UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE

VELVA B., et al.,	)	
	)	EEOC Hearing No. 520-2010-00280X
Complainant,	)	
	)	OFO Appeal Nos. 0720160006
vs.	)	0720160007
	)	
MEGAN J. BRENNAN,	)	OFO Request Nos. 0520180094
Postmaster General,	)	0520180095
United States Postal Service,	)	
	)	Agency Case No. 4B-140-0062-06
Agency.	)	

POSTAL SERVICE'S RESPONSE AND OBJECTION TO MOTION FOR ENTRY OF CASE MANAGEMENT ORDER AND PROPOSED CASE MANAGEMENT ORDER

The United States Postal Service (Postal Service) files its Response and Objection to the February 11, 2019 Motion for Entry of Case Management Order and Proposed Order filed by counsel for Phase I Class Agent Velva B., Thomas & Solomon LLP and Kator, Parks, Harris & Weiser, P.L.L.C. (counsel), and its proposed Case Management Order.

I. Introduction.

The individual claims for relief process set out by the Office of Federal Operations (OFO) and Management Directive 110 (MD-110) is not discretionary. The MD-110, Section 1614.204 of Title 29 C.F.R., and the Commission's orders set forth the procedures for processing class complaints of discrimination and individual claims for relief. Moving counsel proposes a plan that not only deviates radically from the process ordered by the OFO, but also subverts the mandated individual claims process. The Postal Service files with this Response and Objection its proposed Case Management Order for the Phase II individual claims process, which unlike

moving counsel's submission, complies with the orders issued in this case, the MD-110, and Commission regulations.

II. The Phase II process set forth in the MD-110 is not discretionary.

Counsel's proposed case management order deviates wildly from the explicit instructions of the OFO, MD-110, and federal regulations governing both the Commission and the Postal Service. They provide no explanation or acknowledgement of this deviation, nor do they provide any legal support for their assertion that the Administrative Judge in this matter can or should disregard OFO orders, federal regulations, and the sovereign immunity of the Postal Service.

In its November 7, 2018 Order (Order), the OFO ordered the following dispute process for all parties to follow:

> Pursuant to the Commission's Order, the Agency **will** notify the AJ of its intent to dispute an individual claim for relief. **The AJ will** issue an order tolling the 90-day period within which the Agency is required to issue a decision on an individual claim. **The AJ will** also issue an order advising the Agency to provide a statement in support of its decision to dispute a class member's claim, with any supporting evidence, within fifteen (15) days of receiving the AJ's order, providing a copy to the individual. The class member **will** then have fifteen (15) days from the date of service of the Agency's submission to submit to the AJ a statement, and any documents, in support of his or her claim, providing a copy to the Agency.
>
> We note that **the AJ has discretion** to enlarge the 15-day period at the written request of either party, or on her own motion. **The AJ also has the discretion** to obtain additional information or hold a hearing to further develop the record regarding an individual's claim.
>
> At the conclusion of the fact-finding, **the AJ will** issue a decision concerning the class member's claim to the Agency and the class member. The AJ's decision **will** advise the Agency that the 90-day period for issuing a final order on the claim will resume upon receipt of the AJ's decision. If the Agency does not issue a final order within the 90-day period, the AJ's decision becomes the final order of the Agency.[1]

The Order follows the MD-110's directives, giving the Administrative Judge and the parties no opportunities to deviate from the process mandated by that directive. Neither the

[1] Order at 5 (citing EEO MD-110, Chapter 8 § XII(C)(2)-(4)) (emphasis added).

MD-110 nor the Order contemplate the Commission abdicating its statutory mandate by delegating decision-making authority to special masters. It also does not authorize the appointment of a unitary "class counsel" in the individualized Phase II claims process, nor does it allow the AJ to appoint such a counsel over the express objections of individual claimants, forcing them to pay 30% of their recovery to a law firm they did not choose. And it certainly does not contemplate allowing said counsel to commandeer the process for their own financial gain, hand-picking their own clients to receive adjudication and potential relief in batches of 50, while other claimants who are *pro se* or have other representatives are shut out of the process and denied the right to have their claims heard.

The Order also clearly lays out the procedure for processing disputed claims, including which portions are committed to the AJ's discretion—enlargements of the 15-day period, and the AJ requesting additional information or holding a hearing; and which portions are mandatory—the AJ tolling the 90-day deadline, each party submitting a statement, the AJ issuing a decision on the claim, and a final order implementing the AJ's decision.

III. Neither Phase I Class Counsel nor the Commission can force claimants to be represented by counsel in the Phase II individual claims process.

A. Basic Statutory Construction - the MD-110 and 29 C.F.R. § 1614.204(l).

The MD-110 and Section 1614.204 of Title 29 C.F.R. clearly set forth the Commission procedures for processing class complaints of discrimination and individual claims for relief. There is nothing in the MD-110 or Commission regulations that permits—much less mandates—that a "class agent" or "class counsel" be bound to represent individual claimants after the class complaint has been processed (Phase I) and the individual claims process (Phase II) begins. While the MD-110 clearly contemplates a "class agent" and "class counsel" during the Phase I liability process, there is no reference to the class agent or class counsel after a liability

determination has entered, the class complaint process has closed, and the Phase II individual relief process has begun.

