Case No. 05-17193

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANS, INC.,

Plaintiff and Appellant,

v.

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT;
TWIN RIDGES ELEMENTARY SCHOOL DISTRICT,

Defendants and Appellees.

District Court Case No. CIV. S-98-00266 FCD PAN

APPEAL FROM UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HONORABLE FRANK C. DAMRELL, PRESIDING

APPELLEES' BRIEF

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I.
INTRODUCTION.

Appellees Sacramento City Unified School District and Twin Ridges Elementary School District (hereinafter collectively "School Districts") urge this Court to uphold the Honorable Frank C. Damrell's (hereinafter "district court") judgment, pursuant to Fed. R. Civ. P. 52(c), resulting from Appellant PLANS, Inc.'s (hereinafter "PLANS")[1] complete failure to meet its evidentiary burdens at trial. After extended discovery, numerous opportunities to disclose witnesses, and expert witness disclosure deadlines, PLANS had a full and fair opportunity to prepare its case for trial pursuant to the controlling federal rules and the district court's Third and Fourth Amended Pretrial Order. PLANS now seeks to undo its trial mistakes and seeks a third "bite of the apple" in this case. [2]

Sacramento City Unified School District is a large urban school district that operates several magnet desegregation schools. The school at issue in this case is John Morse Waldorf Methods Magnet School (hereinafter "John Morse"). John Morse teaches the State-approved curriculum while utilizing certain Waldorf methods.

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[1] The acronym PLANS stands for People for Legal and Nonsectarian Schools, Inc.
[2] *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 319 F.3d 504 (9th Cir. 2003) [standing to pursue claim].

Twin Ridges Elementary School District is located in Nevada County, California and is a very small rural district that operates several charter schools pursuant to Cal. Educ. Code §§ 47600-47630. Several of its charter schools also utilize certain Waldorf method instructional techniques in delivering the State-approved curriculum. Yuba River Charter School (hereinafter "Yuba River") is the school that has been the focus of this case, but is only one of several charter schools using Waldorf methods.

PLANS, acting solely in its members' capacities as taxpayers, sought declaratory and injunctive relief barring the School Districts' operation of any Waldorf methods schools as violative of the federal and state establishment clauses. At the start of the bench trial on September 12, 2005, the district court requested PLANS make an offer of proof as to how it could prove its case. SER at 237. PLANS could not make a sufficient proffer. SER at 249. After making several arguments and offering only one potential exhibit as evidence, PLANS formally rested its case. SER at 250. The district court subsequently granted the School Districts' motion for judgment under Fed. R. Civ. P. 52(c) based on PLANS' failure to carry its evidentiary burdens. ER, Vol. II, at 93-96.[3]

[3] "ER" refers to Appellant's Excerpts of Record and "SER" refers to Appellees' Supplemental Excerpts of Record.

II.
STATEMENT OF JURISDICTION.

The School Districts do not contest PLANS' statement regarding jurisdiction. Blue at 1.

III.
ISSUES PRESENTED.

Did the district court properly enter judgment under Fed. R. Civ. P. 52(c) based on a failure of proof after PLANS rested its case?

IV.
STATEMENT OF THE CASE.

This case has a lengthy procedural history. PLANS' brief and selected excerpts of record fail to fully or accurately describe the procedural history necessary for this Court to review the district court's judgment. The School Districts have therefore filed a Supplemental Excerpts of Record with this Court pursuant to Ninth Circuit Rule 30.1.3(a)-(c). It is necessary to explain the procedural history herein.

