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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA

14
15 PLANS, Inc.,

16 Plaintiff,

17 v.

18 SACRAMENTO CITY UNIFIED
SCHOOL DISTRICT, TWIN RIDGES
19 ELEMENTARY SCHOOL DISTRICT,
DOES 1-100,

20 Defendants.

CASE NO. CIV.S-98-0266 FCD PAN

**DEFENDANTS' JOINT REPLY TO
PLAINTIFF'S OPPOSITION TO MOTION
IN LIMINE NO. THIRTEEN (13) TO
EXCLUDE EXPERTS NOT PROPERLY
DISCLOSED BY PLAINTIFF**

Date: April 1, 2005

Time: 10:00 a.m.

Place: Courtroom 2

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23 **I.**
INTRODUCTION

24 Defendants Sacramento City Unified School District and Twin Ridges Elementary School
25 District hereby present their reply to the opposition of Plaintiff PLANS, INC. ("PLANS") to their
26 Motion in Limine No. Thirteen (13). This motion asks the Court to exclude the following
27 witnesses who were not properly or timely disclosed as experts for the Plaintiff. Those witnesses

1 from Plaintiff's Witness List are:

2 **Witnesses Plaintiff Described in its List as "Experts"**

3 (1)¹ Crystal Olsen

4 (2) Robert Anderson

5 (3) Betty Staley

6 (4) Douglas Sloan

7 **Other Listed Witnesses Plaintiff Did Not Describe as Percipient**

8 (32) Rev. Franziska Hesse

9 (33) Rev. Sanford Miller

10 (34) Robert London

11 **Other Listed Witnesses Plaintiff Described as Percipient**

12 (8) Eugene Schwartz

13 (22) Cynthia Hoven

14 (23) Margit Ilgen

15 (24) Ina Jachnig

16 (25) Ernst Schubert

17 (26) Rena Osmer

18 (27) Peggy Alessandri

19 (28) Astrid Schmitt-Stegmann

20 (29) Dennis Klocek

21 For the reasons stated below, Defendants assert that each of the three groupings of witnesses
22 above must be excluded on the ground that they are being offered by Plaintiff as experts –
23 contrary to this Court's Order of March 16, 2005 stating that Plaintiff has no experts and that no
24 new ones can be called. There is yet another reason for excluding the first grouping of witnesses
25 numbered 1 through 4 in particular (Olsen, Anderson, Staley and Sloan): after Defendants filed
26 motion in limine number thirteen (13) on March 11, 2005, this Court ruled explicitly in its

27 ¹ The numbers used for the witnesses refer to the numbers assigned by the Plaintiff on Plaintiff's
28 Witness List attached as Exhibit C to the Court's Pretrial Order dated February 18, 2005.

1 Amended Pretrial Conference Order of March 16, 2005 that Plaintiff cannot call them to testify.²

2 Furthermore, PLANS, INC. itself has been on notice since at least March 17, 2004 when it
3 was advised that it would "...suffer any consequences brought about by Mr. Kendall's future
4 actions." (See Magistrate's Findings and Recommendations, dated March 17, 2004, page 2, lines
5 24 through 26 (describing February 4, 2004 hearing).)

6 II. 7 ARGUMENTS

8 A. The Court's Amended Pretrial Conference Order Dated March 16, 2005 Precludes 9 Plaintiff PLANS From Calling Any Expert Witnesses On Its Own Behalf.

10 The Court's Fourth Amended Scheduling Order filed March 10, 2004 required that all
11 experts (retained, percipient or both) be designated in writing no later than April 16, 2004 and
12 that the designation be accompanied by a written report prepared and signed by the witness.³ The
13 Court's Amended Pretrial Conference Order dated March 16, 2005 states the following under
14 Section XVII, "Impartial Experts/Limitation of Experts:"

15 "Plaintiff disclosed no expert witnesses before the April 16, 2004,
16 deadline. See section IX of this order. [¶] Defendants disclosed
17 Dr. Douglas Sloan and Robert Anderson. **No other non-percipient**
18 **witnesses will be called at trial.**" Amended Pretrial Conference
19 Order, dated March 16, 2005, page 13, lines 13 through 17
20 (emphasis added).

21 The fact that the Court has determined that Plaintiff PLANS has no expert witnesses is dispositive
22 in this motion. Plaintiff PLANS is precluded from calling any witnesses to testify as experts
23 during its case in chief.

24 B. This Court Has Already Ruled In Its Amended Pretrial Conference Order That 25 Plaintiff Cannot Call Witnesses Numbered 1 Through 4 On Plaintiff's Witness List- 26 Dr. Chrystal Olsen, Robert Anderson, Betty Staley and Dr. Douglas Sloan.