A class agent is defined as "a class member who acts for the class **during the pendency of a class complaint**." 29 C.F.R. § 1614.204(3) (emphasis added).[2] But the class, as a single entity, no longer exists after the liability determination because a final decision was rendered; what remains now are individual claimants. *See* 29 C.F.R. § 1614.204(j). The claims asserted by the Class Agent in Phase I have been finally adjudicated and, therefore, she no longer has standing to represent the interest of the individual class members. Indeed, a class agent would be wholly inappropriate in the individual relief phase because the class agent has been awarded relief and does not share common interests with individual claimants. 29 C.F.R. § 1614.204(a)(2). This is why fees are awarded to class counsel at the conclusion of Phase I and are not provided for in the regulations regarding individual relief. *See* 29 C.F.R. 1614.204(l)(1).

In Phase II, claims for relief are to be submitted by individual claimants, and claimants are entitled to have their claims individually adjudicated and to be represented by an attorney or non-attorney representative of their choice, or to proceed *pro se*. *Compare* MD-110 Ch. 8, I-X; 29 C.F.R. § 1614.204(b)-(i) (citing "*class complaint*," "*class agent*," and the entire "*class*") *with* MD-110 Ch. 8 XII; 29 C.F.R. § 1614.2014(l) Relief for Individual Class Members (citing "*individual claims*" submitted by "*each member*" of the class). The lack of reference in the MD-110 to either a class agent or class counsel in the Phase II individual relief process, after clearly specifying their role in Phase I, suggests that the statute was constructed to prevent class counsel or a class agent from binding individual claimants to representation without their consent once the case has moved into the individual adjudication phase.

[2] Counsel asserts that they were appointed to represent the class. This is incorrect. The *Class Agent* was appointed to represent the class in Phase I processing of the class complaint, and counsel served as counsel to the Class Agent.

Individual claimants, therefore, have the right to designate their own counsel or other representative of their choosing or to proceed *pro se* on their claim for relief—a fact recognized on counsel's own website and the solicitation materials they sent to putative class members, which required individuals to affirmatively indicate that they wanted counsel to represent them on their individual claim (albeit by the improper method of using the claim form as both a legal document and the retainer agreement binding the individuals to pay counsel 30% of whatever they may receive on their claim for relief).[3] There is simply nothing supporting counsel's argument that they are "automatically" counsel for every individual claimant in the Phase II individual claims process, and their own statements and actions belie their argument.

B. Claimants have the right to designate their own attorney or other representative or to proceed pro se on their individual claim.

Despite the right of individual claimants to choose their own counsel or have no counsel, moving counsel claims to represent "the interests of all Class Members," and they have filed lists of every individual claimant they purport to represent, claiming to identify "all class members who were known to have filed claims for individual relief and identified Class Counsel as their representative."[4] But their role as "class counsel" does not extend into Phase II. Individual claimants may have designated them as their representative on their individual claim for relief,[5]

[3] *See* http://www.nrpclassaction.com/#thefaqs (Q: Are you still my attorneys during this claim process? Will your firm (and Kator Parks) still represent me if I do not use your claim form? A: The EEOC approved us as Class Counsel . . . **we will represent you in the claim process *if* you use our claim form and send us a signed copy of our completed claim form, which indicates that you want us to represent you.**) The claim form drafted by and sent to all putative class members by counsel is attached as **Exhibit A**.

[4] *See, e.g.*, Notice of Appeal of FADs filed on July 12, 2018; supplemental lists dated July 23, 2018; July 30, 2018; August 6, 2018; August 9, 2018; August 16, 2018; August 20, 2018, August 27, 2018, September 7, 2018 and September 25, 2018.

[5] The Postal Service sent a contact information update and designation of representation form to all claimants with the notices of vacated FADs asking claimants for updated contact information and their designated representative, if any, on their individual claim for relief. A total of 3,545 claimants have affirmatively designated moving counsel as their representative on their individual claim for relief, far less than the 28,000+ individuals they claim to represent.

just as claimants have identified other attorneys or non-attorney representatives or decided to proceed *pro se*.

Numerous individuals who counsel claims to represent have affirmatively stated that they do not want counsel to represent them.[6] By way of example, claimants have made the following statements regarding moving counsel:

- Claimant M-029181 stated "I do not retain or designate Class Counsel-the law firms of Thomas & Solomon, or Kator, Parks, Weiser & Harris- to represent me in my Claim. I have not accepted the legal representation from Class Counsel. I request that all correspondence, pleadings, documents and all other items in this mater [sic] be provided only to myself."[7]

- Claimant M-34112 stated "I have not been able to get in contact with the law firm of Thomas & Solomon so at this time I am 'Not' retaining them to be my legal representative but reserve the right to do so in the future."

- Claimant M-036958 stated "I [] do not want legal representation by your law firm Thomas & Solomon in which I would acquire representation costs/fees."

- Claimant M-065597 stated "*Important* I do Not want to be represented by Thomas & Solomon LLP the Employment Attorneys!" [8]

Also included on lists of individuals moving counsel claims to represent are claimants who have affirmatively stated they do not want to assert a claim for relief in this matter. For example:

- Claimant M-030622 wrote "I am opting-out as a class member under the Postal Service National Reassessment Program. The services of the law firm of Thomas & Solomon and the law firm of Kator, Parks, Weiser, & Harris are not accepted."

[6] The examples provided are merely illustrative of the numerous claimants who have vehemently rejected counsel as their representative in Phase II, and individual claimants should not be required to affirmatively disavow such representation, by moving counsel or any other representative. Additionally, claimants should not be forced to pay moving counsel 30% of any recovery on their individual claim, regardless of whether they have designated them as their representative, plus pay their actual designated representative any fees or costs owed, potentially leaving claimants with less than half of any recovery on their individual claim.

