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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and **PATRICK HAMACHER**,

Case No. 97-75231

vs.

Hon. Patrick J. Duggan

LEE BOLLINGER, et al.,

Defendants,

and

EBONY PATTERSON, et al.,

Intervening Defendants.

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DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AND TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND PARTIAL SUMMARY JUDGMENT WITH RESPECT TO CERTAIN NOMINAL AND INCIDENTAL DAMAGES CLAIMS, ETC.

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INTRODUCTION

This is a very significant moment in the procedural history of this case. In June of 2003 the United States Supreme Court issued its decision and remanded the case "for proceedings consistent with [its] opinion." In the year-and-a-half that followed, Plaintiffs did little except file a motion for attorney fees based on the mistaken argument that they qualify as "prevailing parties" under § 1988. Plaintiffs have now filed two motions -- their Motion for Partial Summary Judgment on Liability ("Motion for PSJL") and their 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 ("Motion for Damages Class") – that require this Court to answer an important, indeed fundamental, question: what is the necessary and appropriate next step in this case?

Plaintiffs' motions, however, offer the wrong answers to that question. Their motions suggest that this Court amend its prior decision, but offer no authority indicating that such a step is sensible, let alone required. Their motions ask that this Court find Plaintiffs have proved liability, even though they have done no such thing. To the contrary, under recent Supreme Court and Sixth Circuit authority these Plaintiffs have failed even to plead the facts necessary to establish liability, and certainly have not proved them. Their motions ask this Court to determine liability on a class-wide basis, despite the fact that this Court has not certified a class that reaches the remaining liability issues, and, indeed, could not do so because of the highly individualized nature of those issues. And, finally, their motions ask that this Court certify various damages classes and award some forms of damages to the members of those proposed classes, even though the proper next step in this case is to address individualized liability questions.

For the reasons set forth in this Response, Defendants respectfully request that this Court take the following steps. First, Defendants ask that this Court deny Plaintiffs' Motion for Partial Summary Judgment because Plaintiffs have not proved liability. Second, Defendants ask that this Court schedule a status conference to discuss whether and how individual Plaintiffs Jennifer Gratz and Patrick Hamacher wish to proceed with respect to their individual liability claims. And, third, Defendants ask that this Court deny Plaintiffs' Motion for Damages Class because it is, at best, premature and, at worst, unmerited.

PROCEDURAL HISTORY

On October 14, 1997 Plaintiffs Jennifer Gratz and Patrick Hamacher filed their Complaint in this matter. The Complaint alleged that the University of Michigan considered race in making undergraduate admissions decisions (Complaint at ¶ 18), that the University had no compelling interest in doing so (Complaint at ¶ 23), and that, if the University did have such an interest, then it had still violated the law by failing to try to achieve that interest through race-neutral means (Complaint at ¶ 24). The Complaint did not allege that the University should have considered race in a more narrowly tailored way, and did not allege that the University would have admitted Gratz or Hamacher if it had done so. Nor does the Complaint allege that the University would have admitted any of the putative class members under a system that considered an applicant's race in a more narrowly tailored manner.

On October 9, 1998, Plaintiffs moved for class certification and to bifurcate the liability and damages phases of this case. In the course of briefing that issue, Plaintiffs argued that "Whether or not plaintiffs Hamacher and Gratz or others would have been admitted under even a

lawful system, they are entitled to seek damages."[1] Defendants agreed with the request for bifurcation but expressed this disagreement:

> Defendants agree that any genuine damages issues in this case ... should be bifurcated ...
>
> Defendants disagree, however, with the suggestion that the question whether the named plaintiffs would have been admitted to the University in the absence of an admissions policy that includes the conscious consideration of race relates only to damages, and not to liability ... [D]efendants submit that with respect to plaintiffs' claim for damages, the question whether plaintiffs would have been admitted to the University under an admissions system that did not involve the conscious consideration of race is more properly understood as a question bearing on liability, rather than damages.[2]

In other words, the parties agreed that the case should be bifurcated into liability and damages phases, but disagreed as to which phase would encompass the question of plaintiffs' actual prospects for admission. On December 23, 1998, this Court bifurcated the case but did not resolve this disagreement; indeed, the Court did not need to do so at that time. This Court also certified a class.

