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Kinch Hoekstra and Edward Keonjian, Trustees of the
L.L. Nunn Trust and Directors of the Deep Springs
College Corporation

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 **CASE MANAGEMENT CONFERENCE STATEMENT OF RESPONDENTS** Hearing Date: June 22, 2012 Hearing Time: 9:00 a.m. Dept: 1 Judge: Hon. Dean T. Stout

Respondents Kinch Hoekstra and Edward Keonjian submit this Case Management Conference Statement to apprise the Court of recent events that affect the topics to be discussed at the upcoming initial Case Management Conference on June 22, 2012.

I. RECENT EVENTS

On September 17, 2011, the Trustees of Deep Springs College voted to approve the following resolution: "Be it resolved, the trustees in good conscience and exercise of their best judgment in carrying out the purpose of the trust, have determined that they have the authority to decide whether to admit women as students." The Trustees rightly saw the proper understanding of the Trust's purpose as the necessary precondition to admit women as students. The Trustees determined that if – and only if – they received permission from the Court, they would be able to transition to coeducation. Accordingly, on February 6, 2012, David Hitz, on behalf of the Trustees, filed his "Petition for Court Order Construing Trust Provisions, or, If Necessary, Modifying the Trust Instrument" ("Petition"), together with a memorandum of points and authorities and a supporting declaration.

On May 9, 2012, dissenting Trustees Hoekstra and Keonjian ("Respondents") filed their "Objection and Response to Petition for Court Order Construing Trust Provisions, or, If Necessary, Modifying the Trust Instrument". Respondents explained at some length why the Trust language prohibits what the Petition seeks, and why Petitioner cannot meet the *cy près* standard to modify the Trust.

Apparently in reaction to Respondents' thorough explanation of why the Petition must fail, Petitioner decided to violate trust law in the most brazen manner by resolving to proceed with coeducation at Deep Springs College without waiting for any determination by this Court. More specifically:

On Saturday night June 2, 2012, Petitioner Hitz emailed the Trustees requesting a special meeting of the Board via telephone on June 6, 2012 to approve two resolutions drafted by the Board's Litigation Committee: (1) to change the Articles and By-laws of Deep Springs Corporation to delete or alter the language in those documents limiting the purpose of the Corporation to the "education of promising young men" at Deep Springs College, and (2) to sell

all of the Trust's assets to the Deep Springs Corporation.[1] By virtue of this scheme, Petitioner contends he can and will proceed with implementing coeducation at Deep Springs College immediately. Appended to Petitioner's June 2 email was a 119-page document appraising the assets of the Trust in preparation for this so-called sale. Attached hereto as Exhibit 1 is a true and correct copy of Petitioner's June 2, 2012 email. Petitioner gave no explanation for why a vote on these resolutions had to occur on an emergency basis, and why, for example, the Trustees could not be permitted even a few weeks to consider them properly.

Questioning the propriety of Petitioner's proposal that the Trustees sell Trust property to themselves as Directors to avoid the restrictions of the Deed of Trust, Trustees (and Directors) Hoekstra and Keonjian protested the nature of the resolutions, the lack of time to consider them, and the lack of a reasonable basis on which to make such decisions. Attached hereto as Exhibit 2 are true and correct copies of pre-vote email correspondence regarding the votes.

Late on June 5, 2012, Petitioner sent the Trustees a 9-page memorandum from general counsel Chris Campbell to justify what he was calling "Plan B," and which he calls the "Corporate Proposal" in the Reply he filed with the Court on June 13, 2012. *See* Reply, p. 9. Petitioner insisted on holding a meeting by phone with the Trustees/Directors on June 6 despite providing the Trustees with less than 24 hours to consider the legal and factual arguments supporting the resolutions. And to be clear, the memorandum from Mr. Campbell was devoted to supporting the resolutions: it was written as a piece of advocacy rather than an even-handed explanation that would fairly allow the Trustees to understand the full legal implications of the resolutions and thereby properly carry out their fiduciary duties. The deficient memorandum and the lack of time for the Trustees to ask questions and properly consider the resolutions made it impossible for the Trustees to act with the necessary care, prudence, and loyalty.

Nevertheless, during this June 6 conference call, Petitioner asserted that it was appropriate for the Trustees to rely on the advice of the Litigation Committee and to devote only an hour to

[1] The Trustees created Deep Springs Corporation in the 1960's as an adjunct to the Trust. Since its creation, the Corporation has existed for the sole purpose of making easier and more efficient certain administrative operations of the Trust. The Trustees of the Trust have always been Directors of the Corporation – hence Petitioner's ability to send the same email to the same people in which he proposed one vote by the Trustees and another vote by the Directors.

the issues before voting on the resolutions. At the end of the call, the Board voted to change the language of the Deep Springs Corporation's Articles of Incorporation and By-laws to permit coeducation. In an attempt to strip from the Trust the assets that are integral to the functioning of the College, and to remove from them their Trust limitations, Board members, wearing their "corporate" hats, voted to offer to purchase the assets from the Trustees. Then, most of those same Board members, as Trustees, accepted the offer they had just made as a Corporation.[2] According to Petitioner, the limitations placed on the use of property under the charitable deed of trust thereupon disappeared, as if by magic. Petitioner now asserts that these unique assets, many of which were purchased by L. L. Nunn himself, may be used for coeducation at Deep Springs without court approval. In essence, the Trustees convinced themselves that they could unilaterally remove the restrictions of the Trust in order to implement coeducation regardless of this Court's ruling.

On June 8, 2012, Petitioner sent an email to alumni and friends of Deep Springs College explaining the Trustees' new course of action. Attached hereto as Exhibit 3 is a true and correct copy of that email. On or about June 13, 2012, Petitioner filed a "Reply to Objection and Response to Petition for Court Order Construing Trust Provisions, or, If Necessary, Modifying the Trust Instrument." In his "Update on the Facts" in this "Reply," Petitioner provides an account of these recent attempts to create facts on the ground to circumvent the legal dispute between a majority and minority of the Board about the fundamental purpose of the Deed of Trust, and about the basic question of whether Deep Springs College can be coeducational.

