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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 **PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, MOTION IN LIMINE** Judge: Hon. Dean T. Stout Date: September 24, 2013 Time: 8:30 AM Dept.: 4

Petitioner, DAVID HITZ, Chairman of the board of trustees of the Lucien L. Nunn Trust (the "L. L. Nunn Trust" or "Trust"), acting on behalf of the board of trustees (the "Trustees"), respectfully submits the following Memorandum of Points and Authorities in Opposition to Respondents' Motion for Judgment on the Pleadings or, in the Alternative, Motion in Limine.

I.
INTRODUCTION

In their Motion for Judgment on the Pleadings or, in the Alternative, Motion in Limine ("Respondents' Motion") and Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings or, in the Alternative, Motion in Limine ("Points and Authorities"), Respondents contend that, as a matter of law, this Court's authority to modify the provisions of the Trust Instrument is limited to the cy près doctrine. Respondents' Motion should be denied because (1) this Court has not held that the only purpose of the Trust is to continue to exclude women and (2) other approaches are available to judicially modify any provision of a charitable trust, including its purposes. This Court has authority to modify the provisions of the Trust Instrument as requested by Petitioner under each of the theories pled by Petitioner: (1) the cy près doctrine; (2) Probate Code section 15409 (unanticipated circumstances); (3) common law equitable powers; and (4) Probate Code section 15403 (consent of the beneficiaries). Therefore, this Court should deny Respondents' Motion.

II.
THIS COURT MUST GIVE DEFERENCE TO THE PETITIONER IN ANY MOTION THAT TESTS THE SUFFICIENCY OF THE PLEADINGS

A motion for judgment on the pleadings is similar to a general demurrer because it tests the sufficiency of the complaint to state a cause of action. (*Wise v. Pacific Gas & Electric Co.* (2005) 132 Cal.App.4th 725, 738.) "The court must assume the truth of all factual allegations in the complaint, along with matters subject to judicial notice." (*Ibid.*) "Moreover, the allegations must be liberally construed with a view to attaining substantial justice among the parties." (*Guild Mortgage Co. v. Heller* (1987) 193 Cal.App.3d 1505, 1508.) When liberally construing allegations, the court assumes the truth of all facts that may be inferred reasonably from (1) the facts pled, (2) the facts contained in exhibits to the complaint, and (3) the facts that are judicially noticed. (*Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal.App.4th 1395, 1402, citing, *Neilsen v. City of California City* (2005) 133 Cal.App.4th 1296, 1305 [inferences drawn in reviewing a demurrer]; Code Civ. Proc., § 452 [liberal construction of allegations].)

Lastly, if a defect in the pleadings is found, but a cure is a reasonable possibility,

the trial court abuses its discretion by not granting leave to amend and a reviewing court must reverse. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Similarly, a motion in limine may operate as a general demurrer to the complaint or a motion for judgment on the pleadings when it alleges failure to state a cause of action, but there are limits on its use. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 27.) A motion in limine falls under a court's power to control litigation and conserve judicial resources because it seeks to decide issues in advance of trial. (*K.C. Multimedia, Inc. v. Bank of American Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 951.) A motion in limine is not, however, designed to "replace the dispositive motions prescribed by the Code of Civil Procedure." (*Amtower v. Photon Dynamics* (2008) 158 Cal.App.4th 1582, 1593.) Appellate courts are wary of tactics using the non-statutory motion in limine as a substitute for dispositive motions authorized by statutes. (*Id.* at p. 1594.) Motions in limine "circumvent procedural protections provided by the statutory motions or by trial on the merits." (*Ibid.*)

It is inappropriate to grant either judgment on the pleadings or a motion in limine to strike any of the causes of action pled by Petitioner here. In his Petition for Court Order Construing Trust Provisions, or if Necessary, Modifying the Trust Instrument (the "Petition"), his Supplement to Petition for Court Order Construing Trust Provisions, or if Necessary, Modifying the Trust Instrument (the "Petition Supplement"), and in the Declaration of L. Jackson Newell, that Petitioner filed with and cited in the Petition ("Newell Declaration")[1], Petitioner alleges facts sufficient to state a cause of action for each of the asserted bases for modification of the Trust Instrument Accordingly, this Court should deny Respondents' Motion.

