

1 DECONCINI MCDONALD YETWIN & LACY, P.C.
2 2525 EAST BROADWAY BLVD., SUITE 200
3 TUCSON, AZ 85716-5300
4 (520) 322-5000

4 Richard M. Yetwin, Esq. (AZ #03196)
ryetwin@dmyl.com
5 Heather K. Gaines, Esq. (AZ #18447)
hgaines@dmyl.com
6 Sesaly O. Stamps, Esq. (AZ #25773)
sstamps@dmyl.com

7
8 TUCSON UNIFIED SCHOOL DISTRICT
9 LEGAL DEPARTMENT
10 1010 E. TENTH STREET
TUCSON, AZ 85719
(520) 225-6040

11 Nancy Hughes Woll, Esq. (AZ # 16830)
Nancy.Woll@tusd1.org

12 Attorneys for Defendants

13
14 **UNITED STATES DISTRICT COURT**
DISTRICT OF ARIZONA

15 ROY and JOSIE FISHER, et al.,)
16 Plaintiffs,)

17 UNITED STATES OF AMERICA,)
18 Plaintiff-Intervenor,)

19 vs.)

20 ANITA LOHR, et al.,)
21 Defendants,)

22 and)

23 SIDNEY L. SUTTON, et al.,)
24 Defendants-Intervenors.)

No. CIV 74-90 TUC DCB
(lead case)

JOINT MOTION TO MODIFY
THE SCHEDULING ORDER

1 Master (“January 2012 Order”) at 5. The USP was intended to cover all traditional
2 aspects of a school desegregation plan as well as the areas included in the 1978
3 Stipulation of Settlement in this matter as the Stipulation of Settlement was interpreted
4 and applied by the parties and the Court. *Green v. Cnty. Sch. Bd. Of New Kent Cnty.*, 391
5 U.S. 430 (1968); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).
6

7 In developing the USP, the January 2012 Order instructed the Special Master to
8 consider the briefs, filings, data, and opinions of the Parties and designated school
9 desegregation experts. January 2012 Order at 5, 13-14. In addition, the Special Master
10 was instructed that he may accept input from, *inter alia*, District employees, PUSP
11 Committee or Independent Citizens’ Committee members, parents, students, teachers,
12 and any other interested parties. *Id.* at 5. Since January 6, 2012, the Special Master has
13 traveled to Tucson a number of times, engaged local and national experts to provide
14 advice and input, analyzed voluminous data and documents provided by the District, and
15 worked to develop the Plan by conferring with the Parties, TUSD staff and
16 administrators, community members, and other interested stakeholders in various public
17 and private forums. The Parties have worked industriously with the Special Master and
18 each other to provide comprehensive comments on the initial draft USP and to respond
19 productively and expeditiously to each successive draft of the proposed Plan.
20

21 Pursuant to the July 13, 2012 Order of this Court (“July 2012 Order”), the Parties
22 planned to meet with the Special Master in Tucson on August 24-25, 2012, to discuss the
23 elements of the draft USP and to seek informal resolution to ongoing issues and
24 objections. However, due to personal tragedy in the immediate family of *Fisher*
25

1 Plaintiffs' counsel, the Parties and the Special Master respectfully agreed to reschedule
2 said meeting to September 9-10, 2012. The Parties met this past week and held
3 productive informal discussions regarding the ideas and proposals in the draft USP. On
4 September 11, 2012, this Court entered an amended Scheduling Order ("September 2012
5 Order") requiring the Special Master to provide the Parties with a final version of the
6 proposed USP by September 21, 2012. September 2012 Order at 2. The Parties now
7 jointly ask the Court to modify the scheduling order in this matter to allow constructive
8 discussions to continue for an additional seven weeks to come to further consensus, to
9 permit the Parties to work toward a consent decree on one or more of the *Green* factors,
10 and to minimize the likelihood of the Parties filing significant formal objections to the
11 USP when it is submitted to the Court. The requested extension of time will not impact
12 the schedule for implementation of the USP.

14 **II. LEGAL ARGUMENT**

15 Pursuant to Rule 16(b)(4) of the Federal Rules of Civil Procedure, "a schedule
16 may be modified only for good cause and with the judge's consent." Inquiry into good
17 cause may take into account the prejudice to the non-moving party or parties, but focuses
18 primarily on the moving party's reasons for seeking modification. *Jackson v. Laureate,*
19 *Inc.*, 186 F.R.D. 605, 607 (E.D.Cal. 1999). The 1983 Advisory Committee Notes on
20 Rule 16(b)(4) further explain that such modifications are appropriate upon showing that
21 the existing schedule "cannot reasonably be met despite the diligence of the party seeking
22 the extension." *See also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th
23 C. 1992); 6A Wright, Miller & Kane, *Federal Practice and Procedure* § 1522.1 at 231
24

