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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF INYO, MAIN COURTHOUSE

In re the Matter of the

L.L. NUNN TRUST for the benefit of DEEP SPRINGS COLLEGE under Deed of Trust dated November 5, 1923

Case No. SICVPB 12-53232
Assigned for All Purposes to:
Hon. Dean T. Stout

RESPONDENTS/OBJECTORS' PROPOSED STATEMENT OF DECISION

Judge: Hon. Dean T. Stout

Date Action Filed: February 6, 2012
Trial Date: April 28, 2014

Respondents/Objectors Kinch Hoekstra and Edward Keonjian submit the following proposed statement of decision and ask that the Court adopt this statement of decision as the statement of decision of the Court.

I. INTRODUCTION.

This action concerns the L.L. Nunn Trust for the Benefit of Deep Springs College Under the Deed of Trust Dated November 5, 1923 (the "Trust"). Petitioner David Hitz seeks to modify the Trust to give the Trustees of the Trust (the "Trustees") discretion to use the Trust estate for the education of women, in addition to men, at Deep Springs College.

Trial in this action was held before the Court, with no jury present, on April 28, 29, and 30, 2014, and May 1, 2, and 13, 2014. Petitioner was represented by Christopher L. Campbell and Dirk B. Paloutzian of Baker, Manock & Jensen PC. Real party in interest Deep Springs College Corporation was represented by Jon Michaelson of K&L Gates. Respondents/Objectors (hereinafter, Respondents) Kinch Hoekstra and Edward Keonjian were represented by Eric M. George and Ira Bibbero of Browne George Ross LLP, Joseph C. Liburt of Orrick, Herrington & Sutcliffe LLP, and Heather M. Hoekstra.

Testimony was taken from David Hitz, Cory Francis Myers, David Neidorf, David John Benedict Welle, Zachary Robinson, L. Jackson Newell, Roger Lehecka, Ronald Riggio, William Dominic Jones, Amity Michelina Wilczek, Laura Beth Marcus, Kinch Steven Hoekstra, Richard L. Stack and Brian Jones. Numerous exhibits were admitted into evidence, as indicated in the record.

Having heard and read the evidence presented and received, and having observed the witnesses who testified at the trial, the Court hereby issues its statement of decision.

II. THE PLEADINGS AND LEGAL THEORIES.

On February 6, 2012, Petitioner filed a Petition for Court Order Construing Trust Provisions, or, if Necessary, Modifying the Trust Instrument (the "Petition"). On May 9, 2012, Respondents filed an Objection and Response to Petition for Court Order Construing Trust Provisions, or, if Necessary, Modifying the Trust Instrument. Respondents filed an Amended Objection and Response to Petition for Court Order Construing Trust Provisions, or, if Necessary,

Modifying the Trust Instrument on August 14, 2012. Petitioner filed a Supplement to Petition for Court Order Construing Trust Provisions, or, if Necessary, Modifying the Trust Instrument on March 22, 2013.

Questions regarding the construction of the Trust were heard and decided before trial commenced. The Court having concluded that the Trust could not be construed to permit the Trustees to use the Trust estate for education of women at Deep Springs College, trial was held solely on the legal theories presented in the pleadings seeking modification of the Trust.

The Petition and the Supplement to Petition seek modification of the trust under four legal theories:

1. Cy près;
2. Statutory equitable deviation pursuant to Probate Code section 15409;
3. Common law equitable deviation; and
4. Consent pursuant to Probate Code section 15403.

In all cases, Petitioner seeks to modify Trust to give the Trustees discretion to use the Trust estate for the education of women at Deep Springs College.

Petitioner bears the burden of proof on all of his claims. "Whatever plaintiff is obligated to plead, plaintiff is obligated to prove." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 654.) Plaintiff has the burden to prove the facts supporting cy près (*Lynch v. Surprise Valley Lodge No. 2* (1972) 26 Cal.App.3d 265, 272), equitable deviation (see *Moxley v. Title Ins. & Trust Co.* (1946) 27 Cal.2d 457, 468), and the statutory claims.

A trust may be modified under the doctrine of cy près where (1) it is illegal, impossible, or impracticable to give literal effect to the specific charitable purpose of the trust; and (2) the illegality, impossibility, or impracticability is permanent. (*Arman v. Bank of America, N.T. & S.A.* (1999) 74 Cal.App.4th 697, 703, fn. 11; *Estate of Mabury* (1976) 54 Cal.App.3d 969, 985.)

The conditions for statutory equitable deviation are set forth in Probate Code section 15409. That statute provides: "On petition by a trustee or beneficiary, the court may modify the administrative or dispositive provisions of the trust . . . 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. In this case, if necessary to carry out the purposes of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument."

Under common law, equitable deviation is available where (1) there was some expression in the trust instrument of the purpose of the trustor; (2) a peculiar or exceptional circumstance makes modification necessary to accomplish the purpose of the trustor; and (3) the change is necessary in order to carry out, not defeat, the primary purpose of the trustor as expressed in the trust instrument. (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 80-82; *Moxley, supra*, 27 Cal.2d at p. 468.)

Probate Code section 15403 provides in subdivision (a) that "if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court." Subdivision (b) qualifies subdivision (a) in relevant part as follows: "If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust."

III. STATEMENT OF FACTS.

Nunn started Deep Springs College in 1917. (4/30 Tr. [Newell] 505:8-10.)[1] He executed the Trust, for the benefit of Deep Springs College, in 1923. (Ex. 1-001.)

Deep Springs College is a two-year college that is unusual, if not unique, in many respects. It is small, with a student body of approximately 26. (4/28 Tr. [Hitz] 103:21-104:2.) It has only four long-term faculty members. (4/28 Tr. [Neidorf] 212:10-17.) Although the student body is entirely male, approximately forty percent of the faculty and staff has been female over the past decade. (4/28 Tr. [Neidorf] 212:18-21.) The program at the school is based on three "pillars" established by Nunn: academics, self-governance, and labor. (Ex. 14-005- 14-006.) All students attend tuition-free. (Ex. 14-004; 4/28 Tr. [Neidorf] 211:23-212:6.)

[1] Cites to the reporter's transcript consist of the date of testimony, the letters "Tr.", the name of the witness in square brackets, and the range of pages and lines.

In September 2011, by a margin of 10-2, the Trustees voted to "plan and implement a transition to a coeducational student body." (Ex. 213, p. 1.) "No particular event precipitated the board's decision to review its all-male policy . . . ." (Ex. 6-001.) Neither did any "financial or legal pressures motivate a change in the admissions policy." (Ex. 6-001.) Instead, the change was precipitated by a "strategy process" that "resulted in a list of five issues with coed on it." (4/28 Tr. [Hitz] 91:13-20.)

Additional facts are stated in the following sections discussing the theories by which Petitioner seeks to modify the Trust.

IV. THE PURPOSE OF THE TRUST.

Before discussing the individual theories, the Court will discuss a common theme running through them: the purpose of the Trust. It is clear to the Court from the evidence presented that an indispensable purpose of the Trust includes the education of promising young men.

A fundamental rule of construction of a trust is that the intention of the trustor is to be determined first by looking to the words of the trust instrument. "[T]he paramount rule in the construction of wills is that the intention of the testator must be given effect as far as possible. . . . [A]t all times such intention is of supreme importance, and all other rules of construction must yield to it." (*In re Munson's Estate* (1942) 54 Cal.App.2d 590, 592.) In ascertaining the testator's intent, "the intention to be determined is that which is *actually expressed* in the language of the will." (*Estate of Simoncini* (1991) 229 Cal.App.3d 881, 889 (emphasis in original).)[2]

The Trust itself, in what the parties agree is the "Purpose paragraph," states:

> 1. The purpose for which the property hereby conveyed and the rents, income, profits, and proceeds thereof, shall be used by said trustees is to provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by grantor at Deep Springs in Inyo County, California, but in such manner and form and at such place or places within said state as said trustees in good conscience and the exercise of their best judgment may determine, for the education of promising young men, selected by said trustees or as they may prescribe, in a manner emphasizing the need and

[2] The same general rules of interpretation apply to "a will, trust, deed and any other instrument." (*Burkett v. Capovilla* (2003) 112 Cal.App.4th 1444, 1449.)

> opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self government by the students themselves shall be a feature as is now the case at said Deep Springs, and which work shall be carried on not for profit but solely for the advancement of the purpose hereinabove mentioned.

(Ex. 1-004.) The Trustees were thus charged to (1) carry on the work previously started at Deep Springs College, (2) in the manner they determine, (3) for the education of promising young men, (4) emphasizing service and uplifting mankind to a life in harmony with the Creator, (5) featuring self-government, and (6) not for profit. Of these six provisions, one concerns the composition of the student body, and the fact that Mr. Nunn elected to include that provision in the paragraph setting forth the purpose of the Trust is evidence that Nunn gave that provision significant weight.

Significantly, Nunn condensed the purpose of the trust in a 1924 letter to the Trustees, but continued to emphasize the education of "promising young men." In that letter, Nunn wrote: "I shall keep driving home to you gentlemen, even if it takes my dying breath, that the purpose of Deep Springs is 'the education of promising young men in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator.'" (Ex. 32-003 - 32-004.) As Dr. Hoekstra testified, the condensation and emphatic nature of Exhibit 32 indicates that "these were the fundamental principles which [Nunn] wished to perpetuate . . . ." (5/2 Tr. [Hoekstra] 910:8-15.) Dr. Newell, who was admitted without qualification as an expert on Nunn's life, agreed that Nunn's 1924 letter stated what Nunn believed was the purpose of the Trust, which was executed only one year earlier, in 1923. (5/27 Tr. [Newell] 1112:11-15.) Even Petitioner agreed that Nunn's instruction to use the trust *res* for the education of young men was not "a coincidence." (4/28 [Hitz] Tr. 73:6-14.)

The Court finds that precise language of the Trust should be given weight not merely because of the rules of construction cited above, but because of the special qualifications of the grantor, Nunn, who was trained as a lawyer and "maintained his wits until his deathbed . . . ." (4/30 Tr. [Newell] 568:7-11.) Dr. Newell testified that Nunn wrote the Trust "knowingly, consciously, and intentionally . . . ." (4/30 Tr. [Newell] 568:14-16.) Petitioner testified that Nunn was "[a] fine writer" with "legal training." (4/28 Tr. [Hitz] 74:23-75:2.) Nunn "knew precisely what he was doing when he executed the Deed of Trust" and "would have been full[y] aware of

the legal implications of doing something by way of a deed of Trust . . . ." (4/30 Tr. [Newell] at 564:1-8.) Nunn "chose to educate promising young men." (4/30 Tr. [Newell] at 564:24-26.)

There was abundant evidence that Nunn intentionally created an all-male college although he could have created a coeducational institution. Nunn was aware of coeducational colleges "from an early age" and even underwrote and supported the education of young women – including his female relatives – at such schools. (4/30 Tr. [Newell] 540:11-26, 497:23-498:7, 542:3-543:1, 543:11-15.) Dr. Newell testified that nothing prevented Nunn from creating Deep Springs College as a coeducational institution had that been his purpose. (4/30 Tr. [Newell] 541:24-542:2.)

There are no writings by Nunn that specifically address the relative merits of coeducation versus male-only education. (4/30 Tr. [Newell] at 540:7-10; 4/30 Tr. [Newell] 541:16-23 (Dr. Newell has never seen any writings on why Nunn would have wanted to emulate or reject a coeducational model).) (Dr. Newell testified a trunk full of documents authored by Nunn was destroyed a year or two after Nunn died (4/30 Tr. [Newell] at 538:23-539:8), and while that trunk may have contained writings addressing the purpose of the Trust, the Court declines to speculate about what was in the trunk.) In the absence of additional writings by Nunn, the Court gives some weight to the evidence, introduced by Dr. Hoekstra without objection, that one Waldo, who drafted the Trust with Nunn, "made it very clear that Nunn was very intentional about the single-sex specification in the Deed and [that Nunn] would not want the institution to be coeducational." (5/1 Tr. [Hoekstra] at 886:7-14.)

Subsequent writings issued by or on behalf of Deep Springs College confirm that the education of young men is central to the purpose of the Trust. The school's 2005-2006 Annual Report summarized Deep Springs College's purpose as follows: "Deep Springs' mission remains clear. We prepare young men for a life of service." (Ex. 10-004 [President's Report].) The 2010 self-study report prepared by Deep Springs in support of reaffirmation of the college's accreditation stated: "L.L. Nunn, the founder of Deep Springs, directly stated the purpose of the college: to prepare young men for lives of service to humanity." (Ex. 14-066.)

Petitioner asserts that the purpose of the Trust is to prepare students for leadership. This assertion is undermined by the evidence. The Trust itself does not employ the word leadership. In light of the rules of construction of a trust instrument, this fact is to be given significant weight. The Court also gives weight to the facts that while other, contemporaneous writings by Nunn discuss leadership (e.g. Ex. 26-039 - 026-042 ["The Purpose"]; Ex. 359 ["Children of this World"]), and while the parties agree that Nunn was a "fine writer" and the Trust was carefully drafted, Nunn chose not to mention leadership training as a purpose of the Trust in the trust instrument.

Dr. Newell testified that it was his belief that Nunn restricted Deep Springs College to be for the education of men only for reasons of efficiency because in Nunn's time, men were more likely to obtain positions of leadership. (4/30 Tr. [Newell] 546:13-17.) But Dr. Newell also admits both that Nunn never expressed that view in writing, and that Nunn's conduct – admitting one Japanese student and one Catholic student to Deep Springs College at a time when Japanese Americans and Catholics were unlikely to obtain positions of leadership – was inconsistent with that view. (4/30 Tr. [Newell] 546:18-547:17.)

In sum, the Court concludes that an indispensable purpose of the Trust, as stated in the instrument itself, includes the education of promising young men.

V. THE EVIDENCE DOES NOT SUPPORT MODIFICATION UNDER THE DOCTRINE OF CY PRÈS.

As set forth above, the Court may modify the Trust under the doctrine of cy près only if (1) it is illegal, impossible or impracticable to give literal effect to the specific charitable purpose of the trust; and (2) the illegality, impossibility or impracticability is permanent. (*Arman, supra*, 74 Cal.App.4th at p. 703, fn. 11; *Estate of Mabury, supra*, 54 Cal.App.3d at p. 985.) The Court construes this test to mean, in this case, whether (1) it is illegal, impossible or impracticable to continue operating Deep Springs College as an all-male institution, and (2) if so, whether the impairment is permanent. Whether the intention of the Trust is the education of leaders or a multi-

faceted purpose that includes the education only of promising young men[3], the Court finds that Petitioner has not met his burden of showing that it is illegal, impossible or impracticable to give literal effect to the specific purpose of the Trust.

A. <u>It Is Neither Illegal, Impossible, Nor Impracticable to Continue Operating Deep Springs College as an All-Male Institution</u>.

The evidence does not support a showing that it is illegal, impossible, or impracticable to continue operating Deep Springs College as an all-male institution.

It is not illegal. Petitioner proffered no evidence and advanced no argument suggesting that it is illegal to operate an all-male college; to the contrary, Petitioner himself, in a 2011 e-mail, dismissed that contention. (Ex. 8-020 – 8-021.) Respondents' expert, Brian Jones, admitted as an expert on federal policy regarding single-sex education (5/2 Tr. [B. Jones] 1009:23-1010:2), opined that single-sex schools are not only legal but "within the mainstream of higher education." (Ex. 53-001, ¶ 1.)

