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Class Agents[1]	) EEOC No. 570-2016-00501X) Agency No. M-94-6376
v.	
Merrick Garland, Attorney General, Department of Justice, Agency.	
	) Date: May 13, 2024

ORDER RETAINING JURISDICTION OVER CLASS COMPLAINT AND GRANTING MOTION TO REMOVE MATTHEW FOGG AS CLASS AGENT

Introduction

On March 19, 2024, at 4:53 p.m., on the eve of the March 20, 2024 Fairness Hearing to consider the fairness, adequacy, and reasonableness of the Settlement Agreement given preliminary approval on September 21, 2023, Matthew Fogg emailed the Commission and counsel for the parties a document entitled, "Complainant's Notification of District Court Filing" (Complainant's Notification). The first paragraph of that document reads as follows:

> COMES NOW Matthew Fogg ("Complainant"), in the above-entitled action against the Attorney General of the United States in his official capacity as head of the Department of Justice ("DOJ" or "Agency"), and NOTIFIES the parties that Fogg, still aggrieved, filed a complaint in the United States District Court for the District of Columbia today, based on the claims in *Fogg et al. v. Garland* (EEOC Appeal No. 0120073003, Hearing No. 570-2006-00483X; Agency No. M946376). Accordingly, the EEOC no longer has jurisdiction over the complaint, and all

[1] No later than May 15, 2024, Class Counsel shall identify the Class Agent whose name shall replace Matthew Fogg's in the caption of this complaint.

> proceedings, including any pending discovery requests and the fairness hearing scheduled to decide whether a preliminary settlement agreement is lawful, are hereby CANCELLED in accordance with 29 CFR 1614.407.

Complainant's Notification at 1. Fogg explained his reason for filing in federal court as rooted in the "gravity of the claims and the potential impact on the class members," and his interest in "a more detailed examination and determination of fairness, beyond the scope of what may be achieved through administrative processes alone." Complainant's Notification at 2. Fogg expressed a "profound disillusionment" with the administrative forum and the settlement process. *Id.* Fogg acknowledged his actions thirty years after the filing of his complaint and on the eve of the Fairness Hearing constituted "what some might deem a nuclear option," but asserted that his move was "a testament to the enduring belief that long-suffering is indeed redemptive." *Id.* at 3-4. Fogg did not provide a copy of his civil action with his Notification.[2]

In response to this submission, after consultation with counsel for the parties, I canceled the March 20, 2024 Fairness Hearing to allow for briefing on the impact of Matthew Fogg's federal court filing on the Commission's jurisdiction over the complaint. On March 22, 2024, I issued an Order for briefing, instructing Class Counsel to ensure Fogg received a copy of the Order.

This Order resolves the question of the Commission's jurisdiction over the class complaint and Class Agents' Motion to disqualify Matthew Fogg as a Class Agent.

Class Agents Motion to Remove Matthew Fogg as Class Agent

On March 22, 2024, Class Agents filed their Motion to Remove Matthew Fogg as Class Agent (Class Agents' Motion). In their Motion, Class Agents seek removal of Fogg as a Class Agent on the grounds that he has been untruthful with the Commission, the U.S. District Court, Class Counsel and Members of the Class; that he has pursued highly individualized relief in his federal district court filing, abandoning entirely the hiring claims included in the administrative class complaint; and that he has demonstrated that his interests are adverse to those of the Class.

Class Agents further argue that Fogg cannot move this complaint to federal court. First, Class Agents argue the Agency has taken final action on the case by resolving the case through settlement, thereby making Fogg's federal court filing untimely pursuant to EEOC Regulations at 29 C.F.R. §1614.407. Second, Class Agents argue that Fogg, as one of multiple Class Agents, did not have the authority to file a civil action on this administrative complaint without the consent of the other Class Agents. In the alternative, Class Agents argue that even if Fogg had the authority to file in federal district court, he cannot, in doing so, extinguish the claims of remaining Class Agents and Members who did not consent to and are not parties to the civil action. Class Agents analogize to federal law governing removal, requiring unanimity among defendants to remove. Class Agents also note that there are "material differences between Fogg's civil action and the operative Class Charge here," noting that the civil action does not include any mention of "allegations related to Headquarters assignments and the hiring of DUSM positions, unlike the operative Class Charge that includes DUSMs with Headquarters assignment claims and 'applicants

[2] The Complaint is captioned *Matthew Fogg v. Merrick Garland*, 1:24-cv-00792, filed before the U.S. District Court for the District of Columbia on March 19, 2024. A copy of Fogg's filing appears as Exhibit E to Class Agents' Motion to Remove Matthew Fogg as a Class Agent.

never employed who were subjected to USMS policies and practices for hiring and recruitment of Deputy U.S. Marshal positions…'" Class Agents' Motion at 13. Class Agents also note that the civil action includes "individual claims for retaliation related to his involvement in a Congressional hearing and the creation of a website and YouTube content," and claims relating to his workers compensation claims and taxes. *Id.* Class Agents note that these claims are unique to Fogg.

Finally, Class Agents argue that equity demands that the Commission retain jurisdiction over this complaint, noting that hundreds of Class Members have filed claims since the publication of the Notice of Resolution and stand to lose the opportunity for relief if the Commission dismisses the administrative complaint pursuant to Fogg's filing of a civil action. In support of their Motion, among other exhibits, Class Agents submit Declarations regarding their lack of advanced knowledge of or consent to Fogg's federal district court filing and documentation of communications between Class Counsel and Fogg relating to settlement negotiations.

