H(2325)83

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 72-100 C(4)
	)	
THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MISSOURI et al.,	)	
	)	
Defendants.	)	

SIGNATORIES' PRE-HEARING MEMORANDUM

Pursuant to H(2278)83, the undersigned signatories of the proposed settlement agreement 1/ hereby submit their joint witness list, exhibit list and brief concerning the issues to be addressed at the April 28, 1983, fairness hearing on the proposed settlement agreement submitted by the parites.

In Section I, below, the signatories list the witnesses they expect to call and the exhibits they expect to introduce at the fairness hearing. In Section II the signatories summarize the legal standards which are applicable

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1/ One suburban school district, University City, has rejected the Agreement. See H(2259)83. Two school districts, Mehlville and Rockwood, have imposed conditions which are inconsistent with the Agreement in Principle. See H(2243)83 and H(2250(83.

to this Court's review and approval of the proposed settlement agreement. The authorities discussed in Section II demonstrate that the principal factor the Court must consider in evaluating the proposed settlement is the strength of plaintiffs' case on the merits, balanced against the strength of the defendants' case on the merits, the risk of litigation, the existence of disputed and unsettled questions of fact and law, and what is offered in settlement. Therefore, as discussed in Section III, plaintiffs and defendants have attached hereto as appendices A and B their respective proffers concerning what the evidence at trial would have shown regarding the allegations in plaintiffs' complaints, and in Section IV we describe the key terms of the proposed settlement agreement. Finally, in Section V the signatories demonstrate that the proposed settlement agreement is a fair, reasonable and workable compromise of the claims and defenses in this matter. The signatories also will show that the funding and other provisions of the agreement are well within the Court's power to order, and that the settlement agreement will be beneficial to the plaintiff class and to the public interest generally. Thus, this proposed settlement agreement should be approved.

I. Witnesses and Exhibits 2/

The plaintiff signatories expect to call the following witnesses at the fairness hearing on April 28, 1983:

1. Dr. James DeClue
2. Minnie Liddell
3. Dr. Robert Dentler
4. Dr. Jerome Jones
5. Dr. Evelyn Luckey
6. Carol Gibson
7. Susan Uchitelle

The defendant signatories expect to call the following witnesses at the fairness hearing on April 28, 1983:

1. John Davis
2. Dr. Gary Wright
3. Dr. Jay Moody

The signatories reserve the right to call additional witnesses in rebuttal of any evidence that may be introduced in opposition to the proposed settlement agreement.

The signatories will offer as exhibits at the hearing the following documents, which are available for inspection at the offices of Lashly, Caruthers, Baer & Hamel:

1. Settlement Agreement
2. A revised and edited version of the Appendix to the Settlement Agreement concerning quality education.

2/ If any individual defendant school district wishes to call any additional witnesses to introduce additional exhibits, it will inform the Court in a separate filing.

3. A projected budget for the first year of implementation of the Settlement Agreement by the City Board
4. A collection of newspaper articles concerning the Settlement Agreement
5. A chart listing per pupil expenditures in the St. Louis City school district and in each St. Louis County school district
6. A chart listing per pupil expenditure as in Exhibit 5 which contains adjustments reflecting the inclusion of the budget for implementation of the Settlement Agreement
7. A bar chart showing effective tax rates in the St. Louis City school district and in each St. Louis County school district (offered by plaintiff signatories only)
8. A chart showing the percent of per capita income spent on education by Missouri as compared with all other states
9. A chart showing per pupil expenditures in Missouri as compared with other Plains States and the national average
10. A chart showing Missouri's tax effort as compared with all other states
11. A chart showing Missouri's tax effort as compared with other Plains States

12. A letter from Dr. Jerome Jones to the Missouri StateBoard of Education dated April 20, 1983
13. The resume of Dr. Robert Dentler
14. The resume of Dr. Jerome Jones
15. The resume of Dr. Evelyn Luckey
16. The resume of Carol Gibson
17. The resume of John Davis
18. The resume of Dr. Gary Wright
19. The resume of Dr. Jay Moody
20. Projected budgets for the first year of implementation of magent schools by County School Districts

II. Standards For Court Approval

A settlement agreement proposed by the parties to a class action can bind absent class members and become a final consent order only if it is reviewed and approved by the trial court. Rule 23(e), Fed. R. Civ. P. It is well established that in order to approve such a settlement, the court must find that it is a "fair, reasonable, and adequate" compromise under all the circumstances. See Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), cert. denied, 423 U.S. 864 (1975); Manual for Complex Litigation, Part I, § 1.45, at 56 (5th ed. 1982).

The Manual for Complex Litigation, supra, lists the following four considerations as relevant to determining whether a settlement is fair, reasonable, and adequate: (1) the

strength of plaintiff's case on the merits, balanced against what is offered in settlement; (2) defendant's ability to pay; 3/ (3) the complexity, length and expense of further litigation; and (4) the amount of opposition to the proposed settlement. Id., at 56. Additional factors which some courts consider in this process include: (1) the presence of collusion in reaching the settlement; (2) the reaction of class members to the settlement; (3) the opinion of competent counsel; and (4) the stage of the proceedings and the amount of discovery completed. See 3B Moore's Federal Practice ¶ 23.80[4] at 23-521 (1982 ed.). The risks of establishing liability must be weighed. The probable result at trial must also be balanced against the expense and time involved in trying the lawsuit to a resolution. Id. at 23-522. Uncertainty and attendant risks regarding the legal standards by which litigation might ultimately be judged is also relevant. See Armstrong, supra, 616 F.2d at 322 n.25. In a school desegregation case the courts must also assure that the proposed settlement meets constitutional standards. Armstrong, supra, 616 F.2d at 319; cf. Liddell v. Caldwell, 546 F.2d 768, 773 (8th Cir. 1976), cert. denied, 433 U.S. 914 (1977). See also Green v. County School Board, 391 U.S. 430, 439 (1968);

3/ The defendant's ability to pay is not relevant to a school desegregation case. Armstrong v. Board of School Directors, 471 F. Supp. 800, 805 (E.D. Wis. 1979), aff'd, 616 F.2d 305 (7th Cir. 1980).

Adams v. United States, 620 F.2d 1277, 1296 (8th Cir.), cert. denied, 449 U.S. 826 (1980).

The factor which is considered the most important in determining the fairness of a proposed class action settlement is the strength of plaintiffs' case, balanced against the strength of the defense, the risk of the litigation, and what is offered in settlement. See, e.g., Armstrong, supra, 616 F.2d at 314; Grunin, supra, 513 F.2d at 124. However, a court should not try the case on the merits at a fairness hearing. Rather than attempting to reach ultimate conclusions of fact and law on the merits, a court reviewing a proposed class action settlement simply must assure that the terms of the settlement are reasonable in light of the strengths of plaintiffs' case, see, e.g., Grunin, supra, 513 F.2d at 123-24, and the risks and uncertainties of litigation. Armstrong, supra, 616 F.2d at 322 n.25. Indeed, the court "must not forget that it is reviewing a settlement proposal rather than ordering a remedy in a litigated case." Armstrong, supra, 616 F.2d at 314-15. As the Second Circuit stated in Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974):

> The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.

Thus, as with all settlements, what this Court will review will be a bargained-for compromise between the parties.

The Court's role in reviewing that compromise is limited to the minimum required to protect the interests of the class and the public, and the Court should not substitute its own judgment for that of the parties and their counsel. Id. at 315. Indeed, it "is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement." Armstrong, supra, 616 F.2d at 312; accord, e.g., United States v. McInnes, 556 F.2d 436, 441 (9th Cir. 1977); DuPuy v. Director, 519 F.2d 536, 541 (7th Cir. 1975), cert. denied, 424 U.S. 965 (1976). Especially in cases such as this one, the courts have emphasized that "there is an overriding public interest in favor of settlement." Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977).

This Court has appropriately provided notice to the public of the proposed settlement agreement and offered all interested persons an opportunity to be heard. See, e.g., Cotton v. Hinton, supra, 559 F.2d at 1331. However, a District Court has the authority to limit the scope of the hearing and need not "open to question and debate every provision of the proposed compromise," 4/ id., since courts "do not focus on individual components of settlements, but rather view them in

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4/ Indeed, the Court "may limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision." Id.

their entirety in evaluating their fairness." Armstrong, supra, 616 F.2d at 315. The guiding consideration should be that the Court acquire sufficient information relevant to the fairness of the proposed settlement so that it can decide whether to approve the proposal as a whole.

