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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PLANS, Inc.,

Plaintiff,

v.

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

Defendants.

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

**DEFENDANTS' JOINT OBJECTIONS TO PLAINTIFF'S EXHIBIT 89; DEFENDANTS' JOINT MOTION FOR JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 52(c) -- WITH PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Trial Date: September 12, 2005
Time: 1:30 p.m.
Courtroom: 2
The Honorable Frank C. Damrell, Jr.

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### FEDERAL RULES OF CIVIL PROCEDURE



### FEDERAL RULES OF EVIDENCE



### TREATISE

Defendants Sacramento City Unified School District ("SCUSD") and Twin Ridges Elementary School District ("TRESD") hereby jointly present their objections to Plaintiff's proffered Exhibit No. 89 in Section I below. They present their written motion for judgment pursuant to Federal Rule of Civil Procedure 52(c) in Section II. They also present proposed findings of fact and conclusions of law in Section III.

## I.
## OBJECTIONS TO PLAINTIFF'S EXHIBIT NO. 89

### *"THE WALDORF TEACHER'S SURVIVAL GUIDE," Eugene Schwartz*

Defendants hereby present the following objections to the admission of Plaintiff's proffered Exhibit No. 89, a book entitled "THE WALDORF TEACHER'S SURVIVAL GUIDE," allegedly written by a person named Eugene Schwartz. But before doing so, the Defendant Districts provide the content of the interrogatory response that was the only item Plaintiff supplied at trial on September 12, 2005, as its offer of proof in connection with this exhibit.

### A. Pertinent content of SCUSD interrogatory response that Plaintiff supplied as its offer of proof in connection with its Exhibit 89.

At the trial on September 12, 2005, reference was made to Sacramento City Unified School District's Interrogatory Response No. 8 of Set No. 2 propounded by the Plaintiff. That interrogatory was a supplemental response to Interrogatory No. 9 contained in Set No. 1. As quoted in Plaintiff's designation of portions of answers to interrogatories to be read at trial dated September 6, 2005, Interrogatory No. 9 of Set No. 1 propounded by Plaintiff Plans, Inc. stated: "Identify all DOCUMENTS, in the possession or control of the answering defendant, and its agents, including all DOCUMENTS in the possession or control of individual teachers and administrators, which relate to training or instruction in Waldorf teaching methods or Waldorf curriculum." The District's response stated: **"John Morse Elementary School keeps a file of articles on Waldorf Education. The following is a list of books and magazines which are available to teachers and are owned and maintained by John Morse Elementary School: ...."**[1] (Emphasis added.) This statement was followed by a list of numerous books and articles,

[1] *See* "PLAINTIFF'S [sic] PLANS, INC PORTIONS OF ANSWERS TO INTERROGATORIES

which list included "THE WALDORF TEACHER'S SURVIVAL GUIDE by E. Schwartz" ("SURVIVAL GUIDE"). No other statements or admissions were made in this interrogatory response.

**B. OBJECTION: Authentication – FED. R. EVID. 901(a).**

At the beginning of the trial of this matter, the Court asked Plaintiff to submit an offer of proof to establish the necessary foundation for its exhibits. Authentication is a foundational element that Plaintiff, as the party seeking to have Exhibit 89 admitted, must provide. Federal Rule of Evidence 901(a) states: "The requirement of authentication or identification as a *condition precedent to admissibility* is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED R. EVID. 901(a) (emphasis added).

The easiest way of authenticating this book is to have its author testify. But Plaintiff effectively eliminated that method of authentication by voluntarily withdrawing Eugene Schwartz, the stated author, as a witness in its case.[2]

The only "foundation" Plaintiff stated as its offer of proof for Exhibit 89 was the SCUSD interrogatory response, as quoted in Section I-A above. On its face, this interrogatory response does nothing to authenticate the document that Plaintiff presented as Exhibit 89 as being all or any portion of a book by that title or that such a book was actually written by a person named Eugene Schwartz. Plaintiff offered no other evidence that Exhibit 89 was what it purported to be. Yet even if the exhibit had been properly authenticated, the serious hearsay flaw underlying this entire document renders it independently inadmissible, as discussed in Section I-B immediately below. *See* 5 J. B. Weinstein, WEINSTEIN'S Evidence, ¶ 901(a)[02], at 901-28 (1996) ("A document is not admissible simply because it has been authenticated. For example, if offered to prove the truth of assertions made in it, the document will need to meet hearsay requirements.")