As to impossibility, that Deep Springs College continues today to educate only male students is evidence that it is not impossible to operate an all-male college. President Neidorf acknowledged that the fact that Deep Springs College is single-sex is not currently an impediment to procuring academic accreditation. (4/28 Tr. [Neidorf] 218:16-20.)

Nor is there any evidence that operating Deep Springs College as an all-male college is impracticable. To the contrary, Deep Springs College, operating as an all-male institution is by all accounts in excellent shape in multiple regards:

- Academically and faculty recruitment: The parties stipulated that the Dean of Deep Springs College, Kenneth Cardwell, would, if called, have testified that "the life of the mind flourishes at Deep Springs." (5/2 Tr. at 824:25-825:25 [stipulation]; Ex. 357-035.) President Neidorf acknowledges that Deep Springs College has "good

[3] The Court will not address, because the parties have not raised in their pleadings or at trial, the question of whether any aspect of the "Purpose paragraph" of the Trust is illegal, impossible or impractical to give literal effect to.

faculty right now[.]" (4/28 Tr. [Neidorf] 199:10-11.) He wrote in the school's 2009 Annual Report that as a result of a fundraising campaign then going on, the school was able "to remain competitive in the recruitment of staff and faculty . . . ." (4/28 Tr. [Neidorf] at 211:10-19; Ex. 11-016.) The school's 2010 accreditation report states: "The Deep Springs academic program is rated among the best in the country by most college guides." (4/28 Tr. [Neidorf] at 218:26-219:10; Ex. 14-005.) The report continues, and it is true today, that "'Deep Springs' success in filling administrative and faculty positions has sustained the smooth, efficient operation of the college.'" (4/28 Tr. [Neidorf] at 220:7-22; Ex. 14-088.)

- Student recruitment: Deep Springs College is so successful at recruiting students that it is able to accept fewer than ten percent of its applicants. (4/28 Tr. [Neidorf] at 216:10-13.) Zachary Robinson, co-chairman of the Deep Springs College Applications Committee as of Spring 2014, believed that the pool of applicants in 2014 was "unusually strong" in terms of quality. (4/29 Tr. [Robinson] 420:23-421:9; Ex. 357-040.) The pool of applicants was also larger than the previous year's, 199 compared with 140-150. (4/29 Tr. [Robinson] 421:23-25; Ex. 357-040.)
- Student success: There was no dispute that Deep Springs College alumni generally continue their education at elite schools. (4/28 Tr. [Neidorf] at 219:20-220:4; Ex. 14-006 - 14-007.) Recent Deep Springs College graduate Cory Myers, who at the time of trial was attending Yale, testified that ten or eleven Deep Springs College alumni were then also attending Yale. (4/28 Tr. [Myers] 142:21-23.) As of 2003, the last year for which evidence was presented at trial, nearly 60 percent of Deep Springs College graduates held doctoral degrees. (4/28 Tr. [Neidorf] 217:1-6.)
- Financially: As of April 2011, according to Deep Springs College's Development Director, David Welle, Deep Springs College's endowment had "'fully recovered the ground it lost as a result of the 2008 market crash.'" (4/29 Tr. [Welle] 347:16-21; Ex. 349-005.) In May 2011, Deep Springs College's endowment reached $17

million, "the strongest ever." (4/29 Tr. [Welle] 343:9-17; Ex. 343-002.) In December 2011, the Deep Springs College endowment was "healthy." (4/29 Tr. [Welle] 343:23-344:12; Ex. 324-003.) By December 31, 2013, the Deep Springs College endowment reached a record level of over $20 million, and was able to provide 53% of the school's operating funds in 2013, and a higher percentage in the following academic year. (4/29 Tr. [Welle] 351:16-352:7; Ex. 357-069.) The school has few liabilities, and only has one debt, which it incurred "'carefully and in full agreement with its partner in the LLC in order to avoid jeopardizing the interests of either organization.'" (4/28 Tr. [Neidorf] 221:10-21; Ex. 14-103.)

- Generally: Dr. Newell testified that, in his opinion, Deep Springs College has in the past and will continue, as long as Mr. Neidorf continues to be President, to accomplish Nunn's purpose. (4/30 Tr. [Newell] 555:5-556:10.) Mr. Welle wrote in a 2008 fundraising letter and testified it was true at the time that the "current students are thriving," the "physical plant of the college is robust and conducive to our educational vision," and "Deep Springs is stable . . . ." (4/29 Tr. [Welle] 340:16-341:14; Ex. 322-001.) Mr. Myers testified and wrote a position paper in 2011 that, at that time, the college was in "excellent condition." (4/28 Tr. [Myers] 138:14-20; Ex. 212 at 2.)

Petitioner contends it is impossible or impracticable to prepare students for leadership at Deep Springs College so long as the school remains all-male. Setting aside the Court's finding that the purpose of the Trust is not to operate an institution to prepare students for leadership, Petitioner's argument is not persuasive. At the outset, the Court observed qualities of leadership evident in the courtroom from Deep Springs College alumni, to wit, from Petitioner, Mr. Welle, Drs. Newell and Hoekstra, Mr. Myers, Mr. Robinson, Mr. W. Jones, not to mention from counsel Mr. Campbell and Mr. Liburt.

As noted above, Dr. Newell opined that, notwithstanding the single-sex policy, Deep Springs College has and will continue to accomplish Nunn's purpose. (4/30 Tr. [Newell] 555:5-556:10.)

The Court finds the evidence regarding Arete College instructive on the question of whether Deep Springs College may accomplish Nunn's purpose if it continues as an all-male institution. Arete College was begun in 2010 and incorporated in 2011. (5/1 Tr. [Marcus] 828:1-5, 828:15-17.) Its model was Deep Springs College, and its vision was to establish a female-only college similar in many respects, to Deep Springs College: a two-year tuition-free college to prepare students for lives of leadership and enlightened service, with some degree of isolation, and based on the three pillars of Nunn's educational model, namely academics, labor, and self-government. (5/1 Tr. [Marcus] 828:23-829:8.) What the Court finds significant is that two of the witnesses testifying at trial that Deep Springs College requires coeducation in order to continue training leaders – President Neidorf and Dr. Newell – were also on the Board of Advisors of Arete College. (5/1 Tr. [Marcus] 828:6-14.) Although Arete College is apparently no longer a viable project, both Dr. Newell and President Neidorf continue to support the concept of an all-female school based on Nunn's model. (4/30 Tr. [Newell] 538:1-9, 557:18-558:7; 4/28 Tr. [Neidorf] 224:8-225:8.) Without denigrating these witnesses' attempts to explain away the inconsistency, the Court finds it probative as to their belief in the efficacy of single-sex college-age leadership education that both were willing to serve as advisors to such an institution.

Petitioner's expert Roger Lehecka opined that if a college's purpose is creating leaders, it does not make sense for it to be all-male because "[i]t's not getting them ready for what they're going to be doing." (4/30 Tr. [Lehecka] 615:21-616:16.) The Court gives little weight to Mr. Lehecka's opinion for several reasons. Mr. Lehecka has neither performed research nor written about gender and American higher education in the 20th Century. (4/30 Tr. [Lehecka] 617:17-22.) Hence, Mr. Lehecka's opinion is based largely on his experience overseeing the transition of Columbia College from all-male to coeducation in the 1980s. But Mr. Lehecka has no knowledge of whether Deep Springs College students become leaders notwithstanding the school being all-male. (4/30 Tr. [Lehecka] 653:24-654:8.) More significantly, Mr. Lehecka does not believe that the success of the alumni – let alone the financial condition of the school or the quality of the faculty or the students – has any bearing on whether an all-male school should become coeducational. (4/30 Tr. [Lehecka] 642:9-643:9.) In Mr. Lehecka's opinion, every all-male

college should become coeducational unless the purpose of the school is to remedy past discrimination. (4/30 Tr. [Lehecka] 641:23-642:8.) Thus, Mr. Lehecka's opinions are neither informed nor affected by the past success or specific features of Deep Springs College, and are not probative with respect to the issue raised in this case.

