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9
10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA
12

13 PLANS, Inc.,)	Case No. CIV. S-98-0266 FCD PAN
)	
)	Date: April 1, 2005
)	Time: 10:00 a.m.
14 Plaintiffs,)	Place: Courtroom 2
)	
15 v.)	
)	
16 SACRAMENTO CITY UNIFIED SCHOOL)	MOTION IN LIMINE NO. TWELVE
DISTRICT, TWIN RIDGES ELEMENTARY)	
17 SCHOOL DISTRICT, DOES 1-100,)	DEFENDANTS' JOINT MOTION IN
)	LIMINE TO EXCLUDE EXHIBITS NOT
)	PREVIOUSLY DISCLOSED OR
18 Defendants.)	PRODUCED
)	

19
20 **I. INTRODUCTION.**

21 Defendants TWIN RIDGES ELEMENTARY SCHOOL DISTRICT (hereafter "TRES D") and
22 SACRAMENTO CITY UNIFIED SCHOOL DISTRICT (hereafter collectively "Districts" or
23 "Defendants") move this Court, in limine, for an order excluding each and every trial exhibit listed by
24 Plaintiff which was not previously disclosed to Defendants. Defendants propounded two sets of
25 Requests for Production of Documents under Federal Rules of Civil Procedure, rule 34, requiring the
26 disclosure and production of all documentary evidence supporting Plaintiff's claims in this case.
27 (Cannon Decl. ¶ 10.) Most recently, Defendants propounded Request for Production of Documents,
28

1 Set No. Two, on August 4, 2003. (Cannon Decl. ¶ 11.) Plaintiff failed to adequately respond to this
2 request and produced no documents. (Cannon Decl. ¶ 12.) Thus, a motion to compel was necessary.
3 The first hearing on the motion to compel was held on December 3, 2003, Magistrate Judge Nowinski
4 presiding. (Cannon Decl. ¶ 13.) Plaintiff was ordered to provide the requested information and was
5 ordered to pay \$625 in sanctions. (Cannon Decl. ¶ 14.) Plaintiff failed to comply with the court's
6 order and a second motion to compel with a request for sanctions was filed by Defendants. (Cannon
7 Decl. ¶ 15.) On February 4, 2004, Magistrate Nowinski again ordered Plaintiff to provide a full
8 response to Defendants discovery requests. (Cannon Decl. ¶ 16.) Plaintiff supplied minimal further
9 discovery responses, but has never paid the monetary sanction ordered by the court. (Cannon Decl.
10 ¶ 17.) Plaintiff's counsel was specifically told by Magistrate Nowinski at a third discovery hearing
11 on February 25, 2004, that he would not be allowed to introduce evidence at trial which was not
12 disclosed to Defendants during discovery. (Cannon Decl. ¶ 18.) The Magistrate, with concurrence
13 of this Court by Order dated May 26, 2004, eventually determined dismissal was not appropriate at
14 this time.

15 Notwithstanding this, Plaintiff again ignores the Court's orders and directions and now lists
16 numerous documents never previously disclosed to Defendants.

17 **II. ARGUMENT.**

18 Plaintiff's Exhibit List, attached to the court's Pretrial Conference Order dated February 18,
19 2005, as Exhibit "D," includes numerous "documents" never previously disclosed to Districts.¹
20 Plaintiff and Districts have undergone extensive discovery over the past seven years. Districts have
21 propounded two sets of Requests for Production of Documents requiring the disclosure and production
22 of all documentary evidence supporting Plaintiff's claims in this case. Due to Plaintiff's lack of
23 responses in 2003 and 2004, Defendants were forced to bring multiple motions to compel to receive
24 responses from Plaintiff, and Plaintiff was court ordered to provide appropriate responses. Plaintiff

26 ¹ Furthermore, Plaintiff did not actually submit an exhibit list to the court with the joint final
27 pretrial statement submitted to the court on February 1, 2005. As such, TRES D objects to Plaintiff's
28 exhibit list being accepted by the court and attached to the court's Pretrial Conference Order. This
objection is contained in TRES D's Objections to the Pretrial Conference Order to be filed on or before
March 14, 2005.

