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L. L. Nunn Trust

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF INYO

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,	Case No.: SI CV PM 1253232 **OBJECTION AND RESPONSE TO PETITION FOR COURT ORDER CONSTRUING TRUST PROVISIONS, OR, IF NECESSARY, MODIFYING THE TRUST INSTRUMENT**

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Messrs. Kinch Hoekstra and Edward Keonjian, as dissenting members of the Board of Trustees of the Lucien L. Nunn Trust, hereby object and respond to David Hitz's Petition for Court Order Construing Trust Provisions, or If Necessary, Modifying the Trust Instrument, as follows:

OBJECTIONS TO PETITION

I. INTRODUCTION

1. Lucien L. Nunn ("L. L. Nunn") founded Deep Springs College in 1917, and in 1923 the College became a charitable trust according to the terms and conditions of the Lucien L. Nunn Trust (the "L. L. Nunn Trust" or "Trust"). Widely admired as an excellent and unique educational institution, the college is thriving: it is fulfilling its mission, it is in good financial shape, and external indicators of success are unequivocal (for example: the college is as selective as the Ivy League, its students transfer to first-rate institutions and do well there, and they report a deep and abiding positive impact). The college is flourishing in no small part because of the extraordinary dedication of the Petitioner, Declarant Newell, and many others who have varying feelings about implementing coeducation at Deep Springs College.

2. Respondents and Objectors, Kinch Hoekstra and Edward Keonjian ("Respondents"), are members of the Board of Trustees (the "Board" or the "Trustees") of the Trust who dissented when the Trustees voted on September 17, 2011 to admit women as students of Deep Springs College, in violation of the Deed of Trust. A true and correct copy of the Deed of Trust is attached hereto as Exhibit A and incorporated herein by this reference.

3. The purpose of the Trust is limited to the education of "promising young men." The Trustees are legally (and morally) bound to carry out the purpose of the Trust. They are not permitted to substitute their preferences for the express stipulations of the trustor, L. L. Nunn. The Trustees have no basis in law to ignore the direction of the trustor, and they have offered the Court no legal or factual justification for a judgment modifying the terms of the Trust created by Mr. Nunn.

4. On September 17, 2011, the Trustees reviewed **for the first time** the putative legal standard for modifying this charitable Trust, as presented by the General Counsel to the Board of

Trustees. Although Trustees had at least several months to come to their individual positions on the coeducation question, **all** Board discussion before the day of the vote was undertaken in ignorance of the relevant legal standards and requirements. The Trustees reconvened a few hours later and decided that they had the discretion to take the vote; immediately afterward, the Trustees voted in favor of coeducation.

5. Respondent Trustees, Kinch Hoekstra and Edward Keonjian, believe that the Trustees did not and do not have such discretion. Respondent Trustees further believe that the Trustees' decision to accept women as students at Deep Springs is a breach of their fiduciary duty because it plainly violates the explicit purpose of the Deed of Trust to educate "promising young men." (Ex. A at p. 4, ¶ 1.) Petitioner's interpretation of the Deed of Trust is plainly erroneous.

6. Moreover, the facts and circumstances do not support any modification of the Trust's purpose. Although California law allows for modification of a trust's purpose if the exceedingly stringent *cy près* standard is met, there is no evidence whatsoever that this standard is met in this case. Under *cy près*, Petitioner must prove that it is illegal or impossible or impracticable for Deep Springs College to continue as a single-sex college. (*See Estate of Klinkner* (1978) 85 Cal.App.3d 942, 951; Rest.2d § 399.)

A. Private Single-sex Colleges Are Neither Illegal Nor Against Public Policy.

7. Not only are private single-sex colleges legal, the direction of recent public policy is toward greater support for single-sex institutions, even public ones. For example, although since its inception the Title IX[1] framework clearly permitted single-sex primary and secondary schools, private single-sex undergraduate institutions, and historically single-sex public institutions, significant recent changes to the rules implementing Title IX provided clarification and encouragement for single-sex public schools and classrooms. (Nondiscrimination on the Basis of Sex in Ed. Programs or Activities Receiving Fed. Financial Assistance; Final Rule, 34 C.F.R. § 106 (2006).) Since the 2001 No Child Left Behind Act allowed local educational agencies to use "Innovative Program" funds to support single-sex public schools and classrooms,

[1] *See* 20 U.S.C. § 1681(a)(1)-(5) (Title IX means title IX of the Education Amendments of 1972, Pub.L. 92–318, as amended by section 3 of Pub.L. 93–568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686).

there are hundreds of public schools that are single-sex or offer such classrooms.

8. As co-sponsor Hillary Rodham Clinton stated on the Senate floor, the purpose of Senate Amendment 540, since signed into law, was to "further the ability of our school districts around the country to develop and implement quality single-sex educational opportunities as a part of providing a diversity of public school choices." (Remarks of Sen. Clinton, Debate on S.A. No. 540, 107th Cong. 1st Sess. (2001) 147 Cong. Rec. S5943.)[2]

9. Public policy also supports furthering educational choice by encouraging a diversity of private institutions of higher education. The Supreme Court recognizes the value that single-sex institutions offer their students. Justice Ginsberg, writing for the majority in *U.S. v. Virginia*, (1996) 518 U.S. 515, 536, noted that "[s]ingle sex education affords pedagogical benefits to at least some students[.]" Moreover, the principles that provide legal protections for women's colleges to pursue a mission of all-female education apply equally to the legal protections for men's colleges to pursue a mission of all-male education.

10. Higher education statistics clearly indicate that women's institutions have at least as much to gain from these protections. There are 60 women's colleges in the United States, and 4 men's colleges, including Deep Springs College. There are three women's colleges in California (Mills College, Mount St. Mary's College, and Scripps College), and one men's college (Deep Springs College). Nor is there an imbalance of resources or influence in favor of the sole California institution that is all-male. According to each college's website, the all-female undergraduate student body population is as follows: Mills - 941, Mount St. Mary's - 2160, Scripps - 950, for a total of 4051. Deep Springs has an all-male student body of 26. According to the three women's colleges, their living alumnae number nearly 50,000; the living alumni of Deep Springs number in the hundreds. All-female college endowments in California added up to $496 million in FY 2011; all-male college endowments in California (i.e., that of Deep Springs) added up to a few percent of this figure, at $17 million. [3]

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[2] Kay Bailey Hutchison, Barbara Mikulski, Susan Collins, Thomas Carper, and Edward M. Kennedy also co-sponsored the amendment.

[3] Nat. Assn. of College and University Bus. Officers, *U.S. and Canadian Institutions Listed by Fiscal Year 2011 Endowment Market Value and Percentage Change in Endowment Market Value from FY 2010 to FY 2011* (rev. March 19, 2012)

11. Nor is there any demographic imbalance in favor of young men in the undergraduate population as a whole (public or private): in California in 2008, there were **246,113 fewer undergraduate men than women enrolled in college**.[4] This is a striking statistic: the shortfall of male undergraduates is more than the total number of undergraduates that year (male and female) in the entire University of California system (all nine campuses) - *plus* the total number of current undergraduates at the University of Southern California, San Francisco State University, San Diego State University, and Stanford University. This suggests that redistributing undergraduate opportunities from men to women should not be a priority in California. The situation in California mirrors the country as a whole, where women earn markedly more associate's degrees (over 62 percent), bachelor's degrees (over 57 percent), master's degrees (over 60 percent), and doctorates (over 52 percent and rising rapidly). [5] Amidst considerable public concern about what is often called a crisis in the education of boys and young men, it is an odd time to petition the Court to modify a trust to allow Deep Springs to cut the number of young men it educates roughly in half so that it can begin to educate women in their stead.[6] Most pertinently for the *cy près* standard, however, is that an all-male college is unambiguously legal.

B. Deep Springs Continues to Flourish

12. As discussed further below, Petitioner also cannot prove that it is impossible or impracticable for Deep Springs College to continue as a single-sex college. Deep Springs College is thriving, and by any important criterion is doing better than at most times in its 95-year history. Its finances are better than at many times throughout its history, it is attracting

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<http://www.nacubo.org/Documents/research/2011NCSEPublicTablesEndowmentMarketValues319.pdf>. Mills $183,397,000; Mount St. Mary's $45,932,000; Scripps $266,869,000); Deep Springs College, Annual Report for 2011, p. 11.

[4] Custom Data Report, *Private and Public Undergraduate Enrollment in California Aggregated by Gender in 2008* (2012) California Postsecondary Education Commission. Note: The most recent complete year in the data set was 2008. The 2010 data set excluded private institutions. For a copy of Respondents' Custom Data Report generated on May 6, 2012, see Exhibit M.

[5] U.S. Dept. of Ed., Nat'l Ctr. for Ed. Statistics, *The Condition of Education 2008-2009,* (NCES 2011-033), Indicator 26 (2011), http://nces.ed.gov/fastfacts/display.asp?id=72.

[6] For a recent contribution to the extensive literature on this situation, see Robert B. Smith, *Saving the 'Lost Boys' of Higher Education*, The Chronicle of Higher Education, Oct. 2, 2011, at http://chronicle.com/article/Saving-the-Lost-Boys-of/129243/.

outstanding students and faculty, the students successfully transfer to other prestigious colleges and universities, and its reputation in academia is outstanding.

13. As suggested by the Trustees' lack of consideration of the legalities of their decision until the very date of their vote, and the preceding months of debate about the general merits of coeducation, the Trustees' decision was not driven by the legally necessary determination that it was impossible or impracticable for Deep Springs College to continue as it has existed for 95 years, but rather by their personal preferences (however well-intentioned) that Deep Springs College not remain a single-sex institution. The Petition is an after-the-fact attempt to justify legally a decision the Trustees made for legally irrelevant reasons. The Trustees never determined that it was impossible or impracticable for Deep Springs to continue as a single-sex institution: the question was never posed that way, that issue was never discussed, and the Trustees never voted on that question.

14. There is no existential crisis threatening Deep Springs College. The Trustees did not recognize and debate dire circumstances. Rather, they decided they wanted to change the purpose, and are now trying to contrive facts and arguments to meet a legal standard of which they were ignorant. They assumed that, having decided that Deep Springs College would be better if it were coed, court approval would be one of the steps of implementation. But the *cy près* standard is not a mere technicality, and Petitioner cannot meet it in this case. It is not impossible or impracticable for Deep Springs to continue as a single-sex institution. The Court must deny the Petition.

II. HOW THE COEDUCATION VOTE CAME ABOUT

A. The Coeducation Debate Was A Matter of Preference

15. Petitioner, as Chair of the Board, sent a letter to all alumni and friends of Deep Springs on March 28, 2011, in which he outlined the rationale for taking up the question of coeducation. A true and correct copy of this Letter from Petitioner, dated March 28, 2011, is attached hereto as Exhibit B and incorporated herein by this reference.

16. Petitioner there listed notable signs of the health and well-being of the college, and wrote:

> In light of this progress, and as part of our on-going strategic planning process, the board has decided to spend the next 6 months deliberating on whether or not Deep Springs should become coeducational. At the next board meeting, in September, we will vote on whether to begin planning for a transition.

(Ex. B at p. 1). There is no indication in this letter or in any other communications from Deep Springs or from the Board at this time that Deep Springs is facing a crisis, that a new interpretation of the Trust language or historical circumstances has come to light, or that there are concerns that the purpose is substantially impaired. On the contrary, Petitioner presented the issue of coeducation as one that could be addressed precisely because the college is thriving. In this letter, Petitioner also signals the central issue to be considered by the Board, namely "the advantages and disadvantages of coeducation, as well as the advantages and disadvantages of being all male." (*Ibid.*) This letter contains not a single reference to the Deed of Trust or the purpose of the institution as there laid out. The subsequent discussions were duly framed in these terms of comparative advantage, with Trustees encouraged to plot out their thoughts according to a two-by-two matrix (advantages and disadvantages of continuing with an all-male student body vs. advantages and disadvantages of changing to a coeducational student body).

17. At the end of August 2011, after intervening discussions about the general merits of coeducation, the social implications of gender relations, and other matters irrelevant to the language of the Deed of Trust and the applicable legal requirements, the Board conducted a straw poll of its members on the issue of coeducation. The numerical results of this straw poll were closely mirrored the following month when the Trustees voted to admit women as students of Deep Springs.

18. On September 16, 2011, the Trustees had a meeting devoted to the question of coeducation, and began the meeting with position statements by each of the Trustees in turn. A true and correct copy of the relevant pages of the September 16, 2011 Minutes are attached hereto as Exhibit C incorporated herein by this reference.

19. Respondent Trustees stated that they were opposed to voting for the change to coeducation. The remaining Trustees stated a wide range of reasons for supporting a move to coeducation, almost all of which were entirely irrelevant to the legal standard. These included:

(1) that the societal default is to include both genders, and given that Trustee's lack of strong feeling either way the default position should be preferred; (2) that other small academic environments were successfully coeducational; (3) that "activist trusteeship" on this issue would improve the institution; (4) that Deep Springs needs to prepare students for leadership in a mixed-sex world; (5) that young women would benefit from the unique educational experience that Deep Springs could offer them; (6) that a coeducational Deep Springs would be a better Deep Springs, as women would contribute something distinctive; (7) that the Trustees should strive for "an ideal Deep Springs different from the one described in the Deed of Trust"; (8) that "a coed Deep Springs would be a better and stronger institution"; (9) that the arguments against coeducation are not compelling; and (10) that the "life in harmony with the creator" spoken of in the Deed includes women. (*See* Ex. C at pp. 1-6.)

