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

14
15 In re the Matter of

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

18
19
20
21 Deceased.
22
23

CASE No. SICVPB1253232

**PETITIONER'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO RESPONDENTS'
MOTION FOR PRELIMINARY
INJUNCTION**

[Probate Code §§ 17200 and 15409]

DATE: October 30, 2012

TIME: 9:00 A.M.

DEPT: 1

JUDGE: Dean T. Stout

Action Filed: February 6, 2012

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24 **I.**
INTRODUCTION AND STATEMENT OF FACTS

25 Lucien L. Nunn ("L. L. Nunn") established what is now Deep Springs College in
26 1917. By Deed of Trust executed November 5, 1923 (the "Deed of Trust"), L. L. Nunn created a
27 trust endowed with most of his personal fortune to provide for and carry on the educational work

1 he began at Deep Springs in 1917 (the “Trust”).

2 Originally, Deep Springs College was operated exclusively by trustees (“Trustees”)
3 of the Trust. In 1967, the Deep Springs Corporation, a California non-profit public benefit
4 corporation (the “Corporation”), was formed to assist with fundraising for Deep Springs College.
5 However, in 1995, when it became clear that the Trust was no longer able to successfully operate
6 Deep Springs College, the Corporation’s Board of Directors (the “Board of Directors”) assumed
7 all operations, liability and responsibility for operating Deep Springs College. (Declaration of L.
8 Jackson Newell in Support of Petitioner’s Opposition To: Respondents’ Motion for Preliminary
9 Injunction; and Respondents’ Motion to Join Deep Springs Corporation as a Party (“Decl. of L.
10 Jackson Newell”), ¶ 14.) Thereafter, the Trust has played no role in the operation or decision-
11 making concerning Deep Springs College. (Decl. of L. Jackson Newell, ¶ 15.)

12 Since its establishment in 1917, Deep Springs College has operated with few
13 exceptions as a single-sex institution, extending admissions only to male students. The question
14 whether Deep Springs College should be a coeducational institution has been considered and
15 debated by the Trustees, students, alumni, faculty, and staff for at least 40 years. Formal votes on
16 coeducation were conducted by the Trustees in 1979 and 1994. In 2002 the Trustees determined
17 that reconsideration of admitting female students should be included in the long-range planning
18 for Deep Springs College – this determination was reaffirmed in the long-range planning priorities
19 set by the Trustees in 2008.

20 Ultimately, on September 17, 2011, the Trustees (by a vote of 7-2) and the Board
21 (by a vote of 10-2) determined that coeducation will be more successful than single-sex male
22 education at achieving the purposes of Deep Springs College now and in the future. The Board
23 directed the administration, faculty and staff to prepare for a prompt transition to coeducation.
24 The administration determined that it was feasible to admit the first coeducational class in 2013
25 and planned accordingly.

26 On February 6, 2012, the Trustees filed their Petition for Court Order Construing
27 Trust Provisions, Or, If Necessary, Modifying the Trust Instrument (the “Original Petition”) with

1 this Court. The Original Petition requested a judicial determination construing the Trust to allow
2 the Trustees the discretion to continue to use the Trust estate to benefit Deep Springs College even
3 after it becomes coeducational, or in the alternative, for a judicial modification of the Deed of
4 Trust to permit use of the Trust estate for the education of women, in addition to men, at Deep
5 Springs College. After Respondents filed their Objection and Response to Petition for Court
6 Order Construing Trust Provisions, or, if Necessary, Modifying the Trust Instrument on May 7,
7 2012 (the "Objection and Response"), it became clear to the Trustees and to the Board that a
8 judicial resolution would not be forthcoming prior to deadline for recruitment of students for the
9 2013 school year. The Board had significant concern that delaying the transition would create
10 uncertainty for current and potential students, parents, donors, the accreditation board and others.
11 That uncertainty presents a serious risk of damaging Deep Springs' ability to operate successfully.

