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County of Inyo
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INYO CO. SUPERIOR COURT
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IMAGED

SUPERIOR COURT OF CALIFORNIA

COUNTY OF INYO

In re the Matter of the L.L. Nunn Trust for the benefit of Deep Springs College under the Deed of Trust dated November 5, 1923	Case No. SICVPB 12-53232 RULINGS AND ORDERS ON PETITION FOR COURT ORDER INTERPRETING ENDOWMENT GIFT INSTRUMENT; MOTION FOR JOINDER OF DEEP SPRINGS CORPORATION; AND, MOTION FOR PRELIMINARY INJUNCTION

On February 6, 2012, Petitioner David Hitz, Chairman of the Board of Trustees of the L.L. Nunn Trust, acting on behalf of the Board of Trustees (hereinafter Petitioners), filed a "Petition For Court Order Construing Trust Provisions, Or, If Necessary, Modifying The Trust Instrument (Probate Code §§ 17200 and 15409)" in the above-entitled action. On May 9, 2012, Objectors/Respondents (hereinafter "Respondents"), Kinch Hoekstra and Edward Keonjian, Trustees of the L.L. Nunn Trust filed their "Objection And Response To Petition For Court Order Construing Trust Provisions, Or, If Necessary, Modifying The Trust Instrument." Petitioner's Reply was filed June 13, 2012.

By stipulation, on August 2, 2012, the Court issued an "Order Re Bifurcation and Briefing Schedule," wherein the issue of interpretation was bifurcated from, and to be heard prior to, the issue of modification of the Trust Instrument.

On August 15, 2012, Respondents filed an "Amended Objection and Response..." On October 4, 2012, Respondents filed a Motion to Join Deep Springs Corporation as a Party, along with a Motion for Preliminary Injunction. Opposition and Reply pleadings followed.

The matters came on for hearing on November 19, 2012. Mr. Christopher Campbell of Baker Manock & Jensen, PC and Mr. Peter E. Tracy of the Law Office of Peter E. Tracy appeared for Petitioners. Mr. Joseph Liburt of Orrick, Herrington & Sutcliffe, LLP and Ms. Heather M. Hoekstra appeared for Respondents. The Court having considered the pleadings, evidence, arguments of Counsel, and good cause appearing therefore, rules as follows:[1]

As requested by Petitioners, the Court took judicial notice of the excerpt from *Words and Their Uses Past and Present: A Study of the English Language* by Richard Grant Wright and published in 1927.[2]

On November 16, 2012, Respondents filed Objections to Evidence Submitted By Petitioner in Opposition To Respondent's Motions for Joinder and Preliminary Injunction. On November 19, 2012, Petitioners filed Objections to the Declarations of Kinch Hoestra, Edward Keonjian, and Paul Jeffrey Johnson. The Court has addressed the objections in a separate ruling.

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[1] The Court's rulings and orders contained herein were previously issued by way of a brief Chambers Order that was filed January 8, 2013. This pleading is prepared and filed for the purpose of providing greater detail as to the Court's reasoning and basis for its rulings and orders.

[2] See pg. 18 and Exhibit A of Petitioner's Memorandum of Points and Authorities in Support of Petition for Court Order Construction Trust Provisions, filed February 6, 2012.

PETITION FOR COURT ORDER CONSTRUING TRUST PROVISIONS

The Court recognizes that both Petitioners and Respondents have a strong affection for Deep Springs College and a sincere belief in doing what is best for the school. However, what is best for the future of the school is not the question before this Court. Instead, this Court is limited to what Trustor L.L. Nunn intended as the purpose of the Lucien L. Nunn Trust ("Trust") when he executed it in 1923. Specifically, the question before this Court is whether the language of the Trust can be interpreted as giving the Trustees the discretion to institute coeducation at Deep Springs College.

Issue: Can the Trust be Construed as Giving the Trustees Discretion to Admit Female Students?

