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17 UNIFIED SCHOOL DISTRICT

18 UNITED STATES DISTRICT COURT  
19 EASTERN DISTRICT OF CALIFORNIA

20 PLANS, Inc.,

21 Plaintiff,

22 v.

23 SACRAMENTO CITY UNIFIED  
24 SCHOOL DISTRICT, TWIN RIDGES  
25 ELEMENTARY SCHOOL DISTRICT,  
26 DOES 1-100,

27 Defendants.

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

**DEFENDANTS' JOINT REPLY TO  
PLAINTIFF'S OPPOSITION TO MOTION  
IN LIMINE NO. ELEVEN (11) TO  
EXCLUDE TESTIMONY BY WITNESSES  
NOT PREVIOUSLY DISCLOSED**

**Date: April 1, 2005  
Time: 10:00 a.m.  
Place: Courtroom 2**

28 **I.**  
**INTRODUCTION**

Defendants Sacramento City Unified School District and Twin Ridges Elementary School District hereby present their reply to the opposition of Plaintiff PLANS, INC. to their Motion in Limine No. Eleven (11). This motion asks the Court to exclude the following witnesses<sup>1</sup> who

<sup>1</sup> The name of Eugene Schwartz is not included above because Plaintiff stated in footnote 1 of its opposition to Motion in Limine Thirteen (13) that it "withdraws its request to offer the testimony of . . .

1 were included on Plaintiff's Witness List attached as Exhibit C to the Court's Pretrial Order of  
2 February 18, 2005:

3 (22) Cynthia Hoven

4 (23) Margit Ilgen

5 (24) Ina Jachnig

6 (25) Ernst Schubert

7 (26) Rena Osmer

8 (27) Peggy Alessandri

9 (28) Astrid Schmitt-Stegmann

10 (29) Dennis Klocek

11 (32) Rev. Franziska Hesse

12 (33) Rev. Sanford Miller; and

13 (34) Robert London

14 This motion is brought under Fed. R. Civ. Proc. 37(c) on the ground that these witnesses  
15 were *not* disclosed in Plaintiff's discovery responses. As discussed below, Plaintiff's legal and  
16 factual arguments in opposition to this motion are erroneous.

17 Furthermore, PLANS, INC. itself has been on notice since at least March 17, 2004 when it  
18 was advised that it would "...suffer any consequences brought about by Mr. Kendall's future  
19 actions." (*See* Magistrate's Findings and Recommendations, dated March 17, 2004, page 2, lines  
20 24 through 26 (describing February 4, 2004 hearing).)

## 21 **II.** 22 **ARGUMENTS**

### 23 **A. Plaintiff's Assertion That The Above Names Were Disclosed In Its Discovery** 24 **Responses Is Simply Incorrect.**

25 Plaintiff's Opposition ignores the fact that Defendants' opening memorandum was  
26 supported by the detailed Declaration of Michelle L. Cannon. The Opposition also includes the  
27 egregiously false statement that all of the witnesses on its witness list were disclosed during

28 witness no. 8. Eugene Schwartz." Defendants removed the name of Else Gottgens (No. 31) from this  
motion because she was included in error.

1 discovery.<sup>2</sup> That simply is not true; Plaintiff did not state the names of the above witnesses in its  
2 written discovery responses -- despite the fact that Defendants' contention-style interrogatory  
3 requests asking for names and addresses were very comprehensive.<sup>3</sup>

4 Plaintiff made yet another false statement in its Opposition to Defendants' Motion in  
5 Limine No. Thirteen (13) when it asserted that three of the above individuals -- (32) Rev.  
6 Franziska Hesse; (33) Rev. Sanford Miller; and (34) Robert London -- were included in its  
7 responses to Defendants' Requests for Admission.<sup>4</sup> That assertion is also patently untrue, as  
8 shown by Plaintiff's responses themselves.<sup>5</sup> See the accompanying Supplemental Declaration of  
9 Michelle L. Cannon, ¶¶ 10-11, Exhibits I and J.