[7] Counsel purports to have a lien on this claimants' claim. *See* Lien asserted by counsel against all individual claims for relief, attached as **Exhibit B**, at 666.

[8] *See* Illustrative examples, attached as **Exhibit C**.

- Claimant M-087859 wrote "Please take my name on reverse side out of this. I misunderstood your 1st letter all of mine worked out for the good. I have no complaints just giving you information that I tried to explain was all good. I don't want to be in any lawsuit. Thank you."[9]

- Claimant M-025511 wrote "I received a call from Thomas & Solomon LLP asking if I was going to file a claim. I explained I am still receiving benefits via US DOL, OWCP and see no reason. I was advised to file anyway because it doesn't matter. I have read and reread the various details required for a claim and none of the requirements make me eligible."

- Claimant M-034251 wrote "I have no problem with past or present treatment for any injury treatment by the US Postal Service. NO Settlement is necessary."[10]

Counsel claims to represent thousands of individual claimants who have designated other counsel or another representative, have indicated that they do not wish to file a claim, or have indicated that they do not have counsel and are acting *pro se*.[11] Based on these circumstances, counsel appears to be vastly overstating the number of individuals they represent in an effort to unduly influence the Phase II process and to collect fees and costs as "class counsel" from both the Postal Service **and** every claimant who has filed an individual claim for relief. Counsel's assertion of representation of all claimants is demonstrably false and procedurally improper, as they can only represent those individuals who have knowingly engaged them as counsel and provided a proper designation of representation naming them as their designated representative in the Phase II process. Counsel's references to this being a "no opt out" class likewise apply only to the Phase I liability process, which has concluded, and is not implicated in the individual claims process.

[9] Counsel purports to have a lien on this claimants' claim. *See* Exhibit B, at 145.
[10] *See* Illustrative examples, attached as **Exhibit D**.
[11] Of the individual claimants' claims that counsel purports to have a lien on, 2,316 have affirmatively stated that they do not have representation or have designated other counsel according to the returned contact update sheets received to date. *See* Exhibit B.

C. Equity mandates allowing individuals to designate a representative of their choice or to proceed pro se.

Allowing counsel to be appointed "class counsel" for every individual claimant would only serve to enrich counsel at the expense of individual claimants and, where applicable, the designated representatives they have chosen to represent them. It would be unfair to issue an order that requires every individual claimant to pay counsel 30% of any amount paid to them on their claim, which as more fully set forth below is what counsel seeks to do. Counsel's improper attempt to inject themselves into the Phase II individual claims process would deprive individual claimants of their right to designate their own representative or to proceed *pro se*, force claimants to pay attorneys' fees to a representative they have not designated (except for those claimants who have, in fact, designated counsel as their representative), and allow counsel to complicate and delay processing and potential settlement of individual claims for relief.

IV. The Commission cannot order the Postal Service to pay quarterly bills for counsel's alleged "ongoing" attorneys' fees and costs.

The class-action device was not intended "to create a cottage industry for class action attorneys that would grant them 'lifetime income.'" *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 625–26 (6th Cir. 2013) (citing *Alliance v. City of Chicago*, 356 F.3d 767, 773 (7th Cir. 2004) ("The class-action device is not intended to be a lawyers' gravy train."); *see also Hensley v. Eckerhart*, 461 U.S. 424, 446 (1983) (Brennan, J., concurring and dissenting) (class action fee awards are not indeed to be a "relief fund for lawyers"); *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (class action fee awards "were never intended to produce windfalls to attorneys . . . ."). This type of "gravy train" is precisely what counsel asks the Commission to grant them here, regardless of what is best for individual claimants.

Counsel's intent to treat this case as an income stream is exemplified by the Fee Petition they submitted in their role as Phase I class counsel, a role that terminated at the close of Phase I. Counsel submitted an Attorneys' Fees and Costs Petition demanding $18 million in fees and costs, which the Postal Service challenged as grossly inflated and lacking veracity. The Fee Petition submitted by counsel includes, for example, entertainment expenses including nightclub and movie theatre charges, thousands of dollars for extravagant dinners for counsel, fees and costs for first class airfare, unexplained trips where counsel billed no time to the case, and extended stays for counsel at luxury hotels.[12]

One egregious example of these excesses is the over $100,000 in fees and costs charged for a trip to Austin, Texas for a single 3-hour meeting described only as "meeting with co-counsel for case strategy." The five attorneys who went on this trip collectively billed over 80 hours of time, at claimed hourly rates of $1,008 to $1,200 per hour, for the 3-hour meeting, while they enjoyed multiple nights of hotel stays at a cost of over $1,200 per night, a steakhouse dinner with a charge of $492.25, and the day of the 3-hour meeting, a $172.25 dinner followed by a night out at a bar/nightclub, all of which was included in their $18 million request.[13] This is but one example of the gross excesses counsel has charged for in this case. There is no doubt that—if permitted to do so by the Commission—they will continue their grossly exorbitant billing practices under the guise of their claimed role as "class counsel" in the individual relief process.

