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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PLANS, Inc., Plaintiffs, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, TWIN RIDGES ELEMENTARY SCHOOL DISTRICT, DOES 1-100, Defendants.	Case No. CIV. S-98-0266 FCD PAN DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION Date: July 30, 2004 Time: 10:00 a.m. Place: Courtroom 2

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Defendants Sacramento City Unified School District ("SCUSD") and the Twin Ridges Elementary School District ("TRESD") (hereafter collectively "School Districts") hereby file their Opposition to Plaintiff's Motion for Summary Judgment, or, in the Alternative, Summary Adjudication filed by Plaintiff PLANS, Inc. (hereafter "PLANS").

The School Districts respectfully assert that: (1) anthroposophy is not a religion for Establishment Clause purposes; and (2) even if anthroposophy is deemed a religion, these public schools do not teach anthroposophy, but do instruct California-approved curriculum utilizing entirely permissible *instructional methods* adapted for use in public schools. John Morse Waldorf Methods Magnet School (hereafter "John Morse") includes a fully credentialed principal, 15 certificated teachers, 10 classified staff, and educates approximately 300 children. (Eining Decl. ¶ 8.) Yuba River Charter School (hereafter "Yuba River") similarly educates approximately 240 students, and has 10 credentialed teachers, 20 classified staff, and 5 administrative staff. (Paquette Decl. ¶ 4.) PLANS, by summary judgment, invokes the injunctive authority of this court to completely shut down these schools, as well as presumably any other similar school chartered by TRESD. (PLANS' Points & Authorities 20-21.)

This court previously dismissed this lawsuit for lack of standing, but the Ninth Circuit Court of Appeals reversed on the basis of a PLANS analogy comparing these schools to hypothetical publically funded Catholic charter schools. *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 319 F.3d 504 (9th Cir. 2003). The Ninth Circuit found taxpayer "pocketbook" standing, but only on the basis of PLANS' claimed constitutional violation, e.g., an objection that the *entire curriculum* of the schools is inherently religious. *PLANS*, 319 F.3d 504.[1] PLANS' summary judgment motion now falls short of its claim before the Ninth Circuit that the *entire curriculum* of these public schools is inherently religious, again citing limited instances of particular events, school activities, programs, or

[1]"Because PLANS does not challenge a specific program or activity, but rather the Waldorf school *curriculum as a whole* and because the schools are supported by a measurable amount of public funds, we find that PLANS enjoys taxpayer standing to proceed" *id*. at 505 (emphasis added); "[t]his case is no different from a situation in which a school district uses public monies to fund the operation of a parochial school, e.g., setting up a magnet or charter Catholic school, where there would be no question as to taxpayer standing to challenge such funding." *Id*. at 508 (emphasis added).

even non-school events to allege unconstitutionality. (PLANS Undisputed Facts, nos. 157, 163, 164, 167, 169, 170, 176.) PLANS alleges that anthroposophy is a religion for Establishment Clause purposes by citing only inadmissible documents based upon (often inaccurately paraphrased) random quotes extracted from books by Rudolf Steiner. (PLANS Undisputed Facts, nos. 1-114; Defendants' Objection to Evidence.) PLANS does not address at all the second "advancement" or "endorsement" prong of the test in *Lemon v. Kurtzman,* 403 U.S. 602 (1971) ("*Lemon*") (PLANS Points & Authorities, passim; see also this court's Memorandum and Order regarding summary judgment of September 24, 1999 ("Summary Judgment Order"), and Amended Pretrial Conference Order of April 24, 2001 ("Pretrial Order") 3-4, ¶ 2-4.) PLANS relies solely upon the third *Lemon* "excessive entanglement" prong in seeking summary judgment. (PLANS Points & Authorities 18-20.) Most critically, despite full discovery rights, PLANS cites *no curriculum evidence whatsoever from either school district* to prove the sweeping "inherently religious curriculum" claim propounded to the Ninth Circuit. (PLANS Undisputed Facts, nos. 115-176.)

