

1 SACRAMENTO, CALIFORNIA

2 MONDAY, SEPTEMBER 12, 2005; 1:30 P.M.

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5 THE CLERK: Plans versus Sacramento City. It's on for
6 a court trial, Your Honor.

7 THE COURT: Appearance of counsel.

8 MR. KENDALL: Scott Kendall for plaintiff, Your Honor

9 MS. CANNON: Michelle Cannon for Twin Ridges.

10 MS. DENIOUS: Susan Denious on behalf of the
11 Sacramento City Unified School District.

12 MS. BUGALLA: Marshal Bugalla on behalf of Twin
13 Ridges.

14 THE COURT: This matter is set for a bench trial.
15 There are some preliminary matters we need to deal with of
16 some consequence. I think I indicated that to the parties
17 during the in limines. The significant threshold issue is
18 set forth in the final pretrial order. The Court indicated
19 the issue of whether anthroposophy is a religion for
20 establishment clause purposes is indeed the threshold issue.

21 I have reviewed the trial briefs of the parties. I
22 have looked at the exhibit list and the witness list, and in
23 doing so, as I indicated in the past, I'm going to require
24 proffer, Mr. Kendall, on that issue.

25 I'm going to be candid with you. I'm having a

1 difficult time trying to piece together what I perceive to be
2 your witness list and what they may or may not say under oath
3 and your exhibit list. I just can't match those documents
4 with witnesses. I want you to help me in that regard.

5 I'll ask you to come forward, and I want, essentially,
6 a very detailed proffer; that is, the witnesses you're going
7 to call in order to establish that anthroposophy is a
8 religion for purposes of the establishment clause. I want
9 the names of witnesses, the basis of their testimony and the
10 exhibits that might be introduced for those witnesses.

11 I think we should start there before we go any
12 further.

13 Mr. Kendall, come forward. Do you understand what I'm
14 asking of you?

15 MR. KENDALL: I do. It's obviously an issue we've
16 been working on ourselves very diligently since you've made
17 your evidentiary rulings.

18 That really becomes the critical issue for us as well.
19 The key witnesses that we would have offered with regard to
20 the issue --

21 THE COURT: What you're going to offer. It's the
22 proffer now, not what you were going to do.

23 MR. KENDALL: I want to be very clear on the point I'm
24 making. The only witnesses that we would have been able to
25 offer with regard to this question of anthroposophy -- I

1 worked on alternative ways of doing it -- would be Betty
2 Staley, who we think is a material, relevant, participant
3 witness, and Dr. Olson. You've excluded both of those on the
4 grounds I did not disclose them. I don't think that's the
5 case, but that is the Court's order. Without those
6 witnesses, I don't believe we'll be able to sustain our
7 burden of proof.

8 THE COURT: Then you have no proffer; that's what
9 you're telling me?

10 MR. KENDALL: That's what I'm telling you. Those
11 witnesses are absolutely critical, and given the Court's
12 position with regard to that, we had alternatives we were
13 working with to try to put the evidence before the Court, but
14 I don't believe it's possible to do it and would be wasting
15 the Court's time to do it without those witnesses.

16 THE COURT: Well, this is not a new issue, obviously.
17 This has been hanging over your head, so to speak, for a year
18 or two now, certainly, since the orders on the motions in
19 limine.

20 I don't believe you filed a Rule 16 motion to amend
21 the scheduling order, did you.

22 MR. KENDALL: No. But this Court was very clear in
23 its ruling.

24 THE COURT: There are other things that could have
25 been done in terms of other witnesses if you amended the

1 scheduling order, if you had other witnesses you think you
2 could call. The bottom line is: I made that ruling because
3 I found there was no disclosure.

4 That is the only basis for the ruling. That's what
5 comes to mind anyway.

6 MS. DENIOUS: Your Honor, these individuals were also
7 listed previously as defense experts. That was the other
8 basis.

