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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Roy and Josie Fisher, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al., Defendants.	4:74-cv-00090-DCB (Lead Case)
Maria Mendoza, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al. Defendants.	CV 74-204 TUC DCB (Consolidated Case)

RESPONSE IN OPPOSITION TO MENDOZA PLAINTIFFS' MOTION TO STRIKE PORTIONS OF THE SPECIAL MASTER'S RESPONSE TO OBJECTIONS TO 2016-17 ANNUAL REPORT [ECF 2112]

Introduction and Summary

The Court should deny the Mendoza Plaintiffs' request for drastic relief striking a portion of the Special Master's reply to objections to his Annual Report. The request meets none of the requirements of a motion to strike under Local Rule 7.2(m) and Federal Rule of Civil Procedure 12(f). Indeed, the Mendoza Plaintiffs apparently styled their filing as a "motion to strike" solely to get around the Court's direction that there would be no sur-replies to the Special Master's filing unless the Court so directed, which the Court has not done.

But even assuming the Mendoza Plaintiffs had requested leave to file a response, none is necessary because the Special Master has raised no new issues. Although Mendoza Plaintiffs assert that the Special Master attempts to "adopt" a new school integration metric (ECF 2112, p. 2), he does nothing of the sort. Rather, he simply explains that integration results can look dramatically different based on the arbitrary percentage-based definition by which they are measured. This concept, which has been long recognized by the U.S. Supreme Court, underlies the USP's integration obligations, which do not require the District to meet any particular statistical integration goals, but instead simply obligate the District to pursue integration in good faith.

Accordingly, whether styled as a motion to strike, motion for leave to file a response, or otherwise, the Court should deny Mendoza Plaintiffs' motion.

Detailed Analysis

I. The Mendoza Plaintiffs' Motion to Strike Must Be Denied.

A motion to strike material from the record "should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Colaprico v. Sun Microsystems, Inc.*, 759 F.Supp. 1335, 1339 (N.D. Cal. 1991). Moreover, "even a properly made motion to strike is a drastic remedy which is disfavored by the courts and infrequently granted." *Yount v. Regent Univ., Inc.*, No. CV-08-8011-PCT-DGC, 2009 WL 995596, at *11 (D. Ariz. Apr. 14, 2009) (quoting *Int'l Longshoreman's Assoc. v. Va. Int'l Terminals, Inc.*, 904 F.Supp. 500, 504

(E.D.Va.1995)); *see also Lowe v. Maxwell & Morgan PC*, 322 F.R.D. 393, 398 (D. Ariz. 2017) ("Motions to strike are generally disfavored and rarely granted.").

Under Rule 12(f), Mendoza Plaintiffs must, but cannot even arguably, show that the Special Master's pleading "is redundant, immaterial, impertinent, or scandalous or that the requested relief is unavailable[.]" *Vesecky v. Matthews (Mill Towne Ctr.) Real Estate, LLC*, No. CV-09-1741-PHX-JAT, 2010 WL 749636, at *1 (D. Ariz. Mar. 2, 2010); *see also* Fed. R. Civ. P. 12(f). "Any doubt regarding the redundancy, immateriality, impertinence, scandalousness or insufficiency of a pleading must be decided in favor of the non-movant." *Vesecky*, 2010 WL 749636, at *1.[1] Further, Mendoza Plaintiffs must show "how such material will cause prejudice." *Id.*

The material to which Mendoza Plaintiffs' object—the Special Master's discussion of a "25% plus or minus" integration metric—meets none of the Rule 12(f) criteria. The discussion plainly is not redundant because, as Mendoza Plaintiffs admit, the Special Master did not raise the metric in earlier filings. [ECF 2112, p.2.] The discussion is not "immaterial" because it relates to the District's USP objective of working towards integration. *See Vesecky v. Matthews (Mill Towne Ctr.) Real Estate, LLC*, No. CV-09-1741-PHX-JAT, 2010 WL 749636, at *1 (D. Ariz. Mar. 2, 2010) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993), *rev'd on other grounds*, 510 U.S. 517 (1994)). The discussion is not "impertinent" because it pertains to the issues in question, *i.e.*, the District's compliance with the USP. *See id.* And the discussion is not "scandalous" because it does not "unnecessarily reflect[] on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court." *Id.* The Mendoza Plaintiffs do not even argue that the pleading caused them prejudice.

[1] Although L.R. Civ. 7.2(m) also permits motions to strike under Rule 26(g)(2), under Rule 37(b)(2)(A)(iii), or in response to filings that are prohibited by a statute, rule, or order, Mendoza Plaintiffs' motion plainly does not seek to strike for any of those reasons.

At bottom, Mendoza Plaintiffs' motion to strike is nothing more than a thinly veiled attempt to skirt the Court's order prohibiting sur-replies unless directed by the Court (ECF 2103 at 2). The Court should deny Mendoza Plaintiffs' improper motion.