The Court also gives little weight to the opinion of Petitioner's expert Ronald Riggio that leadership is best taught in a coeducational setting. Dr. Riggio, an expert in leadership training, has not worked in leadership development at single-sex colleges, so his opinion is not informed by experience in environments like Deep Springs College. (5/1 Tr. [Riggio] 683:1-13.) Nor is it informed by research on all-male colleges because no "sound" research on single-sex colleges – as distinguished from single-sex K-12 education – exists. (5/1 Tr. [Riggio] 684:3-11, 711:10-712:11.) While Dr. Riggio draws for his opinion on scholarship involving K-12 education, he acknowledges that college-age and K-12 students do not learn in the same way, and is unaware of any research indicating that research on K-12 students can be generalized to college-age students. (5/1 Tr. [Riggio] 685:2-5, 685:20-25.) Dr. Riggio testified that leadership training outcomes can be measured in three ways – leadership role occupancy, effectiveness, and success – but there have been no studies comparing those outcomes between single-sex and coeducational colleges. (5/1 Tr. [Riggio] 751:7-24.) Dr. Riggio described a hypothetical study that could measure these outcomes at a school such as Deep Springs College, but acknowledges that the only such study is currently in progress at Claremont McKenna College, a coeducational institution, and no such study has been performed at any other school. (5/1 Tr. [Riggio] 752:24-756:6.) Dr. Riggio has no specific knowledge about Deep Spring College, its programs or its students. (5/1 Tr. [Riggio] 687:5-8.) Dr. Riggio testified that single-sex education reinforces sex role stereotypes in students, encourages bullying, and gives rise to negative side effects not present in coeducational environments, but he does not know whether any of those outcomes are exhibited in the Deep Springs College student body. (5/1 Tr. [Riggio] 748:19-750:25.) Finally, Dr. Riggio testified that the three pillars of Nunn's education model practiced at Deep Springs College – academics, labor, and self-governance – were an effective way to teach leadership. (5/1 Tr. [Riggio] 752:12-23.) In

sum, the Court finds Dr. Riggio's opinions are not probative with respect to whether Deep Springs College can succeed or is succeeding in leadership training.

The evidence thus establishes that Deep Springs College is operating successfully as an all-male institution. Petitioner has therefore failed to meet his burden of showing it is illegal, impossible, or impracticable to continue operating Deep Springs College as an all-male institution.

B. Even Were It Illegal, Impossible, or Impracticable to Continue Operating Deep Springs College as an All-Male Institution, Any Such Impairment Is Not Permanent.

As discussed above, the Court finds that it is neither illegal, impossible, nor impracticable to continue operating Deep Springs College as an all-male institution. However, even assuming for the sake of argument the existence of such impairments as argued by Petitioner, there is no evidence that those impairments are permanent.

For example, the primary impairment argued by Petitioner was a possible decrease in funding. Although Development Director Welle testified that it is speculative to predict whether the school would have greater or lesser success at fundraising if it became coeducational (4/29 Tr. [Welle] 337:3-8), and that as of Spring 2012, "[t]he net effect [of the debate regarding coeducation at Deep Springs College on funding] appears to be negligible to somewhat positive" (4/29 Tr. [Welle] 350:3-6; Ex. 356-063), there was also evidence that any decrease in funding from foundations can be accounted for by correcting President Neidorf's admitted inability to solicit funds from foundations (5/13 Tr. [Neidorf] 1076:26-1077:22).

In general, Dr. Newell testified that Deep Springs College has faced challenges from time to time in the past – indeed, his book about the school is titled "On The Edge" – but has always recovered. (4/30 Tr. [Newell] 519:8-523:3.) Petitioner has not met his burden of proving that any impairment is permanent.

* * * * *

Because Petitioner has not met his burden of proof of showing illegality, impossibility, or impracticability, the Court declines to modify the Trust under the doctrine of cy près.

VI. THE EVIDENCE DOES NOT SUPPORT MODIFICATION UNDER PROBATE CODE SECTION 15409.

Under Probate Code section 15409, the Court may modify the administrative or dispositive provisions of the Trust 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." The Court may only authorize modification, however, "if it is necessary to carry out the purposes of the trust . . . ." (Prob. Code, § 15409.)

A. The Main Intent of Nunn Was to Educate Promising Young Men.

The evidence establishes that Nunn wanted the Deep Springs College student body be (1) single-sex and (2) specifically male. As shown above, this conclusion is evident from the language of the Trust, from Nunn's writings made close in time to when the Trust was created, and from the circumstances of Nunn's life. Further evidence is discussed in this section.

It is clear from Nunn's words and actions that Nunn founded Deep Springs College for the education of men. Nunn did not allow women to teach or administer the school. (4/30 Tr. [Lehecka] 649:18-21.) Nunn gave no thought to admitting female students to Deep Springs. (4/30 Tr. [Newell] 558:20-24.) Those who knew Nunn agreed that Nunn was "intentional about the single-sex specification in the Deed and would not want the institution to be coeducational." (5/1 Tr. [Hoekstra] 886:3-14.) Nunn did not discuss women in his writings, but did repeat on multiple occasions that Deep Springs College was for the education of young men. (4/30 Tr. [Lehecka] 650:7-11; 5/13 Tr. [Newell] 1110:6-1112:15.) Nunn never hired a woman to work for him personally or at any of his businesses. (4/30 Tr. [Newell] 497:15-22) There is no doubt that Nunn chose the words "young men" and not "women" intentionally and understood its legal implications as Nunn was educated as a lawyer at Harvard Law School and apprenticed with an attorney before writing the Trust. (4/30 Tr. [Newell] 567:25-568:16.) These facts do not necessitate the conclusion that Nunn did not believe women could be leaders, but they do necessitate the conclusion that Nunn did not create Deep Springs College for the direct benefit of women.

Underscoring Nunn's intention that the Deep Springs College student body be exclusively male is Nunn's continued, enthusiastic support of education for women generally and at other institutions. Nunn was aware of coeducational and exclusively female colleges, paid for his nieces' and grandnieces' formal education, and underwrote his competitor's daughter's education at coeducational Oberlin before creating Deep Springs College. (4/30 Tr. [Newell] 497:15-498:7, 543:21-24.) Yet no writing of Nunn's exists in which Nunn addresses coeducation. And there is nothing in the Trust that mentions women. Nor did Nunn ever seek to amend the Trust to permit women students at Deep Springs. (4/30 Tr. [Newell] 534:10-12, 539:26-540:10; Ex. 1.)

That Nunn's intention was for Deep Springs College to be exclusively male is also supported by the fact that he created Deep Springs College after having created another all-male institution, the Telluride Association. (4/30 Tr. [Newell] 4-12; 4/28 Tr. [Myers] 139:14-25.) In creating Deep Springs, Nunn could have chosen to create a coeducational school or a school exclusively for women. He chose neither. (4/30 Tr. [Newell] 541:24-542:2.) In fact, unlike Telluride Association, which was not governed by a trust and became coeducational in the 1960s, Nunn enshrined the all-male requirement in a binding legal document – the Trust – when he created Deep Springs College. (4/28 Tr. [Myers] 140:1-6; Ex. 1.) The fact that Deep Springs College was even more explicitly and bindingly single-sex than Nunn's earlier educational efforts lends support to the Court's finding that the intention of the Trust is restricted to the education of men.

Accordingly, the evidence supports the conclusion that Nunn employed the Trust to ensure that Deep Springs College be for the education of men only.[4]

[4] Because the education of men is a central purpose of the Trust, Probate Code section 15409, which permits modification only of administrative or dispositive provisions of a trust, is inapplicable here. As shown in the body, however, the provisions of section 15409 are not satisfied even if this issue is overlooked.

