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

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

Plaintiff's Memorandum in Opposition to Motion for Intervention

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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,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISES MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS, DEANNA A. SMITH, ALICE BRENNAN,

IVY RENE CARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Proposed Defendant-Intervenors.

I. Introduction

Plaintiffs submit this memorandum in opposition to the motion to intervene of various Michigan high school students and "Citizens for Affirmative Action's Preservation" (hereinafter collectively referred to as "applicants"). As discussed below, applicants plainly do not have a protectable legal interest in this action Ä a prerequisite to intervention as a matter of right under Rule 24(a). Even if they had such an interest, the motion to intervene is at minimum premature insofar as the allegations relating to the required proof of "impairment of interest" and "inadequate representation" are mere speculations about positions or arguments that defendants may or may not assert in defense of their admissions policies and practices. Until defendants have at least answered interrogatories about, among other things, the nature of the "compelling interest(s)" claimed by defendants as justification for their race-based admissions policies, there is no record from which to conclude that whatever interests applicants have may be impaired or that they will not be adequately represented by defendants.

The Court should also deny the alternative motion for permissive intervention under Rule 24(b) for the reason that applicants have no legally cognizable claim or defense for which

there could be a "question of law or fact in common" with the parties to this lawsuit. Granting the motion would also unduly

delay and prejudice adjudication of the parties' rights in this action because of the extraneous and hypothetical issues that applicants propose to litigate.

II. Argument

A. Applicants are not entitled to Intervention as a Matter of Right under Rule 24(a)

Intervention as a matter of right under Rule 24(a) requires the proposed intervenors to demonstrate that all four criteria of the rule have been met: (1) that the motion is timely; (2) that the proposed intervenors have a "significant legal interest" in the subject of the pending litigation; (3) that the disposition of the action may impair or impede the proposed intervenors' ability to protect their legal interest; and (4) that the parties to the litigation cannot adequately protect the proposed intervenors' interest. See, e.g., Jansen vs. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990). In this case, applicants are unable to meet the second and third elements of the rule because they have no "significant legal interest" that could be impaired in this litigation. As to the fourth element, applicants have brought their motion at such an early and premature stage of the litigation that, even assuming they had a protectable interest, there is no basis in the record from which to conclude that

defendants could not adequately protect that interest.

1. Applicants Lack a "Protectable Legal Interest" in this Action

The Supreme Court has determined that the Rule 24(a) requirement of an "interest relating to property or transaction which is the subject of the action" means a "significantly protectable interest." Donaldson v. United States, 400 U.S. 517 (1971). The Sixth Circuit repeatedly has required that the

interest in the litigation be a "direct, substantial interest" that "must be `significantly protectable.'" See, e.g., Purnell v. City of Akron, 925 F.2d 941 (6th Cir. 1991); Grubbs v. Norris, 870 F.2d 343, 346 (6th Cir. 1989) ("interest must be significantly protectable." The Sixth Circuit has also described the interest as one that must be a legally protectable interest. See, e.g., Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997) (appropriate focus under Rule 24(a) is "whether [applicant for intervention] has a legal interest in [the] case that is substantial enough to warrant intervention as a matter of right"); Jansen v. City of Cincinnati, 904 F.2d 336, 341 (6th Cir. 1990) ("[a]pplicants for intervention as a matter of right must have a significant legal interest in the subject matter of the litigation"); Stotts v. Memphis Fire Department, 679 F.2d 579, 582 (6th Cir. 1982) (intervention denied where there was no "legally protected interest").

Two flaws loom particularly large in applicants' argument that they have the kind of "interest" in this lawsuit that Rule 24(a) requires. First, although applicants reiterate throughout their memorandum that they have an "interest," even a "vital interest" in the case, nowhere do they explain how that interest is "significantly protectable" or even just "protectable." Their reasoning is ipse dixit: applicants assert that they have an "interest" in the case sufficient under Rule 24(a); therefore they must have one. As explained in the discussion of cases below, the law requires much more than applicants have shown.

Plaintiffs' lawsuit challenges the lawfulness of the racially discriminatory admissions policies and practices of defendants from 1995 to the present. Applicants undisputably are desirous of preserving and defending the defendants' policies, and applicants may be able to show they would actually benefit from the policies. Those showings, however, certainly do not amount to demonstration of a "significantly protectable interest;" the argument that applicants have a desire and interest in preserving the defendants' system of racial preferences is not in law or logic an argument that they have a "protectable interest."

