interp. Br., at p. 2). This is all part of the comic production of “Plan B,” an elaborate  
farce of mistaken identity which requires the Board to act as if the Trust is incidental to the College’s operation,  
when it actually specifies the basic principles and conditions of the operation of the College and of Deep Springs  
Corp.

1 In the Petitioner's Response Brief on Interpretation of the L. L. Nunn Trust ("Pet'r's Resp.  
2 on Interp."), Petitioner repeatedly warns the Court against intervening in this matter. Petitioner's  
3 concluding comparison to racial discrimination is misleading and a desperate tactic that cuts  
4 against his argument. (Pet'r's Resp. on Interp. at pp. 14-15.)<sup>2</sup> L. L. Nunn provides no warrant  
5 whatsoever in the Deed of Trust for the racial policies or the Jewish quotas enacted by the Board  
6 of Trustees, and his rejection of such policies was clear and principled. (Hoekstra Decl. 2d, Ex.  
7 82.) Petitioner believes that this shameful policy of the Board of Trustees provides an obvious  
8 illustration that the Court should not "substitute its judgment for that of the fiduciaries who  
9 supervise Deep Springs College," who should be allowed to move the College in whatever  
10 direction they see fit regardless of the Trust purpose. What this example of how this Board has  
11 abused its discretion and departed from the founder's principles instead illustrates with vivid  
12 emphasis is instead the peril of allowing the Trustees free reign to decide College policy not in  
13 the terms laid down by the Trust but according to their own convictions or the prevailing societal  
14 values of the day.

15 **VI. GRANTING THIS MOTION FOR PRELIMINARY INJUNCTION WOULD**  
16 **PRESERVE THE STATUS QUO**

17 The purpose of a preliminary injunction is to preserve the status quo pending final  
18 resolution upon a trial. (See *Scaringe v. J.C.C. Enterprises, Inc.* (1988) 205 Cal.App.3d 1536)  
19 The status quo has been defined to mean the last actual peaceable, uncontested status which  
20 preceded the pending controversy. (*Voorhies v. Greene* (1983) 139 Cal.App.3d 989, 995) "The  
21 sole purpose of a preliminary injunction is to 'preserve the *status quo ante litem* pending a  
22 determination of the action on the merits.'" (*Sierra Forest Legacy v. Rey* (9th Cir. 2009) 577 F.3d  
23 1015, 1023.)

24  
25  
26 <sup>2</sup> Even the coeducational college will discriminate on the basis of gender, and someone who might otherwise  
27 be qualified for admission may be denied admission solely because of his or her gender. Consider the Trustees'  
28 discussion following the vote to implement coeducation: after one Trustee asked "is it proper and would it be  
desirable to set a gender quota?" General Counsel Christopher Campbell replied that "it is legal because we are a  
private, undergraduate educational institution, allowed to select on the basis of gender." There is then broad Board  
agreement that the Board should do so. (See Ex. 83 at p. 29.)



1           A.     Deep Springs As A Thriving, Healthy, and Respected Single-Sex College is the  
2                     Status Quo

3           The *status quo ante litem* is that Deep Springs College not be transitioning to coeducation  
4 under any guise, but instead is continuing with an all-male student body until it receives a final  
5 legal determination about whether such a transition is legally permitted. Respondents were  
6 initially baffled by Petitioner’s very different depiction of the *status quo ante litem*. They now  
7 see that the claim that the status quo was merely a different distribution of assets is an attempt to  
8 continue the charade that the question at issue is about a dormant Trust that provides some assets  
9 for the College, and an attempt to render reparable some of the damages that will follow should  
10 the injunction not be granted. The redistribution of assets is itself instrumental to the irreparable  
11 harms, for it is necessary even in Petitioner’s reckoning to allow for a transition to a  
12 coeducational college that would otherwise be using those assets. But an injunction against  
13 disposing of property is proper if disposal would render the final judgment ineffectual. (*Wilkins v.*  
14 *Oken* (1958) 157 Cal.App.2d 603, 606–607, 321 P.2d 876.) Thus this should not be regarded as a  
15 matter of assets that have been shuffled and may later be reshuffled.

16           B.     Petitioner’s Portrayal of the Matter at Issue Is Artificial and Misleading

17           More importantly, the Petitioner’s artificial post-Plan-B way of characterizing the matter  
18 is an attempt to mislead this Court. For over a year both sides of this action have discussed at  
19 length all matters pertaining to whether Deep Springs College (the “College”) can legally become  
20 coeducational. Yet Petitioner now claims in his Memorandum of Points and Authorities in  
21 Opposition to Respondents’ Motion for Preliminary Injunction (hereinafter “Pet’r’s PI Opp.”),  
22 that “the ability of Deep Springs to serve as a coeducational institution is not at issue in this case.”  
23 (Pet’r’s PI Opp. at p. 14:14-15.) This would be risible were it not so deeply duplicitous. The  
24 Court will not be fooled into thinking that the matter at issue is now just whether Deep Springs  
25 College can avail itself of a small percentage of its assets once it becomes coeducational; rather,  
26 the matter at issue is, as it has been all along, whether Deep Springs may or may not become  
27 coeducational given the stated purpose of its underlying Trust.  
28

1 C. Whether Deep Springs Can Become Coeducational Is The Matter Presently  
2 Before This Court

3 Respondents ask this Court to recall that in the Summary of Relief Requested by  
4 Petitioner in his Petition For Court Order Construing Trust Provisions, Or If Necessary,  
5 Modifying The Trust Instrument, filed on February 6, 2012 (hereinafter "Petn."), Petitioner asked  
6 that this Court construe the language of the trust instrument "to allow the trustees to provide for  
7 the education of both men and women." (Petn. ¶ 6:16.) In that same paragraph, Petitioner asked  
8 this Court to confirm that the Trustees have the discretion to "authorize the admission of female  
9 students[.]" (*Id.* at ¶ 6:24-25, emphasis added.) Later on in that same petition, Petitioner asked  
10 this Court to declare whether the Trustees have the authority "to educate both men and women."  
11 (*Id.* at ¶ 13, p. 6:28-7:1, emphasis added.) In his Memorandum of Points and Authorities in  
12 Support of the Petition (hereinafter "Petn. P & A"), Petitioner notes that "if the Court does not  
13 construe the Deed of Trust to give the Trustees discretion to educate women" (Petn. P & A, at p.  
14 3:4, emphasis added) or "admit females" (*Id.* p. 3:19-20, emphasis added), then he requests a  
15 judicial modification of the Deed of Trust "to permit the education of men and women together at  
16 Deep Springs College[.]" (*Id.* at p. 15:20-22.)

17 The ability of Deep Springs College to become coeducational is the heart of the matter  
18 before this Court. Petitioner petitioned this Court to determine it, and all issues arise because of  
19 it. Respondents filed their Motion to Join Deep Springs Corporation ("Corporation") as a Party to  
20 prevent Petitioner's attempt to implement coeducation at Deep Springs via the Corporation even  
21 though the Corporation is restricted by the very language "at issue in this matter before the court."  
22 (Petn. P & A at p. 2:10-11.) Furthermore, Respondents' Motion for Preliminary Injunction is  
23 meant to stop the Trustees from implementing coeducation before this Court decides whether they  
24 have the authority to do so. Both Petitioner and Respondents have asked this Court to determine  
25 whether Deep Springs College may legitimately accept women as students. Respondents  
26 respectfully request that this Court require Petitioner to wait for its answer.

27 Dated: October 2<sup>d</sup>, 2012

28 By:   
JOSEPH C. LIBURT