Petitioners allege that Trustor L.L. Nunn established the trust for the fundamental purpose of educating a group of selfless leaders who worked for the benefit of humanity. They further allege that the language of the Trust gives them broad discretion to administer the school. Respondents argue that while the Trustees' decision to admit women is well-intentioned, they are not permitted to substitute their preferences for the express stipulations of L.L. Nunn.

The statement of purpose in the Deed of Trust states that the Trust was established:

> [T]o provide for and carry on educational work in the State of California *similar to and in development of the work already inaugurated by Grantor* at Deep Springs in Inyo County, California, but in such manner and form and at such place or places within said State as said Trustees in good conscience and the exercise of their best judgment may determine, *for the*

> *education of promising young men*, selected by said Trustees of as they may prescribe, in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self government by the students themselves shall be a feature as is now the case at said Deep Springs and which work shall be carried on not for profit but solely for the advancement of the purpose hereinabove mentioned.
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> (Deed of Trust, ¶ 1 (emphasis added).)

The Probate Code applies the same general rules of interpretation to "a will, trust, deed and any other instrument." (Prob. Code § 21101.) The trust is to be construed "'according to the intention of the testator as expressed therein, and this intention must be given effect as far as possible.'" (*Burkett v. Capovilla* 112 Cal.App.4th 1444, 1449, quoting *Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 134.) What a testator intended by the use of certain words in setting up a testamentary trust must be determined consistent with the testator's intention discovered from a consideration of all the language in the four corners of the instrument, *giving the words he employed their plain and ordinary meaning*, except where the context in which they were used renders them a different denotation, or where legal or technical words were used and it was clear from their use that the legal or technical words were used and it was clear from their use that the legal or technical meaning was intended. (*Estate of Stober* (1980) 108 Cal.App.3d 591, 597 (emphasis added).)

Reading the plain and ordinary meaning of the words in the purpose statement, the Trust appears to give the Trustees broad discretion over how and where to administer the educational

component, but limited to the purpose of "the education of promising young men." For example, it appears that the Trustees could relocate the school, change it to a four-year program, or cease farming operations, but whatever form it takes must be "for the education of promising young men."

Although Petitioners argue that the use of "men" in this instance, refers generically to mankind, the Probate Code is clear that "[t]he words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained." (Prob. Code § 21122.) In this case, there is nothing in the trust that raises questions that Nunn meant anything besides males when he used the term "young men." As both parties have repeatedly stated, L.L. Nunn was a well-educated attorney and businessman with significant experience in drafting documents and educational institutions. In addition, both sides point out that Nunn was heavily involved in the admissions of the first classes and all of the students were male.

Petitioners provide some of Nunn's personal letters and an excerpt from language guide from the period to support that Nunn meant men and women when he used the word "men." (*see* Petition for Court Order Construing Trust Provisions ("Original Petition") filed Feb. 6, 2012, p. 6, lines 22-28, p. 7, lines 2-6; Petitioner's Opening Brief, p. 13, lines 3-7.) The Court finds the evidence unconvincing and inapplicable to the instant case. More importantly, it is improper to look to extrinsic evidence to interpret the trust in the absence of ambiguity in the terms of the instrument. (*see Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 70; *Estate of Cox* (1970) 8 Cal.App.3d 168 187.)

The Court finds that the remaining provisions of the trust, which are cited in Petitioner's briefs, do indeed provide broad discretion to the Trustees, but again are limited to taking any necessary actions for *the purpose of the Trust*. The powers and authorities of the Trustees are described as follows:

> In order to enable them to accomplish *the purpose of this trust* in such manner as they in the exercise of their best judgment may deem most fitting and expedient, the said Trustees are hereby authorized and empowered to act in the manner and deal with any and all property now or hereafter held by them hereunder, (said property so held hereunder at any given time being hereafter referred to as the trust estate), as they in good conscience and the exercise of their best judgment may deem proper and advisable; and they are hereby given and granted full power and authority:
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> (b) To transfer and turn over, without receiving pecuniary consideration therefor, all of the trust estate held hereunder to an educational corporation, unincorporated association, or other like organization devoted to the cause of education, whether formed by said Trustees then existing, whenever so to do will in the judgment of said Trustees best maintain and carry out the purpose herein set forth, *provided that under no circumstances shall any of the trust estate be so transferred or turned over to any such organization formed or operated for private gain, or for use otherwise than in the accomplishment of the purpose of this 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, however, to such additional conditions and limitations as may be imposed by said Trustees;
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> . . .

