

1 CHRISTIAN M. KEINER, SBN 95144  
MICHELLE L. CANNON, SBN 172680  
2 GIRARD & VINSON, LLP  
1006 Fourth Street, Eighth Floor  
3 Sacramento, CA 95814-3326  
Telephone: (916) 446-9292

4 Attorneys for TWIN RIDGES ELEMENTARY SCHOOL DISTRICT  
5

6 KRONICK MOSKOVITZ TIEDEMANN & GIRARD  
SUSAN R. DENIOUS, SBN 155033  
7 400 Capitol Mall, 27th Floor  
Sacramento CA 95814-4416  
8 Telephone: (916) 321-4500

9 Attorneys for SACRAMENTO CITY UNIFIED SCHOOL DISTRICT

10 UNITED STATES DISTRICT COURT  
11 EASTERN DISTRICT OF CALIFORNIA  
12

13 PLANS, Inc., ) Case No. CIV. S-98-0266 FCD PAN  
14 )  
Plaintiffs, ) Date: April 1, 2005  
15 ) Time: 10:00 a.m.  
v. ) Place: Courtroom 2  
16 )  
SACRAMENTO CITY UNIFIED SCHOOL ) MOTION IN LIMINE NO. THIRTEEN  
17 DISTRICT, TWIN RIDGES ELEMENTARY )  
SCHOOL DISTRICT, DOES 1-100, ) DEFENDANTS' JOINT MOTION IN  
18 ) LIMINE TO EXCLUDE EXPERTS NOT  
Defendants. ) PROPERLY DISCLOSED BY PLAINTIFF  
19

20 **I. INTRODUCTION.**

21 Defendants TWIN RIDGES ELEMENTARY SCHOOL DISTRICT (hereafter "TRES") and  
22 SACRAMENTO CITY UNIFIED SCHOOL DISTRICT (hereafter collectively "Districts" or  
23 "Defendants") move this Court, in limine, for an order excluding any testimony by "expert" witnesses  
24 not disclosed pursuant to the Court's Scheduling Order of March 10, 2004.

25 **II. ARGUMENT.**

26 The Court's Scheduling Order of March 10, 2004, required that the parties designate in writing  
27 expert witnesses they propose to tender at trial no later than April 16, 2004. The Order also provided  
28 twenty (20) days for supplemental designation of experts. (See Court's Scheduling Order at 3.) The

1 Order specifically states that “An expert witness not appearing on a party’s written expert designation  
2 will not be permitted to testify unless the party offering the witness demonstrates: (a) that the necessity  
3 for the witness could not have been reasonably anticipated at the time the list was proffered; (b) that  
4 the court and opposing counsel were promptly notified upon discovery of the witness; and (c) that the  
5 witness was promptly made available for deposition.” (See Court’s Scheduling Order at 3.)

6 In *Wong v. Regents of the University of Cal.*, 379 F.3d 1097 (9th Cir. 2004), a case in which  
7 the court’s scheduling order at issue identified the same three bases for allowing the belatedly  
8 disclosed expert to testify (*see id.* at 1103)—the Ninth Circuit upheld the district court’s denial of a  
9 plaintiff’s request to make a supplemental, i.e., untimely, disclosure of expert witnesses under Federal  
10 Rules of Civil Procedure, rules 16 and 37(c). Under Rule 16, the court explained:

11 The abuse of discretion standard is deferential, and properly so, since the  
12 district court needs the authority to manage the cases before it efficiently and  
13 effectively. In these days of heavy caseloads, trial courts in both federal and  
14 state systems routinely set schedules and establish deadlines to foster the  
15 efficient treatment and resolution of cases. Those efforts will be successful  
16 only if the deadlines are taken seriously by the parties, and the best way to  
17 encourage that is to enforce the deadlines. Parties must understand that they  
18 will pay a price for failure to comply strictly with scheduling and other orders,  
19 and that failure to do so may properly support severe sanctions and exclusions  
20 of evidence. The Federal Rules of Civil Procedure explicitly authorize the  
21 establishment of schedules and deadlines, in Rule 16(b), and the enforcement  
22 of those schedules by the imposition of sanctions, in Rule 16(f).” *Id.* at 1103.