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TO BE READ AT TRIAL," dated September 6, 2005.

[2] *See* Court's pretrial conference order of April 20, 2005, p. 6, n. 3, which cites to "Pl.'s Opp'n to Defs.' Mot. In Limine 13 at 1 n. 1" as evidence that Plaintiff withdrew the name of this witness. (*See also*, the name of Eugene Schwartz which is crossed off on Plaintiff's Witness List attached to the Court's order of April 20, 2005.)

And, at a more fundamental level of foundational (*see* the discussion in Sections I-F and I-G below), Plaintiff demonstrated its inability to establish foundational relevance that the exhibit was what Plaintiff was asserting it to be at the time of trial, i.e., [alleged] stand-alone proof that anthroposophy is a religion.

**C. OBJECTION: Hearsay -- FED. R. EVID. 801(c), 802 and 805.**

**1. Defendants object to Exhibit 89 on the ground of hearsay and hearsay within hearsay.**

Defendants object to Plaintiff's proffered Exhibit No. 89 on the ground that it is inadmissible hearsay with no applicable exception. Federal Rule of Evidence 801(c) states: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Federal Rule of Evidence 802 states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Federal Rule of Evidence 805 states: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

Plaintiff is offering this exhibit in the form of the author's out-of-court statements as evidence of the truth that Rudolf Steiner held particular spiritual-sounding views. The policies of unreliability and unfairness that underlie the rule of hearsay exclusion are present here. The plaintiff did have the book's author on its final witness list. Accordingly, that author did not testify to establish a foundation for his stated conclusions or for any alleged expertise the author may claim to have about philosophy, religion or anthroposophy. That author is unavailable for cross-examination. The author's statements in Exhibit No. 89 are therefore inadmissible hearsay, pure and simple -- without any applicable exception.

Internally, the book is also replete with hearsay within hearsay in the form of quotations and paraphrasing of statements allegedly made elsewhere by Rudolf Steiner.[3] Near the

[3] The following are locations of some of the quotations of or paraphrasing of alleged statements by Rudolf Steiner that appear in Plaintiff's Exhibit 89: page 5 (last 3 sentences) through the first paragraph of page 6 (note especially the sentence that begins, "Rhythm, Steiner tells us, ...."); page 13 obviously is

end of the exhibit, on page 64, the author admits how heavily he had been referring to [out-of-court] statements by Steiner, by stating, "For the umpteenth time, I'll cite Steiner, '…."" Plaintiff's Exhibit 89, p. 64.

**2. Plaintiff's citation of SCUSD's interrogatory response making reference to the "SURVIVAL GUIDE" does nothing to invalidate the effect of the hearsay rule.**

At the trial on September 12, 2005, Plaintiff asserted that its Exhibit 89 (SURVIVAL GUIDE) is not hearsay because SCUSD's interrogatory response constitutes an admission by SCUSD as a party opponent rather than hearsay under Federal Rule of Evidence 801(d)(2). Plaintiff appeared to be claiming that this interrogatory response somehow constitutes a "statement of which the party has manifested an adoption or belief in its truth," under subparagraph (B) of rule 801(d)(2). FED. R. EVID. 801(d)(2)(B). But a mere statement about possession and the availability of the book to teachers does not amount to an admission by the District that the entire contents of an entire book are true and are adopted as the statements of the District itself. At most, the interrogatory response indicates that the SURVIVAL GUIDE was available as a mere reference book, along with many other books. There is no further statement in the response indicating that the teachers were informed that they were expected to read it, let alone follow its teachings and accept them as the District's own statements. The interrogatory response simply does not extend that far – by any stretch of any reasonable person's imagination.

**D. OBJECTION: Lack of foundation for personal knowledge – FED. R. EVID. 602 and 104(b).**

Federal Rule of Evidence 602 states: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses."