Counsel not only seeks to be paid by the Postal Service, but also by all individual claimants, regardless of whether the claimant has actually designated them as their representative in the Phase II individual claims process. Counsel has demanded—via a claim form which they

[12] *See* Postal Service's Dec. 3, 2018 Response to Class Agent's Appeal of Final Agency Decision on Phase I Attorney's Fees and Costs.
[13] *See id*., and attachments thereto.

sent to all putative class members—that every individual claimant pay them 30% of any recovery, regardless of whether the individual terminates their services. That claim form states: "From **any** recovery, we will receive **30% of the gross value or amount as a fee** ("Contingency Fees"). . . **If you terminate our representation of you, this agreement will entitle us to payment of the Contingency Fees from any recovery you ultimately obtain**" (emphasis added).[14] By simply using the one-page, generic claim form, which counsel sent to putative class members and repeatedly suggested claimants use, claimants have purportedly agreed to pay counsel 30% of the amount or value of anything they recover, regardless of whether the individual terminates the attorney-client relationship at any time, and even if counsel has expended no time on their individual claim.

In addition to demanding that the Postal Service pay them quarterly, and obligating every individual claimant to pay them 30% of any amounts recovered on their claims, counsel also submitted a purported "lien" on any amounts awarded or paid to individual claimants in Phase II.[15] The Postal Service is aware of no authority permitting counsel to place such a lien on claimants, which appears to be spurious, for any and all amounts awarded, regardless of whether or not the claimant has designated them as their counsel.[16]

There is no Commission authority to allow counsel to be paid by the Postal Service for alleged "ongoing attorney's fees and costs." Any counsel or representative's right to recover fees and costs, if any, cannot be determined until after the claims of those individuals who have designated a representative in the Phase II process have been adjudicated on the merits. Accordingly, Counsel's demand to submit periodic bills to be paid by the Postal Service must be

[14] *See* Exhibit A.
[15] *See* Exhibit B.
[16] By way of example, counsel has placed a purported lien against Claimant M-072333, Exhibit B, attachment, at 260, and this claimant is represented by designated representative Attorney Elaine Wallace.

denied and should not be included in the case management order. Counsel also cannot claim a right to recover payment from individual claimants who have not affirmatively designated them as their representative in the individual claims process. It is for the individual claimants—not counsel—to determine if they want to be represented and by whom.

V. The Commission lacks authority to appoint special masters.

Counsel requests that individual claims be reviewed and adjudicated by special masters at the Postal Service's expense. Counsel's request must be denied because: (1) only administrative judges are authorized to adjudicate claims; (2) the Commission lacks authority to appoint special masters; and (3) the Commission lacks authority to order the Postal Service to bear the cost of adjudication.

A. Only AJs are authorized to adjudicate individual claims for relief.

The Commission's regulations, the MD-110, the EEOC's Administrative Judge's Handbook, and Commission's orders in this case all explicitly provide that only administrative judges are authorized to adjudicate individual claims for relief. Because the Commission's regulations do not allow administrative judges to delegate this authority, special masters cannot review or adjudicate individual claims for relief.[17]

Since the Commission has exclusively authorized administrative judges to adjudicate the individual claims in this case, moving counsel's request for special masters must be denied. After the Commission's regulations and the MD-110, the OFO's decisions in this case constitute the most relevant and binding authority with respect to the individual claims process. In the OFO's September 25, 2017 Decision, the Commission specifically and exclusively ordered that "**administrative judges** shall retain jurisdiction over the complaint in order to resolve any

[17] *See* 29 C.F.R. § 1614.204(l) (no provision for AJ to delegate authority or appoint special masters).

disputed claims by class members,"[18] and that "[t]he **administrative judge** may hold a hearing or otherwise supplement the record on a claim filed by a class member."[19] When the OFO issued its March 2018 Order, the Commission reiterated that "the **AJ** is the appropriate person to manage the individual claim relief process for class members . . . ."[20] Moreover, in its November 7, 2018 Order, the OFO emphasized that it would be "**beyond the scope of 29 C.F.R. § 1614.204(1) or EEO MD-110 Chapter 8 § XII to appoint a Special Master to assist in the adjudication of the disputed claims for individual relief**."[21]

The Commission's regulations and guidance confirm that administrative judges have exclusive authority to adjudicate individual claims for relief. Consistent with the above-referenced OFO orders in this case, the Commission's regulations provide that **"[a]dministrative judges** shall retain jurisdiction over the complaint in order to resolve any disputed claims by class members," and "[t]he **administrative judge** may hold a hearing or otherwise supplement the record on a claim filed by a class member."[22] During Phase I summary judgment briefing, moving counsel themselves acknowledged that Commission regulations require administrative judges to adjudicate individual claims for relief:

> Notably, **under the EEOC class complaint regulations**, a finding of class-wide liability in Phase I does not eliminate the opportunity for the Agency to argue for a finding of no liability or no relief as to individual Class Members in Phase II. Indeed, the Agency has three opportunities in Phase II to contest whether an individual Class Member satisfies the definition of "disabled." First, the Agency has the opportunity to render its own determination and deny certain relief to each Class Member claimant who does not (in the view of the Agency) satisfy the definition of disabled. Second, if the Class Member claimant does not agree with an Agency finding of no relief, then the Agency has an opportunity to prove **to the Administrative Judge** that the Class Member does not satisfy the definition of disabled and therefore is not entitled to certain relief. Third, **if the Administrative**

[18] Sept. 25, 2017 OFO Decision, at 40 (quoting 29 C.F.R. § 1614.204(l)(3)) (emphasis added).
[19] *Id.* at 41 (emphasis added).
[20] March 9, 2018 OFO Decision on Request for Reconsideration, at 5 (emphasis added).
[21] November 7, 2018 OFO Decision, at 6.
[22] 29 C.F.R. § 1614.204(l)(3) (emphasis added).

