IN THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE

Matthew F. Fogg, et al., Class Agents, Complainants	EEOC No. 570-2016-00501X Agency No. M-94-6376
v.	
Jefferson B. Sessions, III Attorney General, Department of Justice (U.S. Marshals Service) Agency	Date: April 26, 2017

NOTICE OF CLASS ACTION

TO: CLASS MEMBERS

RE: A CLASS ACTION THAT MAY AFFECT YOUR RIGHTS. CAREFULLY READ THIS NOTICE.

1. This notice is to inform you that the U.S. Equal Employment Opportunity Commission (EEOC), Washington Field Office, in this class action, issued decisions defining the class on February 24, 2017 (copy attached). The complaint alleges that a class of African-American operational (i.e., law enforcement) employees of the U.S. Marshals Service ("USMS") has been subjected to discrimination concerning certain terms and conditions of their employment. The USMS Headquarters facility is located at 1215 South Clark Street, Arlington, Virginia 22202.

2. The EEOC has not determined whether the agency is responsible for any alleged discriminatory actions.

3. Your legal rights may be affected if you are a member of the class described below:

   All current and former African American Deputy U.S. Marshals and Detention Enforcement Officers who were subjected to the Agency's policies and practices regarding promotions, including reassignments and transfers, Headquarters assignments, and hiring and recruitment from January 23, 1994 to present.

4. This notice is being made available to all potential class members via U.S. mail. To be a class member, you must meet all of the criteria listed above in the definition of the class.

if you are uncertain whether you are a member of the class, you should contact the attorneys representing the class agents and the class, identified below in Item 8.

5. A final decision finding discrimination would be binding on all members of the class and on the agency. A finding of no discrimination would not be binding on a class member's separately filed individual complaint. Class members may not "opt out" of the class action while it is pending. However, they do not have to participate in the class or file a claim for individual relief. All class members will have the opportunity to object to a proposed settlement, if any, and to file claims for individual relief if discrimination is found. For more information, *see* 29 C.F.R. § 1614.204.

6. Class members should ensure that their contact information (mailing address and email address information) is correctly listed in all agency records.

7. Class agents are:

Matthew Fogg
Antonio Gause
Regina Holsey
Thomas Hedgepeth
Charles Fonseca
Ivan Baptiste
Tracey Bryce
Theodore Riley

8. The class agents and the class are represented by:

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Matthew Fogg, et al Class Agent, v. Jeff B. Sessions, Attorney General, Department of Justice, Agency.	EEOC No. 570-2016-00501X Agency No. M-94-6376 Date: April 11, 2017

ORDER RESPONDING TO AGENCY'S REQUEST FOR CLARIFICATION AND MOTION TO EXTEND TIME TO NOTIFY CLASS MEMBERS

On February 24, 2017, I issued an Order defining the class in this case, granting Complainant's motion to amend the class charge, and authorizing discovery. On March 11, 2017, the Agency submitted its Request for Clarification and Motion to Extend Time to Notify Class Members (Agency Request and Motion). On March 15, 2017, the Class Agents sought leave to file a response, which I granted, and on March 27, 2017, the Class Agents filed their Response to Agency's Request for Clarification and Motion to Extend Time to Notify Class Members (Class Agents' Response). On March 31, 2017, the Agency filed its Reply to Class Agents' Response to Agency's Request for Clarification and Motion to Extend Time to Notify Class Members (Agency's Reply). On April 3, 2017, the Class Agents sought leave to file a surreply, which I granted, and on April 7, 2017, Class Agents submitted their Surreply to Agency's Request for Clarification and Motion to Extend Time to Notify Class Members (Class Agents' Surreply).

Clarification Regarding Whether Class Includes Claims Related to Hiring From Outside the Agency

In its Request and Motion, the Agency seeks clarification regarding the class definition. Acknowledging that my February 24, 2017 Order defined the class as, "all current and former African American Deputy U.S. Marshals and Detention Enforcement Officers who were subjected to the Agency's policies and practices regarding promotions, including reassignments and transfers, Headquarters assignments, and hiring and recruitment from January 23, 1994 to present," the Agency first seeks clarification as to whether the "hiring and recruitment" component of the class definition includes claims regarding hiring from outside the Agency. The Agency argues that the definition should not include such claims, because no class agent makes allegations regarding hiring from outside the Agency. The Agency also seeks to confirm its understanding that the "reassignment and transfers" component of the class definition involves only reassignments and transfers between headquarters divisions, asserting that no class agent alleges discriminatory reassignment or transfer with respect to positions outside headquarters.

In the Class Agents' Response, Class Agents argue that the class includes current and former Deputy U.S. Marshals (DUSMs) and Detention Enforcement Officers (DEOs) "who applied for a DUSM position at an earlier point in the liability period and were *not hired initially* when they applied for a position." While Class Agents acknowledge that the current class definition does not include persons who were *never* hired by the Agency, they state that if through discovery they obtain evidence that would support such a claim, they may seek to amend the class definition at a later stage in the litigation. Class Agents further state that they are prepared to add such a claim now if I find it appropriate in the interest of efficiency. With respect to the Agency's contention that the class claim regarding reassignments and transfers should be limited to reassignments and transfers between headquarters divisions, Class Agents argue that the Agency's attempt to narrow the class definition in this way should be rejected. Citing *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n. 15 (1982) and *Candice B. v Dep't of Homeland Sec.*, EEOC Appeal No. 0120160714 (June 1, 2016), Class Agents argue that "[i]t is neither necessary nor appropriate to have a multitude of class agents, each of whom has experienced every conceivable permutation of the class claims." Class Agents' Response at 3. Rather, Class Agents argue, the Class Agents may fulfill requirements for commonality and typicality where they are subjected to the same discriminatory policy as other class members, even when the application of such policy manifests in different ways or at different stages of the hiring process.

