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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA

14 PLANS, Inc.,

15 Plaintiff,

16 v.

17 SACRAMENTO CITY UNIFIED
18 SCHOOL DISTRICT, TWIN RIDGES
ELEMENTARY SCHOOL DISTRICT,
19 DOES 1-100,

20 Defendants.

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

**DEFENDANT'S JOINT REPLY TO
PLAINTIFF'S OPPOSITION TO MOTION
IN LIMINE NO. TWELVE (12) TO
EXCLUDE EXHIBITS NOT PREVIOUSLY
DISCLOSED OR PRODUCED**

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

21
22 **I.**
INTRODUCTION

23
24 Defendants Sacramento City Unified School District and Twin Ridges Elementary School
25 District hereby present their reply to the opposition of Plaintiff PLANS, INC. to their Motion in
26 Limine No. Twelve (12). This motion asks the Court to exclude the following numbered exhibits
27 on Plaintiff's Exhibit List attached as Exhibit D to the Court's Pretrial Order of February 18,

1 2005: **Plaintiff's Exhibits Nos. 100-113, 116-118, 120-134, 136-159, 161-169, 171, 174-183,**
2 **186-187, 189-192, 194-199, and 201-217.** As discussed below, Plaintiff's legal and factual
3 arguments in opposition to this motion are erroneous.

4 Furthermore, PLANS, INC. itself has been on notice since at least March 17, 2004 when it
5 was advised that it would "...suffer any consequences brought about by Mr. Kendall's future
6 actions." (See Magistrate's Findings and Recommendations, dated March 17, 2004, page 2, lines
7 24 through 26 (describing February 4, 2004 hearing.))

8 **II.** 9 **ARGUMENTS**

10 **A. Plaintiff's Assertion That The Above Numbered Exhibits Were Disclosed And** 11 **Produced During Discovery Is Simply Incorrect.**

12 In its Opposition to this motion, Plaintiff makes the false statement that Plaintiff produced
13 and identified all documents on its Exhibit List during discovery.¹ That simply is not true; the
14 above numbered exhibits were not identified and produced in discovery despite the fact that
15 Defendants' contention-style of document requests were very comprehensive. See, Supplemental
16 Declaration of Michele L. Cannon, ¶¶ 7-9, Exhibits F, G and H (responses incorporate the
17 requests), accompanying this reply. These exhibits also were not included on Plaintiff's 2001
18 Exhibit List (Attachment C to the Court's Pretrial Conference Order filed January 16, 2001).

19 **B. Plaintiff's Assumption That Motions To Exclude Evidence Cannot Be Brought** 20 **Under Fed. R. Civ. P. 37(c) After Discovery Closes Is Not Supported By Authority.**

21 Plaintiff's cited references to portions of Rule 26 of the Federal Rule of Civil Procedure
22 and Advisory Committee Notes thereto do not support its underlying assumption that motions to
23 exclude evidence (as distinguished from motions to compel further responses during discovery)
24 cannot be brought as motions in limine after discovery first takes place or after it terminates. To
25 the contrary, the very cases Defendants cited in their opening brief² arose later in the cases when
26 evidentiary rulings for trial were made rather than during the discovery portion of the litigation.

27 ¹ See, Opposition, page 2, lines 4 through 14.

28 ² 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 A portion of the text of Rule 37(c)(1) of the Federal Rules of Civil Procedure contemplates
2 exclusion of evidence from use in later motions (*e.g.*, summary judgment) or at trial:

3 (c) Failure to Disclose; False or Misleading Disclosure; Refusal to
4 Admit.

5 (1) A party that without substantial justification fails to
6 disclose information required by Rule 26(a) or 26(e)(1), or to
7 amend a prior response to discovery as required by Rule 26(e)(2), is
8 not, unless such failure is harmless, permitted to **use as evidence at
9 a trial**, at a hearing, or on a motion any witness or information not
10 so disclosed. In addition to or in lieu of this sanction, the court, on
11 motion and after affording an opportunity to be heard, may impose
12 other appropriate sanctions. ...” Fed. R. Civ. P. 37(c)(1) (emphasis
13 added).

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

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

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

By excluding Vuckovich [an untimely disclosed expert], the district
court made it much more difficult, perhaps almost impossible, for
Deckers to rebut Polzin’s damages calculations. Nevertheless, this

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case is distinguishable from cases in which we have required a district court to identify ‘willfulness, fault, or bad faith’ before dismissing a cause of action outright as a discovery sanction. [Citations omitted.] These cases do not apply because this sanction, although onerous, was less than a dismissal. *Id.* at 1106.

Here, too, a lesser sanction than dismissal is currently requested – the sanction of exclusion of some, but not all, of Plaintiff’s evidence.

But even if a showing of willfulness or bad faith was required, Defendants readily meet the higher standard. In its opening memorandum for this motion, Defendants recited the salient aspects of Plaintiff’s contumacious conduct during the course of discovery, as shown in the record on Defendants’ motion to dismiss. Defendants’ showing is also supported by the original and the supplemental declarations of Michelle L. Cannon. Plaintiff’s willfulness and bad faith are further illustrated by its false assertions here that all of the documents on the list provided to the Court were disclosed and produced during discovery. (*See* discussion in Section A above.)

III.
CONCLUSION

Plaintiff did not disclose or produce the following exhibits on its Exhibit List during discovery: **Plaintiff’s Exhibits Nos. 100-113, 116-118, 120-134, 136-159, 161-169, 171, 174-183, 186-187, 189-192, 194-199, and 201-217.** Plaintiff has not demonstrated any substantial justification for not doing so. And, Plaintiff could not possibly show that Defendants would not be harmed by a post-discovery disclosure of such a large quantity of documents at this late stage of the litigation. Plaintiff must therefore be barred from introducing these exhibits into evidence at trial.

Dated: March 25, 2005

Respectfully submitted,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By /S/
Susan R. Denious
Attorneys for Defendant SACRAMENTO CITY
UNIFIED SCHOOL DISTRICT

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Dated: March 25, 2005

GIRARD & VINSON, LLP

By /S/
Michelle L. Cannon
Attorneys for Defendant TWIN RIDGES
ELEMENTARY SCHOOL DISTRICT

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 **DEFENDANT’S JOINT REPLY TO PLAINTIFF’S OPPOSITION TO MOTION IN**
6 **LIMINE NO. TWELVE (12) TO EXCLUDE EXHIBITS NOT PREVIOUSLY**
7 **DISCLOSED OR PRODUCED**

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

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Frederick J. Dennehy
PRO HAC VICE
Wilentz Goldman and Spitzer
90 Woodbridge Center Drive
Woodbridge, NJ 07095

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

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

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

28

/s/
Kathy Blenn (original retained by attorney)