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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,

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

**MENDOZA PLAINTIFFS' MOTION FOR
A STAY OF THOSE PROCEEDINGS IN
THIS CASE AS TO WHICH THE
DISTRICT COURT HAS BEEN
DIVESTED OF JURISDICTION AS A
CONSEQUENCE OF TUSD'S APPEAL
FROM THE COURT'S ORDER OF
SEPTEMBER 6, 2018 (DOC. 2123)**

[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
7 al.,
8 Defendants.

Case No. CV 74-204 TUC DCB

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10 **Introduction and Statement of Facts**

11 In its January 22, 2019 filings, TUSD asks this Court to award it unitary status with
12 respect to a number of sections of the USP. (*See, e.g.*, Doc. 2183 at 10:6-9: “[T]he District
13 respectfully asks...that it be awarded unitary status with respect to Sections IV, a, F.1 and
14 I.3 of the USP.” *See also*, Docs. 2176-2182.) The Special Master also addresses TUSD’s
15 request for unitary status with respect to a portion of the USP in his most recent filing with
16 the Court, Doc. 2185, Special Master’s Report and Recommendations Regarding Student
17 Support Departments, at 2: 21-25¹. However, issues relating to the District’s arguable
18 entitlement to unitary status no longer are before this Court.

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21 On September 6, 2018, this Court entered an Order (Doc. 2123, “the Sept. Order”)
22 in which it “granted in part and denied in part” unitary status. (Doc. 2123 at 149:11-12.)
23 On October 4, 2018, TUSD filed a notice of appeal (Doc. 2138) from that Order. It
24 thereafter asserted in its Ninth Circuit Mediation Questionnaire, a copy of which is filed
25 herewith as Exhibit A, that “[t]he principal issue on appeal is whether the school district
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27 ¹ The Mendoza Plaintiffs will address their objections to that Report and Recommendation
28 in a separate filing.

1 has met the requirements for unitary status and termination of court supervision under
2 applicable Supreme Court cases.” It thereby put before the Court of Appeals the issue of
3 whether this Court had erred in not awarding TUSD full unitary status, including with
4 respect to the very same provisions of the USP as to which in its most recent filings it now
5 asks this Court to rule. The Mendoza Plaintiffs have filed a motion to dismiss the TUSD
6 appeal on the grounds that under *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the
7 Court of Appeals does not have jurisdiction over TUSD’s interlocutory appeal.

8
9 Nonetheless, until that motion (or the appeal itself, should the Court of Appeals permit the
10 appeal to proceed,) is resolved, under controlling Supreme Court and Ninth Circuit
11 precedent, this Court has been divested of jurisdiction to act on matters involved in the
12 appeal. Accordingly, this Court should stay all proceedings in the district court that relate
13 to aspects of the case involved in the appeal, specifically all proceedings concerning the
14 District’s arguable entitlement to unitary status with respect to any provision of the USP.
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17 **Under the Supreme Court’s Decision in *Griggs* and Controlling Ninth Circuit**
18 **Authority, This Court Has Been Divested of Jurisdiction to Adjudicate Matters**
19 **Involved in TUSD’s Appeal**

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21 In *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982), the Supreme
22 Court plainly stated: “The filing of a notice of appeal is an event of jurisdictional
23 significance – it confers jurisdiction on the court of appeals and divests the district court of
24 its control over those aspects of the case involved in the appeal.” Although in recent
25 years, the Ninth Circuit has observed that the “divestiture rule” is “more accurately
26 characterized as [a] ‘mandatory claim-processing rule[.]’” than as a “jurisdictional” rule
27 (*Rodriguez v. County of Los Angeles*, 891 F. 3d 776, 790-91 (9th Cir. 2018), citing *Hamer*
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1 *v. Neighborhood Hous. Services of Chicago*, 583 U.S. ___, 138 S. Ct. 13, 17 (2017)), it has
2 continued to apply the rule “to avoid confusion or waste of time resulting from having the
3 same issues before two courts at the same time.” (*Id.*, citing *United States v. Claiborne*, 727
4 F. 2d 842, 850 (9th Cir. 1984).)²

