Jon Michaelson (SBN 83815)
jon.michaelson@klgates.com
Frances B. Cox (SBN 133696)
nancy.cox@klgates.com
K&L GATES LLP
630 Hansen Way
Palo Alto, California 94304
Telephone: 650.798.6700
Facsimile: 650.798.6701

Attorneys for
DEEP SPRINGS COLLEGE CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF INYO

In re the Matter of the

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

Case No. SI CV PB 1253232

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR MODIFICATION OF PRELIMINARY INJUNCTION

Date: April 26, 2013
Time: 9:00 a.m.
Judge: Hon. Dean T. Stout

I. INTRODUCTION

Deep Springs College Corporation (the "Corporation") seeks modification of the Court's Preliminary Injunction entered February 22, 2013 in order to avoid confusion over its meaning and reach, to avoid impairment of Constitutional rights, and to avoid interference with normal operations of Deep Springs College (the "College"). In the revised form requested, the directive would still give full force to the Court's decision that the L.L. Nunn Trust cannot be interpreted to allow the admission of female applicants as students at the College. Though it does not agree, the Corporation accepts that interim directive and wants only to clarify what conduct precisely is enjoined and to whom exactly the restrictions apply. Modification will serve the ends of justice by conforming the preliminary injunction to applicable legal standards and by minimizing chances of unnecessary controversy while this case moves forward.

II. ARGUMENT

A. The Court has the authority to modify the Preliminary Injunction.

A court may modify or dissolve an injunction "upon a showing that...the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order." Code of Civil Procedure section 533. Trial courts have "the right and power to retain control over their own injunctions so that they may modify or suspend them as equity should require." *Wheeler v. Superior Court of the City and County of San Francisco*, 82 Cal. App. 202, 208 (1927).

B. Modification of a Preliminary Injunction is appropriate to conform to preservation of the status quo ante, to eliminate vagueness and uncertainty, and to avoid interference with Constitutional rights.

The central purpose of a preliminary injunction is to preserve the status quo "until the merits of the action can be determined." *Flavio v. McKenzie*, 177 Cal.App.2d 274, 279 (1960). The status quo is "the last actual peaceable uncontested status which preceded the pending controversy." *Voorhies v. Greene*, 139 Cal.App.3d 989, 995 (1983) (quotations and citations omitted). Stated otherwise, "[t]he status quo to be preserved is that state of affairs existing immediately before the filing of the litigation." *Litton Systems v. Sundstrand Corporation,* 750 F.2d 952, 961 (Fed. Cir. 1984). A "post-complaint status quo" is not the status quo to be preserved by a preliminary injunction. It is the "prelitigation status quo" that should be preserved. *Id.* In this matter, the

Preliminary Injunction Order alters elements of the prelitigation status quo, rather than preserving them

Additionally, it must be clear from the language of a preliminary injunction what specific acts a party is enjoined from committing. *ReadyLink Healthcare v. Cotton,* 126 Cal.App.4th 1006, 1026 (2005); *accord, Premier Communications Network v. Fuentes,* 880 F.2d 1096, 1100 (9th Cir. 1989) (federal rules likewise "require[] the language of injunctions to be reasonably clear so that ordinary persons will know precisely what action is proscribed"). Language in a preliminary injunction that is vague, ambiguous, and overbroad should be stricken. *ReadyLink Healthcare v. Cotton, supra,* 126 Cal.App.4th at 1026. Here, Preliminary Injunction language which is undefined and imprecise should be deleted, and concise language substituted where appropriate.

Finally, injunctive relief should be no more burdensome than necessary to prevent specific threatened conduct. *San Diego Unified Port District v. US Citizens Patrol,* 63 Cal.App.4th 964, 971 (1998); *see also Anderson v. Souza,* 38 Cal.2d 825, 840-41 (1952) ("injunctive process ought never to go beyond the necessities of the case"), and *Scripps Health v. Marin,* 72 Cal.App.4th 324, 332 ("the express codified purpose of prohibitory injunction is to prevent future harm to the applicant by ordering the defendant to refrain from doing a *particular act*")(emphasis added). Here, the Preliminary Injunction is unduly burdensome to the extent its language goes beyond providing relief from the threatened conduct – coeducation and any transition to coeducation.

