THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 70 CV 4706**
	)	
THE STATE OF MISSISSIPPI *et al.*,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
McCOMB MUNICIPAL SEPARATE SCHOOL DISTRICT et al.,	)	
	)	
Defendants-Intervenors.	)	
	)	

UNITED STATES' RESPONSE IN OPPOSITION TO MCCOMB MUNICIPAL SEPARATE SCHOOL DISTRICT'S MOTION FOR DECLARATION OF UNITARY STATUS AND FOR DISMISSAL

Pursuant to the scheduling order entered by the Court on April 20, 2006, the United States files this response in opposition to the motion filed by McComb Municipal Separate School District ("the District") for a declaration of unitary status and for dismissal. As set forth below, the United States objects to a declaration of unitary status in two areas: (1) student assignment, and (2) extracurricular activities.

INTRODUCTION

In January 2001, the United States initiated a review of the school system operated by the McComb Municipal Separate School District (the "District"). After evaluating information and data provided by the District and reported by the Mississippi Department of Education,

conducting site visits to the District, and reviewing the record in this case, the United States advised the District of its belief that the District had fulfilled its affirmative desegregation obligations under the Fourteenth Amendment and the parties' April 5, 1971 Consent Decree ("Consent Decree") in the areas of faculty and staff assignment, transportation, and facilities and resource allocation. Accordingly, the United States does not oppose a declaration of partial unitary status in those areas.

However, the District has failed to meet its legal obligations with respect to student assignment and extracurricular activities. In previous submissions to the Court, the United States described how the District unlawfully groups white students together into homerooms at Otken and Kennedy Elementary Schools, thereby creating racially identifiable classrooms at both schools. See, e.g., United States' Motion For Further Relief And Request For Permanent Injunction at ¶¶ 6-9 (filed August 10, 2004) (hereinafter, "Motion for Further Relief") (attached hereto as Exhibit "A"); United States' Response To The Defendant's Motion For Declaration Of Unitary Status at 2, 5-6 (filed May 5, 2004). To this day the District continues to cluster white students and create all-black classrooms at Otken and Kennedy elementary schools. The United States therefore reiterates its position that the District's student assignment policies violate federal law and the terms of the Consent Decree, and preclude a finding that the District has achieved unitary status.

Although the Consent Decree also bars the District from administering any extracurricular activity on a segregated basis, discovery conducted by the United States reveals that the District has implemented or permitted others to implement race-based procedures to govern the selection of students for at least two non-academic honors and accolades: (1) the

McComb High School Homecoming Court, and (2) class superlatives (also referred to as "senior favorites") published in McComb High School's yearbook.

The Supreme Court emphasized in Freeman v. Pitts, 503 U.S. 467 (1992), that to achieve unitary status a school district has the burden to demonstrate that it has eradicated all remnants of a de jure school system. Id. at 494. Assignment of students to classrooms on the basis of race and the use of race to award school-sponsored honors and accolades are quintessential vestiges of a dual school system. The District's adherence to these practices violates its obligations under the Consent Decree and federal law, and compels a finding that the District is not entitled to unitary status in the areas of student assignment and extracurricular activities.

PROCEDURAL BACKGROUND

This case originated on July 9, 1970, when the United States filed a complaint against the State of Mississippi seeking to enjoin the state from operating a racially dual system of public schools. The District subsequently filed a motion to intervene as a party-defendant. On April 5, 1971, the Court entered a Consent Order approving a desegregation plan agreed to by the United States and the District, and enjoining the District "from failing or refusing to take such steps as are necessary to terminate the operation of a racially dual school system and to operate, now and hereafter, a non-racial, unitary system of public schools." April 6, 1971 Order at 2. The Court also retained jurisdiction over the case "to insure full compliance with this order and to modify or amend the same as may be deemed necessary or desirable for the operation of a unitary school system." Id.

