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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Roy and Josie Fisher, et al.,

Plaintiffs,

v.

United States of America,

Plaintiff-Intervenors,

v.

Anita Lohr, et al.,

Defendants,

Sidney L. Sutton, et al.,

Defendant-Intervenors,

Case No. 4:74-CV-00090-DCB

DECLARATION OF JUAN RODRIGUEZ IN SUPPORT OF MENDOZA PLAINTIFFS' MOTION TO STRIKE TUCSON UNIFIED SCHOOL DISTRICT'S OBJECTION TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS RELATING TO PRINCIPAL AND TEACHER EVALUATONS (ECF 1845) OR, IN THE ALTERNATIVE, TO PROVIDE THE PLAINTIFFS AND THE SPECIAL MASTER A REASONABLE OPPORTUNITY TO RESPOND TO THE NEW EVIDENCE OFFERED FOR THE FIRST TIME IN THE OBJECTION AND TO THE DISTRICT'S ATTACK ON THE R&R AS "PUNITIVE"

Hon. David C. Bury

Maria Mendoza, et al., Plaintiffs, United States of America, Plaintiff-Intervenor, v. Tucson United School District No. One, et al., Defendants.	Case No. CV 74-204 TUC DCB

I, Juan Rodriguez, declare under penalty of perjury that the following statements are true:

1. I am above the age of 18 and am competent to make this Declaration. I am an attorney of record for the Mendoza Plaintiffs in this action and have personal knowledge regarding the facts stated herein. This declaration is based upon my personal knowledge, information and belief.

2. On May 9, 2014, the Tucson Unified School District, No. One ("TUSD") filed its Opening Brief (Dkt. No. 18-1) in its Ninth Circuit appeal (U.S. Court of Appeals Case No. 14-15204) from court orders issued by this Court in this case. A true and correct copy of TUSD's Opening Brief is attached hereto as Attachment A.

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: October 9, 2015

MALDEF
JUAN RODRIGUEZ

/s/ Juan Rodriguez
Attorney for Mendoza Plaintiffs

Attachment A

U.S. COURT OF APPEALS CASE NO. 14-15204

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TUCSON UNIFIED SCHOOL DISTRICT NO. ONE,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA

Plaintiff-Intervenor-Appellee,

ROY AND JOSIE FISHER, ET AL., MARIA MENDOZA, ET AL.,

Plaintiffs-Appellees.

TUCSON UNIFIED SCHOOL DISTRICT NO. ONE'S OPENING BRIEF

From The United States District Court For The District of Arizona
District Court Case CV 74-90 TUC DCB (Lead Case)

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INTRODUCTION

The Tucson Unified School District, No. 1 ("TUSD") is one of the oldest and largest public school districts in Arizona. It was founded in 1867, and at one time in the late 1900s, was the largest district in the state. It remains the largest in Southern Arizona and educates nearly 50,000 students in kindergarten through twelfth grade.

For the last forty years, TUSD has been the principal defendant in this school desegregation case. In 2008, the trial court declared that TUSD had achieved unitary status. EOR 157-215. This Court, however, reversed and remanded, instructing the trial court to recommence court supervision and monitoring. *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131 (9th Cir. 2011).

Commencing with its *sua sponte* Order to Show Cause in 2004 and continuing through remand in 2011, the trial court through its orders has appeared anxious to rid its chambers of this case. Ever since being revested with jurisdiction, the court's conduct has been consistent with that perception.

This brief will recount the evolution of this case from the collaborative post-remand work of the parties to select a special master, negotiate the terms under which he would be appointed (the "Appointment Order") (EOR 132-149), through

the development of an extensive and complex plan designed to lead TUSD to unitary status (the "USP")(EOR 45-131).

From there, TUSD will narrate through the present day where, beginning with a series of bizarre procedural orders in December 2013, the framework that was to govern the District's march towards unitary status and the legal processes to be applied to those steps have been eviscerated by the trial court. In these December 2013 procedural orders, the trial court ordered that TUSD was entitled to no judicial process. Those orders also precluded judicial review of special master reports and recommendations, thereby delegating the final say to the special master on matters of TUSD's educational policy.

Based on TUSD's experience to date, and underscoring the very reason why procedures exist for judicial process and review following a report and recommendation, it appears that the trial court adopts as its order every special master report and recommendation. This is particularly troubling because the special master is not a lawyer applying legal standards. Instead of judicial review under legal standards, the trial court appears to adopt the special master's review standards – which are his opinions on educational policy.

The apparent rubber-stamping of the special master's recommendations is readily apparent from the trial court's refusal to hold hearings or status conferences

in this case. TUSD repeatedly has sought evidentiary hearings and/or oral argument on disputed matters. None of these requests has been granted. Indeed, since this case was assigned to the trial court in 2003, no request TUSD has made of the court to appear before it, whether to argue a motion or to have a status conference, has been granted - ever![1]

TUSD respectfully submits that the trial court has abdicated its role as the decision-maker. The parties have a constitutional right to have an Article III Judge decide contested issues, listen to evidence after determining its admissibility, and hear the parties' legal arguments, and not merely defer to the recommendations of a special master, no matter how well-intentioned those suggestions may be. This case likely is one of the oldest matters pending in the District of Arizona and is being approached in an almost whimsical, or at least certainly haphazard, fashion by the court. Change is needed to afford TUSD basic procedural fairness and fundamental due process.

This brief likely is dissimilar to most this Court has seen. It reports the trial court's serious and repeated disregard of the rules of civil procedure, its own previous orders, and the Constitution. The fair and equitable processes and procedures set forth in the Appointment Order and the USP have been shredded

[1] *See* Argument, Section F below for detailed account of requests for hearings and the subsequent denials.

and laid to waste by the court's subsequent orders, some of them *sua sponte*, all as detailed herein. The net effect is to deprive TUSD of a meaningful right to be heard by an Article III Judge because, in addition to abandoning the previously agreed procedural safeguards, the trial judge seemingly has abdicated his judicial responsibility to the Special Master and, anecdotally, his law clerk.

Please follow along as we take this Court into the "Land of Oz" where the rules of civil procedure do not apply, where the trial court's previous orders can be modified or interpreted at whim and *sua sponte,* without notice, and without deference to Constitutional requirements. How compelling can this ostensibly dry legal argument be? Please continue.

PROCEDURAL HISTORY

TUSD appeals the orders dated December 2, 2013 ("Process Order") (EOR 22-44), December 16, 2013 ("UHS Order") (EOR 17-21), December 20, 2013 ("Reduction and Denial Order") (EOR 7-16), and January 7, 2014 ("January Denial Order") (EOR 1-4) (collectively "Procedural Modification Orders").

On January 6, 2012, the court named Dr. Willis Hawley, a Maryland college professor, as special master pursuant to Rule 53, Fed. R. Civ. P. EOR 132-149. On February 20, 2013, the court adopted the USP. EOR 45-132. The USP details specific plans that TUSD must develop and implement in good faith in order to

attain unitary status at the end of the 2016-2017 school year.[2] *Id*. For example, § V.A.5 of the USP requires TUSD to develop a plan revising the admissions process for University High School to ensure multiple measures for admission are used and that all students have an equitable opportunity to enroll ("UHS Admissions Plan"). *Id.* at EOR 75-76.

The Appointment Order guarantees the parties the right to file objections following a Special Master report and recommendation ("R&R"). Appointment Order § V, EOR 140-142. It provides a four-step process for objections to an R&R ("Objection Provisions"): (1) TUSD may object to a special master's R&R; (2) the Special Master shall either revise his R&R or respond to TUSD's objections; (3) TUSD may reply to the Special Master's response if necessary; and (4) the public may comment on the Special Master R&Rs. *Id.* at EOR 141-142. The Objection Provisions provided concurrent procedural safeguards against the broad powers afforded to the Special Master by the Appointment Order.

[2] A school district achieves "unitary status" only after a court finds it has (1) complied in good faith with the desegregation decree since entered, and (2) eliminated "the vestiges of past discrimination…to the extent practicable." *See Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1141 (9th Cir. 2011). In 2011, this Court reversed the trial court's order declaring that TUSD had achieved unitary status, holding that TUSD had failed to meet both status requirements. *Id*. at 1143-1144. In particular, this Court stressed that TUSD must demonstrate a "history" of good faith compliance "over a reasonable period of time." *Id*. at 1442-1443.

F.R.C.P. 53 and the Appointment Order prohibit modifying these due process rights without prior notice to the parties and an opportunity to be heard. Appointment Order § IX, EOR 148; Fed. R. Civ. P. 53(b)(4). All prior orders not inconsistent with the USP shall remain in full force and effect. USP §§ XI.A.2, XII, EOR 105. The USP specifically incorporated and preserved the Objection Provisions of the Appointment Order and Rule 53. *Id.* ("…the Parties may seek judicial resolution of any dispute pursuant to the process set forth in the January 6, 2012 Order Appointing Special Master and as permitted by law.").

On October 13, 2014, the Department of Justice ("DOJ") filed a Motion for Referral to Magistrate Judge. EOR 1497-1504. This was joined by TUSD and opposed by both Plaintiff classes. EOR 1492-1496 (TUSD's Joinder) and EOR 1259-1491 & EOR 1246-1258 (Plaintiffs' Oppositions). The DOJ's Motion for Referral to Magistrate Judge charged that "the formal record of compliance in this case has been sparse, meaning that the District's compliance – or lack thereof – with the USP and with this Court's orders is not accurately and succinctly represented in the judicial record, and will make future determinations of unitary status impracticable." EOR 1498.

