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13 UNITED STATES DISTRICT COURT

14 DISTRICT OF ARIZONA

15 Roy and Josie Fisher, et al.,

16 Plaintiffs,

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,
25
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Case No. 4:74-CV-00090-DCB

MENDOZA PLAINTIFFS' MOTION TO STRIKE THE PORTIONS OF THE SPECIAL MASTER'S 6/12/2018 RESPONSE TO OBJECTIONS TO 2016-17 ANNUAL REPORT (DOC. 2111) CONTAINING FINDINGS AND/OR DISCUSSION RELATING TO A "25% PLUS/MINUS" STANDARD TO ASSESS INTEGRATION, INCLUSIVE OF TABLE II-I THERETO

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 On June 12, 2018, the Special Master refiled (as Doc. 2111) the “Special Mater’s
12 Response to Objections to 2016-17 Annual Report” (“June Filing”) that he had previously
13 filed (as Doc. 2109) on May 10, 2018 (“May Filing”). In that June Filing, he stated that
14 the new filing was intended in part to “make corrections clarifying the analysis and
15 proposals in the 2016-17 SMAR”. (June Filing at 2:18-19.)

16
17 That June Filing contains findings and conclusions not set forth in the May Filing
18 relating to what the June Filing refers to as “highly diverse” schools based on application
19 of what the June Filing finds to be “the more conventional definition of integration [than
20 that mandated by the USP, that is]...a 25% plus or minus measure.” (June Filing at 10:6).
21 The June Filing then attaches Table II-I to identify schools that the June Filing finds to be
22 “highly diverse”. Further, having adopted the “25% plus or minus” measure, the Special
23 Master then finds, based on the application of that measure, that “more than half of the
24 District’s students have the benefit of an integrated education.” (June Filing at 10:6-7.)
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1 Because they believed that the Special Master had exceeded the scope of his
2 authority by making findings and recommendations based on a definition of integration not
3 set forth in the USP¹, the Mendoza Plaintiffs asked the Special Master to withdraw those
4 portions of the June Filing, including Table II-I, that did so. He has declined.

5
6 Accordingly, while mindful of this Court's order stating that there were to be no
7 sur-replies to the Special Master's filing of a response to the parties' objections to his
8 2016-17 Annual Report (Doc. 2103) and while reluctant to place additional demands on
9 the Court, because they believe that the challenged findings and recommendations are not
10 authorized, they file the within motion pursuant to LR Civ. 7.2 (m) seeking to strike Doc.
11 2111 from 8:4 to 8:23 and from 10: 5 to 10:8, and Table II-I thereto.

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13 **Argument**

14 The Order Appointing Special Master (Doc. 1350) states that in his annual reports,
15 the Special Master shall evaluate the District's compliance with the provisions of the USP
16 and make findings of fact "as to the District's compliance with the USP's provisions".
17 (Doc. 1350 at 8:1 and 8:12-13.) As noted above, in footnote 1, the USP contains an
18 express definition of what constitutes an integrated school. Therefore, for purposes of
19 evaluating District compliance with the provisions of the USP, it is that definition that
20 must be applied in assessing to what degree students in the District "have the opportunity
21 to attend an integrated school." (USP, Section II, A, 1.)

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27 ¹ The USP defines an integrated school as one "in which no racial or ethnic group varies
28 from the district average for that grade level (Elementary School, Middle School, K-8,
High School) by more than +/- 15 percentage points, and in which no single racial or
ethnic group exceeds 70% of the school's enrollment." (USP, Section II, B, 2.)