1 (2d ed. 1990) (“good cause” means scheduling deadlines cannot be met despite party's
2 diligence). To demonstrate diligence, the moving party must show (1) that she worked
3 with the Court to create a workable Rule 16 Order; (2) that her non-compliance with the
4 existing Order is due to reasonably unforeseen or unanticipated developments; and (3)
5 that she timely sought amendment once it became apparent that she could not comply
6 with the Order. *Jackson*, 186 F.R.D. at 607-608; *Hansen v. Schubert*, 459 F.Supp.2d 973,
7 1000-1001 (E.D.Cal 2006) (quoting the *Jackson* test). A showing of carelessness by the
8 party seeking the modification will preclude the provision of relief under Rule 16(b)(4).
9 *Engleson v. Burlington Northern R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir.1992).

11 In this matter, the Parties are united in asking the Court for an amendment to the
12 scheduling order, so there can be no prejudice to any party to this litigation. Further, the
13 Parties can demonstrate diligence pursuant to all three factors in the *Jackson* test.

14 First, the Parties have consistently and in good faith attempted to accurately
15 project the time necessary for the completion of the USP. The January 2012 Order was
16 based on what the Parties believed, at that time, to be reasonable assumptions regarding
17 the time necessary for the Special Master to draft and develop the USP. The relatively
18 short initial timeframe was also motivated by a desire to provide timely relief to the
19 students in TUSD. However, the complexities of drafting and editing a lengthy and
20 comprehensive document and negotiating its contents between multiple parties (see *infra*)
21 has led to all parties agreeing that additional time is necessary for the completion of this
22 task in a manner which will draw as limited objections as possible. Moreover, because
23 the Parties all agree that it is in the interest of both this Court and the students of Tucson
24

1 to have a Plan in place to take effect by January 2013, the Parties' proposed amended
2 scheduling order still requires submission of the final USP to the Court before the
3 January 2013 deadline in the original January 2012 Order.

4 Second, the Parties could not reasonably have anticipated either the volume of
5 comments, edits, and suggestions to and iterations of the draft USP. Between April 2,
6 2012, when the Special Master first shared his draft elements and principles for the USP
7 and the Tucson meetings on September 9-10, 2012, the Parties have provided
8 comprehensive comments on multiple versions of the USP, drafted and shared
9 substantive and legal memoranda regarding various parties' proposals and suggestions,
10 collectively exchanged over a thousand emails regarding the draft, and conducted dozens
11 of conference calls with the Special Master and between the Parties regarding specific
12 provisions of the draft Plan. In addition, the Parties could not have anticipated the
13 personal tragedy which caused the August meeting to be moved to September, meaning
14 that the Parties were unable to meet and confer in August as previously ordered and
15 planned out of respect due to *Fisher* Plaintiffs' counsel.

16 Third, the Parties are seeking amendment to the scheduling order in a timely
17 manner. The meetings between all Parties and the Special Master concluded at close of
18 business on September 10, 2012. At those meetings, more consensus was found than
19 previously anticipated. As such, the Parties collectively agreed that continuing to work
20 together informally to resolve differences could be fruitful, and that stopping discussions
21 now and moving instead to filing formal objections would needlessly curtail newly
22 developed positive momentum and areas of agreement. Then, between September 11 and
23
24

1 September 13, 2012, the Parties traveled back to their respective places of work and
2 conferred individually, collectively, and with the Special Master regarding next steps.
3 The Parties then filed this Motion on September 14, 2012, as soon as consensus was
4 reached.

5 **III. CONCLUSION**

6 The Parties recognize the importance in following scheduling orders so that the
7 Court can control its docket and avoid awarding carelessness or lack of diligence.
8 *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C.1987). However, as delineated *supra*,
9 the Parties and the Special Master have been working diligently to resolve objections,
10 reach consensus where possible and meet the Court's schedule. The Parties respectfully
11 ask that the Court amend the September 11, 2012 scheduling order to provide the Parties
12 with adequate time to resolve ongoing differences and come to a more amicable solution.

14 Respectfully Submitted,

15
16 Dated: September 14, 2012

/s/ Heather K. Gaines by permission
RUBIN SALTER, JR., ASBN 01710
Counsel for Plaintiffs Roy and
Josie Fisher, et al

/s/ Heather K. Gaines by permission
PROSKAUER ROSE LLP
LOIS D. THOMPSON
JENNIFER L. ROCHE

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
NANCY RAMIREZ

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

/s/ Heather K. Gaines by permission

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

ANURIMA BHARGAVA, Chief
CHRISTOPHER AWAD
ZOE M. SAVITSKY
Educational Opportunities Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Patrick Henry Building, Suite 4300
Washington, D.C. 20530
Tel: (202) 514-8392
Fax: (202) 514-8337