9 MR. KENDALL: I was not calling them as defense
10 experts. I was calling them for their percipient testimony,
11 and the plaintiff's position was that you should not be able
12 to hide percipient testimony, which both of these witnesses
13 were actively involved in creating these schools and teaching
14 the teachers based on the fact that the defendant simply
15 identified them as experts and then withdrew them as experts.

16 That's not a basis whatsoever --

17 THE COURT: Well, counsel, look. The plaintiff has
18 its case and defendants have their case. Normally you don't
19 make your case by calling defense witnesses as experts.
20 That's what you intend to do. You need experts. You need
21 opinion testimony in order to make your case, in my view; you
22 can certainly call percipient witnesses in order to get
23 certain documents in and perhaps you could make your case.

24 I can't try your case for you, but I've been
25 struggling myself to find out how you can make this case, and

1 I can't find the witnesses and match them with any exhibits
2 that make any sense. Obviously that's the conclusion you've
3 come to.

4 Well, defense counsel come forward, please. Plaintiff
5 has indicated plaintiff is unable to make a proffer to
6 establish that anthroposophy is a religion for establishment
7 clause purposes. I think we've been pretty clear in our
8 discussions in the past; over the course of several years
9 this case has been before me, that is a threshold issue.

10 MS. CANNON: Yes, Your Honor.

11 MS. DENIOUS: Yes.

12 THE COURT: We don't get to the other test that would
13 determine whether or not there is advancement or entanglement
14 unless we have a religion. If that is the case, and I think
15 you would agree, Mr. Kendall, I'm going to ask defendants to
16 prepare conclusions of law in this matter, I guess limited
17 findings of fact.

18 Anything you would add, be it aside your views on my
19 rulings, but I'm talking about right now as we stand on the
20 brink of trial that can salvage your case under these
21 circumstances?

22 MR. KENDALL: The only proffer I would be able to make
23 is with regard to -- we provided the Court with
24 interrogatories that we intended to read into evidence. One
25 of the interrogatories by Sacramento City Unified School

1 District identified books that it had put forth as being
2 something that was available for the teachers in the public
3 school system on anthroposophy. One of those books is the
4 Waldorf Teacher's Survival Guide.

5 We believe under the rules this would be an adoptive
6 admission on behalf of the school district with regard to
7 that particular book, and that particular book clearly
8 identifies all sorts of religious basis for the Waldorf
9 school system. This is something identified by the school
10 district as being their book with regard to this education.

11 It includes statements about Lucifer and Aramen and
12 everything that the schools do, their meditative work, is all
13 under the guardianship of Lucifer. It's been quoted in the
14 summary judgment motions and we believe that that is
15 admissible based on the discovery responses of the defendants
16 and as an adoptive admission.

17 And as a result, that that could in and of itself push
18 the defendants to the position where they would need to call
19 witnesses to rebut that.

20 THE COURT: I think there's more likelihood you'd get
21 a 52(c) motion in response to that. Your burden is a lot
22 more extensive than that particular exhibit; however, I'll
23 allow the defendants to make their own decision on that
24 score. It seems to me there is still an issue -- there would
25 be a 52(c) motion in response to that if I allow it, and I'll

1 be fairly liberal in light of these circumstances because I
2 want to see this matter resolved once and for all.

3 What is the -- that is in the interrogatory? Which
4 number is that? You nodded your head, counsel. I didn't
5 mean to preempt your response. Would that be your response,
6 a Rule 52(c) motion, if I were to allow this document?
7 You'll object to it as well. I want to make this
8 dispositive.

9 MS. DENIOUS: Yes.

10 MS. CANNON: There is an objection pending to that
11 exhibit, but we would, of course, move for judgment under
12 Rule 52(c) as well.

13 THE COURT: What I would suggest you do -- do you have
14 anything further, Mr. Kendall? Plaintiff's portion of
15 answers to interrogatory; is that interrogatory 8 or 17?

16 MR. KENDALL: On the material that we prepared for
17 you, it was on our document, plaintiff's portions of answers
18 to interrogatories, to be read on page three, Waldorf
19 Teacher's Survival Guide, E. Schwartz.

