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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

REPLY IN SUPPORT OF PETITION FOR MODIFICATION OF PRELIMINARY INJUNCTION

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

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INTRODUCTION

The Petition of newly joined party Deep Springs College Corporation for Modification of the Preliminary Injunction arises from these facts:

- Respondents filed a Motion for Preliminary Injunction "to preserve the status quo" pending a final decision on whether the trust should be interpreted or modified to permit admission of women as well as men to Deep Springs College. (Court's February 13, 2013 Ruling on Respondents' Motion for Preliminary Injunction ["Ruling"] at 15:26.)
- The Court granted Respondents' Motion and stated that the restriction should remain in effect while "waiting for a decision on the Petition to Interpret/Modify the Trust." (Ruling at 19:1-2.)
- The Court specified conduct to be enjoined – namely (a) admitting women to Deep Springs College, (b) soliciting or accepting applications from women to be students, (c) "Trustees… spending funds on transition plans" and (d) "transferring assets." (Ruling at 21:10-16.)
- The Court also specified who should be enjoined – namely "the Trustees of the Trust, the Directors of the Corporation, the Trust, the Corporation, and 'any other entity that Petitioner may concoct'." (Ruling at 15:22-26.)
- The present Preliminary Injunction Order on its face reaches conduct beyond that described in the Ruling. The Order also extends beyond the categories identified in the Ruling as to who should be enjoined.

Because of the material differences between the Ruling and the language appearing on the face of the Preliminary Injunction Order, because the Order is in many respects ambiguous and over reaching, and because the Order raises Constitutional issues and needlessly interferes with normal functioning of the College, modification is appropriate and will minimize future controversy.

In their Opposition, Respondents do not dispute directly that current language is unclear and overbroad. Instead, they argue that ambiguous language should be construed and applied in certain ways. But that, of course, further demonstrates the need for modification. If language must be explained, the Order does not comply with the law.

Respondents criticize several modifications which the Corporation has proposed to address these problems. However, they have not made constructive suggestions of alternative language that would be more clear, better tailored, less unambiguous, and/or less intrusive.

Lastly, Respondents unleash a hailstorm of allegations extraneous to the issue at hand. Few of these matters are worthy of response. To the limited extent any may be relevant, none alters the

conclusion that the interests of justice would be served by modifying the preliminary injunction to clarify what conduct is proscribed and to whom exactly the proscription applies.

ARGUMENT

1. The Preliminary Injunction is Unacceptably Vague and Overbroad on Its Face.

As set forth in our opening papers – and Respondents do not dispute – the language of a preliminary injunction must make clear what specific ***acts*** are enjoined. (Pet'n. at 2:3-10, citing *ReadyLink Healthcare v. Cotton,* 126 Cal.App.4th 1006, 1026 (2005), and *Premier Communications Network v. Fuentes,* 880 F. 2d 1096, 1100 (9th Cir. 1989).) The fact that Respondents in their Opposition are forced to offer constructions and interpretations of Preliminary Injunction language is an admission that the subject portions of the Order are vague and ambiguous.

Respondents' argument that the Corporation "fails to provide any evidence…that would warrant a modification of the preliminary injunction" (Opp. at 2:12-14) ignores the fact that language of the Preliminary Injunction as written – on its face – is the problem. Vague, ambiguous, and overbroad phrasing "speaks" for itself; no extrinsic evidence is necessary.[1]

a. Subparts (c) and (d) of the Preliminary Injunction Should be Tailored to Address only the Specific Harm Alleged.

Respondents agree that "[a]n injunction should be tailored to eliminate only the specific harm alleged." (Opp. at 5:20.) And Respondents point out that the Court has ruled on how the harm alleged here is to be eliminated – by enjoining (a) admission of women to Deep Springs College, (b) solicitation of and acceptance of applications from women, (c) "the Trustees from spending funds on transition plans" and (d) "the Trustees from... transferring assets." (Opp. at 5:11-13, citing Ruling at 21:10-16.)

