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12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF ARIZONA**

14 Roy and Josie Fisher, et al.,
15 Plaintiffs,
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17 v.
18 United States of America,
19 Plaintiff-Intervenors,
20 v.
21 Anita Lohr, et al.,
22 Defendants,
23 Sidney L. Sutton, et al.,
24 Defendant-Intervenors,

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

**MENDOZA PLAINTIFFS' REPLY IN
SUPPORT OF MOTION TO STRIKE
TUCSON UNIFIED SCHOOL
DISTRICT'S OBJECTION TO SPECIAL
MASTER'S REPORT AND
RECOMMENDATIONS RELATING TO
PRINCIPAL AND TEACHER
EVALUATIONS (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"**

MOTION FOR ACTION

Hon. David C. Bury

1 Maria Mendoza, et al.,
2 Plaintiffs,
3 United States of America,
4 Plaintiff-Intervenor,
5 v.
6 Tucson United School District No. One, et al.,
7 Defendants.

Case No. CV 74-204 TUC DCB

9
10 **Introduction**

11 Mendoza Plaintiffs file this reply in support of their Motion to Strike Tucson
12 Unified School District’s Objection to Special Master’s R&R Relating to Principal and
13 Teacher Evaluations (ECF 1845) or, in the Alternative, to Provide the Plaintiffs and the
14 Special Master a Reasonable Opportunity to Respond to the New Evidence Offered for the
15 First Time in the Objection and to the District’s Attack on the R&R as “Punitive” (Doc.
16 1855) (“Mendoza Plaintiffs’ Motion”). The District filed its opposition to Mendoza
17 Plaintiffs’ Motion on October 23, 2015 (ECF 1860) (“TUSD Opposition”).¹

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20 As with the inaccurate statements in the District’s Motion for an Evidentiary
21 Hearing/Status Conference (Doc. 1846) to which the TUSD Opposition heavily cites,
22 Mendoza Plaintiffs do not seek to “micro-manage” “minute policy decisions at every level
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25 ¹ Because the TUSD Opposition’s caption page references only Mendoza Plaintiffs’
26 motion to strike, Mendoza Plaintiffs clarify that their motion also requested, in the
27 alternative, that they and the Special Master be provided an opportunity to respond to the
28 District’s new evidence and its allegations that the Special Master’s R&R is “punitive,”
and that they made this motion under an R&R process that allows Mendoza Plaintiffs to
respond only with permission of the Court. (See Stipulated Process for Parties’ Review of
District Plans Covered by Section I(D)1 of the USP (“Stipulated Process”), Doc. No. 1581,
at para. 6.)

1 of District operations” (TUSD Opposition at 3); rather they seek compliance with the USP
2 Section IV, H, 1 requirement that student and teacher evaluations be accorded “adequate
3 weight” in principal evaluations.²

4 The District’s failure to provide the Plaintiffs and Special Master with an
5 opportunity to respond to its new evidence by introducing it in the TUSD Objection – to
6 which no response is permitted without order of this Court- should not be excused by the
7 District’s claim that it learned that what it called a “facially unsupported” recommendation
8 (TUSD Objection at 6:14-15) was supposedly unsupported by research (TUSD Opposition
9 at 3-4) on September 11, 2015. Over five months ago, the Special Master informed the
10 parties, including TUSD, that his recommendation regarding survey weight for teacher
11 evaluations was formed through discussions with experts and that there was little research
12 directly on the issue, which Mendoza Plaintiffs understood to also relate to principal
13 evaluations, and thus TUSD’s failure should not be excused as the parties would be
14 deprived of the opportunity to review the additional evidence and research the Special
15 Master has since identified as supporting his recommendation against the District’s
16 untested new evidence.

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18 Moreover, the District’s accusations that the Special Master’s R&R is “punitive in
19 nature” and “specifically intended to deter TUSD from protecting its legal rights” calls into
20 question the Special Master’s motivations and should not be permitted to go unresponded
21 to, no matter how the District may now frame its attack. Indeed, the TUSD Objection is so

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26 ² In this regard, the 17% weight allocation allowed for surveys under A.R.S. 15-
27 203(A)(38), to which TUSD cites in TUSD’s Objection to Special Master’s Report and
28 Recommendation Relating to Principal and Teacher Evaluations (ECF 1845) (“TUSD
Objection”) at 8, certainly is a measure of adequacy and one which the District has failed
to, but must, address.