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attempting to paraphrase contents of Steiner's book, KNOWLEDGE OF HIGHER WORLDS; the last sentence of page 14 and the first two paragraphs of page 15 include paraphrasing and directly quoted words of Steiner; page 20 paraphrases "remarks" allegedly made by Steiner; and other similar paraphrasing or quotes from Steiner also appear on pages 27, 28, 30, 39, 46, 50 and 54.

If all this book is supposed to do in this case is show the personal views of an individual named Eugene Schwartz, it is irrelevant (see discussion of relevance in Sections I-F and I-G below). But Plaintiff obviously wanted this exhibit to serve a different purpose – to establish the views of Rudolf Steiner indirectly, and thereby establish the views of anthroposophists in general indirectly, and further establish that any such views constitute a religious creed or dogma--indirectly. This exhibit cannot possibly satisfy Plaintiff's heavy expectation for it -- since Plaintiff supplied no foundation that the purported author of the exhibit, Eugene Schwartz, had any basis for personal knowledge. Without such foundation, there is no way to verify that he is able to accurately summarize and paraphrase the various viewpoints of Rudolf Steiner, a philosopher whose writings are difficult to say the least, or to establish that such views constitute a creed or dogma that anthroposophists of today collectively accept or are expected to accept.

**E.** **OBJECTION: Lack of any foundational showing that the author's conclusory statements are admissible as lay opinions, or as expert opinions (FED. R. EVID. 701, 702-705, 104(b) and 1008).**

**1. Texts of Fed. R. Evid. 701 (lay opinion) and 702-705 (expert opinion).**

Federal Rule of Evidence 701 states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." FED. R. EVID. 701.

Federal Rule of Evidence 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

Federal Rule of Evidence 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible

> in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

FED. R. EVID. 703.

Federal Rule of Evidence 704 states:

> (a) Expect as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

FED. R. EVID. 704.

> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

FED. R. EVID. 704.

Federal Rule of Evidence 705 states:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

FED. R. EVID. 705.

**2. <u>Plaintiff provided no foundation for admission of lay or expert opinions by the author of Exhibit 89.</u>**

The hearsay statements of the author of this exhibit are also inadmissible as lay opinion or as expert opinion in the absence of any evidence about who the author is, what his experience is, and whether he possesses the qualifications to serve as an expert witness on the issues of religion, philosophy and/or anthroposophy at Phase I of the trial. Indeed, the book's author expressly disclaims any intention of making broad pronouncements on behalf of any group. The first page of Exhibit No. 89 (numbered viii) states:

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> I want to stress that what follows are, indeed, my words. No opinions are expressed in this booklet other than my own. Its conception and mode of exposition represent a completely independent endeavor, not linked with any institution in the Waldorf movement—including, above all, my own school."

Plaintiff's Proffered Exhibit No. 89, p. viii (with page 1 of the exhibit). In short, the hearsay conclusions stated by the author of this exhibit are worthless as opinions in the absence of foundation for admissible lay or expert opinion.

**F. OBJECTION: Lack of relevance and any foundation for conditional relevance (FED. R. EVID. 401-402, 104(b)).**

**1. Text of pertinent rules.**

Federal Rule of Evidence 104(b) states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." FED. R. EVID. 104(b).

Similarly, Federal Rule of Evidence 1008 states in pertinent part: "When the admissibility of other evidence of contents of writings, recordings or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine. ... " FED. R. EVID. 1008.

Federal Rule of Evidence 401 states: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequences to the determination of the action more probable or less probable than it would be without the evidence." And Rule 402 states, "[a]ll relevant evidence is admissible except as otherwise provided[.]" FED. R. EVID 402. By defining admissible evidence in this manner, irrelevant evidence does not fall within the rule's scope of admissibility.

