IN THE CIRCUIT COURT OF VILAS COUNTY, WISCONSIN

Conserve Community LLC, et al.

Plaintiffs,

v.

Conserve School Corporation, et al.

Defendants.

Case No.: 09 cv 54
Code Number 30701 & 30330

Honorable Neal A. Nielson III

Brief in Support of Plaintiff's Motion for Emergency Temporary Injunctive Relief

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Introduction

Conserve School was opened in 2002 with a supporting endowment of over a quarter billion dollars. It is funded by the Conserve School Trust, which was established by the late James R. Lowenstine. The six people who sit on the Conserve School board are the same six people who are the trustees of the Conserve School Trust and also include the same six people who sit on the Board of Directors of Lowenstine's corporate legacy, the Chicago-based company Central Steel & Wire.

Conserve School was a work in process for nearly 40 years–from Jim Lowenstine's initial vision for an environmentally-oriented high school to its construction in 2002. The current school board has dismantled his dream in just 4 months.

Without seeking external input, the board of Conserve School announced on January 30th it was going to change the school from a four year college preparatory to a semester-only camp program for juniors only. There is no question that this violates Mr. Lowenstine's intent. The Managing Trustee of the Trust and the Treasurer/Director of Conserve School, Ron Kazmar, stated in 2007 that "[it] was Mr. Lowenstine's desire to set up a college preparatory boarding school for gifted students much like Culver. He wanted the school to have a bent toward nature studies and ecology."[1]

The reason given to the public for the decision to close is the current economic downturn. The Conserve School Trust holds assets worth over $192 million. The Conserve School Corporation holds assets of over $58 million, including mortgage-free buildings and land. Conserve's Trust places it as **the highest per-pupil endowment of any high school in the country**, far exceeding

[1]Nixon, R. (2007). Conserve School suit dismissed. *The Pilot News.* Retrieved February 24, 2009, from http://www.thepilotnews.com/content/view/4031/

even Exeter Academy and Phillips Andover. In absolute terms, its endowment places it in the top 20 private high schools in the country. One-hundred-and-fifty of the top two-hundred boarding schools in the country operate with an endowment of less than $50 million. There were no apparent attempts made to reduce the current spending while maintaining the four year college preparatory model. There were no apparent attempts made at fund raising, grant-writing or institutional development that is common at almost all boarding schools and educational institutions of Conserve School's caliber.

So why can't Conserve School operate with combined school and trust assets of a quarter-billion dollars? The answer concerns majority control of Central Steel & Wire (CSW). The Conserve School Trust held 59.2% of the shares of CSW stock in 2007. This fell to 54% in 2008. The urgency to cease operations of the four year school seems to be an attempt by the board members of the school/trust/steel company to maintain control of Central Steel & Wire.

The terms of the trust place the current board members of the school/trust/steel company in an untenable situation. The corporate structures created in the trust create a constant conflict of interest with regard to their fiduciary duties to all entities. The **permanent injunction** filed by plaintiffs seeks to unburden them from this difficult position. Plaintiffs seek this **temporary injunction** to keep the school operating while the permanent injunction is litigated. Plaintiffs have consulted with experts in the field of education, finance and endowments and are confident that, with this Court's intervention, it is possible to satisfy the needs of all parties and accomplish the public good envisioned by Lowenstine–an inspirational four year college preparatory school in the Northwoods of Wisconsin with an emphasis on ecology and ethics that is known throughout the world as an institution of scholarly endeavor.

Statement of Facts

The history of Lowenstine and Lowenwood

Mandel Lowenstine of Valparaiso, Indiana founded Central Steel & Wire (CSW) in 1909. In 1921, he purchased 40 acres in Land O'Lakes, Wisconsin as a summer property which he named *Lowenwood*. Two years later, Mandel's son Jim was born. Mandel acquired additional acreage up to his death in 1956. Jim continued to grow the property until he had acquired 1200 acres.[2] The Lowenstine property that Jim visited every summer as a boy, young man, and adult instilled in him a love and respect for the outdoors.

Jim Lowenstine attended the four-year high school Culver Military Academy. After graduation, he served in the military, then worked with his father at CSW, where he eventually became president, chairman and CEO.

Jim Lowenstine plans Conserve School–from vision to reality in forty years

By the early to mid-1960's, Lowenstine had plans to create a school at Lowenwood. The plaque that greets visitors today at Conserve School was written on May 13, 1965: "To the future young folks of Lowenwood: I wish you all love, hope, happiness, and a long and healthful life. May your understanding of mankind be broadened through your association with and, I am sure, your love of Lowenwood."