20. As noted above, on September 17, 2011, the Trustees were informed for the first time about the (alleged) legal requirements for changing Deep Springs College to a coeducational college, and proceeded to vote to do so.

B. Changing A Trust's Purpose Must Be Necessary

21. The process described above is not what one would expect from the board of a charitable trust contemplating having to change its purpose. The expected process would be driven by the *cy près* standard. Because the *cy près* standard requires that the trustor's stated purpose be impossible or impracticable to fulfill, the expected first step of the process would be a general recognition by the Trustees of a dire situation. Specifically, in the case of a college, one would expect a general recognition that the college was clearly failing or in present danger of ceasing to exist, whether due to lack of funds, lack of student applicants, or some other catastrophe. Second, one would expect the Trustees to discuss thoroughly the dire situation. Third, one would expect the Trustees to try to determine the causes of the dire situation. Fourth, one would expect the Trustees to discuss thoroughly possible actions to fix the dire situation while remaining true to the stated purpose of the Trust. Fifth, one would expect the Trustees to attempt solutions consistent with the purpose of the Trust. Sixth, and only if other actions failed and there was no other possibility, would one expect the Trustees to explore and attempt solutions

inconsistent with but as close as possible to the purpose of the Trust.

22. The Trustees of Deep Springs did none of these things. As described, the Trustees began with the conclusion that they wanted to change the Trust's purpose because they believe coeducation is better, and are now working backwards. But their effort fails because, as Petitioner himself has joined many others in emphasizing, Deep Springs College is flourishing, and Petitioner cannot show as a matter of fact that it is impossible or impracticable for Deep Springs to continue as an all-male college.

23. Perhaps recognizing the futility of making this showing, Petitioner contends that the language of the Trust should be interpreted in a novel way that contradicts 95 years of Deep Springs College history as a single-sex college. Specifically, Petitioner contends that when L. L. Nunn stipulated in the Trust that it was "**solely** for the advancement of the purpose hereinabove mentioned", and the "purpose hereinabove mentioned" was the purpose of educating "**promising young men**", he really meant "promising young men **and women**."

24. According to California law, the Trustees have a fiduciary obligation to administer the Trust in accordance with the terms of the instrument. (Cal. Prob. Code § 16000.)

25. Trustees faced with a new interpretation of the language of the Trust in tension with the practice of the institution for 95 years would presumably discuss the language at length and in detail, consulting experts who might shed light on how best to read a historic document if there were ambiguity. The Trustees did not do this before voting, because the language of the Deed is clear and unambiguous. The Trustees did not converge on the implausible interpretation of the Trust until it emerged as a way to bring about their preference for coeducation.

26. The relevant issue is neither whether the Trustees believe single-sex education is inferior generally, nor whether the Trustees believe the specific Deep Springs College experience might be enhanced by the presence of women in the Student Body. In other words, the relevant issue is not the preference of the Trustees; it is the intent of the grantor, L. L. Nunn, as clearly set forth in the Deed of Trust. The Trustees have a fiduciary duty to carry out that intent, without regard to their personal preferences. If the Trustees wish to have a coeducational college similar to Deep Springs, they are free to donate or raise the funds to create one according to their own

vision. But in their role as Trustees, as a matter of law they cannot treat the assets of the Trust as assets they may dispose howsoever they choose, nor can they set aside terms and conditions of the Trust by virtue of which they are Trustees.

III. DEEP SPRINGS COLLEGE SUMMARY

27. Deep Springs College is an all-male liberal arts college located on a cattle ranch and alfalfa farm in an isolated valley in California's high desert. Electrical pioneer L. L. Nunn founded the school in 1917 on what are now known as the "three pillars" of academics, labor, and self-governance in order to help young men prepare for lives of service to humanity. The school's approximately 26 students, along with its staff and faculty, form a close community engaged in this intense project.

28. Deep Springs operates on the belief that meaningful labor, political deliberation and self-governance, and a liberal arts education can prepare young men for a life of service, broadly conceived. Each student attends the college for two years and receives a full scholarship valued at over $50,000 per year. Most complete their degrees at the world's most prestigious four-year institutions.

29. Deep Springs College is essentially alone in Deep Springs Valley, a geological depression between the White and Inyo mountain ranges in California. The nearest sizable town is Bishop (pop. 3879), an hour by car over Westgard Pass to the west. The college's physical isolation plays a central role in the educational experience. Each year, the student body discusses the "isolation policy" and determines how to apply it. In general, students neither leave the valley nor allow personal visitors during school terms. Some years, the students even forbid themselves the use of social media or non-academic internet browsing in order to comply with their understanding of this isolation policy.

30. As part of their education, the student body is given an unusual degree of responsibility for and authority over the operations and policies of the college. Deep Springs students also spend at least 20 hours per week in manual labor on the ranch, including milking cows, irrigating fields, and feeding livestock. Together, these features marked out Deep Springs

as a radical alternative to mainstream higher education at the time of its founding; together, these features still make Deep Springs a radical alternative to that mainstream.

31. It is sometimes thought that while the other features were unconventional, the all-male student body was at the time wholly mainstream. This view is based on a misunderstanding of the relevant history, as will be shown more fully below. A letter in the college's first year of operation from a member of its first class of students demonstrates that the all-male student body was understood to be distinctive at Deep Springs itself. A true and correct copy of this Letter from Herb Reich, dated December 22, 1917, is attached hereto as Exhibit D and incorporated herein by this reference. "It differs from conventional schools in a number of important respects" writes Herb Reich. He lists seven respects, including the admissions process, the full scholarship for all students, the labor program, the academic program, the isolation policy, the small size - and the all-male student body. "Only male students are admitted": in Reich's list, this is the second important respect in which Deep Springs differs from conventional schools. (Ex. D.)

32. During his lifetime, every educational institution that L. L. Nunn established educated only young men. Yet, only this Deed of Trust specifically limits the student body to men. For example, Mr. Nunn founded the Telluride Association in 1911 as a self-governing umbrella organization for further educational initiatives, but he did not mention gender in the Association constitution or in any of the constitutions of the Telluride Association Branches. So while we can only speculate as to Mr. Nunn's motivation in choosing to include that specific limitation in the Deed of Trust, his decision to do so was calculated and intentional, and established rules of construction do not permit either the Trustees or the Court to ignore that specific limitation.

IV. BACKGROUND: DEED OF TRUST

33. L. L. Nunn made his fortune as an electrical engineering pioneer bringing long-distance alternating current to the American West. He was also a lawyer, having set up a legal practice after informal study at Harvard Law School and the universities of Gottingen and Leipzig. Above all, he was a visionary educator. In 1917, Mr. Nunn founded his last educational institution, now Deep Springs College, in Deep Springs Valley, Inyo County, California. Over

the course of the last 40 years of his life, Mr. Nunn developed and fine-tuned an experimental educational philosophy through trial and error. Almost all of his educational institutions failed. In his mind, Deep Springs was his last and best chance at success.

34. Although starting with institutes directly tied to his commercial ventures, Mr. Nunn eventually decided to divorce his commercial exploits from his philanthropic interests. In a legal battle to secure tax exempt status for the Telluride Association and its residential house at Cornell University in Ithaca, New York, Mr. Nunn learned that the purposes of his educational organizations must be exclusively charitable and not for pecuniary interest in order to obtain tax exempt status. (See *People ex rel. Walcott v. Parker* (1914) 146 N.Y.S. 753 [action by Sidney S. Walcott, as president of the Telluride Assoc. ("T.A."), against the Tompkins Cty. Treasurer to vacate and set aside an assessment on the property of the association in the city of Ithaca for the years 1910 and 1912 on the basis that T.A. was tax exempt].)

A. L. L. Nunn's Last Will and Testament (March 31, 1922)

35. On March 31, 1922, L. L. Nunn executed his Last Will and Testament ("Will"). A true and correct copy of the Last Will and Testament, dated March 31, 1922 is attached hereto as Exhibit E incorporated herein by this reference. The Will created a trust for the residue of his estate that would be applied by the named trustees "for the uses and purposes, and with the powers and duties, hereinafter stated to-wit:"

> 5. (a) Within ten years from the date of my death said trustees shall cause an educational corporation to be organized in such manner and form as they may deem most suitable and proper (*but in this connection I beg them to give thought and respect so far as their best judgment will enable them so to do to my views as set forth in many letters, statements, and documents to be found in my files*), **for the purpose of conducting educational work in the State of California in continuation of the work now being carried on by me at Deep Springs, for the education of such promising young men as may be selected by said educational corporation, or in such manner as may be prescribed in the instruments creating the same, along lines emphasizing the needs and opportunities in our country for public service, in which educational work democratic self-government by the students themselves, as is now the rule at Deep Springs, shall be a feature, and which said corporation shall be organized and shall carry on its work not for private gain, but purely for the advancement of the purposes mentioned,** but which corporation shall be organized with power to receive and hold other property to be used in carrying on its work, both by deed and by will; and, upon the organization of said corporation, said trustees or their successors in trust shall turn over to said corporation all of the property then held by them in trust under the provisions

hereof.

(Ex. E at pp. 1-2, ¶ 5(a) [emphases added].)

36. The above paragraph of the March 31, 1922 Will shows that L. L. Nunn initially intended to devise and bequeath all of his residuary estate (including the property subject to the later Deeds of Trust) through his will to the Trustees of Deep Springs. The language above provided the purpose for which the property was to be used, set the terms and conditions for the Trustees, and required that within ten years from his death said Trustees were to form a corporation for the purpose of carrying on the educational work Mr. Nunn had already begun at Deep Springs.

B. Deeds of Trust (May 15 and November 5, 1923)

37. On May 15, 1923, L. L. Nunn executed the first Deed of Trust that transferred what is now the L. L. Nunn Trust Estate to the Trustees. A true and correct copy of the May 15th Deed of Trust is attached hereto as Exhibit F and is incorporated herein by this reference. However, so that he and the trustees could make necessary amendments, L. L. Nunn did not record the May 15th document. Before November 5, 1923, the Trustees of Deep Springs met officially three times: May 15, 1923; June 25-26, 1923; and in October 1923. According to the minutes of these meetings, some changes were made to the language of the trust.

38. On November 5, 1923, L. L. Nunn executed and recorded the Deed of Trust at issue.

C. First Codicil to the Will (November 5, 1923)

39. Also on November 5, 1923, Mr. Nunn republished his Last Will and Testament with his First Codicil. A true and correct copy of the First Codicil, dated November 5, 1923 is attached as Exhibit G and is incorporated herein by this reference. ("First Codicil"). The First Codicil changed paragraph five of the Will (the extracted language above) so that it would incorporate by reference the May 15, 1923 and November 5, 1923 Deeds of Trust and subject Mr. Nunn's residuary estate to the terms and conditions found in both of the Deeds. Therefore, Mr. Nunn (1) revoked the requirement to form the corporation; (2) amended the limiting language

from "purely" to "solely"; (3) more greatly elaborated the restrictions on the Trustees' discretion in their management of the Trust; (4) isolated and placed the trust purpose in its own paragraph so that references to it later in the document would be clear and unambiguous; and (5) changed the purpose of the Trust from:

> for the purpose of conducting educational work in the State of California in continuation of the work now being carried on by me at Deep Springs, for the education of such promising young men as may be selected by said educational corporation, or in such manner as may be prescribed in the instruments creating the same, along lines emphasizing the needs and opportunities in our country for public service, in which educational work democratic self-government by the students themselves, as is now the rule at Deep Springs, shall be a feature, and which said corporation shall be organized and shall carry on its work not for private gain, but purely for the advancement of the purposes mentioned.

(Ex. E at pp. 1-2, ¶ 5(a).)

to

> **1. The purpose** for which the property hereby conveyed and the rents, income, profits, and proceeds thereof, shall be used by said Trustees **is to provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by Grantor at Deep Springs** in Inyo County, California, but in such manner and form and at such place or places within said State as said Trustees in good conscience and the exercise of their best judgment may determine, **for the education of promising young men**, selected by said Trustees or as they may prescribe, in a manner emphasizing the need and opportunity for **unselfish service** in uplifting mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self-government by the students themselves shall be a feature as is now the case at said Deep Springs and **which work shall be carried on** not for profit but **solely for the advancement of the purpose hereinabove mentioned**.

(Ex. A at p. 4, ¶ 1. [emphases added].)

40. It is understandable that L. L. Nunn elaborated where he felt it was necessary, and did not where he felt that the words spoke for themselves. That there is no elaboration of the restriction to educating only "promising young men" suggests nothing other than that Mr. Nunn—a lawyer himself and familiar with canons of interpretation—held this restriction to be clear and unambiguous.

41. Clearly, the reason he expands on student self-government is because student self-government as Mr. Nunn radically conceived of it would not be self-evident decades later. In the early years of Deep Springs College, the ongoing disputes about the meaning of student self-

government demonstrate that it was subject to competing interpretations. As described above, the Deep Springs Student Body possesses a uniquely significant amount of power over themselves as a body. If Mr. Nunn had not elaborated on his conception, the robust version of self-government practiced today may never have been realized.