**2. The SURVIVAL GUIDE (Exhibit 89) is not relevant to the important threshold issue of the trial of whether anthroposophy is a religion.**

Exhibit 89 is not admissible because it is irrelevant to the threshold issue to be determined at Phase I of whether anthroposophy is a religion – i.e., the important threshold issue upon which the relevance of all remaining issues is dependent (Trial Phase II issues). Plaintiff's

offer of proof on Exhibit 89 did not include the names of any witnesses that Plaintiff could call to testify who would even try to claim that the SURVIVAL GUIDE constituted a learned treatise on the nature of anthroposophy or that the book included any careful delineation of what the central tenets of anthroposophy are, if indeed, there are any such central tenets. Instead, its title (THE WALDORF TEACHER'S SURVIVAL GUIDE), its content, and its causal presentation of fictional conversations between two Waldorf educators (rather than between scholars with expertise in philosophy or religion), reflects that the book is intended to be a very practical, hands-on set of suggestions for Waldorf teachers to carry out their work.[4] In short, this book has zero utility in assisting the trier of fact in determining whether anthroposophy is a religion for purposes of the Establishment Clause and the other provisions of the state constitution that are involved in this case.

**G. OBJECTION: Additionally and alternatively, Plaintiff failed to establish a foundation of conditional relevance of the SURVIVAL GUIDE on the issue of whether anthroposophy is a religion.**

Anthroposophy is the alleged "religion" in Plaintiff's case. At trial, PLANS was unable to produce the required foundation for relevance of Exhibit 89 (under Federal Rules of Evidence, Rules 104(b), 402 and 1008). Since PLANS is the plaintiff, it bore the burden of proof in establishing what anthroposophy is in the first place, and whether anthroposophy is a religion. Any mere showing that Rudolf Steiner or any of his followers, including a person named Eugene Schwartz, personally held spiritual beliefs does not suffice.

PLANS was required, as a foundational matter, to prove that any statement of spiritual beliefs or conclusions contained in Exhibit 89 somehow constitute beliefs that are

[4] See the practical rather than theoretical suggestions for teachers contained in Exhibit 89 on the following subjects: (1) time management, pp. 9–14 of Exhibit 89; (2) improving student punctuality, pp. 22–24; (3) smiling and radiating enthusiasm in the classroom, p. 22; (4) homework assignments, pp. 25–26; (5) increasing the artistic quality of children's work, p. 30; (6) working with the difficult child, pp. 31–33; (7) teacher self-assessment in looking for patterns in the kinds of students who elect to leave, pp. 33–34; (8) addressing parental pressure to alter the Waldorf developmental approach in the lower grades, pp. 34–36; (9) enhancing the learning of language arts in the upper grades, pp. 37–41; (10) improving interpersonal relations among the teachers on the faculty, pp. 43–45; (11) addressing parental complaints, pp. 46–59; and (12) strengthening each teacher's own, unique perspectives and individuality, pp. 59 and 67.

***components*** of an anthroposophical "***creed***" or ***canon of ethics***[5] -- rather than the personal beliefs of Rudolf Steiner and/or a person named Eugene Schwartz. But without that kind of showing, Exhibit 89 does nothing to assist Plaintiff in supplying the requisite foundation for relevance of Exhibit 89 on the important threshold religion issue in this case.

## II.
## DEFENDANTS JOINT MOTION FOR JUDGMENT AGAINST PLAINTIFF UNDER FEDERAL RULE OF CIVIL PROCEDURE 52(C)

### A. Legal standards.

#### 1. Federal Rule of Civil Procedure 52(c) provides the Court with discretion to grant a motion for entry of final judgment before the close of all of the evidence at a non-jury trial if specified criteria are met.

Federal Rule of Civil Procedure 52(c) for "Judgment on Partial Findings" provides for discretionary entry of judgment before the close of all of the evidence. The rule states in pertinent part:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. ...

FED. R. CIV. P. 52(c). The Advisory Committee Note discussing the 1991 Amendment, in which subdivision (c) was added, makes the following statement: "[Subdivision (c)] parallels the revised Rule 50(a), but is applicable to non-jury trials. It authorizes the court to enter judgment *at any time* that it can appropriately make a dispositive finding of fact on the evidence." FED. R. CIV. P. 52(c), Advisory Committee Notes (emphasis added). "Granting a motion under Rule 52(c) at the trial stage is a decision on the merits in favor of the moving party." Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2573.1, p. 496.

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[5] The Ninth Circuit's opinion in *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996) demonstrates that the absence of certain religious indicia, such as a creed and/or a set of moral obligations, is properly considered in determining whether something is a religion: "The New Age proponents cited by plaintiffs clearly indicate that there is no New Age organization, church-like or otherwise; no membership; no moral or behavioral obligations; no comprehensive creed; no particular text, rituals, or guidelines; no particular object or objects of worship; no requirement or suggestion that anyone give up the religious beliefs he or she already holds. In other words, anyone's in and 'anything goes.'" *Id.* at 1229-30.

