No. 13-2456

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Equal Employment Opportunity Commission,

Plaintiff-Appellant,

v.

Mach Mining, LLC,

Defendant-Appellee.

On Interlocutory Appeal from an Order of the
United States District Court for the Southern District of Illinois, Benton Division
Case No. 3:11-cv-879-JPG-PMF
Honorable J. Phil Gilbert, District Judge

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PLAINTIFF-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because it will significantly aid this Court's decisional process. *See* Fed. R. App. P. 34(2)(c).

This case presents the questions whether the EEOC's efforts to obtain voluntary compliance through conciliation are subject to judicial review, and if so, what kind of review is warranted. The answers to these questions are of exceptional importance to the government's ability to enforce the laws against employment discrimination.

Mach Mining, a company that has never hired a woman for a mining position and does not even have a women's changing room, seeks to shift the focus of this case from whether Mach Mining engaged in systemic hiring discrimination against women to whether the EEOC sufficiently conciliated before filing suit.

Mach Mining should not succeed because judicial review of conciliation is not authorized by any statute. Title VII certainly does not authorize judicial review of conciliation; indeed, it precludes review. Title VII commits the pre-suit conciliation process to the EEOC's discretion alone. By statute, EEOC-initiated pre-suit conciliation is an "informal and confidential process" that empowers the EEOC to conciliate and decide, on its own, whether it was able to obtain an agreement "acceptable to the Commission." 42 U.S.C. § 2000e-5(b), (f)(1). When no such agreement is reached, the EEOC may bring suit to achieve compliance with the antidiscrimination laws. *Id.* § 2000e-5(f)(1). It is then the court's role to determine

whether the EEOC's allegations are correct, not to delve into a process committed to the agency's discretion.

Judicial review of conciliation not only delays and diverts the court from the central question before it—whether an employer has engaged in discrimination—but it also undermines the conciliation process itself by destroying the confidentiality necessary for effective conciliation and by encouraging employers to treat conciliation not as a forum to resolve disputes but as an opportunity to collect defenses for a larger fight to come. Protecting the conciliation process from these forces is critical to the EEOC. Conciliation is central to the Commission's enforcement efforts—it is an efficient, effective, and inexpensive way to resolve employment discrimination charges. The Commission asks that this Court protect that process by concluding that conciliation is unreviewable and return this case to the district court to determine whether Mach Mining, in refusing to hire a single woman for a mining position, has engaged in systemic hiring discrimination.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this EEOC-initiated Title VII enforcement action under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f).

On July 30, 2012, the EEOC moved for summary judgment on Mach Mining's "affirmative defense" that the EEOC failed to sufficiently conciliate with Mach Mining before initiating this action. R.32. On January 28, 2013, the district court denied that motion. R.55. On March 21, 2013, the EEOC moved for reconsideration of the order denying summary judgment in the EEOC's favor, or in the alternative, to certify an interlocutory appeal of that order to this Court under 28 U.S.C. § 1292(b). R.59. On May 20, 2013, the district court denied the reconsideration motion, but granted the motion to certify appeal under § 1292(b). R.86. On May 30, 2013, the EEOC petitioned this Court for interlocutory appeal, and this Court granted the petition on June 28, 2013, pursuant to 28 U.S.C. § 1292(b), and thus this Court has jurisdiction under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

1. May courts review the EEOC's informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit?
2. If courts may review the EEOC's conciliation efforts, should the reviewing court apply a deferential or heightened scrutiny standard of review?

STATEMENT OF THE CASE

This is an interlocutory appeal presenting the questions whether the EEOC's pre-suit obligation to engage in conciliation is judicially reviewable, and if it is, what standard should apply to the review of such conciliations.

STATEMENT OF THE FACTS

Mach Mining has never hired a single woman in a mining position. The EEOC investigated a charge of sex discrimination against Mach Mining, found cause to believe it was true, and invited the company to conciliate. After attempting conciliation—which failed to prove fruitful—and informing Mach Mining of the EEOC's conclusion that the Commission was unable to secure an agreement acceptable to the Commission, R.32-1, at 9, the EEOC brought a class failure-to-hire sex discrimination case against Mach Mining, *id.* at 1–2. In its Answer, filed November 28, 2011, Mach Mining asserted the "affirmative defense" that the EEOC failed to conciliate prior to filing suit, and the parties have disputed the issue of the reviewability of conciliation efforts ever since. *See* R.10. This dispute can only be understood in light of Title VII's statutory provisions.

In the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e *et seq.*, amending Title VII of the Civil Rights Act of 1964, Congress established an integrated, multistep enforcement procedure which can culminate in the EEOC's authority to bring federal civil actions on behalf of employment discrimination victims. The procedure begins when a charge is filed with the EEOC alleging that an employer engaged in unlawful discrimination. 42 U.S.C. § 2000e-5(e). The EEOC then notifies the employer of the charge and investigates it. *Id.* § 2000e-5(b). If the Commission determines after the investigation that there is reasonable cause to believe that the charge is true, the Commission must then attempt to eliminate the unlawful employment practice "by informal methods of

conference, conciliation, and persuasion," *id.*, and if conciliation is unsuccessful, the EEOC may bring a civil action in federal court. 42 U.S.C. § 2000e-5(f)(1).

At issue in this case is whether the EEOC's attempts at conciliation are subject to judicial review. Title VII contains four provisions that specifically address conciliation: the statute

- permits the Commission to bring a civil action "[i]f . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission," 42 U.S.C. § 2000e-5(f)(1);
- describes conciliation as a process utilizing "informal methods of conference, conciliation, and persuasion," *id.* § 2000e-5(b);
- mandates that conciliation be confidential and that "nothing said or done as a part of such informal endeavors" may be "used as evidence in a subsequent proceeding without the written consent of the persons concerned," *id.* and
- mentions a court's role in conciliation only in the context of cases initially brought by private plaintiffs in which the EEOC intervenes. In such cases, "[u]pon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance," *id.* § 2000e(f)(1)(B).

None of these provisions contains a standard of review for conciliation or any other indication that the judiciary should examine the agency's pre-suit settlement process.

Mach Mining seeks extensive conciliation-related discovery, but resists discovery about its potentially discriminatory hiring practices. For example, Mach Mining has made 696 requests for admissions of fact, 645 of which pertain to the EEOC's investigation or conciliation. *See* R.25. Yet Mach Mining has objected to merits-based discovery on the ground that information about specific claimants is

undiscoverable because the "EEOC failed to investigate, reach a determination upon and/or conciliate." *Id.* at 21, 23–30, 35–53.

Believing that review of conciliation runs counter to the text of Title VII and that it is undermining the objectives of Title VII by actually discouraging rather than promoting conciliation, the EEOC challenged Mach Mining's "affirmative defense" that the EEOC failed to sufficiently conciliate by moving for summary judgment and arguing that conciliation is unreviewable. The district court denied that motion, but eventually certified the question of whether conciliation is reviewable to this Court. This Court granted the petition for interlocutory review on June 28, 2013.

SUMMARY OF THE ARGUMENT

The EEOC is firmly committed to administrative settlement of employment discrimination charges generally and to conciliation in particular. But the threshold question of whether a particular agency action is reviewable is whether judicial review is authorized by a specific statute. Title VII does not authorize review of conciliation; it precludes review. Title VII provides no procedure, venue, basis, or legal standard by which a court could review such a decision. The statute instead makes clear that the conciliation process rests squarely with the EEOC. It describes conciliation as an informal, confidential process that ends with an agreement or when the Commission concludes that it has been unable to obtain an agreement "acceptable to the Commission." And Title VII mentions a court's role in conciliation only in the context of suits brought by private parties where the EEOC intervenes, which suggests that the court has no role in conciliation in other cases. Moreover, in

an unbroken chain of cases, this Court has repeatedly concluded that other pre-suit administrative duties of the EEOC are not subject to judicial review. Those repeated conclusions apply with equal force to conciliation.

Although Mach Mining has not asserted that the Administrative Procedure Act authorizes review of conciliation in this case, the APA's provisions and principles confirm that conciliation falls outside judicial review for three reasons. First, Title VII precludes review of conciliation and the APA's judicial review provisions do not apply when another statute specifically precludes review. Second, the EEOC's decision that conciliation has failed is a decision "committed to agency discretion by law," which is explicitly precluded from APA review. Third, the APA does not create judicial review of conciliation because the APA authorizes review only of "final agency actions," and the decision that conciliation has failed is not a "final agency action."

The EEOC can demonstrate satisfaction of its pre-suit obligation to engage in conciliation and determine whether it was able to reach an agreement acceptable to the Commission without court review. It can certify in its complaint the fact that it had engaged in conciliation and failed to reach an agreement acceptable to the Commission. This Court has endorsed this method to establish the satisfaction of conditions precedent in analogous situations. This method was specifically discussed and endorsed by key legislators during the debates of the 1972 Amendments to Title VII that created EEOC litigation authority.

Review of conciliation is not only unauthorized—and is, in fact, precluded by Title VII—but it also undermines Title VII's objective to encourage out-of-court

settlement of employment discrimination charges. Judicial review of conciliation destroys the statutorily mandated confidentiality necessary to promote pre-suit settlement and encourages employers to view conciliation not as a means to settle the dispute but as an opportunity to collect evidence for a future "failure to conciliate defense." In the EEOC's experience, this is becoming a routine defense tactic in EEOC-initiated suits, undermining conciliation itself and delaying and diverting suits once they are brought.

The experience of the Circuits that have concluded that conciliation is judicially reviewable also supports nonreview. No Circuit has articulated a statutory basis for such review. Nor do the Circuit Courts that review conciliations agree as to what standard should govern that review—which is not surprising given that Title VII itself provides no standard of review. Moreover, the practical experience of courts reviewing conciliations demonstrates that no consistent, workable standard can govern review. Not only do the Circuits disagree about what standard should govern, but even when courts purport to apply the same standard, examples of inconsistent results abound. As a practical matter, therefore, judicial review provides no consistent measure upon which to assess Commission action—or even for the Commission to assess its own action.

Finally, in the event that this Court concludes that courts should review conciliation to determine whether a particular EEOC conciliation was adequate, the remedy for any perceived inadequacies should be a stay to allow for further conciliation or an order to engage in mediation. If an employer is denied sufficient conciliation, then any such deprivation is procedural, and should be remedied by

additional process and not the harsh sanction of dismissal of the merits suit designed to address unlawful discrimination.

ARGUMENT

I. The EEOC's pre-suit conciliation process is not subject to judicial review.

Conciliation is central to the Commission's enforcement scheme. It is efficient, effective, and inexpensive. Judicial review of the Commission's conciliation efforts in those relatively few cases litigated by the Commission not only risks compromising conciliation but also is precluded by Title VII.

A. Title VII precludes judicial review of conciliation.

1. The text of the statute does not provide for review of conciliation and leads to the conclusion that review is precluded.