1 Notwithstanding the explicit provisions of the USP, in the June Filing, the Special
2 Master first references what he says are his own and others' disagreements with the USP
3 definition of an integrated school and then adopts a "25% plus or minus" standard on
4 which he bases a finding as to the number of District students attending an "integrated
5 school." (June Filing at 8:4-8:23, 10:5-8 and Table II-I.)
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7 On June 18, 2018, the Mendoza Plaintiffs requested the Special Master to withdraw
8 all findings and discussion based on and/or relating to a "25% plus or minus measure" to
9 "define" integration in the June Filing and to withdraw Table II-I. (A copy of their
10 request is attached as Exhibit A.)
11

12 That request states in pertinent part:

13 "Mendoza Plaintiffs request that all findings and discussion based on and/or relating
14 to a "25% plus or minus measure" to "define" integration in the June Filing and Table II-I
15 be withdrawn on the grounds that no such findings and discussion are supported by the
16 record in this case, that there is nothing in the record in this case to support application or
17 use of a "25% plus or minus measure" to "define" integration, and that the record in this
18 case in fact establishes that the "25% plus or minus measure" is not "the more
19 conventional definition of integration", notwithstanding the assertion in the June Filing.

20 To the extent there has been discussion in this case of the standard to use to assess
21 integration, it does not appear that any party ever contemplated a plus/minus 25%
22 standard. Rather, the debate centered on whether to use 20% plus/minus or 15%
23 plus/minus. See, for example, Judge Bury's discussion of student assignment issues in his
24 opinion of April 24, 2008 (Doc. 1270) at 15-20.

25 Of greater significance given the findings in the June Filing are the following:

- 26 (1) In her review of the relevant cases, Christine H. Rossell, an expert known to the
27 Special Master, found that while the plus/minus 20% standard had been used in
28 some cases, "the most common standard" adopted by the courts was the plus/minus
15% standard. See Dr. Christine H. Rossell, The Carrot or the Stick, Temple
University Press, 1990, at 30.
- (2) In 1995, TUSD commissioned an external study of TUSD's use of special local
funds for desegregation and programs related to the Office of Civil Rights
requirements. (TUSD OCR Audit, December 12, 1995.) The report applied the
plus/minus 15% standard, noting that was the standard most "commonly used by
the courts." (TUSD OCR Audit at 2.) One of the authors of that study was Maree
Sneed, whose work is known to the Special Master and who was counsel to the

1 District at the time the USP, including its definitions and standards to determine
2 “integration”, was being negotiated.

3 (3) The plus/minus 15% standard was used by the federal court in the mid-1990s when
4 Topeka, Kansas, the school district that had been the focus of the Supreme Court’s
5 decision in *Brown v. Board of Education*, finally desegregated.

6 (4) The plus/minus 15% standard was used in Cleveland, a majority African American
7 school district, in *Reed v Rhodes*, when Dr. Leonard Stevens who has served both as
8 an expert in this case and as an advisor to the Special Master was the court monitor
9 in that case.

10 Mendoza Plaintiffs have never agreed to a definition of integration other than that
11 set forth in the USP and the Court has not adopted a different definition. There is no
12 evidence in the record in this proceeding to support a finding that a “25% plus or minus”
13 standard should be applied in this case much less that it is “more conventional” than the
14 15% standard mandated by the USP. Mendoza Plaintiffs therefore request that the Special
15 Master withdraw all findings and discussion based on and/or relating to the use of a “25%
16 plus or minus” standard to “define” integration or to identify “highly diverse” schools in
17 the June Filing and that he withdraw as well Table II-I thereto.”

18 The Special Master declined to withdraw the portions of the June Filing in issue.

19 (A copy of the email correspondence between the Mendoza Plaintiffs and the Special
20 Master on this topic is attached as Exhibit B.)

21 **Conclusion**

22 For the reasons set forth above and pursuant to the Order Appointing Special
23 Master, Rule 53 of the Federal Rules of Civil Procedure and LRCiv 7(m), the Mendoza
24 Plaintiffs request that the Court enter an order striking the following sections of Doc. 2111
25 and Table II-I thereto: 8:4 to 8:23 and 10:5-8.

26 Respectfully submitted,
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Dated: June 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2018 I electronically submitted the foregoing Mendoza Plaintiffs' Motion to Strike the Portions of the Special Master's 6/12/2018 Response to Objections to 2016-17 Annual Report (Doc. 2111) Containing Findings and/or Discussion Relating to a "25% Plus/Minus" Standard to Assess Integration, Inclusive of Table II-1 Thereto 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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/s/ Juan Rodriguez

Dated: June 21, 2018