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20 **IN THE UNITED STATES DISTRICT COURT**
21 **FOR THE DISTRICT OF ARIZONA**

22 Roy and Josie Fisher, et al.,
23 Plaintiffs,
24 v.
25 Tucson Unified School District No. 1, et al.,
26 Defendants.
27 Maria Mendoza, et al.,
28 Plaintiffs,
29 v.
30 Tucson Unified School District No. 1, et al.,
31 Defendants.

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

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

32 **RESPONSE IN OPPOSITION**
33 **TO MENDOZA PLAINTIFFS' MOTION TO STRIKE (ECF 2433)**
34 **THE DISTRICT'S REPORT ON COMPLIANCE WITH THE SPECIAL**
35 **MASTER'S RECOMMENDATIONS ON TECHNOLOGY PROFESSIONAL**
36 **LEARNING (ECF 2426)**

Introduction and Summary

1
2 The Mendoza Plaintiffs' motion to strike should be summarily denied. The motion
3 is based on a mischaracterization of the nature of the District's filing, and in any event is
4 not an appropriate remedy. The Mendoza Plaintiffs' real issue is merely that they want an
5 opportunity to respond substantively to the District's filing. If so, the proper approach is
6 to seek leave to respond, **not** to move to strike. Indeed, *had they even asked* the District
7 if there was any objection to filing a response, the District would have accommodated.
8 But they did not, preferring instead to move for the draconian, and completely improper,
9 relief of striking a pleading from the record.

10 On November 21, 2019, the Special Master filed a Report and Recommendation
11 ("R&R") relating to the District's efforts to evaluate the proficiency of teachers in the use
12 of technology in the classroom. [ECF 2375.] In that Report, the Special Master
13 recommended that the District modify its Technology Integration Observation Tool and
14 submit it to the Special Master for approval.

15 Without waiting for an order from the Court, and in an effort to move the process
16 along as expeditiously as possible, the District complied with the Special Master's
17 recommendations. The District modified its technology observation tool, and submitted
18 it to the Special Master for approval on January 6, 2020 (copy of email submitting to the
19 Special Master attached as Exhibit A). On January 31, 2020, the District filed a brief
20 report on those efforts to comply with the Special Master's recommendations. [ECF
21 2426.] Earlier today, the District received a response from the Special Master, which is
22 attached as Exhibit B.

23 Filing a report on the efforts to comply with the Special Master's recommendation
24 is **not** inappropriate, *but rather is commendable*. It serves to inform the Court as to the
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1 status of the work on the Special Master's recommendations, in light of the passage of
2 time since the Special Master's Report, so that that information can inform the Court's
3 anticipated order regarding the Report and Recommendation. Striking the District's filing
4 deprives the Court of this information, and makes the record incomplete for any appeal.

5 **I. The Motion to Strike should be summarily denied.**

6 "Motions to strike are generally disfavored and rarely granted." *Lowe v. Maxwell*
7 & *Morgan PC*, 322 F.R.D. 393, 398 (D. Ariz. 2017) (denying motion to strike); *accord*,
8 *e.g.*, *Hanna v. ComTrans Inc.*, CV-16-01282-PHX-DLR, 2016 WL 6393601, at *2 (D.
9 Ariz. Oct. 28, 2016) (similar, noting that such a motion "is a drastic remedy"). Plaintiffs
10 argue that ECF 2430 is "further briefing" on the District's original notice of compliance
11 that was barred by the Court's Order (ECF 2312) and thus may be stricken under LRCiv
12 7.2(m). To the contrary, the District's filing merely reported on work requested and issues
13 raised by the Special Master in the R&R; it was **not** additional briefing on the District's
14 original notice of compliance. Regardless, "even a properly made motion to strike is a
15 drastic remedy which is disfavored by the courts and infrequently granted." *Yount v.*
16 *Regent Univ., Inc.*, CV-08-8011-PCT-DGC, 2009 WL 995596, at *11 (D. Ariz. Apr. 14,
17 2009) (emphasis added) (quoting *Int'l Longshoreman's Assoc. v. Va. Int'l Terminals,*
18 *Inc.*, 904 F. Supp. 500, 504 (E.D. Va. 1995)). For the reasons discussed below, the Court
19 should decline to apply that drastic remedy here.