D. Second Codicil (October 1, 1924)

42. On October 1, 1924, nearly a year after L. L. Nunn recorded the Deed of Trust, he executed his Second and Final Codicil to his Last Will and Testament. A true and correct copy of the Second Codicil, dated October 1, 1924 is attached as Exhibit H and incorporated herein by this reference. Approaching death yet keen to provide as much money as possible for the Deep Springs endowment, Mr. Nunn actively invested in development projects. Some of these investments did well and his estate grew enough that Mr. Nunn needed to reallocate money to his family members, his friends, and Deep Springs. (*Compare* Ex. E at p. 1, ¶ 4 *with* Ex. H at pp. 5-7, Art. II-III, ¶ 4-6.) Mr. Nunn also incorporated the May 15th and November 5th Deeds of Trust into his Will in Article V of his Second Codicil. (Ex. H at pp. 7-11, Art. V.)

43. At the time, there was a mortmain statute in place in California (Cal. Civ. Code § 1313 (1919)) that restricted a devise to a charitable organization to no greater than one-third of a decedent's estate unless that devise was executed by a person with no children, parents, or spouse at least six months before that person's death. Therefore, being childless, parentless, and a lifelong bachelor, if Nunn could live at least six months after October 1, 1924 (i.e., until April 1, 1925), he could leave as large an endowment as possible to Deep Springs from his estate.

44. L. L. Nunn so strongly wanted to endow the college he had set up in his Deed of Trust with as much money as possible that he fought to stay alive in order that the mortmain statute not apply to his estate. Frank Noon, an original trustee, was at Mr. Nunn's death bed and a January 14, 1960 letter from Noon recalls:

> Here is the story. In 1923, Mr. Nunn executed the Deep Springs Deed of Trust. Because of some legal questions raised by his attorney it seemed necessary to execute a codicil to his Will on October 1, 1924. The laws of California nullify charitable bequests made within six months of the death of the testator. About ten years earlier he had contracted tuberculosis and when the codicil was executed on

> October 1, 1924, he had been living on sheer nerve for years.
>
> During the spring of 1925 my family was away and I lived at Mr. Nunn's house. I returned from some engagement on the night of March 31, 1925 and as usual went to Mr. Nunn's room for a visit. Just after midnight he looked at his watch and said, "Do you know what day this is?" I said, "it is now April 1st." He then said, "I am greatly relieved - the six months are up."
>
> On April 2nd, Mr. Nunn asked nurses to help him out of bed, and he sat on a couch for a time. He was so weak that I urged him to go back to bed. He nodded his head in agreement and with help walked across the room to his bed. In a few moments he was gone.
>
> The purpose for which he was living was accomplished. Certainly the therapy of purpose kept him alive.

(Frank Noon, *Letter to F. A. Harper* (Jan. 14, 1960).) A true and correct copy of this Letter from Noon is attached hereto as Exhibit I and incorporated herein by this reference.

45. L. L. Nunn was dying a long and miserable death from tuberculosis. His autopsy report shows that he had use of less than one lung by the time he died. According to an unpublished account by Frank Noon, in the final six months of his life, L. L. Nunn consumed an entire tank of oxygen each day even though he was bedridden, and at one point fell into a coma for two weeks. That he was able to will himself to live to April 1, 1925 in order to give Deep Springs the best opportunity for survival in accordance with his legal specifications shows his remarkable dedication to the principles of the enterprise he had taken such pains to establish.

46. After L. L. Nunn's death in 1925, his brother P. N. Nunn and close associates moved quickly to destroy L. L. Nunn's papers (likely consisting of several thousand files). There was a second purging by Frank Noon of L. L. Nunn's remaining papers at the college. Due to these massive culls any available articulation for *why* Mr. Nunn wanted to educate only "promising young men" was likely destroyed. Consequently, any attempt almost a century later to invest dispositive meaning to the few remaining extrinsic documents must be viewed with a healthy dose of skepticism.

47. There is a strong public policy in favor of encouraging private charitable giving, and courts have long recognized that strictly enforcing donor restrictions, unless impossible or impracticable to fulfill, furthers that strong public policy:

> These eleemosynary institutions do not fill the place, which would otherwise

> be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind, to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution[.]

(*Trs. of Dartmouth Coll. v. Woodward* (1819) 17 U.S. 518, 647 [Marshall, J.].)

> In addition to the general public interest, however, there is the interest of donors who have directed that their contributions be used for certain charitable purposes. Although the public in general may benefit from any number of charitable purposes, charitable contributions must be used only for the purposes for which they were received in trust.

(*L.B. Research and Educ. Found. v. UCLA Found.* (2005) 130 Cal.App.4th 171, 181.)

48. L. L. Nunn devoted himself and his fortune, and even suffered an extended period of physical agony, in order that the charitable purpose he conceived would have the best chance to endure in accordance with his directions. Moreover, subsequent generations of benefactors have given generously to an institution that they believed was and would be guided by the purpose Mr. Nunn set down in the Deed of Trust. The public policy of California mandates that the purpose he declared in the Deed of Trust be respected and enforced.

V. THE PURPOSE OF THE L. L. NUNN TRUST IS TO EDUCATE PROMISING YOUNG MEN FOR LIVES OF SERVICE.

49. L. L. Nunn's intent and purpose can be determined from the plain language he actually used in the Deed of Trust. If the Court can determine Mr. Nunn's intent from words actually used in the Deed of Trust, the "inquiry has ended," and it is unnecessary to consult extrinsic evidence. (*Estate of Simoncini* (1991) 229 Cal.App.3d 881, 889.) By removing only the boilerplate language that is common to charitable trust conveyances, numbered Paragraph One (the "Purpose Statement") of the Deed of Trust reads as follows:

> The purpose . . . is to provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by Grantor at Deep Springs . . . , **for the education of promising young men,** . . . in a manner emphasizing the need and opportunity for **unselfish service** in uplifting

> mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self-government by the students themselves shall be a feature as is now the case at said Deep Springs and which work shall be carried on . . . **solely for the advancement of the purpose hereinabove mentioned**.

(Ex. A at p. 4, ¶ 1 [emphases added].)

50. For more than 88 years since 1923, the Trustees of Deep Springs have consistently interpreted the clause "for the education of promising young men" as a clear direction to educate only young men.

51. Indeed, the most recent Institutional Self Study Report in Support of Reaffirmation of Accreditation (hereinafter "2010 Self Study")—(which **Petitioner signed** in December 2010, certifying that he "believe[d] the Self Study Report accurately reflects the nature and substance" of Deep Springs College)—clearly states "**L. L. Nunn, the founder of Deep Springs, directly stated the purpose of the college: to prepare young men for lives of service to humanity**." (Deep Springs College, *The 2010 Institutional Self Study Report in Support of Reaffirmation of Accreditation* at p. 66 [emphasis added].) A true and correct copy of the 2010 Self Study is attached hereto as Exhibit J and incorporated herein by this reference.

52. In the recitals of the November 5th Deed of Trust, L. L. Nunn clearly describes his intent to provide for and perpetuate "educational work for the education and development of promising young men." (Ex. A at p. 1 [Recitals].) This descriptive language of Mr. Nunn's intent is put into force when it is restated in the prescriptive Purpose Statement in paragraph one. Furthermore, the Deed of Trust refers back to this Purpose Statement **six** times when delimiting the duties and powers of the Trustees. (Ex. A at p. 4 ¶ 1 and pp. 4-6, ¶¶ 2(b), 2(c), 2(d), 2(f), 2(g).) These references reinforce the Purpose Statement's explicit limitation of the Trustees' discretion to actions which shall be "solely for the advancement of the purpose hereinabove mentioned." (Ex. A at p. 4, ¶ 1.) Mr. Nunn's intent is both clear and emphatic. An integral part of the purpose for which L. L. Nunn conveyed the real and personal property to the Trustees of Deep Springs was "for the education of promising young men." (*Ibid.*)

53. L. L. Nunn was a sophisticated entrepreneur and lawyer. The choices he made in the legal language he used were deliberate. The year that he founded Deep Springs, he

demonstrated a firm grasp of the role of a trust's language in limiting the actions of trustees: "Honesty in trustees requires that the trusteed property be protected against destruction. This includes the declared purpose, character and traditions, as well as the money." (L. L. Nunn, *Letter to Oliver Clark, President of T.A., Ithaca Branch* (March 20, 1917) at p. 3.) A true and correct copy of this Letter from L. L. Nunn is attached hereto as Exhibit K and incorporated herein by this reference.

54. In light of L. L. Nunn's obvious understanding that the language he chose to use in the Deed of Trust would govern, it is a highly dubious enterprise to suggest that extrinsic documents should be used to interpret the Deed of Trust. Petitioner places great weight on "The Purpose," which was written more than a year after the November 5th Deed of Trust was executed and recorded. "The Purpose" is not a legal document. As a result, it cannot bear the weight of (and should not be subject to the same criteria of scrutiny as) a document that the grantor intended to be legally binding.

55. While the Deed of Trust is a legal conveyance in which Mr. Nunn sets the terms and conditions placed upon the Trustees, "The Purpose" is a letter to the Student Body. A true and correct copy of the document referred to by the Petitioner as "The Purpose" is attached hereto as Exhibit L and incorporated herein by this reference. In addressing the students, Mr. Nunn's language is generally hortatory, and he articulates lofty ideals to which the students should aspire. This is exemplified by the tone of "The Purpose." He is telling them that they are the chosen few. (Ex. L at p. 37.) This is meant to motivate action and introspection on the part of the Student Body. The rhetorical register of the Deed of Trust is strikingly different. Mr. Nunn was educated in the law, practiced law, and engaged in extensive commercial litigation. The Deed of Trust is accordingly precise, and attentive to ensuring that the Trustees are bound by law to accomplish the purpose of the trust as therein defined. By contrast, the Trustees and courts were not the intended audience of the letter, and it was not meant to have legal effect. Therefore, Respondents question its relevance for elucidating the context in which L. L. Nunn composed and executed the Deed of Trust. If the Court deems it relevant, this document should instead be understood as an informal reflection supplementary to the legally binding statement of purpose that is definitive.

56. Even if the Court deems the language in "The Purpose" relevant, it serves only to underline L. L. Nunn's clear intention to educate promising young men as expressed in the Deed of Trust, for he says in the later document that "[t]he purpose of Deep Springs is . . . to create an environment where *young men* . . . may . . . build the character for full employment in the service of their fellowmen." (Ex. L at p. 37 [emphasis added].) Mr. Nunn immediately goes on to describe this "environment" as consisting of: "[a]n intimate association with a small group of *young men* which have declared themselves ready to accept the purpose of Deep Springs. . . ." (*Ibid.* [emphasis added].) As in the Deed of Trust, Mr. Nunn makes clear in "The Purpose" that the purpose of Deep Springs is to educate young men.

57. L. L. Nunn was adamant that the Trustees remain loyal to the purpose and foundational principles of Deep Springs as found in the language of the Deed of Trust:

> [T]he fundamental principles practiced at the institution are those which I wish to perpetuate. I shall keep driving home to you gentlemen, even if it takes my dying breath, that the purpose of Deep Springs is the education of promising young men in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator.

(L. L. Nunn, *Letter to the Trustees of Deep Springs College* (1924) [quoted in Stephen A. Bailey, L. L. Nunn: A Memoir (1933) at p. 154].)

VI. L. L. NUNN INTENDED THE WORD "MEN" IN "PROMISING YOUNG MEN" TO REFER TO MEN AND NOT WOMEN OR MANKIND.

58. The Trustees do not have the authority to implement coeducation. Petitioner (on behalf of the non-dissenting Trustees) relies on specious and fanciful reasoning to interpret the Deed of Trust to justify their vote to admit women.

59. If L. L. Nunn had intended to allow Deep Springs College to admit anyone other than "promising young men", he easily could have done so by not including that phrase. He could have specified "promising young men and women." If he had not been a lawyer, he might have (more vaguely) simply referred to "promising young students," and by that ambiguity perhaps made the issue a closer call. But he did not actually use any of those phraseologies; he actually specified "promising young men."

60. That Mr. Nunn's use of this specific phrase was intended to mean precisely what it says is confirmed by the beginning of the Deed of Trust, which states that "The purpose … is to provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by Grantor at Deep Springs." It is undisputed that the "work already inaugurated by Grantor at Deep Springs" solely involved educating young men, which is why Nunn described that "work already inaugurated" in the Recitals to the Deed of Trust as "educational work for the education and development of promising young men." Petitioner admits that "[t]here is no question that L. L. Nunn intended the Deep Springs College student body to be all-male when he founded the college in 1917." (Petn. at p. 6, ¶ 12).

61. Petitioner contends that "promising young men" really means "promising young men and women." Petitioner has no evidence to support this interpretation, and 95 years of single-sex education at Deep Springs contradict it. Petitioner ignores this and instead places supreme weight on the contention that "men" can mean "mankind," and thus includes women, and in conclusion, L. L. Nunn must have meant "women" when he specified "men"! To state this argument is to rebut it.

62. In neither 1923 nor 1927 was the word "men" generally used to mean "men and women" or "mankind." Unremarkably, "man" could be used in a gender-neutral way then as it sometimes is now, but any competent user of the English language should be able to distinguish which is which by the context surrounding the usage of the word.