Upon review of the parties' submissions, I find that the class definition by its own terms is clear, therefore to the extent the Agency seeks to rewrite the class definition, the Agency's Request is DENIED. The class includes current and former DUSMs and DEOs, some of whom may have claims regarding the hiring process when they were outside applicants, but the class does not include persons who were never hired by the Agency. I decline the Class Agents' invitation to amend the class definition now to include applicants for employment who were never hired by the Agency; should the evidence obtained through discovery warrant such an amendment, Class Agents may move to amend the class definition at a later date. Further, the scope of reassignments and transfers as provided in the definition is not limited to reassignments and transfers to or between headquarters divisions.

Clarification Regarding Mr. Fogg as Class Agent

In its Request and Motion, the Agency essentially argues for reconsideration of the decision to retain Mr. Matthew Fogg as one of the Class Agents for this case. The Agency argues that the decision to retain Mr. Fogg as a Class Agent is "in direct contradiction to the November 17, 2015 OFO decision ... [which stated] 'that new class agents are to substituted in lieu of Fogg.'" Agency's Request and Motion at 3-4. The Agency further argues that Mr. Fogg was "not personally affected by any of the proposed claims in this case," and that claims regarding his termination have already been resolved through separate judicial proceedings. In their Response, Class Agents argue that the Agency is merely "rehashing" arguments it previously made in an effort to unduly delay the proceeding. Class Agents argue that the OFO decision referred both to substitution of a class agent and to addition of class agents. In the Agency's Reply, the Agency argues that the OFO decision was clear insofar as it stated "we find that a new Class Agent should be substituted, who has claims more typical of the class." In the Class Agents' Surreply, Class Agents decline to present further argument regarding Mr. Fogg's status as a Class Agent.

EEOC Regulations at 29 C.F.R. § 1614.20(a)(3)(2016) define an agent of the class as a "class member who acts for the class during the processing of the class complaint." Regarding Mr. Fogg as Class Agent, the 2015 Decision on Request for Reconsideration states, "...we find that a new Class Agent should be substituted, who has claims more typical of the class." *Fogg v Dep't of Justice*, EEOC Request No. 0520120575 (November 17, 2015). Referring to the 2012 Decision that was the subject of the Agency's Request for Reconsideration, the Commission directs the Administrative Judge to "respond to the class's Motion to Amend to add a new class agent." *Id.* A review of the Commission's 2012 Decision shows that the Commission expressly determined that Mr. Fogg established both typicality and commonality requisite for designation as an agent of the class at that time. *See Fogg v Dep't of Justice*, EEOC Appeal No. 0120073003 (July 11, 2012). The Commission's 2015 Decision denied the Agency's Request for Reconsideration of the 2012 Decision, which was premised in part on arguments challenging Mr. Fogg's qualification to serve as a Class Agent. The Commission's direction that a new Class Agent "should" (not, say, "must" or "will") be substituted, the lack of any analysis explicitly reversing the Commission's 2012 finding that Mr. Fogg was qualified to serve as Class Agent, and the reference to the pending motion to *add* (not to substitute) class agents all lead me to conclude that the fairest reading of the Commission's intent was not to disqualify Mr. Fogg altogether, but to bring in additional class agents with claims "more typical of the class" as redefined by the Commission on its own motion. As such, to the extent the Agency's Request for Clarification is effectively a Request for Reconsideration of my February 24, 2017 Order Granting Complainant's Motion to Amend Class Charge (and thereby retaining Mr. Fogg as a Class Agent), the Agency's request is DENIED. Mr. Fogg may continue to serve as an Agent of the Class.

Clarification Regarding Duplicative Class Complaints

In its Request and Motion, the Agency raises *Brewer v. Dep't of Justice*, No. 08-01747-BJR (D.D.C.) and *Tuaua v. Dep't of Justice*, EEOC No. 570-2010-01061X/Agency No. USM-2010-00422, currently pending before the U.S. Court of Appeals for the District of Columbia

Circuit and the EEOC Office of Federal Operations (OFO), respectively, noting that although "the parties exchanged extensive briefing on the overlapping nature" of the two cases with the instant case, the February 24, 2017 Order "did not expressly address these issues." Agency Request and Motion at 4. The Agency argues that the overlapping class claims may not be entertained in the instant class complaint, and must instead be dismissed or held in abeyance pursuant to EEOC Regulations at 29 C.F.R. 1614.107(a)(3). The Agency argues that "unless the Administrative Judge is willing to abort this proceeding mid-case if the Court of Appeals for the D.C. Circuit reverses the denial of class certification in *Brewer*, these overlapping claims should be, at a minimum, stayed to avoid this wasteful duplicative effort." Agency Request and Motion at 6. Similarly, the Agency argues, EEOC Management Directive 110 Chapter 8-3 (August 5, 2015) requires that because some claims within the *Tuaua* case are "functionally identical" to some of the claims in the instant case, "these claims must be held in abeyance pending the outcome of the *Tuaua* class which takes precedence." Agency Request and Motion at 8. In further support of its contention that this case must be dismissed or held in abeyance, the Agency cites to *Boyer v Social Security Administration*, EEOC Appeal No. 01A12004 (August 22, 2001) (affirming dismissal of a class complaint under 29 C.F.R. § 1614.107(a)(3) where a federal judge and an administrative judge had each dismissed class complaints on the same matter for the same putative class); *Ackerman v U.S. Postal Serv.*, EEOC Appeal No. 01852503 (May 5, 1986) (affirming Agency's dismissal of a complaint that addressed the same matter that was the subject of a pending class action in federal court); and *Hutcheson v Tennessee Valley Authority*, EEOC Appeal No. 01831124 (May 5, 1986) (affirming dismissal of a class complaint where, subsequent to filing the appeal with OFO, the complainant filed the same complaint in federal court, and declining to remand the case for further processing by the agency based on the advanced procedural posture of the federal court case).

In their Response, Class Agents argued that the *Brewer* and *Tuaua* cases do not bar the instant case, incorporating by reference the parties' June – August 2016 briefing on the issue. In short, Class Agents argue that class certification has been denied in both cases, and the issues in those cases are not identical to those in the instant case.