What Petitioner and the non-dissenting Trustees are doing is legally frivolous. They are setting aside the requirements of trust law, their fiduciary duties, and the terms of the Trust by transferring Trust assets to an entity (the Corporation) that they control, and contending that because this entity (by virtue of the recent vote) no longer is limited to educating promising young men, they can use those Trust assets to institute coeducation at Deep Springs College regardless of the Trust's limitations. This is lawless. The entire doctrine of *cy près* would be meaningless, as would trustor restrictions on charitable trusts quite generally, if trustees who

[2] Trustees/Directors Hoekstra and Keonjian dissented from both votes.

wished to escape a trust's expressed purpose could simply transfer trust assets to a corporation that contained no such limitation, and then use the assets however they wished. That is precisely what Petitioner is doing here.

Petitioner cannot escape trust law by resorting to corporations law. Petitioner utterly ignores that as a matter of trust law, trustees remain trustees at all times in all matters that pertain to the trust. They cannot breach their fiduciary duties by claiming to doff their "trustee" hat, regardless of whether they don a "corporate" hat or any other sort of hat. A violation of fiduciary duties remains a violation even if trustees state that they are not acting as trustees while undertaking the violation.

Even if Petitioner could somehow escape trust law through corporations law, the proposed scheme is a corporate sham. There is precisely one enterprise involved here: Deep Springs College. The Trust governs the College, and the Corporation exists only to serve the College according to the Trust. According to the Articles that set up the Corporation, its first primary purpose is to hold assets so as "to pay over the principal and income therefrom to the Trustees of Deep Springs, a tax exempt trust, for the purpose of educating promising young men as set forth in that Deed of Trust dated November 5, 1923, in which L. L. Nunn is the grantor [.]" For its entire history since the 1960's, the Corporation has simply acted as part of the overall enterprise of Deep Springs College. As the law respects form less than substance (Cal. Civ. Code § 3528), Respondents believe that this Court will see these actions for what they are: a shell-game to avoid California charitable trust law. Petitioner's novel contention that the Corporation can now be deemed an entirely independent entity, assume complete dominance, ignore the Trust, and do whatever it wants with the same enterprise and assets – Deep Springs College – is factually and legally misguided. Petitioner has fabricated this "Plan B" scheme in order to couch this dispute as concerning merely the remaining assets technically held in the Trust's name, thereby (according to Petitioner) leaving all of the assets technically held in the Corporation's name entirely unaffected by the Trust's terms. Because the Trust and the Corporation are both the same enterprise – Deep Springs College – this scheme fails.

This is not a dispute concerning only the assets the Trustees purported to transfer to themselves in their Corporation guise; rather, it is a dispute concerning ALL assets of Deep Springs College, including its goodwill and reputation. ALL assets – whether held by the Trust or the Corporation – are bound by the Trust language, and the Trustees/Directors cannot use ANY of them in violation of the Trust. The Trust and Corporation are inseparable. Moreover, all assets collected by the Corporation are bound by the purposes in place at the time, as stipulated in the Articles of Incorporation: *i.e.*, for the education of promising young men, according to the Deed of Trust.

II. CASE MANAGEMENT CONFERENCE ISSUES

Because the Board of Trustees is proceeding as if trust law does not apply to them and as if its claimed "corporate" authority to implement coeducation were not fictitious, and is pushing on with a plan to recruit women so that they arrive as students in approximately one year, Respondents have no other choice but to file several motions shortly. Respondents plan to move to compel joinder of the Deep Springs Corporation as an indispensable party to the litigation. (Cal. Code of Civ. Proc. § 389.) Although it was clearly Petitioner's obligation to join the Corporation as a party, Petitioner has failed to comply with this obligation (for reasons which are now obvious), so Respondents will file the motion to compel joinder.

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Respondents will also file a motion for preliminary injunction seeking to prohibit the Trust, the Corporation, and any other entity that Petitioner may concoct in furtherance of his scheme, from engaging in any activity whatsoever in relation to coeducation, in order to preserve the status quo pending a final determination on the merits of the Petition before this Court. This preservation of the status quo is also necessary to protect Deep Springs College from potential lawsuits from donors and women applicants, as discussed in Respondents' pre-vote emails (*See* Exhibit 2). It is reckless for the Trustees to continue with their plan to implement coeducation in advance of the legal determination of these matters.[3] Finally, Respondents will request an evidentiary hearing on the merits of the Petition and Response.

Dated: June 19, 2012

JOSEPH C. LIBURT
Orrick, Herrington & Sutcliffe LLP

HEATHER M. HOEKSTRA

By: Joseph C. Liburt
JOSEPH C. LIBURT
Attorneys for Objector/Respondents
Kinch Hoekstra and Edward Keonjian, Trustees of the L.L. Nunn Trust and Directors of the Deep Springs College Corporation

[3] Prior to "Plan B", Respondents were aware that preliminary transition planning was occurring, but Respondents had no intention of seeking an injunction because (1) Petitioner and the Trustees assured the Deep Springs community that coeducation could not happen unless and until court approval on the merits, and (2) Petitioner represented that he was personally paying for all transition costs, thus no Deep Springs assets would be used on transition activities. Indeed, it is Respondents' understanding that Petitioner is personally paying all legal fees and costs in relation to the Petitioner's side of this litigation. Now, however, that Petitioner has decided to ignore the law and this Court and proceed with coeducation regardless, Respondents have no alternative but to seek an injunction. Because Petitioner intends to proceed with the recruitment and admissions process and have the first women students arrive in June 2013, Respondents will ask the Court to set a preliminary injunction hearing within the next few months. Shortly after hearing about "Plan B", Respondents promptly served extensive document requests relating to the Corporation, the Trust, and the L.L. Nunn, LLC, which is another entity that had or has some involvement in certain Deep Springs assets.

EXHIBIT 1

-------- Original Message --------
Subject:[TDS] Plan B for Going Coed in 2013 (from the Litigation Committee) (WITHOUT ATTACHMENT)
Date: Sat, 2 Jun 2012 21:17:59 +0000
From: Hitz, Dave <Dave.Hitz@netapp.com>
To:TDS <tds@thestrykers.net>
CC: Cory Myers <cfm@deepsprings.edu>

[I realized that 9 MB apraisal attachment might bog things down for some people, so let me also send it without.]

Our initial goal was to go coed in 2013. That is unlikely now, given the legal opposition. With appeals, we could be delayed until 2015 or beyond. This is too slow. To keep the 2013 date, we propose Plan B, described below.

