

1 SCOTT M. KENDALL, SBN 166156
2 Law Offices of Scott M. Kendall
3 9401 East Stockton Blvd Suite 210
4 Elk Grove, CA 95624-1768
5 (916) 685-7700

6 Attorney for Plaintiff PLANS, INC.

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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11 PLANS, Inc.,

12 Plaintiff,

13 vs.

14 SACRAMENTO CITY UNIFIED SCHOOL
15 DISTRICT, TWIN RIDGES ELEMENTARY
16 SCHOOL DISTRICT, DOES 1-100,

17 Defendant

) Case No.: CIV. S-98-0266 FCD PAN

) Date: April 1, 2005

) Time: 10:00 a.m.

) Place: Courtroom 2

) OPPOSITION TO DEFENDANTS' JOINT
MOTION IN LIMINE NO. ELEVEN (11) TO
EXCLUDE WITNESSES

18
19 I. INTRODUCTION

20 Defendants fail to make a *prima facie* showing for the exclusion of any evidence. They fail to
21 demonstrate, with my specificity, a particular discovery request that was violated. Instead, they ask this
22 court to assume they asked the right question, and that they offered exhibit is outside the scope of the
23 response. Defendant's Motion is really an untimely discovery Motion, and not adequate as that.

24 Plaintiff PLANS, Inc. opposes Defendants' Motion In Limine No. Eleven on three basis: 1.)
25 Plaintiff has, during discovery, identified and produced all witnesses to Defendants' for which they now
26 complain; 2.) Defendants have waived their right to bring a discovery motion for new sanctions and
27 therefore fails on its face as an untimely motion for post-discovery sanctions, and 3.) Assuming,
28 *arguendo*, such a motion could be brought at present, Defendants' have failed to meet any burden for

1 application of Federal Rules of Civil Procedure, Rule 37(c) (hereinafter referred to as “Rule 37(c)”)
2 making no showing of a willful refusal to produce or identify witnesses.

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4 II. ARGUMENT IN OPPOSITION

5 1. PLAINTIFFS HAVE PRODUCED AND IDENTIFIED ALL WITNESSES
6 DURING DISCOVERY WHICH ARE CONTAINED ON PLAINTIFF’S
7 EXHIBIT LIST.

8 Since Defendants’ fail to attach any interrogatories or requests for production of documents,
9 including responses, to which they complain, it is impossible to understand what they purport is a
10 discovery violation. Plaintiff answered all discovery to the satisfaction of Defendant’s, as they did not
11 seek further responses or sanctions. Plaintiff’s responses placed Defendant’s on notice of all relevant
12 witnesses concerning the issues at trial would be disclosed, which has now been done. Since the
13 witnesses identified need not be deposed, but only read, the only issue should be their relevancy at trial.
14 Defendants’ have not argued that the witnesses are not relevant.

15 2. RULE 37(C) PROVIDES ONLY FOR REMEDIES AVAILABLE
16 FOR WILLFUL BAD FAITH AT THE INCEPTION OF THE
17 ACTION, DEFENDANTS’ HAVE WAIVED THEIR RIGHT TO
18 BRING A MOTION FOR SANCTIONS FOR DISCOVERY
19 DEFFICIENCIES.

20 Rule 37(c), contrary to representations in Defendants’ motion, relates solely to sanctions
21 available to the trial court during discovery. Indeed, the rule applies only to the failure to disclose
22 evidence during the initial disclosures of information at an informal conference of the parties, before
23 formal discovery begins. For the exclusionary rule to be triggered it must be in response to failures to
24 follow Federal Code of Civil Procedure Rules 26(a) [Initial disclosures at informal conference of the
25 parties, in preparation for a discovery plan], 26(e)(1) [supplements disclosures where a party learns, in a
26 material respect, of incomplete or inaccurate information and that information has not otherwise been
27 made known to the other parties], and 26(e)(2) [seasonal amendment of discovery responses based on
28 the same criteria in the preceding rule 26(e)(1)].

1 Indeed, the Advisory Committee Notes to Rule 26(a) (1) (B) regarding disclosure of
2 information regarding witnesses at the party conference illuminates the purpose behind the rule:

3 “Subparagraph (B) is included as a substitute for the inquires routinely made
4 about the existence and location of documents and other tangible things in the
5 possession, custody and control of the disclosing party. Although, unlike
6 (disclosures at the eve of trial), an itemized listing of each exhibit is not
7 required, the disclosure should describe and categorize, the extent identified
8 during initial investigation, the nature and location of potentially relevant
9 documents and records... As with potential witnesses, the requirement for
10 disclosure of documents applies to all potentially relevant items then known to
11 the party, whether or not supportive of its contentions in the case. (*Emphasis
12 added*).

13 ... This obligation applies only with respect to documents then reasonably
14 available to it ...(*Emphasis added*).