Upon review of the parties' submissions and the cases the Agency cites in support of its renewed argument that the pendency of the *Brewer* and *Tuaua* cases require either that I narrow the class definition in this case or hold this case in abeyance, I find the Agency's arguments unavailing. The cases to which the Agency cites are distinguishable from the instant case insofar as each dealt with situations where the same matter was raised before multiple tribunals. Here, the complaints in the *Brewer* and *Tuaua* cases do not appear to be wholly coextensive with the instant case, insofar as they implicate different (though possibly overlapping) issues, bases and time frames. There is no "live" class action proceeding in either case, as the denials of class certification are pending on appeal in both cases. Barring a successful appeal, neither case will move forward as a class action.

Moreover, the class definition is not set in stone at this stage of the litigation. EEOC Management Directive 110 Chapter 8 Section V states:

> Even after a class is certified, the Administrative Judge remains free to modify the certification order or dismiss the class complaint in light of subsequent developments. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 160 (1982). The Administrative Judge has the authority, in response to a party's motion or on his/her own motion, to redefine a class, subdivide it, or dismiss it if the Administrative Judge determines that there is no longer a basis for the complaint to proceed as a class complaint. *Hines v. Dep't. of the Air Force*, EEOC Request No. 05940917 (Jan. 29, 1996).

As such, as the *Brewer* and Tuaua situations change, there is room to modify the class definition in this case, if appropirate.

To the extent the Agency argues that abeyance is necessary to promote the efficient use of litigation resources, this case has already missed that boat, twenty-three years beyond the filing of the complaint that gave birth to this case and in view of the piecemeal fashion in which related litigation has proceeded in the administrative and federal judicial processes. Given the exceptional procedural history of this case, including the fact that the original complaint underlying this case was filed over two decades ago and has yet to proceed even to the discovery phase, I decline to further delay the proceedings by holding this case in abeyance. Nor will I attempt to read the tea leaves of *Brewer* and *Tuaua* in order to somehow narrow the scope of the class definition at this stage in the instant litigation. When decisions are issued on the pending appeals in *Brewer* and *Tuaua*, I will provide the parties with the opportunity to brief the extent to which the class definition in this case should be modified in light of those decisions. Until such time, the parties shall proceed with discovery as described in the February 24, 2017 Order. I find no further clarification is warranted.

Agency's Motion for an Extension of Time to Notify Class Members

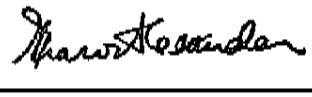
Finally, in its Request and Motion, the Agency seeks an unspecified extension of time to notify class members "until clarification is obtained and reasonable efforts can be undertaken to identify the class members." In the Class Agents' Response, the Class Agents argue that any further delay in notifying class members should be avoided.

The Agency's Request for Clarification and Motion for Extension of Time to Notify Class Members and subsequent briefing by both parties delayed this proceeding by over a month. To the extent the Agency seeks further extension of the regulatory time frames for providing notice in class action proceedings, the Agency's Motion is DENIED. Pursuant to its obligations under EEOC Regulations at 29 C.F.R. 1614.204(e), the Agency shall issue notice to the class members within 15 days of the date of this Order, that is, no later than April 26, 2017.

Procedural Order

In order to ensure efficient use of litigation and adjudicatory resources, any party wishing to file a motion other than the dispositive motions authorized by the February 24, 2017 Order shall seek leave to file in advance of making such submission. Such party shall seek leave in writing by electronic mail and include within the request a description of the proposed submission, the rationale for the submission, whether the opposing party consents to the filing, and a proposed time line for submission and response if appropriate.

It is so ORDERED.



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UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office

Matthew Fogg, et al. **Class Agents,**	)	
v.	)	**EEOC No. 570-2016-00501X** **Agency No. M-94-6376**
Jeff B. Sessions, **Attorney General,** **Department of Justice,** **Agency.**	)	

CLASS AGENTS' RESPONSE TO AGENCY'S REQUEST FOR CLARIFICATION AND MOTION TO EXTEND TIME TO NOTIFY CLASS MEMBERS

Beyond seeking clarification regarding notice to class members, the Agency's Request for Clarification and Motion to Extend Time to Notify Class Members ("Agency's Request and Motion" or "Agency Req. & Mot.") is both an attempt to reargue class certification issues already decided by the Office of Federal Operations (OFO) and the Administrative Judge and to delay this proceeding. *See* 11/17/15 OFO Decision Denying the Agency's Request for Reconsideration; 2/24/17 Administrative Judge's Order Defining Class, Granting Complainant's Motion to Amend Class Charge, and Authorizing Discovery. Two-thirds of the Agency's Request and Motion seeks a different answer to previously-decided issues that have nothing to do with clarifying notice. Agency Req. & Mot. at 3-8. Class Agents respectfully request that the Agency be ordered to comply with the notification requirements in 29 C.F.R. § 1614.204(e) as soon as possible. *See* 29 C.F.R. §1614.204(e)(3) (It is well settled that a class "complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.").

I. The Class Definition Clearly Informs the Agency of the Class Members to be Given Notice Under 29 C.F.R. § 1614.204(e).

Contrary to the Agency's assertion, the class definition is sufficiently clear to enable the Agency to comply with the class member notification requirements in 29 C.F.R. § 1614.204(e). "The class for this complaint is defined as all current and former African American Deputy U.S. Marshals and Detention Enforcement Officers who were subjected to the Agency's policies and practices regarding promotions, including reassignments and transfers, Headquarters assignments, and hiring and recruitment from January 23, 1994 to present." 2/24/17 Order at 2. The 2/24/17 Order is clear that *notice should go to all African American current and former Detention Enforcement Officers (DEOs) and Deputy U.S. Marshals (DUSMs) who were employed within the class period.*[1] Because they were subject to relevant USMS policies and procedures, every African American DEO and DUSM employed by the USMS during the class period should receive notice.

a. "Hiring and recruitment" claims

The Agency argues that the "hiring and recruitment" claims should include "existing employees seeking to be promoted/converted from the DEO job series classification to the [DUSM] job series classification," and exclude "claims involving initial hiring of persons from outside the organization for initial appointments." Agency Req. & Mot. at 3. This attempt to narrow the parameters of the class conflicts with the plain language of the class definition and reflects a misunderstanding of the application of relevant authorities to the Amended Class Charge.

