

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAY 10 2002

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CASE NUMBER 1:02CV00923

JUDGE: Royce C. Lamberth

DECK TYPE: Employment Discrimination

DATE STAMP: 05/10/2002

**JURY
ACTION**

CLASS ACTION

JURY DEMANDED

Case No.: _____

INDIVIDUALLY AND ON BEHALF OF
ALL OTHER SIMILARLY-SITUATED
PERSONS,

Plaintiffs,

vs.

PAUL H. O'NEILL,
Secretary of the Treasury
United States Department of the Treasury,
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
Defendant.

CLASS ACTION COMPLAINT

I. NATURE OF ACTION

1. Plaintiffs, Hispanic Special Agents of the United States Customs Service ("Customs Service"), bring this action, on their own behalf, and on behalf of a class of all other Hispanic Special Agents in the GS-1811 series who have been employed as GS-1811's at any time from, at least January 1, 1974 to the present, or in the alternative from January 1, 1977 to the present, to address a pattern and practice of discrimination on the basis of national origin by the Department of Treasury's United States Customs Service in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e and the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Plaintiffs allege that the Customs Service's personnel policies, practices, and procedures discriminate against Hispanic Special Agents on the basis of their national origin in the following areas: selections for competitive positions and promotions, including, but not limited to GS-13, GS-14, GS-15 and SES positions; transfers, assignments and other career

enhancing opportunities; assignment to undercover work; discipline; awards and bonuses; foreign language proficiency awards; training; harassment and hostile work environment based on national origin, systemic retaliation, and other terms and conditions of employment. On the basis of these violations, plaintiffs seek equitable relief, including, but not limited to, back pay, front pay, and other lost compensation, compensatory damages, a declaratory judgment, and an injunction requiring the Customs Service to cease and desist these illegal acts, and remedy the effects of its illegal conduct.

II. JURISDICTION, EXHAUSTION OF ADMINISTRATIVE REMEDIES AND TOLLING OF LIMITATIONS

2. Jurisdiction in this case exists pursuant to 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981a. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e) and 42 U.S.C. 2000e-5(f).

3. Plaintiffs have exhausted administrative remedies. On or about January 9, 1995, Special Agent Miguel Contreras initiated contact with the agency's office of Equal Employment Opportunity ("EEO") and caused to be filed a class action complaint on March 23, 1995. The initial class complaint alleged discrimination in the recruitment of applicants, hiring, initial job assignments, transfers, promotions, retention, training, awards and bonuses, and discipline. In 1995, the complaint was certified as a class by an administrative law judge of the Equal Employment Opportunity Commission ("EEOC). The decision was upheld by the EEOC on appeal. This complaint tolled the statute of limitations from its initial filing for all members of the class as to these claims, or any claims reasonably arising therefrom or the investigation thereof.

4. From at least 1977 to the present, members of the class raised these issues with Customs Service management from time to time, but no meaningful effort was made to address the discriminatory policies, practices and procedures.

5. In fact, throughout this period, the Customs Service management systematically retaliated against members of the class who brought claims or otherwise sought to address the problems of discrimination within the Customs Service. This "system of retaliation" is more fully described in Section IV. I.

6. From at least 1974, Defendant Department of Treasury has been on notice that the personnel policies, practices, and procedures described herein were discriminatory and yet it failed to take action.

a. From at least 1974 forward, black Agents of the United States Secret Service ("Secret Service") have complained about similar personnel policies, practices and procedures resulting in discrimination against black Special Agents in promotions, assignments, awards and bonuses, training, discipline, harassment and retaliation. Secret Service management promised that it would address the discrimination but failed to do so in any meaningful way. In May of 2000, the Black Agents of the Secret Service filed their own class action suit, Moore v. O'Neill, Civ. Action No. 00-0953, seeking relief from these practices since January 1, 1974.

b. From at least 1983, black Agents of the Bureau of Alcohol, Tobacco & Firearms ("BATF") have complained about similar personnel policies, practices and procedures resulting in discrimination against black Special Agents in promotions, assignments, awards and bonuses, training, discipline, harassment and retaliation. BATF management promised that it would address the discrimination but failed to do so in any meaningful way. In 1990, the Black Agents of the BATF filed their own class action suit, Stewart v. Rubin, Civ. Action No. 90-2841.

After lengthy mediation and negotiations, the parties reached agreement on a Settlement Agreement on July 8, 1996, which the court approved remedies going back to December 25, 1981 based on equitable tolling. At the press conference announcing the Settlement Agreement, BATF (and former Secret Service) Director John Magaw acknowledged that the BATF had discriminated against the black Agents. In his testimony before Congress, he recognized that the same problems existed at Secret Service during his previous tenure as Director of that Agency in 1992 and that they were endemic to federal law enforcement.

c. The Secret Service, BATF and Customs Service are each Bureaus of the Department of Treasury. The Director of the Secret Service, the Director of BATF, and the Commissioner of Customs, all report to the Undersecretary of Law Enforcement at the Department of Treasury and are governed to a significant degree by Treasury Management Directives as to the practices described herein.

d. Despite knowledge of the above facts, Treasury officials did not act to eliminate the discriminatory policies, practices, and procedures at the Customs Service as described herein.

e. Accordingly, the statute of limitations is tolled from January 1, 1974 to the present as to all claims of race discrimination by all former and current Hispanic Special Agents of the Customs Service who are members of the class as identified in this Complaint.

III. PARTIES

7. The named plaintiffs are all current or former Special Agents of the United States Customs Service. All of the named plaintiffs hold or have held GS ratings between GS-5 and GS-15. The named plaintiffs, as a group, have performed a variety of the jobs assigned to 1811-series criminal investigators in the Customs Service. Many have received commendations for

their work and risked their lives performing dangerous undercover assignments in support of the Customs Service's mission to secure our borders.

