IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ AND PATRICK HAMACHER,

for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, ET AL.,

Defendants,

and

EBONY PATTERSON, ET AL.,

Intervening Defendants.

Civil Action No. 97-75231
Hon. Patrick J. Duggan
Hon. Thomas A. Carlson

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND PARTIAL SUMMARY JUDGMENT WITH RESPECT TO CERTAIN NOMINAL AND INCIDENTAL DAMAGES CLAIMS; AND FOR CERTIFICATION OF A SUBCLASS TO DETERMINE COMPENSATORY DAMAGES CLAIMS

CLASS ACTION

Plaintiffs, by and through counsel, hereby respectfully move this Court for an order as follows:

1. Modifying this Court's class certification order, filed December 23, 1998, to permit determination on a class-wide basis under Federal Rule of Civil Procedure 23(b)(2) whether plaintiffs and the class members are entitled to nominal damages and the return of application fees they paid for admission to the defendants' College of Literature Science & the Arts ("LSA");

2. Granting plaintiffs and the class members partial summary judgment awarding each of them their nominal damages and a return of the application fees that they paid for admission to the LSA, plus interest;

3. Certifying, under any of Federal Rules of Civil Procedure 23(b)(2), 23(b)(1)(B), or 23(b)(3), a subclass or subclasses consisting of those class members whom defendants determined were qualified for admission to the LSA, but were informed that defendants could not make an offer of admission to them on first review.

In support of this motion, Plaintiffs submit the accompanying memorandum of law, affidavit and exhibits.

On December 7, 2004, the undersigned counsel had a conference with attorneys for defendants, explained the nature of the motion and its legal basis, and requested but did not obtain concurrence in the relief sought.

Dated: December 8, 2004

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND PARTIAL SUMMARY JUDGMENT WITH RESPECT TO CERTAIN NOMINAL AND INCIDENTAL DAMAGES CLAIMS; AND FOR CERTIFICATION OF A SUBCLASS TO DETERMINE COMPENSATORY DAMAGES CLAIMS

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2. Whether the Court should grant the motion for partial summary judgment of the plaintiffs and class members awarding them their nominal damages and a refund of the fees that they paid when applying for admission to the LSA.

3. Whether the Court should certify, under any of Federal Rule of Civil Procedure 23(b)(2), 23(b)(1)(B), or 23(b)(3), a subclass for determination of the additional compensatory damages to which some of the subclass members are entitled for violations of their constitutional and civil rights by defendants.

CONTROLLING OR PRINCIPAL AUTHORITIES

Cases

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Carey v. Piphus, 435 U.S. 247 (1978)

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Gratz v. Bollinger, 539 U.S. 244 (2003)

In re Cardizem CD Antitrust Litigation, 200 F.R.D. 326 (E.D. Mich. 2001)

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INTRODUCTION

Plaintiffs submit this memorandum of law in support of their motion (1) to modify the Court's prior order certifying a class pursuant to Rule 23(b)(2) to permit determinations of whether class members are entitled to nominal damages and the return of any application fee they paid, (2) to grant partial summary judgment on each class member's entitlement to nominal damages and a return of any application fee, and (3) to certify a subclass to permit specifically-defined class members to pursue claims for other damages. The relief sought is the logical and just culmination of plaintiffs' successful challenge, on behalf of thousands of class members, to the admissions systems of the defendants' College of Literature Science & the Arts ("LSA") for all years at issue (1995-2003). It also permits the most judicially practical and efficient means of resolving the damages phase of this case, which by the Court's class certification order, was bifurcated and reserved for determination after adjudication of liability.[1]

Having obtained a final judicial determination that defendants' admissions systems were unconstitutional and violative of federal civil rights statutes, plaintiffs and the class are entitled to a judgment awarding them at least their nominal damages of $1 each. While some members of the class will be entitled to more damages, they all have in common the immediate right to be awarded the nominal damages to which any plaintiff whose constitutional rights have been violated is entitled. There is no reasonable basis for requiring these thousands of class members to file individual lawsuits to recover their nominal damages; the class-action device is designed precisely for such situations where the individual entitlement to damages is too small to justify individual lawsuits.

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[1] A judicial determination on each of the foregoing issues is necessary because defendants have consistently taken the position that they will not negotiate resolution of class-wide damages issues unless and until a class is certified on damages, which they oppose. *See* Affidavit of Kirk O. Kolbo, dated June 8, 2004, at ¶ 3, accompanying plaintiffs' motion for interim reimbursement of fees and costs.

For similar reasons, the Court should order defendants to refund to the class members the application fees that they paid at the time of application for admission to the LSA. Each class member had a right to have their application considered in a nondiscriminatory manner, but the defendants instead rejected these applications under undisputedly unconstitutional and unlawful admissions policies, while pocketing the fees that they required from applicants. Ordering defendants to disgorge these sums is just and equitable, and doing so on a class-wide basis achieves two of the fundamental objectives of class certification. First, it again permits a means for recovery of damages so small in individual cases as to make separate suits impractical. Second, an order for a class-wide refund would serve the important and legitimate objective of deterring future unlawful admissions practices, an effect that could not reasonably be expected if refunds are made only in individually-filed suits.

Class-wide award of nominal damages and refund of application fees paid by class members can be readily made under Federal Rule of Civil Procedure Rule 23(b)(2) by simply modifying this Court's existing certification order to encompass determination of these damages, which clearly are only incidental to the primary liability claims previously certified by the Court. Because the certification is appropriate under 23(b)(2), no notice to the class is necessary before the Court determines the class members' entitlement to the nominal and incidental damages that are the subject of this aspect of the certification.

For other compensatory damages to which plaintiffs and the class members may be entitled, plaintiffs have proposed several alternative class-wide mechanisms as the most just and efficient means of concluding the damages phase of the case. All of the alternatives have in common the certification of a subclass of those applicants most likely to be entitled to additional compensatory damages: those individuals, like Jennifer Gratz and Patrick Hamacher, who were

rejected for admission after first receiving a letter from defendants informing them that they were qualified for admission, but that defendants could not make an offer of admission on first review. The damages that some of these class members may be entitled to recover include higher expenses incurred due to attendance at another university.

