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UNITED STATES DISTRICT COURT

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DISTRICT OF ARIZONA

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Roy and Josie Fisher, et al.,)

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Plaintiffs,)

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v.)

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United States of America,)

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Plaintiff-Intervenor,)

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v.)

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Anita Lohr, et al.,)

CV 74-90 TUC DCB
(lead case)

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Defendants,)

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and)

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Sidney L. Sutton, et al.,)

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Defendants-Intervenors,)

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Maria Mendoza, et al.,)

ORDER

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Plaintiffs,)

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United States of America,)

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Plaintiff-Intervenor,)

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v.)

CV 74-204 TUC DCB
(consolidated case)

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Tucson Unified School District No. One, et al.,)

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Defendants.)

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July 7, 2011, the Ninth Circuit Court of Appeals remanded this case for continued

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judicial oversight of the Tucson Unified School District (TUSD), until Defendant TUSD has

1 attained unitary status. The Ninth Circuit affirmed this Court's conclusion that the record
2 could not support a finding that Defendant TUSD had demonstrated good faith compliance
3 with the Consent Decree. It reversed this Court's finding that by adopting a Post Unitary
4 Status Plan (PUSP), which was fashioned by a joint committee of the parties and experts to
5 ensure public oversight of TUSD's ongoing desegregation efforts, TUSD attained unitary
6 status. The Mandate issued on August 10, 2011.

7 On August 16, 2011, Plaintiffs Mendoza (Mendoza) requested a status conference
8 and suggested that each party file a memorandum setting out its position as to how this matter
9 should proceed.

10 On August 16, 2011, TUSD requested the case be referred to a mediator, either a
11 Magistrate Judge or the 9th Circuit Mediation program, for a settlement conference. TUSD
12 believes aspects of the PUSP must be revisited due to changes in TUSD's leadership, the
13 PUSP was not designed for court oversight, it does not set forth a path for achieving unitary
14 status, and the parties are not fully in agreement on its provisions. TUSD believes that
15 appointment of a mediator will offer a forum where it can present to Plaintiffs a draft plan,
16 proposed by TUSD, that will have as its goals the elimination of all vestiges of a segregated
17 system and the attainment of unitary status within a reasonable time period.

18 On August 17, 2011, Plaintiffs Mendoza filed an objection to a settlement
19 conference or appointment of a mediator. Mendoza accuses TUSD of trying to escape the
20 judicial oversight mandated by the Ninth Circuit and charges that TUSD is attempting to
21 circumvent the current remedial plan, the PUSP, especially its provisions for accountability.

22 On August 18, 2011, Plaintiffs Fisher (Fisher) objected to filing a memorandum
23 outlining its procedural position until after the Court conducts a status hearing. Fisher
24 objects to Defendant TUSD being given responsibility for drafting a new plan without any
25 input from Plaintiffs because TUSD has acted in bad faith, even as to the PUSP. For
26 example, TUSD has ignored even the most basic reporting requirements under the PUSP, it

1 party). Given the lack of good faith exhibited by TUSD in this case, the Court intends
2 funding for the Special Master to be paid by TUSD, but the parties should agree on fee
3 parameters and whether it is appropriate to pay the Special Master from desegregation
4 money. If unable to agree on a Special Master appointment, each party shall propose at least
5 two names of candidates for a Special Master, who will be charged to perform the tasks
6 proposed below.

7 Additionally, the parties should attempt to agree on the provisions required to be in
8 the contents of the Order of appointment, such as the scope of the reference, the issues to be
9 investigated, the circumstances under which ex parte communication with the Court or a
10 party will be appropriate, the time-frame and format for delivering the master's record of
11 activities and final Report to the Court. Fed. R. Civ. P. R. 53(b)(2). The parties should
12 consider whether or not to stipulate that the Special Master's findings of fact are to be
13 accepted as final, leaving only questions of law for *de novo* review by the Court. Fed. R.
14 Civ. P. R. 53(g)(4).

15 In order for the parties discussions to be more productive, the Court provides the
16 following outline regarding requirements for the Special Master's Report. The Report will
17 be the Plan for TUSD to attain unitary status proposed by the Special Master after
18 considering the positions of all parties, including the Plaintiff-Intervenor the United States.
19 *See Fisher v. Tucson TUSD*, 2011 WL 2806556, at *7 n. 24 (9th Cir. July 19, 2011) (noting
20 that the United States expressed the view that TUSD had not attained unitary status). The
21 Plan shall include specific substantive programs and provisions to be implemented by TUSD
22 and an implementation time schedule including benchmark dates covering at least the initial
23 completion of the Plan, implementation time schedules for all proposed Plan programs or
24 provisions, review and revision deadlines, and identify the final unitary status deadline. The
25 Plan must include review and evaluation criteria for each required program or provision.

1 which should be incorporated, omitted , supplemented, and/or improved to make it a Plan for
2 unitary status. The Plaintiff-Intervener, the United States, shall provide an explanation of its
3 role in this case, specific to the preparation of the Unitary Status Plan and whether it can
4 provide any special expertise to assist the Special Master and/or at a minimum assist in
5 identifying an individual to serve as a Special Master in the case.

6 **Accordingly,**

7 **IT IS ORDERED** that the Request for a Status Conference (Doc. 1312) and Request
8 for Direction by holding Status Conference (Doc. 1319) are DENIED.

9 **IT IS FURTHER ORDERED** that the Request for a Settlement Conference or
10 Appointment of Mediator (Doc. 1313) is DENIED.

11 **IT IS FURTHER ORDERED** that within 5 days of the filing date of this Order,
12 any party objecting to the appointment of a Special Master in this case shall file an Objection.
13 Any Response shall be due within 5 days. There will be no Replies.

14 **IT IS FURTHER ORDERED** that within 20 days of the filing date of this Order
15 the parties shall jointly file a Memorandum (Joint Memorandum) with the Court that
16 identifies the Special Master stipulated to by the parties, or if the parties are unable to agree
17 on an appointment, the names of individuals proposed for appointment as Special Master in
18 the case.

19 **IT IS FURTHER ORDERED** that the curriculum vitae be attached for any
20 individual proposed for appointment as Special Master in this case.

21 **IT IS FURTHER ORDERED** that the Joint Memorandum shall reflect whether the
22 parties agree, and if not the differing positions of the parties as to the fee parameters for the
23 Special Master and whether desegregation money may be used to pay the Special Master.

24 **IT IS FURTHER ORDERED** that within 30 days of the filing date of this Order
25 the parties shall jointly prepare and file a proposed form of Order for the appointment of the
26 Special Master, which satisfies the requirements set out in Fed. R. Civ. P. R. 53(b)(2) and
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1 specifies whether the parties shall stipulate that the Special Master's findings of fact are to
2 be accepted as final, Fed. R. Civ. P. R.53(f)(3).

3 **IT IS FURTHER ORDERED** that within 30 days of the filing date of this Order
4 the parties shall prepare and file memoranda regarding the appropriateness of partial judicial
5 withdrawal and memoranda regarding the adequacy of the PUSP. Each party may file one
6 brief per subject which may not be longer than 15 pages. There will be no Responses or
7 Replies.

8 **IT IS FURTHER ORDERED** that within 10 days of the filing date of this Order
9 the Plaintiff-Intervenor shall file the brief requested by the Court.

10 DATED this 13th day of September, 2011.

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14 David C. Bury
United States District Judge