In an order dated February 12, 2001, the Court placed this case and a number of other desegregation cases on its inactive docket. On October 30, 2003, the United States moved to

restore this case to the Court's active docket to address the District's acknowledged policy of considering race in the assignment of students to classrooms at Otken and Kennedy Elementary Schools. The District did not oppose reinstatement of the case to the Court's active docket, and the Court granted the United States' motion on November 17, 2003.

The District moved for a declaration of unitary status on March 29, 2004. On August 10, 2004, the United States moved to enforce the provisions of the Consent Decree pertaining to student assignment, and further petitioned the Court for a permanent injunction barring the District from assigning students to classrooms by race in such a way as to create all-black classrooms. See Motion for Further Relief (attached hereto as Exhibit "A"). At the District's request, the Court consolidated these two motions and entered an order scheduling discovery and a hearing for July 13, 2006.

On April 20, 2006, the Court entered a scheduling order that granted the parties two months to complete discovery. At the close of discovery, the United States informed the District in a letter dated June 14, 2006 (attached hereto as Exhibit "B"), that it objected to a declaration of unitary status in the areas of student assignment and extracurricular activities. Pursuant to the scheduling order the parties attempted to resolve the United States' objections through a consent decree, but were unable to do so.

The District has informed the United States that it intends to address the United States' objections in the area of extracurricular activities by formulating new policies that would eliminate race as a factor in the selection of students for McComb High School's Homecoming Court and class superlatives. See June 29, 2006 Letter from Holmes S. Adams to Jonathan Fischbach (attached hereto as Exhibit "C"). However, the District has declined the United

States' invitation to enter into a consent decree to memorialize this understanding.

With respect to student assignment, the parties have been unable to reach an agreement that would resolve the United States' objections to the District's practice of clustering white students – and consequently creating all-black classrooms – at its elementary schools. Accordingly, the United States opposes a declaration of unitary status in the areas of student assignment and extracurricular activities.

ARGUMENT

I. Legal Standard

"The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system." Freeman v. Pitts, 503 U.S. 467, 485 (1992). In determining whether a school district has met its desegregation obligations such that the district court should withdraw its supervision and dismiss the case, the court must consider (1) whether the District has "complied in good faith with the desegregation decree[s]" for a reasonable period of time, see Bd. of Educ. of Oklahoma City v. Dowell, 498 U.S. 237, 248, 249-50; Freeman, 503 U.S. at 498; (2) "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable," Dowell, 498 U.S. at 250; and (3) whether the District has demonstrated a "good-faith commitment to the entirety of a desegregation plan so that parents, students, and the public have assurance against further injuries or stigma," Freeman, 503 U.S. at 498.

The school district has the burden of demonstrating that it has complied with all three prongs of the test. See United States v. Fordice, 505 U.S. 717, 739 (1992) ("Brown and its progeny . . . established that the burden of proof falls on the State, and not the aggrieved

plaintiffs, to establish that it has dismantled its prior de jure segregated system." (emphasis in original)); Freeman, 503 U.S. at 494; Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979). The first prong requires that the defendant school district demonstrate "good-faith compliance . . . with the court order over a reasonable period of time . . . ." Freeman, 503 U.S. at 498 (citing Dowell, 498 U.S. at 249-50).

The second prong requires that the district demonstrate that it has eliminated the vestiges of the prior dual system to the extent practicable. The district must demonstrate that it has eradicated the remnants of the dual system in every facet of the school district's operations, including student assignment; faculty and staff assignment; transportation; facilities and resource allocation; and extracurricular activities, see Freeman, 503 U.S. at 492; Green, 391 U.S. at 435, 436-37 (1968), as well as "administration attitudes," Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 196 (1973), and quality of education, Missouri v. Jenkins, 515 U.S. 70, 102 (1995) (citing Milliken v. Bradley (Milliken II), 433 U.S. 267, 287 (1977)). These "Green factors" are "among the most important indicia of a segregated system," Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971), and they are often "intertwined or synergistic," so that a constitutional violation in one area cannot be eliminated without remedies in another.[1] Freeman,