As explained more fully below, certification of the subclass for compensatory damages would be appropriate under any of Rules 23(b)(2), 23(b)(1)(B), and 23(b)(3). While only Rule 23(b)(3) requires notice to the class members, plaintiffs propose that the class members be given notice and an opportunity of opting out of the class following certification under any of these provisions of Rule 23. Such a certification would permit the Court to resolve in one proceeding issues common to the class, including where the burden lies in establishing whether an applicant would have been admitted but for the unlawful admissions policies. It is already clear from defendants' positions as set forth in previously filed briefs that the parties have significant disagreements. It makes no sense to litigate disputed common issues time and time again in individually-filed suits, which, apart from the judicial inefficiency this would entail, could lead to inconsistent outcomes. For all these reasons of efficiency, fairness, and consistency, it is far better to decide these common issues in one proceeding rather than many.

PROCEDURAL HISTORY AND BACKGROUND

In October 1998, plaintiffs moved to certify this lawsuit as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The proposed class was defined as all individuals who:

1. applied for and were not granted admission to the College of Literature, Science & Arts ("LSA") or who in the future intend to apply for admission into the LSA for all academic years from 1995 forward; and

2. are members of those racial or ethnic groups, including Caucasian, that Defendants treat less favorably in considering their applications for admission.

At the same time, plaintiffs moved for an order bifurcating the trials of the liability and the damages issues.

On December 23, 1998, this Court issued an order granting plaintiffs' motion. The accompanying opinion explained that the Court was actually granting the motion for class certification in part and denying it in part. Opinion ("Op.") 2. Specifically, the Court found that plaintiffs met all the requirements of Rule 23(a), and granted plaintiffs' motion to certify a class pursuant to Rule 23(b)(2). In concluding that the request of plaintiff Hamacher (the proposed representative for a Rule 23(b)(2) class) for compensatory and punitive damages did not undermine the propriety of Rule 23(b)(2) certification, this Court held that "the individual determinations with respect to damages will ultimately be made in a separate proceeding from this Court's decision on the issue of whether injunctive and declaratory relief is appropriate on the issue of defendants' liability. At the appropriate time, the Court may, if necessary, certify subclasses pursuant to Rule 23." Op. 13.

The Court certified the following class:

> Those individuals who applied for and were not granted admissions to the College of Literature, Science & Arts for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that Defendants treat less favorably in considering their applications for admission.

December 23, 1998, Order, p. 2.

Because it certified a class pursuant to Rule 23(b)(2), the Court did not address plaintiffs' motion to certify a class pursuant to Rule 23(b)(3). Op. 14.

In February 2000, Defendants moved for relief from the December 1998 order regarding class certification and bifurcation in light of subsequent authority. This Court denied that motion

in an opinion and order dated May 1, 2000. The Court noted that it "ha[d] not as of yet certified a class" for the damages phase of the lawsuit. May 1, 2000, Opinion and Order 5; *id.* at 7 ("the Court specifically declined to rule regarding class certification for the damages phase of this action," citing the December 23, 1998 opinion).

After both sides moved for summary judgment, this Court granted plaintiffs' motion for summary judgment in part and granted defendants' motion in part. *See* Order Dated January 30, 2001. Specifically, this Court held that the systems of admissions to the University of Michigan's LSA School from 1995-98 violated the Constitution, but that defendants were entitled to summary judgment with respect to the systems in place during 1999 and 2000. On appeal, the Supreme Court granted plaintiffs' petition before judgment (*i.e.*, before the Sixth Circuit issued an opinion on direct appeal), reversed this Court's holding to the extent it granted defendants' summary judgment on liability, and remanded the case for further proceedings. *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003). As a result of this Court's January 30, 2001, order, and the decision of the Supreme Court in this case, it is now judicially established that defendant's LSA admissions policies for 1995-2003 violated the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1981, and 42 U.S.C. § 2000d (Title VI).

In this motion, plaintiffs seek to have certain issues related to damages determined as part of the class, and, in addition, to certify a subclass, pursuant to Rule 23, for other compensatory damages.[2] The subclass would include those members of the class who received a letter in the fall stating that the decision on their application would be deferred until the spring. Both Gratz and Hamacher are members of this subclass. In these letters, defendants informed applicants that

[2] The University has no Eleventh Amendment immunity from suits for damages for violations of Title VI. *See* 42 U.S.C. § 2000d-7(a)(1).

they were qualified for admission, albeit not as qualified as those who were admitted on first review. *See* Joint Proposed Summary of Undisputed Facts Regarding Admissions Process, Filed December 13, 2000 1-2 [hereinafter "Joint Summary of Undisputed Facts"]. Although the exact number of students who received these form letters from 1995 to 2003 is not known, it is undisputed that the number of qualified students whom the defendants are not able to offer admission is very large. *See id*. at 1 ("'[a]dmission to the University is selective, meaning that many more students apply each year than can be admitted,' and the University rejects many qualified applicants.")

The purpose of the subclass is to permit those members of it, who are most likely to have suffered damages, to pursue claims for damages in an efficient way.[3] Plainly, this possibility was left open by this Court's previous orders concerning certification.

ARGUMENT

I. THE ISSUES OF NOMINAL DAMAGES AND A REFUND OF THE APPLICATION FEES SHOULD BE CERTIFIED FOR CLASS TREATMENT, AND THIS COURT SHOULD ORDER THAT RELIEF FOR CLASS MEMBERS.