The DOJ explained that "regular court involvement" is required for this case, and that a magistrate judge could ensure that occurs. EOR 1499 ("The creation of an adequate judicial record in this matter will require regular court

involvement – not merely for the purposes of dispute resolution, but to ensure that all aspects of the District's efforts at compliance are properly and directly placed into in [sic] the record for future determinations of both good faith and of fidelity to the substance of the USP and the District Court's orders.") The DOJ's rationale traces, in part, the language that this Court used in *Fisher*.

In response to the DOJ's motion, the Special Master made a report and recommendation to the court that the true "intent" of the DOJ's motion was to limit the roles of the Plaintiffs and Special Master. EOR 36-37 ("The Intent of the Motion to Limit the Roles of Plaintiffs and the Special Master"). Indeed, the Special Master claimed that, although DOJ's motion was "putatively aimed at enhancing the record of actions taken" (EOR 32), the "motion by DOJ in which the District joins is one of a continuing set of readily documentable efforts by the District and, to the lesser extent, the DOJ, to limit the role of the plaintiffs and the Special Master to make meaningful contributions to the implementation of the USP" (EOR 36). Instead of a legal standard of review for compliance with the USP and the Constitution (which could be accomplished by an Article III Judge or a magistrate judge as proposed by the DOJ), the Special Master suggested that the District's good faith compliance efforts be evaluated by relying on the Special Master's opinions on educational policy. EOR 38 ("The DOJ motion would place substantial responsibility for resolving differences in the hands of the Magistrate

Judge. However, many issues can be resolved by turning to educational research and this has been the case so far.")

On December 2, 2013, the trial court denied the DOJ's Motion and, instead, expanded the power of the Special Master far beyond the scope set forth in Rule 53, the Appointment Order and USP. That is, the court *sua sponte* eliminated the parties' right to be heard on any R&R issued by the Special Master. ("Process Order"). EOR 22-44. The Process Order, without a request by any party, prior notice, or any opportunity to be heard, eliminated the following rights under Rule 53, the Appointment Order and the USP: (1) to object to a Special Master's R&R within 30 days of its filing; (2) to have the parties and the Special Master file required responses to TUSD's objections to the R&R and/or revise the R&R in accordance with the objections; (3) for TUSD to file a reply to the responses of the parties and Special Master; (4) to have the court decide *de novo* all objections to the Special Master's R&R; and (5) to a public comment period following an R&R; and (6) to have the court consider public comment. *Id.* ("The matter will be considered fully briefed upon the submission of the R&R; THERE SHALL BE NO FURTHER BRIEFING UNLESS REQUESTED BY THE COURT") (emphasis in original).

On December 16, 2013, TUSD filed a Motion for Reconsideration of the Process Order ("Motion for Reconsideration of Process Order"). EOR 662-703.

The court denied this Motion on December 20, 2013. EOR 7-16.

On November 22, 2013, the Special Master filed a report and Recommendation gutting the District's admissions process for University High School ("Special Master UHS Plan"). EOR 704-798. On Friday, December 13, 2013 (10 days before expiration of the 30-day objection period), TUSD filed its Objection and Response ("UHS Objection"). EOR 799-1241. TUSD's UHS Objection documented TUSD's research-based rationale for its admissions plan and citing the deference to which it was entitled on matters of education policy. *Id*. On December 16, 2013, the court adopted the Special Master's UHS Plan ("UHS Order") without addressing the District's basis for its plan or making any findings on TUSD's compliance with the USP or the Constitution. EOR 17-21. The court also ordered that TUSD's UHS Objection be stricken[3] based on an incorrect

[3] The UHS Objection, stricken by the trial court, is incorporated properly into the Excerpt of Record because, although documents stricken by the district court are generally not considered a part of the record on appeal, such documents may be considered to determine whether the court's order striking the documents was appropriate. *See Levald v. City of Palm Desert*, 998 F.2d 680, 691-92, n.1 (9th Cir. 1993) (reviewing amended complaint not accepted for filing by court without considering factual allegations therein for limited purpose of determining whether court abused discretion when denying leave to amend). As explained herein, the court improperly struck TUSD's UHS Objection (EOR 799-1241) and Shortened UHS Objection (EIR288-661) based upon an erroneous application of a local rule. Incorporation of the UHS Objection into the record likewise is appropriate under Fed. R. App. P. 10(e), where documents considered by the court in forming an opinion, though not filed or otherwise excluded from the record, may be included in the record on appeal "to reflect what actually occurred in the district court." *Townsend v. Columbia Operations*, 667 F.2d 844, 849 (9th Cir. 1982) (documents

application of page limit requirements under LRCiv 7(e)(1). *Id* at p.5.

On December 17, 2013, TUSD filed a Motion for Reconsideration of the trial court's UHS Order based on the violation of TUSD's due process rights ("Motion for Reconsideration of UHS Order") (EOR 276-282) accompanied by a shortened version of the UHS Objection ("Shortened UHS Objection") (EOR 283-661)[4].

TUSD's Motion for Reconsideration of the UHS Order raised the issues that (1) TUSD has the right to be heard on the Special Master's report and recommendation under Rule 53, the Appointment Order and the USP, and (2) the court must review the UHS Plan under the appropriate legal standard for compliance with the USP and Constitution. EOR 276-282. TUSD also noted the court's (incorrect) application of LRCiv 7(e)(1). EOR 280.

On December 20, 2013, the trial court issued its order granting, in part, and denying, in part, TUSD's Motion for Reconsideration of the Process Order ("Reduction and Denial Order"). EOR 7-16. The Reduction and Denial Order did the following: (1) reduced the time within which to file objections to a Special Master's R&R from thirty (30) days to seven (7) days and limited the size of any

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that trial court excluded, but used as basis for opinion, included in appellate record). The UHS Objection and Shortened UHS Objection may be considered on appeal because the court expressly relied upon them in the UHS Order. *See* EOR 8:10-15 (court "reviewed the assertions in the Shortened Objection" and "[found] it offered nothing new" before ordering the same stricken for exceeding page limits).

[4] *See* n.4, above.

TUSD objection from seventeen (17) pages to ten (10) pages; (2) issued a *sua sponte* contract interpretation of the Appointment Order (EOR 141) and ordered the Objection Provisions in the Appointment Order would be superseded by a voluntary resolution provision in the USP (EOR 50-51) that specifies the procedures which must be followed *before* the Special Master may submit an R&R ("Voluntary Resolution Provision"); and (3) denied TUSD's objections to the Special Master's UHS Admissions Plan without conducting a *de novo* review required of it to determine whether TUSD's UHS admissions plan complied with the USP or the Constitution. EOR 7-16.

On January 3, 2014, TUSD filed a Motion for Reconsideration of the Reduction and Denial Order. EOR 230-248. Although no party opposed the motion, the trial court denied it ("January Denial Order") on January 7, 2014. EOR 1-4. The Process Order, UHS Order, Reduction and Denial Order and January Denial Order are collectively referred to herein as the "Procedural Modification Orders." (EOR 22-44; EOR 17-21; EOR 7-16; EOR 1-4, respectively). On January 29, 2014, TUSD filed a Notice of Appeal of the Procedural Modification Orders. EOR 227-229.

The Procedural Modification Orders have eliminated key due process entitlements and procedures ensured by Rule 53, the Appointment Order and the USP. Indeed, the Procedural Modification Orders will limit severely TUSD's

record respecting its action plans and any Special Master R&R thereon, inequitably reduce the record in a one-sided and prejudicial fashion, and permit the trial court to apply an incorrect legal standard when analyzing the District's compliance efforts.

It will be too late to correct these plain errors when TUSD applies for unitary status following the close of the 2016-2017 school year, or in appeal by any party of the trial court's unitary status determination. TUSD will suffer this plain and irreparable damage because the elimination or modification of full *de novo* judicial review will result in a woefully deficient and incomplete record, limiting the scope of future trial court and appellate review. Moreover, the trial court's failure to review TUSD plans by comparing evidentiary materials to the applicable legal standard renders the USP meaningless as a roadmap to unitary status. Because the trial court declines to provide scrutiny beyond the say-so of the Special Master, TUSD cannot know the standard by which the court will be reviewing the matters to come before it (to date, there are at a minimum, four additional plans TUSD is required to develop under the USP, two pending R&Rs, a pending R&R request, and three other plans under review that could be the subject of future R&R requests[5] that will be subject to this unclear and arbitrary process).

[5] The Procedural Modification Orders will apply, and accordingly prejudice TUSD at a minimum, as to the following upcoming plans, policies and procedures:

The relief TUSD seeks is an order directing the trial court to (a) be bound to follow the procedures in Rule 53, the Appointment Order and USP, thereby ensuring a complete and accurate record for purposes of both unitary status determination and appeal, and (b) review *de novo* TUSD plans for compliance with both the USP and Constitution so that TUSD will not be faced with a moving target for achieving unitary status.

JURISDICTIONAL STATEMENT

The trial court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over this interlocutory appeal from the trial court's Orders of December 2, 2013 ("Process Order") (EOR 22-44); December 16, 2013 ("UHS Order") (EOR 17-21); December 20, 2013 ("Reduction and Denial Order") (EOR 7-16); and January 7, 2014 ("January Denial Order") (EOR 1-4), under 28 U.S.C. §

- Plans yet to be submitted for 2014: The Comprehensive Magnet Plan, Comprehensive Boundary Plan, Multi-Year Technology Plan, Multi-Year Facilities Plan.
- Pending R&Rs: (1) the April 29, 2014 R&R regarding the designation of Salvador A. Gabaldón, M.A. as Culturally Relevant Pedagogy and Instruction Director (*See* TUSD's Request for Judicial Notice ("RJN") Ex. 10, ECF 1579), and (2) the May 5, 2014 R&R regarding TUSD's Outreach, Recruitment and Retention Plan (RJN Ex.11, ECF 1582).
- Pending R&R request: An R&R request has been made by Plaintiffs regarding the Boundary Review Process (even though TUSD's Boundary Review Process remains in development) regarding which the Special Master has not yet filed his R&R with the court.
- Other potential R&R requests involve: The Dropout Prevention and Retention Plan (USP § V.E.2, EOR 78-80) Family and Community Engagement Plan (USP § VII, EOR 94-97), and Advanced Learning Experiences Access and Recruitment Plan. (USP § V.A, EOR 72-76).