[1] A recital that an exhibit is made part of a pleading makes every part of the attachment a portion of the pleading. (*In re O'Brien's Estate* (1966) 246 Cal.App.2d 788; 49A Cal.Jur.3d (2010) Pleadings, § 57, pp. 100-101.) The Newell Declaration is referenced in the Petition on Page 10 at lines 14, 18, 24, and 27.

III.
LEGAL ARGUMENT

A. No Final Determination Has Been Made Concerning The Purpose Of The L. L. Nunn Trust

This Court ruled on the **interpretation** of the Trust in its February 13, 2013, Rulings and Orders on Petition for Court Order Interpreting Endowment Gift Instrument ("Rulings and Orders").

Based on the Ruling and Orders, Respondents argue that the purpose of the L. L. Nunn Trust is to continue a mens school and, therefore, cy prés is the only legal theory available to modify the Trust to allow for the admission of women. Respondents do not articulate a cognizable or specific legal theory for their claim, but presumably they ask this Court to apply a doctrine such as "law of the case" or collateral estoppel or res judicata to its decision on interpretation. None of these apply, however.

Res judicata and collateral estoppel both arise after entry of final judgment in one lawsuit and commencement of another. (1 Cal. Affirmative Def. (2013 ed.) §14:60 citing *People v. Yokely,* 183 Cal. App.4th 1264, 1273.) Therefore, neither apply in this matter as there is no final judgment.

By contrast, the doctrine of law of the case operates primarily within the proceedings in a single lawsuit. (1 Cal. Affirmative Def. (2013 ed.) §14:60.) The doctrine has been explained as follows:

> Where, upon an appeal, the supreme court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular....
>
> ...It goes almost without saying that law of the case requires some action by an *appellate* court. A prior trial court ruling is not law of the case, whether the trial court in the same California court case or a federal district court that may have has jurisdiction over the dispute at some point.
>
> ...Law of the case applies to legal principles determined *upon* an appeal; interlocutory trial court determinations remain interim rulings subject to change at any time, subject to §1008 of the Code

of Civil Procedure, and are not encompassed within the doctrine of law of the case.

(Ibid; Citations and footnotes omitted.)

The sole determination by this Court was that "[t]he Trust can not be construed as giving the Trustees discretion to admit female students." (Rulings and Orders, 9:22-23.) Contrary to Respondents' contentions, this Court has not made any decision as to the purpose of the Trust. "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." (Code Civil Proc. § 1003.) Generally speaking, an order is not a final determination of the cause but an intermediate ruling of some kind, usually a decision on a motion. (See, 6 *Cal. Proc.* (5th), Proceedings Without Trial, §§1, 44; 7 Witkin, Cal. Proc 5th (2008) Judgment, §8, p. 552.) An oral or written opinion by a trial judge, discussing and purporting to decide the issues in the manner of an appellate court opinion, is merely an informal statement of the judge's views. It may be helpful in framing the judgment, or on appeal in interpreting ambiguous or uncertain portions of the judgment, but it is not itself the decision of the court or a judgment. (See, *De Cou v. Howell* (1923) 190 Cal. 741, 751, *Diaz v. Shultz* (1947) 81 Cal.App. d 328, *Lord v. Katz* (1942) 54 Cal.App. 2d 363, 367, *Bailey v. El Dorado* (1984) 162 Cal.App.3d 94, 97, *In re Marriage of Hafferkamp* (1998) 61 Cal.App.4th 789, 793, citing the text [unsigned ruling that was not entitled "judgment" did not constitute judgment]; *Collins v. Hertz Corp.* (2006) 144 Cal.App. 4th 64, 77, quoting the text [tentative decision at initial hearing finding triable factual issues had no legal effect]; 46 Am.Jur.2d (2006 ed.), Judgments §7; 9 *Cal. Proc.* (5th), Appeal, §350 et seq.; 7 Witkin, Cal. Proc. 5th (2008) Judgments, §10, 9.554.)