First, the Agency's request to limit the hiring and recruitment claims to only DEOs who unsuccessfully sought DUSM positions in the class period belies the class definition – namely, "*all current and former* African American [DUSMs] and [DEOs] who were subjected to the

[1] "DUSMs" in this definition includes all current and former employees who served as a DUSM, regardless of the job title associated with the particular duties performed, such as Inspector, Investigations Coordinator, etc.

Agency's policies and practices regarding . . . *hiring and recruitment* . . . ." 2/24/17 Order at 2 (emphasis added). The class definition, therefore, accounts for class members who are current or former DUSMs or DEOs who applied for a DUSM position at an earlier point in the liability period and were *not hired initially* when they applied for a position. The Agency's suggestion that hiring claims for current and former DUSMs are not included in the class is unavailing.

The current Class Agents with hiring claims – namely, former DEOs Tracey Bryce and Theodore Riley – sufficiently represent all DUSM hiring claims. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982) ("If [defendant-employer] used a biased testing procedure to evaluate *both applicants for employment and incumbent employees*, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking [sic] processes.") (emphasis added); *see also Candice B. v. Johnson*, EEOC Appeal No. 0120160714, at *15-20 (June 1, 2016) (overturning administrative judge's denial of class certification and finding commonality and typicality established in gender discrimination class action on behalf of female applicants to Customs and Border Protection challenging various stages of three-step hiring process, even though class agent advanced to third step and was given conditional employment offer and class members included women who did not make it to third step of hiring process).

It is neither necessary nor appropriate to have a multitude of class agents, each of whom has experienced every conceivable permutation of the class claims. Under *Falcon*, 457 U.S. at 159 n.15, and *Candice B. v. Johnson*, EEOC Appeal No. 0120160714, at *15-20, Class Agents

Bryce and Riley properly and sufficiently represent class members with hiring claims and satisfy commonality and typicality requirements because their claims and those of class members are based on the same discriminatory policy.

Second, based on the evidence revealed in discovery, the Class Agents may move to revise the class definition to include African Americans who applied for DUSM positions during the class period and were *never hired* by the Marshals Service.[2] The Agency's argument that the hiring and recruitment claims should exclude the "initial hiring" of outside applicants for USMS positions does not take into account that: (1) Class Agent Matthew Fogg's initial 1994 class charge, as well as his supplemental class charge materials submitted in 2004, reference and contemplate hiring claims by those seeking DUSM positions from outside the Agency and who never were hired, *see* 7/11/12 OFO Decision Certifying Class Claims; 11/17/15 OFO Decision at 1;[3] and (2) controlling authorities indicate that outside hiring claims for DUSM applicants would be appropriate if there is evidence that the same general policy of USMS discrimination applied in that context as in the context of hiring, promotions, and Headquarters assignments for DEOs or DUSMs employed by the Agency. *See supra* at 3-4.

The current class claims include the hiring and recruitment claims for current and former African American DEOs and DUSMs who applied and were not selected for any DUSM positions.

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[2] In that event, the class definition would be revised as follows: "all current and former African American Deputy U.S. Marshals and Detention Enforcement Officers and applicants for Deputy U.S. Marshals positions who were subjected to the Agency's policies and practices regarding promotions, including reassignments and transfers, Headquarters assignments, and hiring and recruitment from January 23, 1994 to present."

[3] *See* EEOC relation back doctrine:

> [A] charge is sufficient when the [EEOC] receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including . . . to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received.

29 C.F.R. § 1601.12(b).

In the course of discovery on the hiring and recruitment claims, Class Agents will obtain evidence about the Agency's hiring and recruitment policies throughout the class period and the effects of those policies on the racial composition of DUSMs employed by the Agency. *See Falcon* and *Candice B. v. Johnson*. That evidence will allow the parties and the Administrative Judge to determine: (1) whether current and former USMS employee class members and outside African American DUSM applicants were subject to the same "general policy of [racial] discrimination," *see Falcon*, 457 U.S. at 159 n.15, and (2) whether there is evidence that those policies had an adverse impact on outside African American applicants becoming DUSMs. If discovery confirms that the same general policy of discrimination applied and there is evidence of a statistically significant disparity in hiring outside candidates, then Class Agents would seek to amend the class definition to include outside DUSM applicants who were never hired by the USMS.

Under the current class definition, notice need only be given to current and former USMS DUSMs and DEOs. However, if the Administrative Judge determines that it would be more efficient to amend the class definition now, Class Agents are prepared to add a class agent who was denied a DUSM position as an outside applicant and was never employed by the USMS. In that case, those receiving notice would include not only former and current USMS DUSMs and DEOs, but also unsuccessful applicants for DUSM positions never employed by USMS.

b. "Promotions, including reassignments and transfers" claims

The Agency's argument that the promotion claims, including "reassignments and transfers" should be narrowed only to "merit promotion [plan]" (MPP) claims also is wrong. As noted above, Class Agents are not required to reflect every possible type and variation of denied promotion, reassignment, or transfer to satisfy typicality. *See* Agency Req. & Mot. at 3. The Administrative Judge should reject the Agency's assertion that there must be a Class Agent who

has been subject to every conceivable and exact type of denied promotion, reassignment, or transfer.

In addition to promotions through the MPP, the "promotions, [] reassignments and transfers" claims include non-competitive promotions, transfers, and directed reassignments, including assignments and transfers through the Office of Preference system. The MPP only applies to some promotions and transfers above the GS-11 or GS-12 level (at different times of the liability period), but other centralized policies apply to the class and control promotions, assignments, and transfers at those and other levels. Throughout their collective USMS tenures, the Class Agents have served in every GS-level included in the class definition and have been subject to every USMS policy that applies to promotions, reassignments, or transfers during the class period.