63. Furthermore, there is no clear evidence that L. L. Nunn intended to use "men" in any sense other than to give it its ordinary and grammatical meaning. (Cal. Prob. Code § 21122.) In the particular context of the Deed of Trust that L. L. Nunn executed in 1923, interpreting "men" as meaning "men and women" or "mankind" when there is no clear evidence that L. L. Nunn intended to use "men" in that sense would violate fundamental rules of construction set forth in the Probate Code.

VII. THE TRUST DEED DOES NOT GIVE THE TRUSTEES AUTHORITY TO ADMIT WOMEN INTO THE DEEP SPRINGS STUDENT BODY.

64. While the language in the Deed of Trust bestows a generous amount of discretion

upon the Trustees, it clearly and unambiguously limits this discretion in several ways.

65. Most pertinently, the Purpose Statement restricts the Trustees to using the trust corpus "solely for the advancement of the purpose" of the Trust, where that purpose is defined in terms of being "for the education of promising young men." (Ex. A at p. 4, ¶ 1.) The limiting term "solely" restricts the Trustees' discretion to actions that advance the purpose "hereinabove mentioned." (*Ibid.*) By using the term "hereinabove", L. L. Nunn is directing the Trustees to the language preceding the conclusion of paragraph one. The purpose for which the Trust was created, in its entirety, is stated in paragraph one and the preceding recitals. By using the term "solely" at the end of the Purpose Statement with reference to what comes before it, "solely" modifies each integral part of the purpose. Therefore, the conveyance shall be used by the Trustees *solely*

> for the education of promising young men . . . in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self-government by the students themselves shall be a feature as is now the case at said Deep Springs[.]

(*Ibid.*)

66. Secondly, while the Deed does grant the Trustees discretion to act in accordance with their good conscience and exercise of their best judgment, the grant of authority in paragraphs 2(a)-2(g) is **repeatedly conditioned** on the Trustees' actions accomplishing the purpose of the trust. (Ex. A at pp. 4-6, ¶¶ 2(a)-2(g).)

67. Thirdly, paragraph 2(b) prohibits turning over the corpus "for use otherwise than the accomplishment of the purpose of this trust." As the Deed of Trust consistently limits the grants of authority and discretion with a reference back to the Purpose Statement, it follows that the Trustees must act in accordance with the Purpose of the Trust.

68. Petitioner contends that Paragraph 2(b) of the Deed of Trust permits the Trustees to transfer the Trust estate to a coeducational institution, and that therefore the Trustees would also have the authority to implement coeducation at Deep Springs College. (Petn. at p. 8, ¶16.) Petitioner is incorrect. Paragraph 2(b) provides the Trustees with authority to "transfer or turn over . . . all of the trust estate held hereunder to [a] like organization devoted to the cause of

education[.]" The language of the Trust limits this grant of authority to transfer the estate. The power of transfer is given to the trustees "[i]n order to enable them to accomplish the purpose of this trust." (Ex. A at p. 4, ¶ 2.) This specific power may only be exercised when doing so will in the judgment of said Trustees "best maintain and carry out the purpose herein set forth, provided that under no circumstances shall any of the trust estate be so transferred or turned over . . . for use otherwise than in the accomplishment of the purpose of this trust[.]" (*Id.* at p. 4, ¶ 2(b).) Again, as that purpose is limited to educating promising young men, the Trustees do not have the power to transfer the trust estate to a coeducational institution.

69. As a result of these careful limitations of the Trustees' power, authority, and discretion, if the Trustees wish to change the purpose of the Trust by admitting women, they must meet the *cy près* standard and request that the court grant *cy près* relief in order to transfer the trust estate to a coeducational institution or to modify the Trust purpose to admit women.

70. Since the intention of L. L. Nunn is the most important element in the determination of the rights of the Trustees, and Mr. Nunn's clear intention was to educate promising young men only, the Trustees exceeded their discretion in voting to admit women.

VIII. L. L. NUNN KNEW HOW TO GRANT UNFETTERED AUTHORITY TO TRUSTEES YET TOOK CARE NOT TO DO SO WITH THE TRUSTEES OF DEEP SPRINGS

71. The Second Codicil to his Last Will and Testament altered L. L. Nunn's personal bequests to many of his family members and friends. Most interestingly, he created several small trust funds for the education of the children of his siblings and his friends. In each of these small trusts, he gave the trustee absolute and unfettered discretion in executing the trust. For example:

> 4.(r) To Harold R. Waldo, now of Salt Lake City, Utah, the sum of Five Thousand Dollars ($5,000.00) to be held in trust by him and expended in the education of his children, *in such manner as he may deem fitting and proper.* **Any portion of such sum not expended for such purpose may be used and applied in such manner as said Trustee may, in his absolute discretion, determine.** Said trust shall terminate on the death of said Trustee whereupon the trust estate shall immediately vest in and pass to the wife of said Harold R. Waldo if she shall survive him, otherwise to the surviving children of said Harold R. Waldo in equal shares[.]

(Ex. H at p. 5, ¶ 4(r).)

72. Also interesting are the two trusts in subparagraphs (s) and (t) of Nunn's Second Codicil, which contain very similar grants of total and complete discretion to the trustee of those personal trusts during the life of the trusts, and also create contingent remainders for the Trustees of Deep Springs. The language creating these remainders states that upon termination of those trusts, any money remaining is immediately vested in the Trustees of Deep Springs and is

> to be held in trust, however, and used and disposed of by said persons and their successors appointed in accordance with the provisions of said conveyance dated November 5th, 1923, or by said organization, **for the same purpose, with the same powers, and upon the same terms and conditions as are set forth in said conveyance dated November 5th, 1923,** for the government of the holding, use and disposition of the property therein described, to which conveyance reference is hereby made for a more particular statement thereof.

(Ex. H at p. 6, ¶ 4(s).)

73. The Second Codicil unequivocally demonstrates that L. L. Nunn knew how to provide a trustee with unlimited discretion, and that he did so immediately before limiting the Trustees of Deep Springs' use of the remainders to the same purpose, with the same powers, and under the terms and conditions found in the May 15, 1923 and November 5, 1923 Deeds of Trust. There is clear juxtaposition of Nunn's provision of absolute discretion for these small private trustees on the one hand, and his provision of the limited discretion available to the Trustees of Deep Springs on the other.

IX. THIS COURT CANNOT MODIFY THE PURPOSE OF A TRUST USING EQUITABLE DEVIATION.

74. Probate Code section 15409 is the statutory codification of the doctrine of equitable deviation. (Rest.3d Trusts § 66, cmt. b.) Under section 15409, a court may modify **administrative** or **dispositive** provisions of the trust, which concern "the powers and duties of the trustees of charitable trusts with respect to the administration of the trust" (Rest.2d Trusts § 381, cmt. a.) or the terms governing the distribution of the trust income or principal to beneficiaries. (*Moxley v.. Title Ins. & Trust Co.* (1946) 27 Cal.2d 457, 466.) In other words, equitable deviation relates to "the methods of accomplishing the purposes of the trust" (Rest.2d Trusts § 381, cmt. a.) or "directing advances of trust income or principal to the beneficiaries."

(Moxley, *supra*, 27 Cal.2d at p. 466.) Consequently, courts apply equitable deviation to modify the manner in which trustees carry out a charitable trust. However, where trustees seek to modify or redefine the settlor's **specific charitable purpose or intent**, as in the present case, a court must analyze such a request under the *cy près* standard.

X. PETITIONER FAILS TO MEET REQUISITE STANDARD FOR *CY PRÈS* RELIEF

75. The common law doctrine of *cy près* is a rule for the construction of charitable trust instruments in equity that is not to be applied to a charitable trust unless it is **impossible or impracticable** to carry out the specific charitable purpose or purposes of the creator of the trust. (See *Estate of Klinkner* (1978) 85 Cal.App.3d 942, 951.) An essential ingredient of the *cy près* doctrine is the requirement that the impossibility or impracticability of fulfillment of the specific charitable purpose of the trust be **permanent**. (See *Estate of Mabury* (1976) 54 Cal. App. 3d 969, 985.) The doctrine remains in effect in California. (Cal. Prob. Code § 15002; see e.g., *Arman v. Bank of America, N.T. & S.A.* (1999) 74 Cal.App.4th 697, 703.)

76. Petitioner is requesting that the Court modify the charitable purpose of the L. L. Nunn Trust, and this requires application of the *cy près* doctrine rather than equitable deviation under section 15409. Had Petitioner pled properly and requested modification of the purpose of the Trust under *cy près*, this Court could not grant such relief because Petitioner cannot establish that the purpose of the Trust as set forth above is permanently impossible or impracticable to fulfill. Deep Springs College continues to fulfill its fundamental purpose and is flourishing in all relevant respects.

77. There is no suggestion in Petitioner's papers that the purpose of the Trust is illegal. As noted above, single-sex colleges are not only lawful, but public policy supports them.

78. Nor can Petitioner prove that it is impossible or impracticable for Deep Springs College to continue as a single-sex college. An overview of potentially relevant criteria demonstrates this.

A. The Numbers and Quality of Student Applications are Stable and High

79. Petitioner cannot demonstrate that the number or quality of student applications is low, and further cannot demonstrate that such (purely hypothetical) recruitment issues contribute to the permanent impossibility or impracticability of fulfilling the purpose of the Trust.

80. For the last decade, Deep Springs College received, on average, 130-160 applications competing for 12-16 spots.[7] This makes Deep Springs more selective than most Ivy League colleges and universities. Historically, these are high numbers for Deep Springs. Over Deep Springs College's 95 years, there have been years when far fewer than 100 young men applied.

81. In March 2011, David Niedorf, President of the College, stated in his report to the Trustees that "the visiting applicant group was to my eye a strong one." When discussing the class of 2010 that had arrived a few months earlier, Niedorf said:

> The class is a strong one, and has adapted to life at Deep Springs with a dispatch and an evident relish that is a pleasure to see. Their combination of ability and motivation, and the determination so far shown by these students to make their time in the valley significant reassures me that the incredible effort that so many people devote to the project of sustaining Deep Springs is not in vain.

82. Most Deep Springs students go on to attend the best institutions of higher learning in the United States and abroad, such as Harvard, the University of Chicago, Yale, Brown, Columbia, UC Berkeley, and Oxford.[8]

83. Even if the number or quality of applications were low, which Respondents deny, Petitioner cannot demonstrate that any such (hypothetical) problem is due to being single sex and not other causes.

84. Deep Springs has an extremely rigorous application process. According to its Self Study:

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[7] For example, for the class of 2012 there were 164 applications for 13 places; for the class of 2011 there were 157 applications for 12 places; and for the class of 2010 there were 154 applications for 15 places. Note: class years are numbered by the year of entry rather than the projected year of graduation as is the common practice at most U.S. colleges and universities.

[8] "Deep Springers are generally successful in the transfer applications process. In the past 10 years, 16% of students transferred to Harvard, 13% to the University of Chicago, 7% to Yale and 7% to Brown. Other schools frequently attended after Deep Springs include Columbia, Oxford, Berkeley, Cornell and Stanford." (Statistics, Admissions, Deep Springs College Website, http://www.deepsprings.edu/admissions/statistics (03/05/2012).

> Beyond the parameters of all-male enrollment, the application is highly rigorous and includes two stages. In the first stage, applicants are asked to submit three original essays, their high-school transcripts and test scores and teacher recommendations. The subset who make it to the second round must write another four essays, supply a sample of their high-school work and visit the college for several days. This visit gives them an opportunity to observe and participate in the college's operations, including labor and self-governance and to be interviewed by the Applications Committee.

(Ex. J at p. 6.)

85. The Self Study acknowledges "that many of its defining features" including its isolation, the labor program, and rigorous academic and intellectual standards "may not be attractive to all students." (Ex. J at p. 25.) Therefore, if there were a problem of application numbers or quality, there would be a range of candidate reasons other than the single-sex student body. Other possible reasons may explain or contribute to students not applying or not accepting the offer to attend Deep Springs: (1) Deep Springs is only a two-year program that requires re-applying as a transfer student to schools that may have accepted the potential student as a freshman (thus entailing a risk that he may not be accepted as a transfer student), (2) some schools, such as Princeton, do not accept transfer students, (3) there is a potential loss of financial aid from schools that offer full packages only to students who attend as freshmen, (4) its isolated desert location, (5) limited curricular offerings in every field, (6) parental pressure, (7) preference to attend more conventional institutions, (8) certain aspects of self-government and accountability, and (9) the no drug and alcohol policy, to name but a few.[9]

86. In fact, given that there are only four all-male colleges in the United States, and that none of the others has the academic prestige of Deep Springs, it is highly probable that the all-male environment has been decisive in attracting some students to the college.

87. Even if Petitioner could demonstrate that the all-male student body results in a low number or quality of student applications that contributes to the impossibility or impracticability of fulfilling the trust purpose, Petitioner cannot show that less extreme means of increasing the

[9] Application Committee Report (10/2010) - "One of the two applicants who rejected our offer faced parental pressure to attend Yale University immediately out of high school, rather than take the chance that he might not get into Yale as a transfer student. The other applicant felt that he would be better suited to a more conventional college experience."

number or quality of student applications other than petitioning this Court to change the purpose of the Trust document would be unsuccessful.