[2]Information from Vilas County Recorder of Deeds

Lowenstine carefully crafted the terms of his trust in order to ensure that Lowenwood and Conserve School would persevere. He restated and amended his trust–first written in 1981–nine times in his life.[3]

In his trust, Lowenstine provided that the trustees should "use part or all of the net income of the Conserve School Trust to defray the costs incurred in the operation of a school called the "Conserve School.""[4] He wrote that "the trustees may also use net income and principal of the Conserve School Trust" for multiple purposes, including "to acquire equipment,"[5] "to employ suitable faculty,"[6] "to prescribe a school curriculum which must include instruction in reading, writing and arithmetic and shall comply as nearly as the trustees deem practicable with the requirements set by school officials of the State of Wisconsin and which also shall, to the extent the trustees deem practicable, include nature [and other such] study..."[7] and "to open the school for the **regular enrollment** of students beginning with the seventh grade, and extending, in the discretion of the trustees, through high

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[3]Ex. A, *Second Restatement of James R. Lowenstine Trust Dated August 17, 1981*, Article VI, ¶H. (Attached) Hereafter, this will be referred to as *the Conserve School Trust* or *the Trust.* Technically, the Conserve School Trust was created by the Second Restatement of James R. Lowenstine Trust Dated August 17, 1981 after other beneficiaries inherited other monies left by Mr. Lowenstine.

[4]Ex. A, Article VI, ¶A.

[5]Ex. A, Article VI, ¶B(5).

[6]Ex. A, Article VI, ¶B(7).

[7]Ex. A, Article VI, ¶B(8).

school."[8] It was his intent to operate the school "for the public good..."[9] and in fact the trust and school are both registered as non-profit corporations.

Lowenstine envisioned Conserve School to have a student body that regularly attended the school and weren't simply visiting from other schools. This is implicit in his trust direction that "...students who are enrolled in public or other private schools may be permitted to enroll in the Conserve School..." only "after such students' regular school hours or on Saturdays and school holidays, and during summer vacations."[10]

According to filings with the IRS, "Conserve School Corporation (the corporation) was established on January 6, 1997 to administer the Conserve school, a nonsectarian school for the enrollment of high school students located on 1,200 acres of property in Land O'Lakes, Wisconsin. Conserve School is a nonsectarian, independent, coeducational boarding school (grades 9-12) with both a classical-preparatory program tailored to serve an academically talented student body and a special emphasis on wildlife, natural habitats, outdoor sports and ecology."[11]

Jim and Elaine, his wife of 30 years, had no children. Elaine passed away in 1994. Jim died two years later. In 2002, Conserve School's doors opened as a four-year college preparatory high school for grades 9-12.

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[8]Ex. A, Article VI, ¶B(10) *emphasis added*.

[9]Ex. A, Article VI, ¶H.

[10]Ex. A, Article VI, ¶K.

[11]Ex. B, IRS 2008 form 990 for Conserve School Corporation.

Analysis of the finances of the school and trust show thriving institutions.

As of June 30, 2008, the Conserve School Trust held $192.7 million in net assets.[12] At the same time, Conserve School held assets of $58.8 million–$9 million in investments and $50 million in real property. Exhibit D to this brief is a chart that summarizes the finances of the school and trust for since inception, as compiled from IRS form 990s. A review of this chart, or the actual 990 forms[13] reveals that in 2006, the trust received income from dividends and other sources of $8.8 million. After giving the school $4.3 million and other expenses of $.5 million, the trust had a surplus of $4 million in 2006, which was re-invested. In 2007, the trust had $6.7 million in revenues and paid $4.9 million for the school and expenses, for a profit of $1.8 million. In 2008, the trust had revenues of $8 million and paid out $5.3 million, resulting in a $2.7 million profit. In table format:

Conserve School Trust	Year ending June 30, 2006	Year ending June 30, 2007	Year ending June 30, 2008
Revenues In (mostly from dividends)	8,857,397	6,751,488	8,061,595
Out to Conserve School	(4,291,500)	(4,522,470)	(4,973,767)
Other expenses	(538,128)	(353,474)	(381,514)
Surplus/profit	$4,040,787	$1,877,544	$2,770,017

For the past three years, the trust has had a surplus of $1.8 million to $4 million, after giving Conserve school $4 million to nearly $5 million per year to operate. The income from the trust pays

[12]Ex. C, IRS 2008 form 990 for Conserve School Trust.

[13]Ex. E consists of all 990 forms for fiscal years ending in June 2006 and 2007 for the school and trust.

roughly half of Conserve School's operating budget, with the other half coming from tuition and other sources.[14]

Parents whose children attend Conserve School referenced the website www.BoardingSchoolReview.com to compare the endowment of Conserve School to the endowments of other schools. A review of listings of 243 private boarding schools, places Conserve somewhere in the top fifteen.[15] Conserve School's per-pupil endowment amount of over $1.3 million exceeds well-known 4 year private college-prep schools St. Paul's School, Philips Academy Andover, and Philips Exeter Academy, which had endowments from $740,000 to $950,000 per-pupil.[16]

The financial details of the trust

Lowenstine's trust was created as a charitable organization under the Internal Revenue Code in order to avoid taxability .[17]

Lowenstine included a provision in the Trust that he recommends that CSW stock not be sold:

> I recommend that CENTRAL STEEL stock not be sold. If, however, the trustees determine that any CENTRAL STEEL stock should be sold, the trustees should be in control of CENTRAL STEEL and be intimately familiar with and skilled in the operation of CENTRAL STEEL's business. Therefore, I have provided in paragraph C of Article VII of this instrument that, at least upon my death, a majority of the Individual Trustees will be individuals who then are Central Steel Directors.[18]

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[14]Ex. B through E.

