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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 D") 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)¹ 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.

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28 ¹ 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

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9 DATED: March 11, 2005.

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

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12 KRONICK MOSKOVITZ TIEDEMANN & GIRARD

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15 DATED: March 11, 2005.

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