To determine whether the EEOC's conciliation efforts are judicially reviewable, the threshold question is whether "actions of the agency are . . . made reviewable by a specific statute." *See Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 614 (7th Cir. 2003).

Far from authorizing judicial review of conciliation, Title VII precludes it. No provision specifically articulates what the EEOC must do besides attempt conciliation and decide whether the employer offered a conciliation agreement acceptable to the Commission. No provision authorizes judicial review of that decision. No provision declares what venue would hear challenges based on alleged failures to conciliate. No provision establishes what standard of review would apply

in assessing the validity of that decision. And no provision articulates what the remedy should be if the EEOC fails to fulfill its duty to engage in conciliation.[1]

Indeed, everything about the conciliation process, as described by Title VII, leads to the conclusion that review is precluded because the process is committed solely to the EEOC's discretion:

- Title VII establishes that conciliation ends when there is an agreement acceptable to the EEOC or when the EEOC decides that it has been "unable to secure from the respondent a conciliation agreement acceptable to the Commission." 42 U.S.C. § 2000e-5(f)(1).

- Title VII requires that conciliation be kept confidential—mandating that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Id.*

- Title VII describes conciliation along with the terms "conference," and "persuasion" as "informal methods." *Id.* § 2000e-5(b).

- And Title VII mentions a court's role in conciliation only in the context of cases initially brought by private plaintiffs in which the EEOC intervenes. In such cases, "[u]pon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance." *Id.* § 2000e-5(f)(1).

By its express terms, therefore, the statute places the decision that conciliation has succeeded or failed solely with the EEOC—"acceptable to the Commission," *id.*—and does not mention any judicial review of that decision. *See, e.g.*, *Turner v.*

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[1] When a statute does authorize review, it generally does so explicitly. *See, e.g.*, 47 U.S.C. § 402 (authorizing review of Federal Communication Commission decisions by delineating the procedure for challenging agency action, who has the right to challenge them, what venue they are to be challenged in, and more).

U.S. Parole Comm'n, 810 F.2d 612, 615 (7th Cir. 1987) ("The absence of mandatory language in this provision also immediately suggests the breadth of discretion characteristic of nonreviewable authority."); *see id.* (concluding that the clause "[a]t any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served" is "entirely bereft of any standards a court could apply in reviewing the Bureau's decision," and thus precludes review).

That the statute makes clear that the conciliation process is to remain confidential and cannot be used in a subsequent proceeding also indicates that Congress intended to preclude review. Title VII commands that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b). Congress considered keeping conciliation confidential so important that it specified criminal penalties if "any person . . . makes public information in violation of this subsection." *Id.* If Congress envisioned judicial review, it would make no sense to proscribe parties from disclosing conciliation information to the court.

On the other hand, knowing that what is said or done during conciliation may eventually find its way into litigation, even if the information is used in a non-merits manner, "would risk a decrease in the open communication necessary to reach voluntary settlements during the conciliation process." *See EEOC v. Philip Servs. Corp.*, 635 F.3d 164, 169 (5th Cir. 2011) (refusing to enforce oral conciliation agreement because keeping conciliation communications and actions out of court

was necessary to preserve the conciliation process itself); *Branch v. Phillips Petro. Co.*, 638 F.2d 873, 881 (5th Cir. 1981) ("[P]rospect of disclosure or possible admission into evidence of proposals made during conciliation efforts would tend to inhibit the kind of free and open communication necessary to achieve unlitigated compliance with . . . Title VII.").

The statute's command that the conciliation process be "informal," 42 U.S.C. § 2000e-5(b), also indicates that Congress considered the conciliation process to be within the EEOC's domain and precluded review of it. As Senator Williams—an opponent of a legislative proposal to make conciliation reviewable—recognized, courts would be reviewing an incomplete record, one that does not accurately represent what took place. Senator Williams believed review of conciliation would be problematic because no record would be made of informal conferences, phone calls, and meetings, and the formalized record would not accurately represent what happened. 118 Cong. Rec. 3806 (Feb. 14, 1972). That Title VII requires no formalized record is further evidence that Congress did not intend judicial review of conciliation. *See ICC v. Locomotive Eng'rs*, 482 U.S. 270, 283–84 (1987) (rejecting judicial review of denials of reconsideration because of the lack of consistent recordkeeping, reasoning that review was not workable because "the vast majority of denials of reconsideration . . . are made without a statement of reasons").

Title VII mentions a court's role in conciliation only in the context of cases initially brought by private plaintiffs in which the EEOC intervenes and this too supports the notion that Title VII precludes review of the conciliation process. "Upon request," the court may pause the proceedings not to review conciliation but

to further the Commission's—not the court's—efforts to obtain voluntary compliance. 42 U.S.C. § 2000e-5(f)(1). Because the court's role is mentioned only in this context, the statute suggests that courts have no role in cases where the EEOC does not intervene, but rather initiates suit directly. *Cf. EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832–33 (7th Cir. 2005) (rejecting reliance on principle that private suits must correlate with charge allegations as inapplicable to EEOC litigation because the statute applies the exhaustion requirement only to a private litigant and not the EEOC).

Finally, the legislative history of Title VII, like its text, also supports the conclusion that review of conciliation is precluded. *See Turner*, 810 F.2d at 614 (noting "legislative intent sufficient even to overcome a presumption favoring judicial review"). During the 1972 debates on the amended Act, which first gave the EEOC litigation authority, Senator Javits, responding to a proposal to require judicial review of EEOC conciliation, found the suggestion "inconceivable," stating that "we would substitute the court for the parties insofar as settlement was concerned." 118 Cong. Rec. 3807 (Feb. 14, 1972). When Senator Ervin queried how the EEOC would demonstrate that no conciliation agreement was reached, Senator Javits replied that the EEOC would simply "certify [that] for the record." *Id.* He could not imagine a court reviewing the EEOC's decision beyond that:

> I do not know what the court would decide or how a court could probe into the minds of the Commission, whether they did or did not, in good faith, decide that they would or would not work out a conciliation agreement which the respondent might have wished. . . . If they settle, they do. If not, they do not and they go to court. This tries to introduce a totally different standard than anything encompassed by our laws or practice.

Id. In the end, the proposal to require judicial review of conciliation was "soundly rejected." *EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241, 262 (N.D. Ill. 1980).

2. Caselaw confirms that conciliation, like other EEOC pre-suit administrative functions, is not judicially reviewable.

This Court has long recognized that Title VII precludes—or at the very least does not authorize—judicial review of the EEOC's pre-suit activities. In *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 294 (7th Cir. 1994), this Court implicitly concluded that conciliation is unreviewable when it noted that when the EEOC "fail[s] to get all of what it wanted in bargaining" and subsequently files suit to "back up its [conciliation] demand," that is "a matter for the conscience of the person who authorized suit, rather than for the judiciary."

This Court's decision in *EEOC v. Caterpillar* also is instructive. In that case, this Court concluded that the EEOC's investigation and determination that there was reasonable cause to believe the charge of discrimination are not judicially reviewable. 409 F.3d at 833. Caterpillar challenged whether the EEOC's suit was sufficiently related to the EEOC's investigation and argued that the investigation and reasonable-cause determination were subject to judicial review in order to find that out. *Id.* at 832. This Court rejected this argument, reasoning that since

> courts may not limit a suit by the EEOC to claims made in the administrative charge, they likewise have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation. The existence of probable cause to sue is generally and in this instance not judicially reviewable.

Id. After reaching the decision that EEOC investigations and cause findings were not reviewable under Title VII, this Court, relying on APA cases, concluded more generally that the EEOC's cause finding would not be reviewable. *Id.* at 832–33.

Other decisions of this Court support nonreview. In *McCottrell v. EEOC*, 726 F.2d 350, 351–52 (7th Cir. 1983), an employee sought judicial review of the EEOC's decision finding no reasonable cause supported his charge of discrimination, but this Court refused to review the EEOC's cause finding, holding that "Title VII does not provide either an express or implied cause of action against the EEOC to challenge its investigation and processing of a charge."

In *Stewart v. EEOC,* 611 F.2d 679, 683 (7th Cir. 1979), several employees sought review of the EEOC's alleged failure to act on their charges and make timely reasonable cause determinations of those charges, but this Court refused to review their challenge, reasoning that Title VII does not authorize review of the challenged agency actions by the EEOC: "Had Congress intended a remedy of enforcement against the EEOC, the provisions of [Title VII] would have so indicated." *Id.* at 682.

And in *Doe v. Oberweis Dairy*, 456 F.3d 704, 710 (7th Cir. 2006), this Court rejected Oberweis's argument that an employee had a duty to cooperate in good faith with the EEOC during its investigation, and that an employee's failure to do so should bar suit. This Court refused to review the employee's pre-suit activities and specifically rejected Oberweis's proposed "good-faith" standard, reasoning that there was no basis in the statute to review whether the employee had cooperated in "good-faith." *Id.* at 711. And adding a good-faith requirement, this Court reasoned,

is "adventurous and . . . will distress originalists." *Id.* This Court recognized its risks:

> We know from cases under the National Labor Relations Act, which requires unions and employers to bargain in good faith, how difficult it is to enforce such a duty, because it jostles uneasily with the right of each party to a labor negotiation to refuse an offer by the other even if a neutral observer would think it a fair, even a generous, offer.

Id. This Court could have been writing about review of conciliation when it offered its reasons for rejecting review of an employee's pre-suit activities: "To allow employers to inject such an issue by way of defense in every Title VII case would cast a pall over litigation under that statute." *Id.*

The common theme of these decisions is that the courts may not review discretionary decisions the EEOC makes during its administrative process—including the EEOC's decision to end conciliation when it cannot secure an agreement acceptable to the Commission.

B. The Administrative Procedure Act and its underlying principles also foreclose review of EEOC conciliations.

Mach Mining has not argued that the APA authorizes judicial review of conciliation, but as this Court recognized in *Caterpillar* and other cases, the principles of agency review as articulated by the APA reinforce the conclusion that Congress did not intend judicial review of the EEOC's administrative process. *See EEOC v. Caterpillar,* 409 F.3d at 832 (rejecting the notion that Title VII authorizes review of EEOC investigations and cause findings, then relying on APA cases to support that conclusion); *McCottrell*, 726 F.2d at 351–52 (concluding that neither Title VII, nor the APA, authorized review of EEOC charge handling).

Nevertheless, if Mach Mining were to contend that the APA's judicial review provisions authorize review of conciliation, it would be mistaken for three reasons. First, because, as noted, Title VII precludes review, the APA's general review provisions would be inapplicable. *See* 5 U.S.C. § 701(a)(1) (stating that judicial review is not available under the APA when another "statute precludes review"). Second, the APA also would not trigger judicial review in this case because the conciliation process is a decision "committed to agency discretion by law" under § 701(a)(2), and such decisions are exempted from the APA's judicial review provisions. And third, the APA only triggers judicial review of final agency actions, *id.* § 704, and the EEOC's decision that conciliation has failed is not a final agency action within the meaning of the APA.