This Court already has determined that the requirements of Rule 23(a) and Rule 23(b)(2) have been met in this case. The first part of plaintiffs' motion seeks to have additional issues determined on a class-wide basis, *viz*., class members' entitlement to nominal damages and to refunds of their application fees. Because the issues in dispute on these claims are legal ones, it is also appropriate for the Court to grant partial summary judgment awarding the plaintiffs and the class members their nominal damages and a refund, plus interest, of the fees that they paid at the time of application to the LSA. In addition to the efficiency achieved by certifying class

[3] Of course, members of the class who would not be members of the subclass may still pursue those damage claims as well, either by intervening in this action or commencing a new action after the current class has been decertified. The purpose of the subclass is simply to identify those whose likelihood of being harmed by the past admission systems is greatest.

treatment for these common claims, awarding these nominal and incidental damages on a class-wide basis serves the important objective of deterring future wrongful conduct in a way that cannot be accomplished through small awards in individual cases.

Treatment of these issues on a class-wide basis does not affect any of the Court's prior analysis under Rule 23. That is, numerosity, commonality, typicality, and adequacy of representation, the four requirements under Rule 23(a), are all met for precisely the same reasons that this Court already found. Nor would treatment of nominal damages or a refund of an application fee (which plaintiffs understand to be $40 for all the years in question[4]) affect this Court's previous finding that damage claims do not predominate for purposes of Rule 23(b)(2). Op. 13 ("While it is true, that in addition to the declaratory and injunctive relief sought by plaintiffs, Hamacher and his proposed class intend to seek compensatory and punitive damages, certification under Rule 23(b)(2) is appropriate. 'So long as the predominant purpose of the suit is for injunctive relief, the fact that a claim for damages is also included does not vitiate the applicability of 23(b)(2).'" (citation omitted)). Plaintiffs' claim for an award of nominal damages and refund of a $40 application fee cannot be characterized as anything other than incidental to the liability claims that have been the predominate purpose of the lawsuit and which were the basis of the Court's proper certification under Rule 23(b)(2). Accordingly, the Court

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[4] The application of Patrick Hamacher, the named class representative, confirms that he paid the $40 application fee. *See* Hamacher application at p. 1, attached as Exhibit A to the accompanying Affidavit of Kirk O. Kolbo) ("Kolbo affidavit"). The requirement of the application fee, which is $55 for applicants in the United States on temporary visas, is shown from the University's brochures and application materials. *See, e.g.*, Undergraduate Admissions Application, included in "Admissions the American Way" authored by Marilyn McKinney, Associate Director of Undergraduate Admissions (Exhibit B to Kolbo affidavit); Undergraduate Admissions Bulletin 1995 term, "Application Checklist" (Exhibit C to Kolbo affidavit); Undergraduate Admissions Bulletin at i-2, May 17, 1996 (Exhibit D to Kolbo affidavit); Undergraduate Admissions Bulletin, 1996-1997, at 151 (Exhibit E to Kolbo affidavit); Undergraduate Admissions Bulletin at i-2, August 6, 1997 (Exhibit F to Kolbo affidavit); Undergraduate Admissions Bulletin, 1997-1998 at 163 (Exhibit G to Kolbo affidavit). Because applicants can obtain a waiver of the fee, plaintiffs' motion is limited to requiring the University to refund application fees actually paid to it by class members.

need only to modify the existing 23(b)(2) certification order to encompass the issues of entitlement to nominal damages and refund of the application fees.

Moreover, the question of class members' entitlement to nominal damages and a return of their application fees are legal issues largely unaffected by individual circumstances and can be decided on summary judgment under Federal Rule of Civil Procedure 56. The question in every class member's claim for such relief is whether Title VI authorizes such relief regardless of whether defendants can show that a specific class member would not have been admitted even without defendants' illegal consideration of race.

A. Nominal Damages

The illegality of the admissions systems for all years at issue is sufficient to entitle each class member to nominal damages. *See, e.g. Jordan v. Dellway Villa of Tennessee, Ltd*., 661 F.2d 588, 594 (6th Cir. 1981) (holding that victims of racial discrimination in housing "are entitled to nominal recovery even if the [defendants] demonstrate, during the remedial phase of this litigation, that the claimants suffered no actual damages"). Although defendants have argued on prior occasions that the Supreme Court's opinion in *Texas v. Lesage*, 528 U.S. 18 (1999), would preclude any damages at all under Section 1983 if defendants could prove that a specific candidate would not have been admitted even without the illegal use of race, that argument has no merit when addressed to the present motion. *Lesage* only concerned Section 1983; it specifically declined to address liability or damages under Title VI or Section 1981. *See Lesage*, 528 U.S. at 22.[5] Here, damages are being sought under Title VI, and *Lesage* does not

[5] *Lesage* did not address (and the plaintiff in that case apparently did not raise) the issue of a defendants' liability under *Carey v. Piphus*, 435 U.S. 247, 266 (1978), for at least nominal damages where a constitutional violation has been proven. *Id*. (where several students received 20-day suspensions from school without due process, students would be entitled to nominal damages even if school could show that they would have suspended students under constitutional procedures). Even with respect to damages under Section 1983, the *per curiam* decision in *Lesage* has not convinced lower courts that nominal damages are unavailable if a defendant shows that it would have made the

preclude nominal or other damages from being awarded under Title VI even if the defendants can show that the "same decision" would have resulted. Indeed, the one court to explicitly address the issue has concluded that *Lesage* is irrelevant for purposes of determining Title VI liability. *Tracy v. Bd. of Regents Of The University System of Georgia*, No. CV 497-45, 2000 WL 1123268, at *11-12 (S.D. Ga. June 16, 2000) (although student who challenged admissions system at the University of Georgia could not recover under Section 1983, because he would not have been admitted under a race-neutral system, he was entitled to nominal damages under Title VI) (attached as Exhibit I to the Kolbo affidavit), *aff'd in part, rev'd in part on other grounds sub. nom., Wooden v. Bd. of Regents of the University Sys. of Georgia*, 247 F.3d 1262 (11th Cir. 2001). Other courts have reached this result at least implicitly. *See Tolbert v. Queens College*, 242 F.3d 58, 74 (2d Cir. 2001) (holding in Section 1981 and Title VI suit that even if defendants' race discrimination against plaintiff was not the proximate cause of his having failed his comprehensive examinations, plaintiff would still be "entitled as a matter of law to an award of nominal damages"); *Hopwood v. Texas*, 236 F.3d 256, 277-78 & n.80 (5th Cir. 2000), *aff'g* 999 F. Supp. 872, 923 (W.D. Tex. 1998) (nominal damages awarded under Title VI even where university showed that law school applicants would not have been admitted under a race-neutral system). It deserves mention that defendants' brief in opposition to plaintiffs' motion for an interim award of attorneys' fees relies heavily on *Hopwood*.