The parties subsequently filed cross-motions for summary judgment that, like the Complaint, focused on the issues of compelling interest and narrow tailoring. On December 13, 2000 this Court issued its Opinion on the parties' motions. In that Opinion, this Court described the precise issues before it:

> As previously mentioned, this phase of the litigation has been explicitly limited to the issue of 'liability,' defined as 'whether Defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the

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[1] *See* Plaintiffs' Reply Memorandum in Support of Motion for Class Certification and for Bifurcation of Liability and Damages Trials, filed November 17, 1998, at 16.

[2] Defendants' Reply Memorandum of Law in Support of Defendants' Motion for Order Denying Class Certification and in Opposition to Plaintiffs' Motion to Certify a Class Action and to Birfucate Liability from Damages, filed October 30, 1998, at 26-27.

> Constitution,' as well as Plaintiffs' request for injunctive and declaratory relief ...
>
> [T]he two issues this Court must decide in resolving the parties' motions for summary judgment are: (1) whether Defendants have asserted a compelling governmental interest in support of LSA's use of race and (2) whether the measures by which the LSA has used race as a factor in admissions decisions were narrowly tailored to serve such interest.
>
> Both the Plaintiffs and the University Defendants have agreed to the material facts relating to the mechanics of the LSA's admissions policies, and that the Court has, in the record currently before it, all the evidence they wish to present. Therefore, both Plaintiffs and the University Defendants agree there is no need for a trial with respect to the issue of whether diversity constitutes a compelling interest under strict scrutiny, and whether the LSA's admissions programs were narrowly tailored to achieving that interest, and that, based upon the record before the Court, such issues may be resolved by summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Opinion at 6-8. The Motions did not *ask* this Court to decide – and this Court did *not* decide – whether Gratz, Hamacher, or any member of the certified class would actually have been admitted to the University of Michigan in the absence of the programs under scrutiny. Instead, this Court focused on the specific questions of compelling interest and narrow tailoring.

In its Opinion, this Court went on to conclude that "a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny." Opinion at 25. This Court further concluded that the 1999-forward admissions systems qualified as "narrowly tailored," although the 1995-1998 systems did not. Opinion at 26-44. On January 30, 2001 this Court issued an Order implementing these rulings, "declare[ing] unconstitutional" the programs in existence from 1995 through 1998, and upholding the programs in place for 1999 and 2000.

Plaintiffs appealed and, on June 23, 2003, the United States Supreme Court issued its Opinion. Like the Opinion of this Court, the Opinion of the Supreme Court was limited and specific:

> We conclude ... that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. We further find that the admissions policy also violates Title VI and 42 U.S.C. § 1981. Accordingly, we reverse that portion of the District Court's decision granting respondents summary judgment with respect to liability and remand the case for proceedings consistent with this opinion.

Gratz v. Bollinger, 539 U.S. 244 (2003). Thus, the Supreme Court – like this Court – expressed no view on the question of whether Hamacher or Gratz would be admitted under a system that considered race in a more narrowly tailored way. To the contrary, the Supreme Court did nothing more than reverse this Court's decision with respect to narrow tailoring. It did not direct this Court to enter a final judgment on liability in Plaintiffs' favor, and, for the reasons discussed in this brief, could not have done so.

ARGUMENT

I. THIS COURT SHOULD DENY PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AND SET A SCHEDULING CONFERENCE TO ADDRESS THE NEXT STEP IN THE LIABILITY PROCEEDINGS

In some passages of their Motion for Partial Summary Judgment on Liability, Plaintiffs seem to ask this Court simply to amend its January 30, 2001 Order so it says what the Supreme Court said. *See, e.g.*, Motion for PSJL at ¶1, Memorandum at 3 ("This requires no more than to amend the Court's January 30, 2001, order ..."), and Memorandum at 7 ("plaintiffs respectfully request this Court to amend its January 30, 2001, order so that it conforms to the Supreme Court's opinion in this case"). Plaintiffs do not, however, cite a single case or Federal Rule of

Civil Procedure indicating it is necessary or appropriate for this Court to do what they request. Indeed, having this Court simply repeat what the Supreme Court said seems wholly pointless.[3] If that were all Plaintiffs wanted, then the Court could deny their motion for these reasons alone.

