UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAROLEE BRADY HARTMAN, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil Action No. 77-2019CRR
	)	Judge Charles R. Richey
JOSEPH DUFFEY,	)	Special Master Saltzburg
	)	
Defendant	)	

CLAIMANT AMBROSE'S OPPOSITION TO DEFENDANT'S MOTION TO REVERSE SPECIAL MASTER'S DECISION REGARDING CLAIM OF JUDITH L. AMBROSE

On October 15, 1996, Defendant Duffey filed his Motion to Reverse Special Master's Decision Regarding Claim of Judith L. Ambrose, asserting five grounds for reversal: (1) the record does not support the Special Master's determination that Ms. Ambrose actually applied for the position of Radio Broadcast Technician in 1976; (2) the Special Master improperly analyzed the claimant's burden of proof of application and rejection; (3) the Special Master improperly analyzed Defendant's burden of proof; (4) the Special Master improperly ruled that the claimant mitigated her damages; and (5) the Special Master denied reasonable discovery to Defendant. Not only do Defendant's arguments lack merit, they are specious and indicative of his refusal to recognize the finding of liability and the allocation of the burdens of proof properly ordered by this Court.

I. **Defendant cannot demonstrate that the Special Master's determination that Claimant Ambrose applied is clearly erroneous.**

In his first argument, Defendant seeks reversal of the Special Master's determination that Judith Ambrose applied for the position of Radio Broadcast Technician in 1976. Defendant argues that the Special Master, having relied upon sworn testimony of the claimant for the purposes of finding application, committed clear error. (Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Reverse Special Master's Decision Regarding Claim of Judith L. Ambrose [hereinafter "Defendant's Memorandum"] at 4 - 7.) Specifically, Defendant complains that Ms. Ambrose's testimony that she applied for the position of Radio Broadcast Technician is unsupported by documentary proof, that is, that Ms. Ambrose did not retain her application form nor the rejection letter she received thereafter. (*Id.* at 7.)

Defendant proffers this position despite Defendant's full knowledge that class members had no notice whatsoever that the Hartman suit was pending at the time and therefore had no reason to maintain an application or rejection letter.[1/] Defendant, then, demands that class members, without notice of the suit, retain an application and a rejection letter for twenty years in order to meet the burden of proof on the issue of application. Such demands are patently unreasonable. Defendant offers not a single authority for this remarkable and oppressive requirement.

1/ Claimant Ambrose testified at her hearing that she had kept her application and her rejection letter for some time and likely discarded it when she moved with her child to Washington in 1986. (*See* Transcript, July 29, 1996, at 161.) According to Ms. Ambrose, "No doubt it was because I divested myself of everything, everything, that I didn't think was pertinent to my life at the time. . . . Again, I can't see why I would've -- if you think about it **why I would have kept a 20 year old rejection letter.** It doesn't sound logical." (*Id.*)

Further, Defendant rejects the Special Master's reliance upon Ms. Ambrose's testimony of the contents of the rejection letter she received, claiming, "there is nothing from her description of the putative rejection letter from the USIA to distinguish it from any other form letter." (Defendant's Memorandum at 6.) What Defendant wishes to escape, and what the Special Master noted, is that the Agency's own witness, Robert Holland, described USIA's rejection letter in virtually identical terms to those used by Ms. Ambrose: "that there were other applicants that we had that were more qualified than they and had been selected therefor." (Transcript, July 30, 1996, at 193; Report of the Special Master, at 11.) On this record, the Special Master properly determined that Ms. Ambrose applied, as she testified, and was rejected.

Moreover, in light of the Agency's wholesale document destruction, the very fact that this Defendant would offer the position that, absent corroboration, a claimant's testimony is insufficient to establish application is more than a little ironic. Not only did the Agency have specific notice that this suit was pending and was therefore under a legal duty to maintain those documents, Defendant has boldly insisted that he should bear no responsibility whatsoever as a result of that destruction, despite the prejudice undeniably visited upon the Plaintiffs. Had Defendant followed the law, **he** would have a copy of Ms. Ambrose's application in his file as well as the applications of thousands of other women, and no burden would have been visited upon Plaintiff class at all. At bottom, Defendant admittedly destroyed the very corroboration he now demands.

Ms. Ambrose testified, credibly in the view of the Special Master, that she applied for the position of Radio Broadcast Technician. (Report of the Special Master Regarding 1976

Claim of Judith Ambrose, at 6 - 10.) Significantly, Defendant offered no shred of credible evidence to contradict Ms. Ambrose's testimony. Since Defendant cannot demonstrate clear error of fact on this credibility issue, this Court should reject Defendant's argument. *See* Rule 53,(e)(2), Fed. R. Civ. P; *Oil, Chemical, and Atomic Workers International Union v. N.L.R.B.*, 547 F.2d 575 (D.C. Cir. 1976), as amended (1977).

II. The Special Master, far from committing error harming Defendant in the analysis of Defendant's burden of proof, permitted Defendant to offer opinion testimony over objections of the Plaintiffs.

In an across-the-board attack on the decision in favor of Ms. Ambrose, Defendant complains that the Special Master improperly analyzed the burden of proof on Defendant during Ms. Ambrose's hearing, an error, Defendant argues, that mandates reversal of that decision. (Defendant's Memorandum at 7 - 12.) Defendant complains that the standard during class action remedial hearings is preponderance, rather than clear and convincing. (*Id.*) Further, Defendant claims that the Special Master, far from applying either a preponderance or a clear and convincing standard, required Defendant to meet his burden "to the exclusion of all possible doubt." (Defendant's Memorandum at 7.) Finally, Defendant argues that, even under a clear and convincing standard, his evidence exceeded his burden of proof. (*Id.*) Not only is Defendant in error on the issue of the proper standard to be applied, on the merits Defendant offered no credible evidence in support of his position, which rested entirely upon an improper hypothecation regarding the past.

Since Defendant's argument is unsupported in law or fact, his position must fail. As a result, the Ms. Ambrose's claim must prevail.