20 THE COURT: What line is that?

21 MR. KENDALL: That is line 25.

22 THE COURT: All right. Let me first hear -- I
23 assuming there will be an objection.

24 Anything else?

25 MR. KENDALL: No, Your Honor.

1 THE COURT: As I recall, this book was written by
2 Mr. Schwartz?

3 MR. KENDALL: That's correct.

4 THE COURT: But you withdrew Mr. Schwartz as your own
5 witness?

6 MR. KENDALL: That's correct, Your Honor.

7 THE COURT: That's the way you normally get this in.
8 The author is listed as a witness and you withdrew him as a
9 witness.

10 MR. KENDALL: This is a document identified by the
11 school district by being their document that they have
12 available to teachers --

13 THE COURT: There's an easier way to do this. You're
14 making life tough here. You want to use their witnesses.
15 You withdrew your witness in order to establish this
16 particular fact. You're doing it the hard way is all I'm
17 saying. Whether you can overcome the objection is your
18 issue.

19 MR. KENDALL: Mr. Schwartz would be -- I understand.

20 THE COURT: He's not available because you withdrew
21 him.

22 What is the exhibit number objection on this one for
23 the defendants?

24 MR. KENDALL: Plaintiff's exhibit --

25 THE COURT: 89?

1 MS. CANNON: Yes, Plaintiff's Exhibit 89.

2 THE COURT: All right. I'm going to hear, first of
3 all, the evidentiary objection at this time to Exhibit 89,
4 Waldorf Teacher's Survival Guide by Eugene Schwartz.

5 MS. DENIOUS: Yes. We had made a relevance objection
6 especially if this was offered in phase one of the trial that
7 this is really not a phase one issue, that the way plaintiff
8 has presented it is it would be of interest as to what is
9 occurring at John Morse School rather than what is
10 anthroposophy and is it a religion.

11 THE COURT: You object on relevance grounds?

12 MS. DENIOUS: Yes. And also because there is a
13 threshold level that needs to establish whatever is stated in
14 that particular document actually constitutes part of a creed
15 or a dogma that is accepted by the Anthroposophical Society.
16 So that threshold showing would have to be made.

17 We also object on the basis of authentication and we
18 object on the basis of hearsay and we object on the basis
19 that there's no foundational showing of personal knowledge or
20 a basis for an opinion as to whether this is admissible,
21 useful lay opinion or whether there's any foundation to
22 assume that Mr. Schwartz is an expert witness for any reason.

23 We also object on the basic level of personal
24 knowledge. I believe I mentioned that before under Rule 602.
25 Also because this particular document as submitted violates

1 the Doctrine of Completeness because it isn't complete. It
2 is only an excerpt.

3 THE COURT: You say it's not complete?

4 MS. DENIOUS: The Doctrine of Completeness. It's only
5 a fragment of a document rather than the complete thing.

6 THE COURT: You have a real smorgasbord of objections.
7 Most sound good to me, but what is your response?

8 MR. KENDALL: With regard to the completeness, it is
9 the complete document including all the copy rights. I
10 believe it's an adoptive admission under Federal Rule
11 801(d)2(B), and the basis for that, this is -- it's not
12 hearsay at all. It's an admission because it's been
13 identified by the school district as being one of the
14 documents they maintain for their teachers.

15 THE COURT: Without foundation what is it an admission
16 of?

17 MR. KENDALL: It's an admission of what they present
18 themselves by their conduct to the teachers as to what
19 Waldorf education is and what it's all about. What this
20 document indicates is it's completely filled with nothing but
21 religious material, things like Lucifer and Aramen and all
22 sorts of conduct that is given to the public school teachers
23 by the school district for the purpose --

24 THE COURT: Go back. Foundation. That's what I'm
25 interested in. How do you establish this? You said a lot of

1 things.

2 MR. KENDALL: It's based on their responses to
3 discovery that creates the foundation for it. That makes
4 this an adoptive admission. They identified these as books,
5 documents that they have for the benefit of their public
6 school teachers so their public school teachers understand
7 what Waldorf education is.