The named plaintiffs are as follows:

- a. Plaintiff Miguel A. Contreras ("Special Agent Contreras") is a GS-13 Senior Special Agent in the Office of Investigations in Yuma, Arizona. He came to this country from Mexico as a migrant farm worker when he was 12 years old and later became a naturalized citizen. In 1988, Special Agent Contreras joined the Customs Service as a Special Agent in El Centro, California. He continued to advance and served from 1995 through May 1999, as the Resident Agent in Charge for the Office of Internal Affairs in El Centro, California.
- b. Plaintiff Ruben E. Gonzalez ("Special Agent Gonzalez") is a GS-15 Associate Special Agent in Charge ("ASAIC") in the Houston, Texas, Office of Investigations of the United States Customs Service. He started with the Customs Border Patrol in 1979 and later became a Customs Patrol Officer. Special Agent Gonzalez served with the Bureau of Alcohol, Tobacco and Firearms from 1983-1987 before rejoining the Customs Service in 1987.
- c. Plaintiff E. William Velasco ("Special Agent Velasco") retired as a GS-15 Special Agent in 1999. Before his retirement, he served as the acting Assistant Commissioner of Internal Affairs and was the highest ranking Hispanic Special Agent in the Customs Service at the time.. After serving five years with the BATF, Agent Velasco joined the Customs Service in April, 1982.
- d. Plaintiff John Yera ("Special Agent Yera") is a GS-14 Special Agent with the United States Customs Service Cybersmuggling Center in Fairfax, Virginia. He began his career with the Customs Service as a Special Agent in November 1988.

e. Plaintiff Ricardo Sandavol ("Special Agent Sandavol") is a GS-14 Special Agent and the Resident Agent in Charge in the El Centro, California, Office of Investigation.

f. Plaintiff Stephan Mercado-Cruz ("Special Agent Mercado") is a GS-14 Special Agent and a Group Supervisor in the El Centro, California, Office of Investigation.

g. Plaintiff Frank Almonte ("Special Agent Almonte") is a GS-13 Special Agent of the United States Customs Service. He has been employed with the Customs Service since 1983 and became a Special Agent in 1987. Special Agent Almonte is currently assigned to the John F. Kennedy airport Associate Special Agent in Charge (SAC) office.

h. Plaintiff Ramon Martinez ("Special Agent Martinez") is a GS-13 Special Agent assigned to the Baltimore-Washington Office of Investigations. He was initially hired as a Customs Inspector in 1982 and later became 1811-series Special Agent in 1983.

8. Defendant Paul H. O'Neill is sued in his official capacity as Secretary of the Treasury. As part of his official duties, he is responsible for the United States Customs Service.

IV. CLASS ACTION ALLEGATIONS

9. Plaintiffs have filed this case as a class action pursuant to Fed. R. Civ. P. 23 (a), 23 (b)(2), and 23 (b)(3).

10. This action is properly maintainable as a class action under Rule 23 (a) because: (a) the class includes more than 400 current and former Hispanic Special Agents of the Customs Service, which makes the class so numerous that a consolidated complaint of the members of the class is impracticable; (b) the claims alleged on behalf of the class raise questions of law or fact common to the class; (c) the claims of the class representatives are typical of the claims of the

class; and (d) the class representatives and class counsel will adequately and fairly protect the interests of the class.

11. This action is properly maintainable as a class action under Rules 23 (b)(2) and 23 (b)(3) because: (1) the defendant has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; (2) there are questions of law or fact common to members of the class that predominate over any questions affecting only individuals; (3) and a class action is superior to other methods for the fair and efficient adjudication of the controversy.

12. Plaintiffs request that the class be defined as the named plaintiffs and all current or former Hispanic Special Agents (Criminal Investigators GS-1811) who served with the Customs Service from January 1, 1974 to the present or alternatively, January 1, 1977 to the present.

V. CLAIMS

A. Discriminatory Selection for Competitive Positions

13. From the dates of their employment, continuing up to and including the present time, plaintiffs and the plaintiff class have been discriminated against on the basis of their national origin (Hispanic), by the employment policies, practices, and procedures of the Customs Service and by the manner in which these practices have been implemented. Each of the practices complained of herein is excessively subjective, is not job-related and has been implemented through a "good old boy network" to the exclusion of Hispanic Special Agents such that each practice has an adverse impact upon Hispanic Special Agents. In addition, Plaintiffs have been

intentionally discriminated against on the basis of their national origin with regard to each of the practices herein.

14. Unlike most federal law enforcement agencies, particularly all other Treasury Agencies, Customs has no Career Development Plan ("CDP") to assist Special Agents in developing their career. The Merit System Promotion Plan is the only vehicle through which the Customs Service selects and promotes Special Agents to management and supervisory positions, identified thorough the relevant period as ranging from GS-12 to SES positions. Without a CDP a "Good O' Boy System" is fostered as found by the Government Accounting Office ("GAO") in a 1996 Report on the Implementation of Blue Ribbon Panel Recommendations. Despite these findings, Customs made no meaningful efforts to change its practices. Indeed, Customs has intentionally, failed to gather, maintain and analyze data required by the Uniform Guidelines and has denied their legal applicability. Selections for supervisory positions in the Customs Service are determined pursuant to various procedures. These selection processes, and the current Merit Promotion Plan, adopted July 1, 1986, for management positions in the Customs Service are excessively subjective, have a disparate impact on Hispanic Special Agents and, plaintiffs are informed and believer and thereon allege, are neither job-related nor required for business necessity. Rather, the Customs Service's selection systems promote Agents based upon who they know instead of their ability, which has a disparate impact upon Hispanic Special Agents, in violation of Title VII of the Civil Rights Act of 1964 as amended. Further, although the Customs Service has known that its promotion practices have a disparate impact during the relevant period, it has failed to implement procedures that are valid and have less adverse impact on Hispanic Special Agents in violation of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 et seq. All of the other illegal practices set forth herein also have a

disparate impact on Hispanic Special Agents in the selection process. According, the Customs Service's personnel procedures, practices and policies in their totality, have a disparate impact upon each member of the class.

15. As a result of the Customs Service's use of the Merit Promotion Plan and failure to institute a valid CDP, plaintiffs are informed, believe and thereon allege, that qualified Hispanic Special Agents are promoted to, or selected for, competitive management positions significantly less frequently than similarly situated white Special Agents, and when selected, are assigned positions that provide less opportunity for further promotional opportunities than similarly situated white Special Agents.

16. The Customs Service has further discriminated against Hispanic Special Agents by administering an exam known as the Special Agent GS-14 (SA-14) test. Plaintiffs allege that the SA-14 test has an adverse impact on Hispanic Special Agents that cannot be justified by business necessity. Furthermore, other alternative tests exist that have less adverse impact and would serve Defendant's purposes. Customs has known of the adverse impact of said test and maintained it, despite such knowledge, in willful disregard of Plaintiffs' federally protected rights. Indeed, Customs maintains that it has no legal requirement to maintain data on the impact of its personnel practices.