> **Judge** issues a determination in favor of the Class Member claimant, the Agency may argue to the Office of Federal Operations that the Class Member claimant does not satisfy the definition of disabled.[23]

Because the Commission's regulations unambiguously provide that administrative judges must adjudicate individual claims, counsel's request for appointment of special masters must be denied.

B. There is no legal authority for appointment of special masters.

Counsel cites no legal authority that would allow the Commission to appoint special masters.[24] Special masters are not mentioned or contemplated in the MD-110, Enforcement Guidance publications, or the Commission's regulations. No Commission case holds—or even suggests—that the Commission has authority to appoint special masters.

There are only four recognized sources of authority to appoint special masters: (1) Fed. R. Civ. P. 53; (2) inherent powers of Article III courts; (3) the Magistrates Act, 28 U.S.C. § 631 *et seq.*; and (4) consent of the parties,[25] none of which allow the Commission to appoint special masters in this case. The first and most frequently cited source of authority to appoint special masters is Rule 53 of the Federal Rules of Civil Procedure. But only Article III courts are permitted to exercise authority granted by the Federal Rules of Civil Procedure, which "govern the procedure in all civil actions and proceedings in the United States district courts."[26]

The Department of Justice Office of Legal Counsel (DOJ) has clarified that "[t]he Federal Rules of Civil Procedure do not even apply to EEOC proceedings."[27] Consistent with

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[23] Class Agent's Opposition to Agency Motion for Summary Judgment, at 10 (Oct. 17, 2014) (emphasis added).
[24] Motion for Entry of Case Management Order, at 6 (Feb. 22, 2019). The federal cases cited by counsel do not support their position that the EEOC can appoint special masters. *See, e.g.*, *Williams v. Macon Cty Greyhound Park, Inc.*, 2013 WL 1337154 (March 29, 2013) (no appointment of special masters, decision to certify class reversed on appeal).
[25] *See* Margaret G. Farrell, The Role of Special Masters in Federal Litigation, SG046 ALI-ABA 1005, 1009. The Postal Service **does not consent** to the appointment of special masters.
[26] Fed. R. Civ. P. 1.
[27] EEOC's Authority to Impose Monetary Sanctions Against Fed. Agencies for Failure to Comply with Orders Issued by Admin. Judges, 2003 WL 24151769, at *5 (O.L.C. Jan. 6, 2003).

the Rules' general limitation of authority to federal courts, Rule 53 only authorizes "a court" to appoint special masters.[28] Not a single Commission case has cited Rule 53 or suggested that Rule 53 might empower the Commission to appoint special masters. Therefore, Rule 53 does not authorize the Commission to appoint special masters.

The second source of authority to appoint special masters is the inherent equity powers of the Article III courts.[29] But "Agencies have no inherent powers . . . and may act only because, and only to the extent that, Congress affirmatively has delegated them the power to act."[30] For this reason, the DOJ has confirmed that the Commission lacks the scope of inherent powers available to Article III courts.[31]

The third source of authority to appoint special masters is the Magistrates Act, which created the role of magistrates and authorized Article III courts to refer matters to magistrates to act as special masters.[32] However, the authority to appoint magistrates as special masters is limited to "[t]he judges of each United States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands . . . ."[33] Accordingly, the Magistrates Act does not grant the Commission authority to appoint special masters. The fourth and final source of authority to appoint special masters is the consent of all parties.[34] Here, the Postal Service **has not, does not, and will not** consent to the appointment of special masters.

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[28] Fed. R. Civ. P. 53(a)(1).
[29] *See* Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 738 (2001) (quoting *Chambers v. NASCO, Inc*., 501 U.S. 32, 43 (1991)).
[30] *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring) (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").
[31] *See* EEOC's Authority to Impose Monetary Sanctions Against Fed. Agencies for Failure to Comply with Orders Issued by Admin. Judges, 2003 WL 24151769, at 6 (O.L.C. Jan. 6, 2003).
[32] *See* 28 U.S.C. § 631(a).
[33] *Id.*
[34] *See* Margaret G. Farrell, The Role of Special Masters in Federal Litigation, SG046 ALI-ABA 1005, 1009.

Counsel cites no Commission precedent for appointing special masters. Instead, they cite a treatise which discusses possible treatments of class actions in federal district court,[35] and a federal district court case that cites to the same treatise and ultimately did not involve appointment of special masters as the class certification was reversed on appeal.[36] Counsel goes on to cite: (1) a federal district court case where both parties had agreed to using special masters, but disagreed on the source of those special masters;[37] (2) an unreported federal district court case with no apparent objection from the parties regarding using a special master—where a single special master was appointed to determine compliance only and was to be eliminated after injunctive relief was complete—not to adjudicate claims and determine whether individuals were class members, qualified individuals with a disability, or entitled to specific relief;[38] (3) a federal district court case where a special master was appointed in conjunction with a consent decree;[39] and (4) a case discussing the authority of a federal district court to appoint special masters under federal rules.[40] They cite no Commission case law authorizing the Commission to appoint special masters without the consent of both parties, because such precedent and authority does not exist.

Because none of the recognized sources of authority apply here, the Commission lacks authority to appoint special masters. Consequently, counsel's request for special masters must be denied.