Matthew Fogg's Motion to Strike Motion to Remove Matthew Fogg as Class Agent Due to Lack of Jurisdiction and Unethical Practices by Class Representatives' Counsel

On April 9, 2024, Fogg submitted his Motion to Strike Motion to Remove Matthew Fogg as Class Agent Due to Lack of Jurisdiction and Unethical Practices By Class Representatives' Counsel (Fogg Response). In his Response, Fogg accuses Class Counsel of excluding him from a meeting with Class Agents on March 20, 2024, on the grounds that Class Counsel no longer represented him. Fogg concedes that he sent correspondence purporting to terminate Sanford Heisler Sharp as Class Counsel in the past, but notes that Class Counsel did not exclude him from Class Agent calls before March 20, 2024. Fogg accuses Class Counsel of coercing Class Agents into signing Declarations in support of the Motion to remove him as a Class Agent, and of fraud in the form of allowing the eponymous son of a deceased Class Agent to sign his Declaration. Fogg also takes issue with the Declaration of Sheldon Martin, whom he asserts "was never a part of previous settlement deliberations involving Fogg, and [Class Agents] were never notified that Martin was vetted as a [Class Agent], which again gives the appearance of deception and fraud." Fogg Response at 4. Fogg moves that the Declarations be struck from the record for these reasons.

In further opposition to Class Agents' Motion to remove him as a Class Agent, Fogg reiterates and expounds upon his allegations that the Settlement Agreement was the product of fraud on the part of Class Counsel, allegations Fogg first brought to my attention on September 28, 2023, one week after I issued the Order Granting Preliminary Approval of the Settlement Agreement, Authorizing Notice, and Scheduling Fairness Hearing. These include allegations that Class Counsel failed to disclose the terms of the proposed Settlement Agreement to Class Agents prior to moving for preliminary approval; settled the case for less than Class Agents authorized; created a hostile work environment for Fogg; and failed to address racial profiling against Black members of the public in the Settlement Agreement.[3] *Id.* at 7. Fogg asserts that he was designated as the Class Spokesman, with the authority to act on behalf of the Class. In support of his submission, Fogg attaches a March 17, 2024 email from Class Member Douglas Tolliver to Class Counsel, expressing disappointment with the "grossly insane settlement of a 15-million dollar monetary settlement with Attorney's fees attached," and stating "he never would have agreed to this foolishness and know

[3] Racial profiling against members of the public is outside the scope of the Commission's jurisdiction, and not part of the allegations in this case.

that many other class members would agree if we all had known about the settlement talks!"[4] Fogg Response, Exhibit 1 at 1. Fogg also attaches an email he received from Class Agent Jeffrey Whitehead asserting that Class Agents did indeed appoint Fogg as their spokesperson, and representing that Fogg "has been the only agent submitting responses, briefs, and any other documents on behalf of the agents." Fogg Response, Exhibit 2 at 1. Whitehead states his view that "the settlement put forth is an insult to this class lawsuit."[5] Fogg Response, Exhibit 2 at 2.

Fogg counters Class Agents' assertion that he has not acted in the best interests of the Class by asserting that his "strategic decisions, even if unconventional or disputed, do not inherently constitute a breach of his fiduciary duty to the class unless unequivocally proven to harm the class's welfare." Fogg Response at 16. He also argues that Class Agents have failed to prove their allegations that he has been dishonest. He argues that Class Counsel are motivated to discredit him in retaliation for bar complaints he recently filed against them, and to push the Settlement Agreement through to final approval so they may receive their fees. *Id.* at 18-19. Fogg argues his actions are in the best interest of the Class because he is moving the case to "a forum whereby any future settlement agreement would not be unilaterally negotiated without the CAs' consent and prior knowledge," adding that he "is suing for 3 Billion dollars," giving the Class a chance to obtain "a much larger compensatory damages award" as well as more favorable programmatic changes. *Id.* at 19. Indeed, Fogg argues, his

> decision to transition the class action into Federal court, rather than representing a unilateral departure from the class's collective interests, should ensure the most robust legal redress possible for the class. It is a testament to Fogg's fiduciary responsibility towards the class – to explore every viable legal avenue that could amplify their voice and enhance their chances of securing justice, even at the eleventh hour. Therefore, the move to Federal court should be seen as leveraging the Federal judiciary's capacity to address complex, systemic issues at the heart of the class's grievances. In summary, Fogg's actions, far from bypassing the collective action's goals, embody a strategic expansion of the legal battleground to secure the class's interests.

Id. at 20.

As for the fact that his Complaint in federal district court neglects to include the claims of many Class Members, Fogg responds that his complaint is an "emergency placeholder," and that he "plans, in good faith and only after receiving written consent from each CA, on filing an Amended Class Action Complaint in Federal court with the CAs as named Class Representatives." Fogg Response at 13. This, he asserts, along with "acquiring new legal counsel ... will prove he has the best interests of the class in mind." *Id.*

With respect to the question of jurisdiction, Fogg cites to EEOC Regulations at 29 C.F.R. §1614.407(b) for the premise that jurisdiction was terminated by the filing in federal district court. He argues that he "was the sole class agent who filed the administrative class complaint and thus had the right to file a civil action in the appropriate U.S. District Court after 180 days from the

[4] Tolliver is not among the Class Members who filed objections to the Settlement Agreement.
[5] Whitehead is not among the Class Members who filed objections to the Settlement Agreement.

original class complaint filing … since a final agency action had not been taken." Fogg Response at 5; *see also Id.* at 14 ("Since he was the single-named CA and Complainant who filed the initial 1994 administrative complaint and developed it alone for ten years, Fogg had the right to unilaterally file the complaint in Federal court on the same issues after exhausting his administrative remedies, thereby extinguishing the underlying proceedings…") Fogg cites to the cancelation of the March 20, 2024 Fairness Hearing as evidence that the federal court filing terminated jurisdiction. *See* Fogg Response at 5, 14.

