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

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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**

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO 42 U.S.C. § 1988**

## STATEMENT OF THE ISSUES

What amount are plaintiffs entitled to for their attorneys' fees and costs as prevailing parties in this civil rights action?

## CONTROLLING AUTHORITIES

Cases

*Berger v. City of Mayfield Heights*, 265 F.3d 399 (6th Cir. 2001)

*Dubuc v. Green Oak Township*, 312 F.3d 736 (6th Cir. 2002)

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

*Hanrahan v. Hampton*, 446 U.S. 754 (1980)

*Hensley v. Eckerhart*, 461 U.S. 424 (1983)

*Missouri v. Jenkins*, 491 U.S. 274 (1989)

*Northcross v. Bd. of Educ. of Memphis City Schs.*, 611 F.2d 624 (6th Cir. 1979)

*Paschal v. Flagstar Bank*, 297 F.3d 431 (6th Cir. 2002)

*Wayne v. Village of Sebring*, 36 F.3d 517 (6th Cir. 1994)

Statutes and Rules

42 U.S.C. § 1981

42 U.S.C. § 1988

42 U.S.C. § 2000d

Federal Rule of Civil Procedure 54(d)

## I. INTRODUCTION

Having prevailed before this Court and the United States Supreme Court on a matter of fundamental national importance, plaintiffs submit this memorandum in support of their motion for a statutory award of attorneys' fees and costs. Plaintiffs commenced this class-action suit for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, and 42 U.S.C. §§ 1981, 1983 and 2000d *et seq.* against the Board of Regents of the University of Michigan ("University") and several of its employees. Under 42 U.S.C. § 1988, plaintiffs are "prevailing parties" in an action under these statutes and may recover reasonable attorneys' fees. As a direct consequence of plaintiffs' lawsuit, defendants' admissions systems for their College of Literature Science & the Arts ("LSA") have been finally adjudicated as unlawful and unconstitutional for *all* of the years that were in issue in the lawsuit. This judicial determination inures to the benefit of untold thousands of students who apply each year to defendants' institution and who, without the benefit of the decision in this case would still be subject to unlawful discrimination in the consideration of their applications for admission. It is common knowledge that the outcome of the case has had important consequences outside the relationship between these particular defendants and the students that apply to their educational institution. The case has been one of national importance with consequences that have required colleges and universities across the country to evaluate and change their admissions systems to comply with the ruling of the United States Supreme Court in this case. Because plaintiffs have prevailed, and because their counsel have done so in a role as private attorney general as envisioned by Congress, they respectfully request this Court to grant their motion for an interim award of attorneys' fees and costs.

As explained more fully below, plaintiffs seek to be reimbursed in the amount of $1,736,967.00 for attorneys' fees and $334,385.84 for costs, for a total of $2,071,352.84.

## II. PROCEDURAL BACKGROUND

Plaintiffs Jennifer Gratz and Patrick Hamacher commenced this action in October 1997, after being denied admission into the defendants' College of Literature, Science & the Arts ("LSA"). Defendants denied plaintiff Gratz admission to the 1995 freshman class. Plaintiff Hamacher was denied admission for the entering 1997 class. The Complaint alleged that the defendants operated an admissions system that illegally discriminated on the basis of race in violation of the Equal Protection Clause to the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983, and 2000d. Plaintiffs sought, *inter alia*, declaratory and injunctive relief, and damages for the defendants' constitutional and statutory violations.

On December 12, 1998, this Court granted plaintiffs' motion for class certification. The certified class consisted of individuals who applied for and were not granted admission to the LSA for all academic years from 1995 forward, and who were members of those racial or ethnic groups treated less favorably on the basis of race. In the same opinion and order, the Court bifurcated the trial on the issues of liability and damages, with liability to be determined first. After extensive discovery and other proceedings, the parties eventually filed cross-motions for summary judgment as to liability.[1] In an opinion filed on December 13, 2000, and order filed on January 30, 2001, the Court granted plaintiffs' motion for summary judgment in part by

[1] Plaintiffs and the University defendants actually briefed the case on summary judgment twice. The first time occurred in May 1999, but these motions were not heard because on June 2, 1999, the Sixth Circuit stayed hearings on the motion pending a decision by the Sixth Circuit on an appeal by the intervening defendants of this Court's denial of their motion to intervene. Following an argument on the intervention issue in the Sixth Circuit on August 10, 1999, the Sixth Circuit reversed the denial of intervention. *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). On remand, this Court set new deadlines for discovery and filing of motions. The Court heard the parties' motions for summary judgment on November 16, 2000.