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[35] Newberg & Conte, Newberg on Class Actions § 24.122 (3d ed. 1992).
[36] *Williams v. Macon Cty. Greyhound Park, Inc.*, 2013 U.S. Dist. LEXIS 45355 (M.D. Ala. Mar. 29, 2013), *rev'd* 562 Fed. Appx. 782 (11th Cir. 2014).
[37] *United States v. City of New York*, 847 F. Supp. 2d 395, 434 (E.D.N.Y. 2012).
[38] *Neal v. Dir., D.C. Dep't of Corrections*, 1995 U.S. Dist. LEXIS 11515, Case No. 93-2420 (RCL) (D.D.C. Aug. 9, 1995).
[39] *Alberti v. Klevenhagen*, 46 F.3d 1347, 1363 (5th Cir. 1995).
[40] *Gary W. v. Louisiana*, 601 F.2d 240, 246 (5th Cir. 1979).

C. The Commission cannot order the Postal Service to bear the cost of adjudication.

Counsel argues that the Postal Service should pay for special masters to adjudicate class members' claims as "it is the Agency's class-wide discrimination that has created the need for the relief process."[41] Counsel has previously categorized this same request as "a monetary sanction."[42] An order requiring the Postal Service to bear the cost of adjudicating claims would constitute a monetary sanction by the Commission that is barred by sovereign immunity.[43] The DOJ has expressly opined that "the EEOC does not have inherent power to impose monetary sanctions on federal agencies."[44] Reviewing a dispute between the Commission and the Department of the Navy, the DOJ stated:

> EEOC next argues that its power to impose [monetary sanctions] against federal agencies flows from the judicial doctrine of the 'inherent powers' of the forum. EEOC directs our attention to *Chambers v. NASCO, Inc.*, in which the Court discussed the inherent power of the federal courts. But EEOC is not a federal court, and the sanctioned party in *Chambers* was not a federal agency.[45]

After questioning whether it is even possible for the Commission to have inherent powers at all, the DOJ concluded that, even if the Commission could have inherent authority to impose non-monetary sanctions to maintain the integrity of its proceedings, the Commission lacks Congressionally-granted authority to impose monetary sanctions against federal agencies.[46] Because the Commission lacks authority to impose monetary sanctions against federal agencies, it cannot order the Postal Service to bear the cost of adjudicating claims via special masters.

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[41] Feb. 11, 2019 Motion, at 6.
[42] Class Agent's Notice of Disputed Class Member Claims for Relief and Motion for Appointment of Special Masters, at 4 (May 22, 2018).
[43] *See Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text").
[44] *See* EEOC's Authority to Impose Monetary Sanctions Against Fed. Agencies for Failure to Comply with Orders Issued by Admin. Judges, 2003 WL 24151769, at *6-7 (O.L.C. Jan. 6, 2003).
[45] *Id.* at *6 (internal citations and quotations omitted).
[46] *Id.* at 6-7.

Counsel has also repeatedly acknowledged that if the Commission made a class-wide liability finding, the Commission's regulations would require an "administrative judge"—not a special master—to oversee individual remedial hearings and issue decisions on individual claims for relief.[47] Over the Postal Service's repeated objections, and despite counsel's recognition that the Commission's administrative judges would adjudicate remedial claims, Administrative Judge Stilp held that "[a] class does not need to show, at this stage, that each class member is a qualified individual with a disability. That showing can be made during Phase 2 (damages)."[48] Judge Stilp repeatedly stated that "[c]laims for individual relief shall be processed pursuant to 29 C.F.R. § 1614.204(l)(3),"[49] which exclusively contemplates the adjudication of individual claims by "**administrative judges**."[50]

The OFO affirmed Administrative Judge Stilp's Decision, holding that "whether individual class members are actually qualified individuals with disabilities will be determined during the remedial phase of this class proceeding."[51] The OFO recognized the administrative difficulties associated with individualized inquiries, but decided to defer such determinations to the remedial phase:

> Expecting every potential class member to undertake the individualized inquiry that the Rehabilitation Act requires during the liability phase of the *Teamsters* process is inherently impractical, unworkable in practice, and would effectively bar the use of class complaints as a means of challenging workplace policies that discriminate against individuals with disabilities. [. . .] A far more efficient and effective way to resolve the individualized-inquiry dilemma is to require prospective class members to prove that they are qualified individuals with disabilities during the remedies phase . . . .[52]

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[47] Class Agent's Opposition to Agency Motion for Summary Judgment, at 10 (Oct. 17, 2014) (arguing that "the Administrative Judge" would oversee hearings and issue decisions during the individual claims process); Class Agent's Opposition to Agency Motion for Reconsideration, at 7 (Nov. 13, 2017) (arguing that "the Administrative Judge is in the appropriate position to manage the Phase II relief process . . . .").
[48] AJ's Report of Findings and Recommendation on Class Liability, at 2 (Jun. 4, 2015).
[49] *Id*. at 66, 73, 84, 89 (emphasis added).
[50] 29 C.F.R. § 1614.204(l)(3) (emphasis added).
[51] Sept. 25, 2017 OFO Decision, at 27 n.8.
[52] *Id*. at 15.

Simply put, both Administrative Judge Stilp and the OFO each specifically held that the adjudication of individual claims would be borne by the Commission's administrative judges. Manifest injustice would result if the Commission made an informed decision to defer *prima facie* determinations to the individual remedial phase, then, after the fact and without any authorization, shifted that cost to the Postal Service via the appointment of special masters.