Agency Brief in Response to the
Equal Employment Opportunity Commission's Order Regarding Jurisdiction

On April 9, 2024, the Agency filed its Brief in Response to the Equal Employment Opportunity Commission's Order Regarding Jurisdiction (Agency Response), stating its position that "it appears that this matter should be administratively dismissed, with further proceedings to be held before the district court."[6] Agency Response at 1. Without addressing the particulars of how Class Agents distinguished the scope of the federal court filing from that of the administrative complaint before the Commission, the Agency asserts that the Commission's jurisdiction appears to be terminated because the Agency has not taken final action as contemplated in EEOC Regulations at 29 C.F.R. §1614.407, and 29 C.F.R. §1614.107(a)(3). The latter provision requires an agency to dismiss a complaint "that is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint…" The Agency notes that the requirement for dismissal of EEO complaints upon a filing in federal court is animated by an interest in avoiding the wasted resources associated with adjudicating the same complaint in two fora, and granting "due deference to the authority of the federal district court." Agency Response at 4, (citing *Ted L., Class Agent v. Dep't of Veterans Affs.*, EEOC Appeal No. 0120182368 (Apr. 11, 2019)). The Agency argues that as a Class Agent at the time of the filing of the civil action, Fogg "appears to have acted within his purported rights to file a civil complaint under 29 C.F.R. §1614.407(b)." Agency Response at 5. "The consequence of Class Agent Fogg's civil filing appears to be complete removal of this matter from the administrative process pursuant to 29 C.F.R. §1614.107(a)(3), which specifies that an agency '*shall* dismiss and *entire* complaint' that is the basis of a pending civil action in a district court." Agency Response at 5. The Agency asserts that "given the interests in judicial economy and irreparable harm that could be caused by the issuance of conflicting opinions, the circumstances justify the Commission's exercise of judicial restraint to take no further action given the pendency of federal court proceedings." Agency Response at 6. The Agency takes no position on Class Agents' Motion to Remove Matthew Fogg, asserting that because the Motion was filed after Fogg filed his case in federal court, jurisdiction has been terminated and the Commission cannot resolve the Motion.[7]

Class Agents' Reply In Support of Motion to Remove Matthew Fogg as Class Agent

On April 16, 2024, Class Agents filed their Reply in Support of Motion to Remove Matthew Fogg as Class Agent (Class Agents' Reply). With respect to the question of whether the

[6] The Agency asserts that its reference to the civil action does not constitute a waiver of service of process.
[7] Because the Agency could have addressed Class Agents' Motion in the alternative and elected not to, I find the Agency has waived the opportunity to brief a position on Class Agent's Motion to Remove Matthew Fogg as Class Agent.

Commission retains jurisdiction over the class complaint, Class Agents reiterate their argument that the Agency has taken final action by agreeing to settle the case, therefore Fogg's filing is untimely. Class Agents further assert that Fogg was not acting as a Class Agent when he filed in federal court, because he was not authorized by the Class to file on their behalf. Class Agents note that neither the Agency nor Fogg point to case law in support of the premise that a "rogue Class Agent" can "erase the claims of other class agents" through unilateral action, or that the original Class Agent in a case with multiple Class Agents is vested with superior authority as compared to the others. Class Agents Reply at 5, 9.

Class Agents assert that the Agency's citation to Commission regulations at 29 C.F.R. §1614.107(a)(3) is misplaced, because that provision addresses the agency's obligation to dismiss a complaint pursuant to a civil action *prior to any request for an administrative hearing*. Class Agents argue that this provision does not apply to dismissal by administrative judges after a hearing request or in connection with the adjudication of a class complaint. Rather, Class Agents note that dismissal of class complaints is governed by 29 C.F.R. §1614.204(d), which provides that the administrative judge "may dismiss the complaint, or any portion" thereof, for the reasons identified in 29 C.F.R. §1614.107(a).