But that is not all Plaintiffs want. Other passages of the Motion and Brief go considerably further and make clear that Plaintiffs want something much more significant. In those passages, Plaintiffs ask this Court to enter a "final judgment" in their favor. *See, e.g.*, Brief at 3 ("plaintiffs have brought the present motion for the purpose of obtaining a final judgment..."). Indeed, the very title of their motion indicates that Plaintiffs seek a judgment holding the University *liable* to them. And Plaintiffs urge this Court to enter such a "final judgment" on liability so this case can move swiftly on to the question of damages:

> The appropriateness of a judgment in the form of a judicial declaration of rights is also implied from this Court's decision to bifurcate the determinations of liability and damages. A judicial determination that the challenged admissions systems are unlawful should precede proceedings to determine the damages or other specific remedial relief to which the plaintiffs or class members are entitled. This is true regardless whether claims for damages or other remedial relief are eventually pursued on a class-wide basis, or on an individual basis following any decertification of the class.

Memorandum at 8. In asking this Court to enter a "judgment" so they can move forward with their claims for "damages or other remedial relief" Plaintiffs gloss over a critical point: facts supporting a finding of liability have not yet even been alleged, let alone proved. Controlling Sixth Circuit and Supreme Court authority make this clear.

As noted above, when Plaintiffs filed their motion to bifurcate the liability and damages phases of this case they argued that they were entitled to seek damages regardless of "[w]hether

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[3] At a status conference conducted last year Plaintiffs raised the same issue with the Court. When the Court asked why such a step is necessary, Plaintiffs' counsel responded: "To make it official." To which this Court aptly responded: "The Supreme Court ruled. How much more official can it get?"

or not plaintiffs Hamacher and Gratz or others would have been admitted under even a lawful system ...." [4] In support of that argument, Plaintiffs relied in part on the decision of the Fifth Circuit in *Lesage v. Texas*, and triumphantly declared that courts had "specifically reject[ed] the contention that [this question] has anything to do with liability."[5] Unfortunately for Plaintiffs, while their case has been pending the United States Supreme Court reversed the Fifth Circuit decision in *Lesage* and made clear that, in fact, this question has everything to do with liability.

In *Lesage*, the plaintiff applied for admission to the Ph.D. program in counseling and psychology at the University of Texas's Department of Education. The school rejected his application and offered admission to at least one minority candidate. It was undisputed that the school considered plaintiff's race at some stage during the review process. Defendant sought summary judgment, offering evidence that – even if their admissions process had been completely colorblind – the plaintiff would not have been admitted. The district court granted the motion, ruling that "any consideration of race had no effect on this particular individual's rejection," and that there was "uncontested evidence that the students ultimately admitted to the program had credentials that the committee considered superior to [plaintiff's]." The Fifth Circuit reversed.

Subsequently, however, the United States Supreme Court issued a *per curiam* decision reversing the Fifth Circuit. In pertinent part, the Supreme Court held as follows:

> Insofar as the Court of Appeals held that summary judgment was inappropriate on Lesage's § 1983 action seeking damages for the school's rejection of his application for the 1996-1997 academic year even if petitioners conclusively established that Lesage would have been rejected under a race-neutral policy, its decision is inconsistent with this Court's well-established framework for

[4] Plaintiffs' Reply Memorandum in Support of Motion for Class Certification and for Bifurcation of Liability and Damages Trials, filed November 17, 1998, at 16.
[5] *Id.* at 18.

> analyzing such claims. Under *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S. Ct. 568 (1977), even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat *liability* by demonstrating that it would have made the same decision absent the forbidden consideration ... The government can avoid *liability* by proving that tit would have made the same decision without the impermissible motive.

Texas v. Lesage, 528 U.S. 18 (1999)(emphasis supplied). Cases decided after *Lesage* reiterate the principle that this is a foundational liability issue. *See, e.g., Anderson v. City of Boston*, 375 F.3d 71 (1st Cir. 2004)("Lesage makes clear that when the governmental entity would have made the same decision even without the impermissible consideration of race ... there is no deprivation of constitutional rights at all ... Without a deprivation of constitutional rights, liability will not attach, and damages – nominal, compensatory, or otherwise – cannot be imposed").

