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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF INYO

In re the Matter of the L.L. Nunn Trust for the benefit of Deep Springs College under the Deed of Trust dated November 5, 1923	Case No. SI CV PM 1253232 **RESPONDENTS' OPPOSITION TO PETITION FOR MODIFICATION OF PRELIMINARY INJUNCTION** Date: April 26, 2013 Time: 9:00 a.m. Dept: 4 Judge: Hon. Dean T. Stout ACTION FILED: February 6, 2012

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I. INTRODUCTION

The modifications to the preliminary injunction proposed by Petitioner David Hitz et al. (in their corporate personality as Deep Springs College Corporation) would unduly weaken the standard to which the Trustees/Corporation are held accountable and invite evasion by the enjoined parties. Given the context in which this injunction arises, Petitioner's proposed modifications would not further the ends of justice and indeed would thwart them. Petitioner strains to find conflict with the injunction language, but fails to support his arguments with a preponderance of evidence (or indeed any evidence at all), and fails to consider the concerns the Court raised in its Ruling on the Motion for Preliminary Injunction.

Three preliminary points bear highlighting at the outset. First, the Court's finding that the Corporation and the Trustees are alter egos for the purposes of this litigation means that the Corporation is not in a position to claim distinct interests from Petitioner Hitz (who not only filed this action on behalf of the Trustees and therefore purports to act in this action as the representative of the Trustees as a body, but also is the Chairman of the Board of Directors of the Corporation).

Second, while Respondents recognize the Court's authority to modify the injunction at any point insofar as equity is served by doing so, they do wish to remind the Court that this Petition effectively amounts to a motion for reconsideration of an issue already decided, without any change in facts or law in the month since the Court issued the Preliminary Injunction Order.

Third, the form of injunction now proposed by Petitioners is nearly identical to the form Petitioner previously proposed and this Court rejected. This Court determined that an injunction limited to prohibiting a transition to coeducation at Deep Springs was inadequate to prevent the Trustees and Corporation from such actions as "Plan B" or transfers of assets to facilitate coeducation. The instant Petition simply ignores that finding and fails to provide an adequate mechanism to prevent such abuses.

Indeed, as discussed below, the true purpose of the Petition is not any of the reasons Petitioner asserts, but rather to eliminate language in the injunction that stands as an obstacle to Petitioner's stated intention to bring about coeducation as soon as possible, and in particular to

throw Respondent Hoekstra off the Board of Trustees so that no one will remain on the Board who wishes and has standing to prevent Petitioner's and the other Trustees' unlawful actions. This Court should deny the Petition.

II. ARGUMENT

A. The Corporation Fails To Demonstrate By A Preponderance Of Evidence That It Is Entitled To The Modifications Sought.

The burden is on the restrained party to show by a preponderance of the evidence that one of the circumstances set forth in Code of Civil Procedure section 533 is present and justifies a modification of a preliminary injunction. (*See Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1504; see also, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 861 ["As a general rule, the 'party desiring relief' bears the burden of proof by a preponderance of the evidence"]; Cal. Evid. Code, §§ 115, 500.) Petitioner fails to provide any evidence whatsoever, much less any evidence that would warrant a modification of the preliminary injunction, and relies instead on speculation and hypothetical situations. This is insufficient as a matter of law.

B. The Bifurcation Of Interpretation And Modification Complicates The Purpose Of A Preliminary Injunction.

The current Order does not alter the *status quo*. Rather, it preserves the undisputed *status quo ante litem* of Deep Springs College's purpose and practice of educating "promising young men". Although Petitioner takes issue with the Order to the extent it extends beyond what Petitioner views as the Court's core holding, as discussed further below, injunctions are permitted to take into account the specific facts of the case and include provisions designed to make any core holding effective and not easily evaded. Here, Respondents designed the form of injunction order to address concerns they have and the Court shares about the need to reign in Trustee actions before this matter is resolved. Preliminary injunctions are "aimed at preventing future conduct . . . likely to occur during the pendency of the action." (*Cal-Dak Co. v. Sav-On Drugs, Inc.* (1953) 40 Cal.2d 492, 496.) Respondents met their burden in showing this, and designed the Order accordingly.

