P. Bruce Converse (#005868)
Timothy W. Overton (#025669)
DICKINSON WRIGHT PLLC
1850 N. Central Avenue, Suite 1400
Phoenix, Arizona 85004-4568
bconverse@dickinsonwright.com
toverton@dickinsonwright.com
courtdocs@dickinsonwright.com
Phone: (602) 285-5000
Fax: (844) 670-6009

Robert S. Ross (#023430)
Samuel E. Brown (#027474)
TUCSON UNIFIED SCHOOL DISTRICT
LEGAL DEPARTMENT
1010 East Tenth Street
Tucson, Arizona 85719
Robert.Ross@tusd1.org
Samuel.Brown@tusd1.org
Phone: (520) 225-6040
Attorneys for defendant
Tucson Unified School District No. 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roy and Josie Fisher, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al., Defendants.	4:74-cv-0090-DCB (Lead Case)
Maria Mendoza, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al., Defendants.	4:74-cv-0204 TUC DCB (Consolidated Case)

RESPONSE IN OPPOSITION TO MENDOZA PLAINTIFFS' MOTION TO STRIKE (ECF 2430) THE DISTRICT'S REPORT ON COMPLIANCE WITH THE SPECIAL MASTER'S RECOMMENDATIONS (ECF 2422)

Introduction and Summary

The Mendoza Plaintiffs' motion to strike should be summarily denied. The motion is based on a mischaracterization of the nature of the District's filing, and in any event is not an appropriate remedy. The Mendoza Plaintiffs' real issue is merely that they want an opportunity to respond substantively to the District's filing. If so, the proper approach is to seek leave to respond, **not** to move to strike. Indeed, *had they even asked* the District if there was any objection to filing a response, the District would have accommodated. But they did not, preferring instead to move for the draconian, and completely improper, relief of striking a pleading from the record.

On November 25, 2019, the Special Master filed his Report and Recommendation ("R&R") relating to the District's Three-Year Plus Integration Plan/Comprehensive Magnet Plan. [ECF 2379.] In that Report, the Special Master recommended that the District work with him to modify its plans for building on the success it has had in the last two years in promoting integration (a) by redefining integration, and (b) by developing new academic criteria to be used to evaluate magnet schools.

Without waiting for an order from the Court, and in an effort to move the process along as expeditiously as possible, the District complied with the Special Master's recommendations. On January 31, 2020, the District filed a report on those efforts to comply with the Special Master's recommendations. [ECF 2422.] Filing a report on the efforts to comply with the Special Master's recommendation is **not** inappropriate, ***but rather is commendable.*** It serves to inform the Court as to the status of the work on the Special Master's recommendations, in light of the passage of time since the Special Master's Report, so that that information can inform the Court's anticipated order

regarding the Report and Recommendation. Striking the District's filing deprives the Court of this information, and makes the record incomplete for any appeal.

I. The Motion to Strike should be summarily denied.

"Motions to strike are generally disfavored and rarely granted." *Lowe v. Maxwell & Morgan PC*, 322 F.R.D. 393, 398 (D. Ariz. 2017) (denying motion to strike); *accord, e.g., Hanna v. ComTrans Inc.*, CV-16-01282-PHX-DLR, 2016 WL 6393601, at *2 (D. Ariz. Oct. 28, 2016) (similar, noting that such a motion "is a drastic remedy"). Plaintiffs argue that ECF 2430 is "further briefing" on the District's original notice of compliance that was barred by the Court's Order (ECF 2312) and thus may be stricken under LRCiv 7.2(m). To the contrary, the District's filing merely reported on work requested and issues raised by the Special Master in the R&R; it was **not** additional briefing on the District's original notice of compliance. Regardless, "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.*, CV-08-8011-PCT-DGC, 2009 WL 995596, at *11 (D. Ariz. Apr. 14, 2009) (emphasis added) (quoting *Int'l Longshoreman's Assoc. v. Va. Int'l Terminals, Inc.*, 904 F. Supp. 500, 504 (E.D. Va. 1995)). For the reasons discussed below, the Court should decline to apply that drastic remedy here.