Subparts (a) and (b) address the first two aspects of the Ruling in straightforward fashion. The present language in subparts (c) and (d) of the Order, however, is not straightforward and goes

[1] The few extrinsic facts set forth in our opening papers are known to Respondent Mr. Hoekstra, who attended Deep Springs College as a student and has served as both a Trustee of the L.L. Nunn Trust and a member of the Board of the Corporation in recent years. Why he wishes to challenge these few facts as unsubstantiated (Opp. at 2:7-14) is unknown and serves no purpose. Nonetheless, to eliminate needless controversy, we submit herewith the Declaration of David Neidorf to supply foundation for factual matters which may be helpful to the Court in considering this Petition.

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beyond enjoining "the Trustees from spending funds on transition plans and transferring assets." Instead, subpart (c) enjoins "using any assets or resources...for the ... education, or support of female students," and subpart (d) prohibits "disposing of assets...to facilitate...transition to co-education." As pointed out in our Petition and recognized by Respondents, Deep Springs presently uses assets and resources to support female students when they visit the campus (Opp. at 6), yet present language prohibits this conduct. And under current wording as well, Petitioner and his counsel might not be allowed to pursue this litigation (which involves use of assets "to facilitate ...transition to co-education").

Respondents say that "one cannot reasonably interpret the Order as prohibiting boarding women visitors." (Opp. at 6:15-16.) But in the next breath they claim that "support for short-term women students" is "illegitimate...but the incidental support of women visitors (who 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." (Opp. at 7:10-13.) Which is it? Hair splitting does nothing to help insure that the stated purposes of the Preliminary Injunction are achieved. If language of the Order is modified to be clear and unambiguous – as the law requires – no one will need to engage in parsing and guesswork.

The modified order tendered by the Corporation prohibits all conduct identified in the Ruling and does so without creating other problems for the parties and the Court. Modified subpart (c) bars "[u]sing any assets or resources...to implement coeducation or a transition to coeducation," and modified subpart (d) prohibits "[s]elling, transferring, or otherwise disposing of assets of Deep Springs College to implement coeducation or a transition to coeducation. By using the term "implement"—which connotes the carrying out of an act – this proposal eliminates confusion prompted by words such as "support" and "facilitate" which have multiple possible meanings and can be construed differently in different contexts.[2] And the language proposed by the Corporation avoids

[2] Respondents' suggest that facial deficiencies of the Order can be rectified by adding provisions to exclude certain things from prohibitions of the Order (Opp. at 6:26-28). This is a backwards approach. The function of a preliminary injunction is to unambiguously define what acts are prohibited. Our proposed modified order does so with relative ease. Failing to draft an injunction properly in the first instance, and then trying to fix problems with a band-aid list of exceptions would yield a document which is difficult to read and to understand, which is more cumbersome to administer, and which will require future modification requests whenever new circumstances arise that cannot now be anticipated.

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interference with decades-long practices at Deep Springs which are not at issue and avoids any impairment of legal representation.

Respondents' further argument that stronger (but unspecified) language should be added to subparts (c) and (d) to discourage evasion (Opp. at 5-6) is frivolous. It is premised on Respondents' conviction that so-called Plan B was "wrong." Whatever the Court might think of Plan B substantively, it is undisputed that Petitioner promptly and fully disclosed the plan to both Respondents and this Court. It is also undisputed that no irreversible commitments of resources were made to implement Plan B. No evidence exists that Petitioner or the Corporation intends to do anything except continue to cooperate with the Court and to comply with its directives. What is necessary and appropriate in the Preliminary Injunction is clear and unambiguous guidance as to what conduct and who is enjoined. Respondents' suggestion that the injunction should be punitive because they were offended by Plan B is inappropriate and not a legitimate basis to deny the Petition.

b. Subpart (e) of the Preliminary Injunction is Neither Necessary nor Constitutional, and Should be Deleted.