1292(a)(1).[6] The foregoing trial court orders were injunctive orders because they modified and amended prior existing injunctive orders, namely the Appointment Order (EOR 132-149) and the USP (EOR 45-131).

A. The Trial Court's Modifications of the USP, a Consent Decree, Are Appealable Orders Modifying an Injunction under 28 U.S.C. § 1292(a)(1).

Consent decrees that "prescribe[ ] conduct * * * and compel [ ] compliance" are equivalent to injunctions. *Turtle Island Restoration Network* v. *U.S. Dept. of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012) (internal quotation marks omitted).

Here, the USP is a consent decree. *See* USP generally, EOR 45-131; *see also* USP § I, n.1, EOR 50 ("this document is intended by the Parties as a consent order…."). Thus, the USP is an injunction, and any order explicitly or implicitly modifying it is an order "modifying" an injunction within the meaning of § 1292(a)(1). The trial court's December 2, 2013 Order in effect, modified the USP by imposing legal obligations on TUSD different from those prescribed by the USP. It "substantially alter[ed] the legal relations of the parties," *Cunningham* v. *David Special Commitment Ctr.*, 158 F.3d 1035, 1037 (9th Cir. 1998), by adding new legal obligations neither imposed nor contemplated by the original consent

[6]Section 1292(a)(1) confers jurisdiction on the courts of appeals over orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."

decree.

B. The Appointment Order is Injunctive in Nature and the Trial Court's Modifications of That Order Are Appealable Under 28 U.S.C. § 1292(a)(1).

Injunctions are "orders that are directed to a party, enforceable by contempt, and designed to accord or protect 'some or all of the substantive relief sought by a complaint' in more than preliminary fashion." *Thompson v. Enomoto*, 815 F.2d 1323, 1326 (9th Cir. 1987) (quoting 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3922 at 29 (1977)); *Orange Cnty. v. Hongkong & Shanghai Banking Corp.*, 52 F.3d 821, 825 (9th Cir. 1995). This Court determines "the appealability of an interlocutory order under 28 U.S.C. § 1292(a)(1) [by looking] to its substantial effect rather than its terminology." *Turtle Island*, 672 F.3d at 1165 (further citations and internal quotations marks omitted).

Here, the substantial effect of the Appointment Order is injunctive under *Thompson* because: (1) the Appointment Order governs the conduct of all the parties and the Special Master; (2) the USP refers to certain provisions of the Appointment Order requiring action by TUSD;[7] (3) the USP specifically

[7] *See, e.g.*, USP X.C.1, EOR 103 ("The Parties shall continue to follow the Notice and Request for Approval procedure pursuant to the January 6, 2012 Order.…"); USP X.C.2, EOR 103 ("The January 6 Order of Appointment requires the District to provide the Special Master with notice and seek approval of certain actions regarding changes to the District's assignment of students.…"); USP X.E.3, EOR 104 ("Such determinations of the Special Master may be appealed [by the parties] to the Court pursuant to the terms of the January 2012 Order."); USP XI.A.2, EOR

incorporates the provisions of the Appointment Order not inconsistent with the USP;[8] and (4) the Appointment Order is enforceable by contempt and designed to afford relief to the Mendoza and Fisher Plaintiffs' classes.

C. The Notice of Appeal Was Filed Timely.

On January 29, 2014, TUSD filed a timely notice of appeal of the four Procedural Modification Orders (EOR 227-229), the earliest of which was December 2, 2013. Thus, TUSD filed the notice of appeal well within the sixty (60) day limit prescribed by Fed. R. App. P. 4(a)(1)(B)(i) for appeals where the United States is a party.

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105 ("The Parties commit to negotiate in good faith any disputes that may arise, and the Parties may seek judicial resolution of any dispute pursuant to the process set forth in the January 6, 2012 Order…and as permitted by law").

[8] *See* USP XII, EOR 105 ("All Orders not inconsistent herewith remain in full force and effect.")

ISSUES FOR REVIEW

A. *Did the trial court abuse its discretion and eliminate the parties' due process rights when it sua sponte eliminated the established protocols for objections to reports and recommendations filed by the special master?*

B. *Did the trial court fail to analyze the University High School admissions process under the applicable legal standard, and instead, defer entirely to the special master's personal opinions, without evidence, to reject TUSD's appropriate and lawful policy judgment for an equitable admissions process?*

C. *Did the trial court abuse its discretion when it sua sponte interpreted unambiguous portions of the USP and Appointment Order?*

D. *Did the trial court abuse its discretion when it struck TUSD's two timely filed objections to a report and recommendation for ostensibly exceeding a local rule's page limits?*

E. *Did the trial court abuse its discretion by denying TUSD the judicial involvement, oversight and judgment of an Article III Judge to which it is entitled?*

Attached at the end of this Brief is an Addendum containing the full text of the pertinent constitutional provisions, statutes, and rules cited in this Brief.

STATEMENT OF THE CASE

A. TUSD's Due Process Right to Object Under Fed. R. Civ. P. 53 and Appointment Order.

The Appointment Order (EOR 132-149) contains several provisions acknowledging the parties' rights under Rule 53(f), to lodge objections to a Special Master's R&R, be heard on those objections and have them determined *de novo* ("Objection Provisions"):[9]

> Appointment Order § V.1: "The Special Master's findings of fact shall be subject to review by the Court **upon objection to such findings by any Party**."
>
> Appointment Order § V.2: "The Special Master may make recommendations with respect to conclusions of law (hereafter "recommendations"), but any such conclusions shall be subject to review by the Court **upon objection to such conclusions by any Party**.
>
> Appointment Order § V.4: "**The Parties shall have the right to object** to findings of fact or recommendations and to any substantive provisions in any proposed plans in the Special Master's reports…"

See Appointment Order § V, EOR 140-142 (emphasis added); Fed. R. Civ. P. 53 (f)(1)("In acting on a master's order, report or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.")

[9] Pursuant to Fed. R. Civ. P. 53(f), parties have a right to (1) object to a special master's R&R, (2) to be heard on those objections and (3) for the court to decide *de novo* all objections to the R&Rs. Fed. R. Civ. P. 53(f)(1)-(3).

In addition to preserving the parties Rule 53(f) due process rights, and consistent with the objection period provided for in Rule 53(f)(2), the Appointment Order provides additional provisions for objecting to the Special Master's R&Rs:

> Appointment Order § V.4(a): "**Any objections must be filed** within thirty (30) days of said report being filed with the Court"
>
> Appointment Order § V.4(b): **"The parties and the Special Master shall file Responses to the Objections or to revise any proposed plan within twenty-one (21) days from the filing of any such objections or**, in the case of filings for which public comment is permitted, from the close of such public comment period, to file comments or responses to the objections or to revise any proposed plans"
>
> Appointment Order § V(c): "The Parties shall have twenty-one (21) days after the filing of the Responses to file Replies."
>
> Appointment Order § V(d): "Thereafter the Court will take such action as the Court deems appropriate based upon the findings and recommendations and the **Objections**, Responses, Replies, and any public comments thereto."

Id. at pp.10-11(emphasis added).

Rule 53 and the Objection Provisions in the Appointment Order prohibit modification to these due process rights without prior notice to the parties and an opportunity to be heard. *See* Appointment Order § IX, EOR 148 ("The order may be amended at any time after notice to the parties and an opportunity to be heard."); *see also* Fed. R. Civ. P. 53 (b)(4).

B. TUSD's Due Process Right to Object is Preserved by the USP.

The USP states that all prior orders not inconsistent with the USP (including the Appointment Order) shall remain in full force and effect. USP § XII, EOR 104

("EFFECT OF PRIOR ORDERS. All Orders not inconsistent herewith remain in full force and effect.")(emphasis in original).

Additionally, the USP specifically preserved the Objection Provisions in the Appointment Order and Rule 53:

> "…the Parties may seek judicial resolution of any dispute pursuant to the process set forth in the January 6, 2012 Order Appointing Special Master and as permitted by law."

USP § XI.A.2, EOR 105.

C. <u>The December 2, 2013 Process Order.</u>

On December 2, 2013, the trial court issued an order that *sua sponte* denied the District the opportunity to be heard regarding the Special Master's reports and recommendations ("Process Order"). EOR 29 ("The matter will be considered fully briefed upon the submission of the R&R; THERE SHALL BE NO FURTHER BREIFING UNLESS REQUESTED BY THE COURT.") (emphasis in original). The Objection Provisions that protect due process are expressly guaranteed under Rule 53, the Appointment Order and the USP.

The Process Order, *sua sponte* and without notice and opportunity to be heard:

1) eliminated TUSD's (and for that matter, any party's) right under Rule 53, the Appointment Order and USP § XI.A.2 to object to Special Master R&Rs regarding TUSD plans within 30 days of their filing;[10]

2) eliminated the Appointment Order's requirement that the parties and the Special Master file responses to any objections and/or revise the R&R in accordance with the objections. *See* Appointment Order § V, EOR 141 ("The Parties and the Special Master ***shall*** file responses to the Objections or revise any proposed plan within twenty-one (21) days from the filing of any such objections…")(emphasis added);

3) eliminated TUSD's right to file a reply to the responses of the parties and Special Master. *Id.* ("The Parties ***shall*** file have twenty-one (21) days after the filing of the Responses to file Replies.")(emphasis added);

4) eliminated TUSD's right to have the trial court decide *de novo* all objections to the Special Master's R&Rs (by virtue of eliminating TUSD's right to object); and

5) eliminated the public comment period following a Special Master R&R, together with any consideration by the court of such comment on a Special Master's R&R. EOR 142 ("Thereafter, the Court will take such

[10] Rule 53 provides for 21 days to object to an R&R. The Appointment Order increased the objection period from 21 days to 30 days per stipulation of the parties.

action as the Court deems appropriate based upon the findings and recommendations and Objections, Responses, Replies, ***and any public comments thereto***.") (emphasis added).