Nor is the decision which the Court did make a final one in these proceedings. A judgment pending on appeal is not res judicata nor collateral estoppel because it is not a final, conclusive judgment. (Prob. Code, §1310; 7 Witkin, Cal. Procedure (5th ed. 2008) Judgments, § 364, p. 986.)

The Petition requests two separate forms of relief: (1) a court order construing the Trust provisions to allow the Trustees discretion to admit female students to Deep Springs College (Petition, 3:12-25); or (2) court modification of the Trust Instrument to allow the Trustees to admit

female students to Deep Springs College. (Petition, 3:26-4:7.) This Court bifurcated trial on the Petition because modification would not be necessary if the Court interpreted Trust provisions to permit the Trustees to admit female students to Deep Springs College without modifying any trust provisions. (Order Re Bifurcation and Briefings Schedule, 2:11-14.) The interpretation issue was heard, decided and currently is on appeal. Now the issue of modification is set to be adjudicated. Respondents' Motion attempts to prevent the issue of modification from being heard under three of Petitioner's four theories, based on the false premise that this Court has already ruled that the Trust's sole purpose is to operate a men's college and the further false premise that the decision as to interpretation is final in this matter. As explained below, the Petition and Petition Supplement state a cause of action under each proposed theory for modification.

B. <u>The Trust's Purposes Must be Determined in the Context of the Various Provisions Allowing Modification.</u>

Petitioner has pled facts, including provisions of the Trust Instrument, that show that L. L. Nunn's purpose for Deep Springs College was broader than continuing a men's college. (Petition, 7:8-9:15.) The Court must assume these allegations are true for purposes of this proceeding.

California law uses different undefined terms with respect to modifying a trust[2]. The cy prés doctrine refers to a trust's "charitable purpose." (Rest. (3d) Trusts, §67.) Probate Code section 15403 (consent of beneficiaries) uses the term "material purpose." Probate Code section 15409 (unanticipated circumstances) describes modifying "administrative or dispositive provisions" after considering the "purposes" of the trust. Under California common law, the court's equitable powers requires an examination of the "primary purpose of the trust." (*Ike v.*

[2] There is little case law on means and standards for modifying charitable trusts. However, other authorities are relevant, especially the Restatement Third of Trusts (2003) of The reporter for that Restatement was University of California at Berkeley School of Law Professor Edward C. Halbach, Jr. "California trust law is essentially derived from the Restatement Second of Trusts." (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 379.) The Restatement Second of Trusts has been superseded by the Restatement Third of Trusts in certain areas. (13 Witkin, Summary of Cal. Law (10th ed. 2008) Trusts, § 12, p. 579-580.) As a result, California courts may look to the Restatement Third of Trusts for guidance, and the Restatement Second of Trusts where the Restatement Third of Trusts is silent on the issue. (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP, supra*, 201 Cal.App.4th at p. 379.)

Doolittle (1998) 61 Cal.App.4th 51, 79.)

The most general description of the settlor's intent is the charitable purpose. Charitable purposes include "the relief of poverty, the advancement of education or religion, the promotion of health, governmental purposes, or any other purpose the accomplishment of which is beneficial to the community." (See Prob. Code, § 18502, subd. (a); Rest.2d Trusts, § 368.) Here, the gift was for the charitable purpose of advancing education.

By definition, a modification is contrary to the settlor's specific intent as stated in the trust instrument. So the court's inquiry is not what the settlor intended, but what were his broader purposes and objectives. "Purpose" is not "intent." Rather, purpose is the "aim, object or motive underlying [the settlor's] intent." (*Rust v. Rust* (D.C. Cir. 1949) 176 F.2d 66, 67.)