Subpart (e) bears no relationship to the four activities the Court has enjoined. Further, to prohibit "using support for or opposition to a transition toward, or a policy of coeducation...as a criterion for...evaluating faculty, staff, employees..." raises a host of legal and practical problems. (Pet'n. at 4-6.) Most glaringly, subpart (e) chills speech and impairs the right of association by essentially barring discussion of factors that might (and indeed are likely to) come into play in "evaluating faculty, staff, employees...." It also invites entanglement by the Court in personnel decisions which can under no circumstances cause the L.L. Trust, the Corporation, or anyone else to violate the essential purpose of the Ruling.

Respondents argue that subpart (e) is needed for four reasons, but none of what they say makes logical sense. First, Respondents claim that "[t]he college has advertised for employment openings claiming to applicants that Deep Springs would be coeducational." (Opp. at 8:26-27.) So what. There is no evidence that any such advertisement was placed or ran after the Court issued its Ruling. But even if one did, that would be irrelevant. Nothing in the Ruling prohibits the College from recruiting employees in whatever manner it believes appropriate. Even subpart (e) as currently

worded does not address the content of job advertisements. Nor is there evidence that any individual hired in response to advertising which Respondents do not like has caused or could cause Deep Springs College to become a coeducational institution in violation of the Order.

Respondents' next proffered rationale for subpart (e) is that "the college hired a transition team with the express purpose of facilitating the transition to coeducation." (Opp. at 8:27-28.) This assertion is inaccurate,[3] but again so what. Respondents are focused on extraneous past behavior, and not anything that has happened since the Ruling was issued. And even then, any legitimate concern about what current personnel or newly hired employees might do in the future is already covered by subparts, (a), (b), and (c). Subpart (e) is surplusage in this regard.

Third, Respondents claim that subpart (e) is needed because "Petitioner David Hitz has threatened to remove Kinch Hoekstra from the Board of Trustee's because of the latter's disagreement on coeducation." (Opp. at 8:28-9:2; emphasis omitted.) Mr. Hitz, Mr. Hoekstra, and anyone else is free under the Constitution to express an opinion (even in the form of a verbal "threat" as construed by the Opposition) without fear of violating a court ordered preliminary injunction because such a statement may be linked in Respondents' thinking (with or without justification) to a personnel decision.[4]

Respondents' final basis for subpart (e) is that "the Trustees have just reappointed David Hitz to a third, extraordinary term." (Opp. at 9:3-4.) There is, of course, no evidence that the Board of the Corporation reappointed Mr. Hitz for anything other than good reason. Nor is there evidence that in doing so it considered – let alone was compelled to reach that result – because of Mr. Hitz' position

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[3] See paragraph 9 of the accompany Neidorf Declaration. The College only filled positions that were already open. No new positions were created in anticipation of a hoped for transition to coeducation.

[4] According to Mr. Hitz, what he discussed with Mr. Hoekstra on this subject was Mr. Hitz's observation or opinion that Mr. Hoekstra continuing to serve as a Trustee during this litigation made it difficult for the Board to function cohesively and that it was becoming increasingly uncomfortable for all parties. There is, of course, no evidence that anyone has taken action to attempt to remove Mr. Hoekstra from the Board as a result of this set of legitimate concerns or for any other reason.

on the subject of coeducation. All that this extraneous argument illustrates is that subpart (e) is fertile ground for mischief.[5]

In addition to not providing any good reason to maintain subpart (e), Respondents cannot and do not overcome the infirmity of this provision under the Constitution. Deep Springs personnel and students, as well as the directors of the Corporation and the Trustees of the L.L. Nunn Trust, have the right to discuss and consider all relevant criteria in making personnel choices on a fully informed basis without running afoul of the language in the Preliminary Injunction. (Pet'n. at 4-6.)

Respondents' contention in this regard that "there is simply no warrant" to characterize subpart (e) as a "gag order" (Opp. at 11:8-9) is untenable. They themselves try to justify subpart (e) on the basis of a statement allegedly made by Mr. Hitz to Mr. Hoekstra which Mr. Hoekstra found objectionable. Respondents cannot credibly describe subpart (e) as having no impact on free speech while at the same time urging that the provision should be retained in the Order so as to prevent someone from making personnel decisions allegedly based even in the smallest of measures upon an expressed opinion regarding the subject of coeducation at the College.