88. In 2009, when the Applications Committee wanted to boost application numbers, the Communications Committee reported that (1) they would restructure their mailing strategy to target potential students based on their PSAT results (as far more high school students take the PSATs than the SATs or ACTs); (2) they were in the process of rewriting and reformatting the viewbook (the main recruitment brochure), and (3) they were making an effort to reach out to media outlets to increase the school's publicity. These efforts were successful, as the number of applications for the following year increased 37.5 percent.

89. The approved 2011-2012 budget for student recruitment was $8,000. The budget allocated for the reprint of the viewbook or college brochure was $10,500, and the approved budget for minority recruitment was $1,000. These nominal amounts suggest that student recruitment has not been identified as a crisis area requiring unusual efforts and attention.

90. Clearly, student recruitment is not a problem, much less a problem causing it to be impossible or impracticable for Deep Springs to continue as a single-sex college. Even if student recruitment were impaired, Petitioner cannot isolate the single-sex policy as the cause. Moreover, Petitioner cannot demonstrate that less extreme measures than going coed would fail to fix this (hypothetical) problem.

B. Faculty Recruitment is Highly Successful

91. Petitioner cannot show that faculty recruitment is an area of concern, much less a factor contributing to the permanent impossibility or impracticability of carrying out the specific charitable intent of the trustor.

92. According to the 2010 Self-Study, "[o]ver the past several years, Deep Springs has been **extremely successful** in attracting **highly qualified faculty and staff**, in part due to its recent efforts to offer salaries and benefits competitive with other colleges and universities." (Ex. J at p. 22 [emphasis added].)

93. "Deep Springs has been extremely successful in the past several years in hiring and maintaining gifted faculty and staff." (Ex. J at p. 86.)

94. "**The institution has sufficient staff**, with appropriate preparation and experience to provide the administrative services **necessary to support its mission and purpose**." (Ex. J at p. 34 [emphases added].)

95. The College accomplished this success with a faculty recruitment budget similar in size to one that was approved for the 2011-2012 academic year: only $1,000. If faculty recruitment were an issue worthy of changing the purpose of the trust, there would be evidence of more investment to remedy this concern. The Trustees of Deep Springs manifestly believe, on the contrary, that it is warranted to spend for this purpose a quarter of what they spend on raising poultry for eggs.

96. Clearly, Deep Springs College and its Trustees do not actually believe that faculty and staff recruitment over the past few years has contributed to any permanent impossibility or impracticability of fulfilling the purpose of the Trust.

97. However, if faculty recruitment were contributing to the permanent impossibility or impracticability of fulfilling of the purpose of the Trust, it is highly unlikely that this would be due to the single sex mandate in the Deed of Trust. There are numerous reasons having nothing to do with its single-sex student body why Deep Springs could, in theory, have difficulty recruiting certain excellent teachers.

98. For example, (1) as Petitioner admits, all teaching positions at the college are temporary, as the longest term a faculty member can serve is six years; therefore there is no tenure. (2) The isolated location makes academic travel difficult. (3) There is nowhere nearby for school-age children to attend school (Bishop, California, being a full hour away on a route without public transportation), so it is hard to attract faculty and staff with such children. (4) The college, while special, is tiny. (5) Limited lab facilities, a small library, and few colleagues could be detrimental to research projects and publication productivity. (6) There are significant teaching and administrative loads. These are just a few reasons why certain professors may not consider applying or accepting an offer of employment.

99. Even if Petitioner could demonstrate that Deep Springs being single sex substantially hinders faculty recruitment and therefore contributes to an impossibility or

impracticability of fulfilling the trust purpose, Petitioner cannot show that less extreme means of improving faculty recruitment other than petitioning this Court to change the purpose of the Trust document would be unsuccessful.

100. The 2010 Self Study explains that targeted measures have resulted in remarkably successful faculty recruitment:

> Deep Springs recognizes the need to keep the academic program—the core of the college's program—vibrant. The college seeks to attract highly-qualified faculty who are also a good match for the unique nature of its program. To this end, the President and the Trustees of Deep Springs College have worked to ensure that financial resources are available to attract the most qualified candidates. In addition to this, the college has been more active in recruiting faculty through different searches. These efforts have been successful: Deep Springs's current faculty includes long-term chairs in the Natural and Social Sciences, a one-year appointment in the Humanities and a long-term Dean of the college. **Student evaluations of recent courses taught at Deep Springs indicate that the current academic program is the best in recent memory**.

(Ex. J at p. 24 [emphasis added].)

101. Further, "Deep Springs has also been successful in finding venues (including academic journals and online resources) to advertise open positions and solicit candidates who are both qualified and a good match for the college's program." (Ex. J at p. 22.)

102. In his semi-annual President's Report to the Trustees in October 2010, President David Neidorf noted:

> In the same way, we can acknowledge the success of last year's Curriculum Committee; we have this semester a faculty that is overall unusually strong. Our ability to attract this faculty is based on much more than salary—indeed, faculty members who came to Deep Springs primarily for the money would, almost by definition, be poor choices for us. But respectable compensation remains a necessary condition of academic quality, and having been able to implement the TDS compensation policy over the last 2-3 years has had a concrete effect on the overall quality of academics at Deep Springs.

103. "In addition, the college has made an effort to keep files and maintain communication with prospective candidates for future short- or long-term employment." (Ex. J at p. 22.)

104. Faculty recruitment at Deep Springs College is irrefutably successful. Even if it were a problem, Petitioner cannot isolate the all-male student body as the cause. Moreover,

Petitioner cannot demonstrate that less extreme measures available to improve faculty recruitment have failed or would fail (to remedy this nonexistent problem).

C. Deep Springs College Has A Stellar Academic Reputation

105. Petitioner fails to demonstrate that the academic reputation of Deep Springs College is a problem, or that this nonexistent problem contributes to a permanent impossibility or impracticability of fulfilling the purpose of the L. L. Nunn Trust.

106. According to an article in *The Chronicle of Higher Education*, Deep Springs is "[o]ne of the most selective colleges in the nation . . . admit[ting] just 13 students each year from about 200 applications. . . . Most have outstanding academic records (with SAT scores averaging 1490), and rarely does anyone turn down an admission offer." (Scott Smallwood, *Listening for the Voice of the Desert*, The Chronicle of Higher Education (Sept. 13, 2002) p. A56 .) In addition, in 2002, "three Deep Springs students won Truman scholarships, more than any other institution." (*Ibid.*) As a result, the article's author states that "[n]o one is pessimistic about Deep Springs anymore." (*Ibid.*)

107. The selectivity of the college is also emphasized in an article from *The Christian Science Monitor*, which notes that Deep Springs is "one of the most selective colleges in the United States." (Stacy A. Teicher, *Twenty-six Renaissance Men* (Feb. 19, 2002) The Christian Science Monitor, at p. 13, § 2.) Deep Springs is "one of the most selective colleges in the nation." (Peter Y. Hong, *Making Hay with Education*, The L.A. Times (Jan. 14, 2004) at p. 2, col. 1.) Moreover,

> [t]he arduous labor in the classroom and fields pays off when the time comes to transfer to a four-year school. Last year's graduates went on to Brown, Columbia, Cornell, Harvard, Oxford and Stanford. Each such success affirms the vision of the college's founder, an Ohioan who believed a combination of physical toil, book learning and monastic isolation would forge outstanding citizens.

(*Ibid.*)

108. As noted above, the college has a reputation for its superior ability to place its students at elite institutions:

As a two-year institution, Deep Springs is technically a junior college, but its

> success in placing students at prestigious universities puts it in a category of its own. In recent years, about a fourth of each graduating class has transferred into the sophomore or junior class at Harvard, a fourth to the University of Chicago, and one or two students have gone to Oxford, Yale, and Brown.

(Dana Goodyear, *The Searchers: The Fate of Progressive Education at Deep Springs College*, The New Yorker (Sept. 4, 2006) at p. 62.)[10]

109. Even if Deep Springs College's academic reputation were a problem and contributed to a permanent impossibility or impracticability of fulfilling the purpose of the Trust, Petitioner cannot demonstrate that any such hypothetical problem is due to the single sex student body and not other causes.

110. Furthermore, even if Petitioner could demonstrate that Deep Springs single-sex nature negatively affects the college's academic reputation, and contributes to an impossibility or impracticability of fulfilling the trust purpose, Petitioner cannot show that less extreme means to improve the college's (hypothetically bad) reputation would fail.

D. The College's Finances & Fundraising are Healthy and Stable

111. Petitioner fails to demonstrate that the financial health of the college is so drastically impaired that it is permanently impossible or impracticable to fulfill the purpose of the L. L. Nunn Trust.

112. All institutions want more money than they have. However, desiring more money than is currently available is not the same as being on the verge of collapse. And the Petitioner is on record as saying that, even in the wake of the financial crisis, the financial situation of the college is solid and allows us to look forward with confidence:

> I am lucky to have become chairman when the college is doing well. The economy has been tough, but thanks to the prudent guidance of our investment committee, we didn't suffer catastrophic losses like Harvard or Yale. Money is tight and we do need your help, but I see opportunity, not emergency. In past eras, alumni and friends have banded together to save the college; now we have the opportunity to reflect on and support goals and aspirations for the college. This seems fitting as we approach our 100th anniversary.

(David Hitz, *Letter from the Chair*, 2009 Deep Springs College Annual Report, at p. 1 [retrieved from http://www.deepsprings.edu/downloads/annual-reports/Annual%20Report_2009.pdf].)

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[10] *See also*, Bill Chappell, *Colleges For Partying, Eating, And Learning (If You Must)* (NPR, Aug. 1, 2011) <http://minnesota.publicradio.org/features/npr.php?id=138895540>.

113. According to the 2010 Self-Study,

> Deep Springs has unrestricted reserves equal to over twice its annual budget, and due to the size of the endowment and to ongoing annual fundraising (which is sufficiently stable year-to-year to be provisionally relied upon), Deep Springs has sufficient cash flow. The college invests according to industry-standard practices for educational institutions.

(Ex. J at p. 105.)

114. Furthermore, the college

> has been vigilant in raising funds and careful in expending them, especially long-term financial resources such as the endowment. The President, Vice President and trustees have given Deep Springs the necessary funds for day-to-day operation as well as resources for unforeseen circumstances. They have done so to ensure the college's continued success, and have used long-term planning, in concert with the college's mission statement, to do so. Nonetheless, the President, Vice President, and trustees continue to seek additional resources to enhance this financial "cushion."

(Ex. J at p. 105.)

115. Given the small size of the institution and its budget, the Trustees "can oversee the availability and use of funds. This oversight ensures that the budgeting, availability and allocation of resources is in accordance with the college's commitment to input from all constituencies." (Ex. J at p. 106.)

116. Each student at the college receives a full scholarship valued at more than $50,000. According to the Self Study:

> It is essential to the mission of Deep Springs that the college does not charge tuition or fees of any kind. The founder argued that students would engage more deeply in their educations if they came to the college as its beneficial owners. Students do not pay to live at the college, and the college does not pay a wage to student workers. Students are expected to share in the college's operations. A tuition-free program gives students an opportunity to claim ownership in their educations without the common form of "exchange" that might accompany tuition payments.

(Ex. J at p. 101.) Even so, this policy is neither described nor required by the Deed of Trust. If the college's finances were doing so poorly as to warrant petitioning the court for *cy près* relief, one would think that the Trustees would consider charging some tuition rather than letting the charitable trust and the college fail. The issue has not been considered, not just because it would violate traditional values held by the college, but also because the college's finances are relatively

robust.

117. There have been periods in Deep Springs' history when the college's finances were not as healthy as they are currently. In response to one such period at the end of the 1990s, the Declarant and the broader Deep Springs community banded together for an intensive capital campaign that increased the endowment from $7 million to $18 million over six years. This is impressive for a college that has had just over 1,000 students during its entire 95-year history. Some of the money was used to rebuild the Main Building (originally built in 1917 by the first students and additional hired workers). It also funded the rebuilding of The Museum (additional classroom space), the building of a new dormitory, and the renovation of faculty and staff houses. Lastly, in 2007, Deep Springs College was able to raise money to successfully purchase the last significant tracts of privately held lots in the valley, thus ensuring the College's isolation into perpetuity. Thus, Deep Springs has a proven ability to raise substantial funds.

118. Most relevantly however, is the significant risk that the college might lose a substantial part of its endowment from the Withrow Bequest if the college were to become coeducational. If the Trustees were so concerned that the college's finances are threatened or that fundraising may soon dry up, it is difficult to understand why they would risk losing the current value of James Withrow's restricted gift of $1 million plus the residuary of his estate, as detailed in the Petition for Court Order Interpreting Endowment Gift Instrument. Some alumni and erstwhile supporters have chosen and will choose to stop giving to the college because of a decision to go coed, and in the nearly eight months since the announcement of the decision to transition to coeducation, there has not been a meaningful boost to fundraising due to that decision. It is particularly worthy of note that the college's most significant donor has committed to "love, support, and nurture Deep Springs, whichever way the coed decision turns out." (Ex. B at p. 2.)

119. Even if the financial health or fundraising for the college were endangered, Petitioner cannot demonstrate that any such (hypothetical) problem is due to the Deep Springs student body being single sex, rather than other causes.