"same decision" in the absence of illegal considerations. Lower courts have noted the tension between *Carey* and *Lesage*, and several have concluded that *Carey* should continue to be followed until the Supreme Court explicitly addresses that tension. *Saunders v. White*, 191 F. Supp. 2d 95, 112 n.21 (D.D.C. 2002); *Comfort v. Lynn School Committee*, 150 F. Supp. 2d 285, 300-01 (D. Mass 2001). *See also Hershell Gill Consulting Engineers v. Miami-Dade County*, 333 F. Supp. 2d 1305, 1342 (S.D. Fla. 2004) (nominal damages of $100 awarded to engineering firm subjected to race-conscious affirmative action contracting program even though firm could not show any damages as a consequence of the program) (attached as Exhibit H to Kolbo affidavit).

It is not at all surprising to have somewhat different remedies available for 42 U.S.C. § 1983 and 42 U.S.C. § 2000d (Title VI). Section 1983 was designed to provide a tort remedy for the victims of constitutional wrongs, and the Supreme Court has stated that remedies normally available in common-law tort actions should be available under Section 1983. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986). In contrast, the Court has said that contract remedies are the most analogous for Title VI because Spending Clause legislation is much in the nature of a contract. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Nominal damages are also more readily available in contract than in tort. *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 95 (1993) ("Nominal damages are always available in breach of contract actions (5 Corbin, Contracts 1001, at 29), but they are allowed in tort only when needed to protect an 'important technical right.'").

B. Refund of Application Fees

So, too, is it appropriate for the Court to rule as a matter law that plaintiffs and the class members are entitled to a refund of the application fees that they paid, plus interest. The amount of the refund is small in each individual case, which is precisely a reason that justifies class treatment for this common claim. In addition to providing a means for litigating in the aggregate claims so small on an individual basis that they could not feasibly be brought in separate suits, a class-wide adjudication would serve the purpose of deterring future wrongful conduct. *See, e.g., In the Matter of American Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988) ("Outside of bankruptcy, class actions aggregate claims and permit both compensation and deterrence that are otherwise impossible."); *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 326, 350 (E.D. Mich. 2001) ("'aggregate proof of the defendant's monetary liability promotes the deterrence objectives of the substantive laws underlying the class actions and promotes the economy and judicial access for small claims objectives of Rule 23'") (quoting 2 Alba Conte and Herbert

Newberg, *Newberg on Class Actions*, § 10:05, at 487 (4th ed. 2004) [hereinafter *Newberg on Class Actions*]); *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975); *Rivera v. Fair Chevrolet Geo Partnership*, 165 F.R.D. 361, 366 (D. Conn. 1996).

This Court plainly has the power to order a refund of the application fees to class members. Courts have broad authority to order appropriate equitable relief to individuals whose rights under Title VI have been violated. *See, e.g., Afro American Patrolmens League v. Duck*, 503 F.2d 294 (6th Cir. 1974) (following finding of Title VI and other civil rights violations, district court did not abuse discretion in requiring city to pay for expert chosen by plaintiff to devise new employment promotion examination and in enjoining all promotions pending new policies); *Gautreaux v. Romney*, 448 F.2d 731, 734 (7th Cir. 1971) (determination of just what type of equitable remedy might be appropriate where Title VI violation shown in housing case was question best left initially to sound discretion of district court). It is common in civil rights cases for courts to exercise their equitable powers to order retrospective or "make whole" relief, such as back pay or reinstatement in the case of employees who have been denied a job or promotion as a result of unlawful discriminatory practices. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (Title VII); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993) (Title VII); *Long v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 9 F.3d 340, 343 (4th Cir. 1993) (Title VII); *Moore v. Sun Oil Co.*, 636 F.2d 154, 157 (6th Cir. 1980) (Section 1981).

Having the power to order the refund to the class members, the Court should do so in order to provide one form of "make whole" relief to the class members that would also serve to deter future violations of the civil rights laws at issue. The refund is a straightforward contract-type remedy in which a party receives back money paid for a contract breached or unperformed

by the other contracting party. Indeed the contract analogy is particularly apt because in applying to the LSA, plaintiffs and the class members were seeking to enter into a contractual relationship. *See Runyon v. McCrary*, 427 U.S. 160, 172 (1976). Moreover, the Supreme Court has stated that contract remedies are the most analogous for Title VI. *See Barnes v. Gorman*, 536 U.S. 181, 186 (2002). By accepting money that the class members submitted with their applications, the University was undertaking that it would evaluate and act upon the applications in a lawful and nondiscriminatory manner. Its admissions brochures and application forms make this promise explicit. *See*, *e.g.*, Hamacher Application at p. 1, Exhibit A to Kolbo affidavit. When the University instead considered and rejected these applications under its unlawful and unconstitutional admissions polices, it breached its obligations to the class members. Under these circumstances, it is inequitable for the University to retain the money that it obtained from the class members. Just as it matters little whether an order for backpay in a Title VII or Section 1981 case is an equitable or legal remedy, the record in this case supports an order requiring the University to refund all application fees paid by the class members for all years at issue, 1995-2003, whether ordered as equitable relief or monetary damages. *See*, *e.g.*, *Johnson v. Kakvand*, 192 F.3d 656, 660 (7th Cir. 1999) (refers to district court's finding that compensatory damages for discriminatory denial of a mortgage refinancing included the $300 application fee); *Idrees v. American University of the Caribbean*, 546 F. Supp. 1342, 1350 (S.D.N.Y. 1982) (medical school student fraudulently induced to attend offshore medical school; damages include his $50 application fee); *El Dorado Springs v. United States*, 28 Fed. Cl. 132, 135 (Fed. Ct. Claims 1993) (federal court of claims had jurisdiction over claim by applicant for federal financing assistance from Housing and Urban Development that it was entitled to a return of its application fees because HUD failed to follow its own regulations in evaluation of the application; court

characterizes the claim as a "demand for return of money paid to the government") (attached as Exhibit J to Kolbo affidavit).

