IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roy and Josie Fisher, et al.,

Plaintiffs

and

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District, et al.,

Defendants,

and

Sidney L. Sutton, et al.,

Defendants-Intervenors,

No. CV-74-00090-TUC-DCB
(Lead Case)

Maria Mendoza, et al.,

Plaintiffs,

and

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District, et al.

Defendants.

No. CV-74-0204-TUC-DCB
(Consolidated Case)

ORDER

Notice Concerning Divestiture of Jurisdiction

On October 14, 2020, the Mendoza Plaintiffs filed a Notice Concerning Divestiture of this Court's Jurisdiction to Rule on TUSD's pending Supplemental Petition for Unitary Status. (Doc. 2548.) Like the interlocutory appeals from the Court's Order issued on September 6, 2018, which granted unitary status in part, the District's current interlocutory appeals from the Court's most recent Orders raise jurisdictional issues.

The District's prior interlocutory appeal from the Court's September 6, 2018, Order was dismissed July 29, 2019, for lack of appellate court jurisdiction because this Court has at all times retained jurisdiction over implementation of the USP and did not "'substantially alter[]' the parties' legal relationship, Cunningham v. David Special Commitment Ctr., 158 F.3d 1035, 1037 (9th Cir. 1998)." (Decision (Doc. 2522-1) at 3.) Similarly, the Plaintiffs' interlocutory cross-appeal was dismissed for lack of appellate jurisdiction. The Mandate issued on September 14, 2020. (Mandate (Doc. 2522)).

The current interlocutory appeal relates to a series of Orders in June and July 2020, reviewing Notices of Compliance which identified areas of noncompliance with the September 6, 2018, Order and the fact that the Court did not consider the District's Supplemental Petition for Unitary Status. The Court did not consider the Petition because it was filed on December 31, 2019, (Doc. 2406), but was not fully briefed by the parties until June 17, 2020, (Fisher Response (Doc. 2480). See (Order filed 4/28/20 (Doc. 2466) at 9-10 (allowing supplemental responses/replies to Supplemental Petition for Unitary Status). The Special Master, then, supplemented his Report and Recommendation (R&R) on July 6, 2020. (Doc. 2494).

When the Court saw the notice of TUSD's most recent appeals filed August 4, 2020, it did not see any reason for divestiture of its jurisdiction over the ongoing operations of the District under the USP. (Decision (Doc. 2522-1) at 3) (dismissing interlocutory appeal of September 9, 2018 Order for lack of appellate jurisdiction); *see also Fisher v. TUSD*, 588 Fed. Appx. 608 (9th Cir. December 15, 2014) (considering TUSD appellate argument that USP is like Consent Decree which may not be modified by Court's procedural order

limiting review and comment of Action Plans and dismissing appeal for lack of jurisdiction).

The Mendoza Plaintiffs, however, suggest that TUSD's theory of its current appeals is that this Court has erred in refusing to dissolve the structural injunction and terminate supervision, therefore, "it continues to control TUSD's operations" without jurisdiction. According to TUSD, the issues on appeal are: 1) "Whether the district court erred as a matter of law by refusing to dissolve the injunction because the only vestiges of de jure discrimination were eliminated by 1983, and TUSD has long since met the good-faith compliance standard, as properly applied in the circumstances of this case." 2) "Whether the district court erred as a matter of law by refusing to dissolve the injunction because the vestiges of past discrimination by TUSD have been eliminated to the extent practicable, and TUSD has complied in good faith with the whole of the Unitary Status Plan." (Notice (Doc. 2548-1) at 2)). The Mendoza Plaintiffs argue that these are the exact same issues that this Court must address to rule on the pending Supplemental Petition for Unitary Status. (Notice (Doc. 2548) at 3) (citing *United States v. Vroman*, 997 F.2d 627 (9th Cir. 1993) (filing notice of appeal divests district court of control over aspects of the case involved in the appeal); *see also Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58 (1982); *Watchtower Bible & Tract Soc. of New York, Inc. v. Colombani*, 712 F.3d 6, 11 (1st Cir. 2013).

The District argues that this Court has not been divested of jurisdiction to rule on the Petition for Unitary Status because "[t]he Ninth Circuit has long held that the general rule of divestiture' is not a creature of statue and is not absolute in character,' and it has recognized that where the district court is supervising a continuing course of conduct, the rule should not—and does not—apply." (Response (Doc. 2552) at 4 (citing *Hoffman ex rel N.L.R.B v. Beer Drivers' Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1076))).

Generally, the Court is obligated to ensure its own subject matter jurisdiction at each stage of the proceeding. *See, e.g., Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 593 (2004) ("[B]y whatever route a case arrives in federal court, it is the obligation of both

district court and counsel to be alert to jurisdictional requirements.") This Court turns to the question of whether the appeal filed by TUSD divests this Court of jurisdiction to decide in the first instance the issues submitted to the circuit court by interlocutory appeal.