III. Summary of Plaintiffs' Case

Plaintiffs' amended interdistrict complaints allege that prior to 1954 defendants established and implemented an interdistrict system of racial segregation throughout the metropolitan area and that since 1954 defendants have failed to meet their affirmative duty to dismantle that system. Defendants have denied those allegations.

Attached hereto as Appendix A is plaintiffs' proffer of what they contend the evidence would show at a trial of these interdistrict allegations. Attached as Appendix B is defendants' proffer of what they contend the evidence would show regarding these issues.

All signatories agree that in view of these allegations and defenses, the record herein, and all other pertinent factors, the proposed settlement agreement is fair, reasonable, and appropriate. See pp. 26-27, infra, and Affidavit of Counsel for Plaintiffs and Defendants, attached hereto as Appendix C.

IV. Description of Proposed Settlement Agreement 5/

The Settlement Agreement [H(2217)83] was filed by the Special Master on March 30, 1983. By April 4, the Liddell Caldwell and City Board plaintiffs, 20 of the 23 suburban school district defendants, and the St. Louis County defendants had advised the Court of their unconditional acceptance of the Agreement. One school district -- University City -- rejected the Agreement [H(2259)83], and two school districts -- Mehlville and Rockwood -- imposed conditions which are inconsistent with the Agreement in Principle. [H(2243)83]; [H(2250)83]. Three other parties -- the State of Missouri, the City of St. Louis and the United States -- advised the Court that they could not sign the Agreement as drafted by the signatories [H(2234)83]; [H(2259)83]; [H(2261)83. The Settlement Agreement is consistent with the Agreement in Principle submitted to the Court on February 22 [H(2141)83] and approved

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5/ The terms of the Settlement Agreement speak for themselves. Nothing in this section shall be deemed to modify, supplement, construe, or interpret any provision of the Settlement Agreement. Nothing stated herein shall be admissible in any subsequent litigation or other proceeding involving the interpretation or enforcement of the Settlement Agreement.

at that time by plaintiffs and all St. Louis County suburban school districts except Riverview Gardens. 6/

Section XII of the Agreement provides that the litigation involving paragraph 12(c) and the plaintiffs' interdistrict claims will be stayed for a period of five years to give the voluntary desegregation plan contained in the Agreement time to work. During this five year period, the suburban school districts and the City Board will recruit students and take other actions specified in the Agreement to encourage black city students to attend school in the suburbs and white suburban students to attend school in the city. A summary of the major provisions of the Agreement follows:

A. Suburban School Districts

The Agreement establishes two recruiting goals for the suburban school districts: a "plan goal" and a "plan ratio." The "plan goal" is 25 percent black. (Section II.A.1.a.). The "plan ratio" is an increase of black student enrollment of 15

6/ The Agreement does not include the St. Charles and Jefferson County districts, against which plaintiffs' interdistrict claims have been stayed. In addition, paragraph 12(d) housing issues and the housing defendants against which plaintiffs' claims have been stayed are not included in the Agreement and are subject to further proceedings in this action, notwithstanding the County defendants' suggestion in H(2239)83 that the settlement covers all issues in the litigation.

percentage points or achievement of the plan goal, whichever is less. (Section II.A.1.b.).

Each suburban school district that does not already exceed the plan goal is required to recruit and take other actions specified in the Agreement to increase its minority enrollment to the plan ratio within five years. (Sections II, XII). A school district which reaches the plan ratio within five years, or within any extension of time mutually agreed to by the parties, is entitled to a final judgment declaring that it has satisfied its pupil desegregation obligations. In such a case, the school district's only continuing interdistrict obligations which are judicially enforceable are to participate in those provisions of the Settlement Agreement relating to magnet schools and to the recruitment, acceptance and promotion of transfer students in order to reach and maintain the plan goal. (Section XII.D.).

If a school district fails to reach its plan ratio within five years, the plaintiffs may renew the litigation involving paragraph 12(c) and their pending interdistrict claims (Section XII.E.), but only after the parties have complied with the provisions of Section XII.F. calling for the appointment of a monitor and Section XII.G requiring negotiations. In such litigation, however, plaintiffs must prove liability in order to obtain further relief and they have agreed not to seek school district consolidation, dissolution,

or reorganization or a remedy beyond the plan goal. (Section XII.E.2.).

The plan ratios and plan goals of each suburban school district are set forth in Section II.A.2.b. of the Agreement. If all suburban school districts reach their plan ratios within five years, they would, on the basis of September, 1982 enrollment, have accepted 14,766 black students. Again, on the basis of September, 1982 enrollments, if these districts satisfy their plan goals, they would have accepted a total of 22,832 black students. These projections are based on September, 1982 enrollments; they will change if the total enrollment or residential black enrollment of suburban school districts change during the five year period.

The Settlement Agreement contains a number of other important provisions relating to voluntary interdistrict transfers. Section II.B.2. relates to eligibility. It provides that black students who are members of the racial majority at a school in any participating district which is 50 percent or more black may transfer to a school and district in which they would be in the racial minority, subject to certain conditions set forth in Section II.B.3. Likewise, white students who are members of the racial majority at a school in a participating district which is more than 50 percent white may transfer to a school and district in which they would be in the racial minority. (Section II.B.2.b.). Section II.B.3.

establishes priorities to deal with the possibility that the number of students wishing to transfer may exceed the number of seats available in any particular grade level for a given year. Section II.C. sets forth standards for the placement of voluntary transfer students, and Section II.D. contains provisions to ensure the equitable placement of students.

Finally, Section III of the Agreement permits the suburban school districts to offer magnet schools as one way of attracting interdistrict black transfer students. Suburban districts may offer up to 8,000 magnet school spaces. (Section III.A.3.c.iii.). Section III.B. contains a list of specific magnet schools which a number of suburban school districts are authorized to offer in the 1983-84 and 1984-85 school years.

B. City Schools

In addition to participating in the voluntary interdistrict transfer provisions described above, the Agreement calls for the City Board to operate a series of magnet schools and to improve the general quality of education offered by the city. These provisions are intended to facilitate the voluntary interdistrict transfer of students and to provide improved educational opportunities for black students remaining in one-race schools.

Section III of the Agreement relates to magnet schools. It contemplates the City making approximately 12,000 seats available in magnet schools. (Section III.A.3.c.iii.).

Each magnet school or program shall be 50 percent black and 50 percent white with an allowable variance of not more than plus or minus 10 percent. (Section III.A.3.d.).

Magnet schools or programs offered by the city may not be duplicated by suburban school districts. (Section III.A.1.). Section III.B. contains a list of magnet schools the city is authorized to operate in the 1983-84 and 1984-85 school years.

Section III.C. sets forth procedures and standards for the approval of new magnet schools or programs in succeeding years. It establishes a magnet review committee with final authority to approve or disapprove new magnet schools. (Section III.C.2.).

Finally, the Settlement Agreement establishes eligibility standards and priorities specifically for magnet schools. With certain exceptions, all students whose race is in the majority in their assigned school and district are eligible for acceptance into a magnet school in another district in which their race is in the minority. (Section III.J.). The Agreement contains admissions priorities (Section III.K.) and permits a school district to set aside 30 percent of the seats in any magnet it offers for residential students (Section III.L.).

Section IV of the Settlement Agreement contains provisions to improve the quality of education provided by the

city school system and special provisions to improve the quality of education for students in one race schools. This section is responsive to Section III of the Agreement in Principle which provides in part:

a. The settlement will contain specific provisions for improving the quality of education provided by the city school system and for restoring its AAA rating. No exhaustive list of specific provisions has been drafted yet, but reduction of the pupil/teacher ratio to the state's standard for an AAA rating or to county average, whichever is lower and an early childhood (birth to age 4) education program suggested in the past by the State are examples of the type of provisions under consideration.

b. Since there are now approximately 30,000 black children in one race schools in the city, some of these students will remain in all one race schools on the north side of St. Louis even if 15,000 black students transfer to county schools and other students attend integrated magnet schools. The settlement plan will include special provisions to improve the quality of instruction received by black students who attend one race schools.

The City Board has developed a program of the kind and scope to satisfy that section of the Agreement in Principle. It is set forth in Section IV of the Settlement Agreement and the Appendix thereto. The City Board has prepared a revised and edited version of the Appendix, which will be presented at the hearing as Exhibit 2. Part A of the original Appendix and Exhibit 2 include specific programs to improve the quality of

education throughout the school system. 7/ It includes provisions for, among other things, reduction of pupil/teacher ratios; staff selection and performance assessments; implementation of effective school models; provisions for a full complement of staff; curriculum development; staff development; and facilities improvement. Part B contains special provisions for nonintegrated schools. It includes, among other things, lower pupil/teacher ratios; afterschool, Saturday and summer school experiences; parental involvement programs; and schools of special emphasis.