The School Districts, on the other hand, will proffer expert and percipient witness testimony from distinguished educators to prove (1) anthroposophy is a philosophy, not a religion (Sloan Decl. ¶ 14-57), and (2) the public schools at issue teach secular curriculum within the California curriculum frameworks and are not religious. (Anderson Decl. ¶ 8, 10-11.) Administrators, teachers, and parents from both School Districts will testify to the curriculum not being religious. (Eining, Chavez, Kuchera, Messier, Paquette, and Lawrence Decls.) The School Districts will bring to this court at trial the entire curriculum, attached now in summary description as Exhibits B and C to the declaration of Robert Anderson.

Defendants respectfully assert that Ninth Circuit case law, and the admissible evidence when applied to this court's specific pretrial order setting forth the matters subject to proof (Pretrial Order 2-7, ¶ 1-11), will support an ultimate defense judgment that anthroposophy is a "philosophy," not a "religion." Admissible evidence and case law as well will support a defense judgment regarding the *Lemon* "second prong." (Pretrial Order 3, ¶ 2-3.) Further, as a matter of law, there can be no "excessive entanglement" pursuant to the *Lemon* "third prong" in these factual circumstances, further supporting a defense judgment. (Pretrial Order 3-4, ¶ 4-11.) Further, PLANS is not entitled to the

"shut-down" injunctive relief requested. Finally, PLANS now submits *no evidence whatsoever* regarding Defendant SCUSD or John Morse so that Defendant is per se entitled either to trial or to be dismissed from this action forthwith. The School Districts request at a minimum PLANS' motion be denied and this matter proceed to trial.

II. BRIEF PROCEDURAL HISTORY.

On May 6, 1999, the School Districts filed a Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues including, inter alia, the request for dismissal on the grounds that PLANS lacked taxpayer standing. The School Districts assumed anthroposophy was a religion only for the purposes of their motion, because that issue (and facts) was clearly in dispute. This assumption itself was not "employed lightly." (Summary Judgment Order 17, n. 16.) This court granted summary adjudication in favor of School Districts on the "secular purpose" prong of the *Lemon* test (Summary Judgment Order 18-19, 25), but ruled disputed issues of fact existed on the second "advancement" or "endorsement" prong, and third "excessive entanglement" prong. (Summary Judgment Order 19-24.) This court denied summary judgment in pertinent part on the issue of standing (*id*.), but later dismissed on the basis of lack of taxpayer standing.

PLANS thereafter claimed at the Ninth Circuit this matter was analogous to a publically funded Catholic parochial school, and that the entire curriculum of these public schools was religious. *PLANS*, 319 F.3d at 507-508. The Ninth Circuit finding taxpayer standing on that basis reversed and remanded. *Id*. at 508.

This court subsequently twice granted PLANS and School Districts additional discovery in August and October 2003. This court has reiterated that its previous rulings and pretrial order remain in effect until modified by the court. That pretrial order recognizes this case involves issues of law and/or mixed issues of law and fact. (Pretrial Order 2.) PLANS' failure to respond to School Districts' discovery resulted in sanctions imposed by the magistrate[2] and an order to show cause regarding dismissal on December 9, 2003. On May 26, 2004, this court adopted the magistrate's . . .

[2]PLANS has never remitted the sanctions imposed by the magistrate.

eventual recommendation the case not be dismissed for failure of PLANS to respond to discovery requests propounded by School Districts.

III. POINTS AND AUTHORITIES.

A. STANDARD OF REVIEW.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party (*United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)), and draw all reasonable inferences in non-moving party's favor. *PLANS, Inc.,* 319 F.3d at 507*,* citing *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1097 (9th Cir. 2000). Once the moving party meets the requirements of Rule 56 by showing there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Genuine factual issues must exist that "can be resolved only by a finding of fact, because they may reasonably be resolved in favor of either party." *Id*. at 250. In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. *T.W. Elec. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 629, 630-631 (9th Cir. 1987), citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574 (1986); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991). The evidence presented by the parties must be admissible. FED. R. CIV. P. 56(e). Conclusory or speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49 (2d Cir. 1985); *Thornhill Publishing Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). The moving party's failure to provide a sufficient statement of uncontroverted facts is ground by itself for denial of the motion. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774-775 (9th Cir. 2002).