12 On June 6, 2012, the Trustees voted (by a tally of 5 to 2) to sell all of the Trust's
13 real property assets to the Corporation for fair market value. Also on June 6, 2012, the Board
14 voted (8 to 2) to purchase all of the Trust's real property assets for fair market value. This plan
15 has been referred to among the Trustees and Board as "Plan B." The sole purpose of Plan B is to
16 segregate, for the time it takes to resolve the issues presented in the Original Petition, all assets
17 that may arguably be subject to a Trust restriction that prevents those assets from being used for
18 coeducation. Plan B allows the Trust to maintain the full value of its assets and to obtain cash for
19 its very illiquid desert real estate to use as ultimately directed by this Court while also allowing the
20 Corporation to move forward with its transition to coeducation using only assets which are not
21 subject to possible restriction concerning coeducation based on language in the Trust document.

22 II. 23 ARGUMENT

24 This Court should deny Respondents' motion for a preliminary injunction. The
25 power to issue a preliminary injunction is extraordinary and should be exercised with great caution
26 and only where it appears that a sufficient cause for hasty action exists. A preliminary injunction
27 should not be issued except in extreme cases in which a right to relief is clearly established and
28

1 irreparable injury would flow from refusal. (*Hagen v. Beth* (1897) 118 Cal. 330.) The key factors
2 in determining whether to issue a preliminary injunction are how likely it is that the moving party
3 will prevail on the merits and a balancing of the relative harm the parties will suffer in the interim
4 due to the issuance or non-issuance of the injunction. Here, Respondents have not met their
5 burden. They cannot demonstrate likelihood of prevailing on the merits, and the harm that will be
6 suffered by Petitioner if the preliminary injunction is granted outweighs any harm to Respondents
7 if the preliminary injunction is denied.

8 **A. Respondents Cannot Demonstrate Likelihood of Prevailing on the Trust Petition.**

9 It is Respondents' burden to demonstrate likelihood of success on the merits of the
10 underlying petition. Respondents have not met this burden. Respondents are not likely to prevail
11 on the merits. Moreover, while Petitioner need not demonstrate likelihood of his own success on
12 the merits in order to defeat the request for a preliminary injunction, for the reasons discussed
13 below it is likely that Petitioner will succeed on the merits of the underlying petition. As such, the
14 request for a preliminary injunction should be denied.

15 **1. Petitioner's Proposed Interpretation of the Deed of Trust Is Entirely**
16 **Reasonable, and Likely to Be Adopted.**

17 As fully set forth in Petitioner's Opening Brief on Interpretation of the L. L. Nunn
18 Trust filed on October 3, 2012, incorporated herein by reference, the Purpose Paragraph of the
19 Deed of Trust contains an unambiguous broad grant of discretion to the Trustees to determine the
20 form and manner of education at Deep Springs. The reference in the Purpose Paragraph to
21 "promising young men" can best be understood only as a description of the educational work that
22 L. L. Nunn had begun at Deep Springs, as it existed in 1923, and as a description of L. L. Nunn's
23 vision for Deep Springs which represents non-binding advice and guidance to the Trustees in their
24 further development of that educational work. Moreover, in light of the contemporary usage of
25 the term "men" and societal norms existing in 1923, it is very likely that references to "men" were
26 intended generally to describe both male and female persons. In addition, the attached Declaration
27 of David Neidorf states that admissions policies are means, not purposes, of an educational plan.

1 In light of these factors, not only is there insufficient likelihood of Respondents prevailing on the
2 merits of the interpretation question, Petitioner is more likely to prevail on this issue.

3 **2. Assuming *Arguendo* that Petitioner’s Proposed Interpretation is Not Adopted,**
4 **the Deed of Trust May be Modified Under Probate Code Section 15409.**

5 Assuming purely for the sake of discussion that Petitioner is not successful on the
6 issue of interpretation, he remains likely to prevail on the issue of obtaining a modification of the
7 Deed of Trust under Probate Code §15409. That section provides, in pertinent part, as follows:

8 (a) On petition by a trustee or beneficiary, the court may modify the
9 administrative or dispositive provisions of the trust or terminate the
10 trust if, owing to circumstances not known to the settlor and not
11 anticipated by the settlor, the continuation of the trust under its
12 terms would defeat or substantially impair the accomplishment of
13 the purposes of the trust. In this case, **if necessary to carry out the**
14 **purposes of the trust, the court may order the trustee to do acts**
15 **that are not authorized or are forbidden by the trust instrument.**