27 As noted above, the Amended Pretrial Conference Order of March 16, 2005 states that
28 Plaintiff disclosed no expert witnesses before the April 16, 2004 deadline,⁴ and states more
specifically that Plaintiff will not be permitted to call witnesses numbered 1 through 4 on its list –

29 ² See Pretrial Conference Order of March 16, 2005, page 10, subparagraph C, lines 6 through 8.

30 ³ See Order of March 10, 2004, page 3, lines 5 through 12, and page 4, lines 5 through 14.

31 ⁴ See Amended Pretrial Conference Order of March 16, 2005, page 13, lines 14-17.

1 (1) Dr. Chrystal Olsen, (2) Robert L. Anderson, (3) Betty Staley, and (4) Dr. Douglas Sloan. (See
2 Pretrial Conference Order of March 16, 2005, page 10, subparagraph C, lines 6 through 8.)

3 And even if this Court had not already ruled that Plaintiff could not call witness No. 3,
4 Betty Staley, Plaintiff's argument that it should be permitted to use her as a *percipient* witness to
5 testify about funding and other facts would remain disingenuous and untimely. Plaintiff listed her
6 as an "expert" who would be called to testify on the following subject only: "To describe her
7 understanding of the relationship between Anthroposophy, religion, and Waldorf Education."
8 Plaintiff made no mention of any "*percipient*" testimony to be given by Ms. Staley -- even
9 though Plaintiff used the word "percipient" repeatedly for many other individuals on that same
10 list. Plaintiff cannot possibly have any legitimate excuse for failing to include Betty Staley on its
11 witness list as a percipient witness on non-expert matters when its counsel has known about her
12 existence for years.

13 **C. The Testimony Of Rev. Franziska Hesse (No. 32), Rev. Sanford Miller (No. 33) And**
14 **Robert London (No. 34) Must Be Excluded Because Plaintiff Intends To Use Them**
To Provide Opinion (Expert) Testimony.

15 The two Reverends (Hesse and Miller) and Robert London (Nos. 32-34) are not described
16 as "percipient" witnesses on Plaintiff's list. Instead, the description the Plaintiff provided for
17 their testimony states as follows: "To provide foundational testimony about anthroposophy
18 teachings and practices and the relationship between Anthroposophy and religion." This
19 description demonstrates that Plaintiff intends to use these witnesses to supply opinion testimony
20 on the nature of anthroposophy and on whether anthroposophy is a religion. Any such opinion
21 testimony would necessarily be in the nature of *expert testimony* – i.e., testimony that has already
22 been precluded in the Court's Amended Pretrial Conference Order of March 16, 2005 barring
23 additional expert witnesses. Given the nature of their purported testimony, Defendants' interests
24 would be seriously prejudiced if these witnesses are allowed to testify when Defendants did not
25 have the opportunity to depose them in discovery. This motion must therefore be granted with
26 respect to these three witnesses – Hesse, Miller and London (Nos. 32-34).

27 It should be noted that Plaintiff's opposition asserts that these three people, whom it
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1 describes as teachers of “Anthroposophy in a church setting,”⁵ were recently disclosed in
2 response to Defendants’ Requests for Admission.⁶ But despite this assertion, no such names
3 appear anywhere in Plaintiff’s “Response to Request for Admissions” signed by Scott M. Kendall
4 and dated January 15, 2004 or in the Supplemental Response to Requests for Admissions signed
5 by Scott M. Kendall dated March 31, 2004. See accompanying Supplemental Declaration of
6 Michelle L. Cannon, ¶¶ 10-11, Exhibits I and J.

7 **D. The Testimony Of Nine Other People⁷ on Plaintiff’s Witness List Must Also Be**
8 **Excluded Because They Are Offered By The Plaintiff As Percipient/Expert**
9 **Witnesses.**

10 The Court’s Fourth Amended Scheduling Order filed March 10, 2004 expressly advised
11 the parties that the term “expert” when used in that scheduling order included “both ‘percipient
12 experts’ (persons who, because of their expertise, have rendered expert opinions in the normal
13 course of their work duties or observations pertinent to the issues in the case) and ‘retained
14 experts’ (persons specifically designated by a party to the testifying expert for the purposes of
15 litigation).”⁸

16 Plaintiff uses a common description reflecting that opinion testimony will be elicited for
17 nine of the other witnesses on its list: (8) Eugene Schwartz; (22) Cynthia Hoven; (23) Margit
18 Ilgen; (24) Ina Jachnig; (25) Ernst Schuberth; (26) Rena Osmer; (27) Peggy Alessandri; (28)
19 Astrid Schmitt-Stegmann; and (29) Dennis Klocek. That common description reads as follows:
20 “To provide percipient testimony regarding describe [sic] [his/her] understanding of the
21 relationship between anthroposophy, religion, and Waldorf Education.” Given that this
22 description is worded at an abstract, theoretical level rather than the level of evidentiary facts, it
23 can only be assumed that Plaintiff intends to call these people as *percipient experts* within the
24 meaning of the Court’s March 10, 2004 Order. Since they were not disclosed as percipient

24 ⁵ Plaintiff’s Opposition to Motion in Limine No. 13, page 2, lines 4 through 6.