B. ANTHROPOSOPHY IS A PHILOSOPHY, NOT A RELIGION, FOR FIRST AMENDMENT ESTABLISHMENT CLAUSE PURPOSES.

Whether anthroposophy qualifies as a religion for Establishment Clause purposes is the threshold issue in this case. PLANS relies upon entirely inadmissible "evidence" to assert anthroposophy is a religion for purposes of the Establishment Clause. (PLANS Undisputed Facts, nos. 1-114.) This issue is just as disputed between the parties now as when this court set forth the factual disputes and legal standards in its pretrial order. (Pretrial Order 2-4, IV, A-D, VII 1.) The School Districts respectfully assert PLANS errs as a matter of evidence and law.

Turning to the School Districts' evidence, perhaps first and foremost, admissible evidence proves that a person who is a Christian, Jew, Muslim, Buddhist, Hindu, Marxist, or atheist can join as a member or participate in anthroposophical societies and remain atheist, agnostic, or adherent of a traditional sect or denomination. (Sloan Decl. ¶ 45, 56.) How can any group which includes atheists, agnostics, and devout believers alike among its membership be deemed a religion without stretching this key legal concept beyond any meaning? Further, anthroposophy does not describe itself as a religion; it does not claim a sacred scripture unique to itself; it does not have dogma, creed, canon law, or hierarchal structure; it does not have clergy; it does not have ceremonial functions or hold formal worship services; it does not have sacraments or similar rituals. (Sloan Decl. ¶ 45-56.) The testimony of Dr. Douglas Sloan, Professor Emeritus, Teachers College, Columbia University, one of School Districts' expert and percipient witnesses will place anthroposophy within the context of its roots in continental European education/philosophy. (Sloan Decl. ¶ 25-33). Dr. Sloan also places Rudolf Steiner among ancient to modern philosophers who might have influenced existing religions, but do not create religions.[3] (Sloan Decl. ¶ 36-41.) In the Establishment Clause context the Fifth Circuit

[3]For example, the Greek philosopher Aristotle (c. 384-322 B.C.E) significantly influenced Catholic theologian St. Thomas Aquinas (NINIAN SMART, WORLD PHILOSOPHIES 200-206 (Routledge 1999)), but Aristotle is undoubtedly a philosopher, not a religious figure. (NINIAN SMART, WORLD PHILOSOPHIES 124-157 (Routledge 1999) inclusive of Aristotle as philosopher; also *id*. at 138-141.) The Greek philosopher Plato (c. 428-348 B.C.E.) as well has been described as having an "immense influence on Christianity" (NINIAN SMART, WORLD PHILOSOPHIES 135-136 (Routledge 1999)), but without question was a philosopher. (NINIAN SMART, WORLD PHILOSOPHIES 124-157 (Routledge 1999)). Further, both Plato and Aristotle founded long-lived academies of philosophical inquiry, not religions. (NINIAN SMART, WORLD PHILOSOPHIES 135-136 (Routledge 1999).

Court of Appeals has colorfully stated, "Absent feathers, webbed feet, a bill, and a quack, this bird just ain't a duck!" *Doe v. Santa Fe Independent Sch. Dist.*, 168 F.3d 806, 822 (5th Cir. 1999). Similarly, PLANS can repetitiously call anthroposophy a "religion," but that does not make it so.

The School Districts recognize there exists an explicitly Christian church entitled the "Christian Community" which arose from Steiner's earliest lectures. (Sloan Dec., ¶43.) Although PLANS does *not* include the "Christian Community" organization within its Statement of Undisputed Facts (*id.*), it does mention this group in its Points & Authorities at page 9. However, the Christian Community Church is entirely separate from anthroposophy or related organizations. (Sloan Decl. ¶ 43.) PLANS has never claimed the School Districts are operating Christian schools.

The controlling law applied to the evidence does not support PLANS either. Rather than apply evidence to the criteria set forth by the Ninth Circuit in *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996) as required by this court's Pretrial Order (2-4, ¶ VI A-D, VII 1), PLANS goes beyond *Alvarado* to rely upon out-of-circuit authority, *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) ("*Malnak II*"), to claim anthroposophy is a religion as a matter of law. (PLANS Points & Authorities 11-15.) First, a federal district court is bound by circuit precedent and applies out-of-circuit authority only in limited circumstances. *Allstate Ins. Co. v. Stevens*, 445 F.2d 845, 846 (9th Cir. 1971); *In re Etherton*, 88 F.Supp. 874, 876 (S.D. Cal. 1950). The Ninth Circuit *Alvarado* standards control, not *Malnak II*.