> (g) Generally, to do all such things and handle and dispose of the trust estate held hereunder *as they may deem necessary and appropriate for the accomplishment of the purpose of this trust.*
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> (Deed of Trust, ¶ 2 (emphasis added).)

As the Statement of Purpose is the only section of the Trust itself in which Nunn elaborates on the purpose for the school, it appears that the only purpose intended by him was to continue a men's college.

Petitioners cite to a wholly separate document entitled "The Purpose," which was written on December 30, 1924, in which L.L. Nunn stated, "[i]t is a fact of social evolution that the few always dominate" and "the burden of leadership is in part the consciousness of the call - the vision of need - but the acceptance of the calling is to be one of the few..." L.L. Nunn then goes on to say, "[t]he purpose of Deep Springs is to help the training of the few." Petitioners argue that "the few" shows the testators intent to train leaders regardless of gender. However, L.L. Nunn's use of "the few" is not inconsistent with the determination that he meant males when he said "promising young men" nor does it show that he intended "The Purpose" to clarify any perceived ambiguity in his Trust.

Notably, the Petitioners cite to no California cases on point. Instead, the Petitioners cite to the following out-of-state cases where the courts have interpreted a term of a trust or will as having an expanded meaning. The Court finds each of these cases distinguishable from the instant case.

In *Trustees of Dartmouth College v. City of Quincy* (1970) 357 Mass. 521, the decedent left real estate for the purposes of a school to educate Quincy-born girls. The city sought an

interpretation of the trust to admit non-Quincy born girls "[w]hen it became impossible to keep the school running under the specific terms of the trust." (Pet. Opening Brief, p. 11, lines 22-26.) In this case, there are no allegations that the school cannot keep running under the specific terms of the trust.

In *Ebitz et al. v. Pioneer National Bank* (1977) 372 Mass. 207, the decedent established a scholarship fund under his will to assist "worthy and ambiguous young men to acquire a legal education." The court upheld the probate court's ruling that the term "young men" did not prohibit assisting women, in light of the decedent's reference to another gender neutral program and the gender neutral language to help "as many *students* as possible." (*Id.* at 211 (emphasis added).) "The term 'young men' is unambiguous unless, in the context of the entire instrument, an element of ambiguity is introduced." (*Id.* at 210.) The ambiguity in *Ebitz* was the decedent's directive that the trustee acquaint himself with the educational work of the Knights Templar and use its program as a guide in carrying out the trust. "This testamentary provision, hence, is highly significant, because a trustee cannot follow its guidelines and at the same time restrict fund benefits of the trust to young men." (*Id.* at 211.) In the present matter, L.L. Nunn made no references to any other programs even though he had been involved in other gender neutral academic endeavors.

The decedent in *In re Estate of Edwards* (N.Y. App. Div. 1982) 86 A.D.2d 702 created a testamentary trust to benefit an existing an all-male boarding school, Worcester Academy. The will stated that the school would continue receiving payments as long as it "continues to be operated as a boys preparatory school, preparing boys for college entrance." (*Ibid.*) The

school decided to admit girls, causing a contingent beneficiary to file suit. The court held that even though it was educating girls, the school was still serving the purpose of preparing boys for college. It further held that "[h]ad he wished to qualify his bequest by use of language such as 'solely' or 'only,' we would expect to find such limiting language in the will." (*Id.* at 703.) While *Estate of Edwards* is the most applicable to the case at issue, there are some distinguishing factors. First, the court in *Estate of Edwards* expressly noted "that New York courts are cautious in divesting a named beneficiary." (*Ibid.*)

In the present case, a finding that the trust does not permit coeducation would not divest Deep Springs of its funding. In addition, the decedent in *Estate of Edwards* was merely one of many donors to an already long established school. Also, per the history found on the Worcester Academy's website, the school was founded as "a school for the education of youth in languages, arts and sciences…" and had previously been a coeducational institution. Deep Springs College was founded by L.L. Nunn and, at the time of creating the Trust, was its sole benefactor. Hence, the Trust in this case is much more intrinsically tied to the governance of the school.