120. Further, even if Petitioner could demonstrate that being single sex substantially

injures the financial health of the college and therefore contributes to an impossibility or impracticability of fulfilling the trust purpose, Petitioner cannot show that less extreme means of improving the financial health or fundraising efforts would be unsuccessful.

E. Deep Springs Provides An Exceptional Education

121. Petitioner fails to demonstrate that the quality of the education Deep Springs currently provides contributes to a permanent impossibility or impracticability of fulfilling the purpose of the L. L. Nunn Trust.

122. The education one receives at Deep Springs is unique. Close contact with the faculty in the classroom and out, the small size of all the classes, and the chance to develop not only the entire curriculum but also independent study courses are just a few benefits of the college's program. Again the Self Study is illuminating:

> Deep Springs' academic program is characterized by disciplinary breadth and rigor. The breadth of the academic program is evidenced in the wide variety of courses offered as well as the college's strong commitment to the core disciplines: humanities, social sciences and natural sciences. Deep Springs pursues faculty of the highest caliber who are committed to the unique character of Deep Springs as well as [a] traditional liberal arts curriculum. Deep Springs also strives to provide an interdisciplinary environment that incorporates other aspects of the college's pedagogical program (labor and self-governance) into the learning process.
>
> The structure of the Deep Springs academic program places a high amount of responsibility and accountability on each individual in the classroom. This sense of personal responsibility, combined with the formal, broad-based processes of review and evaluation, ensures that the college's academic program (as well as its overall operation) remains highly rigorous. Deep Springs' selectivity in admissions and faculty hiring also helps maintain a high level of academic rigor. Emphasis on both formal and informal evaluation of the college's performance among its constituencies ensures that the academic program remains on par with expectations of rigor and accountability embodied in the college's mission.

(Ex. J at p. 61.)

123. In emphasizing its success at accomplishing its mission and purpose through interdisciplinary integration, the Self Study states that "Deep Springs provides an interdisciplinary learning environment that not only connects different disciplines but also incorporates the three pillars of academics, labor and self-governance as a broader pedagogical environment for students." (Ex. J at p. 61.) The Self Study further explains the success of this "broader pedagogical environment:"

> What is clear, however, is that the elements of a Deep Springs education (high degree of selectivity, high academic standards, free tuition, interdependence of all aspects of the college and ranch and high involvement from all community members in the project of the college) place a great deal of responsibility and accountability on each student. In discussing, exploring, and working towards the common good, students consistently cultivate key virtues such as self-reliance, compassion, fair judgment and self-awareness.

(Ex. J at 67.)

124. The quality of an academic program can also be gauged by teachers' evaluations of their experience in the classroom. When asked about her experience teaching at Deep Springs, Elizabeth Kiss, then a professor at Princeton University and currently President of Agnes Scott College (a women's college in Decatur, Georgia), said "teaching at Deep Springs was a pleasure because the students are smart, independent-minded, and extraordinary engaged in their own education. Even an ordinary class there is stimulating. But at their best, Deep Springs classes are in a league of their own."

125. Despite the prestigious reputation of the schools to which Deep Springers transfer, "Deep Springs professor Katie Peterson, . . . said she believes students are often disappointed after they transfer. 'And as well they should be,' she added. 'They'll never have an experience as honest or as thoughtful as they will have here.'" (Lawrence Mower, *Labor's Love Not Lost*, The Las Vegas Rev. J., July 9, 2007.)

126. Any suggestion that the education of the students of Deep Springs College is inhibited by their lack of contact with women must be muted by the fact that most students are educated before and after their two-years at Deep Springs in mixed-sex environments; and by the fact that women play a large role in the Deep Springs community itself. Forty percent of faculty and staff are women; students learn from and work with women on a daily basis. (Ex. J at p. 26.)

127. Another measure of the success of an academic program is the evaluation and response it receives from its current and former students. Current "[s]tudent evaluations of recent courses taught at Deep Springs indicate that the current academic program is the best in recent memory." (Ex. J at p. 24.)

128. When discussing feedback from former students from the last 70 years, the Self

Study emphasizes that "[a]lumni testimonies reflect the enduring value of the interdisciplinary structure of the college's pedagogical program." (Ex. J at p. 66.) These alumni testimonies confirm how successfully "the college's pedagogical program fosters within the student a 'love for the life of the mind' and encourages them to orient themselves towards learning not merely as an end in and of itself, but rather as a means for developing self-awareness and lifelong intellectual curiosity." (*Ibid.*)

129. What is more, "[a]lumni outcomes provide ample evidence of the virtues, values, and professional successes cultivated by a Deep Springs education." (Ex. J at p. 66.). Deep Springs alumni

> consistently enter a range of different professions, including government service, medicine, academia, research or managing nonprofit organizations (to name a few). One of the major themes in alumni testimonies of their Deep Springs pedagogical experience is the atmosphere of the college; an atmosphere that helped instill in them the values required to pursue "service to humanity" in a range of different professions.

(Ex. J at p. 67.)

130. Undoubtedly, the quality of the education received at Deep Springs is superb. If there were difficulties with the quality of the education, Petitioner could not show that these difficulties are due solely or primarily to the single-sex student body, or that other solutions other than coeducation, would not solve or sufficiently mitigate the (hypothetical) problems.

XI. PETITIONER FAILS TO MEET THE STANDARD FOR EQUITABLE DEVIATION

131. This Court cannot grant Petitioner the requested modification of the purpose of the L. L. Nunn Trust based on equitable deviation because (1) it is the incorrect standard to apply; and (2) even were it the correct standard, Petitioner fails to meet any element of it.

132. Probate Code section 15409, subdivision (a) reads (in relevant part):

> On petition by a trustee . . . , the court may modify the administrative or dispositive provisions of the trust . . . if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust.

133. Thus, if section 15409 were the applicable standard, the Court would need to

determine: (1) the purpose(s) of the L. L. Nunn Trust; (2) whether there are relevant changes in circumstances that L. L. Nunn did not know of and could not have anticipated, and (3) whether owing to those circumstances, continuation of the Deed of Trust under its current terms would defeat or substantially impair the accomplishment of the Trust purpose(s).

134. Petitioner cannot show that L. L. Nunn did not know or anticipate the claimed change in relevant circumstances. Petitioner cannot demonstrate that those (alleged) changed circumstances have defeated or substantially impaired the purpose as laid down in the Trust. Petitioner cannot show that this (alleged) defeat or substantial impairment is due to the terms and conditions in question, rather than other features of the operation of Deep Springs and/or other changed circumstances.

135. Just as continuation of the L. L. Nunn Trust under its current terms is not permanently impossible or impracticable, neither does continuation of the Trust under its current terms defeat or substantially impair the accomplishment of the Purpose of the Trust. Deep Springs College is successfully fulfilling its Purpose and is thriving in all relevant respects. It continues to attract excellent students and faculty; its finances are healthy and the college is successful at fundraising; especially in light of its tiny size, it has an outstanding reputation in both academic and popular media; and it continues to provide its students with a rigorous, fulfilling, and meaningful education that prepares them for lives of service.

A. The Purpose Of The Trust Is Clear and Unambiguous

136. The purpose of the L. L. Nunn Trust is stated clearly and unambiguously in the Deed of Trust:

> 1. The purpose for which the property hereby conveyed...shall be used by said Trustees is to provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by Grantor at Deep Springs . . . , *for the education of promising young men*, . . . in a manner emphasizing the need and opportunity *for unselfish service* in uplifting mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self-government by the students themselves shall be a feature as is now the case at said Deep Springs and which work shall be carried on . . . *solely for the advancement of the purpose hereinabove mentioned.*

(Ex. A at p. 4, ¶ 1 [emphases added].)

137. The stated purpose of the Trust is to educate promising young men for lives of unselfish service to humanity. There is no indication in the Deed or elsewhere that L. L. Nunn wished to educate young men because he believed young women to be incapable of education for lives of service, because he thought the education of young women for such a purpose to be anything less than laudable or important, or that he thought women any less able than men to lead lives of unselfish service. He nonetheless chose to dedicate his Trust specifically to the education of young men.

B. Training Leaders In General Is Not The Purpose of Deep Springs College

138. Petitioner claims that "to fulfill L. L. Nunn's purpose in establishing the institution," Deep Springs College must "offer education to all of society's potential leaders," a set that now includes women. (Petn. at p. 10-11, ¶ 25). As Mr. Nunn's purpose in establishing the institution was solely to provide for the education of promising young men, that purpose simply cannot be fulfilled by educating women instead of men.

139. Nor is an "inhibition" of the functioning of the college, were Petitioner successful in demonstrating it, sufficient to demonstrate substantial impairment of the purpose, as would be minimally required by the standard of equitable deviation. Further, the Petitioner does not demonstrate the claimed historical change, that the claimed change was not known or anticipated by Nunn, that the claimed current circumstances are relevantly different from the circumstances of 1923, or that the question of women's "leadership roles" in 1923 is relevant. In addition, Petitioner's assertions about the role of women at that time are doubtful and oversimplified.

140. While Respondents certainly agree that society's potential leaders include women, that is not the relevant inquiry here. L. L. Nunn's sole purpose in establishing this particular institution was to provide for the education of young men for lives of service. Nevertheless, there is no reason to think that in dedicating the institution to that purpose, he was doing so because he believed women to be less suited for lives of service.

C. Highly Educated and Influential Women Raised and Educated L. L. Nunn

141. L. L. Nunn would have known or anticipated that young women were fully educable for lives of service, and that this education could happen alongside the education of

young men for lives of service. It is worth noting, however, that Respondents do not have to demonstrate that this is true; rather, Petitioner must demonstrate that this is not true in order to meet this element of the equitable deviation standard.

142. L. L. Nunn's maternal grandmother, Mary Towler Kendall, insisted on attending classes at a college where her father was a professor. "To the scandal of the faculty" she finished her coursework, thereby becoming the first recorded "college woman."[11] An extraordinary woman, Mrs. Kendall, who lived with L. L. and his family in Ohio, set the precedent for higher education for her daughters, her sons, and her grandchildren.[12]

143. L. L. Nunn was particularly close with his sister Emily throughout his life. Emily had a formal education far superior to her brother's. She joined their sister Ellen to study German in Dresden, then studied physiology at Newnham College at the University of Cambridge, zoology at the University of Zurich, and laboratory biology at Johns Hopkins University. Emily's scientific papers included publications in *The Proceedings of the Royal Society* and in the first volume of *The Journal of Physiology*, and she was appointed professor of biology at Wellesley. Later dismissed for her agnosticism, she went to London in the early 1880s to work with the renowned scientist T. H. Huxley, who commended her scientific research. (Tucker and Groeben, *supra*, at pp. 197-9.) She corresponded with the scientific luminaries of her day, including Darwin, Huxley, and the renowned physicist John Tyndall. (*Id.* at p. 205.) "Emily was strong-willed, inured to difficult circumstances, and convinced of her right to access on the same level as males." (*Ibid.*) L. L. Nunn never indicated disapproval of his favorite sister's views or endeavors, and supported her through much of her life.

144. L. L. Nunn was educated in large part by the formidable educational entrepreneur and author Linda Thayer Guilford, who was a pioneer in high-quality education for women. Nunn lived with two of his older sisters in this period, Emily and Miriam, both of whom were then teaching (one of them with Guilford).[13] Guilford, "early Cleveland's most prominent

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[11] Tucker & Groeben, *My Life is a Thing of the Past: The Whitmans in Zoology and in Marriage* in Creative Couples in the Sciences 196 (Pycior et al., eds., 1996).

[12] *Ibid.*

[13] Linda Thayer Guilford, The Story of a Cleveland School 91 (Harvard Univ. Press, 1890)

educator"[14] was known for setting up female academies that rivaled the nearby male colleges.[15] She then set up a coeducational institution, Cleveland Academy. Nunn says that his two years (1867-9, from age 14 to 16) with Guilford at Cleveland Academy "constituted my only regular schooling[.]"[16] Although Cleveland Academy was coeducational, boys were a small percentage of the students: in Nunn's first year there, only 15 of the 132 pupils were boys, and in his second year 27 of the 142 students were boys.[17]

145. While he was at Cleveland Academy, his sister Miriam and his brother J. J. were attending nearby Oberlin College. L. L. Nunn's involvement with Oberlin College was extensive, and he later educated many students at Oberlin at his expense.[18] Nunn's involvement with Oberlin and his willingness to support students' education there is striking in the context of the present question, for Oberlin was the very first coeducational college in the United States, being coeducational some 80 years before Nunn founded Deep Springs in 1917.

D. Coeducation Was The Dominant Form of Higher Education in 1917 and 1923

146. Furthermore, L. L. Nunn did not set up the Trust in a time or place where all-male education was the default rule. On the contrary, the dominant model of college and university education at the time he set up the Trust was coeducational, especially so in the American West. In addition, the clear and continuing trend was toward more coeducational and fewer all-male institutions, both absolutely and as a percentage of all educational institutions in the United States.

147. L. L. Nunn established Telluride House, the other surviving Nunnian institution, at Cornell University in 1910. Cornell was another pioneer in coeducation, having altered its policy to allow for the admittance of women in 1870, thus becoming the first coeducational Ivy League institution.