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[1] A court may declare a district unitary and relinquish control over one or some areas of a district's operations while retaining supervision over others. Freeman, 503 U.S. at 490. In deciding whether to order complete or partial withdrawal of the court's supervision, the district court must consider the following:

> [1] whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; [2] whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and [3] whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the courts' decree and

503 U.S. at 497.

The third prong requires that the court look to a school district's past and current compliance, as well as its likely future actions. Not only is compliance with prior court orders required of the district, the court must also inquire into whether it is "unlikely that the [school board will] return to its former ways . . . ." Dowell, 498 U.S. at 247. "[M]ere protestations of an intention to comply with the Constitution in the future will not suffice." Dowell v. Bd. of Educ., 8 F.3d 1501, 1513 (10th Cir. 1993) (citing Brown v. Bd. of Educ., 978 F.2d 585, 592 (10th Cir. 1992)). Rather, "specific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith." Id. "A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations." Freeman, 503 U.S. at 491.

II. The District Should Not Be Declared Unitary in the Area of Student Assignment Because It Unlawfully Assigns Students By Race To Elementary-School Classrooms In Violation Of The Consent Decree And Federal Law.

The United States articulated its objections to the District's student assignment policies in its Motion for Further Relief and accompanying Memorandum of Law (attached hereto as Exhibit "A"). The District presented its position on the validity of its student assignment practices in its Response to the United States' Motion for Further Relief, and accompanying Memorandum of Law, submitted September 29, 2004 (hereinafter, "Response to Motion for

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> to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

Missouri v. Jenkins, 515 U.S. 70, 89 (1995) (quoting Freeman, 503 U.S. at 491) (alterations in original).

Further Relief") (attached hereto as Exhibit "D"). On October 12, 2004, the United States filed a Reply Memorandum of Law in Support of its Motion for Further Relief (hereinafter, "Reply in Support of Motion for Further Relief") (attached hereto as Exhibit "E"). Accordingly, the parties' dispute over the legality of the District's student assignment practices has been fully briefed and is well positioned for resolution by the Court.

Without fully rebriefing the bases for the United States' objections to the District's student assignment practices, four points are worth recapitulating in advance of the July 13, 2006 hearing. First, the District does not dispute that at Otken and Kennedy elementary schools it assigns children to elementary school classrooms on the basis of race. The District conceded in its Response to Motion for Further Relief (attached hereto as Exhibit "D") that "[u]nder the District's policy, the District groups or clusters white students in elementary homerooms. The racial makeup of any homeroom, however, is not to vary more than plus or minus 20% from the racial makeup of the grade." Id. at 1-2.

Second, the District does not allege that too few white students are enrolled at its elementary schools to eliminate all-black classrooms at every grade level. Indeed, the most recent enrollment data submitted by the District to the Department of Justice reflects that for the 2005-2006 school year, 669 black students (83%) and 132 white students (16%) were enrolled at Otken Elementary School (K-2), while 376 black students and (85%) and 63 white students (14%) were enrolled at Kennedy Elementary School (3-4). See Exhibit "F". By way of example, if the racial composition of each classroom at these schools approximated the demographics of the school as a whole, classrooms with 20 students would contain an average of 3-4 white

students, and all such classrooms would be integrated.[2]

Third, it is clear from the factual record that the District's motivation for clustering white students in classrooms at Otken and Kennedy is the fear of "white flight" – namely, that the parents of white children at Otken and Kennedy would remove their children from McComb's public schools if their children were not grouped with a significant number of other white children. See Reply in Support of Motion for Further Relief at 3-4 (attached hereto as Exhibit "E"); Deposition of Dr. Pat Cooper at 77-79, 93-96, 101, 103-104, 115-120 (March 23, 2004) (attached hereto as Exhibit "G").