The identification of a material purpose is a question of fact and within the trial court's discretion in ruling on a petition to modify a trust. (Prob. Code, §§ 17200, subd. (b)(13), 17206; *Petaluma Boys and Girls Club v. Walsh* (2008) 169 Cal.App.4th 1049, 1062.) If a settlor does not explicitly state that a specific purpose is the primary purpose or a material purpose of the trust, the identification and weighing of purposes frequently involve a subjective process of interpretation. (Rest.3d Trusts, § 65, cmt. d.) The finding of a material purpose generally requires some showing of a particular concern or objective on the part of the settlor. (*Ibid.*) Petitioner alleges facts showing that the Settlor's purpose was simply to provide for the continued development of Deep Springs by the Trustees.

Even if the exclusion of women is a material purpose or restriction on the use of the Trust assets, however, there are other purposes and restrictions stated in the Trust instrument that the Court must balance with the purpose of excluding women. The Settlor provided that the school be non-profit, that it be located in California, that it emphasize the need and opportunity for uplifting mankind from materialism to idealism, and that it feature student self-government. All these purposes or restrictions are subject to modification under any of Petitioner's theories, as they are all subservient to the Settlor's dominant charitable purpose of advancing education. Therefore, the Motion should be denied because the Petitioner has the right to present evidence concerning these various Trust provisions.

C. **Four Separate Legal Bases Authorize This Court to Modify the Trust Instrument.**

Respondents argue that this Court can modify the Trust Instrument only under the cy près doctrine. This is incorrect.

In its Rulings and Orders, this Court stated "it appears" L. L. Nunn's only intended purpose was to continue a men's college. (Rulings and Orders, 7:7-8.) The Respondents have taken this dicta as a final ruling on the purpose of the Trust. This contention is erroneous for at least three reasons. First, as already noted, the Court's decision as to interpretation is not final in these proceedings; nor can it be considered law of the case. Second, Respondents have improperly elevated an observation about continuing a men's college to a formal finding that the Trust has no other purpose than to fund an institution that excludes females. To the contrary, this Court's actual holding was only that the Trust Instrument did not empower the Trustees to admit women. (Rulings and Orders, 9:22-23.) Third, even if a gender restriction is deemed to be one Trust purpose, each of the bases for modification advanced by Petitioner still permits modification of a trust purpose. Specifically, (1) the administrative and dispositive provisions subject to modification under Probate Code section 15409, with respect to a charitable trust, include all provisions of a trust instrument; (2) a court's broad equitable powers allow it to modify a trust purpose; and (3) Probate Code section 15403 (modification with consent of the beneficiaries) explicitly allows a court to modify a "material" purpose of a trust.

1. **The Cy Près Doctrine.**

The cy près doctrine provides that where trust property is to be applied to a designated charitable purpose, and it becomes unlawful, impossible, impracticable, or wasteful to carry out that purpose, the trust will not fail but the court should direct application of the property to a charitable purpose that reasonably approximates the designated objective. (Rest.3d Trusts, § 67.) Respondents concede that cy près is applicable here. (Respondent's Points and Authorities, 1:8-9.)

Judicial modification of the Trust Instrument is also permitted under each of the following other legal bases. These additional legal means to modify a trust are important, because they involve different standards for modification which can and should be applied in this matter.

2. Probate Code Section 15409 Allows This Court to Modify the Trust Instrument If Due to Unanticipated Circumstances, the Continuation of the Trust Under its Terms Would Defeat or Substantially Impair the Accomplishment of the Trust's Purposes.

Probate Code section 15409 permits a court to modify the administrative or dispositive provisions of a trust (or even terminate the trust) upon the petition of a trustee or beneficiary if "owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust." This statute provides for a two step process. First, the petitioner must demonstrate circumstances not known nor anticipated by the settlor. Second, if the court finds that such circumstances exist, it must then determine whether continuation of the trust without modification would defeat or substantially impair the accomplishment of trust purposes.

