SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF INYO

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| IN RE THE MATTER OF | ) |
| | ) |
| L.L. NUNN TRUST FOR THE BENEFIT OF DEEP SPRINGS COLLEGE UNDER THE DEED OF TRUST DATED NOVEMBER 5, 1923 | ) No. SICVPB 1253232 |
| | ) |
| DECEASED. | ) |
| | ) |

**REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS**

HONORABLE DEAN T. STOUT

Monday, November 19, 2012

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BISHOP, CALIFORNIA; MONDAY, NOVEMBER 19, 2012

1:08 P.M.

DEPARTMENT NO. 4 HONORABLE DEAN T. STOUT

APPEARANCES:

(The Petitioners are represented by counsel, CHRISTOPHER L. CAMPBELL and PETER TRACY, Attorneys at Law; the Respondents are represented by counsel, JOSEPH C. LIBURT and HEATHER M. HOEKSTRA, Attorneys at Law.)

(Jeri Beth Rich, Certified Shorthand Reporter, C-4670)

THE COURT: Good afternoon. Please be seated.

All right. For the record the Court will call the matter of the L.L. Nunn Trust for the Benefit of Deep Springs College Under the Deed of Trust Dated November 5, 1923, this court's case number SICVPB 12-53232.

And could I have counsel please state their appearances?

MR. CAMPBELL: Christopher Campbell, your Honor, representing the petitioner.

MR. TRACY: Peter Tracy also representing the petitioner, your Honor.

THE COURT: Thank you, Counsel.

Sorry about the moving chairs.

MS. HOEKSTRA: Heather Hoekstra representing

the Respondents.

THE COURT: And it's Hoekstra?

MS. HOEKSTRA: Hoekstra, yeah.

THE COURT: Thank you.

MR. LIBURT: Good afternoon, your Honor. Joe Liburt also representing the Respondents.

And one of the Respondents, Kin Hoekstra, is actually sitting right there.

THE COURT: Thank you. All right.

MR. CAMPBELL: Your Honor, I should say that Dave Hitz, the Petitioner, is at counsel table with me.

THE COURT: Thank you, Mr. Campbell.

I -- just thinking about a new pair of glasses -- but I have read and considered the pleadings and exhibits and documents on file in this matter. I understand, first matter on the agenda today, if you will, is the issue of the interpretation of the Deed of Trust -- and correct me if I'm wrong -- but I believe there was a stipulation or agreement between the parties to bifurcate the issues of modification. Am I correct, Counsel?

MR. LIBURT: That is correct, your Honor.

MR. CAMPBELL: Yes, your Honor.

THE COURT: I have a number of -- the petition -- is it Mr. Hitz or Hitz?

MR. HITZ: Hitz.

THE COURT: Thank you. Sorry.

For court order construing the Trust provisions and, if necessary, modification, was filed February 6, 2012, in this matter. There was a request in that petition, I believe at page 18, for the Court to take judicial notice under Evidence Code Section 451 subdivision (e), generally referred to "The Request Pertaining to Words and Phrases." I would be inclined to take judicial notice. Anything further in that regard from anyone?

MR. LIBURT: I'm sorry, judicial notice of what exactly, your Honor?

THE COURT: On page -- can I have Volume I -- the "Words and Phrases."

MR. CAMPBELL: I have it in here somewhere.

MR. LIBURT: No objection, your Honor. That's fine.

THE COURT: Okay. I couldn't remember the precise title. I had to look it up in the pleading.

MR. LIBURT: That's fine.

THE COURT: Very well. I will take such judicial notice and I am mindful of the parties' positions on that issue.

Again, the petition was filed February 6,

2012; objections -- objection and response filed May 9, 2012; reply, June 13, 2012; and then the amended objection and response, August 15, 2012. I do -- I am mindful this past Friday, November 16th, some evidentiary objections were filed but I believe they pertain solely to the -- I'm going to say Respondent Objector's Motion for Joinder and Motion for Preliminary Injunction, which I would intend to hear arguments on those matters sequentially and start with the interpretation issue, if that's acceptable to counsel.

MR. LIBURT: That makes perfect sense, your Honor.

MR. CAMPBELL: Yes, your Honor.

THE COURT: All right. Let me start, then, with the Petitioners on the interpretation issue.

MR. CAMPBELL: Thank you, your Honor.

Once again, Christopher Campbell for the Petitioners.

Thank you, first of all, for taking time during your Thanksgiving break so that we could get this to hearing without any additional delay.

Unfortunately there have been -- have been some issues outside of any of our control that have stretched out longer than we'd hoped.

THE COURT: I understood. No problem.

MR. CAMPBELL: As you know, Deep Springs college is really the only college of its type. It's had a long history -- 95 years or so now -- and during that time it's gone through sort of some booms and busts. As we -- as we pointed out, there was some very difficult times during the nineties and the, as always has happened with Deep Springs, there's a small group of people who really cared about it who came together to bring it literally back out of the rubble of the buildings collapsing. And we have to recognize that everyone involved in this case, every litigant, everyone who filed a declaration, and all of the counsel played very significant roles in that renovation, renovation and renaissance of Deep Springs, that leads it to the high point that it is today. We certainly recognize that Respondents and their counsel are doing this because of their great concern about Deep Springs and that is, as you can see, there's quite a few folks in the audience who are greatly concerned about Deep Springs. We won't take a poll of how they would vote on these -- any of these issues but they're -- there is a lot of concern. We all --

THE COURT: If I may interrupt, if there's students here, which it appears there are, I hope they

get credit for --

MR. CAMPBELL: Well, one of the things -- basic purpose of Deep Springs is to have practical experience in governance so I think this is a really pertinent thing for the education as envisioned.

THE COURT: I would hope that's true.

Also being mindful of the arguments or statements relative to isolationism being a significant part of the university, I hope there's no temptation coming over here to Bishop today.

MR. CAMPBELL: Right. Well, they weren't allowed to talk to anybody until they got through the metal detector.

THE COURT: Okay. I'm sorry.

MR. CAMPBELL: That's quite all right.

And in a very real way each of us are -- have been shaped by, and we do this because, Deep Springs has been a really intense and defining experience in our lives. So we -- we fully recognize that everyone is acting in the best good faith here.

We know from our own experience that Deep Springs has very strong support, it's very deep, but it's also very small because it's a small college with a small alumni group, a small circle of friends and as a result it's inherently fragile and unstable.

That makes all of us who are involved in taking on the stewardship of Deep Springs for whatever limited time we are responsible for it very cautious about making any changes, making any shifts. But at the same time the current group is also highly aware that there are a lot of problems in all sorts of historical institutions, and certainly Deep Springs has had the problem, of just continuing with what you're doing because it seems like such a success and then -- then it becoming a problem as you go ahead.

At least since I arrived at Deep Springs in 1973, and certainly before that, there's been discussions about co-education: It's been set aside, it's been highly divisive at some times, it's been set aside at other times. When the Deep Springs community realized that to them the continuation of Deep Springs was more important than any particular element of it, we needed to focus on that, which is, as I've described, or we've described in our papers and declarations, is what happened in the nineties.

When the -- one of the declarants for the respondents, who is Paul Jeffrey Johnson in his declaration but we always have known him as Jeff, so I -- when he was Chairman of the Board he instituted a long-range planning process to try to get away from

that boom and bust cycle, really looked down the road more than the Trustees had in the past perhaps, and co-education was on that initial list of things that had to be addressed and has stayed on that list.

By 2010, the Trustees decided it was time for them to really dig into that and understand it and make a decision.

As -- as has been discussed, the tone of the discussion was a little different this time because the focus was on what Deep Springs should be doing, leaving the practical elements of both legal and financial and architectural to come after the decision of what should be done. In that process the trustees did have access to all of the documents and I -- I know for a fact that many of them read volumes of documents that had been generated about co-education in the past. Those included legal briefs from several of us in the room that have been generated at various times and analyses --

THE COURT: Well done, I might add, to both sides. Thank you.

MR. CAMPBELL: Thank you.

MR. LIBURT: Thank you.

MR. CAMPBELL: Of course these were prior ones. The -- as -- as Respondents have noted, I've

provided -- I've been general counsel since '92 and I've provided various -- various analyses of this issue and obviously my research and understanding of how -- how the law applies has developed over -- over the last 20 years, as I hope all of our understandings does develop over that period of time.

So ultimately the Trustees decided they needed to come to a decision and that decision was really based on the focus of why Deep Springs exists and why are we all spending so much time on it. And that came down to Nunn's vision of a practical crucible, in a sense, to use practical experience to train people for leadership to make a difference in the world and make a difference particularly on the things that he discussed: Unselfish -- over and over again -- unselfish service and moving the body politic away from materialism and greedy profit-seeking towards a more inclusive and, in his case, very spiritual view of life.

And seeing that as really the rationale for Deep Springs to be there and the rationale for L.L. Nunn to himself create and care so much about it, the Trustees made the decision that of course they would keep educating men but to educate men in an environment, a practical environment, where they can

practice leadership.

Nunn made point after point the reason for student body government is so they can practice leadership and they can practice governance so that they are really learning how this works before they go out in the world just no longer made any sense to be in a single-gender student body; that it was important to not only educate women in the same way because of their leadership roles in society, but it's very important to educate the men who are at Deep Springs with -- in a co-educational environment because that is the practical training. You know, what Nunn kept saying, is you have to have practical training in order to get good at things.

So for all those reasons in this day and age to fulfill that -- that broader purpose of Deep Springs of educating leaders to have an impact in society, whether they're male or female, the Trustees decided that that overarching purpose that Nunn articulated is best suited by pursuing co-education.

And of course, as we've laid out in our papers, the Trustees felt that because that is the purpose, they had, in their determination, after long study, that is the purpose and this is the best way to serve that purpose, that the grant of discretion to the

Trustees to adjust the methods of education at Deep Springs to fulfill the purpose included that discretion to transition the student body to a co-educational student body.

THE COURT: Mr. Campbell, if I can interrupt while you take a pause there.

MR. CAMPBELL: I was actually concluding, your Honor, so, please. We'd like to respond to any -- anything that you have a concern about.

THE COURT: I appreciate that.

Some of your argument seems to be that because of the broad authority that's granted to the Trustees, that with changing times and, as you argue, this overarching purpose of providing practical training, if you will --

MR. CAMPBELL: Yes.

THE COURT: It's not inconsistent with the purpose of the Trust to go co-ed. But I think we agree that, if there's no ambiguity, the Court is bound to interpret the plain language and meaning of the Trust Purpose clause. I mean we're in agreement on that I assume.

MR. CAMPBELL: Correct.

THE COURT: All right. And my concern is -- well, let me phrase it this way: You've also urged the

Court to consider extrinsic evidence and I guess my first question is could you identify the ambiguity in the Purpose clause that would allow the Court to consider extrinsic evidence?

MR. CAMPBELL: Certainly, your Honor. I can almost do it word for word. But paraphrasing slightly, the -- the Purpose clause begins with the phrase that "The property is provided to the Trustees for the purpose of carrying on the educational work begun by the Grantor and continuing that" -- "continuing" -- "carrying it on similar to and in development of that educational work being" -- "begun by the Guarantor."

To me, that alone requires some extrinsic evidence because clearly the Grantor did not attempt in the Deed of Trust to fully describe the educational work that he had begun. If the Trustees are -- are exhorted, given the fiduciary duty, to carry on that educational work that he had begun, it seems to me that that phrase requires them to look at all of the other things that he wrote to describe that educational work and understand his purposes in that educational work --

(A discussion was held off the record.)

MR. CAMPBELL: Purposes, to understand his thinking and his -- and why it was so -- why this particular educational work was so important to him.

And, as we know, as you've seen, there's a lot of other writing that he did specifically to the Trust -- to the students to help them understand what he was getting at in this -- in this unique school that he had -- he had formed.

So to me that -- that direction, that's not -- I mean in a sense there's not ambiguity but it's -- it is a direction from Nunn to look at other things to understand the educational work that the Trustees are being given the fiduciary duty to carry on.

The -- the Deed of Trust is not a complete explanation of what he -- and he did not attempt to make it a complete explanation of what this educational work was. So how could they -- how could they understand what their charge was without looking at his other writings?

THE COURT: As an aside, for the students' benefit, I think one of those extrinsic items of evidence, letters to the students, was kind of chastising them about coming to town.

MR. CAMPBELL: Yes.

THE COURT: But I think we're okay here, once again, for this purpose --

MR. CAMPBELL: Well, we have -- we have solved one of those letters because we built their new student

residence where the tennis court was so they're not hopping around like monkeys on a tennis court any longer.

THE COURT: Let me back up a little bit.

I think you talked about the language in the first paragraph of the Deed of Trust, which I'm referring to as the Purpose clause, as granting rather broad authority or discretion to the Trustees, and I'm going to paraphrase a little bit myself, but basically giving discretion to the Trustees in good conscience and the exercise of their best judgment may determine, so it's the beginning of the paragraph; we have that broad discretion.

MR. CAMPBELL: Correct.

THE COURT: But then it goes on to say, again, The exercise of their best judgment may determine, comma, for the education of promising young men, comma, then selected by the Trustees, and so forth.

It just seems, purpose of argument here, that --

MR. CAMPBELL: Right.

THE COURT: -- a plain reading of that paragraph and that discretion is qualified, if you will, by a stated purpose, basically: The education of promising young men. So in terms of the argument that

they have this expansive jurisdiction, discretion, authority as Trustees in how that education is delivered, I guess the argument is, does that really help the interpretation argument that "promising young men" means men and women?

MR. CAMPBELL: Well, our -- our -- we have not argued that he meant men and women there. Our argument is that he was -- that was part of his description, that balance of the paragraph was his description, of some of the elements of the educational work that he had begun and that the Trustees were required to continue, carry on, similar to and in development of.

But if one were to look at, say, that that's more than description -- descriptive of the current situation, at most we believe it would be a restriction on the Trustees' exercise of their discretion.

And it's very important to note that in the probate law and interpretation of gifts and trusts, a restriction is not a purpose. The purpose is carrying on the college and -- and providing a certain type of education with a certain focus. You know, that education is the purpose.

The question is, as the "promising young men" is, is that education, the benefits of that education, restricted only to be -- to providing it to young men

or is -- is "young men" a description of the college as it existed, which we all agreed was just "promising young men selected by the Trustees" at the -- at that date in 1923.

We believe that that -- that was his description to give the -- basically to concisely say this is the educational work he meant, because he had other educational work going on in other places. But even if it's a restriction, that doesn't make it the purpose and it doesn't allow you to take all of the other comments that it can solely, the funds can solely, be used to bring about the purpose. You can't bootstrap that "solely" to put it in front of "young men," you know, "solely for the purpose of young men" because he never says that "young men" is the purpose and logically it makes no sense, because you're supposed to be selecting young men who -- or students, which is the terminology we prefer to use -- you're supposed to be selecting these students by finding the ones who are willing to accept the purpose of Deep Springs and to carry on the purpose of Deep Springs.

If educating -- if -- merely educating young men was the purpose, then there would be no meaning to that language, that -- that these students need to carry on the purpose, not only while they're at Deep

Springs, but after they leave, you know, the purpose of -- of the education, which is in -- is below that paragraph after the selection of "young men," emphasizing unselfish service, et cetera. So that's, to us, that emphasizing the "unselfish service," which is right there, is the description of what he was getting at, what type of education he was getting at. He doesn't say, "this is how you shall provide unselfish service," he doesn't say, "this is the type of practical work you will have," but he emphasized that unselfish service, practical work, and student governance are important elements of the educational model he was -- he was creating.