[15]http://www.boardingschoolreview.com/largest_endowments/sort/1

[16]*Id.*

[17]Ex. A, Article VI, ¶L.

[18]Ex. A, Article VIII, ¶C.

He also instructed the board of the trust to consider needs of the steel company first. He provided that "[i]n voting the shares of CENTRAL STEEL, I authorize the trustees to consider primarily the best interests of CENTRAL STEEL..."[19] He further included his intent to exempt the trustees from diversifying the assets of the trust: "The trustees shall not be bound by principles of diversification of assets with respect to shares of CENTRAL STEEL."[20]

Lowenstine attempted to waive any conflict of interest that was created by the design of trustees sitting on the boards of the steel company, trust and school. He did this by stating in the trust that any action taken by the board shall be "as if no such relationship or conflict of interest existed, and the trustees shall be relieved, to the maximum extent permitted by law, of any liability for actions so taken."[21]

The trust provides that the board and officers receive "reasonable" compensation and expense reimbursement for their duties.[22] In 2008, this averaged about $30,000 per trustee.[23]

As of June 30, 2007, the Conserve School Trust held 59.2% of the shares of Central Steel & Wire stock.[24] This percentage fell to 54% in 2008.[25]

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[19]Ex. A, Article VIII, ¶ I.

[20]Ex. A, Article VIII, ¶C.

[21]Ex. A, Article VIII, ¶ I.

[22]Ex. A, Article VII, ¶ M.

[23]Ex. C. Statement 8.

[24]Ex. E, Statement 7.

[25]Ex. C, Statement 7.

Where the money goes if Conserve School fails

The Trust states that if it is "impractical to operate Conserve School, then [t]he trustees shall arrange for and effect the sale of all securities of CENTRAL STEEL..."[26] The Trust document then outlines the priority of purchaser, which is:

1. Central Steel & Wire's profit sharing plan or Employee Stock Option Plan;
2. Other shareholders of Central Steel & Wire;
3. Employees of Central Steel & Wire;
4. Other persons.

The Trust provides that Rush Medical College be given $2 million from the proceeds, and the remainder to Culver Educational Foundation, which runs Culver Military Academy.[27] Culver sued the Conserve School Trust in 2005. That case was dismissed with prejudice. Plaintiffs are not aware of the terms of the dismissal, or if there was a settlement.

<u>The trust does not provide a methodology for the trustees to place a value on the Central Steel & Wire stock before selling it to an ESOP, to themselves or to others.</u>

The Conserve School board decides over four months to close the four year school.

In a meeting on February 1st, 2009, Ron Kazmar, VP Finance and CFO of Central Steel & Wire, managing trustee of the Conserve School Trust, and director/treasurer of Conserve School, told parents he met with that he first started thinking about closing the four year program on September 15, 2008 when Lehman Brothers filed for bankruptcy.[28] On January 30, 2009, parents received an

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[26]Ex. A, Article VI, ¶ M and M(1).

[27]Ex. A, Article VI, ¶ M(3)(a).

[28]Ex. F, affidavit from parent Dr. Mary Hermes, ¶6. Also, Ex.G.

email letter that Conserve would no longer operate a four year school beginning next school year.[29] The letter indicates that the decision was made due to "the impact of the economic downturn on Conserve School..."[30]

Conserve School does not have an advancement or development officer to raise funds for the school.[31] Conserve School has not taken steps in the last few years to engage in any type of fund-raising. During this period, there was no apparent attempt to create a development office nor to solicit contributions from parents. Conserve School did not apply for any charitable grants during this time period.

The school is terminating all but eight of approximately twenty-eight current teachers. The Officers/Trustees of Conserve School are offering a transition year next year for a limited number of sophomores and juniors with a greatly reduced class selection and elimination of athletic programs. Current freshman are not allowed to return at all next year. [32]

At a meeting with approximately a dozen parents on February 1, 2009, Ron Kazmar admitted that a conflict of interest exists in the structure of the steel company, trust and Conserve School. He stated that the board members and officeres put the steel company first, the Trust second, and Conserve School last.[33]

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[29]Letter attached to ex. F.

[30]*Id.*

[31]Ex. G, affidavit from parent and financial consultant William Meier, Jr.

[32]Letter attached to ex. F.

[33]Ex. F, ¶5.

There is no concrete transition plan.