16 (Cal. Prob. Code §15409, subd. (a) [emphasis provided].) The language of Probate Code §15409 is
17 clear: “administrative or dispositive” provisions of a trust may be modified under that section
18 if, under changed circumstances, the continuation of the trust under its terms would defeat or
19 substantially impair the accomplishment of the purposes of the trust. Respondents espouse an
20 unduly limited view of the reference to “administrative or dispositive” provisions. They assume
21 without citation that a trust contains provisions that are neither administrative nor dispositive.
22 However, a more plausible reading of Section 15409 is that any provision of a trust—that is, not
23 just the administrative provisions, and not just the dispositive provisions, but both the
24 administrative and dispositive provisions (which make up all of the provisions of a trust)—may be
25 modified under the statute.

26 Despite Respondents’ efforts to elevate the reference in Deed of Trust to
27 “promising young men” from how it should appropriately be understood—that is, as a description
28 of the circumstances that existed in 1923 and as the starting point from which L. L. Nunn’s
educational work should evolve—to an absolute commandment, the Deed of Trust does not
provide support for such a view. L. L. Nunn’s purpose in creating the Trust was to entrust his

1 assets to the Trustees to continue his educational experiment at Deep Springs—with great
2 deference given to the Trustees to determine the particular ways in which that goal should be
3 conducted and adapted over time. In furtherance of this overarching purpose, even if the Deed of
4 Trust forbids use of Trust property to further the education of women—a contention disputed by
5 Petitioner—the court may modify the Trust under Probate Code §15409 to authorize the trustee to
6 do an otherwise forbidden act, e.g., the use of Trust property to provide coeducation at Deep
7 Springs College.

8 **3. It Is Not Necessary that the Elements for *Cy Près* Be Satisfied.**

9 It is understandable that Respondents would discount the applicability of Probate
10 Code §15409 to try to force Petitioner to satisfy the more stringent requirements of the *cy près*
11 doctrine. However, even if the court determines that modification of the Trust under Section
12 15409 is inappropriate, Respondents are unlikely to prevent application of the *cy près* doctrine to
13 allow support of a coeducational Deep Springs College by the Trustees under the Deed of Trust.

14 “Unless the terms of the trust provide otherwise, where property is placed in trust to
15 be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or
16 impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the
17 property to the designated purpose, the charitable trust will not fail but the court will direct
18 application of the property or appropriate portion thereof to a charitable purpose that reasonably
19 approximates the designated purpose.” (Rest.3d Trusts §67.) While it would certainly be lawful
20 for the Trust to support single-sex male education, the Trustees of the Trust have determined in
21 good faith and in their discretion that it is now impracticable for Deep Springs College to continue
22 to be a single-sex, male only, educational institution with Deep Springs purpose of training for
23 leadership. As a result, there is ample support for application of the *cy près* doctrine, if necessary,
24 to allow support of a coeducational Deep Springs College by the Trustees under the Deed of Trust.
25 Thus, there is insufficient likelihood of Respondents’ prevailing on the merits of the underlying
26 petition.

1 **4. The Corporation is Permitted to Use Assets Acquired After the Amendment of**
2 **its Articles of Incorporation and Bylaws for the Implementation of**
3 **Coeducation.**

4 **a. The Board May Use the Corporation's Assets to Implement**
5 **Coeducation.**

6 “A corporation may amend its articles from time to time, in any and as many
7 respects as may be desired, so long as its articles as amended contain only such provisions as it
8 would be lawful to insert in original articles filed at the time of the filing of the amendment.”
9 (Cal. Corp. Code § 5810, subd. (a).) Additionally, a corporation's “bylaws may be adopted,
10 amended or repealed by the board.” (Cal. Corp. Code § 5150, subd. (a).) The Corporation's
11 Board therefore had the right to amend the language of Deeps Springs Corporation's Articles of
12 Incorporation and Bylaws.

13 As Respondents themselves point out, the Board merely amended the language of
14 the Bylaws and Articles of Incorporation; they did not amend the purpose. (*See* Respondents'
15 Memorandum, 12:16.) The amended language is simply meant to clarify, for the benefit of third
16 parties, including future directors, that coeducation is permitted at Deep Springs. The purpose of
17 the Corporation is still to provide for educational work, and as a charitable corporation, Deep
18 Springs Corporation will continue to hold its assets in trust for its stated charitable purpose:
19 education.