VI. The Postal Service certified its compliance with the Notice process.

On March 9, 2018, the OFO ordered the Postal Service to immediately issue Notice and issue Final Agency Decisions on submitted claims within 90 days (the March 2018 Order). The allegation that the Postal Service failed to comply with the OFO's mandate is incorrect, improper, and duplicative of the Class Agent's pending enforcement petition.

The Postal Service is in full compliance with the March 2018 Order, the MD-110, and 29 C.F.R. § 1614.204. In the March 2018 Order, the Postal Service was ordered to issue notice of the Order and begin the individual relief phase. The Postal Service timely issued notice to all putative class members and has provided its certifications of compliance with its Notice obligations. Counsel has failed to provide a single meritorious example of how the Postal Service failed to comply with an OFO order or directive. The Postal Service has asked counsel to identify any individuals who did not receive notice, and to date, they have not identified anyone.

After the OFO issued the March 2018 Order confirming the procedures to be followed in the individual relief phase, the Postal Service undertook great efforts to timely and properly mail notice to all 130,000 putative class members within ten business days of the Final Order. Counsel themselves acknowledged that the Postal Service timely issued Notice of the March 2018 Order. On their website, counsel instructed individuals to "submit a claim form within

30 days of your receipt of the notice from the Postal Service" and further suggested that all claims be mailed "no later than April 12, 2018." Counsel's website included a link to additional information, including an information packet. Counsel also mailed their claim form to all putative class members, giving them yet another opportunity to have received notice.

The Postal Service has provided all necessary certifications detailing its efforts and compliance with respect to mailings, re-mailings, and postings in all facilities nationwide and online websites.[53] To the extent counsel continues to challenge compliance with the March 2018 Order, the issue is properly submitted to the OFO, not the Administrative Judge. *See, e.g.*, *Complainant v. Dep't of Homeland Security*, EEOC DOC 0120151589, 2015 WL 4761003, at *2 (July 31, 2015) ("Complainant's claim that the agency is not in compliance with a prior EEOC order should not be addressed as a separate complaint. Rather… he may file with the [OFO] a petition for enforcement."); *see also Lomax v. Dep't of Veterans Affairs*, EEOC DOC 0420080009, 2010 WL 619233, at *2 (Feb. 4, 2010) (the OFO has the inherent authority to enforce its decisions and orders). Any allegation that the Postal Service failed to comply with an OFO Order therefore must be filed with and adjudicated by the OFO—not the AJ—via a petition for enforcement.

Counsel has already filed an enforcement action challenging, among other things, the Postal Service's notice process, which the OFO has not ruled on. *See* June 26, 2018 Petition for Enforcement; August 31, 2018 Class Appeal Brief at 1, 6 (noting that appeal arguments rendered the Petition for Enforcement moot and arguing the Postal Service failed to properly notify class members of claims process); November 7, 2018 OFO Order (ruling on the issue of whether final agency decision were prematurely issued not addressing arguments that the Postal Service's notice was improper). Counsel provides nothing to support their challenge of the extensive

[53] *See* Declarations of Notice Mailings, Re-Mailings, Online Postings, and Facilities Postings, attached as **Exhibit E**.

efforts, time, and expense expended by the Postal Service to comply with the notice mandates in the March 2018 Order. Inclusion of notification briefing in the case management order is unnecessary, procedurally improper (arguably it is a part of a pending OFO enforcement action and if not, one should be properly filed), and should be rejected.

VII. Conclusion.

Because the relief requested by counsel is not only contrary to the mandates of previous OFO orders in this case, the MD-110, and Commission regulations, but also outside of the bounds of fairness and beyond the scope of Commission power, counsel's Motion should be denied.

Respectfully submitted on February 25, 2019.

Eve G. Burton, Esq.
U.S. Postal Service Law Department
Denver Program Office
600 17th Street, Suite 1705-S
Denver, CO 80202-5402
Phone: (720) 221-5100; Fax: (720) 221-5154
Email: eve.g.burton@usps.gov

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE

VELVA B., et al.,	)	
	)	EEOC Hearing No. 520-2010-00280X
Complainant,	)	
	)	OFO Appeal Nos. 0720160006
vs.	)	0720160007
	)	
MEGAN J. BRENNAN,	)	OFO Request Nos. 0520180094
Postmaster General,	)	0520180095
United States Postal Service,	)	
	)	Agency Case No. 4B-140-0062-06
Agency.	)	
	)	

CASE MANAGEMENT ORDER

Having reviewed the parties' submissions and the record in this case, the Commission hereby enters this Case Management Order governing the processing of claims for individual relief filed in the above-captioned matter.

I. Notification of Agency Final Action (MD-110 Ch. 8 § XI D)

All potential class members were notified in March 2018.

II. Claims for Individual Relief by Class Members (MD-110 Ch. 8 § XII A)

All individual claimants were required to submit, within 30 days of receiving notice of the Agency Final Action, a "specific, detailed showing that:

1. The claimant is a class member who was affected by the discriminatory policy or practice; and

2. The discriminatory action occurred within the period of time for which the Administrative Judge found class-wide discrimination in his/her decision"….

March 9, 2018 OFO Order, 7. Those claims were received throughout March and April 2018.[1]

[1] Some may have been received in May 2018.

III. Oversight of Individual Claims for Relief (MD-110 Ch. 8 § XII C)

The MD-110 provides that "Administrative Judges retain jurisdiction over the complaint in order to resolve any disputed claims of class members and **may** hold hearings or otherwise supplement the record on a claim filed by a class member." (*emphasis added*, MD-110 Ch. 8 § XII C.1)

A. Notification of Intent to Dispute (MD-110 Ch. 8 § XII C.2)

The Postal Service submitted to the Administrative Judge notices of which claims it intends to dispute on January 14, 2019, and provided "a copy of such notice to the class member."