This case was filed in February 1998. ER, Vol. I, at 1. PLANS' complaint alleges that the operation of Waldorf methods schools, including John Morse and Yuba River, violate the Establishment Clause of the First Amendment as well as the Establishment Clause of California Constitution. ER, Vol. I, at 1-4. PLANS' allegations are based on its belief that Waldorf methods are religious. ER, Vol. II, at 2. After full discovery, the School Districts moved for summary judgment, or, in

the alternative, summary adjudication of issues on May 6, 1999. SER at 015-039. This motion was based in part on PLANS' lack of taxpayer standing. SER at 016. On September 24, 1999, the district court denied summary judgment, but granted summary adjudication on the issue of School Districts' secular purpose in operating its Waldorf methods schools. SER at 039. The matter proceeded towards trial. On April 6, 2001, School Districts filed a Notice of New Authority citing *Altman v. Bedford Central Sch. Dist.*, 245 F.3d 49 (2d Cir. 2001) based on School Districts' continued belief that PLANS did not have proper taxpayer standing. SER at 041-042. The district court then ordered additional briefing on the question of taxpayer standing. SER at 062-063. As a result, and based on the new authority, the district court entered judgment in favor of School Districts based on PLANS' lack of taxpayer standing. SER at 122-128.

PLANS appealed that decision to the Ninth Circuit, claiming that it had taxpayer standing because it alleged the entire curriculum at the schools were inherently religious and thus were akin to a publicly funded Catholic charter school. SER at 131-149. The Ninth Circuit reversed the district court's ruling on standing on the basis of the analogy comparing Waldorf methods schools to hypothetical publicly 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.[4] The case was remanded to the district court for further proceedings. *PLANS*, 319 F.3d at 508.

Once remanded to the district court, PLANS requested and received the opportunity to complete new and thorough discovery. SER at 151-155, 157, 254-263. The district court issued a series of scheduling orders that detailed the deadlines for discovery, the deadlines for disclosure of expert witnesses, and set forth other pretrial requirements. SER at 151-155, 157, 166, 168-178. During this time, PLANS propounded Interrogatories and took numerous depositions. PLANS did not disclose any expert witnesses prior to the district court imposed deadline of April 16, 2004.

School Districts also completed further discovery during this time, propounding Interrogatories, Request for Production of Documents, and Requests for Admissions. ER, Vol. II, at 40-42. PLANS failed to properly respond to these discovery requests by School Districts and thus necessitated several motions to compel. ER, Vol. II, at 40-42. These motions to compel were granted and included

[4]"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). "This 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.

sanctions against PLANS for its failure to comply. SER at 158-160, 162-164. Specifically, School Districts were properly concerned over PLANS' repeated failure to specify which witnesses and documents supported its claims and what it intended to use at trial. ER, Vol. II, at 40-42. The district court specifically informed PLANS that it would be limited at trial to those witnesses and documents that it disclosed during discovery. ER, Vol. II, at 40-42.

Prior to trial, PLANS timely filed a motion for summary judgment on the issue of anthroposophy as a religion. SER at 180-194. This motion was denied due to lack of admissible evidence supporting the motion as well as many disputed facts. SER at 180-194.

The district court bifurcated the issues for trial on April 1, 2005. ER, Vol. II, at 48-50, 74. Pursuant to this bifurcation, if the district court made the determination that anthroposophy was a religion, then the second phase of the trial would proceed and the issue of whether the curriculum was anthroposophical would be determined. ER, Vol. II, at 48-49; 93-94.[5] All parties, specifically including PLANS, agreed to this bifurcation and the district court issued a Third Amended Pretrial Order on April 20, 2005. ER, Vol. II, at 61-75. PLANS had ten

[5] PLANS' claim is that anthroposophy is a religion and that it cannot be separated from Waldorf methods. SER at 180-194. The School District's claim that anthroposophy is a philosophy and that, furthermore, it is separate and distinct from the Waldorf methods used at the schools at issue. SER at 180-194.

(10) days from the date of the Pretrial Order of April 20, 2005, to object to any portion of the Order. ER, Vol. II, at 75. PLANS did not object.

Prior to the start of trial School Districts filed motions in limine. These motions, among others, included motions to exclude witnesses (Motion in Limine No. 11) and evidence (Motion in Limine No. 12) not disclosed by PLANS during discovery. ER, Vol. II, at 32-35, 36-39. The motions also sought to exclude expert witnesses not properly disclosed by PLANS (Motion in Limine No. 13). SER at 197-200. School Districts' Motions In Limine Nos. 11, 12, and 13 were granted by the district court on April 1, 2005. ER, Vol. II, at 8-16; SER at 201.

