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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.	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 FISHER PLAINTIFFS' REQUEST TO STAY DISTRICT COURT'S DECISION ON UNITARY STATUS (ECF 2478)

Introduction

The Fisher Plaintiffs have requested that the Court stay further action on the District's request for acknowledgment of unitary status and termination of Court supervision.[1] This stay request should be denied because: (a) the pending Ninth Circuit appeal does not divest this Court of its ability to rule on the District's Supplemental Petition for Unitary Status; and (b) the COVID-19 pandemic does not afford a legal or factual basis to delay the Court's determination.

I. The Court has not been divested of jurisdiction.

The Fisher Plaintiffs primarily argue that the **plaintiffs'** pending appeal before the Ninth Circuit has divested this Court of jurisdiction to act on the Supplemental Petition. [ECF 2478, pp. 26-30.] That appeal has not divested this Court of jurisdiction because: (a) where a court (as here) has a supervisory role over a party's conduct, it is well-established Ninth Circuit law that an appeal does not divest the court of its ability to continue to act; and (b) regardless, the issues on appeal are not the same issues to be addressed by this Court.

A. Divestiture does not occur when the district court has the role of supervising conduct.

The Ninth Circuit has long held that the general rule of divestiture "is not a creature of statute and is not absolute in character" and that there are some cases, such as those where the district court is supervising a continuing course of conduct, where the rule should not — and does not — apply. *See Hoffman for & on Behalf of N.L.R.B. v. Beer Drivers & Salesmen's Local Union No. 888, Int'l Bhd. of Teamsters, Chauffeurs,*

[1] This request was combined with the Fisher Plaintiffs' objection to the Special Master's Report and Recommendation (ECF 2478).

Warehousemen & Helpers of Am., 536 F.2d 1268, 1276 (9th Cir. 1976). This is such a case.

Specifically, the court in *Hoffman* held that, "where the court supervises a continuing course of conduct and where as new facts develop, additional supervisory action by the court is required, an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision, even though in the course of that supervision the court acts upon or modifies the order from which the appeal is taken." *Id.* (emphasis added). *See also, e.g.*, *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 n. 14 (9th Cir.1994) (holding that the court retained jurisdiction to expand an injunction, despite a pending appeal of the injunction, where the court was serving a supervisory role); Fed. R. Civ. P. 62(d) ("While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction . . . .").

Hoffman is controlling. Divestiture does not apply here because, under the USP, this Court supervises the parties' continuing course of conduct. As in *Hoffman*, the Court retains jurisdiction to act on or modify the USP, the underlying injunction, and the Court's other orders as new information arises.[2]

[2] The Mendoza Plaintiffs, arguing in 2019 that a different appeal (filed by the District) had divested the Court of jurisdiction, relied on *McClatchy Newspapers v. Central Valley Typographical Union No. 46, International Typographical Union*, 686 F.2d 731 (9th Cir. 1982), *amended sub nom. McClatchy Newspaper v. Local 46* (9th Cir. Sept. 22, 1982), to argue that the *Hoffman* exception did not apply. This argument failed then and, if made by the Fisher Plaintiffs now, would fail again because the reasons the court in *McClatchy* declined to apply the *Hoffman* exception are not present here. Specifically, the *McClatchy* court noted that the district court in that case, unlike in *Hoffman*, did not have a supervisory role. 686 F.2d at 735. The district court had merely confirmed an arbitrator's award finding that certain job guarantees had survived a strike, and it was that confirmation judgment that was being appealed. The district court's subsequent

Indeed, courts adjudicating desegregation cases regularly hold that the case may proceed, and the district court may continue its role of supervising the parties' conduct, despite the fact that certain orders are under appeal. For example, the Eighth Circuit — relying on the Ninth Circuit's decision in *Hoffman* — held that pending appeals of orders in a desegregation case did not divest the district court of jurisdiction to supervise (and issue additional orders related to) the school district's vocational education program. *Bd. of Educ. of St. Louis v. State of Mo.*, 936 F.2d 993, 995-96 (8th Cir. 1991). "To conclude otherwise would only further delay achievement of the goal of providing a quality integrated vocational education system to [the school district's] students." *Id.* at 996. *See also, e.g.*, *Plaquemines Par. Comm'n Council v. U.S., by Mitchell*, 416 F.2d 952, 954 (5th Cir. 1969) ("The district court did not lose jurisdiction of the parties merely because an appeal was pending from the desegregation order."); *United States v. State of La.*, CIV. A. 80-3300, 1990 WL 58143, at *1 (E.D. La. May 3, 1990) (the court retained jurisdiction notwithstanding interlocutory appeals of injunctive orders because "the Court retains continuing jurisdiction until either the defendants are judicially found to be 'operating the system of public higher education on a unitary basis' or the United States agrees . . . to dismiss the action"). Because the *Hoffman* exception to divestiture applies, this Court retains jurisdiction regardless of the pending appeals.

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amendment of the judgment to order the remedy of reinstatement — something outside the scope of the arbitrator's award — was improper both because the general rule of divestiture applied without exception and because application of a remedy "must abide further inquiry, either by arbitration or by appropriate judicial proceedings, in which each party has the opportunity for a full and fair presentation of its case." *Id.* Because, unlike in *McClatchy*, this Court has a supervisory role, the *Hoffman* exception applies.

B. Regardless of the *Hoffman* exception, the Court is not divested of its ability to act because the issues today are not the same as those involved in the pending appeal.