C. Other Provisions

The Settlement Agreement contains other provisions designed to help ensure its success. For example, Section VIII requires the State to provide all transportation under the Agreement. Section V covers part time educational programs and Section VII relates to parental involvement. The Agreement also includes provisions relating to faculty, administration and financing, which are summarized below.

1. Faculty

Section VI of the Settlement Agreement requires suburban school districts to recruit and use their best efforts to hire black faculty and administrators. It establishes a

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7/ The suburban districts do not agree or disagree with the details of the program developed by the City Board.

goal of 15.8 percent for black teachers (Section VI.B.4.), and 13.4 percent for black administrators (Section VI.B.5.). The Agreement contains annual hiring goals based on the total number of teachers and administrators hired in each year. (Section VI.E.). For example, the ratio for the first nine hires is 1 black to 2 whites (33.3 percent). The goal for new hires from 10 to 20 is 1 black to 3 whites (25 percent).

The Agreement provides that nothing in the Settlement Agreement shall require a suburban school district to violate state law regarding the hiring of laid-off teachers. (Section VI.H.). The same section of the Agreement provides that school districts are to use funds received pursuant to this Agreement at their request and as ordered by the Court for the purpose of filling vacant teacher positions with black teachers should it be necessary to meet the hiring goals set forth in the Agreement.

The Agreement contains provisions relating to reporting and enforcement (Section VI.F.) and to the voluntary transfers of teachers among the districts to promote faculty desegregation (Section VI.I.). Section VI.G. provides that all hiring obligations under the Settlement Agreement shall terminate at the time either the hiring goals are satisfied or the district reaches its pupil goal of 25 percent black.

2. Administration

Section IX creates a Voluntary Interdistrict Coordinating Council (VICC) to coordinate and administer the student transfer and voluntary teacher exchange provisions of the Settlement Agreement. The VICC shall consist of one person selected by each school district which is a party to the Agreement, one person selected by the Liddell Plaintiffs, one person selected by the Caldwell Plaintiffs, and one person selected by the State Board of Education. (Section IX.B.). Section IX.J. delineates VICC's powers, and Section IX.A.2. provides that the VICC shall have no power to alter or amend the terms and provisions of the Settlement Agreement.

Section IX.K. establishes a student recruitment and counseling center with responsibility for all recruitment and counseling activities with respect to the student transfers under the Settlement Agreement. With Court approval, the new recruitment and counseling center will include the present student recruitment and counseling service now operating under the terms of the intradistrict desegregation order. A parallel office will be established by VICC in St. Louis County. These offices are now in existence under the current paragraph 12(a) voluntary plan. The powers of the student recruitment and counseling service are set forth in Section IX.K.4.

Sections IX.N. and O. contain procedures for the resolution of disputes arising under the Settlement Agreement.

Section IX.M. provides that, with the Court's approval, the Coordinating Committee established pursuant to this Court's paragraph 12(a) plan will cease to exist and its records, funds, property and personnel will be transferred to VICC.

3. Equitable Treatment

The Agreement makes provisions for the equitable treatment of transfer students who participate in the voluntary interdistrict program. Section II.D provides that transfer students shall not be assigned by the host district in any manner that contributes to racial segregation (II.D.2.) and that the current placement of the host district will be honored for a semester and changed only after testing, remedial efforts and consultation with parents (II.D.4.). Section II.F. states that the host district shall respond to the educational needs of students without regard to their status, and further provides for the furnishing of extracurricular buses where needed to enable transfer students to participate in after-school activities (II.F.2.).

Section II.F. further provides for nondiscrimination in the application of discipline (II.F.5.) and calls upon the Recruitment and Counseling Center to assist students in understanding their due process rights in cases involving lengthy suspensions or expulsions (II.F.4.). Section IX.O. sets out a procedure that parents and students may invoke to resolve individual disputes and grievances of transfer

students. Section VII requires participating districts to encourage the involvement of parents of transfer students in the educational processes of the host district and suggests steps to be taken to fulfill that obligation.

4. Financing

Section X of the Agreement states that the fulfillment of the obligations of the parties is contingent upon an order by the Court establishing adequate funding for the obligations of the parties consistent with the Settlement Agreement. To this end, the Agreement contemplates a funding order established by the Court.

a. Interdistrict Transfers

Section X.B.1 effectively requires the State to pay to host districts their then-current cost per pupil, less transportation and food service costs, for each interdistrict transfer student they accept. Section X.B.2. includes two payment options for sending districts. One option permits a home district to receive from the State for five years one-half of the State aid it would have received for each student who transfers to another district. (Section IX.B.2.a.). Under the second option, a school district which, as a result of this Agreement, experiences a decline in its actual enrollment may report its second preceding school year's actual enrollment as a basis for calculating State aid, beginning in the 1984-85 school year.

b. Other Provisions

All other costs of the Agreement will be paid by such combination of additional state funding as the Court may order pursuant to the Eighth Circuit's decision in Liddell v. Board of Education, 677 F.2d 626, 641-42 (8th Cir.), cert. denied, 103 S. Ct. 172 (1982), and a tax rate increase in the City of St. Louis as shall be ordered by the Court (Section X.B.3.). Included are the cost of the incentives for voluntary teacher exchanges; the cost of student recruitment; start up costs and building modification costs of new magnet schools and expanded magnet costs to school programs; one time extraordinary costs (other than hiring of personnel), such as the cost associated with reopening a closed school, the cost of community involvement centers, and part time educational programs; transportation of transferring pupils; operating expenses of the VICC, its staff and the recruitment and counseling center and each of its offices; the costs relating to the improvements in education programs offered by the City Board; and such other costs incurred pursuant to the Settlement Agreement.

V. The Court Should Approve The Detailed Implementation Plan As A Fair, Reasonable, And Adequate Settlement Of the 12(c) Phase Of This Litigation

As discussed in Section II above, the basic question to be decided by this Court in determining whether to approve the Settlement Agreement is whether it constitutes a "fair,

reasonable, and adequate" settlement of plaintiffs' claims. Grunin, supra, 513 F.2d at 123. The signatories respectfully submit that the pleadings and other materials filed with this Court, coupled with the testimony to be adduced at the April 28 hearing, demonstrate that the settlement proposal clearly fulfills this requirement.

The most important criterion in evaluating a proposed class action settlement, the courts have held, is the strength of the plaintiffs' case on the merits balanced against the strength of the defense, the risk and cost of litigation, and what defendants have offered in the settlement. Grunin, supra, 513 F.2d at 124. See Section II, supra. In addition, as discussed in Section II, supra, in a school desegregation case the court must determine whether the proposed settlement complies with constitutional requirements.

The proposed settlement meets these standards. The agreement contains specific goals and timetables, and mandates that each predominantly white suburban district strive to achieve a black student population of 15-25% without regard to current space available. This may permit approximately 14,000 to 23,000 of the 30,000 students now attending one-race schools in the City of St. Louis to transfer to the suburbs. At the same time, the plan avoids a disproportionate burden on black students by providing for additional magnet schools and quality education improvements in the City, which would help achieve

integration in the City by attracting white students and would provide some relief to black students remaining in all-black schools. See Liddell, supra, 677 F.2d at 641-42. The magnet school provisions themselves could enable some 6,000 additional black St. Louis students to attend integrated schools. The plan also includes other important elements to comply with constitutional standards, such as affirmative recruitment efforts, reinstitution of litigation if voluntary efforts do not succeed, and faculty desegregation. See generally Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1, 18-20 (1971).

The plan is also reasonable in light of the strength of plaintiffs' case when weighed against the strength of the defense and the risk of litigation. The signatories obviously differ concerning their assessment of plaintiffs' claims and the relevant legal standards. See Appendices A and B (proffers of plaintiffs and defendants). As the proffer submitted by plaintiffs demonstrates, the plaintiffs sought to prove at trial that defendants established, implemented, and failed to dismantle an unconstitutional interdistrict system of racially segregated schools throughout the St. Louis area. In accordance with these claims, the proposed settlement provides for specific desegregation obligations upon all signatory districts in St. Louis and St. Louis County, Armstrong, supra, 616 F.2d at 321, and includes "remedial criteria of sufficient

specificity" which it is hoped will achieve meaningful city-suburban desegregation. Swann, supra, 402 U.S. at 26.