1. The APA would not authorize judicial review of conciliation because Title VII specifically precludes it.

If a statute precludes review, as the Commission reads Title VII to do, *see supra* subpart I.A., then review is not available under the APA either. *See* 5 U.S.C. § 701(a)(1); *Rueth v. U.S. EPA*, 13 F.3d 227, 231 (7th Cir. 1993) (concluding that the Clean Water Act precluded review of the challenged agency action and therefore the action was also not reviewable even under the APA's general review provisions).

2. The conciliation process is "committed to agency discretion by law" and thus would be unreviewable under the APA.

"[A]lthough the APA generally provides that an agency action is reviewable . . . there is an exception when [the] 'agency action is committed to agency discretion by law,' 5 U.S.C. § 701(a)(2)." *Lalani v. Perryman*, 105 F.3d 334, 337 (7th Cir. 1997).

The determination that an action is "committed to agency discretion by law" can be supported one of three ways, all of which are manifested in this case. First, judicial review is not available when the governing "statutes are drawn in such broad terms that in a given case there is no law to apply." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). In such cases, judicial review is not possible because there is no standard against which to judge the legality of the agency action. For example, in *Webster v. Doe*, the National Security Act authorized the CIA director to terminate an employee whenever he "shall deem such termination necessary or advisable in the interests of the United States." 486 U.S. 592, 594 (1988). When a CIA employee challenged his termination, the Supreme Court held that the decision was unreviewable—there was no standard to apply because the statute placed the decision completely at the Director's discretion. *Id.*

Here Title VII likewise provides no standard because only the EEOC can say whether a conciliation proposal was "acceptable to the Commission." 42 U.S.C. § 2000e-5(f)(1). "This standard fairly exudes deference to the [EEOC] and appears . . . to foreclose the application of any meaningful judicial standard of review." *Cf. Webster*, 486 U.S. at 600. Further, the statute describes conciliation, along with "conference" and "persuasion," as "informal." Each of these words is a "broad term that does not contain any law to apply." *Cf. Overton Park*, 401 U.S. at 410.

The legislative history of Title VII also supports the view that conciliation is committed to the EEOC's discretion and there is no standard to govern review. Again, during the 1972 debates, Senator Javits specifically noted: "I do not know

what the court would decide or how a court could probe into the minds of the Commission, whether they did or did not, in good faith, decide that they would or would not work out a conciliation agreement which the respondent might have wished." 118 Cong. Rec. 3807.

Second, an agency decision is also considered "committed to agency discretion by law" when the statute suggests that Congress intended the agency to have final authority over a decision. In *Webster*, for example, the Director was authorized to terminate any employee when he "deem[s] such termination necessary." 486 U.S. at 594; *see also Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (holding that the allocation of funds from a lump-sum appropriation was not subject to judicial review because it "reflects a congressional recognition that an agency must be allowed flexibility[.]"). Here Title VII likewise places the discretion solely with the EEOC—"acceptable to the Commission"—and does not mention any judicial review of that decision.

Moreover, in determining "[w]hether and to what extent a particular statute precludes judicial review," courts look not "only [to] its express language," but also at "inferences of intent drawn from the statutory scheme as a whole." *Sackett v. EPA*, 132 S. Ct. 1367, 1373–74 (2012). As noted, that conciliation is informal and confidential and that the statute mentions a court's role only in the context of staying litigation when the EEOC did not already have the chance to conciliate indicate that Congress considered the conciliation process committed to the EEOC's discretion and not reviewable. *See supra* subpart I.A.1.

The third way a court determines that actions are committed to agency discretion is when the agency decisions are "of the sort" that had been "traditionally

unreviewable." *See Webster*, 486 U.S. at 609 (Scalia, J., dissenting on a different point); *see also Lincoln*, 508 U.S. at 192 (agency's allocation of funds from a lump-sum appropriation is unreviewable in part because it was an "administrative decision traditionally regarded as committed to agency discretion").

The conciliation efforts specified in Title VII were initially unreviewed because enforcement was through private lawsuits and "voluntary conference, persuasion, and conciliation" by the EEOC. *See, e.g.*, *Jenkins v. United Gas Corp.*, 400 F.2d 28, 30 (5th Cir. 1968). "Believing that the voluntary compliance approach had been singularly unsuccessful in eliminating employment discrimination, Congress added court enforcement to EEOC's arsenal of powers." *EEOC v. E.I. duPont de Nemours & Co.*, 516 F.2d 1297, 1301 (3d Cir. 1975).

There is little basis for believing that Congress both granted the EEOC the power to bring suit to buttress the EEOC's ability to obtain voluntary compliance and remedy discrimination, but circumscribed the EEOC's authority by making a formerly unreviewable process reviewable, and in the process, delaying and diverting EEOC enforcement actions from the outset. *Cf. FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980) ("[J]udicial review to determine whether the Commission decided that it had the requisite reason to believe [that a violation had occurred] would delay resolution of the ultimate question whether the Act was violated."). A better reading is that "Congress may well have believed that employers would be more likely to respect Title VII's mandates if they were required to deal with an agency capable of taking the matter to court should the conciliation process break down." *E.I. duPont*, 516 F.2d at 1301.

3. An EEOC decision that conciliation has failed is not a final agency action, and thus would not be reviewable under the APA.

Conciliation also would not be reviewable under the APA because it is not a final agency action. *See* 5 U.S.C. § 704 (limiting review to only final agency actions). "Final agency action" under the APA does not mean "the order is the last administrative order contemplated by statutory scheme." *Stewart,* 611 F.2d at 683 (internal citations and quotations omitted). Instead, to be a "final agency action" within the meaning of the APA, "[f]irst, the action must mark the 'consummation' of the agency's decision-making process, it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

The EEOC's decision that conciliation has failed meets neither element of the test: it is not a final agency action because it is interlocutory in nature—it does not resolve the dispute—and the decision creates no rights or obligations and no legal consequences flow from it. *See id.*; *cf. Laber v. Harvey*, 438 F.3d 404, 416 (4th Cir. 2006) ("[T]he EEOC has no power to order the private-sector employer to take corrective action even if it finds reasonable cause exists."). It marks neither the consummation of the agency's decision making process (since the agency then must determine whether it will litigate the matter) nor does it impose on the employer a penalty or responsibility to act (since it requires no further action from the participants). Based on these features, at least one court has already recognized that "failure of conciliation . . . was not final within the meaning of controlling [APA

caselaw]." *See Circuit City v. EEOC*, 75 F. Supp. 2d 491, 509 (E.D. Va. 1999). And this Court has concluded that other EEOC pre-suit obligations are not reviewable under the APA because they are not final agency actions. *EEOC v. Caterpillar*, 409 F.3d at 833 (investigations and cause findings); *Stewart v. EEOC,* 611 F.2d at 683 (investigations).

The Supreme Court has more generally concluded that an agency's initiation of enforcement proceedings is not a "final agency action" subject to judicial review under the APA. In *Standard Oil*, the Supreme Court concluded that the FTC's "averment of 'reason to believe' that [Standard Oil] was violating the [Federal Trade Commission] Act" was not a final agency action because it "represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." 449 U.S. at 241 (cited by *Caterpillar*, 409 F.3d at 833, to support its conclusion that the EEOC's cause finding is not judicially reviewable). The Court specifically rejected Standard Oil's argument that it should be able to challenge the initiation of the action because of the burden of having to defend itself. *Id.* at 244; *see also Del Marcelle v. Brown County Corp.*, 680 F.3d 887, 905 (7th Cir. 2012) (Easterbrook, J. concurring) ("[R]eview is limited to the agency's final decision. Issuing a complaint is not reviewable even though it portends a multi-year adjudicative process that may cost millions to resolve."); *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (AT&T could not challenge EEOC decision to bring suit, but "would instead simply [have to] defend itself against the suit").

C. The EEOC can demonstrate that conciliation took place and that it was unable to secure a conciliation agreement acceptable to the Commission by certifying that fact to the district court.

The EEOC recognizes that it has a duty to conciliate before bringing a civil action. This duty can be satisfied by the EEOC's certification that the requisite conciliation occurred.

This method of establishing that a pre-suit condition precedent has been satisfied is well established under Seventh Circuit and Supreme Court precedent. *See Caterpillar*, 409 F.3d at 832 (holding that courts "must accept the EEOC's Administrative Determination concerning the alleged discrimination discovered during its investigation" and "have no business limiting the [EEOC's] suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation"); *see U.S. v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 1*, 438 F.2d 679, 681 (7th Cir. 1971) (holding Attorney General's signature on complaint alleging "reasonable cause to believe" that employer engaged in a "pattern or practice of resistance" in violation of Section 707(a) of Title VII, 42 U.S.C. § 2000e-6(a), was "sufficient" and "clearly demonstrate[d] the basis of the Attorney General's 'reasonable cause to believe'"); *see also Standard Oil*, 449 U.S. at 241 ("To be sure, the issuance of the complaint is definitive on the question whether the Commission avers reason to believe that the respondent to the complaint is violating the Act.").

This method was also endorsed during debates on the 1972 Amendments to the Civil Rights Act of 1964. Senator Javits specifically discussed how the EEOC would demonstrate that it had engaged in conciliation and reached no acceptable

resolution—by certifying that fact to the district court. 118 Cong. Rec. 3807 (Feb. 14, 1972). A certification requirement would ensure that the EEOC not shortcut conciliation, but unlike even a so-called deferential standard, it would not risk complicating litigation and undermining conciliation itself. A signed complaint—which is governed by an attorney's Rule 11 obligations—stating that the EEOC invited the respondent to participate in the informal conciliation process, but was unable to secure an agreement acceptable to the Commission should satisfy this requirement.

In the alternative, the EEOC could certify that it had engaged in conciliation and that it was unable to obtain an agreement "acceptable to the Commission" by submitting to the district court the EEOC's letter of determination and its notice of failure of conciliation. This would demonstrate the fact that conciliation took place and the results of the attempted conciliation without undermining the confidentiality of the process itself. Requiring any further information would undermine conciliation itself by destroying the confidentiality of the process.[2]

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[2] This Court and most of its sister Circuits recognize, in their own mediation processes, that strict confidentiality promotes out-of-court settlement and the lack thereof undermines it. For example, "All of the program offices operate with confidentiality; the administration and operation of each program is separate from the court's decision-making process. Local rules usually prohibit mediators, the parties, and the parties' attorneys from disclosing the substance of a conference to any judge or non-party." *See* Robert J. Niemic, Federal Judicial Center, Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers 12 (2d ed. 2006), available at http://www.fjc.gov/public/pdf.nsf/lookup/MediCon2.pdf/$file/MediCon2.pdf. Yet, "[g]enerally not considered confidential, however, are the fact that the mediation took place and the bare results of the mediation (for example, settled, not settled, or continued)." *Id.* The

II. Non-review promotes conciliation, whereas review undermines it.

In most cases filed by the EEOC after the 1972 Act, the question of whether the EEOC sufficiently conciliated did not usually delay litigation of the merits, although the risk that such delay might occur has existed since the early days of EEOC litigation authority. But now, challenges to the EEOC's conciliation process, like Mach Mining's in this case, are becoming more routine. This means that extensive motion practice on conciliation—which can be fairly characterized as mini-trials—is frequently required in EEOC-initiated suits before the court can reach the merits.