The district court's Third Amended Pretrial Order specifically states that Motion in Limine No. 11, the School Districts' motion to exclude trial witnesses listed by PLANS who were not disclosed to School Districts during discovery, and Motion in Limine No. 12, the School Districts' motion to exclude exhibits listed by PLANS that were not disclosed to School Districts, were both granted pursuant to Fed. R. Civ. P. 37(c). ER, Vol. II, at 65-66. The Pretrial Order also again confirmed that the district court granted Motion in Limine No. 13 to exclude expert witnesses not disclosed during discovery. ER, Vol. II, at 66. The district court specifically prohibited PLANS from calling expert witnesses previously designated by School Districts as expert witnesses. ER, Vol. II, at 71. PLANS voluntarily

withdrew proposed expert Eugene Schwartz from its witness list. ER, Vol. II, at 53, 94. The parties thus proceeded to trial scheduled for September 12, 2005.

At the start of the bench trial scheduled for September 12, 2005, the district court questioned how PLANS intended to proceed and requested that PLANS make an offer of proof as to how it would prove anthroposophy was a religion based upon the documents and witnesses on PLANS' witness and exhibit list. SER at 236-237.

PLANS' counsel offered only one piece of documentary evidence, and interrogatory response from the School Districts, and no witnesses who could prove that anthroposophy was a religion. SER at 237-249. After discussion, PLANS' counsel then specifically rested its case on the threshold issue of whether anthroposophy was a religion. SER at 250. The School Districts then moved for judgment under Fed. R. Civ. P. 52(c). After review and modification of the School District's proposed findings and conclusions, the district court granted judgment in favor of the School Districts on September 28, 2005. ER, Vol. II, at 93-96. The district court made specific findings of fact and conclusions of law in support of its final judgment. ER, Vol. II, at 93-96. This appeal followed.

V.
STATEMENT OF FACTS.

The district court made the following findings of fact and/or mixed findings of law and fact in its Fed. R. Civ. P. 52(c) judgment:

1. This Court bifurcated the issues for trial in this case, in agreement with the parties, in its pretrial 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, (1) they had been previously disclosed as Defendants' experts, (2) they were subsequently listed by Plaintiff as "Defendants Experts," and (3) were never disclosed by Plaintiff as its expert witnesses prior to the deadline for disclosure of expert witnesses on April 16, 2004 (the court affirmed this finding at the April 1, 2005 hearing on the parties' motions in limine).

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, the court required Plaintiff to make an offer of proof as to how it would prove that anthroposophy is a religion for Establishment Clause purposes given its listed exhibits and witnesses.

6. Plaintiff's counsel first stated that he had "no proffer" based on the court's prior ruling described above in paragraph 2. (R.T. 2:1-10.)

7. Plaintiff's counsel then stated that he had one item of evidence to support Plaintiff's case that anthroposophy is a religion, namely, Plaintiff's Exhibit 89, a book entitled The Waldorf Teacher's Survival Guide, written by Eugene Schwartz. (R.T. 4:22-5:4.)

8. In support of Plaintiff's Exhibit 89, counsel read 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, among many other books, The Waldorf Teacher's Survival Guide.

9. 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.)

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

11. Plaintiff did not proffer any further exhibits or witnesses on the issue of whether anthroposophy is a religion for Establishment Clause purposes.

ER, Vol. II, at 93-95.

VI.
STANDARDS OF REVIEW.

The district court's findings of fact and mixed findings of law and fact contained in the Fed. R. Civ. P. 52(c) judgment are reviewed for clear error. *Saltarelli v. Bob Baker Group Med. Trust*, 35 F.3d 382, 384 (9th Cir. 1994).

The district court's rulings regarding exclusion of witness(es) are reviewed for abuse of discretion. *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005) ["*Wong II*"]; *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-1106 (9th Cir. 2001).

VII.
SUMMARY OF ARGUMENT.

A. THE DISTRICT COURT PROPERLY ENTERED JUDGMENT UNDER FED. R. CIV. P. 52(c) AFTER PLANS RESTED ITS CASE BASED UPON A FAILURE OF PROOF.

