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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

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. ELEVEN
17 DISTRICT, TWIN RIDGES ELEMENTARY)
SCHOOL DISTRICT, DOES 1-100,) DEFENDANTS' JOINT MOTION IN
18) LIMINE TO EXCLUDE TESTIMONY BY
Defendants.) WITNESSES NOT PREVIOUSLY
19) DISCLOSED

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 each and every trial witness listed
24 by Plaintiff who was not previously disclosed to Defendants.

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1 Districts propounded four sets of interrogatories to Plaintiff requesting names, addresses and
2 telephone numbers for witnesses with information relevant to Plaintiff's allegations in this case.
3 (Cannon Decl. ¶ 2.) On August 4, 2003, Defendants propounded Interrogatories, Set No. 3, on
4 Plaintiff. (Cannon Decl. ¶ 3.) Plaintiff failed to adequately respond to these interrogatories and a
5 motion to compel was necessary. (Cannon Decl. ¶ 4.) The first hearing on the motion to compel was
6 held on December 3, 2003, Magistrate Judge Nowinski presiding. Plaintiff was ordered to provide the
7 requested information and to pay \$625 in sanctions. (Cannon Decl. ¶ 5.) Plaintiff failed to comply
8 with the court's order and a second motion to compel with a request for dismissal was filed by
9 Defendants. (Cannon Decl. ¶ 6.) On February 4, 2004, Magistrate Nowinski again ordered Plaintiff
10 to provide a full response to Defendants' discovery requests. (Cannon Decl. ¶ 7.) Plaintiff supplied
11 minimal further discovery responses, but has never paid the monetary sanction ordered by the Court.
12 (Cannon Decl. ¶ 8.) Plaintiff's counsel was specifically told by Magistrate Nowinski at a follow-up
13 order to show cause hearing regarding dismissal on February 25, 2004, that he would not be allowed
14 to call witnesses at trial who were not disclosed to Defendants during discovery. (Cannon Decl. ¶ 9.)
15 The Magistrate, with concurrence of this Court by Order dated May 26, 2004, eventually determined
16 dismissal was not appropriate at that time.

17 Yet, Plaintiff's counsel now lists many witnesses as trial witnesses without any prior disclosure
18 to Defendants. Not only may Plaintiff not call these undisclosed witnesses at trial, but Defendants
19 object to Plaintiff's continued disregard of Court orders and instructions.

20 **II. ARGUMENT.**

21 Plaintiff's Witness List, attached to the court's Pretrial Conference Order dated February 18,
22 2005, as Exhibit "C," includes numerous witnesses never previously disclosed to Districts.¹ Plaintiff
23 and Defendants have undergone extensive discovery over the past seven years. As mentioned above,
24 Districts have propounded four sets of interrogatories requesting the names of all witnesses having

25
26 ¹ Furthermore, Plaintiff did not actually submit a witness or exhibit list to the court with the joint
27 final pretrial statement submitted to the court on February 1, 2005. As such, Districts object to
28 Plaintiff's witness list being accepted by the Court and attached to the Court's Pretrial Conference Order.
This objection is contained in TRESA's Objections to the Pretrial Order which will be filed on or before
March 14, 2005.

1 information supporting Plaintiff's allegations/contentions. Due to Plaintiff's lack of responses in 2003
2 and 2004, Defendants were forced to bring multiple motions to compel responses from Plaintiff, and
3 Plaintiff was court ordered to provide appropriate responses. Plaintiff did list some witnesses²,
4 demonstrating knowledge and capability to comply with the Federal Rules. Notwithstanding all of
5 this, Plaintiff now includes thirteen proposed witnesses who were not disclosed as witnesses during
6 discovery. The undisclosed witnesses are: Eugene Schwartz; Cynthia Hoven; Margit Ilgen; Ina
7 Jachnig; Ernst Schuberth; Rena Osmer; Peggy Alessandri; Astrid Schmitt-Stegmann; Dennis Klocek;
8 Else Gottgens; Rev. Franziska Hesse; Rev. Sanford Miller; Robert London (witnesses numbers 8, 22-
9 29, 31-34). As a result, these named witnesses should be excluded from testifying at trial. To allow
10 otherwise would be to allow Plaintiff to act in bad faith, to ignore the rules of discovery as well as the
11 directions of the Magistrate and trial court, thereby placing Defendants at a prejudicial disadvantage
12 with trial preparation and at trial. The trial judge has broad discretion to exclude evidence. *United*
13 *States v. Ives*, 609 F.2d 930, 933 (9th Cir. 1979), *cert. denied*, 445 U.S. 919. Further, under Federal
14 Rules of Civil Procedure, rule 37(c), a party cannot use any witness or information not timely disclosed
15 under the applicable discovery rules unless that party can show that its failure was substantially
16 justified in the circumstances of the case or that the delay was harmless. FED. R. CIV. P. 37(c)(1); *Yeti*
17 *By Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); *see generally Von*
18 *Brimer v. Whirlpool Corp.*, 536 F.2d. 838 (9th Cir. 1976). Although the Ninth Circuit reviews every
19 discovery sanction under an abuse of discretion standard, it gives "particularly wide latitude to the
20 district court's decision to issue sanctions under Rule 37(c)(1)." *Yeti*, 259 F.3d at 1106. The burden
21 of proving harmlessness is on the party facing sanctions. *Yeti*, 259 F.3d at 1107.

22 As shown by the facts stated above, the Plaintiff in this case cannot possibly show that it had
23 substantial justification for its extremely belated disclosure of these witnesses. The facts stated above
24 show that Plaintiff simply failed to act diligently when it had the opportunity and the obligation to do
25 so.

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27 _____
28 ² Plaintiff's trial witnesses disclosed during discovery include Tina Means, Caitlin Cawley, David Anderson, Carol Fegte, Karen Geisler, George Hoffecker, Carol Nimick, and Sallie Romer.

1 Plaintiff also cannot show that its extreme failure to make timely disclosures of these witnesses
2 has not harmed Defendants or the judicial process. To the contrary, Defendants are seriously
3 prejudiced by this extremely late disclosure: discovery is long since closed and Defendants have not
4 had the opportunity to depose these people. The prejudice will be even greater if Defendants should
5 learn for the first time during trial that any of this testimony will be in the form of improper opinion
6 testimony.

7 **III. CONCLUSION.**

8 For the foregoing reasons, Defendants respectfully request that this Court grant their motion
9 in limine excluding Plaintiff's witnesses numbers 8, 22-29, and 31-34 due to Plaintiff's failure to
10 disclose any of these witnesses during the discovery process or at any time prior to the submission of
11 his trial witnesses list.

12 Respectfully submitted,
13 GIRARD & VINSON, LLP

14
15 DATED: March 11, 2005.

16 By /s/ Michelle L. Cannon
17 MICHELLE L. CANNON
18 Attorneys for TWIN RIDGES ELEMENTARY
19 SCHOOL DISTRICT
20 KRONICK MOSKOVITZ TIEDEMANN & GIRARD

21 DATED: March 11, 2005.

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