Applicants argument for an "interest" sufficient under Rule 24(a) evaporates upon the answer to one question: What protection or entitlement could applicants claim if defendants unilaterally and voluntarily ceased use of racial preferences in admissions?

They claim none and have none. Defendants have not pled in their answer, and applicants have not argued in their memorandum that any constitutional, statutory, or contractual provision obligates defendants to maintain the policies challenged by plaintiffs. Defendants and applicants no doubt contend that defendants' policies are defensible on the basis of Justice Powell's concurring opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). The legal disconnect in applicants' reasoning, however, is their implied and false assumption that what defendants are allegedly permitted to do equates to something to which applicants are entitled, a "significantly protectable legal interest."[1] There is no basis in law for such a conclusion.[2]

The second flaw permeating applicants' argument for an "interest" under Rule 24(a) is one that demonstrates both the legal insufficiency of their position and the serious practical complications that will burden this Court and the parties if the motion is granted. Applicants want to expand the scope of this lawsuit well beyond anything put in issue by the complaint and answer. They offer the parties and the Court the opportunity to try two cases instead of one, the first being plaintiffs' challenge to defendants' past and present admissions policies, and the second consisting of applicants' complaint against some future, hypothetical admissions policy that allegedly will deny

them "access" to the University of Michigan. 3 The offer should

1 That applicants miss this point is evident in their heavy reliance on cases where a protectable legal interest is clearly present. For example, applicants cite to cases involving consent decrees, which given the parties to the agreed upon and court approved decrees enforceable legal rights. See, e.g., Jansen vs. City of Cincinnati, 904 F.2d 336 (6th Cir. 1990). Similarly, in the school desegregation cases, where there has been de jure segregation in the past, there is a recognized legal interest under the Fourteenth Amendment in eliminating the discrimination. See also, e.g., Freeman vs. Pitts, 503 U.S. 467, 494 (1992) (once school district has remedied racial imbalance due to de jure segregation, there is no further duty to remedy imbalance caused by demographic factors).

2 This argument for denying intervention does not, of course, require resolution of the merits of defendants' or applicants' contentions about Bakke. The point is that even if defendants' policies were permissible under Bakke, applicants have not shown that they have their own "legally protected interest" in the voluntary, continued use of those policies.

3 Applicants cite, for example, to reported drops in minority admissions at the University of California at Berkeley and the University of Texas, and to literature on the performance of minorities on standardized tests. See Applicants' Memorandum at p.7 & n.7, and p.12, n.11. How can applicants divine that plaintiffs' success in this lawsuit will result in adoption of a particular admissions system employed by another institution, or that defendants will even continue to use standardized tests in considering admissions?

be rejected because the additional time, expense, and protracted litigation devoted to this second issueÄsolely attributable to the interventionÄwould necessarily all be for naught. Until and unless defendants implement or announce implementation of a specific admissions policy that applicants find objectionable, there is no justiciable issue for this Court to decide about such a policy. Moreover, contrary to applicants contentions about stare decisis, no amount of success by plaintiffs in this lawsuit precludes or even hinders applicants from mounting a legal chal-

lenge to some future, actual admissions policy that applicants believe to be unlawful. The doctrine of stare decisis does not mean, as applicants imply, that a successful challenge to defendants' existing policies impairs or impacts a challenge to a subsequent and different policy.4 Moreover, the United States Supreme Court made clear in Martin vs. Wilks, 490 U.S. 755 (1989), that individuals not parties to a discrimination case or any consent decree entered in that case cannot be precluded from litigating in a subsequent case their rights as affected by the consent decree.

4 In considering the Sixth Circuit's recognition in Jansen vs. City of Cincinnati, 904 F.2d 336 (6th Cir. 1990), of the possible adverse effects of stare decisis as factor under Rule 24(a), it remains important to note that Jansen concerned a claim by the intervenors that the same consent decree they had negotiated with the city had become the subject of litigation to which the proposed intervenors would not be a party unless the intervention was allowed. Thus, the proposed intervenors were faced with the possibility that a court ruling on a consent decree they had negotiated would have stare decisis consequences without any participation by them. Applicants here can show no such relationship between defendants' present admissions policies and some hypothetical, future admissions policies that defendants may implement.