**2. Rule 52(c) permits entry of final judgment in a non-jury trial when plaintiff has failed to carry an essential burden of proof.**

"Rule 52(c), effective December 1, 1991, replace[d] part of FED. R. CIV. P. 41(b), which formerly authorized dismissal at the close of plaintiff's case-in-chief in a non-jury trial if plaintiff failed to carry an essential burden of proof." *Carter v. Ball*, 33 F.3d 450, 458, n. 10 (4th Cir. 1994). "The case law developed under Rule 41(b) [of the Federal Rules of Civil Procedure] between its promulgation in 1938 and the 1991 amendments to Rule 41(b) and Rule 52(c) is applicable under Rule 52(c)." Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2573.1, p. 494. Thus, a plaintiff's failure to carry its burden during its case-in-chief remains as a ground for judgment of dismissal. The early dispositive nature of the rule has been explained as follows: "The text of the rule is clear. When a party has finished presenting evidence and that evidence is deemed by the trier insufficient to sustain the party's position, the court need not waste time, but, rather, may call a halt to the proceedings and enter judgment accordingly...." *Feliciano v. Rullan*, 378 F.3d 42, 59 (11th Cir. 2004).

**3. A party can be "fully heard" for purposes of rule Fed. R. Civ. P. 52(c) based on an offer of proof without live testimony.**

The Ninth Circuit has recognized that a dispositive finding sufficient to support entry of judgment under Rule 52(c) can be made based the trial court's assessment of an offer of proof: "We conclude the offer of proof was an appropriate means for the court to receive and consider Granite's proffered evidence. The court was not required to receive live testimony." *Granite State Insurance Co. v. Smart Modular Technologies, Inc.*, 76 F.3d 1023, 1031 (9th Cir. 1996).

**4. Any judgment entered under FED. R. CIV. P. 52(c) must be supported by findings of fact and conclusions of law, as required by FED. R. CIV. P. 52(a).**

Federal Rule of Civil Procedure 52(c) further states: ". . . Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule." Subparagraph (a) also establishes "clearly erroneous" as the standard of review for the Court's findings of fact FED. R. CIV. P. 52(a). The "clearly erroneous standard prohibits the

reviewing court from "substitut[ing] our judgment if conflicting inferences may be drawn from the established facts by reasonable men, and the inferences drawn by the trial court are those which could have been drawn by reasonable men." *Lundgren v. Freeman*, 307 F.2d 104, 113 (9th Cir. 1962). Thus, no automatic deference should be extended to inferences from the non-moving party's evidence.

Conclusions of law under Rule 52 take a different standard of review than the standard applied to findings of fact. "A district court's determinations on questions of law and on mixed questions of law and fact that implicate constitutional rights are reviewed de novo." *Perry v. Los Angeles Police Dept.*, 121 F.3d 1365, 1368 (9th Cir. 1997).

Some intermingling of findings of fact at the evidentiary level, on one hand, and conclusions of law, on the other, could easily occur -- especially in a case like this requiring the application of various provisions of law to particular facts. But any such intermingling, even if it were to occur, would not invalidate a judgment entered under Rule 52 if it were otherwise sound:

> The fact that the district court intermingled some of its findings of fact with its conclusions of law is of no significance. We look at a finding or a conclusion in its true light, regardless of the label that the district court may have placed on it. [Citations omitted.] *In other words, the findings are sufficient if they permit a clear understanding of the basis for the decision of the trial court, irrespective of their mere form or arrangement.*

*Tri-Tron International v. Velto*, 525 F.2d 432, 435-36 (9th Cir. 1975) (emphasis added).

**B. Arguments.**

**1. Plaintiff was the party with the burden of proof on the issue of Trial Phase I in this bifurcated trial – the issue of whether anthroposophy is a religion**

As the Plaintiff, PLANS carries the evidentiary burden of proving that anthroposophy is a religion. *Alvarado v. City of San Jose*, 94 F.3d 1223, 1226-1231 (9th Cir. 1996).