A. **Defendant's position that he is entitled to a preponderance standard is contrary to precedent and has been waived.**

At the outset, Plaintiffs note that Defendant claims, without elaboration, that this class action remedial phase is controlled by *Price Waterhouse*, 490 U.S. 228 (1989), a Supreme Court opinion concerning an individual liability matter, and demands that the entire *Teamsters* process in *Hartman* be altered. (Defendant's Memorandum at 7.) Defendant cites no authority and makes no argument for the proposition that the holding in *Price Waterhouse* may be imported to *Hartman* where Defendant never proposed such a standard despite multiple opportunities to do so, where Defendant has waived his right to appeal on the basis of such standard, and where Defendant himself proposed the clear and convincing standard. On this record, Defendant's current argument is undercut by his own actions.

A review of the record in this case demonstrates that Defendant had multiple opportunities to raise the issue of the standard to be used in *Teamsters* hearings and has never disputed that the clear and convincing standard is applicable. For example, despite having appealed this Court's 1988 remedial decision on two separate occasions, Defendant has never appealed the issue of the standard of proof, a critical issue before this Court nine (9) years ago when the issue of remedies was tried and fully briefed by the parties. Defendant never argued for a preponderance standard in his post-remedial trial briefs in 1987 or at any time thereafter. (*See* Defendant's Trial Brief, and Defendant's Post-Trial, filed February 17, 1987.) Significantly, *Price Waterhouse* was decided in 1989, a full three years prior to Defendant's first appeal of this Court's remedial opinion. Defendant neither raised the issue before the Trial Court, nor did Defendant designate the burden of proof as an issue in his 1992 appeal.

Additionally, in 1991 Defendant affirmatively embraced the clear and convincing standard in his counter-proposal to Plaintiffs' Proposed Order of Reference. (*See* Defendant's Proposed Order of Reference at 11, filed July 22, 1991.) Finally, should this issue have been genuine, Defendant would have preserved it in his 1995 appeal. Not having ever raised the issue before the Trial Court at any time before or after the 1988 Remedial Opinion, Defendant is precluded from raising it now, by both operation of the doctrine of waiver and by law of the case. *Hartman v. Duffey*, 88 F.3d 1232 (D.C. Cir. 1996), *rehearing and suggestion for rehearing en banc denied* (issues not raised on initial appeal are waived) *and the cases cited therein.*

Defendant chooses now to argue against the very position he embraced before this Court and to attempt, at this late date, to turn the clock back again and to overturn literally years of effort. While Plaintiffs have long recognized that delay is a critical goal of Defendant's strategy (after all, the longer he delays the greater the possibility that women who were victimized will never enter the agency in their rightful places), this current posture far exceeds the "dillydally, do little, and delay" noted by the Court in February, 1993. (*See* Transcript, February 4, 1993, at 18.)

B. **Defendant's assignment of error by the Special Master on the burden of proof must fail where Defendant's position relies upon a misreading of the decision and does not reflect the Orders of this Court.**

For his second point on burden of proof, Defendant argues, without support, that the Special Master committed an error of law by applying neither the preponderance standard now embraced by Defendant nor the clear and convincing standard ordered by this Court, but by requiring but proof beyond all doubt. (Defendant's Memorandum at 7.) Defendant's argument must be rejected where the Special Master applied the proper standard of proof.

Initially, Defendant relies upon that portion of the Special Master's Report which states:

> There is no way to know exactly what happened when Ms. Ambrose filed her application in 1976. . . . It is possible that in 1976, a time when there were few female radio broadcast technicians at VOA, someone rejected her[] without actually having the application fairly evaluated. It is possible that someone removed a portion of the application so that the evaluator had an incomplete form. It is possible that the evaluator treated men and women differently in 1976.

(Defendant's Memorandum at 7, *quoting* Report of the Special Master at 38-39.)

From this quotation, Defendant concludes "[t]hus, the Special Master required defendant to establish his defense to the exclusion of all possible doubt." (*Id.*) Notably, Defendant has severely edited this quotation to excise the conclusion drawn by the Special Master that demonstrates the fatal flaw in Defendant's position. The excised portion of the Special Master's ruling reads, in pertinent part:

> Plaintiffs cannot possibly know or prove what occurred inside the agency, nor are they required to do so. The Defendant is required to prove the defense set forth, namely that Ms. Ambrose would have been rejected[2/] because she lacked minimal qualifications in 1976. There is no credible evidence to support the defense.

(Report of the Special Master at 38.)

Injudicious editing cannot be used to manufacture a legal argument. Moreover, the very fact that Defendant concludes from this passage that the Special Master held him to a "beyond all doubt standard" demonstrates Defendant's utter failure to comprehend or accept his burden of proof during a *Teamsters* hearing. Defendant, not the Plaintiffs or the Special Master, must

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2/ In fact, as discussed in Part C, *infra*, this Court cannot enter any order in favor of the Defendant on this claim, since Defendant's entire showing at Ms. Ambrose's hearing consists of impermissible hypothecation, not evidence of the actual treatment afforded Ms. Ambrose's application in 1976.

prove, by clear and convincing evidence, his own defense, in this case, "lack of minimum qualifications." The Special Master found, as a matter of fact and law, that Ms. Ambrose was qualified for the position she sought and therefore the proffered defense fails. The Special Master, through this passage and others, has ruled that Defendant has not and cannot prove his burden of demonstrating that she was rejected for a legitimate, nondiscriminatory reason. (*Id.*)

In his pleading, though, Defendant reads the record as if he had no burden at all and the Special Master's findings of fact carry no weight. The Special Master specifically ruled: (1) Claimant Judith Ambrose met the specified qualifications for the position of Radio Broadcast Technician in 1976, but was rejected; (2) Ms. Ambrose would have included all of her qualifications in her application to the Agency; and (3) the Agency found qualified and hired other male applicants with the same or lesser qualifications. (Report of the Special Master at 33-38.)

Defendant attacks the determination that he failed to meet his burden of demonstrating lack of qualifications by claiming that the Special Master's conclusion rests on faulty premises. Defendant would do better to appraise the record in a fair manner. Since he had neither the actual application nor a witness who recollected Ms. Ambrose's application, Defendant offered only two specific pieces of documentary evidence in support of the sole defense that Ms. Ambrose lacked qualifications: an SF-171 from 1985 (nine years after the original application) and a resume from 1995 (nineteen years after the application.)