The Ninth Circuit has not yet ruled upon, but has recognized, the proposition that religion for Establishment Clause purposes is to be construed more narrowly than for Free Exercise Clause purposes. *Alvarado*, 94 F.3d at 1230, n. 6, and cases cited therein; *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 520, n. 5 (9th Cir. 1994). Nevertheless, in *Peloza*, 37 F.3d at 521, the Ninth Circuit specifically rejected the claim that "evolutionism" or "secular humanism" are religion for Establishment Clause purposes. In doing so, the Ninth Circuit relied in part upon the following definition:

> According to Webster's, religion is the "belief in and reverence for a supernatural power accepted as the creator and governor of the universe." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 993 (1988).

Peloza, 37 F.3d at 521, n. 4.

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As stated in LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978), and quoted in *United States v. Allen*, 760 F.2d 447, 450-451 (2d Cir. 1985), and *Peloza*, 37 F.3d at 521, n. 5:

> [W]hile "religion" should be broadly interpreted for Free Exercise Clause purposes, "anything 'arguably non-religious' should not be considered religious in applying the establishment clause."

In this case, the weight of the admissible evidence establishes anthroposophy is more clearly "philosophy" than "religion" when applying Ninth Circuit *Alvarado* factors. (Sloan Decl. ¶ 14-57.) In *Alvarado* itself, the Ninth Circuit rejected the broad claims of "New Age" religion argued by plaintiffs therein. *Alvarado*, 94 F.3d at 1229-1231.[4] Since it is *arguably* not a religion, anthroposophy should be construed to be a philosophy for Establishment Clause purposes.[5]

Malnak II itself does not support PLANS' claims.[6] In *Malnak II*, 592 F.2d 197, the Third Circuit reviewed the situation where techniques of transcendental meditation itself were taught in public high schools through a textbook developed by a Hindu religious authority (Maharishi Mahesh Yogi), and the instruction involved Hindu-related religious practices inclusive of chanting a mantra

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[4]*Alvarado* was referred to in one treatise as follows: "It has been held that so-called 'New Age' concepts do not implicate the Establishment Clause of the First Amendment, inasmuch as they do not demonstrate any shared or comprehensive doctrine or display any structural characteristics or formal signs associated with traditional religions, given the absence of any organization, membership, moral or behavioral obligations, comprehensive creed, particular texts, rituals, or guidelines, particular object or objects of worship, or any requirement that anyone give up religious beliefs he or she already holds." 16A AM. JUR. 2D *Constitutional Law* § 416 (2003), footnote citation to *Alvarado* omitted. PLANS has dropped any pretense of claiming anthroposophy is a "New Age" religion. (PLANS Points & Authorities, passim.)

[5]Nor would anthroposophy meet the constitutional definition of "religion" set forth by commentators such as: Eli A. Echols, *Defining Religion for Constitutional Purposes: a New Approach Based on the Writings of Emanuel Swedenborg*, 13 B.U. PUB. INT. L.J. 117 (2003) [religion includes rules governing behavior, traceable to what is divine, that do not contradict the "golden rule," and it calls on its participants to conform to rules of the divine]; Anand Agneshwar, *Rediscovering God in the Constitution*, 67 N.Y.U. L. REV. 295 (1992) [religion is a system of beliefs, based upon supernatural assumptions, that posits the existence of apparent evil, suffering, or ignorance in the world and assumes a means of salvation or redemption from these conditions].