8 THE COURT: Does this establish anthroposophy as a
9 religion?

10 MR. KENDALL: I believe it does, Your Honor.

11 THE COURT: Is anthroposophy discussed in detail?

12 MR. KENDALL: In detail. The whole book is basically
13 that.

14 MS. CANNON: We would disagree with that. That's not
15 what the book is about.

16 THE COURT: You finish up, and let's take these
17 issues. So your position is that this does address phase one
18 of the trial that anthroposophy is a religion under the
19 establishment clause?

20 MR. KENDALL: Absolutely. And to elaborate further,
21 Malnak --

22 THE COURT: Malnak is not the law of this case.
23 Malnak -- you keep going over matters that I've ruled on.
24 The Malnak case has nothing to do with this case. Isn't that
25 what the Court ruled on? I've ruled that that case has to do

1 with a specific issue that is not in this case. Haven't I
2 said that?

3 MR. KENDALL: I'm not aware of the Court saying that.

4 THE COURT: I made it pretty clear. I'm not going to
5 go over plowed ground. But the bottom line is, I said the
6 facts in Malnak were not similar to this case. I made that
7 very clear in the written order. I'll make it clear now if I
8 haven't made it clear before, but I said you've cited Malnak
9 and I've said Malnak doesn't apply. Don't cite me Malnak.

10 Do you want to read the order, take the time?

11 MR. KENDALL: No, Your Honor.

12 THE COURT: Are you denying I didn't say that in my
13 order? Do you recall that?

14 MR. KENDALL: No, I don't, Your Honor.

15 THE COURT: Go ahead.

16 MR. KENDALL: With regard --

17 THE COURT: This is not about Malnak.

18 MR. KENDALL: This also goes to the very issues. When
19 the issue was briefed with regard to expert witnesses several
20 years ago by the defendants, it was the defendant's position,
21 which we agree with now, that this ultimately is not an issue
22 for expert opinion.

23 What the Court must do in order to determine the issue
24 of whether something is a religion, the Court has to look
25 beyond expert opinion and has to look to the actual evidence,

1 the underlying evidence and make the call.

2 We agree with that position, which is why we decided
3 to go with Betty Staley and Dr. Olson, and allow them to
4 produce precipient witness versus simply calling an expert
5 that was going to have an opinion which doesn't necessarily
6 accomplish what Alvarez requires.

7 THE COURT: Let me hear from the defendants.

8 MS. DENIOUS: Your Honor, first of all, the
9 characterization of the interrogatory was not correct in the
10 sense that there was no global admission that this particular
11 exhibit constitutes a definitive statement of anthroposophy
12 and that we were advancing it by possibly having it on our
13 shelf in a library at some undescribed point in time.
14 There's no foundational showing the book is still there.
15 There is no foundational showing that anybody was required to
16 read it or it was used at the school.

17 All of those things would be a phrase two issue rather
18 than a phase one issue with respect to this case.

19 Then the other foundational issues of whether
20 Mr. Schwartz was even a person qualified to issue opinions as
21 to what anthroposophy is is completely missing and whether
22 the comments made by Mr. Schwartz in this document have
23 anything to do with any ideas that the Anthroposophical
24 Society as distinguished from Rudolph Steiner or some of his
25 other people who he had in other areas of endeavor as

1 distinguished from the Anthroposophical Society.

2 THE COURT: The interrogatory asked: What books do
3 you have in your possession that relate to Waldorf teaching
4 methods? That's the question. There's a whole page of
5 various titles and includes this document or -- I assume it's
6 a book -- am I correct about that?

7 MR. KENDALL: Yes.

8 THE COURT: -- written by Eugene Schwartz.

9 MR. KENDALL: Correct.

10 THE COURT: So it's his views that we're relying on
11 here. Eugene Schwartz was your witness at one time. For
12 whatever reason, you decided not to call Eugene Schwartz.
13 This is hearsay upon hearsay. The only admission here is
14 they happened to have this book. This is so far fetched, I
15 don't know why we're spending so much time, but I wanted to
16 give you every opportunity.