But those -- those are still elements that, yes, in their discretion the Trustees can develop as -- as they learn things. L.L. Nunn came to education very late in his life. He had -- he had many other careers before then and he only accidentally came to education because he needed to educate people to run his power plants because no one else was doing that, and he got very interested in it. But it was very late in his life and he had a very short time to experiment with it. Some other experiments had failed. He founded Deep Springs in 1917. He wrote the Deed of Trust in 1923.

I think it's very clear, from even the Purpose paragraph, but certainly all of his other writings, that he did not think he had it completely figured out and he wanted the Trustees to continue experimenting, that it was an educational experiment, and he expected that it would need to be modified and he hoped that it would improve.

There's one letter that I think both parties have quoted where he said he really hopes that things change and grow because it needs to get better.

THE COURT: Let me ask you about some of the cases here that were cited, if I may. And the Trustees of Dartmouth College case was cited. And it appears in that case that it was clear that it would be impossible to keep the college operating under the specific terms of the Trust restrictions, if you will, that -- to educate Quincy-born females only.

MR. CAMPBELL: Right.

THE COURT: And I don't know if that doesn't distinguish that case from the case at bar here. I'm not convinced from the allegations or evidence that Deep Springs cannot continue to operate under the specific terms of the Trust. I mean can we distinguish the Trustees of Dartmouth College vs. City of Quincy on the basis that it was apparently financially impossible

to keep Dartmouth operating if they adhered to the Trust?

MR. CAMPBELL: Well, your Honor, I think the distinction there is that that case, and many other cases that have been cited, were not ones about the interpretation of what aren't the terms of the Trust, but -- but were more about, Well, we all agree that this is the term of the Trust and it's -- and it's either inconvenient, problematic, et cetera; what do we do about it?

So I think there's a distinction right there, is what we're talking about is what is the correct interpretation of the terms of the Trust in the first instance. Is the "promising young men" actually a limitation on the Trustees' discretion or not? And if your Honor finds that it is a limitation, then I think we move to the next step, which is, as you noted at the beginning we bifurcated -- of modification, if -- are there grounds for modifying that limitation. But if your Honor finds it's not a limitation, then I don't think Dartmouth and a number of the other cases really apply because those are ones where there was an agreement that there was a limitation that was problematic to some degree.

But we're at the phase of deciding -- deciding

what is the purpose and whether -- and, more importantly, what is the breadth of discretion granted by the instrument to the Trustees to operate Deep Springs in the future.

THE COURT: All right. Thank you.

Anything further, Mr. Campbell?

MR. CAMPBELL: No, your Honor, if you don't have any other further questions.

THE COURT: Let me hear, then, Mr. Liburt?

MR. LIBURT: Thank you, your Honor.

I would just like to echo what Mr. Campbell said, that everyone involved in this cares quite a bit about the college and has contributed in various ways. And while the parties, as I'm sure you've seen from the papers, vigorously dispute most of the issues, Respondents certainly appreciate the contributions that Petitioner and people aligned with Petitioner have made. And so it is somewhat uncomfortable, I think, for everyone to be in this position where we are so vigorously disagreeing when everyone obviously cares quite a bit.

So I'd like to begin with an overview of what I'm going to say and then address "promising young men" specifically and then move on to "discretion," the Trustees' discretion.

California courts have repeatedly held that the paramount rule in interpreting wills and trusts is that the intention of the Grantor as expressed in the granting document must be given effect.

L.L. Nunn's intention as expressed in the Deed of Trust is clear. He wrote that "The purpose is to educate promising young men in a manner emphasizing unselfish service, democratic self government in California as a nonprofit institution."

And he further wrote that "This educational work is to be carried on by the Trustees," quote, solely for the advancement of the purpose herein above mentioned, unquote.

This is a clear and unambiguous statement of Nunn's intent that Deep Springs College educate solely promising young men.

California courts have repeatedly held that we're supposed to give the language its ordinary, commonsense meaning rather than a specious and fanciful meaning and we can't just ignore this language and render it superfluous; we can't simply pick and choose the language we like and we don't like.

But even if the Court finds the Deed of Trust somehow ambiguous on this point and considers extrinsic evidence regarding L.L. Nunn's intent, there is simply

no evidence whatsoever that L.L. Nunn ever affirmatively intended to allow women students at Deep Springs College. The evidence is entirely one sided.

Respondents have submitted numerous letters from L.L. Nunn including those in which he explicitly says that the purpose of Deep Springs is the education of promising young men, in so many words. But even the Nunn letters that Petitioner has submitted contain no affirmative evidence that he ever intended to allow for the admission of women. Most of the letters are gender specific to males and a few simply do not specify. But nowhere will you find any evidence that L.L. Nunn had an intention to allow women to attend Deep Springs College.

So when you add it all up, you have a specific instruction in the Deed of Trust that the purpose is for the education of promising young men, that the Trustees solely have to advance this purpose, and then you have a lot of extrinsic evidence, should you choose to examine it, and we don't believe there's a basis because the language is plain, but you have this extrinsic evidence where Nunn is talking about young men, men and boys, at Deep Springs, but you have nothing at all where he ever talks about Deep Springs having women students.

And in light of the one-sided evidence, Petitioner is left to advocate what we regard as specious and fanciful reasoning, which really boils down to the following: Because L.L. Nunn did not in everything he ever wrote specifically say, "young men and not young women," that somehow this means he really intended to allow the admission of women. This sort of argumentation is not evidence that L.L. Nunn had any actual intention of permitting women to be students at Deep Springs and it violates the principle that the intention is to be determined from the language the Grantor actually used and not some undeclared intention which may have been in his mind.

Now, there's no evidence that L.L. Nunn ever had such an undeclared intention but, regardless, that's what Petitioner's effectively arguing for.

Because the evidence of L.L. Nunn's actual intention is entirely one sided, the Trustees switched horses in midstream and have tried to argue that regardless of whether "promising young men" really means what it says, they have unlimited discretion to do whatever they want.

The Trustees here try to take an ordinary grant of discretion in the Deed and elevate it so that it is the only meaningful language in the Deed to the

exclusion of any of the specific commandments that L.L. Nunn carefully set forth in the Deed.

Trust law does not permit this. Even if the Trustees could show that L.L. Nunn gave them absolute discretion, and he didn't, even absolute discretion must be exercised within the purpose of the Trust. As one California court colorfully put it, quote, The purpose of a Trust is to be carried out no matter what the document says about the Trustor's -- Trustee's discretion. It is obvious that a trustee's discretion is never unlimited or arbitrary such as might be exercised by an oriental prince out of the Arabian Nights sitting at the city gate and exercising his own uncontrolled whim as to what is appropriate and just. That's from the In Re: Miller's Estate case at page 907.

Similarly, as the court held in the Estate of Bothwell case, the plan of the Trust -- the Trustor must be followed and the Trustees can't depart from it merely because they believe it's unwise. As the Bothwell case instructs, the Trustees cannot substitute their own plan because they think it is a better one. But that is precisely what this proceeding's about. The Deep Springs Trustees think L.L. Nunn's plan to educate promising young men is unwise and so they are

steaming ahead with their better plan. They have set themselves up as princes out of the Arabian Nights and, consistent with this view of their powers, they repeatedly urge this Court to defer to their wishes and their view.

But they are Trustees, not princes and, as Trustees, they have a fiduciary duty to carry out the Trust's purposes rather than trying to figure out a way to defeat it.

Turning specifically to "promising young men," what does that mean? Well, the California cases hold that it's axiomatic, that when you look at the -- that you have to look at the instrument creating the Trust to determine the nature, extent, and object of the Trust, and the cardinal rule is that what the Grantor intended to accomplish is to be gathered, if possible, by giving the most ordinary -- ordinary interpretation to the language used without resorting to specious and fanciful reasoning.

So the most obvious point is that L.L. Nunn affirmatively specified that the purpose was for the education of promising young men. The most ordinary interpretation of this language is that Nunn intended precisely what he wrote. The most ordinary interpretation of "promising young men" is not

"promising young women" or "promising young men and promising young women" or any other variant.

Now, Petitioner comes up with numerous different formulations of the Purpose but in none of them does he include this "promising young men" language. There -- this is a blatant disregard of several rules of interpretation. Petitioner's Purpose formulations render the "promising young men" language a nullity and fail to give effect to all of the language in the Deed and it is only by ignoring the "promising young men" language in the Deed that Petitioner can contend that the college is 95 years as an all male institution is mere -- is merely an admissions policy rather than a Trust commandment.

Nunn's repeated inclusion of the "promising young men" language in the Deed was by no means a mistake. In the May 1923 version of the Deed Nunn referred to "young men" but in the November -- the November 1923 version he again focused on that language and added the qualifier "promising." And he states in the November 1923 version that this latter version of the Deed, quote, More particularly defines the terms and conditions of the Trust upon which Grantor desires that the property conveyed to him -- by him to said Grantees shall be held and used, unquote.

So far from being a mere admissions policy or -- Nunn's specification of "promising young men" can only be interpreted as a command to the Trustees.

But even if all this were not enough -- and this goes to a point that Mr. Campbell made -- Nunn stated in -- in the recitals in the Deed that he had established an educational institution at Deep Springs where he had already been carrying on educational work for the education and development of promising young men.

And then in the Purpose paragraph he says 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 the Grantor at Deep Springs. And then he goes on to specify that that purpose is for the education of promising young men.

So Nunn, Mr. Nunn, is clearly instructing not that the purpose is education of anyone but, rather, that it is limited to being similar to what he had already been doing at Deep Springs and for the education of promising young men.

And it is absolutely undisputed that during the seven years that Deep Springs existed before Nunn executed the Deed of Trust it had only male students.

Petitioner admits this.

And Petitioner also made a judicial admission in his original legal Brief that accompanied his Petition when he admitted that, quote, There is no question that L.L. Nunn intended the Deep Spring College student body to be all male when he founded the school, unquote. That's at page six of the Brief that Petitioner filed on February 5 or 6.

And there's no basis to read the phrase "promising young men" to mean something different when it appears in two places in the Deed. In the recital it unequivocally meant only young men because it's undisputed that that's all there were in the work that he had been doing and so it must have the same meaning when it is used in the Purpose paragraph.

And then at the end of the Purpose paragraph in the Deed of Trust, in fact in the same sentence as the "for the education of promising young men" clause, Nunn wrote that work described in the Purpose paragraph shall be carried on solely for the advancement of the purpose herein above mentioned, because the purpose herein above mentioned affirmatively states that it is for the education of promising young men. There is simply no possibility that this phrase can properly be interpreted to include promising young women or

unpromising old men or women, for that matter.

So "promising young men" doesn't mean promising young men and women, promising young mankind, or promising young men but not only promising young men; it means what it says. And, contrary to the law, Petitioner's position is that these words should not be given their most ordinary interpretation. Petitioner's position is apparently that words don't actually mean what they say and that nothing is excluded unless it is specifically and affirmatively excluded. So, according to Petitioner, "promising young men" does not mean "and not women," unless Nunn explicitly added "and not women."

But, presumably, according to Petitioner, Nunn's other instructions in the Deed must be given similar treatment. For example, Nunn's instruction that "the purpose is to provide for educational work in the State of California" is not limited to California, because Nunn did not say, "in the State of California and not in any other state, country, planet, or solar system." So, according to Petitioner's logic, the Trustees are absolutely free to move Deep Springs out of California because Nunn did not exclude other locations when he specified California.

Similarly, Nunn's instruction that "the

purpose is to provide for educational work similar to and in development of the work already inaugurated by Grantor at Deep Springs" is not actually limited to such similar work because Nunn did not specify that the educational work had to be similar to and not dissimilar to the work already inaugurated.

Again, Nunn's instruction that "the purpose is to provide for educational work in such manner and form as said Trustees in good conscious and the exercise of their best judgment may determine" is not actually limited to "good conscience and best judgment" because Nunn did not specify that the Trustees had to exercise good conscience and not bad conscience or that the Trustees had to use their best judgment and not their worst judgment, and so on.

It is simply not the law that an unambiguous restriction like "promising young men," in order to be deemed unambiguous and plain language, must affirmatively negate every implied alternative. This is entirely contrary to the canons of construction. But that's what Petitioner's erroneous logic requires.

So the Deed's language is plain and unambiguous and there is no basis to examine extrinsic evidence but, if extrinsic evidence is examined, it is entirely one sided in confirming that L.L. Nunn

intended Deep Springs to be solely for the education of promising young men.

For example, Exhibit 53 to the Hoekstra declaration is a letter from L.L. Nunn to the Trustees of Deep Springs College from 1924 and he says, quote, The 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 and uplifting mankind from materialism to idealism, et cetera, unquote.

What other extrinsic evidence is there, should you choose to examine it? Well, Deep Springs has a history of being 95 years as an all-male institution. That's a practical construction of the Deed language. There have been brochures and other Deep Springs documents that consistently have stated "In accordance with the Deed of Trust, Deep Springs is an all male college."

We have Exhibit 54 to the Hoekstra declaration, which is also submitted by the Petitioner, which is what they've called "The purpose" -- or somebody called "The purpose," where he says, "The

purpose of Deep Springs is to create an environment where young men may build the character for full employment," et cetera.

We have the institutional self-study report from the year 2010, a mere two years ago, signed by Petitioner, Mr. Hitz, in which he certified that he, quote, Believed the self-study report accurately reflects the nature and substance, unquote, of Deep Springs College. And he -- he states, quote, 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, close quote.

And then there -- I'm not going to go through all the other extrinsic evidence, I'm sure you'll be relieved to hear, your Honor, but, and as I'm sure you saw, we attached various other documents to the Hoekstra declaration to similar effect.

So I would like to address fairly briefly some of the extrinsic evidence that the Petitioner discussed and highlighted in Petitioner's Response Interpretation Brief which consisted of pre-1923 Deed of Trust letters from L.L. Nunn.

So the first point about them is that certainly these informal letters, and then of course any letters that Respondents have put forward, none of

them can trump what's actually in the Deed, which is the formal legal document that the Court is supposed to determine the Grantor's intent from, but even in the letters that Petitioner highlighted, the only specific gender references are to men.

Now, Petitioner says that these pre-Deed letters from Mr. Nunn are relevant to explaining the work already begun and thus to explain that language in the Deed. But, regardless of what these letters say, and nowhere in them does he say anything that can be interpreted as Mr. Nunn saying it's just fine for women to be allowed as Deep Springs students, the undisputed fact is that during this period there were only male students. So these letters must be understood in light of this undisputed fact; in other words, Nunn is taking as a given that the students are male. So any discussion of the moral order of the universe, et cetera, is in the context, the known context, of all male students. There's no likely inference that he really meant to ignore what he had actually done and was doing at the time, which was having all male students at Deep Springs when he wrote these letters.

Petitioner talks about how Deep Springs is supposed to be unique. Well, it is, certainly in large part due to the emphasis on living a life of service,

the isolation, the ranch work, the students' self government, et cetera. It doesn't matter if "all male" was unique at the time; it's quite sufficient that the Deed specifies "all male." In short, it's the combination of factors that make it unique and you can't strip out a factor that is specified as a purpose in the Deed.

THE COURT: Well, what -- what if the purpose -- or purposes, plural, as the case may be -- are in conflict? What if, for example, when we look at the phrase in the first paragraph of the Deed of Trust, "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," do you agree that that phraseology is part of the purpose?

MR. LIBURT: I agree that that phraseology is a part of the purpose, yes. But I don't -- it is not in any way inconsistent with part of the purpose being that Deep Springs is for the education of promising young men. It is for the education of promising young men and the education is to be carried out in a particular manner, which is what you just quoted, but those -- those are not at all inconsistent.