1 saturated with discussion of its new evidence, accusations directed to the Special Master,
2 and additional briefing of its fully briefed Motion for Evidentiary Hearing/Status
3 Conference (ECF 1846), that this Court should strike it in its entirety.

4 Accordingly, the Mendoza Plaintiffs ask that the Court strike the objection or, in the
5 alternative, permit them AND the Special Master a reasonable time to respond to the new
6 evidence and the accusations directed to the Special Master.

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8 **This Court Should Not Excuse the District's Failure to Provide Its New Evidence**
9 **During the Many Months the Parties Attempted to Resolve Outstanding Issues**

10 As detailed in Mendoza Plaintiff's Motion, TUSD had months in which it could
11 have provided the evidence proffered for the first time with its objection and thereby
12 afforded the Special Master and Mendoza Plaintiffs the opportunity to consider and
13 respond to it. The District's new claim that on September 11, 2015, it "learned" that what
14 it first purported to be a "facially unsupported" recommendation (TUSD Objection at 6:14-
15 16) was supposedly unsupported by research (TUSD Opposition at 3-4) is misleading and
16 unsupported by the record once one looks beyond the District's incomplete and selective
17 recital of the "omitted communications" regarding research in the TUSD Opposition (*see*
18 TUSD Opposition at 2).³

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22 Given that **over five months ago**, the Special Master's May 5 email regarding
23 weight of surveys in teacher evaluations indicated that there is "little [direct] research on

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25 ³ Mendoza Plaintiffs do understand the research provided by the Special Master and
26 referenced by the District (TUSD Opposition at 3) to support the Special Master's
27 recommendation concerning survey weight based on discussions with experts (*see* Special Master's May 5,
28 2015 Memo, attached hereto as Exhibit A (with regard to **survey weight** in teacher
evaluations, which relates to survey weight in principal evaluations, "[e]xperts I have
talked [with] vary [regarding the weight of surveys] with the highest estimate being 40
percent.")).

1 what the right weight should be [for surveys]” (exhibit A), it defies credulity to believe that
2 for many months the District failed to provide its new evidence because it operated under a
3 belief that there existed significant direct research on the amount of weight that should be
4 accorded to surveys in principal evaluations. Because the Special Master’s memo should
5 have reasonably put the District on notice of the limited availability of direct research on
6 survey weight for principal evaluations, and that the Special Master additionally based his
7 recommendation on other research and bases, the District could have in May 2015 inquired
8 about those bases, and should have provided its new evidence at that time. Had it done so,
9 the Plaintiffs and Special Master would have been afforded ample opportunity to rebut and
10 respond to the new evidence. (See Special Master’s post-R&R briefing 10/19/15 email,
11 attached as Exhibit D to TUSD’s Opposition (stating that the Special Master “identified
12 experts” with views that countered the District’s expert, and a Baltimore study that “found
13 that teacher assessments were more highly correlated... with student performance than the
14 assessments of traditional observers of principals”).) It failed to do that; instead, it
15 provided its new evidence over five months later under a process that denies the Special
16 Master an opportunity to respond, and provides such an opportunity to the Plaintiffs only if
17 so ordered by the Court.

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22 The District’s failure to provide the parties its new evidence in the period of over
23 five months during which they sought to resolve outstanding issues therefore cannot be
24 excused by the District’s new claims regarding the Special Master’s recommendation, and
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1 this Court should therefore strike TUSD’s Objection, or in the alternative, provide the
2 Plaintiffs and Special Master an opportunity to respond.⁴

3 **This Court Should Afford the Plaintiffs and Special Master the Opportunity to**
4 **Respond to the District’s Serious Allegations that the Special Master’s “Punitive”**
5 **R&R is “Specifically Intended to Deter TUSD From... Protect[ing] its Legal Rights,”**
6 **Should it Elect Not to Strike the Objection in its Entirety**

8 In the TUSD Objection, the District asked this Court to strike a portion of the R&R
9 concerning the context of the R&R because it purportedly is “punitive in nature” and
10 “specifically intended to deter TUSD from asserting legal positions to protect its legal
11 rights.” (TUSD Objection at 3:20-21.)