Not only have challenges to conciliation become more frequent, they have become more burdensome on the court and the EEOC when they have been raised. Mach Mining's approach in this case is indicative of this emerging trend: Mach Mining seeks extensive discovery about conciliation—a process it participated in—and resists merits-based discovery about whether its refusal to hire women constituted systemic discrimination.

A. The EEOC is committed to conciliation and resolution of employment discrimination suits without judicial intervention.

The district court, echoing the sentiment of other courts that have engaged in review of EEOC conciliations, justified review by reasoning that "[w]ithout court review th[e] statutory command [to engage in conciliation] is meaningless." R.86, at 4. But the district court is incorrect. The EEOC—on its own accord—is firmly committed to conciliation. Indeed, conciliation is central to the Commission's

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principles of confidentiality that this Court maintains to promote appellate settlement apply with equal force to EEOC pre-suit conciliations.

enforcement scheme—it is an efficient, effective, and inexpensive method to resolve employment discrimination suits. And in the EEOC's experience, judicial review undermines, rather than promotes conciliation.

The EEOC does not need court intervention to encourage it to engage in conciliation. The EEOC has, throughout its history, been committed to voluntary resolution of employment discrimination disputes generally and to conciliation in particular.

The EEOC has an enormous incentive to conciliate. The Commission receives nearly 100,000 charges of discrimination every year. Resolving these charges in the administrative process is efficient, effective, and inexpensive. Indeed, conciliation is but one part of the EEOC's comprehensive commitment to pre-suit resolution. The EEOC relies on conciliation to resolve cases in which it finds reasonable cause—the only cases in which conciliation comes into play—attempting conciliation in 4,000 to 6,000 cases a year. EEOC Enforcement & Litigation Statistics: All Statutes FY 1997–2012, http://eeoc.gov/eeoc/statistics/enforcement/all.cfm. In fiscal year 2012, for example, nearly 37% of cases in which the EEOC found cause were resolved in conciliation. *Id.* In the last decade, the EEOC has used conciliation to resolve nearly 13,000 employment discrimination claims. *Id.*

Even in the cases where conciliation fails, the EEOC brings suit in but a fraction: there were 2,974 failed conciliations in fiscal year 2011, but only 261 federal suits; in fiscal year 2012: 2,616 and 122. *Id.*; EEOC Litigation & Enforcement Statistics: Litigation Statistics, FY 1997–2012, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm; *see also EEOC v.*

Waffle House, Inc., 534 U.S. 279, 290 n.7 (2002) ("Indeed, even among the cases where it finds reasonable cause, the EEOC files suit in fewer than five percent of those cases.").

The Commission in fact obtains far more relief for victims of discrimination through conciliation than litigation. In fiscal year 2012, for example, the EEOC resolved 1,591 charges of discrimination and obtained $365.4 million for aggrieved individuals using the conciliation process. EEOC Enforcement & Litigation Statistics: All Statutes FY 1997–2012, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm. On the other hand, the EEOC resolved 283 cases and obtained $44.2 million for victim of discrimination using its statutory litigation authority. EEOC Enforcement & Litigation Statistics: Litigation Statistics, FY 1997–2012, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm. The risk therefore that the EEOC will "thwart the conciliation process and as a result thrust additional cases on the federal courts is [at most] a slight one." *Doe*, 456 F.3d at 710.

The EEOC is so committed to pre-suit settlement that the Commission has added a layer of mediation not even contemplated or required by the statutory regime. As one leading treatise notes, the EEOC, on its own and without any judicial prodding, "encourages individual settlements throughout the administrative process." Barbara Lindemann & Paul Grossman, Employment Discrimination Law, subpart 26.III.K (5th ed.). Indeed, in 1999, the EEOC launched a private sector mediation program. EEOC, FY 2003 Performance and Accountability Report, at http://www.eeoc.gov/eeoc/plan/archives/annualreports/

par/2003/. The program proved popular with employers and charging parties alike; in the first four years of the plan's existence, the EEOC resolved more than 35,000 charges through mediation. *Id.* By 2012, nearly 98 percent of respondents and charging parties expressed confidence in the mediation program, and using the mediation process, the EEOC resolved 8,714 cases and conducted 11,380 mediations. EEOC, FY 2012 Performance and Accountability Report, http://www.eeoc.gov/eeoc/plan/2012par_performance.cfm.

The EEOC's current Strategic Enforcement Plan, which was approved by the Commission in 2012, reiterates the agency's core commitment to resolving employment discrimination disputes without litigation. Among other things, the Plan requires the agency to "develop[] a draft Quality Control Plan that establishes criteria to measure the quality of investigations and conciliations and develops a peer review assessment system" of those investigations and conciliations. U.S. Equal Employment Opportunity Commission, Strategic Plan for Fiscal Years 2012–2016, available at http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm#appendixb.

Finally, the EEOC is firmly committed on its own to conciliation. But the EEOC is also mindful of the Congressional expectation that conciliation rather than litigation be its primary enforcement mechanism. *See Lincoln*, 508 U.S. at 193 (noting that "an agency's decision to ignore congressional expectations may expose it to grave political consequences").

B. Review undermines conciliation.

Judicial review of conciliation undermines conciliation in at least two ways. First, it destroys the confidentiality necessary to have free and unfettered discussions during conciliations. Second, it creates an incentive for employers to treat conciliation not as a means to resolve disputes, but as an opportunity to develop a defense for a larger fight to come.

The purpose of the statute's prohibition on revealing statements made or actions taken during the Commission's conciliation efforts is to promote the congressional policy favoring unlitigated resolution of employment discrimination claims. "The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy." *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 600 n.16 (1981) (quoting Sen. Dirksen at 110 Cong. Rec. 8193 (1964)); *see also Olitsky v. Spencer Gifts*, 842 F.2d 123, 127 (5th Cir. 1988) (allowing admission of liability made during conciliation in subsequent litigation would "attach a penalty to the candor and forthrightness that Congress obviously believed were necessary to the successful conciliation of disputes"). Reviewing what went on during conciliation undermines conciliation because "[k]eeping private what is 'said or done' during conciliation is necessary to encourage voluntary settlements." *Philip Servs.*, 635 F.3d at 168.

Second, reviewing conciliation only encourages employers to view conciliation not as dispute resolution but as another front in a potential litigation battle, where gamesmanship rather than candor is rewarded. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 694 (8th Cir. 2012) (Murphy, J., dissenting) (searching review of conciliation "reward[ed] CRST for withholding information from the Commission").

The conciliation process itself is turning into a form of quasi-litigation where many respondents focus more on setting up a "failure to conciliate" defense rather than attempting to correct the employment practices EEOC found unlawful in its reasonable cause determination. *See, e.g.*, Seyfarth Shaw LLP, Pro-Actively Addressing and Preparing for EEOC Investigations and Lawsuits at 7 (2012), available at http://www.seyfarth.com/dir_docs/publications/EEOCCountdown Webinar72512.pdf (advocating, in a section entitled "High Level Strategic Considerations Post-*CRST*," which discusses the EEOC's administrative process, that "every communication [with] EEOC should be viewed as an exhibit to a future motion to a federal district court judge").

The Supreme Court, this Court, and others, have expressed concern about creating these sorts of procedural impediments in Title VII litigation, recognizing the risk of delay and diversion that such impediments would create. *See, e.g.*, *EEOC v. Shell Oil, Co.*, 466 U.S. 54, 67 (1984) ("To construe the notice requirement as respondent suggests would place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible investigations by the EEOC."); *Doe*, 456 F.3d at 711 (allowing employers to challenge whether private litigant cooperated with EEOC's administrative investigation in "good faith" before obtaining right to sue letter "would cast a pall over litigation under [Title VII]"); *EEOC v. Chicago Miniature Lamp Works*, 526 F. Supp. 974, 975 (N.D. Ill. 1981) (judicial review of basis for EEOC's reasonable cause determination would turn every Title VII case into a "two-step action" and "deflect the efforts of both the Court and the parties from the main

purpose of this litigation: to determine whether [the employer] has actually violated Title VII"); *see also CRST*, 679 F.3d at 697 (Murphy, J., dissenting) (noting that judicially enforced pre-suit requirements "punish[] the EEOC for employer recalcitrance and weaken[] its ability to enforce Title VII effectively" and "frustrate[] the underlying goal of the 1972 amendments intended to strengthen the EEOC's enforcement power").

Because of this dynamic, judicial review of conciliation results in fewer charges of discrimination being resolved through the conciliation process—depriving victims of relief—and ultimately placing increased burdens on courts.

III. If this Court were to conclude that conciliation is subject to judicial review, it should articulate a standard that embodies maximum deference to the EEOC's prosecutorial discretion.

A. A searching review of conciliation runs counter to the text of the statute, is based on incorrect premises, and undermines, rather than promotes conciliation.

Title VII contains no standard by which courts can measure the adequacy of EEOC's conciliation efforts, stating only that if EEOC cannot obtain "a conciliation agreement acceptable to the Commission," the EEOC may bring a civil suit against a respondent. 42 U.S.C. § 2000e-5(f)(1).

However, the Second, Fifth, and Eleventh Circuits, have adopted a searching review standard which requires courts to evaluate the "reasonableness and responsiveness of the EEOC's [conciliation] conduct under all the circumstances." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003) (quoting *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. Unit A 1981)); *EEOC v.*

Johnson & Higgins, Inc., 91 F.3d 1529, 1534 (2d Cir. 1996).[3] Under this heightened review standard, the court examines the conciliation to determine whether the EEOC: (1) outlined to the employer the reasonable cause for its belief that a violation of the law has occurred; (2) offered an opportunity for voluntary compliance; and (3) responded in a reasonable and flexible manner to the reasonable attitudes of the employer. *Id.*

This review of the offers and counteroffers made during conciliation discussions runs counter to the text of the statute, and the courts adopting this standard articulate no basis in Title VII or the APA for such an approach, nor could they. As discussed, nothing in Title VII outlines a procedure for conciliation that the EEOC must follow. In fact, application of this judicially-created standard requires the court to violate the express confidentiality provisions of Title VII because it forces the court to "use[] as evidence in a subsequent proceeding" what was "said or "done" during the "informal" conciliation. 42 U.S.C. § 2000e-5(b).