The Process Order completely ignored both Rule 53(b)(4) and section IX of the Appointment Order that prohibits modification to the Objection Provisions without notice and an opportunity to be heard. EOR 148.

D. <u>TUSD's Motion for Reconsideration of Process Order.</u>

On December 16, 2013, TUSD filed a Motion for Reconsideration of the Process Order on the grounds the trial court's elimination of any party's ability to object to Special Master R&Rs was a violation of TUSD's due process rights, expressly protected under Rule 53, the Appointment Order and the USP ("Motion for Reconsideration of Process Order").[11] EOR 662-703.

E. <u>The UHS Order.</u>

On Friday, December 13, 2013 at 6:15 p.m. (10 days before expiration of the 30-day objection period), TUSD filed its Objection and Response to Special Master's November 22, 2013 R&R Regarding University High School ("Special Master UHS Plan") pursuant to Rule 53, the Appointment Order and the USP

[11] The Motion for Reconsideration of Process Order (EOR 662-703) also raised certain factual errors in the Process Order including the incorrect statement that TUSD had not proposed partial withdrawal of judicial oversight (EOR 23) – when in fact TUSD had. The court eventually corrected that error. *See* EOR 9 n.1:17-27.

("UHS Objection"). EOR 799-1241. TUSD's UHS Objection documented TUSD's eleven-month good faith compliance with the USP and the Constitution (including its consultation with experts, research on best practices, consultations with Plaintiff, the Special Master and the community at large), and also addressed the never-before-seen Special Master UHS Plan.[12] EOR 704-798. The UHS Objection (EOR 799-1241) was 23 pages (eight pages of which is factual background demonstrating eleven months of compliance with the USP) plus the affidavits of four TUSD administrators that played a central role in the research and development of the UHS Admissions Plan. The UHS Objection attached an additional 420 pages of exhibits. *Id*.

On Monday, December 16, 2013 at 3:21 p.m. (before one full court day had passed after the UHS Objection was filed), and without any other party having filed papers opposing or supporting any position, the trial court issued an order adopting the Special Master's UHS Plan ("UHS Order"). EOR 17-21. The UHS Order included no analysis nor made any findings on the TUSD UHS Admissions Plan's compliance with the USP and/or the Constitution. *See Id*. Indeed, the court refused to consider TUSD's UHS Objections before adopting the Special Master's UHS Plan. EOR 21. Instead, the court (again *sua sponte*) struck the entire UHS

[12] The Special Master submitted the Special Master UHS Plan to the court on November 22, 2014; however it was not formally filed with the court until December 16, 2014.

Objection (EOR 799-1241), including all affidavits and documentation of TUSD's good faith compliance with the USP and Constitution, based on LRCiv 7(e)(1), a local rule limiting objections to 17 pages, exclusive of the statement of facts.[13] EOR 21. However, the UHS Objection complies with this local rule because it is less than 17 pages exclusive of the 8 page statement of facts. EOR 799-1241.

E. TUSD's Motion for Reconsideration of UHS Order.

On December 17, 2013, the day after the UHS Order was filed, TUSD filed a Motion for Reconsideration of the UHS Order on the grounds the trial court's refusal to consider TUSD's objections violated TUSD's due process rights ("Motion for Reconsideration of UHS Order"). EOR 276-282. The same day, and also still within the 30-day objection period permitted under the Appointment Order, TUSD filed a shortened version of the UHS Objection ("Shortened UHS Objection") for the court's consideration, consisting of 17 pages and an 8 page attached statement of facts. EOR 283-661.

The Motion for Reconsideration of UHS Order asserted that: (1) under Rule 53, the Appointment Order and the USP, the trial court was required to consider TUSD's objections before ruling because TUSD has the right to be heard; (2) the

[13] United States District Court for the District of Arizona, Local Civil Rule 7(e)(1) (hereinafter "LRCiv 7(e)(1)") states: "Unless otherwise permitted by the Court, a motion including its supporting memorandum, and the response including its supporting memorandum, may not exceed seventeen (17) pages, exclusive of attachments and any required statement of facts."

UHS Objection did not exceed the page limits provided in LRCiv 7(e)(1) because the court erroneously included the statement of facts in determining the 17-page limit – something the rule expressly precludes the court from doing; (3) in the alternative, that the court should exercise the discretion permitted it under LRCiv 7(e)(1) to consider the original UHS Objection because it involves an issue of public importance spanning an eleven month period; and (4) in the second alternative, the court should consider the Shortened Objection (*Id.*) also filed within the permissible objection period. EOR 276-282.

The following day, December 18, 2013, the Mendoza Plaintiffs-Appellees filed a Motion to Strike TUSD's Shortened UHS Objection. EOR 260-275.

F. The Reduction and Denial Order.

On December 20, 2013, the trial court issued its order granting in part and denying part TUSD's Motion for Reconsideration of Process Order, denying completely TUSD's Motion for Reconsideration of UHS Order ("Reduction and Denial Order"), and striking the Shortened Objection. EOR 7-16. In the Reduction and Denial Order, the court agreed to reconsider its decision not to allow objections to the Special Master R&Rs. EOR 14 ("The Court shall reconsider its decision to not allow objections to these R&Rs.").

First, the trial court ordered the time within which to file objections to any Special Master's R&R reduced from thirty (30) days to seven (7) days and the

length of any objection reduced from seventeen (17) pages to ten (10) pages. EOR 15 ("Any Objection filed to such an R&R regarding a Plan of Action will be limited to 10 pages and filed within 7 days of service of the R&R"). No party had sought this restrictive briefing schedule and page limit, which was ordered *sua sponte*.

Second, the Reduction and Denial Order issued a *sua sponte* contract interpretation of the unambiguous Objection Provisions of the Appointment Order and the USP, without the request of any party to do so. EOR 7-16. Instead, the trial court ordered the Objection Provisions in the Appointment Order superseded by a voluntary resolution provision in the USP that must be followed *before* the Special Master may submit an R&R ("Voluntary Resolution Provision").[14] *Id.*

Third, the trial court denied TUSD's objections to the Special Master's UHS Admissions Plan on the grounds that TUSD's objections "offer nothing new as to the merits of the CAIMI [a type of examination TUSD was going to use as a part of the UHS admissions process] as a tool to identify non-traditional class-member

[14] The Voluntary Resolution Provision in the USP states: "The Special Master and the Parties shall work towards voluntary resolution of any disputes. If any disagreements cannot be resolved within thirty (30) days from the date Plaintiffs provide their comments to the District, the Special Master shall report such disagreements to the Court together with his recommendation concerning how the disagreement(s) should be resolved. The Special Master's report shall include as attachments all submissions made to him by the Parties with respect to the item(s) in issue. The Court may order additional briefing as it deems appropriate." *See* USP § I.D.1, EOR 50-51.

students." EOR 14. The court failed to conduct the required *de novo* review to determine whether TUSD's UHS admissions plan complied with the USP or the Constitution. *See Id.* Instead, the court found TUSD's materials demonstrating the basis for its educational policy, including its compliance with the USP and the Constitution, were not among the objections "arguably relevant" to the court's analysis. EOR 14:5-11.

Fourth, the Reduction and Denial Order struck from the public record TUSD's Shortened Objection (EOR 283-661) on the grounds it again exceeded the page limit in LRCiv 7.2(e)(1) because the trial court apparently (and erroneously) included the text of the attached statement of facts as part of the 17-page limit – something the rule expressly precludes the court from doing. EOR 8.

G. Motion for Reconsideration of Reduction and Denial Order.

On January 3, 2014, TUSD filed a Motion for Reconsideration of the Reduction and Denial Order (EOR 230-248) on the following grounds:

(1) The trial court committed a manifest legal error when it modified the Objection Provisions in the Appointment Order (EOR 140-142, and USP § XI.A.2 (EOR 105) without first having provided the parties notice and an opportunity to be heard. Accordingly, TUSD requested the court to permit briefing and hold a hearing before the court issued any order modifying the Objection Provisions in the Appointment Order. EOR 238.

(2) The court committed a manifest legal error when it, *sua sponte*, interpreted the plainly unambiguous provisions of the USP and Appointment Order (a) without first having been presented a disagreement about it from the parties, (b) then calling for the parties' evidence on the issue, and, (c) after considering that evidence, (d) determining the meaning of the language to resolve the dispute. TUSD accordingly asked the court that if it intended to adopt an order interpreting the provisions of the USP and Appointment Order, it first advise TUSD of the nature of the dispute and grant it leave to submit evidence on the issues before the court considered making such a determination. EOR 238-239.

(3) The court committed a manifest legal error when it denied TUSD's UHS Objection defending the TUSD UHS Admissions Plan without first having conducted a *de novo* review of the TUSD UHS Admissions Plan for compliance with the USP and the Constitution. Accordingly, TUSD requested the court reconsider its order denying the TUSD UHS Admissions Plan and, after taking evidence on the issue, review that Plan *de novo* for compliance with the USP and the Constitution. EOR 239-242.