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[14] Sharon Morrison Pizone, The Sociocultural Context of Cleveland's Miss Mittleberger School For Girls, 1875-1908 91 (May 2009) (unpublished Ph.D dissertation, Cleveland State University) at http://etd.ohiolink.edu/send-pdf.cgi/Pinzone%20Sharon%20Morrison.pdf?csu1248799957.

[15] William Ganson Rose, Cleveland: The Making of a City 214, 333 (Kent St. Univ. Press, 1990).

[16] L. L. Nunn, *Letter to Frank Noon (June 16, 1909)* printed in Orville Sweeting, The Educational Experiment of L. L. Nunn 22 (1970) (unpublished manuscript, on file with Deep Springs College Archive).

[17] Linda Thayer Guilford, The Story of a Cleveland School 105 (Harvard Univ. Press, 1890).

[18] Stephen A. Bailey, L. L. Nunn: A Memoir 39 (1933).

148. In 1916, there were 574 colleges and universities in the United States.[19] Of these, 341 were coeducational, 144 were all-male, and 89 were all-female schools. (*See* Exhibit N, *Compiled Table of Bureau of Education Statistics for 1916, 1918, and 1920* (2012).)[20] By 1920—a mere four years later—the number of all-male institutions had dropped to 117, the number of all-female institutions had increased to 115, and the number of coeducational institutions had increased to 354. (*Ibid.*) It is simply untrue that Nunn did not know and could not have anticipated that coeducational colleges would exist, or even become the norm—they already were the norm before he executed the Deed of Trust.

149. The percentage of male undergraduates being trained in single-sex colleges and universities was already noticeably declining by the time L. L. Nunn founded Deep Springs in 1917 and likely declined markedly further by the time he signed the Deed of Trust in 1923. In 1916, only 29 percent of undergraduate men were educated in single-sex environments. (Ex. N) Four years later, in 1920, only 23 percent of undergraduate men were enrolled in single-sex institutions. (Ex. N) Even in this short period of the first years of Deep Springs College, there is an appreciable trend away from all-male institutions and towards co-educational and women's colleges.

E. The Condescension of Posterity Does Not Do Justice To Early 20th Century Women

(1) Women took advantage of western freedom by challenging Victorian gender norms

150. Although Respondents maintain that the changing demographic details of leadership roles in society is not relevant to a proper determination of this case, they also maintain that L. L. Nunn could have easily known or anticipated that women occupied or would occupy leadership roles, and that he knew or anticipated that the position of women in American society, especially in the West, would change and progress.

151. Leaving aside the many women whom Nunn knew and may have recognized as

[19] Not including Teacher Training (Normal), Vocational, Preparatory, Technical, or Professional Schools.

[20] The Bureau of Education in the Department of the Interior compiled separate statistics for Men's, Women's, and Coeducational Institutions only for the years 1916-1920.

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fully prepared to take up leadership roles later in their lives and after his death, it would still be an endless project to detail examples of women who occupied positions of leadership during his lifetime. Perusing even a small portion of the entries in the biographical catalogues of accomplished women from this era is a sure-fire remedy for the view that L. L. Nunn could not have known or anticipated that women might lead lives of significant service and leadership alongside their male counterparts. [21] A few relevant trends and representative examples will have to suffice here.

152. Nunn lived at the height of the Progressive era and spent the majority of his adult life in Utah, Colorado, and California. Western women were more likely than women outside the West to enter higher status, male-dominated professions, including law and medicine. Utah had the highest percentage of women doctors in the U.S.[22] By 1910, the percentage of women lawyers and women doctors was twice as high in the West as in the East.[23] Women in the West undoubtedly made greater inroads into these male-dominated professions than women elsewhere. It was their greater participation in professional employment and the conditions of frontier settlement and land ownership that had a greater impact on women's enfranchisement than women's employment in general.[24]

153. Western states also provided greater opportunities for women in property ownership, education, and professional occupations partly because the newly settled areas of the West did not have institutionalized laws and practices that disadvantaged women. These conditions created more opportunities for women to explore a greater variety of activities and occupations that had not been open to them before, or at least not to the same extent. The reality of women's lives also changed dramatically as they adapted to harsh frontier conditions in establishing new communities and states in the West. Out of both necessity and choice, women

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[21] Such resources include: A Woman of the Century (Willard & Livermore, eds., 1893)(1897 ed. entitled American Women); Woman's Who's Who of America (John William Leonard, ed., 1915); Biographical Cyclopaedia of American Women, 3 vols. (Cameron et al., eds., 1924-8); Notable American Women: A Biographical Dictionary, 3 vols. (James et al., eds., 1971)(about women born before 1900).

[22] Sandra L. Myres, Westering Women and the Frontier Experience 1800-1915, 267 (1982).

[23] McCammon & Campbell, *Winning the Vote in the West: The Political Successes of the State Suffrage Movements, 1866-1919*, 15 Gender and Society 55, 66 (2001)(citing the U.S. Bureau of the Census (1914)).

[24] *Ibid.*

resisted the rigid gender boundaries that restricted women's activities, in an environment seen to be open to new ideas and free from entrenched practices.[25]

154. Women's reminiscences, diaries, and letters contain ample evidence to support the argument that women on the frontier challenged and changed existing gender norms, adopted more flexible attitudes about women's "sphere," and experimented with new behavior patterns as a result.[26] Therefore, necessity and practice caused westerners to recognize women's economic and political independence more than others outside the West.

155. Jeannette Rankin, a California suffragist at the time (who became in 1917 the first woman elected to Congress, and to this day is the only woman to have been elected to Congress from Montana), explained in 1911: "The men of California are used to seeing women do things. The women run fruit ranches; they own and operate mines; they are in all professions and occupations; they are original and efficient."[27]

(2) Women's suffrage adopted 50 years before the 19th Amendment

156. The same conditions encouraged political experimentalism in the West, which created more openness and less opposition to the adoption of women's voting rights. Unlike those living in other regions of the United States, men and women in the western states were trying to establish new communities, territories, and states without being restrained by entrenched practices and norms in a difficult environment that required and encouraged women to take on responsibilities and tasks that went well beyond traditional gender norms.

157. Three years before the Deed of Trust, the 19th Amendment was ratified. Yet women had been voting in nearly all of the western states prior to its 1920 ratification. L. L. Nunn spent much of his adult life in the states of Utah, Colorado, and California, where women

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[25] *See* Susan Estabrook Kennedy, If All We Did Was to Weep at Home: A History of White Working-Class Women in America (1979); Johnny Faragher & Christine Stansell, *Women and Their Families on the Overland Trail to California and Oregon, 1842-1867*, 2 Feminist Studies 150 (1975); Lillian Schlissel, *Mothers and Daughters on the Western Frontier*, 3 Frontiers 29-33, 32 (1978); Lillian Schlissel, *Women's Diaries on the Western Frontier*, 18 American Studies 87 (1977); Julie Roy Jeffrey, Frontier Women: The Trans-Mississippi West, 1840-1880 (1979); Gerda Lerner, *The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson, 1800-1840*, 10 American Studies Journal 5 (1969); Sandra L. Myres, Westering Women and the Frontier Experience 1800-1915 (1982).

[26] Lillian Schlissel, *Women's Diaries on the Western Frontier*, 18 American Studies 87 (1977).

[27] Jeanette Rankin, *Why the Country Folk Did It*, Woman Voter, Dec. 1911, at 13 (quoted in Rebecca J. Mead, How the Vote Was Won: Woman Suffrage in the Western United States, 1868-1914, 148 (2004).

had the vote in 1870, 1893, and 1911 respectively. Not least, women who led the well-publicized push for national women's suffrage provided examples of women's leadership in the public sphere with which all educated (and most uneducated) Americans were familiar.

158. Many men recognized women's equality. On June 27, 1918, during a debate on the 19th Amendment on the floor of the U.S. Senate, Senator Miles Poindexter (Wash.) stated:

> The Western States have long since overcome the prejudices which heretofore have discriminated against women in the suffrage. . . . The States themselves have long since recognized women as equal partners in the State as well as in business and in the home. With us it has ceased to be an experiment, and most of the antisuffrage arguments, based upon theory and dire prophecy, have no effect in the face of realities.

(Remarks by Sen. Poindexter, 56 Cong. Rec. 8343 (1918).)

(3) Women Leaders and "The New Woman" made headlines

159. The leadership of women was fundamental to the passage and enforcement of the 18th Amendment (Prohibition). In 1921, Mabel Walker Willibrandt was appointed as Assistant Attorney General of the United States and argued over 40 cases before the Supreme Court defending and enforcing the Volstead Act. Ms. Willibrandt, a native Californian, was "undoubtedly the most famous woman in America at the time who was not an entertainer."[28]

160. In 1922, Florence Ellinwood Allen was elected to the Supreme Court of Ohio. An article published in 1923 highlighted women's successes in this most conservative of professions:

> In this space of little more than fifty years, though the number of women who have adopted law as a profession has not been great, those who have been active in it have given conclusive evidence that women may be equally successful in all its many branches . . . There seems to be no prejudice at all on the part of men, and women are accepted on terms of absolute equality – particularly is this so in the Pacific Coast States.

(Ida Parker White, *Justice is Truth in Action* (1923) The Business Woman 8.)

161. In the public sphere, the rise of women's colleges, women's increased literacy, delayed age of marriage, the shrinking sizes of families, an ideal of upward mobility, and capitalist development gave rise to what was called *the New Woman*. Single, highly educated,

[28] Ken Burns, Prohibition (PBS Documentary 2011)(Interview with Daniel Okrent) http://www.pbs.org/kenburns/prohibition/people/#detail=2082505810-willebrandt.

and economically autonomous, she "challenged existing gender relations and the distribution of power."[29] The New Woman eschewed marriage, and "fought for professional visibility, espoused innovative, often radical economic and social reforms, and wielded real political power."[30] These New Women were avowed feminists, who campaigned for suffrage and autonomy. In many ways, the period from when L. L. Nunn conceived of Deep Springs until the time of his death was the period in American history in which educational and professional gender equality was most readily foreseeable. The following decades have frequently been seen as a serious and widely unanticipated setback for women's public and private roles.[31] Marjorie Hope Nicolson, writing when Dean of Smith College in the late 1930s, looked back to the time of her graduation from the University of Michigan in 1914:

> We came late enough to escape the self-consciousness and the belligerence of the pioneers, to take education and training for granted. We came early enough to take equally for granted professional positions in which we could make full use of our training. This was our double glory.[32]

In the 1910s and early 1920s, "positions were everywhere open to us...it did not occur to us that life could be different."[33] Within a decade, however, "shades of the prison house began to close, not upon the growing boy, but upon the emancipated girls."[34]

F. Observing and Anticipating Women's Growing Equality and Leadership Was Unavoidable

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[29] Smith-Rosenberg, Disorderly Conduct: Visions of Gender in Victorian America 245 (1985).
[30] *Ibid.*
[31] *See* Anita M. Harris, Broken Patterns: Professional Women and the Quest for a New Feminine Identity (1995). On the educational reversals, *see* Goldin et al., *The Homecoming of American College Women: The Reversal of the College Gender Gap*, Nat'l Bureau of Econ Research Working Paper No. 12139, 1:

> Another lesser-known fact is that the number of male to female undergraduates in the United States was about at parity from 1900 to 1930. Male enrollments began to increase relative to female enrollments in the 1930s and they soared directly following the end of World War II. A highpoint of gender imbalance in college attendance was reached in 1947 when undergraduate men outnumbered women 2.3 to 1. From then on female college enrollments began to catch up, especially in the 1970s. Gender equality was again reached around 1980 and subsequently women overtook men in college enrollments and graduation rates. The narrowing of the gender gap in enrollments to 1980 was a return or a 'homecoming,' although the levels of college going were almost six times higher in 1980 than in the 1920s for both men and women.

[32] Harris, *supra* note 31, at 67.
[33] *Ibid.*
[34] *Ibid.*

162. The women leaders on the national stage mentioned above are merely a few examples of the women that L. L. Nunn likely would have read about, heard about, and met. The women of the United States, and in particular of the western states, had already been seeking and obtaining greater power, autonomy, and political and economic rights by the time that Mr. Nunn established Deep Springs. The women that Nunn encountered in the West held greater responsibilities and rights than their counterparts in the East. That they used this freedom from social restraint to obtain higher education, enter and succeed in the professions, and own and manage property and businesses was a testament to the dramatic progress underway.