Cases

The case principally relied upon by applicants, Jansen v. City of Cincinnati, 904 F.2d 336 (6th Cir. 1990), actually presents one of the best illustrations of the reasoning that compels denial of intervention in this case. In Jansen, the applicant intervenors were black firefighters who had been members of a

certified class that had entered into a court-approved affirmative action program with the city of Cincinnati to eliminate discrimination in hiring and promotions in the fire department. Subsequent to entry of the consent decree, several white applicants who had been denied admission to the fire recruit class commenced suit against the city. The white applicants alleged violations of the consent decree as well as civil rights violations under 42 U.S.C. Sections 1981, 1983, and 1988.

The district court in Jansen denied the motion to intervene as a matter of right because, among other reasons, the black fire fighters lacked a protectable interest in the suit of the white applicants. In reversing, the Sixth Circuit made clear throughout its discussion of the "interest" requirement of Rule 24(a) that the black fire fighters had a sufficient legal interest for intervention as a matter of right because of their status as parties to the consent decree under challenge in the suit of the white applicants:

> . . . . . The proposed intervenors, present and future black applicants for employment and promotion. . . . . are parties to the consent decree challenged in this action. The consent decree governs hiring and promotion decisions in the Division of Fire by setting goals for minority hiring and timetables for achieving racial

> integration. At stake in this litigation is the proposed intervenors' interest in continuing affirmative action under the consent decree.
>
> . . . . . The subject matter of the litigation requires an interpretation of the consent decree negotiated by

> the proposed intervenors and the City when they were in the midst of an adversarial relationship. Therefore, as parties to the consent decree, the proposed intervenors have a significant legal interest in its interpretation.

904 F.2d 336, 342 (emphasis in original).

In deciding that the black applicants in Jansen could intervene as a matter right because of their "legal" interest as "parties" to the consent decree under challenge, the Sixth Circuit cited approvingly to an Eleventh Circuit case that applicants in this action have also relied upon, In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987), aff'd. sub nom. Martin v. Wilks, 490 U.S. 755 (1989). See 904 F.2d. at 341-42. As in Jansen, the proposed intervenors in In re Birmingham were black applicants and employees of the city's fire department who had entered into a court-approved affirmative action program subsequently challenged in a lawsuit against the city commenced by white fire fighters. In concluding that the district court should have permitted intervention as a matter of right by the black individuals, the Eleventh Circuit noted that the applicants for intervention were "the same individuals who had filed a class action" against the city and who "represented the interests of persons whose jobs were directly at stake" in the lawsuit commenced by the white

fire fighters. 833 F.2d at 1496 & nn. 12 & 13. See also, e.g.,

Baker v. City of Detroit, 504 F. Supp. 841 (E.D. Mich. 1980) (black police officers allowed to intervene in suit against city challenging court-approved affirmative action program).5

Applicants comment in a footnote that the "Sixth Circuit has . . . . made clear that prospective intervenors need not

5 Applicants cite to several cases from jurisdictions outside the Sixth Circuit on the issue of the sufficiency of the "interest" required under Rule 24(a). See Applicant' Memorandum at p. 5. The Sixth Circuit cases cited herein are dispositive of the issue, although the cases cited by applicants do not present a case for an outcome different from what Sixth Circuit analysis requires. In Associated General Contractors v. City of New Haven, 130 F.R.D. 4 (D. Conn. 1990), minority owned businesses were allowed to intervene in actions challenging a statutorily mandated affirmative action program that entitled minority owned businesses to certain percentages of government contract awards. As in litigation over consent decrees, the intervenors were seeking to protect their entitlement to a benefit conferred by a law directly challenged in the lawsuit.