5
6 Here, the Ninth Circuit’s decision in *McClatchy Newspapers v. Central Valley*
7 *Typographical Union No. 46*, 686 F. 2d 731 (9th Cir. 1982), is particularly instructive. In
8 *McClatchy*, after an appeal had been filed from a judgment confirming an arbitrator’s
9 award finding that certain job guarantees had survived a sympathy strike, the district court
10 entered an amended judgment ordering that employees who had the benefit of those job
11 guarantees be reinstated. The Ninth Circuit found that the district court’s order did more
12 than maintain the status quo pending appeal; rather, it materially affected the substantive
13 rights of the parties. The Circuit then ruled that the district court had been without
14 jurisdiction to enter the amended judgment and ordered that it be vacated. Were this Court
15 to rule on the outstanding District requests and Special Master recommendations as they
16 relate to TUSD’s entitlement to unitary status with respect to portions of the USP as to
17 which unitary status was not granted in the Sept. Order, it would be affecting the
18 substantive rights of the parties under that Order and effectively amending it regardless of
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23 ² The Mendoza Plaintiffs and the Fisher Plaintiffs filed cross appeals and the Mendoza
24 Plaintiffs believe that, under *Carson*, their appeal will be permitted to proceed even if the
25 TUSD appeal is dismissed. However, that appeal is not likely to pose the same divestiture
26 issues as the TUSD appeal because it addresses this Court’s grant of unitary status with
27 respect to certain portions of the USP and thus involves issues that are not likely also to
28 come before this Court as it continues to oversee the District’s implementation of those
portions of the USP as to which the Sept. Order did not grant unitary status and TUSD
compliance with the Sept. Order. In that regard, Mendoza Plaintiffs further note for
purposes of clarity that the Sept. Order has not been stayed pending appeal and they do not
understand this Court to have been divested of its jurisdiction to oversee compliance with
that Order during the pendency of the TUSD appeal.

1 how that ruling might be denominated. The Ninth Circuit’s ruling in *McClatchy*
2 demonstrates that such an order (or orders) if entered while the District’s appeal is pending
3 will have been rendered without jurisdiction and therefore would be vacated on appeal.

4 Again, so that there can be no confusion, Mendoza Plaintiffs are not arguing that the
5 case before the district court must be stayed in its entirety. (*See, e.g., Britton v. Co-Op*
6 *Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990): “where an appeal is taken from a judgment
7 which does not finally determine the entire action, the appeal does not prevent the district
8 court from proceeding with matters not involved in the appeal” (citation omitted).) Thus,
9 for example, proceedings related to the on-going implementation of the USP and
10 compliance with orders concerning the District’s performance under the USP like the
11 recently filed Report of Special Master on Status of Drachman and Roskrige K-8 Magnet
12 Schools (Doc. 2184) and the Special Master’s Report and Recommendations Regarding
13 Student Support Departments (Doc. 2185)³ as they relate to TUSD’s on-going obligations
14 under the USP and the Sept. 6 Order (as distinct from claimed entitlement to an award of
15 unitary status), the budget process, etc. all would proceed.

19 Conclusion

20 For the reasons set forth above, during the pendency of the District’s appeal from
21 the Sept. 6 Order, this Court should stay proceedings related to the District’s outstanding
22 requests for and the Special Master’s reports and recommendations concerning unitary
23 status related to portions of the USP as to which unitary status was not awarded in the
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³ Mendoza Plaintiffs will address their objections to that Report and Recommendation in a separate filing.

1 Sept. Order (*e.g.*, Docs. 2176-2183 and 2185) as well as all other matters involved in the
2 appeal even as other matters, not involved in the appeal, proceed.
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4 Dated: January 31, 2019
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CERTIFICATE OF SERVICE

I hereby certify that on I electronically submitted the foregoing **MENDOZA PLAINTIFFS' MOTION FOR A STAY OF THOSE PROCEEDINGS IN THIS CASE AS TO WHICH THE DISTRICT COURT HAS BEEN DIVESTED OF JURISDICTION AS A CONSEQUENCE OF TUSD'S APPEAL FROM THE COURT'S ORDER OF SEPTEMBER 6, 2018 (DOC. 2123)** 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: January 31, 2019

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