The equitable basis for refunding the class members' application fees is not contingent on a determination whether the University would have offered admission to particular class members under a lawful admission system. The fee was not paid in exchange for an offer of admission, so whether admission should have been offered is not material to whether the fees should be refunded. Instead, the class members paid the fee so that the University would consider the application, and they each had a right to have the application considered in a lawful manner. Because there is no longer any dispute that the University violated the civil rights of these thousands of class members through the illegal admissions operated from 1995 to 2003, it is just and equitable that this Court order the University to refund these application fees.

Thus, this Court should treat the questions of nominal damages and the right to a return of the application fees as class issues that are particularly well suited for class-wide determination because of the common issues presented and the small size of the individual claims. Because the defendants can no longer genuinely dispute that they violated the constitutional and civil rights of the class members, it is appropriate for the Court to grant partial summary judgment awarding the class members nominal damages and a refund of the application fees that they paid, plus interest.

II. THIS COURT SHOULD CERTIFY A COMPENSATORY DAMAGES SUBCLASS.

In addition to entitlement to at least nominal damages and a refund of their application fees, some subclass members may be entitled to more substantial compensatory damages. *See, e.g., Johnson v. Board of Regents of the University System of Georgia*, 106 F. Supp. 2d 1362, 1379-80 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001) (awarding plaintiff-students

unlawfully denied admission to university the extra costs students incurred as a result of having to attend another university). To be certified, a subclass must meet the requirements of Rule 23(a), and one of the three requirements of Rule 23(b). Here, the proposed subclass meets all of the requirements of Rule 23(a), as well as Rule 23(b)(2), 23(b)(3), and 23(b)(1)(B).

As with any motion for class certification, this Court must assume that the allegations of the Complaint are true for purposes of this motion. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Thus, for purposes of this motion, this Court must assume that plaintiffs' applications were rejected, and they were forced to attend other institutions, "[a]s a result of defendants' racially discriminatory procedures and policies" and "[a]s a result of defendants' discrimination." Complaint ¶¶ 25-26.

At the outset, it deserves emphasis that certifying a subclass would give this Court the flexibility of using all available damage remedies, including a class-wide remedy. For example, many courts have resolved class actions where it is difficult to determine what would have happened in the absence of illegal discrimination by awarding individual members of the class a *pro rata* share of the total damages incurred by all plaintiffs. (Thus, if there were 10,000 members of the class and $500,000 in total damages for all plaintiffs, each class member would receive $50.) *See, e.g., Bailey v. Great Lakes Canning*, 908 F.2d 38, 42 (6th Cir. 1990) (approving settlement where class of 157 received approximately $3,000 each even though only 20 individuals in the class were estimated to have lost a position, and to have lost about $18,000 each; "[i]t would have been virtually impossible for the court to determine which individuals would have been hired but for the discrimination. Therefore, we find that *pro rata* distribution of the award among the class was the fairer method. It is the best that could be done under the circumstances, even though it obviously may have generated a windfall for persons who would

never have been hired and undercompensated the genuine victims of discrimination"); *Hameed v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506, 520-21 (8th Cir. 1980) (ordering the district court to calculate the damages to the class as a whole resulting from discriminatory criteria used for admission into an apprentice program—essentially the backpay that would have been obtained by the number of black applicants who would have been hired in the absence of the discriminatory criteria—and then to divide the total damages to the class by all members of the class who were rejected or did not apply because of the discriminatory criteria); *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976) (where attempting to determine who would have been promoted would lead to a "'quagmire of hypothetical judgments,' . . . in which any supposed accuracy in result would be purely imaginary," court orders a class-wide procedure in awarding backpay); *id.* at 453 ("Given a choice between no compensation for black employees who have been illegally denied promotions and an approximate measure of damages, we choose the latter"); *id.* at 454 n.7 (describing calculations); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 263 n.154 (5th Cir. 1974) (describing *pro rata* method of calculation); *Senter v. General Motors Corporation*, 383 F. Supp. 222, 229 (S.D. Ohio 1974) (fund of money created for subclasses of black employees who had been discriminated against by employer based on number of positions which black employees would have received absent discrimination, with subclass to divide the fund equally), *aff'd*, 532 F.2d 511 (6th Cir. 1976).

In this case, one means of employing the *pro rata* method to compensatory damages would be for the Court to determine what number of subclass members would have been admitted, but for defendants' unlawful conduct. This number is presumably smaller than the total number of subclass members. Rather than engaging in speculation and hypothesis and

protracted litigation about which particular subclass members would have been admitted, and which ones would have been rejected anyway, the Court could limit and define the damages recovery for all subclass members to be the percentage of a class members' damages represented by the percentage of subclass members who would have been admitted absent defendants' discriminatory conduct.[6]

Even if this Court eschews the *pro rata* method, it is clear that each subclass member's entitlement to damages will depend not only on his or her own application, but on all of the other applications in the years in question, especially those of the other subclass members (*i.e.*, rejected white and Asian-American candidates whom the defendants had previously determined were "qualified" for admission) for that year. That is, for any given subclass member, one must evaluate the other rejected applications to some degree to determine what applicants are entitled to damages. It would make far more sense to engage in this exercise once rather than separately for every subclass member's separate lawsuit.

