IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MATTHEW FOGG	*	
Plaintiff,	*	
v.	*	Case No. 1:24-cv-00792-CRC
MERRICK GARLAND, Attorney General,	*	
	*	
Defendant.	*	

* * * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STAY PROCEEDINGS

TABLE OF CONTENTS

I. CASES AND AUTHORITIES ii

II. RELEVANT FACTS 1

III. APPLICABLE LAW 4

IV. ARGUMENT 10

V. CONCLUSION 18

CASES AND AUTHORITIES

Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412 (5th Cir. 1998).............................. 8
Armstrong v. Manzo, 380 U.S. 545, 552, (1965) 5
Berry v. Schulman, 807 F.3d 600, 609 (4th Cir. 2015) 8
Davis v. N. Carolina Dep't of Correction, 48 F.3d 134, 138 (4th Cir. 1995) 6
Eubanks v. Billington, 110 F.3d 87, 95 (D.C.Cir.1997)... 8
Evans v. Jeff D., 475 U.S. 717, 726 (1986) 9
Grannis v. Ordean, 234 U.S. 385, 394 (1914)... 5
Hansberry v. Lee, 311 U.S. 32, 40 (1940) 6
In re Jiffy Lube Secs. Litig., 927 F.2d 155, 159 (4th Cir. 1991) 7
Keith v. Aldridge, 900 F.2d 736, 740–41 (4th Cir.1990)... 8
Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir.1987)........................ 7
Mathews v. Eldridge, 424 U.S. 319, 333 (1976) 5
Morris v. Affinity Health Plan, Inc., 928 F. Supp. 2d 805, 809 (S.D.N.Y. 2013) 9
Morrissey v. Brewer, 408 U.S. 471, 481 (1972) 6
Nilsen v. York County, 228 F.R.D. 60, 61–62 (D.Me.2005)... 7
Norfolk S. Corp. v. Chevron, U.S.A., Inc., 371 F.3d 1285, 1288 (11th Cir.2004) 8
Occidental Life Ins. Co. of California v. E.E.O.C., 432 U.S. 355, 361 (1977)................ 7
Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 211 (4th Cir.2009) 8
Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091, 1095 (4th Cir. 1982) 6
See *Parker v. Anderson,* 667 F.2d 1204, 1211 (5th Cir.1982) 7
Sloan v. Winn Dixie Raleigh, Inc., 25 F. App'x 197, 198 (4th Cir. 2002)....................... 8
Tardiff v. Knox Cnty., 567 F. Supp. 2d 201, 210 (D. Me. 2008)....................................... 8
Ted L., Class Agent v. Department of Veterans Affairs, EEOC DOC 0120182368, 2019 WL 1762014.. 5
U.S. ex rel. May v. Purdue Pharma L.P., 737 F.3d 908, 913 (4th Cir. 2013)................ 8
United States v. Purdue Pharma L.P., 600 F.3d 319, 329 (4th Cir. 2010)..................... 9

STATUTES

28 U.S. Code § 1331 6
29 C.F.R. §1614.409...11
29 C.F.R. 1614.107(a)(3) 5
42 U.S.C. s 2000e-5... 6

RULES

Fed R. Civ. P. 23(e)(4).. 7
Fed.R.Civ.P. 23(e) 7

MEMORANDUM

COMES NOW, Plaintiff Matthew Fogg ("Plaintiff" or "Mr. Fogg"), by and through his undersigned counsel submits this Memorandum in Support of his Opposition to Defendant's Motion to Stay Proceedings and in support thereof states as follows:

I. RELEVANT FACTS

1. At all times relevant Mr. Fogg was employed as a Federal Investigator for the United States Marshall Service (the "Agency").
2. The Agency is a bureau that operates under the direct supervision of the Attorney General of the United States.
3. On July 12, 1994, Mr. Fogg filed an administrative complaint of employment discrimination with the Equal Employment Office ("EEO") of the Agency.
4. On April 2, 1996, the EEO dismissed the claim and Mr. Fogg timely appealed to the Equal Employment Opportunity Commission (the "EEOC").
5. On October 24, 1997, the EEOC mistakenly closed the appeal administratively.
6. In 2004, the EEOC, on a successful petition by Mr. Fogg, reopened the appeal.
7. On May 26, 2006, the EEOC vacated the Agency's dismissal and remanded the case to the EEOC Washington Field Office.