13 In the TUSD Opposition, the District utterly fails to address its statements described
14 above, which Mendoza Plaintiffs pointed out as being inappropriate and calling into
15 question the Special Master’s motivations, and thereby implicitly acknowledges that it
16 made serious accusations. The District instead merely questions why Mendoza Plaintiffs
17 request an opportunity for the Special respond to its statements that it now describes as

19 _____
20 ⁴ Mendoza Plaintiffs are constrained to correct the District’s misleading and inaccurate
21 statement that “had the Mendoza[] [Plaintiffs] contacted TUSD before filing their Motion
22 to Strike to discuss the issue, TUSD would have stipulated to a motion for leave to respond
23 as to the issues raised in TUSD’s expert declaration” (TUSD Opposition at 4:16-18).
24 Notwithstanding the District’s implicit assertion that such contact did not take place,
25 Mendoza Plaintiffs unambiguously notified the District (including three District attorneys
26 of record for this case), at the October 5 and 6, 2015 meetings among the parties and
27 Special Master, of their intent to file a motion to strike for the specific reason that the
28 District provided new evidence for the first time in its objection relating to principal
evaluations under a process that does not allow the Mendoza Plaintiffs an opportunity to
respond as a matter of course. (See Declaration of Juan Rodriguez, attached hereto as
Exhibit B.) At no point during those meetings or before the filing of Mendoza Plaintiffs’
Motion did the District say that it would stipulate to the motion it now claims it would
have stipulated to had Mendoza Plaintiffs raised the issue. (*Id.*) In that regard, the District
should blame only itself for the costs it has imposed with its months-long failure to present
its new evidence, and its failure to act to avoid additional litigation, notwithstanding its
directly conflicting statement referenced above.

1 concerning “a recommendation regarding a disagreement between the parties.” (TUSD
2 Opposition at 5:7-8.) Had the District adhered to this view that the R&R merely regarded
3 a “disagreement between the parties” at the time it objected, there would have been no
4 need for Mendoza Plaintiffs to raise the issue of an opportunity for them and the Special
5 Master to respond. However, the District in fact questioned and attacked the Special
6 Master’s motivations, describing his R&R as “punitive” and “specifically intended to deter
7 TUSD from asserting legal positions to protect its legal rights.” (TUSD Objection at 3:20-
8 21.)⁵ This Court should not allow the motivations of the Special Master to be questioned
9 without affording him the opportunity to rebut and respond to those accusations, no matter
10 how the District subsequently may frame its attack.
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13 **Conclusion**

14 Based on the foregoing, the Mendoza Plaintiffs ask that this Court strike the TUSD
15 Objection or, in the alternative, allow them AND the Special Master a reasonable time to
16 respond to the District’s new evidence and the accusations directed to the Special Master.
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25 ⁵ Mendoza Plaintiffs do not understand what the District means when it says that affording
26 the Special Master an opportunity to respond “would set a harmful precedent to the Special
27 Master to align himself with a party’s objection... .” (TUSD Opposition at 5:9-10.) An
28 opportunity to respond to TUSD attacks is not “align[ment] with a party’s objection,” and
the only “harmful precedent” that has been set here is an attack on the Special Master’s
motivations under a process that does not allow him to respond to those attacks, and
affords the Plaintiffs that opportunity only if so ordered by this Court.

Dated: October 30, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2015, I electronically submitted the foregoing Mendoza Plaintiffs' Reply in Support of Motion to Strike Tucson Unified School District's Objection to Special Master's Report and Recommendations Relating to Principal and Teacher Evaluations (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 the District's Attack on the R&R as "Punitive;" Declaration of Juan Rodriguez in Support of Mendoza Plaintiffs' Motion to the Office of the Clerk of the United States District Court for the District of Arizona for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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Dated: October 30, 2015