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

JENNIFER GRATZ AND PATRICK HAMACHER, for themselves and all others similarly situated, Plaintiffs v. LEE BOLLINGER, JAMES J DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN Defendants -and- EBONY PATTERSON, ET AL., Intervening Defendants	Civil Action No. 97-75231 Hon. Patrick J. Duggan Hon. Thomas A. Carlson PLAINTIFFS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY

Plaintiffs and the class, by and through counsel, hereby respectfully move the Court for an Order as follows:

1. Granting summary judgement on liability, pursuant to Federal Rule of Civil Procedure 56, in favor of Plaintiffs and the class and against Defendants The Board of Regents of the University of Michigan ("University"); and Lee Bollinger, in his official capacity as president of the University of Michigan.

2. Declaring that the University and Lee Bollinger , acting in his official capacity, have violated Plaintiffs' rights and the rights of the class under the Equal Protection Clause of the Fourteenth Amendment; and (with respect to the University) Title 42 U.S.C. §2000d (Title VI of the Civil Rights Act of 1964); and (with respect to Defendant Bollinger, acting in his official capacity) Title 42 U.S.C. §§ 1981, 1983.

3. Permanently enjoining the University and Lee Bollinger, acting in his official capacity,

from engaging in the future in illegal race discrimination practices in admission of students to the LSA.

The motion is brought on the basis of the accompanying memorandum of law, affidavit and exhibits, and the summary judgment memorandum and exhibits filed by plaintiffs on April 8, 1999 and May 30, 1999.

On April 1, 1999, the undersigned counsel had a conference with attorneys for defendants, explained the nature of the motion and its legal basis, and requested but did not obtain concurrence in the relief sought.

PENTIUK, COUVREUR & KOBILJAK, P. C.

By_____
Kerry L. Morgan
Suite 230, Superior Place
20300 Superior Street
Taylor, MI 48180-6303
734/374-8930

David F. Herr, #44441
R. Lawrence Purdy, #88675
Kirk O. Kolbo, #151129
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
612/672-8200
Michael E. Rosman
Michael P. McDonald
CENTER OR INDIVIDUAL RIGHTS
1233 20th Street, NW
Suite 300
Washington, D.C. 20036
202/833-8400

ATTORNEYS FOR PLAINTIFFS

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS PARTIAL SUMMARY JUDGMENT ON LIABILITY

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the record shows that there is no genuine issue of any material fact and that plaintiffs and the class are entitled as a matter of law to partial summary judgment on liability because defendants' race-conscious admissions policies and practices for the

College of Literature, Science and the Arts (LSA) violate the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 2000d under the rationale articulated by Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

2. Whether the record shows that there is no genuine issue of any material fact and that plaintiffs and the class are entitled as a matter of law to partial summary judgment on liability under 42 U.S.C. § 2000d because defendants claim that their race-conscious admissions policies and practices are motivated by an interest in "diversity," which is not a "compelling governmental interest" for strict scrutiny analysis under the Equal Protection Clause of the Fourteenth Amendment.

3. Whether the record shows that there is no genuine issue of any material fact and that plaintiff and the class are entitled as a matter of law to partial summary judgment on liability against defendant Bollinger acting in his official capacity, for violating 42 U.S.C. §§ 1981 and 1983.

INDEX TO EXHIBITS

INTRODUCTION

On April 8, 1999, plaintiffs served and filed a motion for partial summary judgment on liability and a memorandum and exhibits in support of the motion. Subsequently, on May 30, 1999, plaintiffs also filed and served a combined reply and opposition memorandum and exhibits concerning the cross motions for summary judgment. The motions for summary judgment were not heard due to a stay of the proceedings issued by the Sixth Circuit and the subsequent addition in August 1999 of the intervenors as parties.

Plaintiffs now renew their motion for summary judgment and submit this supplemental memorandum in support thereof. The grounds upon which plaintiffs are entitled to judgment in their favor have not changed in the intervening months since the motion for summary

judgment was first filed. Accordingly, plaintiffs are satisfied to rest on the arguments, authorities, and statement of the record that are contained in their earlier submissions in support of the summary judgment motion. The only purpose of this supplemental memorandum is to update the record so that it includes a discussion of the undisputed material facts concerning the admissions policies of the defendants "College of Literature, Science and the Arts" (LSA) for two additional academic years (1999 and 2000) for which information was not available at the time the motion for summary judgment was first filed. As discussed below, the undisputed material facts continue to establish that defendants[1] admissions policies and practices violate the federal civil rights of the plaintiffs and the class. They are therefore entitled to judgments in their favor and against defendant Bollinger in his official capacity under 42 U.S.C. § 1981 and § 1983, and against the Regents of the University of Michigan ("University") under 42 U.S.C. § 2000d.