PLANS does not allege in its opening brief that any of the district court's findings of fact and/or mixed findings of fact and law were clearly erroneous. Blue, passim. Therefore, it is undisputed that Findings #1 through #12 included within the judgment and set forth above were appropriate. PLANS similarly does not dispute the district court's conclusions of law. Blue, passim. The record fully supports each and every finding of fact and conclusion of law set forth in the district court's judgment. Thus, the district court properly entered judgment in favor of School Districts pursuant to Fed. R. Civ. P. 52(c) irrespective of any claimed errors by PLANS.

B. PLANS' CLAIMED ERRORS BY THE DISTRICT COURT DO NOT SUPPORT REVERSAL.

1. PLANS DID NOT LIST THE DISPUTED WITNESSES AS PERCIPIENT WITNESSES.

PLANS claims that the district court wrongfully excluded percipient testimony by *percipient witnesses* of PLANS simply because School Districts listed them as experts. Blue at 8-9. This is not accurate. The witnesses which PLANS now claims were absolutely key to its case were never listed by PLANS as percipient witnesses, nor were they ever disclosed by PLANS as percipient or

expert witnesses during the lengthy discovery processes. PLANS only listed Betty Staley, Crystal Olsen, Bob Anderson, and Douglas Sloan on its witness list as "Defendants' Expert." See ER, Vol. II, at 19; SER at 217. If PLANS intended to call the witnesses as percipient witnesses, it could have and should have listed them as such.

2. PLANS DID NOT PROPERLY DESIGNATE THE DISPUTED WITNESSES AS EXPERTS.

PLANS never designated any of the people it claims to be essential to its case as expert witnesses. PLANS had ample opportunities to disclose all these witnesses as expert witnesses but failed to do so.

PLANS first disclosure of expert witnesses was due February 1, 1999, and PLANS disclosed Dan Dugan, Debra Snell, Kathleen Sutphen, James Horton, James Randi, Eugenie Scott, Bill Bennett, Herman de Tollenaere, Craig Branch, and John Morehead. SER at 002, 011-013. PLANS' counsel later stated in argument to this Court that "*my experts* tell me anthroposophy is a new age religion." SER at 135. After the matter was remanded by the Ninth Circuit, and further full and complete discovery was again completed, PLANS had another opportunity to disclose expert witnesses. SER at 168-178. Under the Fourth Amended Scheduling Order of March 10, 2004, the disclosure of expert witnesses was due on April 16, 2004. SER at 168-178. PLANS now disclosed *no experts*. As such, School Districts moved for exclusions of any witnesses called by PLANS as

experts pursuant to Fed. R. Civ. P. 37(c) and 16(f). Under Fed. R. Civ. P. 16(f), the district court has the discretion to sanction parties who do not follow pretrial orders. As discussed below, this includes excluding witnesses not properly disclosed.

C. EXCLUSIONS OF WITNESSES AND DOCUMENTS NOT PROPERLY DISCLOSED WERE WITHIN THE DISTRICT COURT'S DISCRETION.

Fed. R. Civ. P. 16(f) provides that if a party or a party's attorney fails to obey a scheduling or pretrial order, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and, among others, any of the orders provided in Fed. R. Civ. P. 37(b)(2)(B)(C)(D). Fed. R. Civ. P. 16(f). Part of the purpose of Rule 16 is to use the pretrial conference as a means to familiarize the litigants and the district court with the issues actually involved in a lawsuit so that the parties can accurately appraise their cases and substantially reduce the danger of surprise at trial. *Walker v. West Coast Fast Freight, Inc.*, 233 F.2d 939 (9th Cir. 1956). For these reasons, when a party ignores or violates the judge's scheduling orders or pretrial orders, the judge may sanction that party.

The trial judge is vested with considerable discretion in deciding whether to impose sanctions, and, if so, in determining what form sanctions should take. *Jones v. Winnepesaukee Realty*, 990 F.2d 1 (1st Cir. 1993).