**2. A failure by the Plaintiff to satisfy its burden of proof on the issue of whether anthroposophy is a religion is fully dispositive of this action.**

The issue for Trial Phase I is whether anthroposophy is a religion. This is a threshold, dispositive issue that must be resolved first. For example, in *Alvarado v. City of San*

*Jose* (94 F.3d 1223 (9th Cir. 1996), the Ninth Circuit stated: "Before turning to the issue of whether the statue violates the Establishment Clause, or the religion clauses of the California Constitution, *we must first consider* whether the object in question can be defined as "religious" for establishment purposes." *Id.* at 1226-27 (emphasis added). It is for this very reason that this Court bifurcated the trial of this case. Moreover, Plaintiff did not object to this bifurcation.

As stated by the Plaintiff and memorialized in the Court's final pretrial conference order of April 20, 2005, the alleged "religion" that is asserted to be part of the Defendants' use of Waldorf-inspired activities and curriculum at the subject schools is anthroposophy. Rather than targeting a particular symbol or activity as "religious," the Plaintiff in this case claims that anthroposophy as a whole is a "RELIGION" and that this alleged religion permeates all of Waldorf education, including the mere usage of Waldorf-inspired methods in these particular public schools. Thus, this Court has correctly identified the threshold issue in this case (for Trial Phase I) as the issue of whether anthroposophy is a religion – within the meaning of the federal Establishment Clause and the California constitutional provisions involved in this case.

**3. Although Plaintiff was "fully heard" on the issue of whether anthroposophy is a religion, it failed to satisfy its burden of proof.**

Plaintiff failed to introduce any admissible evidence to satisfy its burden of proving that anthroposophy is a religion for Establishment Clause purposes. At the trial, the Court requested PLANS make an offer of proof as to how it would establish that threshold issue. Plaintiff's counsel initially admitted it had no witnesses or evidence. (See Reporter's Transcript ("RT") at 3:6-10.) PLANS sole proffer was the introduction of its proposed Exhibit No. 89 by way of SCUSD's response to interrogatories, wherein it listed that it had purchased a book entitled, "THE WALDORF TEACHER'S SURVIVAL GUIDE," by Eugene Schwartz. (RT at 5:22-25 and 6:1-19.) The Court gave PLANS the opportunity to come forward with other evidence on the issue of whether anthroposophy is a religion. (See RT at 7:13-25; 14:24-25.) But PLANS elected to rest its case. (See RT at 15:22-24.)

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**4. Even if Plaintiff's Exhibit No. 89 (SURVIVAL GUIDE) were to be admitted into evidence, its contents are insufficient to satisfy Plaintiff's burden of proof.**

**a. Unlike Fed. R. Civ. P. 50(a) for jury trials, Rule 52(c) permits the Court – as trier of fact – to weigh the proffered evidence.**

Unlike Federal Rule of civil Procedure 50(a) for jury trials, Rule 52(c) for non-jury trials permits the Court -- as the trier of fact -- to consider the evidence in a light most favorable to the nonmoving party: ". . . Rule 50(a) [applicable to jury trials only] requires the court to consider the evidence in the light most favorable to the plaintiff, *Payne v. Milwaukee County*, 146 F.3d 430, 432 (7th Cir. 1998), whereas Rule 52(c) allows the district court to weigh the evidence to determine whether the plaintiff has proven his case." *Ortloff v. United States*, 335 F.3d 652, 660 (7th Cir. 2003).

**b. Plaintiff's evidence at Phase I is insufficient even if Exhibit 89 is admitted into evidence.**

Even if Plaintiff's Exhibit 89 were to be admitted into evidence over Defendants' objections as stated in Section I above, this Court must still find that Plaintiff has failed to satisfy its burden of proof on the threshold issue of whether anthroposophy is a religion. The Court must do so for all the same reasons that Defendants argued in Sections I-F and I-G above that Exhibit 89 is not relevant to the threshold religion issue, which sections are incorporated into this argument by reference. Therefore, by the weight of the evidence, no reasonable trier of fact could possibly conclude that Exhibit 89, a casually worded, practical guide for Waldorf teachers, constitutes proof that anthroposophy is a religion for the important constitutional purposes involved in this litigation.