B. Nunn Supported the Education and Professional and Academic Leadership of Women.

Nunn was aware of and personally witnessed the evolution of women's educational and professional opportunities before he created Deep Springs College. (4/30 Tr. [Newell] 547:18-25.) In 1900, more than a thousand women were lawyers in the United States. In 1911, women were given the right to vote in California. In 1921, a female Assistant Attorney General in the U.S. Department of Justice argued more than 50 cases before the United States Supreme Court. (4/30 Tr. [Newell] 551:11-552:6.) Further, two of Nunn's sisters studied in Dresden, Germany, one of whom became a well-known biological scientist and wrote scientific papers published in the Journal of Physiology and referenced by the Royal Society. (4/30 Tr. [Newell] 542:3-543:1.)

Nunn was also aware of the existence of coeducational colleges, and also of exclusively female colleges, and underwrote the education of a woman at coeducational Oberlin before he created Deep Springs College. (4/30 Tr. [Newell] 540:11-26.) In fact, at the time Nunn created Deep Springs College in 1923, the dominant model of college education was coeducational. (4/30 Tr. [Newell] 548:1-6.) Nunn was thus not only aware that women sought out education, including graduate-level education, and that women were being educated as leaders in male-dominated professions such as law and science, but also funded the education of several women.

Accordingly, because it can be reasonably concluded that Nunn knew throughout his lifetime that women were pursuing higher education and increasingly becoming professionals and academics, it must be concluded that, when he created Deep Springs College toward the end of his life, Nunn anticipated women pursuing education and entering the workforce in professional and academic capacities.

C. Continuing Deep Springs College as All-Male Will Not Substantially Impair the Accomplishment of the Trust's Purpose.

Continuing Deep Springs College as an exclusively male college will not substantially impair the accomplishment of the Trust's purpose whether the purpose is to educate young men or to educate leaders.

First, there is no evidence that Deep Springs College is suffering in quality or unable to educate young men. Deep Springs College currently "compares very well to the top four-year private colleges nationally." (4/28 Tr. [Neidorf] 209:16-210:1.)

By all accounts, Deep Springs College is in very healthy shape. The faculty is regarded as competent and the students are considered to be excellent. (4/30 Tr. [Newell] 522:25-523:7.) Maintaining an all-male student body is not an impediment to procuring accreditation. (4/28 Tr. [Neidorf] 218:16-20.) Neither the President nor the Administration of Deep Springs College has ever represented that Deep Springs College is unable to effectively achieve Nunn's purpose or that there was any serious problem regarding finances or ability to fundraise, retain or recruit faculty, or attract qualified students. (4/29 Tr. [Welle] 361:23-362:11; 5/1 Tr. [Hoekstra] 875:15-878:6.)

Deep Springs College's male-only admission policy has never posed and does not now pose any financial threat to Deep Springs College. Funds for professional development are available for faculty and staff and Deep Springs College has few financial liabilities. (4/28 Tr. [Neidorf] 220:23-221:21.) Deep Springs College "has sufficient cash flow and reserves to maintain stability, strategies for appropriate risk management, and realistic plans to meet financial emergencies and unforeseen consequences" and is vigilant in raising funds and careful in expending them. (4/28 Tr. [Neidorf] 222:2-29.) Further, any prediction whether a coeducation Deep Springs College would have greater success fundraising would be entirely speculative; no formal poll has been taken as to whether alumni would give more or less money to Deep Springs College were it to become coeducational. (4/29 Tr. [Welle] 337:3-13.) The evidence that was adduced suggests Deep Springs College would lose the financial support of at least three current donors of it went coeducational. For example, the Hugh and Hazel Darling Foundation – one of the top ten non-alumni donors to Deep Springs College in the past 12 years – has donated $796,000 in large part because Deep Springs College is single-sex, but stated that it would "sincerely doubt . . . making gifts in the future" should the school become coeducational. (5/13 Tr. [Neidorf] 1076:15-25; 5/2 Tr. [Stack] 1000:4-9, 1003:1-15.) Two other donors, who collectively have given approximately $2.8 million to Deep Springs, have expressed opposition to coeducation at Deep Springs College. (5/13 Tr. [Neidorf] 1060:3-9.)

There is no dearth of qualified, promising student applicants. In fact, Deep Springs College has a recent pattern of attracting more promising applicants each year than the former year. The male applicants in 2013 were stronger on average than those from the 2012 applicant pool, and there were significantly more applicants in the 2012 pool. (4/29 Tr. [Robinson] 372:7-16; Ex. 357-040.) Deep Springs College has sustained a smooth, efficient operation because it has been successful in filling administrative and faculty positions with competent persons. (4/28 Tr. [Neidorf] 220:7-26.)

Accordingly, there is no evidence that continuing Deep Springs College as all-male would substantially impair the Trust's purpose of educating promising young men.

Second, no evidence was addressed that Deep Springs College cannot effectively teach leadership within a single-sex student environment. Petitioner introduced no scientific scholarship or evidence that an all-male college environment has a deleterious effect on leadership education; no scientific studies have been conducted in an all-male college on how students learn leadership. (5/1 Tr. [Riggio] 685:20-687:4, 695:4-10.)

By student and alumni accounts, Deep Springs College has taught, and continues to effectively teach, leadership based on the three-pillar model of Nunnian education: academics, labor, and self-governance. (5/1 Tr. [Riggio] 752:12-23.) And there are examples of current all-male colleges (e.g., Morehouse) that effectively teach leadership. (5/2 Tr. [B. Jones] 1031:16-26.)

Accordingly, the Court finds that continuing Deep Springs College as all-male will not substantially impair the accomplishment of the Trust's purpose.

D. Admitting Women is Not Necessary to Carry Out the Purpose of the Trust; Doing So Would Defeat the Trust's Purpose.

1. Nunn's Unconventional Method Includes a Unique and Isolated All-Male Environment.

Although the coeducational model was dominant at the time Nunn created Deep Springs College, Nunn "wanted a college without adapting common standards and common horizons of aspiration." (4/28 Tr. [Neidorf] 178:4-5.) Dr. Newell testified:

> So I think the "purpose" was leadership; the "high-grade material" were the young men that he invited to be educated at Deep Springs College and Telluride. And the unconventional method which he employed – it seems to me – involve eight particular ingredients. And those were self-governance, labor, meaningful labor, a distinctive academic program, isolation, sobriety, religiousity in terms of returning to the Creator, and a single-sex policy. Those eight ingredients were his unconventional method.

(5/13 Tr. [Newell] 1102:3-30.)

The unique education provided at Deep Springs College is achieved through a combination of elements, one of which is an all-male student body. As. Dr. Hoekstra made the point: "It's not just a college for young men; it's not just a college in California; it's not just for providing the ultimate goal of uplifting mankind from materialism to idealism, it is the conjunction of those things." (5/1 Tr. [Hoekstra] 945:9-12.) The ingredient of an all-male structure contributes to the uniqueness of the Deep Springs College experience. (5/1 Tr. [Hoekstra] 848:8-20.) An all-male environment enables certain young men to achieve a maturity and camaraderie that they could not achieve in a coeducational environment. (5/2 Tr. [Hoekstra] 993:6-994:4.) Many alumni attribute their maturation to that aspect of their Deep Springs College experience that placed them in a space with no women, and that enabled them to focus in a manner that might not have been possible for them in a coeducation environment. (4/28 Tr. [Hitz] 32:11-26.)

Many young men purposefully choose Deep Springs College because it is all-male. Certain prospective students are attracted to the single-sex environment because they believe that they need an all-male environment in which to mature without the distraction of the opposite sex. (4/28 Tr. [Neidorf] 228:13-229:21.) Dr. Hoekstra testified that he was specifically attracted to Deep Springs College's single-sex model because, having attended a high school that was coeducational, he believed an all-male school would help him focus because it did not contain the same elements of gender roles present in a coeducational environment. (5/1 Tr. [Hoekstra] 848:21-849:16.) The all-male environment of Deep Springs allows certain students to discover personal aspects about their character and personality; some students in a single sex environment

find themselves freed from being concerned about appearing a certain way in front of women or society – a factor that Mr. Niedorf describes as "a precious part of Deep Springs." (4/28 Tr. [Niedorf] 170:24-171:15.) After being both a student and professor at Deep Springs, Dr. Hoekstra concluded "that the all-male environment [at Deep Springs] was unusually healthy and added something important to the institution." (5/1 Tr. [Hoekstra] 868:13-869:3).