20 As argued in the Petitioner's Opposition to Respondents' Motion to Join Deep
21 Springs Corporation As a Party (“Opposition to Joinder”), incorporated herein, the Corporation
22 was not formed to administer the Trust and is not a trustee of the Trust. The Deep Springs
23 Corporation was formed under the California Corporations Code as a nonprofit corporation for
24 educational purposes and holds its assets in furtherance of such purpose.

25 **b. Injunction Against the Corporation Is Not Proper.**

26 Again, as fully set forth in Petitioner's Opposition to Joinder, the Deep Springs
27 Corporation is neither an alter ego of the Trustees nor an agent of the Trustee, and should not be
28 compelled to join the current action as a necessary party. The Corporation therefore also should

1 not be enjoined since it is not a party to this action. An injunction is generally a personal decree
2 that operates against the defendant. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal*
3 (2005) 129 Cal. App. 4th 1228, 1266.) While an injunction may cover agents, employees, or those
4 who act in concert with the enjoined party, an injunction against a corporate employer is
5 inappropriate to enjoin the actions of specific employees. (*Id.*) In this instance, since Deep
6 Springs Corporation is neither a party to this case, nor the agent of a party in this case, it should
7 not be enjoined.

8 Moreover, Respondent’s claims improperly implicate the “Academic Freedom” and
9 “Academic Abstention” doctrines. The concept of “academic freedom” refers essentially to the
10 First Amendment right of colleges and universities to be free from unwarranted interference from
11 outside parties into academic and educational endeavors. The four “essential freedoms” are “who
12 may teach, what may be taught, how it shall be taught, and who may be admitted to study.”
13 (*Sweezy v. New Hampshire* (1957) 354 U.S. 234, 263.) State action which infringes on these
14 freedoms may be held to violate the First Amendment.¹ “Academic abstention” is a related judicial
15 doctrine in which courts defer to the academic decision-making of colleges and universities. (*See*
16 Steven G. Olswang, *Academic Abstention Stronger Than Ever, Despite Vaksman*, 26 *Journal of*
17 *Law and Education* 91 (1997), noting that “[s]ince the Dartmouth College case [footnote omitted]
18 almost two centuries ago, the Supreme Court has articulated the view that colleges and universities
19 could best perform their missions when they were free from governmental or judicial interference.
20 This principle of academic abstention has permeated all levels of the judiciary, such that faculty
21 decisions on such matters as student admissions...are not easily overturned by courts.”)

22 The decision by the Directors of the Deep Springs Corporation to become
23 coeducational is a purely academic judgment concerning “who may be admitted to study.” The
24

25
26 ¹ Of course, because the Respondents are not state actors, the First Amendment right protection of academic
27 freedom is not directly on point. However, the rationale underlying the doctrine—that colleges and universities should
be given great latitude in matters of academic decision-making—is certainly implicated by the Respondents’ attempts
to thwart the considered decisions of the Trustees of the Trust and the Directors of the Deep Springs Corporation.

1 Trust is but one source of funding and support for Deep Springs College, an academic institution
2 entitled to the benefit of the policy that results in the doctrines of academic freedom and academic
3 abstention. Regardless of whether the Trust forbids its assets from being used to support the
4 education of females—and, of course, Petitioner contends that the Trust contains no such
5 restriction—there is simply no basis for this Court or any other person to interfere in the academic
6 decision of Deep Springs Corporation regarding whether to admit women to the college. The
7 directors of Deep Springs Corporation, as such, being distinct from the trustees of the Trust,
8 should be afforded great latitude with regard to the admissions policy of the college, and should be
9 free from the attempts of dissatisfied alumni—attempting to engage the assistance of the Court—
10 to overturn the considered decisions of the college’s decision makers.