While plaintiffs believe that the evidence they would have presented at trial could well have justified further, mandatory relief, and defendants maintain that no relief would have been ordered at all, all signatories also recognize that further litigation would have been inherently uncertain, "complex, and time-consuming." Armstrong, supra, 616 F.2d at 325. The proposed settlement permits desegregation now, not years from now after more litigation. Furthermore, the settlement differs from other types of remedies involving freedom of choice, since it holds open the option of further litigation if necessary.

Even more important, the signatories also recognize the advantages of a voluntary settlement in achieving the community leadership and cooperation necessary to implement desegregation most effectively. As the Seventh Circuit Court of Appeals has explained, "the spirit of cooperation inherent in a good faith settlement is essential to the true long range success of any desegregation remedy." Armstrong, supra, 616 F.2d at 318. In light of these factors, coupled with the substantial area-wide desegregation which the plan promises and the possible availability of litigation if proven necessary, the compromise represented by the proposed settlement provides for relief fully commensurate with plaintiffs' claims.

This conclusion is reinforced by the strong expressions of support for the settlement which have come from responsible community leaders and groups throughout the St. Louis area. As plaintiffs have previously noted, the leadership of the St. Louis area's colleges and universities, several area religious leaders, both United States Senators from Missouri, the press, and a number of educational groups have voiced approval of the settlement. See H(2281)83 at 2-4 and App. A-G. The Eighth Circuit Court of Appeals has cited the Agreement in Principle as a model for parties in other cases to consider. See Clark v. Board of Education, No. 82-1934, slip op. at 15-16 n.12 (8th Cir., March 31, 1983). These statements of support establish a firm basis for optimism that the settlement agreement will generate the kind of community cooperation necessary to achieve meaningful area wide desegregation.

In addition, counsel for virtually all the signatories to the agreement in this case have executed and filed an affidavit, attached hereto as Appendix C, stating their opinion that based upon the prior findings and the evidence of record, the proposed settlement is fair and reasonable. As the courts have held, this statement by counsel is entitled to weight, and provides further support for this Court's approval of the settlement. See Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976); In re

Armored Car Antitrust Litigation, 472 F. Supp. 1357, 1368 (N.D. Ga. 1979).

The signatories recognize, of course, that this Court must consider statements both in favor of and in opposition to the proposed settlement. A number of comments have raised a variety of specific points about particular parts of the Settlement Agreement, which must be considered in light of the general principle that courts "do not focus on individual components of settlement, but rather view them in their entirety in evaluating their fairness." Armstrong, supra, 616 F.2d at 315. The signatories will be prepared to deal with individual comments at the April 28 hearing. Based on a review of some of the broader concerns expressed in statements filed so far, however, the signatories submit that there is no adequate reason to reject the settlement agreement.

First, the State has expressed doubt concerning the authority of the Court to order the State to fund various aspects of the proposed settlement. See H(2259)83 at 8. Such an objection is totally without merit. The Eighth Circuit has specifically held that based upon its earlier rulings, this Court may require the State to take action to "help eradicate the remaining vestiges of the government imposed segregation in the city schools, including actions which may involve the voluntary participation of the suburban schools." Liddell, supra, 677 F.2d at 641. Indeed, the Court of Appeals has

explicitly ruled that several of the very provisions contained in the settlement agreement, including establishing additional magnet and part time programs "at state expense," mandating additional steps by "the state and the city" to improve the quality of education in St. Louis schools, and requiring the "state to provide additional incentives for voluntary interdistrict transfers," could be ordered based upon the previous court findings in this case. Id. at 641, 642. There can be no question that this Court has the authority to order the state to fund the plan.

Such an order would be fully in accord with the rulings of other courts, which have often required state defendants to fund quality education and other components of school desegregation remedies based upon intradistrict violations. See, e.g., Milliken v. Bradley, 433 U.S. 267 (1977); Reed v. Rhodes, 500 F. Supp. 404 (N.D. Ohio 1980), aff'd, 662 F.2d 1219 (6th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). In addition, despite the State's claims of "severe financial constraints," H(2259)83 at 7, published reports reveal that Missouri ranks 48th out of 50 states in percentage of per capita income spent on education, and falls in the bottom 25 percent in such measures as expenditures per

pupil and tax effort. 8/ The State defendants, which have already been adjudicated as "primary constitutional wrongdoers" in creating and maintaining segregation in the city schools, should not be permitted to escape their responsibility in this litigation by claiming that they cannot afford to devote more than these minimal amounts to education. See Liddell, supra, 677 F.2d at 630.

Second, the City of St. Louis has suggested that to the extent that the City Board is required to fund the settlement plan, there is no authority for the Court to order a city tax increase. See H(2234)83 at 5. To the extent that additional city funding is to be involved, however, both the Supreme Court and the Eighth Circuit have ruled that tax levies may be ordered in desegregation cases. See Griffin v. County School Board, 377 U.S. 218, 233 (1964)(holding that district court may require officials to "levy taxes to raise funds" for operation of public school system "without discrimination"); United States v. Missouri, 515 F.2d 1365, 1372-73 (8th Cir.),

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8/ See National Center for Education Statistics, Digest of Education Statistics 1982 at 24; Missouri State Teachers Association, Financial Facts 1982; Advisory Commission on Intergovernmental Relations, Tax Capacity of the 50 States: Methodology and Estimates (1982) at 44-45. See also Yaris v. Special School District of St. Louis County, No. 81-423 C(2), slip op. at 40 n.7 (E.D. Mo. March 3, 1983) (noting that "only one state in the country appropriates less funds than the State of Missouri for its educational system").

cert. denied, 420 U.S. 951 (1975)(ruling that "district court had the authority to implement its desegregation order by directing that provision be made for the levying of taxes"). This objection should not prevent court approval of the settlement.

The same principles which support a court-ordered tax increase would also permit the Court to order that excess revenues due to a scheduled 1983-84 rollback in city taxes be used to help fund the plan. Specifically, city school taxes are currently scheduled to be reduced by approximately $10 million in 1983-84 to reflect retirement of city school bonds issued in 1962 and an increase in revenues to the city schools due to passage of Proposition C in Missouri last year. The Court could order part of this roll-back to be used to help fund the interdistrict desegregation plan, just as it ordered the use of surplus revenues in the same bonds retirement account for funding of the intradistrict plan in 1980. See Liddell v. Board of Educ., 491 F. Supp. 351, 353 (E.D. Mo. 1980). Alternatively, the Court could also order that the City Board seek a tax increase, with the State to fund all of the plan until the increase is obtained.

Finally, a number of comments, such as the submissions of the North St. Louis Parents and Citizens for Quality Education and some of their members, have expressed concern about "inferior facilities and resources" in the inner city

schools. Memorandum in Support of Motion to Object to Proposed Settlement and to Intervene as Party Plaintiffs [H(2163)83], at 2. Plaintiffs have shared this concern throughout this litigation. The settlement plan accordingly includes specific provisions for improving the quality of education in inner city schools as discussed above. Plaintiffs wish to assure concerned class members as well as this Court that they regard these provisions as crucial components of the Settlement Agreement which must be implemented adequately along with the rest of the plan.

By the very nature of a settlement, it is a compromise between the positions of adverse parties. By the very nature of compromise, no party will get precisely what it sought in litigation. In this case, however, the proposed settlement offers the opportunity for a meaningful, voluntary solution to the enduring problem of school segregation in the St. Louis area. As the courts have recognized, "there is an overriding public interest in favor of settlement" of litigation such as the instant case. Armstrong, supra, 616 F.2d at 313. Moreover, this plan exemplifies the "practical flexibility" and "facility for adjusting and reconciling public and private needs" which the Supreme Court emphasized as an important aspect of desegregation remedies in Brown v. Board of

Education, 349 U.S. 294, 300 (1955). The signatories to this settlement agreement strongly urge its approval by this Court.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed or hand delivered this 25th day of April, 1983 to all counsel of record.

Kenneth Brost

Appendix A -- Proffer of Plaintiffs' Case

Absent a settlement of this case, plaintiffs would be prepared to present evidence demonstrating that the public schools operated by defendants are racially segregated on a metropolitan basis in violation of the Constitution of the United States. As described in Section A, below, this evidence would show first that, prior to 1954, defendants created and operated a racially segregated, metropolitan-wide dual school system. Second, the evidence would demonstrate that the defendants have failed to fulfill their affirmative constitutional duty to dismantle the pre-1954 racially dual school system. This proffer of plaintiffs' case incorporates by reference the Synopsis of Testimony Submitted by City Board, Caldwell and Liddell Plaintiffs [H(2034)83], which describes the expected testimony of all of plaintiffs' witnesses. Also incorporated by reference are the exhibits, deposition excerpts, and interrogatory answers listed in the Pre-Trial Memorandum of Plaintiffs St. Louis Board of Education, et al., Craton Liddell, et al., and Earline Caldwell, et al. [H(1995)83]. 1/ In Section B, below, we describe briefly the

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1/ The description set forth in Section A is a summary of matters the plaintiffs are prepared to prove, and does not purport to provide an exhaustive inventory of the testimony and documentary evidence that would be marshalled in support of plaintiffs' case.

type of order plaintiffs would seek at the conclusion of a trial on the merits in order to remedy the interdistrict constitutional violations described in Section A.