Respondents suggest that issuance of the Preliminary Injunction Order does not "constitute state action for purposes of free speech." (Opp. at 9:15-16.) This is wrong. The case Respondents cite for their proposition, *Golden Gateway v. Golden Gateway Tenants Association,* 26 Cal.4th 1013 (2001) (Opp. at 9:16-17), involved judicial enforcement of a *private* – not court ordered – injunction. By contrast, the issue here is not whether enforcement of a *private* restraint would constitute state action, but whether the terms of the Order comport with applicable legal standards – including the First Amendment.

The matter at hand is comparable to *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal.4th 864 (2003), another case which Respondents cite. (Opp. at 9:17-21.) In *DVD,* a *court-ordered* injunction

[5] Respondents' admission that their aim in drafting subpart (e) was to prevent hirings and/or reappointments based on views of coeducation portends future controversy. Respondents could well seek a contempt citation under subpart (e) every time an individual they believe supports coeducation – or who has the temerity to say that they do in fact support a change at Deep Springs – is hired or re-engaged by the College. Contrary to Respondents' presumptions, the four purposes specified in the Order do not include limiting the College to hiring only faculty or staff who do not support coeducation or a requirement that the composition of the Board be changed in their favor.

was treated as state action properly subject to First Amendment analysis. This Court's Order is as well.

Respondents also rely on *DVD* to argue that subpart (e) is content neutral and thus not subject to Constitutional scrutiny. (Opp. at 9:17-24.) Wrong again. Even content neutral injunctions must "not burden speech more than necessary." *Id.* at 885. Here, there is no need to burden speech at all by retaining subpart (e), as the purposes set forth in the Order are accomplished without it. Subpart (e) should be stricken.

c. <u>The Preliminary Injunction Should be Tailored to Identify Clearly The Entities and Persons To Whom It Applies</u>.

In their request for preliminary injunction, the Respondents 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. (Ruling at 15:22-26.) Yet the term "Enjoined Persons" is defined in the Order to also include "agents, servants, employees, aiders, abettors, corporate affiliates, related entities" and persons acting "in concert with" any related entities." These additional references should be removed, as they go beyond what is necessary and proper to achieve the purpose of Respondents' motion. (Pet'n. at 7:9-17.)

Respondents ignore this point in their Opposition. Instead, they discuss at length categories of persons they believe should be enjoined when acting in particular capacities. (Opp. at 10-11 and 13-14.) The result is more confusion, more unnecessary hair splitting, and the prospect of a preliminary injunction so convoluted that the Court would need to publish annotations to explain what is going on. Again, of course, this discussion by Respondents themselves further establishes that the preliminary injunction does not pass legal muster and should be modified.

With particular regard to Deep Springs students, for example, Respondents contend that students should be considered Enjoined Persons insofar as they participate in matters of college governance, and "if there were similar a delegation to the Curriculum Committee" as to the Applications Committee. (Opp. at 10:13-14.) Whatever this means, Respondents ignore the fact that while Deep Springs students participate actively in College governance, their only unfettered authority is over conduct of the student body itself and appointing student members of the Board of

Trustees.[6] Because the President and the Board always have the right and responsibility to ensure that student recommendations comply with legal and other requirements, there is no need to constrain student self-governance. L.L. Nunn himself – as expressed in his Deed of Trust – wished to maximize the role of the student body in College affairs, and there is no valid reason to subject the beneficiaries of the Trust (the students) to any restriction.