23 The same scheduling considerations apply in this case. Experts were required to be disclosed in April  
24 2004, and Plaintiff first listed these “experts” in January 2005.

25 Under Rule 37(c), as another ground for its decision denying the plaintiff’s request to add  
26 expert witnesses after the disclosure deadline, the *Wong* decision upheld the district court’s conclusion  
27 that the single factor (a)—that the necessity for such a witness could have been reasonably anticipated  
28 at the time the lists were exchanged—was alone sufficient to exclude the testimony of the  
supplemental expert witnesses even though the other two criteria, (b) and (c), were “likely satisfied.”  
*Id.* There was no substantial justification for belated disclosure; and the untimely disclosure also was  
not “harmless.”

If *Wong* had been permitted to disregard the deadline for identifying  
expert witnesses, the rest of the schedule laid out by the court months  
in advance, and understood by the parties, would have to have been  
altered as well. Disruption to the schedule of the court and other parties

1 in that manner is not harmless. Courts set such schedules to permit the  
2 court and the parties to deal with cases in a thorough and orderly  
3 manner, and they must be allowed to enforce them, unless there are  
4 good reasons not to. The district court did not abuse its discretion here  
in refusing to permit Wong to supplement his disclosure with the  
additional expert witnesses and in barring testimony by and relying  
upon those witnesses. *Id.* at 1105.

5 The same grounds (Rules 16 and 37(c)) and the same rationale apply to an even greater extent in this  
6 case.

7 Plaintiff failed to serve any expert designation prior to the April 16, 2004, deadline. (*See*  
8 Pretrial Conference Order dated February 18, 2005 at 13.) Plaintiff also failed to serve a supplemental  
9 designation after Defendants disclosed experts on April 16, 2004. Yet, Plaintiff now includes four  
10 experts which he lists as “Defendants’ Expert” (Plaintiff’s Witness List, Nos 1-4)<sup>1</sup> as well as a whole  
11 host of people who will purportedly testify either as “percipient” or “foundational” witnesses on the  
12 subjects of Waldorf education and/or anthroposophy. (Plaintiff’s Witness List Nos. 8, 22-29 and 31-  
13 34.) This is clearly Plaintiff’s attempt at an end run around the expert disclosure requirement.

14 Plaintiff should not be allowed to call these witnesses at trial. These witnesses were not  
15 previously disclosed as expert witnesses by Plaintiff. Districts have not had the opportunity to depose  
16 these witnesses. Plaintiff did not notify counsel or the court of any new expert witnesses.  
17 Furthermore, Plaintiff has provided no information as to why it could not have disclosed the experts  
18 within the time frame allowed. For all of these reasons, Plaintiff should not be allowed to call these  
19 witnesses at the trial. To allow Plaintiff to do so would allow Plaintiff to ignore the strict guidelines  
20 of the Court’s Scheduling Order and to thwart normal discovery rules.

21 ...  
22 ...  
23 ...  
24 ...  
25 ...

---

27  
28 <sup>1</sup> TRES D’s objection to Plaintiff’s listing of these four witnesses is also contained in TRES D’s  
Objections to Final Pretrial Conference Order to be filed with the court on or before March 14, 2005.

1 **III. CONCLUSION.**

2 For the foregoing reasons, Defendants respectfully request that this Court grant this motion in  
3 limine excluding testimony by Plaintiff's witnesses numbers 1-4, 8, 22-29 and 31-34 on Exhibit C to  
4 the Pretrial Conference Order.

5 Respectfully submitted,

6 GIRARD & VINSON, LLP

7  
8  
9 DATED: March 11, 2005.

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

10  
11  
12 KRONICK MOSKOVITZ TIEDEMANN & GIRARD

13  
14  
15 DATED: March 11, 2005.

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