UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

JENNIFER GRATZ and

PATRICK HAMACHER,

for themselves and all others

similarly situated,

Plaintiffs,

V.

LEE BOLLINGER, JAMES J.

DUDERSTADT, THE UNIVERSITY

OF MICHIGAN, and THE UNIVERSITY

OF MICHIGAN COLLEGE OF

LITERATURE, ARTS, AND SCIENCE,

Defendants.

CASE NO.: 97-CV-75231-DT

HON. PATRICK J. DUGGAN

OPINION

This matter is currently before the Court on plaintiffs' motion for class certification and bifurcation of liability and damage trials and defendants' motion for order denying class certification. Plaintiffs seek class certification from this Court pursuant to FED. R. Civ. P. 23(b)(1)(B) and 23(b)(2) on the issues of whether defendants engaged in unlawful discrimination; whether they should be enjoined from engaging in such discrimination in the future; and on plaintiffs' claim for punitive damages. (Pls.' Br. in Supp. Mot. Class Cert. at 1). Alternatively, plaintiffs seek to maintain a class pursuant to FED. R. Civ. P. 23(b)(3) and 23(c)(4) on the issue of whether defendants engaged in unlawful discrimination and on plaintiffs' claim for punitive damages. Id. Defendants oppose plaintiffs' request for class certification contending that plaintiffs fail to demonstrate why class action is the appropriate vehicle through which to adjudicate the merits of plaintiffs' claims. In addition, plaintiffs also request the Court to order bifurcation of the liability and damage issues. The Court entertained oral argument on the parties' respective motions on December 10, 1998. For the reasons that follow, the Court grants in part, and denies in part, plaintiffs' motion for class certification. The Court denies defendants' motion for an order denying class certification. The Court also grants plaintiffs' motion for bifurcation of the liability and damages aspects of the trial.

Class certification under the Federal Rules of Civil Procedure is governed by FED. R. Civ. P. 23. In order to maintain an action pursuant to Rule 23, a prospective class must satisfy the prerequisites of FED.

R. Civ. P. 23(a) which provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"The Supreme Court has required district courts to conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met before certifying a class." *In Re Am. Med. Sys., Inc.*, 75 F.3d 1069, 10782D79 (6th Cir. 1996) (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982)). Once the class representative has satisfied the prerequisites of Rule 23 (a), the representative must then demonstrate "that the class he seeks to represent falls within one of the subcategories of Rule 23(b)." *Senter v. General Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976) (citing 3 B. J. Moore, Federal Practice para. 23.03 at 23-228 (2d ed. 1974)). "The party seeking class certification bears the burden of proof." *In Re Am. Med.*, 75 F.3d at 1079. The Court will apply the aforementioned criteria to the plaintiffs' request for class certification.

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A. Rule 23(a) Prerequisites

1. Numerosity

The first subdivision of Rule 23 requires that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "There is no strict numerical test for determining impracticability of joinder." *In Re Am. Med.*, 75 F.3d at 1079 (citing *Senter*, 532 F.2d at 523 n. 24). "When class size reaches substantial proportions, however, the impracticability requirement is usually satisfied by the numbers alone." *Id.* The potential class is defined as all individuals who:

> (1) applied for and were not granted admission to the College of Literature, Science & the 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 to the Law School. [1]

(Pls.' Br. in Supp. Mot. Class Cert. at 1). Plaintiffs note that "[d]efendants receive thousands of applications for admission each year for a limited number of available spaces." (Pls.' Br. in Supp. Mot. Class Cert. at 5) (citing Dfs.' Ans. at para. 11). Joinder of thousands of students who "applied for and were not granted admission" and are members of "racial and ethnic groups, including Caucasian" is impracticable. The Court finds that plaintiffs satisfy the numerosity requirement of Rule 23(a)(1).

[fn 1]Presumably, counsel for plaintiffs intended to refer to the College of Literature, Science, & the Arts.