Indeed, when a plaintiff seeks damages this is not just a foundational *liability* issue – it is a foundational *standing* issue. Of particular interest in this regard is the Sixth Circuit decision in *Aiken v. Hackett*, 281 F.3d 516 (6th Cir. 2002). In that case – actually a collection of consolidated actions – plaintiff white police officers challenged the affirmative action program of the City of Memphis. The district court entered partial summary judgment for the City because the officers could not show an injury in fact and therefore could not prove standing. The Sixth Circuit affirmed, stating as follows and citing *Lesage*:

> When plaintiffs allege a violation of the Equal Protection Clause in the context of a government program, courts must evaluate whether the claimed injury is one that invades a legally protected interest. If the plaintiffs allege that a racial preference cost them some benefit under a government program, those plaintiffs may have alleged an injury in fact. But if those same plaintiffs cannot also allege and show that 'under a race-neutral policy' they would have received the benefit, those plaintiffs have not alleged an injury in

> fact because they have not alleged an invasion of some interest that the law protects … Those plaintiffs lack Article III standing …

Id. at 519 (citations omitted). *See also Cotter v. City of Boston*, 323 F.3d 160, 167 (1st Cir. 2003)(relying on *Lesage* and holding that "plaintiffs lack standing to sue for damages if they cannot show that they would have benefited had the government not considered race").[6]

None of the proceedings before this Court have reached the question of whether the University of Michigan would have made the same decision with respect to any given applicant under a system narrowly tailored in a manner consistent with the Supreme Court decisions in this case and in *Grutter*. Indeed, as noted above, Plaintiffs' Complaint does not even allege that they would have been admitted under a policy that considered race in a constitutionally permissible manner. Plaintiffs' suggestion that this Court enter a "final judgment" on liability blissfully ignores the fact that they have not even advanced the allegations required by *Lesage* and *Aiken*, let alone prevailed upon them.

Furthermore, the question of whether any specific applicant would have been admitted under such a policy obviously turns on numerous individual considerations and cannot be answered on a class-wide basis. It would be improper for this Court to certify a class to address

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[6] Plaintiffs argue that *Lesage* does not control here because it addressed liability under § 1983 but not under § 1981 or Title VI. Memorandum in Support of Plaintiff's Motion for Class Damages at 10. In support of this argument, Plaintiffs cite a Georgia district court case, later reversed, and two cases they say recognized this "implicitly." They cite no persuasive authority that "explicitly" so holds, and no post-*Lesage* Sixth Circuit authority that so holds. In any event, Plaintiffs are simply mistaken in making this argument. With respect to standing, *Aiken* obviously turned on an interpretation of the standing doctrine and Article III – not on an interpretation of § 1983. Similarly, with respect to liability, nothing in *Lesage* suggests that its analysis turns on some specific language contained in § 1983 but absent from the other statutes. Indeed, it is ironic that Plaintiffs – who have argued all along that § 1983, § 1981, and Title VI impose liability under the same standard for purposes of this case – would now contend that some unarticulated distinction between them renders the reasoning of *Lesage* applicable to some but not to others.

this liability question and, in fact, this Court has not done so. To the contrary, in its December 23, 1998 Opinion this Court held only as follows:

> The Court will certify a class, pursuant to Fed. R. Civ. P. 23(b)(2), on the issue of liability: whether defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

Opinion at 15. The Supreme Court decision in *Grutter* established that an admissions system may use race as a factor, and the Supreme Court decision in this case established that the University's undergraduate system did not do so in a sufficiently narrowly tailored way. Those elements of liability, which this Court held were common to all class members, have been resolved and the purpose and utility of that class has concluded. Nothing, however – not the Supreme Court decision in *Grutter* nor the Supreme Court decision in *Gratz* nor any proceeding before this Court – has established that the infirmity in the University's undergraduate system actually changed the result with respect to any particular applicant. That element of liability remains unresolved and is far too individualized to be addressed through a class action.[7]

Plaintiffs' motion suggests that the next appropriate step in this case is for the Court to enter a final judgment on liability so we can proceed to the issue of damages on a class-wide basis. As set forth above, this is simply and demonstrably wrong on numerous counts: Plaintiffs' Complaint does not include allegations sufficient to support a finding of liability under *Lesage* and *Aiken*; there have been no proceedings before this Court to address the question of whether any given individual would have been admitted under a system that considered race in a manner

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[7] Interestingly, Plaintiffs' Complaint similarly suggests that they seek a class "on the issues of whether defendants engaged in unlawful discrimination and whether defendants should be enjoined from continuing their discriminatory policies." *See* Complaint at ¶ 10. Nowhere does the Complaint suggest that Plaintiffs would have been admitted under a system that considered race in a constitutionally permissible manner, let alone that this question lends itself to class treatment.

consistent with the Supreme Court's decisions; and, as to that question, this Court has not certified – and could not certify – a class. The appropriate next step is not the entry of a judgment but the conducting of a status conference to discuss whether and how Gratz and Hamacher wish to proceed with respect to their individual liability claims.