declaring the LSA's admissions system for years 1995-1998 unlawful. The Court granted summary judgment in defendants' favor with respect to the admissions systems for 1999 and 2000, declaring that those admissions systems were lawful. The Court also granted the individual defendants' motion for summary judgment on qualified immunity grounds. In a separate opinion and order, the Court rejected the arguments of the intervenors made by them in their opposition to plaintiffs' motion for summary judgment.

In its December 13, 2000, opinion, this Court concluded that diversity was a compelling interest that could justify the narrowly-tailored use of racial preferences in admission. It concluded that the use of race in the admissions process was not narrowly tailored for the admissions systems in effect from 1995 through 1998. However, it also held that that the racial preferences used in the admissions systems in effect beginning in 1999 and at the time of the summary judgment hearing were narrowly tailored to achieve an interest in diversity.

Multiple appeals to the Sixth Circuit followed. The University defendants filed a petition, and plaintiffs filed a cross-petition, seeking permission to appeal from the January 30, 2001, order, which effectuated the decisions made in the December 13, 2000, opinion. The Sixth Circuit granted both requests for permission to appeal by order dated March 26, 2001. Plaintiffs also filed as a matter of right, pursuant to 28 U.S.C. § 1292(a), an appeal from this Court's summary judgment dismissing the plaintiffs' request for injunctive relief. In the same appeal, Plaintiffs also sought review of this Court's final judgment dismissing their claims against the individual defendants on grounds of "qualified immunity." A fourth appeal was filed by the intervenors with respect to the decision of this Court rejecting the intervenors' proffered justifications for the University's use of racial preferences in admissions. On April 2, 2001, defendants in this case and in a related case of *Grutter v. Bollinger* moved to consolidate the two

cases and expedite the appeals. Shortly thereafter, plaintiffs filed a petition for initial hearing *en banc*, which was eventually granted on October 19, 2001. The Sixth Circuit heard argument separately on the two cases on December 6, 2001.

On May 14, 2002, the Sixth Circuit issued its decision in *Grutter*, 288 F.3d 732 (6th Cir. 2002). In the opinion, the Court of Appeals stated that it would separately render its decision in this case in a "forthcoming" opinion. *Id.* at 735 n.2. On October 1, 2002, because no opinion had been issued in this case, and a petition for certiorari was already pending in *Grutter*, plaintiffs petitioned the United States Supreme Court pursuant to Rule 11 of the Supreme Court's Rules of Procedure for a writ of certiorari before judgment. That petition was granted on December 2, 2002, with respect to the following question:

> Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

While the defendants conditionally opposed plaintiffs' petition for certiorari in this case, they did not petition the Supreme Court for review of this Court' judgment striking down as unlawful the admissions systems of the LSA for 1995 through 1998. Ultimately, it became clear that the defendants had abandoned any defense of the admissions systems for those years.[2]

The Court also granted certiorari in *Grutter* on the same issue with regard to the University of Michigan's law school admissions policy. Numerous *amicus curiae* briefs were filed with the Supreme Court on behalf of both plaintiffs and defendants. With the nation watching, oral argument for both cases was held at the Supreme Court on April 1, 2003.

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[2] After nearly six years defending the 1995-1998 admissions policies, the University finally "disavowed" them in their brief on the merits in the Supreme Court. *See* Brief for Respondents 5 n.7.

On June 23, 2003, the Supreme Court issued its opinion, striking down the University's LSA admission policy because it was "not narrowly tailored to achieve the interest in educational diversity that [the defendants] claim justifies their program." *See Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). Specifically, the Supreme Court reasoned that the University's current policy did not provide individualized consideration because it "automatically distribute[d] 20 points to every single applicant from an 'underrepresented minority' group," which had "the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant." *Id.* at 272 (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J.)). Accordingly, the Supreme Court held that the University's LSA freshman admission policy violated the Equal Protection Clause of the Fourteenth Amendment, Title VI and 42 U.S.C. § 1981, and reversed that portion of this Court's decision granting defendants' summary judgment on liability and remanded the case for proceedings consistent with its opinion. *Gratz*, 539 U.S. at 276.[3] On October 29, 2003, the Sixth Circuit issued an order remanding the case to this Court for further proceedings consistent with the Supreme Court's opinion.