In a 2011 student body vote as to whether an all-male student body created a unique and valuable opportunity for emotional growth and maturation – 25 voted in favor, zero against and three abstained. (5/2 Tr. [Hoekstra] 915:8-916:9.) This vote demonstrates that Deep Springs College students believe an all-male student body too valuable to their education. (5/2 Tr. [Hoekstra] 916:17-26.) Mr. Robinson testified that he is "certain the experience at Deep Springs College would change and certainly the all-male part of it would be something that is lost in that way. That is something that is a unique experience." (4/29 Tr. [Robinson] 409:3-10.)

Invariably, admitting women to Deep Springs College would impair an indispensable purpose of the Trust. The evidence shows the all-male environment is crucial to the environment at Deep Springs College and important to certain young men who seek an environment in which to mature, isolated from the cultural expectations of society. As Nunn himself warned, and as President Neidorf and Dr. Hoekstra agree, "Deep Springs is not conventional in its methods, and any attempt to introduce conventional methods or radical change would destroy its usefulness altogether." (Ex. 26-043; 4/29 Tr. [Neidorf] 266:3-267:3; 5/2 [Hoekstra] 904:7-9.)

2. <u>An All-Male Student Body Does Not Threaten the Program at Deep Springs College</u>.

There is no evidence the all-male student body policy has or will ever threaten Deep Spring College's quality of education, financial livelihood or stability. Deep Springs College is not now in any kind of peril and there is no evidence that continuing the school as an all-male college will put it in future financial peril or prevent it from recruiting qualified administration, faculty or student candidates. (4/30 Tr. [Newell] 552:7-553:1; 553:6-9.) By all accounts, Deep Springs College as it currently exists remains worthwhile as an all-male and "unusual and valuable" institution. (4/28 Tr. [Neidorf] 229:1-21.)

Modification of the Trust to admit women to Deep Springs College has never been proposed as a remedy for any problem at the school. (5/1 Tr. [Hoekstra] 925:15-21.) The school has debated becoming coeducational for 40 years but has never sought to implement such a change until now. In fact, admitting women has been perceived as so attenuated to the question of Deep Springs College's existence that when the school was on the brink of bankruptcy in the mid-1990's, the issue of coeducation was tabled because it was not considered relevant to the issue of saving the college from dire financial straits. (4/28 Tr. [Hitz] 21:23-22:3.)

There is no evidence that if Deep Springs College remains single-sex either the number or the quality of student applicants will decrease. To the contrary, this year's student applicants are stronger than last year's. (Ex. 357-040.) The quality of students at Deep Springs College is excellent and impressive. (4/30 Tr. [Newell] 553:10-19.)

There is also no evidence that Deep Springs College's all male environment is responsible for any problems pertinent to attracting or retaining faculty or staff. Any such issues are largely attributable to the location and isolation of Deep Springs College and the fact that faculty members are never eligible for tenure. (4/30 Tr. [Newell] 534:24-535:7.) Nor is there any evidence that any faculty member is doing a substandard job. (4/30 Tr. [Newell] 554:19-555:4.)

Nor does there exist financial pressure that necessitates, or can be remedied by, admitting women. (4/28 Tr. [Neidorf] 206:22-24.) The current budget for the school has increased. (4/30 Tr. [Newell] 554:19-555:4.) Moreover, as addressed above, there is no evidence that admitting women to Deep Springs College would result in any increase in monetary donations; there is, however, some evidence that admitting women would have the opposite impact. (5/13 Tr. [Neidorf] 1078:11-1079:19.)

In sum, maintaining an all-male student body will not place Deep Springs College in jeopardy with respect to the quality of the student body, the educational program, or the school's finances. Because Petitioner has not shown that continuing Deep Springs College with an all-male student body would defeat or impair the accomplishment of the Trust's purpose, and because Petitioner has not shown that Nunn was unaware of women in leadership roles, the Court denies Petitioner's request to modify the Trust under Probate Code section 15409.

VII. THE EVIDENCE DOES NOT SUPPORT APPLICATION OF COMMON LAW EQUITABLE DEVIATION.

Common law equitable deviation is available where (1) there was some expression in the trust instrument of the purpose of the trustor; (2) a peculiar or exceptional circumstance makes modification necessary to accomplish the purpose of the trustor; and (3) the change is necessary in order to carry out, not defeat, the primary purpose of the trustor as expressed in the trust instrument. (*Ike, supra*, 61 Cal.App.4th at pp. 80-82; *Moxley, supra*, 27 Cal.2d at p. 468.)

As explained above, Nunn expressly stated his intention in the trust instrument to create a school only for young men. Nunn's conviction in this regard is further evidenced by the fact that he supported and funded women's education yet created several institutions exclusively for men, and by the fact that he was trained as a lawyer yet never sought to frame or amend the Trust to include any mention of women or coeducation.

No peculiar or exceptional circumstances make the admission of women necessary to accomplish the Trust's purpose. As discussed above, Deep Springs College is flourishing and there is no threat or peril to the continuance or success of the school. (5/1 Tr. [Hoekstra] 925:15-20.) No financial or legal matter, no concern regarding admitting future students, and no crisis of any sort, caused the Trustees to review Deep Springs College's all-male policy. (4/28 Tr. [Hitz] 92:17-93:23.) Even positioning the existence of such a problem, no evidence suggests the admission of women would solve such a hypothetical problem. Nor does any sound research support the propositions that an all-male college cannot effectively teach leadership, or that an all-male educational environment impairs leadership training. (5/1 Tr. [Riggio] 685:20-687:4, 695:4-10.)

Evidence supports the finding that Deep Springs College's all-male environment promotes the goal of maturation in preparation for leadership by isolating students from certain pressures of the outside world. (5/1 Tr. [Hoekstra] 853:13-24.) Dr. Hoekstra, a former Deep Springs College student and now a professor, testified that the two-year period he spent without women co-students did not stunt his social growth and, in fact, contributed to his development: "the maturation that was brought about by the environment of Deep Springs was – was more valuable

and contributed to my development in that way, more than being in a college with a coeducational environment would have been." (5/1 Tr. [Hoekstra] 855:8-23.) Dr. Hoekstra also testified that two years at an all-male college prepared him to interact with women classmates later at a coeducational college (Brown) by teaching him to engage with people without first considering gender. (5/1 Tr. [Hoekstra] 859:21-860:9.)

Notably, the isolation from female student colleagues that is experienced by Deep Springs College students is periodic, not total, during the student's two-year program. Deep Springs students interact with women throughout the academic year and during breaks and generally come from coeducational high schools. As noted above, the students of Deep Springs College interact with women who occupy leadership positions at Deep Springs College inasmuch as 40% of the college's professors are women. Further, after matriculating from the two-year program, most Deep Springs College students complete their degrees at four-year coeducational colleges such as Harvard, Yale, Brown, Stanford, the University of Chicago, Swarthmore, U.C. Berkeley, and Reed. (4/28 Tr. [Neidorf] 219:20-220:4.)

Finally, no change is necessary to effectively accomplish the Trust's purpose of educating men, which is being amply achieved. Deep Springs College also continues – though it is not a stated Trust purpose – to prepare young men for lives of leadership. (4/29 Tr. [Welle] 341:17-24.) All evidence shows that Deep Springs College has accomplished Nunn's purpose and will continue to accomplish Nunn's purpose. (4/30 Tr. [Newell] 555:5-556:10.) The overall trend of the school is one of improvement, and nothing about the current all-male program at Deep Springs College is not working well. (5/1 Tr. [Hoekstra] 869:24-870:13.)