1 did disclose certain exhibits², demonstrating knowledge and capability to comply with Federal Rules.
2 Notwithstanding this procedural history, Plaintiff now includes one hundred and four (104) exhibits
3 never previously disclosed to Defendants. (See Plaintiff’s Exhibit List, Exhibit Nos. 100-113, 116-
4 118, 120-134, 136-159, 161-169, 171, 174-183, 186-187, 189-192, 194-199, and 201-217.) As a
5 result, these exhibits should be excluded from trial. To allow otherwise would be to allow Plaintiff
6 to act in bad faith, to ignore the rules of discovery as well as the directions of the Magistrate and trial
7 court, thereby placing Defendants at a prejudicial disadvantage with trial preparation and at trial. The
8 trial judge has broad discretion to exclude evidence. *United States v. Ives*, 609 F.2d 930, 933 (9th Cir.
9 1979), *cert. denied*, 445 U.S. 919.

10 Under Federal Rules of Civil Procedure, rule 37(c), a party cannot use any witness or
11 information not timely disclosed under the applicable discovery rules unless that party can show that
12 its failure was substantially justified in the circumstances of the case or that the delay was harmless.
13 FED. R. CIV. P. 37(c)(1); *Yeti By Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.
14 2001); *see generally Von Brimer v. Whirlpool Corp.*, 536 F2d. 838 (9th Cir. 1976). Although the
15 Ninth Circuit reviews every discovery sanction under an abuse of discretion standard, it gives
16 “particularly wide latitude to the district court’s decision to issue sanctions under Rule 37(c)(1).” *Yeti*,
17 259 F.3d at 1106. The burden of proving harmlessness is on the party facing sanctions. *Yeti*, 259 F.3d
18 at 1107.

19 ...
20 ...
21 ...
22 ...

24 ² The following exhibits were disclosed through Plaintiff’s discovery responses. Exhibit
25 numbers: 114: “Introduction to Waldorf Education,” H. Barnes, 115: “Lighting Fires,” J. Smit, 119:
26 “Steiner Education in Theory and Practice,” G. Chillis , 135: “Rudolf Steiner’s Curriculum for Waldorf
27 Schools,” 170: “Waldorf Education and Anthroposophy,” Rudolf Steiner, 172: “Outline of Esoteric
28 Science,” Rudolf Steiner, 173: “The Spiritual Hierarchies,” Rudolf Steiner, 184: “How to Know Higher
Worlds,” Rudolf Steiner, 185: “Theosophy,” Rudolf Steiner, 188: “Karmic Relationships,” Rudolf
Steiner, 193: “Anthroposophical Leading Thoughts,” Rudolf Steiner and 200: “The Education of the
Child,” Rudolf Steiner.

1 There is no justification, let alone substantial justification, for Plaintiff's refusal to cooperate
2 appropriately in discovery, as detailed above, and then turn around and list this large number of
3 exhibits for the very first time seven years after this case was filed. Further, Defendants would be
4 severely harmed (prejudiced) if they should be required to prepare for trial in the face of so many
5 unknown and potentially inadmissible documents.

6 **III. CONCLUSION.**

7 For the foregoing reasons, Defendants respectfully request that this Court grant this motion in
8 limine excluding Plaintiff's Exhibits numbers 100-113, 116-118, 120-134, 136-159 and 161-169, 171,
9 174-183, 186-187, 189-192, 194-199, and 201-217 due to Plaintiff's failure to disclose these exhibits
10 during the discovery process or at any time prior to the submission of his exhibit list. Plaintiff's
11 blatant disregard for the Court's orders and rules of discovery should not be rewarded nor should it
12 result in prejudice to Districts.

13 Respectfully submitted,

14 GIRARD & VINSON, LLP

15
16 DATED: March 11, 2005.

17 By /s/ Michelle L. Cannon
18 MICHELLE L. CANNON
19 Attorneys for TWIN RIDGES ELEMENTARY
20 SCHOOL DISTRICT

KRONICK MOSKOVITZ TIEDEMANN & GIRARD

21 DATED: March 11, 2005.

22 By /s/ Susan R. Denious as authorized on 3/10/05
23 SUSAN R. DENIOUS
24 Attorneys for SACRAMENTO CITY UNIFIED
25 SCHOOL DISTRICT