17. In 2000 or perhaps earlier, the Customs Service formally established an expanded reference check process known as "vetting." Further, secret personnel security folders are maintained on every Special Agent for this purpose. Under vetting, a secret review is conducted of an applicant's entire past record. If the review raises relevant concerns about prior conduct and/or performance that has a nexus, or link, to the duties of the position for which an employee is being considered, the information is provided to the Assistant Commissioner for consideration.

Some form of "vetting" occurred throughout the relevant period, but after 2000 it became more extensive and formalized. Plaintiffs allege that vetting has had an adverse impact on Hispanic Special Agents that cannot be justified by business necessity. Furthermore, as demonstrated below "vetting" has been manipulated and used as a vehicle for retaliation by Customs management to deny Hispanic Special Agents promotions and other competitive assignments. Plaintiffs allege that internal investigations that target Hispanic Special Agents are often left open, are incomplete, and erroneous, resulting in Hispanic Agents being disqualified for consideration for competitive selections more frequently than their non-Hispanic peers.

18. In addition, certain assignments appear to be barred from Hispanics. No Hispanic has ever held the following positions in the Customs Service: Headquarters Treasury Liaison, Headquarters State Department Liaison, Headquarters Office of National Drug Control Policy ("ONDCP") Liaison, Headquarters Interpol Liaison, Headquarters Central Intelligence Agency ("CIA") Liaison, Customs Director Operation Alliance, and Equal Employment Opportunity Special Assistant to the Commissioner. Similarly, no Hispanic Agent has ever held the following SAIC positions: SAIC-Atlanta, SAIC-Baltimore, SAIC-Boston, SAIC-Buffalo, SAIC-Chicago, SAIC-Denver, SAIC-Detroit, SAIC-Los Angeles, SAIC-New Orleans, SAIC-New York, SAIC-NY-JFK, SAIC-San Antonio, SAIC-San Diego, SAIC-San Francisco, SAIC-Seattle, SAIC-Tampa, and SAIC-Houston. Each of these are significant career-enhancing positions.

Special Agent Contreras

19. In 1988, Special Agent Contreras transferred from BATF to the Customs Service as a GS-12 Agent. He applied for numerous GS-13 positions as both a senior Special Agent and a supervisor criminal investigator. In 1992, Special Agent Contreras was promoted to GS-13 Special Agent in the Office of Investigations for Detroit, Michigan. From 1993 to 1995, Special

Agent Contreras applied for numerous GS-14 supervisory positions throughout the United States and for many foreign assignments. For each of the positions, Agent Contreras met the qualifications and yet was not selected. In most cases, white Special Agents with similar or less experience were selected.

20. In December 1995, Special Agent Contreras was selected as the Internal Affairs GS-14 Resident in Charge (RAC) in El Centro, California. After he gained the requisite experience, Agent Contreras began applying for GS-15 supervisory positions. From 1996 until the present, he has applied for over 40 GS-15 positions. He frequently made the best qualified list and yet was never interviewed for any of the positions. In most cases, white Special Agents with similar or less experience or qualifications were selected.

Special Agent Gonzalez

21. From 1994 to 2001, Special Agent Gonzalez applied for over thirty-four (34) GS-15 and Senior Executive Service ("SES") supervisory positions, including positions as SAIC, ASAC, Director, Foreign Area Director, and Customs Liaison. Special Agent Gonzalez made the best qualified list for every GS-15 position he applied for and yet he was never interviewed for any of them.

Special Agent Velasco

22. Special Agent Velasco became a GS-14 Special Agent in 1985. From 1986 until 1995, he applied for numerous GS-15 promotions, but was passed over and white Non-Hispanic Agents with less experience were selected. In 1996, he was promoted to GS-15 as the Director of Internal Investigations and Affairs in Customs Headquarters, Washington D.C. After serving as acting Assistant Commission for Internal Affairs, Agent Velasco applied for four or five Senior Executive Service positions, but he was passed over and white Non-Hispanic Agents were

selected. Velasco applied for the Assistant Commission of Internal Affairs position, a job that he had already performed in an "acting" capacity. Customs Commissioner Raymond Kelly selected a white non-Hispanic male—Bill Keefer, the present Assistant Commissioner. Agent Velasco also applied for a position as the Treasury Liaison twice. In each instance, white non-Hispanic males were selected for the position. One of them was John Varrone, the present Assistant Commission of Investigations. The other one was a white male Special Agent who had absolutely no management experience.

23. Agent Velasco later attempted to obtain a GS-15 lateral transfer out of Washington. He applied for a GS-15 Deputy SAIC position in Tampa, Florida. The position was given to a white non-Hispanic Agent from Atlanta who had already made an announcement that he planned to retire. The Assistant Commissioner said that the position was given to that Agent because he had asked for it. One year later, Velasco applied for Deputy SAIC positions in Tampa, Atlanta and another office away from the southwest border. Agent Velasco was informed that he had been selected for the Deputy SAIC position in Tucson, Arizona. He had not applied for that position and he later found out that this forced reassignment to Tucson was because of a clerical entry error. He called Assistant Commissioner Bonni Tischler about the mistake and her response was, "Tough shit, if you don't want to go, don't go." After dealing with health and marital problems caused by job-related stress, Agent Velasco opted to retire rather than transfer to Tucson, Arizona.

Special Agent Almonte

24. Special Agent Almonte became a GS-12 in July 1991. He applied for numerous GS-13 positions from 1993 to 2000, but was not promoted. In October 2000, Special Agent Almonte filed an EEO complaint regarding his non-selection to GS-13 position in the SAIC/New

York office. After nearly ten years as a GS-12, he was promoted to GS-13 in January 2001. In each of the above cases of non-selection, the Special Agents selected were white non-Hispanic males.

Special Agent Martinez

25. Special Agent Martinez became a GS-12 in September 1986. He applied numerous times for a GS-13 promotion in 1988, but was passed over in favor of a white Special Agent. In January 1990, he was transferred to the Internal Affairs office in Miami, Florida. In 1991, he received his GS-13 as the result of a desk audit. In 1992, he began applying for numerous GS-14 positions throughout the country. None of his applications for GS-14 positions were referred to hiring authorities in Headquarters or any place east of the Mississippi River or north of the Mason-Dixon line. The only position he was offered was a GS-14 position in El Paso, Texas. Agent Martinez declined it because he had secured what he thought was a career enhancing lateral transfer to Headquarters.