8. On March 19, 2007, the Washington Field Office dismissed the class complaint and upon timely appeal by Mr. Fogg the EEOC Office of Federal Operations reversed the dismissal on July 11, 2012.
9. The case languished before the EEOC for twelve (12) years.
10. In 2023, the EEOC approved a preliminary settlement reached between class counsel and the Agency.
11. Mr. Fogg opposed the settlement and on November 1, 2023, informed the EEOC that he was terminating the services of the class counsel and again voiced his disapproval of the preliminary settlement.
12. Seeking redress, Mr. Fogg filed a pro se Complaint in this Court on March 19, 2024.
13. On March 19, 2024, Mr. Fogg notified the EEOC of his Complaint filed in this Court; Specifically, Mr. Fogg notified the EEOC that under 29 C.F.R. §1614.407, §1614.408, and §1614.409 the filing of a Complaint in Federal Court by the class agent on behalf of the class terminated the EEOC's jurisdiction over the appeal and that any decision taken by the EEOC after the Complaint is filed in federal court is not enforceable.
14. On March 20, 2024, the EEOC Administrative Judge mandated a "Fairness Hearing" to determine if EEOC had continuing jurisdiction after being informed of Mr. Fogg's complaint pursuant to 29 C.F.R. §1614.409.
15. The Agency objected to continued EEOC jurisdiction and in its brief advised the Administrative Judge that the Federal Courts had jurisdiction over the

matter now that Mr. Fogg had filed the federal complaint and notified the EEOC. (See Exhibit A).

16. The Agency pointed out that at the time of its filing the Agreement remained unsigned.

17. Class Counsel sought to have Mr. Fogg removed as class representative and maintain EEOC jurisdiction over the matter.

18. Over the Agency and the class representative's objections the EEOC maintained jurisdiction and removed Mr. Fogg as the class representative.

19. In July 2024, the EEOC approved a fifteen-million-dollar ($15,000,000.00) settlement of all claims with the class counsel in a settlement agreement (the "Agreement").

20. The EEOC approved the settlement, and it was sent to the Agency for a Final Agency Action ignoring the Federal Complaint.

21. Mr. Fogg then and continuously since then has objected strenuously to the fairness of the settlement and the means by which it was obtained.

22. Mr. Fogg by and through his objections, filed with the EEOC and by and through his Complaint filed in this court repudiated the Agreement and opted out.

23. The Agency, as demonstrated by its objection to continued EEOC jurisdiction, was aware that Mr. Fogg was opting out and repudiating the Agreement.

24. The Agency, class counsel, and the EEOC Administrative Judge were all aware that this EEOC appeal should have terminated pursuant to 29 C.F.R.

§1614.409 upon the filing of a class action by the class representative in federal court before a final EEOC decision was taken.

25. The Agency now seeks to validate the EEOC decision, that it opposed, to maintain jurisdiction while placing a hold on Mr. Fogg's right to individual and potentially a class relief.

26. This matter has now been delayed for thirty (30) years.

II. APPLICABLE LAW

When a class agent, acting in his capacity as a class agent, files a Complaint in a Federal District Court of competent jurisdiction purporting to represent the class the administrative judge must properly dismiss the administrative class complaints pursuant to 29 C.F.R. 1614.107(a)(3) (See *Ted L., Class Agent v. Department of Veterans Affairs*, EEOC DOC 0120182368, 2019 WL 1762014). Further, pursuant to 29 C.F.R. §1614.409 the effective of filing a civil action under 29 C.F.R. §1614.407 or 29 C.F.R. §1614.408 **shall** terminate the EEOC's processing of the appeal (emphasis added) and any EEOC decision issued after the complainant files suit in district court shall not be enforceable by the Commission (*Id*.).

It is a fundamental requirement of due process that the opportunity to be heard occurs in a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

The federal courts indisputably provide Class Agents ample "procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Class Agents can be heard on the very issues they seek to litigate before the EEOC. The Supreme Court recognized the "duty" of federal courts to examine potential conflicts amongst class members and protect the rights of parties. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

Federal statues allow a party to bring or remove any matter to the district courts of the United States any matter over which those courts have original jurisdictions (See *Davis v. N. Carolina Dep't of Correction*, 48 F.3d 134, 138 (4th Cir. 1995)). Pursuant to 28 U.S. Code § 1331 district courts have original jurisdiction on all civil actions under the constitution, laws, and treaties of the United States. Title VII creates a private right of action for employment discrimination and vests the federal courts with jurisdiction over such actions including without limitation a right of action pursuant to 42 U.S.C. s 2000e-5(f)(1) (1976) and district court jurisdiction 42 U.S.C. s 2000e-5 (f)(3).

