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

CLASS ACTION

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR AN INTERIM AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO 42 U.S.C. § 1988

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

MISCELLANEOUS

INTRODUCTION

Plaintiffs took a challenging case, under adverse circumstances against a well-funded, determined litigant. After winning part of the case in the trial court, they went on to achieve complete vindication in the United States Supreme Court, with the defendants' policies declared unlawful and unconstitutional for all relevant years That constitutional determination has already been cited by other courts. *See, e.g., Parents Involved in Community Schools v. Seattle School District No. 1*, 377 F.3d 949, 957-58, 966-81 (9th Cir. 2004) (invalidating school district assignment of students using "racial tiebreaker"). Now, after winning an important victory in this case, plaintiffs face the same defeated adversary, which would deny them their victory in order to avoid having to pay for the years of obstinate adherence to their unlawful and unconstitutional policies. This result would be absurd and would reward the University for their unjust and wrongful conduct. It would ignore the facts of this case and settled law as well.

ARGUMENT

I. PLAINTIFFS AND THE CLASS ARE "PREVAILING PARTIES"

In arguing that plaintiffs have not yet obtained an enforceable judgment in their favor, defendants overlook the fact that this Court granted plaintiffs' motion for summary judgment with respect to defendants' College of Literature, Science & the Arts ("LSA") admissions programs from 1995-1998 and declared the admissions systems for those years to be unconstitutional. This judgment was made appealable by the Court's order entered pursuant to 28 U.S.C. § 1292(b). While defendants appealed from this judgment to the Sixth Circuit, they declined to seek Supreme Court review of it, and ultimately defendants expressly "disavowed" the admission system for those years. This Court's *judgment* as to the 1995-1998 systems is not

therefore a mere "opinion" or "statement of law," and it alone is enough to establish the "prevailing party" status of plaintiffs.

Central to defendants' argument that plaintiffs are not prevailing parties is their premise that the *only* way for plaintiffs and the class members to directly benefit from this action is for them to obtain a judicial determination that they would have been admitted under a lawful system. *See* Defendants' Br. 4-5. The premise is false because it is well established that the injury in an Equal Protection case is the inability to compete on an equal footing, "not the ultimate inability to obtain the benefit." *See* Order and Opinion [Granting Class Certification] at 11 (December 28, 1998) (citing *Northeastern Fla. Chapter of the Assoc. Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).[1] Even in the absence of a claim for damages, therefore, a plaintiff with proper standing can maintain an action for *prospective* relief requiring a defendant to remove unlawful discriminatory barriers. Here, the Supreme Court ruled definitively that plaintiff Hamacher had standing to make such a claim. *Gratz v. Bollinger*, 539 U.S. at 244, 262 (2003). Moreover, the Supreme Court definitively held that this Court's certification of the class was proper. *Id.* at 267-68. The certified class consists of applicants of the disfavored races who applied for and were denied admission from "1995 forward." Order and Opinion [regarding Class Certification] 15. As a result of the judgment entered by this Court, defendants are not free to institute the kind of unlawful admissions systems that were in place from 1995-1998. Moreover, defendants do not deny that they changed their admission system in 2003 as a direct consequence of the Supreme Court's decision striking down the

[1] The Supreme Court reiterated this principle in this case. *Gratz v. Bollinger*, 539 U.S. at 244, 261-62 (2003) (citing *Jacksonville* for its holding that in an equal protection challenge to a discriminatory barrier, "no . . . showing" is necessary that plaintiff would have obtained the benefit in the absence of the barrier).

admissions systems in effect from 1999 to the time of the Court's decision. Accordingly, plaintiffs have obtained judicial relief directly benefiting thousands of class members through the removal of unlawful discriminatory barriers to admission, and having accomplished as much, they are "prevailing parties" under Section 1988.