26. Since 1997, Special Agent Martinez has applied for numerous GS-14 positions and made the best qualified on several lists, yet has not been selected. He believes that it has to do with the vetting process, but he has been given no information.

B. Discrimination in Transfers, Assignments and Denial of Other Career-Enhancing Opportunities

27. The Customs Service maintains procedures for making decisions regarding transfers, assignments and other career-enhancing opportunities that are excessively subjective and have an adverse impact on Hispanic Special Agents. This system cannot be justified as consistent with business necessity. As a result of these procedures, Hispanic Special Agents receive fewer and less desirable assignments. Hispanics are more likely to be assigned to offices

along the Southwest border and Puerto Rico than similarly situated white Non-Hispanic Agents. Hispanic Agents also are more likely to be assigned to small offices and therefore are less likely to receive the diverse work experience necessary for promotion. Hispanic Agents have difficulty obtaining foreign attaché positions, especially those in Europe which are considered the most career-enhancing. In addition, Hispanic Special Agents have difficulty obtaining "acting positions" in supervisory roles such as RAIC, SAIC or ASAIC. When Hispanic Agents do obtain these positions of responsibility, they are frequently at lower grades than those held by comparable white Non-Hispanic Special Agents.

Special Agent Contreras

28. In 1993, Special Agent Contreras applied for a high profile GS-13 lateral foreign assignment to Hermosillo, Mexico as the Customs Representative. He was not selected. The Assistant Commissioner denied his lateral transfer because Contreras was needed for his Spanish-language ability and undercover skills.

Special Agent Gonzalez

29. In 1991, Special Agent Gonzalez was assigned to Puerto Rico in the Office of Internal of Affairs. Later in March 1994, he was transferred to the Office of Investigations and became the GS-13 Resident Agent in Charge (RAIC). Puerto Rico is considered to be a hardship assignment in the Customs Service. Special Agent Gonzalez attempted to secure a lateral transfer to other offices in the United States, but was denied. He was even denied transfers to other locations considered to be hardship areas such as the Texas-Mexico border and other areas on the southwest border.

Special Agent Velasco

30. While assigned to Customs Headquarters in Washington D.C., Special Agent Velasco applied numerous times for GS-15 European attaché positions in Paris, France and Vienna, Austria. He was passed over for these career enhancing positions and white non-Hispanic Agents were selected.

Special Agent Sandoval

31. In February 2002, Walter Collette, the acting SAIC of the El Centro, California Office of Investigations requested that Special Agent Sandoval be placed in an acting GS-15 Associate Special Agent in Charge ("ASAIC") position. Customs Headquarters denied Sandoval this opportunity. Previously, a white non-Hispanic supervisor was placed in this position for ninety (90) days.

32. In his present position as the Resident Agent in Charge ("RAIC") of the El Centro, California, Office of Investigations, RAIC Sandoval supervises five GS-14 Group Supervisors and full complement of Agents and support personnel. The El Centro RAIC office is bigger than many Customs SAIC offices, yet the RAIC position is only a GS-14 position. RAIC Sandoval has requested the Customs Service upgrade the RAIC position to a GS-15 position, but they have refused. In contrast, the non-Hispanic office manager of the San Diego Office of Internal Affairs is a GS-15, even though he is responsible for only 2 GS-14 supervisors. The non-Hispanic Customs Port Director in Calexico, California is also a GS-15 and he supervises no GS-14s.

Special Agent Yera

33. After being permanently paralyzed from the chest down in an undercover operation in 1991, Agent Yera returned to the Newark, New Jersey Office of Investigations-

Smuggling Division in May 1993. Yera was made the evidence custodian. This was an undesirable job that was typically held by Special Agents for one year and then rotated. Agent Yera was the evidence custodian for nearly four years. In 1997, he applied for and completed forensic computer training at the Customs Academy in Glynco, Georgia. When Agent Yera returned to the Newark office, he was continued to be assigned as the evidence custodian.

C. Discriminatory Assignments to Undercover and other Undesirable Work

34. The Customs Service uses a discriminatory method of assigning cases to Special Agents, including, but not limited to, disproportionately assigning Hispanic Special Agents to undercover, wiretap, debriefing informants, Spanish-language translation, and tape transcription duty. Undercover assignments are dangerous. Hispanic Special Agents are often assigned to undercover without proper training or adequate back up support. The Customs Service subsequently devalues undercover work and Spanish-language related investigative activities in terms of promotions, awards and other terms and conditions of employment. As a result, there is an adverse impact on Hispanic Special Agents, which cannot be justified by business necessity. As a result of the Custom Service's use of such methods of assigning cases, Hispanic Special Agents are assigned to fewer high profile cases, receive cases that are not career-enhancing, and are disproportionately tasked to undercover work and other Spanish-language related duties than are similarly situated white non-Hispanic Special Agents. In addition, Hispanics are typically assigned narcotics smuggling cases, which are considered less desirable than financial investigations, intellectual property rights investigations, strategic investigations and child pornography investigations.

Special Agent Contreras

35. Throughout his career with Customs, Special Agent Contreras was assigned substantial undercover work while similarly situated white non-Hispanic Special Agents were assigned little or no undercover work. Special Agent Contreras was assigned to numerous undercover investigations in Calexico, California and throughout Michigan. On assignment in Detroit, Michigan, Special Agent Contreras successfully infiltrated a cell of a Columbian drug organization as the principal undercover operative. As a result, several co-conspirators were subsequently arrested and convicted of drug trafficking and money laundering charges. Throughout his career, Special Agent Contreras has been assigned wiretap, language translation, and tape transcription duties. The inordinate amount of undercover and Spanish language related duties he was assigned adversely affected his opportunity to obtain the diverse experiences, necessary for promotion.