The district court's Fourth Amended Scheduling Order of March 10, 2004, required that the parties designate in writing expert witnesses they proposed to tender at trial no later than April 16, 2004. SER at 168-178. The Pretrial Order also provided twenty (20) days for supplemental designation of experts. SER at 170. The Pretrial Order specifically stated:

> An expert witness not appearing on a party's written expert designation will not be permitted to testify unless the party offering the witness demonstrates: (a) that the necessity for the witness could not have been reasonably anticipated at the time the list was proffered; (b) that the court and opposing counsel were promptly notified upon discovery of the witness; and (c) that the witness was promptly made available for deposition.
>
> SER at 170-171.

Here, PLANS has not and cannot claim that it could not anticipate the need for expert witnesses at the time disclosure was required. PLANS failed to follow the district court's Pretrial Order that required disclosure of expert witnesses by April 16, 2004. SER at 168-178. As explained fully below, this conduct is the proper basis for exclusion sanctions.

The Ninth Circuit recognizes the trial court's discretion to exclude expert witnesses not disclosed by the deadline imposed by a scheduling order. *Wong II*, 410 F.3d at 1060; *Yeti by Molly v. Deckers Outdoor Corp.*, 259 F.3d at 1106. Additionally, district courts across the country have routinely excluded expert witnesses who were not properly disclosed under Rule 16(f). *See Zeigler v. Fisher-*

Price, Inc., 302 F.Supp.2d 999 (N.D. Iowa 2004); *North Star Mutual Ins. Co. v. Zurich Ins. Co.*, 269 F.Supp.2d 1140 (D.Minn. 2003); *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306 (M.D.N.C. 2002).

In *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097 (9th Cir. 2004) ("*Wong I*"), the Ninth Circuit, in a case in which the district court's scheduling order at issue identified the same three bases for allowing the belatedly disclosed expert to testify (*see id.* at 1103), upheld the district court's denial of a plaintiff's request to make a supplemental, i.e., untimely, disclosure of expert witnesses under Fed. R. Civ. P. 16 and 37(c). Under Rule 16, this Court explained:

> The abuse of discretion standard is deferential, and properly so, since the district court needs the authority to manage the cases before it efficiently and effectively. In these days of heavy caseloads, trial courts in both federal and state systems routinely set schedules and establish deadlines to foster the efficient treatment and resolution of cases. Those efforts will be successful only if the deadlines are taken seriously by the parties, and the best way to encourage that is to enforce the deadlines. Parties must understand that they will pay a price for failure to comply strictly with scheduling and other orders, and that failure to do so may properly support severe sanctions and exclusions of evidence. The Federal Rules of Civil Procedure explicitly authorize the establishment of schedules and deadlines, in Rule 16(b), and the enforcement of those schedules by the imposition of sanctions, in Rule 16(f)." *Id.* at 1103.

The same scheduling considerations applied in this case. Experts were required to be designated and disclosed in April 2004, and PLANS belatedly and untimely listed these "experts" in its pretrial witness list in January 2005. The district court properly exercised its discretion in excluding these proposed expert witnesses.

Under Rule 37(c), as another ground for denying the Plaintiff's request to add expert witnesses after the disclosure deadline, this Court in *Wong I* upheld the district court's conclusion that the single factor (a)—"that the necessity for such a witness could have been reasonably anticipated at the time the lists were exchanged"—was alone sufficient to exclude the testimony of the supplemental expert witnesses even though two other criteria, (b) and (c), were "likely satisfied." *Id.* at 1103. In *Wong I* there was no substantial justification for belated disclosure; and the untimely disclosure also was not "harmless":

> If Wong had been permitted to disregard the deadline for identifying expert witnesses, the rest of the schedule laid out by the court months in advance, and understood by the parties, would have to have been altered as well. Disruption to the schedule of the court and other parties in that manner is not harmless. Courts set such schedules to permit the court and the parties to deal with cases in a thorough and orderly manner, and they must be allowed to enforce them, unless there are good reasons not to. The district court did not abuse its discretion here in refusing to permit Wong to supplement his disclosure with the additional expert witnesses and in barring testimony by and relying upon those witnesses.
>
> *Id.* at 1105.