Defendants' contention that plaintiffs have obtained no judicial determination of liability is based on their misleading reading and application to this case of the Supreme Court's decision in *Texas v. Lesage*, 528 U.S. 18 (1999) (per curiam). The Court's short per curiam opinion reviewed only the Fifth Circuit's reversal of summary judgment for defendant on Lesage's Section 1983 claim for damages. No issues involving Title VI or Section 1981 were before the Court, and its opinion expressly left those issues "open." *Id.* at 22. Moreover, the Court's decision made clear that there was no allegation before it of "ongoing or imminent constitutional violation to support a claim for forward-looking relief." *Id.* at 21. If there had been such allegations, the Court acknowledged the applicability of its rule announced in *Jacksonville* that "a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered." *Id.* at 21 (citing *Jacksonville*, 508 U.S. at 666).[2]

Defendants make no effort to analyze any of these relevant distinctions between *Lesage* and the posture of this case. This case is not one in which a lone plaintiff seeks retrospective relief only in the nature of compensatory damages. The Court's opinion in *Gratz* (especially the explicit rejection of Justice Stevens' standing argument) leaves no doubt that the Court was

[2] The Court in *Lesage* noted that Lesage had not contested the defendants' assertion in its petition for certiorari that the case presented no issues of ongoing discrimination. It appeared to the Court, therefore, that Lesage had abandoned any claim for prospective relief, although it left that question open on remand. *Lesage*, 528 U.S. at 22.

deciding the claims of the plaintiffs and class for the ongoing unlawful discrimination by defendants. Accordingly, defendants' contention that plaintiffs have not secured a determination of liability is wrong because it assumes that "liability" can mean one thing only, *i.e.*, liability for compensatory damages, when it can instead encompass liability on claims for prospective relief. Having established defendants' liability, plaintiffs are prevailing parties.

The "prevailing party" cases cited and discussed by defendants actually illustrate the fallacy of defendants' contention that plaintiffs are not prevailing parties. At the outset, it is notable that none of the cases cited by defendants were class actions. In *Farrar v. Hobby*, 506 U.S. 103 (1992), the plaintiffs sued for $17 million in money damages for alleged deprivations of their constitutional and civil rights, but recovered only $1 in nominal damages after a jury determined that they had not suffered any actual damages.[3] The Court did not conclude that the plaintiffs were not "prevailing parties," which is the threshold question disputed by defendants in this case.[4] Instead, the Court held that consideration of the relationship between the relief sought by plaintiffs in *Farrar* and the relief obtained compelled the conclusion that a reasonable fee was no fee at all. The judicial remedy obtained for the class in this case, in which the claim for damages has only been incidental[5] to the principal relief sought, is far more than the mere

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[3] The appellate court summarized the result in *Farrar*: "The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. . . ." *Farrar v. Hobby*, 941 F.2d 1311, 1315 (5th Cir. 1991), *quoted in Farrar*, 506 U.S. at 108.

[4] The Court held that the Fifth Circuit "erred in failing to recognize that petitioners were prevailing parties." *Farrar*, 506 U.S. at 116.

[5] Indeed, this case was certified as a class on this basis. *See* Order and Opinion [regarding Class Certification] 13.

"technical" victory that was obtained in *Farrar*, 506 U.S. at 113 (quoting *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782 (1989)).[6]

The result in *Farrar* is similar to another case cited by defendants, *Carbalan v. Vaughn*, 760 F.2d 662 (5th Cir. 1985), which is also easily distinguishable from this one. In *Carbalan*, plaintiffs' "original and amended complaints sought only money damages" from a municipal judge who had denied the plaintiff bail and from the city that employed the judge. *Id.* at 664. The district court dismissed before trial the claims against the judge, and the jury found that while the judge had denied the plaintiff's right to reasonable bail, the city was not liable and that the plaintiff had sustained no damages. *Id.* Because neither the judge nor city were liable to plaintiff, the district court entered a judgment that the plaintiff "take nothing" and refused to award fees under Section 1988. *Id.* In affirming, the Fifth Circuit noted simply that the plaintiff "has won no relief against anyone, and is not entitled to attorneys' fees." *Id.* at 666. Given that in this case, (1) monetary relief is not the primary, much less the only relief sought; and (2) that plaintiffs have obtained a judicial determination that their rights and the rights of the class were violated, and as consequence the class members have directly benefited from the defendants' change in their admissions system, *Carbalan* has even less relevance to this case than does *Farrar*.