25 ⁶ See Opposition to Defendants’ Joint Motion in Limine No. Thirteen (13) to Exclude “Experts,”
26 page 2, lines 4 – 6.

27 ⁷ The name of another witness, Else Gottgens (No. 31) was included by mistake in Defendant’s
28 opening papers.

28 ⁸ See Order of March 10, 2004, page 4, lines 5 through 13.

1 experts in accordance with that March 10, 2004 scheduling Order, it is approximately a year too
2 late to be trying to add them to Plaintiff's list as percipient expert witnesses.

3 **III.**
4 **CONCLUSION**

5 The four witnesses Plaintiff expressly listed as "experts" on its Witness List -- (1) Dr.
6 Chrystal [sic] Olsen, (2) Robert L. Anderson, (3) Betty Staley and (4) Dr. Douglas Sloan -- must
7 be excluded. They were not disclosed by April 16, 2004, as required by the Court's March 10,
8 2004 scheduling order, and this Court has already ruled in the Amended Pretrial Conference
9 Order dated March 16, 2005 that these four witnesses cannot be called by the Plaintiff.

10 Plaintiff also lists three other witnesses that it does not describe as "percipient:" Rev.
11 Franziska Hesse (No. 32), Rev. Sanford Miller (No. 33) and Robert London (No. 34). Plaintiff's
12 opposition states that they are teachers of "Anthroposophy in a church setting." These three
13 witnesses must also be excluded because they were not disclosed by the April 16, 2004 deadline
14 for expert witnesses and this Court's Amended Pretrial Conference Order of March 16, 2005 bars
15 the Plaintiff from adding new expert witnesses at this very belated point in time.

16 Plaintiff's abstract description of their "percipient" testimony shows that nine other
17 witnesses on the list must be excluded as "percipient experts" within the definition of "expert"
18 stated in this Court's scheduling order of March 10, 2004. Those nine people are: (8) Eugene
19 Schwartz;⁹ (22) Cynthia Hoven; (23) Margit Ilgen; (24) Ina Jachnig; (25) Ernst Schuberth; (26)
20 Rena Osmer; (27) Peggy Alessandri; (28) Astrid Schmitt-Stegmann; and (29) Dennis Klocek.

21 In summary, Plaintiff's witnesses Nos. 1 through 4, 8, 22-29 and 32 through 34, as listed
22 in Attachment C to the Court's Pretrial Conference Order (Plaintiff's Witness List), must be
23 excluded because they were not timely or properly disclosed as experts for the Plaintiff. To do
24 otherwise would reward Plaintiff's lack of diligence and its egregious failure to comply with

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27 _____
28 ⁹ Note: Plaintiff voluntarily withdrew the names of Robert Anderson (No. 2) and Eugene Schwartz
(No. 8) in footnote 1 of its Opposition to this motion in limine number thirteen.

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1 **PROOF OF SERVICE**

2 I, Kathy Blenn, declare:

3 I am a resident of the State of California and over the age of eighteen years, and
4 not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento,
CA 95814-4416. On March 25, 2005, I served the within documents:

5 **DEFENDANTS' JOINT REPLY TO PLAINTIFF'S OPPOSITION TO MOTION IN**
6 **LIMINE NO. THIRTEEN (13) TO EXCLUDE EXPERTS NOT PROPERLY**
7 **DISCLOSED BY PLAINTIFF**

- 8 by transmitting via facsimile from (916) 321-4555 the above listed document(s) without error to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmittal/confirmation sheet is attached.
- 9 by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.
- 10 by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.
- 11 by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery
- 12 by personally delivering the document(s) listed above to the person(s) at the Address(es) set forth below.

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Frederick J. Dennehy
PRO HAC VICE
Wilentz Goldman and Spitzer
90 Woodbridge Center Drive
Woodbridge, NJ 07095

21 I am readily familiar with the firm's practice of collection and processing
22 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
23 Service on that same day with postage thereon fully prepaid in the ordinary course of business. I
24 am aware that on motion of the party served, service is presumed invalid if postal cancellation
25 date or postage meter date is more than one day after date of deposit for mailing in affidavit.

26 I declare that I am employed in the office of a member of the bar of this court at
27 whose direction the service was made.

28 Executed on March 25, 2005, at Sacramento, California.

/s/
Kathy Blenn (Original signature on file with
attorney Susan Denious)