163. "Women lawyers, doctors, authors, teachers, architects, chemists, and artisans in every line, have won distinction and financial independence in the United States; and for this self-support and this service to society they have been made competent by the splendid educational facilities which that great Republic affords its youth of both sexes."[35] "Much of our twentieth-century history will be the recital of woman's achievements."[36]

164. It is unknown whether L. L. Nunn's interest in isolated all-male education was a response to the growing presence of women in the public sphere. The rise of feminism at the turn of the century provoked a variety of responses among American men. One of these responses, deemed masculinist, urged a greater participation by men in rearing and educating young boys and sought to create distinctly male agencies of socialization.[37] Theodore Roosevelt was the embodiment of a masculinist man and the Boy Scouts of America was an organization founded on masculinist ideals. In the early twentieth century, with female students outnumbering male students at many colleges and universities, and women dominating certain courses by high percentages, especially in the liberal arts, several institutions were concerned to reintroduce rough gender parity or carve out distinct educational opportunities for men. The University of Chicago reacted in 1902 to women's enrollment overtaking that of men's (as well as their dominance of academic honors such as Phi Beta Kappa membership) by segregating classes by gender for the

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[35] Amie L. Diggs, *Co-Education in the United States*, The Westminster Review 663, 671 (Dec. 1903).
[36] *Id.* at 672 (quoting a public address of James B. Dill, a "well-known corporation lawyer").
[37] Michael Kimmel, *Men's Responses to Feminism at the Turn of the Century*, 1 Gender and Society 261, 269 (1987).

first two undergraduate years. Boston University launched a "More Men Movement" in 1910, "when it was shown that the college was in need of about three times its then quota of men to equal the number of women students."[38] (Questions about imbalance were being asked again in 2011, given that, like many campuses today, Boston University's undergraduates are 60% women.[39]) Northwestern University launched a similar initiative shortly thereafter.[40]

165. Respondents do not assert that L. L. Nunn restricted the Deep Springs College education to young men for similar reasons; this is unknown. Rather, Respondents assert that in light of the events and trends of the time, Petitioner cannot prove that L. L. Nunn was unaware and could not possibly have anticipated the roles of women in education or in broader society. Petitioner also cannot prove that current circumstances are so different from Nunn's time that the purpose of the Trust cannot be accomplished in the present context.

166. Rather than being short-sighted and unable to anticipate the growing role of women in the public sphere, L. L. Nunn was likely fully aware of these structural shifts and indeed may have been responding to the changes in social organization already underway.

RESPONSE TO PETITION

167. Answering paragraph 1 of the Petition, Respondents admit that Petitioner is a Trustee of the Trust, and that Petitioner purports to bring the Petition pursuant to the Probate Code and the common law.

168. Answering paragraph 2 of the Petition, Respondents lack knowledge or information sufficient to form a belief about the truth of the allegation that "A true and correct copy of the Deed of Trust is attached as Exhibit 'A'", because the document attached as Exhibit A is of such poor quality that it is unintelligible, and on that basis Respondents deny such allegation. Respondents admit the remaining allegations in paragraph 2.

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[38] Boston Evening Transcript 2 (Sept. 22, 1910). This article suggests that there was no attempt to limit the number of women, but only to increase the number of men. In 1917, a university committee reported that this sustained effort to increase the enrollment of men had been a complete failure.

[39] Nicolae Ciorogan & Chris Maggio, *YouSpeak: When Women Outnumber Men - Are there enough men on campus?* BU Today (Feb. 14, 2011), http://www.bu.edu/today/2011/youspeak-when-women-outnumber-men/ (9935 women undergraduates, 6689 men).

[40] 13 The Christian Student 4, 21 (1912) (reporting also that "most coeducational colleges" had fewer than 45 percent men in their liberal arts courses).

169. Answering paragraph 3 of the Petition, Respondents admit that the Deed of Trust states whatever it states, and that the Deed of Trust is the best evidence of what it states. Respondents further admit that the real property conveyed was where Deep Springs College was, and still is, located. Except as so admitted, Respondents lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 3, and on that basis deny each and every remaining allegation in paragraph 3.

170. Answering paragraph 4 of the Petition, Respondents admit the allegations in paragraph 4 of the Petition, except that Respondents deny that any vote by the Trustees can prohibit Respondents from objecting and responding to the Petition, or undertaking other legal action to defend the Trust, as Respondents believe they have a fiduciary duty to object to the Petition for the reasons set forth above. Respondents also deny that one of the Trustees is named "Erik Muggler": his name is Erik Mueggler.

171. Answering paragraph 5 of the Petition, Respondents admit that the Deed of Trust states whatever it states, and that the Deed of Trust is the best evidence of what it states. Respondents further admit that "L. L. Nunn wrote in the Deed of Trust his intentions respecting the trust", that he describes in the Deed of Trust his intention that it be "for the education of promising young men", and that his intention for the future was that Deep Springs would "provide for and carry on educational work . . . similar to and in development of the work already inaugurated by Grantor at Deep Springs." Respondents further admit that "Since its inception, Deep Springs College has admitted only men as students." Respondents further admit that the Trustees are taking steps to prepare for the admission of women beginning in the 2013-14 term, but deny that the Trustees have the legal authority to do so. Respondents aver that taking such steps before obtaining final court approval to do so is premature, and depending on the particular steps taken, could subject the college to lawsuits by third parties, and may thus be inconsistent with the Trustees' duty of care. Respondents further admit that Petitioner is now contending that the language of the Deed of Trust does not limit the Trustees' discretion to admit women students. Respondents deny that the language of the Deed of Trust gives the Trustees such discretion. Except as so admitted, Respondents deny each and every remaining allegation in

paragraph 5.

172. Answering paragraph 6 of the Petition, Respondents admit that Petitioner is now asserting the various assertions contained in paragraph 6, but deny that any of these assertions are true. Respondents deny each and every allegation in paragraph 6, and deny that the relief Petitioner requests is proper or authorized by law.

173. Answering paragraph 7 of the Petition, Respondents deny each and every allegation in paragraph 7, and deny that the relief Petitioner requests is proper or authorized by law.

174. Answering paragraph 8 of the Petition, Respondents admit that the Deed of Trust states whatever it states, and that the Deed of Trust is the best evidence of what it states.

175. Answering paragraph 9 of the Petition, Respondents admit that the Deed of Trust states whatever it states, and that the Deed of Trust is the best evidence of what it states. Except as so admitted, Respondents deny each and every allegation in paragraph 9.

176. Answering paragraph 10 of the Petition, Respondents admit that there is a document that currently bears the title "The Purpose." Respondents further admit that the version of this document attached as Exhibit B states whatever it states. Respondents deny that Petitioner's interpretation of that document is accurate. Respondents also lack knowledge or information sufficient to form a belief about the truth of the allegation that "A true and correct copy of The Purpose is attached as Exhibit 'B'", and on that basis Respondents deny such allegation. Respondents aver that the titling and vintage of that document are open to question and may have changed over time, including after the death of L. L. Nunn, and on that basis deny each and every remaining allegation in paragraph 10.

177. Answering paragraph 11 of the Petition, Respondents admit that since 1917, Deep Springs College has operated as a single-sex institution, extending admission only to male students. Respondents further admit that from 1917 through 1924, L. L. Nunn participated in the selection process of students for admission. Respondents further admit that various people associated with Deep Springs College have, from time to time, considered whether Deep Springs College would be a better institution if it were coeducational, and that until 2011, the Trustees

have never approved a resolution purporting to change Deep Springs College to a coeducational institution. Respondents aver that it is highly revealing that nowhere in this recitation is there any mention of debate or consideration of the legal requirements of changing the purpose of Deep Springs from single-sex to coeducational. Respondents not only admit, but highlight the following allegation in the Petition: "In early 2011, the Trustees and the board of directors determined that **it had become logistically and financially possible** to implement a change **if the Trustees determined that admission of female students would advance the educational purpose of Deep Springs College in its second century of operation**." As discussed above in Respondents' Objections, this throws into relief why the Petition must be denied: the Trustees' decision was based on a belief that admitting female students would make Deep Springs better, **not** on the basis of any facts establishing that continuing as a single-sex institution would be permanently impossible or impracticable. Indeed, Petitioner's admission that "it had become logistically and financially possible" flatly contradicts both the *cy près* and equitable deviation standards; Petitioner nowhere alleges (and cannot allege within the confines of C.C.P. section 128.7) that Deep Springs is now in such dire financial straits that it cannot continue as a single-sex institution; rather, Petitioner admits that Deep Springs is doing well.

178. Answering paragraph 12 of the Petition, Respondents admit that "there is no question that L. L. Nunn intended the Deep Springs College student body to be all-male when he founded the school in 1917." Except as so admitted, Respondents deny each and every remaining allegation in paragraph 12.

179. Answering paragraph 13 of the Petition, Respondents deny each and every allegation in paragraph 13. Respondents aver that Petitioner is grossly distorting the meaning of the Deed of Trust.

180. Answering paragraph 14 of the Petition, Respondents deny each and every allegation in paragraph 14. Respondents aver that Petitioner is grossly distorting the meaning of the Deed of Trust.

181. Answering paragraph 15 of the Petition, Respondents admit that the Deed of Trust states whatever it states, and that the Deed of Trust is the best evidence of what it states. Except

as so admitted, Respondents deny each and every allegation in paragraph 15. Respondents aver that Petitioner is grossly distorting the meaning of the Deed of Trust.

182. Answering paragraph 16 of the Petition, Respondents admit that the Deed of Trust states whatever it states, and that the Deed of Trust is the best evidence of what it states. Except as so admitted, Respondents deny each and every allegation in paragraph 16. Respondents aver that Petitioner is grossly distorting the meaning of the Deed of Trust.

183. Answering paragraph 17 of the Petition, Respondents admit that the Deed of Trust states whatever it states, and that the Deed of Trust is the best evidence of what it states. Except as so admitted, Respondents deny each and every allegation in paragraph 17. Respondents aver that Petitioner is grossly distorting the meaning of the Deed of Trust. Respondents further aver that the last sentence of paragraph 17 reveals Petitioner's and other Trustees' lack of understanding of their fiduciary duties, and/or their neglect of such fiduciary duties. Having amputated a fundamental attribute of the purpose – that Deep Springs is "solely" for the education "of promising young men" – Petitioner reveals a disregard for the Trustees' fiduciary duty to carry out the stated purpose of the Trust, characterizing such lawful adherence as "slavish", and substituting for that adherence the Trustees' own "considered judgment".

184. Answering paragraph 18 of the Petition, Respondents deny that the relief Petitioner requests therein is permitted.

185. Answering paragraph 19 of the Petition, Respondents admit that the legal authorities cited therein state whatever they state, and are the best evidence of what they state. Except as so admitted, Respondents deny each and every remaining allegation in paragraph 19. Respondents also aver that Probate Code section 15409 is not the correct legal test, but rather that the *cy près* doctrine is the correct legal test. Respondents further aver that the authorities cited in paragraph 19 do not support the Petition.

186. Answering paragraph 20 of the Petition, Respondents deny each and every allegation in paragraph 20.

187. Answering paragraph 21 of the Petition, Respondents deny each and every allegation in paragraph 21.

188. Answering paragraph 22 of the Petition, Respondents deny each and every allegation in paragraph 22.

189. Answering paragraph 23 of the Petition, Respondents deny each and every allegation in paragraph 23. Respondents deny that section 15409 sets forth the applicable test. Respondents further deny that Petitioner's statement of the court's equitable power is complete or fully accurate, and deny that the facts and circumstances warrant any such exercise of the court's equitable power.

190. Answering paragraph 24 of the Petition, Respondents deny each and very allegation in paragraph 24.

191. Answering paragraph 25 of the Petition, Respondents deny each and every allegation in paragraph 25.

192. Answering paragraph 26 of the Petition, Respondents lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 26.

193. Answering paragraph 27 of the Petition, Respondents admit the allegations in paragraph 27.

194. Answering paragraph 28 of the Petition, Respondents lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 28.

AFFIRMATIVE DEFENSE

195. Respondents aver that Deep Springs College Corporation must (or in the alternative, may) be joined as a party to this proceeding, because it is a party whose interests are so directly involved that the court cannot render a fair adjudication in its absence. Petitioner has not complied with his obligations under California Code of Civil Procedure section 389(c).

PRAYER FOR RELIEF

WHEREFORE, Respondents pray for relief as follows:

1. That all relief Petitioner seeks in the Petition be denied;

2. That the Court join Deep Springs College Corporation as a party to this proceeding;

3. That the Court confirm that the Deed of Trust does not permit the admission of

female students;

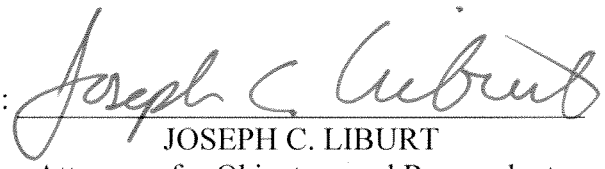
4. That the Petition be denied and dismissed with prejudice and that Petitioner take nothing thereby;

5. For such other and further relief as the Court deems just.

Dated: May 8, 2012

JOSEPH C. LIBURT
Orrick, Herrington & Sutcliffe LLP

HEATHER M. HOEKSTRA

By: 
JOSEPH C. LIBURT
Attorneys for Objectors and Respondents
Kinch Hoekstra and Edward Keonjian,
Trustees of the L. L. Nunn Trust

OHSUSA:750756571.1

VERIFICATION

STATE OF CALIFORNIA
COUNTY OF INYO

I have read the forgoing **OBJECTION AND RESPONSE TO PETITION FOR COURT ORDER CONSTRUING TRUST PROVISIONS, OR, IF NECESSARY, MODIFYING THE TRUST INSTRUMENT** and know its contents.

I am one of the Respondents and Objectors. The matters stated in the Objection and Response are true of my own knowledge except to those matters which are stated on information and belief, and as to those matters I believe them to be true.

Executed on May 7, 2012, in Princeton, New Jersey

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

Kinch Hoekstra
Trustee of the L.L. Nunn Trust