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2. Common questions of law or fact

"Rule 23(a) simply requires a common question of law or fact." *Bittinger v. Tecumseh Prod Co.*, 123 F.3d 877, 884 (6th Cir. 1997) (citing *Forbush v. J C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (emphasis in original)). In this case, each plaintiff seeks a determination from this Court that defendants' admissions policy impermissibly utilizes race as a factor in determining the propriety of admission in violation of 42 U.S.C. secs. 1981 and 1983, and the Equal Protection Clause of the Constitution. The common question over the constitutionality of defendants' admissions policy is sufficient to satisfy Rule 23(a)(2).

3. Typicality of claims or defenses between plaintiffs and class

The third prerequisite to a class action under Rule 23(a) is the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. Civ. P. 23(a). The typicality test "limit[s] the class claims to those fairly encompassed by the named plaintiffs' claims." *In Re Am. Med*, 75 F.3d at 1082 (citation and quotation omitted).

Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.... A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members.

Sprague v. General Motors Corp., 133 F.3d 388, 399 (6th Cir.) cert. denied, 118 S. Ct. 2312, 141 L. Ed. 2d 170 (1998) (quoting *In Re Am. Med*, 75 F.3d at 1082) (citing Herbert B. Newberg and Alba Conte, 1 Newberg on Class Actions, sec. 3-13, at 3-75, 76 (3d ed. 1992)).

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Plaintiffs contend the "typicality" element is met where plaintiffs' claims of unlawful discrimination "arise from defendants' systematic use of race in making admissions decisions that adversely affect all applicants who are not members of the preferred racial groups." (Pls.' Br. in Supp. Mot. Class Cert. at 8-9). In contrast, defendants contend that plaintiffs are unable to meet the typicality requirement because of the nature of the individualized determinations, exclusive of race, that factor into defendants' admissions decisions. To this end, defendants maintain that plaintiffs "misconstrue" the defendants' admissions policy by arriving at an inappropriate definition of the proposed class. (Dfs.' Br. in Opp. Class Cert. at 19). Defendants quibble with plaintiffs' employment of the term "treated less favorably." Because defendants evaluate such criteria as a prospective student's academic record, standardized test score, essay, residency status, geographical location, alumni relationships, personal achievement, leadership and service, defendants contend that an applicant who possesses any one or more of these factors is "treated more favorably than one who does not." Id. Thus, defendants assert that the class sought to be maintained by plaintiffs, is "amorphous" and fails the typicality requirement.

The Court rejects defendants' argument. In order to meet the typicality requirement, plaintiffs must establish that "a significant relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Sprague*, 133 3 F.3d at 399. Plaintiff Gratz is a Caucasian resident of the state of Michigan who applied for admission into the fall 1995 freshman class. (Pls.' Compl. at 14). Plaintiff Gratz was placed on a "wait-list" and later denied admission. Id. Plaintiff Hamacher is a Caucasian resident of the state of Michigan who applied for admission into the fall 1997 freshman class. (Id. at 15). Plaintiff Hamacher

was rejected for admission in the spring of

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1997; however, plaintiff Hamacher alleges a desire to attend the University of Michigan if defendants cease application of allegedly discriminatory criteria in admissions.

The challenged conduct in this case is defendants' allegedly improper application of race as a criterion in admissions decisions. The fact that each student is subject to an array of other factors does not defeat plaintiffs' ability to satisfy the typicality requirement. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie individual claims." *Smith v. University of Wash. Law School*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) (citing *Newberg* sec. 3.13 at 3-77 and Supp.; *Raboidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)).

To the extent that race is a factor in each admissions decision by defendants, "a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class" sufficient to entitle plaintiffs to maintain the class. See *Sprague*, 133 F.3d at 399. "In cases alleging racial, ethnic, or sex discrimination, typicality is satisfied if the named plaintiffs allege that the defendant discriminated against them in the same general fashion as against the other members of the class." *Smith*, 2 F. Supp. 2d at 1342 (citing *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986)). The lead plaintiffs allege that defendants discriminated against them in the same manner by subjecting Caucasian applicants to differing admissions criteria than that applicable to members of a minority group. In this regard, plaintiffs' claims are representative of those of the named class in that their claims arise out of the same alleged discriminatory conduct. Accordingly, the typicality requirement of Rule 23(a) is satisfied in this case.