For example, during the liability period, Class Agent Antonio Gause was discriminatorily denied a non-MPP transfer through the Office of Preference system to a GS-12 position in Atlanta in favor of a non-African American employee. Ex. 1, Decl. of Antonio Gause, ¶¶ 3-5 (Transfers through the Office of Preference system are centralized at USMS Headquarters and "the USMS Director's office must sign off on all transfers"). In addition, Class Agent Thomas Hedgepeth experienced a discriminatory directed reassignment to a less-prestigious role in the Management Support Division at Headquarters in 2012 after serving as Acting Marshal, when the USMS reassigned a non-African American former Acting Marshal to a more prestigious role.[4]

[4] Contrary to the Agency's misrepresentation (Agency Req. & Mot. at 3), promotion, reassignment, and transfer claims are neither limited to selections made under the MPP nor to Headquarters assignment claims. Instead, promotion, reassignment, and transfer claims arise when African Americans DUSMs are denied positions or treated less favorably than non-African American DUSMs. Headquarters assignment claims will arise through the MPP or other promotion decisions, transfers, or reassignments, which result in African Americans being excluded from identifiably white Headquarters Divisions and assigned to less prestigious ones. Thus, promotion, reassignment, and transfer claims are interactive with and not mutually exclusive of Headquarters assignment claims.

Despite the Agency's assertions to the contrary, Class Agents are not required to reflect every possible variation on the denial of a promotion. Class Agents are, therefore, adequate representatives to represent race discrimination claims involving the application of Agency-wide policies regarding promotions, reassignments, or transfers applicable to DEOs or DUSMs during the class period.

II. Matthew Fogg is a Proper Class Agent.

The issue as to whether Matthew Fogg should remain as a Class Agent has already been briefed by the parties and the Administrative Judge considered the parties' briefing, as well as the prior OFO Decisions, in ruling that Fogg is to remain a Class Agent. 2/24/17 Order at 1.[5] The Agency's rehashing of arguments already resolved simply burdens the Administrative Judge and the parties and causes undue delay in this proceeding.

III. The Class Claims are not Barred by Either *Brewer* or *Tuaua*.

Similarly, the Agency seeks to waste the Administrative Judge's time in attempting to re-litigate the decision that the class claims are not barred by *Herman Brewer, et al., v. Loretta Lynch*, No. 08-01747-BJR (D.D.C.) or *Ramsey Tuaua v. Department of Justice*, EEOC No. 570-2010-01061X; Agency No. USM-2010-00422. Agency Req. & Mot. at 4-8. Because this issue also has already been thoroughly briefed for and decided by the Administrative Judge, the Agency's attempt to recycle its previous arguments should be summarily rejected. The Agency makes no

[5] *See* 6/27/16 Agency Resp. to 5/6/16 Order at 2; 6/30/16 Mot. to Amend Class Charge at 3 (stating that "[Class] Agent Fogg seeks to *add* [seven Class Agents] to represent the Class") (emphasis added); 7/18/16 Agency Opp. to Mot. to Amend at 1; 8/1/16 Class Agent's Reply to Agency's Opp. to Mot. to Amend at 2 n.2 ("[T]he Agency "mischaracterizes the Motion [to Amend Class Charge] as asking to 'substitute' new Class Agents for . . . Fogg[,]" when in fact, the Motion to Amend seeks to "*add* class agents[;]" also noting that a complainant can file and pursue an EEO charge "by or on behalf of any person claiming to be aggrieved" whether or not the complainant is also aggrieved) (citing 29 C.F.R. § 1601.7); 8/12/16 Agency's Surreply Regarding Class Counsel's Mot. to Amend at 1-3 (stating that 11/17/15 OFO Decision "expressly determined that Fogg can no longer remain as a class agent in this litigation"). The Agency mischaracterizes the 2/24/17 Order stating that Fogg is to remain a Class Agent as being "in direct contradiction" to the 11/17/15 OFO Decision, Agency Req. & Mot. at 3, even though the 11/17/15 OFO Decision makes references to both "add[ing]" class agents and substit[uting]" in "a new Class Agent." 11/17/15 OFO Decision at 7.

arguments regarding *Brewer* that have not been previously raised and addressed to the Administrative Judge,[6] so there is nothing further to be decided.

The same is true of the Agency's arguments regarding *Tuaua*.[7] The Agency claims that "the Administrative Judge's February 24, 2017 Order did not expressly address" the Agency's arguments, Agency Req. & Mot. at 4, but the Administrative Judge clearly considered and rejected them. The attention given to these arguments is demonstrated by the Administrative Judge's specific inquiries to the parties regarding the status of both *Brewer* and *Tuaua* and the parties' responses to those inquiries prior to the 2/24/17 Order. *See* 11/10/16 email correspondence from the Administrative Judge to parties; 11/10/16 email correspondence from Agency counsel; and 11/11/16 email correspondence from Class Agents' counsel. Thus, the Administrative Judge clearly considered and rejected the Agency's *Brewer* and *Tuaua* arguments and there is no basis on which to disturb that ruling.

IV. Conclusion

For the foregoing reasons, Class Agents respectfully request that the Administrative Judge enter an Order directing the Agency to provide notice to the class as defined, consistent with the class notification requirements of 29 C.F.R. § 1614.204(c).

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[6] *See* 6/27/16 Agency's Response to 5/9/16 Order at 6-8; 6/30/16 Mot. to Amend Class Charge at 9-10 (noting that "[t]here are . . . no live class claims in [*Brewer*]," "[Class] Agent Fogg's claims were not "*the basis*" for [*Brewer*]"), and the scope of the claims is broader here than in *Brewer*); 7/18/16 Agency's Opp. to Mot. to Amend Class Charge at 7-9; 8/1/16 Class Agent's Reply to Agency's Opp. to Mot. to Amend at 7-11 (explaining that (i) "there is no pending *Brewer* class action;" (ii) the Class "Charge [is] not the same administrative complaint" that provided the basis for *Brewer*; (iii) "no complainant in this administrative complaint is a 'party' to the *Brewer* action;" and (iv) "[d]ismissal under 29 C.F.R. § 1614.107(a)(3) would [] be inappropriate" because "the class claims here differ from those asserted in *Brewer*"); 8/12/16 Agency's Surreply Regarding Counsel's Mot. to Amend at 5-9.