THE COURT: Well, between 1923 and 2012, as we look at that language, you know, basically educating

these promising young men in a manner emphasizing the need and opportunity for unselfish service and uplifting mankind, et cetera, and interpreting the meaning of that part of the purpose, don't we have to look at changing societal standards perhaps to fulfill Mr. Nunn's partial purpose, if you will, of educating these students, or promising young men, about the needs and opportunities for unselfish service and uplifting mankind, doesn't that arguably open the door for a conflict here within the Purpose clause and, if so, how do I reconcile it?

MR. LIBURT: No, it doesn't, your Honor. What -- what -- what you're referring to, if anything, would relate to cy-pres or modification; it does not relate to interpretation. I believe what -- what you're getting at is -- or once you start looking at things outside the Deed in societal changes, or what have you, then you're certainly not in the realm of interpreting what this means anymore. If anything, you're in -- you're on the question that we've agreed to bifurcate.

THE COURT: Right.

MR. LIBURT: And -- and I'm not going to go into it because it's -- we've bifurcated it.

THE COURT: Well, I appreciate your point.

That was one of my own questions too. But --

MR. LIBURT: Yeah. You know, and I would -- when -- if and when we get to that, I'll be happy to explain why it's not relevant to that either. But that's begging -- begging a future issue.

THE COURT: That's fine.

MR. LIBURT: So -- so, anyway, so to summarize on the extrinsic evidence, you find copious evidence that L.L. Nunn affirmatively intended Deep Springs to have male students but you still find no evidence that L.L. Nunn ever had any actual affirmative intent to allow for women students at Deep Springs. And since the Court is supposed to determine the Grantor's intent, the extrinsic evidence points to only one outcome.

And now I'd like to turn to Trustee discretion. The courts have said that when determining the scope of discretion that's been given to Trustees, the court needs to look at the instrument creating the Trust alone. So you don't look at extrinsic evidence when you're determining scope of discretion, you look only at the Trust document.

Now, the case law that the parties have cited explains that in general a Trustee can be granted ordinary discretion or absolute discretion and, as we

have argued, L.L. Nunn granted the Trustees ordinary discretion. But this distinction is ultimately irrelevant here because the case law is clear that even if L.L. Nunn had granted the Trustees what's called absolute discretion, absolute discretion is not unlimited discretion; its terms are set by the terms of the Trust, and the cases we've cited in our Briefs explain that.

And as I mentioned when I began from the In Re Miller's Estate and the Arabian Nights, the purpose of the Trust is to be carried out no matter what the document says about the Trustees' discretion and it's obvious that a Trustee's discretion is never unlimited or arbitrary.

So, again, not that I think it matters, but he did not, L.L. Nunn did not, grant the Trustees unlimited discretion. Discretionary power is not presumed to be arbitrary, and absolute discretion must be clearly conferred. There's -- there's nothing in the language that -- where Mr. Nunn used words like "absolute," "sole," and "uncontrolled," or "unlimited." But it's instructive to compare the language -- the discretion that Mr. Nunn put into the Deed of Trust with the language that he used in several of these small, individual trust funds that he conferred in his

second and final codicil to his will where he did confer absolute and unfettered discretion on the Trustees of those Trust funds and this shows that he knew how to do so if he wished to do so.

So -- but there are additional facts that show that the Deed of Trust does not convey unlimited discretion to the Trustees. First, Petitioner places heavy reliance on the Manner and Form clause in the Purpose paragraph of the Deed but this clause does not establish unlimited discretion, nor does it even mean what Petitioner thinks it means.

"Form" in this context refers to legal form: Is this going to be pursued as a Trust, a corporation, an unincorporated association, et cetera.

And as for "Manner," Nunn actually discusses "manner" in the same sentence. He says, "for the education of promising young men in a manner emphasizing the need and opportunity for unselfish service," et cetera. So "manner" seems to refer to an educational ethos or goal but it's not a blanket authority for the Trustees to ignore Nunn's requirement that the purpose is to educate promising young men. So that's the first point.

Second, Petitioner's interpretation of the Manner and Form clause renders much of the Deed

superfluous. It's significant that in paragraph two of the Deed and in the ensuing subparagraphs A through G of paragraph two Nunn goes out of his way to specify various powers and discretion that the Trustees have. All of them, quote, In order to enable them to accomplish the purpose of this Trust, unquote, but among all the things that Nunn explicitly says the Trustees can do, he does not say or imply that they can decide to admit women. And Nunn's explicit listing of powers in paragraph two and subparagraphs contradicts Petitioner's contention that the Manner and Form clause in paragraph one grants the Trustees discretion to do whatever they wish. If that were so, then paragraph two would be entirely superfluous. If the Manner and Form clause means they can do whatever they want, then Nunn's enumeration of specific powers in paragraph two is entirely unnecessary.

Third, Nunn's repeated limitation of the Trustees' powers to the purpose of the Trust, which I believe he does six times where he refers back, demonstrates that he did not give them anything approaching unlimited discretion.

Fourth, Petitioner contends that the Manner and Form clause gives the Trustees discretion to ignore the "promising young men" clause. But, if that is so,

then the rest of the Purpose paragraph is meaningless because it's unnecessary. If the Trustees are free to ignore the "promising young men" requirement, then they can also ignore the nonprofit requirement, the California requirement, the students' self government requirement, and every other requirement in the Deed.

If what Petitioner contends were true, then all these other provisions have no point because, according to Petitioner, the Deed grants the Trustees unlimited authority and discretion. If this were so, then the Deed would be a substantially shorter document; it would contain the listing of the property Nunn conveyed in a single sentence that the Trustees could do whatever they liked with it.

But the Deed doesn't say that, it doesn't mean that, and it wouldn't even be a charitable trust if it did.

The specific requirements and limitations that Nunn placed on the Deed must be given effect as a matter of Trust law.

Fifth, Petitioner relies heavily on paragraph 2(b) of the Deed, which gives the Trustees the power to transfer property. What Petitioner ignores is that paragraph two limits all of its subsections, including 2(b), quote, To accomplish the purpose of this Trust,

unquote. Paragraph two does not give the Trustees discretion to transfer property if the purpose of such transfer is not to accomplish the purpose of this Trust.

Even within paragraph 2(b), Nunn requires that in the event of a transfer, any Grantees of the transfer must take on the Trustees' duties and responsibilities hereunder.

So Nunn made sure that any transfer of property would still keep that property subject to the terms of the Deed, including, of course, that it's for the education of promising young men. In fact, in paragraph 2(b), Nunn declares, quote, 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, unquote.

So, wrapping up --

THE COURT: I'm sorry. And I think we have similar language in paragraph G, basically talking about handling and disposing of Trust estate, that as Trustees deem necessary and appropriate but for the accomplishment and purpose of this Trust.

So I think, again, we kind of come full circle again and get back to, okay, what is the purpose of

this Trust?

MR. LIBURT: I certainly agree that the Court needs to declare what the purpose -- what the purpose is and whether the purpose or part of that purpose is the education of promising young men, I certainly agree with that.

THE COURT: Yeah, I know. Thank you.

MR. LIBURT: Fairly obvious point, I guess, your Honor.

THE COURT: So was mine.

MR. LIBURT: So, as I mentioned before, the case law says that the plan of the Trustor must be followed and the Trustees can't depart from it because they think it's unwise or they have a better plan, and L.L. Nunn understood this legal point. And, since it is the law, he must be deemed to have relied on it.

As he wrote in a letter to Oliver Clark, which is Exhibit 52 to the Hoekstra declaration, he says, quote, Honesty in Trustees requires that the Trustee property be protected against destruction. This includes the declared purpose, character, and traditions, as well as the money, unquote.

So, in conclusion, Respondents respectfully submits that they've shown that "promising young men" is exclusive to males; that the Trustees are to

undertake their activities solely for the education of such young men; that the education of young men is a requirement of the purpose of the Trust; and that the Trustees do not have the discretion to unilaterally alter or ignore that requirement.

Thank you.

THE COURT: Thank you.

Mr. Campbell, rebuttal?

MR. CAMPBELL: Yes, your Honor. It will be relatively short because we really don't disagree with Mr. Liburt's extensive analysis of the law.

What we do disagree with is the interpretation of what is the purpose. We -- we certainly acknowledge the Trustees do not have unlimited discretion. We certainly acknowledge that they -- they are exhorted to follow the purpose repeatedly and that that purpose was very important to L.L. Nunn.

The -- the question is what is the purpose and what is the meaning of this language, and Mr. Liburt's argument really had very little to do with that question. But I do want to respond to a couple of points that he made pertaining to that.

First of all, the recital, as we all know in standard legal drafting, the recitals are statements of things that are of historical context in which the

document is drafted; in that, he said that he had established a school for promising young men in Deep Springs, California. We agree that that's a correct statement and, quite frankly, we agree that -- with Mr. Liburt; it should be interpreted exactly the same way. And when it reoccurs in the Purpose paragraph, it is a -- merely a description of the college as it existed in 1923. It is not a restriction, it is not a purpose. It is a description of the work as it existed on that day, that Mr. Nunn exhorted the -- and entrusted to the Trustees to develop in a similar way using their best discretion on the manner and form -- we can argue about those terms -- but certainly -- certainly that -- that some discretion to shift it to -- to achieve the purpose as they understand it in the best way.

THE COURT: Well, but doesn't the Purpose clause go on to say -- it may be tied to a democratic self government by the students themselves but there's reference in the Purpose clause, as I recall, about carried on, basically, in a manner as currently the case at Deep Springs.

MR. CAMPBELL: Yes. "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."

And then it goes on to the parenthetical, "for the education of young men selected by Trustees as they may prescribe in a manner emphasizing the need" -- "emphasizing," which is an emphatic word indicating that was important to him -- "democratic self government by the students shall be a feature, which work shall be carried on not for profit, but solely for the advancement of the purpose."

So L.L. Nunn knew how to use emphasis -- "shall be," "solely" -- and he did not use any of those words in modifying the "promising young men."

As I said before, the "similar to and in development of the work already inaugurated by Grantor" does cry out for some description of what that work is. And, as I say, we are -- we are contending, and that was what the Trustees -- the majority, not all, obviously -- the majority of the Trustees found that was the -- that was the connotation of that language, that the purpose to them was to provide for and carry out that work.

And "similar to and development of" -- "and development of" certainly implies changes. And we can debate "manner and form" as legal terms but "development of" means continuing the experiment,

clearly.

The other specific item discussed by Mr. Liburt is that the -- the intent of the Grantor is paramount. We agree with that. And -- and the Trustees are doing everything they can to divine the intent and implement it. But clearly there's room for disagreement about that; we wouldn't be here if there wasn't.

But the intention of the Trust of the Grantor really only goes to what they want to be accomplished and how much discretion -- how much limitation they're going to put on the Trustees in exercising their discretion to accomplish those purposes.

Mr. Liburt has set up a straw man of there's no affirmative evidence that L.L. Nunn ever intended to have female students. I think that's a gross misinterpretation of the requirement of Grantor intent.

The question before this Court is did he intend to limit the Trustees' discretion to ensure that there would never be female students. It doesn't -- his intent didn't mean he had to contemplate there were female students. It's like saying he had to contemplate there would be mail wagons or other things that we have today -- the Internet -- but he -- he did -- he did not specifically intend that the Internet

would be used at Deep Springs; I freely admit that. But that doesn't mean that it shouldn't be.

And I think the same thing has to do with women. The question is, first, is "promising young men" a purpose. As I say, just grammatically and from the law, of what the law looks at as purposes, that's not a purpose. The purpose is education of the type and for the result envisioned by L.L. Nunn or hoped for -- his vision was a little grandiose, we admit, but we're still trying to get there. That -- that's the purpose.

The question is -- and the Trustees are given wide discretion to do whatever they can to -- to achieve that at Deep Springs in that development of that educational experiment. The question is did he intend to limit that discretion to having the benefits of Deep Springs achieved only through male students or was he open minded enough to -- to leave that question to the Trustees and merely put that in there as a description of the work that he had inaugurated. And we all agree, everyone in this courtroom agrees, that that is an accurate description of the work he had inaugurated and entrusted to the Trustees to modify and develop as they saw fit over a long period of time. He wanted Deep Springs to be a permanent educational

philosophy; he wanted it to be a model. He had a letter where he says, "a method of education which, if successful, should become general," because he thought it was a better way of educating people. And obviously if he thought it would become a general source of -- type of education, that contemplated involving women.

Tellingly, just in terms of language interpretation, as you, your Honor, noted, right after "promising young men" he said the "need and opportunity" -- "emphasizing the need and opportunity for unselfish service, in uplifting mankind from materialism to idealism." Clearly he was intending that the benefits of Deep Springs redound to mankind, which clearly includes men and women.

The method he was choosing, as Mr. Liburt said, he took as a given that at that time that type of leadership was being provided predominantly by men. There were certainly examples of women, as -- as Mr. Hoekstra's declarations have pointed out, accurately, but predominantly was done by men at that time and he took as a given that they would be men at that time and for some time in the future. But that doesn't mean he restricted the Trustees or he intended to restrict the Trustees to only benefit men or only utilize the education of men to achieve these purposes

in perpetuity. And that's -- that is the hurdle that Respondents need to get over, I believe, is, is there the intention of that restriction. We do not see that. He did not put "sole" -- the word "solely." He did not emphasize that in any way. He took it as a given. And we agree.

But if it had been important to him to actually exclude women for any reason, he would have mentioned it somewhere. As noted repeatedly, he was trained as a lawyer, he practiced as a lawyer. Lawyer training was a little different back in those days. They didn't have a three-day Bar exam but he -- he was a very careful and meticulous man and a meticulous drafter and he did not say, "I intend to limit the Trustees to only admit men or to not" -- "not admit women," as was done in many of the cases responded -- by Respondent -- cited by Respondents. So that -- that is how the Trustees came out in making this decision.

We have that purpose. We are bound to implement it. How do we best do it? What is the -- what is the best way to accomplish it now with regard to this question of co-education? Is the best way to keep a single sex male student body? Is that going to accomplish those purposes out in society that -- of -- of unselfish service, uplifting mankind, all of

mankind, not just the young -- promising young men from materialism to idealism to a life in harmony with the Creator? Or at this point is it a better way to accomplish that goal to start admitting women and start educating both the men and the women for leadership of our current society, which could use a lot of leadership, in a co-educational environment? And that's -- that's the, obviously, the decision the Trustees made.

THE COURT: Thank you.

MR. LIBURT: Your Honor, may I have 30 seconds?

THE COURT: Can you have more than -- you can have more than that. I'm going to -- I'll go back and forth again here. This is important and I want to make sure we fully vet it.

MR. LIBURT: On this issue I have one small point to make and then I will gladly submit unless your Honor has questions.

THE COURT: All right.

MR. LIBURT: The Purpose paragraph, it's Respondents' position that everything in that paragraph is part of the purpose. It begins with the words "the purpose" and it ends by saying "solely for the" -- "solely for the advancement of the purpose herein above

mentioned." Everything in between is part of the purpose. And the problem with Petitioner's argument is that there's no principled way to pick and choose which clauses in this Purpose paragraph are really purpose in which somehow are not purposed; they're merely descriptive or something else. The -- everything is described as being part of the purpose in this paragraph; that's what the plain language is. And there's simply no -- there's no principled basis to say, Well, you know, the "manner and form," that is part of the purpose but the "for the education of promising young men" simply is not. It's all part of the purpose and -- and no part of that can be rendered a nullity or ignored.