I'd like to schedule a one-hour telephone vote next Wednesday, June 7th, so please let me know your availability. (I am free any time from noon to midnight, Pacific time.)

Recap of Plan A

I still think Plan A was the right way to start. We believe the board has the authority under the Deed of Trust to admit both men and women, but given the history, it seemed only fair to ask the court to confirm this. Plus, we promised the community that we would.

At the risk of oversimplifying, the goal of Plan A is to confirm that we may use assets from the Nunn Trust and the Withrow Fund to support a coed Deep Springs. Those assets are worth about $2.5 million. This is an important question that must be resolved, so even under Plan B, our existing legal petitions will continue.

Plan B

Plan B is to move forward on coeducation, but **without using any assets from either the Nunn Trust or the Withrow Fund**. Our legal counsel has advised us that we may legally go coed as long as we don't spend these contested funds.

What allows this is that Nunn's original trust no longer runs the college. Deep Springs Corporation runs the college, and the trust is almost entirely dormant. In 1962, the board – including several of Nunn's original trustees – voted to create the corporation, and in 1996, the board moved the entire operation of the college into the corporation. Trust law determines how trust assets may be used, but corporate law, which is much more flexible, determines what the college is allowed to do.

The steps for Deep Springs Corporation to transition to coeducation in 2013 require a simple majority. The proposed motions are at the end of this email.

At first, this may sound like a legal trick. If Plan B is so easy, why didn't we start that way? Two reasons. First, we didn't anticipate a long legal battle. Second, even with Plan B, we still need Plan A to get access to the $2.5 million in contested assets.

Plan B doesn't guarantee success. The opposing legal team can request an injunction, so the court still makes the final decision. What's different is that we can move forward unless they stop us, rather than waiting through years of appeals.

Also, there is some risk that we'll lose access to the contested assets. However, we believe our case is strong and that new donations can cover the loss if necessary.

I don't feel bad about updating our strategy. We decided that coeducation best fulfills our purpose, so now our responsibility as trustees is to manage the transition as effectively as we can. I worry that delay will damage Deep Springs. It'll be harder to recruit students, since they won't know whether or not they'll be going to a coed school. It could hurt fundraising, faculty recruiting, morale, and who knows what else. Letting the decision languish for years does not seem prudent.

Detailed Actions

This plan requires several steps.

First, we should amend the articles and bylaws of the Deep Springs Corporation to explicitly allow coeducation. As with the trust, we believe the board has the authority admit both men and women, but it is cleaner to modernize the language. The changes are minor and require a simple majority vote of the corporation board.

Second, we shouldn't spend Withrow funds until the petition is resolved. They are managed as a separate fund within the Deep Springs Corporation. The current value is $1.2 million.

Third, we shouldn't use trust assets to operate the college until the petition is resolved. The corporation owns most of the college, but the trust does own some property in the valley. The corporation should buy this property at fair market value. This does not diminish the value of the trust in any way. It simply replaces one asset with another and is allowed by section 2a of the Deed of Trust, which says that the trustees have the authority to sell any trust assets "without the intervention of any court or any limitation or restriction on the discretion of said Trustees." (An independent apraisal, attached, has determined that the real estate and grazing permits are worth $915,000. Our audited financials show an additional $441,000 in property improvements. We propose to round up to $1.5 million.)

Motions

We recommend that the corporation board pass the following resolution:

> Whereas the Board has discussed coeducation with hundreds of alumni and friends of the college, and has determined by an 83% majority that coeducation best fulfills the purpose of the college, and
>
> Whereas waiting for the court petitions on coeducation may delay the transition until 2015 or beyond, and
>
> Whereas the delay has the potential to damage the college in many ways,
>
> Therefore be it resolved: (1) that the articles and bylaws of Deep Springs Corporation be amended to explicitly allow coeducation, (2) that the corporation purchase all valley property owned by the trust for

$1.5 million as determined by an independent appraisal and by audited financials, (3) that neither Withrow Funds nor Trust assets be spent to support education for women until the petition is legally resolved, and (4) that we proceed with a transition to coeducation in 2013.

We also recommend that the trustees of the Nunn Trust pass the following resolution:

Be it resolved that the trust sell all valley property owned by the Nunn Trust to the Deep Springs Corporation, for $1.5 million, as determined by an independent appraisal and by audited financials.

As I said above, I propose that we telephone vote next Wednesday, so please let me know your availability. We can have discussion during the call, and everyone on the litigation committee is happy to have one-on-one conversations as well. (My cell is 650-714-8432.)

I believe that this is a prudent and responsible step for the board to take, and I continue to hope for a transition to coeducation in 2013.

Dave

EXHIBIT 2

-------- Original Message --------
Subject:[TDS] Against "Plan B"
Date: Tue, 05 Jun 2012 03:10:20 +0100
From: Kinch Hoekstra <hoekstra@berkeley.edu>
To:tds@thestrykers.net

Fellow Trustees:

I am dismayed by this turn of events. I think that what the Litigation Committee recommends, as outlined in Dave Hitz's latest email, would be a grave mistake and a seriously irresponsible course of action. We all need to consider very carefully what is being proposed.

First, I doubt that it is an accurate description of collective intent to say that what the Trustees of Deep Springs voted for in September was to confirm that we may use $2.5 million of our assets to support a coed Deep Springs. When we met in September, we were arguing about whether the college should go coed, with the understanding that if the Deed of Trust could not be interpreted or modified to allow such a transition, then such a transition could not be undertaken. The action proposed by the Litigation Committee denies that very premise. This is no mere adjustment of strategy. Moreover, we have effectively promised the community that we will not proceed with coeducation without confirmation from the court that we may do so according to the Deed of Trust. I cannot see how this maneuver would be consistent with that promise.