Special Agent Gonzalez

36. Throughout his career with BATF and Customs, Special Agent Gonzalez was assigned substantial undercover work, while similarly situated white non-Hispanic Special Agents were assigned little or no undercover work. Special Agent Gonzalez was assigned to numerous undercover investigations in New York City and South Florida because of his Spanish language ability and knowledge of Hispanic culture. In addition, he was frequently assigned wiretap, language translation, and tape transcription duties. For example, while assigned to the Internal Affairs Office in San Juan, Puerto Rico, Special Agent Gonzalez was required to routinely translate documents for other non-Spanish speaking Agents. The inordinate amount of undercover and Spanish language related duties he was assigned adversely affected his

opportunity to obtain supervisory experience. As a result, his chances for promotion, awards and bonuses were adversely affected.

Special Agent Yera

37. From the beginning of his career until June 1991, Special Agent Yera was frequently assigned to undercover and Spanish-language duties such as wiretap monitoring, debriefing informants and transcribing tapes. He performed such assignments at the direction of mostly white Non-Hispanic case agents and other white supervisory personnel.

38. In June 1991 while assigned to the Newark, New Jersey Office of Investigations - Smuggling Division, Special Agent Yera was tasked with performing a controlled delivery as an undercover operative. Agent Yera was to meet two Columbian drug smuggling suspects in the parking lot of a Holiday Inn Hotel and give them 100 kilograms of cocaine which was part of larger narcotics seizure. Yera was instructed by the United States Attorney and his Group Supervisor to entice the suspects into handling the cocaine. Agent Yera was not briefed on the details of his back-up team or on the take down or arrest signals. He later found out that there were no Spanish-speakers assigned to monitor his undercover wire.

39. When one of the suspects closed the truck of the vehicle where the cocaine was stored, the signal for the take-down team was activated. When the team arrived, Group Supervisor Phillip Shields exited the vehicle and fired his weapon, hitting Special Agent Yera in the spine. As a result, Agent Yera was left paralyzed from the chest down. This sequence of events was entirely predictable given the egregious negligence of the supervisory Agents. Had sufficient care been taken to ensure that a Spanish-speaking Agent was monitoring the undercover wire, Agent Yera would not have been injured. Similarly situated non-Hispanic Agents who speak English during undercover assignments are not treated in a similar fashion.

The lack of concern here is reflective of a discriminatory animus against Hispanic Special Agents. It should be noted that the Customs Service did not discipline any of the supervisory Special Agents involved in the Yera shooting. In fact, Customs promoted Phillip Shields the supervisory Agent who shot John Yera.

Special Agent Mercado

40. Throughout out his career, Special Agent Mercado was frequently assigned to undercover and Spanish-language duties such as wiretap monitoring, debriefing informants and transcribing tapes. Most of the time, he performed such assignments for white non-Hispanic case agents who later received credit for the arrests or seizures that resulted from Mercado's work.

Special Agent Almonte

41. Throughout his career, Special Agent Almonte was frequently assigned to undercover and Spanish-language duties such as wiretap monitoring, debriefing informants and transcribing tapes. Most of the time, he performed such assignments for white non-Hispanic case agents who later received credit for the arrests or seizures that resulted from Almonte's work.. In early 1992, Almonte was transferred to the Financial Division of the New York/SAIC office. When he met Group Supervisor Edward Feltham, he was told "They have plans for you", meaning they already had plans to use Almonte as an undercover agent. During a meeting called by ASAIC John Twomey, all of the Agents in the group were asked to tell him about one case they were work on. When it was Almonte's turn, he explained that he was working as an undercover agent for all four groups in the division. Almonte was thrust into undercover work without any sort of formal undercover training. It was not until 1995 that he received undercover training.

42. In 1992, after Almonte had transferred to the Financial Division of the New York/SAIC office, a Group Supervisor and Senior Special Agent (both white non-Hispanics) called him into an office to convince him to perform undercover money-pickups from Columbian drug smugglers. Senior Special Agent Robert McCrossen told Almonte, "This is so easy, I would have my teenage kids do it if I could." In 1997, a Hispanic undercover agent was shot and wounded and two suspects were killed during a money pickup involving New York/SAIC personnel and the Drug Enforcement Agency ("DEA").

43. Because Almonte has constantly been asked by his Customs supervisors to work an undercover, monitor a wiretap, debrief a defendant, transcribe tapes and translate documents, he has not been able to develop his own cases and career. Case agents, who are typically white non-Hispanic, have benefited from Agent Almonte's language and undercover skills, but Almonte has not in terms of career progression.

D. Discriminatory Discipline

44. The Customs Service uses disciplinary procedures that are excessively subjective and, as a result, have an adverse impact on Hispanic Special Agents. Moreover, the Customs Service uses its disciplinary system as a vehicle to retaliate against Hispanic Special Agents who complain about discrimination in the Customs Service. In addition, the Customs Service has engaged in a pattern and practice of failing to discipline white agents who are found guilty of discrimination. These disciplinary procedures cannot be justified by business necessity. As a result, Hispanic Special Agents are disciplined more frequently and more harshly than similarly situated white Special Agents.

Special Agent Contreras

45. In 1992, when he was assigned to the Detroit Office of Investigations, Special Agent Contreras received a written reprimand for a security violation, when he walked away from a Treasury Enforcement Communications System ("TECS") computer without signing off. Just minutes later, a white Special Agent committed the same violation in front of a Customs manager. When it was brought to the attention of the ASAIC, no punishment was imposed on the white Special Agent.

46. After Special Agent Contreras filed a class action complaint in March 1995, he became the subject of numerous Internal Affairs investigations, including, but not limited to the following: In July 1998, Agent Contreras was investigated for theft of government property and unauthorized use of government property when he and another Hispanic Special Agent posted a message in TECS regarding his class action complaint.

47. In October 1999, Special Agent Contreras was served with a letter of removal for allegedly divulging confidential information to his secretary regarding her son's involvement in drug activities. Agent Contreras had received information that the woman's son was going to be killed by members of a drug organization. Agent Contreras appealed this action to the Merit System Protection Board ("MSPB"). While these proceedings were being conducted, Agent Contreras was served with a proposed twenty (20) day suspension for misleading his supervisor about the posting a picture of a dead informant. In June 2000, Agent Contreras settled his MSPB appeal by agreeing to accept a reduction in grade to GS-13 in exchange for all pending charges being expunged from his personnel file. During negotiations, Customs attorney Dyan Medina suggested that Contreras could obtain better terms if he would dismiss his class action suit. Contreras refused to compromise the interests of the class.