The School Districts respectfully assert that the same grounds (Fed. R. Civ. P. 16 and 37(c)), and the same rationale, apply to an even greater extent in this case. As evidenced by the discovery sanctions, the School Districts were reasonably concerned they were not being properly informed about what evidence and witnesses PLANS might use at trial. This concern continued with PLANS' last minute attempts to call undisclosed witnesses.

In summary, PLANS failed to serve any expert designation prior to the deadline of April 16, 2005. SER at 168-178. PLANS also failed to serve a supplemental designation after School Districts' disclosed experts on April 16, 2004. Yet, at trial and in this appeal, PLANS claims it could not present its case without presenting expert testimony vis-à-vis School Districts' experts. PLANS had ample opportunity during discovery and prior to the deadline for disclosure of experts to disclose expert witnesses it intended to use at trial. PLANS failed to disclose such experts and the witnesses were properly excluded by in limine motions. PLANS' attempt to re-categorize expert witnesses as solely percipient witnesses for purposes of this appeal are disingenuous.

D. PLANS FAILED TO PROVE ITS CASE.

The School Districts respectfully maintain that PLANS failed to prove its case after numerous opportunities to do so. PLANS' counsel told the Ninth Circuit in oral argument in 2002 that it could prove its case if given the chance. PLANS' counsel specifically informed the Ninth Circuit that "*my experts* tell me anthroposophy is a new-age religion." SER at 135 (emphasis added). [6] PLANS

[6] Because PLANS did not live up to the promises made at the Ninth Circuit previously, and because counsel's previous oral arguments to this Court are informative of this case, School Districts include a transcript of the oral arguments at Tab 7 of the SER. School Districts request the Court take judicial notice of the previous Ninth Circuit proceedings in the PLANS case.

failed to back up this statement with either witnesses or documents. PLANS had its bench trial and rested its case without proof of its claims.

PLANS has already received "two bites of the apple" in this case. The first occurred when the Ninth Circuit remanded the case back to the district court based upon counsel's assertions of what PLANS' counsel could prove. The second was when PLANS was allowed to completely reopen discovery and prove its case anew in 2004. PLANS now seeks a third bite – by asking this Court to allow it to once again attempt to prove its case by casting aside requirements of the Federal Rules of Civil Procedure, the district court's scheduling orders, and the district court's pretrial orders.

VIII.
CONCLUSION.

School Districts respectfully submit that this matter should finally be put to rest. PLANS has been given its final opportunity and failed to follow controlling federal rules and the district court's Third and Fourth Amended Pretrial Orders. The district court acted in full accord with all applicable federal rules and within its discretion. School Districts request the Court affirm the district court's judgment.

Respectfully submitted,

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DATED: April 25, 2006.

By _____
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DATED: April 25, 2006.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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STATEMENT OF RELATED CASES

[Circuit Rule 28-2.6]

The School Districts are unaware of related cases pending in this Court.

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
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DATED: April 25, 2006.

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PROOF OF SERVICE

I am employed in the county of Sacramento, state of California. I am over the age of 18 and not a party to the within action; my business address is 1006 Fourth Street, Eighth Floor, Sacramento, California 95814-3314.

On April 25, 2006, I served the foregoing document described as APPELLEES' BRIEF on the following interested parties in this action by placing two true copies thereof enclosed in sealed envelopes addressed as follows:

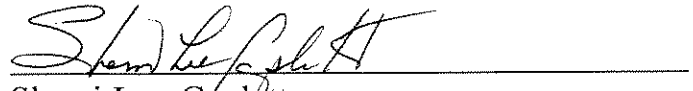
Mr. Scott M. Kendall (2 copies)
Attorney at Law
Law Offices of Scott Kendall
9401 E. Stockton Blvd. Suite 210
Elk Grove, CA 95624

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Sacramento, California.

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.

I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

Executed on April 25, 2006, at Sacramento, California.



Sherri Lee Caplette