[6]Judge Adam's approach in *Malnak II* has been described by one commentator as the most consciously articulated example of the "analogical approach" to determining religion for constitutional purposes. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984). The "analogical approach" compares the debated belief, activity, or organization with what is undeniably religious. *Id*. at 771-772. This is precisely what the School Districts are doing here pursuant to the *Alvarado* factors—presenting objective evidence that anthroposophy is far more akin to philosophy than religion.

with required attendance at a puja. *Malnak II*, 592 F.2d at 198-200. None of those factors, e.g., a formal religion with millions of worldwide adherents (Hinduism); religious exercise (chanting mantra), and religious ceremony (Hindu puja) are present in this case. Whatever the usefulness of Judge Adams' *Malnak II*'s concurrence[7] as relied so heavily upon by PLANS, the factors set forth by the Ninth Circuit in *Alvarado* control here. Moreover, Judge Adams' concurrence focused upon the theory that "[t]he rose cannot be had without the thorn" (*Malnak II*, 592 F.2d at 213) to support the truism that a religion cannot claim Free Exercise protection without Establishment Clause prohibitions. *Id*. But, in this case anthroposophy does not claim status as a religion, or Free Exercise Clause protection. (Sloan Decl. ¶ 44, 57.) In this case, there is no rose—no thorns.

The School Districts assert that when they have the opportunity to fully brief this weighty issue, and apply the law to the facts as mandated by this court's pretrial order, the court will conclude as well that anthroposophy is a type of philosophy for Establishment Clause purposes.

C. PLANS DOES NOT ADDRESS THE SECOND *LEMON* PRONG AT ALL AND ITS CLAIM THE SCHOOLS' CURRICULUM IN ITS ENTIRETY IS RELIGIOUS FAILS PROOF.

Pursuant to the second *Lemon* prong, the issue is "endorsement" or "advancement." (Pretrial Order 3-4, ¶ 2-3, 6-13.) Irrespective of whether anthroposophy is deemed philosophy or religion, the School Districts respectfully assert the public schools' entire curriculum is secular and not inherently "religious" (Anderson Decl. ¶ 8-11, Exhibits B, C). The schools at issue do not "advance" or "endorse" anthroposophy. PLANS proffers no undisputed facts why a "reasonable observer" would believe that either school "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 666, 686 (1984) (O'Connor, J., concurring), as cited by Justice O'Connor in *Elk Grove Unified Sch. Dist. v. Newdow*, No. 02-1624, 2004 WL 1300159 (U.S. June 14, 2004), setting forth again the "endorsement" analysis.

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[7]In a Free Exercise majority opinion in *Africa v. Commonwealth of Pennsylvania*, 622 F.2d 1025 (3d Cir. 1981) Judge Adams subsequently concluded that the organization M.O.V.E. lacked the structural characteristics of religion, that its ideology was not religious, and thus did not meet the threshold test of religion. *Id*.

PLANS itself has admitted the schools are not affiliated with a traditional religious denomination or sect. (PLANS Response to Admission nos. 5-6; Keiner Decl. ¶ 3, Exhibit A.) This admission obliterates the false analogy to publically funded Catholic or other undeniably religious schools. *PLANS*, 319 F.3d 504. Rather, quite unlike a religious school, these schools teach California curriculum using in part certain pedagogical methods which originated in private Waldorf schools. (Anderson Decl. ¶ 8-11; Chavez Decl. ¶ 9; Messier Decl. ¶ 9; Paquette Decl. ¶ 7; Eining Decl. ¶ 12.) Such methods are adaptable to public schools and congruent with multiple pedagogies. (Anderson Decl. ¶ 10; Eining Decl. ¶ 12; Messier Decl. ¶ Paquette, ¶ 7.) The schools do not teach or practice anthroposophy. (Chavez Decl. ¶ 12; Messier Decl.¶ 7, 11.) Thus, even if anthroposophy is deemed a "religion," these public schools are quite unlike true religious schools.

This court's pretrial order specifically references as "disputed facts" the curriculum in the schools. (Pretrial Order 3, ¶ IV 2 A-D, 3 A-D.) The School Districts have brought, and at trial will bring, the full curriculum to this court. (Anderson Decl. ¶ 8, Exhibits B-C.) On its face, the curriculum of both schools is patently secular. (Anderson Decl. ¶ 8, Exhibits B-C.) In the expert opinion of Mr. Anderson, an educational expert employed by the California State Department of Education specifically in the field of curriculum, these schools and the curriculum are not religious. (Anderson Decl. ¶ 10-11.) Representative administrators and teachers employed at the schools themselves will testify to the secular curriculum and that the teaching is not religious. (Chavez Decl. ¶11-13; Messier Decl. ¶ 12; Eining Decl. ¶ 11; Paquette Decl. ¶ 5.)[8] Administrative oversight for Establishment Clause purposes is similar to any public school. (Eining Decl. ¶ 13-15.) Teachers at either school do not need to have private Waldorf school experience, or to reference anthroposophy or Rudolf Steiner to teach the curriculum. (Chavez Decl. ¶ 6-7; Messier Decl. ¶ 6-7; Eining Decl. ¶ 6-7; Paquette Decl., ¶ 3.)[9] Most critically for the "reasonable observer" inquiry, based upon their direct experience, parents who choose these schools for the children will testify that they do not see