C. <u>Each of the changes requested by the Corporation is appropriate.</u>

1. <u>Subpart (c) of the Preliminary Injunction can and should be limited to implementing coeducation or a transition to coeducation.</u>

Subpart (c) of the Preliminary Injunction should be modified as follows:

> (c) Using any assets or resources (including but not limited to funds, facilities, and employee time) of Deep Springs College, the Trustees of Deep Springs, the Deep Springs College Corporation, the LL Nunn LLC, and any other entities associated with Deep Springs College~~, for the recruitment, education, or support of female students or for preparing for a transition to coeducation~~ *to implement coeducation or a transition to coeducation.* [Redline and italicized words added.]

First, subpart (c) as currently written alters the status quo ante. Prior to commencement of this action, the College used its "assets or resources" for "support of female students." For example,

female students have regularly visited the College and participated in classes and other student activities for short periods of time. In particular, this has involved female students enrolled in Telluride Association programs at Cornell University and the University of Michigan.[1] Female students from other colleges and universities have also visited friends who were College students at Deep Springs on weekends, vacation days, and the like. The College has used "assets or resources" to support these "female student" visitors. They often attended classes at the College, ate meals in the College Boarding House, used College facilities, and stayed in the College dormitory. Enjoining *any support* of female students disturbs normal operations at the College as they have existed for many years prior to commencement of this case.

Second, it is unclear what conduct is prohibited by the phrase "[u]sing *any* assets or resources...for the recruitment, education or support of female students...." Does this mean Deep Springs College can no longer offer lunch (a resource) to "support" a visiting "female student"? Can a female student visiting from an affiliated Telluride Association program no longer attend a class (arguably education) at Deep Springs? Can a female student even visit the College (arguably visiting might lead to recruitment)? The current language should be tailored more narrowly to reflect precisely what actions are being enjoined.

Similarly, general references to "facilities" and "employee time" in subpart (c), coupled with the vague phrase "preparing for a transition," arguably bar the College and College personnel from participating in this proceeding. Can College attorneys meet in a College classroom (a "facility") to discuss the status of this case with the President of the institution (thereby consuming "employee time")? Language of the provision must be revised to avoid this sort of unintended and unjustifiable restriction.

Finally, subpart (c) is more burdensome than necessary to provide relief from the specific threatened conduct. As this Court has recognized, Respondents' Preliminary Injunction motion sought to enjoin "activity related to coeducation" that would alter the status quo of admitting only

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[1] Telluride Association ("TA") is a non-profit organization founded by L.L. Nunn in 1911. Among other things, TA operates self-governing residential houses at Cornell University and the University of Michigan, and offers summer programs to enrich the educational experience of high school sophomores and juniors from around the world. See www.tellurideassociation.org.

males. (Rulings and Orders, Feb. 13, 2013, p. 15:25-26.) Subpart (c) language should therefore be drawn more narrowly to enjoin explicitly only activity related to *implementing* coeducation or a transition to coeducation.

2. Subpart (d) of the Preliminary Injunction should also be limited to implementation of coeducation or a transition to coeducation.

For similar reasons, subpart (d) should be modified as follows:

> (d) Selling, transferring, or otherwise disposing of assets of Deep Springs College (whether held by the Trust, the Deep Springs Corporation, or otherwise) ~~so as to facilitate~~ *to implement* coeducation or a transition to coeducation. [Redline and italicized words added.]

First, subpart (d) as currently written alters the status quo in prohibiting "disposing of assets…to facilitate…transition to co-education." As described, prior to commencement of this litigation female students visited the College regularly, which arguably "facilitates…a transition to coeducation." "[A]ssets" of the College include its hay and cattle, some of which the College sells, using proceeds to help finance College operations. College operations, in turn, include support of female student visitors. The Preliminary Injunction as now written arguably enjoins the College from continuing to operate as it has for decades. Rather than preserve the status quo, subpart (d) upsets it.