I further doubt that most trustees had anything but the haziest awareness of the corporation's very existence until the recent reaccreditation exercise brought some of the relevant papers to light, or perhaps until the need to take both a corporation vote and a trust vote on coeducation itself. The founding and guiding principles of Deep Springs have always been understood to be articulated in the Deed of Trust. The Deed has long been circulated to all incoming students and all new trustees. Few alumni or friends of the college even know of the existence of the corporation, and even we who are its directors are generally unfamiliar with and very rarely refer to its articles or by-laws. It would be irresponsible for us to circumvent a legal dispute between a majority of the board and a minority of the board about the fundamental meaning of the Deed of Trust, and about the basic question of whether Deep Springs College can be coeducational, by eviscerating the Trust in this way and hoping that the allegedly looser regulations on corporations won't land us in similar difficulties. This is a simple end-run or shell game that implies that coeducation is more important than our founding principles and our fiduciary obligations.

This fundamental role of the Deed of Trust is reflected in the articles of incorporation and the corporation by-laws themselves. According to the articles setting up the corporation, its first primary purpose is to hold assets so as "to pay over the principal and income therefrom to the Trustees of Deep Springs, a tax exempt trust, for the purpose of educating promising young men as set forth in that Deed of Trust dated November 5, 1923, in which L. L. Nunn is the grantor [.]" As stated in Article I of the Restated Bylaws: "The specific and primary purposes of this Corporation are to provide for and carry on educational work in the State of California similar

to, and in development of, the work inaugurated by Lucien L. Nunn at Deep Springs in Inyo County, California, in such form and manner and at such place or places within the State of California as the Board of Trustees may determine, for the education of promising young men [...] in a manner emphasizing the need and opportunity for unselfish service", etc. I find it incredible that we would attempt to rush coeducation into place under the guise of an altered corporation, without waiting to see what the proper authorities determine about the Deed of Trust – to the specific (and currently contested) language of which the corporation has been carefully and purposefully subordinated.

Dave says that we didn't start with this easy "Plan B" because we didn't anticipate a long legal battle and because the way we approached this (now called "Plan A") was required for access to the $2.5 million in contested assets. This is not why we didn't go with this new plan from the beginning. I don't know what people thought about the chances of a long legal battle, though in the previous coeducation reports and the associated documentation that we say we have considered, a protracted legal contest is frequently and confidently predicted. But we certainly never talked as a board about the procedure we followed being the best one so long as there was no prospect of a legal battle, and we never talked about following the procedure we did because it was the way to secure a percentage of our assets that might otherwise be restricted. To say that our approach to this question was a particular process that we followed to secure a portion of assets or given what seemed to be a comparatively open legal opportunity is rationalization after the fact, now that a possible way to sidestep the legal process has been identified.

L. L. Nunn set up this board of trustees to accomplish the purpose stipulated in the Deed of Trust. In doing so, he intentionally set up this board in the context of California trust law. Just as certain powers are reserved under this arrangement for the Student Body, and certain powers are reserved for the Trustees, so certain powers are reserved for the courts. There can be little doubt that the issue currently in front of the court is just such a matter. The trustees cannot simply decide at this juncture that their interpretation of this matter is authoritative, for what is in dispute is precisely the proper understanding of the limitations of our authority. The court has not decided that the majority's interpretation of trustee authority is valid. Our conviction as a board has been that court approval was a requirement for coeducation. "Plan B" is an astonishing attempt to render the court proceedings almost entirely moot by presenting the court with the accomplished fact of coeducation before it has the opportunity to rule.

I think that the move proposed by the Litigation Committee is illegitimate, legally and morally, and that it will be seen to be so; and therefore that forging ahead on this basis is likely to be far more damaging than delay. For example, what if the courts eventually disallow the transfer of assets from the Trust to circumvent the limitations of an active legal challenge? (Remember that we as Trustees would have to vote to drain the Trust of its current holdings *to fulfill the purpose of the Trust*, where the relevant interpretation of that purpose is currently before the court.) Suppose that we've tried to recruit the coed class of 2013 before some such ruling comes down, and would then have to unspool coeducation *after* it had begun: are such risks preferable to delay? We are not an institution in imminent peril. That we are told that our general counsel has assured us in generic terms that this move is legal should not be sufficient in such a momentous matter. The trustees should have received a full presentation of the legal details before being asked to vote on this matter, and should seek further advice if we have doubts, as a miscalculation about this will be a gargantuan blunder. Similarly, we are owed by this proposal's proponents a full assessment of the putative damage of implementing coeducation in 2015, say, instead of 2013, and an assessment of the risks of pursuing the proposed action instead. Even if this scheme is legally permissible, which I doubt, it would be regarded as outrageous by a great many of our alumni and friends. The damage resulting from that is likely to be serious.

The board voted in favor of coeducation on the understanding that this involved a legal process. The legal process should be allowed to run its course, if both sides of the dispute continue to believe that what they are doing is in accordance with their fiduciary obligations. What those obligations require should be under constant review, and I hope that each trustee will read our Response and further papers and reconsider his or her position

in light of the arguments and evidence therein. We can reverse any decision on this policy at this point, and doing so is unlikely to be more problematic than having the courts put a stop to the policy. Trustees were not presented with all of the material provided in the pleadings before we voted, and that material is relevant to the question of ongoing support for the legitimacy and desirability of transitioning to coeducation. Not least, it is the Respondents' contention that trustees voted on the basis of an entirely mistaken legal standard. Suppose that we are right about this, and also right that Deep Springs cannot meet the correct standard: would two-thirds of the board have voted in favor of coeducation had they known this? If there is doubt about this, how can we as a board proceed with an action like the one being proposed in advance of a legal decision? Or does this board now think that we have the authority to decide in favor of coeducation regardless of the ultimate legal determination that we have that authority according to the Trust? Such a view was – for good reason – never expressed in September or in the board's earlier discussions leading up to the vote.

Although I have indicated that we need considerably more information and opportunity for deliberation, I do have a simple request for information at this point: who is currently on the Litigation Committee? I wonder how many current members of the board have approved of this proposal.

I note that this email was sent out late on Saturday. I was in rural Virginia without internet access on Saturday, driving all day Sunday, and flying all day today. It is now early Tuesday in Oxford, where I arrived a few hours ago from the airport and where I am finally catching up with email. I find that I am being urged to vote in a matter of hours, via telephone call, without any preceding email discussion, to gut the Deed of Trust so that it no longer stands in the way of a favored policy. Most of you have had perhaps a day or two more to think about this breathtaking proposal, which is based on little more than an expression of concern that delay may be damaging, together with counsel's sweeping assurance that this contrivance is legal. We simply cannot exercise our necessary duty of care in these circumstances. I sincerely hope that the sponsors of the proposal will withdraw it, and in any case that the other trustees will have no part in the matter.