[8]The teachers brought forward at this time are limited only by the time constraints involved in responding to PLANS' motions.

[9]*Id.*

any religious instruction or activities and do not consider the schools religious.[10] (Kuchera Decl. ¶ 6-7; Lawrence Decl. ¶ 8.)

PLANS does seem to assert a theory that anthroposophy is the foundation of Waldorf private education; that private Waldorf education and the public Waldorf *method* schools at issue are identical; and the two (anthroposophy and public Waldorf *method* schools) are thus somehow inseparable. (PLANS Points & Authorities 20.) But, this construct remains only a theory without supportive evidence, much less admissible evidence. For example, PLANS puts forward *no undisputed facts whatsoever* regarding defendant SCUSD or John Morse's curriculum. (PLANS Undisputed Facts, nos. 115-176.) Rather than support the theory posited before the Ninth Circuit with facts admissible in court, PLANS falls back on its previous assertions regarding specifically identifiable and discrete past practices at TRESD (e.g., PLANS Undisputed Facts, nos. 157, 163, 164, 167, 169, 170, 176.)

Even at a theoretical level, this "inseparability" construct is insupportable. Under this theory, even though the Greek Philosopher Plato unquestionably never founded a religion, because the dialectical method used in his dialogues pondered in part metaphysical issues, the Socratic *method* could never be constitutionally used to teach curriculum in public law schools.[11] Clearly as a pragmatic, practical matter, instructional *methods* can be separated from whatever source of origination.

PLANS' summary judgment motion must fail because it fails to address at all the disputed facts regarding what these schools actually do in teaching curriculum or otherwise, and the second *Lemon* "advancement" or "endorsement" prong. (Pretrial Order 2-3 and 5, IV 2 A-D, 3 A-d, VII 2-4 and 6-13.)

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[10]Additional parents will testify at trial.

[11]For example, in the *Republic* the dialogue ponders the nature of perception and reality [the famous "Allegory of the Cave"] (THE COLLECTED DIALOGUES OF PLATO 747-752 (Edith Hamilton & Huntington Cairns eds., Princeton University Press 1973) (1961)); posits underlying perfect forms or "ideas" made knowable by use of dialectic (THE COLLECTED DIALOGUES OF PLATO, at 744-747), "proves" reincarnation [the Myth of Er] (THE COLLECTED DIALOGUES OF PLATO, at 838-844), as well as discusses the best model for a State.

D. THE "EXCESSIVE ENTANGLEMENT" TEST REMAINS IN DISPUTE.

PLANS' motion for summary judgment entirely relies upon the third *Lemon* "excessive entanglement" prong, ignoring once again the disputed facts on this issue set forth in this court's pretrial order at paragraphs IV 4-11, and VII 14-15.[12] This court also previously ruled disputed facts existed on this "excessive entanglement" prong. (Summary Judgment Order 22-23.) With respect to the current facts regarding SCUSD or John Morse, no SCUSD or John Morse public funds are expended at Steiner College. (Eining Decl. ¶ 17.) At Yuba River, teachers themselves decide where and how to spend a $400 training stipend and no other potential TRESD funds are spent at Steiner College . (Paquette Decl. ¶ 7.)

With respect to legal issues; first, it is not all clear the *Lemon* "excessive entanglement" prong still stands alone, or standing alone is sufficient to find a constitutional violation. As stated in Justice O'Connor's recent concurrence in *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002):

> In *Agostini v. Felton*, [citation omitted], we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, see *ibid.,* and the degree of entanglement has implications for whether a statute advances or inhibits religion [citations omitted]. *Id*. at 2476; *accord Columbia Union College v. Clarke*, 159 F.3d 151, 157 (4th Cir. 1998) [the "effects" and "entanglement" prong comprise a single "effects" inquiry].