The remaining cases cited by defendants also fail to support their position that plaintiffs are not prevailing parties. In *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam), the Court

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[6] Defendants' reference to Judge Friedman's citation to *Farrar* in his opinion denying a motion for interim fees after his ruling in *Grutter* is highly misleading. Judge Friedman's order makes clear that he denied the motion because his judgment had been stayed on appeal and the case was in its "early stages of the appellate process." *See* Opinion and Order Denying Plaintiff's Motion for Interim Fees and Costs at 6 (April 26, 2001) (attached as Exhibit C to the Kolbo affidavit). Those circumstances plainly have no resemblance to the present status of this case.

reversed an award of attorneys' fees to two plaintiffs whose prisoner claims had become moot by the time the district court had entered a declaratory judgment in their favor because one had died and the other had been released from prison. *Id.* at 3. Because the judgment could not affect the relationship between defendants and the former prisoners, the Court held that the plaintiffs were not prevailing parties. *Id.* at 4. In so holding, the Court made a point that defendants omitted from their discussion of the Court's short opinion: "The lawsuit was not brought as a class action, but by two plaintiffs." *Id.* This case, of course, *is* a certified class action, and the certification served the important purpose of "ensuring that a justiciable claim is before the Court." *Gratz*, 539 U.S. at 268 (quoting Opinion and Order [regarding Class Certification] 14). The judicial determinations of this Court and of the Supreme Court changed the relationship between the defendants and the class members by producing the changes in the admissions system implemented by defendants in 2003. The result obtained in this case is not remotely similar to the judgment obtained in *Rhodes* on thoroughly mooted claims. *See also Putnam v. Davies*, 960 F. Supp. 1268, 1272-73 (D. Ohio 1997) (awarding fees where plaintiffs obtained declaratory relief that benefited plaintiffs and the class members, and distinguishing *Rhodes* as a case not brought as a class action and in which plaintiffs' claims were moot), *aff'd*, 149 F.2d 1184 (6th Cir. 1997).

Defendants are equally wide of the mark in relying on *Brister v. Faulkner*, 214 F.3d 675 (5th Cir. 2000), another case involving named plaintiffs only—not a class action—and one in which the court held that the defendant university *had not violated* the plaintiffs' constitutional rights. *Id.* at 678, 685, 687. Although the district court had entered a judgment declaring some aspects of the defendants' restrictions on leafleting in a public forum to be unlawful, it upheld the action taken by defendants in removing the plaintiffs from the property where they leafleted,

and after the judgment "plaintiffs still could not leaflet at the time, and in the manner, that they sought." *Id.* at 687 (noting that the judgment "did nothing to alter the legal relationship *between these parties*") (emphasis in original). In affirming the district court's denial of attorneys' fees, the Fifth Circuit did so on the ground that plaintiffs were not "prevailing parties" because their rights had not been violated. *Id.* The court distinguished *Farrar* as a case in which plaintiffs *were* at least "prevailing parties" because there had been a determination that their constitutional rights had been violated. *Id.* And it distinguished another Fifth Circuit case for the same reason, *Doe v. Santa Fe Independent School District*, 168 F.3d 806 (5th Cir. 1999) (fees awarded where declaratory judgment vindicated student's constitutional rights).

Finally, defendants contest plaintiffs' "prevailing party" status by arguing that it rests on the "catalyst" theory rejected by the Supreme Court in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). The contention is a frivolous one. *Buckhannon* addressed the situation where the plaintiff obtains the result sought in litigation through means *other* than a judicial determination of liability or a judicially sanctioned outcome, *i.e.*, a consent decree. In *Buckhannon*, for example, the plaintiffs sued to enjoin the enforcement of a state law, and prior to any judicial determination on the merits, the state legislature repealed the law at issue. The district court then granted the defendants' motion to dismiss the case as moot, as plaintiffs had relinquished any claim for damages. *Id.* at 601-02, & n.1.

In affirming the district court's and Fourth Circuit's denial of plaintiff's motion for attorneys' fees, the Supreme Court rejected the line of lower court cases from other circuits which held that plaintiffs could recover fees for a defendants' *voluntary* change of conduct in the absence of judicially-sanctioned relief under the "three thresholds" test required by the "catalyst

theory." *Id.* at 610. The Court based its rejection of this theory on its holding that the statutory term "prevailing party" means "one who has been awarded some relief by the court," *id.* at 603; a party who "has prevailed on the merits of at least some of his claims," *id.* (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980)); even if only for nominal damages, *Buckhannon*, 532 U.S. at 604 (citing *Farrar*). *See also Buckhannon*, 532 U.S. at 603 (quoting with approval the Black's Law Dictionary definition of "prevailing party" as a "party in whose favor a judgment is rendered, regardless of the amount of damages awarded").