Finally, courts have noted that the class-wide remedy has the advantage of ensuring that there is no underdeterrence, *i.e.*, that those who have engaged in illegal discrimination pay for the costs of that discrimination even if the individuals who were subjected to the discrimination primarily lost an improved chance at receiving the benefit in question. *Doll v. Brown*, 75 F.3d 1200, 1205-06 (7th Cir. 1996) (noting analogous tort situations where plaintiffs' damages are discounted by the probability that the harm would have occurred even in the absence of negligence; this method "recognizes the inescapably probabilistic character of many injuries. It

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[6] Thus, under this *pro rata* method, the class-wide determination results in designating for class members a percentage rather than a particular dollar figure. Proofs of damage could be kept relatively uncomplicated and heard by a special master or magistrate judge. *See, e.g.*, *Senter v. General Motors Corporation*, 383 F. Supp. 222, 228-230 (S.D. Ohio 1974), *aff'd*, 532 F.2d 511 (6th Cir. 1976).

is essential in order to avoid undercompensation and thus (in the absence of punitive damages) underdeterrence"); *id.* at 1206 (the method "strikes us as peculiarly appropriate in employment cases involving competitive promotion. In such a case the plaintiff's chances are inherently uncertain because of the competitive setting"; in a situation where four discriminatees each had a 25% chance of a job in the absence of discrimination, "without the lost-chance concept, . . . the employer would get off scot-free"). Here, of course, the decision of this Court and the Supreme Court have definitively established that defendants violated the rights of the plaintiff class over a period of nine years (from 1995-2003) by adopting a system that violated the very decision (Justice Powell's opinion in *Bakke*) that defendants claimed as a model. Having a class would ensure that the Court can devise a remedy that neither punishes nor underdeters, but is equitable in light of the constitutional violations at issue.

A. Plaintiffs' Proposed Subclass Meets The Requirements of Rule 23(a).

Plaintiffs already have demonstrated (and this Court has agreed) that the class as a whole meets the requirements of Rule 23(a). *See* December 23, 1998, Opinion 3-7. The same would hold true for the subclass, which is, after all, just a subset of the individuals comprising the class. Indeed, the analysis for the subclass is precisely the same for the third and fourth factors (typicality and adequacy of representation), and plaintiffs incorporate its prior analysis and the Court's opinion here. In each instance, the question of whether the defendants' system of admissions violated the law is the central focus of any class member's claim for damages. The current plaintiffs, Gratz and Hamacher, have pursued that question diligently over the course of the last seven years—and successfully.

Moreover, as to commonality, the case is even stronger than it was previously because there are at least two other important legal issues and a significant fact issue common to each subclass member's claim for damages: First, will a given class member have the burden of

showing that (s)he would have been admitted in the absence of defendants' illegal use of race, or will defendants bear the burden of showing that that class member would not have been admitted? Second, will defendants be entitled to use a hypothetical system that still used race, but in a way consistent with the Supreme Court's opinion, to determine whether a given class member would or would not have been admitted? Defendants seem to believe that the class members will have the burden, and that each class member must show that (s)he would have been admitted under a hypothetical universe in which race could be used. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for an Interim Award of Attorneys' Fees and Costs 4-5.

Plaintiffs disagree on both counts. First, the burden is on the party that has engaged in illegal conduct. *Hopwood v. Texas*, 78 F.3d 932, 957 (5th Cir. 1996). *Cf. Fields v. Clark University*, 817 F.2d 931, 936 (1st Cir. 1987) ("'it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor'" (quoting then-Judge Scalia in *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983)); *Johnson v. Board of Regents of University System of Georgia*, 106 F. Supp. 2d 1362, 1376 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001). For all their reliance on *Lesage*, defendants should know from that case that the burden is upon *them* to prove that they would have made the same decision to deny admission to a class member even under a lawful admissions program. Second, while it is true that the Supreme Court did not preclude the use of race entirely in declaring defendants' admissions systems unconstitutional, determining what would have happened with some other, narrowly-tailored, constitutional use of race, would be the "fictitious recasting of past conduct" rejected by Justice Powell in *Bakke*. *See Regents of the*

University of California v. Bakke, 438 U.S. 265, 321 n.54 (1978) (Powell, J.). *Id.* at 320 n.54 ("There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate . . ."). The Sixth Circuit has explicitly rejected the kind of hypothetical approach suggested by defendants. *See Jordan v. Dellway Villa of Tennessee, Ltd*., 661 F.2d at 595 ("[C]ourts are not to erect hypothetical constructs of what might have happened in each individual class members' case had the defendant not discriminated against the entire class.").

In any event, regardless of whose position prevails, these legal issues are common to all subclass members' claims and bolster the finding of commonality previously made. Moreover, the subclass members' claims for compensatory damages all have in common a factual issue concerning how many of these subclass members would have been admitted except for the unlawful discrimination practiced by defendants. This is a fact question, informed by the answer to the legal questions discussed above, that would be present in every individually-filed suit if the case is not certified for class-wide treatment of damages.[7] There is no reason why that fact-intensive question common to all the class members should be litigated and decided again and again in individually-filed lawsuits. This does not mean that the Court would necessarily have to decide on a class-wide basis which particular subclass members would have been admitted. Instead, the judicial determination could be limited to the far simpler question of what number of subclass members would have been admitted.

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[7] Because plaintiffs' proposed subclass is limited to those class members whom the defendants have already determined were "qualified" for admission, the claims of these class members (whether the case is certified or not) could never be defeated by an attempted demonstration by defendants that these applicants would have been rejected on the basis of a facial review of their application alone. Instead, for each subclass member, it will be relevant and necessary to compare applications and determine how many applicants would have been admitted in the year that the subclass member applied.