As to third parties (not even mentioned in the Order), Respondents make an entirely new assertion that Telluride Association "and other third parties can and should be enjoined to the extent that their actions affect Deep Springs." (Opp. at 18.) Neither Telluride Association nor any other third party has been served or is otherwise a participant in this proceeding. Respondents have not sought to join Telluride Association or any other third party. Respondents have not provided evidence or even suggested that evidence exists of a threat which would justify applying any restriction to anyone other than those identified in the Ruling. And how the Court, the Trust, the Corporation, or anyone else can anticipate what "actions" will or will not "affect Deep Springs" is a mystery – as well as yet another invitation to add yet more uncertainty to an already ambiguous Order.

Finally in this regard, Respondents argue that this Court has *in rem* jurisdiction over non-parties. This misses the point. Just because a Court *might* be able to exercise jurisdiction over a non-party does not mean that jurisdiction *should or needs to be* exercised. The preliminary injunction should apply only to "the Trust, the Corporation, their Trustees and Directors and any other entity that Petitioner may concoct." (Ruling at 15.) The definition of "Enjoined Persons" should not include non-parties, as that would go beyond what is necessary and proper to achieve the purpose at hand. Respondents have provided no reason why anyone other than the Trust, the Corporation, their Trustees and Directors (as well as officers) and "any other entity that Petitioner may concoct" should be enjoined.

[6] Exercise of such powers cannot violate the preliminary injunction. While acting as a Trustee, however, any student member of the Board would of course be bound by the Order. Expansive language is not needed to accomplish this result, as all Trustees and Board members are already enjoined. This includes a student who is appointed by his fellow students to serve as a Trustee.

2. <u>The Proposed Modification Properly Focuses on Conduct Directly Related to Coeducation and Preventing Transition to Coeducation</u>.

Present Preliminary Injunction language is impermissibly vague and ambiguous because it does not describe specific ***conduct*** or ***acts*** directly related to the specific harm alleged – namely coeducation and transition to coeducation. Respondents concede this legal standard. *See* Opp. at 5:20 ("[a]n injunction should be tailored to eliminate only the specific harm alleged") and Opp. at 6:8-9 ("language of an injunction should be specific enough to allow ordinary persons to know precisely what actions are enjoined"). Rather, they contend that language proposed by the Corporation is somehow "weaker" than what now appears in the Order. Even if correct (which it is not) this characterization is irrelevant because modifications proposed properly focus on **conduct** or **acts** tied to the specific harm alleged whereas current language does not.

Subpart (c) of the Order precludes "using any assets" for "recruitment, education or support of female students," and thus is not limited to conduct directly related to any purpose specified in the Ruling. The terms "recruitment" and "support" in particular are unconnected to the purposes of the preliminary injunction, as is the overbroad notion of "education of female students." We modified the language to enjoin **conduct** or **acts** relative to specific harm alleged: "using any assets" to "implement co-education or a transition to co-education." The modified language leaves no doubt as to what those who are enjoined must not do.

Respondents complain that the word "implement" is no more precise than the word "facilitate." (Opp. at 7-8.) Not so. "Implement" connotes carrying out or putting into effect a plan, which requires taking some purposeful step. By contrast, "facilitate" refers to making something easier to accomplish, which can occur in many different ways and sometimes can even come about as an unintentional side effect of a legitimate act. In the spirit of compromise, the Corporation would be equally satisfied using the phrase "carry out" in place of "implement" so long as the subpart pertains only to acts enjoined in terms no broader than set forth in the Ruling.

In similar fashion, subpart (d) presently focuses on the ***effect*** of conduct, rather than proscribing conduct itself: "disposing of assets …so as to facilitate…coeducation or a transition to coeducation." By substituting the phrase "to implement" for the words "so as to facilitate" the

provision properly comes to address conduct to be enjoined rather than on what the effect of doing something undefined might be. And, once more, if Respondents do not like the word "implement," we are pleased to substitute "carry out" – again so long as acts enjoined are no broader than what is identified in the Ruling.