While Section 15409 is sometimes referred to as cy près for non-charitable trusts, it also applies to charitable trusts. (Prob. Code, § 15004.) Importantly, the Section 15409 standard for modification (substantial impairment of trust purposes) is different than the cy près standard (unlawful, impracticable, impossible, or wasteful). Therefore, Section 15409 is an independent means to modify any provision of a charitable trust.

Petitioner has alleged that changed circumstances have substantially impaired the ability to achieve the Trust purposes with an all male student body. Petitioner has described those changed circumstances in detail. (Petition, 10:14-11:4; Newell Declaration.) Again, for purposes of the current motion, these allegations must be taken as true. As a result, this Court is obligated to conduct a trial to determine what circumstances have changed, what the Trust's purposes are, and whether continuation of the Trust under its males-only restriction would substantially impair the accomplishment of those aims.

a. Administrative and Dispositive Provisions of a Trust Include All of the Trust's Terms.

Although the Probate Code does not provide definitions for "administrative provisions" or "dispositive provisions" of a trust, none is needed because, as explained below, the administrative and dispositive provisions together constitute all provisions of a trust instrument.

Under Probate Code Section 15409, if the test is met, the Court may modify any trust term or terminate the trust. The reference in Section 15409 to "administrative or dispositive provisions" is not intended as a limitation on what can be modified, but to clarify that the old rule of equitable deviation has been broadened. The change from the prior rule is illustrated by comments to Restatement Second of Trusts section 381, which explained that in contrast to cy prés, Section 381 applied only to the administration of the trust. But Section 66 of Restatement Third Trusts, which replaced Section 381, states that the court may modify an "administrative or distributive" trust provision. Using both terms emphasizes that the ability to modify under unanticipated circumstances has been expanded to include distributive (or as in Section 15409, "dispositive") provisions. As explained in Comment b to Section 66, the court may modify "provisions defining the beneficial interests or entitlements of the various trust beneficiaries." (See *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334 [dispositive provisions of trusts include identifying beneficiaries and distributing trust property].)

Therefore, any trust term is either administrative or dispositive, and can be modified under Section15409.

b. A Court's Statutory Power to Modify the Provisions of a Trust Is Separate From Its Common Law Power to Modify the Provisions of a Trust.

While similar to the equitable power of courts under common law, Probate Code section 15409 is not merely a "statutory codification of the doctrine of equitable deviation" as alleged by Respondents. (Points and Authorities, 4:5-6.) Respondents attempt to equate Probate Code section 15409 with a stale definition of "equitable deviation" so as to diminish the statute's broad scope and liberal modification standard. They are wrong again.

Respondents cite an out-of-date article and the superseded 1959 Restatement Second of Trusts Section 381 to argue that equitable deviation applies only to administrative provisions. This is fallacious for two reasons. The modern definition of equitable deviation as stated in the Restatement Third of Trusts section 66 (published in 2003) provides that the court may modify "an administrative or distributive provision of a trust" or permit the trustee to deviate from "an administrative or distributive provision." (Emphasis added.) Likewise Probate Code section

15409 specifically allows a court to "modify the administrative or dispositive provisions of the trust or terminate the trust." (Emphasis added.) Section 15409 and modern equitable deviation are similar, as they both allow modifications as extensive as permitted under the cy près doctrine, but their prerequisites for modification differ from those of cy près.[3]

A court has explicit broad powers under Probate Code section 15409. Subdivision (a) allows the court to "order the trustee to do acts that are not authorized or that are forbidden by the trust instrument" in order to carry out trust purposes. Moreover, even a spendthrift clause in a trust does not impair the court's authority to terminate or modify the trust. (Prob. Code, § 15409, subd. (b).) In other words, Section 15409 does not place any limitations on which provisions courts may modify.

Accordingly, when he pleads that there were unanticipated circumstances and the continuation of the trust under its terms without modification would substantially impair the accomplishment of trust purposes, Petitioner has alleged the requisite elements for modification under Probate Code section 15409, and this Court has statutory authority, apart from its common law authority, to modify the Trust Instrument accordingly. Trial is required to hear evidence to substantiate these allegations.

