UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

LINCOLN MEMORIAL UNIVERSITY, DUNCAN SCHOOL OF LAW,	)	**Case No. 3:11-cv-608**
Plaintiff,	)	**Judge Varlan**
v.	)	**Magistrate Judge Shirley**
THE AMERICAN BAR ASSOCIATION,	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR RECONSIDERATION

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Plaintiff, Lincoln Memorial University, Duncan School of Law, ("DSOL") moves the Court to reconsider its Memorandum Opinion and Order of January 18, 2012, (Doc. 35), denying Plaintiff's Motion for Temporary Restraining Order and for Preliminary and Permanent Injunction.

On January 31, 2012, the ABA filed a Notice of Supplementation of Record and Supplemental Declaration of Hulett H. Askew (Docs. 37, 37-1) which give rise to this Motion. In its Order, this Court concluded that DSOL did not meet the requirements for injunctive relief imposed by Rule 65 of the Federal Rules of Civil Procedure, including the necessity that the DSOL exhaust its administrative remedies prior to seeking relief in this Court. Given that the ABA's representations regarding the Appeals Panel – which the Court expressly relied upon in reaching its decision – inaccurately portrayed the Appeals Panel as an impartial administrative review body appointed **prior** to the ABA's denial decision, Plaintiff respectfully requests that the

Court reconsider its finding that Plaintiff's failure to exhaust its administrative remedies is unexcused. Furthermore, as demonstrated by the Supplemental Declaration of DSOL Dean Sydney Beckman, filed this same date, the irreparable harm to the law school caused by the ABA now includes the actual withdrawal of at least eight students and the expressed intent to transfer by additional students.

A court may grant a motion pursuant to Federal Civil Rule 59(e) if there is a clear error of fact or law; newly discovered evidence; an intervening change in controlling law; or to prevent manifest injustice. *Gencorp Inc. v. Am Int'l Underwriters Co.*, 178 F.3d 804, 834 (6th Cir. 1999); *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005), *cert. denied*, 547 U.S. 1070 (2006). The ABA's recently filed Notice of Supplementation constitutes newly discovered evidence with respect to the issue of exhaustion of administrative remedies decided by this Court. The ABA's misrepresentation also caused the Court to base its decision on a clear error of fact. Justice and fairness require a different result.

The ABA's recent admission that the Appeals Panel was not constituted until **after** the Council made the decision to deny the DSOL's application for provisional approval supports the conclusion that any efforts by the DSOL to exhaust its administrative remedies would be futile. Moreover, the record clearly demonstrates that DSOL satisfies the requirements for injunctive relief pursuant to Fed. R. Civ. P. 65, including evidence that DSOL is likely to succeed on the merits of its claims and that DSOL is suffering irreparable harm as a result of the ABA's decision denying provisional accreditation.

Furthermore, when one reviews the ABA's decision in light of recent case law of the United States Supreme Court governing administrative review, *Judulang v. Holder*, 132 S. Ct. 476, 483-84 (2011), and its progeny, *Union Pacific Railroad Company v. United States*

Department of Homeland Security, 2011 U.S. Dist. LEXIS 146567, at *27-30 (D. Neb. Dec. 19, 2011), it is evident that the ABA's decision cannot stand upon proper district court review.

For these reasons and as explained more fully in the Memorandum in Support of Plaintiff's Motion filed this same date, DSOL asks the Court to exercise its discretion to reconsider its Memorandum Opinion and Order, and find that DSOL is excused from exhausting its administrative remedies and further find that based on newly discovered evidence under the applicable legal standards, DSOL is entitled to injunctive relief to forestall the irreparable injury it presently endures as a result of the arbitrary and capricious actions of Defendant ABA.

In the Sixth Circuit, a Motion for Reconsideration is construed by the court as a Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e). *Moody v. Pepsi-Cola Bottling Co.*, 915 F.2d 201, 206 (6th Cir. 1990). *Accord Summer v. Cunningham*, U.S. District Court, E.D. Tenn., Case No. 3:10-cv-169 (May 12, 2011)(Varlan, J.)(Court reviewed a pro se litigant's motion for reconsideration as if it had been made pursuant to Fed. R. Civ. P. 59(e)); *United States v. Jarnigan*, U.S. District Court, E.D. Tenn., Case No. 3:08-cr-7 (Dec. 17, 2008)(Varlan, J.)(While Federal Rules of Criminal Procedure do not provide for motion to reconsider, courts typically evaluate such motions under the same standards applicable to a Rule 59(e) motion to alter or amend judgment). The Sixth Circuit has held: "A court may grant a Rule 59(e) motion to alter or amend if there is (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005); *Trentham v. Hidden Mountain Resorts, Inc.*, 2010 U.S. Dist. LEXIS 70311, at *11 (E.D. Tenn. July 13, 2010)(Varlan, J.). "Where, however, 'something material was overlooked or disregarded … [which] point[s] to substantial error of fact or law' reconsideration may be warranted. *Miller v. Norfolk S. Rwy. Co.*, 208 F. Supp. 2d

851, 853 (N.D. Ohio 2002) (citations omitted)." *Downey v. Reich Installation Services, Inc.*, 2009 U.S. Dist. LEXIS 81559 (N.D. Ohio Sept. 9, 2009). The Court should reconsider its Memorandum Opinion and Order based upon the ABA's Notice of Supplementation of the Record (Doc. 37) which is tantamount to newly discovered evidence regarding the ABA Appeals Panel. The ABA's misrepresentation also caused the Court to base its decision on a substantial error of fact. The Court should also reconsider based upon new evidence that has arisen since the hearing on the issue of irreparable harm as more fully described in the Supplemental Declaration of Dean Beckman filed this same date, and to prevent manifest injustice and to correct a clear error of law pertaining to the proper standard of review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on February 8, 2012, I am filing the foregoing Motion for Reconsideration via the Court's CM/ECF which will automatically generate a Notice of Electronic Filing that will be emailed to the following registered Filing Users:

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