Good cause appearing therefore, the Court rules in favor of the Objectors/Respondents. The Trust can not be construed as giving the Trustees discretion to admit female students.

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MOTION TO JOIN DEEP SPRINGS CORPORATION

Joinder Issues

Moving Party/Respondents argue that the Corporation must be joined in this action to afford substantial justice. They argue that the Court can join the Corporation by one of three methods: (1) under Code of Civil Procedure section 389; (2) agency theory; or (3) alter ego liability.

Alter Ego

Generally, a corporation is considered a separate and distinct entity from its stockholders, although both law and equity will disregard this distinction and treat them as one entity when necessary to prevent fraud, protect the rights of third persons or accomplish justice. (*Kohn v. Kohn* (1950) 95 Cal.App.2d 708, 718.) In California, two conditions must be met before the alter ego doctrine will be invoked: (1) there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not exist, and (2) there must be an inequitable result if the acts in question are treated as that of the corporation alone. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) Among the factors to be considered in applying the doctrine are commingling of funds and assets, holding out that one entity is liable for the debts of the other, use of the same offices and employees, and use of one as a mere shell for the affairs of the other. (Id. at 538-539.) No one characteristic governs, but the court must look at all the circumstances to determine whether the doctrine should apply. (*Ibid.*)

In this case, the Respondents argue that the Trust and the Corporation fail to maintain an arm's length relationship, disregard corporate formalities, fail to segregate corporate records, commingle funds, use the same offices, and have identical officers and directors. In response, Petitioners claim that there is no unity of ownership, especially since it is a non-profit corporation with no ownership and a non-profit trust with no ownership. In addition, they assert that the Trust was established to continue L.L. Nunn's educational experiment, while the Corporation was formed to solicit charitable donations.

Petitioners argue that the corporate veil should only be pierced in cases of fraud or exceptional circumstances. They assert that the 1995 fundraising campaign, which allegedly saved the College, was explicit in that no donations would be accepted if it imposed co-ed, single sex or other restrictions on the current or future governing board. They claim that all donations to the Corporation since 1995 have not been subject to any restrictions. They argue denying joinder would not lead to an inequitable result since it would allow the Corporation "to honor its donors' intent." However, this is a specious argument since all donations were supposedly made with the understanding that the money was given without restrictions.

The Court agrees with the Petitioners that piercing the corporate veil is to be used sparingly and in exceptional circumstances. However, that does not necessarily mean it should not be applied in this case. Particularly since the actions of the Trustees and Directors indicate that the two entities could arguably be considered one and the same.

Respondents allege in their points and authorities that on June 6, 2012, the Board of Trustees met by telephone and in their capacity as Directors of the Corporation, voted to amend the Articles of Incorporation and the Bylaws to allow for coeducation. Respondents further allege that the Board, in their capacity as Trustees, approved the sale of all remaining tangible assets owned by the Trust to the Corporation for $1.5 million. The same individuals then purportedly voted, this time as Directors of the Corporation, to approve the purchase of the real property from the Trust. This "switching of hats" lends credibility to Respondents' argument that there is a unity of ownership between the Trust and the Corporation.

Also, the Declaration of L. Jackson Newell, which is in opposition to the motion, shows that the Corporation and Trust are held out to the public as interchangeable entities. In his declaration, Newell states that the board decided that donors could write their checks to the Trustees of Deep Springs or to Deep Springs College, but the money would be deposited in the Corporation account. (Dec. of L. Jackson Newell, ¶ 15.) "Some alumni may have been confused as to the difference between the governing entities, but no one made an issue of the matter." (*Ibid.*)

The Court finds there is sufficient evidence to support a finding that the two entities function as a single enterprise. Notwithstanding the Court's determination on the alter ego theory, the facts also lend themselves to a finding that the Corporation should be joined as an indispensable party.