## III. CONCLUSION

Because of PLANS' complete failure to satisfy its evidentiary burden at Phase I of the trial on the threshold and independently dispositive issue of whether anthroposophy is a religion, judgment should be entered forthwith against Plaintiff PLANS, Inc. and in favor of each of the two defendants, Sacramento City Unified School District and Twin Ridges Elementary School District.

## IV.
## FINDINGS OF FACT AND CONCLUSIONS OF LAW

**A. Findings of Fact:**

1. This Court bifurcated the issues for trial in this case, in agreement with the parties, in its pre-trial order dated April 20, 2005. The threshold issue of whether anthroposophy is a religion for Establishment Clause purposes was to be adjudicated before the remaining issues in this case.

2. At the final pretrial conference on February 11, 2005, the Court excluded Betty Staley and Crystal Olsen from Plaintiff's witness list since they were Defendants' previously disclosed experts, they were listed by Plaintiff as "Defendants Experts," and were not disclosed by Plaintiff's as expert witnesses prior to the deadline for disclosure of expert witnesses on April 16, 2004.

3. At or before the final pretrial conference on February 11, 2005, Plaintiff voluntarily withdrew Eugene Schwartz from its witness list.

4. At the trial on September 12, 2005, Plaintiff's counsel admitted that PLANS had not made any motion to amend the Court's scheduling order under Federal Rule of Civil Procedure 16. (RT at 3:20-23.)

5. At the start of trial on September 12, 2005, Plaintiff was required to make an offer of proof as to how it would prove anthroposophy to be a religion for Establishment Clause issues with the exhibits and witnesses it had on its exhibit and witness lists.

6. Based upon its counsel's statements at trial on September 12, 2005, Plaintiff intended that Exhibit 89 be introduced into evidence in connection with the issue of whether anthroposophy is a religion.

7. Plaintiff's offer of proof consisted solely of reading into the record Defendant SCUSD's Response to Interrogatories, Set No. 1, Interrogatory No. 9. This interrogatory requested that SCUSD "identify all DOCUMENTS, in the possession or control of the answering defendant, and its agents, including all DOCUMENTS in the possession or control of individual teachers and administrators, which relate to training or instruction in Waldorf

teaching methods or Waldorf curriculum." SCUSD's response included a book entitled, "THE WALDORF TEACHER'S SURVIVAL GUIDE," written by Eugene Schwartz.

8. Plaintiff claimed that this interrogatory response was an adoptive admission on behalf of SCUSD regarding "all sorts of religious basis for the Waldorf school system." (RT at 6:5-10.)

9. Plaintiff did not have any witnesses to testify concerning the contents of this book, including its author whom Plaintiff previously withdrew as a witness.

10. Plaintiff put forth no further exhibits or proposed witnesses on the issue of whether anthroposophy is a religion for Establishment Clause issues.

11. Plaintiff rested its case on the threshold issue of whether anthroposophy is a religion.

**B. <u>Conclusions of Law:</u>**

1. Plaintiff failed to carry its evidentiary burden of establishing that anthroposophy is a religion for purposes of the Establishment Clause of the First Amendment to the United States Constitution or the other California constitutional provisions involved in this case, as stated in the Court's pretrial conference order dated April 20, 2005.

2. The Court finds that anthroposophy is not a religion for Establishment Clause purposes.

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3. Because the issue of whether anthroposophy is a religion is a threshold issue upon which the relevance of all other issues in this case depends, Plaintiff's failure to satisfy its burden of proof on the threshold issue is dispositive of this action.

Dated: September 16, 2005

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

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

Dated: September 16, 2005

GIRARD & VINSON, LLP

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

**PROOF OF SERVICE**

I, Bao Xiong, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814-4416. On September 16, 2005, I served the within documents:

**DEFENDANTS' JOINT OBJECTIONS TO PLAINTIFF'S EXHIBIT 89; DEFENDANTS' JOINT MOTION FOR JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 52(c) -- WITH PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

☐ 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.

☒ 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.

☐ by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ 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

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

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

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal 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 September 16, 2005, at Sacramento, California.

Bao Xiong