Class Agents note that "even in simple cases with individual complaints, an individual's entire EEO complaint is not dismissed after the filing of a civil action if the civil action does not perfectly overlap with the case before the EEOC." Class Agents' Reply at 6. Class Agents note that the Commission has held dismissal pursuant to a civil action to be appropriate only where "the EEOC complaint is wholly 'incorporated into the civil action." Class Agents' Reply at 6 (citing *Shapiro v. Dep't of the Army*, EEOC Appeal No. 05970513 (Dec. 18, 1998)). Indeed, Class Agents note that the Commission has held that dismissal of an entire complaint pursuant to a civil action where the claims are not entirely the same constitutes reversible error. *See* Class Agents' Reply at 7 (citing *Stromgren v. Dep't of Veterans Affs.*, EEOC Request No. 05891079 (May 7, 1990); *Schlieter v. U.S. Postal Serv.*, EEOC Appeal No. 07A30007 (Sept. 29, 2003)). Class Agents point to the Commission's similar analysis in the context of class complaints, finding that an administrative judge erred in dismissing a class complaint pursuant to a class agent's filing of a civil action, where the claims were the same and the class agent was disqualified by virtue of having filed an individual complaint in federal district court. *Heredia v. Smithsonian Institution*, EEOC Appeal No. 01A22353 (June 5, 2003). Class Agents note that in *Heredia*, the Commission remanded a complaint dismissed by an administrative judge when the class agent filed the same claims in federal district court, holding that the class should have been afforded an opportunity to substitute a new class agent. Similarly, in *Joana C.*, the Commission allowed for substitution of a class agent where the original class agent settled her claims against the Agency. *Joana C. v. Dep't of the Army*, EEOC Appeal No. 0120103378 (Mar. 14, 2017). Here, Class Agents argue, it is even more clear that the Class Complaint should not be dismissed, both because the federal district court complaint is not the same as the administrative complaint before the Commission, and because there are already other Class Agents in place and representing the interests of the Class.

Class Agents also assert that the Agency's reliance on 29 C.F.R. §1614.407 is misplaced, characterizing it as "an exhaustion requirement, not a 'removal' mechanism." Class Agents' Reply at 9. Class Agents argue that the Agency's interpretation of Fogg's federal court filing as binding on the entire class notwithstanding his lack of authorization would be contrary to the Supreme Court's decision in *Smith v. Bayer Corp.*, 564 U.S. 299, 318 (2011), which held that "the mere

proposal of a class in the federal action could not bind persons who were not parties there." Class Agents further argue that the Commission should not wait to see what action the federal court takes with Fogg's civil action, but should instead move forward with the adjudication, noting that the Agency "cites no decision in which the Commission has ever stayed a case to wait for a federal court to determine the Commission's ability to proceed." Class Agents' Reply at 18. Class Agents note that the Commission has already declined to hold this case in abeyance pending the outcome of related class actions. Class Agents' Reply at 16 (citing April 11, 2017 Order).

Finally, in response to Fogg's Motion, Class Agents note that Fogg failed "to dispute the falsity of his statements to the Commission and the District Court." Class Agents' Reply at 20, 21. Class Agents respond to Fogg's allegations of abetting the forgery of a Class Agent Declaration, noting that Zachary Thomas, Sr. was a Class Member who recently passed away, while his son, Zachary Thomas, Jr., is a Class Agent who, along with Class Agent Sheldon Martin and several others, was approved to serve as a Class Agent in the August 13, 2021 Order amending the class complaint. Class Agents also assert that even if one Class Agent and one Class Member now support Fogg's move to federal court, this "does not cut against the predominant weight of the Class Agents' positions," because "[b]y overwhelming numbers, the Class does not support Fogg's eleventh-hour gambit and wants this settlement to move forward." Class Agents' Reply at 22.

Agency Surreply in Response to Jurisdictional Issues

On April 26, 2024, the Agency filed its Surreply in Response to Jurisdictional Issues (Agency Surreply). In its Surreply, the Agency challenges Class Agents' assertion that the Agency has taken final action by virtue of having agreed to settle the case. The Agency points out that the proposed settlement agreement is not yet signed, and the Commission's regulations require signatures for a settlement agreement to be valid. Agency Surreply at 2. The Agency further argues that the Commission should "exercise judicial restraint during the pendency of district court proceedings," to ensure "the novel legal issues resulting from Fogg's actions are given the necessary legal consideration with the ultimate goal of 'getting it right.'" Agency Surreply at 3. The Agency distinguishes *Heredia* from the situation presented here, noting that in *Heredia*, the Class agent filed an individual complaint in federal court, not a class complaint. Agency Surreply at 4. The Agency also distinguishes *Joana C.*, noting that the case involved a Class Agent who settled her claims, and there is no mention of a federal court filing in that case. The Agency faults Class Agents for not addressing *Ted L.*, in which the Commission found an administrative judge properly dismissed three class complaints where the class agent filed a complaint in federal district court, purporting to do so on behalf of the class.

To the extent Class Agents argue that the Agency's position would result in violation of due process, the Agency argues that Class Agents will be able to have their claims heard in federal court. The Agency concludes by asserting that the Commission should defer to the federal court to prevent simultaneous adjudication of the same claims, "wasting critical resources, and creating the potential for inconsistent or conflicting decisions concerning novel legal issues in class action jurisprudence." Agency Surreply at 6.

Matthew Fogg's Motion for Leave to File Surreply and Surreply

On April 26, 2024, Fogg filed a Motion for Leave to File Surreply and Surreply (Fogg Surreply),[8] stating the reason for the request was to oppose "any motion seeking his removal" and to address "recent motions by the Class Law Firm (CLF) which aim to intervene in the related Federal Court proceedings." Fogg Surreply at 1. Fogg also stated that he "disputes procedural irregularities and jurisdictional errors in the ongoing EEOC proceedings." *Id.* In his Surreply, Fogg reiterates his opposition to the Motion for his removal as Class Agent, and his Motion that Declarations submitted by Class Counsel should be stricken from the record. He also responds to Class Counsel's reference in its Reply brief to its intent to intervene in the federal district court matter, asserting that their choice to do so "would be inappropriate and is anticipated to be viewed unfavorably by the judiciary, aligning with the underlying ethical concerns raised in the documented instances." Fogg Surreply at 3. Fogg references documents in Exhibit A to his Surreply, which he says "call into question their validity and challenge the integrity of the EEOC's handling of this matter. The document also illustrates a pattern of procedural neglect and misinformation that are pertinent to the jurisdictional errors currently under scrutiny."[9] Fogg Surreply at 2.