First, at the hearing, Defendant offered, from his own files, a **1985** application of Ms. Ambrose for an entirely different position as evidence that she lacked qualifications in 1976. Ms. Ambrose promptly pointed out that Defendant's exhibit was incomplete and was missing

a page which would have included relevant experience. (Transcript, July 29, 1996, at 130-131.) To overcome what is, obviously, yet another in the legion examples of Defendant's faulty record-keeping, Defendant now claims that the Special Master improperly discounted the incomplete SF-171 from 1985 and concluded that "a supplemental page had been removed," that the "supplemental page . . . was subsequently removed by unknown nefarious agents of USIA to disadvantage her," and that "someone had tampered with the application." (*See* Defendant's Memorandum at 9 - 10.) The Special Master made no such conclusions and cast no such aspersions. Rather, the Special Master merely concluded that the additional experience would have been included on a separate supplemental sheet,[3/] that the supplemental sheet was not in the file, and given the position for which she was applying, Ms. Ambrose would have included the experience in her application. (Report of the Special Master at 16.)

Thereafter, Defendant turned to an abbreviated **1995** resume (prepared 19 years after the application he destroyed) and argues that "this resume falls far short of describing the claimant's qualifications" and that because this resume, hastily prepared two decades later and in anticipation of agency RIFs, is abbreviated, the Special Master was compelled to conclude that any SF-171 prepared in 1976 (19 years earlier) would have been similarly abbreviated because Ms. Ambrose worked long hours. (Defendant's Memorandum at 10.) Defendant then concludes, "Hence, the claimant would not have had time to prepare an elaborate employment application even if she had been inclined to do so." (*Id.*) The torture of this logic is so convoluted that it is difficult to describe. The closest analogy is akin to concluding that a person

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3/ Defendant's own counsel agreed that, given the physical appearance of the original form, this relevant experience would have to have been contained on a supplemental sheet. (Transcript, July 30, 1996, at 186.)

who makes his mortgage payment one day late in 1996 must not have had the income to qualify for the mortgage when he applied in 1976.

After lofting this astounding non-sequitur, Defendant then claims that, even if Ms. Ambrose's qualifications were as outstanding as she testified and that even if she was rejected while males of the same or lesser qualifications were hired, the Special Master still impermissibly found in favor of the claimant because Defendant may have merely "misjudged" her qualifications, and mere honest mistakes do not constitute sex discrimination.[4/] (Defendant's Memorandum at 11.) Defendant's conclusion demonstrates his own failure to recognize or accept this Court's order that he, not the plaintiffs, has the burden of establishing that no sex discrimination occurred, and that where he fails, the presumption entitles the claimant to judgment.

In fact, the Special Master determined that Ms. Ambrose was fully qualified and that the Defendant failed to prove otherwise, by any standard of proof. Moreover, without regard to Defendant's obvious failure of proof, Plaintiffs thoroughly established the relative lack of qualifications of the two male selectees in comparison with Ms. Ambrose. (*See*, Transcript, July

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4/ This "honest mistake" position is a post-hearing invention and as such is untimely. After having watched his defense of lack of minimum qualifications collapse in open court, Defendant now creates a new and different reason why he should prevail. Defendant's Declaration opposing Ms. Ambrose's claim does not even suggest that an "honest mistake" was made. (*See* Court's Exhibit B.) Finally, *assuming arguendo* that an "honest mistake" defense could be entertained, such a defense is not supported by this record. Defendant's sole liability witness, Mr. Holland, specifically denied any recollection of having considered Ms. Ambrose. Moreover, and critically, in an intentional discrimination case where intent to discriminate is presumed, a "good faith" defense would require, at a minimum, that the person who made the judgment to testify so that Plaintiffs could test the defense through cross-examination. Since Defendant offered no witness with knowledge and given Defendant's wholesale document destruction, Plaintiffs could not, in any event, have tested a "good faith" defense.

30, 1996, at 212-224.) The treatment of these males by the agency contrasts sharply with that of Ms. Ambrose, who, with better qualifications, was apparently summarily rejected, and the Special Master so found. (Report of the Special Master at 36 - 38.) As well, in the view of the Special Master, Defendant's own witness conceded the fact of Ms. Ambrose's qualifications. (Report of the Special Master at 32 - 33.)

Defendant's argument consists, almost entirely, of a skewed reading of the record, inaccurate characterization of the findings of the Special Master, and an unsupported view of the law. Defendant failed to carry his burden of proof on his sole stated defense. Where Defendant's sole proffered defense--lack of qualifications--fails, the presumption of discrimination has not been dispelled and Claimant is entitled to judgment. This Court has so ruled. *Hartman v. Wick*, 678 F. Supp. at 335. Ms. Ambrose must prevail.

C. Defendant cannot overturn the determination in favor of the claimant where this Court would be forced to endorse an impermissible hypothecation of the past.

The Trial Court cannot, on this record, overturn the determination in favor of Ms. Ambrose where to do so would require this Court to endorse an impermissible hypothecation of the past.

Ignoring this Court's proper rulings, Defendant adopted the view at Ms. Ambrose's hearing that his burden could be met, where his witness concedes lack of personal knowledge of the actual reason for Ms. Ambrose's rejection, merely by only showing what "might have" been the reason for her rejection. Failing to recognize his status as a proven discriminator, Defendant refused to acknowledge that he was required to offer evidence that his reason was true, valid, and non-discriminatory and to do so by admissible evidence. (Defendant's

Memorandum at 11.) As this Court has ruled, "if there is any uncertainty about the **actual** reason that defendant rejected a claimant's employment application, that doubt must be resolved against the defendant." *Hartman v. Wick*, 678 F. Supp. at 335.