Applicants also cite to a district court opinion in Podberesky v. Kirwan, 838 F. Supp. 1075 (D. Md. 1993), which involved a challenge to a program setting aside certain scholarships at the University of Maryland for minority students only. Although the court's opinion indicates that several minority recipients of the scholarships were intervenors, the case contains no discussion or analysis of the issue, and there is no indication that the motion for intervention was even opposed. The Fourth Circuit case reversing and remanding the district court opinion also contains no consideration of the propriety of allowing intervention. Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995). Moreover, the factual background from which the various district court and appellate decisions arose in Podberesky included a finding that the black-only scholarships offered by the University of Maryland were "intended as a partial remedy for past discriminatory action." Podberesky vs. Kirwan, 956 F.2d 52, 54-55 (4th Cir. 1992). The black scholarship program had been adopted after three prior remedial plans had been rejected by the Office for Civil Rights. Id; see also, e.g., Hopwood vs. Texas, 861 F. Supp. 551, 569 (W.D. Tex. 1994) (noting that blacks-only scholarship in Podberesky had been "adopted in response to protracted litigation and OCR guidelines"), vacated and remanded on other grounds, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

demonstrate a legal or equitable interest" in an action for which they seek intervention." Applicants' Memorandum at p. 4 n. 3. The Sixth Circuit case cited for that proposition, Purnell v. City of Akron, 925 F.2d 941 (6th Cir. 1991), is more interesting and complex on this issue than applicants' memorandum suggests. Purnell concerned a motion for intervention in a federal wrongful death action by two individuals who claimed to be the illegitimate children of the decedent. The two children also had pending a separate state court action to determine paternity and heirship under Ohio law. At the time the children moved to intervene as a matter of right in the wrongful death action (and at the time the appeal was decided), the paternity and heirship issues had not been resolved in the state court proceeding.

In reviewing the district court's denial of the motion to intervene, the Sixth Circuit noted the definitions of "litigable interest" under 24(a)(2), including the Sixth Circuit's prior rulings that there must be a "direct, substantial interest" in the litigation that must be "significantly protectable." 925 F.2d at 947 (quoting Jansen v. City of Cincinnati, 904 F.2d 336, 341 (6th Cir. 1990)).6 The Purnell case posed two questions regarding whether the children seeking intervention had a protectable interest in the wrongful death action. The court noted first that "[w]hether the . . . children claim an interest

6 As noted in the earlier discussion of the Sixth Circuit's definition of "interest," the Jansen Court also stated that "[a]pplicants for intervention as a matter of right must have a significant legal interest in the subject matter of the litigation." 904 F.2d at 341 (emphasis added).

relating to the property or transaction that is the subject of [the wrongful death action] depends in large part on the right of an illegitimate child to sue for the wrongful death of his or her biological father. If illegitimate children have no such rights, then the children would have no basis to intervene under Rule 24(a)(2)." 925 F.2d at 941 (emphasis added). After concluding that there was such a right of recovery for illegitimate children under Ohio law, the remaining question was whether the children had a protectable interest prior to any adjudication of their paternity by the decedent. The court concluded that the children had an "indirect" interest that was "contingent" on proof of their paternity by decedent:

> . . . . Although the [children] have a legally protectable interest related to the transaction at issue if they are in fact [the decedent's] children, that interest may be classified as indirect or contingent until paternity is proved.

925 F.2d at 947 (emphasis in original). The court held therefore, that the requirement of "interest" was met sufficiently to hold in abeyance the motion to intervene until the paternity issue was resolved. Id. at 950, 954 ("circumstances . . . adequately satisfy the requirements of Rule 24(a)(2) and therefore justify holding in abeyance the motion to intervene until the paternity issue is resolved, one way or the other". . . . "[the children] claim a sufficient interest to justify holding the motion for intervention in abeyance until the paternity issue is

resolved").[7]

7 For the same reasons, the court concluded that the district court should have "granted permissive intervention contingent

Michigan State AFL-CIO vs. Miller, 103 F.3d 1240 (6th Cir. 1997), also fails to support the applicants' case for intervention in this action. Miller concerned a legal challenge to Michigan legislation that restricted the right of labor unions to take automatic deductions from union members' paychecks for the purpose of allowing the union to make political contributions. The state of Michigan appealed a district court order enjoining enforcement of the law, and the Michigan Chamber of Commerce petitioned to intervene as a defendant in order to argue for the validity of the legislation. In reversing the district court's denial of the motion to intervene as a matter of right, the Sixth Circuit concluded that the intervention issue was a "close one" that "in view of the facts unique to this particular case" justified holding that the Chamber had a "substantial legal interest" in the litigation. 103 F.3d at 1247. In support of that conclusion, the Sixth Circuit cited four factors, all pertaining to the intervenor's status in relation to legislation or state regulation of the Chamber under the challenged legislation.[8]

upon resolution of the paternity determination"). 925 F.2d at 950-51.