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Compulsory Joinder (CCP § 389)

Petitioners argue joinder of the Corporation is not necessary since this action only concerns interpretation of the Trust. They argue the question of whether the interpretation of the Trust affects Corporate assets is before the court in the related action of *In re the Matter of James R. Withrow, et al.* However, this argument assumes that the interpretation of the Trust has no bearing on the Corporation since it is a separate entity. This is not necessarily true.

It is undisputed that the College assets were distributed to the Trust pursuant to Paragraph 2(b). (Petnr.'s Resp. to Motion, p. 2, lines 2-6.) However, under that portion of the Trust, the Trustees are given authority:

> (b) To transfer and turn over, without receiving pecuniary consideration therefor, all of the trust estate held hereunder to an educational corporation, unincorporated association, or other like organization devoted to the cause of education, whether formed by said Trustees then existing, whenever so to do will in the judgment of said Trustees best maintain and carry out the purpose herein set forth, *provided that under no circumstances shall any of the trust estate be so transferred or turned over to any such organization formed or operated for private gain, or for use otherwise than in the accomplishment of the purpose of this 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, however, to such additional conditions and limitations as may be imposed by said Trustees;
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> (Deed of Trust ¶ 2 (emphasis added).)

Although the Trustees never placed any additional conditions or limitations on the Corporation, the Trust language

shows that the corporation, to which the assets were transferred, was supposed to be operated for the accomplishment of the purpose of the Trust. As such, interpreting the purpose of the Trust does appear to affect the Corporation.

Also, the Corporations bylaws were amended in 1968 to state "[t]he specific and primary purpose for which this corporation is formed is to provide for education work for the education of promising young men in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism…" (See Dec. of Elias J. Barrios, Exh. A.) The Corporation's purpose statement is the same as the purpose statement of the Trust.[3]

Petitioners also argue that Section 389(a)(2) is designed to protect the person who is not a party to the action, not the person seeking relief. However, Section 389(a) does not contain such restrictions. Section 389(a)(1) requires joinder "where in his absence complete relief cannot be accorded among those already parties." Section 389(a)(2) requires joinder to protect the person not a party to the action, but when the absence of a party "leaves any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

It does not appear that complete relief can be accorded between the parties since the Trust owns land and an interest in the campus buildings and the Corporation owns the rest. For example, if the Corporation is not joined and the Court determines that the Trust does not allow for co-education, does the school continue as a coeducational college with the caveat

[3] It does not appear that the purported amendment to the Corporation's Articles of Incorporation and bylaws, which was voted on by the Trustees on June 6, 2012, changed the purpose statement as well.

that they cannot use any of the unincorporated land or the buildings in which the Trust holds an interest? What is the Trustee's continued role in the governance of the college? If the remaining Trust assets are sold to the Corporation (Plan B) and then the school becomes coeducational, would a finding that the Trust does not allow coeducation mean that the Trustees would have $1.5 million in sales proceeds that they could not use towards Deep Springs College? The facts in the pleadings appear to show two entities that are co-dependent on one another and any decision rendered in this case will affect both of them.[4]

Good cause appearing therefore, the Court finds that the Deep Springs Corporation is an indispensable party, subject to joinder pursuant to the provisions of Code of Civil Procedure § 389.

The Court need not reach Respondent's theory of joinder based on agency.

Good cause appearing therefore, Respondents' motion for joinder of Deep Springs Corporation is GRANTED.

MOTION FOR PRELIMINARY INJUNCTION

Moving Parties/Respondents Kinch Hoekstra and Edward Keonjian, Trustees of the L.L. Nunn Trust (collectively "Respondents"), filed this motion to prohibit the Trustees of the Trust, the Directors of the Corporation, the Trust, the Corporation, and "any other entity that Petitioner may concoct in furtherance of his scheme," from engaging in any activity related to coeducation to preserve the status quo.