Usually preliminary injunctions are instated before there has been a substantial ruling on

the merits. Hence they are meant to maintain a *status quo ante litem* that is pre-controversy. Thus, "[t]he very purpose of a preliminary injunction is to prevent irreparable loss of rights **before judgment**." (*Sierra On-Line, Inc. v. Phoenix Software, Inc.* (9th Cir. 1984) 739 F.2d 1415, 1422.)(emphasis added) The preliminary injunction here is well designed to protect Respondents' and beneficiaries' rights from Trustee encroachment. After balancing the equities, this Court determined that Petitioner should be restrained from exercising rights claimed by the Trustees pending a judgment on the remaining merits. (See *Southern Christian Leadership Conf. v. Al Malaikah Auditorium Co.* (1991) 230 Cal.App.3d 207, 223.)

The language Petitioner cites from *Flavio v. McKenzie* (1960) 177 Cal.App.2d 274, 279 states that the purpose of the preliminary injunction is to preserve the status quo "until the merits of the action can be determined." Respondents do not disagree with this statement of the law, but point out that there has now been a substantial and final ruling on the merits of interpretation. The finality of this Court's ruling on interpretation is clear not only from its orders, but from the fact that Petitioner has filed an appeal of the Court's interpretation ruling. In light of Petitioner's appeal, it is now apparent that a permanent injunction is proper. (Cal. Civ. Code, § 3422.[1]) Therefore, while Respondents are content to have a preliminary injunction in place pending the outcome of Petitioner's attempt to modify the trust, if the Court is inclined to Petitioner's view of the *status quo ante litem* rather than Respondents' view of the *status quo ante litem*, and further believes that this causes a problem with the *preliminary* injunction, then Respondents request that the Court re-issue the preliminary injunction as a permanent injunction stemming from its final decision on interpretation, for the same reasons that the parties thoroughly briefed on Respondents' Motion for Preliminary Injunction and Respondents' Memorandum of Points and Authorities Regarding Interpretation of the Deed of Trust and that the Court discussed in its

[1] Injunction, when allowed. Except where otherwise provided by this title, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:
1. Where pecuniary compensation would not afford adequate relief;
2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or,
4. Where the obligation arises from a trust.

orders.[2] Since a permanent injunction is a final judgment on the merits (*Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1041), the Court's granting of a permanent injunction regarding its ruling on interpretation should clear up any issues Petitioner raises about the *status quo ante litem.*

The decision to issue a permanent injunction rests in the sound discretion of the trial court; the decision will not be disturbed on appeal without a clear showing by the complaining party of abuse of that discretion. (*Jameson v. Five Feet Rest.* (2003) 107 Cal.App.4th 138, 145.) The trial court may modify or dissolve a permanent injunction under the same circumstances[3] that allow it to modify a preliminary injunction. (Cal. Civ. Code, § 3424, subd. (a).) Therefore, if the Court ultimately grants Petitioner's request to modify the trust to allow coeducation, the Court can dissolve the permanent injunction. Respondents requested a permanent injunction in their Prayer for Relief when they filed their Amended Objection And Response To Petition For Court Order Construing Trust Provisions, Or, If Necessary, Modifying The Trust Instrument; Request For Injunctive Relief; Cross Complaint For Injunctive Relief on August 15, 2012, and will respectfully request that this Court issue the permanent injunction requested in accordance with its ruling on the Trust's interpretation if the Court finds any problem with the current preliminary injunction based on the *status quo ante litem.*

In light of this Court's final interpretation ruling, the Trustees (whether choosing to call themselves Trustees or Directors) do not have the discretion to admit, matriculate, or educate women, regardless of any pre-litigation discussions or questions about whether they had that discretion. The instant Petition to modify the preliminary injunction has made clear that a permanent injunction implementing that ruling is needed, since Petitioner is under the misapprehension that the pre-controversy *status quo* should provide authoritative guidance despite the Court's definitive interpretation of the trust language to the contrary. While, prior to the commencement of this action, the college and its attendant parties may have contemplated,

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[2] Indeed, there have been further activities by Petitioner that warrant the present injunction, whether in preliminary or permanent form, as discussed below.