Yours,
Kinch.

On 6/2/2012 10:17 PM, Hitz, Dave wrote:
[I realized that 9 MB apraisal attachment might bog things down for some people, so let me also send it without.]

Our initial goal was to go coed in 2013. That is unlikely now, given the legal opposition. With appeals, we could be delayed until 2015 or beyond. This is too slow. To keep the 2013 date, we propose Plan B, described below.

I'd like to schedule a one-hour telephone vote next Wednesday, June 7th, so please let me know your availability. (I am free any time from noon to midnight, Pacific time.)

Recap of Plan A

I still think Plan A was the right way to start. We believe the board has the authority under the Deed of Trust to admit both men and women, but given the history, it seemed only fair to ask the court to confirm this. Plus, we promised the community that we would.

At the risk of oversimplifying, the goal of Plan A is to confirm that we may use assets from the Nunn Trust and the Withrow Fund to support a coed Deep Springs. Those assets are worth about $2.5 million. This is an important question that must be resolved, so even under Plan B, our existing legal petitions will continue.

Plan B

Plan B is to move forward on coeducation, but **without using any assets from either the Nunn Trust or the Withrow Fund**. Our legal counsel has advised us that we may legally go coed as long as we don't spend these contested funds.

What allows this is that Nunn's original trust no longer runs the college. Deep Springs Corporation runs the college, and the trust is almost entirely dormant. In 1962, the board – including several of Nunn's original trustees – voted to create the corporation, and in 1996, the board moved the entire

operation of the college into the corporation. Trust law determines how trust assets may be used, but corporate law, which is much more flexible, determines what the college is allowed to do.

The steps for Deep Springs Corporation to transition to coeducation in 2013 require a simple majority. The proposed motions are at the end of this email.

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Plan B doesn't guarantee success. The opposing legal team can request an injunction, so the court still makes the final decision. What's different is that we can move forward unless they stop us, rather than waiting through years of appeals.

Also, there is some risk that we'll lose access to the contested assets. However, we believe our case is strong and that new donations can cover the loss if necessary.

I don't feel bad about updating our strategy. We decided that coeducation best fulfills our purpose, so now our responsibility as trustees is to manage the transition as effectively as we can. I worry that delay will damage Deep Springs. It'll be harder to recruit students, since they won't know whether or not they'll be going to a coed school. It could hurt fundraising, faculty recruiting, morale, and who knows what else. Letting the decision languish for years does not seem prudent.

Detailed Actions

This plan requires several steps.

First, we should amend the articles and bylaws of the Deep Springs Corporation to explicitly allow coeducation. As with the trust, we believe the board has the authority admit both men and women, but it is cleaner to modernize the language. The changes are minor and require a simple majority vote of the corporation board.

Second, we shouldn't spend Withrow funds until the petition is resolved. They are managed as a separate fund within the Deep Springs Corporation. The current value is $1.2 million.

Third, we shouldn't use trust assets to operate the college until the petition is resolved. The corporation owns most of the college, but the trust does own some property in the valley. The corporation should buy this property at fair market value. This does not diminish the value of the trust in any way. It simply replaces one asset with another and is allowed by section 2a of the Deed of Trust, which says that the trustees have the authority to sell any trust assets "without the intervention of any court or any limitation or restriction on the discretion of said Trustees." (An independent apraisal, attached, has determined that the real estate and grazing permits are worth $915,000. Our audited financials show an additional $441,000 in property improvements. We propose to round up to $1.5 million.)

Motions

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We also recommend that the trustees of the Nunn Trust pass the following resolution:

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As I said above, I propose that we telephone vote next Wednesday, so please let me know your availability. We can have discussion during the call, and everyone on the litigation committee is happy to have one-on-one conversations as well. (My cell is 650-714-8432.)

I believe that this is a prudent and responsible step for the board to take, and I continue to hope for a transition to coeducation in 2013.

Dave

TDS mailing list
TDS@thestrykers.net
http://mail.thestrykers.net/mailman/listinfo/tds_thestrykers.net

-------- Original Message --------
Subject:[TDS] Resolutions, June 2, 2012
Date: Tue, 5 Jun 2012 01:23:51 -0400 (EDT)
From:edward1717@aol.com
To:tds@thestrykers.net

Dear Trustees:

Some three months ago, when a legal challenge to the petition submitted on behalf of Deep Springs to change our Deed of Trust was being considered, attorneys for both sides made an agreement - accepted by a judge - to continue the challenge deadline for some sixty (60) days. That is a fairly common practice when it is clear that a counter-petition could not be quickly prepared to address the issues raised. We appreciated that courtesy.

This brings me to the June 2, 2012 resolutions proposed by TDS Chairman Dave Hitz. We now have notice of a one (1) hour discussion on Wednesday, June 6, on some very important issues - votes to follow immediately. And what is it that we are contemplating? Consider the following under Plan B of Dave's memo:

> "..... Nunn's original trust no longer runs the college. Deep Springs Corporation runs the college, and the trust is almost entirely dormant."

Thus, for starters, according to this determination, virtually everything effected under the provisions of the Deed - what you and no doubt scores of other Trustees - have promoted, cited, championed, reported, and in general brought about - stemmed from an "almost" dormant document. And, a charitable trust was simply replaced by a corporate one. There is much to question here, beginning with how we have been so enormously successful while working under what is essentially now viewed as something just short of a legal Dead Letter.

The primary legal justification here? Apparently, "Our legal counsel has advised us that we may legally go coed as long as we don't spend.....(certain types of funds.)" Well, that remains to be determined; this is why we have disputes resolved within a duly constituted judicial system. Questions? Just to begin: How does corporate law differ from charitable trust law, and how does this affect specifically the governance of Deep Springs? What does "dormant" mean in view of the historical record of TDS stewardship of the Deed? And much more.

The subject of Deed dormancy seems not to have been raised in at least the more than eight (8) years I have served as Trustee, and nothing was submitted that this alleged form of benign neglect has ever been institutionalized earlier. Furthermore, what has been shared about the context and the intent of some type of changes to a corporate entity back in 1962 and in 1966? Without something much more than a most general legal opinion, I cannot in good conscience vote for resolutions which simply eradicate what I have pledged to uphold via a very live Deed Of Trust.