8 The four "particularly compelling facts" cited by the Court in Miller were that the Chamber was (1) a vital participant in the political process that resulted in the legislation; (2) a repeat player in the litigation concerning the legislation; (3) a

significant party adverse to the challenging union in the political process surrounding regulation under the legislation; and (4) an entity regulated by at least three of the four statutory provisions challenged by the plaintiff unions. 103 F.3d at 1246-47. Applicants here have not even attempted to make a similar showing in the context of the defendants' admissions policies. Moreover, the intervention pleadings leave almost a complete mystery as to the identity and background of the organizational applicant for intervention, "CAAP." Applicants have made no showing on their identity and interests in relation

Applicants also erroneously suggest that the Sixth Circuit's decision in Bradley v. Milliken, 828 F.2d 1186 (6th Cir. 1987), supports the sufficiency of the "interest" alleged in this case. Bradley involved the remedial stage of a class action school desegregation case, in which a black parent group and approximately 60 individuals appealed from a district court's denial of a motion to intervene. The Sixth Circuit in Bradley merely assumed that a protectable interest had been proven, and then affirmed the denial of the motion for intervention on grounds that the interests of the proposed intervenors were adequately protected by the plaintiffs. Id. at 1192.9

A number of other cases within the Sixth Circuit demonstrate the insufficiency applicants' claimed interest for the purposes of Rule 24(a)(2). In Stotts v. Memphis Fire Department, 679 F.2d 579 (6th Cir. 1982), eleven non-minority firemen employed by the city of Memphis sought to intervene in a class action alleging that the city fire department had racially discriminatory hiring

to the lawsuit as was done by the Chamber of Commerce in Miller and the public interest group allowed to intervene in the Ninth Circuit case cited by applicants, Idaho Farm Bureau Federation

vs. Babbitt, 58 F.3d 1392 (9th Cir. 1995).
9 The Bradley Court commented that "it has generally been accepted that students, parents of children in the school system and parent organizations have a sufficient interest in eliminating segregation in the schools to satisfy" the interest requirement of Rule 24(a)(2). 828 F.2d at 1192. This description does not apply even in a general way to applicants in this case, who are not seeking to eliminate or challenge any existing illegal condition as it applies to them (e.g., segregation) at the University of Michigan. See also Hatton v. County Board of Education, 422 F.2d 457 (6th Cir. 1970) (intervenors in county school desegregation case were residents of the county and parents of children enrolled in the schools that were subject of segregation claims.)

and promotion practices. The proposed intervenors sought to challenge a proposed consent decree entered into between the plaintiffs and the city. The Sixth Circuit affirmed denial of the motion to intervene in part on the ground that the non-minorities did not have a legally protectable interest in the class action suit:

> . . . . [T]he 1980 Decree does not harm or adversely affect any legally protected interest of non-minorities. Id. There is no legally cognizable interest in promotional expectations which presumptively could only occur as the result of discriminatory employment practices.

679 F.2d at 582 (emphasis added); see also, e.g., Youngblood v. Dalzell, 123 F.R.D. 564 (S.D. Ohio 1989) (non-minorities did not have significant protectable interest sufficient to intervene in action relating to consent decree approving affirmative action program in city fire department); Youngblood v. Dalzell, 625 F. Supp. 30 (S.D. Ohio 1985) (same), aff'd, 804 F.2d 360 (6th Cir. 1986), cert. denied, 480 U.S. 935 (1987); Brewer v. Republic

Steel Corp., 513 F.2d 1222 (6th Cir. 1975) (Ohio Civil Rights Commission did not have "direct, substantial interest" sufficient to intervene in action relating to federal civil rights laws, which were outside the scope of the Commission's duty and interest); United States v. ABC Industries, 153 F.R.D. 603 (W.D. Mich. 1993) (denying intervention as a matter of right in CERCLA action because proposed intervenors did not have "direct, substantial, and legally protectable interest");

Because applicants plainly cannot establish that they have

any protectable legal interest in this action, their motion should be denied for that reason alone. It follows from the demonstrated absence of a protectable legal interest that applicants also do not meet the "impairment" prerequisite of Rule 24(a). As already discussed above, whatever objections applicants may someday have to the future admissions policies of defendants can be fully litigated at the time such policies become known; at present, applicants complaints are entirely speculative and hypothetical.