UNDISPUTED MATERIAL FACTS

Defendants continue to make admissions decisions with the use of the 150-point "Selection Index" scale that defendants first began using for the freshman class that was enrolled in the fall of 1998. The written guidelines remain substantially and materially the same as they were for the 1998 class. The "College of Literature, Science and the Arts Guidelines for All Terms of 1999" ("1999 Guidelines") are attached as Exhibit A to the accompanying supplemental affidavit of Kirk O. Kolbo ("Kolbo Affidavit"). The "1999 Guidelines for the Calculation of a Selection Index for all Schools and Colleges Except Engineering" ("1999 Selection Index Guidelines") are attached as Exhibit B to the Kolbo affidavit. The "College of Literature, Science and the Arts Guidelines for All Terms of 2000" ("2000 Guidelines") are attached as Exhibit C to the Kolbo affidavit. The "2000 Guidelines for the Calculation of a Selection Index for All Schools and Colleges Except Engineering" ("2000 Selection Index Guidelines") are attached as Exhibit D to the Kolbo Affidavit.

Among the 150 possible Selection Index points, defendants continue to award 20 points to every applicant who is a member of an underrepresented minority racial or ethnic group, *i.e.*, African-American, Hispanic, or Native American. *See* 1999 Selection Index Guidelines (Ex. B) at p. 6; 2000 Selection Index Guidelines (Ex. D) at p. 8. Commencing with the freshman class to be enrolled in the fall of 2000, defendants have developed a new procedure for "flagging" certain application files. This procedure is set forth in a document entitled "Procedures for Reviewing LS&A (including Residential College) and Engineering Freshman Applications for all Terms of 2000" ("Procedures Guidelines"), attached as Exhibit E to the Kolbo affidavit. Admissions counselors are instructed to "flag" applications that meet one of the several criteria.One such criteria is membership in an "underrepresented race or ethnicity." Under the new procedures, defendants admit students whose calculated Selection Index meets or exceeds a designated "cutoff." *See* Procedures Guidelines at p. 2. Additional admissions are then made from the "Pool" of students whose applications were "flagged." *Id.*

The "flagging" procedure is also described in Defendants' Supplemental Objections and Response to Plaintiffs' Interrogatory Number One (1), which is attached as Exhibit F to the

Kolbo affidavit. The supplemental interrogatory answers also state that defendants have made the following two changes concerning treatment of application files from underrepresented minority students: 1) defendants may now defer (or postpone) applications of underrepresented minorities, "in contrast to [their] prior practice of undertaking to make immediate decisions to admit or deny such applicants"; and 2) defendants no longer use "protected categories" in the admissions process. *See* Supplemental Interrogatory Answer at p. 4.

ARGUMENT

Plaintiffs demonstrated in their original motion for summary judgment and supporting memorandum and exhibits that defendants have violated the federal civil rights of plaintiffs and the class and that plaintiffs and the class are entitled to a declaration of rights and an injunction prohibiting defendants from applying their illegal, racially discriminatory admissions policies and practices in the future. The form of defendants' policies have changed in small respects over the course of the academic years (1995 to the present) that this case concerns, but the changes have not affected or diminished plaintiffs' entitlement to declaratory and injunctive relief. Defendants have never represented that they would cease their illegal conduct. They have not shown that "there is no reasonable expectation" that their illegal admissions policies, either in their present form, or in the varying forms they taken over the years, will be repeated in the future. *See Dixie Fuel Co. v. Commissioner,* 171 F.3d 1052, 1057 (6th Cir. 1999). Accordingly, plaintiffs are entitled to declaratory and injunctive relief on the basis of defendants' illegal policies in effect for any of the years encompassed by this class action. In light of the foregoing, a discussion of defendants' current polices is not necessary for the purpose of deciding defendants' motion, but does illustrate the extent to which defendants have failed to provide any reason to believe, much less an assurance, that their illegal conduct will cease.