Headmaster Stefan Anderson sent an email to parents asking them to attend a meeting on February 20, 2009 to help Conserve develop a transition plan and curriculum. While it was initially announced that the 4 year school would close and a semester program would be implemented, he told one parent at the meeting that perhaps they would consider a year-long program for next year. No written transition plan has been produced. One parent, with a Ph.D. in Curriculum and Instruction, describes the transition plan as "only a skeleton of ideas hastily thrown together and with little or no apparent input from teachers."[34] She describes the school as "muddling their way through this with no apparent educational plan."[35]

The Conserve students and teaching faculty are in crisis.

The teachers' perspective

Conserve School teachers are reluctant to attach their names to an affidavit for fear of retribution. One teacher, who has been courageous enough to share factual details when approached by parents, describes the chilling effect the administration has had on teaching faculty. He describes a threat to withdraw his severance package for even questioning the definition of anti-disparagement in the severance agreement:

> Teachers were given a severance agreement with 45 days to review its content, which gives us until mid-march to review and accept. The "anti-disparagement" clause in the agreement has had a chilling effect on staff morale. When upon review, I asked for clarification about the anti-disparagement terms (see letter attached), I was confronted by Headmaster Stefan Anderson and Chief Financial Officer Felix Banton and threatened with the withdrawal of my severance package.[36]

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[34] *Id.*, ¶7.

[35] *Id.*

[36] Ex. H, Nienstadt Affidavit, ¶16.

Other teachers describe the students as being in a state of "crisis."[37] In part, this has manifested itself in students failing classes. A teacher describes that they had **one** student failing class last semester and **seven** this semester since the announcement.[38] They also describe that "[m]any students have stopped doing work or have given up."[39]

One teacher states that "[s]tudents are swarming the health center. My classes have 3-6 absences on many days. I find out later that students have spent the day with the nurse and have taken a mental health day."[40]

Other teachers state that they have been so busy writing scores of student recommendations for transfer to new schools next year, that classroom preparation and studies have "suffered significantly."[41]

The affidavit of the Advanced Placement Economics teacher is instructive.[42] He describes the cancellation of all curriculum advancement, including weekly faculty meetings "where substantive curriculum development and teaching methodology were discussed. The teachers have been left with the impression that the administration has abandoned any effort improve the quality of instruction delivered to Conserve students, which had been a clear priority previously."[43] There have been

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[37]Ex. F, Hermes affidavit 2 ¶8

[38]*Id.*

[39]*Id.*

[40]*Id.*, ¶9.

[41]*Id.*, ¶10.

[42] Attached as Ex.H.

[43]Ex. H, ¶8.

official pronouncements from administration to "water down" courses, such as when the "Conserve School's Dean of Academic Affairs formally communicated to teaching faculty that they should reduce student academic workloads in classes to help them deal with the emotional distress caused by the January 30th announcement."[44] Further, "[b]ecause of the stress that I perceive the students are under given the timing of announcement, I've eased my grading criteria in my History of Exploration class."

He writes that the closing of the school been "dramatically disruptive" to all students.[45] At least one student has left the school due to the stress of Conserve's announcement.[46] Students who have never before asked for extensions have asked for them "due to the high level stress due to the timing of the announcement and its consequences."[47]

To compound matters, teachers have each been given an additional five personal days before the end of the year to look for jobs.[48] Resources previously used for students, such as vans for transportation, have been diverted to teachers who need them for job-seeking.[49]

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[44] *Id.,* ¶9.

[45] *Id.,* ¶5.

[46] *Id.,* ¶7.

[47] *Id.,* ¶13.

[48] *Id.,* ¶14.

[49] *Id.,* ¶15.

Ultimately, the economics teacher states that "[i]t is my opinion as an educator, to avoid further irreparable emotional and educational harm, it is essential that the school be returned to its former status quo as quickly as possible."[50]

Students' and parents' perspectives

At a school meeting on February 20, 2009, parents requested that the school place psychologists on campus due to concerns of health, safety, and potential and foreseeable psychological emergencies of students.[51]

In addition to safety concerns, many parents have written letters expressing the severe difficulties they've faced. All Conserve families have faced difficulties, but this is especially true with international students, who comprise 25% of Conserve School. The timing of the school closing is even more difficult for them and their families. A United States Diplomat living in the United Kingdom who chose to send her daughter to Conserve writes of the severe difficulty of finding a school for her daughter that Conserve's closing has had:

> At this time Willow Macy has not been accepted to another school. And, we do not have an option to put Willow in a public school, while I am working overseas. I must find a boarding school for her because when I sent Willow to Conserve I gave up her place at a THE premier international school in London located a few blocks from my home. At the American School in London (ASL), Willow was a student in good standing, a member of the Student Council, a recipient of numerous academic, sports and community service awards. If I had known Conserve would close as a four year boarding school, I would never have sent Willow to Conserve, we were and are only interested in a 4 year boarding school program. And, now, if there was a possibility of returning to ASL, I would have pulled Willow out for this current semester...
>
> Furthermore, I chose Conserve because it is located in Wisconsin, where I have family members and own property... We consider Wisconsin our home state, and I have not been able to find another school in Wisconsin that offers the unique combination of outdoor education and high level math and science courses that are necessary for

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[50] *Id.,* ¶17.