With that I'll submit unless your Honor has questions.

THE COURT: Thank you, Mr. Liburt.

Mr. Campbell, anything else?

MR. CAMPBELL: Yes. Briefly.

I don't think -- I don't think Respondents mean that every word is part of the purpose because in their papers they've actually said that the discretion granted to the Trustees is form language that can be omitted.

They've also said that you can't change around

the words but they've moved "solely" up in front of "promising young men." There's, you know, it has to be read as it is and some -- some items are more important than others, clearly.

The -- I mean the purpose is obviously not to provide education to -- within California. It's fairly clear under the terms of paragraph two that the Trustees are granted the discretion to move the college out of California or to provide the assets to someone outside of California to pursue a similar type of education.

So we cannot -- we cannot say that every word in that paragraph has the same weight and the same -- the same direction to the Trustees. You know, the -- the purpose -- I always think that when someone who's a careful writer is writing things down they put the important things first and it says, "The purpose for which the property is conveyed is to provide for and carry on educational work similar to and development of the work already inaugurated" and that -- and I don't see how you can follow "development of" if -- or the Trustees can follow the command to develop when the Respondents are arguing that the Trustees have to hue to every single other word in the whole document.

I, you know, those purpose -- the purpose is a

broad purpose and we've cited many cases where the courts have said of course every one of these is interpreted on its facts but you have to look at the broad purpose and you have to look at the process and the diligence and the -- the reasonableness of the Trustees' interpreting and implementing that purpose. And in this case it is very clear to us that Mr. Nunn's purpose was much broader than educating 12 promising young men per year; he had much bigger things in mind. And he gave the Trustees broad discretion to and intended to give the Trustees broad discretion to develop an experiment with better ways to achieve those broader and more far-reaching purposes.

Thank you, your Honor.

THE COURT: Thank you.

Mr. Liburt, anything else? I don't want anybody going home saying, "I wish I'd said this," so --

MR. LIBURT: Well, as long as you're inviting me, your Honor --

THE COURT: Sure.

MR. LIBURT: -- how about another 20 seconds?

MR. CAMPBELL: We'll time it.

THE COURT: The floor's yours.

MR. LIBURT: Thank you.

Actually I do believe that the boilerplate discretion language is integral to the purpose. Of course we're not saying that the Trustees have no discretion. They have discretion to do many things under this Deed and I think it is important to the purpose that the Trustees do have discretion on many things.

So I don't agree that -- that not all the language is part of the purpose -- it is -- and "solely" refers to the whole purpose.

I believe Mr. Campbell is wrong about the "California." I don't recall anything in paragraph two that says the Trustees have authority to move Deep Springs outside of California but if I'm somehow missing that explicit grant of authority, then I would suggest that there's no such similar grant as to "promising young men."

THE COURT: I had a note to myself to check.

I do want to ask a little bit some of the cases that I believe are cited by the Petitioner.

MR. CAMPBELL: Yes, your Honor.

THE COURT: And I think bearing on the issue of interpretation, and I know we can get into this interpretation vis-a-vis modification, but one of them I believe was from New York.

MR. CAMPBELL: The Edwards case, your Honor.

THE COURT: Let me go back. I'm -- you're right. But going back to the Massachusetts case -- Ebitz, I believe it was -- versus --

MR. CAMPBELL: Yes.

THE COURT: -- Pioneer National Bank, isn't that case distinguishable, Mr. Campbell -- because there was clearly some language the decedent used, referring to gender-neutral programs, gender-neutral language? For example, I think there was --

MR. CAMPBELL: I --

THE COURT -- a quote, "as many students as possible"?

MR. CAMPBELL: He wanted to have his -- the Grantor wanted to have as much impact as possible. I believe that was -- that was a scholarship program for North Hampton -- citizens of the -- North Hampton to be law students. I believe that was the one that was named for a judge who was very interested in the Ninth's Templar.

THE COURT: And isn't that the problem? Isn't that where the ambiguity comes in, in that case that may not exist in this case? Because if the Trustees are directed to acquaint themselves with the educational work --

MR. CAMPBELL: Yes.

THE COURT: -- of the Ninth's Templar in its use and -- use of its program as a guide in carrying out the Trust, they had a problem there because the Trustees couldn't follow the guidelines and at the same time --

MR. CAMPBELL: Correct.

THE COURT: -- restrict the funds to young men.

MR. CAMPBELL: Correct.

THE COURT: We don't have that situation here, do we?

MR. CAMPBELL: Well, I think -- I think the important thing about that case, your Honor, is that it does indicate that directing the Trustees to do -- to look at something outside, much as -- much as in this case, the Trustees are directed to carry on the work similar to and development of the work -- carry on educational work similar to and development of the work inaugurated by the Grantor.

I think just as in the Ebitz case, that that requires the Trustees to look at those other documents to see -- to understand as fully as possible what they can about -- about the work that Mr. Nunn had inaugurated, what was unique about it and what was

important about it, so that they could -- or they can still develop that in a way that is consistent with those principles that are set out. So I -- I think that that is really a direct analogy to this case because of that similar reference to something outside of the Deed of Trust that should be considered by the Trustees in doing their work.

THE COURT: All right. Thank you.

Let me then shift back to the Estate of Edwards, the New York case --

MR. CAMPBELL: Okay.

THE COURT: -- which, you know, may be most applicable to this case.

As I understand, the court said, basically held, that if he had wished to qualify his bequest by the use of language such as "solely" or "only," we would expect to find such limiting language in the will, and of course we've had that argument here, about whether he'd use "solely" or "only" and chose not to use such words.

But I'm looking at the Estate of Edwards and I noted a couple of things: One was there seemed to be reliance in the Estate of Edwards on the fact that New York courts were very cautious in divesting a named beneficiary --

MR. CAMPBELL: Uh-huh.

THE COURT: -- and in the present case I don't know that a finding that the Trust does not permit co-education would -- would not divest Deep Springs of its funding. I mean is that a distinguishing feature here between Edwards and this case, preoccupation with avoiding divestiture, if you will?

MR. CAMPBELL: Well, I think there's two ways of looking at that. And if I may make one point of -- about Edwards before I directly answer your question, sir.

THE COURT: Sure.

MR. CAMPBELL: In the Estate of Edwards, a key element was that the school would continue to be a preparatory school for boys; there would just be girls there -- that would be the change -- but boys would not be moved out, similar with Deep Springs.

As we have noted, unfortunately due to some imprudent decisions by Trustees in decades past who did not diversify their investments, there is very, very little left of L.L. Nunn's gift. It is a sad thing. It should have been managed better but it was not.

There have been many, many gifts, probably gifts by almost everyone in this room, since that time. And there is no evidence that the donative intent of

those folks -- the intentions of those donors -- was to limit this school to co-education. We're not having a -- a -- an evidentiary hearing so we won't have people talk about their intentions but the -- there's certainly among them people who do not intend to limit Deep Springs to co-education and there's certainly among them a number of people who would like to fund a co-education to Deep Springs and would like their funds to be used for that.

In a sense, though, by, huing to a -- I think an improper but at the very least excessively strict interpretation of L.L. Nunn's intentions, those folks and potential donors in the future are essentially divested in that they -- their donations are being -- being held to a very restrictive interpretation from a document in 1923, that really there's no basis for having that document control the intention of new donors.

So it's not divesting Deep Springs currently unless the, you know, unless the decision is to go forward, operate Deep Springs with the -- with the funds that are not subject to those restrictions and donate or find another institution that can utilize the unfortunately paltry remaining amounts of the L.L. Nunn Trust for the education of promising young men.

THE COURT: Some of those issues we may be discussing after a recess here --

MR. CAMPBELL: Right. Exactly.

THE COURT: -- on the other motions. But in terms of --

MR. CAMPBELL: Yeah.

THE COURT: -- whether or not the Estate of Edwards -- and I realize it's a New York case but --

MR. CAMPBELL: Right.

THE COURT: -- would be distinguishable otherwise. In Edwards he was one of many donors, as I understand the facts.

MR. CAMPBELL: As is Mr. Nunn.

THE COURT: Correct.

It was founded as a, quote, School for the education of youth -- I emphasize that -- languages, arts, and sciences, and so forth. And, perhaps more significantly, though, it previously had been a co-educational institution; it has that prior co-ed history.

Here, obviously, Deep Springs was founded by Mr. Nunn, the sole benefactor at the time, and it seems that the Trust in this case is much more intrinsically tied to the governance of the school that existed in Edwards. I don't know if I'm making sense here.

MR. CAMPBELL: No, I don't disagree with anything you're saying, your Honor. And I think this really goes to the statement in Ike vs. Doolittle which is a California case which both parties have cited, that the factual circumstances are never on all fours.

THE COURT: Yeah.

MR. CAMPBELL: So it's very hard.

As you notice, we've cited, between us, we've cited a very small number of cases from a wide variety of jurisdictions just to get anything that -- that pertains to this point. But there are no circumstances that are -- are on all fours certainly.

THE COURT: So we're back to I wish I could take a poll of the students.

MR. CAMPBELL: Right.

So we think Edwards is instructional. Once again, for future things, we think Edwards is very important for the Withrow will because that was executed in New York after Edwards was decided. But certainly it goes to the concept that, as pointed out by the Respondents, once again in great and fascinating historical detail, quite frankly, for those of us who are -- who are interested in Deep Springs, as we all are, the Respondents papers have been fascinating

reading; there's a lot in there.

But as is pointed out and pointed out by Mr. Liburt today, when Mr. Nunn wanted to grant discretion he knew how and when he wanted to create restrictions he knew how. And what Edwards is -- we have cited Edwards for is that Nunn knew how to make a restriction and when there isn't a restriction -- that is the issue -- did he intend to make a restriction? Whether he ever intended or envisioned that women might be students is not the relevant question of intent. The question of intent is did he intend the restriction and what Edwards says is if you don't spell out the restriction, especially if you're a sophisticated lawyer known for meticulous drafting, then the presumption is that you did not mean that to be a restriction.

THE COURT: All right. Thank you.

We're going to have to call a break here at some point but let me have, Mr. Liburt, give you a chance here.

MR. LIBURT: Your Honor, I agree with the various ways you've distinguished Edwards. I do think that when you get into funding issues we're again leaping forward to cy-pres or modification.

And I do agree with Mr. Campbell that the

cases Petitioner's cited, the cases that we've cited, you know, are of limited -- limited instructional value because the terms of the deeds are -- tend to be different. You've got distinctions like the one that you mentioned, you know, does it -- does it say "solely" or "only." All these cases seem to be distinguishable one way or another to someone's advantage or other and so I know it's not terribly helpful to you but --

THE COURT: I'm just groping for help, that's all.

MR. LIBURT: So --

THE COURT: That's all right. Thank you.

Anything further?

MR. CAMPBELL: If your Honor doesn't have any questions, I have nothing to add.

THE COURT: I think let's take about a ten-minute recess to get everyone to the bathrooms and back through security.

MR. CAMPBELL: They're on the other side. How convenient.

THE COURT: Logistical problem we're working on. We talk about facilities.

MR. CAMPBELL: Just leave the belt here.

THE COURT: And probably take up the joinder

motion.

MR. LIBURT: Thank you, your Honor.

MS. HOEKSTRA: Thank you, your Honor.

MR. CAMPBELL: Thank you, your Honor.

(A recess was taken, after which the following proceedings were had in open court:)

THE COURT: All right. Turning, then, to what I'm going to call Respondents' motion to join the Deep Springs Corporation, I know the Respondents on Friday, I believe it was -- last Friday evening I received the Respondents' objections to evidence submitted by the Petitioners in opposition to the Respondents' motion for joinder and preliminary injunction, specifically to provisions in the declarations of Mr. Hitz. Is it Neidorf, I believe --

MR. CAMPBELL: Neidorf, your Honor.

THE COURT: Neidorf -- thank you -- and Mr. Newell. I assume that the Petitioners have not had an opportunity to respond to those objections. I don't know what the parties' request might be. I would not intend to rule on the objections at this time, defer doing that, and encouraging counsel then to sort of argue both sides or in your arguments point out where the Court's ruling on any of the objections one way or the other may affect your position or argument. But

I'm concerned about providing opportunity to be heard on the objections and how to handle that situation.

Mr. Campbell, thoughts or comments there?

MR. CAMPBELL: Yes, your Honor.

Well, first of all -- I apologize; it's in here somewhere -- in response to their objection, we filed an objection to Mr. Hoekstra's declaration.

THE COURT: I'm sorry, I don't think I've seen that. I'll have to --

MR. CAMPBELL: No, I assume you haven't.

MR. LIBURT: I did receive it, your Honor.

THE COURT: Thank you.

MR. CAMPBELL: But I brought a copy for your Honor. Just couldn't find it in all this stuff.

Ours is a little shorter than theirs because we had short time to prepare it.

THE COURT: Well, we'll get the Petitioners' objections to the declarations of Mr. Hoekstra and the other gentlemen filed today.

So in terms of responding to each other's objections or how do you want to proceed, gentlemen?

MR. LIBURT: Your Honor, typically when I submit objections or the other side submits objections, usually in my experience the court simply rules on them in the course of, you know, issuing the substantive

order. And so I don't -- I certainly don't particularly need or want an opportunity to have to argue specific objections. I'm perfectly willing to submit to you and if you believe any of the objections are appropriate and you wish to take them into account in your ultimate ruling, that's great. I mean I would of course request that you rule but I don't need to argue them.

THE COURT: Very well.

Mr. Campbell?

MR. CAMPBELL: I agree. I think your Honor is the decision maker and you've read all of them so I'm happy to allow you to use your discretion to weight them however you believe is appropriate.

THE COURT: Very well. Then we'll submit, then, on both sets of objections.

And let me turn, then, to the, Mr. Liburt, to allow you to argue here on your motion to join the corporation.

MR. LIBURT: Thank you, your Honor. But Ms. Hoekstra will be arguing this motion.

THE COURT: Miss Hoekstra?

Thank you.

MS. HOEKSTRA: Thank you, your Honor.

Just a little preface: This is my first oral

argument so if I appear a little nervous, don't discredit that.

THE COURT: Just -- fine -- take your time.

MS. HOEKSTRA: All right.

So I'm going to be talking about the joinder motion that we filed and I will be talking about the three theories under which we believe that this Court should find the corporation subject to the determination.

THE COURT: I have an initial question, then.

MS. HOEKSTRA: Oh. Okay. Yes, your Honor.

THE COURT: Don't mean to get you off base right from the word "go" but I guess I have.

Well -- and I guess it really weights to the -- the three methods that you've referred to.

MS. HOEKSTRA: Uh-huh.

THE COURT: I mean ultimately the alter ego/ liability/agency theory and Code of Civil Procedure Section 389, it seemed the agency theory's largely dependent on a contract and the parties dispute the existence of the contract between the Trust and corporation, as I understand it.

MS. HOEKSTRA: Uh-huh.

THE COURT: So I'm just kind of wondering if that theory is really applicable here and, if so,

what's your position relative to the contract?

MS. HOEKSTRA: So, your Honor, it's true that the -- that the existence of a contract is debated and disputed --

THE COURT: Uh-huh.

MS. HOEKSTRA: -- but the reason why we applied the agency theory based on this disputed contract is because where third parties believe that there is an agency relationship as -- as Don Porter, who was the independent auditor for the college for ten years, believed that agency relationship to exist, so where the principal intentionally or through want of ordinary care causes a third person to believe that an agent possesses actual authority, that is called ostensible agency and so that's the kind of underlying theory or factor for the agency argument.