(4) When the court struck TUSD's Shortened Objection (EOR 283-661), doing so both violated the local rule regarding page limits and had profound repercussions, giving it a jurisdictional effect not authorized under Fed. R. Civ. P. 83 by striking 400 pages of evidence of compliance activity related to TUSD's

UHS Admissions Plan. This will impact both TUSD's ultimate request to be determined unitary, and any party's right to appeal that determination. TUSD further argued that for the court to strike TUSD's objections for this reason constituted further manifest error because doing so eliminated timely public record of TUSD's good faith compliance with the USP regarding the UHS Admissions Plan, something TUSD must demonstrate in order to obtain unitary status pursuant to USP § I.C.[15] EOR 242-243.

H. <u>The January Denial Order.</u>

On January 7, 2014, without any oppositions filed, the trial court issued its order denying TUSD's Motion for Reconsideration of the Reduction and Denial Order ("January Denial Order"). EOR 1-4. The January Denial Order did not address any of the substantive legal grounds TUSD had offered for

[15] This Court has underscored the necessity for a complete and accurate record of TUSD's good faith compliance for a unitary status determination. *See Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1135 (9th Cir. 2011) (**"**The Supreme Court has underscored that the first showing, regarding good faith, is central to a district court's decision to declare a school system unitary and withdraw its supervision. In *Freeman*, the Court directed district courts to 'give particular attention to the school system's record of compliance' because '[a] school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations.' 503 U.S. at 491. Indeed, 'A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new de jure violation.' *Id.* at 498 n.4 When a school district demonstrates good faith, it 'enables the district court to accept [its] representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future.' *Id.* (citation omitted)").

reconsideration, but rather simply concluded, without any analysis, that there was no merit to TUSD's Motion for Reconsideration of the Reduction and Denial Order. EOR 3:8-18.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in issuing its Process Order (EOR 22-44), its UHS Order (EOR 17-21), its Reduction and Denial Order (EOR 7-16), and its Denial Order (EOR 1-4) (collectively "Procedural Modification Orders") after disregarding the Appointment Order, the USP, the Federal Rules of Civil Procedure, and applicable constitutional provisions and decisional law.

First, the trial court's drastic reduction and elimination of the right to file objections and obtain *de novo* review thereon is erroneous as a matter of law. Without any warning to any parties, the court modified the Appointment Order (EOR 132-149) and USP § XI.A.2 (EOR 105) by reducing the 30 day objection period in the Appointment Order to only seven days. In doing so, the court denied the parties their right to notice and an opportunity to be heard before any modification of the Appointment Order and USP.

Second, the trial court's *sua sponte* contract interpretation of the Voluntary Resolution Provision of the USP (USP § I.D.1) (EOR 50-51) and the Objection Provisions in the Appointment Order was erroneous as a matter of law**.** In the Reduction and Denial Order, the court modified the Appointment Order (EOR

140-142) and USP § XI.A.2 (EOR 105) when it *sua sponte*, without giving the parties an opportunity to be heard, interpreted the USP as eliminating the parties' objection rights as to a special master R&R (EOR 7-16). The court also failed to use the proper analysis for contract interpretation and used the wrong standard under the USP to determine whether an Appointment Order (EOR 132-149) provision remains in full force and effect

Third, the trial court's January Denial Order (EOR 1-4) erroneously applied the wrong legal standard to review the UHS Admissions Plan. The court failed to conduct a *de novo* review, as required by Rule 53(f)(3), of TUSD's compliance with the USP and Constitution. Further, the court limited its review to a single specific admissions measure proposed by TUSD, and did so using an incorrect standard and without making proper findings.

Fourth, TUSD's objections to the Special Master's UHS Admissions Plan (EOR 799-1241) should not have been stricken from the record. The trial court's Reduction and Denial Order (EOR 7-16) struck TUSD's entire Shortened Objection (EOR 283-661) to the Special Master's UHS Admissions Plan (EOR 704-798) after an erroneous and clearly incorrect determination that TUSD's Objection exceeded LRCiv 7.2(e)(1)'s prescribed page limits.

ARGUMENT:
THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ABIDE BY RULE 53, THE APPOINTMENT ORDER AND THE USP

A. Standard of Review

The trial court's decision to grant or explicitly or implicitly modify permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004); *Spangler v. Pasadena City Bd. Of Educ.*, 519 F. 2d 430, 434-438 (9th Cir. 1975) (reversed on other grounds) (abuse of discretion standard applied to trial court decision on whether to modify desegregation order and dissolution of injunction). A trial court's order is clearly erroneous as a matter of law if the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *In re Cement Antitrust Litig*. (MDL No. 296), 688 F.2d 1297, 1305 (9th Cir. 1982) *aff'd sub nom. Arizona v. U.S. Dist. Court for Dist. of Arizona*, 459 U.S. 1191, 103 S. Ct. 1173, 75 L. Ed. 2d 425 (1983) and *supplemented sub nom. State of Ariz. v. U.S. Dist. Court for Dist. of Ariz.*, 709 F.2d 521 (9th Cir. 1983).

B. The Trial Court Abused its Discretion When it Eliminated the Appointment Order's Objection Provisions Without Notice and Opportunity to be Heard.

The Appointment Order simply may not be modified absent notice to the parties and opportunity to be heard.

Rule 53(b)(4) of the Federal Rules of Procedure states as follows:

"(4) Amending. The order [appointing special master] may be amended at any time after notice to the parties and an opportunity to be heard."

Fed. R. Civ. P.53 (b)(4). "The provision in Rule 53(b)(4) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment. The hearing requirement can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony." Rule 53, Committee Notes on Rules - 2003 Amendment.

Additionally, the Appointment Order contains a provision mirroring Rule 53(b)(4), prohibiting modification absent notice to the parties and an opportunity to be heard. *See* Appointment Order § IX, EOR 148. Finally, the USP provides for using the Appointment Order's Objection Provisions. USP § XI.A.2, EOR 105 ("…the Parties may seek judicial resolution of any dispute pursuant to the process set forth in the January 6, 2012 Order Appointing Special Master and as permitted by law.").

In ruling on TUSD's Motion for Reconsideration of Process Order (EOR 662-703), the trial court modified the Appointment Order (EOR 132-149) and USP § XI.A.2 (EOR 105) by reducing the thirty (30) day objection period in the Appointment Order (and 21 day period in Rule 53) to only seven (7) days, significantly reducing the objection procedure which follows an R&R. Such a short objection period is contrary to Rule 53's intent to afford objecting parties adequate time for thorough study and response to complex issues.[16] The court issued the Process Order (EOR 22-44) without notice to the parties that it was contemplating reducing the objection period (and eliminating the Special Master response/revision and TUSD reply procedures), thereby erroneously denying all parties an opportunity to be heard on the reduced objection schedule and an adequate compliance record. Therefore, the court abused its discretion when it modified the Objection Provisions of the Appointment Order, thereby also modifying USP § XI.A.2 (EOR 105) which provides for use of those Objection Provisions.

[16] In 2003, Rule 53(g)(2) was amended to increase the objection period from 10 days to 20 days. Fed. R. Civ. P. 53 advisory committee's (2003 Amendment) ("The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation.") In 2009, Rule 53(g)(2) was amended again to increase the objection period from 20 to 21 days. *Id.* (2009 Amendment).

C. The Trial Court Abused its Discretion When it Refused to Conduct a Mandatory *De Novo* Review of the TUSD UHS Admissions.

> Rule 53 requires a *de novo* review of objections to a Special Mater's R&Rs: "Reviewing Factual Findings. The Court must decide *de novo* all objections to findings of fact made or recommended by a master…"

Rule 53(f)(3).

The requirements for *de novo* review are set forth in the both the USP and the Constitution. *United States v. South Bend Community School Corp.*, 511 F. Supp.1352, 1360 (D. Ind. 1981) ("this Court's duty is only to determine whether the plan submitted conforms to the consent decree entered into by the parties and whether it is compatible with the Constitution of the United States in light to the Supreme Court's pronouncement in *Brown v. Board of Education* and its progeny."); *United States v. Choctaw County School District*, 941 F. Supp.2d 708, 715 (D. Miss. 2013) ("[T]he Court's analysis is limited to a determination of whether the [school] District's proposed modification is constitutionally adequate."). Courts similarly have observed the need to defer, whenever possible, to school administrators on matters that fall within their area of expertise, particularly, the proper administration of a school district. *Anderson v. Canton Mun. Separate School District*, 232 F.3d 450, 454 (5th. Cir. 2000) (court must "remain at all times cognizant of the deference that must be accorded to school

boards in their decisions such as the placement of schools" because court lacks "expertise and competence needed to dictate" such decisions); *Morgan v. McDonough*, 689 F.2d 265, 276 (1st Cir. 1982) ("courts must narrowly tailor their remedial orders to the unconstitutional conditions which gave rise to the need for court intervention" and "in so doing, courts should defer whenever possible to the reasonable proposals of the local officials charged with administering the school system"); *Monteilh v. St. Landry Parish School Bd.*, 848 F.2d 625, 632 (5th Cir. 1988) (observing fact that "plan does not result in the most desegregation possible does not mean that the plan is flawed constitutionally").

In *United States v. South Bend Community School Corp.*, 511 F.Supp. 1352 (N.D. Ind. 1981), the Court analyzed its power when evaluating a desegregation plan instituted pursuant to a consent decree:

> In this posture the role of the court, *empowered as it is under Article III of the Constitution of the United States*, is very limited. This Court is not here to act as a super school board nor is it here to decide what the best or most desirable plan of desegregation may be. Rather, this Court's duty is only to determine whether the plan submitted ***conforms to the consent decree*** entered into by the parties and ***whether it is compatible with the Constitution*** of the United States in light to the Supreme Court's pronouncement in *Brown v. Board of Education* and its progeny.

Id. at 1360 (emphasis added). The court then concluded the plan the school board adopted was acceptable, specifically noting with approval that "most of the day to

day details of the implementation of this plan are left to the administrators" of the school. *Id.* at 1361.