[51] Ex. F, ¶11.

> Willow's special physical and intellectual needs. There is no other school in the U.S. where there is an academic program integrated with outdoor education and sustainability studies and which is located near family members who can come to Willow's aid at a moment's notice in my place, while I am working overseas as a diplomat with the United States Department of State's Foreign Service.
>
> In anticipation of keeping Willow in Conserve School through her graduation in 2012, I recently accepted a 3-year Foreign Service assignment in South Africa, a hardship posting that offers an education allowance that guarantees I would have the funding to send Willow to Conserve through 2012. With Conserve's abrupt announcement, I am now committed to working in South Africa through 2012, at the same time my daughter, Willow, has no onward school to attend. This has meant many sleepless nights for me, worrying about finding another school before I must leave the United Kingdom for South Africa.
>
> My daughter, Willow, although very familiar with moving every 2-3 years due to our Foreign Service life, had been told by me that she would be settled for her entire high school career at Conserve, surrounded by extended family members, on whom she could call should she experience emotional difficulties. Research on children raised in the Foreign Service indicates that stability in their high school years is an important factor in their personal development. Willow has had to call on her aunts, uncles and cousins at times this year to obtain advice and assurance while at Conserve... Willow has now fallen behind in her homework, has missed classes while she has written essays for application and attended presentations and interviews with other schools, resulting in a marked decrease in academic standing in most of her classes as she struggles to fill out applications for new schools, deal with her friends' distress, and reach out to old friends as she searches for the stability she and I thought we had found at Conserve...
>
> Lastly, if we had been given proper, advance notice of Conserve's closing, we would have been able to schedule school tours in the summer, when I would have been on Home Leave, between assignments. Home Leave provides for funding for both leave and airfare for Willow and me to return to my Home Leave address, Wisconsin, from which I could have driven my Wisconsin-licensed auto to schools in the United States. With little warning, I have had to schedule and use personal leave to take time to look at schools in the U.S... This also means this summer I will have less personal leave available and will not be able to spend as much time with my family as I had anticipated... In addition, I have had to pay for a full fare, return air ticket from the United Kingdom to the U.S. to look at prospective schools. Finally, I am forced to pay for a rental car to drive to schools in four states in the Northeastern United States this week.[52]

One parent writes about her daughter and the inability to find a viable school option for next year given the timing of Conserve School's announcement:

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[52]Ex. I, Macy affidavit.

> Samantha has not been accepted to another school at this time; she was interested in one school that had a program of her interest, but they do not have any openings for Juniors (Thacher School in California); this information was confirmed by Carol Hotchkiss in personal discussions with school administrators. She was also interested in Putney, and they have no financial aid available for students after the cutoff deadline. At this point the public schools in Madison and DeForest, Wisconsin, are her only options, and they do not have an emphasis on conservation and the outdoors, and the college preparatory education (especially with regard to her future plans) is substandard. In addition, Samantha has been studying Chinese for seven years; this was a huge deciding factor in her choice of Conserve School. The schools available to us in Madison (West High) and DeForest do not offer Chinese.
>
> Samantha has been having an extremely different [sic] time since the school has informed us of the changes. She has been suffering from severe nightmares, sleep deprivation (when she does sleep, she wakes up multiple times per hour), emotional breakdowns (she has spent a few days in the health center from being distraught to the point where she became sick). Her grades which should be up from last semester are suffering as she cannot focus and is already mourning the loss of her community for next year...[53]

A parent from Southern California who chose to send her son to Conserve writes this:

> The decision to change the direction of the Conserve School has had a severe negative impact on our family...We live 2,000 miles away... We did not choose Conserve School lightly, but are now being put in the position of choosing another school in a month, without the opportunity for us or our son to visit the campus. We have been scrambling trying to fill out applications to schools we have never visited. We are looking online to see if we can tell if our child will be happy and protected there just by viewing a website. We would never have considered applying to schools without first visiting them and really having a feel for whether they would be appropriate for our child.[54]

A parent of a junior, who will come back next year to a program that is greatly reduced in class options, writes that:

> The restructure of the school has been quite disastrous for us... First, he is a junior and will be applying to colleges next year. He was working especially hard and trying to get his best grades yet in the extremely important second semester of his junior year. Instead, he, the other students and the teachers are so distracted from their work he cannot possibly hope to raise his G.P. A. in this environment. He is also applying to other

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[53]Ex. J, Huntoon affidavit.

