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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PLANS, Inc., Plaintiff, vs. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, TWIN RIDGES ELEMENTARY SCHOOL DISTRICT, DOES 1-100, Defendant	Case No.: CIV. S-98-0266 FCD PAN Date: April 1, 2005 Time: 10:00 a.m. Place: Courtroom 2 OPPOSITION TO DEFENDANTS' JOINT MOTION IN LIMINE NO. TWELVE (12) TO EXLUDE DOCUMENTS

I. INTRODUCTION

Defendants fail to make a *prima facie* showing for the exclusion of any evidence. They fail to demonstrate, with my specificity, a particular discovery request that was violated. Instead, they ask this court to assume they asked the right question, and that they offered exhibit is outside the scope of the response. Defendant's Motion is really an untimely discovery Motion, and not adequate as that.

Plaintiff PLANS, Inc. opposes Defendants' Motion In Limine No. Twelve on three basis: 1.) Plaintiff has, during discovery, identified and produced all documents to Defendants' for which they now complain; 2.) Defendants have waived their right to bring a discovery motion for new sanctions and therefore fails on its face as an untimely motion for post-discovery sanctions, and 3.) Assuming, *arguendo*, such a motion could be brought at present, Defendants' have failed to meet any burden for

application of Federal Rules of Civil Procedure, Rule 37(c) (hereinafter referred to as "Rule 37(c)") making no showing of a willful refusal to produce or identify documents.

II. ARGUMENT IN OPPOSITION

1. PLAINTIFFS HAVE PRODUCED AND IDENTIFIED ALL DOCUMENTS DURING DISCOVERY WHICH ARE CONTAINED ON PLAINTIFF'S EXHIBIT LIST.

Since Defendants' fail to attach any interrogatories or requests for production of documents, including responses, to which they complain, it is impossible to understand what they purport is a discovery violation. Plaintiff answered all discovery to the satisfaction of Defendant's, as they did not seek further responses or sanctions. Plaintiff's responses placed Defendant's on notice of all relevant documents concerning the issues at trial would be disclosed, which has now been done. Since the documents identified need not be deposed, but only read, the only issue should be their relevancy at trial. Defendants' have not argued that the documents are not relevant.

2. RULE 37(C) PROVIDES ONLY FOR REMEDIES AVAILABLE FOR WILLFUL BAD FAITH AT THE INCEPTION OF THE ACTION, DEFENDANTS' HAVE WAIVED THEIR RIGHT TO BRING A MOTION FOR SANCTIONS FOR DISCOVERY DEFFICIANCIES.

Rule 37(c), contrary to representations in Defendants' motion, relates solely to sanctions available to the trial court during discovery. Indeed, the rule applies only to the failure to disclose evidence during the initial disclosures of information at an informal conference of the parties, before formal discovery begins. For the exclusionary rule to be triggered it must be in response to failures to follow Federal Code of Civil Procedure Rules 26(a) [Initial disclosures at informal conference of the parties, in preparation for a discovery plan], 26(e)(1) [supplements disclosures where a party learns, in a material respect, of incomplete or inaccurate information and that information has not otherwise been made known to the other parties], and 26(e)(2) [seasonal amendment of discovery responses based on the same criteria in the preceding rule 26(e)(1)].

Indeed, the Advisory Committee Notes to Rule 26(a) (1) (B) regarding disclosure of information regarding documents at the party conference illuminates the purpose behind the rule:

> "Subparagraph (B) is included as a substitute for the inquires routinely made about the existence and location of documents and other tangible things in the possession, custody and control of the disclosing party. Although, unlike (disclosures at the eve of trial), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, the extent identified during initial investigation, the nature and location of potentially relevant documents and records… As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items **then known to the party**, whether or not supportive of its contentions in the case. (*Emphasis added*).
>
> … This obligation applies only with respect to documents **then reasonably available to it** …(*Emphasis added*).
> (Fed.R.Civ.P. 26(1)(B) advisory committee's notes (1993))

The time for objection to any such disclosures made at the inception of this suit have long since past, as have sanctions based on discovery responses that Defendants' deemed inadequate. Thus, Defendants' Motion In Limine No. Twelve clearly represents a misreading of the sanction of exclusion of evidence pursuant to Rule 37(c) as applied to the Rule 26 subsections referenced therein.