II. THIS COURT SHOULD DENY PLAINTIFFS' MOTION FOR CLASS CRTIFICATION AND PARTIAL SUMMARY JUDGMENT WITH RESPECT TO CERTAIN NOMINAL AND INCIDENTAL DAMAGES CLAIMS, ETC. BECAUSE THAT MOTION IS, AT BEST, PREMATURE AND, AT WORST, MERITLESS

Plaintiffs have also filed a motion asking this Court to modify its class certification order, "to have certain issues related to damages determined as part of the class, and, in addition, to certify a subclass ... for other compensatory damages." Memorandum in Support of Plaintiffs' Motion for Damages Class at 7. This makes no sense procedurally or substantively.

Plaintiffs' motion makes no sense *procedurally* because it asks this Court to make decisions about damages while fundamental questions of liability are still pending. As described above, the necessary and appropriate next step in this case is for the Court to address the remaining *individualized* issues related to *liability*. It therefore defies reason to suggest, as Plaintiffs have, that this Court should leap forward and address alleged *class-wide* issues related to *damages*. Plaintiffs -- by ignoring the remaining individual liability issues and attempting to focus the Court's attention class-wide damages – do not just "put the cart before the horse"; they pretend the horse does not even exist.[8]

[8] Further, Plaintiffs' motion invites this Court to decide issues it may, in fact, never need to reach. After all, if individual plaintiffs cannot establish standing and liability then they will not be entitled to damages, class-wide or otherwise. Of course, if a plaintiff can do so then the Court can address the question of damages that time. Plaintiffs' motion is thus, at best, premature. Indeed, Defendants proposed that the parties agree to stay the briefing of Plaintiffs' Motion for Damages Class until after this Court has addressed the foundational standing and liability issues, but Plaintiffs refused. Defendants continue to believe that such a stay best serves the interests of

Further, Plaintiffs' motion makes no sense *substantively* because it asks this Court to certify a 23(b) class where the 23(a) prerequisites are not met. As this Court knows, Rule 23(a) establishes four prerequisites to class certification: the class must be so numerous that "joinder of all members is impracticable;" there must be "questions of law or fact common to the class;" the claims of the representative party must be "typical" of those of the class; and the representative party must "fairly and adequately protect the interests of the class." Fed. R. Civ. Pro. 23(a).

The requirements of Rule 23(a) are not met with respect to the remaining *liability* issues before the Court. After all, the central question now before the Court -- whether any given individual would have been offered admission had the admissions policy used race in a more narrowly tailored way – clearly does not lend itself to class treatment. Plaintiffs have not alleged anything about the number of applicants who would have been admitted under such a system. Further, and more importantly, the question of which applicants would or would not have been admitted under such a system is not one that can be answered in the aggregate; to the contrary, this question must be answered by reference to individual qualifications. In *Gratz* the Supreme Court emphasized the importance of individualized consideration of applicants; it is surely no less important in the consideration of plaintiffs.

Indeed, at this stage these highly individualized liability issues plainly predominate over common or typical ones. In this connection, *see Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997). In that case, plaintiffs sought certification for a class of African-American customers who alleged that Motel 6 discriminated against its customers on the basis of race by providing substandard accommodations or denying them altogether. The *Jackson* Court

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judicial efficiency, and have therefore filed a separate motion asking the Court to put the briefing and decision of these damages issues "on hold" until it has addressed the logically precedent standing and liability issues.

determined that "the single common issue in the . . . case – whether Motel 6 has a practice or policy of discrimination – is not . . . predominant over all the other issues that will attend the Jackson plaintiffs' claims." *Id.* at 1006. The Court explained that the plaintiffs' claims:

> will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination. The issues that must be addressed include not only whether a particular plaintiff was denied a room or was rented a substandard room, but also whether there were any rooms vacant when that plaintiff inquired; whether the plaintiff had reservations; whether unclean rooms were rented to the plaintiff for reasons having nothing to do with the plaintiff's race; whether the plaintiff, at the time that he requested a room, exhibited any non-racial characteristics legitimately counseling against renting him a room; and so on... These issues are clearly predominant over the only issue arguably common to the class – whether Motel 6 has a practice or policy of racial discrimination. Indeed, we expect that most, if not all, of the plaintiffs' claims will stand or fall, not on the answer to the question whether Motel 6 has a practice or policy of racial discrimination, but on the resolution of these highly case-specific factual issues.