Here, the USP requires the following with respect to the UHS Admissions Plan:

1) TUSD review and revise the current admissions process;

2) Multiple measures be used for the admissions process;

3) All students have an equitable opportunity to enroll;

4) TUSD will consult with experts regarding use of multiple measures;

5) TUSD shall review best practices for admitting students of similar programs; and

6) TUSD shall consult with the Plaintiffs and the Special Master during the drafting and prior to implementation.

USP § V.A.5, EOR 75-76. Additionally, the Constitutional review requires deference to the educational policy decisions made by the administrators of the school district.

The trial court's Reduction and Denial Order (EOR 7-16) nowhere reflects that it conducted a *de novo* review of the TUSD UHS Admissions Plan. Indeed, the trial court conducted **no** review, let alone a *de novo* review, of many of the factors listed above to determine TUSD's compliance with the USP. EOR 14:5-11

The trial court specifically noted it had not considered the following factors: TUSD's compliance with the constitution; TUSD's compliance with the USP; whether TUSD's revised procedures ensured multiple measures for an equitable opportunity; TUSD's review of internal and external research of best admissions practices; TUSD's extensive consultation with experts; and TUSD's incorporation of public comment. *Id.* (referring to TUSD's collaborative efforts with Special Master and Plaintiffs as required under USP, constitutional sufficiency of TUSD's admissions plan, and pages 4-5, 14-16 and 23 of TUSD's objections as irrelevant to court's analysis). This is plain legal error.

Instead, it appears the trial court limited its review (again, it is unclear whether this review was *de novo*) to interpreting whether the CAIMI (the objective admission measure proposed by TUSD to comply with the USP)[17] was a sufficient tool to identify non-traditional class-member students. EOR 14:11-13. This is not the appropriate standard under the USP for review of TUSD's UHS Admissions Plan.[18] The USP requires that TUSD ensure that multiple measures for admission be used so that all students have an ***equitable opportunity*** to enroll at University High School. USP § V.A.5 (EOR 75-76). Accordingly, the CAIMI should be

[17] EOR 799-1241, UHS Objection, for detailed background on the CAIMI.

[18] The suggestion regarding identification of non-traditional applicants is taken from the memorandum of Jeannie Franklin of Montgomery County Public Schools in Rockville, Maryland. EOR 18. This standard does not exist in the USP, which controls this case.

reviewed as a method to provide an additional measure for an ***equitable opportunity*** to enroll—not reviewed in terms of surfacing non-traditional applicants. As shown in the UHS Objection and Affidavits of Juliet King, Ph.D, Samuel Brown and Martha Taylor, the TUSD UHS Admissions Plan meets that criterion in an *objective* manner with the CAIMI, designed to increase the overall pool of applicants qualified for admission without "lowering the bar." EOR 799-1241; EOR 283-661. There was no finding, nor any evidence in the record to support one, that any student would be denied an equitable opportunity to enroll if the CAIMI is used.[19]

Accordingly, the trial court abused its discretion by erroneously failing to conduct a *de novo* review of the UHS Admissions Plan (EOR 961-1029), as required by the USP and the Constitution.

[19] Indeed, the subjective measures urged by the Special Master frustrate compliance with the USP's requirement that the opportunity for admission be equitable. Equality in subjective evaluation is difficult to establish because subjective measures require human judgment which reduces transparency and consistency of admissions. *See* TUSD Admissions Plan, Review Process, Section VI (EOR 720; EOR 795) ("Early consensus from the working group determined that additional admissions criteria should be objective and well-defined. The initial feeling was that the use of interviews, personal essays and/or staff recommendations could inject subjectivity into the process and could reduce the transparency and consistency of admissions."); *see also* Dr. Chester Finn interview notes (EOR 730-732) ("Quantitative is easy to explain to the public vs. human judgment that is an evaluation of others.")

D. The Trial Court Abused its Discretion When it Erroneously Struck TUSD's Shortened Objections For Exceeding Page Limits.

Paper size and similar guidelines in local rules never have been raised to a level of jurisdictional importance. *Smith v. Frank*, 923 F.2d 139, 142 (9th Cir. 1991); *Loya v. Desert Sands Unified School Dist.*, 721 F.2d 279, 280-281 (9th Cir. 1983). If a trial court finds that a party has exceeded a local rule's page limit requirements, this condition should not compromise a party's ability to appeal. *Smith*, 923 F. 2d at 142*; See also Cintron v. Union Pac. R. Co.*, 813 F.2d 917, 920 (9th Cir. 1987) (failure to punch holes in top margin of complaint or include copy of civil cover sheet should not prevent prosecution of action); *United States v. Dae Rim Fishery Co*., 794 F.2d 1392 (9th Cir. 1986) (naming agents of defendants instead of defendants in summons, as local rule required, should not bar action). Indeed, papers timely filed, but overly long under local rules, should not be rejected without a reasonable, even if conditional, opportunity to conform to local rules. *Smith*, 923 F. 2d at 142.

Exceeding page limits set forth in local rules should not inhibit a party's ability to object to a special master's report and recommendation:

> Similarly, in the present case, the application of the pleading length limitation under the local rules in combination with the time limitation under Fed. R. Civ. P.53 gives the local rule a jurisdictional effect not authorized under Fed. R. Civ. P.83. As noted, the failure to object to a magistrate's findings, conclusions, and recommendations within the period fixed by the Federal Rules of Civil Procedure either precludes or limits review by the Court of Appeals, thereby affecting the appellate court's jurisdiction.

> However, plaintiff did file objections to the magistrate's findings, conclusions, and recommendations within the time authorized by Fed. R. Civ. P. 53; plaintiff's error was that the objections were too long in violation of the local rules. Plaintiff is prevented from fully pursuing his rights not because of his untimeliness, but because of the length of his pleading and the operation of a local rule. Such an interpretation would give the local rule an impermissible jurisdictional character.

Id. (citations omitted).

Here, the trial court's Reduction and Denial Order (EOR 7-16) struck TUSD's entire Shortened Objection (EOR 283-661) to the Special Master's UHS Admissions Plan (EOR 704-798) because it apparently found that an 8 page exhibit containing a separate statement of facts, as permitted by LRCiv 7(e)(1), should be included in determining the 17 page limit under that rule. Not only does the court's order striking the TUSD UHS Objection (EOR 799-1241) and Shortened UHS Objection (EOR 283-661) find no support in either the local rule or case law, it potentially impacts TUSD's ability to secure a unitary status determination, as well as any appeal of that determination, and also unfairly excludes the timely record of TUSD's compliance with USP § V.A.5 (EOR 75-76) relating to UHS admissions.

E. The Trial Court Abused its Discretion When it *Sua Sponte* and Improperly Interpreted Unambiguous Portions of the USP and Appointment Order.

In the Reduction and Denial Order (EOR 7-16), the trial court *sua sponte* interpreted the Voluntary Resolution Provision in the USP (USP § I.D.I, EOR 50-

51) and found Section I.D.I to be a more "specific provision" regarding objections than a similar, more "general" provision in the Appointment Order, determining that the former trumped the latter. EOR 9-10 n.3. In doing so, the court held the USP terminated the right of all parties – including TUSD - to object to a Special Master R&R even though another USP provision, § XI.A.2 (EOR 105), specifically requires use of the Objection Provisions. This clearly is erroneous as a matter of law.

The interpretation of a consent decree "is governed by familiar principles of contract law." *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989); *Miller v. Fairchild Indus*., 797 F.2d 727, 733 (9th Cir. 1986) ("An agreement to settle a legal dispute is a contract and its enforceability is governed by familiar principles of contract law."); *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc*., 689 F.2d 885, 892 (9th Cir. 1982) ("[Because] consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts.").

First, the trial court's finding is erroneous as a matter of law because its *sua sponte* interpretation of consistent USP and Appointment Order provisions has modified, without request by any party to do so, the USP and Appointment Order as they plainly read and as TUSD understands them. As such, TUSD should have

an opportunity to be heard and present evidence pursuant to Rule 53(b)(4) and Appointment Order § IX., EOR 148.

Second, this finding is erroneous as a matter of law because interpretation of a purportedly ambiguous contract provision[20] requires a two-step analysis the trial court failed to conduct here. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993). "First, the court considers the evidence that is alleged to determine the extent of integration, illuminate the meaning of the contract language, or demonstrate the parties' intent. *See* 3 Arthur Linton Corbin, CONTRACTS, § 542 at 100-01 (1992 Supp.). The court's function at this stage is to eliminate the evidence that has no probative value in determining the parties' intent." *Taylor*, 175 Ariz. at 153, 854 P.2d at 1139. "The second step involves "finalizing" the court's understanding of the contract." *Id.* As such, if the court here intends to issue an order interpreting the provisions of the USP and Appointment Order, it first must consider evidence and allow TUSD an opportunity to be heard before making such a determination.

In addition, the partial analysis the trial court conducted on this issue was incorrect and erroneous as a matter of law. The court's analysis of whether a provision in the USP "is contrary to or modifies" the Appointment Order is not the

[20] Although TUSD believes there is no ambiguity among or between document provisions, conflicting interpretations have been raised by the District Court's Reduction and Denial Order adopting an interpretation different than TUSD's.

proper standard under the USP to evaluate whether a provision in the Appointment Order remains in full force and effect. Instead, the court is required to give full force and effect to the Appointment Order unless a USP provision is "inconsistent with" an Appointment Order provision. USP § XII, EOR 105. Under this analysis, the Objection Provisions clearly are not inconsistent with the USP which specifically affirms and refers to the use of the Objection Provisions in the Appointment Order. USP § XI.A.2, EOR 105 ("…the Parties may seek judicial resolution of any dispute pursuant to the process set forth in the January 6, 2012 Order Appointing Special Master and as permitted by law.").