It would be best to continue the legal process now under way to resolve the co-ed issue - a process outlined broadly by our counsel last fall, and subsequently started by same. There is a meeting between the parties scheduled before a judge on June 22.

A judicial system which readily grants a sixty (60) day continuance would probably look less than favorably at the proposed rush to interpretation and action , especially since some new legal theories have just been surfaced.

I respectfully ask you to reject these resolutions.

-------- Original Message --------
Subject: Re: [TDS] Against "Plan B"
Date: Tue, 5 Jun 2012 07:54:12 +0000
From: Hitz, Dave <Dave.Hitz@netapp.com>
To:TDS <tds@thestrykers.net>

Let's keep the Wednesday vote.

We decided that coeducation is the best way to fulfill the purpose of Deep Springs. Now our job is to make it happen.

Legally, of course! But finding a legal solution is like climbing a mountain. There are many paths to the top. Chris proposed Plan A, in part, because he thought it would be fast. We knew that only board members had standing to object, and we couldn't imagine that we'd have a divided board in a legal battle against itself. We expected a decision months ago. (Positive or negative, we'd at least have a first result.)

Okay, so we were wrong. But good boards *adapt*. They respond to change. If one approach doesn't work, or is too slow, then they try another.

Kinch observes that the board has not spent much time on legal strategy. Of course not! We have a divided board in a legal battle with itself. The opposition isn't normally invited to strategy discussions. With Kinch and Ed on the board, we can't discuss certain topics as a normal board would. Instead, theLitigation Committee talks in private and presents – in final form – to the board as a whole. This is admittedly awkward. I apologize, but I see no alternative.

To Kinch's question, the litigation committee is Frank, Erik, Jamie, Cory, and myself (same as the Succession and Agenda Committee). Along with Chris and David Neidorf, of course.

A final thought. We promised the community that we would involve the legal system. We have done that! And thanks to Kinch and Ed, our legal strategy will receive an extra thorough review;

there is a judge well versed in the issues who can review any objections they might raise. If Plan B works, it is because it is *legal*, not because it is a trick. The benefit is, it should be faster.

Dave
cell: REDACTED

-------- Original Message --------
Subject: Re: [TDS] Opinion Letter on Plan B (from Chris Campbell)
Date: Wed, 6 Jun 2012 14:17:51 -0400 (EDT)
From:edward1717@aol.com
To: Dave.Hitz@netapp.com, tds@thestrykers.net

Dave -

You sent out a memo last weekend, concerning alternative coed implementation plans, and calling for decisions today. In essence, together these resolutions are to short-circuit the existing legal process and to avoid the inconvenient language of the trust by shifting all our unique assets to a corporation. Now, less than a day before we vote to effect these schemes. we get an extensive legal brief supporting same (surely only in response to complaints that we were about to vote irresponsibly and in the dark), with no time to digest and discuss same properly. Great.

Ed Keonjian.
-----Original Message-----
From: Hitz, Dave <Dave.Hitz@netapp.com>
To: TDS <tds@thestrykers.net>
Sent: Tue, Jun 5, 2012 5:37 pm
Subject: [TDS] Opinion Letter on Plan B (from Chris Campbell)

Chris provided me with the attached opinion letter regarding Plan B.

As always, feel free to write or call if you have any questions or concerns.

Dave

TDS mailing list
TDS@thestrykers.net
http://mail.thestrykers.net/mailman/listinfo/tds_thestrykers.net

-------- Original Message --------
Subject:[TDS] More on these motions ("Plan B")
Date: Wed, 06 Jun 2012 17:56:26 +0100
From: Kinch Hoekstra <hoekstra@berkeley.edu>
To:tds@thestrykers.net

Fellow Trustees:

Dave's initial September letter to the community said that we would "petition the court to determine whether we may legally go coed". He explained: "The court may let us interpret the trust as allowing women to be admitted, it may allow us to modify the trust, or it may disallow the transition." (His letter in the 2011 Annual Report said: "It will be up to the courts to determine whether we may make this change. If the courts allow it, it will be up to history to judge the change." In his March letter to the community, Dave stated that "we must petition the court to determine whether we may legally go coed.") We were not providing a generic assurance "that we would involve the legal system", as Dave suggests; we were saying that we understood the transition to *depend on* whether the court allows us to interpret the trust to admit women as students, and that we thought that we *must* petition the court for permission to do so: the court would be *disallowing* coeducation if it denied the Petition. This is what Dave wrote to the community on our behalf, and it corresponds with my sense of our shared understanding in our discussions. To say otherwise now is a change of course, not just on which legal strategy to deploy, but on whether we think we should have court approval that coeducation is consistent with the Deed of Trust before implementing coeducation at Deep Springs. That would be a fundamental shift that involves denying a premise of our discussions up to this point, altering one of the parameters in which the vote took place, and abandoning an undertaking to the community.

We need to be honest that to undertake the course of action that the Litigation Committee recommends would be a change of direction and a change of mind. That is why this is no mere matter to be decided by a majority of a quorum in a one-hour phone call, on the heels of a last-minute presentation of a brief in order to placate the complainers, there having been no substantial discussion and only a few days of notice.

Please note that the legality of "Plan B" is *not* assured if it "works" in the sense of no one

putting a legal stop to it, any more than speeding through a residential neighborhood is legal because no one stops you. I'm confident that Ed is as committed as I am to challenging any maneuver that seems illegal; but trustees cannot outsource their responsibilities by counting on us to bring this to a court if it looks improper. Every trustee has an obligation to assure himself or herself that each of the proposals is legal and in keeping with his or her full range of fiduciary obligations.