[3] "Upon notice and motion, the court may modify or dissolve a final injunction upon a showing that there has been a material change in the facts upon which the injunction was granted, that the law upon which the injunction was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction."

facilitated, or attempted to implement a transition to coeducation without a prohibition on devoting resources to such activities, that putative situation existed **before** this Court ruled that the trust language does not permit the education of women with college resources. Therefore, Respondents respectfully request that the Court grant a permanent injunction implementing its January 8, 2013 and February 13, 2013 ruling on the Trust's interpretation.[4]

C. The Modifications Petitioner Suggests Will Weaken The Injunction And Make It Ineffective In Preventing Attempts By The College To Avoid Trust Law.

When the parties last litigated the substance of the preliminary injunction, this Court found that Petitioner's proposed injunction language would fail to prevent a Plan B-like maneuver or other actions in furtherance of coeducation:

> 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.

(Court's Rulings and Orders on Petition for Court Order Interpreting Endowment Gift Instrument; Motion for Joinder of Deep Springs Corporation; and, Motion for Preliminary Injunction (Feb. 13, 2013) at p. 21:10-16.) Petitioners' proposed modifications to paragraphs (c), (d), and (e) of the injunction essentially re-propose the language that the Court already rejected because of its functional inadequacy.

1. The Injunction Should Not Be So Narrow As To Invite Evasion.

An injunction should be tailored to eliminate only the specific harm alleged, but it should not be "so narrow as to invite easy evasion." (*Skydive Ariz., Inc. v. Quattrocchi* (9th Cir. 2012) 673 F.3d 1105, 1116 [quoting *McComb v. Jacksonville Paper Co.* (1949) 336 U.S. 187, 193].)

Petitioner's hypotheticals aside, the proposed edits to paragraphs (c) , (d), and (e) create many more problems than they purport to solve. Petitioners have proven themselves capable of "Plan B"; they publicly stated that they will pursue a series of other such legal strategies until

[4] If the Court wishes to have a formal motion requesting a permanent injunction, Respondents will file one forthwith, although Respondents do not believe under the circumstances that it is necessary because the Court is thoroughly familiar with the facts and has the discretion to issue a permanent injunction for all of the reasons previously discussed, including protecting the integrity of its substantive rulings.

they accomplish their ends; and they invited thousands of young women to apply to Deep Springs in advance of a legal determination of the legitimacy of such an invitation, and then had to inform those young women who applied that they could not be admitted.[5] Given these facts, the injunction language is fully justified, and rather than being overbroad is instead carefully tailored to fit the subject in question.

a. Paragraph (c): Petitioner's Proposed Language Fails To Inform Ordinary Persons What Actions Are Proscribed.

As Petitioner notes, the language of an injunction should be specific enough to allow ordinary persons to know precisely what actions are enjoined. Petitioner proposes to eliminate language proscribing the "recruitment" and "education" of women students and instead seeks to replace it with a proscription on "implement[ing] coeducation or [] transition[ing] to coeducation." The current language is clearer and more specific than the language Petitioner proposes.

Throughout the instant Petition, Petitioner strains to find conflict with the Order's language by intentionally misreading it and its scope. One cannot reasonably interpret the Order as prohibiting boarding women visitors. Further, neither the letter nor spirit of the Order prohibits either short-term visits from female friends or Petitioner's pursuit of this litigation (indeed that may be the only action toward coeducation Petitioner may engage in since the Trustees do not have the discretion to admit, matriculate, or educate women). However, if this Court believes there is a real risk of controversy, then Respondents suggest that rather than deleting necessary and clear language, this Court should modify the Order by adding clarifying language to address Petitioner's specific concerns.[6]

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[5] The President of the College, Mr. Neidorf, then solicited these young women to share their disappointment in writing so he could use their upset feelings as part of a media strategy to engender sympathy for Petitioner's coed position. (Ann Schnoebelen, Court Stands in Way of Dreams to Be Deep Springs' Pioneer Women in THE CHRONICLE OF HIGHER EDUCATION (January 17, 2013).) Neidorf has since posted what he claims to be all of these letters on the Deep Springs College website. Petitioner needlessly caused the young women's disappointment by prematurely inviting them to apply, and then used their disappointment to further his cause. As discussed below, both Petitioner and Mr. Neidorf have been rewarded with additional tenure in their roles.