48. In 2000, Special Agent Contreras also was investigated by the Department of Treasury's Inspector General because his cousin was married to an alleged drug smuggler. His last contact with the cousin was at a family funeral in 1995.

49. In 2002, the acting SAIC served Special Agent Contreras with a "Letter of Caution" because Contreras granted an interview to the Hispanic newspaper "Bajo El Sol" for an article detailing his rise from migrant farm worker to Customs Service Special Agent criminal investigator. In the article, Contreras advised young people to "stay away from drugs and violence, and to try to find ways to succeed and be happy through formal education."

E. Discrimination in Awards & Bonuses

50. The Customs Service uses methods of selecting Special Agents for awards and bonuses, including quality step increases (QSI), that are excessively subjective. This policy has an adverse impact on Hispanic Special Agents that cannot be justified as consistent with business necessity. Moreover, there is a lack of disclosure by the Customs Service regarding awards and bonuses. These procedures have resulted in Hispanic Special Agents receiving fewer awards and bonuses or awards and bonuses of lesser amounts than similarly situated white Special Agents

Special Agent Gonzalez

51. In 2000, Special Agent Gonzalez was the Program Manager for Undercover Operations at Customs Headquarters. He participated in "Operation Powerplay," an initiative designed to prevent funds from illegal narcotics profits from being removed from the United States. All of the participants received awards for this work on this project, except for Special Agent Gonzalez.

Special Agent Velasco

52. Although Special Agent Velasco received numerous small awards, he did not receive the case awards or recognition normally given to Special Agents for carrying out high profile cases such as "Operation Greenback," a money laundering joint task force operation in Miami, Florida. In fact, all the Special Agents who participated in "Operation Greenback" were recognized and promoted, except for Special Agent Velasco.

F. Foreign Language Proficiency Awards

53. In 1991, Congress authorized federal agencies to pay awards up to five percent of basic pay to law enforcement officers who used one or more foreign languages in the performance of their official duties. 5 U.S.C.S. § 4523. Almost immediately in 1992, the Department of Justice agencies instituted foreign language award programs and began to offer foreign language pay awards for their law enforcement officers who spoke foreign languages in the course of their official duties.

54. In August of 1992, the Customs Service required some Hispanic Agents to be tested for language proficiency by the Defense Language Institute in Monterey, California. But the language pay awards were not implemented at that time. In January 1996, the Department of Treasury's Office of Personnel Policy issued a memorandum describing the parameters of its language pay award policy. Soon thereafter, the Commissioner of Customs drafted a memorandum regarding payment of Foreign Language Proficiency Awards and forwarded it to the Ronald K. Noble, the Undersecretary of Law Enforcement. The memorandum stated that a conservative estimate of the cost to pay LEOs (law enforcement officers) Foreign Language Proficiency Awards would be \$2.0 million. The memorandum further stated that the money

would have to come out of Treasury's Salary and Expenses Appropriation. The Commissioner advised that "it is my intention to take no further steps to authorize the payment of Foreign Language Proficiency Awards to LEOs within Customs" until specific policy guidance is provided. This decision to delay implementation had a disparate impact upon Hispanic Special Agents because they are more likely to qualify for foreign language proficiency awards than any other identifiable group.

55. In 1997, Customs contracted with the Department of State's Foreign Service Institute to test Special Agents again for foreign language proficiency. The tests were conducted via telephone interview. Spanish language proficiency was tested based on Castilian or proper Spanish as spoken in Madrid, Spain. This test did not assess knowledge of the Spanish vernacular as spoken in Puerto Rico, or on the southwest border which is the type of Spanish most often used by Customs Special Agents in the course of their normal job duties. As a result, Hispanic Special Agents received lower foreign language proficiency scores than they would have if they had been tested on a job-related measure of foreign language ability. These actions were taken in conscious disregard of the Hispanic Special Agent's federal protected rights.

56. Under the Customs Service policy, Special Agents had to meticulously document their annual usage of a foreign language in the course of their official duties using case numbers and narrative reports. Participants had to document, at least, 208 hours of official duty usage to be eligible for any level of award. The policy specified that only hours during the basic workweek would be counted. No overtime hours and no credit for partial hours were allowed. The policy also noted that all Foreign Language Awards were subject to the availability of funds.

57. After complaints about the policy, the Customs Service issued a memorandum in 1998, claiming that "we cannot change the statute to allow overtime hours to be credited for

reporting purposes.” This statement was demonstrably false and misleading. Agents were then ordered to redo their reports to eliminate any overtime hours that had been included in their reports on foreign language usage.

58. Given the Customs Service’s heavy utilization of Hispanic Special Agents for their Spanish language ability and knowledge of Hispanic culture on the southwest border and elsewhere, these policies were intentionally and purposively discriminatory. They also had an adverse impact upon Hispanic Special Agents because they are more likely to qualify for foreign language proficiency awards than any other identifiable group. There is no legitimate nondiscriminatory reason for these policies and they cannot be justified by business necessity.

Special Agent Velasco

59. While assigned to Headquarters in the Office of Internal Affairs, Special Agent Velasco applied for the Foreign Language Proficiency Award program, but was denied because he was a manager. He was told that he could not be tested or certified as being proficient in a foreign language. Agent Velasco continued to use his Spanish-language ability while teaching classes and briefing government officials on smuggling techniques in Central America. In addition, Customs management, including the Chief Counsel’s office, constantly asked Velasco to translate Spanish newspaper articles and legal documents.

Special Agent Yera

60. Special Agent Yera was aware of the Foreign Language Proficiency Award program. He took the language proficiency test and passed. However, he was discouraged from applying for the award because of the lack of information on how to comply with the burdensome documentation requirements for certification. Agent Yera used and continues to use his Spanish-language ability in support of his official duties at the Customs Service.

Special Agent Mercado

61. Special Agent Mercado received a letter of commendation from the Federal Bureau of Investigation ("FBI") Special Agent in Charge James Ahearn, thanking him for his contributions in a narcotics investigation in 1990. The letter stated that Agent Mercado's "extensive knowledge of the Spanish vernacular peculiar to the Southwest region, as well as [his] drug investigative experience proved extremely valuable, and were critical" to the success of the operation. Yet, when Agent Mercado was tested for Spanish language proficiency, he received a score of "2", the lowest passing score. Mercado applied for a Foreign Language Proficiency Award, but because of his test score he received a smaller award. Agent Mercado estimates that had he been allowed to count overtime hours spent responding to the border and doing undercover work, he would have documented over 1000 hours of Spanish language usage.