Finally, as to the first requirement, numerosity, the proposed subclass would have thousands of members. As already noted, it is already a stipulated fact that the subclass of qualified students whom the defendants rejected for admission is very large. *See* discussion *supra* at 7-8. Moreover, according to defendants' own expert, eliminating race as a factor in admissions would have reduced the number of African Americans, Mexican Americans, and Native Americans offered admission by 872 in 1995 alone and by 1066 in 1996 alone. *See* Supplemental Report of Stephen Raudenbush, dated March 3, 1999, at p. 9, accompanying the Defendants' Renewed Motion for Summary Judgment, filed July 17, 2000. In any event, the proposed subclass has more than enough members to meet the numerosity requirement.

B. The Proposed Subclass Meets The Requirements of Rule 23(b)

As shown below, the proposed subclass meets the requirements of Rule 23(b)(2), 23(b)(1)(B), and 23(b)(3).

1. Rule 23(b)(2). -- Again, this Court already has ruled that the class as a whole meets the requirements of Rule 23(b)(2). Thus, by definition, the subclass must also meet the requirement of Rule 23(b)(2).

Rule 23(b)(2) permits class treatment where the party opposing the class has acted in a way generally applicable to the class, making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. As this Court is aware, plaintiff Hamacher and the class he represents still seek injunctive and/or declaratory relief for defendants' long-standing and continuous violations of the Constitution and federal law.

Moreover, under Rule 23(b)(2), a court may certify for class treatment claims that include requests for damages provided that the requests for damages do not predominate over the claims for other kinds of relief. Since this Court already has ruled that the claims of the class are properly certifiable under Rule 23(b)(2), it has necessarily held that the claims for damages do

not predominate. Op. 13 ("While it is true, that in addition to the declaratory and injunctive relief sought by plaintiffs, Hamacher and his proposed class intend to seek compensatory and punitive damages, certification under Rule 23(b)(2) is appropriate. 'So long as the predominant purpose of the suit is for injunctive relief, the fact that a claim for damages is also included does not vitiate the applicability of 23(b)(2).'" (citation omitted)). If this is true for the class, it is also true for the subclass. Accordingly, class treatment pursuant to Rule 23(b)(2) is appropriate for the subclass as well since (like the class), members of the subclass primarily seek non-monetary relief.[8] *See also Jordan v. Dellway Villa of Tennessee, Ltd.*, 661 F.2d at 591-92 (Rule 23(b)(2) certification); *id*. at 594-595 (instructing on class-wide determination of damages).

2. Rule 23(b)(1)(B). Rule 23(b)(1)(B) provides that a class action may be maintained if the prosecution of separate actions by individual class members would create a risk of adjudications with respect to individual members that would as a practical matter be dispositive of the interests of the other members of the class.

While this Court previously rejected a Rule 23(b)(1)(B) certification for the class as a whole because "[t]he claims presented in the present lawsuit do not hinge upon recovery from a limited fund," that decision was made when the principal issue was how to determine liability, which the Court determined could be done on a class-wide basis under Rule 23(b)(2). *See* December 23, 1998, Op. 14. Because the focus of the case is now damages, and the Court's prior ruling can always be modified (*see* Rule 23(c)(1)(C)), plaintiffs believe it is appropriate for the Court to re-evaluate whether a subclass may and should be certified under 23(b)(1)(B).

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[8] Of course, members of the subclass should have the right to opt out of the subclass and seek damages separately. Accordingly, plaintiffs believe that the procedures of Rule 23(c)(2)(B) should still be applied to members of the subclass. *Fisher v. Va. Elec. & Power*, 217 F.R.D. 201, 226 (E.D. Va. 2003) (certifying under Rule 23(b)(2), but providing notice as required by Rule 23(c)(2)(B), stating that "allow[ing] [class members] to opt out on the damages issues . . . best serves the ends of justice in this action.").

While it is true that the "limited fund" case may have been one of the models for Rule 23(b)(1)(B), just as organized crime activity was the model for RICO, the language of Rule 23(b)(1)(B) extends beyond the "limited fund" model. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 245-46 (1989) (although Congress's major target in passing RICO was organized crime, the language it used was broader and the language cannot be limited by Congress's primary purpose). The Advisory Committee Notes to the 1966 Amendment to Rule 23 demonstrate that the authors of the rule considered the "limited fund" situation to be just one of many different kinds of situations in which Rule 23(b)(1)(B) would apply. *See* Federal Civil Judicial Procedures and Rules 127-28 (Thomson West 2004); *Id.* at 128 ("Similar problems . . . can arise in the absence of a fund either present or potential").

Here, although there is no "limited fund," there is a "limited benefit" that not every member of the subclass would necessarily have obtained: an offer of admission under a lawful system. Indeed, the number of slots that would have been made available under such a system no doubt will be controverted by defendants, and it seems inevitable that the number of individuals in the subclass will be larger than the number of slots opened. Accordingly, the conclusion that named plaintiffs, or other class members, would have received slots necessarily makes it less likely that the rest of the class would have received one. (Indeed, to deal with the inherent uncertainty about who would have received the open slots, courts have relied upon the *pro rata* share described previously. *See* discussion *supra* at 16-18). Thus, individual treatment of damage claims would create at least some risk that adjudications with respect to individual members of the class would practically dispose of the claims of other members of the class, and Rule 23(b)(1)(B) certification of the subclass is therefore proper.

3. Rule 23(b)(3). Under Rule 23(b)(3), a class should be certified if it meets the requirements that (1) common issues predominate over individual issues, and (2) class treatment is superior to other methods of adjudication.

a. Predominance. -- Predominance requires a common nucleus of operative facts. *Bradberry v. John Hancock Mut. Life Ins. Co.*, 217 F.R.D. 408, 414 (W.D. Tenn. 2003). "'The predominance requirement is satisfied unless it is clear that individual issues will overwhelm the common questions and render the class action valueless.'" *Id.* (quoting *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 297, 307 (E.D. Mich. 2001)).