3. DEFENDANTS' HAVE FAILED TO MEET ANY BURDEN FOR APPLICATION OF RULE 37(C) MAKING NO SHOWING OF A WILLFUL BAD FAITH REFUSAL TO PRODUCE OR IDENTIFY DOCUMENTS.

Assuming, *arguendo*, such a motion could be brought at present, Defendants' have not even proffered a showing Plaintiffs acted in bad faith and willfully to withhold the identification of documents such that the burden would shift to Plaintiffs to show substantial justification or harmlessness. They cite *Yeti By Molly Ltd. V. Deckers Outdoor Corp*., 259 F.3d 1101 (9th Cir. 2001), *Von Bremer v. Whirlpool Corp*., 536 F.2d 838 (9th Cir. 1976), for the proposition that it is Plaintiff's burden under Rule 37(c) to demonstrate a lack of bad faith or willfulness. This is not so. The court in *Yeti, supra* states:

> "Two express exceptions ameliorate the harshness of Rule 37(c)(1): The information may be introduced if the parties' failure to disclose the required information is substantially justified or harmless." (*Ibid*. at 1106).

Yeti was also factually far a field from the case at bench. There, a district court properly excluded testimony of defendant's expert witness as a sanction for failing to provide the opposing party the expert's report for two and one-half years after having been identified in the expert's deposition, well after the close of discovery and only a month prior to trial.

Similarly, *Von Bremer*, *supra*, which Defendant's cite "generally", is another example where the excluded evidence was produced on the eve of, and during trial. Von Bremer involved numerous other problems in what began as a patent suit. After the initial law suit was dismissed for failure to prosecute, it was reinstated and contractual documents pivotal to plaintiff's case were not produced until the beginning of and during trial which had never been previously disclosed.

Moreover, willfulness and bad faith have been typically been applied as the standard for dismissal of the action, or exclusion of evidence tantamount to dismissal. (See, *Crown Life Insurance Company v. Craig,* 995 F.2d 1376, 1382 (7th Cir. 1993), questioning the reasoning in *Von Bremer, supra.*)

Defendant's Motion cannot meet this standard, as the Motion does not identify the perpetrated discovery that was violated.

III. CONCLUSION.

The threshold question here is whether Defendants' have any right to seek exclusion of documents they claim were not disclosed after they had an opportunity to review all of the documents in question. The Declaration of Michelle L. Cannon, accompanying Motions In Limine Eleven, Twelve, and Thirteen, concedes that numerous interrogatories and requests for admissions were propounded upon Plaintiffs. They were followed by motions to compel, requests for sanctions (including dismissal), and ultimately were answered and supplemented. If the answers to those discovery requests were in adequate Defendants' literally had years to bring further discovery to bear and clear up any ambiguities. They never sought the sanction contained in Rule 37(c) until now. The one sanction they did request was dismissal, which was denied.

In any event, the instant motion is not timely as it relates to Rule 37(c), as discussed above. If Defendants' a surprised by the inclusion of several documents that were previously produced, if not identified specifically, that is their burden. With the ample time and personnel to review what is on the current Plaintiffs' list no harm will result in proceeding with the relevant documents and no undue delay will result. If the court is of the opinion that an affirmative duty existed to disclose, with particularity, every document that the Plaintiffs' intended to use at trial, before discovery began (*See*, Rule 27, as discussed *supra*), then the failure to identify with particularity 271 documents at that time was substantially justified and is harmless to a party intricately involved in the litigation for over half a decade.

Plaintiffs' respectfully request denial of Defendant's Motion In Limine Twelve.

DATED: March 18, 2005

/s/ Scott M. Kendall

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Attorney for Plaintiffs
PLANS, Inc.