3. This Court's Equitable Powers, Founded In Common Law, Permit Judicial Modification of the Trust Instrument.

This Court may also modify the Trust Instrument under its common law equitable powers. "[T]he common law power of a trial court in equity to modify a trust" is a "broad" one. (*Ike v. Doolittle, supra*, 61 Cal.App.4th at p. 79.) Courts have equitable power to modify the terms of a trust "where the primary purpose of the trust would not be accomplished by a strict adherence to the terms of the declaration of trust." (*Id.* at pp. 79-80.) The California Supreme Court has recognized this judicial authority to change the ways in which the intended benefits to the beneficiaries are attained in order to effectuate the settlor's intent. (*Adams v. Cook* (1940) 15

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[3] The American Jurisprudence article relied upon by Respondents cites no California case or law and is therefore unconvincing authority regarding equitable deviation. It is also contrary to the Restatement Third of Trusts §66, which is similar to Probate Code §15409.

Cal.2d 352, 359.) In advancing their motion, Respondents ignore this basic precept of the law.

Here, Petitioner has alleged that L. L. Nunn's intent to provide for the education of society's leaders cannot effectively be accomplished by strict adherence to the phrase "for the education of promising young men." (Petition, 10:27-11:4.) This allegation -- deemed true for purposes of the motion at hand -- is sufficient grounds for this Court to use its broad common law equitable powers to modify the Trust instrument to preserve L. L. Nunn's charitable intent. Therefore, the motion should be denied to allow the Petitioner to present proof of his allegations to the Court.

4. The Attorney General's Consent is Sufficient Under Probate Code Section 15403 to Modify the Trust Instrument.

With one exception, Probate Code section 15403, subdivision (a) compels a court to modify or terminate an irrevocable trust if all beneficiaries consent. The exception arises if the court finds that the proposed modification changes a provision that the court determines is a "material" purpose of the trust. In that case, the trust can be modified only if the court, in its discretion, determines that the reason for modifying the trust, under the circumstances, outweighs the interest in accomplishing a material purpose of the trust. (Prob. Code, § 15403, subd. (b).) Thus, if the males-only restriction does not rise to a "material purpose" then the modification with the consent of the beneficiaries requires no court analysis. If the evidence substantiates that allegation, then the Court simply allows the modification by consent of the beneficiaries. Even if excluding females is a material purpose, the Court may allow modification of that purpose by consent of the beneficiaries if the reason for doing so outweighs the interest in complying with the no-females restriction. Petitioners have alleged that L. L. Nunn's dominant purpose would be better achieved by relaxing the male-only restriction. (Petition, 9:8-15.)

a. The California Attorney General, Not the Dissident Co-Trustees, Represents the Trust Beneficiaries.

All beneficiaries must consent for Section 15403 to apply. The Probate Code defines a beneficiary as "a person to whom a donative transfer of property is made or that person's successor in interest, and . . . [a]s it relates to a charitable trust, includes any person entitled to enforce the trust." (Prob. Code, § 24, subd. (d).)

In the only published case involving a charitable trust and Probate Code section 15403, *Boys and Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049, the settlor created an intervivos charitable trust in which he designated five charities as beneficiaries and granted the trustees broad discretion to (1) determine the relative amounts or percentages to give to the trust beneficiaries, including the power to exclude a named beneficiary from receiving a distribution; and (2) name additional beneficiaries and distribute trust assets to them. (*Id.* at pp. 1051-1052.) The beneficiaries of the trust, both named and unnamed, successfully petitioned the court to modify the trust under section 15403 pursuant to a settlement agreement reached by the beneficiaries **over the trustees' objection**. (*Id.* at p. 1052.)