[6] For example: "This Order shall not be interpreted as prohibiting the following: (1) Boarding female visitors; or (2) Pursuing this legal proceeding." The point is that if, for example, a Deep Springs student has a woman friend stop by and stay for a few days as a guest, as has historically happened, that is a far cry from coeducation, implementing coeducation, or facilitating coeducation. Petitioner, the administration, the faculty, the staff and the students are and should be able to distinguish routine guest situations from coeducation efforts.

To eliminate the language prohibiting "support" of female students would again set loose Petitioner's fertile imagination, encouraging the Trustees to think up new ways to avoid trust or injunction restrictions. For example, if prevented from admitting women as students to Deep Springs College, but allowed to "support" them, Petitioner could institute visiting or exchange programs which would be tantamount to coeducation but would rely on the women students at Deep Springs being officially enrolled elsewhere than at Deep Springs. Nor is this mere speculation, as the College has instituted such actions in the past in order to evade the trust's restrictions. (See Declaration of David Neidorf in Support of Petitioner's Opposition to Respondents' Motion for Preliminary Injunction and Motion to Join Deep Springs Corporation as a Party, at pp. 4-5, ¶¶ 10-11.) Illegitimate support for short-term women students at Deep Springs in the past cannot serve as precedent, but the incidental support of women visitors (who may happen to be students elsewhere but are visiting Deep Springs as guests rather than attending as students) does not seem to Respondents to be enjoined, as they made clear in correspondence to Petitioner before Petitioner filed this motion.

b. Paragraph (d): Petitioner's Proposal Weakens The Standard To Which The Trustees Should Be Held.

Again, having female students visit the College, for example to visit a friend, cannot reasonably be interpreted as facilitating a transition to coeducation. Even Petitioner contends only that it "arguably" does so, indicating that such an interpretation is a stretch. The Order neither explicitly nor impliedly prohibits female students from visiting their friends at Deep Springs. It is entirely unreasonable to suggest that feeding a visiting girlfriend in the Boarding House amounts to facilitating a transition to coeducation. The gap between those two activities is too great to allow for confusion.

Next, the suggested substitution of "facilitate" with "implement" in paragraph (d) provides no more precision than the word currently in place. In fact, it would merely weaken the standard of conduct to which the enjoined parties are held. Replacing "facilitate" with "implement" would allow Petitioner to justify another Plan B-like maneuver. While Petitioner could readily contest the idea that Plan B was an "implementation" of coeducation, Petitioner

would find it difficult to deny that it was meant to "facilitate" a transition to coeducation. In fact, Petitioner went as far as to argue that the sale of assets at the heart of Plan B was not meant to implement coeducation, but rather to diversify the assets of the trust. Given Petitioner's demonstrated capacity to push confining language past its limit, the word "facilitate" is warranted, necessary, and better serves the ends of justice.

2. Paragraph (e): The Language Of The Injunction is Necessary and Must Be Interpreted In Light Of The Record.

In determining whether the enjoined party has been given sufficient notice of the conduct proscribed, the language of the injunction must be interpreted in light of the record which discloses the kind of conduct that is sought to be enjoined. (See *People v. Wheeler* (1973) 30 Cal.App.3d 282, 296.) The complete strike of paragraph (e) is unacceptable and the adduced hypotheticals are forced. Free speech and assembly rights are not implicated. There is no free speech or assembly right to be able to hire someone who explicitly rejects the lawful trust restrictions of one's organization, or to be able to terminate someone for supporting them. Petitioner provides no legal authority whatsoever to support his argument about free speech and free association. Furthermore, Respondents disagree with Petitioner's contention that all discussion of coeducation is potentially banned by the wording of the injunction.

Respondents insist on attention to the particular character of this injunction, sought not by a corporate competitor aiming to damage the enjoined party as far as possible, but rather by Trustees/Directors endeavoring to protect the institution in terms of its Trust. The Court has no reason to believe that the Respondents will raise objections to conversations held among faculty and staff on the issue of coeducation, and Respondents herewith disavow any intention to do so. Not least, the language of the injunction does not prohibit such conversations.