Moreover, the Voluntary Resolution Provision in the USP clearly is in response to a directive in the Appointment Order requiring the USP to include a timeline for voluntary resolution of objections to TUSD plans (not objections to reports and recommendations filed with the court as provided in the Objection Provisions): "The USP shall include, at a minimum the following: … A timeline for the filing of any objections to the District's reports together with a schedule for the filing of responses to those objections and for the Special Master to prepare findings and conclusions with respect to the objections." Appointment Order § I(6), EOR 137. The Appointment Order does not require the USP to include a timeline for objections to Special Master R&Rs because that procedure already is included in the Objection Provisions in the Appointment Order. As such, the

Voluntary Resolution Provision providing a timeline for ***objections to TUSD plans*** clearly is not inconsistent with the Objection Provisions providing a timeline for ***objections to Special Master R&Rs***. Thus, the trial court abused its discretion by *sua sponte* and erroneously interpreting the clear provisions of the USP and Appointment Order.

F. The Trial Court Appears to Have Abdicated Many of its Judicial Functions and Responsibilities to the Special Master.

The Constitution prohibits a trial court from abdicating its duty to determine a controversy using its own judgment by delegating that duty to any of its officers. U.S. Const. art. III; *Stauble v. Warrob, Inc.*, 977 F.2d 690, 695 (1st Cir. 1992) (*citing Kimberly v. Arms*, 129 U.S. 512, 524 (1889)). Although Rule 53, Fed. R. Civ. P., permits courts to appoint special masters in limited circumstances, the special master's role is to '"aid judges in the performance of specific judicial duties' and not to displace the court." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957) (citations omitted).

A trial court inexcusably abdicates its judicial responsibility, in violation of Article III of the Constitution, when it acts as a "mere rubber stamp" for a special master's findings and conclusions. *Burlington N. R.R. v. Department of Revenue*, 934 F.2d 1064, 1072 (9th Cir. 1991)*; See Stauble*, 977 F.2d at 696 (special master

sets and clears table, but trial judge "determine[s] the main course, *i.e.*, the meat-and-potatoes issues of liability").

Before relying on a special master's report, a trial court must find sufficient supporting evidence and be satisfied that the special master applied the proper legal standards before relying on a special master's report. *Id.* at 696-97 (citations omitted) ("summary confirmation" of special master's report, without holding hearing, without providing analysis of evidence, without any comment on a party's objections, and without discussion of special master's legal conclusions, violated Article III). "The mere 'laying of hands' by a trial judge who adopts a magistrate's or master's recommendation of liability *pro forma* cannot inoculate a proceeding against the pathology that invariably follows from noncompliance with Article III." *Id*. at 696; *see Reed v. Board of Election Comm'rs*, 459 F.2d 121, 123 (1st Cir. 1972) (trial court's blanket approval of magistrate's recommendation, purporting to be decision on merits, but without a merits hearing or notice and opportunity to be heard, constitutes abnegation of judicial authority "entirely contrary to the provisions of Article III").

Applying this legal framework here, it appears the trial court has abdicated its Article III responsibilities to the special master. The record suggests that the court has done no more than rubber stamp the special master's ex parte

suggestions[21] and recommendations. The trial court simply has adopted the special master's recommendations, without providing notice, without allowing the parties to present evidence or argument, and without holding a hearing. *See*, *e.g*. EOR 22-44, the Court's Order Adopting the Special Master's UHS Plan ("UHS Order") discussed above. Indeed, the court denied the DOJ's October 2013 request (joined by TUSD and opposed by the Special Master and Plaintiffs Fisher and Mendoza) for a referral to a magistrate judge so the case could have the regular court involvement it so desperately needs. EOR 1499: 19-24.

The parties are entitled to better – the law requires it. The trial court needs to hold hearings when requested so parties may present evidence and argue their positions. How are the parties to deal with the court's *sua sponte* interpretation of its past orders? One would assume a party could file a motion for reconsideration and have an opportunity to offer evidence and argue its position to the court. Not in this trial court.

TUSD has asked the trial court to permit it a hearing to argue its position on at least fourteen occasions, including both separately filed motions/requests for

[21] The Appointment Order permits the Special Master broad *ex parte* access to the trial court. *See* Appointment Order § VIII, EOR 146 ("The Special Master may engage in ex parte communications with the Parties, counsel or the Court, and may have *ex parte* communications with Party representatives or employees outside the presence of counsel.")

hearings[22] and by including the phrase "oral argument requested"[23] in the caption as provided for in the local rules as the procedure for requesting a hearing. LRCiv 7.2(f). The Mendoza Plaintiffs also have made a request for hearing on at least one occasion that likewise was denied. *See, e.g.*, EOR 1580-1582 and EOR 150-156. Not once has the court granted any of these requests. Never has the court held a hearing on any matter since this case was remanded in 2008. Indeed, prior to remand, the most recent status conference was conducted approximately two years earlier on 3/9/06 – and it was conducted by the court's law clerk outside the presence of an Article III judge. EOR 221-224. Perhaps most critically, the court never has held a hearing on the Procedural Modification Orders which significantly modified the rights and obligations of the parties under the Appointment Order and

[22] *See* TUSD's separately filed motions for hearings and the corresponding denial orders: EOR 225-226 (TUSD motion for hearing, denied in EOR 225-226), EOR 1588-1590 (TUSD motion for hearing denied in EOR 216-220), EOR 1583-1587 (TUSD request for scheduling conference, denied in EOR 216-220), EOR 1577-1579 (TUSD request for settlement conference denied in EOR 150-156), EOR 249-257 (TUSD motion for hearing denied in EOR 5-6) and RJN Ex. 2 (TUSD motion for hearing denied in RJN Ex. 8).

[23] *See* TUSD's requests for oral argument made within its briefs pursuant to LRCiv 7.2(f) and the corresponding denial orders: EOR 1242-1245 (oral argument denied in EOR 17-21), EOR 799-1241 (oral argument denied, by virtue of being stricken, in EOR 17-21), EOR 22-44 (oral argument denied in EOR 7-16), EOR 283-661 (oral argument denied, by virtue of being stricken, in EOR 7-16), EOR 230-248 (oral argument denied in EOR 1-4), ECF 1565 (RJN Ex. 3)(oral argument denied in 1567, RJN Ex. 5), ECF 1568 & 1569 (RJN Exs. 6 & 7) (oral argument denied in ECF 1573, RJN Ex. 8) and ECF 1575 (RJN Ex. 9)(no hearing granted to date).

USP.[24] This Court must direct the trial court to perform its judicial functions, not just go through the motions. The matters before the court are very serious and are entitled to the full attention of this Article III judge.

CONCLUSION

For the reasons stated above, TUSD respectfully requests this Court vacate the orders appealed herein, remand with directions to take such action as is consistent with the Court's order, and order such other relief as the Court deems appropriate. *See, e.g., Shafer v. Army & Air Force Exch. Serv.*, 376 F.3d 386, 395 (5th Cir. 2004) (vacating orders where trial court's failure to follow formal Rule 53 requirements produced series of material errors). In addition, the trial court should be directed to conduct a meaningful review, with careful scrutiny, of special master reports and recommendations as required by Rule 53. *Williams v. Lane*, 851 F.2d 867, 885-86 (7th Cir. 1988) (ordering trial court to review special master findings "with care" because special master's conclusions "warrant careful scrutiny due to

[24] TUSD requested a hearing regarding the Procedural Modification Orders on ten separate occasions, each of which was denied. *See* TUSD's requests for oral argument regarding the Procedural Modification Orders and corresponding denial orders: EOR 1242-1245 (oral argument denied in EOR 17-21), EOR 799-1241 (oral argument denied, by virtue of being stricken, in EOR 17-21), EOR 22-44 (oral argument denied in EOR 7-16), EOR 283-661 (oral argument denied, by virtue of being stricken, in EOR 7-16), EOR 230-246 (oral argument denied in EOR 1-4), ECF 1565 (RJN Ex. 3) (oral argument denied in ECF 1567, RJN Ex. 5) and ECF 1568 & 1569 (RJN Exs. 6 & 7) (oral argument denied in ECF 1573, RJN Ex. 8).

extensive relief sought by plaintiffs."). This careful review should include, but not be limited to, holding a hearing, and receiving testimony and evidence when requested by a party, and analysis of the same using the correct standard of review. *Stauble*, 977 F.2d at 696-697 ("Like the bark of a dog to Sherlock Holmes, see Arthur Conan Doyle, Silver Blaze, in The Complete Original Illustrated Sherlock Holmes 117 (1976), the indicia of independent review are telling in this case by their absence. The district court adopted the master's report without a hearing, without any stated analysis of the evidence, and without any discussion of the master's legal conclusions.").

IN THE ALTERNATIVE, TUSD REQUESTS THIS COURT TO TREAT THIS OPENING BRIEF AS A PETITION FOR A WRIT OF MANDAMUS.

In the alternative, should this Court determine it has no jurisdiction over this appeal, TUSD requests that the Court consider this brief as a Petition for a Writ of Mandamus, under 28 U.S.C. § 165(1)(a) and Rule 21, Fed. R. App. P., and issue its Writ of Mandamus to the trial court, vacate the orders subject to the Petition, and require the trial court to take such action as this Court directs and in furtherance of its decision.

This Court may treat a notice of appeal from an otherwise nonappealable order as a Petition for Writ of Mandamus. *Cordoza v. Pacific States Steel Corp,* 320 F.2d 989, 998 (9th Cir. 2003); *See, e.g., Hernandez v. Tanninen,* 604 F.2d 1095, 1099 (9th Cir. 2010) (construing appeal as petition for writ of mandamus

where grounds for pending interlocutory appeal eliminated and granting relief); *Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (reviewing appeal as petition for writ where order not immediately appealable). The Court determines *de novo* whether the writ should issue by reviewing the trial court's orders for a clear abuse of discretion. *Id.*; *Hernandez,* 604 F.2d at 1099.