Even the signing of an agreement does not preclude the EEOC from issuing an individual plaintiff a right to sue letter (See *Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091, 1095 (4th Cir. 1982)). "If a complainant is dissatisfied with the progress the EEOC is making on his or her charge of employment discrimination, he or she may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court. The 180-day limitation provides only that this private right of action does not arise until 180 days after a charge has been filed.

Nothing in s 706(f)(1) indicates that EEOC enforcement powers cease if the complainant decides to leave the case in the hands of the EEO rather than to pursue a private action." *Occidental Life Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355, 361 (1977). As such the right to pursue private action rather than leaving the case in the hands of the EEOC lies with the complainant/Plaintiff and not the EEOC (*Id*.)

Under federal law, federal class action settlements become effective against class members only through judicial approval. Fed.R.Civ.P. 23(e). Individuals are required to have clear and unambiguous options to opt out of a settlement. Fed R. Civ. P. 23(e)(4). In the absence of such clarity, and unless there are clear and new opportunities for class member to opt out a court may refuse to approve a class action settlement (See *Nilsen v. York County,* 228 F.R.D. 60, 61–62 (D.Me.2005)). Courts are required to consider five factors in assessing the adequacy of a settlement, including the degree of opposition to the settlement (See *In re Jiffy Lube Secs. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991)).

Class members and class representatives may be obligated to sign Agreements even if the agreement is in opposition to the individuals own interests (See *Parker v. Anderson,* 667 F.2d 1204, 1211 (5th Cir.1982)). A class representative acts as a fiduciary and should keep the class's interests in mind, even above his own interests, when it comes to signing certain documents (See *Kirkpatrick v. J.C. Bradford & Co.,* 827 F.2d 718, 726 (11th Cir.1987)). However, like all class members, the class representative had the right to opt-out of the settlement

agreement (See *Tardiff v. Knox Cnty.*, 567 F. Supp. 2d 201, 210 (D. Me. 2008)). Providing the Court an opt out notice serves to exclude class members from participation in the settlement (See *Sloan v. Winn Dixie Raleigh, Inc.*, 25 F. App'x 197, 198 (4th Cir. 2002)). "If a class action is more about individual monetary awards than it is about uniform injunctive or declaratory remedies, then the 'presumption of cohesiveness' breaks down and the procedural safeguard of opt-out rights becomes necessary." *Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015) (Quoting *Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412 (5th Cir. 1998)* ; See Also *Eubanks v. Billington,* 110 F.3d 87, 95 (D.C.Cir.1997)).

The traditional res-judicata inquiry is modified in cases where the earlier action was dismissed in accordance with a settlement agreement and/or a release (*See Keith v. Aldridge,* 900 F.2d 736, 740–41 (4th Cir.1990)). However, the legitimacy of a judgement based on a settlement agreement only has force based on the fact that the parties consented to it *(*See *U.S. ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 913 (4th Cir. 2013); See Also *Norfolk S. Corp. v. Chevron, U.S.A., Inc.,* 371 F.3d 1285, 1288 (11th Cir.2004). Settlement agreements operate the same principals as contracts and as such any preclusive effects of a settlement agreement should be measured by the intent of the parties (See *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.,* 556 F.3d 177, 211 (4th Cir.2009)).

Forcing a plaintiff to accept a settlement he is clearly opposed to from its inception would be wholly inequitable even if there is a failure to timely file a Notice of Exclusion. *Morris v. Affinity Health Plan, Inc.*, 928 F. Supp. 2d 805, 809

(S.D.N.Y. 2013), aff'd, 558 F. App'x 51 (2d Cir. 2014). "Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986)).

A plaintiff who is not bound by the settlement terms has the right to pursue and file his own claims before the agreement is signed (See *United States v. Purdue Pharma L.P.*, 600 F.3d 319, 329 (4th Cir. 2010)).

III. ARGUMENT

Matthew Fogg served this country honorably as a U.S. Marshall even when the effects of racially motivated policies and procedures hindered his career and the career of other African American Marshalls who worked with him. However, in 1994, he filed an EEO complaint with the Agency's EEO department and embarked on what would become a thirty-year odyssey of administrative stalling and misplaced notions of justice. At the end of a thirty-year uphill battle, Mr. Fogg was told that his class agent attorneys had agreed to a settlement that would provide the class members with a pittance and in exchange for fighting for justice for thirty years the Agency would throw a few dollars their way and dismiss the class members in much the same way as it had dismissed them and their concerns when they worked for the Agency.