A. Description of Plaintiffs' Evidence

Plaintiffs' evidence would show that education is a state function in Missouri, with certain authority delegated by the state to local school districts. Before the Civil War, the Missouri Constitution prohibited the education of blacks. See Plaintiffs' Exhibit ("Ex.") 149. After the war, the Constitution was revised to permit their education, but required that all schools be segregated by race. State laws provided for the creation of separate black schools and "colored consolidated high school districts," and authorized transfers of black students from districts where there were no schools for blacks to other districts, to ensure that all schools would remain segregated. The State further encouraged interdistrict transfers by providing for payment of tuition and transportation costs by the district of origin. It also encouraged local districts to participate in interdistrict transfers of blacks through state reports and bulletins, which explained how state funds could be used to underwrite the cost of transfers. See Exs. 1, 2. In sum, the evidence would show that the State played a crucial role in the establishment of a coordinated interdistrict system of segregation in the St. Louis area.

The evidence would establish that the defendant school districts failed to create and maintain schools for blacks in all areas where blacks resided, and those schools which were established were often of inferior quality. For many years high school education for blacks was available only in the City of St. Louis, and the high schools for black students eventually opened in St. Louis County were recognized as inferior.

Plaintiffs' case would demonstrate that as a result of the above facts, significant numbers of interdistrict transfers took place from suburban areas to St. Louis, with partial subsidization of tuition and transportation costs by the State defendants and the suburban districts. See Exs. 150, 443-45. It was often necessary for black children desiring an education to travel long distances, passing one or more white schools along the way, in order to reach the nearest black facility. Even after a black high school was opened in St. Louis County, black parents often felt compelled to send their children to St. Louis, due to the inferiority of the suburban black schools. Because of the hardships involved in commuting to St. Louis, and the fact that suburban districts often failed to reimburse transportation costs, many black suburban students went to live with friends or relatives in St. Louis in order to attend school, and then often remained in the City to live. Other black families moved into the City in order to avoid

these hardships and to obtain education which was not available in rural and suburban areas. See, e.g., Ex. 2. These factors contributed significantly to the residential segregation and concentration of blacks in the City, which continues even today. See, e.g., Exs. 116, 152, 299, 307.

The evidence would also demonstrate that many interdistrict transfers of black students occurred among districts in St. Louis County for the purpose of maintaining segregation. See Exs. 443-45, 448, 455. Many districts had no black schools at all, thus forcing all black children to travel to other districts. In particular, many transfers occurred between most St. Louis County districts and Webster Groves, which operated a county consolidated high school for blacks under authorization of state law.

Testimony would show that in some areas, defendant school districts made boundary changes that further isolated black students and consigned them to particular districts. For example, the creation of the Berkeley district, as described in United States v. Missouri, 515 F.2d 1365 (8th Cir.), cert. denied, 423 U.S. 951 (1975), resulted in the isolation of black students in the Kinloch district. In another instance, an area containing a relatively high proportion of blacks was transferred from what is now Hazelwood to Scudder, a predominantly black district that is now part of Ferguson-Florissant. School board minutes reflected the board's understanding that the change would

"take all the colored out of this District and save a lot of tuition." See Ex. 20.

The evidence would also establish that the pre-1954 interdistrict dual system of education was reinforced by other government actions which prevented black people from securing housing in parts of the metropolitan area reserved for whites. The testimony would show a close relationship between state-promoted housing segregation and educational segregation in the St. Louis area. Patterns of residential segregation originally fostered by government action were subsequently adopted and enforced by realtors and others. The result was the creation of a dual housing market that has continued to the present. See Exs. 193, 194.

Plaintiffs' evidence would also demonstrate that, until 1949, the courts of the State of Missouri enforced restrictive covenants forbidding the sale of property to blacks, and state officials continued to record such covenants thereafter. Racially restrictive covenants were recorded and enforced in the City of St. Louis and each and every school district in St. Louis County. See Exs. 430, 431. This practice reinforced residential segregation and further contributed to segregation of schools throughout the metropolitan area and the exclusion of black families from many suburban districts. Patterns of residential segregation

persisted even after such covenants were no longer recorded, and a racially dual housing market continues to exist.

The evidence would demonstrate further that, prior to 1954, public housing policies carried out in the metropolitan area reinforced the dual housing market. All conventional public housing for black residents was built in the black neighborhoods of the City of St. Louis and was occupied exclusively by black families. Conversely, all public housing for white residents was built in white neighborhoods and occupied exclusively by whites. Federal Housing Authority policies based on local custom and usage further reinforced the dual housing market by excluding blacks from obtaining FHA mortgage insurance in white neighborhoods. See Ex. 212. All of these governmental practices promoting residential segregation have contributed to the highly segregated school system that persists to this day.

Evidence in the second phase of plaintiffs' case would demonstrate that, after 1954, defendants failed to fulfill their affirmative duty to dismantle the racially dual, metropolitan-wide system of public education. This failure is shown by the fact that schools and school districts in the metropolitan area remain highly segregated today. See Exs. 434-35, 439. Dr. Karl E. Taeuber, an expert in demography and statistical analysis specializing in the study of racial segregation and its causes, has prepared an "index of dissimilarity"

analysis, similar to those employed by courts evaluating segregation in other cities, based on census and school district data for the metropolitan area from 1950 to 1980. The index provides a measure of the degree to which the racial composition of individual units, such as schools or census blocks, departs from that of the metropolitan area as a whole. Professor Taeuber's analysis shows a very high degree of school segregation in the St. Louis area today, even higher than that which existed in other metropolitan areas before the courts found unconstitutionally segregated conditions and ordered mandatory remedies. The analysis also demonstrates that the overall level of segregation among schools is largely attributable to interdistrict segregation rather than intradistrict segregation. The index of dissimilarity analysis also shows a very high level of residential segregation, with the St. Louis metropolitan area ranking among the most segregated of 237 Standard Metropolitan Statistical Areas surveyed.

The evidence would also show that, throughout the post-1954 period, the defendants ignored or rejected numerous opportunities to meet their affirmative duty to dismantle the racially dual metropolitan-wide system of education. If pre-1954 school district consolidation trends had continued, segregation could have been alleviated substantially with relatively little transportation of pupils. Under a 1948 state

law providing for consolidations, reorganizations proceeded rapidly throughout the state, including St. Louis County, until 1954. The need for consolidation in order to increase school district efficiency and broaden curriculum offerings was widely recognized in Missouri. See Ex. 24. But while consolidations continued rapidly throughout the state for about ten years following the Brown decision, they slowed dramatically in St. Louis County. Moreover, the evidence shows that most of the consolidations and boundary changes that did occur in St. Louis County had little or no desegregative effect. Post-1954 changes in state law made it more difficult for consolidation to be achieved in St. Louis County. For example, a 1969 change made it more difficult for consolidation propositions to be placed on a ballot and a 1977 change allowed any affected district to block consolidation by a majority vote, whereas previously consolidation could be rejected only by majority vote in the entire area to be encompassed by the new consolidated district.

Testimony would describe several proposals made since 1954 for consolidations that would have had considerable desegregative effect, each of which was rejected by the defendants. A 1962 study conducted by the University of Chicago recommended significant consolidation within the County. See Ex. 49. However, several suburban districts refused to cooperate in the study, and none sought

consolidation as a result of it. In the late 1960's, the state-sponsored Spainhower Commission developed a detailed plan for consolidation of city and suburban districts that would have greatly reduced interdistrict segregation. See Ex. 42. The St. Louis Board of Education presented to the Commission its own proposal, which would have grouped existing city and suburban districts into ten consolidated districts. See Ex. 37. In 1976, a Governor's Conference Report recommended the promulgation and adoption of a state master plan for reorganization that would, among other objectives, reduce elementary school racial isolation created by current district boundaries in the St. Louis area. See Ex. 48. Like all other consolidation proposals, this one was rejected by the defendants. In some instances, desegregative consolidation on a smaller scale was also rejected.