/s/ Heather K. Gaines by permission

DeCONCINI McDONALD
YETWIN & LACY, P.C.
Richard M. Yetwin
Heather K. Gaines
Sesaly O. Stamps
Counsel for Defendant Tucson Unified School
District

CERTIFICATE OF SERVICE

1
2 X I hereby certify that on September 14, 2012, I electronically transmitted the attached
3 document to the Clerk's Office using the CM/ECF System for filing and transmittal of
4 a Notice of Electronic Filing to the following CM/ECF registrants:

5 Rubin Salter, Jr., Esq.
6 177 N. Church, Ste. 805
7 Tucson, Arizona 85701

8 William J. Maledon, Esq.
9 2929 N. Central Ave.
10 P.O. Box 36379
11 Phoenix, Arizona 85067-6379

12 Anurima Bhargava, Esq.
13 Christopher Awad, Esq.
14 Zoe Savitsky, Esq.
15 Civil Rights Division
16 U.S. Department of Justice
17 Washington, D.C. 10530

18 Lois D. Thompson
19 Jennifer L. Roche
20 Proskauer Rose LLP
21 2049 Century Park East, Suite 3200
22 Los Angeles, California 90067

23 Nancy Ramirez
24 MALDEF
25 634 S. Spring Street, 11th Floor
26 Los Angeles, California 90014

19 X I hereby certify that on September 14, 2012, I electronically transmitted the attached
20 document to the following, who is not a CM/ECF registrant:

21 Dr. Willis Hawley
22 2138 Tawes Building
23 University of Maryland
24 College Park, MD 20742
25 wdh@umd.edu
26

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

ROY and JOSIE FISHER, et al.,)
Plaintiffs,)

UNITED STATES OF AMERICA,)
Plaintiff-Intervenor,)

vs.)

ANITA LOHR, et al.,)
Defendants,)

and)

SIDNEY L. SUTTON, et al.,)
Defendants-Intervenors.)

No. CIV 74-90 TUC DCB
(lead case)

**PROPOSED STIPULATION AND
MODIFICATION TO THE
SCHEDULING ORDER**

MARIA MENDOZA, et al.,)
Plaintiffs,)

UNITED STATES OF AMERICA,)
Plaintiff-Intervenor,)

vs.)

TUCSON UNIFIED SCHOOL)
DISTRICT NO. ONE, et al.,)
Defendants.)

No. CIV 74-204 (TUC) (DCB)
(consolidated case)

IT IS HEREBY STIPULATED AND ORDERED that the September 11, 2012

Scheduling Order is modified in relevant part as follows:

- 1 1. **IT IS ORDERED** that the Special Master shall provide the Fisher Plaintiffs, Mendoza
2 Plaintiffs, United States and TUSD (collectively, the “Parties”) with the final version of
3 the proposed Unitary Status Plan (USP) by **November 1, 2012**.
- 4 2. **IT IS FURTHER ORDERED** that all documents, drafts, communications and
5 negotiations contemplated herein related to the filing of the USP shall remain
6 privileged and confidential and shall not be shared outside the Parties. The
7 confidentiality provision referenced in the Court’s July 13, 2012 Order (Doc. 1377)
8 shall be extended to **November 9, 2012**.
- 9 3. **IT IS FURTHER ORDERED** that on **November 1, 2012**, the proposed USP and any
10 Party objections shall be delivered to the Court and to translators for translation into
11 Spanish.
- 12 4. **IT IS FURTHER ORDERED** that on **November 9, 2012**, the USP, in English and
13 Spanish, shall be filed with the Court and simultaneously released to the public and the
14 parties objections, if any, shall be filed with the Court.
- 15 5. **IT IS FURTHER ORDERED** that the State by *amici* shall file Objections by
16 **November 28, 2012**.
- 17 6. **IT IS FURTHER ORDERED** that the USP shall be made available for public review
18 and comment at each school and on-line, with public hearings to be between **November**
19 **26-28, 2012**. The public comment period shall close **November 28, 2012**, and the
20 Special Master shall make all public comments available for review by the Parties and
21 the State, upon request, with protections as to the identity of the commenter.
22
23
24
25

1 7. **IT IS FURTHER ORDERED** that by **December 10, 2012**, the USP shall be filed with
2 the Court, identifying any changes made pursuant to the public comment process.

3 8. **IT IS FURTHER ORDERED** that by **December 14, 2012**, the Parties and the State
4 shall file responses to objections, including any objections presented at the public
5 hearings and/or by written comments sent to the Special Master by the public during the
6 public comment period.

7
8 9. **IT IS FURTHER ORDERED** that by **December 19, 2012**, the Parties shall file any
9 responses to other Parties' objections, and that the matter shall be deemed fully briefed
10 and submitted.

11 10. **IT IS FURTHER ORDERED** that there shall be no replies.

12
13 DATED: _____

14
15 _____
16 David C. Bury
17 United States District Judge
18
19
20
21
22
23
24
25
26