II. The Special Master's Filing Does Not Require a Response.

Even assuming Mendoza Plaintiffs had requested leave to file a sur-reply to address the "25% plus or minus" metric, that request would have been meritless because the Special Master raises no new issues. Although Mendoza Plaintiffs improperly characterize the Special Master's pleading as "having adopted the '25% plus or minus' measure" (ECF 2112, p. 2), the Special Master has not "adopted" anything. Rather, he simply explains how integration results can change dramatically based on how integration is defined because percentage-defined integration is arbitrary. As he explains, in the District's continued integration of its schools, not only have several schools "crossed the integration threshold[s]" set by the parties, but "this move to integration is not an aberration but rather part of the trend in each of the schools." [ECF 2111, p. 7.] He then explains that if the District's integration efforts and results are assessed by other measures, including "a 25% plus or minus measure, more than half of the District's students have the benefit of an integrated education." [*Id.* at 10.]

The point is that no single arbitrary numeric goal can fully capture the District's integration efforts or results. As the Special Master has recognized, "the USP definition [used] to calculate the number of TUSD students who attend integrated schools [] understates the number of students in TUSD who have an opportunity . . . to learn with and from students of races different from their own." [*Id.* at 8.] Likewise, the Court recognized that a school falling outside of the 15% rule does not preclude a finding that it has a "healthy racial mix." [ECF 1909 at 14 ("Magee is not considered integrated within the context of the 15% margins, but that does not preclude this Court from recognizing that it has a healthy racial mix.")]. The United States Supreme Court recognized this concept in *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1,

23-24 (1970), where it found that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."); *see also Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987) ("[I]t is the maximum practicable desegregation that the law requires. This is a practical, not a theoretical standard.")[2]

Moreover, the Supreme Court rejected complete reliance on the percentage-based plans set forth in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 726-27 (2007), pointing out that "[t]he plans [we]re tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits," and found that there was "no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with racial demographics of the respective school districts—or rather the white/non-white or black/"other" balance of the districts." The Court further explained that "[a]s the districts' demographics shift, so too will their definition of racial diversity." *Id.* at 731. "Even in the context of mandatory desegregation, [the Supreme Court has] stressed that racial proportionality is not required." *Id.* at 732; *see also Milliken v. Bradley*, 433 U.S. 267, 281 n.14 (1977) ("the Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more"); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976) ("The District Court's interpretation of the order appears to contemplate the

[2] The Special Master's example that a school with 40% White, 40% Latino and 20% Black would not be considered integrated under the USP is making the same point regarding the arbitrary nature of such measurements that the United States Supreme Court made when reviewing the Seattle School District's plan: "a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African- American, 25 percent Latino, and 20 percent white students would not." *Parents Involved in Community Schs. v. Seattle School Dist. No. 1*, 551 U.S. 701, 724 (2007). The Special Master's 40/40/20 example follows the logic of the Supreme Court in clearly explaining how Johnson Elementary School and Lawrence 3-8 would be considered as diverse because each of those schools has 40% or more of two distinct racial/ethnic groups (Native American and Latino), and not because of its additional African American and/or White student population. The USP does not require any specific number of any race/ethnicity for a school to be considered diverse.

'substantive constitutional right (to a) particular degree of racial balance or mixing' which the Court in Swann expressly disapproved.").

As this Court has recognized, this same principle underlies the structure of the USP: "The +/– 15% rule, like the 70% cap rule, was designed to accommodate a District with an average 60% majority Hispanic student population and a small 23% Anglo student population and to account for some neighborhoods being almost exclusively one race. Neither rule was designed to produce a numeric integration goal; the USP does not require a school to attain integration status. The purpose of both rules was to allow TUSD to show positive integration in the face of overwhelming numbers of Latino students in a school." [ECF 1909 at 14.][3]

In sum, Mendoza Plaintiffs do not explain how the Special Master has raised any issue warranting a sur-reply. The Special Master simply acknowledges the well-recognized concept that integration progress cannot be measured solely by adherence to a single arbitrary percentage-based metric. And, because the District's compliance is measured not based on meeting arbitrary statistical integration goals, but rather by its good faith effort towards achieving integration, the Special Master properly utilizes an alternate definition of integration as a lens through which to view that progress.

Conclusion

For the reasons set forth above, the Court should deny the Mendoza Plaintiffs' Motion to Strike Portions of the Special Master's Response to Objections to 2016-17 Annual Report [ECF 2011.]

[3] Indeed, on multiple occasions throughout this litigation, Mendoza Plaintiffs themselves have asked this Court to assess the District's actions or proposed actions by "other measures" not found in the USP, including (a) whether an action "favors a predominantly White school over schools in the District that are predominantly Latino" [ECF 1794 at 4:7-8], (b) even where the percentages show improvement in integration, whether "the actual *number* of Latino students attending the school has declined." [*Id*. at 5, fn 2], (c) the "relative number of students attending racially concentrated schools" and the "percentage of racially concentrated schools [ECF 2048 at 3:5-7 and fn 2], (d) the "percentage of TUSD students attending integrated nonmagnet schools" [ECF 2101 at 5:12-13].

DATED this 25th day of June, 2018.

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CERTIFICATE OF SERVICE

The foregoing document was lodged with the Court electronically through the CM/ECF system this 25th day of June, 2018, causing all parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

/s/ Diane Linn
Employee of Steptoe & Johnson LLP