For defendants to suggest that plaintiffs in this case have not obtained judicial relief in their favor on the merits on at least some of their claims is absurd. Plaintiffs have obtained a judgment from this Court that defendants' admissions systems from 1995 to 1998 were unconstitutional. They have obtained a ruling on the merits from the Supreme Court that defendants' admissions system from 1999 to the time of the Court's decision was unconstitutional and violative of Title VI and 42 U.S.C. § 1981 (and an award costs in the amount of $14,676 that defendants have never paid). Not even defendants deny that the changes made in the LSA admissions system after the decision by the Supreme Court in *Gratz* were the product of that judicial ruling, rather than a "voluntary change in conduct."[7] *Buckhannon*, 532

[7] Of course, when a defendant changes its conduct in response to a judicial ruling on the merits, the judicial relief is also appropriately characterized as the "catalyst" for the change, but the Court in *Buckhannon* obviously did not hold that a plaintiff in such cases is not a prevailing party. *See Buckhannon*, 532 U.S. at 607 n.9 (citing with approval a decision of the Eighth Circuit, *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970), which had awarded fees where a judicial determination of liability was the "catalyst" prompting defendants' change in conduct). Accordingly, defendants are wrong that plaintiffs have relied in their opening brief only on cases that awarded fees on the basis of the rejected "catalyst theory." *See* Defendants' Br. 5 n.5. In each of the cases cited by plaintiffs, the court awarded fees on an interim basis after the plaintiff in those cases had obtained at least some judicial relief in their favor on the merits; none addressed the appropriateness of a fee award under the three-part catalyst test. *Owner-Operator Independent Drivers Ass'n v. Bissell*, 210 F.3d 595, 598-99 (6th Cir. 2000) (declaratory judgment); *See West Side Women's Services, Inc. v. City of Cleveland*, 594 F. Supp. 299, 300 & n.1, 302 (N.D. Ohio 1984) (granting partial summary judgment in favor of

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U.S. at 605. Accordingly, plaintiffs' entitlement to "prevailing party" status fits squarely within the statutory meaning of that term as interpreted by the Court in *Buckhannon.*

II. PLAINTIFFS' FEES AND COSTS ARE REASONABLE AND RECOVERABLE.

A. Plaintiffs' Success

Defendants apply the wrong legal standard and mischaracterize the nature of the results sought and obtained in the litigation in arguing that plaintiffs' fee should be reduced for "limited success." A reduction is appropriate on this ground only where plaintiff has "failed to prevail on a *claim* that is distinct in all respects from his successful *claims*." *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). Defendants contend this principle applies here because the Supreme Court concluded that diversity is a compelling interest that can justify the narrowly tailored use of race in admissions. Plaintiffs at no time asserted any separate claim that defendants were liable because they justified the use of race on an interest in diversity, a fact which can be confirmed by simply examining the Complaint in this action. Instead, what plaintiffs did was to assert claims that defendants' admissions systems were unlawful and unconstitutional, which has now been judicially established. While one stated reason was plaintiffs' argument with respect to the diversity rationale, at every stage of this litigation plaintiffs consistently presented alternative legal theories in support of their claims, including the legal theory that enabled them ultimately to prevail on their claims—that defendants' admissions systems for all years at issue were unlawful and unconstitutional because they were not narrowly tailored even to achieving an interest in diversity. *See Hensley*, 461 U.S. at 435 ("Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain

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plaintiffs); *Krislov v. Rednour*, 97 F. Supp. 2d 862, (N.D. Ill. 2000) (granting summary judgment in favor of plaintiff).

grounds is not a sufficient reason for reducing a fee."); *id.* at 440 ("Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.").

It is telling that defendants cannot cite to a single instance in the seven-year history of this case in which plaintiffs have filed a document containing a representation or argument inconsistent with their having as a principal objective the cessation of illegal and unconstitutional admissions practices by defendants. Instead, defendants point to extrajudicial, unauthenticated, hearsay accounts of alleged commentary on the *Gratz* and *Grutter* cases and to a cryptic reference by the Supreme Court that plaintiffs "*argue*, first and foremost" that diversity is not a compelling interest. *Gratz*, 539 U.S. at 268 (emphasis added). Having filed a legal action in which the objectives of the lawsuit can be gleaned from the pleadings and records on file, the best measure of the extent of success is to compare the claims made to the judicial results obtained. Where, as here, plaintiffs seek and obtain a determination of defendants' liability for unlawful and unconstitutional practices, it is unintelligible to describe the result as "limited success." Conduct is either lawful or not; there are not degrees to which it is just "a little bit" or "a lot" illegal or unconstitutional.