Predominance is met here because the issue of whether defendants' systems of admissions for the LSA were legal was and is the most important, and most difficult, question in determining liability. *See Bradberry v. John Hancock*, 217 F.R.D. at 414 (predominance met in case alleging that insurance company sold worthless policy rider to purchasers of long-term care insurance; "[k]ey questions involved in the instant action include: whether the marketing of the Rider is misleading, whether the Rider has any real value . . . , whether purchasers of the Rider have suffered economic damages merely by buying it, and whether or not the marketing of the Policy and Rider violate [state law]"); *Violette v. P.A. Days, Inc.*, 214 F.R.D. 207, 215 (S.D. Ohio 2003) (in claim that seller of used automobiles engaged in unfair practices, predominance was met because "[seller's] liability will be analyzed in terms of its standard policies and procedures, which affected each class member").

The possibility of individual issues determining damage claims is insufficient to warrant denial of a certification and Rule 23(b)(3). *See, e.g., Sterling v. Velsicol Chemical*, 855 F.2d at 1197 ("No matter how individualized the issues of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action"); *Mick v.*

Level Propane Gases, Inc., 203 F.R.D. 324, 331 (S.D. Ohio 2001) (in claim alleging that seller of propane gas used deceptive and fraudulent practices, court certifies class under Rule 23(b)(3) because "the class action device is the superior method for adjudicating Plaintiffs' claims that [seller] engaged in allegedly deceptive practices"; "Actions premised upon a single disaster or course of conduct are appropriately certified under Rule 23(b)(3) despite the fact that individual damage claims differ").

Moreover, the issues set forth above concerning the standards and burdens under which each class member may be entitled to compensatory damages (*see* discussion *supra* at 20-21), and the factual question of the number of subclass members who are entitled to damages are also significant issues for each class member's separate claim. Because these issues are thoroughly common to the class members, they meet the predominance test required for a Rule 23(b)(3) certification. *See* Fed. R. Civ. P. 23(c)(4)(A) ("an action may be brought or maintained as a class action with respect to particular issues"). Indeed, whenever a court certifies particular common issues for class-wide treatment, the predominance test is necessarily meant. *See* 2 *Newberg on Class Actions* 4:23, at 154 ("Because a limitation of a class action to designated common issues lies in the court's discretion under Rule 23(c)(4) in every class action, and because this court power has the capability of automatically satisfying the predominance test under Rule 23(b)(3), it follows that the predominance test of Rule 23(b)(3) must be read with a recognition of the power of the court to uphold a class with respect to particular issues under Rule 23(c)(4).")

b. Superiority. -- The superiority factor determines whether a class action is superior to many individual actions. Here, the analysis should be undertaken from the time that plaintiffs first moved for class certification under Rule 23(b)(3), *i.e.*, when the question of the legality of defendants' system had not yet been decided. Were it otherwise—that is, were a party

opposing the motion permitted to contend that the class procedure is not superior because the predominant issue already has been decided before the class was certified—a delay in determining certification under Rule 23(b)(3) would be tantamount to a denial. *Cf. Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("the mere fact that questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible"); *Owner-Operator Independent Drivers Association, Inc. v. Arctic Express, Inc.*, 288 F. Supp. 2d 895, 902 (S.D. Ohio 2003).

That is, the question under "superiority" is whether, at the outset, it would have been better to have one trial on the question of the legality of defendants' system, followed by determinations of subclass members' damages, or many trials in which both the legality of defendants' system and an individual's damages were determined.

But even if the "superiority" determination ignored the overwhelming importance of the question of the legality of defendants' admissions systems, a class action is still superior because it permits this Court to decide the other legal issues common to all claims—the questions of burden and legal standards identified previously (*supra* at 19-21)—once instead of many times. Further, the factual issues involving which class members are entitled to compensatory damages can be decided once instead of many times. And, finally, a class action would allow the Court to use tools like the *pro rata* damage methodology (which would avoid the necessity of determining who would have been admitted).

The class members' rights would also be protected. As proposed by plaintiffs, if this Court certified a compensatory damages class under any of the provisions of Rule 23(b) for which certification is sought, the individuals members would receive notice and could "opt out" of the subclass. *Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 487 (D. Minn. 2003)

(certifying claim of discrimination as a hybrid class, wherein the second stage involving "'damages is resolved using the "opt out" procedures established for Rule 23(b)(3) actions'").

For all these reasons, a class action is superior to numerous individual actions, which would be a time-consuming, repetitive, and an unnecessary burden on the court.

CONCLUSION

For all the foregoing reasons, this Court should grant plaintiffs' motion to (1) modify the existing class certification order to include class certification under Rule 23(b)(2) of the plaintiffs' and class members' claims for nominal damages and a refund of their application fees paid; (2) granting partial summary judgment in favor of the plaintiffs and the class members awarding them their nominal damages and refund of application fees, plus interest; and (3) certifying a subclass for determination of additional compensatory damages under Federal Rules of Civil Procedure 23(b)(2), 23(b)(1)(B), or 23(b)(3).

Dated: December 8, 2004

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RE: ***Jennifer Gratz and Patrick Hamacher v. Lee Bollinger, et al.***
Court File No.: 97-75231

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2004, I electronically filed

1. Plaintiffs' Motion for Class Certification and Partial Summary Judgment with Respect to Certain Nominal and Incidental Damages Claims; and for Certification of a Subclass to Determine Compensatory Damages Claims;

2. Memorandum of Law in Support of Plaintiffs' Motion for Class Certification and Partial Summary Judgment with Respect to Certain Nominal and Incidental Damages Claims; and for Certification of a Subclass to Determine Compensatory Damages Claims;

3. Affidavit of Kirk O. Kolbo in Support of Plaintiffs' Motion for Class Certification and Partial Summary Judgment with Respect to Certain Nominal and Incidental Damages Claims; and for Certification of a Subclass to Determine Compensatory Damages Claims

with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Mail the papers to the following non-ECF participants:

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