Dr. Pat Cooper, the Superintendent of the McComb School District, testified at his deposition that during the summer preceding the 2000-2001 school year "[we] had three or four sets of parents . . . who had traditionally kind of been our – our eyes and ears out there . . . . They were kind of leaders in the public schools and trying to keep whites in. And their fear was that if we changed our assignment policies or procedures or practices [to eliminate clustering], we would begin to lose even more white students, including their own." Id. at 101. Dr. Cooper further testified that after initially asking the principals of Otken and Kennedy "to devise a system whereby we would have no one-race classrooms," id. at 108, that "we got so much complaint from the white parents and the threats of not coming back to school, at that point I came back to the board and said, 'I just want to make you aware that we're going to go back to

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[2] The United States has also informed the District that it would not object to a purely random method of assigning students to classrooms at Otken and Kennedy Elementary Schools, though it is statistically probable that a random assignment system would occasionally result in all-black classrooms. However, a random assignment system would likely produce fewer all-black classrooms than the current regime, and eliminate any stigma associated with assignment to an all-black classroom.

our prior method of assigning students. And that might, in fact, bring some future difficulty with the Department of Justice.'" Id. at 113.

Because the law is so well-settled that concerns of "white flight" are an inadequate justification for segregating students through classroom assignment, see Stell v. Savannah-Chatham County Bd. of Educ., 888 F.2d 82, 85 (11th Cir. 1989) ("fear of 'white flight' cannot justify delaying desegregation"); United States v. Desoto Parish Sch. Bd., 574 F.2d 804, 816 (5th Cir. 1978) (same); Memorandum in Support of Motion for Further Relief at 8-9 (attached hereto as Exhibit "A") (citing cases), counsel for the District has attempted to insinuate a second, post hoc rationale for the district's practice of clustering white students at Otken and Kennedy. Reasoning that the District's policy of clustering white students helps to attract those students to the public school system, the District argues that it "has in good faith adopted a policy in its two elementary schools to improve the diversity of its schools . . . . Without such diversity in the public school system, there will be no effective way to break down racial stereotypes, promote racial understanding, or prepare students of either race for a diverse workforce and society." Memorandum in Support of Response to Motion for Further Relief at 8 (citing Grutter v. Bollinger, 539 U.S. 306, 329 (2003)) (attached hereto as Exhibit "D").

As the United States pointed out in its Reply in Support of Motion for Further Relief (attached hereto as Exhibit "E"), this rationalization of the District's segregative assignment practices is belied by the absence of any indication in the record that the District attempts to extend the benefits of diversity to black students at Otken and Kennedy. Id. at 3-4. Indeed, it is difficult to understand how the District accomplishes the goals of "breaking down racial stereotypes," "promoting racial understanding," and "preparing students for a diverse

workforce," by sequestering substantial numbers of black children in all-black classrooms during formative years of their development, while reinforcing the prejudices of white parents who feel their kids are "socially isolated" and thrust into "a totally different environment and culture" when placed in a predominantly black classroom without a critical mass of white classmates. See Deposition of Dr. Pat Cooper at 103, 106 (March 23, 2004) (attached hereto as Exhibit "G").

Fourth, the District insists that its policy of clustering white students only to the point where the racial composition of a class would vary more than 20% from the racial composition of the grade as a whole, see Response to Motion for Further Relief at 1-2 (attached hereto as Exhibit "D"), is consistent with a statistical test promulgated by the Department of Education's Office of Civil Rights ("OCR") for use in ability-grouping cases. "Superintendent Cooper testified that when he came to the District, it was grouping white students in making elementary room assignments. He continued the practice upon his good faith understanding that the Office of Civil Rights . . . had approved the plus or minus 20% variance from the racial make up of each grade." See Memorandum in Support of Response to Motion for Further Relief at 6 (attached hereto as Exhibit "D").[3]

As a threshold matter, the District continues to ground its race-based student assignment policies in the "20% rule," even though it has been notified repeatedly by the Department of Justice that its practice of clustering white students is unlawful. See, e.g., Letter from Sunil M.