## III. ARGUMENT

Plaintiffs who are "prevailing parties" in actions brought under certain federal civil rights statutes are entitled to an award of reasonable attorney's fees. The statutory basis for an award of such fees is contained in 42 U.S.C. § 1988, which provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981 . . . 1983 . . . and 2000d . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[3] The Supreme Court also taxed costs in favor of plaintiffs in the amount of $14,676.00. The University has not yet paid this sum.

42 U.S.C. § 1988. "The purpose of this provision 'is to ensure effective access to the judicial process for persons with civil rights claims, and to encourage litigation to enforce the provisions of the civil rights acts and constitutional civil rights provisions.'" *Walker v. Bain*, 65 F. Supp. 2d 591, 596 (E.D. Mich. 1999) (citations omitted).

In the Sixth Circuit, the appropriateness of attorney's fee awards under 42 U.S.C. § 1988 involves a two-step inquiry. *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994). First, the district court must determine whether the plaintiff is a "prevailing party." *Id.* If the plaintiff is a "prevailing party," the district court must determine the amount of the attorneys' fees award. *Berger v. City of Mayfield Heights*, 265 F.3d 399, 406 (6th Cir. 2001) ("in the absence of special circumstances a district court not merely 'may' but must award fees to the prevailing plaintiff"); *Northcross v. Bd. of Educ. of Memphis City Schs.*, 611 F.2d 624, 633 (6th Cir. 1979) ("the prevailing party should 'ordinarily recover an attorney's fee unless special circumstances would render such an award unjust"); *Walker*, 65 F. Supp.2d at 596 (stating that there is a "statutory presumption that fees should be awarded to successful plaintiffs absent unusual circumstances").

In the present case, Plaintiffs are entitled to their requested attorneys' fees because they ultimately prevailed in obtaining a final adjudication that the defendants' admissions systems for all years at issue are unlawful and unconstitutional. They prevailed in the first instance when this Court declared the admissions policies in effect for 1995 to 1998 to be unlawful and the University subsequently disavowed its defense of these policies. Plaintiffs prevailed further in obtaining a decision from the Supreme Court invalidating the admissions policies in effect from 1999 to the time of the Court's decision. The result is that defendants have been required to dismantle their unlawful system through what they acknowledge to be "substantial" changes in

the admissions system. *See* Press Release, "New U-M undergraduate admissions process to involve more information, individual review," University of Michigan News Service, August 28, 2003, *available at* http://www.umich.edu/news/index.html?Releases/2003/Aug03/admissions (attached as Exhibit U to the accompanying affidavit of Kirk O. Kolbo ("Kolbo affidavit")). These changes will benefit the class of future applicants (represented by Hamacher). As shown below the fees for which reimbursement is sought are reasonable in amount and justified by the results in this case.

### A. The Plaintiffs are Entitled to an Award of Fees as "Prevailing Parties" in this Action.

There can be no serious question case that the Plaintiffs are "prevailing parties" in this case and entitled to an interim award of attorneys' fees. "To be a 'prevailing party,' a party must 'succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Berger*, 265 F.3d at 406 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Under Sixth Circuit precedent, "[a]ny enforceable judgment, or comparable type of relief, or settlement . . . will generally make a plaintiff a 'prevailing party' as long as 'his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiffs.'" *Owner-Operator Indep. Drivers Ass'n v. Bissell*, 210 F.3d 595, 597 (6th Cir. 2000) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). Furthermore, attorneys' fees may be awarded at an interlocutory stage of the proceedings when a party "has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980); *see also Dubuc v. Green Oak Township*, 312 F.3d 736, 753 (6th Cir. 2002). "Interim fees are 'especially appropriate' when a party has prevailed on 'an important matter' in a case, even if the party ultimately does

not prevail on all issues." *Webster v. Sowders*, 846 F.2d 1032, 1036 (6th Cir. 1988) (quoting *Hampton*, 446 U.S. at 757).