Subpart (e) also does not proscribe **conduct** or **acts** directly related to the essential purpose of the preliminary injunction – barring transition to coeducation and coeducation itself until a final decision is reached on the Petition for Interpretation/Modification. Enjoining "using" personal opinion concerning coeducation as "a criterion" for "evaluation" would require the Court to inquire into an individual's state of mind in the face of an alleged violation. That difficult (if not impossible) task is a far distance from barring conduct or acts. Also, the term "using" in this context is not "reasonably clear so that ordinary persons will know precisely what action is proscribed." *Premier Communications Network v. Fuentes, supra,* 880 F. 2d at 1100. (Pet'n at 6:15-26.) Even if the Court could figure out how to administer this provision, those subject to it cannot be properly informed by subpart (e) as to their obligations. Subpart (e) should be stricken as not merely unconstitutional but as unworkable as well.

3. Other of Respondents' Extraneous Arguments are not Pertinent to the Issue at Hand.

Respondents raise further arguments which lack factual or legal support and obfuscate the issue to be decided on this Petition. We discuss some but not all of these distractions.

a. Respondents are Wrong in Asserting that the Corporation Seeks to Re-Litigate Issues Already Decided and Has Some Improper Motive in Bringing this Petition.

The Petition seeks changes to a few words in subparts (c) and (d) and deletion of subpart (e) – all for one reason. In recognition of the obligation to comply with the Ruling, many individuals associated with Deep Springs College (as well as ourselves) tried but experienced substantial difficulty fully understanding the meaning and scope of the Order. If the Order cannot be readily understood, or if application of the Order as written would cause problems from a legal or practical standpoint, something is wrong and should be addressed. Issues presented were not briefed before, and are ripe for decision.

Respondents contend that the ulterior motive is to "eliminate language in the injunction that stands as an obstacle …to throw Respondent Hoekstra off the Board of Trustees so that no one will remain on the Board who…has standing to prevent Petitioner's…unlawful actions." (Opp. at 1:27 – 2:2.) This accusation is without foundation. No one has contended that Respondents' standing depends on their continuing to be a trustee of the Trust or a member of the Corporation's Board. So far as the Corporation is concerned, both Mr. Hoekstra and Mr. Keonjian (who is no longer a Board member) had and will continue to have standing to pursue this matter through the courts. There is no legal basis or good reason to expand the Order beyond its stated purposes so as to perpetuate Mr. Hoekstra's position on the Board.

b. Respondents' Request to Convert the Preliminary Injunction to a Permanent Injunction Must be Denied.

Respondents' argument that "[t]he instant Petition to modify the preliminary injunction has made clear that a permanent injunction…is needed" (Opp. at 4:21-22) is without merit. They cite no authority for the proposition that seeking clarification of language in a preliminary injunction is proper basis to request imposition of permanent restrictions. No such authority exists. If Respondents believe they are entitled to a permanent injunction at this time, they should make formal application for that relief to the Court.

c. Respondents' Arguments Concerning the Status Quo Ante are Inconsistent and Do Not Address Whether Inappropriate Language of the Preliminary Injunction Should be Modified to Serve the Ends of Justice .

Respondents argue that "the undisputed *status quo ante litem* of Deep Springs College's purpose and practice of educating 'promising young men'" [sic], and nothing more. (Opp. at 2:17-19.) However, they themselves admit elsewhere in their Opposition that the state of affairs before this litigation began involved much more. For example, women have been visiting Deep Springs College and attending occasional classes regularly for decades, to the point that even Respondents admit that "one cannot reasonably interpret the Order as prohibiting women visitors." (Opp. at 6:16.) Likewise, coeducation at Deep Springs has been discussed and debated for decades among students, faculty, staff, and others interested in the College. Subpart (e) of the current Order discourages that discussion and debate for no good reason. Subpart (e) also adds new and unnecessary complexities to

the hiring process as it existed before this action commenced. These and a host of other legitimate pre-litigation activities are unavoidably implicated in a literal reading of the current language of the Preliminary Injunction. The status quo has more than one element and more than one dimension.

CONCLUSION

For the foregoing reasons Deep Springs College Corporation respectfully requests that its Petition for Modification of Preliminary Injunction be granted.

Respectfully submitted,

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Dated: April 19, 2013

By: _____

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