According to this Court's rulings, Defendant has engaged in a pattern and practice of discrimination; in other words, discrimination *was the routine*. *Id.* at 335. Specifically, this Court ruled that "once 'the employer is a proven discriminator,' there is a **presumption** that his actions against alleged victims of that discrimination were ***illegal***." *Id.* at 333 (initial emphasis in original). As this Court has ruled, "Because it is impossible to recreate the *process* that led to the rejection of a plaintiff's employment application, 'all doubt must be resolved against the proven discriminator. . . .'" *Id.* at 335. Thus, as ordered by this Court, to dispel the presumption of illegality, Defendant was required to demonstrate his rejection of Ms. Ambrose's application was free of discrimination, that her rejection was the *exception* to the policy and practice of discrimination. To discharge his burden, Defendant may prove by clear and convincing evidence that the claimant's application was subjected to full and fair consideration, that the same standards were applied to her that were applied to males, that no additional procedural roadblocks were visited upon her, and finally that after a full and fair consideration she was properly rejected. This Defendant did not do.

Contrary to Defendant's current complaints that he was not afforded a proper hearing under the appropriate standard of proof, the Special Master afforded Defendant far too great an opportunity to meet his burden, and, rather than requiring the Agency to prove by clear and convincing evidence why Ms. Ambrose's application ***was*** rejected, the Special Master permitted the Agency to offer "an opinion" from a personnelist that Ms. Ambrose lacked minimum

qualifications.[5/] This single personnelist admitted he did not have personal knowledge of Ms. Ambrose's qualifications, and, indeed, did not even have a copy of her application for employment from 1976. (Transcript, July 30, 1996, at 199.) Defendant offered no record of actually having given Claimant Ambrose full and fair consideration. Defendant offered no evidence of having considered Ms. Ambrose's qualifications in 1976 under the same standards afforded male applicants or that she was given the same favorable reading of her qualifications as had the males. (*See* Report of the Special Master, *generally*, at 35 - 38.) Defendant offered no testimony from anyone with knowledge of her qualifications in 1976. Defendant offered no evidence of having rejected Ms. Ambrose for lack of qualifications or for any other reason. In fact, no records of the event have survived, as Defendant has admittedly destroyed them. Rather than excluding this witness from testifying, as requested by Plaintiffs (*see* Transcript, July 30, 1996 at 30 - 31; 195), the Special Master permitted this witness, under the rubric of "opinion" testimony, and using a ***1985*** application for an entirely different position and ***1995*** abbreviated resume, to offer the ***opinion*** that the USIA "would have rejected" Ms. Ambrose for lack of qualifications nearly twenty years ago.

According to the burdens directed by this Court, "Defendant will be able to overcome this presumption of discrimination if he can prove, by clear and convincing evidence, that he **had** a legitimate, non-discriminatory reason for rejecting the claimant's employment application. *See, e.g., Trout v. Lehman*, 702 F.2d 1094, 1107 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056, 104 S.Ct. 1404, 79 L.Ed.2d 732 (1984); *McKenzie v. Sawyer*, 684 F.2d at 78;

5/ Plaintiffs made timely objections to the admission of this "hypothecation." (*See*, Transcript, July 29, 1996 at 22, 29; Transcript, July 30, 1996 at 195.)

Harrison v. Lewis, 559 F. Supp. at 946-47." *Hartman v. Wick*, 678 F. Supp. at 335. This Court went on to hold, "Thus, if there is any uncertainty about the actual reason that defendant rejected a claimant's employment application, that doubt must be resolved against the defendant." *Id.* The Special Master himself, more than a year and a half prior to Ms. Ambrose's hearing indicated his understanding of this Court's prior rulings:

> [t]he remedial order does not permit the Defendant to argue that he "might have," "could have," or even "would have" rejected a claimant for various reasons. What matters is what reason the Defendant actually had for not hiring the applicant at the time she was rejected for employment.

(Special Master's Report, January 17, 1995, at 3.)

Thus, under the law of the case, Defendant may meet his burden of proving that he rejected Ms. Ambrose's application for a legitimate, non-discriminatory reason only by offering evidence of the actual reason that he had at the time her application was rejected. *Id.* In short, the Defendant is prohibited from asserting a hypothetical non-discriminatory reason for rejecting the applicant. *Id.*

Although in a case not applicable to a class action remedial phase, the Supreme Court has prohibited hypothecating the past under Title VII, through its *Price Waterhouse* decision. There the Court ruled that the "critical inquiry" is whether race, gender, or an impermissible factor "was a factor in the employment decision *at the time it was made*." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989)(emphasis in original). "An employer may not, in other words, prevail . . . by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." *Id.*, 490 U.S. at 252; *see also Sabree v. United Brotherhood of Carpenters and Joiners Local*, 921 F.2d 396, 404 (1st Cir. 1990)(finding that

"the direction [in *Price Waterhouse*] to essentially take a snapshot at the moment of the allegedly discriminatory act is applicable to all Title VII cases").

This doctrine had also been embraced by the United States Court of Appeals for the District of Columbia Circuit, although also in an individual liability case. In *Cuddy v. Carmen*, 762 F.2d 119, 127 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1034 (1985), *reh'g denied*, 475 U.S. 1072 (1986), the Court held that an employer who did not recall considering a plaintiff's application could not satisfy the burden of articulating a legitimate non-discriminatory reason by testifying that "if he had considered" plaintiff's application, he "would not have selected" plaintiff. Such testimony alone "would clearly be insufficient evidence of what the defendant's motivation here actually was: The question at hand is the *actual* reason for the employment decision -- not some *hypothetical* non-discriminatory reason that an employer submits after the fact." *Id.* (emphasis in original).

Following the reason of *Cuddy*, other courts have also held that a defendant may not articulate *post hoc*, hypothetical non-discriminatory reasons for its actions. *See, e.g., Sabree*, 921 F.2d at 404 ("a defendant may not invent a *post hoc* rationalization for its action at the rebuttal stage of the case"); *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 925 (11th Cir. 1990); *Joshi v. Florida State University Health Center*, 763 F.2d 1227, 1235 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985). Rather, the defendant must explain its actual motives at the time of the employment decision under scrutiny. *Sabree*, 921 F.2d at 404 ("unless a defendant articulates a 'legitimate non-discriminatory reason' that *actually* motivated the decision, the reason is legally insufficient") (emphasis in original); *Jolly v. Northern Telecom, Inc.*, 766 F. Supp. 480, 493 (E.D. Va. 1991)(citing *Cuddy*, stating that defendant cannot rebut plaintiff's

prima facie case by "articulating after-the-fact hypothetical non-discriminatory reasons for its action. Instead, it must explain its motives as of the time that the plaintiff was actually rejected."); *Norris v. City and County of San Francisco*, 900 F.2d 1326, 1331 (9th Cir. 1990)("[t]he issue to be resolved is whether the decision, when it occurred, was then *actually* motivated by illegal discrimination, not whether the employer could thereafter articulate some hypothetical non-discriminatory reason for its decision")(emphasis in original). Significantly, these decisions, in large part, address the burdens in an individual liability trial prior to a finding of liability, circumstances in which a defendant's burden is merely articulation, not as here, where Defendant has the burden of proof himself and by clear and convincing evidence.