2. Applicants Cannot Show Indadequate Representation; the Motion is Premature

Even assuming that applicants could demonstrate a protectable legal interest that may be impaired in this lawsuit, they have not met their burden of demonstrating inadaquate repre-

sentation of their interests by defendants. A fundamental problem with applicants' motion is that it has been brought at such an early stage of the litigation that the allegations made in its support are based on speculation and guess. Applicants candidly acknowledge that "Defendants' cursory response to Plaintffs' complaint reveals little about Defendants' intended defense of the University's admissions programs." See Applicants' Memoranduam at p. 8. It should follow from such an acknowledgement that there is insufficient information from which to conclude whether applicants can demonstrate inadequacy of representation. That the Sixth Circuit has said that the burden to demonstrate

inadequate representation is "minimal" does not mean that applicants can meet it with an entirely hypothetical showing.

The Sixth Circuit cases cited by applicants do not support their argument that they have met the burden here. In Michigan State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997), for example, the court stated that "it may be enough to show that the existing party who purports to seek the same outcome will not make all of the intervenor's arguments." Id. at 1247. Applicants here have not met even that minimal burden; they merely guess (because defendants'a answer "reveals so little") that they will make arguments different from the defendants. Moreover, the

facts in Miller demonstrated adversity and inadequcy of representation in that the party to whom the intervenor was to look for representation, the state of Michigan, had already failed to appeal a ruling adverse to the intervenor. Id. at 1248 ("The State of Michigan has already demonstrated that it will not adequately represent and protect the interests held by the Chamber [intervenor]").

Jansen v. City of Cincinnati, 904 F.2d 336 (6th Cir. 1990), also relied upon by applicants, only further demonstrates the absence of showing here on inadequacy of representation. The proposed intervenors in Jansen, black firefighters seeking to uphold the validity of a consent decree against a challenge by white firefighters, were already in litigation concerning the consent decree against the party (the city) to whom they were to look for adequate representation. Id. at 343 ("This fact

alone weighs heavily in favor of finding that the City inadequately represents the interests of the proposed intervenors"). Moreover, the city had already demonstrated that it would not rely on a provision in the consent decree negotiated by the city and the proposed intervenors, so that the court could conclude that "the City and the proposed intervenors have divergent views regarding the proper interpretation of the consent decree." Id.

Several Sixth Circuit cases demonstrate the insufficiency of

applicants' showing on adequacy of representation, at least on the present record. In Hatton v. County Board of Education, 422 F.2d 457 (6th Cir. 1970), the Sixth Circuit determined that parents of students in the county's segregated school district had a protectable interest in a desegreation suit against the county, but denied the motion to intervene because of a failure to show inadequate representation:

> There is nothing in petitioner's motion papers to indicate that their interests as residents of Maury County and parents of children attending the public schools are not being adequately represented by the present defendants. The record indicates that the defendants have advanced every reasonable defense to this action, and petitioners have made no allegation of collusion, bad faith, or gross negligence on the part of the Board of education in defending the suit.

Id. at 461.

In Bradley v. Milliken, 828 F.2d 1186 (6th Cir. 1987), the Sixth Circuit considered a motion to intervene during the remedial stage of a school desegretation case. The proposed intervenors and the class representatives had different views on

modifications to the remedial aspects of the consent decree. The Court rejected several arguments urged by the proposed intervenors on the issue of inadequacy of representation:

> . . . . A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation. . . . .

. . . .

> . . . . It appears evident to us that the present class representatives and proposed intervenors share the same ultimate objective in a unitary school district. Although the litigation strategy has altered, this objective has not been abandoned by current counsel. We cannot say at this point in the litigation and upon this record that the agreed-upon modifications in [the consent decree] so harm members of the plaintiff class and the proposed intervenors that the class representatives have failed to fulfill their duty. . . . On the basis of the record before us, we simply cannot find that such differences of opinion lead to a conclusion that representation has been inadequate to protect the interests of the proposed intervenors.