Plaintiffs already have accomplished the principal goal of their lawsuit by obtaining a declaratory judgment that the University of Michigan's undergraduate admissions program's use of racial preferences at the time plaintiffs applied was unconstitutional. At all times in the advocacy of their positions, plaintiffs have asserted two independent legal grounds in support of their specific legal claims. First, plaintiffs argued that the admissions systems were not narrowly tailored to achieve a compelling governmental interest, even assuming that diversity was such a compelling interest. Second, plaintiffs argued that diversity was not a compelling interest justifying the use of racial preferences.[4] While the Supreme Court ultimately concluded in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that diversity was a compelling interest in the context of educational admissions, its decision in this case fully vindicated plaintiffs' independent argument that the University's admissions system was not narrowly tailored to achieve an interest in diversity. In the end, the defendants' admission systems for all years at issue were judicially determined to be what plaintiffs contended all along that they were: illegal quota systems. The consequence is that plaintiffs have prevailed on a significant issue of constitutional law, forced the defendants to change their admission policy, and ultimately achieved a vindication of civil rights for themselves and future applicants.

While this Court has yet to determine the damages to be awarded to the plaintiffs and the class members for defendants' violation of their statutory and constitutional rights, there cannot be any serious doubt that plaintiffs are prevailing parties under section 1988, and that they are

[4] Plaintiffs' briefs in support of the motions for summary judgment filed with this Court in 1999 and 2000, their briefs filed with the Sixth Circuit, and in the Supreme Court, all make clear that plaintiffs have always consistently advocated these two, independent legal positions.

entitled to an award of reasonable attorneys' fees. *See Bissell*, 210 F.3d at 597 (declaratory judgment finding policies discriminatory and unconstitutional made plaintiff prevailing party); *Krislov v. Rednour*, 97 F. Supp. 2d 862, 867 (N.D. Ill. 2000) (plaintiffs were prevailing parties "having won summary judgment . . . on a significant issue of constitutional law and achieved a vindication of civil rights for the benefit of voters and candidates in Illinois"); *West Side Women's Servs. v. City of Cleveland*, 594 F. Supp. 299, 302 (N.D. Ohio 1984) (holding that plaintiffs who won partial summary judgment as to liability on constitutional issue were prevailing parties even though damages had not yet been tried).

### B. Plaintiffs' Lodestar Fees Are Reasonable and Should Be Awarded on the Basis of Current Rates to Compensate for Delay in Payment.

The second part of this Court's analysis is to determine whether Plaintiffs' requested fee is reasonable. In the Sixth Circuit, the lodestar method is used to calculate the base fee. *See, e.g., Paschal v. Flagstar Bank*, 297 F.3d 431, 434 (6th Cir. 2002); *Berger v. City of Mayfield Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000); *Phelan v. Bell*, 8 F.3d 369, 374 (6th Cir. 1993). The lodestar value is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. "This figure is strongly presumed to represent a reasonable fee . . . ." *Walker*, 65 F. Supp. 2d at 596. After this figure is calculated, the district court may "adjust the 'lodestar' to reflect relevant considerations peculiar to the subject litigation." *Adcock-Ladd*, 227 F.3d at 349 (citing *Reed v. Rhodes*, 179 F.3d 453, 471-72 (6th Cir. 1999)).

In both its initial calculation of the lodestar fee and/or when considering a request for an enhancement, the Sixth Circuit has repeatedly held that the district court may consider the

following factors from the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974):

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'understandability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

*Paschal v. Flagstar Bank*, 297 F.3d 431, 435 (6th Cir. 2002); *Adcock-Ladd*, 227 F.3d at 349.

The starting point for plaintiffs' fee is the lodestar calculation. Here, plaintiffs' fee is based on the actual hours expended by the attorneys and their staff at their current standard hourly rate, to take into account the delay in payment. *See Missouri v. Jenkins*, 491 U.S. 274, 282 (1989); *Louisville Black Police Officers Org. v. Louisville*, 700 F.2d 268, 276 (6th Cir. 1983). Plaintiffs throughout this case were represented by lawyers from three separate law firms. Accompanying this brief are the affidavits and statement of counsel and detailed billing and expense information for the Maslon law firm, based in Minneapolis, Minnesota; the Center for Individual Rights ("CIR"), located in Washington, D.C.; and Detroit, Michigan attorney Kerry Morgan. The detailed supporting information of the Maslon firm is contained in the accompanying affidavit, with attached exhibits, of Kirk O. Kolbo. Michael Rosman's statement ("Rosman statement") and attached exhibits contain the information and materials submitted in support of the fees and costs of CIR. The supporting materials for Kerry Morgan are contained in his accompanying affidavit ("Morgan affidavit") with attached exhibits. The hours, rates, and costs as reflected in the statements, affidavit, and exhibits are briefly summarized as follows:

| | FEES | COSTS | TOTAL |
|---|---|---|---|
| MASLON LAW FIRM | $1,398,120.25 | $3,947.76 | $1,402,068.01 |
| CENTER FOR INDIVIDUAL RIGHTS | $254,230.75 | $330,363.00 | $584,593.75 |
| KERRY MORGAN | $84,616.00 | $75.08 | $84,691.08 |
| TOTAL | **$1,736,967.00** | **$334,385.84** | **$2,071,352.84** |

The hourly rates of each of the attorneys and staff for the Maslon firm represent the standard fee charged to clients by each attorney based on their experience and qualifications, all as explained in more detail in the Kolbo affidavit submitted in support of this application. *See* Kolbo affidavit at ¶ 12. While the Maslon firm is located in Minneapolis, Minnesota and CIR is located in Washington, D.C., the rates at which reimbursement is sought for Maslon and CIR are in line with the prevailing rates of law firms of comparable skill, knowledge, qualifications, experience, and reputation in the Detroit metropolitan area. This is shown from the affidavit of Detroit attorney Mark Kowalsky, who has practiced law in this jurisdiction for more than 20 years. *See* Affidavit of Mark Kowalsky at ¶ 7. As the Kolbo affidavit establishes, the Maslon firm rates are also in line with the prevailing markets rates of other private practice attorneys and firms in Minnesota, where Maslon is located. *See* Kolbo affidavit at ¶ 13. The rates submitted for CIR, a non-profit, *pro bono* public-interest law firm located in Washington, D.C., are comparable to prevailing market rates of attorneys in private practice in the Washington, D.C. area. *See* Rosman statement at ¶¶ 8-9. *See also Rosenberger v. Rector and Visitors of Univ. of Virginia*, No. Civ. A-91-00360-C, 1996 WL 537859, Slip Op. 7-8 (W.D. Va. Sept. 17, 1996) (finding CIR attorney rates reasonable) (attached as Exhibit T to Kolbo affidavit). Because the rates at which the Maslon firm and CIR seek reimbursement are consistent with the prevailing

market rates in this venue, there is no need to evaluate whether there is some basis for using a rate that is higher than the local prevailing rate. *See Adcock-Ladd*, 227 F.3d at 350-51. Finally, Attorney Morgan's rates are also based on the rates that he regularly and customarily charges clients for his work in Michigan. *See* Morgan affidavit at ¶¶ 7-10.

A review of the billing records submitted by plaintiffs establishes that plaintiffs' counsel practiced discretion and economy in their expenditure of time and costs in this action. This resulted because of counsels' efforts to work together without performing services that were redundant, inefficient, or simply unnecessary. *See Hensley*, 461 U.S. at 434. Plaintiffs' counsel have carefully reviewed the detailed billing and cost information identified in the accompanying affidavits and exhibits to ensure that the time and costs for which reimbursement is sought were reasonably and necessarily incurred in their representation of plaintiffs and the class. *See* Kolbo affidavit at ¶ 16; Rosman statement at ¶¶ 20-22; Morgan affidavit at ¶ 10. In the course of reviewing these itemizations, counsel made the decision in some instances to exclude time or expenses for one or more reasons that caused counsel to conclude that the item should not be included in this application. *See* Kolbo affidavit at ¶ 16; Rosman statement at ¶¶ 20-22.

The reasonableness of the fees and costs are evident in a number of respects. Plaintiffs litigated this case over a six-year period with substantially the same lawyers and staff. In the case of the Maslon law firm, which rendered the large majority of services for which reimbursement is sought, approximately 88 percent of attorney time is attributable to just three lawyers. *See* Kolbo affidavit at ¶ 15. In addition, plaintiffs have reason to believe that the fees and costs incurred by them in litigating this case are substantially less than the fees and costs incurred by the defendants. Information made available by the defendants to third parties through Freedom of Information Act requests indicates that the University defendants have spent

more than $10 million dollars in litigating the *Gratz* and *Grutter* cases. *See* Kolbo affidavit at ¶ 22 and attached Exhibit R. While plaintiffs do not have information on how this sum is allocated between the two cases, the combined total dwarfs what plaintiffs' counsel expended on the two cases. *See* Kolbo affidavit at ¶ 22.