In a *Teamsters* hearing pursuant to a finding of liability in an intentional discrimination matter, the sole issue for trial is historically what occurred: whether the Agency can demonstrate that ***at the time*** this particular claimant's application was rejected, no intentional discrimination played a part. Stated another way, Defendant must prove by clear and convincing evidence this claimant was not the victim of the routine practice of the discrimination against women in that the Defendant rejected her for legitimate, non-discriminatory reason ***at that time*** and, thus, this claimant's rejection was the exception to that routine practice. Whether any individual, expert or lay witness, today has an ***opinion*** regarding whether she was the victim of discrimination twenty years ago is simply not relevant, and such opinion testimony hardly constitutes clear and convincing evidence.[6/]

6/ Endorsing hypothecation rather than evidence also invites the Claimant to offer opinion testimony that she was the victim of discrimination. Thus the entire hearing would degenerate into competing opinions regarding the discriminatory policy, rather than an evidentiary hearing regarding the actual event.

Plaintiffs strenuously objected to the admission of such unfounded opinion which undeniably is not based on first hand knowledge of the actual reason for rejection, as required by this Court's remedial opinion. As the record demonstrates:

> Q. [Mr. Van Horn]: Mr. Holland, I'd like you to -- next, I'd like to give you what's been received in evidence as Defendant's Exhibit 1 and my question is, based on the routine practice that you followed as of September 1976, can you tell us whether the applicant that's reflected here, Ms. Ambrose, **would have had** the minimum qualifications necessary for Radio Broadcast Technician as of September 1976?

(Transcript, July 30, 1996, at 194.)

Agency witness Robert Holland, in response to this kind of improper questioning, testified in the conditional tense: "I **would have considered**," "I **would have given** very little weight," and "it **would not have** met the minimum qualifications." (*Id.* at 195 - 197.) Rather than offer evidence of actually how and why Ms. Ambrose was rejected, Defendant offered only unsubstantiated opinion, conceived years after the actual event.

In his Final Report on the Claim of Judith Ambrose, the Special Master, although he ruled in favor of Ms. Ambrose, found, "Plaintiffs' reliance on [cases prohibiting hypothecated non-discriminatory reasons] is reasonable, but they do not . . . preclude the Defendant from proving that there was a practice in place at a given time that was uniformly applied to all applicants." (Report of the Special Master, at 48, ¶ 9.) Despite Plaintiffs' citation of numerous authorities, Defendant has not offered even a single authority for his current position that this Court could overturn the Special Master's decision and rule that Defendant met his burden of

proof through the offer of a mere hypothecation of the past.[7/] Far from applying too high a standard of proof to the Defendant, the Special Master applied far too low a standard, and, thus, did not give sufficient deference to this Court's ruling that the practice of the agency was one of discrimination against women and, therefore, any employment decision involving a class member is presumptively a product of that practice. *See Hartman v. Wick*, 678 F. Supp. at 333. In fact, the presumption of the unlawfulness of Defendant's decisions constitutes the very basis for *Teamsters* hearings and the essence of the rationale behind shifting the burden of proof to a defendant.

Rather than putting on evidence of what actually occurred and ignoring this Court's finding of intentional discrimination, Defendant attempted to convert this claim into a contest of what the Agency would have, could have, or should have done. Significantly, albeit very subtly, endorsing this view serves very effectively to relieve Defendant of his proper burden in that Defendant would be permitted to "articulate" any hypothetical non-discriminatory reason regardless of his actual reason. Under this reasoning, Defendant could succeed in carrying his burden with **no** actual evidence whatsoever. Adopting this view would sweep away any effect of the liability finding, and the Plaintiffs would be left to prove, as if there were no liability finding, that Defendant discriminated against each claimant. Moreover, under this scheme, Plaintiffs, as in the case of Ms. Ambrose, would be, and were, forced to meet that newly crafted reason both without benefit of the historical, relevant documents and without testimony from the

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7/ The Special Master also cited no authority for the admission of hypothecated evidence which would permit a ruling in favor of the Defendant.

official who actually rejected the applicant.[8/] Plaintiffs are aware of no authority for such an extraordinary position.

For example, at Ms. Ambrose's hearing, Plaintiffs were forced to cross-examine not on what actually occurred to Ms. Ambrose, but rather on the merits of the hypothetical opinion of an Agency personnelist who had no recollection or record of the actual handling of Ms. Ambrose's application. As a result, cross-examination was directly constrained to other instances in which this newly crafted opinion of the witness appeared untenable. Thus, Plaintiffs in Ms. Ambrose's claim were left with scouring those few documents which survived to determine whether any other files relating to males hired by the Agency indicate that the expert's current opinion is ill-founded. Predictably, Defendant objected to Plaintiffs' attempts to offer documentary evidence undermining Mr. Holland's opinion, by asserting that evidence relating to "other hires" was not contemporaneous to the decision on Ms. Ambrose's application or that the witness had no personal knowledge regarding the qualifications of male selectees.[9/] In other words, heads I win, tails you lose.

This Court recognized full well in 1988 that this very day would come. At that time, the Defendant argued that he should not be held responsible for his continuous destruction of

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8/ This Court has itself recognized the power of historical documentation in its remedial opinion where the Court noted that "plaintiff[s] even adduced unrebutted evidence showing that the USIA vetoed at least one Mid-Level applicant because there were 'enough women in the Foreign Service at mid-level.'" *Hartman v. Wick*, 678 F. Supp. at 332.