Also, the word "facilitate" in subpart (d) is undefined and its meaning in this context uncertain. Female students have visited the College regularly, the College "disposes of assets" to support their visits, and these visits arguably "facilitate" transition to coeducation. The word "implement" is more precise and does not potentially encompass normal College operations, and is therefore substituted to solve the problem. Change of the word "facilitate" to "implement" does not undermine the rulings of the Court on February 13, 2013. It is merely a more precise and just way to delineate conduct allowed and conduct proscribed.

3. Subpart (e) of the Preliminary Injunction is neither necessary nor Constitutional, and should be deleted.

Subpart (e) should be deleted in its entirety, as follows:

> (e) ~~Using support for or opposition to a transition toward, or a policy of, coeducation at Deep Springs as a criterion for hiring, firing or evaluating faculty, staff, employees or selecting, dismissing or evaluating members of the Board of Trustees or the Directors of the Deep Springs College Corporation.~~"

This provision enjoins "using support for or opposition to a transition toward, or a policy of coeducation ... as a criterion for ... evaluating faculty, staff, employees ...." This raises several concerns, including: (1) infringement of Constitutional rights of freedom of speech and freedom of association; (2) applicability to students; (3) interference with the College's ability to discuss and use relevant criteria for choosing and evaluating faculty and staff; and (4) overbreadth.

Subpart (e) chills free speech and the right of association by essentially barring discussion of certain factors that might (and indeed are likely to) come into play in "evaluating faculty, staff, employees ...." Deep Springs College personnel, along with the Directors of the Corporation and the Trustees of the L.L. Nunn Trust, have the constitutional right to discuss and consider all relevant criteria in making decisions on a fully informed basis without fear of running afoul of language in the Preliminary Injunction. They also have the right to choose to associate with those who speak in support of coeducation or in opposition to coeducation, and to evaluate prospective hires using this consideration.

Second, subpart (e) should not be applicable to students as Respondents have suggested. While students are intimately involved in all affairs of the College, the only actual power which they have is with respect to governance of the student body itself. In all other matters they participate but only advise. Decision-making ultimately rests with College administrators, Directors of the Corporation, and/or Trustees of the L.L. Nunn Trust. Accordingly, there is no basis for enjoining the scope of student discussion, inquiry, activity, or advice.[2]

Third, because this litigation is ongoing and the outcome cannot be predicted, it is essential to disclose to and discuss with applicants for faculty and other positions that the coeducation question is unsettled and may could ultimately be resolved in favor of coeducation or against coeducation. A well prepared applicant may be deterred from accepting a position with the College after being told that the interviewer cannot talk about coeducation for fear of violating an injunction.

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[2] Further still, any limitation on the role which students have played historically in the operations of Deep Springs College would contradict the emphasis on self-governance which L.L. Nunn himself included in the 1923 Deed of Trust. Deep Springs students are L.L. Nunn's intended beneficiaries. They are not "agents" of the Corporation as Respondents have asserted.

At the present time, a faculty member being hired for a long term position (of which there are only 3 at the College) will certainly, at least at the start of her or his appointment, be teaching an all male student body. That may or may not change during her/his tenure. The same faculty member may (or may not) be involved in a transition to coeducation, depending on the outcome of this case. Therefore, making an offer to someone who only wishes to teach in a single sex college, or someone who only wishes to teach in a college that will transition to coeducation in short order, would not be prudent at this juncture. But subpart (e) explicitly prohibits using that criterion in hiring. And making any mention of the subject to an applicant implies that it may be a criterion. As a result, subpart (e) is essentially a gag order regarding discussion of coeducation with applicants. In addition to violating the First Amendment, subpart (e) will substantially impair the College's ability to hire the best faculty.

Faculty turnover at Deep Springs College is much higher than at other institutions, and being unable to fill just one position can create a substantial problem for the academic program. There is no good reason – nor any legal justification – for making hiring even more difficult than it already is.

Fourth, subpart (e) language (like that in other parts of the order) is impermissibly vague and ambiguous. It prohibits using a faculty, staff, employee, Trustee or Corporate Director's personal opinion concerning coeducation as "a criterion" for "evaluation." The term "a criterion" is not defined, and its meaning is unclear. On one hand, "a criterion" could mean a substantial motivating factor in an employment action. On the other end of the spectrum, "a criterion" could be interpreted to include any discussion concerning the transition to coeducation that might influence a decision, meaning perhaps an outright ban on all discussion of coeducation.