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4. Adequacy of Representation

The Sixth Circuit requires satisfaction of two factors in order establish adequacy of representation: 1) the representative will vigorously prosecute the interests of the class through qualified counsel; and 2) the representative must have common interests with unnamed members of the class. *Senter*, 532 F.2d at 525 (citing *Gonzales v. Cassidy*, 474 F.2d 67, 73 (6th Cir. 1973)).

> In making the determination of adequacy of representation the district court should consider the experience and ability of counsel for the plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent.

Cross v. National Trust Life Ins. Co., 553 F.2d 1026, 1031 (6th Cir. 1977).

The record of this case contains the affidavits of counsel for plaintiffs delineating their respective qualifications to serve as counsel for the class of plaintiffs. This Court finds plaintiffs' counsel to be qualified to prosecute the instant action on behalf of the class. Accordingly, the first prong on the adequacy of representation analysis is met.

With respect to the second element, the Court finds the record utterly devoid of the presence of any evidence tending to show antagonism between the interests of plaintiffs Gratz and Hamacher, and the members of the class which they seek to represent. In fact, the Court has already determined that

plaintiffs share a common interest in litigating the constitutionality of the consideration of race as an admissions preference. Therefore, plaintiffs have met the adequacy of representation element of Rule 23(a).

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B. Certification

Having determined that plaintiffs satisfy the prerequisites contained in FED. R. Civ. P. 23 (a), the Court will now turn to an analysis of the issue of certification under subsection (b) of Rule 23.

Plaintiffs seek to certify a class comprised of the following individuals:

[A]ll individuals who:

> (1) applied for and were not granted admission to 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....

(Pls.' Br. in Supp. Mot. Class Cert. at 1).

1. Rule 23(b)(2) Certification

Plaintiffs initially seek to certify this class pursuant to FED. R. Civ. P. 23(b)(2), which provides:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

In support of certification under Rule 23(b)(2), plaintiffs note that defendants:

> discriminate in a categorical manner on the basis of racial identity, and plaintiff Hamacher seeks both declaratory and injunctive relief from defendants' unlawful practices. Plaintiff Hamacher still desires to attend the LSA and would apply to transfer if defendants ceased their discriminatory practices.

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(Pls.' Br. in Supp. Mot. Class Cert. at 10). Thus, plaintiffs' assert that in light of defendants' across the board alleged discrimination in admissions criteria, plaintiffs are entitled to certification under Rule 23(b)(2).

Defendants launch a tripartite attack on plaintiffs' maintenance of a class action pursuant to Rule 23(b)(2). First defendants contend that plaintiff Hamacher lacks standing to represent a class seeking declaratory and injunctive relief. Second, defendants argue that plaintiffs cannot establish that injunctive

relief predominates over plaintiffs' claims for money damages, a necessary condition to Rule 23(b) class status. Third, defendants, relying on the Sixth Circuit's holding in Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 686 (6th Cir. 1976), contend that the class action vehicle is unnecessary "when the nature of the relief requested would automatically inure to the putative members." (Dfs.' Br. in Opp. Mot. Class Cert. at 6). According to defendants, if plaintiff Hamacher were to prevail on the merits of his claim and obtain a declaratory ruling that race was an impermissible factor in admissions, a benefit would immediately inure to the putative class members in the absence of class certification.

Defendants claim that plaintiff Hamacher lacks standing because he "suffers no threat of imminent future injury...." (Dfs.' Br. in Opp. Mot. Class Cert. at 21). According to defendants, Hamacher's undergraduate performance to date at Michigan State University precludes his ability to transfer to the University of Michigan.[2] In addition, defendants argue that because plaintiff Hamacher has not applied to transfer, he has no present intent to do so , and thus suffers no imminent risk of future injury sufficient to support standing to entitle him to injunctive relief. Defendants cite

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[fn. 2]According to defendants, Hamacher would need to achieve a 3.0 grade point average to attempt to transfer to the University of Michigan.

the Court to that portion of Hamacher's deposition testimony in which he addresses his intentiow, with respect to transfer to the University of Michigan.