In this case, as discussed *supra* at pages 9-11, PLANS proffers no evidence or briefing regarding the *Lemon* second prong, whether delineated "advancement" or "endorsement." (PLANS Points & Authorities, passim.) PLANS appears to rely on outmoded doctrine to assert an injunction may issue on "excessive entanglement" alone.

Second, Plaintiff miscomprehends the *Lemon* "excessive entanglement" prong by confusing public school teachers taking classes at Steiner College with the State spending taxpayer funds to directly aid Steiner College itself.

> It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate

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[12]"Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, [citation] and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

> all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well-settled, on the other hand, that the State may not grant aid to a religious school, whether cash or inkind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State [citations omitted]. *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 486-487 (1985).

Controlling case law is also clear that there is no entanglement issue when public officials supervise public employees on public property. *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1461 (9th Cir. 1995). As the High Court has stated:

> Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state. *Wolman v. Walter*, 433 U.S. 229, 248 (1976).

Thus, there can be no "excessive entanglement" as a matter of law when teachers take classes on their own volition at Steiner College, or school officials at SCUSD or TRESD supervise their own teachers' instruction of State curriculum to ensure "neutrality." *Wolman*, 433 U.S. at 248; Eining Decl. ¶ 1, 13-15; Paquette ¶ 1.) Further, U.S. Supreme Court doctrine has evolved beyond *Lemon* as cited in the Summary Judgment Order at pages 22-24, to allow public employees to instruct even on private sectarian school grounds.[13]

Third, by attacking teachers theoretically taking classes at Steiner College (PLANS Points & Authorities 19-20), PLANS first assumes (without proving) that Steiner College is somehow a "religious" institution. (PLANS Points & Authorities 19.) It is already disputed by the School Districts that "anthroposophical" equates to "religious." But, by PLANS' own proffered evidence, Steiner College at no point claims status as a religious organization or institution. (PLANS Huber Decl. Exhibit I at 1-3 [Steiner College is incorporated as a 501(c)(3) "educational purpose," not "religious purpose" corporation; the articles reference Internal Revenue Code section 170(b)(1)(A)(2) "educational organization" status as a school; the college's curriculum is based upon philosophy of Rudolf Steiner; the property is irrevocably dedicated to "educational purposes" and so forth].) Further,

[13]"[T]he Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Zobreast v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) at 13; *Agostini*, 521 U.S. at 230 [a public school teacher may even teach on parochial school grounds].

even if this matter is treated as a State aid case, with respect to "excessive entanglement," this court must determine the precise nature of the institution (e.g., whether it is "pervasively sectarian" or "religiously affiliated") and whether State aid supports secular or sectarian purposes. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 762 (1976); *accord Columbia Union College*, 159 F.3d at 157-163.

Fourth, and more importantly, PLANS ignores fundamental First Amendment free speech and association rights held by public school teachers. *Pickering v. Board of Educ.*, 391 U.S. 563 (1988); *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503 (1969). As stated by the High Court in *Tinker*: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to *teachers* and students. It can hardly be argued that either student or *teachers* shall shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this court for almost 50 years." *Id*. at 505 (emphasis added). The Ninth Circuit has stated: "Neither this court nor the Supreme Court has definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment. [Citations omitted.]" *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1148 (9th Cir. 2001), see also footnote 6 and tests cited therein at 1149. Nevertheless, the Ninth Circuit in *California Teachers Ass'n*, 271 F.3d at 1148-1149 assumed *arguendo* instructional speech receives some First Amendment protection.

Put simply, the First Amendment and basic principles of academic freedom dictate public school teachers may attend any institution to study, receive credits, or advance training. It does not matter whether the institution is public or private; U.C. Davis or National University; CSU Sacramento or Steiner College; Sacramento City College or St. Mary's College. Further, teachers in California cannot be disciplined for off-duty conduct unless it is clearly connected ("nexus") to the classroom. *Morrison v. State Bd. of Educ.*, 25 Cal. 3d 1098, 1107-1108 (1972). Classroom instruction itself within SCUSD is also protected by the Academic Freedom clause of the collective bargaining agreement with SCTA/CTA/NEA. (Eining Decl. ¶ 9.) What matters is the teachers' *classroom instruction*, or in this case, once again *the curriculum* of John Morse or Yuba River, not their outside academic activities.