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[3] Significantly, the District does not even adhere to its own plus or minus 20% policy consistently. See Memorandum in Support of Motion for Further Relief at 5-6 (attached hereto as Exhibit "A") (noting that during the 2003-2004 school year the District established classes where the number of white students exceeded the school-wide average by more than 20 percent). Even as recently as the previous school year, the racial composition of at least one class at Kennedy Elementary School (taught by Rebecca Martin) violated the plus or minus 20% rule. See Exhibit "M".

Mansukhani to C. Ashley Atkinson, dated February 12, 2001 (attached hereto as Exhibit "H"); Letter from Andy Liu to Holmes Adams, dated September 13, 2001 (attached hereto as Exhibit "I"); Letter from Sunil M. Mansukhani to Holmes Adams, dated February 25, 2002 (attached hereto as Exhibit "J"). Hence, any argument that the District's continued application of that rule is in good faith is without merit.

More importantly, the 20% rule, as described in the OCR publication relied upon by Dr. Cooper (attached hereto as Exhibit "K"), is simply a tool for determining whether a classroom in which students are grouped by ability is racially identifiable. Racial identifiability, however, is simply one indicia of unlawful grouping of students by race. Here, resort to the 20% rule to show unlawful grouping is unnecessary because the District concedes that it intentionally assigns white students to the same classrooms to avoid white flight. Accordingly, the issue of whether classrooms at Otken and Kennedy are racially identifiable under the 20% rule is beside the point.

In the final analysis, the District's student assignment policies violate the Consent Decree and federal law because students are intentionally assigned to classrooms on the basis of race. That the racial composition of those classes may fall within the 20% rule in no way legitimizes the illegal act of grouping students on the basis of race to begin with. See Christian v. Board of Educ. of Strong Sch. Dist. No. 83 of Union County, 440 F.2d 608, 611 (8th Cir. 1971) ("[T]his kind of pupil assignment [that clusters white students and leaves all black classes] constitutes discrimination in the public schools in violation of the Constitution."). Accordingly, the Court should deny the District's motion for a declaration of unitary status with respect to student assignment, and enjoin the District from continuing to assign students by race to classrooms at Otken and Kennedy elementary schools.

III. The District Should Not Be Declared Unitary in the Area of Extra-Curricular Activities Because It Has Violated the Consent Decree and Federal Law by Using Race To Select Students for Participation in Certain Extra-Curricular Activities.

The Consent Decree prohibits the District "from maintaining any classroom, non-classroom, or extra-curricular activity on a segregated basis, so that no student is effectively excluded from . . . participating in any non-classroom or extracurricular activity on the basis of race, color, or national origin." With respect to at least two extracurricular activities, however, the District has conspicuously failed to eliminate considerations of race from the process of nominating and selecting students for non-academic honors and accolades.

a. The McComb High School Homecoming Court

During discovery the United States requested and received copies of the 2003, 2004, 2005, and 2006 Camellian – the yearbook published annually by McComb High School. The pictures of the Homecoming Court featured in each yearbook revealed that (a) every year an equal number of black and white female students (two of each race) were being selected to represent the senior class as Homecoming Queen and Senior Maids, and (b) every year one black female student and one white female student were being selected by race to represent the junior class, sophomore class, and freshman class, respectively, in the Homecoming Court.

Cherrie Randall, the assistant principal at McComb High School, confirmed at her deposition that the balloting procedures for selecting McComb High School's Homecoming Queen, senior maids, and maids from the junior, sophomore, and freshman classes were manipulated to achieve these results. See Deposition of Cherrie Randall at 14-16 (May 31, 2006) (attached hereto as Exhibit "L"). Specifically, Ms. Randall testified that for each high school class, students in the class were given a ballot to nominate female classmates for the

homecoming court. Id. After these ballots were collected and the counted, the District created a second ballot for each class that listed only the names of the two white females and two black females from that class who received the highest number of nominations from their classmates. Id. These new ballots were then distributed to the students of the appropriate class, who voted a second time from the list of two black females and two white females. For the senior class, the student receiving the most votes was named the Homecoming Queen, and the remaining three students were elected to the Senior Court. For each of the other classes, the black student and white student receiving the most votes represented their class on the Homecoming Court. Id. This balloting system ensured that an equal number of black female students and white female students represented the senior, junior, sophomore, and freshman classes, respectively, on the Homecoming Court.

