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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.
Maria Mendoza, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al., Defendants.

4:74-cv-0090-DCB
(Lead Case)

4:74-cv-0204 TUC DCB
(Consolidated Case)

RESPONSE IN OPPOSITION
TO MENDOZA PLAINTIFFS' MOTION TO STRIKE (ECF 2434)
THE DISTRICT'S NOTICE OF COMPLIANCE WITH THE SPECIAL
MASTER'S RECOMMENDATIONS ON THE DIVERSITY PLAN FOR
TEACHERS AND ADMINISTRATORS (ECF 2425)

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 December 13, 2019, the Special Master filed a Report and Recommendation ("R&R") relating to the District's efforts to promote diversity in its teaching and administrative staffs. [ECF 2392.] In that Report, the Special Master recommended (a) that the District continue to report compliance with the 15% rule of thumb for all races/ethnicities, as it has done in the past (and which it will continue to do), (b) that the District retain the original set of incentives for transfers to improve diversity (which it has done), (c) that the District return to the original 26 target schools for the Diversity Transfer Program for 20-21 (which it has done); and (d) develop a proactive plan for prioritizing the recruitment and selection of teachers and administrators of color through GYO programs (which the District has also done).¹

¹ The Special Master also included a recommendation, since withdrawn, for requirements for the racial/ethnic composition of small administrative teams. The District will continue actively to promote the diversity of its administrative staff at each school, and will report on the composition of its administrative teams, by race and ethnicity, each year. To the extent feasible, the District will compute compliance with the 15% rule. The District notes, however, that for certain small administrative teams, no possible combination of race/ethnicities will meet that rule. In others, the combinations meeting that rule are so limited as to amount to an unconstitutional quota. Thus, "compliance" with the 15% rule cannot be a requirement.

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 2425.] 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*,

1 *Inc.*, 904 F. Supp. 500, 504 (E.D. Va. 1995)). For the reasons discussed below, the Court
2 should decline to apply that drastic remedy here.

3 Courts should deny motions to strike where the submission at issue was reasonably
4 prompted by other filings or orders. For example, this District has denied motions to strike
5 improper “sur-replies” where they responded to new issues raised on reply, *see, e.g.*,
6 *Sebert v. Arizona Dep’t of Corr.*, 2:16-cv-00354-PHX-ROS, 2016 WL 3456909, at *1-2
7 (D. Ariz. June 17, 2016), and denied a motion to strike a “memorandum of explanation”
8 filed by a law firm after the court granted sanctions against it. *See Larson v. White*
9 *Mountain Group LLC*, CV 11-01111-PHX-FJM, 2011 WL 6759555, at *1 (D. Ariz. Dec.
10 23, 2011). Similarly, here, the filing at issue (ECF 2425) was reasonably prompted by the
11 Special Master’s R&R. The Special Master raised various issues that he wanted the
12 District to address; the District accordingly did so. The Court should deny the motion to
13 strike on this basis.

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

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

10 Finally, motions to strike are commonly denied where permitting the challenged
11 filing to remain in the record would not unduly prejudice a party, *see, e.g., Sebert*, 2:16-
12 cv-00354-PHX-ROS, 2016 WL 3456909, at *2; *Hanna*, CV-16-01282-PHX-DLR, 2016
13 WL 6393601, at *2, or, conversely, where striking the filing would unduly prejudice a
14 party. *See, e.g., R. Prasad Indus. v. Flat Irons Envtl. Sols. Corp.*, CV-12-08261-PCT-
15 JAT, 2015 WL 13388176, at *3 (D. Ariz. Jan. 22, 2015).

16 Here, plaintiffs cannot argue that they would be prejudiced at all by the Court's
17 permitting the District's filing to remain in the record: they substantively responded to
18 the filing. [See ECF 2434 at 2-5.] On the other hand, striking ECF 2425 would prejudice
19 the District. The District is seeking to show its compliance with Special Master's
20 recommendations, and the District should be able to briefly address those during the
21 Court's consideration of the issues. This is the District's only opportunity to be heard
22 regarding the issues raised in the Special Master's report, as required by Fed R. Civ. P.
23 53(f)(1), which provides:

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

[Emphasis added.] For this reason, too, the motion to strike should be denied.²

II. The Mendoza Plaintiffs substantive response to the District’s filing is without merit.

A. The District has retained all of the original incentives of the initial TDP.

The Mendoza Plaintiffs first assert that the District’s Diversity Transfer Plan does not retain the incentives offered in the original TDP plan from 2016. As the District has noted in prior pleadings, none of the over 100 teachers who have elected to transfer under the plan to date has chosen any incentive other than the stipend. Nonetheless, as requested by the Special Master, the Diversity Transfer Plan expressly includes all of the incentives of the original TDP:

“The District initially offered a range of other incentives equivalent to that stipend, including technology packages, tuition assistance and the like, but all transfer candidates to date have taken the stipend. The District will continue to offer equivalent incentives.” [ECF 2329-1, p. 42.]

