1 SACRAMENTO, CALIFORNIA 2 MONDAY, SEPTEMBER 12, 2005; 1:30 P.M. 3 ---000----4 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. THE COURT: This matter is set for a bench trial. 14 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 set forth in the final pretrial order. The Court indicated 18 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 religion for purposes of the establishment clause. I want 8 9 the names of witnesses, the basis of their testimony and the 10 exhibits that might be introduced for those witnesses. I think we should start there before we go any 11 12 further. 13 Mr. Kendall, come forward. Do you understand what I'm asking of you? 14 MR. KENDALL: I do. It's obviously an issue we've 15 16 been working on ourselves very diligently since you've made 17 your evidentiary rulings. That really becomes the critical issue for us as well. 18 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

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

24THE COURT: There are other things that could have25been done in terms of other witnesses if you amended the

scheduling order, if you had other witnesses you think you
 could call. The bottom line is: I made that ruling because
 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, and the plaintiff's position was that you should not be able 11 12 to hide precipient testimony, which both of these witnesses 13 were actively involved in creating these schools and teaching the teachers based on the fact that the defendant simply 14 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 its case and defendants have their case. Normally you don't 18 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 precipient 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

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struggling myself to find out how you can make this case, and

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

Well, defense counsel come forward, please. Plaintiff has indicated plaintiff is unable to make a proffer to establish that anthroposophy is a religion for establishment clause purposes. I think we've been pretty clear in our discussions in the past; over the course of several years 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.

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

District identified books that it had put forth as being
 something that was available for the teachers in the public
 school system on anthroposophy. One of those books is the
 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.

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

THE COURT: I think there's more likelihood you'd get a 52(c) motion in response to that. Your burden is a lot more extensive than that particular exhibit; however, I'll allow the defendants to make their own decision on that score. It seems to me there is still an issue -- there would 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 to interrogatories, to be read on page three, Waldorf 18 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.

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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?

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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 has presented it is it would be of interest as to what is 8 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 object on the basis of hearsay and we object on the basis 18 19 that there's no foundational showing of personal knowledge or 20 a basis for an opinion as to whether this is admissible, useful lay opinion or whether there's any foundation to 21 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

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the Doctrine of Completeness because it isn't complete. It
 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 documents they maintain for their teachers. 14 15 THE COURT: Without foundation what is it an admission of? 16 17 MR. KENDALL: It's an admission of what they present themselves by their conduct to the teachers as to what 18 Waldorf education is and what it's all about. What this 19

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 --

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

1 things.

MR. KENDALL: It's based on their responses to 2 3 discovery that creates the foundation for it. That makes this an adoptive admission. They identified these as books, 4 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. THE COURT: You finish up, and let's take these 16 17 issues. So your position is that this does address phase one 18 of the trial that anthroposophy is a religion under the establishment clause? 19 20 MR. KENDALL: Absolutely. And to elaborate further, Malnak --21 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 MICHELLE L. BABBITT, OFFICIAL COURT REPORTER, USDC -- (916) 442-8446

with a specific issue that is not in this case. Haven't I
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 haven't made it clear before, but I said you've cited Malnak 8 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,

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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 exhibit constitutes a definitive statement of anthroposophy 11 12 and that we were advancing it by possibly having it on our 13 shelf in a library at some undescribed point in time. There's no foundational showing the book is still there. 14 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 than a phase one issue with respect to this case. 18 19 Then the other foundational issues of whether 20 Mr. Schwartz was even a person qualified to issue opinions as to what anthroposophy is is completely missing and whether 21 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

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1 distinguished from the Anthroposophical Society.

| 2  | THE COURT: The interrogatory asked: What books do             |
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| 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.                           |

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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. MS. CANNON: Our objection is in writing and our 9 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. I want you to refashion your objection in detail and 16 17 include that -- you're going to file a Rule 52(c). I want your objection laid out in detail. And then even if the book 18 were to be admitted, I presume that you would still be filing 19 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 exhibit? 23 24 MR. KENDALL: Yes, Your Honor. 25 THE COURT: Obviously, I'm going to grant the MICHELLE L. BABBITT, OFFICIAL COURT REPORTER, USDC -- (916) 442-8446

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) motion? 4 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 to exclude evidence, we have a Rule 52(c) motion and a 18 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?                      |
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| 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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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. MICHELLE L. BABBITT, CSR 6357 

1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF CALIFORNIA 3 ---000----BEFORE THE HONORABLE FRANK C. DAMRELL, JR., JUDGE 4 5 ---000---PLANS, Inc., ) 6 ) Plaintiff, ) 7 ) ) No. CIV. S-98-0266 vs. 8 ) SACRAMENTO CITY UNIFIED SCHOOL ) 9 DISTRICT, et al., DOES 1-100, ) ) 10 Defendants. ) 11 12 13 14 ---000----15 REPORTER'S TRANSCRIPT 16 17 18 TUESDAY, SEPTEMBER 13, 2005 19 20 ---000----21 22 23 24 25 Reported by: MICHELLE L. BABBITT, CSR #6357

| 1  |     |       | APPEARANCES                                                                                                        |
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