This dual race selection system endorsed and administered by the staff of McComb High School violates federal law. See Godby v. Montgomery County Board of Education, 996 F. Supp. 1390, 1408 (M.D. Ala. 1998) ("Even in the context of something as relatively minor as a junior high homecoming election . . . the pernicious nature of racial distinctions by the government is not wiped away. All such distinctions delay 'the time when race will become a truly irrelevant, or at least insignificant factor;' exacerbate racial identity; and feed racial hostility and prejudice.") (quoting Aderand Constructors, Inc. v. Pena, 515 U.S. 200, 229 (1995)). This selection process also violates the terms of the Consent Decree by denying to students of both races the opportunity to compete for positions on the Homecoming Court that the District has reserved for students of a different race.

b. The selection of class superlatives

The United States' review of McComb High School's yearbooks for 2005 and 2006 also demonstrates that the winners of class superlatives reported in those yearbooks were selected on the basis of race, such that an identical number of black and white students were reported as the senior class's "senior favorites" in a variety of categories, including "Most Handsome/Beautiful," "Most Likely to Succeed," "Most Intelligent" and "Best Personality." Again, the United States was able to corroborate the use of race in the process for selecting class superlatives by analyzing the "senior favorite" ballots disseminated to the graduating class of 2006, produced by the District at McComb 6/07/2006 1773 to 1873. A tally of these ballots reflects that in order to attain racial balance within each class superlative category, there were many instances in which students were designated a "senior favorite" despite receiving fewer votes than a classmate of a different race. While the record does not suggest that the District affirmatively mandated the selection of senior favorites by race, it manifestly failed to impose any rules or restrictions to prevent the students who staff the yearbook, and the faculty sponsor who oversees them, from conferring "senior favorite" status on the basis of race.

The District has informed the United States that it intends to formulate new policies to eradicate race-based criteria from the process of selecting students for McComb High School's Homecoming Court and class superlatives. See June 29, 2006 Letter from Holmes S. Adams to Jonathan Fischbach (attached hereto as Exhibit "C"). The promised new policies, if formulated and implemented for a reasonable period of time, should address the United States' concerns in this area. Nonetheless, the law is clear that the District cannot be declared unitary with respect to a particular Green factor until it actually terminates practices inconsistent with the consent

decree, and remains in compliance with the consent decree and federal law for a reasonable period of time. Dowell, 498 U.S. at 248, 249-50. Accordingly, the United States opposes any effort by the District to obtain unitary status with respect to extracurricular activities before it successfully remedies the aforementioned violations. However, the United States is willing to revisit the issue of unitary status once the District formulates and implements policies that truly remove race-based considerations from the selection of students for all extracurricular activities, honors and accolades.

CONCLUSION

For the reasons stated above, and in prior briefing on the issue of student assignment, the United States objects to a declaration of unitary status in the areas of student assignment and extracurricular activities. The United States further urges the Court to enjoin the District from continuing to assign students by race to classrooms at Otken and Kennedy elementary schools. Finally, the United States reserves its right to supplement the points raised in these objections should the District raise new arguments in a responsive brief.

Respectfully submitted,

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This the 19th day of May 2006.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June 2006, I served a copy of Plaintiff's Notice of Deposition of McComb Municipal Separate School District to the following counsel of record, by sending a copy of the same by overnight courier delivery, postage prepaid, at the address listed below:

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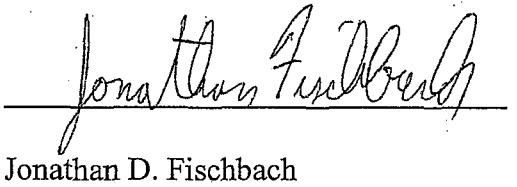

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