“Additionally, the Director may work with the Executive Director of Human Resources to customize the incentive to best meet the needs of the transfer candidate.” [ECF 2329-1, p. 9.]

B. The District’s Plan Sets Out a Proactive Approach to Prioritizing Recruitment of Teachers and Administrators of Color for GYO Programs.

Contrary to the Mendoza Plaintiffs’ assertion, the Special Master has not found the District’s Diversity Plan to be inadequate. The District believes, based on a number of comments in the R&R and other communications from the Special Master to the parties,

² 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, mooted motion to strike for failure to comply with the limitation).

1 that the Special Master had not had the opportunity to review its final Diversity Plan by
 2 the time he filed his R&R, and based his report on prior filings by the District.

3 The District's Diversity plan does set out a proactive approach to prioritizing
 4 recruitment of teachers and administrators of color for GYO programs. For example, the
 5 District's Diversity Plan contains the following proactive elements:

6
 7 **2. Identification of Qualified Minority Participants.**

8 Using District HR data, the Director will assemble and regularly update a list
 9 of minority teachers and others in the District who already hold administrator
 certificates but are not currently employed in administrator positions in the
 District.

10 Using District HR data, data from teacher evaluations, and other sources of
 11 referral, the Director will assemble and regularly update a list of qualified
 minority teachers who may be candidates to work towards an administrator's
 certificate.

12
 13 **3. Direct Personal Outreach, Mentoring and Coaching.**

14 **a. Minority Administrator Candidates.** For those minority
 15 employees who already hold administrator certificates, the Director will
 16 conduct regular email and/or telephone contact to advise these candidates of
 open administrator positions, and encourage them to apply. The Director will
 follow up with direct personal contact as much as possible.

17 The Director will also explore the feasibility of matching minority
 18 administrator candidates with existing administrators to serve as mentors for
 the decision to become an administrator, and guides for the process of
 19 applying for an administrator's position. The Director will also conduct a
 number of clinics and coaching sessions to assist for interested candidates
 with the application process, including interview skills coaching and formal
 resume construction.

20
 21 **b. Minority Teachers.** For those minority teachers who do not yet
 22 have an administrator's certificate, the Director will conduct regular e-mail
 and/or telephone contact to advise these candidates of the availability of the
 23 Leadership Prep Academy and tuition assistance programs, and to encourage
 them to participate. The Director will conduct several meetings and
 24 information sessions to encourage minority teachers to enroll in the
 Leadership Prep Academy and/or tuition assistance programs, and invite
 25 minority administrators to attend and provide their own stories and paths as
 an encouragement to others. [ECF 2923-1, p. 43.]

C. **The District is Entitled to Unitary Status Now, and Need Not Wait To See Whether the District Hires Additional Hispanic and African American Teachers and Administrators in Future Years.**

The District already employs Hispanic administrators at rates higher than state and national averages³, and employs African American administrators of color at rates (a) equal to the national average, (b) three times the Arizona state average rate, and (c) double that of the Tucson population.⁴ There is no need to “wait and see” any longer. The suggestion by the Mendoza Plaintiffs that, notwithstanding the success of the District in employment, and its continued commendable effort to “grow its own,” the District must continue to wait before locally elected officials can resume their proper oversight of District affairs is nothing more than an intransigent insistence, regardless of the facts, that this Court run the District in perpetuity.

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.

³ The District has previously reported data showing that the District employs teachers of color at higher than national averages, or comparable to the local population. [ECF 2353, at p. 9.] In SY2018-19, 41 percent of TUSD site administrators were Hispanic. (ECF 2298-1, p. 43; Appendix IV – 9, IV.K.1.g (4) Site Administrative Teams SY2018-19.) Nationally, the average rate is only 8.2% Hispanic. See data reported by the National Center for Education Statistics of the U.S. Department of Education at https://nces.ed.gov/surveys/ntps/tables/ntps1718_2019082201_a12n.asp, and by the National Education Association at <https://www.nea.org/assets/docs/NBI%2011%20Administrator%20Diversity.pdf>. The Arizona state average reported by the NCES is about 21% Hispanic administrators. (https://nces.ed.gov/surveys/ntps/tables/ntps1718_19110501_als.asp).

⁴ From the same sources, in SY2018-19, 11 percent of TUSD site administrators were African American. Nationally, 10.6% of administrators are African American; in Arizona statewide, only 3% of administrators are African American. The African American population in the Tucson metropolitan area is approximately 4%.

1 Dated this 28th day of February, 2020.

2 Respectfully submitted,

3 /s/ P. Bruce Converse

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th 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