828 F.2d at 1192-93 (emphasis added) (citations omitted).

In Stotts v. Memphis Fire Department, 679 F.2d 579 (6th Cir. 1982), the Sixth Circuit affirmed denial of a motion for intervention by non-minority firefighters who sought to challenge a consent decree entered into between minority firefighters and the city. In rejecting the claim that the city could not adequately represent the interests of the non-minorities, the Court stated:

> The City, an existing party to the litigation, protected the legally protected interest of non-minorities. At the outset of the litigation, the objective of the City was to refute the allegations of discrimination and maintain the status quo. Maintenance of the status quo was consistent with the objectives and the protection of the legally protected interests of the non-minorities.

Id. at 579; see also, e.g., Hopwood vs. Texas, 21 F.3d 603, 605 (5th Cir. 1994) (denying

motion for intervention on ground that proposed intervenors had not shown that their interests

would not be adequately represented by governmental entity and noting that "where the party whose representation is said to be inadequate is a a governmental agency, a much stronger showing of inadequacy is required"); 7C C. Wright & A. Miller, Federal Practice and Procedure, Section 1909, at 333-339 (1986) (also noting that greater showing on inadequacy of representation is required when party said to be inadequate is a governmental agency).

In this case, with little more in the record than the complaint and answer, applicants have not met even their minimal burden to demonstrate inadequacy of representaiton. Assuming that applicants had made a showing of a significantly protectable interest that might be impaired in this case, it is not possible on the basis of this scarce record to determine whether defendants could adequately represent those interests. If all the other required elements of intervention as a matter of right were present, a determination on adequacy of representation should, at a minimum, await defendants' service of answers to plaintiffs' interrogatories and document requests served shortly after commencement of the action.[10]

10 Plaintiffs served defendants a first set of interrogatories and document requests on December 24, 1997. Pursuant to agreement of the parties, defendants will respond to the discovery requests by March 20, 1998.

B. The Court Should Not Grant Permissive Intervention under Rule 24(b)

Applicants alternatively seek an order allowing permissive intervention under Rule 24(b). Permissive intervention in this case requires that applicants' "claim or defense and the main action have a question of law or fact in common." Rule 24(b).11 Whether to grant or deny permissive intervention is a matter committed to the sound discretion of the court, which should consider whether the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Id; see also, e.g., Bradley v. Milliken, 828 F.2d 1186, 1193-94 (6th Cir. 1987); Meyer Goldberg, Inc. v. Goldberg, 717 F.2d 290 (6th Cir. 1983); Afro American Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974). This Court should deny applicants' motion in this case for all the reasons contemplated by Rule 24(b). As discussed at length above, applicants have no cognizable claim or defense that presents a question of law or fact in common with the original parties. Moreover, allowing intervention will surely complicate, delay, and prejudice adjudication of this case because applicants desire to expand the subject matter of the litigation well beyond the legal and fact issues placed in issue by plaintiffs' complaint and defendants' answer. As noted in the discussion under Rule 24(a), applicants effectively seek to try both this case and the one after it: they desire to defend the defendants' current admissions policies by litigating what

11 Applicants make no argument that permissive intervention should be granted for the other ground stated in Rule 24(b): a statute of the United States conferring a conditional right to intervene.

applicants believeÄin the exercise of rampant speculationÄwill be the future admissions policies and practices of defendants. Applicants have neither the need nor the right to litigate such issues in this case or at this time. Neither the parties nor the Court should be burdened with the extraneous and hypothetical issues presented by applicants' motion.12

III. Conclusion

For all of the foregoing reasons, applicants have failed to meet there burden of proving entitlement to intervention as a matter of right under Rule 24(a) or permissive intervention under Rule 24(b). Plaintiffs respectfully request therefore that the Court deny the applicants' motion.

Dated:

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12 Denial of the motion for intervention under 24(a) and (b) does not, of course, preclude the Court from permitting the applicants or others to participate in the case at some stage through filing of briefs as amicus curiae. See, e.g., Bradley v. Milliken, 620 F.2d 11141, 1142 (6th Cir. 1975); Brewer v. Republic Steel Corporation, 513 F.2d 1222, 1225 (6th Cir. 1975).

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