[54]Ex. K, Krull affidavit.

schools and this is further distracting him from his school work."[55]

Conserve School is a school for gifted students. The closing of Conserve means that many students will not have access to a school that can meet the students' special needs, like this freshman:

> My son, Julian Alberts, is a Freshman at Conserve School. Julian has not been accepted, nor has he applied to another school, as Conserve School was the only boarding school of interest to him. The loss of Conserve School as a 4 year college prep. school means that Julian will return to public school. A public school that lacks a gifted program, and also lacks the heart and soul of a boarding school. Throughout Julian's public educational career, his needs have not been met. The Sturgeon Bay School District has had to slash budgets, virtually eliminating the gifted and talented program.
>
> Although by returning to public school Julian will be slighted, educationally speaking, the real loss will come in the form of personal growth. In just one short semester at Conserve School I have seen, in Julian, a transformation of sorts. There has been enormous personal growth, which include but are not limited to, mental and spiritual growth. This would not have been possible in a mainstream program. The loss of Conserve School as a 4 year high school will, indeed be a detriment to Julian's emotional, social, and spiritual health.[56]

Having no good alternatives and uprooting of family also rings true for this Ohio mom:

> It is unacceptable for my son to attend our local public high school (which he has never attended) due to the school having until very recently been in a state-declared "Emergency" for both reasons of academic failure and budgetary concerns, as well as rampant drug problems within the school...
>
> There are no other schools in our local area that can adequately service Kegan's educational needs, and it is my feeling that it would be reckless and therefore cause additional harm for me to try to uproot our family, whole or in part, and relocate to provide another school option for my son...
>
> The announced transition of Conserve School has had profound impact on our family functions ...This process has been incredibly disruptive to my personal pursuits, my husband's career, and my younger son's well being.
>
> The effects on Kegan are... yet undetermined; I do not expect them to be insignificant.[57]

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[55]Ex. L, Knight affidavit.

[56]Ex. M, Stracka affidavit.

[57]Ex. N, Leizerman affidavit.

The deadline for most competitive schools has passed, leaving students with no good educational option, like this girl and her family from Michigan:

> Until January 30th, 2009, Conserve School was all we had hoped and dreamed it would be...Since that date academics have gone out the window. Students and teachers are walking around in a daze, a stupor. Class time is now spent either preparing for, or participating in interviews, for other schools (for both students and teachers)... We have certain objectives we want met by a school and no other school has what Conserve has to offer for an academic program and the quality of faculty. Plus, the timing of the decision could not have been worse. Deadlines for most other schools are February 1st and therefore students are beginning the process too late. .. Merit-based financial aid is generally assigned on a first come first serve basis. The Conserve students are coming in at the end of that process and therefore will not fare well, if at all, in terms of merit-based financial aid...
>
> The only option left is for Lena to return to a public school that does not have an academically gifted program and therefore cannot cater to her specific educational needs... It is possible that if given more time, we could identify another school for Lena but we can only dedicate so much of her time, and that of ours as parents, to this quest. Normally such things are done with a year lead-time to allow for due diligence. Having to do it in 25 days is completely unfair as an outcome of what we felt to be an implied contract...[58]

Conserve has a very diverse racial and cultural mix of students. This diversity broadens all students' experiences, but also provides a safe-haven for minorities, from African-American students living in South Chicago to Native American students in Wisconsin, like this family:

> We have two children, John Lee Hermes (freshman at Conserve) and Bineshii Hermes Roach (prospective student). Bineshii has not been accepted to any other high schools and cannot attend Hayward High School since both of the children have experienced damage to their self-esteem as enrolled tribal members in this school system. As bright Native Americans, they are odds with many entrenched practices, and are faced with a system which is segregated in many ways. It is ironic and will cause a premature shift in our family to send them to a school far away, where travel costs will prevent us from seeing them very often...
>
> We took over a year to decide to let John Lee apply and attend Conserve...
>
> We have not even had time to [find a new school and] decide if this is realistic or financial feasible and yet due to the time pressure of receiving this news after school's application deadlines, we will need to decide in the matter of a couple weeks.[59]

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[58]Ex. O, Sutter affidavit

[59]Ex. P, Hermes affidavit 2.

Law and Argument

A temporary injunction requires a showing of likelihood of success and immediate harm.

In order to obtain a temporary injunction, the movants must demonstrate a reasonable probability of ultimate success on the merits.[60] "Temporary injunctions are to be issued only when necessary to preserve the status quo."[61] Movants must show "adequate remedy at law and irreparable harm..."[62] For a temporary injunction "the requirement of irreparable injury is met by showing that, without it to preserve the *status quo pendente lite*, the permanent injunction sought would be rendered futile."[63]

This Court should order Conserve School to maintain the status quo next year.

It is indisputable that there will be immediate harm if this Court does not grant temporary relief to maintain the current program. Otherwise, the permanent injunction will be an exercise in futility because current Conserve School students will have left Conserve School and it will be too late to recruit new students on short notice. Students who are applying to other boarding schools, or trying to convince those schools to accept late application, will have to make a commitment to one school or another by April in most instances. The few sophomore and juniors who will permitted to return the skeletal program that remains at Conserve next year must give their notice of intent to Conserve by March 15th. The teachers must also decide whether to sign the severance agreement around this

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[60] *School Dist. Of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis.2d 365 (1997). (quote source omitted). See also, WI ST § 813.02.