The use of code words in school board documents indicates that race was a factor underlying opposition to desegregative consolidations. For example, one such statement proposes that only districts with "population of . . . the same general type" be consolidated, see Ex. 75, while another states that a reorganized district "should include elements of the population with a high degree of homogeneity," see Ex. 69.

The evidence would also show that, at the same time the defendants resisted desegregative consolidation, they evolved a pattern of interdistrict cooperation among suburban

districts. This has further excluded the City from the County and helped the suburban districts to resist cooperation or consolidation with the City. For example, the Cooperating School Districts organization has allowed small suburban districts to operate in some respects as a consolidated county district, without any of the desegregative impact of such a consolidation. The CSD has also played an active role in opposing consolidation on behalf of the suburban districts.

Plaintiffs would be prepared to prove that the defendants have also rejected proposals for interdistrict transfers that would have had a desegregative effect, notwithstanding a general willingness to accept transfer students. For example, in 1967, Superintendent Kottmeyer of the St. Louis district presented a proposal to the surburan districts that would have decreased segregation and the racial identifiability of schools through exchanges of students and teachers between St. Louis and the suburbs. The defendant districts uniformly refused to participate. See Exs. 119, 123, 124. The defendants also refused to participate in the 1980 Benson proposal of transfers between the City and County. See Ex. 116. Nor has any of the predominantly white districts proposed an interdistrict desegregation plan of its own.

The testimony would also demonstrate that the State failed to exercise its authority over its subordinate school districts to require the dismantling of the pre-1954 racially

dual system. Although the State could require steps such as consolidations or transfers to promote desegregation, it has not done so. Other means, such as the use of funding and accreditation criteria relating to effective desegregation, which have been used successfully in other states, have not been implemented in Missouri.

The evidence would also show that the defendants' response to Brown -- alleged conversion to a "neighborhood school" system -- was ineffective to dismantle metropolitan-wide school segregation because their own actions had already created and continued to maintain racially identifiable neighborhoods and school districts. The pre-1954 interdistrict dual system resulted in certain school districts becoming identified for blacks and others becoming virtually all-white. Governmental actions and omissions after 1954 maintained and expanded the pattern of racial identifiability of school districts in the St. Louis metropolitan area, thus ensuring that "neighborhood schools" would be ineffective in dismantling the dual system. See H(1995)83 at 12-14.

In sum, the evidence would demonstrate that a coordinated, multidistrict, metropolitan-wide system of public education in the St. Louis area was firmly established by 1954. A pattern of actions and omissions since Brown shows the failure of the defendants to take steps that would have been effective in reducing school segregation. In sum, they have

failed in their affirmative constitutional duty to dismantle the racially dual interdistrict system of public education they created in the St. Louis metropolitan area.

B. Relief Sought by Plaintiffs

On February 1, 1982, the City Board submitted a "Final Report on the Feasibility of School Desegregation in the St. Louis Metropolitan Area," pursuant to the Court's orders of November 19, 1981 [H(643)81] and January 18, 1982 [H(754)82]. While this report was not a desegregation plan, it was designed to serve as a basis for developing such a plan, and provides an outline of the type of relief that plaintiffs would seek at the successful conclusion of a trial on liability. Its features indicate the kinds of relief that the plaintiffs believe would be justified by findings of interdistrict segregation, and which would likely be effective in alleviating such segregation. The central features of this feasibility study include: consolidation of all St. Louis County, Jefferson County, and St. Charles County districts and the city district into one district with five sub-districts; student reassignment and transportation as necessary to achieve complete and lasting school desegregation; desegregation of teachers; creation of uniform curricular and other educational standards; and special educational programs, including magnet schools.

The Court's Interim Order for Mandatory Interdistrict Desegregation of August 6, 1982 [H(1183)82] reflects a judgment

that a finding of interdistrict liability would justify the type of relief sought by plaintiffs. In that order the Court conditionally approved the abolition of the presently-existing school districts and their consolidation into a single metropolitan-wide district encompassing the City of St. Louis and St. Louis County. This unified district would be divided into four subregions with approximately equal populations, to be used for purposes of staff and student assignments. A central board of education would have responsibility for overseeing interdistrict remedial plans and programming affecting all four subregions.

Under the Order, the Court would establish a "Commission to Help Implement Lasting Desegregation" to monitor implementation of and compliance with the remedial plan. Students would be subject to reassignment, but those in presently desegregated schools, magnet schools, or special education, vocational education, or bi-lingual programs could be exempted. A desegregative transportation system under the supervision of the Central Board would be implemented. The faculty and staff racial composition would reflect the composition of the student population, and, if necessary, the black staff and faculty population would be increased by a specific percentage each year until the required percentage is met. Educational programs designed to facilitate desegregation, such as elective ethnic courses, were also

envisioned. The district would be financed by a uniform district-wide tax rate to be established initially by the Court, while the state would separately fund incremental desegregation costs. Parent and community involvement and implementation of desegregation would be encouraged by the Central Board. Overall, the plan would seek to eliminate racially identifiable schools, to distribute the burdens of desegregation as equally as possible between black and white students, to maximize stability so far as consistent with the goal of effective desegregation, and to provide quality education throughout the system.

APPENDIX B

DEFENDANTS' PROFFER

I.
Summary of Defendants' Evidence
for Their Case in Chief

Defendants' evidence[1] would have shown that at all times after the 1954 decision in Brown the assignments of black and white students in the separate St. Louis County school districts were made in a racially neutral manner. Post-Brown assignments were and have been made pursuant to the attendance policy in each district applied nondiscriminatorily to both black and white students in the district. More than 30,000 black students presently attend public schools in St. Louis

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[1]Only seven of the twenty-three school districts in St. Louis County (not counting the Special School District) were active defendants at the time of the February 14, 1983 trial setting. Fifteen school districts were participants in this Court's 12(a) Voluntary Desegregation Plan as to whom litigation has been stayed. Litigation has also been stayed as to Ferguson-Florissant. These sixteen districts have participated in trial preparation either not at all or only to a limited extent prior to the time stays were entered.

The description of evidence set forth in this proffer is a summary of matters the active defendants are prepared to prove. It does not purport to provide an exhaustive inventory of the evidence that would be marshalled in the defense of this case. A more complete listing of the evidence defendants are prepared to adduce is found in the pretrial materials, including synopses of witness testimony and designations of deposition testimony and interrogatory answers, filed on and about January 25, 1983 and February 1, 1983 either jointly or singly by the State, St. Louis County and school district defendants, which materials are hereby incorporated into this proffer by reference.

County compared with some 48,000 black students in the City of St. Louis. These 30,000-plus black students in St. Louis County, the evidence would show, attend unitary school districts and are treated in the same manner as are white students within the district. Moreover, each school district in St. Louis County has both black and white students and is, therefore, integrated. Some districts are majority white and integrated. Some are majority black and integrated substantially. Some are majority white and integrated substantially.

The defendant school districts' evidence would have shown that none of the three types of interdistrict violations described by the Supreme Court in Milliken v. Bradley, 418 U.S. 717, 744-48 and 755 (1974) (discussed in defendants' pretrial brief H(2000)83 at pages 8-10) as possibly justifying interdistrict relief occurred in this case. The evidence would not only fail to support but would actually refute the existence of any of these circumstances. First, as the evidence would show, no school district boundary lines have been drawn or changed on a racial basis. Second, no new school district was ever "carved out" on a racial basis. Third, it would be shown, there were no interdistrict transfers of students between any of the districts involved in this case which have "increased racial segregation." Milliken, 418 U.S. at 746-47 (emphasis added). (Defendants' evidence regarding the pre-Brown transfers of students is discussed in part III below.) Defendants' expert witnesses would have demonstrated in most compelling fashion that the higher proportion of black students in the St.

Louis City schools than in the St. Louis County schools is the result of factors other than any actions by school districts (see footnote 6 in part III below and the text thereat). In short, the evidence would show that the defendant St. Louis County school districts committed no acts sufficient to give rise to an interdistrict violation, and this would have been especially apparent with respect to the determinative post-Brown era.