[4] As an aside, joinder may promote greater efficiency and judicial economy should Respondents file a separate action to enjoin the Corporation's actions in selling the remaining Trust assets.

To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits. Past California decisions establish that, as a general matter, the question of whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of the harms that is likely to result from the granting or denial of interim injunctive relief. (*White v. Davis* (2003) 30 Cal. 4th 528, 554.)

As did the parties during oral argument, the Court focuses its discussion on the second prong regarding the balance of harms.

This motion for injunction stems from the Board of Trustees and the Corporation voting on June 6, 2012 to amend the Articles of Incorporation and the Bylaws to allow for coeducation. Respondents allege that the Trustees and the Corporation directors approved the sale of all remaining tangible assets owned by the Trust to the Corporation for $1.5 million, a move referred to as "Plan B," with the intent to remove any trust-based restrictions on those assets.

Respondents' Arguments for the Preliminary Injunction

The Respondents allege that the land to be sold under "Plan B" is unique and that money damages would not be adequate. Also, under Code of Civil Procedure section 526(a)(3), an injunction may be granted "[w]hen it appears, during litigation, that a party to the action is doing, or threatens, or is about to do … some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual." Respondents argue that the

Trustees and the Corporation actions in repeatedly stating that they will begin admitting women for the term beginning September 2013, accepting applications from female students, and describing the college as coeducational in job announcements is evidence that they intend to transition to coeducation rather than waiting until the court renders its decision in this case.

Second, Respondents argue that Plan B and other efforts to transition to coeducation before the court reaches a final determination will expose the College to litigation. Specifically, they argue that now that the College is publicly representing they are recruiting female students, the school runs the risk of being sued by those women if their applications must be denied based on gender. They also claim that taking the risk of having to undo coeducation would be unfair to female applicants given the time and energy it takes to gain admission to the College.

Lastly, the Respondents claim this raises public interest concerns because it would render charitable trust limitations meaningless. They claim allowing Plan B would mean that any trustees that wish to avoid the limitations in the trust could then transfer the assets to a separate corporation and then operate without restriction.

Petitioners' Opposing Arguments

The Petitioners' opposition counters that for the same reasons it cannot be compelled to join this action, it should also not be enjoined since it is not a party. They allege that the Trust is only one source of funding for the College so even if the court finds that the trust assets cannot be used for coeducation, it should be allowed to pursue coeducation with other assets. Since the funds raised through the last campaign

did not come with restrictions on their use, the Petitioners argue that using them for coeducation does not violate any duties owed.

They also assert that the move toward coeducation has been widely praised so the allegations that the College's reputation and goodwill will suffer are unfounded. The litigation threat is also unfounded, according to Petitioners, in that all prospective applicants have been notified of this lawsuit and although they "are confident enough to invite applications, … there is the possibility we could be prevented from accepting women."

Lastly, Petitioners' argue that the College's reputation will be damaged if it *does not* move forward to implement coeducation. They anticipate that it will be at least two years before there is a final judicial resolution of the Trust interpretation issue. In the meantime, the uncertainty over whether the College will be coeducational will negatively impact its ability to recruit faculty, students, and obtain new donations. Allegedly, college faculty do not want the stigma of being affiliated with a college that does not accept females, potential students want to know what type of school they are being admitted to, and donors will not contribute until they are confident about the College's leadership and direction. In addition, since the school has already made a public commitment to coeducation its credibility will be damaged unless they start the transition.

Conclusion

Respondents have met their burden. The Petitioners do not provide compelling reasons for the need to transition to

coeducation right now versus waiting for a decision on the Petition to Interpret/Modify the Trust.