B. Billing Entries

Plaintiffs have submitted contemporaneously-kept time records in support of their fee application. This is not a case, for example, in which records were reconstructed after the fact. The records identify the lawyer or other personnel who performed services; the date the services were performed; the amount of time for which services were rendered; and a description of the type of services performed. As the Court noted in *Hensley*, "[p]laintiff's counsel . . . is not required to record in great detail how each minute of his time was expended." *Hensley*, 461 U.S.

at 437 n.12. In addition to submitting time records, plaintiffs provided a detailed summary of events occurring in the case, identifying dates of depositions, court status conferences, hearings, and exchanges of written discovery and briefs. The detailed chronology, in conjunction with the contemporaneous records, makes it readily apparent what activities plaintiffs were engaged in throughout the pendency of the action. In the case of the Maslon records, which are the most voluminous because of the firm's relative proportion of time devoted to the case, the time records are sufficiently detailed that the vast majority of entries can also be organized by subject matter, in addition to by date, which plaintiffs have done to assist in the evaluation of the overall reasonableness of plaintiffs' petition. *See* Exhibit P to Kolbo affidavit accompanying Memorandum in Support of Petition.

While defendants object to what they call "block billing," there is no customary or per se rule prohibiting the practice; defendants have not argued or offered evidence that plaintiffs' billing methods contravene standards or customs in the forum market; and defendants have not even represented whether it paid or refused to pay bills submitted by counsel employing similar billing methods. *See Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1215 (10th Cir. 2000) (use of block billing by employee's attorney did not warrant reduction of fees). Defendants' objection to "block billing" is especially pointless when defendants have not shown a basis for reducing plaintiffs' fee on a theory that they obtained limited success. *See* discussion *infra* at 9-10. Moreover, defendants have not explained how it would be practical or meaningful to allocate time among issues that are interrelated. A deposition, for example, may touch on a variety of topics and include much background information, which would make it absurd for plaintiffs to have to identify in billing records how much time was spent on discrete, separate issues in preparing or taking a deposition. The same is true with drafting and responding to written

discovery requests. Defendants have given no reasons why time devoted to discrete areas or types of discovery must be separately recorded on time sheets, especially when there is ample evidence submitted of what type and how much discovery was engaged in.

Plaintiffs have exercised billing judgment in this case, reflected by the fact that substantial amounts of time were excluded from the petition, as explained in the Kolbo and Rosman affidavits accompanying the petition. What remains is a request for reimbursement of fees and costs incurred by the prevailing plaintiffs that are dwarfed by the fees and costs incurred by the losing defendants, as shown from their Freedom of Information Act disclosures. *See* Exhibit R to Kolbo affidavit accompanying the Memorandum in Support of Petition (noting defendants have paid in excess of $10 million in fees and costs in the two cases).

C. Fees Related to the Intervention

Defendants rely on the Supreme Court's decision in *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), for their contention that plaintiffs cannot recover from defendants the fees and costs incurred as a result of the intervention. *Zipes* held, however, only that plaintiffs could not recover fees and costs from the *intervenors*, who themselves had not violated the law. The Court did not consider or decide anything with respect to a prevailing party's entitlement to recover fees and costs from a defendant, whose illegal conduct is the subject and target of the lawsuit. The distinction is an important one. Plaintiffs' lawsuit was necessitated by defendants' illegal conduct, and the intervention was a direct result of defendants' defense and maintenance of the unconstitutional and unlawful admissions systems. *See, e.g., Kelley v. Metropolitan County Bd. of Educ.*, 773 F.2d 677, 685 (6th Cir. 1985) (awarding fees in favor of prevailing plaintiffs and against defendant school board for work related to intervenor-defendants). *See also Jaguar Cars v. Cottrell*, No. Civ.A. 94-78, 1999 WL

1711082, *5 (E.D. Ky. July 8, 1999) ("*Kelley* supports the notion that fees incurred as a result of the intervener should not be attributed to a defendant if it would be unfair to hold the defendant responsible for them . . . . However, in the case at bar, [defendant-intervenor] Blackhorse and the Commission acted in concert in the litigation and there is no cause to exclude from an award of fees work performed by Plaintiff's attorneys in response to Blackhorse's actions.") (attached as Exhibit D to the Kolbo affidavit).