Id. *See also Abramovitz v. Ahern*, 96 F.R.D. 208, 218-19 (D. Conn. 1982), in which the Court grappled with a similarly postured case and refused to certify a subclass of persons

> who contend that they are entitled to money damages for illegal arrests, trials and convictions based on illegal intercepts of their communications because there is no issue common to all members of the sub-class other than the existence and legality of the surveillance program. [W]hether an arrest, trial or conviction was legal will not be resolved by finding that information 'tainted' by reason of illegal electronic surveillance was a consideration in the decision to take such action. Instead, resolution of the issue would require a review of the totality of the circumstances concerning the arrest, trial and conviction of each plaintiff to determine whether there was an independent basis for governmental action rendering any alleged misconduct harmless.

Id. In the same vein, though with respect to the typicality component, *see Elkins v. American Showa, Inc.*, 219 F.R.D. 414, 419 (S.D. Ohio 2002):

> The Sixth Circuit has summarized the typicality standard in this manner: "As goes the claim of the named plaintiff, so go the claims of the class." *Sprague, v. GMC*, 133 F.3d

> 388, 397 (6th Cir. 1998). Typicality is not present where a named plaintiff who proved his own claim would not necessarily have proved anybody else's claim. *Bacon*, 205 F.R.D. at 479 (citing *Sprague*, 133 F.3d at 399).

In this case, if Gratz or Hamacher proved their own claim – if they proved that they would have been admitted under a system that considered race in a narrowly and constitutionally tailored manner – they would not necessary prove that this holds true for a single other applicant.[9]

These arguments apply with equal force to Plaintiffs' request for "class damages." Plaintiffs seek a class-wide refund of application fees, ignoring the fact that a university may decline admission to an applicant for a wide array of factors having nothing to do with race: grades, test scores, incomplete paperwork, lackluster "recommendations," and all sorts of other highly individualized reasons. Even more remarkably, Plaintiffs seek a sub-class for purposes of recovering "compensatory damages." Plaintiffs do not specify the items that would make up such damages, presumably because they are so highly individualized. Plaintiffs do, however, note that such damages "may" include "higher expenses incurred due to attendance at another university" – an issue that obviously cannot be addressed in the aggregate and plainly does not lend itself to class treatment.[10]

Indeed, the infirmities in Plaintiffs' Motion for Class Damages simply underscore the correctness of Defendants' position with respect to Plaintiffs' Motion for Partial Summary Judgment. The necessary, proper, and logical next step is to see whether any Plaintiff can show they have standing to seek damages because they would have been admitted under a system that considered race in a more narrowly tailored manner. If a Plaintiff passes that threshold, then the question will turn to one of liability and whether that Plaintiff is correct in claiming that the

[9] It should be noted, in passing, that the record contains substantial evidence casting doubt on the ability of Gratz and Hamacher to prevail on this issue on their own behalf.
[10] *See* Memorandum in Support of Plaintiffs' Motion for Damages Class at 5.

University would have admitted them under such a policy. And, finally, if the Plaintiff prevails on these individualized questions of standing and liability, then the proceedings can move on to address that Plaintiff's individualized proofs of damages. This makes sense and comports with law and logic. Plaintiffs' request – that this Court ignore critical elements of standing and liability and certify a class to deal with highly individualized damages issues – plainly does not.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court deny Plaintiffs' Motion for Partial Summary Judgment on Liability and also Plaintiffs' Motion for Class Damages. Defendants further request that this Court schedule a status conference to discuss the remaining proceedings with respect to liability.

Respectfully submitted,

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Dated: January 19, 2005
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PROOF OF SERVICE

On January 19, 2005, Debby Bailey Miller caused to be served a copy of Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment on Liability and to Plaintiffs' Motion for Class Certification and Partial Summary Judgment with Respect to Certain Nominal and Incidental Damages Claims in the above-captioned matter on: Kirk O. Kolbo, Esq., Maslon

Edelman Borman & Brand, LLP, 3300 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402 via first class mail. I also caused a copy of said Response to be served today on Kirk Kolbo via fax at: (612) 672-8397.

Debby Bailey Miller