For all these reasons, PLANS' motions for summary judgment on the "excessive entanglement" test falls far short of meeting current U.S. Supreme Court and Ninth Circuit doctrine.

E. PLANS IS NOT ENTITLED TO THE SOUGHT-FOR DRASTIC INJUNCTIVE RELIEF OF SCHOOL CLOSURE.

PLANS seeks the drastic "shut-down" injunctive relief of school closure. (Complaint at 3; PLANS Points & Authorities at 20-21.) Pursuant to the Pretrial Order, VI, Relief Sought, paragraphs 1 through 3, the School Districts contest the truly retroactive nature of injunctive relief arising from past events sought by PLANS, and whether it would be a proper exercise of federal injunctive power to completely close these School Districts' Waldorf method schools. *Id*.

As Chief Justice Rehnquist recently noted: "When courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies." *Elk Grove*, 2004 WL 1300159 at *17 (Rehnquist, C.J. concurring). If there is some discrete, identifiable problem with these schools, the elected school boards and public school administrators/teachers will fix it. Beyond the goal of keeping these schools open for those parents and pupils who favor this innovative educational approach, no single component of the programs is sacrosanct. The School Districts will fully brief their position that injunctive or declaratory relief, if any, must be narrowly tailored to the proven violation. To take just one example, PLANS really complains that *if* State funds are spent, no matter how indirectly, at Steiner College that alone constitutes "excessive entanglement." (PLANS Points & Authorities at 17-19.) Assuming *arguendo* this court eventually agrees, appropriately tailored injunctive relief would bar expending public funds from these School Districts at Steiner College, not entirely shutting down these public schools.

F. PLANS IS NOT ENTITLED TO SUMMARY JUDGMENT AGAINST SCUSD, AND SCUSD AND/OR TRESD ITSELF MAY BE ENTITLED TO SUMMARY JUDGMENT.

PLANS has proved none of the elements of its claim and submitted no evidence whatsoever by way of undisputed facts regarding SCUSD, so that Defendant, at a minimum, is entitled to trial on the merits. Moreover, this court may grant summary judgment to a non-moving party in appropriate circumstances. *Kassbaum v. Steppenwolf Productions, Inc.*, 236 F.3d 487, 494-495 (9th Cir. 2000).

Because PLANS has submitted no undisputed facts whatsoever proving its claim against SCUSD, and because SCUSD has submitted a statement of undisputed facts pertaining to that Defendant, SCUSD standing alone may be entitled to summary judgment in its favor. *Kassbaum*, 236 F.3d at 494-495. Assuming *arguendo* that considering PLANS' requested summary adjudication this court finds convincing the School Districts' proffered evidence that anthroposophy is philosophy not religion for Establishment Clause purposes, then summary judgment on that threshold issue may be appropriate for both Defendants as well. *Kassbaum*, 236 F.3d at 494-495.

IV. CONCLUSION.

PLANS's motions for summary judgment/adjudication are styled for the court of public opinion by relying upon rhetoric, assumptions, and hyperbole, but not for the federal district court. PLANS simply does not bring forward any admissible evidence regarding religion or the actual curriculum of these schools. In doing so, PLANS completely ignores both the second *Lemon* prong and this court's Pretrial Order. The School Districts bring forward admissible percipient and expert witness testimony regarding the threshold religion issue and the second *Lemon* "advancement" or "endorsement" prong. The question of "excessive entanglement" remains just as disputed as ever on both the law and facts. The School Districts respectfully assert that case law and the genuine admissible undisputed facts set forth by Defendants compels either summary judgment on behalf of SCUSD, or even TRESD as well, or that PLANS' motions be denied and the School Districts be allowed to fully defend these outstanding public schools at trial.

The School Districts respectfully request that our elected school boards, dedicated professionals, concerned parents, and hard-working pupils whose policy decisions, workplaces, and education would be destroyed by PLANS's proposed drastic remedy deserve no less.

Respectfully submitted,

GIRARD & VINSON, LLP

Dated: August 12, 2004.

By _____
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