Searching review not only violates the text of Title VII, but is also based on the following incorrect premises: (1) that a searching review is required to punish government misconduct; and (2) that a searching review promotes conciliation.

Some courts engage in a searching review of conciliation as a means to punish what they consider government misconduct. In *EEOC v. Asplundh Tree Expert Co.*, for example, the Eleventh Circuit criticized the EEOC for its "grossly arbitrary

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[3] Several circuits, including this one, along with the Third, Ninth and D.C. Circuits have not addressed whether the EEOC's conciliations efforts are judicially reviewable, or—assuming some review—what standard of review applies.

manner" and "unreasonable conduct in failing to fulfill its statutory requirement to conciliate the matter," and affirmed dismissal because the EEOC did not conciliate in the manner that the Eleventh Circuit thought it should. 340 F.3d at 1259–61.

Long before *Asplundh Tree*, commentators recognized that the notion that the EEOC should be punished for insufficient conciliation is misguided. "By refusing to hear actions absent an adequate attempt to resolve the dispute without litigation, some courts seem to see themselves as punishing EEOC misconduct." C. Sullivan, M. Zimmer & R. Richards, Federal Statutory Law of Employment Discrimination § 3.11(b), at 331, 332 (1980). But, "most defaults probably occur not because of the agency's willful refusal to comply but rather from the inevitable mistakes inherent in processing a huge volume of charges with inadequate resources." *Id.* at 330.

Not only does the statute authorize the Commission, and not courts, to determine whether a particular conciliation offer is acceptable or not, courts, as a general matter, are ill-equipped to assess the EEOC's conciliation process. Courts reviewing conciliation examine only the conciliation in the case before it, whereas the Commission engages in thousands of conciliations per year. Searching review of the conciliation process in a particular case may well identify areas where the EEOC, or for that matter the other party, missed opportunities to reach an agreement, but such close examination in a particular case does nothing to promote conciliation over all, given the vast number of charges of discrimination that the EEOC constantly deals with. If a court were to review *all* the cases the EEOC conciliated it would, in the Commission's view, not only have a very different view about what would be adequate in a particular case, but would also have a great deal

of confidence in the EEOC's commitment to the conciliation process as a general matter.

Courts, such as the district court in this case, also review conciliation based upon the notion that doing so promotes conciliation. The argument is that when the conciliation process is not undertaken properly, more cases will proceed to court. But, as discussed, review undermines, rather than supports conciliation. *See supra* subpart II.B.

B. A deferential standard presents problems with little offsetting benefit.

The Fourth, Sixth, and Tenth Circuits, on the other hand, have adopted a more deferential standard, but they too have done so without rooting the standard in any provision in Title VII or the APA. Under this approach, a court "should only determine whether the EEOC made an attempt at conciliation. The form and the substance of . . . . conciliation[] is within the discretion of the EEOC . . . and is beyond judicial review." *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *see also EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) ("The law requires . . . no more than a good faith attempt at conciliation."); *EEOC v. Zia, Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("[W]e agree that a court should not examine the details of the offers and counteroffers between the parties[.]").

The *Keco* court, for one, articulated well the risk review of conciliation poses. It recognized the "potential for delay and diversion is significantly increased when a defendant is allowed to challenge" another EEOC pre-suit activity, and recognized that the court should only determine whether the EEOC attempted conciliation. 748

F.3d at 1100. The court also stated that "[b]efore bringing suit, the EEOC must make a good faith effort to conciliate the claim," *id. at* 1100, 1102, and this so-called good-faith standard opened the door to later challenges that have resulted in delay and diversion.

This Court, however, has already rejected adding a "good faith" requirement to Title VII and recognized its risks. In *Doe*, this Court refused to impose a "good faith cooperation" standard to bar lawsuits by private complainants whose charges of discrimination were dismissed for failure to cooperate with the EEOC's administrative investigation. 456 F.3d at 710. This Court reasoned that there is no basis in the statutory language for such a requirement, and that the Supreme Court has admonished that courts should not impose requirements beyond those in the statute. *See id.* Adding a good-faith requirement, this Court reasoned, is "adventurous and . . . will distress originalists." *Id.*

The *Doe* Court's "decisive objection" to imposing a good faith standard on conditions precedent was that "it would protract and complicate Title VII litigation, and with little or no offsetting benefit." *Id.* This Court noted the difficulty in enforcing the National Labor Relations Act, which unlike Title VII, imposes a statutory duty to bargain in good faith, "because it jostles uneasily with the right of each party to a labor negotiation to refuse an offer by the other even if a neutral observer would think it a fair, even a generous offer." *Id.* The good-faith standard's practical difficulties, this Court reasoned, applied in the Title VII context as well. A complainant's lack of cooperation might be easy to establish in some cases, but in others it would be difficult to judge whether the complainant failed to cooperate,

such as when the complainant responds to requests for information but refuses to bargain in good faith over the employer's settlement offer. *Id.* In the end, this Court recognized that "allow[ing] employers to inject such an issue by way of defense in every Title VII case would cast a pall over litigation under that statute." *Id.*

The good-faith standard should be rejected not only for all the reasons articulated in *Doe*, but also because application of such a standard would require the court to violate an express statutory provision. A court cannot review the informal conciliation process under any standard without "us[ing] as evidence in a subsequent proceeding" what was "said or done" during the "informal" conciliation.

Even this relatively limited review therefore has pitfalls, without any offsetting benefit. In addition to the risk that review of conciliation would "delay and divert" litigation, this kind of review risks unnecessarily formalizing the conciliation process, in contravention of the statute's admonition that conciliation be "informal," or, in the alternative, as Senator Williams—an opponent of conciliation reviewability—recognized, courts would be reviewing an incomplete record, one that does not accurately represent what took place. 118 Cong. Rec. 3806.

C. Crafting a workable, consistent standard of review is not possible.

The experience of applying the good-faith standard in the Circuits that have adopted it also supports nonreview and validates this Court's assessment in *Doe* that a "good-faith" standard of cooperation is, in practice, "difficult . . . to enforce." 456 F.3d at 711.

Even circuits that purport to apply the same standard of review do so in radically different ways. Courts purporting to apply deferential review disagree about what that review requires just as courts applying heightened scrutiny disagree about particular applications of that standard. Examples of inconsistent application of these standards are legion.

Some courts applying the deferential standard consider the particular demands and offers,[4] while others refuse to consider the particular demands and offers.[5] On the other hand, some courts applying the heightened standard refuse to consider particular settlement demands,[6] whereas others do.[7]

Some courts require the EEOC to identify every class member to satisfy its conciliation obligation in class cases.[8] Others do not.[9]

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[4] *See, e.g.*, *EEOC v. First Midwest Bank*, 14 F. Supp. 2d 1028, 1032–33 (N.D. Ill. 1998) (citing *Keco* and examining the amount of EEOC's monetary demands over time and the information exchanged in support of those demands).

[5] *See, e.g.*, *EEOC v. Acorn Niles Corp.*, No. 93-5981, 1995 WL 519976, at *6 (N.D. Ill. Aug. 30, 1995) (rejecting employer's argument that EEOC failed to sufficiently conciliate on the basis that the EEOC's demands were excessive and unfounded, because substance of EEOC's offer is beyond judicial review).

[6] *See, e.g.*, *EEOC v. Hibbing Taconite Co.,* 266 F.R.D. 260, 273 (D. Minn. 2009) (citing *Asplundh Tree* but refusing to allow discovery of "the substance and details of any settlement offers").

[7] *See, e.g.*, *EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 467–69 & n.5 (5th Cir. 2009) (examining conciliation under the heightened scrutiny standard and considering EEOC's monetary demand and the facts underlying the demand).

[8] *See, e.g.*, *CRST*, 679 F.3d at 677 (affirming dismissal of parts of EEOC suit brought on behalf of claimants identified after the close of the investigation and conciliation); *EEOC v. Swissport Fueling, Inc.*, __ F. Supp. 2d __, 2013 WL 68620, at *26 (D. Ariz. Jan. 7, 2013) (concluding that the EEOC could not seek relief for twenty-one claimants identified after

Courts applying deferential review sometimes require the EEOC to disclose damages information and calculations to satisfy its pre-suit obligations,[10] whereas others do not.[11]

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the close of the investigation and conciliation even though the EEOC sought relief in conciliation for class); *EEOC v. LaRana Haw., LLC*, 888 F. Supp. 2d 1019, 1045–46 (D. Haw. 2012) (finding that EEOC failed to satisfy either the deferential or the heightened standard of conciliation review where the EEOC did not describe the class in conciliation and ordering a stay for renewed conciliation after the EEOC disclosed the "number or identity of the Claimants").

[9] *See, e.g.*, *EEOC v. Rhone-Poulenc, Inc.*, 677 F. Supp. 264, 265–66 (D.N.J. 1988), *affd per curiam*, 876 F.2d 16 (3d Cir. 1989) (conciliation satisfied under deferential standard even though parties only discussed the original claimant and not other class members); *EEOC v. Scolari*, 488 F. Supp. 2d 1117, 1129 n.14 (D. Nev. 2007) (permitting EEOC to seek relief for claimants identified after the close of the investigation and conciliation); *EEOC* v. *Dial,* 156 F. Supp. 2d 926 (N.D. Ill. 2001) (rejecting the defendant's argument that EEOC's failure to identify specific class members during conciliation made conciliation inadequate); *EEOC v. United Road Towing, Inc.*, No. 10-6259, 2012 WL 1830099, at *5 (N.D. Ill. May 11, 2012) (holding that under either deferential or heightened standard the EEOC satisfied conciliation obligation with respect to seventeen claimants who were not identified during conciliation).

[10] *See, e.g.*, *EEOC v. Pac. Maritime Ass'n*, 188 F.R.D. 379, 380–81 (D. Or. 1999) (holding that the EEOC did not engage in good faith conciliation in part because it failed to explain the basis for its damages calculation); *EEOC v. Die Fliedermaus, L.L.C.*, 77 F. Supp. 2d 460 (S.D.N.Y. 1999) (applying heightened scrutiny test and holding that EEOC did not respond reasonably and flexibly when it failed conciliation after the Defendant asked for more information about charging party's damages and the scope of the class for which EEOC was seeking relief, and EEOC did not provide answers to those questions)

[11] *See, e.g.*, *Serrano v. Cintas Corp.*, 699 F.3d 884, 904–05 (6th Cir. 2012) (concluding that the EEOC notifying Cintas that it was seeking relief for a class coupled with Cintas's failure to express interest in conciliation satisfied conciliation requirement in class case); *EEOC v. Riverview Animal Clinic, P.C.*, 761 F. Supp. 2d 1296, 1302 (N.D. Ala. 2010) (applying *Asplund* standard but concluding that "EEOC can in fact negotiate in good faith even if it does not have an accurate final computation of actual damages")

Some courts require the EEOC to disclose information supporting the cause finding[12]; others do not.[13] Some courts evaluate whether the EEOC met with and communicated with the employer enough[14]; others do not.[15]

All this demonstrates that, as a practical matter, neither the heightened nor the deferential standard of review provides a consistent measure upon which to assess Commission action—or even for the Commission to assess its own action. Indeed, the uncertainty created by these varying standards and applications only encourages employers to use the conciliation process not as a means to resolve discrimination charges informally, but as a future defense to a suit on the merits.