Although defendants claim Justice Powell's opinion in *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), as their lodestar, they persist in their active and flagrant disobedience of very clear proscriptions in that opinion. Justice Powell plainly disapproved of a "two-track" or dual admissions system in which different standards applied to different racial groups, or in which race was considered in a manner other than as a "plus" factor in a "particular" applicant's file in an "individualized, case-by-case" review of files. 438 U.S. at 317-18, 319 n.53. Defendants entirely ignore that admonition and much else in Justice Powell's opinion. Instead, they systematically treat all applicants from underrepresented minority students in a different and more favorable manner than applications from other racial groups. Before a file of an underrepresented minority student is even picked up and looked at by an admissions counselor, it is pre-determined that the applicant will receive some form of favored treatment solely due to race and ethnicity. Thus, *every* underrepresented minority applicant will have 20 points tacked on to his or her Selection index solely because of race or ethnicity. And under the new "flagging" procedures discussed above, all underrepresented minorities are given systematic preferential treatment by placement in the "Pool" of students who remain subject to consideration for admission

during the admissions review process.

The redundancies and extent of preferential treatment built into defendants' admissions policies render meaningless the two changes recently made and discussed above in the defendants' policies with respect to "protected categories" and the postponed or "wait-listed" students. First, the files of underrepresented minorities remain "protected" insofar as the "flagging" procedure ensures that the files of these students remain in the review "Pool" because of their race. Second, to the extent that these minority applications are "flagged" because of race or ethnicity, the pool, which in effect operates as a "postpone" pool or "wait-list", still remains segregated on the basis of race and ethnicity. And finally, in supplementing their answers to interrogatories, defendants have not disavowed, among others, their express written policy, practice, and double standard of admitting all "qualified" underrepresented minority students, while limiting admission of applicants from disfavored races on the basis of available space. [1]

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[1] That policy and practice is expressed in several University documents produced in this case:

> … [M]inority guidelines are set to admit all students who qualify and meet the standards set by the unit liaison with each academic unit, while majority guidelines are set to manage the number of admissions granted to satisfy the various targets set by the colleges and schools…
>
> …Thus, the significant difference between our evaluation of underrepresented minority groups and majority students is the difference between meeting qualifications to predict graduation rather than selecting qualified students one over another due to the large applicant pool.

See Exhibit S (Office of Undergraduate Admissions "Admission Policy for Minority Students," p. 2 (October 4, 1995) accompanying plaintiffs' original memorandum in support of motion for summary judgment; *see also* Exhibit T ("Executive Summary: Affirmative Action and Diversity Programs at the University of Michigan," p. 2 (November 1995)) accompanying plaintiffs' original memorandum in support of motion for summary judgment.

As set forth in plaintiffs' original memorandum in support of motion for summary judgment, even if defendants' admissions system complied with the requirements of Justice Powell's opinion in *Bakke*, the "diversity" rationale of his opinion has never had the support of a majority of the Court (or a single other Justice). Because defendants purport to justify their race-conscious admissions policies solely on the basis of "diversity," their use of race is not founded on a "compelling governmental interest." *See* Plaintiffs' Memorandum In Support of Motion for Partial Summary Judgment at pp. 25-36.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in plaintiffs' earlier opening and reply memoranda in support of motion for partial summary judgment, plaintiffs respectfully request the Court to grant their motion for summary judgment as follows:

1. Finding liability against the Board of Regents, and Lee Bollinger in his official capacity;

2. Declaring that defendants have violated plaintiffs' rights, and the rights of the class, under the Equal Protection Clause of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d); 42 U.S.C. § 1981; and 42 U.S.C. § 1983; and

3. Permanently enjoying defendants from applying their illegal, racially discriminatory admissions policies and practices in the future.

PENTIUK, COUVREAUR & KOBILIAK, P.C.

By_____
Kerry L. Morgan, #P32645
Suite 230, Superior Place
20300 Superior Street
Taylor, MI 48180-6303
734/374-8930

David F. Herr, #44441
R. Lawrence Purdy, #88675
Kirk O. Kolbo, #151129
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
612/672-8200

Michael E. Rosman
Michael P. McDonald
CENTER FOR INDIVIDUAL RIGHTS
1233 20th Street, NW
Suite 300
Washington, D.C. 20036
202/833-8400

Dated: July 17, 2000

ATTORNEYS FOR PLAINTIFFS