The Fisher Plaintiffs' stay request fails for a second reason, independent of the applicability of the *Hoffman* exception. Even where *Hoffman* does not apply, where the same issues are not involved in both the appeal and the trial court, the trial court does not lose jurisdiction by the filing of the appeal. For example, in *Stein v. Wood*, 127 F.3d 1187 (9th Cir. 1997)(cited by the Fisher Plaintiffs), the Ninth Circuit held that divestiture did not apply because "[t]his is not a case where the district court would be deciding the same issues before the appeals court." 127 F.3d 1187, 1189-90 (9th Cir. 1997) (emphasis added).

Here, the pending appeal involves the plaintiffs' challenges to areas in which the Court awarded partial unitary status in 2018. When the Mendoza Plaintiffs argued in early 2019 that the Court had been divested of jurisdiction by the then-pending appeal filed by the District, they stated that the appeal filed by the plaintiffs, which is now the only appeal pending, "is not likely to pose the same divestiture issues as the TUSD appeal because it addresses this Court's grant of unitary status with respect to certain portions of the USP and thus involves issues that are not likely also to come before this Court as it continues to oversee the District's implementation of those portions of the USP as to which the Sept. [2018] Order did not grant unitary status and TUSD compliance with the Sept. [2018] Order." [ECF 2186, p. 3 n.2.][3]

[3] Although the Mendoza Plaintiffs incorrectly argued that the *Hoffman* exception did not apply, *see* note 2, *supra*, and although the District disagreed (and continues to disagree) with the Mendoza Plaintiffs' argument that the District's prior appeal raised divestiture issues, it is telling that the Mendoza Plaintiffs acknowledged that the plaintiffs' appeal was unlikely to divest the Court of jurisdiction to continue the case.

The question at hand is whether the District today is entitled to a termination of court supervision; the "matters involved in the appeal" concern a different time period, a different procedural context, and a different legal standard, and are thus outside the divestiture rule even if that rule would otherwise apply to this case. This is a second, independent reason that the pendency of the plaintiffs' own appeals does not deprive this Court of jurisdiction to terminate its supervision of the District.

II. The COVID-19 pandemic provides no basis for staying the Court's determination of unitary status.

The Fisher Plaintiffs also argue that the Court should stay its decision on unitary statys as a result of the COVID-19 pandemic, arguing that "an additional school term or academic quarter may be required for legitimate analysis and findings by both the Special Master in its Report and Recommendation, and the U.S. District Court in deciding the issue of Unitary Status." [ECF 2478, pp. 7-8, 25-26.][4] This argument is also unavailing, because no additional data is needed for determination of the Supplemental Petition in the first place.

The Fisher Plaintiffs also argue that the COVID-19 pandemic and the resulting closure of in-person schools requires a delay in consideration of unitary status because of "the likely regression of African American Students' progress during the COVID 19 outbreak due to limited on-line computer access (and the lack of appropriate Summer Academic Tutoring Programs during said outbreak)." [ECF 2478, p. 7:24-26.] This is an utterly unsubstantiated allegation, but more fundamentally problematic because its

[4] Specifically, the Fisher Plaintiffs point to the fact that, due to the COVID-19 closure of in-person schools, students were permitted to use their third-quarter grades as their fourth-quarter grades; the Fisher Plaintiffs claim this makes academic data "less than reliable." But because fourth-quarter academic data is not necessary for determination of its Supplemental Petition, the change is irrelevant.

unstated premise is that African American students will somehow "regress" more than other students of similar economic status.

Moreover, the educational challenges thrust upon school districts across the country as a result the pandemic, and the response to those challenges, are simply *not the issue* in this case: these issues have nothing to do with the District achieving unitary status after elementary school segregation, which ended 70 years ago.[5] There is no evidence that the District's response is somehow constitutionally lacking, no evidence (or even the allegation) of any intentional racial or ethnic discrimination in the District's response to the COVID-19 crisis, and certainly no evidence that would justify interference by the federal court in the response by the District's locally elected officials to this unprecedented calamity. Indeed, this is precisely the time when the cumbersome process of court supervision can wreak the most havoc on a school district's ability to respond. The District should be permitted to refocus its efforts on addressing these challenges and ensuring its continued ability to provide a quality education to its students, regardless of race or ethnicity, rather than having additional time, effort, and resources consumed by litigation and Court reporting requirements. In reality, the District and its staff and teachers have worked exhaustingly hard to continue to provide a quality education to their students during the remote-learning period of SY 2019-20, including extraordinary efforts

[5] "[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (quotation marks omitted). "The vestiges of segregation [to be eliminated] . . . must be so real that they have a causal link to the *de jure* violation being remedied," and a school district is "under no duty" to battle reoccurrence of racial disparities that result from factors other than the original violation. *Freeman v. Pitts*, 503 U.S. 467, 494-96 (1992); *see also Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436-37 (1976). Any impacts on African American students' academic achievement caused by limited internet access in their homes are, without question, not causally connected to the District's prior constitutional violation and thus outside the scope of what the District can be required to address.

to overcome technology limitations in students' homes, to continue its mission to educate all the children it serves. In short, the COVID-19 pandemic is actually a powerful reason for acceleration of the termination of supervision, not further delay.

Conclusion

The Fisher Plaintiffs' stay request should be denied. First, the Court has not been divested of jurisdiction to rule on the Supplemental Petition for Unitary Status by the pending Ninth Circuit appeal, both because the *Hoffman* exception applies and because, regardless, the matters involved in the appeal are not the same those currently at hand. Second, the recognition that the District is operating in unitary status is not dependent on the availability of complete data for this past school year, nor does the COVID-19 pandemic provide any legal or factual reason to delay termination of court supervision. The District is operating in unitary status in all areas. The Special Master and the Department of Justice have both confirmed this. The Court should not delay any longer.

Dated this 30th day of June, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 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