On the other hand, the Court has ample reason to believe that the Trustees/Corporation want to strike paragraph (e) so as to continue to facilitate the implementation of coeducation while the case is pending: (1) The college has advertised for employment openings claiming to applicants that Deep Springs would be coeducational in 2013; (2) the college hired a transition team with the express purpose of facilitating the transition to coeducation; (3) **Petitioner David**

Hitz has threatened to remove Kinch Hoekstra from the Board of Trustees because of the latter's disagreement on coeducation (see Hoekstra Declaration in Opposition to Petition to Modify the Preliminary Injunction and Liburt Declaration, Exhibit A); and (4) **the Trustees have just reappointed David Hitz to a third, extraordinary term in violation of their own bylaws and policies**[7] (he would have otherwise cycled off the board in October 2013 after serving one partial term plus two full-length terms). The College community certainly understands that Hitz's reappointment (and the extension of Neidorf's presidency) is to facilitate coeducation. See Hoekstra Declaration, Exhibit 2 ("The Trustees of Deep Springs College met in the Valley for their spring meeting over the weekend of March 23. Major business of the weekend included re-electing Dave Hitz '80 to the Board, reappointing David Neidorf to another term as President, and recommitting to pursue a coeducational future for the College.")

a. <u>The Injunction Does Not Implicate Free Speech Or Assembly Rights.</u>

Without <u>any</u> supporting legal authority, Petitioner contends that the Order violates the First Amendment. Judicial enforcement of injunctive relief does not, by itself, constitute state action for purposes of free speech. (See *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1034.) And even it if did, an injunction "that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (*DVD Copy Control Ass'n, Inc. v. Bunner* (2003) 31 Cal.4th 864, 877 [quoting *Los Angeles Alliance for Survival v. Los Angeles* (2000) 22 Cal.4th 352, 368].) The current injunction is content neutral since it is meant to prevent the facilitation and implementation of coeducation before a final determination on the merits. Its prohibition against using coeducation as a criterion in hiring, firing, and evaluating staff, faculty, and trustees is simply meant to prevent the facilitation of coeducation.

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[7] See Hoekstra Declaration, Exhibit 1. TDS POLICY FOR TRUSTEE SUCCESSION DRAFT (Approved in Dec. 2010).
Page 3: "Entering Board members who are chosen to fill a partially completed term of two years or more may serve no more than one complete additional term to prevent excessive tenures."
Page 5: V. Re-election of Board Members: "Trustees are elected to a single four-year term or in some instances a single four-year term plus a short part-term to maintain staggered terms. If a short part-term is two years or more in length, the trustee in question may not serve more than one additional term. Barring this circumstance, TDS has agreed that the Board may request that a trustee agree to serve an additional, full second term."

b. The Injunction Only Applies To The Students Insofar As They Participate In Decisions Of College Governance.

Petitioner professes concern about the application of the injunction to students. Respondents first point out that the injunction does not mention enjoining the students, so they are only enjoined insofar as they are agents or the like of the Trustees or Corporation. Petitioner asserts that the students do not participate in decisions of college governance. Respondents believe that they do, and that it is appropriate that they do so; but that insofar as they do so, they are bound by all legal requirements, including the terms of the injunction.

Petitioner claims that the student-run committees function in a purely advisory role regarding such decisions as admissions and hiring. However, at the recent Trustees' meeting in March 2013, for example, the Trustees delegated decision-making authority to the largely student-run Applications Committee (ApCom) to determine whether or not particular transgender applicants are eligible for admission.[8] If there were similar a delegation to the Curriculum Committee (CurCom), such that students have decision-making authority in the hiring, termination, or evaluation of employees, they would be acting as agents of the Trustees or the administration.

The students clearly have to act within the limits of the law in a range of ways in engaging in these activities, and the terms of the injunction further specify or make explicit these limits. Insofar as Petitioner is correct that the students are merely acting in an advisory role, the injunction should not apply to them.[9] Insofar as Petitioner is correct that student decision-making relates solely to the control of the student body, the injunction should not apply to them. But where the trustees have delegated decision-making powers to the students, or where the administration institutes or permits a process to implement their recommendations without full

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[8] On March 24, 2013, the Trustees passed the following resolution:
WHEREAS, the Board of Directors of Deep Springs Corporation considered the current law and advice of counsel concerning issues to be addressed in the review of applications by transgender applicants;
THEREFORE, the Board of Directors hereby resolves as follows:
An applicant who self-identifies as male and whose identification has been stable and consistent over time shall be considered eligible for admission under the single sex admissions policy. The Board delegates to the Application Committee the task of determining whether an applicant's identification as male meets the standards set forth. See Hoekstra Declaration, Exhibit 3.