> Q: Have you applied to transfer to the University of Michigan at Ann Arbor?
>
> A: No, I haven't.
>
> Q: Do you intend to apply to transfer?
>
> A: Yes, I do.
>
> Q: When?
>
> A: Hopefully when the policy is changed. And I'm going to get my grades up and apply to transfer.
>
> Q: Do you have an understanding that your grades aren't up high enough now to apply to transfer?
>
> A: I'm going to get them up and apply to transfer.

(Hamacher Dep. at 125-26). According to defendants, the aforementioned testimony establishes that Hamacher lacks the present intent to transfer to University of Michigan and bars his ability to represent a Rule 23(b)(2) class seeking injunctive and declaratory relief.

Defendants rely upon *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) for the proposition that plaintiff Hamacher lacks the requisite capacity and intent to transfer and hence, lacks standing. In *Lyons*, a plaintiff pursued a civil rights claim against the city of Los Angeles arising out of the police department's use of a chokehold in effectuating an arrest. The Supreme Court held that plaintiff lacked standing to obtain an injunction because " [t]he equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate irreparable injury." *Lyons*, 461 U.S. at 111. In *Lujan*,

environmental groups challenged limitations on the scope

of regulations designed to require consultation with the Secretaries of the Interior and Commerce before any federal agency action that may detrimentally affect an endangered species. The nature of the environmental groups' claimed injury was "that the lack of consultation with respect to certain funded activities abroad 'increases the rate of extinction of endangered and threatened species.'" *Lujan*, 504 U.S. at 562 (citation omitted). The Supreme Court determined that plaintiffs' professed intentions to return to the habitats of endangered species abroad were insufficiently concrete to establish standing. "Such "some day" intentions2Dwithout any description of concrete plans, or indeed even any specification of when the some day will be2Ddo not support a finding of the "actual or imminent" injury that our cases require." *Lujan*, 504 U.S. at 564 (emphasis in original).

Plaintiff Hamacher's claim is not barred by the reasoning of Lyons and *Lujan*. The essence of Hamacher's claim challenges the University's practice of applying allegedly discriminatory criteria in admissions decisions. Arguably, plaintiff Hamacher has standing to seek money damages for the injury he allegedly suffered when he was denied the opportunity to compete on an equal footing for available spaces in the fall 1997 class at the University of Michigan. See *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 (1978) (" [E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing.")

With respect to plaintiff Hamacher's injunctive relief claim, Hamacher has expressed his intention to apply to transfer to the University of Michigan upon its cessation of alleged

discriminatory practices in admissions. In this regard, Hamacher's intention does not mirror those intentions which the Supreme Court found to be insufficient in *Lujan*. In *Lujan*, the Supreme Court was faced with affidavits from plaintiffs indicating their "intent" to someday return to the habitats of endangered species. In contrast, plaintiff Hamacher claims that he will reapply for admission when his application is considered on an equal basis with those applications of other minority applicants. To the extent that plaintiff Hamacher reapplies to the University of Michigan, he will again face the same "harm" in that race will continue to be a factor in admissions. In this Court's opinion, Hamacher's present grades are not a factor to be considered at this time. The relevant inquiry with respect to Hamacher's standing for injunctive relief is that he intends to transfer to the University of Michigan when defendants cease the use of race as an admissions preference. Accordingly, the Court rejects defendants' argument that plaintiff Hamacher lacks standing to maintain the class pursuant to FED. R. Civ. P. 23(b)(2).

Plaintiff Hamacher's claim is appropriate for class treatment pursuant to Rule 23(b)(2). It is undisputed that defendants' have systematically attributed a racial preference in admissions decisions with respect to non-minority students. Plaintiff is primarily seeking a declaration from this Court that such a policy is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution, and an injunction to prohibit defendants' continued utilization of such a policy. "It is a singular policy and practice of racial discrimination pervasively applied on a classwide basis that plaintiff challenges in this lawsuit." (Pls.' Rep. Br. in Supp. Mot. Class Cert. at 2). Defendants have thus "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive

relief." FED. R. Civ. P. 23(b)(2).