[7] *See* 7/18/16 Agency's Opp. to Mot. to Amend at 8-9; 8/1/16 Class Agent's Reply to Agency's Opp. to Mot. to Amend at 7-11 (explaining that Agency's claim that *Tuaua* case mandates dismissal should be rejected because (i) 29 C.F.R. § 1614.107(a)(3) does not apply here, where "there was no decision on the merits in *Tuaua*; (ii) "not only are the claims in *Tuaua* not 'identical' to those here, but they are completely distinct and have no bearing or relationship to the claims here"; and (iii) "the allegations asserted here drastically differ from those relied on in seeking certification in *Tuaua*"); 8/12/16 Agency's Surreply Regarding Counsel's Mot. to Amend at 8.

Dated: March 27, 2017

By: */s/ Thomas J. Henderson*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Class Agents' Opposition to Agency's Request for Clarification and Motion to Extend Time to Notify Class Members, with all addendums and exhibits, was served via electronic mail on this 27th day of March, 2017 upon the following:

The Honorable Sharon Debbage Alexander
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UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office

MATTHEW FOGG, **Class Agent,** **v.** **JEFF B. SESSIONS,** **ATTORNEY GENERAL,** **U.S. DEPARTMENT OF JUSTICE** **Agency.**	**EEOC NO. 570-2016-00501X** **AGENCY CASE NO. M-94-6376**

AGENCY'S REQUEST FOR CLARIFICATION
AND MOTION TO EXTEND TIME TO NOTIFY CLASS MEMBERS

The Agency hereby requests clarification of the Administrative Judge's February 24, 2017 Order. The instant request is not for purposes of delay. Clarification is requested to assure mutual understanding of the specific issues in this case and to allow for the Agency to properly ascertain the class members so that the required notice can be delivered. Thus, simultaneously, pursuant to 29 C.F.R. § 1614.204(e)(1), the Agency hereby moves for an extension of the 15-day notice period so that the precise parameters of class membership can be understood and the work necessary to identify and notify those class members can be completed.

I. The Class Definition

The Administrative Judge has determined that the Amended Class Charge submitted by class counsel will be the operative complaint in this case. The Amended Class Charge stated by class counsel defines the class as follows. "All current and former African American Deputy U.S. Marshals and Detention Enforcement Officers who were subjected to the Agency's policies

and practices regarding promotions, including reassignments and transfers, Headquarters assignments, and hiring and recruitment from January 23, 1994 to present." Order, at p. 2. We seek clarification as to the precise parameters of the class so that notice can be provided and proper discovery and further proceedings can ensue.

The Agency is guided in discerning the precise class issues by the specific claims of the current Class Agents and the Office of Federal Operations ("OFO") decision, dated November 17, 2015. The OFO decision limited the class to United States Marshals Service ("USMS") law enforcement personnel. It excluded claims regarding discipline and EEO complaint processing. The decision limited the class to "recruitment, promotion, training, and assignments." The Amended Class Charge's class definition, at p. 13, however, only refers to "promotions including reassignments and transfers, Headquarters assignments, and hiring and recruitment." Training claims are not pursued; nor are general assignments. The Class Agents' claims presented in the Amended Class Charge involve the following:

- Antonio Gause – promotions;
- Regina Holsey – promotions;
- Ivan Baptiste – promotions;
- Charles Fonseca – promotions, Headquarters assignment;
- Thomas Hedgepeth – promotions, reassignment, and Headquarters assignment;
- Theodore Riley – promotion from Detention Enforcement Officer to Deputy U.S. Marshal – denoted as a "hiring and recruitment" claim;
- Tracey Bryce – promotion from Detention Enforcement Officer to Deputy U.S. Marshal – denoted as a "hiring and recruitment" claim.

The Agency first seeks clarification regarding the Amended Class Charge's hiring and recruitment claim. As Detention Enforcement Officers ("DEOs"), Bryce and Riley were already USMS law enforcement officers, and thus, their Class Agent claim is that they were not selected to be promoted or "converted" from the DEO position to the higher level Deputy U.S. Marshal

position, which is in a different job series classification. The DEOs, however, do not claim discrimination in connection with their initial hiring or recruitment as DEOs, nor does any Class Agent make allegations regarding the USMS's initial hiring or recruitment of persons from outside the organization for initial appointments to any other positions. Accordingly, the Agency seeks clarification that the Amended Class definition of "hiring and recruitment" does not include claims involving initial hiring of persons from outside the organization for initial appointments, but rather is limited to claims regarding existing employees seeking to be promoted/converted from the DEO job series classification to the Deputy U.S. Marshal job series classification.

There is also a need for clarification of the "reassignment and transfer" language in the class definition. To the extent this claim is not redundant with the merit promotion claim, we understand it to be limited to reassignments to and between Headquarters divisions. These are the only claims alleged by any of the Class Agents. Clarification of this is needed as well.

Clarification is required to assure that class members can be identified, notice can be given, and the parties can fairly prepare for future proceedings. These matters should be addressed before discovery proceeds.

II. Fogg as Class Agent

The Administrative Judge ordered that "Matthew Fogg shall remain as a Class Agent." Order, at p. 2. This, however, appears to be in direct contradiction to the November 17, 2015 OFO decision. That decision, at page 7 stated that new class agents are to be substituted in lieu of Fogg. According to the OFO reconsideration decision, "[W]e find that a new Class Agent should be substituted, who has claims more typical of the class. The prior decision noted that a

Motion to Amend to add two new class members had been filed and would be properly heard by the AJ on remand." (emphasis supplied).