Over those thirty years the EEOC tried repeatedly to wind down or conclude this case including, erroneously, dismissing the case in 1997 under the assumption that

Mr. Fogg did not want to proceed. It tried again in 2007 when it dismissed the appeal. In each instance, Mr. Fogg as the class representative returned the case to the administrative process and proceeded with the case, prevailing to the extent that the EEOC was essentially forced to continue the matter. Mr. Fogg's refusal to accept being dismissed became a thorn in the side of the EEOC and continued until he filed this Complaint in this Court.

In 2023, the class counsel and the Agency reached a preliminary agreement to resolve a thirty-year-old case for fifteen million dollars ($15,000,000.00). When presented with this offer, Mr. Fogg objected to the amount being offered as being unfair and wholly inadequate (See *In re Jiffy Lube Secs. Litig.*, 927 F.2d at 159). His opposition, joined by other members of the class was strident (*Id.*) and vocal, just as he had been throughout the thirty years of fighting to keep this matter alive. Mr. Fogg was unable to get his own attorneys to reject the agreement that he, as class representative and fiduciary for the class, rejected (See *Kirkpatrick,* 827 F.2d 718 at 726). Mr. Fogg attempted to remove the class counsel, notifying the EEOC as such on November 1, 2023. Frustrated at not being heard by either the EEOC Administrative Judge and his own counsel, Mr. Fogg opted for his federally protected right, if dissatisfied with the EEOC's handling of his matter, to circumvent the EEOC and bring an action in federal court (See *Occidental Life Ins. Co. of*, 432 U.S. 355 at 361). The case has been before the EEOC for well over twenty-five (25) years so there is no question about the 180 days that must elapse before a Plaintiff may exercise his right to see the federal courts intervention (*Id.*)

Pursuant to 29 C.F.R. §1614.409 once Mr. Fogg filed a complaint in district court, and duly notified the EEOC and all parties, the ability of the Commission to make a decision and enforce that decision was terminated. 29 C.F.R. §1614.409 is not ambiguous, specifically using the language "Filing a civil action under §1614.407 or § 1614.408 **shall** terminate Commission processing of the appeal" (emphasis added). The law does not provide an out for the EEOC to simply keep jurisdiction and render a decision. In fact, the law states specifically that any decision rendered by the EEOC, in this case the approval of the settlement, will not be enforceable.

What happened next is nothing short of an extraordinary attempt by the EEOC to coopt the judicial process, thumb its nose at Congress and 29 C.F.R. §1614.409, and to deny Mr. Fogg due process.

On a motion by class counsel, opposed by the Agency, the EEOC Administrative Judge took two actions: a) the AJ removed Mr. Fogg as the class representative, and b) the AJ retained jurisdiction over the matter essentially denying this Court jurisdiction. These actions would, should they be allowed to stand, upend the directive of Congress in 706(f)(1) that Federal Courts ultimately have jurisdiction over civil rights claims once the 180-day threshold has been met and would allow the EEOC to claw back claims, decide them, and even settle them with or without the consent of the plaintiffs. EEOC's own precedent and federal law, as found in 29 C.F.R. §1614.107(a)(3) are clear about the role of the Commission when a class agent acting in his capacity as a class representative files a complaint in Federal Court. (See EEOC DOC 0120182368 (2019)). There is nothing in 29 C.F.R.

§1614.107(a)(3) that permits an AJ to simply ignore a claim filed in Federal Court and proceed as though the class representative had not filed this Complaint. In addition, the AJ's response to the Federal Complaint was to remove Mr. Fogg as the class representative, a position he had had for over 30 years and at helm of this class compliant had guided the class through numerous attempts to end this matter. In essence the EEOC punished Mr. Fogg for opposing a settlement and taking his complaint to the federal court system as permitted by 706(f)(1) and 29 C.F.R. §1614.107 and removed him as the class representative.

There should be no argument that Mr. Fogg had the right and retains the right today to bring this matter before this Court. Federal law and precedent is clear that a matter can be removed to federal court whenever those courts have original jurisdiction (See *Davis*, 48 F.3d 134 at 138) and here this matter is clearly one that falls under the constitutional purview of this Court pursuant to 28 U.S. Code § 1331. 42 U.S.C. s 2000e-5(f)(1) (1976) gives Mr. Fogg the right to bring this suit and 42 U.S.C. s 2000e-5 (f)(3) gives this Court jurisdiction. 29 C.F.R. §1614.107(a)(3) required that the AJ dismiss the claims and allow them to proceed under this filing because at the time of the filing Mr. Fogg was still the class representative and acting on behalf of the class.