Defendants at no time opposed the intervention, and the intervenors were aligned with the defendants and supported at all times defendants' legal arguments asserted in defense of its admissions systems. The whole point of the intervention was to obtain a judicial determination that defendants' admissions programs were lawful and could be justified for reasons offered by defendants and by independent reasons offered by the intervenors. Plaintiffs could not reasonably opt to simply ignore the intervenors' arguments and evidence, and had intervenors been successful, plaintiffs would not have prevailed in the lawsuit. This Court plainly has the discretion to require defendants to pay plaintiffs' fees and costs incurred related to the intervention, and the circumstances of the case certainly justify such an award.

D. Fees Related to Media

Plaintiffs have made only a minimal request for reimbursement of fees related to public and media relations, and these are appropriately reimbursable for at least two reasons. First, in a highly publicized case such as this one, it is important that the clients receive advice in communicating with the media. Second, in a class action suit involving thousands of class members, media relations are a means of communicating with the class members about the progress and status of the case. *See, e.g., Keyes v. School District No. 1*, 439 F. Supp. 393, 408 (D. Colo. 1977) ("[T]he news media provides a valuable conduit of information between counsel

and the class."); *Dick v. Watonwan County*, 562 F. Supp. 1083, 1109 (D. Minn. 1983), *rev'd on other grounds*, 738 F.2d 939 (8th Cir. 1984). Given that both the Maslon law firm and CIR have excluded significant amounts of time related to dealing with the public and media—far more being excluded than included—what remains is a reasonable request well within the discretion of the Court to award.

E. Reasonableness of Effort Expended

The unstated premise of defendants' contention that there was "significant 'duplication of services'" rendered by plaintiffs is that plaintiffs should have managed the lawsuit with fewer lawyers and law firms. The number of lawyers and extent of effort that is reasonable is, of course, largely dependent on the nature of the case being litigated. One relevant measure of this is plaintiffs' expenditure of effort relative to that of defendants, since both are obviously litigating the same case. While defendants have refused to disclose records of their counsel providing detailed information about numbers of lawyers, legal personnel, and hours devoted to the case, it is a matter of public record that defendants have in the aggregate incurred fees and costs far in excess of plaintiffs' request for reimbursement.

Defendants have at all times had the services of two large law firms representing them in this litigation, in addition to legal resources devoted to the case by defendants' in-house general counsel's office. Accordingly, defendants fail to explain how a mere count of the number of lawyers and other legal personnel who provided services to plaintiffs demonstrates anything about the reasonableness of effort undertaken by plaintiffs.

Another way to gauge the reasonableness of the hours expended in this case is to average the total hours expended on an annual basis and compare this number to the hours billed yearly by one attorney working full time. Maslon has sought reimbursement for a total of 4,296.85

hours over a five and a half year period; CIR's request totals 863.55 hours (for work performed over a six-year period); and Kerry Morgan's totals are 323.5 hours. One lawyer billing 35 hours per week for 50 weeks has annual billable hours of 1,750. On this basis, Maslon's total request for reimbursement of time equates to just one attorney devoting 781 hours per year, less than half time, to the case. For CIR, the average is 144 hours per year, less than 10% of full time for a single attorney; and for Mr. Morgan, the average is 58 hours per year, just 3% of full time. The *total* for *all firms* represents the equivalent of *just one* attorney devoting less than 60% of full time to the litigation of the case.

Defendants' claim of duplication of effort is largely based on entries showing conferences among counsel or review of discovery and briefs. When multiple counsel are working together on the same case, it should be apparent that communications among counsel are essential precisely to minimize duplication of effort. Moreover, the point of having drafts of documents like motions and briefs reviewed and commented on by colleagues working on the same case together is to enhance the quality of the final work product by obtaining the benefit of the views of others. There is nothing inherently unreasonable about such collaborative activity in a case like this one, and the overall hours expended, as summarized above, confirms the reasonableness of effort expended in the case.