11 Assuming *arguendo* that the Court enjoins the Board from using certain assets
12 transferred to the Corporation by the Trust, the Corporation has other assets that were not
13 transferred from, have no connection to, and therefore are not subject to any provision of the
14 Trust. The Corporation should not be enjoined from using such other assets for any educational
15 purpose, including implementation of coeducation. As stated in the Opposition to Joinder, the
16 Respondents are asking the Court to supplement its judgment for that of the Board as to what is
17 necessary to preserve Deep Springs College. As described in the comments to the Restatement
18 (Third) of Trusts, “A court will not interfere with a trustee's exercise of a discretionary power (or
19 decision not to exercise the power) when that exercise is reasonable, not based on an improper
20 interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary
21 duties....” (Restatement (Third) of Trusts §87 (2007).) This same deference should be given to a
22 director of a charitable trust. There is simply no basis for this Court or any other person to
23 interfere in the academic decision of Deep Springs Corporation regarding whether to admit
24 women to the college.

25 **B. The Relative Interim Harm That Will Be Suffered by Petitioner if the Preliminary**
26 **Injunction is Granted Outweighs Any Harm to the Respondents if the Preliminary**
Injunction is Denied.

27 In determining whether to issue a preliminary injunction, the court must also

1 consider the harm that the moving party is likely to sustain if the injunction is denied as compared
2 to the harm that the non-moving party is likely to suffer if the court grants a preliminary
3 injunction. (*Take Me Home Rescue v. Luri*, (2012) 208 Cal.App.4th at 1342.) The court “must
4 determine which party is more likely to be injured by the exercise of its discretion as to whether to
5 issue a preliminary injunction, and the court's discretion must then be exercised in favor of that
6 party.” (*Ibid.*)

7 **1. Neither Respondents Nor Deep Springs College Will Sustain Harm If the**
8 **Injunction is Denied.**

9 In this case, neither Respondents, nor Deep Springs, will suffer harm if the
10 injunction is denied.

11 **a. There Are Adequate Legal Remedies Available to Respondents.**

12 Injunctive relief is generally available in a case where monetary damages would not
13 afford adequate relief or it would be extremely difficult to determine the amount of compensation
14 that would afford adequate relief. (*Ajaxo Inc. v. E*TRADE Group, Inc.* (2005) 135 Cal. App. 4th
15 21.) The party seeking an injunction must ordinarily show that the acts complained of will cause
16 injuries that cannot be adequately compensated in damages. (*Intel Corp. v. Hamidi* (2003) 30 Cal.
17 4th 1342.) “A court may refuse to issue a preliminary injunction if the threatened damage or
18 injury is of a character that may easily be remedied if the injunction is refused, as where it is
19 chiefly monetary and the defendant is solvent.” (*Williams v. Los Angeles Ry. Co.* (1907) 150 Cal.
20 592.)

21 Respondents have made a far-reaching and very general allegation that they would
22 suffer irreparable harm if the injunction is not granted - they restated the features of an irreparable
23 injury and claimed that the use by the Corporation of the assets it purchased from the Trust will
24 constitute irreparable injury. Assuming *arguendo* that the Court later determines that the Trust
25 purpose does not permit Trust assets to be used for coeducational purposes (an argument with
26 which the Petitioner, of course, denies), and the Court determines that the Corporation did not pay
27 adequate compensation for any asset, the Petitioner can pay the Trust the judicially determined

1 value of assets that were put toward implementing coeducation. It is a mere matter of accounting.
2 Since a monetary remedy will afford full relief, the court should not grant the injunction.

3 **b. Deep Springs' Goodwill and Reputation Will Not Suffer if the College**
4 **Continues to Move Forward with its Transition to Coeducation.**

5 The decision to make Deep Springs coeducational has been widely praised since it
6 was announced, and thus Respondents' concerns that Deep Springs' goodwill and reputation will
7 suffer are unfounded. Moreover, Respondents' claims that the credibility or goodwill and
8 reputation of Deep Springs will suffer as a result of Petitioner's actions are misplaced. Contrary to
9 unsupported claims by the Respondents, there is no intent or effort on the part of the Petitioner to
10 avoid trust law. Rather, the Petitioner recognizes what assets the Trust does and does not own.
11 The money that the Corporation raised through recent fundraising campaigns is not restricted with
12 respect to Deep Springs' admissions policy and, therefore, the Petitioner is not violating or
13 avoiding any duties by using those funds to implement coeducation at Deep Springs.
14 Furthermore, the assets that the Corporation purchased from the Trust were purchased at fair value
15 and as such are only restricted by the Corporation's charitable purpose.