[9] It is worth emphasizing, however, that where the student committees are merely advisory, the Trustees and administration become solely responsible for ensuring that decisions have not been taken on inappropriate grounds.

review, the injunction should apply to the students. That students can be bound by the injunction if they play certain roles is illustrated by the fact that two students are Trustees of the Trust and Directors of the Corporation, and surely those students are bound in that role.

So paragraph (e) is warranted, whereas no good reason has been provided for striking the paragraph.

c. The Injunction Does Not Interfere With The All-Male College's Operations.

Here again, Petitioner misreads the Order and its scope. There is simply no warrant for Petitioner's claim that subpart (e) amounts to "a gag order". (Petitioners' Petition For Modification Of Preliminary Injunction, at p. 6:9.)

The Order states that coeducation cannot be used as a criterion[10] for hiring, firing, or evaluation. It does not say that the college cannot mention the topic or explain the current legal situation. Respondents of course do not object to factual statements to applicants about the current legal situation. However, that is quite different from interrogating an applicant about his or her views on coeducation, and then refusing to hire the applicant due to his or her statement that the college should remain all-male. It is entirely appropriate to prohibit such action.

Everyone on campus, in fundraising discussions, and in communications to the wider community, remains free to speak to and associate with whomever they want. However, the Court has now ruled that the Trust does not permit coeducation. Since the Trustees and their agents have a fiduciary duty to carry out the Trust (Cal. Prob. Code, § 16000), the Trustees have a fiduciary duty to hire employees on grounds that are consistent with and not in violation of the Deed of Trust as clarified in light of this Court's ruling. Petitioner is attempting to conflate (a) a general right to say what one wants and associate with whomever one wants, with (b) the much more limited and specific issue of a private college hiring and evaluation in accordance with its

[10] "A standard of judging; a rule or test, by which facts, principles, opinions, and conduct are tried in forming a correct judgment respecting them." WEBSTER'S NEW INTERNATIONAL UNABRIDGED DICTIONARY 627 (2d. ed. 1944). "A standard, rule, or test on which a judgment or decision can be based." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 431 (4th ed. 2000). The term is defined, and clear, and cannot reasonably be thought to lead to "an outright ban on all discussion of coeducation" (Petitioners' Petition For Modification Of Preliminary Injunction, at p. 6:21.)

Deed of Trust. Respondents simply see no reason that the preliminary injunction would inhibit the proper administration of the college as it continues to function as an all-male school.[11] Petitioner suggests that the injunction will cause employment difficulties. Respondents point out that Deep Springs has had great success employing staff and faculty for an all-male college for nearly a century. Petitioner and his supporters in the administration are the ones who have been acting imprudently by hiring people for the purpose and with the promise of coeducation. Petitioner wishes to modify the injunction in order to continue hiring people to further coeducation, or to remove those who oppose it, despite the Court's ruling on the issue.

d. The Injunction Is Carefully Tailored To The Present Circumstances And Is Therefore Not Overly Broad.

Petitioner contends that if there is a criterion upon which the college may not rely in making a personnel decision, that will require examination into individuals' thought processes. This is not the case. First, there is no *per se* problem with defining a particular criterion as impermissible. Second, any time there is a criterion that entities are not allowed to base a hiring decision upon, such as marital status, race, or age, hiring entities must abide by that and it presents no insurmountable difficulties. So just as the college has experience not using unlawful criteria in their hiring and evaluations procedures, it may employ similar approaches in not using coeducation as a criterion.

3. The Court's Jurisdiction Is In Rem, Therefore It Has Jurisdiction Over The Res And Can Enjoin Any Parties' Or Nonparties' Actions With Regard To That Res.