Class Agents' Sur-Surreply in Support of Motion to Remove Matthew Fogg as Class Agent

On April 30, 2024, Class Agents filed an unopposed Motion for Leave to File Surreply in Support of Motion to Remove Matthew Fogg as Class Agents with accompanying Sur-Surreply (Class Agents' Sur-Surreply).[10] In their Sur-Surreply, Class Agents fault the Agency for failing to "grapple with the due process rights of the remaining Class Agents, and the Class as a whole, that did not consent to the filing of Fogg's "'civil action.'" Sur-Surreply at 4. Class Agents restate their position that "the filing of a putative class case does not affect the claims of the remaining Class Agents, who are not parties to Mr. Fogg's federal district court case," citing *Smith.* Class Agents' Sur-Surreply at 2-3. Class Agents distinguish *Ted L.*, emphasizing that the case involved an administrative class complaint with a single class agent who filed a class complaint containing the same allegations. Class Agents again point to *Heredia* in support of Commission action to address the interests of the absent class members by allowing for the substitution of a class agent where a sole class agent filed an individual case in federal court. Class Agents reason that in this case, where there are already other Class Agents representing the Class and where the complaint has advanced to the stage of seeking final approval of a settlement agreement, the Commission should be even more inclined to allow the class complaint to proceed – particularly given that the allegations of the civil action do not encompass all of the claims in the administrative class complaint.

The Sur-Surreply concludes by countering the Agency's argument that the filing is timely because the complaint has not been the subject of final action. Class Agents note that "[o]n March

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[8] Fogg's Motion for Leave to File a Surreply was granted by order dated May 3, 2024, and the Surreply has been accepted into the record.

[9] Fogg offers no explanation as to the genesis or the probative value of the document identified as Exhibit A, nor is it clear on its face. A second, unmarked document attached to Fogg's Surreply appears to be the text of an email from Class Counsel to Class Members, dated June 11, 2021, with the subject line "Upcoming Washington Post Interviews." As with Exhibit A, its origin and relevance are unclear.

[10] The Motion for Leave to File at Sur-Surreply was granted by Order dated May 3, 2023, and the Sur-Surreply was accepted into the record.

8, 2022, the parties signed a Memorandum of Understanding, laying out the terms of a settlement and agreeing "to cooperate fully in the performance of any additional acts necessary to effectuate the terms of this MOU." Sur-Surreply at 5. Class Agents argue that this MOU "is a writing signed by both parties, satisfying the requirements of 29 C.F.R. § 1614.204(g)(3)." *Id.* Class Agents also point to the Agency's March 6, 2024 Motion for Final Approval and Responses to Class Member Objections, in which the Agency "urged approval of the Settlement Agreement, noting 'all terms and conditions' were agreed to in August 2023. *Id.* at 5. Class Agents argue that this shows "'the terms of the resolution [were] reduced to writing' and the terms of resolution were 'signed by the agent and the agency.' 29 C.F.R. § 1614.204(g)(3); *see Superior Oil Co. v. Udall*, 409 F.2d 1115, 1121 (D.C. Cir. 1969) ("a valid contract can be spelled out of multiple papers, some unsigned")." *Id.*

Jurisdiction

Legal Standard

EEOC Regulations at 29 C.F.R. §1614.407 identify the conditions under which an individual complainant or a class agent may file a civil action. Pursuant to §1614.407(b), an individual complainant or class agent may file a civil action in federal district court, "[a]fter 180 days from the date of the filing of an individual or class complaint if agency final action has not been taken." EEOC Regulations at 29 C.F.R. §1614.409 provide that the "[f]iling of a civil action under §1614.407 ... shall terminate Commission processing of the appeal." The Commission has noted that §1614.409 is intended to "prevent a complainant from simultaneously pursuing both administrative and judicial remedies on the same matters, wasting resources, and creating the potential for inconsistent or conflicting decisions, and ... to grant due deference to the authority of the federal district court." *Baylink v. Dep't of Veterans Affs.*, EEOC No. Appeal No. 0120070046 (May 16, 2007) (citing *Stromgren v. Department of Veterans Affs.*, EEOC Request No. 05891079 (May 7, 1990); *Sandy v. Department of Justice*, EEOC Appeal No. 01893513 (October 19, 1989); *Kotwitz v. USPS*, EEOC Request No. 05880114 (October 25, 1988)).

Notably, 29 C.F.R. §1614.409 provides that the filing of a civil action terminates processing of an *appeal*; the provision does not address the jurisdictional impact of a civil action on an individual or class complaint at the administrative hearing stage. Instead, 29 C.F.R. §1614.204(d)(2) provides that with respect to class action complaints "an administrative judge may dismiss the complaint, or any portion, for any of the reasons listed in § 1614.107 or because it does not meet the prerequisites of a class complaint under § 1614.204(a)(2)." EEOC Regulations at §1614.107(a)(3) require agencies, "prior to a request for a hearing," to dismiss a complaint that is "the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint..." To determine whether dismissal of a complaint pursuant to a civil action is appropriate, an administrative judge must "carefully review" whether the civil action raises the "same matters" presented in the administrative complaint. *Edwina W. v. Dep't of Agriculture*, EEOC Appeal No. 2021001265 (July 5, 2022.)