Special Agent Almonte

62. Special Agent Almonte tested and passed a Spanish language proficiency test administered by the Defense Language Institute in August 1992. He thought that Customs was going to start paying him language pay at that time, but they did not. Almonte had been using his Spanish language capabilities since he first became a Special Agent in 1987. He had to retest in 1997 and received his first language pay award in 1998. Almonte's use of Spanish language during overtime hours was not counted in his language awards.

G. Discrimination in Training

63. The Customs Service uses a method of selecting Special Agents for training that is excessively subjective and, as a result, has an adverse impact on Hispanic Special Agents which cannot be justified as consistent with business necessity. As a result of the use of such

methods, Hispanic Special Agents receive fewer training opportunities, and receive training opportunities that are less career-enhancing, than similarly situated white Special Agents.

Special Agent Contreras

64. Every year from 1995 until the present time, Special Agent Contreras requested to attend the Customs National Hispanic Agents Association ("CNHAA") annual training meeting. The Customs Service denied Agent Contreras's request in 1995, 1997, 1998, 1999, 2000 and 2001. He was given permission to attend in 1996, but at the last minute he was redirected to Customs Headquarters in Washington, D.C. In 2000, Agent Contreras was a candidate for the President of CNHAA, but he could not attend the CNHAA conference and was forced to give his election speech by phone and video tape.

65. Some SAIC offices would not pay for Hispanic Agents to attend the CNHAA conference, but they would pay for black agents to attend the National Organization for Black Law Enforcement Executives ("NOBLE") conference or for female agents to attend Women in Federal Law Enforcement (WIFLE) conference.

66. At the CNHAA meetings, the issues raised in this Complaint were brought to the attention of Customs management personnel, but no action was taken in response to the complaints except vague unfulfilled promises.

Special Agent Velasco

67. From 1992 until his retirement in 1999, Special Agent Velasco applied approximately six times for a year-long Harvard School of Government Executive Law Enforcement training course. The course is considered a stepping stone to reaching the Senior Executive Service ("SES") level. Special Agent was not selected and in each instance a white Non-Hispanic Special Agent was selected.

H. Harassment and Hostile Environment Based on Hispanic National Origin

68. Hispanic Special Agents are exposed to a severe and pervasive atmosphere of harassment and intimidation at the Customs Service.

Special Agent Mercado

69. In 1989, Agent Mercado got a tip about a drug-smuggling tunnel that had been excavated from Agua Prieta, Mexico to Douglas, Arizona. He reported the tip to his superiors and asked for digging equipment, but was ignored. Unwilling to give up, he put his personnel on surveillance duty at a local construction site, looking for any sign of a tunnel entrance. When the head of the Customs office in Phoenix became involved in 1990, Mercado was pushed aside and made the liaison to Mexican authorities in the investigation. In May 1990, the tunnel was discovered and Mercado sat on the sidelines as other Customs raided the operation. The tunnel became a high profile case in the Customs Service, but Mercado was sent to Tucson, Arizona to perform Spanish language wiretap duties for the FBI. Mercado filed an EEO complaint and later settled it by accepting a reduction in grade and a transfer to Yuma, Arizona.

70. Mercado was assigned to the Port of San Luis. Before this time, the Customs Service had never assigned a Special Agent to this location. Mercado was issued a 1978 Jeep without air conditioning to travel in the 115 degree Arizona desert heat. He was not issued a bulletproof vest, binoculars or a Customs radio. Mercado was shunned and received little help from Customs management. He had to make drug arrests alone or ask the local police for assistance.

Special Agent Almonte

71. In February 1998, when Agent Almonte told Narcotics Smuggling ASAIC John Saladino that he had arrested several Dominican nationals on a controlled delivery involving 4

kilograms of heroin, Salidino's response was "Those f—king people." On another occasion, Almonte was in the office gym listening to a Spanish music radio station, Saldino said to Agent Brian Aryai, "There he goes with that f—king music again. Does he think this is a foreign country?" Agent Aryai also heard Customs Supervisor Tom Lorreto say that "Ever since they let Hispanics in here, this job has gone downhill."

Special Agent Yera

72. After being permanently paralyzed during a undercover operation, Agent Yera spent nearly two years rehabilitating himself from his injuries. During this time, he was forced to stay in a hotel for a year until handicapped accessible housing could be obtained for him. The Customs Service denied him per diem allowance for this entire period. The added financial burden piled insult upon injury. This demonstrated an animus against Hispanics in the Customs Service.

73. While assigned to the Cybersmuggling Center in 2002, Agent Yera and another Hispanic Agent were speaking Spanish. Customs Program Manager Claude Davenport told them both that they should stop speaking Spanish and speak "American." Earlier, Davenport had requested Agent Yera's help in translating Spanish documents.

Special Agent Martinez

74. While assigned to Customs Headquarters in Washington D.C., Special Agent Martinez's supervisor referred to him as an "Excitable Mexican" after he filed an EEO complaint. Another supervisor called him an "inferior investigator."

I. Retaliation for Reporting Discrimination

75. Throughout the relevant period, Hispanic Special Agents have suffered systematic reprisals and retaliation for asserting protected rights under Title VII, filing EEO claims or raising issues relating to the discrimination or unfair treatment of Hispanic Special Agents. The Customs Service has engaged in concerted efforts to conceal its acts of discrimination and retaliation through the use of onerous and overbroad non-disclosure agreements to prevent public knowledge of their discriminatory behavior and has maintained a secret database of EEO settlements in the Chief Counsel's Office. Furthermore, as detailed below, high level Treasury law enforcement officials encouraged and supported retaliation and reprisal against those who filed EEO complaints in the Treasury law enforcement Bureaus.

76. In a 1999 deposition, Assistant Commission Walter Biondi testified that Customs senior managers had strong feelings against the EEO program and against "filers" or "complainers." Biondi explained that when Sam Banks became the Deputy Commissioner in 1997, Banks told senior Customs managers at a management conference in Crystal City, Virginia, that he was not going to be as easy as Commissioner George Weise was in resolving EEO complaints. Employees who filed EEO cases were going to have to fight to the bitter end. There was applause from crowd.