16 **c. There Will Be No Harm to the Public Interest if Deep Springs**
17 **Continues to Move Forward with its Transition to Coeducation.**

18 Contrary to Respondents' unsupported arguments, there is no threat to the validity
19 of limitations placed on charitable trusts or to the privileges of corporations in California. As
20 thoroughly laid out in Petitioners' Opening Brief on Interpretation of the L. L. Nunn Trust, Trust
21 assets are to be used for educational purposes, which is precisely how the assets sold and the
22 money paid to the Trust will be used after the transaction between the Trust and the Corporation.
23 There is no support for Respondents' argument, that unnamed other donors will reconsider before
24 creating a charitable trust. The Trustees have followed, and continue to follow, L. L. Nunn's
25 intent and the Trust purpose by using Trust assets for educational purposes.

26 **d. There Will Be No Threat of Litigation Against Deep Springs if Deep**
27 **Springs Continues to Move Forward with its Transition to**
28 **Coeducation.**

Petitioner's actions do not expose Deep Springs to lawsuits from applicants,

1 employees or donors. The College has fully advised all applicants and potential students of the
2 risks in applying for admission while this litigation is pending. The flyer that Deep Springs
3 circulated to all potential applicants for the 2013 school year contained the following release:

4 A California court hearing is scheduled for 10/30/12 to consider a
5 legal motion to stop admission of women for the 2013 entering
6 class. We expect to have a decision from the Judge by December
7 2012. We are confident enough to invite applications, but there is
8 the possibility we could be prevented from accepting women in
9 2013. We hope that won't deter you from applying.

10 Female applicants are therefore fully aware that although they may spend
11 considerable time and effort applying to Deep Springs, their applications may be denied on the
12 basis of their gender. Additionally, only a single donor has requested that his donation be
13 returned² because of the widely publicized plan to implement coeducation.

14 **e. There Will Be No Threat to the Viability of the Trust if Deep Springs
15 Continues to Move Forward with its Transition to Coeducation.**

16 There is no threat to the continued viability of the Trust. Indeed, after the Trust
17 sells its assets to the Corporation and thereby converts its holdings to liquid form, it will be in a
18 better position to advance its mission – whatever the Court determines that may be.

19 **f. Deep Springs Sustained No Harm When it Hosted Female Students in
20 the Past.**

21 Deep Springs College has educated female students in the past. During the 1995-
22 1996 school year three female students from Cornell University attended Deep Springs College for
23 both the summer terms and the winter semester. (Decl. of David Neidorf, ¶ 11.) A second group
24 of three women, students of William Smith College, were present for the fall semester. (*Ibid.*)
25 These women participated fully in student life at Deep Springs: in classes, student body
26 governance, dormitory life, and the labor programs. (*Ibid.*) To Petitioner's knowledge, Deep
27

28 ² The donation in question was made over four years prior to the 2011 vote on coeducation and has already
been expended for the particular purposes agreed upon by the donor when the gift was made. (Declaration of David
Neidorf 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 Neidorf"), ¶ 4.)

1 Springs suffered no harm in connection with those coeducational experiments. Moreover, the fact
2 that female students have attended Deep Springs in the past supports Petitioner's argument that
3 coeducation is not irreversible. There is no harm in allowing female students to attend Deep
4 Springs while the Court decides the interpretation issue.

5 **2. Issuance of an Injunction Will Cause Significant Harm to Deep Springs.**

6 Conversely, the grant of an injunction *will* cause immediate, irreparable harm to
7 Deep Springs College.

8 If the Court joins the Corporation in this action and grants an injunction to prevent
9 Deep Springs from becoming a coeducational college, the uncertainty as to when or whether Deep
10 Springs will become coeducational would greatly harm the institution's reputation and will
11 negatively impact its ability to recruit faculty, recruit students and obtain new donations. (*See*
12 *Declaration of Davit Hitz in Support of Petitioner's Opposition to: Respondents' Motion for a*
13 *Preliminary Injunction; and Respondents' Motion to Join Deep Springs Corporation as a Party*
14 *("Decl. of Davit Hitz"), ¶ 4; See Decl. of David Neidorf, ¶ 16-23, 27.) Petitioner anticipates that*
15 *at least two years may pass before the issue of interpretation or possible modification of the Deed*
16 *of Trust will be resolved by the judicial system. If Deep Springs is enjoined from moving forward*
17 *with its coeducational transition until the court case is completely resolved, it will suffer*
18 *irreparable harm.*