Analysis

I begin with the question of whether Fogg's filing of a civil action is timely. The parties disagree as to whether this complaint has been the subject of "final action," and therefore, whether Fogg's civil action is timely filed. Class Agents contend that the complaint has been the subject of final action by virtue of the parties' agreement to settle this case, memorialized in the MOU signed in March of 2022. The Agency and Fogg assert that final action has not been taken, as the Commission has yet to give final approval to the Settlement Agreement. The Agency and Fogg have the better argument. The Commission's regulations explicitly require an administrative judge to issue a decision approving a settlement agreement to effect settlement of a class action. *See also* EEOC Management Directive 110 (August 5, 2015), Chapter 8, §§ C-2 and C-3. As no such decision has been issued, the case remains open with the Commission's Washington Field Office and the civil action is timely filed.

The Agency contends that if the civil action is timely filed, then it appears that the Commission's jurisdiction over the complaint has been terminated pursuant to 29 C.F.R. §1614.407 and §1614.409. There are two flaws in the Agency's argument. First, 29 C.F.R. §1614.407 provides the conditions under which a complainant or class agent "is authorized" to file a civil action, and the procedures that must be followed to exhaust administrative remedies. *See* 29 C.F.R.§1614.407(g). As Class Agents rightly argue, it is not a removal provision. Second, 29 C.F.R. §§1614.407 and 409 are situated in 29 C.F.R. 1614 Subpart D – Appeals and Civil Actions. They do not apply to class complaints at the administrative hearings stage, which are addressed in Subpart B – Provisions Applicable to Particular Complaints. Indeed, the language of 29 C.F.R. §409 clearly applies to the complaints that are the subject of appeals before the Commission, and mandates termination of Commission jurisdiction. "Filing a civil action under §1614.407 or §1614.408 shall terminate Commission processing of the *appeal*" (emphasis added). Notably, the Commission uses similar language regarding the filing of a civil action "prior to a request for a hearing," in 29 C.F.R. §1614.107(a)(3). There, the regulations direct that "the agency *shall* dismiss an entire complaint … "that is the basis of a pending civil action" (emphasis added).

But the Commission uses different language to address complaints in the administrative hearings process. Both 29 C.F.R. §1614.109(b) (applicable to individual complaints) and §1614.204(d)(2) (applicable to class complaints) use the term "may" with respect to dismissal pursuant to a civil action. "May" is not the same as "shall." Nor does the Commission use language terminating jurisdiction upon the filing of a civil action for class complaints before administrative judges as it does with respect to complaints on appeal. Clearly, the Commission intended something other than mandatory divestment of jurisdiction in cases where a civil action is filed while a complaint is pending before an administrative judge. The plain meaning of §1614.204(d)(2), situated in the Subpart applicable to class actions at the hearings stage and contrasted with the language used at the pre-hearing request and appellate stages, indicates that the Commission intended to provide administrative judges with discretion to dismiss, or not, class actions for the reasons identified in 29 C.F.R. §1614.107(a).

This reading is borne out by the Commission's appellate decisions. In upholding an administrative judge's decision not to dismiss a claim pursuant to EEOC Regulations at 29 C.F.R. §1614.107(a)(1), the Commission recognized the distinction between the mandatory language of §1614.107(a) and the permissive language of §1614.109.

> EEOC Regulation 29 C.F.R. § 1614.107(a)(1) provides that, prior to a request for a hearing in a case, an Agency shall dismiss a complaint that states the same claim that has been decided by the Agency or Commission. In contrast, EEOC Regulation 29 C.F.R. § 1614.109(b) provides that an EEOC Administrative Judge may dismiss a complaint pursuant to § 1614.107 ... This provision's language is permissive rather than mandatory: an EEOC Administrative Judge "may" dismiss a complaint pursuant to § 1614.107, but is not required to do so. When EEOC regulations allow an Administrative Judge to exercise his or her discretion, our review is properly limited to assessing only whether the AJ's decision amounts to an abuse of discretion.

Hunter v. Soc. Sec. Admin., EEOC Appeal No. 0720070053 (Feb. 16, 2012).

Indeed, the Commission has held that an administrative judge errs in dismissing a class complaint pursuant to a civil action, where doing so would leave class members without the ability to seek redress for allegations of class-wide discrimination. In *Heredia*, the sole class agent in a class action complaint pending certification before an administrative judge filed an individual complaint with the same allegations in federal court. The administrative judge dismissed the individual complaint pursuant to the filing of the civil action, and dismissed the class complaint, on the grounds "that complainant, after filing a civil action in federal district court, no longer meets the requirements of a class agent." Without a class agent, the administrative judge reasoned, class certification would be improper because the complaint failed to meet the requirement for adequacy of representation. The defendant agency issued an order implementing the administrative judge's decision denying class certification. On appeal, the Commission affirmed dismissal of the individual complaint. But with respect to the class complaint, the Commission reversed the dismissal, holding that while that the filing of a civil action on the same matter precluded the complainant from serving as class agent, "under the instant circumstances,"[11] the class should have had an opportunity to substitute a new class agent. The Commission remanded the complaint to allow for the substitution of a new class agent and reconsideration of the question of class certification.