In the Ninth Circuit, a consent decree is the equivalent to an injunction. *Thompson v. Enomoto*, 815 F.2d 1323, 1326–27 (9th Cir. 1987) (injunctions are "orders that are directed to a party, enforceable by contempt, and designed to accord or protect 'some or all of the substantive relief sought by a complaint' in more than preliminary fashion." 16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure: Jurisdiction § 3922, at 29 (1977) (quoting *International Products Corp. v. Koons*, 325 F.2d 403, 406 (2d Cir.1963)). This Court also notes that, generally, "the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, . . . , granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[,.]" 28 U.S.C.A. § 1292 (West); Fed. Rule Civ. P. 62(d). This perhaps explains the portrayal by TUSD on appeal of the June and July 2020 Orders issued by this Court addressing the Notices of Compliance as, de facto, refusals by this Court to dissolve the structural injunction and terminate supervision over the District's implementation of the USP. The merit of that argument is for the court of appeals to decide.

Here, this Court looks to Fed. R. Civ. P. 62(c), which directs that an injunction is not stayed if an appeal is taken interlocutory and subsection d which provides that this Court may "suspend, modify, restore, or grant an injunction," while an appeal is pending from an interlocutory order that "continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction." Accordingly, this Court, like the circuit court, must determine whether the June and July 2020 Orders fall under Rule 62(d). Otherwise, the interlocutory appeal does not stay the proceedings in this Court.

The Supreme Court in *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) set out a three-part test to determine whether an interlocutory appeal falls under 28 U.S.C. § 1292(a)(1), allowing appellate review: (1) does the order have the practical effect of the

grant or denial of an injunction; (2) does the order have serious, perhaps irreparable consequences; and (3) is the order one that can be effectively challenged only by immediate appeal? *Enomoto*, 815 F.2d at 1327 (citing *EEOC v. Pan American World Airways, Inc.*, 796 F.2d 314, 316–17 (9th Cir. 1986)). This Court finds that its June and July 2020 Orders do not fall under 28 U.S.C. Section 1292. These Orders were no different than the September 6, 2020, Order issued by this Court, which the Ninth Circuit has described as an interlocutory ruling, which did not have the practical effect of modifying the USP because it did not substantially alter the parties' legal relationship.

There are, however, two differences in circumstances. In 2018, the Court granted in part unitary status where it could, but in the 2020 Orders it did not reach the issue of unitary status because the remainder of compliance issues being considered in 2020 were interrelated and could not be parsed for unitary status purposes. Additionally, the Supplemental Petition for Unitary Status was pending, which is obviously the means by which this Court should undertake the requisite Green factor analysis.

The Mendoza Plaintiffs are correct that as presented by the District the appellate issues are those this Court must answer to rule on the Supplemental Petition for Unitary Status. Therefore, while the District does not contest this Court's jurisdiction, this Court must consider whether it has federal jurisdiction over this case, if as asserted by the District, it has attained unitary status. "The defense of lack of subject matter jurisdiction cannot be waived." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983), and may "be raised at any time during the proceedings," United States v. Bennett, 147 F.3d 912, 914 (9th Cir.1998) (internal quotations omitted). The federal courts possess "only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto[,] ... every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even if not contested by the parties. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (internal quotations omitted).

Subject-matter jurisdiction is a threshold issue that relates to the court's power to

hear a case and must be decided before a determination on the merits of the case. *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 453 (4th Cir. 2012) (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)). A motion under Rule 12(b)(1) raises the question of "whether [the plaintiff] has a right to be in the district court at all and whether the court has the power to hear and dispose of [the] claim." *Id*. at 452.

Conclusion

The District has not filed a Motion to Dismiss, and instead responds to the Notice of Divestiture of Jurisdiction by asserting this Court continues to have a supervisory role over its conduct. (Response (Doc. 2552)). While this cannot waive a jurisdictional defect, it reflects that the District will continue to comply with this Court's oversight directives. Unless and until the District informs this Court otherwise, this Court finds it has jurisdiction to resolve all pending matters before it relevant to USP operations, including granting or denying the Supplemental Petition for Unitary Status.

Simply put, this Court does not find TUSD's current appeal from the 2020 Orders to be any different from its prior appeal of the September 6, 2018, Order, which did not warrant a stay for divestiture pending appeal. (Decision (Doc. 2522-1) at 3); (Mandate (Doc. 2522) (dismissing interlocutory appeals of September 6, 2028 Order for lack of appellate jurisdiction), see also (Order (Doc. 2213) (denying Mendoza Plaintiff's motion to stay for divestiture (Doc. 2186)), *cf.*, (Order (Doc. 2527) (denying Fisher motion to stay (Doc. 2478), including divestiture argument related to prior appeal).

Accordingly,

IT IS ORDERED that this Court finds it retains subject matter jurisdiction over this case pending appeal.

Dated this 18th day of December, 2020.

David C. Bury
United States District Judge