The EEOC's hands were not tied by an Agreement. Indeed, at the time of Mr. Fogg's filing of this Complaint, no agreement had been signed (See Exhibit A). Arguendo, the EEOC was acting under the guise of judicial efficiency and expediency, after thirty years of delaying, that still did not preclude the EEOC from

granting Mr. Fogg and any other objector to the unsigned settlement agreement a right to sue (See *Perdue*, 690 F.2d 1091 at 1095).

The EEOC decided that Mr. Fogg did not have the right to file in Federal Court contrary to standing law (See *Occidental Life Ins. Co. of*, 432 U.S. 355 at 361) and sought to force Mr. Fogg to accept the Agreement. In removing Mr. Fogg as class representative, the EEOC sought to remove his voice but did not remove him from the Class thereby also binding him to the Agreement despite his vehement opposition. Here, in this Motion, the Agency now seeks to continue that process by binding Mr. Fogg to the Agreement, staying this proceeding, and then using res judicata to deny Mr. Fogg the ability to pursue his claims outside of the EEOC Agreement.

The Agency raises the issue of potential res judicata and so it should be addressed. First, it should be noted that per the Agency's own filings opposing the EEOC's continued jurisdiction no agreement was signed when Mr. Fogg filed his federal Complaint. Even if the agreement had been signed, Mr. Fogg was removed from the class over his strident rejection of the Agreement. In other words, Mr. Fogg did not consent to the Agreement once the final version was presented to him (See *U.S. ex rel. May*, 737 F.3d 908 at 913). Thus, we come to the Agency's contention that Mr. Fogg should be bound by a document he signed that precludes him from bringing suit against the Agency despite his repudiation and rejection of the settlement Agreement, under contractual principals, that clearly demonstrate his intent not to agree to the Settlement (See *Ohio Valley Envtl. Coal.,* 556 F.3d 177 at

211). The Agency points to an early document signed by Mr. Fogg as evidence that his later repudiation and rejection of the Agreement, his filing of a claim in this Court prior to the Agreement being signed, his removal as the class agent, and the questionable jurisdiction of the EEOC to continue with the Settlement should all be ignored by this Court.

Mr. Fogg was a fiduciary who felt obligated to sign the Claim Form (Exhibit B) (See *Anderson,* 667 F.2d 1204 at 1211) knowing that a failure to sign could demonstrate he was not acting appropriately for the class. The form itself should cause the Court pause.

It is important for the Court to note that the Claim Form (See Exhibit B) is disguised as a questionnaire and hides the substantial loss of rights within the boilerplate text of the otherwise interactive form. While this interactive form directs the class member to a website conspicuously entitled "Notice of Resolution" (See Exhibit C) by providing a link in the form to usmssettlement.com, there is no language pertaining to a class members ability to opt out anywhere on the form. There is also no opt out information on the Notice of Resolution page. So, while the Notice of Resolution webpage goes into detail about how a class member can voice their opposition to the proposed settlement, there is nothing on that webpage that allows a class member to opt-out of the fifteen-million-dollar ($15,000,000.00) settlement which provides for individual payments, ignoring the procedural safeguard of an opt out provision (See *Schulman*, 807 F.3d 600 at 609).

Mr. Fogg never believed that this Agreement was in the best interest of the class and repeatedly demonstrated that through his numerous filings with the EEOC, his filing of this complaint (in a failed attempt to remove this matter to this Court and out of the EEOC), and the EEOC's removing of Mr. Fogg as a class representative. If anything, the signing of this document demonstrates how the EEOC got it wrong when it removed Mr. Fogg as class agent but does nothing to further the argument that Mr. Fogg should be forced to accept a settlement he rejects (See *Morris*, 928 F. Supp. 2d 805 at 809). There is a well-established principal in the 4th Circuit that does not authorize a court, any court, to require a party to accept a settlement to which they have not agreed (See *Evans*, 475 U.S. 717 at 726). As such, pursuant to Rule 23(e)any class action settlement requires the approval of a court, but the court may not require parties to accept the terms of the settlement to which they have not agreed (*Id*.) In this case, the Agency is seeking to upend this principal by forcing Mr. Fogg to accept a settlement to which he does not agree, of which they had ample notice and cannot claim surprise. If the Agreement is not binding on Mr. Fogg, then he has the right to file and pursue his claims independent of the Settlement which he did prior to the signing of the Agreement (*Purdue Pharma L.P.*, 600 F.3d 319 at 329).