10 **B. Plaintiff's Assumption That Motions To Exclude Evidence Cannot Be Brought**  
11 **Under Fed. R. Civ. P. 37(c) After Discovery Closes Is Not Supported By Authority.**

12 Plaintiff's cited references to portions of Rule 26 of the Federal Rules of Civil Procedure  
13 and Advisory Committee Notes thereto do not support its underlying assumption that motions to  
14 exclude evidence (as distinguished from motions to compel further responses during discovery)  
15 cannot be brought as motions in limine after discovery first takes place or after it terminates. To  
16 the contrary, the very cases Defendants cited in their opening brief<sup>6</sup> arose later in the cases when  
17 evidentiary rulings for trial were made rather than during the discovery portion of the litigation.  
18 A portion of the text of Rule 37(c)(1) of the Federal Rules of Civil Procedure contemplates the  
19 exclusion of evidence in later stages of litigation, *e.g.*, motions for summary judgment, or at trial:

20 (c) Failure to Disclose; False or Misleading Disclosure; Refusal to  
21 Admit.

22 (1) A party that without substantial justification fails to

23 <sup>2</sup> See Opposition, page 2, lines 4 through 14.

24 <sup>3</sup> See Supplemental Declaration of Michelle L. Cannon, ¶¶ 2 – 13, Exhibit A through E (responses  
to interrogatories) and F – J (other discovery responses).

25 <sup>4</sup> See Plaintiff's Opposition to Motion in Limine No. 13, page 2, lines 4 through 6.

26 <sup>5</sup> Furthermore, none of the above listed names were included on Plaintiff's Witness List attached as  
27 Exhibit A to the Court's earlier Pretrial Order filed on January 16, 2001.

28 <sup>6</sup> The cases that Defendants cited were: *Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d  
1101 (9th Cir. 2001) and *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838 (9th Cir. 1976).

1 disclose information required by Rule 26(a) or 26(e)(1), or to  
2 amend a prior response to discovery as required by Rule 26(e)(2), is  
3 not, unless such failure is harmless, permitted to *use as evidence at*  
4 *a trial*, at a hearing, or on a motion any witness or information not  
5 so disclosed. In addition to or in lieu of this sanction, the court, on  
6 motion and after affording an opportunity to be heard, may impose  
7 other appropriate sanctions. . . .” Fed. R. Civ. P. 37(c)(1) (emphasis  
8 added).

9 Under these authorities cited by Defendants, the sanction of exclusion of evidence under Rule  
10 37(c)(1) is therefore a proper ground for a motion in limine. Moreover, Plaintiff’s argument does  
11 not even make sense. How could Defendants be expected to know at the time Plaintiff served its  
12 discovery responses that Plaintiff did not include the names of additional witnesses that Plaintiff  
13 would later try to use at trial? Plaintiff does not cite any authority for its apparent assumption that  
14 trial by ambush is acceptable under modern federal practice. To the contrary, “the purpose of  
15 discovery is to remove surprise from trial preparation so the parties obtain evidence necessary to  
16 evaluate and resolve their dispute.” *Kaufman v. Board of Trustees*, 168 F.R.D. 278, 280 (C.D.  
17 Cal. 1996).

18 **C. The Sanction Of Excluding Witnesses And/Or Exhibits At Trial Does Not Require A**  
19 **Finding Of Willfulness Or Bad Faith Under Current Ninth Circuit Case Law.**

20 The above quoted portion of Rule 37(c)(1) expressly states the correct standards for not  
21 applying the sanction of exclusion: **substantial justification** for failing to disclose the  
22 information during discovery, or **harmlessness** of that failure. The case Defendants cited for that  
23 proposition -- *Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101 (9th Cir. 2001) –  
24 belies Plaintiff’s assertion that a higher standard of willfulness or bad faith must be met to  
25 exclude witnesses or other information at trial. *Yeti*, a case decided under Rule 37(c)(1), states:

26 By excluding Vuckovich [an untimely disclosed expert], the district  
27 court made it much more difficult, perhaps almost impossible, for  
28 Deckers to rebut Polzin’s damages calculations. Nevertheless, this  
29 case is distinguishable from cases in which we have required a  
30 district court to identify ‘willfulness, fault, or bad faith’ before  
31 dismissing a cause of action outright as a discovery sanction.  
32 [Citations omitted.] These cases do not apply because this sanction,  
33 although onerous, was less than a dismissal. *Id.* at 1106.

34 Here, too, a lesser sanction than dismissal is currently requested – the sanction of exclusion of



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. ELEVEN (11) TO EXCLUDE TESTIMONY BY WITNESSES NOT**  
7 **PREVIOUSLY DISCLOSED**

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

21 Frederick J. Dennehy  
22 PRO HAC VICE  
23 Wilentz Goldman and Spitzer  
24 90 Woodbridge Center Drive  
25 Woodbridge, NJ 07095

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

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

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

/s/  
Kathy Blenn  
Original signature retained by attorney  
Susan A. Denious