The alleged harms raised by the Petitioners weigh against them. Regardless of whether the school begins the transition to coeducation, the uncertainty over coeducation will remain until the courts reach a final determination on the merits. In some regards, prematurely transitioning to coeducation would appear to undermine the reputation of the school more than maintaining the status quo. For example, the Petitioners themselves anticipate that this case will last at least two years. So they could realistically end up admitting female students for the fall 2013 term and then have to rescind admission during the middle of the school year, or be forced to tell the 2013 applicants that their applications were for naught since they cannot legally admit them yet. Another potential issue is explaining to donors that the Trustees and Corporation spent critical funds on transitioning to coeducation before they had the legal right to do so.

As stated by Petitioner David Hitz, "[t]ransitions are confusing and difficult. Once you decide to make one, it is best to get through it quickly." (Dec. of David Hitz, ¶ 6.) However, what the Petitioners are requesting is that this Court allow them to begin the transition to coeducation even though there is a realistic possibility that the school may have to transition back to single-sex education in the near future.

Also, in their opposition to the Petition to Interpret the Trust, the Respondents provide statistics that the school has had little difficulty attracting qualified faculty and students under its single-sex policies, and is financially healthy.

Petitioners' argument that selling the Trust assets to the Corporation (aka Plan B) will place the Trust "in a better position to advance its mission - whatever the Court determines that may be" is also without merit. Plan B is designed to lift the Trust's restrictions from the remaining assets, leaving the Corporation with unfettered authority to make the college coeducational. However, if the Trust's mission is determined to be single-sex, it will be left in the position of having funds that it can no longer use for Deep Springs College.

In addition, the declarations of David Hitz and David Niedorf both allege that if they wait they will lose the transition team that has been put in place. (Dec. of David Hitz, ¶ 7; Dec. of David Niedorf, ¶ 26.) Niedorf claims "this is the strongest staff that I have seen at Deep Springs" and that students now will be better able to implement the transition as they more fully they understand "the texture of the board's decision." However, these are not concrete arguments explaining why this particular transition team is so crucial to transition, whereas future teams would not be successful.

Lastly, there is a showing of imminent harm as the Petitioners do not dispute that they are actively preparing to accept women starting in 2013. The risk of having to transition back to single-sex appears to be far more harmful than maintaining the status quo in the interim.

Good cause appearing therefore, Respondents' motion for a Preliminary Injunction is GRANTED.

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Scope of the Preliminary Injunction and Bond

Subsequent to the filing of the Court's Chambers Order on January 8, 2013, issues arose as to scope of the preliminary injunction and any requirement for a bond. The Court has read and considered the "Respondents' Submission Of Proposed Forms Of Order" filed January 23, 2013, which included a proposed form of order and email from Petitioners' Counsel. Further the Court considered additional argument by Mr. Campbell and Mr. Liburt during the status conference held January 29, 2013.

The Court finds that Petitioner's proposal, which simply states that the college is to maintain the single sex admission policy, is inadequate. Such would not prevent the Trustees from spending funds on transition plans or transferring assets. Notwithstanding this litigation, Petitioners have solicited female applicants and voted in Plan B, demonstrating that a more far reaching preliminary injunction is necessary. The Court adopts Respondent's proposed form of order[5] with the following exceptions:

1. On page 3:8-14, paragraphs 3. (c) and (d) pertaining to the solicitation and acceptance of donations based on the representation that Deep Springs will admit women, shall be deleted. It is does not appear necessary to prevent fundraising pending the resolution of this litigation. The Trustees and Directors obviously understand and are on notice that there is a risk of the school having to return such funds. The Court does not believe that it will necessarily harm the school as long as the funds are not expended for transition to coeducation.

[5] Exhibit 1, "Respondents' Submission Of Proposed Forms Of Order," filed January 23, 2013.

2. On page 3:24-25, paragraph 3. (g) pertaining to communicating that Deep Springs College will be, or is likely to be, admitting women as students, shall be deleted. This provision might arguably infringe on Constitutionally protected free speech.