17 But I've heard enough to say that it would be
18 ludicrous to say this in any fashion establishes that
19 anthroposophy is a religion on the possession of a book
20 without any further foundational support for the admission of
21 the book, plus the fact it contains the writings of a person
22 not called as a witness. I don't know how this would ever
23 get into court on this issue of magnitude and importance.

24 Is this your only evidence, counsel?

25 MR. KENDALL: Yes, it is Your Honor.

1 THE COURT: I'm going to -- this is a motion to
2 exclude that evidence under the various grounds?

3 MS. DENIOUS: Yes, Your Honor.

4 MS. CANNON: Yes, Your Honor.

5 THE COURT: I want that put in writing as well as any
6 objections you have to the book itself. All I have is a bare
7 title. There's not much you can do except relate to hearsay
8 relevance and such.

9 MS. CANNON: Our objection is in writing and our
10 objections are in evidence.

11 THE COURT: I'll give you an opportunity to do
12 something again. We'll try to address this trial, this one
13 single issue, evidentiary issue now, that has been the
14 argument based on the admission of this answer to the
15 interrogatory.

16 I want you to refashion your objection in detail and
17 include that -- you're going to file a Rule 52(c). I want
18 your objection laid out in detail. And then even if the book
19 were to be admitted, I presume that you would still be filing
20 the 52(c), and I want you to lay that out in terms of finding
21 facts and conclusions of law as well.

22 Basically, that's your -- you rest after this proposed
23 exhibit?

24 MR. KENDALL: Yes, Your Honor.

25 THE COURT: Obviously, I'm going to grant the

1 appropriate Rule 52(c) motion once it's presented to me. I
2 want this done in writing.

3 How much time do you need to present this Rule 52(c)
4 motion?

5 MS. CANNON: We basically have it prepared. We could
6 get it to you sooner than that.

7 THE COURT: Could you present it to me before the end
8 of this week?

9 MS. CANNON: Yes.

10 THE COURT: How much time do you need to respond,
11 Mr. Kendall?

12 MR. KENDALL: One week would be fine.

13 THE COURT: Fine. Opposition filed in one week. I
14 would like included in that motion your proposed findings and
15 conclusion of law.

16 MS. DENIOUS: Yes, Your Honor.

17 THE COURT: We have objection to the evidence, motion
18 to exclude evidence, we have a Rule 52(c) motion and a
19 proposed findings and conclusions of law.

20 You can also object to any finding and conclusions as
21 well as a Rule 52 motion, Mr. Kendall. This will be a
22 written order. You need time to reply. I'll give you four
23 days to reply.

24 Let's have the dates on those, Ms. Price.

25 THE CLERK: 9-16; response 9-23.

1 THE COURT: And then the reply?
2 THE CLERK: Four days, did you say?
3 THE COURT: Yes.
4 THE CLERK: Do you want court days or calendar days?
5 THE COURT: Court days.
6 THE CLERK: The 29th.
7 THE COURT: The 29th of September.
8 Do you have any other comments you wish to make?
9 MR. KENDALL: No, Your Honor.
10 THE COURT: Very well. That's the Court's order.
11 MS. DENIOUS: Thank you, Your Honor.
12 MS. CANNON: Thank you.
13 THE CLERK: Court is adjourned.
14 (Whereupon, proceedings concluded at
15 2:01 p.m.)
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1 I certify that the foregoing is a correct transcript from the
2 record of proceedings in the above-entitled matter.

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MICHELLE L. BABBITT, CSR 6357

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE FRANK C. DAMRELL, JR., JUDGE

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PLANS, Inc.,)	
)	
Plaintiff,)	
)	
vs.)	No. CIV. S-98-0266
)	
SACRAMENTO CITY UNIFIED SCHOOL)	
DISTRICT, et al., DOES 1-100,)	
)	
Defendants.)	

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REPORTER'S TRANSCRIPT

TUESDAY, SEPTEMBER 13, 2005

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Reported by: MICHELLE L. BABBITT, CSR #6357

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