[61] *Id.* at 371.

[62] *Id.*

[63] *Id.*

date. It is therefore crucial that this Court hold an immediate hearing and rule on the temporary injunction in February or early March of this year. Any later action will leave students without the practical opportunity to attend Conserve even if this Court ultimately grants the permanent injunction.

Teachers are currently scrambling to apply for new jobs for next year. Any action by this Court beyond the immediate future will leave most students and teachers without the option of attending or working at Conserve School next year.

In addition, granting a temporary injunction at this time will alleviate the financial, emotional and psychological harm to students, parents and the public as described in the Statement of Facts above.

Under the doctrine of deviation, the burden of proof shifts to defendants.

This Court has the power to modify or terminate a charitable trust, taking "into account current and future community needs in the general field of charity within which the original charitable purpose falls, other charitable interest of the settlor, the amount of principal and income available under the trust and other relevant factors."[64] Wisconsin Statutes § 701.10(2), subsections (b) and (d) empower this Court to modify the trust to achieve the settlor's purpose by liberally applying the *cy pres* doctrine.

> (2) Modification and termination.
>
> (b) If any administrative provision of a charitable trust or part of a plan set forth by the settlor to achieve the settlor's charitable purpose is or becomes impractical, unlawful, inconvenient or undesirable, and a modification of such provision or plan will enable the trustee to achieve more effectively the basic charitable purpose, the court may by appropriate order modify the provision or plan.

* * *

[64]WI ST § 701.10(2)(a)

> (d) It is the purpose of this subsection to broaden the power of the courts to make charitable gifts more effective. In any situation not expressly covered the court shall liberally apply the cy pres doctrine.

"Cy pres is the common-law doctrine codified by statute in this state, that provides '. . . when a charitable purpose cannot be fulfilled according to its terms, equity will attempt to do the next best similar charitable thing.'"[65] This requires a finding that "the trust's stated purpose has become impossible, unlawful or impracticable."[66]

The doctrines of equitable approximation, or deviation, are corollaries to the cy pres doctrine that "give preference to dispositive provisions over administrative directives."[67] Administrative provisions are "provisions [that] govern how the trust is managed to accomplish its purpose."[68] The doctrine of deviation has been summarized in the Restatement (Second) of Trusts, which states that "a court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust."[69]

The case currently before this Court involves a conflict between the general intent of the trust to provide charitable contributions to Conserve School and the trust's administrative direction that

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[65] *In re Oshkosh Foundation*, 61 Wis.2d 432, 436-37(1973). (quote source omitted.)

[66] *Id.* at 437.

[67] *Id.* at 440.

[68] *In re Madison Community Foundation*, 288 Wis.2d 128, 133 (2005).

[69] Restatement (Second) of Trusts § 381 (1959).

the Central Steel & Wire board and officers direct the trust and school. "Where there is a conflict between a dispositive provision and an administrative direction the latter should give way."[70] In this instance, the dispositive provision–and charitable intent for which the government grants tax benefits–is the continued existence of Conserve School. The trust's administrative direction is for the steel board to administer the trust. Movants request this Court to alleviate the steel company board and officers from their responsibilities to direct one of the country's most promising and accomplished boarding schools. Movants expect the board of the trust and school will breathe a sigh of relief since they receive only nominal compensation and reimbursement for their responsibilities to the trust and school.[71]

In order to permit deviation from the administrative provisions of a trust, courts generally require the presence of two elements: "(1) unforeseen and unforeseeable change in circumstances, and (2) a frustration of the settlor's main objectives by this change, if strict obedience to the settlor [sic] directions were required."[72] Deviation from specific provisions of the trust is appropriate when following them "would defeat or substantially impair the accomplishment of the purposes of the trust."[73]

The intention of the maker of the trust ". . . should be zealously guarded by the courts, particularly when the trust instrument reveals a careful and painstaking expression of the use and

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[70]§ 561 Bogert, The Law of Trust and Trustees, chapter 27.

[71]Ex. A, Article VII, ¶M

[72]Bogert, Supra.

[73]*Colin McK. Grant Home v. Medlock*, 349 S.E.2d 655, 659 (1986).

purposes to which the settlor's financial accumulations shall be devoted. . . ."[74] Jim Lowenstine's intent in creating the Conserve School Trust is clear. The manifestation of his intent is the Conserve School now in existence. Defendant Ron Kazmar, managing trustee of the Trust and the Treasurer/Director of Conserve School, states that "[it] was Mr. Lowenstine's desire to set up a college preparatory boarding school for gifted students much like Culver."[75]

Since the board and officers of the Trust wish to deviate from Lowenstine's intent, they have the burden of proof in this case. The burden of proof is always on the party seeking the deviation because in the case of "an express trust, favorable presumptions arise, and the burden of proof is on the party disputing its validity or terms."[76] In the instant case, it is Conserve Trust and School's board that wishes to upset the status quo and deviate from the purpose of the trust–which is to create Conserve School. Accordingly, the burden of proof in this case should be on those seeking deviation–the board and officers of the Trust.