9/ Where Plaintiffs sought to cross-examine Mr. Holland concerning his "opinion" about Ms. Ambrose and using examples of other selectees, Defendant objected on the basis that "this is *after the time* that Mr. Holland was screening applications for minimum qualifications and I just had him testify about the policies and practices that he followed." (Transcript at 224; *see also* Transcript at 277, 291.)

documents. Although this Court was fully entitled to render judgment against the Defendant there and then, the Court did not enter the extreme sanction against Defendant, but offered him no solace either. Rather this Court simply directed that the Defendant live with the circumstances he himself had constructed, without aid of the Court or aid by the Plaintiffs. *Hartman v. Duffey*, April 15, 1988 opinion of the Court, at 4 ("While this Court has not subjected defendant to penalty because of this routine destruction of files, it cannot allow the lack of information resulting from defendant's practices to affect the legal requirements governing this suit. If the defendant-discriminator faces difficulties, they are difficulties of his own making, and the law cannot penalize the innocent victims of his discrimination simply to ease his tasks.") That the evidence needed by Plaintiffs to meet these defenses was also destroyed with those documents fails to concern the Defendant one iota.

Should Defendant's argument prevail, nearly every claimant could be met by some *facially neutral current opinion*, unsupported by either the actual documents or the actual witnesses. Defendant, then, undoes the finding of intentional discrimination in a single stroke and denies the Plaintiffs the benefit of the presumption of liability, uses the destruction of documents as an excuse for putting on opinions, not evidence, and since the documents have been destroyed, neatly avoids evidence of pretext.

Critically, Mr. Holland and other newfound "experts" of his ilk cannot be effectively tested by cross-examination on the issue of intent since they are not testifying from first hand personal knowledge of what actually transpired. To that extent, therefore, in intentional discrimination *Teamster* hearings, such opinion is wholly irrelevant. In Plaintiffs' view, and the view of a number of courts including this Court, hypothecation excuses Defendant from offering

evidence on a fundamental element of proof. Defendant would be permitted to inoculate his witnesses against any cross-examination directed at the issue of intent, as each witness would be fully at liberty to claim that he was not involved in the actual decision. Fundamental fairness demands that this argument be rejected so that Defendant is not allowed to proceed in this fashion.

Defendant cannot be permitted to prejudice Plaintiffs twice--once by destroying the documents necessary to past litigation and again by insulating his witnesses from proper examination on the critical historical personnel actions. Where Defendant is hamstrung by his failure to maintain those documents and cannot produce a proper witness, Defendant has always had, and still has, the option of conceding the claim. As this Court is well aware, in 1992, Defendant had not only the opportunity, but the responsibility, to concede claims on which he had no proper defense, and in response he did not concede even a single claim. In light of Defendant's failure to concede and in consideration of his absolute demand to proceed to individual trials with each and every claimant, Defendant should hardly be rewarded by decreasing his legal responsibility to offer credible, admissible evidence.

Plaintiffs cannot be forced to play against a stacked deck. Either Defendant had a reason for rejection and can prove it or he cannot. Here, he cannot and did not. Although Ms. Ambrose had no burden whatsoever to prove discrimination, she demonstrated that the position of Radio Broadcast Technicians is now, and always has been, a male dominated job series at the Agency. (Transcript, July 30, 1996, at 202; *see also Hartman v. Wick*, 600 F. Supp. 361 at 373 (finding 103 males hired and no females hired for technical positions at the Agency during 1973-1978). Judith Ambrose proved, unequivocally, that even Defendant's hypothecated defense was

false: she was, in fact, fully qualified for the position. Defendant cannot succeed where he fails to prove, by clear and convincing evidence, lack of minimum qualifications where he (1) does not offer a single witness possessing knowledge of Ms. Ambrose's rejection, (2) cannot prove that she in fact lacked qualifications, (3) can only offer a 1996 *opinion* of what *may have* occurred, and (4) fails to offer any record of what actually occurred. Under this Court's remedial order, absent proof otherwise, **intentional** discrimination is presumed. *Hartman v. Wick*, 678 F. Supp. at 333.

Finally, any sympathy for Defendant's attempts to offer evidence about these long ago events is misplaced and contrary to these claimants' rights in this case.[10/] That this litigation is

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10/ That the Special Master premised his admission of hypothecated evidence, in part, out of concern for the party who destroyed the very documents necessary to Plaintiffs is revealed in an exchange during the hearing:

> Special Master Saltzburg: * * * My ruling is, in my judgment, not inconsistent with Judge Richey's prior rulings or the case law, but my ruling is that the Defendant is entitled to prove that if the Claimant -- once the Claimant proves that she applied for and was rejected as she indicated on her claim form, the Defendant is entitled to prove that everyone who possessed similar qualifications was rejected and therefore she was rejected because she lacked the basic qualifications for the position.
>
> [Counsel for Plaintiffs]: Even without anyone to testify to first-hand knowledge of having considered her application and what the statement of her qualifications was in 1976? Am I correct about that?
>
> Special Master Saltzburg: You're right about that. It had to be the case that -- had to be the case, Judge Richey and every court that considers these cases had to assume, must, that when **you're going back 20 years that it's probable that in many agencies the people who made the decisions would no longer be there and might in fact be unable to testify**. * * * But let me just add -- but it would be almost beyond human belief if someone

completing its twentieth year is, in large part, the result of Defendant's willingness lo these many years to litigate and relitigate each and every issue. Defendant cannot adopt the Stalingrad defense to this litigation, destroy the contemporaneous documentation, and then ask to be relieved of his responsibility to bring forward his proof on all issues, including intent, because of the time that has expired. These Plaintiffs have waited twenty years for the evidence. They have waited two decades for an explanation. Some have died waiting. Plaintiffs are entitled to hold Defendant to his burden of proof and where he cannot produce his evidence, to prevail, as the presumption of discrimination entitles them.

Plaintiffs ask, as both law and equity require, that this Court issue an Order not only affirming the claim of Judith Ambrose, but also specifically ruling for this claim and all others which follow that hypothecated evidence is, as a matter of law, insufficient to discharge Defendant's burden of proof.

> were still there and were able to testify, to be able to testify that he or she actually recalled any individual being judged. All they could say, ***at best -- if all the records were there***, is that the records show such and such, and in this case, it's pretty clear barring a surprise, that there won't be any records relating to the 1976 application.