Courts should deny motions to strike where the submission at issue was reasonably prompted by other filings or orders. For example, this District has denied motions to strike improper "sur-replies" where they responded to new issues raised on reply, *see, e.g.*, *Sebert v. Arizona Dep't of Corr.*, CV1600354PHXROSESW, 2016 WL 3456909, at *1-2 (D. Ariz. June 17, 2016), and denied a motion to strike a "memorandum of explanation" filed by a law firm after the court granted sanctions against it. *See Larson v. White Mountain Group LLC*, CV 11-01111-PHX-FJM, 2011 WL 6759555, at *1 (D. Ariz. Dec.

23, 2011). Similarly, here, the filing at issue (ECF 2422) was reasonably prompted by the Special Master's R&R. The Special Master raised various issues that he wanted the District to address; the District accordingly did so. The Court should deny the motion to strike on this basis.

Courts also commonly deny motions to strike where the information in the challenged filing would provide a more fully developed record, enabling the court to better make decisions on the merits. *See, e.g.*, *Hanna v. ComTrans Inc.*, CV-16-01282-PHX-DLR, 2016 WL 6393601, at *2 (D. Ariz. Oct. 28, 2016) (denying motion to strike because "[t]he Court prefers resolving fully briefed motions when possible" and no prejudice would result); *accord, e.g.*, *Wilson*, 15 C 9364, 2016 WL 8504990, at *3 (new evidence filed with movant's reply addressed evidentiary shortcomings raised in response and permitted court to find that movant had met its burden of proof); *Greenbelt Ventures, LLC v. Washington Metro. Area Transit Auth.*, 08:10-CV-157-AW, 2011 WL 2175209, at *9 (D. Md. June 2, 2011), *aff'd,* 481 Fed. Appx. 833 (4th Cir. 2012); *Johnson v. County of Wayne*, 08-CV-10209, 2008 WL 4279359, at *8 (E.D. Mich. Sept. 16, 2008).

Here, denying the motion to strike will unquestionably provide a more fully developed record and aid the Court in rendering informed decisions as to this area of district operations. The issues raised by the Special Master in the R&R made clear that there were additional areas he wished the District to address; the Court may have the same questions/concerns. The District addressed those matters, and the information it provided should remain in the record. As the Court attempts to make fully informed decisions as to various areas of District operations — an effort all parties should support — having the additional information requested by the Special Master can only help its process. The Court should deny the motion to strike on this basis, as well.

Finally, motions to strike are commonly denied where permitting the challenged filing to remain in the record would not unduly prejudice a party, *see, e.g.*, *Sebert*, CV1600354PHXROSESW, 2016 WL 3456909, at *2; *Hanna*, CV-16-01282-PHX-DLR, 2016 WL 6393601, at *2, or, conversely, where striking the filing would unduly prejudice a party. *See, e.g.*, *R. Prasad Indus. v. Flat Irons Envtl. Sols. Corp.*, CV-12-08261-PCT-JAT, 2015 WL 13388176, at *3 (D. Ariz. Jan. 22, 2015).

Here, plaintiffs cannot argue that they would be prejudiced at all by the Court's permitting the District's filing to remain in the record: they substantively responded to the filing. [*See* ECF 2430 at 3-5]. On the other hand, striking ECF 2422 would prejudice the District. The District is seeking to show its compliance with the various orders and completion plans, and, if the Special Master believed some areas of the District's report on compliance were lacking, the District should be able to briefly address those during the Court's consideration of the issues. This is the District's only opportunity to be heard regarding the issues raised in the Special Master's report, as required by Fed R. Civ. P. 53(f)(1), which provides:

> In acting on a master's order, report, or recommendations, the court **must** give the parties notice and an opportunity to be heard[.]