THE COURT: All right. Thank you. That helps me focus a little bit here --

MS. HOEKSTRA: Okay.

THE COURT: -- preliminarily.

MS. HOEKSTRA: Yes, your Honor.

THE COURT: And I have one other sort of set of initial questions, and it's sort of exactly what assets are owned by the Trust and what assets are owned by the corporation.

It seems the Petitioner alleges that the Trust has no cash assets and I believe the Petitioners, in your moving papers, Mr. Campbell, state that the Trust still owns some unimproved desert land worth some $915,000 and some interest in the college buildings. And I understand the Respondents allege that all remaining real estate assets were transferred over to the -- on June 6, 2012.

So I guess I sort of, for both parties, sort of have a preliminary question as to what assets are owned by the Trust and what assets are owned by the corporation.

MR. CAMPBELL: May I respond to that?

MS. HOEKSTRA: Please.

THE COURT: Thank you. I'm sorry.

MR. CAMPBELL: The -- the plan B, which you've heard talked about, we have not implemented so there has been, since the outset of this -- this litigation -- well, in a fact sense long before the -- the co-educational vote in the Trustees, there have been no transfers of assets between the Trust and the corporation. So we have left the status quo exactly as it was.

THE COURT: Okay. Thank you.

MR. CAMPBELL: The decision to transfer them

was made on June 6 but it has not been implemented.

THE COURT: Thank you.

Let me turn back to you, Miss Hoekstra. Anything on that issue?

MS. HOEKSTRA: No. I mean I agree completely with what Mr. Campbell says.

THE COURT: Thank you.

Let me proceed with your argument, then.

MS. HOEKSTRA: The Respondents move to compel the Deep Springs Corporation's participation in this matter because the Trustees of the L.L. Nunn Trust are attempting to use the corporation as a guise to avoid the limitations of the Deed of Trust --

(A discussion was held off the record.)

THE COURT: What I think -- one of the things that I've found is when we read we speed up so --

MS. HOEKSTRA: Yeah.

THE COURT: Feel free to speak so slow that you think it's obnoxious.

MS. HOEKSTRA: Okay.

THE COURT: Thank you.

MS. HOEKSTRA: All right.

This is a case, even though the corporation was created by the Trustees of the Trust, to administer the Trust. Simply put, everything that the corporation

can or cannot do with regard to co-education at Deep Springs College follows from this Court's determination of the Trust matter.

As Respondents have thoroughly documented, there's a basic legal principle that when trustees of a charitable trust form a corporation to administer Trust provisions, that corporate Board must necessarily act in accordance with the terms and conditions of that charitable trust. Were it otherwise, charitable trusts would have no functional purpose in the law. Indeed, why would a Trustor go to the trouble and expense of setting up a charitable trust if trustees could escape the trust's restrictions or redefine its purpose by implementing a plan B-like maneuver.

Petitioner's plan violates this most basic principle. The only way to uphold this principle in this case is for the Court to compel the corporation's participation in this matter presently before it.

Now, Petitioner's counsel admits that the plan B maneuver has not been implemented but there's nothing stopping them from doing so; they're doing so voluntarily. And so the only possible restriction on their implementing plan B is their joinder into this -- into this matter.

So let us recall first why Respondents had to

file this motion. Petitioner petitions this Court on behalf of the Trustees of the L.L. Nunn Trust in order to allow for co-education at Deep Springs College, despite explicit language in the Deed of Trust limiting the Trustees to "providing for and carrying on the educational" -- "the education of promising young men."

In his original Petition the Petitioner asked this Court to declare that the Trustees have the authority to, quote, educate both men and women, end quote.

In his Memorandum of Points and Authorities Petitioner notes that if, quote, If the Trust -- If the Court does not construe the Deed of Trust to give the Trustees discretion to educate women, end quote, or, quote, admit females, end quote, then Petitioner requests judicial modification of the Deed of Trust, quote, To permit the education of men and women together at Deep Springs College.

What Petitioner brought to this court was a simple, straightforward question: Can the college become a co-educational institution despite explicit language to the contrary in the Deed of Trust. Yet with plan B the Petitioner pretends that that wasn't the question and that the college may go co-educational at its own discretion after all, and this is false, as

Petitioner implicitly recognized by bringing the Petition in the first place.

So now I'm going to talk a bit about plan B. Because the Petitioner found the single-sex limitation in the Trust purpose to be an inconvenient obstruction to his swift implementation of co-education and because he likely recognized the weakness of his arguments on the merits, he devised the asset scheme known as plan B to evade both charitable trust law and this Court's determination on the matter.

However, the Trustees and the corporation are functionally inseparable and share identical interests. As a result, the Board has never treated their role as Trustees as functionally different from their role as a corporation and the facts show that they have consistently confused and conflated the two; therefore, plan B, which requires the entities are completely independent with one now being passive, is nothing other than an attempt to avoid the limitations of the Trust by virtue of which these individuals are Trustees.

So Respondents provide this Court with three alternative theories under which it can bring the corporation into the matter and they are that the corporation and the Trustees function as a single

enterprise, that the corporation is an agent of the Trustees, or that the corporation is a necessary party and therefore should be joined under section 389 of the Civil Code.

Following any one of these three theories, this Court can get to the same just result and with -- this result would be that the corporation would be properly held to the determination of this Court on the issue of whether Deep Springs can become co-educational; the corporation would be complying with applicable trust law; and the Respondents will be provided with an opportunity for complete justice.

However, should this Court reject each of these theories in turn, the Petitioner will have abused the corporate forum; the corporation will be able to avoid its Trust liabilities or Trust obligations with impunity; charitable trusts in California will be undermined; and the public's interest in judicial expediency will be damaged.

So now I'm going to discuss the issue of alter ego, and it's primarily -- I'll be discussing "alter ego" and "single enterprise" interchangeably but "single enterprise" is a variant of the alter ego doctrine --

(A discussion was held off the record.)

MS. HOEKSTRA: Is a variant of the alter ego doctrine.

So the law respects form less than substance, and the separate personality of a corporation is a statutory privilege and must be used therefor for legitimate purposes only; there is no litmus test. And the general rule is that the application of this doctrine varies based on the circumstances of each case. Because it is founded on principle -- equitable principles, no -- it is not dependent on prior decisions involving similar factual patterns.

So based on the substantial evidence provided by the Respondents, the Trustees and the corporation are each an instrumentality of each other and in the prosecution of the single enterprise: Deep Springs College.

And the underlying policy behind the alter ego doctrine is a promotion of justice. Indeed, it would be unjust for an individual who controls or for a person to -- who controls entities to treat -- controls entities to treat them as single and unitary entities and then assert their corporate separateness in order to avoid liabilities and commit fraud.

So the alter ego test/single enterprise test has two prongs and these two prongs are that there be

such a unity of interest that the separate personalities of the corporation and the Trustees do not in fact exist and the second prong is that the recognition of the acts of those of the corporation alone would produce inequitable results.

And I'll now discuss unity of interest. Now, the unity -- unity of interest test is multi-factored so the Court should consider them cumulatively and it should look at all the facts before it and then consider them against the several factors provided in case law to determine whether there's a unity of interest.

So with regard to the first factor, which is the failure to maintain an arm's length distance, which is cited as a factor in both cases, one, Associated Vendors vs. Oakland Meat and Greenspan vs. LADT -- these are both California cases.

So Declarant Hoekstra describes at length three case studies that highlight the -- how pervasive the failure to maintain appropriate distance was and these three case studies are the L.L. Nunn LLC, the co-ed vote, and the plan B vote. But for the sake -- for the sake of the interest of time I won't -- I won't go into them unless this Court would like for me to.

THE COURT: I'm fine. Thank you.

MS. HOEKSTRA: Okay. Great. All right.

So the second factor is a disregard of corporate formalities and Respondents believe that when maintaining the distance was critical, the Trustees and the corporation were unpracticed and their attempts to do so were sophomoric.

Declarant Jack Newell even admits that after 1995 the Trustees saw no utility end holding separate meetings and this is true even though the Deed of Trust specifies that there is an annual -- annual Trustee meeting. And, as a result, 16 years later Respondents Hoekstra and Keonjian were surprised when the general council prompted the Board to take two separate, though nearly simultaneous, votes on the co-ed matter.

The third factor is the lack of segregation and a confusion of corporate records. I think the most important thing is that the entity has been treated -- as though the two entities had been treated basically as one, such that even the president of the college, when filing the federal income tax filing -- wait -- the federal income tax filing, claims that each entity has 13 members of the Board but the Trust only has nine.

First -- second, the corporation Minutes from a 2002 TDS meetings --

(A discussion was held off the record.)

MS. HOEKSTRA: TDS, which is the Trustees of Deep Springs -- sorry -- general counsel provided an orientation on fiduciary responsibilities of Trustees in the State of California and then agreed to provide Trust -- to provide training to the Trustees to better equip them to carry out the duties on behalf of the Trust, and this is in corporation Minutes again.

So the fourth factor is the commingling of fund -- funds and assets. Here it's -- it's generally -- we -- we -- the Respondents discussed how checks written to the Trustees of Deep Springs are deposited in corporate accounts and there's no evidence of separate corporate accounts -- or separate Trustee accounts.

Furthermore, when, in highlighting, in case study three, when the Hardung proposal --

(A discussion was held off the record.)

MS. HOEKSTRA: The Hardung -- that's H-a-r-d-u-n-g -- appraisal was written and used to justify the decision to implement plan B, no one on the Board questioned whether the appraisal was properly done, and Respondents -- Respondent Hoekstra discussed in his -- in his declaration how deeply flawed that analysis actually was. But since nobody really seemed

to care, it seems to indicate that it's because they're the same enterprise.

Some other factors: This was same offices, the same counsel -- it's pretty self-explanatory -- identical directors and officers; again, relatively self-explanatory.

And so there's a final factor which I want to discuss, because Petitioner has objected to its application, so Petitioner charges that the application of inadequate capitalization doesn't apply because they -- because Petitioner argues that the corporation should be the one that is inadequately capitalized for the factor to apply. So -- but the problem is that this doesn't make sense.

So with a normal alter ego situation, you have a plaintiff who sues a corporation and the corporation is undercapitalized so the Plaintiff needs the court to apply the doctrine in order to get to assets held by that corporation's alter ego.

Similarly, the -- the Respondents are currently here in court only with the Trustees of the Trust, according to Petitioner, and yet, as I will soon discuss, this matter pertains to all assets of the Trust and the corporation by virtue of charitable trust law.

So in order to confirm that those assets are indeed subject to this Court's decision, the Respondents must force the corporation into court; otherwise, its separate legal existence, its form, will allow it to avoid charitable trust law with impunity.

The Trust only consists of land because, according to Petitioner, the Trustees transferred the non-real property assets to the corporation under paragraph 2(b) of the Trust and because the corporation is not turning over income and profits from these assets that it holds in benefit of the Trust, like as it -- as described in the Articles of Incorporation of the corporation, it is actively undercapitalizing the Trust and thus minimizing the assets' exposure to the limitations of the Deed of Trust.

However, plan B necessarily fails because the assets of the corporation remain subject to the limitations of the Deed of Trust under California trust law, under the language of the Deed of Trust itself, under the language of the Articles of Incorporation for the Deep Springs corporation, and so on.

So he who takes the benefit of the form of a corporation must take the burden as well. The Trustees and the corporation have consistently confused and conflated their roles and they've failed to maintain

the formalities necessary to find that the two entities are indeed separate and distinct, whether it was poor attention to detail or a systematic recognition that the two legal entities were entirely intertwined and functionally --

(A discussion was held off the record.)

MS. HOEKSTRA: I'm sorry.

Entities were entirely intertwined and functionally indistinguishable, as Respondents maintain. The Trustees and corporation cannot now claim refuge in their -- from their trust obligations in the protections of corporate law.

So regardless of what Petitioner claims to the contrary, it is the actions and the statements made when not under scrutiny that are the most telling of the true nature of the enterprise, and substantial evidence provided by the Respondents support this Court's finding that the corporation's and the Trustees' function is a single enterprise.

When the -- now I'll discuss the second prong of the test. So when the corporate form is used to perpetuate a fraud or circumvent a statute or produce some other inequitable result, the courts ignore the forum and deem the acts as those -- deem those acts to be those of its alter egos.

Adherence to the separate form of the corporation would sanction a fraud or promote injustice because it would allow the Trustees to circumvent the statutes and the trust law and to avoid -- evade trust law in general.

The corporation was formed by the Trustees to administer the provisions of the charitable trust and under the Uniform Supervision of Trustees for Charitable Purposes Act, the California -- California treats the Deep Springs Corporation as a Trustee. Up until now the corporation has not been used in bad faith; however, converting these assets to cash and therefore strengthening the Trust is just a bad faith justification for what the Petitioner's really trying to do.

Furthermore, since the land owned by the Trustees is a uniquely valuable asset essential to carrying out the Trust's purpose, there is no requirement under the law that they diversify those assets and no advantage in doing so.

So if Petitioner is right and the Trustees and the corporation are independent of each other and the latter is not bound by the Deed of Trust, then both Boards face serious charges of fraud.

Again, according to the Uniform Supervision of

Trustees for Charitable Purposes Act, charitable organizations shall not misrepresent the purpose of the charitable organization or the nature or purpose of their solicitations, and failing to disclose a material fact counts as a misrepresentation under that law.

The corporation accepts and deposits checks written to the Deep -- the Trust -- the Trustees of Deep Springs, and Petitioner has admitted that neither the college nor the directors nor the Trustees ever indicated that the donations would go to an entity not governed by the Trust and not governed by trust law.

The corporation has held itself out to the public as an institution dedicated to the education of promising young men, and Petitioner, in its IRS filings and in its various other publicly-available documents, the Petitioner claims that denying Respondents' request will allow it to honor its donor intents, and this is because he claims the facts show that all donors since 1996 gave the corporation with -- gave to the corporation with a specific intent that their funds be used for the education of both men and women.

First, no admissible evidence shows this to be true; this claim is completely unsupported. And claims about the donors' explicit understanding is speculative and hearsay, and it is a far-fetched claim to say that

donors knew of a policy for which there is absolutely no evidence.

Second, the "donors place no supplementary restrictions on their donations" is absolutely irrelevant because they gave to a charitable corporation whose primary purpose is to provide for the education of promising young men and those assets are therefore necessarily restricted to that purpose absent a successful petition to this Court under the cy-pres doctrine.

Further, the Trustees actually recognize this when in their corporation's financial planning document, 2007 to 2017, it states, quote, The management of the Deep Springs endowment --

(A discussion was held off the record.)

MS. HOEKSTRA: Sorry.

States, quote, The management of the Deep Springs endowment is governed by the original Deed of Trust and other institutional documents, as well as California trust law, end quote.

Because acceptance of a -- of charitable contributions by a charity establishes a charitable trust between -- sorry -- establishes a charitable trust and a duty on the part of that charity to use those contributions for the declared charitable

purposes of -- for which they are sought and the declared charitable purposes of the corporation found in publicly-available documents confirm that its purpose is to provide for the promise -- the education of promising young men, it necessarily follows that all assets acquired by the corporation must be used to further that specific purpose.

There are several other inequitable results that would occur for -- from respecting the corporate form of the corporation, and these are to -- they would -- it would prevent the Respondents from being able to carry out their fiduciary duties because it would allow the corporation to implement co-education without having -- without Respondents being able to oppose; it would force the Respondents to file a separate suit with the same facts under the same -- under the same and similar law here presented in the same exact court, wasting both time and taxpayer dollars; it would fly in the face of established precedent law and policy. The charitable corporations formed from trusts --

(A discussion was held off the record.)