The evidence also would have shown that the separate St. Louis County school districts have enjoyed a high degree of local autonomy - vis a vis each other, the City of St. Louis school district and the State of Missouri. The evidence on this would have been presented inter alia by the expert testimony of Dr. Joseph F. Zimmerman of the State University of New York, Albany, who is a political scientist, a consultant to the United States Advisory Commission on Intergovernmental Relations, and a noted expert on the relationships between states and their political subdivisions including school districts. The evidence and his testimony would have been that the degree of local autonomy present in this case is considerably greater than that enjoyed by the suburban Detroit districts in Milliken. (Milliken, discussed infra, held that the autonomous suburban districts could not be held liable for interdistrict segregation without first having their own opportunity to defend in a trial on the merits, even though the Detroit school district and the State of Michigan were adjudicated constitutional

violators.) Dr. Zimmerman would have testified that on a relative basis local school districts in Missouri enjoy a greater degree of local autonomy than local school districts in most other states. Consistent with the high degree of local autonomy enjoyed by the St. Louis County districts is the fact that on the average the amount of State aid received by them as a percentage of total funds is a relatively low figure of only about 28%.

Defendants' case at trial would have also established, based on this Court's judgment in the St. Louis intradistrict case, that the City of St. Louis school district can achieve unitary status within its own borders - without the necessity of an interdistrict remedy and even though the City school district may be 75% or more black.

Based upon the foregoing facts which would have been established at trial, and under settled constitutional precepts governing school desegregation cases, plaintiffs would have failed to establish any interdistrict violations and any right to an interdistrict remedy. The defendant school districts therefore would have been entitled to judgments in their favor.

II.
Defendants' Position Regarding the Proper Legal Standard In An Interdistrict Desegregation Case[2]

The critical factor which must be kept in mind is that the claims and relief sought in this case are interdistrict not

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[2]A more comprehensive and exhaustive analysis of the proper legal standard applicable in this case and of the reasons why under that standard defendants would have been entitled to judgment at trial, is found in defendants' pretrial brief H(2000)83 which is hereby incorporated into this proffer by reference.

intradistrict. An interdistrict desegregation case, which alleges cross-boundary constitutional violations and seeks the elimination of the separate, autonomous school districts, is governed by principles altogether different from those governing an intradistrict case. At stake in an interdistrict case is "local autonomy" - the singlemost "deeply rooted" tradition in public education which "has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." Milliken, 418 U.S. at 741-42.

In an interdistrict case it is well settled that the plaintiff has the heavy burden to prove in the first instance that "there has been a constitutional violation within one district which produces a significant segregative effect in another district." Milliken, 418 U.S. at 744-45 (emphasis added). "It must be shown that racially discriminatory acts. . .have been a substantial cause of interdistrict segregation." Id. (emphasis added). Unlike in an intradistrict case which seeks the elimination "root and branch" of constitutional violations within a single district (Green v. School Board of New Kent County, 391 U.S. 430 (1968)), the only relevant constitutional violations in an interdistrict case are those having a demonstrably "significant" and "substantial" effect in another district. Milliken, supra.

The presumptions and the relatively light standards and burdens of proof which might favor the plaintiff in an intradistrict case have no application in an interdistrict case.

Milliken, 418 U.S. at 744-45; Lee v. Lee County Board of Education, 639 F.2d 1243, 1254-55 (5th Cir. 1981). For example, the mere showing of discriminatory effect, which may suffice in an intradistrict case, is insufficient in an interdistrict case. Lee County, 539 F.2d at 1263. Rather, the effect must be significant and it must be shown to have been the result of a purposefully and intentionally discriminatory act ("motivated by a discriminatory animus"). Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Developing Corp., 429 U.S. 252 (1977); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); Lee County, 539 F.2d at 1263.

Furthermore, and significantly, the affirmative duty after Brown to eliminate the vestiges of a formerly dual school system which the defendant must meet in an intradistrict case (Green v. School Board of New Kent County, supra) does not apply in an interdistrict case. In an interdistrict case there is no affirmative duty on one school board to eliminate discrimination in an adjacent school system, or to consolidate or merge or cooperate with an adjacent school system in order to alleviate racial imbalance problems in the other school district. As was held by the Supreme Court in Milliken:

> Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing racial composition of that district's schools with those of the surrounding districts.

Milliken, 418 U.S. at 749; see also Board of Education of Oklahoma County (District 53) v. Board of Education of Oklahoma

County (District 52), 413 F.Supp. 342, aff'd, 532 F.2d 730 (10th Cir. 1967) (see discussion in defendants' pretrial brief H(2000)83 at pages 4-7). If, as is the case, the Constitution does not require a district to eliminate discrimination or alleviate a racial imbalance[3] in another district or to consolidate or merge or cooperate with another district to that end, then it is no constitutional violation to decline to take those actions. Crawford v. Board of Education of the City of Los Angeles, ____ U.S. ____, 73 L.Ed.2d 948, 957 (1982); Dayton Board of Education v. Brinkman, 443 U.S. 526, 531 (1979) (see discussion in defendant's pretrial brief H(2000)83 at pages 10-11). The constitutional right of school children is only to attend school in a unitary school system in the school district in which they reside. Milliken, 418 U.S. at 746-47.

III.
Application of the Proper Legal
Standard to the Proffered Evidence

Measured against the foregoing, the defendant St. Louis County school districts would have been entitled to judgment at trial. The fact of their local autonomy when coupled with the fact that post-Brown they have assigned students in a racially

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[3]It is well settled that a school district is not required to be "racially balanced" in order to be "unitary" and pass constitutional muster. Milliken, supra, 418 U.S. at 746-47 ("Milliken I"); Milliken v. Bradley, 433 U.S 267, 270 (1977) ("Milliken II"); Pasadena City Board of Education v. Spangler, 427 U.S. 424, 434-35 (1976); see, e.g., Green v. County School Board of New Kent County, supra (57% black, 43% white); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972) (66% black, 34% white); United States v. Scotland Neck Board of Education, 407 U.S. 484 (1972) (77% black, 22% white).

neutral manner and that they are now unitary, and the absence of any of the three types of interdistrict violations catalogued in Milliken, supra, would have foreclosed any liability on their part in this interdistrict case. Defendants' evidence would have demonstrated that they have fully satisfied any and all constitutional duties they owed to the plaintiffs and the class members plaintiffs represent in this interdistrict case.

Plaintiffs' proffered evidence that dual school systems were maintained in Missouri prior to Brown is legally insufficient to make a prima facie case or to meet plaintiffs' burden of proof. See Hazelwood School District v. United States, 433 U.S. 299, 309 (1977). The fact of pre-Brown dual systems is especially devoid of probative value in this interdistrict case because, as discussed above, the defendant St. Louis County school districts never had any affirmative duty to dismantle dual systems outside of their own borders and their declination to do so raises no constitutional violation.

For the foregoing reasons defendants at trial would not have been obliged to address plaintiffs' evidence of pre-Brown acts. Nevertheless, defendants' evidence would have shown that the pre-Brown acts and particularly the pre-Brown interdistrict transfers of students were not made for interdistrict segregative purposes, were negligible in numbers and effect, and, in any event, were much too remote in time to have had any present segregative effect let alone a "significant" one. During the pre-Brown era covered by plaintiffs' proffered evidence, the suburban districts were in the main small, rural, remote and

underfunded. Defendants' evidence would have fully rebutted plaintiffs' theory that these districts could have significantly impacted the racial balance in the City of St. Louis which at the time had over 100,000 students and was the richest and most desirable school district in the St. Louis area.

The evidence would have shown that in the years before Brown, when all schools in all districts were segregated by law, whenever the number of black students in a school district was too small to maintain an adequate elementary school or a high school, the small numbers of students who could not be adequately schooled in the district of their residence were transported to the nearest district (including the City of St. Louis school district) which had an adequate school which those students could attend. Those transfers, which were made by only some districts[4] and involved only a negligible[5] number of students, were as a matter of course made in order to furnish better educational opportunities than were available in the home district. The transfers, it would be shown, were not made for any interdistrict segregative purpose and their segregative effect was de minimus then and nonexistent now.

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[4]Indeed, some of the districts which are signatories to the proposed Settlement Agreement were not even in existence at the time of those transfers.

[5]The evidence would have shown that the numbers of such transfers totalled at their highest only 161 in any given year, and they occurred at a time when the enrollment in the City of St. Louis school district was between 80,000 and 120,000 students.

To the extent plaintiffs contend that a "metropolitan-wide dual system" existed by virtue of the interdistrict transfers, that purported "dual system" was fully dismantled when the transfers ended. In the post-Brown era, defendants' evidence would show, the interdistrict transfers were completely halted.