Having documented with detailed affidavits and contemporaneous records the services performed for plaintiffs and the class member in this case, and having exercised discretion and judgment in billing as shown by the services excluded from this application, plaintiffs respectfully contend that they should be awarded in full the fees supported by the application. There can be no serious dispute that the "results obtained" in the litigation, *Hensley*, 461 U.S. at 434, which is "highly important," *Adcock-Ladd*, 227 F.3d at 349, to calculating the reasonable fee, were significant. As a direct result of plaintiffs' lawsuit, the University's admissions systems for all years at issue in the lawsuit have been adjudged unconstitutional and unlawful, and the University has been forced to change its system so that it complies with the law and respects the legal rights of plaintiffs and thousands of other individuals. Plaintiffs and the class members whose rights the University violated may now also pursue claims for damages against the University for its judicially established violations of constitutional and civil rights. Moreover, the results of the litigation benefit untold tens of thousands of future applicants to the University, who otherwise would have been subjected to the same unlawful treatment that the University dealt to plaintiffs and the class members who applied and were rejected for admission under the illegal systems. Finally, because of the national importance of the lawsuit, there can be little doubt that the results of this litigation will require other educational institutions to change their admissions systems to conform to the requirements of the Supreme Court's opinion in this case.

While plaintiffs have not yet prevailed on their claim against the individual defendants, Bollinger and Duderstadt,[5] for damages under 42 U.S.C. § 1983, that result is not grounds for reducing the lodestar calculation. The basis for the claim against the individual defendants is wrapped up inextricably with the claims against the University for the unlawfulness of the admissions systems. As the Sixth Circuit has explained, "[t]he Supreme Court has instructed that, where 'the plaintiff's claims for relief . . . involve a common core of factor or [are] based on related legal theories":

> Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim by claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

*Wayne v. Village of Sebring*, 36 F.3d 517, 532 (6th Cir. 1994) (quoting *Hensley*, 461 U.S. at 435).

For similar reasons, plaintiffs' lodestar fee calculation should not be reduced on any theory that the Supreme Court has held that race and ethnicity can be considered as a factor in admissions to achieve an interest in student body diversity. Plaintiffs at all times in this litigation pursued alternative legal theories in their ultimately successful effort to strike down the admissions systems for all years at issue. Under such circumstances, the Supreme Court and Sixth Circuit have held that the prevailing party's fee should not be reduced for having prevailed on fewer than all contentions:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass

[5] Because the Sixth Circuit did not decide any of the issues appealed in this case and heard by it on December 6, 2002, the liability of the individual defendants is one of those issues that is now back before this Court as part of the Sixth Circuit's remand following the Supreme Court's opinion.

> all hours reasonably expended on the litigation. . . . In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

*Hensley*, 461 U.S. at 435; *Wayne v. Village of Sebring*, 36 F.3d at 532.

Plaintiffs seek reimbursement for their fees on the basis of the current 2004 rates of the Maslon firm, CIR, and Mr. Morgan. This is a commonly accepted method of compensating a plaintiff for the delays in payment occasioned by years of work with no fee. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274 , 283 (noting that "compensation received several years after the services were rendered—as it frequently is in complex civil rights litigation—is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings."); *id.* at 284 (approving use of current rates as one method of compensating for delay in payment); *Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 274-76 (6th Cir. 1983); *Northcross v. Board of Educ.*, 611 F.2d 624, 640 (6th Cir. 1979); *Copeland v. Marshall*, 641 F.2d 880, 893 n.23 (D.C. Cir. 1980) (en banc) (approving use of current rates); *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 20 n.104 (D.C. Cir. 1984); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 955 (1st Cir. 1984); *Gates v. Deukmejian*, 987 F.2d 1392, 1406-07 (9th Cir. 1992) (approving use of current rates); *Daly v. Hill*, 790 F.2d 1071, 1080-81 (4th Cir. 1986); *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983). This is certainly a case—one that has been pending for more than six years—where it is appropriate to compensate plaintiffs for the delay in collecting fees that were originally incurred years ago. The affidavits submitted in support of the fee applications for the Maslon firm, CIR, and Kerry Morgan all identify the current 2004 rates for each of these firms.