77. Biondi testified that Commissioner George Weise told him about a meeting in December 1996 or January 1997 with then Treasury Undersecretary for Enforcement Raymond Kelly and Treasury Deputy Assistant Secretary Elizabeth Bresee. At this meeting, Undersecretary Kelly said that "Anybody who filed an EEO complaint against their agency is a disloyal employee, should be shown no favor, and treated accordingly." Biondi testified that he asked Commissioner Weise why no one spoke up at the meeting to tell Kelly that this was not

proper. Commissioner Weise got very uncomfortable and said that "given that he was the Undersecretary of the Treasury, nobody said anything." Undersecretary Kelly later became the Commissioner of Customs. Deputy Assistant Secretary Bresee later became the Treasury Assistant Secretary for Enforcement. Thus, officials at the highest levels of the Department of Treasury, in effect, ordered retaliation throughout Treasury's law enforcement Bureaus against those who filed EEO complaints.

Special Agent Contreras

78. After giving deposition testimony regarding class-wide discrimination in the Customs Service on April 16-17, 2002 in Washington, D.C., Special Agent Contreras returned to Yuma, Arizona. On April 19, 2002, Contreras was summoned to his supervisor's office and told that he was the subject of an Internal Affairs investigation involving his misuse of a government vehicle and for lying to his supervisor.

Special Agent Gonzalez

79. From April 23-24, 2002, Special Agent Gonzalez testified in an EEO administrative deposition in Washington, D.C. regarding class-wide discrimination in the Customs Service against Hispanic Special Agents. When he returned to the Houston, Texas, Office of Investigations where he serves as the GS-15 ASAC, Gonzalez discovered that he had been replaced and that a GS-14 Special Agent had put in an acting position as the ASAC. Special Agent Gonzalez called the Acting SAIC and was told that a GS-14 was put in charge because the SAIC did not know when Gonzalez would return from Washington. This action was retaliatory and the explanation offered was pre-textual. Agent Gonzalez's secretary knew his itinerary and he could easily have been reached by cell phone. All Special Agents in Houston are required to carry a cell phone so that they can immediately be contacted.

80. Subsequently, Gonzalez was notified by the SAIC that he was going to be put in charge of the remote Resident Agent in Charge offices in Corpus Christi, Dallas, Oklahoma City, and Beaumont. This would mean diminished responsibility and increased travel. This constituted further retaliation against Gonzalez for actively prosecuting this class action case in the EEO administrative process.

Special Agent Sandoval

81. In 1992, while serving in the Office of Internal Affairs for Calexico, California, Special Agent Sandoval was asked to go to San Diego and investigate a claim involving the alleged assault of Ken Lakes, an African-American Customs Inspector, at the Ysidro Port of Entry. Sandoval investigated and determined that the allegations were true. Several white Customs managers had thrown rocks at Ken Lakes and it appeared to be racially motivated. One of the perpetrators wore a Nazi Swastika ring. Evidence was developed showing that these Customs managers collected Nazi memorabilia and that they had scrawled swastikas on lockers and elevators in Customs buildings. Sandoval came to believe that a neo-Nazi group was behind the incident. He reported it to his superiors and recommended that it be referred to the United States Attorney's Office for prosecution as a "hate crime" under the civil rights statutes. His request was denied and he was told that Customs would send out a memo saying inspectors should not throw rocks at black employees. Sandoval ignored his superiors and reported the results of his investigation to the United States Attorney's Office, where the case was referred to the Justice Department's hate crimes unit in Washington D.C.

82. Thereafter, Agent Sandoval's upgrade to GS-14 was denied and he was not selected for the Internal Affairs/Office of Enforcement rotation. He did not receive temporary acting supervisory assignments. Based on the foregoing, Agent Sandoval filed an EEO

complaint alleging discrimination and retaliation. In 1998, a California federal jury awarded Sandoval \$200,000 for discrimination and retaliation. Several jurors said they believed that corruption and discrimination may be systemic within the Customs internal affairs unit where Sandoval worked in 1992.

83. Special Agent Sandoval applied for six GS-15 foreign attaché positions in London, Paris, Ottawa, Montreal, Panama and Venezuela. He was not selected because he had filed EEO complaints. None of the selected applicants had previously participated in EEO protected activity.

J. Emotional Distress

84. The Customs Service has intentionally discriminated against Hispanic Special Agents in their personnel policies, procedures and practices as set forth above. As a result, the plaintiffs and the class they seek to represent have suffered emotional distress, humiliation and embarrassment. Such emotional distress has been manifested in a variety of ways including, but not limited to, psychological trauma, physical injury and other symptoms to be proven at trial.

85. As additional evidence of discrimination and information about potential victims of discrimination is discovered, this complaint is subject to amendment.

PRAYER FOR RELIEF

86. The foregoing claims against the Department of Treasury and the Customs Service establish a pattern and practice of discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended, and the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

87. Therefore, plaintiffs pray that the following relief be granted to them, and to those whom they represent:

(a) Enter a declaratory judgment that defendant's conduct as alleged herein has violated plaintiffs' civil rights and the civil rights of the Hispanic Special Agents of the Secret Service under 42 U.S.C. § 2000e and 42 U.S.C. § 1981a;

(b) Enter a permanent injunction barring defendant from continuing to engage in the illegal and discriminatory conduct alleged herein;

(c) Enter a permanent injunction directing defendant to take such affirmative steps as necessary to remedy the effects, and prevent future occurrences, of the illegally discriminatory conduct alleged herein;

(d) Award compensatory damages according to proof for each plaintiff and each class member up to \$300,000 and back pay and other such damages as would compensate fully each plaintiff and class member for the emotional distress and other harm alleged herein;

(e) Award reasonable attorneys' fees, expert fees, and costs pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000e; and

(g) Order other such relief as just and proper.

Dated: May 10, 2002

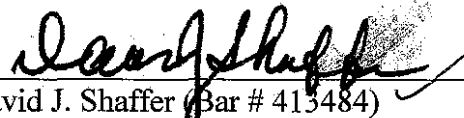
Respectfully submitted,

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DEMAND FOR A JURY TRIAL

Pursuant to Fed.R.Civ.P. 38(b), the plaintiffs demand a trial by jury of all issues so triable as of right.



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