When granting a preliminary injunction, the court must require an undertaking providing for the payment of damages, not exceeding a specified amount, that may be sustained because of the injunction, if the court finally decides that the party was not entitled to an injunction. (CCP § 529(a)) The court may permit a bond (CCP § 995.210(b)) or a deposit into court (CCP § 995.710) in place of the undertaking.

The undertaking requirement is compulsory, not discretionary, and is not dependent on a request from the parties. (*Mangini v. J.G. Darand International* (1994) 31 Cal.App.4th 214, 216-217)[6]

No exceptions to the requirement as specified in subdivision (b) of section 529 of the Code of Civil Procedure are applicable in this case.

The requirement of an injunction bond imposed by CCP § 529 may also be waived or forfeited as explained in *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729; a case which this court finds distinguishable. Herein the Petitioners have responded in opposition to Respondents' arguments that bond is waived or otherwise unnecessary. There has been no implied waiver by Petitioners.

[6] Though acknowledging their request is somewhat symbolic, Petitioners have requested a bond be required.

The court may waive the undertaking requirement in the case of an indigent litigant. (CCP § 995.240; *Conover v. Hall* (1974) 11 Cal.3d 842, 850-852) However, Respondents have not made a sufficient factual showing of indigency.

The beneficiary of the bond may, in writing, waive the bond. (CCP § 995.230) Petitioners, who are the beneficiaries, are requesting the bond. As such, CCP § 995.230 does not appear to be applicable in this action. The Court is mindful of Respondents' argument that there has been a written waiver of the bond by virtue of the provisions of ¶ 4 of the Deed of Trust.[7] This issue has not been briefed. Even though no one questions the good faith of the Respondents/Trustees, the Court is not entirely satisfied that the waiver provided in ¶ 4 is applicable in this circumstance.

Perhaps out of an abundance of caution, the Court feels compelled to require an undertaking. The issue remains as to the amount of thereof.

Petitioners do not provide great detail with respect to their assertion that the injunction damages the college and causes significant extra expense. In other words, they do not specify the potential harm. To the extent the argument is premised on an inhibition to fundraising, and ignoring for the moment the Court's ruling herein with respect to the solicitation and acceptance of donations, a substantial question still exists as to how one would quantify any potential harm.

The Court finds that a nominal undertaking is sufficient. In such cases the Court understands it is not uncommon to

[7] Exhibit A (The Deed of Trust) to the "Petition for Court Order Construing Trust Provisions, or, if necessary, Modifying the Trust Provisions" filed February 6, 2012.

establish an amount that would at least minimally address legal fees to defeat the preliminary injunction that can be recovered against the surety.

An undertaking, bond, or deposit in the amount of Ten Thousand Dollars ($10,000) is ordered to be posted by Respondents. The undertaking or bond shall be in compliance with applicable California Rules of Court.

Respondents shall prepare the order and preliminary injunction consistent with this ruling and order.

So Ordered.

Dated: February 12, 2013

Dean T. Stout
Judge of the Superior Court

DECLARATION OF SERVICE

Case Number SICVPB 12-53232

I, the undersigned, say: I am a citizen of the United States, a resident or employed in the County of Inyo, over the age of eighteen years, and not a party to the within action; that my business address is: 301 W. LINE ST BISHOP, CA that on February 13, 2013, I served a copy of the foregoing document(s) described as:

RULINGS AND ORDERS ON PETITION FOR COURT ORDER INTERPRETING ENDOWMENT GIFT INSTRUMENT; MOTION FOR JOINDER OF DEEP SPRINGS CORPORATION; AND , MOTION FOR PRELIMINARY INJUNCTION

(X) BY MAIL: I am readily familiar with the practice of Inyo County in the collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at, Bishop, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. Said copy was mailed as indicated below:

Christopher L. Campbell
Jeffrey A. Jaech
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(XX) By Fax

Mr. Christopher L Campbell	VIA FAX	(559)432-5620
Mr. Peter E. Tracy	VIA FAX	(760)872-2971
Mr. Joseph C. Liburt	VIA FAX	(650)614-7401

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Dated: February 13, 2013

S. Wilson – Deputy Court Clerk