Given that the EEOC had notice of Mr. Fogg's opposition and filing of this Complaint, that the Agency opposed the EEOC maintaining jurisdiction, and that under the principals of contract there was no meeting of the minds the Agreement itself should have been placed on hold until this Court could determine jurisdiction

and examined various potential conflicts with the class (See *Hansberry*, 311 U.S. 32 at 40). One of the critical roles of the Federal Court system is to provide the Class Agent with "procedural protections as the particular situation demands." *Morrissey*, 408 U.S. 471 at 481). In this case, that means freeing Mr. Fogg and the class from an enforced settlement Agreement and allowing the matter to proceed.

In addition to this filing and concurrently with it, Mr. Fogg is petitioning this Court to rule on the jurisdictional issue brought forth in this matter. By retaining jurisdiction after Mr. Fogg had filed in Federal Court and after the 180-days had expired the EEOC ruling undermines the due process schema laid out by Congress in 28 U.S. Code § 1331 and 42 U.S.C. s 2000e-5(f)(1). Specifically, in this case it denies Mr. Fogg due process and makes him subject to the later signed agreement.

Finally, as the Agency itself argued in its opposition to the EEOC's continued jurisdiction once Mr. Fogg had filed a federal complaint, every plaintiff has the right to be heard in a meaningful manner and in a meaningful time. *Eldridge*, 424 U.S. 319 at 333; *Manzo*, 380 U.S. 545 at 552; *Grannis*, 234 U.S. 385 at 394. The Agency now reverses its stance and moves to have this matter postponed even further, and wants this Court to stay Mr. Fogg's case while giving credence to the EEOC's accepting of the Agreement, denying of this Court's jurisdictional authority, rewriting of the due process outlined in 28 U.S. Code § 1331 and 42 U.S.C. s 2000e-5(f)(1) and forcing Mr. Fogg into a situation where he cannot seek relief for his claims under this settlement to which he never agreed, as class agent or otherwise.

IV. CONCLUSION

Justice demands that 30-years after filing his complaint Mr. Fogg, and those who chose to join him, have their case heard on the merits. There is no legitimate question of res judicata because Mr. Fogg filed this matter before any Agreement was signed or approved. Under the law, specifically 29 C.F.R. §1614.409, the Settlement Agreement approved by the EEOC is not enforceable because Mr. Fogg filed a complaint in district court prior to a final decision by the EEOC and the EEOC chose to ignore the law and render a decision anyway.

Mr. Fogg never agreed to the settlement Agreement and his violent opposition to it, including his filing of a class complaint in district court, led to the EEOC Administrative Judge and the class counsel to engage in a legal sleight of hand, subsequently removing Mr. Fogg as class representative and then, satisfied that Mr. Fogg was no covered by 29 C.F.R. §1614.409 (since according to them he was no longer class representative) certifying the Agreement. Essentially, unless this Court concedes that the EEOC may simply remove the class counsel after he has filed a class complaint in district court so that it can maintain jurisdiction and render a judgement, something not permitted under 29 C.F.R. §1614.409, it cedes jurisdiction to the EEOC that Congress never intended and that the law specifically prohibits.

In addition, the opt-out clauses would have to be revisited and individuals should have a clear way, including if necessary a new way, to opt out of the settlement while this Court is reviewing it (See *Nilsen,* 228 F.R.D. 60, 61–62),

bringing our district in line with the idea that class action plaintiffs cannot be bound to agreements they oppose which deny them of their substantive constitutionally guaranteed rights.

In conclusion the Agency's Motion to Stay should be denied and the Court should order:

1. That this Case shall continue;
2. That the EEOC's approval of the Agreement pursuant to 29 C.F.R. §1614.409 is vacated;
3. That the Agency provide an opt out mechanism for all class members for any settlements; and
4. That Mr. Fogg reinstated as the class representative.

Dated: 10/23/2024

Respectfully Submitted,

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End

(12-2-24) Click Below….

U.S. Equal Employment Commission (EEOC) – Dr. Matthew Fogg's EEOC Response To "Agency Notice of Relevant Filing" In DC Federal Court.