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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). " *Jones v. Diamond*, 519 F.2d 1090, 1100 n. 17 (5th Cir. 1975); see also *Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 680 (N.D. Ohio 1995). As plaintiffs note in their brief, if necessary, 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.

Moreover, the Court rejects defendants' claim that the doctrine of necessity bars plaintiffs' maintenance of the class pursuant to Rule 23(b)(2). In *Craft*, supra, the Sixth Circuit barred a plaintiffs' class action challenging the constitutionality of a municipal utility's policies pertaining to termination of utility service on the grounds that declaratory and injunctive relief, if granted, would "accrue to the benefit of others similarly situated" and, consequently. . . "no useful purpose would be served by permitting this case to proceed as a class action. . . ." *Craft*, 534 F.2d 684 (6th Cir. 1976). In contrast to *Craft*, the Court believes that a class action serves a useful purpose in the instant case because plaintiff Hamacher's claims are particularly susceptible to problems of mootness. "Certification of a class under Rule 23(b)(2) is 'especially appropriate where, as here, the claims of the members of the class may become moot as the case progresses.'" *Johnson v. City of Opelousas*, 658 F.2d 1065,1070 (5th Cir. 1981); see also *Penland v. Warren County Jail*, 797 F.2d

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332 (6th Cir. 1986) (reversing a district court's denial of class certification and criticizing the court's application of the doctrine of necessity).

Defendants acknowledge the potential mootness problems stating that "the passage of time might render Hamacher's claim for injunctive relief moot." (Dfs.' Br. in Opp. to Class Cert. at 9). As the course of the litigation may consume a significant period of time, the claims of the individual students run the risk of becoming moot. The class action vehicle thus provides a mechanism for ensuring that a justiciable claim is before the Court. Accordingly, the Court declines to apply the doctrine of necessity to bar plaintiffs' claims.

2. Rule 23(b)(1)(B)

Plaintiffs also seek to maintain a class pursuant to Rule 23(b)(1)(B) which provides:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests

Rule 23(b)(1)(B) class certification is frequently employed by courts where a large class of plaintiffs

seek recovery from a limited fund. See *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 711 (E.D. Mich. 1985). The claims presented in the present lawsuit do not hinge upon recovery from a limited fund. Accordingly, class certification under Rule 23(b)(1)(B) is denied.

3. Rule 23(b)(3)

As an alternative, plaintiffs seek certification under Rule 23(b)(3). However, as previously noted in this opinion, this Court will certify the class pursuant to FED. R. Civ. P. 23(b)(2). Accordingly, the Court will not entertain plaintiffs' request for Rule 23(b)(3) certification.

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4. Plaintiffs' Class Certification for Damages

In addition to plaintiffs' request for certification on the discrimination issue pursuant to Rule 23(b)(2), plaintiffs also request certification on the claim for punitive damages. Plaintiffs state that at the present time they are not seeking class certification on individual damage issues. The Court notes that in the event of a finding of liability, the Court will be faced with not only determining a punitive damage award, but individual damage determinations as well. Thus, at this time, the Court declines to certify the class for a damage award, either compensatory or punitive, until such time as liability is determined in this action.

5. Conclusion

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. The class will be represented by Mr. Hamacher and will consist of those individuals who applied for and were not granted admission to the College of Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treat less favorably on the basis of race in considering their application for admission.[3] The claims of the class are limited to injunctive and declaratory relief. The Court will not consider claims for damages at this time.

[fn. 3] Plaintiffs do not seek to have plaintiff Gratz represent a class certified pursuant to FED. R. Civ. P. 23(b)(2).

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C. Plaintiffs' Motion to Bifurcate the Trial

Plaintiffs' request that the Court bifurcate the trial into a liability and damage phase. The Court grants plaintiffs' request to bifurcate the trial. The issue of defendants' liability for plaintiffs' claims will be tried first. If the Court enters a finding that defendants' admissions policy is unconstitutional, the Court will then make a determination as to how to proceed with the damage phase of the trial.

An order consistent with this opinion shall issue forthwith.

PATRICK J. DUGGAN

PATRICK J. DUGGAN

UNITED STATES DISTRICT JUDGE

DEC 23 1998

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