Applying the Commission's logic in *Heredia* to circumstances of this case, there is every reason to believe it would be an error to dismiss the class complaint pursuant to Fogg's filing of a civil action. Indeed, if there were ever a case where an administrative judge should exercise discretion to decline to dismiss a class complaint, this is it. First, it is clear from the record that Matthew Fogg did not have the authority or permission of the other Class Agents to move the class complaint to federal court. Second, there are already multiple other Class Agents representing the Class. In both *Heredia and Joana C.*, the Commission reversed dismissal of a class complaint out of concern for the rights of the absent class members at the certification stage. If dismissal at the certification stage was error, then it would be even more so in this case, where the class complaint is thirty years along, already certified, and there are multiple other Class Agents already representing the interests of the class. Third, if this class complaint is dismissed, many Class

[11] The Commission's use of the term "under the circumstances" is further confirmation of the Commission's expectation that an administrative judge should exercise discretion in determining whether to dismiss a class complaint pursuant to the filing of a civil action in accordance with §1614.204(d)(2).

Members will have no recourse – even in federal court – because the complaint Fogg filed in federal court does not include their claims.

This brings us to the most important reason that dismissal of the class complaint pursuant to Fogg's filing of a civil action would be improper. Even assuming Fogg had the authority to file this class complaint in federal court, he simply did not do so. The complaint Fogg filed in federal court does not make the same allegations as the class complaint; it is both overinclusive, and underinclusive. Even where there is no discretion to decline dismissal pursuant to a filing of a civil action, it is error to do so where the civil action does not address "the same matter" as the class complaint.

Fogg's complaint asserts race discrimination and retaliation claims in violation of Title VII of the Civil Rights Act of 1964, individually and on behalf of a putative class of similarly situated persons, specifically "all current and former African American Deputy U.S. Marshals who are serving or have served with the USMS at any time during the liability period." Fogg Compl. at ¶ 74. The factual allegations are wide ranging and are not entirely coextensive with the allegations of the administrative class complaint. Some allegations in the civil action also appear in the class complaint before the Commission. For example, claims of race discrimination in promotions to the position of Deputy U.S. Marshal (DUSM) are part of the administrative complaint.

But many allegations included in the class complaint before the Commission are omitted from the civil action, resulting in "material differences" between the civil action and the administrative complaint. Class Agents' Motion at 13.

> Mr. Fogg's complaint alleges that "USMS has discriminated against Class Representative and all members of the proposed class through its policies, practices, and procedures regarding promotions, transfers, assignments, training, awards, and investigations in violation of Title VII." It is apparent that Mr. Fogg's complaint copied verbatim sections of the Amended Complaint in *Brewer v. Holder*, filed in 2011. The matter before the Commission, however, is broader than the *Brewer* matter. Nowhere does Mr. Fogg include allegations related to Headquarters assignments and the hiring of DUSM positions, unlike the operative Class Charge that includes DUSMs with Headquarters assignment claims and "applicants never employed who were subjected to USMS policies and practices for hiring and recruitment of Deputy U.S. Marshal positions from January 23, 1994 to present."

Class Agents' Motion at 13 (internal citations omitted). Indeed, Class Agents note that "Mr. Fogg completely omitted the hiring class in his Complaint;" persons never hired by the Agency are completely excluded from the complaint. Class Agents' Reply at 8. Class Agents also assert that because Fogg "is not a current employee, he has no ability to pursue the 'injunctive relief'" sought by the Class. *Id.*, (citing *In re Brewer*, 863 F.3d 861, 875 (D.C. Cir. 2017) (denying class certification because the only class representative was not a current employee who could pursue injunctive relief).

The civil action also includes allegations that have nothing to do with the pending class complaint in the administrative forum. Examples include allegations of retaliation, a basis not included at all in the administrative class complaint; allegations of racial profiling against members

of the public, an allegation that is outside the Commission's jurisdiction and therefore could never be part of the administrative complaint; allegations of hostile work environment, which are also not included in the administrative complaint; allegations related to Fogg's advocacy on his website and YouTube channel; and allegations related to Fogg's worker compensation case, federal tax reporting relating to previous awards of backpay and compensatory damages, and retirement benefits.

Because the civil action Fogg filed differs in meaningful ways from the complaint before the Commission, the case is distinguishable from *Ted L.*, the primary case upon which the Agency relies in asserting that the Commission no longer appears to have jurisdiction. In *Ted L.*, the Commission held that the civil action filed by a sole class agent "essentially alleged the same factual claims as those considered by the AJ regarding the Class Agent's three administrative class complaints." Fogg's civil action does not essentially allege the same factual claims as the class complaint. While Fogg assures us that he will amend the complaint down the road, that does nothing to change the analysis at this juncture. Fogg seeks to terminate the Commission's jurisdiction over the class complaint on the grounds that he has filed a civil action; but the fact that the civil action does not address "the same matter" means it cannot serve as grounds for dismissal of the administrative class complaint.