The Attorney General initially filed a statement of "No Position" while the case was pending in probate court, but later filed a "Consent to Modification of Trust" after the appellants filed their notice of appeal. (*Id.* at fn. 7.) In his "Consent to Modification of Trust" the Attorney General stated that he represented the People of the State of California, the ultimate beneficiaries of charity, and that he had acted to provide all beneficiaries, named and unnamed, representation in the modification proceeding. (*Ibid.*) The Attorney General argued that, by consenting to the modification on behalf of all unnamed beneficiaries, the requirements of Section 15403, subdivision (a) were satisfied. (*Ibid.*)

Here, the Attorney General represents all beneficiaries of the Trust because the Trust Instrument does not name any specific beneficiaries. The Trust benefits the general public, not any particular individual or entity. The Attorney General's broad powers with regard to charitable trusts include all aspects of enforcement and supervision. By statute, the Attorney General is a necessary party to any charitable trust modification. (Gov. Code, §§ 12591, 12598; *Patton v. Sherwood* (2007) 152 Cal.App.4th 339, 346.) Because the Attorney General is a necessary party to represent the general public for trust modification, the Attorney General is authorized to consent to a modification on behalf of the general public as the class of beneficiaries. (See Gov. Code, § 12580 et seq.) As a result, the Attorney General's consent is sufficient to modify the Trust Instrument in this case upon petition to this Court. Petitioner is seeking the Attorney General's consent, and expects to obtain it before trial.

b. *A Co-Trustee Is Not a Beneficiary of a Charitable Trust.*

Respondents argue that the students and Trustees must also consent under Section 15403. (Points and Authorities, 9:12-15.) This assertion is fatally flawed. Unless the trustee is also a beneficiary, termination or modification under Probate Code section 15403 does not require trustee consent. (Restatement Third, Trusts § 65, General Comment a.)

The beneficiaries in *Petaluma Boys and Girls Club v. Walsh* were able to modify the terms of the trust under Section 15403 **over the objection of both trustees**. If trustees of a charitable trust were also considered beneficiaries of the trust, the beneficiaries in *Petaluma Boys and Girls Club v. Walsh* would not have been able to modify the terms of the trust because 15403 requires that all beneficiaries consent. As co-trustees, Respondents undoubtedly have standing to object to the Petition, as did the trustees in *Petaluma Boys and Girls Club v. Walsh*, but they are not beneficiaries whose consent is required.

Pursuant to Probate Code section 20, the definition of a beneficiary under Probate Code section 24 does not apply to Section 15403 because the context requires otherwise. As stated in the Law Revision Commission Comments (1990) to Section 20:

> The introductory portion of Section 20 recognizes that, in a particular context, the context may require that a word or phrase used in a particular section be given a meaning different from the definition provided in this part.

Section 24's definition of beneficiaries of a charitable trust makes sense in the context of statutory requirements to give notice, provide information, or allow standing. But here, the context of Section 15403 requires that dissident co-trustees not be treated as trust beneficiaries. The requirement of Section 15403 that all beneficiaries consent is to protect all of **their** interests from impairment without consent. It is not to protect the trustees who have no interest in the trust.

This conclusion is supported by Probate Code section 15404 (modification by settlor and all beneficiaries), which specifically provides that if a beneficiary does not consent to the modification, the court may approve the modification anyway, if the interests of the non-consenting beneficiaries are not substantially impaired. This same rationale also applies to Section 15403. (Restatement Third, Trusts § 65, com. c.) If only those beneficiaries whose interests

would be substantially impaired by the modification need consent, it is incongruous to also require consent of a dissident co-trustee, who has no interest in the trust that could be impaired.

The Attorney General is authorized by law to speak for the beneficiaries of a charitable trust. (Gov. Code, §§ 12591, 12598.) To allow a dissident co-trustee to negate the Attorney General's power in this regard would undermine statutory authority. Petitioner does not dispute the dissident co-trustees' standing to object to any modification, but standing is much different than requiring their consent to a modification under Section 15403.