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[12] *See, e.g.*, *EEOC v. Evans Fruit Co.,* 872 F. Supp. 2d 1107, 1114–15 (E.D. Wash. 2012) (ruling EEOC failed to sufficiently conciliate where it provided information about harassment suffered by individuals in the class and gave partial identification of harassers because it did not respond to additional requests for information that the court deemed to be reasonable).

[13] *See, e.g.*, *EEOC v. Prudential Fed. Sav. & Loan Ass'n,* 763 F.2d 1166, 1169 (10th Cir.1985) (EEOC need not prove discrimination to respondent's satisfaction during conciliation); *Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d at 1129 (holding that informing employer of the nature of the charges, sexual harassment and retaliation, was sufficient and EEOC did not have to provide explicit details of its claims and theories).

[14] *See, e.g.*, *EEOC v. UMB Bank, N.A.*, 432 F. Supp. 2d 948, 954 (W.D. Mo. 2006) (applying *Asplundh Tree* test and holding that EEOC acted unreasonably in refusing the defendant's requests for a conciliation meeting); *Pac. Maritime Ass'n*, 188 F.R.D. at 380–81 (holding EEOC failed to sufficiently conciliate in part because the EEOC refused several requests for face-to face-meetings with the employer); *EEOC v. Bratenahl Place Condo. Ass'n*, 644 F. Supp. 218, 221 (N.D. Ohio 1986) (holding EEOC did not sufficiently conciliate in part because the EEOC declined request for a meeting).

[15] *See, e.g.*, *EEOC v. Sears, Roebuck & Co.*, 391 F. Supp. 2d 317, 321 (D.N.J. 2005) (holding that EEOC's denial of employer's request for a face-to-face meeting did not show EEOC failed to sufficiently conciliate); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 985 (S.D. Ind. 2003) (sufficient conciliation even though respondent argued that it "faced a stone wall" during a conciliation meeting that lasted twenty minutes).

And it leaves the EEOC with little guidance as to what will satisfy the pre-suit conciliation requirements.

IV. Deficient conciliation should be remedied by a stay or mediation, not dismissal.

To the extent that this Court decides that conciliation is reviewable, and situations arise where a reviewing court concludes that a particular EEOC conciliation was inadequate, the remedy should be an order to conciliate further or mediate.

As noted, Title VII mentions a court's role in conciliation only in the context of cases initially brought by private plaintiffs in which the EEOC intervenes. In such cases, "[u]pon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1).

Some courts have concluded that this language means that courts have the authority to stay the proceedings when they conclude that the EEOC has not sufficiently conciliated. *See, e.g.*, *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981). Additionally, district courts have inherent power to order mandatory mediation or conciliation, so long as the case is an appropriate one for mediation and the order of mediation contains procedural and substantive safeguards to ensure fairness to all parties involved. *See, e.g.*, *In re Atlantic Pipe Corp.,* 304 F.3d 135, 147–48 (1st Cir. 2002) (mediation order of district court was not appropriate

because, in particular, it did not set limits on the duration of the mediation or the expense associated with it).

Yet, some courts dismiss suits with prejudice if they find that the EEOC failed to conciliate sufficiently. *See, e.g.*, *Asplundh Tree*, 340 F.3d at 1261 (dismissing EEOC's case for failure to conciliate). This is not authorized by the statute and deprives the Commission of the ability to remedy and deter unlawful discrimination. If the court for some reason concludes that an employer has been deprived of sufficient opportunity to conciliate, then the employer is entitled, at most, to that additional process and not to the "harsh sanction" of dismissal. *See Klingler*, 636 F.3d at 107 (dismissal "far too harsh a sanction").

CONCLUSION

Under Title VII, courts are to make de novo determinations on the merits when conciliation is unsuccessful, not delve into a process that is expressly committed to the EEOC's discretion. Review of conciliation provides no benefit, and risks only protracting litigation and undermining conciliation. The EEOC respectfully requests that this Court conclude that the conciliation process itself is unreviewable and that to satisfy its pre-suit obligation to engage in conciliation, the EEOC must only certify that it engaged in conciliation and that it was unable to obtain an agreement "acceptable to the Commission."

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,853 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the typeface and style requirements of Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface—12-point Century font in the body of the brief and 11-point Century font in the footnotes—using Microsoft Word 2007.

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Dated: July 31, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

MACH MINING, LLC,

Defendant.

Case No. 11-cv-879-JPG-PMF

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff Equal Employment Opportunity Commission's ("EEOC") (1) motion for summary judgment on defendant Mach Mining, LLC's ("Mach Mining") failure to conciliate affirmative defense (Doc. 32); and (2) motion to strike "Section F" of Mach Mining's memorandum in opposition to the EEOC's motion for partial summary judgment (Doc. 45). For the following reasons, the Court denies the EEOC's motions.

1. Facts

The EEOC filed the instant suit on behalf of Brooke Petkas and a class of female applicants who had applied for non-office jobs at Mach Mining. According to the EEOC, Mach Mining "has never hired a single female for a mining-related position," and "did not even have a women's bathroom on its mining premises." Doc. 32, p. 1-2. The complaint alleges that Mach Mining's Johnston City, Illinois, facility engaged in a pattern or practice of unlawful employment practices since at least January 1, 2006. Specifically, those unlawful "practices included, but are not limited to failing or refusing to hire females into mining and related (non-office) positions because of their sex." Doc. 2, p. 2. The EEOC further alleges that Mach Mining "has utilized hiring practices that cause a disparate impact on the basis of sex" through

its practice of "hiring only applicants who are referred by current employees." Doc. 2, p. 3. In its answer, Mach Mining asserted the affirmative defense that the EEOC failed to conciliate in good faith. The EEOC, in its instant motion for summary judgment, argues that *EEOC v. Caterpillar, Inc.*, 409 F.3d 831 (7th Cir. 2005) compels this Court to conclude that its conciliation process is not subject to judicial review.

2. Analysis

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). With this standard in mind, the Court will consider the EEOC's argument that it is entitled to judgment as matter of law.

Upon the EEOC's receipt of a charge of discrimination, the EEOC must notice the employer of the charge, investigate the allegations, and make a determination as to whether there is "reasonable cause" to believe the allegations took place. 42 U.S.C. § 2000e-5(b). Thereafter,

> [i]f the [EEOC] determines [] that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-f(b). As a prerequisite to filing suit, EEOC must give the employer a chance to conciliate. *Id.*; 42 U.S.C. § 2000e-5(f)(1) ("If . . . the [EEOC] has been unable to secure from the respondent a conciliation agreement acceptable to the [EEOC], the [EEOC] may bring a civil action . . . .").

"The [EEOC]'s duty to attempt conciliation is one of its most essential functions." *EEOC v. Radiator Specialty Co*, 610 F.2d 178, 183 (4th Cir. 1979). Its conciliation attempt must be made in "good faith." *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1031 (N.D.

Ill. 1998) (citing *EEOC v. Keco Indus., Inc.*, 748 F.2d 1087, 1102 (6th Cir. 1984); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978)); *see also EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 939 (N.D. Ill 2001). However, "[t]he judiciary's role in reviewing the conciliation process is limited, as the 'form and substance of the EEOC's conciliation proposals are within the agency's discretion and, therefore, immune from judicial second-guessing." *See First Midwest Bank, N.A.*, 14 F. Supp. 2d at 1031. (citing *Keco Indus., Inc.*, 748 F.2d at 1102; *EEOC v. Acorn Niles Corp.*, No. 93-cv-5981, 1995 WL 519976, at *6 (N.D. Ill. Aug. 30, 1995)).

Currently, there is a circuit split as to the scope of inquiry a court may make into the EEOC's statutory conciliation obligation. *See, e.g., EEOC v. St. Alexius Med. Ctr.*, 12-C-7646, 2012 WL 6590625, at *1 (N.D. Ill. Dec. 18, 2012); *EEOC v. United Rd. Towing, Inc.*, No. 10-C-6259, 2012 WL 1830099, at *4 (N.D. Ill. May 11, 2012); *EEOC v. McGee Bros.*, No. 10-cv-142, 2011 WL 1542148, at *4 (W.D.N.C. Apr. 21, 2011). Some circuits employee a "deferential standard" and others use a "heightened scrutiny standard." *United Rd. Towing, Inc.*, 2012 WL 1830099, at *4 (citing *EEOC v. McGee Bros.*, No. 10-cv-142, 2011 WL 1542148, at *4 (W.D.N.C. Apr. 21, 2011)). The Sixth Circuit, for example, employs a deferential standard, holding that

> the district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review.

EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1102 (6th Cir. 1984); *accord EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (finding "the law . . . requires no more than a good faith attempt at conciliation" and determining that the EEOC had provided such a good faith attempt after examining the various conciliation attempts); *EEOC v. Zia Co.*, 582 F.2d 527,

533 (10th Cir. 1978) ("a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide").

Other circuits, however, demand courts engage in a more strenuous review of the conciliation process. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003). For instance, in order to satisfy the conciliation requirement in the Fifth and Eleventh Circuits

> [t]he EEOC must (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer. . . . "[T]he fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances."

Id. (quoting *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981)). Accordingly, even though the circuits are split on the proper scope of a conciliation review, the courts that have weighed in on the matter agree that conciliation is subject to at least *some* level of review.

The Seventh Circuit has yet to weigh in on this circuit split. *See EEOC v. St. Alexius Med. Ctr.*, No. 12-cv-7646, 2012 WL 6590625, at *1 (N.D. Ill. Dec. 18, 2012). However, district courts within the Seventh Circuit, like all other courts to have considered the issue, have concluded that the EEOC's conciliation process is subject to at least *some* level of review. *See, e.g., EEOC v. Menard, Inc.*, 08-cv-0655-DRH, 2009 WL 1708628, at *1 (S.D. Ill. June 17, 2009) (EEOC need only "make[] a sincere and reasonable effort to negotiate"); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 984-85 (S. D. Ind. 2003); *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 941-42 (N.D. Ill. 2001) (after considering the events of the conciliation process the court held it was "persuaded that the EEOC did, indeed, attempt to conciliate" because "[b]oth parties had the opportunity to put their respective proposals on the table before the EEOC determined that conciliation would be futile."); *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1031 (N.D. Ill. 1998) (noting that "[i]f a district court finds improper conciliation

efforts were made, the appropriate remedy is not dismissal, but a stay of the proceedings so that conciliation between the parties may take place" and going on to examine the conciliation process). Specifically, this Court expressed its opinion that the EEOC's conciliation process is subject to review. *EEOC v. Crownline Boats, Inc.*, 04-cv-4244-JPG, 2005 WL 1618809, at *2-4 (S.D. Ill. July 5, 2005) ("Even though conciliation is not a jurisdictional prerequisite, the defendant may still attack the sufficiency of the EEOC's conciliation as an affirmative defense to the EEOC's claim.").