19 First, Deep Springs' reputation will be damaged. Deep Springs has made a public
20 commitment to transition from a single-sex male institution to a coeducational institution. The
21 failure of Deep Springs to move forward with that transition will cause it to lose credibility and
22 will damage its reputation. Other organizations, such as Telluride, will likely view Deep Springs'
23 failure to move forward as evidence that Deep Springs does not actually intend to implement
24 coeducation. Also, other organizations, schools, community members and donors may interpret
25 Deep Springs' failure to move forward with its transition as evidence that Deep Springs does not
26 respect its announced commitments.

27 Further, Deep Springs will have trouble recruiting faculty, as many college

1 professors do not want the stigma of being affiliated with a school that does not admit females.
2 Again, potential faculty members could view Deep Springs' failure to move forward with its
3 transition as evidence that Deep Springs does not respect its commitments, and therefore, decide
4 not to apply for or accept a position at Deep Springs. The same is true for potential students.
5 They want to know what type of institution they are applying to. Potential students could view
6 Deep Springs' failure to move forward with its transition as evidence that Deep Springs does not
7 respect its stated commitments, and therefore, decide not to apply for or accept admission to Deep
8 Springs. Finally, uncertainty on this issue will significantly hinder fundraising efforts, as some
9 donors will not contribute until they are confident about the College's leadership and direction.

10 Deep Springs will therefore suffer immediate and irreparable harm if the Court
11 grants an injunction.

12 **3. An Injunction is Not Necessary to Preserve the Status Quo.**

13 Contrary to Respondents' argument, the status quo in this case is not continuing to
14 run Deep Springs as a single-sex male college. The ability of Deep Springs to serve as a
15 coeducational institution is not at issue in this case. Even assuming for the sake of argument that
16 the Court determines to grant a preliminary injunction (which it should not) to prevent the Trust
17 from selling assets to the Corporation, the Corporation would then not be able to use certain
18 resources for Deep Springs. But other resources are available and Deep Springs could still be
19 coeducational.

20 The status quo in this case is continuing the Trust with the same amount of assets
21 as it had prior to the case. *Without* an injunction, the Trust remains intact and the Trust assets
22 remain unimpaired. *Without* an injunction, the status quo is unaffected. The determination as to
23 what assets belong to the Trust versus what assets belong to the Corporation is matter of
24 accounting, for which an injunction is unnecessary. Moreover, as discussed, the Trust will
25 actually be stronger if the Petitioner's actions are not enjoined, as the Trust assets will be
26 converted to a liquid form, allowing the Trust to better further its purpose whatever the Court may
27 determine that to be.

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**III.
CONCLUSION**

Respondents have not met their burden to satisfy the requirements for a preliminary injunction. Respondents have not, and cannot, demonstrate a likelihood that they will succeed on the merits of the case. Furthermore, although not required to defeat a motion for preliminary injunction, Petitioner has demonstrated reasonable likelihood that he will succeed on the merits.

Additionally, injunctive relief will significantly harm Deep Springs College and the Petitioner, and will cause little, if any, harm to Respondents. Indeed the only harm that would potentially befall Respondents is that Deep Springs will become a coeducational college for a few years, and even then it is unclear as to how that would inflict harm on the Respondents. Moreover, such alleged "harm" can be reversed. Conversely, if the Court issues an injunction, Deep Springs will suffer immediate and irreparable harm to its reputation and its ability to recruit faculty and student and to continue to successfully solicit donors. The injunction should be denied.

DATED: October 15, 2012

BAKER MANOCK & JENSEN, PC

By: 

Peter Tracy

Attorneys for Petitioner DAVID HITZ

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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 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENTS' MOTION FOR PRELIMINARY INJUNCTION** on the interested parties in this action as follows:

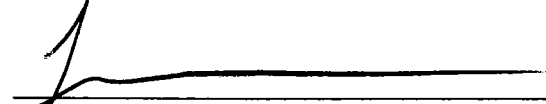
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CHARITABLE TRUSTS SECTION
300 S. SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

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