(Transcript at 29-30)(emphasis added.)

The Special Master, then, recognized that Defendant literally had no evidence--testimony or documents. However, rather than the Defendant's having to suffer the consequences of the adverse effects of the long passage of time and the Agency's destruction of documents, those consequences served to prejudice the Plaintiffs, the victims of Defendant's pattern and practice of discrimination. To the extent that twenty or more years has passed, any prejudice which results cannot and should not be visited upon the class, which has endured two decades of underemployment and financial loss, to provide an advantage to the very agency who caused that loss.

III. **Defendant cannot establish failure to mitigate where claimant actively pursued a equivalent position, and Defendant failed to demonstrate the availability of substantially equivalent employment.**

As a third ground for reversal, Defendant offers the argument that Claimant Judith Ambrose failed to properly mitigate her damages by asserting that Defendant proved that "substantially equivalent jobs were available and the claimant failed to exercise reasonable diligence to seek such a position." (Defendant's Memorandum at 12.) In addition, Defendant argues that claimant removed herself from the job market and, therefore, is not entitled to backpay. (*Id.* at 13 - 15.) Not only is this a complete and utter misrepresentation of the record, Defendant fails to acknowledge that the Special Master did not just determine that Defendant failed to carry his burden of proof on mitigation, the Special Master found that the claimant did more than any reasonable person could have been expected to do to mitigate her damages and that Defendant offered not a shred of proof to the contrary.

First, contrary to Defendant's representations, the evidentiary record reveals that agency witness Ostergard testified that by agency admission, "there's no place identical [to VOA] because VOA was by far and still is the largest radio broadcast organization in this country."[11/] (Transcript, July 30, 1996, at 252; *see also* Plaintiffs' Exhibit No. 29.) As well, when

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11/ Plaintiffs effectively cross-examined Defendant witness Michael Ostergard through the use of an Agency-produced Task Force report dealing directly with the technical professions at the USIA. Interestingly, Defendant now attempts to distance himself from Plaintiffs' Exhibit No. 29, by characterizing the report in his Motion as "an Office of Management and Budget ("OMB") 1983 study." (*See* Defendant's Memorandum at 12.) In truth, Plaintiffs' Exhibit No. 29 itself states, "This study is the work of a Task Force formed by the Directors of Programs and Personnel, Bureau of Broadcasting. . . ." (Plaintiffs' Exhibit No. 29.) Moreover, Agency witness Ostergard was a full fledged member of the Task Force that authored the report. (*Id.* at 3.)

confronted with his testimony that there were "comparable positions" available in the Washington, D.C. area during the period 1976 - 1978, Mr. Ostergard could not identify a single month during these years when any comparable position was open. (*Id.* at 253-54; 260.) In fact, Agency witness Ostergard conceded that, among technicians, VOA is viewed as the "top of the line." (*Id.* at 258.) Taken as a whole, Defendant's evidence falls far short of meeting the first prong of his burden: showing a "substantially equivalent position was available. . . ." *Hartman v. Wick*, 678 F. Supp. at 338.

Not only has Defendant failed utterly to discharge his burden on the first prong, Defendant's complaints regarding Ms. Ambrose's efforts and the Special Master's rulings are entirely misplaced. Defendant's arguments center on his insistence that, after her rejection for a Radio Broadcast Technician position by the Voice of America, Ms. Ambrose be required, apparently as a matter of law, to continue seeking only other Radio Broadcast Technician positions, regardless of their availability and comparability, on pain of forfeiting her right to back pay. (*See* Defendant's Memorandum at 12 - 16.)

Where, as here, two entire decades have passed between Defendant's discriminatory rejection and the claimant's hearing (without notice to the claimant of her supposed duty), Defendant's position is wholly unsupported by fact, law, or reason. Defendant's demands regarding mitigation are irrational. As the Special Master found, Ms. Ambrose continued to pursue work in her field. (Report of the Special Master, at 39 - 41.) She continued to educate herself. (*Id.*) She continued to accept positions of increasing responsibility and expertise. (*Id.*) Despite Ms. Ambrose's continuing to distinguish herself in the technical side of broadcasting, Defendant demands still more and claims that having accepted a position in the technical side

of television broadcasting, claimant has removed herself from pursuit of a Radio Broadcast Technician position. (Defendant's Memorandum at 15.) One can hardly imagine what efforts would have been required by a claimant which Defendant would find satisfactory.[12/]

Plaintiffs are not aware of a single authority for the proposition that a claimant, with or without knowledge of her rights in a discrimination matter, is required, on pain of forfeiting her rights, to apply solely for substantially equivalent positions to the one she originally sought and to continue to do so for twenty years. In the ordinary case, a plaintiff, having suffered discrimination and having brought a discrimination matter in a court of law, is by virtue of her lawsuit on notice of the duty to mitigate her damages. Even in a prolonged case, the matter is likely tried and resolved within five years. Here, by contrast, virtually none of the class members had notice of her rights any time prior to the first published notice in 1988, fourteen years after the first victim suffered discrimination. Requiring these claimants, or any person, as a matter of law to continue fruitless attempts to secure the same job for two decades even to the point of unemployment for a substantial portion of a work life is not and cannot be required under any interpretation of "reasonable efforts to mitigate damages." To Plaintiffs' knowledge, no court has ever required such a course of action for two decades nor has any defendant ever argued it. Maybe it has never been argued because the position is simply ludicrous.

As the Special Master ruled, Defendant did not offer any legally sufficient argument or evidence that Ms. Ambrose failed to mitigate her damages. (Report of the Special Master at

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12/ Contrary to his position with respect to Ms. Ambrose, Defendant, for instance, in Ms. Hashem's claim, adopted the position that she failed **to change her field** in order to mitigate her damages. (*See* Defendant's Motion to Reverse Special Master's Decision Regarding 1975 Claim of Dilara Hashem, at 32.) What is more than apparent is that virtually nothing is satisfactory to this Defendant.

43.) In fact, the evidence is overwhelming that Ms. Ambrose did everything humanly possible to mitigate her damages despite the fact that she had no notice of a duty to do anything with regard to this Agency. That Defendant demands more is simply a revelation of how extreme his arguments will be when confronted with a courageous class member.