Plaintiffs' evidence of alleged post-Brown acts and omissions on the part of the defendant St. Louis County school districts is also legally insufficient to make a prima facie case or to meet plaintiffs' burden of proof. That defendants declined to adopt proposals for merger, consolidation or interdistrict transfers which might have resulted in desegregation, cannot be probative of any constitutional violation on the part of the defendants because, as discussed above, defendants had no affirmative duty to dismantle any alleged interdistrict effects of the pre-Brown dual school systems. In the absence of a constitutional requirement to adopt such measures their failure to do so is no constitutional violation.

Plaintiffs' claim that the participation of the St. Louis County school districts in the Cooperating School Districts evidences or is a constitutional violation is also without merit. This is so because plaintiffs would have been unable to meet their burden to prove, nor is it true, that such participation caused significant interdistrict segregative effects and was motivated by discriminatory animus. The evidence at trial would have negated the existence of such effects and intent. Moreover, the evidence would have shown that under the By-Laws

of the Cooperating School Districts the City of St. Louis school district as an adjoining district was eligible to join the Cooperating School Districts, but it never sought to join and determined for its own reasons not to join.

Plaintiffs also alleged that defendants' school systems are not unitary. Defendants' evidence would have shown that this allegation is without foundation. Defendants' evidence would have shown that after Brown they have assigned students in a racially neutral manner and that the vestiges of the pre-Brown dual school system have been eliminated within their borders.

The fact that the State of Missouri has been found to be a constitutional violator in the City of St. Louis intradistrict desegregation case does not enable plaintiffs to make a prima facie case or to meet their burden of proof as to the defendant St. Louis County school districts. It is well settled that autonomous school districts such as defendants at bar cannot "inherit" liability from, or be "vicariously" liable for, the acts of an adjudicated state violator. Milliken, supra; see also General Building Contractors Asociation v. Pennsylvania, ___ U.S. ___, 102 S.Ct. 3141, 3149 et seq. (1982). As previously discussed, the county school districts had no affirmative duty after Brown to dismantle the interdistrict effects of the formerly dual systems. The alleged failure of the State of Missouri to do so therefore could not be the basis of any liability on the part of the defendant county districts.

With respect to plaintiffs' claims of interdistrict housing violations, plaintiffs' evidence would be of doubtful admissi-

bility. Evidence of allegedly discriminatory government action in housing should be dealt with only in the context of a housing discrimination case, not in a school discrimination case. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22 (1971); Hills v. Gautreaux, 425 U.S. 284 (1976); Bell v. Board of Education of Akron Public Schools, 683 F.2d 963 (6th Cir. 1982); Barnett v. McNary, Civ.Action No. 81-1253-C (U.S.D.C. E.D. Mo.) (discussed in defendants' pretrial brief H(2000)83 at pages 18-20). Moreover, even if allegedly discriminatory acts by non-school governmental officials could somehow be the basis for an interdistrict violation in this school case, plaintiffs' evidence would have failed to show that any such alleged acts had significant interdistrict effect.

Defendants' evidence would have shown that any steps which may have been taken in the past to contain the growth of black neighborhoods within any municipality or governmental subdivision (1) had all ended years ago, (2) were exclusively intradistrict actions not shown to have had any interdistrict or extradistrict impact, and (3) most important of all, were utter and abject failures insofar as the achievement of their alleged purposes concerned. The growth of black communities and the movement of black citizens into formerly white residential areas were not halted or contained (either within specific areas or within the city limits of St. Louis), but took place and are continuing to take place on a massive scale, i.e., large numbers of black citizens have moved from St. Louis into many different parts of St. Louis County.

For example, plaintiffs allege various actions from past decades purportedly taken by the City of St. Louis, such as racial zoning, in an effort to restrict its black residents to certain parts of the City. Defendants' evidence would have shown that these actions had little or no effect at the time, and have produced no presently continuing effects upon racial residential patterns within the city limits. The evidence would have shown that the actions produced no interdistrict effects at all, which under Milliken is fatal to plaintiffs' case.

Defendants' evidence would have shown that black citizens have demonstrably not been confined to or forced to be concentrated in the city limits of St. Louis. There are not now, and never have been, any interdistrict barriers between the different school districts involved in this case. The conclusive proof that there is and has been no containment of black citizens to the city limits of St. Louis is the dramatic increase within the past three decades of black residents in many parts of St. Louis County.

Defendants' evidence would have shown that the present racial composition of the St. Louis City school district is, like the majority black composition of the innercity schools of virtually all of America's major cities today, the result of economic restraints and decisions and personal preference choices made by thousands of individuals. Although not having the burden to do so, defendants would have presented a number

of expert witnesses[6] to explain the demographic, economic and sociological factors which have created present-day racial residential patterns, and would have established that government had and has had little, if anything, to do with the housing choices of these thousands of individuals.

Based upon the foregoing and all the other evidence which would have been submitted at trial, the defendant St. Louis County school districts, it is submitted, would have been entitled to judgment in their favor on the issue of liability. Even if some violation were to have been found, a serious question would then have been presented as to whether the far-ranging interdistrict remedy sought by plaintiffs - involving

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[6]Defendants would have produced (1) Dr. Kevin F. McCarthy of the Rand Corporation, a sociologist and demographer, (2) Dr. Williamson Norfleet Rives of Rice University, an economist and demographer, (3) Dr. Donald Phares of the University of Missouri, St. Louis, an economist and specialist in urban studies, housing and neighborhood transition, (4) Dr. Charles Leven, Director of the Institute for Urban Regional Studies at Washington University in St. Louis, an urban economist, (5) Dr. E. Terrence Jones of the University of Missouri, St. Louis, a political scientist and expert in public opinion survey research and urban policy, and (6) Dr. William A. Sampson of Northwestern University, a sociologist and expert in attitudinal research and urban policy. These six experts would establish, each from his own distinct scientific approach, methodology and expertise, that housing choices and decisions and the higher proportion of black students in the St. Louis City schools than in the St. Louis County schools, are the result of factors other than government action. Their separate perspectives leading to the same conclusions would have provided a compelling, comprehensive multi-disciplinary analysis of these matters. A more detailed summary of their testimony is set forth in Synopsis of the Proposed Testimony of Joint Defendants' Expert Witnesses filed February 1, 1983.

complete consolidation of all party school districts and mandatory two-way busing of students - would have been necessary or appropriate to rectify the violation found.

Defendants' position would have been that indeed the trend is away from mandatory busing as a remedy and that courts are seeking other more feasible alternatives, such as those contained in the proposed Settlement Agreement. See, e.g., Tasby v. Wright, 520 F.Supp. 683 (N.D.Tex. 1981). This Court has already directed the implementation of a remedy in the St. Louis intradistrict case which will achieve unitary status in the City of St. Louis school district. That court-ordered remedy which is already in place fully meets constitutional standards without the need for additional interdistrict relief. Defendants' evidence and position would have been, in the event a violation were found, that a remedy much more modest than the one sought by plaintiffs - involving at most, for example, the creation of opportunities for voluntary interdistrict transfers of students - would have been constitutionally sufficient to remedy whatever interdistrict violation might have been found. Thus, even if assuming arguendo plaintiffs at trial were able to meet their burden to prove illegal discrimination by the defendant St. Louis County school districts, there would have still remained a serious doubt that plaintiffs would have been entitled to the relief for which they prayed.

The foregoing is not intended to be an exhaustive summary of the evidence and reasons why the defendant St. Louis County

school districts would have prevailed at trial. In addition to the foregoing, each district at trial would have presented evidence establishing its own unique defenses and rebuttals to plaintiffs' allegations, based on its particular situation, both past and present. This proffer does not attempt to set forth the additional unique defenses which would have been raised on behalf of the individual St. Louis County school districts. Even without those separate defenses, it is submitted, for the reasons stated above, plaintiffs at trial would have been unable to sustain their burden of proof on liability or to establish entitlement to the relief for which they prayed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	No. 72-100 C(4)
THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF COUNSEL
FOR PLAINTIFFS AND DEFENDANTS

1. The undersigned ("Affiants") are counsel for parties to the above-captioned case.

2. Affiants are familiar with the findings of this Court and the United States Court of Appeals for the Eighth Circuit in this case. Affiants are also familiar with plaintiffs' allegations in this case of interdistrict constitutional violations and certain defendants' responses thereto.

3. Affiants have reviewed carefully and are fully familiar with the terms of the proposed Settlement Agreement submitted to this Court on March 2, 1983 with the Report of the Special Master [H(2158)83].

4. It is Affiants' considered professional opinion that under all the circumstances the proposed Settlement Agreement represents a fair and reasonable compromise and settlement of the claims and defenses of the parties to this action.

5. Affiants declare under penalty of perjury that the foregoing is true and correct.

Executed on April 25, 1983.

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