On the basis of settled authority and the circumstances of this protracted litigation, awarding fees at the current rates for the personnel of these firms is the best and most reasonable means of compensating plaintiffs for the delay in payment of fees

### C. Plaintiffs' Fee Award Should Include Reimbursement of Litigation Expenses, Paid with Interest to Compensate for Delay in Payment.

As prevailing parties, plaintiffs are also entitled to reimbursement of their out-of-pocket expenses incurred in the litigation. These costs are recoverable either as taxable costs under 28 U.S.C. § 1920 or as part of the recovery of a reasonable attorney's fee under 42 U.S.C. § 1988. *See, e.g., Northcross v. Board of Education*, 611 F.2d 624, 639 (6th Cir. 1979). The costs for which plaintiffs seek reimbursement are of the kind typically incurred in litigation and which would ordinarily be billed to the client over and above the hourly fee charged for rendering professional services. The Kolbo affidavit and Rosman statement contain detailed itemizations of the litigation costs incurred, which generally include the following:

> transportation, lodging, and meal expenses necessitated by travel
> court reporter invoices;
> photocopying
> long distance phone calls and facsimile transmissions;
> computerized legal research
> postage and express delivery services
> expert fees

These kinds of costs are routinely awarded to prevailing plaintiffs in civil rights litigation. *See, e.g., Northcross v. Board of Educ.,* 611 F.2d 624 (6th Cir. 1979) (§ 1988 authorizes award of such expenses as photocopying, paralegal expenses, travel and telephone costs); *Perotti v. Seiter*, 935 F.2d 761 (6th Cir. 1991) (decision as to whether to compensate plaintiffs' counsel for time spent in travel is within court' discretion in awarding attorneys' fees); *Heiar v. Crawford County*, 746 F.2d 1190, 1203-04 (7th Cir. 1984) (postage); *West Virginia University Hosps.,*

*Inc. v. Casey*, 898 F.2d 357, 366 (3d Cir. 1990) (long-distance phone calls); *Redding v. Fairman*, 717 F.2d 1105, 1119 (7th Cir. 1983) (transportation); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1188-92 (11th Cir. 1983) (food); *Haroco, Inc. v. American Nat'l Bank & Trust*, 38 F.3d 1429, 1440 (7th Cir. 1994) (computerized legal research). In addition, § 1988(c) explicitly provides that a plaintiff who prevails under 42 U.S.C. § 1981, as plaintiffs did in this case, may be awarded their expert witness fees. The great preponderance of costs incurred in this case were borne by CIR, for which it seeks reimbursement in the amount of $330,363.00 as shown from the Rosman statement. *See* Rosman statement at ¶ 1. In addition, the Maslon law firm incurred unreimbursed costs in the amount of $3,947.76, for which it seeks reimbursement as part of this application. *See also* Kolbo affidavit at ¶ 18.

The same principles that justify using current rates to compensate for delay in payment of attorneys' fees to a prevailing party make it appropriate to adjust reimbursement of litigation expenses to compensate for this same delay in payment. For obvious reasons, expenses cannot be adjusted to reflect "current rates," but courts have compensated for the delay in payment by adding interest, usually at the prime rate, from the date that the expenses were incurred. *See, e.g., Harris Trust and Sav. Bank v. John Hancock Mut.*, 137 F. Supp. 2d 351, 361 (S.D.N.Y. 2001); *Cohen v. Brown Univ.*, Civ. No. 99-485-B, 2001 US Dist LEXIS 20714, *7 (D.N.H. Dec. 5, 2001 (attached as Exhibit S to Kolbo affidavit); *Rosenberger v. Rector and Visitors of University of Virginia*, 1996 WL 537859, at *7 (W.D. Va. Sept. 17, 1996) (attached as Exhibit T to Kolbo affidavit). Accordingly, plaintiffs have calculated interest on the basis of the average

prime rate for each year, as explained in the Rosman statement, and added it to the amount of the costs incurred by CIR. *See* Rosman statement at ¶ 35.[6]

## CONCLUSION

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

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[6] Because of the relatively small amount of costs incurred by the Maslon law firm, interest is not being sought on this sum.