Finally, defendants ignore the fact that plaintiffs have exercised billing judgment by excluding a substantial amount of time from their request. The Maslon firm, for example, excluded approximately $283,055.75 in time from its requests. *See* Exhibit N to affidavit of Kirk O. Kolbo accompanying Memorandum in Support of Petition. In the case of CIR, significant amounts of time have also been excluded from the application, as shown on the time records attached to the accompanying statement of Michael Rosman. For example, while

complaining about the total number of hours devoted to drafting a pre-suit memorandum and the Complaint, defendants fail to point out the CIR excluded 35% and 26%, respectively, of the time devoted to these services. *See* Rosman Statement Exhibit F, p. 1. Defendants also neglect to point out that CIR excluded from its request the Patrick Wright entry of December 3, 1997 complained of by defendants.

F. Expenses and Travel-Related Fees

Defendants offer no argument or reason why it was unreasonable for plaintiffs to be represented by out-of-state counsel, perhaps because defendants themselves hired their lead counsel from a Washington, D.C. law firm. While defendants also had local counsel, virtually every court appearance or deposition was attended by multiple attorneys from defendants' Washington law firm. Travel-related time expenses (*e.g.*, airfare, car rentals, lodging, meals) are commonly recognized as reimburseable to a prevailing party. *See, e.g., Redding v. Fairman*, 717 F.2d 1105, 1119 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1188-92 (11th Cir. 1983). *See also* Alba Conte, 1 *Attorney Fee Awards* § 2.19, at 76 n.228 (1993 ed.). Because it was not unreasonable for plaintiffs in this significant litigation to be represented by out-of-state counsel, plaintiffs should be awarded their travel-related fees and costs. In marked contrast to defendants, moreover, plaintiffs rarely had more than one lawyer traveling from out of state to attend depositions and other proceedings, so care was exercised to keep travel-related costs reasonable. While courts have applied different standards on the issue, it is appropriate to reimburse travel time at the regular rate charged for the lawyers' services, and the Court certainly has the discretion to do so. *See, e.g., Henry v. Webermeier*, 738 F.2d 188, 194 (7th Cir. 1984); *Planned Parenthood Ass'n v. Ashcroft*, 655 F.2d 848, 872 (8th Cir. 1981)), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 476 (1983).

Defendants incorrectly state that CIR has sought to recover over $100,000 in "miscellaneous expenses." The type and nature of expenses for which CIR seeks reimbursement are identified in the statement of Michael Rosman (*see* ¶¶ 29-35) and its accompanying Exhibit G.[8] In addition, the billing and expense records of the Maslon firm identify the type and nature of expenses submitted for payment by CIR. Mr. Rosman's statement makes clear that CIR has backup for the expenses it has incurred, but defendants have made no request to inspect any of it. Finally, there is nothing unreasonable about photocopying expenses of $39,000, incurred over a nearly six-year period. Mr. Rosman's statement explains in paragraph 33 that $4,800 of this sum was for copying the record for the en banc Sixth Circuit and that $26,000 was paid for printing of the briefs and appendix in the Supreme Court, including $14,676 taxed in favor of plaintiffs by the Court that defendants unaccountably have not paid. Notably, defendants again omit any discussion or information on how plaintiffs' costs compare to costs incurred by defendants in litigating the same case.

G. Plaintiffs' Rates

Defendants recite the correct standard for determining a reasonable rate on which the lodestar is to be calculated—the prevailing rate in the forum market for lawyers of comparable skill and experience to that of the attorneys making the application—but then proceed to analyze plaintiffs' rates under a completely different standard, while offering no competent evidence to challenge the sworn testimony submitted by plaintiffs to support their rates. Hence, relying entirely on an unauthenticated, hearsay bar survey, defendants substitute a discussion of *average* rates for that of *prevailing* rates—and these averages are either for *law firms* generally, rather

[8] Although not mentioned in Rosman's statement, about $15,750 of CIR's costs were incurred for court reporters and, as with the other expenses, backup is available for review on request.

than *lawyers* with skill and experience comparable to plaintiffs' lawyers, or *statewide*[9] averages rather than of the market where the case is venued, the Eastern District of Michigan. Nowhere, for example, do defendants discuss or offer evidence on the average rates, much less the prevailing rates, of lawyers in the Detroit or Ann Arbor Metropolitan area with skill and experience comparable to that of plaintiffs in this case (or with any particular level of skill and experience).[10]