IV. Defendant's argument that the decision should be reversed because he was denied discovery cannot be upheld where the record reveals that Defendant simply does not read his own documents.

The fourth argument lofted by Defendant in support of his Motion to Reverse centers around the claim that Defendant was "denied discovery" in this matter and was therefore, unable to properly defend himself in a court of law.[13/] Misquoting the Order of Reference, Defendant attempts to claim that this Court had previously "instructed" the Special Master to permit Defendant to take discovery and, thereby, accuses the Special Master of defiance of this Court's Orders. (Defendant's Memorandum at 16.) Defendant's representation is simply revisionist history.

First of all, the Order of Reference provides, "Upon receipt of the designation of the first round of contested claims, the Special Master will, thereafter, permit both parties to engage in

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13/ In fact, Defendant was not denied discovery. He was permitted to serve interrogatories on each and every claimant and even to inquire from the claimants, over Plaintiffs' objections, about their qualifications for the positions they sought and about their interactions with this Agency to secure employment. Ms. Ambrose dutifully answered those interrogatories. On the other hand, Plaintiffs sought to ask a single interrogatory -- that Defendant identify any position he claimed was substantially equivalent employment. The Special Master denied Plaintiffs this single interrogatory, despite the fact that without such discovery, Plaintiffs would have not a single inkling of what evidence Defendant would offer on the issue of mitigation, since all the evidence was solely within his knowledge and control. Plaintiffs were only apprised in Defendant's Pretrial submission of expert opinion which would be offered on this subject.

such discovery as the Special Master **in his or her discretion** deems necessary for the full consideration of the claim at a hearing. (Order of Reference at 8-9)(emphasis added.) During the spring of 1995 through the spring of 1996, the parties had an opportunity to request and to argue for discovery. The parties were afforded oral argument on these issues. The Special Master thereafter ruled, a ruling which was affirmed by this Court on May 17, 1996. While Plaintiffs themselves may not have agreed with the precise parameters of the Special Master's ruling or with the affirmance of that Order by the Trial Court, nevertheless, the Special Master is not in defiance of this Court on this issue.

Defendant claims he was "surprised" by the evidence at Ms. Ambrose's hearing. Where a defendant has asserted that a female applicant was not a victim of his discriminatory policies and practices and that she failed to meet the minimum qualifications for the position she sought, any reasonable defendant would expect that that he would have to prove that males were measured against the same standards. Obviously, to the extent that his own evidence indicated that similarly or lesser qualified males were treated more favorably, his evidence would be undercut. After Defendant received the class members' claim forms in 1989 (nearly *seven years* before the first *Teamsters* hearing), he presumably reviewed whatever evidence and documentation he had to determine the merits of the claims. Thereafter, when preparing to state his defenses, a process occurring in 1992 (still some four years prior to the first hearing), he presumably reviewed the evidence again. Finally, when preparing for trial in which he was required to offer evidence in support of his own burden of proving that this claimant was nondiscriminatorily rejected for lack of qualifications, Defendant also presumably attempted to acquaint himself with whether he had applied the self same qualifications standards to the males

that he hired. Undeniably, Defendant knew each and every male who was considered and selected for this position.[14/] Defendant had Official Personnel files for those it hired. All he had to do was review his own evidence.

Not only was Defendant fully cognizant of the male selectees for each position in contest, each and every exhibit offered by Claimant Ambrose on the defense was a document from Defendant's own records and produced by him during the course of this litigation. Plaintiffs did not seek to have admitted on this issue even a single document the origin of which was anywhere but the Agency. Both examples offered by the Plaintiffs to show discriminatory assessment of minimal qualifications were from the Official Personnel Files of male selectees for Radio Broadcast Technicians during the class period. Perhaps revealingly, during the hearing, when claimant Ambrose attempted to offer an exhibit relating to a selectee, Defendant objected that he had never seen the document before and demanded an explanation of the source of the document. (Transcript, July 30, 1996, at 219.) That objection was withdrawn when Plaintiffs showed that the records were Defendant's own. (*Id.*) On this record, then, Defendant complains to this Court that he "did not have a fair opportunity to address these examples because defendant did not know that they would be raised until they were actually raised at the hearing." (Defendant's Memorandum at 17.) Not only is this position completely spurious, this argument constitutes a virtual admission that Defendant has not read his own records.

14/ In September, 1992, Defendant presented the Plaintiffs and the Special Master with the Declaration of Harlan Rosacker, apparently listing each and every selectee for the positions at issue and during the relevant class period.

In this matter, Defendant has the burden of proof, by clear and convincing evidence, and is in complete custody and control of the virtually **all** of the evidence. Any "discovery" Defendant demands would be from himself.

* * *

Claimant Ambrose respectfully requests that this Honorable Court issue an Order affirming the Special Master's finding on her behalf, denying Defendant's Motion to Reverse, and directing that Defendant shall not be afforded the opportunity to offer evidence in future proceeding which is speculative or which merely hypothecates the past.

Respectfully submitted,

WEBSTER & FREDRICKSON

Bruce A. Fredrickson #933044
Susan L. Brackshaw #366725
Linda M. Correia #453027
1819 H Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 659-8510

Attorneys for Plaintiff Class

and

CROWELL & MORING

Laurel Pyke Malson #317776
Terrence F. Flynn #429797
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Co-Counsel to Plaintiff Class

and

KATOR, SCOTT & HELLER

Douglas B. Huron #89326
Stephen Z. Chertkof #451713
1275 K Street, N.W.
Suite 950
Washington, D.C. 20006
(202) 898-4800

Co-Counsel to Plaintiff Class

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Claimant Ambrose's Objections to Final Report of the Special Master was hand-delivered to Daniel F. Van Horn, Esq., Assistant United States Attorney, 10th Floor, Judiciary Center Building, 555 4th Street, N.W., Washington, D.C. 20001, and to Lorie J. Nierenberg, Esq., Room 700, United States Information Agency, 301 4th Street, S.W., Washington, D.C. 20547, this 28th day of October, 1996.

Susan L. Brackshaw

Susan L. Brackshaw #366725
1819 H Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 659-8510

Attorney for Plaintiff Class