MS. HOEKSTRA: I'm so sorry.

The charitable corporations formed from trusts are and should be subject to that trust limitation and

because charitable trusts necessarily benefits society, failure to apply the alter ego doctrine in this case would injure the public's interest in preserving and protecting charitable trusts from preferences of temporary trustees.

So the way out of this dilemma is plain: The recently invented fiction regarding the corporation's separate existence must be rejected. The Trustees and directors must be required to renounce any and all claims to be able to proceed with policies not in keeping with the legally-defined purpose of the Deed of Trust, regardless of whether they purport to act as Trustees or a corporation.

So now I'll discuss the agency argument. So if this court chooses not to regard the corporation as a -- chooses to regard the corporation as a distinct entity, it is an agent of the Trustees. So, according to the Articles of Incorporation of the corporation in order to accomplish the purpose of providing for ed -- the education of promising young men, the corporation holds title to Trust assets for the benefits of the Trustees and pays over the principal and income therefrom to the Trustees of Deep Springs, end quote, to -- for the purpose of educating promising young men as set forth in the Deed of Trust.

It uses funds of the corporation and the proceeds of any of its property for the benefit of the Trust and it solicits and receives contributions from donors for the Trust. And because soliciting and receiving contributions for the Trust, it creates -- it creates a fiduciary relationship between the Trust and those donors and therefore it alters the relationships between the Trust and third parties, and this is a hallmark of agency.

I've already discussed a little bit about the contract so I won't go into that. But the results of the contract and the dispute -- the dispute over the contract results in this Court facing a choice. So if the corporation was set up and functions according to and under paragraph 2(b) of the Deed, it is necessarily the alter ego of the Trustees.

If it was not formed and acting in accordance with paragraph 2(b) of the Deed of Trust, then the default rules of the Probate Code apply and the corporation is an agent of the Trustees.

So either under -- either -- under either framework, the Petitioners' account of an independent or separate corporate entity fails and the corporation must be subject to the determination of this matter.

So discussing the paragraph 2(b)

authorization, Petitioner contends that the Trustees transferred all then remaining non-real property assets and all operational responsibility to the corporation pursuant to explicit authorization under paragraph 2(b). And I'll quote paragraph 2(b) here. So it is -- it authorizes the Trustees to transfer and turn over all of the Trust estate held hereunder to an educational corporation provided that under no circumstances shall any of the Trust estate be so transferred or turned over for use otherwise than the purpose of the -- otherwise than in the accomplishment of the purpose of the Trust and, upon such transfer of said Trust estate, the Grantee or Grantees thereof shall be substituted for the said Trustees and shall be subject to all their duties and responsibilities hereunder and vested with all their rights and powers subjected, however, to such additional conditions and limitations as may be imposed by the Trustees.

So if this is the case and the corporation was created and assets were transferred under the authorization of paragraph 2(b), the corporation was substituted as a Trustee and therefore is subject to all of the Trustees' duties and responsibilities and it cannot act independently of the Trust.

However, 2(b) may not have -- may not have

been triggered because not all of the Trust estate was transferred and the Trustees retained the real property assets and were not substituted, because they still exist in addition to the directors of the corporation.

So these considerations suggest the corporation was not formed pursuant to paragraph 2(b) and, in that case, the default rule found in the Probate Code applies.

A Trustee may delegate certain investments and management functions but it cannot delegate its ultimate function to govern and therefore it retains its ultimate right of governance and ultimate right of control.

Probate Code Section 16012 says that the Trustee has a duty not to delegate the entire administration of the Trust to a co-Trustee or other person; therefore, when the Trustees transferred authority to manage and operate the college to the corporation, it was a delegation and the Trustees retained ultimate control and authority over that delegation because they cannot legitimately delegate their ultimate authority. The result is that the corporation is the Trustees' instrumentality or agent.

So, to reiterate, so if the corporation was created and the assets were transferred under 2(b), the

corporation is the alter ego because it substituted; it became -- it substituted itself for the Trustees. As a result, it is subject to the same limitations as we see in the Deed of Trust.

If formed and the assets transferred under the default rule found in the Probate Code, then the corporation is an agent because the power to govern cannot be delegated. If it is the latter, the Trustees must establish the scope and terms of that delegation, which obviously cannot violate the Deed of Trust. Trustees as principals must ensure that the corporation is acting in accordance with the Deed of Trust because its actions can be imputed to them. An action that would be a breach of trust were it committed by the principal Trustees is also a breach of trust if committed by their agent, where the Trustee delegates to the agent the authority to perform an act that the Trustee is under a duty not to delegate, and that would be the duty not to delegate ultimate control.

In conclusion, by virtue of the Deed of Trust and trust law, the corporation functions either as the alter ego or wholly subject to the terms and limitations of the Trustees by virtue of acquiring all its assets and duties under paragraph 2(b) or as an agent serving to benefit the Trust and subject to the

ultimate authority of the Trustees.

Now I'll discuss the last part, which is regarding compulsory joinder under section 389 of the Civil Code. In the alternative, the Deep Springs Corporation is at minimum a necessary party and must be joined at this litigation.

Compulsory joinder of an absent party normally requires a two-prong test. But in a case where joinder is necessary to provide injunctive relief to an existing party, as in the present case, only the first prong is required for joinder to apply.

So the two-prong inquiry is, first, that the Court must consider whether complete relief is possible among those already parties in the action and, second, that the Court must consider whether the absent party has a legally-protected interest in the outcome of the case.

With regard to the first section -- the first factor, complete relief cannot be accorded to the Respondents without joining the corporation. Joinder is required where an absentee's non joinder would preclude this court from rendering complete justice from those already joined, and the Trustees are attempting to execute actions as corporate directors. That would be a breach of trust if they were acting in

their capacities as Trustees.

The corporation's participation in this matter is essential to providing injunctive relief to the Respondents because the corporation should wait to proceed with co-education unless and until they may do so legally.

Without joinder, the Respondents would have to file a separate suit and this court would effectively ratify plan B, which plainly violates numerous California statutes, California Supreme and Appellate Court precedence --

(A discussion was held off the record.)

MS. HOEKSTRA: Supreme and Appellate Court precedence and basic common sense. Moreover, official communications from the Petitioner and from President Neidorf admit that they will keep hatching plots in order to execute this plan. Plan B establishes that they are willing to pursue even patently illegitimate means but the more basic reason why joinder is necessary for complete relief is that the petition and response concern the central question of whether Deep Springs can become co-educational given the explicit restriction in the Deed of Trust --

(A discussion was held off the record.)

MS. HOEKSTRA: Whether Deep Springs can become

co-educational given the explicit limitations in the Deed of Trust and in the Articles of Incorporation.

Without joinder the college will become co-educational before this court can decide the matter and that -- that would be the real -- that's the main reason.

However, courts can and do use the first prong as the sole basis for joinder where the absentee's participation is required, as I've already said, in that -- but we will still, the Respondents will still, demonstrate that the corporation has a legally-protected interest in the outcome of this case.

So the corporation exists only because of the Trust; it was created by the Trustees of the Trust to administer the Trust. The asset -- the assets it holds are subject to the same Trust restrictions as the assets of the Trustees, either because those assets are held by the corporation as the Trust alter ego, its agent, or by the very language of its own Articles of Incorporation.

The corporation manages and controls this litigation. The same people are in front of this court right now. Its committee -- it is a committee of the corporation, the litigation committee, that has been deciding the legal strategy for the Trustees of the

Trust in this matter. This factor supports an application of alter ego so surely it demonstrates that the corporation has acted so as to claim an interest in this litigation.

In conclusion, for the joinder part of the argument, the -- this Court should compel the corporation -- should compel joinder of the corporation because without joinder Respondents have no possibility of being accorded relief.

In order to enjoin the corporation separately, Respondents would have to waste time and energy filing a separate action and so on, and, by the time the case is heard, the college will become co-educational and such a result is perverse and inequitable.

The corporation claims a legal interest in this matter by virtue of the assets it holds, its stated purpose, and its control of this very litigation.

So when Petitioner commences litigation, all relevant parties understood that the decision of the merits of this petition would determine whether the college could become co-educational. But, facing grave legal impediments, Petitioner changed course in a desperate attempt at circumvention. Having decided that implementing co-education swiftly is more

important than obeying the law or protecting the integrity of the college's reputation, Petitioners decided to proceed under the guise of the corporation.

(A discussion was held off the record.)

MS. HOEKSTRA: Integrity of the college's reputation, the Petitioner decided to proceed under the guise of the corporation.

Plan B has been a tremendous waste of everybody's time and resources and the Petitioner should have respectfully awaited this Court's decision instead of trying to preempt it; the issue of whether Deep Springs Corporation -- or Deep Springs College could have become co-educational would have been decided by now, and this is an end run around the fiduciary obligations of the Trustee -- Trustees that is unworthy of the college.

In conclusion, plan B is nothing more than a bad faith attempt to disallow the court from deciding the question of -- that the Petitioner petitioned this Court to decide and, as a result, this Court should exercise its proper discretion and insist its determination extends to the corporation.

THE COURT: Thank you.

Mr. Campbell?

MR. CAMPBELL: Thank you, your Honor.

As I think has generally been the case, we agree with Respondents' analysis of the law. Where they're -- and in fact a large number of facts. But I think where there's -- there's some issues of disagreement or some of the facts they cite, of course the most important of which is that educating promising young men is the be all and end all of the purpose of the Trust, but we've already argued that one so I won't comment on it further.

But obviously most of the basis for joinder is that that is the purpose and clearly, if your Honor does interpret that as not being the purpose, then the -- all of the arguments for joinder would fail.

In terms of a couple of key elements that I -- I believe Ms. Hoekstra correctly analyzed the law, is that these types of remedies to ignore the corporate form are based on facts and in particular they are equitable remedies that are only -- are kind of Draconian because there's a great deal of merit in maintaining the corporate form so those Draconian memories -- excuse me -- Draconian remedies -- excuse me -- are only brought to bear to prevent fraud, injustice, and other factual problems that would result if the corporate form was not swept aside by the court.

We don't believe that the facts provide

that -- or indicate that that sort of problem is going to result here but it does go to the issue of the declarations because, since this is a fact-based inquiry, the declarations are fairly important to -- for your Honor to understand the facts at issue.

The Respondent is correct that the corporation was initially set up by five members of the corporate Board of Directors; however, it was not set up and has never administered the Trust. There was discussion of setting up a corporation to administer the Trust and -- and it essentially had the Trust go away and shift it to a corporate form. I believe there was discussion in Mr. Hoekstra's declaration about Mr. Nunn himself talking about that back in the twenties.

However, what -- what was initially set up was essentially a fundraising arm of the Trust in the corporate form to -- in I believe 1967 to assist in obtaining donations and providing proper appropriate tax deduction or tax deductibility to the donors who were in other states and made it a lot easier to explain the tax -- to the tax folks that this was a donation to a nonprofit corporation dedicated to the purposes of education. They understood that, whereas donating to a single Trustor-free educational trust in California did not make a lot of sense to the tax folks

in other states. So that was initially how the Trust used the corporation and how the -- how the corporation functioned. It never administered the Trust; that was administered by the Trustees of the Trust. And the corporate directors held a one, oh, in my experience, five- to 15-minute meeting annually just to approve the Minutes of the last meeting and to say that they were going to do the same thing the next year. So that -- that was very perfunctory but it met the legal requirement to have a corporate meeting.

That all changed in the mid nineties when the Trustees and the corporate Board of Directors realized that they needed to do something different or the Deep Springs College would close its doors in a very short period of time.

As you have read, there was much dissension in the Deep Springs community and the Board of Directors and the Trustees as to how to accomplish that, concerning co-education, concerning many other issues, and the ultimate resolution was to modify the bylaws of the corporation to make it an operation -- operational entity, transfer the key assets of the Trust to that corporation, utilizing the discretion granted by the Grantor in paragraph 2(b) of the Deed of Trust, so that this independent corporation that had education as its

purpose and had education along the lines set forth in Deep Springs as its purpose could operate those assets.

We are not in any way saying that the assets transferred by the Trust were freed up from any restrictions that your Honor finds applies to those assets but what we are saying, and which I think is a -- an incontrovertible fact, is the corporation then went out and raised lots and lots of other money from other donors and that was what saved Deep Springs, and that -- that fundraising campaign, the campaign for Deep Springs that ultimately raised about 18 million dollars, over ten of which was -- was utilized to restore the buildings to habitability, including the new student residence on the old tennis court and volleyball court, and the rest went to triple the size of the endowment, which had shrunk to about three million dollars.

Without that influx of cash to the corporation explicitly without restrictions upon the discretion of the Trustees to use that in the way they best thought it could be used to carry on Deep Springs, not L.L. Nunn's restrictions, but the restrictions that were discussed in that campaign by those other donors who put up 18 million dollars, the college would be closed today.

THE COURT: How do you determine donors' intent? I mean it seems like your argument is premised here that there was an explicit statement that no donations would be accepted if it imposed a co-ed, single sex, or any other --

MR. CAMPBELL: Yes.

THE COURT: -- restrictions on the current or future governing Board and I understand your position to be that the donations to the corporation since 1995 have not been subject to any restrictions --

MR. CAMPBELL: Correct.

THE COURT: -- and argue that denying joinder would not lead to any inequitable result since it would allow the corporation to, quote, honor its donors' intents.

But since all donations were made with the understanding that the money was given without restrictions, I mean how can the corporation determine the donors' intent, I guess is my question.

MR. CAMPBELL: The legal process for determining the donors' intent is set out in the Uniform Prudent Management of Invested Funds Act, which we refer to by the acronym UPMIFA, which just rolls off the tongue --

THE COURT: The court reporter thanks you,

yeah.

MR. CAMPBELL: That Act, which is, once again, a uniform act that's promulgated throughout the country, it was adopted by California, and, as Miss Hoekstra has acknowledged, I have given approximately annual seminars on --

THE COURT: Uh-huh.

MR. CAMPBELL: -- at Board of Trustees' meetings, and the -- the confusion there I think is that the Board of Directors are referred to as Trustees, which is allowed under trustees' law or under corporate law.

You know, I have discussed with them how they determine that -- that donor intent and how they determine the restrictions under the Uniform Prudent Management of Invested Funds Act, which applies to them as Trustees of a nonprofit corporation, Board of Directors, whatever you want to call them. They're the governing Board of the nonprofit corporation and UPMIFA controls.

(A discussion was held off the record.)

MR. CAMPBELL: UPMIFA, U-P-M-I-F-A, all caps.

The, briefly, how you -- how you determine donative intent is anything written by the donor. You also need to look at the things that were written by

the charitable organization in soliciting those donations and the -- well, the products, the written products that the --

THE COURT: Sure.

MR. CAMPBELL: -- the charitable institutions send out to explain what it's doing and why it needs money.

The -- and we keep a binder which is, as I said, is -- I believe I've said it somewhere in the papers -- is reviewed by the auditor to ensure that the corporation maintains those funds according to any restrictions that are -- that are included.

But the corporation has had the policy -- apparently some members of the Board have not been aware of it -- but the -- the corporation has had the policy since 1995 and has honored the policy, has never accepted a donation that had any explicit or implicit restriction on the -- the discretion of the Trustees to implement co-education.

THE COURT: All right. With respect to the argument about the interchangeable nature of the two entities -- and by this question the Respondents may be wanting to withdraw one of their objections to the declaration of Mr. Newell -- but didn't Mr. Newell state the checks could be written either to the

Trustees of Deep Springs or to Deep Springs College Corporation?