There is simply no evidence of circumstances necessitating a change in the Trust in order to carry out its purpose. Accordingly, the Court declines to deviate from the express wording of the Trust.

VIII. THE EVIDENCE DOES NOT SUPPORT MODIFICATION UNDER PROBATE CODE SECTION 15403.

Petitioner seeks to modify the Trust under Probate Code section 15403, pursuant to which:

- Petitioner must prove that all beneficiaries have consented to modify the Trust.

- If Petitioner proves that all beneficiaries have consented, the Court must determine whether continuation of the Trust as providing for a male-only student body at Deep Springs College is necessary to carry out a material purpose of the Trust.
- If both of these tests are satisfied, the Court may only modify the Trust to permit discretion to admit women to Deep Springs College if it determines that the reasons for modification under the circumstances outweighs the interest in accomplishing a material purpose of the Trust.

A. Not All Beneficiaries Have Consented and Petitioned the Court.

Although the Court finds those students currently matriculated at Deep Springs College ultimately consented (as did the Attorney General, see Ex. 237) to modify the Trust as requested by Petitioner (Ex. 216)[5], none of those students – let alone all of them – petitioned the Court to

[5] While the Court has the greatest respect for the self-governance by Deep Springs College student body, the Court is troubled by the conduct of the Trustees in obtaining the students' consent. Mr. Campbell, counsel for the Trustees, addressed the student body one week before the student body formally voted to consent to modification. (4/29 Tr. [Robinson] 427:15-18.) The student body was under the impression – right or wrong – that Mr. Campbell conveyed to them that the Court requested that they vote on coeducation. (4/29 Tr. [Robinson] 427:19-429:21.) While Dr. Hoekstra also addressed the student body one week before their vote on consent (4/29 Tr. [Robinson] 429:22-24), Mr. Robinson, the student testifying about student body deliberations and the student body representative who signed Exhibit 216 on behalf of the student body, understood that Dr. Hoekstra is not an attorney and that Mr. Campbell is an attorney representing the Trustees (4/29 Tr. [Robinson] 435:15-436:2, 437:5-7). In the week between the meeting and vote, Mr. Campbell sent two e-mails to the student body, which Mr. Robinson understood be intended to provide "legal clarification" if not advice. (4/29 Tr. [Robinson] 436:3-18.) Mr. Campbell did not advise the students to seek independent legal advice, and the Trustees did not hire counsel for them. (4/29 Tr. [Robinson] 436:19-437:4, 447:24-448:3.) The wording of the Trust modification to which the student body consented was transmitted to the student body by Mr. Campbell in the week before the students voted to consent. (4/29 Tr. [Robinson] 439:11-440:10.) Exhibit 216, the document signed by Mr. Robinson reflecting the student body's consent to modification of the Trust, was transmitted to Mr. Robinson by Mr. Campbell just before the student body's March 28, 2014 vote consenting to modification. (4/29 Tr. [Robinson] 440:18-26.) Mr. Robinson testified that the students understood "absolutely" that the specific terms of modification in Exhibit 216 were presented to them for an up-or-down vote. (4/29 Tr. [Robinson] 438:21-24.) The evidence in sum appears to reflect an effort by the Trustees to influence the student body to consent to the modification requested by Petitioner. As above, because Petitioner has not satisfied other prongs of section 15403, as discussed in the body of this statement of (footnote continued)

achieve said remedy. Moreover, neither such a petition – nor even the consent – was obtained from those individuals who, at the time of trial, had been admitted to the next class at Deep Springs College.

Probate Code section 15403, subdivision (a), provides that if all beneficiaries consent to modify a trust, they may compel modification "upon petition to the court." Although the evidence shows that the entire student body consented to modification, the only petitioner before the Court is Mr. Hitz. In addition to Petitioner's inability to satisfy the substantive prongs of section 15403, as discussed below, the Petition must be denied because section 15403 requires all beneficiaries to be petitioners as well as to offer their consent.

Mr. Robinson, Co-Chairman of the Applications Committee, testified that Deep Springs College had, as of the time of trial, "sent out acceptances" to 15 students for the class of 2014 and "received confirmations accepting our offer of admissions from 13 students." (4/29 Tr. [Robinson] 441:10-14.) At that point, it was entirely up to the students who accepted admission whether or not they would attend Deep Springs College. (4/29 Tr. [Robinson] 441:26-442:7.) On May 7, 2014, Deep Spring College published a newsletter titled "Community News" which stated: "We're delighted to announce the incoming Deep Springs Class of 2014![6] Congratulations to you all!" (Ex. 361-001.) That announcement was followed by a list of 14 names. (Ex. 361-001.)

The Court's November 13, 2013 Order listed nine factors considered in determining whether a person has standing to enforce a trust. (Ruling and Order, dated Nov. 13, 2013, at 11-13.) As discussed in that Order, persons who have standing to enforce a trust, with certain exceptions, also have standing to consent to its modification. (*Id.* at 8-11.) The Court finds (with one exception) that with respect to these nine factors, the 14 students comprising the Deep Springs College Class of 2014 are relatively indistinguishable from the students whose consent was given on March 28, 2014. (See Ex. 216.) To wit:

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decision, the Court will not reach the question of whether the students were unduly influenced by the Trustees to consent to modification.

[6] Deep Springs College apparently numbers its classes based on the year the students start at the school, not based on the year it is anticipated they will graduate.

- Factor 1 (whether the interest is current or only potential): The interest of the Class of 2014 students is only marginally less current than the interest of the students in attendance on March 28, 2014.
- Factor 2 (whether the person seeking standing is likely to be injured or has something personal to gain by the action): If anything, the Class of 2014 has more to gain or lose by modification of the Trust than the students in attendance on March 28, 2014 because the Class of 2014 students will be students at Deep Springs College for at least one year longer than the students in attendance on March 28, 2014.
- Factor 3 (whether the class of potential beneficiaries is sharply defined and limited in number): The Class of 2014 consists of 14 students.
- Factor 4 (public policy concerns and objectives): Public policy concerns are indistinguishable between the two groups.
- Factor 5 (the nature of the challenge): The nature of the challenge is also indistinguishable between the two groups.
- Factor 6 (whether the suit is a representative one aimed to indicate the interests of the entire class or to interests of a given individual): The representative nature of the suit is also indistinguishable between the two groups.
- Factor 7 (the ability of the Attorney General to represent any interest): Because the Attorney General represents beneficiaries in cases in which they are indefinite and thus unable to consent on their own behalf, the Attorney General is no less suited to represent the Class of 2014 than she is to represent the students in attendance on March 28, 2014.
- Factor 8 (a class's direct input on trust affairs in terms of decisionmaking power or administration over the trust): The student body elects two trustees to Deep Springs Corporation, and one is also a trustee of the Trust. (4/28 Tr. [Myers] 123:24-124:8.) The students in attendance on March 28, 2014 therefore satisfy this

factor to a greater extent than the Class of 2014, whose students were not able to have a direct input on trust affairs on March 28, 2014.

- Factor 9 (the intent of the settlor regarding the class's beneficiary status): The Trust states that "[t]he students in attendance receiving the benefits of the educational work being conducted hereunder are the sole beneficiaries of this trust . . . ." (Ex. 1-007, ¶ 5.) Notwithstanding this statement, the Court has already held that "it would strain logic to conclude that the Attorney General was not intended as one of the beneficiaries required to sign the consent in cases involving charitable trusts under Probate Code section 15403." (Ruling and Order, dated Nov. 13, 2013, at 10.) It would further strain logic to conclude that if it is proper to require consent from the Attorney General on behalf of unnamed beneficiaries, notwithstanding the above-quoted passage from the Trust, it would not be proper to require consent from a discrete list of named persons who have an even greater interest in the Trust than the unnamed beneficiaries represented by the Attorney General.