Further still, construing Probate Code section 24, subdivision (d) to include co-trustees as beneficiaries of the L. L. Nunn Trust would give any co-trustee veto power. That would be contrary to L. L. Nunn's explicit provisions in the Trust Instrument that the vote of only five trustees is required to authorize an action. (L. L. Nunn Trust §6.) For this reason as well, Respondents' contention that they are beneficiaries of the Trust for purposes of Section 15403 must be rejected.

c. *Members of The Deep Springs Student Body Are Not "Beneficiaries" for the Purpose of Section 15403.*

Beneficiaries of a charitable trust are ordinarily indefinite and therefore unable to enforce the trust on their own behalf. (*Holt v. College of Osteopathic Physicians and Surgeons, supra*, 61 Cal.2d 750 at p. 754.) "[T]he persons who are to obtain advantages from charitable trusts are referred to as 'beneficiaries', although it is more accurate to say that the real beneficiary is the public or community and the persons involved are merely instrumentalities through which the community benefits flow." (Bogert, Trusts and Trustees (3d ed. 2012) § 363.) Standing to enforce a charitable trust is generally limited to the Attorney General as the representative of the public. (*Hardman v. Feinstein* (1987) 195 Cal.App.3d 157, 161-162; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 305, p. 878.)

While the Trust Instrument states that "[t]he students in attendance receiving the benefits of the educational work being conducted hereunder are the sole beneficiaries of this trust," the students are not beneficiaries of the Trust for the purpose of Section 15403 even under Section 24, because they do not have standing to enforce the Trust. This is logical, because the students in

attendance at Deep Springs College are constantly changing. Accordingly, the Attorney General is the only legally cognizable "beneficiary" of the Trust and the only person whose consent is required under Section 15403 to modify the Trust instrument.

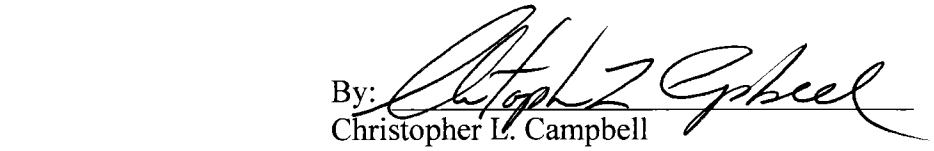
Petitioner has alleged that he will request the California Attorney General's consent to modification of the L. L. Nunn Trust to allow the Trustees to use trust property for co-education at Deep Springs. (Petition Supplement, 2:28-3:2.) Because the Court must assume this request has been made and that the Attorney General will respond at or before the time of trial, Petitioner has stated a cause of action for modification of the Trust Instrument under Probate Code section 15403 and Repondents' attempt to prematurely eliminate this theory must be denied.

IV.
CONCLUSION

In his Petition, Petition Supplement, and Declaration, Petitioner alleges facts sufficient to state a cause of action for modification of the Trust Instrument under the cy près doctrine, under Probate Code section 15409, under common law equitable modification, and under Probate Code section 15403. This Court bifurcated the interpretation and modification issues so that it could hear and decide each separately. The interpretation issue has been decided at this level. Now it is time for the modification issue to be heard and decided by the Court. For the foregoing reasons, Petitioner respectfully requests this Court deny Respondents' Motion so that modification can be considered and determined based on all the properly available legal theories that have been pled by Petitioner.

DATED: August 27, 2013

BAKER MANOCK & JENSEN, PC

By: 
Christopher L. Campbell
Jeffrey A. Jaech
Dirk B. Paloutzian
Attorneys for David Hitz, acting on behalf of the Board of Trustees of the L.L. Nunn Trust

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Fresno, State of California. My business address is 5260 North Palm Avenue, Fourth Floor, Fresno, CA 93704.

On August 27, 2013, I served true copies of the following document(s) described as **PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, MOTION IN LIMINE** on the interested parties in this action as follows:

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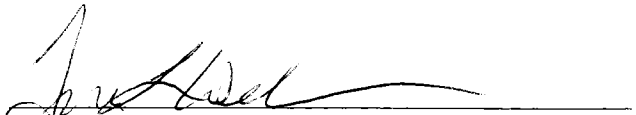
BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Baker Manock & Jensen, PC's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 27, 2013, at Fresno, California.



Tina L. Webb