Having written the above, I received the legal memo, less than twelve hours before the scheduled vote. Those of you who did not check your email yesterday evening or who had other plans for that evening or for today will have had even less time, if any, to consider and digest its contents. Those of you who were unable to open the attachment will receive none. It raises many interesting issues. Here is just one. I hope that all trustees will soberly consider what Chris says about the consequences of breach of trust and the possibility of personal trustee liability. In Chris's enumeration of our personal and individual liability that could follow from these decisions, I was surprised to find no mention of the potential lawsuits that could follow. Suppose that we do as the memo advocates and implement coeducation without prior court approval, and in this hasty and ill-informed manner. Suppose further that the courts disallow it after the fact. Female students, female applicants, donors, and others with a stake in the short-lived coeducational venture could justifiably feel wronged by this board, and sue for damages. Might we be individually liable? Furthermore, I suppose that it is central to our fiduciary duty not to undertake actions that will result in the college being sued. With competent management, there is no risk of lawsuits on this issue if we stay single-sex until the courts decide the matter, whereas if we move to coeducation we will open the college to such lawsuits. How is that consistent with our duty of care?

That the plan now on the table marks a dramatic turnabout is clear from this new legal memo. It concludes by noting that whereas "the Petitions ask the court to provide guidance on how the Trustees and the Corporation may act in the future", implementing the current plan will mean that we ask the court "for approval of what the Trust and Corporation have already done." In other words, we implement coeducation and *then* find out if it is legal. This is no simple supplement to the September decision, but is inconsistent with it. And it seems to me to be reckless, and inconsistent with our duty of care. A court reversal of coeducation after we have transitioned to coeducation would strongly suggest that we had behaved badly at this juncture, it would be disastrous for our reputation, it will be a logistical nightmare, and so on. The proposed course of action thus seems to me to be much riskier for the institution than the potential delay of a year or two. If the court then decides that we cannot transition to coeducation, then, well, as Dave said in his initial letter to the community, such a transition has been legally disallowed. In that case, *if* this situation is managed properly in the interim, we will continue as a thriving institution with an all-male Student Body.

I reiterate my request that the proposers of these motions withdraw them. As should be clear,

I believe that it is perfectly consistent to have voted for coeducation and yet to oppose these proposals, and so I also reiterate my request that trustees vote against the proposals if they are not withdrawn.

Yours,
Kinch.

Let's keep the Wednesday vote.

We decided that coeducation is the best way to fulfill the purpose of Deep Springs. Now our job is to make it happen.

Legally, of course! But finding a legal solution is like climbing a mountain. There are many paths to the top. Chris proposed Plan A, in part, because he thought it would be fast. We knew that only board members had standing to object, and we couldn't imagine that we'd have a divided board in a legal battle against itself. We expected a decision months ago. (Positive or negative, we'd at least have a first result.)

Okay, so we were wrong. But good boards *adapt*. They respond to change. If one approach doesn't work, or is too slow, then they try another.

Kinch observes that the board has not spent much time on legal strategy. Of course not! We have a divided board in a legal battle with itself. The opposition isn't normally invited to strategy discussions. With Kinch and Ed on the board, we can't discuss certain topics as a normal board would. Instead, theLitigation Committee talks in private and presents – in final form – to the board as a whole. This is admittedly awkward. I apologize, but I see no alternative.

To Kinch's question, the litigation committee is Frank, Erik, Jamie, Cory, and myself (same as the Succession and Agenda Committee). Along with Chris and David Neidorf, of course.

A final thought. We promised the community that we would involve the legal system. We have done that! And thanks to Kinch and Ed, our legal strategy will receive an extra thorough review; there is a judge well versed in the issues who can review any objections they might raise. If Plan B works, it is because it is *legal*, not because it is a trick. The benefit is, it should be faster.

Dave

On 6/5/2012 9:22 PM, Hitz, Dave wrote:
Let me update people on our on-going legal process. I'll also describe how Plan B fits in.

The process started in February when we filed two petitions, one on the Nunn Trust and one on the Withrow Fund. (Without opposition, the Judge would have ruled based on this filing.) Then in May, the opposition filed their response. This coming Monday, June 11th, we will file our response to their response. And Friday the week after next, on June 22nd, the Judge will have a conference with all parties. At that meeting, we'll learn more about what's next, such as whether the opposition requests an evidentiary hearing.

Whether we have a shot at the 2013 transition with Plan A depends on how quickly wemove from the conference on June 22nd to decision. With an evidentiary hearing, which is slower, 2013 is almost certainly impossible. Even without the evidentiary hearing we've probably missed 2013. If there are appeals, the timing is hard to predict, but we could easily miss 2014 and maybe even 2015.

The reason we want to vote on Plan B right now, is so we can let the Judge knowwhat we are doing next Monday, along with our response to the petitions. And we'll learn his reaction the week after at our conference. You can see, this is not about hiding anything from the Judge or the legal system. Quite the opposite – the goal is to be transparent and make things happen faster.

Here is something people may not know about corporate law. There is generally no way to ask the courts whether something is legal before deciding to do it. Instead, a corporation gets advice from its counsel and acts: if someone objects, they can seek an injunction. This not a "legal end-run" – it is how the system is designed to work. (Actually, Delaware has something called an "advisory opinion", which is one reason so many companies incorporate there, but that doesn't help us.)

A final comment on timing. We in the litigation committee couldn't evaluate the feasibility of Plan B until we had the appraisal. We first saw that that last Wednesday; the litigation committee had a phone conference on Friday; and Isent it to you all on Saturday.

I do understand that this feels awkwardly fast, and I apologize for that, but it seemed worth the extra effort from all of us to hit this narrow window we have to use existing meetings to get the Judge involved.

Thank you for your time.

Dave

TDS mailing list
TDS@thestrykers.net
http://mail.thestrykers.net/mailman/listinfo/tds_thestrykers.net

-------- Original Message --------
Subject: [TDS] Reminder: Plan B Meeting at 3 PM
Date: Wed, 6 Jun 2012 20:26:13 +0000
From: Hitz, Dave <Dave.Hitz@netapp.com>
To: TDS <tds@thestrykers.net>

Kinch and Ed have both advised against this meeting.

I did not want to act unilaterally, so I checked in with the litigation committee. We unanimously recommend holding the meeting.

The phone number is REDACTED and the conference code is

Dave

EXHIBIT 3

From: Office Man [community.news@deepsprings.edu]
Sent: Friday, June 08, 2012 5:47 PM
To: Deep Springs College Officeman; Main Office
Subject: Going Coed in 2013 (from Dave Hitz and David Neidorf)

Legal Update from TDS Chair Dave Hitz DS'80

The Board of Trustees' goal is for Deep Springs to go coed in 2013. David Neidorf and the transition team are on target to move forward. (After my message is an update from David.)