The Agency had argued, without contradiction, that Fogg had not been personally affected by any of the proposed claims in this case. Moreover, Fogg's claims regarding his termination were resolved through separate court proceedings. We do not believe that the Administrative Judge has the discretion to override OFO's direction regarding Fogg's status as a class agent.

III. Clarification Regarding Duplicative Class Complaints

While the parties exchanged briefing on the overlapping nature of the Brewer and Tuaua class claims with the instant class, the Administrative Judge's February 24, 2017 Order did not expressly address these issues. The Brewer class action lawsuit is currently pending in the U.S. Court of Appeals for the District of Columbia Circuit and has undergone extensive briefing. The Brewer class continues to strongly pursue class certification. The Tuaua class is currently pending before the OFO.

The Brewer class is defined by class counsel as "all current and former African-American Deputy U.S. Marshals, from April 22, 2007 forward in job series 1811, Criminal Investigators, in Grades GS-12 through GS-15 as to the class claims of disparate impact and pattern or practice racial discrimination regarding competitive promotions and directed reassignments." See September 30, 2015 Opinion in Brewer v. Lynch, No. 08-1747-BJR, at 7. Class counsel also proposed a subclass consisting of African American Deputy U.S. Marshals, in Grades GS-13 through GS-15 regarding Headquarters duty assignments. Id., at 8.

The Tuaua class is defined by its class agents as all individuals who:

> (1) Applied for promotion to Senior or Supervisor DEO, DUSM, or other 1811 classification permitting advancement or promotion from DEO GL-7 to GS-9, up to GL-11 to 13, and were not granted promotion or eligibility at any time in their careers from 1998 to the present;
>
> (2) Are members of those racial or ethnic groups, including African-American, Samoan, Asian-American, or Hispanic that the Agency treated less favorably in regards to their pay, promotions, duties, and other privileges and benefits of employment;
>
> (3) Are members of that class of persons over the age of forty, that the Agency treated less favorably in considering their pay, promotions, duties, and other privileges and benefits of employment;
>
> (4) Are members of that class of persons with qualified disabilities or handicapping conditions that the Agency treated less favorably in considering their pay, promotions, duties, and other privileges and benefits of employment.

Decision/Class Certification, dated February 18, 2015 (AJ Hodges).

The Administrative Judge granted provisional class certification in Tuaua in July 2014, but the class claims were dismissed by the Administrative Judge in his February 18, 2015 decision. The class agents appealed to OFO. Tracey Bryce, as Class Agent in the instant class, is a Class Agent in the Tuaua case and specifically raised race discrimination in that case.

There is an overlap between the instant class and the Brewer and Tuaua classes. The instant class and the Brewer class overlap as to all African-American Deputy U.S. Marshals in Grades 12-15 regarding promotions and Headquarters assignments from 2007 to the present. The instant class overlaps with the Tuaua class as to all African-American DEOs who applied for promotion to Deputy U.S. Marshal positions from 1998 to the present.

Accordingly, by law, these overlapping class claims should not be entertained in the instant class complaint. The class claims pending before the U.S. Court of Appeals cannot be entertained administratively because they are the subject of an ongoing judicial proceeding

which takes precedence, even though the class has yet to be judicially certified. The class claims pending before the OFO also take precedence regarding DEO promotions because the Tuaua class complaint was filed in 2010, well before DEOs were added to the class definition in this case. Moreover, as to Class Agent Bryce, she filed as Class Agent in the Tuaua class long before she sought to become Class Agent in this case. Having so filed, her claim in this case is subsumed into the Tuaua class until that appeal is completed.

As for Brewer, the judicial bar of 29 C.F.R. § 1614.107(a)(3) applies even though the Brewer class has not as of yet been certified, and even though the instant Class Agents are not class plaintiffs in Brewer. This is because the class complaints and class members of the two classes are the same for the overlapped claims, and because if the Brewer class wins its appeal and is ultimately certified, there will be two identical proceedings on those overlapping claims. It must be understood that the Brewer class counsel and the instant class counsel are the same, and counsel has expended very substantial resources over more than a nine-year period in preparing for trial in the Brewer case, including years of discovery and experts. The instant case is not in the same posture. Accordingly, interests of resources and economy militate in favor of following the Commission's rule of deference to the judicial action. Unless the Administrative Judge is willing to abort this proceeding mid-case if the Court of Appeals for the D.C. Circuit reverses the denial of class certification in Brewer, these overlapping claims should be, at minimum, stayed to avoid this wasteful duplicative effort.

In Boyer v. Social Security Administration, EEOC Appeal No. 01A12004 (August 22, 2001), the complainant filed an administrative class complaint. Another employee had filed a class action in federal court on the same class claim. The federal court denied class certification,

but resolved the complainant's individual case. The Commission dismissed the administrative class claim based on the filing of the judicial action under 29 C.F.R. § 1614.107 because the class issues were the subject of a judicial proceeding even though the judicial class had never been certified and the complainant was not a class agent in the judicial proceeding. The Commission did not permit the addition of a new class agent.

In Ackerman v. United States Postal Service, EEOC Appeal No. 01852503 (May 5, 1986), the complainant's administrative complaint was dismissed on the ground that it raised matters which were before a federal court in a pending uncertified class action and in which he was not the class plaintiff. The Commission stated that if the class is certified in court, the complainant would be a beneficiary. Dismissal without prejudice was ordered to prevent duplication of administrative and judicial resources, as well as the possibility of inconsistent and conflicting decisions.

In Hutcheson v. Tennessee Valley Authority, EEOC Appeal No. 01831124 (December 13, 1985), the complainant filed an administrative class complaint and subsequently filed a judicial class action lawsuit. The administrative class claim was dismissed and complainant appealed to OFO. OFO held that the reinstatement of the administrative class complaint would require simultaneous litigation on the administrative and judicial level with the "anomalous" result, as in this case, of the processing of the administrative class claims lagging behind the court class action. There, as here, would be a duplication of proceedings and hearings, which would not conserve resources, and the administrative proceeding would not be binding on the court proceedings. Accordingly, the Commission dismissed the administrative class.