20 Courts should deny motions to strike where the submission at issue was reasonably
21 prompted by other filings or orders. For example, this District has denied motions to strike
22 improper "sur-replies" where they responded to new issues raised on reply, *see, e.g.*,
23 *Sebert v. Arizona Dep't of Corr.*, 2:16-cv-00354-PHX-ROS, 2016 WL 3456909, at *1-2
24 (D. Ariz. June 17, 2016), and denied a motion to strike a "memorandum of explanation"

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1 filed by a law firm after the court granted sanctions against it. *See Larson v. White*
2 *Mountain Group LLC*, CV 11-01111-PHX-FJM, 2011 WL 6759555, at *1 (D. Ariz. Dec.
3 23, 2011). Similarly, here, the filing at issue (ECF 2426) was reasonably prompted by the
4 Special Master’s R&R. The Special Master raised various issues that he wanted the
5 District to address; the District accordingly did so. The Court should deny the motion to
6 strike on this basis.

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

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

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

9 Here, plaintiffs cannot argue that they would be prejudiced at all by the Court's
10 permitting the District's filing to remain in the record: they substantively responded to
11 the filing. [*See* ECF 2433 at 2-4.] On the other hand, striking ECF 2426 would prejudice
12 the District. The District is seeking to show its compliance with Special Master's
13 recommendations, and the District should be able to briefly address those during the
14 Court's consideration of the issues. This is the District's only opportunity to be heard
15 regarding the issues raised in the Special Master's report, as required by Fed R. Civ. P.
16 53(f)(1), which provides:

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

19 For this reason, too, the motion to strike should be denied.¹
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23 ¹ If the Court believes the District must specifically request that its filing be
24 permitted, the District hereby does so. *See Kunzi v. Arizona Bd. of Regents*, CV-12-
25 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 **II. The Mendoza Plaintiffs substantive responses to the District's filing are**
2 **without merit.**

3 Contrary to the Mendoza Plaintiffs' unfounded claim, the District modified the
4 tool in the ways suggested by the Special Master. The Special Master recommended that
5 the tool should be modified to include what it is the teacher is doing with the technology
6 to enhance student learning, as confirmed by the email response from the Special Master
7 attached hereto as Exhibit B. Subject to and without waiving its prior objections, the
8 District will comply with the Special Master's additional requests set out in Exhibit B.

9 The modified observation tool does reflect what a teacher is doing with technology
10 to enhance student learning. In column B, the observer indicates which of the four
11 learning goals are observed with the use of each technological tool: active learning,
12 collaborative learning, constructive learning and infusion. In Column C, the observer
13 rates the level of proficiency in the use of the technology in service of the learning goal:
14 entry level, adoption, adaptation, and authentic learning. The learning goals and
15 proficiency levels are explained for the observer on the first page of the tool. The
16 combined data from Columns B and C would show how the teacher and/or the students
17 are integrating technology into instruction and learning and how creatively they are using
18 these tools. Based on discussions with the Special Master, the District believes this
19 format satisfies the Special Master's request for a matrix format.

20 The tool of course still focuses on particular technological tools. This is because
21 **these are** the technologies which are available to teachers; **these are** the technologies
22 which from the very start, the District has declared that it expects its teachers to be
23 proficient in; and **these are** the technologies for which the District is assessing
24 competence.² Artificial intelligence and machine learning are **not** included, because they

25 ² That list was set out in the District's initial technology professional learning plan filed
on December 6, 2018. [ECF 2152-1, pp. 2-3.] Since that filing nearly 15 months ago,

1 are **not** among the technologies included in the District’s fundamental list in which its
2 teachers must be proficient.

3 Contrary to the Mendoza Plaintiffs assertion, the tool can and does guide
4 professional development. It does in fact include what the teacher is doing with the
5 technology to enhance student learning, and does capture information concerning how
6 teachers use technology to further learning. It is designed as an observational rubric, not
7 a source of examples of lesson plans or examples of uses of technology in teaching.

8 Instructional technology professional learning teaches classroom teachers how to
9 differentiate between technology tools, understanding how each is uniquely suited to a
10 particular task, content area, purpose and/or to particular students. The ultimate goal is
11 for all teachers to use and incorporate the available technological tools as an integral part
12 of classroom instruction helping to increase student engagement. In a fully
13 technologically integrated classroom, not only does the teacher infuse technology into
14 classroom instruction but students as well use technology in their collaborations with each
15 other and in their presentations.

16 The technology resource the use of which is being examined through the
17 observation tool and rubric are the specific tools that District teachers have available to
18 them and have been trained to use. The purpose of the Observation Tool is for the District
19 to find out which tools are being used, how they are being used, and how proficient the
20 users are. The information collected then informs the need for additional professional
21 learning, support and training.

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25 no one, including the Special Master, has suggested that that list is in some way
incomplete.

Conclusion

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

4 Dated this 28th day of February, 2020.

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6 Respectfully submitted,

7 */s/ P. Bruce Converse* _____

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CERTIFICATE OF SERVICE

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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