15 ... The disclosure requirements should, in short, be applied with common
16 sense in light of the principals of Rule 1¹, keeping in mind the slatory
17 purposes that the rule is intended to accomplish. The litigants should not
18 indulge in gamesmanship with respect to the disclosure requirements.
19 (Fed.R.Civ.P. 26(1)(B) advisory committee’s notes (1993))

20 The time for objection to any such disclosures made at the inception of this suit have
21 long since past, as have sanctions based on discovery responses that Defendants’ deemed
22 inadequate. Thus, Defendants’ Motion In Limine No. Eleven clearly represents a misreading of the
23 sanction of exclusion of evidence pursuant to Rule 37(c) as applied to the Rule 26 subsections
24 referenced therein.

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**3. DEFENDANTS’ HAVE FAILED TO MEET ANY BURDEN FOR
APPLICATION OF RULE 37(C) MAKING NO SHOWING OF A WILLFUL
BAD FAITH REFUSAL TO PRODUCE OR IDENTIFY WITNESSES.**

Assuming, *arguendo*, such a motion could be brought at present, Defendants’ have not even
proffered a showing Plaintiffs acted in bad faith and willfully to withhold the identification of witnesses

¹ Federal Rules of Civil Procedure 1 states: “These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in [Rule 81](#). They shall be construed and administered to secure the just, speedy,

1 such that the burden would shift to Plaintiffs to show substantial justification or harmlessness. They cite
2 *Yeti By Molly Ltd. V. Deckers Outdoor Corp.*, 259 F.3d 1101 (9th Cir. 2001), *Von Bremer v. Whirlpool*
3 *Corp.*, 536 F.2d 838 (9th Cir. 1976), for the proposition that it is Plaintiff's burden under Rule 37(c) to
4 demonstrate a lack of bad faith or willfulness. This is not so. The court in *Yeti, supra* states:

5 "Two express exceptions ameliorate the harshness of Rule 37(c)(1): The
6 information may be introduced if the parties' failure to disclose the required
7 information is substantially justified or harmless." (*Ibid.* at 1106).

8 *Yeti* was also factually far a field from the case at bench. There, a district court properly
9 excluded testimony of defendant's expert witness as a sanction for failing to provide the opposing party
10 the expert's report for two and one-half years after having been identified in the expert's deposition,
11 well after the close of discovery and only a month prior to trial.

12 Similarly, *Von Bremer, supra*, which Defendant's cite "generally", is another example
13 where the excluded evidence was produced on the eve of, and during trial. *Von Bremer* involved
14 numerous other problems in what began as a patent suit. After the initial law suit was dismissed for
15 failure to prosecute, it was reinstated and contractual documents pivotal to plaintiff's case were not
16 produced until the beginning of and during trial which had never been previously disclosed.

17 Moreover, willfulness and bad faith have been typically been applied as the standard for
18 dismissal of the action, or exclusion of evidence tantamount to dismissal. (See, *Crown Life Insurance*
19 *Company v. Craig*, 995 F.2d 1376, 1382 (7th Cir. 1993), questioning the reasoning in *Von Bremer,*
20 *supra.*)

21 Defendant's Motion cannot meet this standard, as the Motion does not identify the
22 perpetrated discovery that was violated.

23 III. CONCLUSION.

24 The threshold question here is whether Defendants' have any right to seek exclusion of
25 witnesses they claim were not disclosed after they had an opportunity to review all of the documents in
26 question. The Declaration of Michelle L. Cannon, accompanying Motions In Limine Eleven, Twelve,

27 and inexpensive determination of every action."
28

1 and Thirteen, concedes that numerous interrogatories and requests for admissions were propounded
2 upon Plaintiffs. They were followed by motions to compel, requests for sanctions (including dismissal),
3 and ultimately were answered and supplemented. If the answers to those discovery requests were in
4 adequate Defendants' literally had years to bring further discovery to bear and clear up any ambiguities.
5 They never sought the sanction contained in Rule 37(c) until now. The one sanction they did request
6 was dismissal, which was denied.

7 In any event, the instant motion is not timely as it relates to Rule 37(c), as discussed
8 above. If Defendants' a surprised by the inclusion of several documents that were previously produced,
9 if not identified specifically, that is their burden. With the ample time and personnel to review what is
10 on the current Plaintiffs' list no harm will result in proceeding with the relevant witnesses and no undue
11 delay will result. If the court is of the opinion that an affirmative duty existed to disclose, with
12 particularity, every document that the Plaintiffs' intended to use at trial, before discovery began (*See*,
13 Rule 27, as discussed *supra*), then the failure to identify with particularity 271 witnesses at that time was
14 substantially justified and is harmless to a party intricately involved in the litigation for over half a
15 decade.

16 Plaintiffs' respectfully request denial of Defendant's Motion In Limine Eleven.

17 DATED: March 18, 2005

18 /s/ Scott M. Kendall

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20 SCOTT M. KENDALL,
21 Attorney for Plaintiffs
22 PLANS, Inc.
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