Regarding Tuaua, the Commission's Management Directive 110, Chapter 8-3, is

controlling. Chapter 8-3 provides that when an administrative complaint is filed that is "identical" to those presented in a pending, uncertified administrative class complaint, the administrative complaint should be held in abeyance during the pendency of the decision to accept or reject the pending class complaint. In this case, the DEO claims of "hiring and recruitment" are functionally identical to the specific claims raised in Tuaua as to promotion for the overlapping period. The Tuaua class was initiated in 2010, while the DEO claim was just added to this case's class definition. Accordingly, by regulation, the Administrative Judge must hold these claims in abeyance pending the outcome of the Tuaua class which takes precedence. Although Chapter 8-3 speaks in terms of competing individual complaints, it would apply for the same reasons of avoiding duplication to competing class claims.

Further, with respect to Class Agent Bryce, her existing Class Agent status in Tuaua bars her from proceeding on the identical claim in this case. Bryce's claims in this case must be held in abeyance pending the final decision to accept the class complaint in Tuaua. Accordingly, Bryce cannot proceed as a Class Agent in this case.

IV. Conclusion

For the foregoing reasons, the Agency seeks clarification of the class definition, status of Class Agents Fogg and Bryce, and clarification of the rationale for the duplication of the Brewer and Tuaua claims.

In addition, the Agency moves for an extension of time to provide the required notice to class members until clarification is obtained and reasonable efforts can be undertaken to identify the class members.

Dated: March 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Agency's Request for Clarification and Motion to Extend Time to Notify Class Members was emailed this date to the following:

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Honorable Sharon Debbage Alexander
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Date: March 10, 2017

Joe Lazar
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	) EEOC No. 570-2016-00501X
	) Agency No. M-94-6376
Matthew Fogg, et al Class Agents,	)
v.	)
Jeff B. Sessions, Attorney General, Department of Justice, Agency.	)
	) Date: February 24, 2017

ORDER DEFINING CLASS, GRANTING COMPLAINANT'S MOTION TO AMEND CLASS CHARGE, AND AUTHORIZING DISCOVERY

Class Definition And Addition of Class Agents

Pursuant to the Decision on Request for Reconsideration issued by the EEOC Office of Federal Operations (OFO), *Fogg v. Department of Justice*, EEOC Request No. 0520120575 (November 17, 2015), on May 9, 2016, I Ordered the parties to provide briefing on the appropriate date range for the class certified in the Commission's decision, and on the estimated time required for discovery. I also authorized the Class Agent to submit a renewed motion to amend, and ordered the parties to summarize the status of settlement negotiations.

Upon review of the Agency's June 27, 2016 Response to May 9, 2016 Order, the July 2, 2016 Class Agent's Motion to Amend Class Charge, the Agency's July 18, 2016 Opposition to Motion to Amend, Complainant's August 1, 2016 Reply to Agency's Opposition to Motion to Amend, and the Agency's August 12, 2016 Surreply, Complainant's Motion to Amend is hereby GRANTED.

The Amended Class Charge shall serve as the operable complaint for this case. The class for this complaint is defined as all current and former African American Deputy U.S. Marshals and Detention Enforcement Officers who were subjected to the Agency's policies and practices regarding promotions, including reassignments and transfers, Headquarters assignments, and hiring and recruitment from January 23, 1994 to present. Matthew Fogg shall remain a Class Agent, and Antonio Gause, Regina Holsey, Thomas Hedgepath, Charles Fonseca, Ivan Baptiste, Tracey Bryce and Theodore Riley shall be added as class agents.

Discovery

The parties may conduct discovery pursuant to EEOC Regulations at 1614.204(f). In light of parties' well-founded request for an extended period for discovery, discovery shall close on **December 1, 2017. The parties are expected to initiate and complete discovery without intervention by the Administrative Judge. The parties will make every attempt to resolve any discovery disputes without intervention by the Administrative Judge.** If attempts to resolve a dispute are unsuccessful, the moving party shall notify the undersigned *via* email within **five (5) calendar days** of the impasse. Failure to timely raise objections to discovery may result in waiver of such objections. The notification shall advise that a discovery dispute has arisen, briefly describe the dispute and the parties' efforts to resolve the dispute, and propose **two (2) dates/times** when **both** parties are available for a teleconference with the undersigned to address the dispute. The parties shall avail themselves of this process in an effort to quickly and efficiently resolve discovery disputes requiring the intervention of the administrative judge, and as a prerequisite to filing a motion regarding a discovery dispute. Any motion to compel or request to develop evidence filed without prior resort to the informal resolution process described herein may be rejected.

Dispositive Motions

Any Motions for Summary Judgment shall be filed no later than **January 5, 2018.** Oppositions to any Motions for Summary Judgment shall be filed no later than **February 9, 2018**. Any Reply in Support of a Motion for Summary Judgment shall be filed no later than **February 23, 2018.**

Settlement

I invite the parties to participate in a settlement conference to determine whether this matter may be resolved without resort to discovery. In the event that the parties believe my assistance of that of a neutral, third party settlement official would be mutually beneficial in helping the parties achieve a resolution to this case through settlement, the parties may seek such by joint motion. Prior to holding a hearing in this matter, I will require the parties to participate in a settlement conference in advance of the hearing.

Sanctions

Failure to follow this Order or other orders of the Administrative Judge may result in sanctions pursuant to EEOC Regulations at 29 C.F.R. §1614.109(f)(3) and §1614.2014(f)(2). The Administrative Judge may, where appropriate:

(A) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(B) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(C) Exclude other evidence offered by the party failing to produce the requested information or witness;

(D) Issue a decision fully or partially in favor of the opposing party; or

(E) Take such other actions as appropriate.

It is so ORDERED.

For the Commission:

Sharon E. Debbage Alexander
Administrative Judge
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