The "Administrative Judge **will issue an order tolling** the 90-day period within which the agency is required to issue a decision on the class member's claim." (*emphasis added*, MD-110 Ch. 8 § XII C.2). The 90-day period for issuing a decision on the class member's claims is hereby tolled as of **January 15, 2019.**

B. Statement in Support of Dispute (MD-110 Ch. 8 § XII C.3)

The Administrative Judge … "will advise the agency to provide a statement in support of its decision to dispute the class member's claim and any supporting evidence within fifteen (15) days of the agency's receipt of the Administrative Judge's order, providing a copy of any such submission to the class member. The class member will have 15 days from the date of service of the agency's submission to respond to the agency's submission and may file a statement and documents in support of his/her claim, providing a copy of any such submission to the agency. If service of the submission was by mail, the class member may add three days to the date that the response is due." (MD-110 Ch. 8 § XII C.3)

The Agency is hereby ordered to provide a statement in support of its decision to dispute individual claims and any supporting evidence **15 days of the agency's receipt of this order**, and each claimant is hereby ordered to respond to the agency's submission **within 15 days of the agency's submission,** adding three days to the date of the submission for mailing.

The Administrative Judge "has the discretion to enlarge the 15-day period at the written request of either party or on his/her own motion. If a party seeks an enlargement of the 15-day period, that party must provide a copy of its written request to the" individual or the individual's designated representative. (MD-110 Ch. 8 § XII C.3).

Any party seeking an enlargement of 15 days or less may do so in writing and with a copy of the request to the other party. Such requests are hereby **GRANTED** as of the date of their submission. All requests for enlargement larger than 15 days must include an explanation as to why the additional time is necessary, and will be ruled on individually.

C. Withdrawal of Claim or Dispute

After either (a) both parties have submitted their statements in support of dispute, or (b) the deadlines for doing so have passed, the parties may determine that they are in agreement with the correct disposition of the claim.

That is, the claimant may determine that they do not disagree with the Agency's statement in support of dispute or otherwise decide they do not wish to continue to pursue their claim. Alternatively, the Postal Service may receive additional information from the claimant's response to the statement in support of dispute, and may determine that it no longer wishes to dispute the claim.

If the claimant wishes to withdraw their claim, they may do so in writing.[2]

[2] If the Postal Service receives or has already received such a withdrawal, it will forward to the Administrative Judge.

If the Postal Service wishes to withdraw its dispute, it may do so in writing, including a proposed order accepting the claimant's claim(s). Once that proposed order is approved by the Administrative Judge, the Agency will issue a Final Agency Decision on that claim with appeal rights to the OFO per the MD-110 Ch. 8 § XII C.4-5.

If the claimant presents new information in their response to the statement in support of dispute which was not included in their original claim form and/or documents and neither party wishes to withdraw their dispute, the Postal Service may file a brief response or supply additional documentation addressing only the new information within 10 days of receipt of the claimant's response.

D. Additional Information (MD-110 Ch. 8 § XII C.4)

The "Administrative Judge thereafter **may** determine whether **s/he needs** additional information … to further develop the record regarding the class member's claim" (*emphasis added,* MD-110 Ch. 8 § XII C.4).

Parties may not request additional information. If, after receiving the Agency's statement in support of dispute and the claimant's response to the Agency's submission, the Administrative Judge determines that further information is necessary, the Administrative Judge will order those parties to meet and confer to determine which party has the information requested, whether any additional releases are necessary to produce the information, and a reasonable schedule for producing the requested information.

E. Hearings (MD-110 Ch. 8 § XII C.4)

The Administrative Judge "**may** determine whether s/he … should hold a hearing in order to further develop the record regarding the class member's claim. (*emphasis added*, MD-110 Ch. 8 § XII C.4).

If the Administrative Judge determines that a hearing is necessary to further develop the record regarding an individual claim, the Administrative Judge will issue an order that claimant and the Agency to meet and confer regarding scheduling for the hearing, any witnesses, and any stipulations prior to hearing.

F. Determination of Individual Claims. (MD-110 Ch. 8 § XII C.4-5)

"At the conclusion of fact finding, the Administrative Judge will issue a decision concerning the class member's claim and forward the decision to the class member and the agency. The decision will advise the agency that the 90-day period for issuing a final order on the claim will resume upon its receipt of the Administrative Judge's decision.

"The agency must issue a final order regarding the class member's claim within the 90-day period. If the agency does not issue the final order within the 90-day period, the Administrative Judge's decision will become the final order of the agency.

"The agency's final action on a class member's claim must inform the class member of the right to appeal the decision to the Office of Federal Operations or to file a civil action, and it must include EEOC Form 573, Notice of Appeal/Petition (Appendix P)." (MD-110 Ch. 8 § XII C.4-5).

G. Settlement

The parties are reminded that the Commission encourages voluntary resolution efforts. *See, e.g.,* EEOC Management Directive 110 at Chapter 3 ("Alternative Dispute Resolution for EEO Matters"). Individual claims may be settlement without approval of the Administrative Judge. Settlement of a group or groups of claims must be approved pursuant to the notice and approval procedure contained in 29 C.F.R. § 1614.204(g).

IT IS SO ORDERED.

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Monique Roberts-Draper
Administrative Judge