On the other hand, the legal process has been frustratingly slow. We had hoped to have a court decision months ago, but we didn't anticipate that two trustees would take legal action to block the board's vote. As a result, we may not get a ruling in time for a 2013 transition. With potential appeals we could be delayed until 2015 or beyond.

To avoid delay, the trustees have voted to move forward on coeducation without waiting for a court ruling. We did this because we worry that delay could damage Deep Springs. It could be harder to recruit students since they won't know whether or not the school will be coed. Uncertainty could hurt fundraising, faculty recruiting, morale, and possibly cause unforeseen damage to the school's standing. Letting the decision languish for years does not seem prudent. As a board, the trustees voted to go coed, so we believe that our job now is to make it happen: effectively, quickly, and – of course! – legally.

People may be surprised. How can it be legal to go coed before the court rules?

The reason is that most of Deep Springs' assets are not subject to the trust restrictions which lie at the center of the pending court case – they are not even part of the original Nunn Trust. The college has about $27 million in total assets, including $17 million in investments. But only about $2.5 million is *potentially restricted.* Our plan is to undertake coeducation and to run the college **using only assets that are clearly unrestricted,** reducing available investments to $14.5 million. The legal petitions are still important, because we still want the $2.5 million. There is some risk, but we believe we have a strong case.

You may recall that the last coed discussion, in the 1990s, ended in a stalemate when the board realized that the college was almost bankrupt. The trustees turned their attention to fund-raising. In a show of good faith, trustees on both sides of coeducation shook hands and gave *unrestricted* gifts to Deep Springs. They wanted to let future trustees decide this issue. Since then, our policy has been not to accept donations with restrictions either for or against coeducation. We rebuilt the college and the endowment entirely with unrestricted funds. As a result, few restricted assets remain.

This is the simple version, but as always, we will post all our filings on the website, for those who want the details.

This approach does not guarantee success. We will notify the court of our plans. Perhaps we will be blocked, but we believe it is unlikely. We remain optimistic and hopeful that we can have a successful transition to coeducation in 2013.

Dave Hitz

Transition Planning Update from David Neidorf

The transition process for coeducation at Deep Springs College is proceeding smoothly. Since I last reported to the DS community in December, the Coed Transition Committee held a three-day meeting at Deep Springs in January, and has since continued its work via subcommittee. Initially we planned to finalize transition recommendations to TDS during the summer, but we have been struck by the usefulness and importance of the Student Body's participation. By extending the process into the upcoming academic year, we will be better able to involve members of the incoming class of 2012 in detailed discussion of the transition. It is this class that will, if all goes according to schedule, be second-years during our first coeducational year.

During our January meeting, the transition committee accomplished the two major items on its agenda: We established detailed agenda for the work of the subcommittees, on such things as admissions, recruitment, community expectations, health services, and staff adaptation. And we came to tentative agreement over our larger gateway questions. If you don't recall the makeup of the subcommittees and their structure, see my December report at http://www.deepsprings.edu/news%20and%20events/coeducation.

In its discussion of gateway questions, the committee tentatively agreed (pending review when we finalize our report) on the following recommendations to TDS and the student body:

- That we establish a "transition period" of no more than three years, beginning with the matriculation of our first female students, after which we reevaluate policies established during the transition period.
- That the total number of students in a coeducational SB remain the same as in years past at Deep Springs.
- To continue – as we do now – considering gender in admissions decisions, making an effort during the transition period to reach rough gender parity in student numbers over a two-year period. We then anticipate a reexamination of whether or not to continue taking gender into account in admissions.
- That all students who wish to are able to reside in single-sex rooms and use single-sex bathrooms throughout their residence at the college, and that this arrangement be the default for the initial four months of each student's residence.
- That we make infrastructure changes to ensure that single-sex or private bathrooms are available in the dormitory and near ranch, farm and garden facilities at the lower ranch.

We have also had three visits from our admissions consultant, Ted O'Neill (former Dean of Admissions at the University of Chicago). Ted has taken a close look at all stages of our admissions process and discussed with us its quality, (he gave us high marks), and various ways of streamlining it without loss of quality if (as we expect) applications more than double over the next few years. As with the other aspects of transition planning, Ted's recommendations will be included in our final report to the Trustees this fall.

I have been very pleased with the quality and wisdom of the input contributed to this process so far by students, staff, consultants, and board members, and I look forward to working further with this group. Some alumni have asked why not all eras of alumni are represented on the committee – the answer is that we approached planning the transition as more a practical task than as a political opportunity to involve a broad range of supporters. In addition to board representation, we wanted to assemble a smoothly working group of people who would either participate in the transition, or else who had significant professional experience directly relevant to our particular case; residential coeducation with small groups in isolated and intense environments. So far this procedure has worked very well.

Several alumni have asked me also how they can help with the transition. I hope that those who are interested in doing so will let me know directly, but at this juncture there is little help needed. As we move towards recruitment that will change, and we will be back in touch. For now, we hope that alumni who are pleased by the transition will help us to register sustained community support by lending a hand in our ongoing development efforts.

Best wishes for the summer season,
David Neidorf
President, Deep Springs College

PROOF OF SERVICE

I am more than eighteen years old and not a party to this action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 1000 Marsh Road, Menlo Park, California 94025.

On June 19, 2012, I served the following documents:

CASE MANAGEMENT CONFERENCE STATEMENT OF RESPONDENTS

on the interested parties in this action by placing true and correct copies thereof in sealed envelope(s) addressed as follows:

Christopher L. Campbell
Baker Manock & Jensen, PC
5260 N. Palm Avenue, Suite 421
Fresno, CA 93704

Tania M. Ibanez
Supervising Deputy Attorney General
Charitable Trusts Section
California Attorney General's Office
300 S. Spring Street, Ste 1702
Los Angeles, CA 90013

Peter E. Tracy
Law Office of Peter E. Tracy
106 South Main Street, #200
P.O. Box 485
Bishop, CA 93515

I am employed in the county from which the mailing occurred. On the date indicated above, I placed the sealed envelope(s) for collection and mailing at this firm's office business address indicated above. I am readily familiar with this firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the firm's correspondence would be deposited with the United States Postal Service on this same date with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 19, 2012, at Menlo Park, California.

Tina McBride