To recap, the only factor (Factor 8, above) weighing against requiring the consent of the students in the Class of 2014 is that they did not, as of the date of trial, have a direct input into trust affairs. The Class of 2014, however, does have a greater interest than the students in attendance on March 28, 2014 with respect to Factor 2, likelihood of injury. The Court finds that Factor 8 is insufficient to deny the Class of 2014 the authority to consent or withhold consent because a contrary finding would prove too much. (See *Boys and Girls Club v. Walsh* (2008) 169 Cal.App.4th 1049 [20 beneficiaries had no say in trust affairs, yet had standing to petition under section 15403 to modify the trust therein].) Weighing all of the factors, the Court finds that the students in the Class of 2014 had, at the time of trial, standing to enforce the Trust, and therefore were required to give their consent to permit modification under section 15403. Because their consent was not given, the Court has no authority to modify the Trust under section 15403.

B. Education of Men Is a Material Purpose of the Trust.

Even were the Court to have determined that all beneficiaries consented to modification, the analysis under Probate Code section 15403 would not be at an end because the Court also finds that limiting Deep Springs College to male students is a material purpose of the Trust.

"Material purpose" is not defined in section 15403, nor is it defined in any cases in the context of section 15403.[7] (*Boys and Girls Club, supra*, 169 Cal.App.4th at p. 1061, fn. 9.) A case that predates section 15403, *In re Easterday's Estate* (1941) 45 Cal.App.2d 598, concerns a petition by a beneficiary (the trustor's son) to terminate in part a trust from which he was entitled to the income for his life, and in which he obtained a one-quarter interest in the residue. The trust provided that the trustee "'shall pay the net income from the trust estate to my son . . . for and during his natural life.'" (*Id.* at p. 602.) The court quoted Restatement (First) of Trusts (1935), § 337, which provides in part that if the continuance of a trust "is necessary to carry out a material purpose of the trust," the beneficiaries cannot compel its termination by consent. (*Id.* at p. 605.) The court held that the Restatement was then in accord with California law, and refused to modify the trust, reasoning that the evidence "plainly shows that it was the purpose of the testator that his son should, for his own good, not have control of the principal, and that, in the circumstances, his purpose was a wise one." (*Id.* at pp. 606, 608.) While the court did not explain how it arrived at the conclusion that the trustee's control of the principal during the life of the beneficiary was a "material purpose," thereby cutting off the beneficiary's right to modify the trust, the court looked to the words of the trust instrument, as it also held in accord with California law a comment from the Restatement that "'[i]f the purposes for which the trust is created are expressed in the instrument in which the trust is created, a different purpose cannot be shown by extrinsic evidence.'" (*Id.* at p. 605 (quoting Restatement (First) Trust (1935), § 337, comment e).)

[7] Black's Law Dictionary defines "material" as "Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential . . . ." (Black's Law Dictionary 1066 (9th ed. 2009).)

As discussed in a prior section of this statement of decision, an all-male education is one of the six components of the "Purpose paragraph" of the Trust, and one of the two components Nunn chose to emphasize in his 1924 letter to the Trustees. (Exs. 1-004, 32-003 - 32-004.) By analogy to *In re Easterday's Estate*, an all-male education should thus be considered a material purpose of the Trust. Nunn was careful in his choice of words, and it is inconceivable to the Court that he did not consider this component, featured so prominently in the Trust, to be "significant", if not "essential".

C. The Reasons to Admit Women Do Not Outweigh the Interest in Keeping Deep Springs College All-Male.

Even were the Court to find that all beneficiaries consented, it would not permit modification under Probate Code section 15403 because continuing a single-sex educational policy at Deep Springs College is a material purpose of the Trust and the reasons given to permit the Trustees discretion to admit women do not outweigh the interest in keeping the student body single-sex.

In the absence of any authority guiding the Court's exercise of discretion in weighing the interests under Probate Code section 15403, the Court looks to the tests for cy prés and equitable deviation, and finds that modification is not warranted for the reasons stated in the sections on those theories. Even were the Court not to apply such tests, it would still deny modification.

The primary argument Petitioner addressed in favor of eliminating the single-sex requirement is that a college cannot teach leadership if the student body consists only of men. The Court has already discussed why it gave little (if any) weight to the leadership education opinions of Dr. Riggio and Mr. Lehecka. Dr. Newell acknowledges that Deep Springs College has, with the exception of a few years, accomplished Nunn's purpose since its founding. Examples confirming Dr. Newell's observations can be found in, for example, the experiences of recent graduates profiled in the school's Annual Reports (Ex. 11-011 - 11-012 [2009 Annual Report]; Ex 12-008 - 12-009 [2010 Annual Report]), the experiences of older graduates (Ex. 13-010 - 13-011 [2011 Annual Report, profiling graduates from the 1960s], and statistics about success and career paths of graduates found in the 2009 Annual Report (Ex. 11-012 - 11-013). As noted above, the

Court is also impressed by the leadership exhibited by Deep Springs College students and graduates throughout this trial.

Even had Petitioner proven that effective leadership could be taught only in a coeducational classroom (they did not), the interest in keeping Deep Springs College single-sex outweighs the interest in making the school coeducational. The single-sex student body environment is an indispensable ingredient to the unique education offered at Deep Springs College. As summarized by Dr. Hoekstra, who has been an educator for 25 years in both single-sex and coeducational schools, "the all-male environment [at Deep Springs College] was unusually healthy and added something important to the institution." (5/1 Tr. [Hoekstra] 868:13-869:23.) Mr. Robinson also acknowledged that changing to coeducation at Deep Springs College would cause something to be "lost." (4/29 Tr. [Robinson] 490:3-16.) Deep Springs College's students develop their character and personality as they might not in a co-educational environment. To be sure, the Deep Springs College experience is not one that would fit – or perhaps be appropriate for – all young men. But it is an educational option for which certain young men are well suited. The opportunity (and choice) to spend two years maturing in a single-sex environment is not only a unique and indispensable quality of Deep Springs College, but one that, if changed, could indelibly change the Deep Springs College experience.

Simply put, the Deep Springs College experience is a fragile one, and the Court cannot say that its historic success as an educational institution would continue into the future were an alteration made to its student body composition. It is not for any one generation of Deep Springs College's trustees, students, alumni, faculty, or administration to make so fundamental a change to the institution. While such a change could be for the better, that is not their decision under the Trust in light of the present circumstances. California law requires the expressed intentions of L.L. Nunn to continue to be honored for those current and future generation of promising young men for whom the Deep Springs College was created.

* * * * *

Because not all beneficiaries have consented, relief is not available under Probate Code section 15409. Even had they all consented, the Court would still not exercise its discretion to

grant relief because maintaining Deep Springs College as an all-male college is necessary to carry out a material purpose of the Trust, and the Court is not convinced that the reasons proffered for admitting women outweigh the reasons for excluding them from admission.

IX. CONCLUSION.

The Court concludes that Petitioner has failed to meet his burden of proof. The Court declines to modify the Trust as requested by Petitioner.

DATED: August 26, 2014

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 2121 Avenue of the Stars, Suite 2400, Los Angeles, CA 90067.

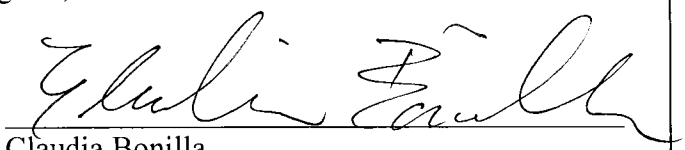
On August 26, 2014, I served true copies of the following document(s) described as **RESPONDENTS/OBJECTORS' PROPOSED STATEMENT OF DECISION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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 Browne George Ross LLP'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 26, 2014, at Los Angeles, California.



Claudia Bonilla

SERVICE LIST

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

INYO SUPERIOR COURT, Case No. SICVPB 12-53232

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