Serving simultaneously on boards of the steel company, trust, and school is a conflict.

The principles of conflict of interest that held true well over a century ago still hold true today. In 1870, the Wisconsin Supreme Court wrote that "[t]he general principle upon which this proposition must rest is, that no man can faithfully serve two masters, whose interests are in conflict. And as men usually and naturally prefer their own interests to those of others, where one attempts

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[74]*In re Oshkosh Foundation*, supra, at 442. (quote source omitted).

[75]Nixon, R. (2007). Conserve School suit dismissed. *The Pilot News.* Retrieved February 24, 2009, from http://www.thepilotnews.com/content/view/4031/

[76]89 C.J.S. Trusts § 66, at 845.

to act in a fiduciary capacity for another, the law will not allow him, while so acting, to deal with himself in his individual capacity."[77]

It went on to quote from an earlier case that being one of a number of directors does not diminish the fiduciary duty. "The same principle applies to him, as one of a number, as if he were acting as a sole trustee."[78]

This principle holds particularly true with charitable organizations. Recent changes on the federal level have made clear that nonprofit corporations must be free of conflicts of interest. The recent clarity on the federal level raises a genuine question of whether the current conflicts in this case can survive federal scrutiny. The IRS has strongly recommended that all nonprofits enact conflict of interest policies, and includes a sample conflict of interest policy in the instructions to Form 1023.[79]

In October 2004, the U.S. Senate Finance Committee encouraged the formation of the Panel on the Nonprofit Sector which has issued reports to Congress. The panel's most recent report, *Principles for Good Governance and Ethical Practice*, includes 33 principles, many of which argue against the current situation where the same men serve themselves and Central Steel and Wire though their employment with the company, and serve the Conserve School Trust and the Conserve School Corporation though their service on the boards of those nonprofit organizations.[80] The fact that the defendant trustees serve multiple masters, and have stated that Conserve School is the least

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[77]*Pickett v. School district No. One, Town of Wiota, etc.*, 25 Wis 551 (1870).

[78]*Id.*

[79]Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code. Online at http://www.irs.gov/pub/irs-pdf/f1023.pdf.

[80]Ex. Q, from http://www.nonprofitpanel.org/report/principles/principles_guide.pdf.

of those masters, demonstrates that the trust should be re-formed to provide for an independent board of trustees for the Conserve School Trust and the Conserve School Corporation

In the area of nonprofit corporations and trusts, trustees are not free to make decisions adverse to the trust's intent, even if those decision in-of-themselves may be deemed to be reasonable and within the realm of discretionary business judgment. As an illustration, the circuit court's decision in *In re Madison Community Foundation* was overturned for its ruling that trustees' decisions are proper "[s]o long as trustees act in good faith and from proper motives and within the bounds of a reasonable judgment under the terms and conditions of the trust."[81] Using that standard, the circuit court concluded that the trustees in that case had not abused their discretion.[82]

The Court of Appeals held that Wisconsin Statute § 701.10(2)(b) is not the sole avenue for modifications of trust instruments.[83] The appellate court analyzed *In re Oshkosh Foundation*[84] and determined that the doctrine of equitable deviation and WI ST § 701.10(2)(b) only apply when the court is constructing a provision that is not directly addressed in the trust document.[85]

The court went on to state that when litigation involves subject matter that is addressed by specific provisions of the trust, then the "[t]rust instruments are construed using the same principles of construction as wills. In essence, the task is to ascertain the intent of the donor."[86]

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[81]266 Wis 128 (2005).

[82]*Id*.

[83]*Id*.

[84]Supra.

[85]*In re Madison Community Foundation* at 136.

[86]*Id.* at 138, quoting *Uihlein v. Uihlein*, 11 Wis.2d 219, 225 (1960).

Under either analysis–whether applying Wisconsin Statute § 701.10(2)(b), as in *In re Oshkosh Foundation;* or ascertaining the intent of the donor, as in *In re Madison Community Foundation*–plaintiffs should prevail in their complaint for a permanent injunction. Accordingly, this Court should also grant plaintiffs temporary injunctive relief to avoid immediate, irreparable harm.

These decisions that are profoundly important to students, parents, teachers and the community are all within this Court's discretion. Plaintiffs respectfully respect and pray that this Court grant the temporary injunctive relief sought.

Relief Requested

Plaintiffs move this Court to order Conserve School Corporation to continue to operate at the status quo of a four year, college-preparatory boarding school for the entirety of the 2009/10 school year in the same formal and substantive manner that it operates at present. Plaintiffs further request, consistent with Wisconsin law governing injunctions, that this Court set a time for the hearing for permanent injunctive relief in the next 90 days.

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Attorney for plaintiffs