MR. CAMPBELL: Yes.

THE COURT: All right. Wasn't -- but the money would be deposited in the corporation account; right --

MR. CAMPBELL: Right.

THE COURT: I understand that part.

MR. CAMPBELL: Right.

THE COURT: And I think he acknowledged in his declaration that, at least in his opinion, that some alumni may have been confused as to the difference between the governing entities but nobody made an issue of the matter so I guess the implication being therefore none exists.

It just -- isn't there some clear interchangeability there? I mean you're saying, Hey, donors, you can write your checks either to the Trustees or the corporation?

MR. CAMPBELL: Well, the -- as -- as we have noted and acknowledged, and as Mr. Newell acknowledged, there may be some confusion -- there is some confusion and there's -- there's some fault by the -- the directors at that time deciding to name the Board of Directors the Trustees of Deep Springs, and there is

some fault for that confusion; however, that does not rise to the level of fraud or what is --

What is -- what are the other tests, Miss Hoekstra?

MS. HOEKSTRA: Oh, inequitable results?

MR. CAMPBELL: Yes, fraud or inequitable results. That's what I was fishing for.

THE COURT: Glad you didn't ask me.

MR. CAMPBELL: Exactly.

That it doesn't rise to that level. What -- what I think, to capsulize Respondents' argument, is that they are concerned that it would be fraudulent and lead to an inequitable result if the corporation used assets in violation of the donors' intents and intentions and expectations for the use of those assets.

The Trustees of the Nunn Trust have said they won't use the assets being held by the Nunn Trust until there's an interpretation by this court or modification.

The Board of Directors' Trustees of the corporation have said there is a potential restriction of the Withrow funds and they won't use those funds in -- for co-education until there's a determination by this Trust.

There's no evidence in front of this Court that there are any other donations or any other assets that are subject to such restrictions and therefore using those other assets to pursue co-education does not propound a fraud on anyone and it does not lead to an inequitable result.

The assets that we allege are not restricted but acknowledge there is a disagreement about it. The Trustees and the Board of Directors have voluntarily submitted to the determination of this court and if there is a creditable argument that there are other assets that are also subject to similar language, potentially subject to similar restrictions, we will stipulate to including those in these proceedings. There's no need for another lawsuit.

But the -- the evidence is, I believe the facts are, that the vast majority of the current assets of the corporation are subject to no such restrictions. And, once again, it is, in terms of the legal analysis, it is key to note that the Trust transferred certain assets to a separate corporation and the corporation has been using those assets to pursue the purposes of the Trust but legally that's very different than operating the Trust on the Trust's behalf, admittedly.

THE COURT: I'm sorry. Go ahead.

MR. CAMPBELL: Go ahead.

THE COURT: I'm backing up a little bit here.

MR. CAMPBELL: Sure. Feel free.

THE COURT: Your pleadings have basically indicated that the Trust has been made entirely passive since the transfer of the land underlying the college to the Telluride Association. Your response to the motion seems to allege that the Trust is just a formality, with -- I believe there was a quote, very little, if any, activity. And so I guess I'm kind of getting to the point that if the Trust is just a formality without any bearing on the corporation, then what's the need for the Court to decide the petition to interpret the terms of the Trust?

MR. CAMPBELL: Well, the -- the relevance of that -- the relevance of the petition for the Trust is that the Trust still owns valuable assets that the corporation would like to utilize for co-education of Deep Springs but the corporation and the Trust have agreed that they will not do so unless this court determines that that is proper.

We've -- we've gotten the appraisal at nine hundred and some thousand. Then on the -- on the books of the Trust it holds a -- an equitable interest in various of the buildings that were transferred to the

L.L. Nunn LLC because of improvements that the Trust made to those buildings. The corporation has acknowledged that -- that equitable interest so there's a million and a half, at least -- Respondents argue that it's a much larger number -- of assets that the corporation would like not to lose as a result of going co-educational. So that that is -- that is the very practical and tangible value of the -- the Trust petition for interpretation or modification.

THE COURT: Well, then from a practical standpoint I can't help but ask this question: If the corporation is not joined in this action and the court were to decide that the Trust does not allow for co-education, how do the Petitioners envision the school operating? I mean, for example, does Deep Springs College divide into two schools with a part of the campus owned by the corporation being co-educational and the part owned by the Trust being single sex?

MR. CAMPBELL: Well --

THE COURT: I can't help it.

MR. CAMPBELL: Yeah.

The -- no, the reason -- the reason that we put forth plan B as early as we did without implementing it, as I noted --

THE COURT: Right. I appreciate that.

MR. CAMPBELL: -- is that we wanted to be clear to the Court and the Respondents how -- exactly how the corporation would intend to proceed if indeed those assets were not available for the corporation to utilize for co-education.

THE COURT: I understand.

MR. CAMPBELL: Basically there'd be a purchase of those assets. The Court -- the Trust would then have however many hundreds of thousands of dollars to pursue the education of promising young men to uplift mankind to -- from materialism and idealism and harmony with the Creator.

THE COURT: All right. Thank you.

I'm sorry, I interrupted you there.

MR. CAMPBELL: That's -- I think the -- oh, yeah, I guess the -- the last point is that the undercapitalization, et cetera, the -- undercapitalization doesn't apply to Trusts because Trusts have the money in them they have.

And obviously all of this turns on the question of, on the one -- on the one hand, the petition we argued this morning, the interpretation, and on the other hand the next petition, which is injunction.

THE COURT: Right.

MR. CAMPBELL: If there's no grounds for an injunction, then there's clearly no grounds for joinder because there's an equitable remedy. The only reason for joinder is to enjoin the corporation from doing something.

So if either of the other two motions fail, I believe as a legal matter the joinder motion should fail as well.

THE COURT: Mr. Campbell, I had a question: I know the bylaws were amended in 1968 basically to state that the specific and primary purpose for which the corporation was formed was to provide for education work for the education of promising young men in a manner emphasizing the phrases that we've repeated here many times.

MR. CAMPBELL: Yes. Quoting paragraph one.

THE COURT: Thank you.

MR. CAMPBELL: In its entirety.

THE COURT: The corporation's Purpose statement then is the same as the Purpose statement in the Trust; however, it's unclear to me whether the purported amendment to the corporation's Articles of Incorporation and bylaws, which I understand were voted on in June --

MR. CAMPBELL: Correct.

THE COURT: -- of this year, whether they changed the Purpose statement as well.

MR. CAMPBELL: The -- once again, those amendments have not been filed and I believe somewhere -- somewhere the Respondents have said, Well, that the Trustees have not seen the final version, et cetera. So those -- that, just like plan B, those have not been implemented.

But the primary purpose of the amendments is not that the corporation feels it is restricted to educating men only, but that, if the corporation is admitting women, it probably should not have the phrase "promising young men" in the Purpose.

THE COURT: Uh-huh.

MR. CAMPBELL: So the idea was to change it to "promising young students" or something of that nature so that it would be a little more neutral sounding on that point. But those have not been -- those have not been filed with the Secretary of State.

THE COURT: Okay. Thank you.

Anything further on the joinder --

MS. HOEKSTRA: Oh.

THE COURT: -- Miss Hoekstra?

MS. HOEKSTRA: Me? Okay.

THE COURT: Yes.

MR. CAMPBELL: Your turn.

MS. HOEKSTRA: So we, the Respondents, do withdraw their evidentiary objection to the parts of the Newell declaration.

THE COURT: Paragraph 15, I believe.

MS. HOEKSTRA: So there are, I think, there's basically two ideas that I want to discuss in response.

So for reasons stated already and in the papers, all assets of the Trust and all assets of the corporation are bound for use of the -- are bound to the use of -- for Trust purposes because the purpose of the corporation is almost exactly the same as the purpose of the Trust and when all donations came into the corporation after the 1995 shuffle around; that stated purpose remained the same.

So it -- if you ask the Secretary of State to provide the Articles of Incorporation of the Deep Springs Corporation, those Articles state that the purpose is to provide for the education of promising young men.

California law -- California -- the California Supreme Court has stated that when a corporation, a charitable corporation, seeks donations from donors, the -- the act of accepting them creates a charitable Trust, a kind of Trust for the purposes, the declared

purposes, of that corporation so therefore all donations given to the corporation since 1968 or 1966 are necessarily restricted to those purposes.

So regardless of whatever superfluous restrictions are placed on the donations, they don't really matter because they're necessarily restricted to the purposes of the corporation.

Also, so undercapital -- so Mr. Campbell says that undercapitalization doesn't apply to Trusts because the Trusts have -- have in them whatever capital they have. So -- but the Trust assets were transferred to the corporation and there's no reason why they can't be transferred back. It is that the Trust assets do depend on the corporation's decisions and actions. I -- I just believe that it actually -- it actually does apply in this case.

I think that's -- that's basically all I have to say in response.

THE COURT: All right. Thank you.

Mr. Campbell, anything else?

MR. CAMPBELL: Yes.

The -- I think a key element here is the legal distinction between a Trust and a corporation. As I said, the corporation was modified in 1995 to put on what was -- we all thought was an impossible campaign

to save the school. Somehow it succeeded. But the purpose, as Mr. Newell said, is to -- was to save the school and to get donations from everyone on both sides of the co-education debate without restrictions to co-education. The -- it's just a matter of life; our memories are short, we forget how dire those circumstances were. Of course a lot of -- most of the current Trustees were not involved at that time. But those circumstances were very dire. The co-educational debate was extremely divisive and we had to raise funds in a co-educational-neutral manner; otherwise, the college would not still be here.

It is important to note that a nonprofit corporation's purpose is legally defined by the tax entities and there are certain categories of purposes. The Deep Springs Nonprofit Corporation purpose is ultimately educational and the, under corporate law, the -- the directors of that corporation have the right to modify and change and to interpret their Statement of Purpose, their more detailed Statement of Purpose, as they believe is appropriate.

The only thing that they cannot do is use donor funds. If they -- if they shift the approach of the corporation, they cannot use donor funds in a way that is inconsistent with what the donors understood or

intended when they gave the funds, and there are a number of circumstances where donors have sued and gotten their money back because the corporation moved on. But that did not restrict the corporation's ability to move on; all it did was restrict their ability to continue to use those funds.

As Respondents have noted, to their dismay this decision by Deep Springs to implement co-education has been broadly publicized. I -- personally I was floored by how much interest there is, that there's been articles in the New York Times and Vogue and all sorts of places, lots of journals of higher education, particularly broad on the Internet, but that's where people get their information now.

And, in addition, there have been five or six communications from Mr. Neidorf, who is right here, by the way, and from Mr. Hitz, to all of the known donors and alumni concerning the co-education process and no one has said that shifting to co-education would violate the terms of their donation, with the exception of one donor who gave about 60,000 to three particular projects; the money was expended for those particular projects and they're done and they have been done for years.

But no one has come forward and said, no, this

will violate the terms or my intent or my -- my understanding of why I gave you that money in that -- that post-'95 period. To me that indicates that whatever confusion, minor confusion, there may have been of who was running the school, it's very clear that those donors understood that their funds were not restricted and in fact the -- the forms -- I recognize this is not before the Court -- but -- evidence is not before the Court but the forms that went out -- as I said, that's what you have to look at and we very carefully designed those -- it said to be used in the discretion of the Trustees. There was a box and most people checked that box. And I think the -- I think that the facts that we have put before the Court that no one has complained, even though a number of families have given hundreds of thousands and millions of dollars since 1995, you would think, if they felt that they had that type of restriction and it was an important part of their intent, we would have heard from someone.

THE COURT: All right. Thank you.

Miss Hoekstra, you want to respond to "in the discretion of the Trustees" or otherwise?

MS. HOEKSTRA: Yes, just briefly.

So when the donors gave money to the

corporation, they were giving money to the college. The college is a college for the education of promising young men and subject to the purposes of the Trust and of the corporation.

Let me try to figure this out. Sorry.

So even though the donors gave -- I mean I don't actually acknowledge this fact but if the donors gave money and checked a little box that said that they give it within the -- they gave the Trustees discretion to use the money, that's still discretion to use the money within the purposes of the Deed of Trust and within the purposes of the corporation. The Trustees and the directors of the corporation can't -- are not allowed legally to exceed that discretion. And so regardless of whether some donor decided to give money and check that box, that doesn't -- it just doesn't -- it's irrelevant. It's absolutely irrelevant.

And that's basically all I want to say.

THE COURT: Thank you.

Before we move on, anything further, Mr. Campbell? I sense I may have cut you off there. I'm sorry.

MR. CAMPBELL: No, I think we're back to the issue of is "promising young men" a purpose or not, and we've already argued that. So I -- I have nothing

further to say.

THE COURT: Very well.

Miss Hoekstra, anything further on the joinder issue?

MS. HOEKSTRA: So -- actually yes.

So if the donations since 1995 were defined according to some particular policy, of which there's absolutely no evidence, then -- I'm sorry. So there's just absolutely no evidence for this policy, other than what the declarations have stated. And such a policy would have to be for the Trust purposes, as I've just said, because it would be illegitimate to allow -- to have your donation go against the purposes of the organization that they're donating to, so.

Thank you.

THE COURT: I understood your position.

Mr. Campbell, anything else?

MR. CAMPBELL: It's our position that a donor can determine what their intent is and if that differs from what the -- in this case -- college wants to use that donation for, they have to give it back. But the donor can absolutely determine what their intent is and obviously a lot of donors interpreted Mr. Nunn's language differently than the Respondents do.

THE COURT: You get the last word. You're the

moving party.

MS. HOEKSTRA: I just submit. Sorry. I just submit. Thank you, your Honor.

THE COURT: Thank you.

Let's shift then to the Respondents' motion for preliminary injunction. The Respondents.

MR. LIBURT: Thank you, your Honor.

THE COURT: Mr. Liburt?

MR. LIBURT: You'll be happy to know that Mr. Campbell and I did briefly talk in the hallway and we agree that both of our presentations on this will be quite a bit shorter than the other two issues.

THE COURT: That's all right. It's fascinating.

MR. LIBURT: It is interesting.

THE COURT: I want to take a moment to compliment everyone.

This may have been your first oral argument; you wouldn't have known it if you hadn't disclosed that.

MS. HOEKSTRA: Thank you, your Honor.

THE COURT: I really want to compliment all counsel on the pleadings, the quality thereof, and the arguments here that have been very helpful to the Court so far, and I'm sure they'll continue to be. So thank

you.

Mr. Liburt?

MR. LIBURT: Thank you, your Honor.

So there's no doubt that the Petitioner will overturn the status quo by proceeding with the transition to co-education unless and until this Court requires it not to. Petitioner and his agents have told the broader community that if plan B does not work, they will proceed with plans three, four, and five until they run out of plans. So I admit I'm slightly confused by Mr. Campbell's statements that they have not implemented plan B, by which I understand him to mean that property, certain property, has not yet been transferred and certain changes to corporate documents have not yet occurred; however, I understand plan B to broadly mean that the college is in fact today as we speak transitioning to co-ed. We know that it has sent out applications to young women applicants; it has hired people with a job description that talks about how Deep Springs is going to be co-ed; and, based on all of the statements that they've made, our understanding certainly is that unless this Court enjoins both the Trust and the corporation, assuming the Court finds that they are indeed separate entities, then Deep -- then the college will in fact admit women

students in -- to begin in the summer or fall of 2013. So -- so I don't think there's any dispute that the status quo will change on co-education if the Court does not issue an injunction.