This Court determines whether to issue a writ of mandamus based on a case-by-case evaluation of the factors outlined in *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977): (1) petitioner has no other adequate means, such as a direct appeal, to attain the relief requested; (2) petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the trial court's order is clearly erroneous as a matter of law; (4) the trial court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the trial court's order raises new and important problems, or issues of law of first impression. *Id.* None of the guidelines is determinative and all five need not be satisfied. *In re Philippine Nat'l Bank,* 397 F.3d 768, 774 (9th Cir. 2005).

A. <u>TUSD Has No Adequate Remedy Except This Writ Review.</u>

TUSD satisfies the first *Bauman* factor because, should this Court determine it is without jurisdiction to entertain TUSD's appeal under 28 U.S.C. §§ 1291 or 1292, TUSD has no other adequate means to obtain the requested relief from the Procedural Modification Orders. *Bauman*, 557 F.2d at 654; *Varsic v. United States*

Dist. Ct., 607 F2d 245, 251 (9th Cir. 1979). A party is not required to seek a discretionary interlocutory appeal before pursuing mandamus relief. *Cole v. United States Dist. Ct. for Dist. of Idaho*, 366 F3d 813, 817 (9th Cir. 2004). Accordingly, the first *Bauman* factor has been met.

B. <u>TUSD Will Be Damaged In a Way Not Correctable On Appeal.</u>

TUSD satisfies the second *Bauman* factor because it will suffer severe prejudice that cannot be remedied on appeal. *Bauman,* 557 F.2d at 654; *Washington Public Util. Group v. United States Dist. Ct.*, 843 F2d 319, 325 (9th Cir. 1987). Prejudicial harm serious enough to warrant this Court's intervention and ordering mandamus relief includes situations in which one's "claim will obviously be moot by the time an appeal is possible," or in which one "will not have the ability to appeal." *DeGeorge v. United States Dist. Court*, 219 F.3d 930, 935 (9th Cir. 2000).

TUSD will suffer prejudice as a result of the modification to Rule 53, the Appointment Order and USP. At the end of the 2016-2017 school year – more than three years hence - TUSD will be required to demonstrate, based solely on evidence in the record, its good faith compliance with its USP obligations and that it has eliminated the vestiges of past unlawful segregation to the extent practicable. USP § XI., EOR 105; *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131 (9th Cir. 2011). To make this showing, the record must reflect accurately TUSD's good

faith efforts so that the trial court has all the necessary information to make a unitary status determination. Additionally, the record must be accurate and complete in the event an appeal follows that determination. *Id*.

The Procedural Modification Orders have severely limited TUSD's record respecting its implementation of plans and the Special Master's R&Rs thereon because they (1) reduce TUSD's objections from seventeen (17) pages to ten (10) pages and the objection time-frame from thirty (30) days to seven (7) days; (2) eliminate the requirement that the Special Master respond to TUSD's objections and/or revise his plan; (3) eliminate TUSD's right to reply to the Special Master's response to TUSD's objections; and (4) eliminate review and consideration of public comments. Process Order, EOR 22-44 (EOR 29, eliminating the above-listed rights: "The matter will be considered fully briefed upon the submission of the R&R; THERE SHALL BE NO FURTHER BRIEFING UNLESS REQUESTED BY THE COURT") (emphasis in original); *see also* Reduction and Denial Order, EOR 15 ("an Objection to the R&Rs for Plans of Action . . . shall be limited to 10 pages and filed within 7 days of service of the R&R.")

Not only do the Procedural Modification Orders severely limit the available record for any appeal, but they also inequitably limit the record in a one-sided and prejudicial fashion against TUSD. As the trial court ordered *sua sponte* in the Process Order (EOR 22-44), the Plaintiffs continue to have 30 days to formulate

objections that will become part of the record to criticize TUSD's good faith USP compliance regarding any individual plan. Further, there is no page limitation for Plaintiffs' objections, which become part of the record as exhibits to the Special Master's R&R and need not be filed as independent "objections" subject to the terms of the Reduction and Denial Order. EOR 7-16. To the contrary, however, any objections to an R&R TUSD may file are subject to the 7 day time limitation and the 10 page limit the court has imposed. As now is glaringly obvious, the process the court has ordered severely tilts the playing field against TUSD's efforts to establish an accurate record as to the individual plans.

If this Court does not direct the trial court to respect TUSD's rights under Rule 53. the Appointment Order (EOR 132-149) and USP (EOR 45-131), this issue will arise again and again. The court has stated that it has "total discretion" over the objection procedures for R&Rs (EOR 15:5) and that it believes it unnecessary that TUSD have any right to object (EOR 14:3-4).

Further, TUSD will suffer prejudice as a result of the trial court continuing to apply an incorrect legal standard when analyzing the acceptability of both the UHS Admissions Plan and all future plans.

TUSD is not permitted to seek a declaration of unitary status until after the end of the 2016-2017 school year. USP § XI. There are a minimum of four additional plans of district-wide significance that TUSD is required to develop

under the USP (EOR 45-131), two pending R&Rs, one pending R&R request, and at least three other plans under review by Plaintiffs that could be the subject of future R&R requests.[25] The USP established specific requirements for the individual plans so that TUSD may be considered to have achieved unitary status. The trial court already has failed to review the TUSD Objections and its UHS plan *de novo* for compliance with the USP and Constitution. If this Court now does not direct the trial court to conduct reviews under the appropriate legal standard, TUSD will be chasing a moving target for years to come. This is completely contrary not only to the purpose of the USP, designed to provide a clear and unambiguous path for TUSD's compliance, but also this Court's previous directives in this very case. *Fisher*, 652 F.3d 1131, 1141.

C. The Trial Court's Refusal to Abide by Rule 53, the Appointment Order and the USP Is Erroneous as a Matter of Law.

TUSD satisfies the third *Bauman* factor because the trial court's Process Order of December 2, 2013 (EOR 22-44), UHS Order of December 16, 2013 (EOR 17-21), Reduction and Denial Order of December 20, 2013 (EOR 7-16), and January Denial Order of January 7, 2014 (EOR 1-4) are clearly erroneous as a matter of law. *Bauman*, 557 F. 2d at 654-655. For the reasons set forth in this Opening Brief's "Argument" section above, the court's Procedural Modification Orders are clearly erroneous as a matter of law.

[25] *See* footnote 6, supra.

D. The Trial Court's Procedural Modification Orders Manifest Persistent Disregard of Fed. R. Civ. P. 53.

Because the trial court's orders manifest a persistent disregard of the federal rules, TUSD satisfies the fourth *Bauman* factor. *Bauman*, 557 F. 2d at 655.

This factor is met and a writ of mandamus must issue when a trial court manifests a persistent disregard of one particular federal rule at issue in the case by repeatedly denying motions requesting the court to correct its error. *See In re Canter*, 299 F.3d 1150 (9th Cir. 2002).

Here, the trial court *sua sponte* issued an order that violated subsections (b)(4), (f)(1), (f)(2) and f(3) of Rule 53 of the Federal Rules of Civil Procedure. EOR 22-44. This error first was manifested in the Process Order and then repeated thrice in the UHS Order, Reduction and Denial Order and January Denial Order. EOR 22-44, EOR 17-21; EOR 7-16; EOR 1-4, respectively. The court persistently disregarded the provisions of Rule 53 despite TUSD bringing the Rule 53 violations to the court's attention on these five different occasions: its UHS Objection (EOR 799-1241), Shortened UHS Objection (EOR 283-661), Motion for Reconsideration of Process Order (EOR 662-675), Motion for Reconsideration of UHS Order (EOR 276-282) and Motion for Reconsideration of Reduction and Denial Order (EOR 230-248). Accordingly, TUSD has more than satisfied the fourth *Bauman* factor.

E. TUSD Need Not Satisfy The Fifth Bauman Factor.

The fifth and final *Bauman* factor considered is whether the trial court's order raises any new and important problems or issues of first impression. *Bauman*, 557 F.2d at 655. Here, there is no new issue of law because the court is not only bound to follow the Appointment Order and Fed. R. Civ. P. 53, but the legal standard the court should be using to review TUSD's plans and objections also is crystal clear. *See* Section III.C above. However, TUSD need not demonstrate that the court's error presents an issue of first impression. *SC Cowen Sec. Corp. v. United States District Court*, 189 F.3d 909, 914 (9th Cir. 1999) (Ninth Circuit notes 4th and 5th *Bauman* factors rarely present at same time).

For all the preceding reasons, and should this Court determine it lacks appellate jurisdiction to decide this matter as an interlocutory appeal, TUSD respectfully requests the Court treat this filing as a petition for writ of mandamus and to grant the relief requested.

Dated this 9th day of May, 2014.

s/ J. William Brammer, Jr.
J. William Brammer, Jr.
Attorney for Defendant-Appellant

ORAL ARGUMENT REQUESTED

TUSD requests oral argument for the reason that the Court's decisional process would be aided by the parties' oral presentation and response to the Court's inquiries at argument.

STATEMENT OF RELATED CASES

TUSD is aware of one related case pending before this Court, case No. 13-15691, which originated from the same United States District Court for the District of Arizona case No. CV 74-90 TUC DCV (Lead Case).

CERTIFICATE OF COMPLAINCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,847 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complied with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 9th day of May, 2014.

s/ J. William Brammer, Jr.
J. William Brammer, Jr.
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2014, I electronically filed Tucson Unified School District No. One's Opening Brief with the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

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