Further still, determining what "criterion" or criteria were used in making a hiring, firing, or evaluation decision would require examination of individuals' thought processes. Such vague and general references are therefore impossible to enforce as a practical matter. Subpart (e) is fertile ground for time consuming and unnecessary disputes while this litigation is pending and thus does not serve the legitimate interests of any party or of the Court.

4. <u>The Preliminary Injunction should be revised to clearly identify those to whom it does and does not apply.</u>

The definition of "Enjoined Persons" – to whom the Preliminary Injunction applies – should be modified as follows:

> "Petitioner, the Trustees of the Trust, the Deep Springs Corporation, the Directors *and Officers* of the Deep Springs Corporation, and *any new entity Petitioner may form* ~~all agents, servants, employees, aiders, abettors, corporate affiliates, related entities, and persons acting under, for, or in concert with any of the aforementioned persons or entities~~ (collectively, the Enjoined Persons") [Redline and italicized words added.]

As this Court recognized, Respondents' Preliminary Injunction motion sought to prohibit "the Trustees of the Trust, the Directors of the Corporation, the Trust, the Corporation, and 'any other entity that Petitioner may concoct'" from engaging in activity that would alter the status quo pending final decision on the merits. Yet the term "Enjoined Persons" in the Preliminary Injunction order also presently includes many additional categories – "agents, servants, employees, aiders, abettors, corporate affiliates, related entities" and persons acting "in concert with" any related entities. These references should be stricken, as they go beyond what is necessary and proper to achieve the purpose of Respondents' motion.[3]

Also, it is questionable whether these broad classes of non-parties are even subject to the Court's jurisdiction. For example, Telluride Association, arguably a "corporate affiliate" and/or "related entity" to the Corporation, runs programs that have been coeducational for more than a century. It is not based in California, is not a party to this action, and probably lacks minimum contacts with California sufficient for this Court to exercise jurisdiction over it and enjoin its activities. Likewise, donors from outside California might be considered "aiders" or "abettors" if they support the College through gifts intended to advance the effort to transform Deep Springs to a coeducational institution. But it will be difficult if not impossible for the Court to block their charitable giving.

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[3] And failure to reference officers of the Corporation is an omission which should be rectified.

None of the additional categories is defined, so it is unclear who exactly is enjoined pursuant to the Preliminary Injunction. For example, as several Deep Springs students in fact have asked, who is an "aider and abettor" or for that matter someone acting "in concert"? Do donors act "in concert with" Petitioners if they direct money to the Corporation earmarked to support a transition to co-education? Are Petitioners' attorneys enjoined from pursuing their proper role in this litigation as they are thereby "aiding and abetting" possible transition to coeducation? Do students fall within the ambit of the Preliminary Injunction? The Deep Springs College Ranch Manager and the Deep Springs College Mechanic are both "employees," and thus presumably subject to the Preliminary Injunction as currently phrased. To prohibit discussions the Ranch Manager or Mechanic were free to have before the litigation began violates the First Amendment and disturbs the status quo.[4] Nor is it necessary to bar a donor, attorney, student, or ordinary employee from expressing support for or opposition to coeducation at the College in order to stop "threatened conduct" – a transition to coeducation or coeducation itself. The definition of "Enjoined Persons" is overly broad, and should be modified as requested, to comply with the purpose of the Preliminary Injunction motion as articulated by this Court. (Rulings and Orders, Feb. 13, 2013, p. 15:25-26.)

III. CONCLUSION

The unconstitutional, unnecessary, and unclear language in the Preliminary Injunction should be stricken, and the Preliminary Injunction should be modified as requested so as to serve the ends of justice.

Respectfully submitted,

K&L GATES LLP

Dated: April 1, 2013

By: _____

Jon Michaelson
Frances B. Cox

Attorneys for
DEEP SPRINGS COLLEGE CORPORATION

[4] The Ranch Manager and Mechanic are, for example, consulted with respect to certain personnel decisions at the College.