In *Caterpillar*, the Seventh Circuit held that the existence of probable cause is not a justiciable issue in a suit brought by the EEOC. *EEOC v. Caterpillar*, 409 F.3d 831, 833 (7th Cir. 2005). Specifically, the EEOC's notice to Caterpillar stated it had "reasonable cause to believe that Caterpillar discriminated against [the claimant] and a class of female employees." *Id*. at 831-32. The EEOC's suit alleged that Caterpillar had engaged in plant-wide discrimination. Caterpillar argued that the plant-wide allegation was unrelated to the original charge and moved for summary judgment. *Id*. at 832. The court denied the motion but certified the following question for interlocutory appeal:

> In determining whether the claims in an EEOC complaint are within the scope of the discrimination allegedly discovered during the EEOC's investigation, must the court accept the EEOC's Administrative Determination concerning the alleged discrimination discovered during its investigation, or instead, may the court itself review the scope of the investigation?

Id. The Seventh Circuit answered that question in the negative, specifically stating as follows:

> If courts may not limit a suit by the EEOC to claims made in the administrative charge, they likewise have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation. The existence of probable cause to sue is generally and in this instance not judicially reviewable.

Id. at 833.

Here, the EEOC fails to argue that its conciliation efforts would satisfy either the "deferential standard" or the "heightened scrutiny standard." Rather, the EEOC argues that the *Caterpillar* decision compels this Court to conclude that its conciliation process is not subject to any level of judicial review because conciliation, like a probable cause determination, is a prerequisite to filing suit.[1] *See* 42 U.S.C. § 2000e-f(b). Considering the same argument from the EEOC, a court in the Northern District of Illinois concluded that *Caterpillar* compels no such conclusion.[2] *EEOC v. St. Alexius Med. Ctr.*, No. 12-cv-7646, 2012 WL 6590625, at *2 (N.D. Ill. Dec. 18, 2012). The *St. Alexius* court reasoned that *Caterpillar* only found the probable cause determination not subject to judicial review and did not address the conciliation process. *Id*. That court further reasoned it

> would not read *Caterpillar* as having implicitly disagreed with the consensus, adopted by all circuits to have addressed the issue, that the EEOC's presuit conciliation efforts are subject to at least *some* level of judicial review; when the Seventh Circuit departs from such a consensus, it does so explicitly. *See Turley v. Gaetz*, 625 F.3d 1005, 1012 (7th Cir. 2010). Reading *Caterpillar* in the manner urged by the EEOC would be particularly unwise given that the Seventh Circuit has cited with approval *Keco Industries* and *Zia*, two of the decisions recognizing a court's authority to evaluate the EEOC's conciliation efforts when those efforts (or lack thereof) are challenged by a defendant in an EEOC-initiated employment discrimination suit. *See [EEOC v.] Elgin Teachers Ass'n*, 27 F.3d [292,] 294 [(7th Cir. 1994)].

Id. at *2. The Court finds the *St. Alexius* reasoning persuasive and adopts its reasoning herein.

The Court also notes that at least one other circuit rejects the EEOC's reasoning that *Caterpillar*'s holding, that the pre-suit reasonable cause determination is non-justiciable, is

[1] The Court also notes that the EEOC makes an argument that the Administrative Procedures Act ("APA") is relevant to the Court's decision. The EEOC cites no authority that directly supports this proposition. Further, this is an action brought directly by the EEOC, not a person aggrieved by an agency action. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entited to judicial review thereof.").

[2] While *St. Alexius* considered an American with Disabilities Act ("ADA") case, as that Court noted, the ADA incorporated the provisions of Title VII "regarding the procedures the EEOC must follow in handling administrative charges and in filing suits against employers on behalf of claimants." *St. Alexius*, 2012 WL 6590625, at *1 (citing 42 U.S.C. § 2177(a)).

inconsistent with a holding that the conciliation process is justiciable. The Fourth Circuit, like *Caterpillar*, has held that Title VII does not provide for review of the EEOC's reasonable cause determination. *Caterpillar*, 409 F.3d at 832 (citing *Georator Corp. v. EEOC*, 592 F.2d 765, 767 (4th Cir. 1979)). That same circuit also employs a deferential standard in reviewing the EEOC's conciliation process. *See EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (finding "the law . . . requires no more than a good faith attempt at conciliation" and determining that the EEOC had provided such a good faith attempt after examining the attempts at conciliation).

For these reasons, the Court concludes that *Caterpillar* does not preclude at least some level of judicial review of the EEOC's conciliation process. Thus, the Court denies the EEOC's motion for summary judgment. Of course, this ruling does not preclude the EEOC from filing a motion for summary judgment arguing that it did conciliate in good faith.

Finally, the EEOC filed a motion to strike a section of Mach Mining's response to the EEOC's motion for summary judgment that contained references to the conciliation process. The EEOC argues Mach Mining's reference to the conciliation process violates the portion of 42 U.S.C. § 2000e-5(b) that states "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." However, because the Court has found that the EEOC's conciliation process is subject to at least some level of review and that review would involve at least a cursory review of the parties' conciliation, the Court denies the EEOC's motion.

The Court notes, however, that the inquiry into the conciliation process does not require every detail of the conciliation process, as the Court need only determine whether the EEOC

made "a sincere and reasonable effort to negotiate." *EEOC v. Menard, Inc.*, 08-cv-0655-DRH, 2009 WL 1708628, at *1 (S.D. Ill. June 17, 2009); *see EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide"); *see also EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 273 (D. Minn. 2009) ("While the substance and details of any settlement offers, or discussions, are not discoverable, the actions and efforts, that are undertaken by the EEOC to conciliate the matter are discoverable information, and are subject to the Court's review.)

3. Conclusion

Thus, the Court finds that the EEOC is not entitled to judgment as a matter of law on Mach Mining's affirmative defense that the EEOC failed to conciliate in good faith and **DENIES** the EEOC's motion for summary judgment (Doc. 32). The Court further **DENIES** the EEOC's motion to strike Section F of Mach Mining's response (Doc. 45).

IT IS SO ORDERED.

DATED: January 28, 2013

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

MACH MINING, LLC,

Defendant.

Case No. 11-cv-879-JPG-PMF

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff Equal Employment Opportunity Commission's ("the EEOC") motion (Doc. 59) to reconsider or to certify for appeal pursuant to 28 U.S.C. § 1292(b) this Court's order (Doc. 55) denying the EEOC's motion for partial summary judgment. Defendant Mach Mining, LLC ("Mach Mining") filed a response (Doc. 66) to which the EEOC replied (Doc. 72). The Court heard oral argument on this matter on May 16, 2013. For the following reasons, the Court denies the motion to reconsider and grants the motion to certify this Court's January 28, 2013, order (Doc. 55) for appeal.

1. Facts

The EEOC filed the instant suit on behalf of Brooke Petkas and a class of female applicants who had applied for non-office jobs at Mach Mining. According to the EEOC, Mach Mining "has never hired a single female for a mining-related position," and "did not even have a women's bathroom on its mining premises." Doc. 32, p. 1-2. The complaint alleges that Mach Mining's Johnston City, Illinois, facility engaged in a pattern or practice of unlawful employment practices since at least January 1, 2006. Specifically, those unlawful "practices included, but are not limited to failing or refusing to hire females into mining and related (non-

office) positions because of their sex." Doc. 2, p. 2. The EEOC further alleges that Mach Mining "has utilized hiring practices that cause a disparate impact on the basis of sex" through its practice of "hiring only applicants who are referred by current employees." Doc. 2, p. 3.

In its answer, Mach Mining asserted the affirmative defense that the EEOC failed to conciliate in good faith. The EEOC then filed a motion for partial summary judgment arguing that conciliation is beyond the scope of judicial review. This Court denied the EEOC's motion finding that the EEOC's conciliation efforts were subject to at least *some* level of review (Doc. 55). The EEOC now asks the Court to reconsider its order denying the EEOC's motion for partial summary judgment. In the alternative, the EEOC asks this Court to certify the following question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): "whether, under Title VII or the [Administrative Procedure Act] ("APA"), courts may review EEOC's informal efforts to secure a conciliation agreement acceptable to the Commission before filing suit."

2. Motion to Reconsider

The EEOC argues reconsideration is appropriate because the Court committed manifest errors of law when it failed to (1) construe the APA to preclude judicial review of conciliation; and (2) strike Mach Mining's brief that referred to conciliation. "A court has the power to revisit prior decisions of its own . . . in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)); Fed. R. Civ. P. 54(b) (providing a non-final order "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). The decision whether to reconsider a previous ruling in the same case is governed by the law of the case

doctrine. *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 571-72 (7th Cir. 2006). The law of the case is a discretionary doctrine that creates a presumption against reopening matters already decided in the same litigation and authorizes reconsideration only for a compelling reason such as a manifest error or a change in the law that reveals the prior ruling was erroneous. *United States v. Harris*, 531 F.3d 507, 513 (7th Cir. 2008); *Minch v. City of Chicago*, 486 F.3d 294, 301 (7th Cir. 2007). The Court will now consider whether it committed a manifest error of law requiring the reversal of its order denying the EEOC's motion for partial summary judgment.

a. APA Applicability

In a footnote in its order denying the EEOC's motion for partial summary judgment, the Court noted the EEOC did not provide caselaw supporting its argument that the APA precludes judicial review of its statutory conciliation requirement. The EEOC, in its motion to reconsider, now backs up its argument with caselaw referencing the APA. Specifically, the EEOC cites to *Standard Oil*, *AT&T*, *Caterpillar*, and *Elgin*. In *Standard Oil*, the Supreme Court found that the Federal Trade Commission's issuance of a complaint, including its reasons to believe the defendant was in violation of the Federal Trade Commission Act, was not judicially reviewable. *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 243 (1980). In *AT&T*, the D.C. Circuit held that the EEOC's letters of determination did not constitute final agency action that was reviewable by the court. *AT&T Co. v. EEOC*, 270 F.3d 973, 976-77 (D.C. Cir. 2001). In *Caterpillar*, a case on which the EEOC heavily relies, the Seventh Circuit held that "[t]he existence of probable cause to sue is generally and in this instance not judicially reviewable." *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005). In sum, *Standard Oil*, *AT&T*, and *Caterpillar* do not take a position on conciliation, and do not persuade the Court that conciliation is beyond judicial review.