Conclusion

For the foregoing reasons, I decline to dismiss the class complaint. Fogg's filing in federal court is not precluded by EEOC Regulations at 29 C.F.R. 1614.407 because the complaint has not been the subject of final action. But the filing does not terminate the Commission's jurisdiction. The filing of a civil action results in automatic termination of Commission jurisdiction only prior to a request for a hearing, or when the complaint is on appeal to the Commission. Dismissal of a class action complaint pursuant to a civil action under 29 C.F.R. 1614.204(d)(2) and 1614.107(a)(3) is at the discretion of the administrative judge. Further, dismissal pursuant to a civil action is only proper at any stage where the civil action encompasses "the same matter" as the administrative complaint. Fogg's civil action does not encompass the same allegations as the administrative complaint. It includes some allegations that are not before the Commission, and omits some allegations and claims for relief that are part of the administrative complaint. While the discretion afforded an administrative judge under 1614.204(d)(2) would permit dismissal of "any portion" of the complaint encompassed in the civil action, I decline to engage in piecemeal dismissals given the advanced procedural posture of the case and the fact that the Settlement Agreement was negotiated based on the operative administrative complaint as a whole. The Commission will retain jurisdiction over the entire complaint.

Because I find that Fogg's filing in federal district court did not terminate the Commission's jurisdiction over the class complaint, I turn now to Class Agents' Motion to Remove Matthew Fogg as Class Agent.

Removal of Class Agent

Legal Standard

A Class Agent must "fairly and adequately protect the interests of the class" and their claims must be typical of the Class. 29 C.F.R. § 1614.204(a)(2); Fed. R. Civ. Proc. 23(a)(4). "Adequacy embraces two components: the class representative (i) must not have antagonistic or conflicting interests with the unnamed members of the class and (ii) must appear able to vigorously prosecute the interests of the class ..." *J.D. v. Azar*, 925 F.3d 1291, 1312 (D.C. Cir. 2019) (citation omitted).

Analysis

Fogg asserts that he "was the sole class agent who filed the administrative class complaint and thus had the right to file a civil action in the appropriate U.S. District Court..." Fogg Response at 5. While that may have been true in 1994, it is not true today. Over a dozen Class Agents represent the class and hundreds of Class Members have filed claims and have a stake in the outcome of this complaint. Fogg cites to no precedent in support of the premise that the original class agent, in a case that has been amended to include multiple class agents, has the power to unilaterally direct the course of the litigation. Scant evidence supports the premise that Fogg speaks for the class in any formal sense. It is natural that many Class Members have held Fogg in high regard as the man who initiated this complaint in 1994 and carried the torch for decades. But that respect should not be confused with authority. There is no evidence that he consulted with fellow Class Agents or obtained their authorization to file a civil action on behalf of the Class. On the contrary, numerous Class Agents affirmatively deny prior knowledge of or agreement with Fogg's attempt to move the case to federal court.

I note that Fogg's opposition to the Settlement Agreement, which he first expressed one week after a grant of preliminary approval, did not result in Class Agents moving to remove him as a Class Agent. It was his actions on March 19, 2024 that prompted the Motion. Through his eleventh hour federal district court filing purporting to terminate the Commission's jurisdiction over this thirty year old class complaint hours before a hearing on final approval of the Settlement Agreement, six months after the hearing was scheduled, and two years after the parties signed an MOU outlining the terms of the Agreement, Fogg demonstrated both poor judgment and a deep lack of consideration for the Class Members he purports to represent.[12] Indeed, for him to remain as a Class Agent at this point would be for him to serve "as the flag-bearer when he would rather see the castle burned to the ground." *Nunez v. BAE Systems San Diego Ship Repair, Inc.* 292 F. Supp. 3d 1018, 1061 (S.D. Cal. 2017). Fogg's submissions also raise concerns about his

[12] Fogg contends that he had "no choice but to terminate the proceedings at the 11th hour, the day prior to the Fairness Hearing, by filing the class action complaint in Federal court to protect the interests of the entire class." Fogg Response at 8. This position is difficult to understand, for at least two reasons. First, the Fairness Hearing was the opportunity for Fogg, and other objectors, to make the case that the Settlement Agreement should be vacated. Indeed, that is the *entire point* of a fairness hearing – to hear evidence and arguments about why the administrative judge should, or should not, grant final approval of the Settlement Agreement. Exercising what Fogg acknowledged is a "nuclear option," filing in federal court at the last minute and causing cancelation of the Fairness Hearing, is irrational if Fogg's goal is an order vacating the Settlement Agreement and directing the parties to either go back to the bargaining table or back into litigation. Second, Fogg offers no explanation of how starting all over again in federal district court with a complaint that does not even encompass the claims of many members of the Class, "protects the interest of the entire class." On the face of it, it seems to do precisely the opposite.

trustworthiness as a Class Agent. His submissions before the Commission and in his district court filing include numerous false statements, including his assertion in his federal court complaint that there has been no preliminary approval of a settlement agreement and no hearing in this matter. This is patently false, and Fogg knows it, because he asserted in his Notification of District Court Filing that the Fairness Hearing scheduled for the following day was "CANCELLED." Finally, Fogg's attempt to move the complaint to federal district court demonstrates that he has no interest in "vigorously prosecut[ing] the interests of the class" before the Commission, which makes him unfit to serve as a Class Agent.

Conclusion and Order

Fogg's Motions to Strike the Motion for his removal as a Class Agent and the Declarations submitted in support thereof are hereby DENIED for want of good cause. Because Matthew Fogg has demonstrated that he is no longer willing to "fairly and adequately protect the interests of the class" in the class complaint before the Commission, Class Agents' Motion to Remove Matthew Fogg as a Class Agent is hereby GRANTED, and Matthew Fogg is hereby REMOVED as a Class Agent. As soon as practical, I will issue an order for a Status Conference to prepare for resumption of the fairness adjudication.

It is so ORDERED.

For the Commission:

Sharon E. Debbage Alexander
Supervisory Administrative Judge

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