[Emphasis added.] For this reason, too, the motion to strike should be denied.[1]

[1] If the Court believes the District must specifically request that its filing be permitted, the District hereby does so. *See Kunzi v. Arizona Bd. of Regents*, CV-12-02327-PHX-JAT, 2013 WL 3895012, at *1 n.1 (D. Ariz. July 29, 2013) (granting motion for leave to extend page limits, mooting motion to strike for failure to comply with the limitation).

II. The Mendoza Plaintiffs substantive responses to the District's filing are without merit.

A. Lack of Consultation with Plaintiffs.

Mendoza Plaintiffs complain that the District did not consult with them before filing the notice. But the Special Master did **not** recommend that the District work with all parties. The Special Master specifically recommended that the District work with the Special Master on both proposals. The District, without waiting for a Court Order directing it to work with the Special Master, took the initiative to work with the Special Master on draft proposals. The District has merely done as the Special Master has asked, and reported on it.

B. Definition of Integration.

The Mendoza Plaintiffs next argue that the Court should not change the definition of integration as recommended by the Special Master. But again, the District did not argue for or against the merits of the Special Master's recommendation, as the Mendoza Plaintiffs do in their motion to strike. Instead, the District merely complied with the Special Master's recommendation in the interest of time and judicial efficiency, while reserving its right to object to the Report and Recommendation. Also, the District was compelled to respond because key components, like next year's magnet site plans, must rely on key provisions, like a new integration definition and new magnet academic criteria.

The District's response clearly states that the desire to change the USP definition of integration comes from the Special Master, not from the District. The Mendoza Plaintiffs' motion mischaracterizes the District's act in following the Special Master's recommendation as the District itself seeking to unilaterally change the USP definition of

integration. As the District's response makes clear: the real goal of the plan is to promote and increase integration as a whole, without regard to any particular definition.

As the Court noted in its order on partial unitary status, in the footnote cited by the Mendoza Plaintiffs, the presence of the formal definition in the USP:

> does not mean that racial percentages other than +/- 15% are not relevant at schools which are neither Integrated nor Racially Concentrated. In other words, it is relevant whether schools are more or less trending towards integration or racial concentration. It is relevant whether schools are +/- 15%, +/-20%, or +/- 25%, with every percentage decrease in racial concentration and percentage increase towards integration being a good thing.

[ECF 2123, at 16, n. 5.] The Court clearly indicated that other measures are relevant, including whether schools were trending towards integration and whether schools are plus or minus, 15%, 20%, or 25% from the District averages. The District's report on its work with the Special Master uses a three-part analysis for measuring progress. One of the three parts is the USP definition. This allows the Court to assess progress towards integration using the USP definition, and to consider as relevant other measures.

C. <u>Academic Achievement Measures</u>

The Mendoza Plaintiffs complain that the academic achievement measures need further explanation and that they wish an opportunity to respond after the explanations are provided. But the District's filing was over three weeks ago and the District has yet to receive a single request for information or explanation from any plaintiff.

Simply put, the Special Master recommended the District work with him to develop the proposal, the District has so worked, and the District has now presented the information to the Court. The District's filing concluded with a statement that "[t]he District has worked with the Special Master as requested, and will comply with any order the Court issues, subject to and without waiving its general objections stated in prior pleadings." The Court has not even ruled on whether such work is required.

As it has in the past, the District did respectfully request that the Court acknowledge that the District is in unitary status with respect to the Student Assignment area of the USP because neither a new integration definition, nor new academic criteria for determining magnet status, should stand as bars to unitary status.

Conclusion

For these reasons, the Motion to Strike should be denied. The Mendoza Plaintiffs have already unilaterally availed themselves of the opportunity to respond, and thus nothing further need be done.

Dated this 24th day of February, 2020.

Respectfully submitted,

/s/ P. Bruce Converse

P. Bruce Converse
Timothy W. Overton
DICKINSON WRIGHT, PLLC
1850 N. Central Avenue, Suite 1400
Phoenix, Arizona 85004-4568
Attorneys for Tucson Unified School District No. 1

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2020, I electronically transmitted the attached foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to all CM/ECF registrants.

/s/ P. Bruce Converse