Conspicuously absent from defendants' brief is any comparison of plaintiffs' rates to the rates charged by defendants' counsel, which included lawyers from the Detroit and Ann Arbor offices of Butzel Long. Notably, for example, defendants do not contend that plaintiffs' rates are higher than the rates charged by Butzel Long for its lawyers of comparable skill and experience. While defendants have refused to provide plaintiffs with information on the rates of their counsel, Butzel Long has disclosed rate information to the media which indicates that the firm's rates range from $185-$430 for partners; $150-$250 for associates; and $90 to $130 for paralegals.[11] *See Michigan Lawyers Weekly*, Sept. 9, 2004 (attached as Exhibit E to Kolbo affidavit). Plaintiffs' rates are well in line with these ranges, and defendants have offered no reason to conclude why Butzel Long's rates would not be probative evidence of the prevailing

[9] Defendants offer no explanation why the relevant forum for determining the lodestar rate should be the entire state of Michigan, rather than the Eastern District of Michigan, specifically the Detroit and Ann Arbor metropolitan areas. Even a cursory glance at the survey data submitted by defendants confirms that the identified rates in Detroit and Ann Arbor are consistently and significantly higher than in outstate areas.

[10] Defendants' only data on rates of Eastern District lawyers based on experience level is limited to information about the median rates of associates.

[11] This kind of information on range of rates illustrates why knowing average *law firm* rates is of little use in making the relevant inquiry into whether the rate of a particular *lawyer* is in line with the prevailing rate in the forum for a lawyer of comparable skill and experience.

rate in the forum market, or why plaintiffs should not receive a rate comparable to the rates charged by defendants' attorneys.

While defendants cite to the general proposition that plaintiffs are entitled to "competent" attorneys, but not the "best counsel in the country," Defendants' Br. 17, they develop no argument and present no evidence on what level of competence would have been adequate in this case; on what the rates of such lawyers would be, or to what extent, if any those rates, have been exceeded by the rates of plaintiffs' lawyers. Ultimately, defendants' challenge to plaintiffs' rates is a conclusory one, unconnected to the appropriate legal standard and supported by no admissible evidence. Plaintiffs, on the other hand, have presented detailed evidence and sworn testimony that the rates of their out-of town counsel—the Maslon law firm[12] and the Center for Individual Rights ("CIR")[13] are in line with the prevailing rates in the Eastern District of Michigan. Their local counsel, Mr. Morgan has done the same.

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[12] Defendants quibble about the rates of former Maslon associate Peter Carlton and current associate Dawn Van Tassel. *See* Defendants' Br. 18 n.22. As explained in plaintiffs' opening brief, in accord with well settled authority, plaintiffs have requested that all their time be reimbursed at current (2004) rates, to compensate for the delay in payment. Because Mr. Carlton left the firm in 2000, the only reasonable manner of adjusting his time to current rates is to use current rates of his contemporaries in the firm, which is what plaintiffs have done. In the case of Ms. Van Tassel, defendants do not explain why a $210 rate is "remarkable" for an associate with her level of experience, especially given that this is well inside the range of associate rates charged by Butzel Long, as shown above.

[13] Defendants ask the Court to assume the rates identified by CIR to be unreasonable by taking "judicial notice" that the cost of living in Washington, D.C. is higher than that of "Mr. Morgan's town, Wyandotte." Defendants' Br. 19. Putting aside that the relevant market is the Eastern District of Michigan, not Wyandotte, Michigan; that it is by no means obvious that the costs of living differ significantly between the two markets; or that these differences are reflected in differences in prevailing rates, the relevant inquiry is whether CIR's requested rates are in line with the prevailing rates in the Eastern District of Michigan, a point on which plaintiffs have offered evidence in the affirmative, and on which defendants have defaulted by offering no evidence. Moreover, defendants cannot overcome their failure to offer evidence on the prevailing rate in the Eastern District of Michigan by citing to another court's finding that Washington, D.C. rates were not in line with the prevailing rate of a legal market in *Texas*. See Defendants' Br. 19 (citing *Hopwood*).

CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request that the Court grant their motion for an interim award of fees and costs.

Dated: October 1, 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 October 1, 2004, I electronically filed **Plaintiffs' Reply Brief in Support of Their Motion for an Interim Award of Attorneys' Fees and Costs Pursuant to 42 U.S.C. § 1988 and Affidavit of Kirk O. Kolbo** 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 Federal Express Mail and United States Mail the papers to the following non-ECF participants:

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