Unlike conventional civil court, a court sitting in probate does not generally exercise personal jurisdiction. Rather, a court sitting in probate exercises *in rem* jurisdiction. (*Lilienkamp v. Sup. Ct.* (1939) 14 Cal.2d 293, 298 ["Jurisdiction of the probate court is a jurisdiction *in rem*."].) "Traditionally, the courts have differentiated between judgments in personam and in rem on the basis that 'A judgment *in personam* imposes a personal liability or obligation o[n] one

[11] The example of a candidate who refuses to teach at a college with an all-male student body is irrelevant given that Deep Springs is such a college. It seems to Respondents that an applicant who is committed to teaching at Deep Springs with an all-male student body should not be discriminated against on that basis, but should be made aware that he or she may then wish to move on if and when Deep Springs does in fact transition to coeducation if Petitioner succeeds in modifying the trust.

person in favor of another. A judgment *in rem* affects the interests of all persons i[n] designated property.'" (*In re Johnson's Estate* (1965) 233 Cal.App.2d 785, 791 [quoting *Hanson v. Deckla* (1958) 357 U.S. 235, 246].) In the instance of a trust action, the res over which the court exercises jurisdiction is the trust. (See, e.g., *In re Radovich's Estate* (1957) 48 Cal.2d 116, 120 ["The jurisdiction of the probate court is a jurisdiction *in rem*, the res being the estate of the decedent, which is to be administered and distributed with regard to the rights of creditors, devisees, legatees, and all the world."][internal citations omitted].)

The Legislature enacted Probate Code section 17001, which explicitly provides for the exclusive and concurrent jurisdiction of the court sitting in probate.[12] And *Estate of Heggstad* (1993) 16 Cal.App.4th 943 contains an in-depth discussion of the broad ability of a court sitting in probate to rule on matters that would historically be beyond the *in rem* jurisdiction of the court, finding that "[t]he interpretation not only makes sense as a matter of judicial economy, but it also recognizes the probate court's inherent power to decide all incidental issues necessary to carry out its express powers to supervise the administration of the trust." (16 CalApp.4th at p. 951.)

This finding is bolstered by the Law Revision Commission Comments cited by the court in *Heggstad*:

> Thus as a matter of judicial economy, the superior court, in proceedings brought before it concerning internal trust affairs, has the power to determine issues other than those strictly relating to the internal affairs of the trust. If a question as to the rights of a third party arises in such proceedings, the court will have the opportunity to decide the issue and need not refer it to another department of the superior court. (18 Cal. Law Revision Comm. Reports, at p. 581.)

a. <u>Telluride Association's Own Coeducational Programs And Charitable Giving Are Not Affected By The Injunction.</u>

The injunction as worded in no way inhibits Telluride Association's ("TA") own educational programs, which have been coeducational since the 1960s. However, TA and other third parties can and should be enjoined to the extent that their actions affect Deep Springs College, or Petitioner will be able to use already existing entities (not formed by the Trust or Corporation) to facilitate or bring about coeducation at Deep Springs.

[12] "In proceedings commenced pursuant to this division, the court is a court of general jurisdiction and has all the powers of the superior court."

> In matters of injunction it has been a common practice to make the injunction run also to classes of persons through whom the enjoined party may act, such as agents, servants, employees, aiders, abettors, etc., though not parties to the action, and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment. But the whole effect of this is simply to make the injunction effectual against all through whom the enjoined party may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the enjoined party, who are in fact his aiders and abettors.

(*Berger v. Superior Ct.* (1917) 175 Cal. 719, 721; see also *Kirby v. San Francisco Savings & Loan Soc.* (1928) 95 Cal.App. 757, 760 [although the decree or order names only the organization and a few individuals, it is binding on others not named who have notice of it.].) Donors whose funds are designated for possible future coeducation are not aiders and abettors. However, accepting gifts with such conditions seemingly violates the policy Petitioner so insisted on this past November, of only accepting unrestricted gifts. As long as the College is not misleading donors about the current legal situation, there should be no issue about donors. The current injunction language is a standard and legitimate way to prohibit the primary enjoined parties from acting improperly by doing so through secondary channels. Since the probate court's jurisdiction is *in rem*, it may properly enjoin third parties from facilitating coeducation at Deep Springs.

III. CONCLUSION

Respondents request that the Court deny the instant petition and retain the substance and force of the injunction already in place, whether as a preliminary or a permanent injunction.

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