I'm not going to say anything else about the likelihood of prevailing on the merits, other -- other than one -- one thing: I will simply refer to something Mr. Campbell said when he started when he -- he talked about the high point that the college is at today. I think that is very relevant to cy-pres modification. I'm certainly not going to talk about interpretation any further.

Moving on to the balance of harms, the only point I'd like to make about the harms that the Petitioner claims is that they're entirely self-caused and they all -- they are all a result of Petitioner deciding to transition to co-ed without waiting for this Court's decision and I do think that it's similar to the situation of the child who kills his parents, then pleading for mercy because he's an orphan. You know, I -- and one other point on that is Petitioner has never explained why there is any harm to the college from continuing at least a little bit longer as all male, the way it has for 95 years. There's really been no good explanation for why -- why this transition

must occur now in light of that history.

On the other hand, there are many and varied harms on the other side, as we've discussed in our papers and I won't repeat. There is increased potential liability, there is increased reputational damage, but there's also the injustice that occurs when rights and duties are allowed to be violated. For example, Respondents have fiduciary obligations to the beneficiaries who are defined in the Trust as the students. But if the injunction is not granted, the number of students educated from the rightful class of beneficiaries will be cut in half.

Without an injunction, Respondents will then be unable to fulfill their obligation to those promising young men and, where the result is such an inequity, no later compensation can serve as an adequate remedy.

Moreover, the Respondents will, according to their fiduciary obligations, be compelled to undertake the effort and expense of suing the Deep Springs Corporation separately, as Miss Hoekstra alluded to, which would then come before this Court.

Alumni and friends of the college have expressed their understandable dismay at the attempt to force through co-education through the corporate form

but the reputational damage to the college will be much more serious if the college accepts women as students and then the legal determination is that they cannot educate those women in accordance with the Trust, whether as Trustees or as a corporation. You could certainly envision a headline in newspapers, "College Kicks Out Women," which does not really sound like an attractive headline and not in the interest of anybody.

And as -- as we've already discussed in our papers, and, again, I won't repeat in detail, we do believe there will be harms to donors who have given under a particular understanding of what they were giving to and if the college is allowed to violate the restrictions of the Deed of Trust, I think donors will rightly regard themselves as having been cheated in terms of what they thought they were giving to.

There are likely to be applicants who won't apply because they now understand that Deep Springs will be co-ed and they want to attend an all-male Deep Springs College.

As mentioned before, there is harm to applicants who otherwise would have ended up being ranked seven through 13 in a class of 13 who, without an injunction, will have their places taken by young women and that -- that is a concrete harm.

And, finally, an injunction is in the public interest for reasons that we've I mean really beat to death in our papers, that we believe that allowing the Trustees to continue transitioning to co- ed without waiting for the -- through the corporate form without waiting for this Court's ruling really would render the cy-pres doctrine meaningless and we don't think it's legitimate or in the public interest that Trustees should be able to ignore Trust limits and, as Miss Hoekstra explained, even limits imposed by the Articles of Incorporation of a charitable corporation, to change the purpose without seeking Court approval merely by the expedience of selling Trust property to themselves in a different form and thereby avoiding the limitations of the Trust, we simply -- we suggest that, strongly, that trust law simply doesn't work that way.

And also in the -- regarding the public interest, we believe that donors would be far less likely to set up charitable institutions if they don't have assurance that before there's any change of purpose or even a -- an adequate time for a court of proper jurisdiction to consider and decide on a change, of whether it is a change of purpose, it would make them far less likely to establish these institutions.

So, for all those reasons, Respondents do

request that the Court issue an injunction as set forth in Respondents' Notice of Motion or as the Court deems most appropriate under the circumstances.

THE COURT: Thank you.

Mr. Campbell?

MR. CAMPBELL: Yes, your Honor.

We obviously think that there is no reason for an injunction because the only thing at issue, the only thing Respondents have discussed, is improperly using certain assets that may arguably be restricted to benefit the education of promising young males solely. But nothing that the Board of Directors has -- intends to do will use those assets that are specifically at issue until there is a resolution of -- by this Court. So there's -- there's no need for an injunction because there's no -- there's no conduct that would violate any of the legal or equitable restrictions that they've cited.

They do go on to speculate that there may be other people who are offended by this and there may be other people that would be harmed by this. But there are no -- there's absolutely no evidence before the Court that any of the other assets that are held by the nonprofit corporation are subject to any such restrictions, and we strongly believe that injunctions

should not -- or injunction is a Draconian remedy and it should not be imposed based on suppositions of someone who might be out there and be upset, especially since we are now 14 months from the decision on co-education with a great deal of publicity. None of those supposed parties have come forward and spoken for themselves but Respondents feel the need to speak on their behalf.

I also want to address the issue of self-caused harms. In terms of hiring, there's a lot of turnover at Deep Springs because of the isolated nature of the location and the tendency of most people there to go a little bit loopy if they're there too long.

THE COURT: I wondered why the six-year limitation of the faculty.

MR. CAMPBELL: Exactly.

MR. LIBURT: I will -- surprisingly, I will concur with Mr. Campbell on that point of people going loopy.

MR. CAMPBELL: Yes. We do need to recognize that the two exceptions to that rule are sitting right here: Jeff and Iris Pope. They have maintained their sanity and humanity through twenty-some years there.

THE COURT: I think we can all agree on that.

MR. LIBURT: I would concur with that as well.

MR. CAMPBELL: And we are all, everyone in this room, the better for it.

So the -- there is this inherent turnover and, obviously having made the decision to go co-ed and it being publicized, as it's gone -- spread like wildfire through the Internet, the positions that Mr. Neidorf had to fill he had to fill with the acknowledgement that was the policy of the Board of Directors and that if you didn't like that policy and if you weren't willing to carry it through if that -- if that transpired, you really weren't the right person for that job, especially since the -- the key positions that were -- were open were the ranch manager's job and the operations manager's job. Those -- those folks have quite a bit of involvement with the students and with the educational program. You know, they're -- everyone does. It's a very small place; that's the whole point. So you really couldn't be hired -- Mr. Neidorf really would not be fulfilling his duties if he hired people who would be hostile to co-education or hostile to women students that might be admitted in the future. So those were -- those hires had to be made in that way because -- because the possibility is certainly out there.

The -- when you take it back to its root, the

harm caused to the college by not proceeding forward is based on the original decision to go co-ed; the rationale for the decision, that it is important for the educational program, and the publicity of that, which there was nothing we could do to avoid. If we'd wanted to lock it down, we couldn't have. It's -- that's just the era of the Internet. Ask General Petraeus about that. So -- so we didn't even try.

We -- we tried to -- we tried to manage publicity as much as possible to get our story out but that's the best you can do these days, and that's -- that's what the root of the harm is. And to say that's a self-caused harm is essentially arguing that this Board of Directors cannot debate and decide on things that they think are important because of the possibility that people might disagree. So I think -- I think arguing that that's a self-caused harm is specious.

And I have one closing point that slipped out of my head.

THE COURT: Take your time. Or we'll come back, either way.

MR. CAMPBELL: The end of a long day.

But the -- the key, of course, as you know -- I won't -- I, like, Mr. Liburt will not argue success

on the merits because you are obviously much more knowledgeable about the potential for success on the merits than we are, or at least you will be by the time you issue your ruling.

THE COURT: I appreciate counsel's, on both sides, focus on the harm prong here.

MR. CAMPBELL: Yeah. Yeah.

THE COURT: Thank you.

MR. CAMPBELL: So the -- yes. And that's -- that is my last -- last note, is that while we acknowledge that if -- if the decision goes the other way ultimately, there would be a harm to a few -- a very small number of young men who were applicant -- or ranked seven through 16 or eight through 16, whatever the number is -- 13. There is potentially a remedy for that. We didn't -- we wouldn't want to do it but we could give them scholarships out of the Deep Springs Trust to be educated somewhere else.

But in terms of harm to the reputation of the college and harms to the college itself, we have put evidence in question or before the Court that there have been co-educational experiments before, there have been women students before, for short periods and for longer periods, and nothing dismal has happened. The college can certainly stop admitting women, certainly

intends to stop admitting women if it proves not to be the appropriate way to go. And it -- that can be -- that can be corrected later if necessary.

And of course that assumes the question of whether all of the corporate assets are subject to the Trust provisions, which I don't believe is a correct statement of the law. And I don't see how people who are giving money today with certain intentions can't be held to the interpretation of the intentions of someone who gave money in 1923. I think that's why a lot of the cases about institutions that have multiple donors come out the way they do as opposed to cases about an individual donor's intent.

It's a -- it's a lot different circumstance when you're relying on new donations every year in order to stay afloat. We have built the -- I say, "we." I haven't helped much. The -- the fundraising apparatus has built the endowment of Deep Springs to a much higher level than it used to be. But even with 17 million dollars in the endowment, it still requires about half a million dollars of annual giving to keep paying the bills every month. We have to rely on those new donors to keep bringing their money in. And I think a message from this Court that legally it doesn't matter what they have in mind and what they want done

with their donations, the Respondents' interpretation of what L.L. Nunn wanted, intent was, 95 years ago, is completely determinative of what those people who are giving, we are relying on to give us money every year, must intend. I think that will -- that will chill donations much more and much more significantly than a ruling that the donative intent of the living people needs to be recognized just as much as Mr. Nunn's donative intent for the portion of the assets that he gave and Mr. Withrow's donative intent for the portion of the assets that he gave. We have to recognize the intent of the current donors and I think an injunction denying their intent sends absolutely the wrong message and will be very damaging to fundraisers.

Thank you.

THE COURT: Thank you, Mr. Campbell.

Mr. Liburt?

MR. LIBURT: Thank you, your Honor. I have a few points.

We clearly have a fundamental disagreement about whether all of the assets are involved or not. As Miss Hoekstra discussed, the Petition was not about a small percentage of assets; it was about whether the college can go co-educational and I think the Court asked a very good question about how exactly this would

work if it is really just about the assets and it really is the case somehow that you've got corporate -- corporation assets that are not bound at all by the Trust, whereas you've got Trust assets that are.

So I'm not going to repeat our points, that all of the assets are involved and this is about more than just assets; it's about what's going to happen with the college.

I would say that Mr. Campbell says that no one's come forward to ask for their money back but -- and I recognize this isn't in front of the Court -- but I've certainly had discussions with people who know that this issue's before the Court and so they're waiting to see what the Court does.

Regarding self-caused harms, the harms are -- relate to going ahead before a legal determination. I would note that the college administration eagerly sought publicity by giving a -- releasing a press release immediately that was sent out. Mr. Campbell said that -- that -- acknowledged that there would be harm to a very small number of young men but what Petitioner is advocating is a benefit to an equally small number of young women. So I don't -- I think in the context of this issue, you know, it's a small number of students or applicants either way.

I have no idea what authority might exist for Deep Springs, whether as the Trust or the corporation, to give a scholarship to promising young men to attend a different college. I have no idea what -- how that could possibly be authorized under any of the relevant documents.

And, finally, we agree that annual giving is crucial to the college but respectfully suggest that the college should not be sending the message to our donors that we are not bound by any Trust restrictions.

And with that I will submit.

THE COURT: Thank you.

Mr. Campbell, anything further?

MR. CAMPBELL: Just two points, your Honor.

This -- this topic has clearly been of deep interest to many people at Deep Springs and who are involved in Deep Springs over 40 years, and unfortunately it's not going to go away. But the -- the continued requirement for donations of living people is a very important aspect of the ongoing viability of the college. That's why the changes were made in 1995, that's why the approach was done in 1995, and my understanding is the majority of the Trustees, the strong majority of the Trustees, still believe that that is the appropriate approach.

The other point is that, I think going back to Nunn, he recognized that there would be changes. He gave the Trustees discretion for operation and development of the college. That operation and development -- operation and developmental control is important to modify the college going forward. We're talking about co-education today. Who knows what we might be talking about next time if we're ever before the Court again.

Hopefully this is my only -- my only foray in this and then I'll pass that on to Miss Hoekstra to do the next one.

The -- the issues of any institution, faced by any institution, is how do you stay relevant, how do you stay viable as the world changes? I think Nunn recognized that he was giving a seed to Deep Springs and he wants it to be nourished -- he wanted it to be nourished and wanted it to grow and develop so that it could serve the broad societal purposes that he so deeply cared about. The Trustees can only do that if they have not unfettered discretion, but the careful, deliberative process that we've gone through. I've personally been involved in -- since 1973 over this co-education issue, to decide, you know, what is the best thing to fulfill those purposes.

I think Nunn was also a good enough businessman that he was well aware that whatever money he gave to Deep Springs would not be enough to endow it in perpetuity; other people would have to contribute, other people would have to take up the torch, as they have. As I said, most of the people in this room are in that category.

And those folks would have their own contributions to making it viable and relevant in the future. And we have to recognize those contributions and we have to recognize the judgment of those people who give of their time and resources to support this little educational light in the wilderness. And just cutting things off and saying that we have to stick with an ossified version of Deep Springs as it existed in 1923 is the surest way to ruin it rather than maintain it as the viable educational alternative it is.

So I hope that your Honor does not enjoin the Trustees from moving forward with what they in the -- not at all hasty -- very deliberately considered, argued, researched, best judgment and very good faith judgment of the best way to maintain it going forward. They're the experts on this and I hope your Honor -- your Honor recognizes and honors their commitment and

their understanding of what is necessary to keep Deep Springs at the high point it is now and moving into the future, rather than maintaining it as it is now until it declines to the point that it has to be reinvented and revitalized once again. We want to keep it at a high point going forward and that means that some changes and modifications are going to have to be made as the world changes. But, you know, Respondents' invitation to let things stay just the same until Deep Springs is almost ruined and then come in and ask for cy-pres relief just is not satisfying to me as a way to run a viable institution.

Thank you, your Honor.

THE COURT: Thank you, Mr. Campbell.

Mr. Liburt?

MR. LIBURT: Nothing further, your Honor.

THE COURT: All right. Well, these matters will stand submitted.

And again I tell the students, I say one of the definitions of a professional is making the difficult look easy. But I am -- perhaps it does look easy, I don't know.

But I would also compliment counsel again for making it even more difficult for me. Maybe that's the -- another definition of a professional.

While we're adjourned on these matters, I just have a couple minutes because I have to address a request for domestic violence restraining order that was just handed to me. But I cannot discuss this case, nor any pending case, and other ethical limitations, but I always enjoy having the courtroom full of students. So if it's with their faculty and everyone's permission, I'd be happy to entertain any questions that are about the state judicial system or the court or anything that -- you got a free shot at the judge.

THE COURT REPORTER: Are we off the record?

THE COURT: Yeah.

(The proceedings were adjourned.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF INYO

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|---|---|
| IN RE THE MATTER OF<br><br>L.L. NUNN TRUST FOR THE BENEFIT OF DEEP SPRINGS COLLEGE UNDER THE DEED OF TRUST DATED NOVEMBER 5, 1923<br><br>DECEASED. | No. SICVPB 1253232<br><br>REPORTER'S CERTIFICATE |

STATE OF CALIFORNIA )
) ss.
COUNTY OF INYO/MONO )

I, JERI BETH RICH, a Certified Shorthand Reporter in and for the State of California, for the County of Inyo, do hereby certify that the foregoing pages, 1 through 137, comprise a full, true, and correct transcription of my stenotype notes taken in the matter of the above-entitled cause on Monday, November 19, 2012.

I also certify that if the Code of Civil Procedure Section 237 applies, all juror identifying information has been redacted.

Dated this _____ day of January, 2013.

_____, C.S.R.
Jeri Beth Rich, C-4670