In *Elgin Teachers Association*, the only case cited by the EEOC that considers conciliation, the EEOC found the Elgin school district's collective bargaining agreement objectionable. *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 293 (7th Cir. 1994). Even though the school district changed the objectionable portions of the agreement, the EEOC filed suit seeking damages. *Id*. The Seventh Circuit rejected the defendant's argument that the EEOC lacked the right to bring suit. *Id*. at 294. Specifically, "[a]lthough the EEOC must pursue conciliation, 42 U.S.C. § 2000e-5(b); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978), it failed to get all of what it wanted in bargaining." *Id*. Accordingly, rather than find conciliation was unreviewable, the Seventh Circuit merely found that the EEOC could pursue its suit because it did not receive all of what it bargained for in conciliation. *Id*.

Interestingly, *Elgin Teachers Association* provides support for a court's authority to inquire into the EEOC's conciliation process. First, the opinion specifically says the EEOC *must* pursue conciliation. *Id*. at 294. Without court review this statutory command is meaningless. Further, the Seventh Circuit cites to *Zia* with approval. *Id*. In *Zia*, the Tenth Circuit specifically recognized a court's authority to review conciliation when it held that "the EEOC is required to act in good faith in its conciliation efforts." *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). However, "a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide . . . ." *Id*. Accordingly, the Seventh Circuit's cite of approval to *Zia* in the context of conciliation leads this Court to believe the Seventh Circuit may find the EEOC's conciliation efforts are subject to at least a minimal level of review.

The EEOC has failed to provide any caselaw that supports its extension of the APA to preclude judicial review of conciliation. To the contrary, the Court's ruling was consistent with

every Circuit to have considered the issue. *See, e.g.*, *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003) ("the EEOC must (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer"); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984) (the district court should only determine whether the EEOC made an attempt at conciliation); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (finding "the law . . . requires no more than a good faith attempt at conciliation" and determining that the EEOC had provided such a good faith attempt after examining the various conciliation attempts); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide").

Further, the Court's order was consistent with Seventh Circuit caselaw that suggests courts may make at least some level of inquiry into conciliation. In *EEOC v. Massey-Ferguson*, the Seventh Circuit found that the EEOC was not required to raise class backpay claims during conciliation. 622 F.2d 271, 277 (7th Cir. 1980). However, the court stated that "failure to conciliate on class backpay is relevant to the question of unreasonable delay and, therefore, ultimately to laches." *Id*. Accordingly, the Seventh Circuit acknowledged that courts may inquire into the conciliation process. Similarly, in *Schnellbaecher v. Baskin Clothing*, the Seventh Circuit found dismissal of a suit was appropriate where a party did not have notice of the charges or a chance to conciliate. 887 F.2d 124, 127 (7th Cir. 1989). Again, the Seventh Circuit seems to acknowledge that at least some level of inquiry into the conciliation process is appropriate. Thus, for the foregoing reasons, the Court cannot conclude it committed a manifest

error of law in finding the EEOC's conciliation process is subject to at least some level of review.

b. Section F of Mach Mining's Response

Similarly, the Court cannot conclude it committed a manifest error of law in failing to strike Section F of Mach Mining's response to the EEOC's motion for partial summary judgment in which Mach Mining discusses the conciliation between the parties. The statute which the EEOC contends prohibits disclosure of this conciliation material provides as follows:

> Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

42 U.S.C. § 2000e-5(b). The EEOC argues that the Court erred because its ruling was in contradiction to the portion of the statute prohibiting conciliation matters to be "used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Id.*

This statutory command to refrain from introducing conciliation matters into evidence in subsequent proceedings appears to be in contradiction to the EEOC's statutory duty to conciliate. The statute requiring conciliation provides that

> [i]f the [EEOC] determines [] that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-f(b). As previously discussed, this statute has been read by every court to have considered the issue as requiring the EEOC to conciliate and subjecting that conciliation to at least some level of judicial review. However, to review whether the EEOC engaged in conciliation, at least some level of evidence regarding conciliation efforts must be introduced into evidence in a proceeding before the court.

"Statutory terms or words will be construed according to their ordinary, common meaning." *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 544 (7th Cir. 2003). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there." *Id.* (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The Court must also be mindful that statutes dealing with the same subject matter must "be read *in pari materia* and harmonized when possible." *Matter of Johnson*, 787 F.2d 1179, 1181 (7th Cir. 1986). Courts have an obligation to construe statutes "in such a way as to avoid conflicts between them, if such a construction is possible and reasonable." *Precision Indus., Inc.*, 327 F.3d at 544.

The Court believes a reasonable interpretation of 42 U.S.C. § 2000e-5(b) is achieved by construing that statute as prohibiting the introduction of conciliation matters into evidence to prove or disprove a claim on the merits. That statute, however, does not prohibit the introduction of conciliation matters in collateral proceedings such as contesting the EEOC's conciliation efforts. The Court can harmonize 42 U.S.C. § 2000e-f(b) with 42 U.S.C. § 2000e-5(b) in this manner by comparing 42 U.S.C. § 2000e-5(b) to Federal Rule of Evidence 408.

Rule 408 prohibits any party from introducing evidence of settlement negotiations into evidence. Fed. R. Evid. 408(a). However, "[t]he court may admit this evidence" in a collateral proceeding. Fed. R. Evid. 408(b). The prohibition on the introduction of the EEOC's conciliation efforts is similar to the reasoning behind Rule 408. Evidence of compromise is excluded on the ground of "the public policy favoring the compromise and settlement of disputes." Fed. R. Evid. 408 advisory committee's note. Similarly, "[w]hen Congress first enacted Title VII in 1964 it selected '[c]ooperation and voluntary compliance as the preferred means for achieving' the goal of equality of employment opportunities." *Occidental Life Ins.*

Co. of California v. EEOC, 432 U.S. 355, 367-68 (1977). Congress intended the EEOC not "simply as a vehicle for conducting litigation on behalf of private parties," but as an "agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion." *Id.* at 368.

Because both Rule 408 and the EEOC's duty to conciliate arise from a strong policy favoring settlement, it is reasonable for the Court to read 42 U.S.C. § 2000e-f(b) as prohibiting the introduction of conciliation with respect to a ruling on the merits of the case. However, such evidence may be permitted in a collateral matter, such as assessing whether the EEOC has engaged in conciliation. Such a construction would further the policy encouraging settlement, but at the same time allow courts to review conciliation in a collateral proceeding. This reading is reasonable and avoids a contradiction of the statutes requiring conciliation and prohibiting the introduction of conciliation matters into evidence. It further avoids an absurd result which would be present if a party contesting conciliation could not introduce evidence of that conciliation. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").

In this instance, Mach Mining did not introduce conciliation matters for the purpose of proving or disproving this case on its merits. Rather, Mach Mining attached this information for the purpose of proving the EEOC failed to fulfill its statutory obligation to conciliate. For that reason, the Court did not commit a manifest error of law in failing to strike Section F of Mach Mining's response to the EEOC's motion for partial summary judgment.

For the foregoing reasons, the Court did not commit a manifest error of law in failing to read the APA as prohibiting judicial review of conciliation or in declining to strike Section F of

Mach Mining's response to the EEOC's motion for partial summary judgment. Thus, the Court denies the EEOC's motion to reconsider.

3. Motion to Certify

In the alternative, the EEOC asks this Court to certify its order denying the EEOC's motion for partial summary judgment to the Seventh Circuit Court of Appeals pursuant to section 1292(b). The court of appeals, in its discretion, may hear an interlocutory appeal after certification from the district court that the appeal presents "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Accordingly, "[t]here are four statutory criteria for the grant of a section 1292(b) petition to guide the district court: there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000). The party seeking an interlocutory appeal bears the burden of demonstrating "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

There are two questions at issue as follows: (1) Is the EEOC's conciliation process subject to judicial review?; and (2) If so, is that level of review a deferential or heightened scrutiny level of review? There is no doubt that these questions are questions of law. Further, the EEOC's position has merit. EEOC has pointed out that no circuit has considered its APA arguments. Also, while all circuits to have considered the issue have found conciliation subject to review, those circuits are not in agreement on the level of review. *See United Rd. Towing, Inc.*, 2012 WL 1830099, at *4 (citing *EEOC v. McGee Bros.*, No. 10-cv-142, 2011 WL 1542148,

at *4 (W.D.N.C. Apr. 21, 2011)) (noting some circuits employee a "deferential standard" and others use a "heightened scrutiny standard" of conciliation review). The Seventh Circuit has not specifically ruled on the justiciability of conciliation or the extent of that inquiry. The EEOC also advances significant arguments that *Caterpillar* should be extended to prohibit judicial review of conciliation.

The questions raised are controlling in this case. "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). Here, if conciliation is justiciable, the inquiry into the EEOC's conciliation could dramatically impact the size of the class. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 689-90 (8th Cir. 2012) (dismissing EEOC's claims on behalf of claimants whose alleged harassment occurred after the filing of suit because EEOC could not have conciliated on those claimants' behalf).

Finally, an interlocutory appeal on this matter may also advance the ultimate termination of litigation. If this appeal is not allowed, and Mach Mining is allowed to discover conciliation material to support its affirmative defense, the numerous discovery requests[1] from Mach Mining will undoubtedly delay the termination of this litigation. On the other hand, if the Seventh

[1] The EEOC summarized the relevant pending discovery as follows:

> Mach [Mining]'s motion to compel discovery on this topic is currently pending and the discovery sought is extensive, including over 100 requests to admit facts, interrogatories, and a 30(b)(6) deposition of an EEOC official. Invariably there is overlap between material that concerns conciliation and material that is covered by the deliberative process privilege. Depositions on these topics almost always produce further discovery disputes regarding EEOC's invocation of this privilege. Mach [Mining] has also indicated that it seeks to depose all of the female applicants for whom EEOC seeks relief, and given the nature of its inquiries to date, it is reasonable to assume that it will attempt to question each woman about her participation in conciliation.

Doc. 72, p. 2.

Circuit concludes that the EEOC's conciliation process is not justiciable, this case will proceed exponentially faster absent numerous conciliation-related discovery requests.

Because the EEOC has established the four statutory criteria for certification pursuant to § 1292(b), the Court grants the EEOC's motion to certify and certifies the following questions for appeal: Whether courts may review the EEOC's informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit? If courts may review the EEOC's conciliation efforts, should the reviewing court apply a deferential or heightened scrutiny standard of review?

4. Conclusion

In conclusion the Court **GRANTS in part and DENIES in part** the EEOC's motion (Doc. 59). Specifically, the Court **DENIES** the EEOC's motion to reconsider and **GRANTS** its motion to certify this Court's January 28, 2013, order for interlocutory appeal. The Court **CERTIFIES** its January 28, 2013, order (Doc. 55) for interlocutory appeal because the following questions meet the 28 U.S.C. § 1292(b) requirements:

> May courts review the EEOC's informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit? If courts may review the EEOC's conciliation efforts, should the reviewing court apply a deferential or heightened scrutiny standard of review?

IT IS SO ORDERED.

DATED: May 20, 2013

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE