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 MACH MINING, LLC AS DEFENDANT-APPELLEE

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DISCLOSURE STATEMENT

Defendant-Appellee Mach Mining, LLC is represented by the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. The parent corporation of Mach Mining, LLC is Coal Field Transports, Inc. There are no publicly held companies that own more than 10 percent of Mach Mining LLC's stock.

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STATEMENT REGARDING ORAL ARGUMENT

In that the EEOC's Interlocutory Appeal lacks support in law and ignores 40 years of precedent ruling otherwise, Appellee Mach Mining, LLC does not see the need for or value in oral argument. Every court to have considered the EEOC's obligations in conciliation has found that whether the EEOC fulfilled its statutory obligation to conciliate is subject to judicial review. Further, precedent establishes that the EEOC is obligated to conciliate in good faith, which, at a minimum, requires providing the employer a meaningful opportunity to resolve the issues, by being reasonable and being responsive to the employer's legitimate requests such that an employer may evaluate and formulate a response to the EEOC's demands. Oral argument on these points is unnecessary.

STATEMENT OF JURISDICTION

The jurisdictional statement in Appellant's Brief is complete and correct.

STATEMENT OF THE ISSUES

The Statement of Issues in Appellant's Brief is complete and correct.

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 conciliation.

STATEMENT OF FACTS

Unfortunately, due to the EEOC's extensive motion practice and its threats against Mach, there is no record of the EEOC's conciliation conduct in this case.

For well over a year, the EEOC has refused to respond to any of Mach's conciliation-related discovery. Through this appeal and four other motions – Doc. No. 32 (Motion for Partial Summary Judgment), Doc. No. 45 (Motion to Strike a portion of Mach's Memorandum in Opposition to EEOC's Motion for Partial Summary Judgment), Doc. No. 59 (Motion for Reconsideration), and Doc. No. 60 (Motion for Protective Order), the EEOC has engaged in lengthy motion practice to prevent Mach from discovering any information from the EEOC regarding its conciliation conduct.

In a double-barreled approach, the EEOC has also effectively obstructed Mach from presenting the district court with the already-known facts about the EEOC's conduct. The EEOC threatened criminal and civil penalties against Mach's counsel if Mach sought to present any conciliation-related information to the district court. On September 13, 2012, EEOC Trial Counsel wrote the following to Mach's counsel of record:

> While it may not be clear that Title VII's criminal sanctions apply to 'any person' including non-EEOC employees (though they may), EEOC's view is that it would certainly be sanctionable for you to inject prohibited documents into the proceedings. . . .
>
> Please . . . confirm that you do not intend to submit evidence of anything that was said or done during conciliation . . . . If you do not so confirm, EEOC will likely be forced to file a motion for a protective order on this matter . . . . [Further], EEOC would have to consider

> seeking sanctions against you personally pursuant to 28 U.S.C.A. § 1927.
>
> To be clear: if you file any conciliation material . . . without the written consent of EEOC and Brooke Petkas, or prior approval of the court, EEOC will likely seek sanctions against you and your client.

Thus, the EEOC has ensured that the only "fact" in the record is its own self-serving conclusion that it complied with its statutory duty to conciliate.

Consequently, although the district court has concluded (like every other court to consider the issue for forty years) that the EEOC's conciliation conduct is subject to judicial review, the court has been to date deprived of the opportunity to consider whether the EEOC: (1) refused to set forth any evidence supporting its findings; (2) refused to explain the basis for its settlement demands; (3) refused to disclose the identity or qualifications of those applicants to whom the EEOC insisted Mach must make unconditional offers for employment; (4) refused to grant Mach an in-person conference as required by the statute so the parties could discuss settlement and why additional information was needed to have meaningful conciliation; (5) ceased negotiations despite Mach's numerous substantial counteroffers and Mach's express willingness to continue negotiations; and (6) prematurely ended conciliation, filed suit and issued a press release within days before the close of the EEOC's Fiscal Year.

SUMMARY OF THE ARGUMENT

Congress intended that the conciliation process should be the EEOC's primary method of enforcing Title VII. Absent review of whether the EEOC has complied with its duty to engage in the conciliation process as intended, Congress' mandate would become empty words lacking the assurance of judicial enforcement.

Accordingly, every court presented with the issue for more than forty years has found that the EEOC's conciliation efforts are subject to judicial review. This is consistent with the general strong presumption in favor of judicial review of administrative agencies. Direct review of conciliation by the district court is particularly appropriate because there will be no other opportunity for review of whether the EEOC complied with its statutory obligation. Congress cannot have intended to give the EEOC a blank check, and no court has allowed the EEOC to sit as judge of its own compliance.

Although the EEOC claims it does not need "court intervention" to ensure its compliance, numerous court decisions upholding the principle of judicial review also demonstrate in practice the need for courts to check the EEOC. Courts have repeatedly found that the EEOC has failed to fulfill its statutory duty by failing to engage in reasonable and responsive conciliation. Moreover, Congress specifically gave the EEOC the right to bring suit because it believed the potential for judicial intervention would lead employers to more fully engage in conciliation and thus ultimately to less litigation. It is odd that the EEOC now takes the position that judicial review of its conciliation efforts would have the opposite effect.

What district courts should review is precisely what the statute requires – whether the EEOC has engaged in the conciliation process in a good faith effort to resolve the dispute. The district court is well-equipped to determine whether the EEOC has, under the circumstances of the particular case, acted reasonably, sincerely, and responsively, such that the employer has been provided a meaningful opportunity to evaluate and respond to the EEOC's demands and thereby to resolve the matters at issue.

This Court should reject the EEOC's effort to overturn four decades of jurisprudence. Indeed, in the face of the overwhelming legislative and judicial history, the EEOC has resorted to turning numerous legal and factual issues on their heads. The EEOC argues that Title VII precludes judicial review by its silence, when the opposite is true. The EEOC has conflated the issue at bar – its obligation to engage in the conciliation process – with the separate issue of whether it can be forced to agree to a particular resolution. And in so doing, the EEOC has done violence to the legislative history of Title VII. Similarly, the EEOC creates an obvious straw-man by acknowledging the Administrative Procedures Act does not apply but arguing it anyway. Moreover, the EEOC ignores that the APA's principles, if they applied, would support judicial review here because there will be no later opportunity for judicial review of conciliation and because the construction and application of Title VII is a matter well-within the court's expertise.

ARGUMENT

I. Courts May Review Whether The EEOC Complied With Its Statutory Obligation To Engage In The Conciliation Process.

A. The Issue Before The Court.

The issue before the Court is straightforward: After the EEOC has initiated a lawsuit in federal court may the court review whether the EEOC first complied with its statutory pre-suit obligation to conciliate the matters at issue with the employer? Every court to consider the issue has answered in the affirmative. These courts rely on Congress' intent that the conciliation process be the central enforcement mechanism of Title VII and the fact that, without such judicial review, this crucial statutory obligation would be unenforceable and thus meaningless.

There is no other means by which an employer can have the conciliation issue addressed. The question is not one of *when* the court should review the EEOC's compliance with its conciliation obligation, but rather of *if* it will ever be reviewed. The conciliation process is not a preliminary agency opinion about the merits of a claim that, if mistaken, will be fixed later by the fact-finder. Whether the EEOC fulfilled Congress' statutory mandate to conciliate before suing will either be reviewed directly or it will not be reviewed at all. According to the EEOC, no court may ever review whether it satisfied its duty, mandated by Title VII, to conciliate meaningfully with the employer before it files a lawsuit. While having unchecked power would no doubt be convenient for the EEOC, there is no merit to the EEOC's position and it has been rejected every time it has been suggested.

B. Conciliation Is At The Heart Of Title VII.

The EEOC's "duty to conciliate is at the heart of Title VII." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003). In fact, Congress made clear that conciliation "is the preferred means of achieving the objectives of Title VII and is one of the most essential functions of the EEOC." *EEOC v. Agro Distribut., LLC*, 555 F.3d 462, 468 (5th Cir. 2009). The Supreme Court has similarly recognized the importance of EEOC's statutory duty to attempt to resolve employment discrimination claims before resorting to litigation.[1]

When Congress originally enacted Title VII in 1964, it conferred upon the EEOC "only the powers of investigation and conciliation." *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 607 (9th Cir. 1982). In 1972, when Congress gave the EEOC the power to file suit, it did so with the intention of strengthening, not replacing, the emphasis on conciliation. *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1357 (6th Cir. 1975). The conciliation requirement "clearly reflects a strong congressional desire for out-of-court settlements of Title VII violations." *Asplundh,* 340 F.3d at 1261. Congress expressed its intention regarding the conciliation process in its March 8, 1972 Conference Report: "The conferees contemplate that the Commission

[1] *See Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 367-68 (1977) (holding the "EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination *and settling disputes, if possible, in an informal, noncoercive fashion*." *Id.* (*emphasis added*). *See also Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982) (holding "the legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into "voluntary compliance" and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace.").

will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring an action in federal district court to seek enforcement." *EEOC v. Zia,* 582 F.2d 527, 533 (10th Cir. 1978) (quoting 118 Cong. Rec. 1861 (March 8, 1972)).

Congress thus made the EEOC's obligation to engage in the conciliation process part of Title VII's "integrated, multistep enforcement procedure" and a statutory condition precedent to filing suit. *EEOC v. CRST Van Expedited*, 679 F.3d 657, 671-72 (8th Cir. 2012) (quoting *Occidental Life Ins. Co. of Calif. v. EEOC*, 432 U.S. 355, 359 (1977)). Conciliation is not optional. Rather, Congress explicitly made conciliation a mandatory obligation of the agency and a right of employers. The statute states that "the Commission *shall* endeavor to eliminate any such alleged unlawful practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (emphasis supplied); *see also Johnson v. EEOC*, 1995 WL 374058 (N.D. Ill. June 21, 1995) (conciliation is an employer's procedural right). Only after the parties engage in those conjunctive methods, and only if they fail, may the EEOC file a lawsuit against the employer. *CRST Van Expedited*, 679 F.3d at 671, 672; 42 U.S.C. §2000e-5(f).

C. Every Court Finds The Conciliation Obligation Subject To Review.

Given the centrality of conciliation to Title VII's enforcement mechanism, it is not surprising that every court to consider the matter has found the EEOC's compliance with its conciliation obligation subject to judicial review. *EEOC v. Mach Mining, LLC*, 2013 WL 319337 *3 (S.D. Ill. Jan 28, 2013). *See, e.g., CRST Van*

Expedited, 679 F.3d at 671-72 (the EEOC failed to conduct *bona fide* conciliation or provide employer a "meaningful opportunity to conciliate"); *Asplundh*, 340 F.3d at 125 (in evaluating the EEOC's conciliation obligation, "the fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances"); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996) (the EEOC fulfills its conciliation obligation only if it "responds in a reasonable and flexible manner to the reasonable attitude of the employer"); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1169 (10th Cir. 1985) (conciliation is "a flexible and responsive process which necessarily differs from case to case" and requires the EEOC to make "a sincere and reasonable effort"); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984) ("Before bringing suit, the EEOC must make a good faith effort to conciliate the claim"); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (requiring "good faith" effort at conciliation). *See also EEOC v. Univ. of Penn.*, 850 F.2d 969, 978-79 (3d Cir. 1988) (rejecting employer's "first-filed rule" argument as inconsistent with congressional intent because "instead of attempting to resolve a dispute in good faith, the EEOC and an employer in this Circuit would engage in pro forma discussions with an eye toward winning the race to the courthouse in the most favorable forum.").

The Seventh Circuit has also recognized that conciliation includes a requirement of "good faith" and that particular information may be required by the parties before such "good faith" conciliation is possible. *EEOC v. O'Grady*, 857 F.2d 383, 392-93 (7th Cir. 1988) (affirming district court decision that statute of

limitations should be tolled because the EEOC could not fulfill required "good faith conciliation efforts" until employer complied with subpoena for information).

Although the EEOC has from time to time questioned the court's power to review whether its efforts have met its statutory obligation, courts have rejected the EEOC's position from the beginning and have continued to do so through the present. These courts recognize that denying judicial review of whether the EEOC complied with its statutory obligation would, by making the obligation unenforceable, essentially make the obligation meaningless.

> If, as the defendants contend, there are statutory preconditions to bringing suit, to foreclose judicial inquiry into the satisfaction of the conditions would eliminate them from the Act. The Court concludes that the question of the EEOC's satisfaction of the statutory conditions precedent to suit is a proper and indeed a necessary subject of judicial inquiry.

EEOC v. Container Corp. of Am., 352 F. Supp. 262, 266 (M.D. Fla. 1972), cited with approval in *EEOC v. Sears*, 504 F. Supp. 241, 278 (N.D. Ill. 1980), *aff'd* 839 F.2d 302 (7th Cir. 1988).

> I am not persuaded by Plaintiff's contention that this Court lacks the power to determine the adequacy of the Secretary's conciliation attempts. Section 7(b) of the ADEA is a statutory precondition to bringing suit.

Brennan v. Weis Mkts., 1973 WL 120, *2 (M.D. Pa. March 22, 1973) (analyzing analogous provision of the ADEA, 29 U.S.C. § 626(b)).

> "[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. . . . Specifically, this Court expressed its opinion that the EEOC's conciliation process is subject to judicial review.

EEOC v. Mach Mining, LLC, 2013 WL 319337 at *3 (S.D. Ill. Jan. 1, 28, 2013) (citing *EEOC v. Crownline Boats, Inc.*, 2005 WL 1618809 (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 ….").

> *Elgin Teachers Association* [27 F.3d 292 (7th Cir. 1994)] 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. Without court review, this statutory command is meaningless. Further, the Seventh Circuit cites to *Zia* with approval. In *Zia* [*EEOC v. Zia*, 582 F.2d 527 (10th. Cir. 1978)], the Tenth Circuit specifically recognized a court's authority to review conciliation . . .

EEOC v. Mach Mining, LLC, 2013 WL 217770 * 2 (S.D. Ill. May 20, 2013).

D. There Is A General Strong Presumption Favoring Judicial Review.

This judicial consensus in favor of reviewability comports with the fundamental principle that the power of an executive agency is subject to being checked by the judicial branch. There is a "strong presumption that Congress intends judicial review of administrative action." *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (internal punctuation and citation omitted). The presumption is so strong it "may be overcome only upon a showing of clear and convincing evidence of a contrary legislative intent." *Id.* "Judicial review is the rule . . . It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 672 n.3 (1986) (quoting Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 432 (1958)).

The reason for the general strong presumption is similar to the rationale set forth by those courts addressing the EEOC conciliation in particular. Judicial review is presumed because "[w]ithout judicial review, statutory limits would be naught but empty words." *Bowen,* 476 U.S. at 672 n.3. (quoting B. Schwartz, Administrative Law § 8.1, p. 436 (2d ed. 1984)). Similarly, Congress itself has also made clear that it intends for there to be judicial review of the laws it enacts, including when they involve administrative agencies. "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases." H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946), U.S. Code Cong. Serv. 1946, p. 1195, *quoted in*, *Bowen*, 476 U.S. at 671. "It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined . . . Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945), *quoted in Bowen*, 476 U.S. at 671.[2]

The right to judicial review is all the stronger when, as here, there is no other means to enforce the requirements of the statute. "[U]nless members of the protected class may have judicial review the statutory objectives might not be realized." *Barlow v. B.L. Collins*, 397 U.S. 159, 167 (1970). Here, emphasizing its preference for conciliation over litigation, Congress has prohibited the EEOC from

[2] Although these statements of the House and Senate occurred in the context of considering what became the Administrative Procedures Act, they reflect Congress's intent regarding judicial review in general. "It has never been the policy of Congress to prevent the administrative of its own statutes from being judicially confined . . ." *Bowen*, 476 U.S. at 670-71.

bringing suit unless and until it conciliates as required by Title VII. 42 U.S.C. §§ 2000e-5(b), 2000e-5(f). Unless the district court can review whether the EEOC has fulfilled the obligation to conciliate set forth in the statute, Congress' "statutory objectives might not be realized." *Barlow*, 397 U.S. at 167. "As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." *Leedom v. Kyne*, 358 U.S. 184, 190 (1958) (internal punctuation and citation omitted).

The Supreme Court explained the "controlling" principle as follows: "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." *Kyne*, 358 U.S. at 190. "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* The Supreme Court later emphasized that "central to our decision in *Kyne* was the fact that the Board's interpretation of the Act would wholly deprive the union of a meaningful and adequate means of vindicating its statutory rights." *Bd. of Governors of the Fed. Reserve Sys. v. Mcorp Fin., Inc.*, 502 U.S. 32, 43 (1991). Similarly, without judicial review of whether the EEOC fulfilled its conciliation obligation, employers would be deprived of any means of vindicating their right to the conciliation required by Title VII.

E. The EEOC's Arguments Have The Law And Facts Backward.

In the face of this uniform judicial precedent and the strong presumption in favor of judicial review, the EEOC presents several arguments against the reviewability of its conciliation obligation. None of them has merit. Instead, to the extent it is relevant at all, closer examination of the EEOC's cited authority demonstrates that it too favors judicial review of the EEOC's conciliation duty.

1. The EEOC Attempts To Reverse The Presumption Of Judicial Review.

The EEOC's first argument is that Title VII precludes judicial review of conciliation because it does not provide specifically for it. (Br. 7). The EEOC says its argument is buttressed by the fact that Title VII mentions "court involvement" elsewhere in the statute. (Br. 10). The EEOC is wrong on both counts.

The EEOC's arguments ignore (and indeed reverse) the well-established presumption in favor of judicial review, and they are incorrect as a matter of law. Congress has made clear that "[t]he mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." *Bowen*, 476 U.S. at 671 (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946), U.S. Code Cong. Serv. 1946, p. 1195). Moreover, the Supreme Court has specifically found that, even where a statute explicitly provides for judicial review of some acts, that is not evidence that Congress intended there be no review of other acts. *Abbot Lab. v. Gardner*, 387 U.S. 136, 141 (1967). "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and

indeterminate evidence of legislative intent." *Id.* (internal punctuation and citation omitted). Moreover, in this case, even the premise of the EEOC's argument is wrong. The "court involvement" language the EEOC relies on for its exclusion-by-comparison-argument says nothing about judicial review of anything, but rather sets forth a process for conciliation if the EEOC intervenes in a suit initiated by a private plaintiff. *See* 42 U.S.C. § 2000e-5(f)(1).[3]

2. The EEOC Attempts To Conflate Separate Sections Of Title VII And, In The Process, Does Violence To The Legislative History Of The Statute.

a. The Issue Is The Process, Not Judicially Imposed Settlement.

The EEOC's second argument against judicial review, based on the "acceptable to the Commission" language in Title VII, 29 U.S.C. §2000e-5(f)(1), is also without merit. (Br. 8-9). The EEOC suggests that the language gives it unreviewable discretion with regard to all aspects of conciliation. The EEOC is incorrect. Not only has the EEOC conflated two separate issues, it has in the process done violence to the legislative history of Title VII's conciliation requirement. (Br. 11-12).

The issue in this case is whether a district court may review whether the EEOC fulfilled its obligation to engage in the process of conciliation as required by

[3] EEOC's citation of *Home Builders v. U.S. Army Corp. of Eng'r*, 335 F.3d 607 (7th Cir. 2003) is particularly misleading. (Br. 7). *Home Builders* involves a lawsuit under the Administrative Procedures Act, a statute that sets forth the rules for when and how a private citizen can initiate litigation against a federal agency. As the EEOC admits elsewhere in its brief, and as the district court correctly held, the APA and its rules do not govern this case. (Br. 14). *Mach Mining*, 2013 WL 217770 at *2-3. Moreover, as discussed *infra*, the principles of the APA actually support judicial review of whether EEOC satisfied its conciliation obligation before filing suit, as required by Title VII.

29 U.S.C. §2000e-5(b). What is *not* the issue in this case is whether a district court may determine that the EEOC ought to have accepted a particular conciliation offer. The "acceptable to the Commission" language of 29 U.S.C. §2000e-5(f)(1), however, speaks at most only to that latter question. The section stands for the proposition that, after engaging in the conciliation process required by §2000e-5(b), the EEOC may file suit if it has been unable to reach a conciliation agreement "acceptable to the Commission." 29 U.S.C. §2000e-5(f)(1). But §2000e-5(f)(1) thereby presupposes that the Commission has already fulfilled its initial obligation to engage in the conciliation process as required by §2000e-5(b). The problem with the EEOC's conduct in this case is not that it failed to accept a particular offer. The problem is that the EEOC failed to engage in the required conciliation process by refusing to provide the information any reasonable employer would need to evaluate the EEOC's demand and formulate a reasonable response.

As recognized by other courts considering the EEOC's conciliation obligation, the agency has an independent obligation to engage in the process of conciliation as required by the statute.

> The Court's decision, however, is not based on the ultimate value of the EEOC's offers, but on the EEOC's failure, despite repeated requests, to provide information about how it calculated its damages.

EEOC v. High Speed Enter., Inc., 2010 WL 8367552 (D. Ariz. Sept. 30, 2010) (citing *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp.2d 1028, 1031 (N.D. Ill. 1998) ("declining to second-guess whether settlement offer was a 'fair sum,' but finding

failure to conciliate in good faith based, in part, on EEOC's failure to explain damages calculation in spite of defendant-employer's request.")).

> The conclusion reached today does not result in the court substituting its judgment for that of the EEOC in determining whether in fact the Commission has been unable to secure a conciliation agreement acceptable to the EEOC. On the contrary, the court has merely enforced the Congressional intent, expressed through the language of the Act and of the regulations, that procedures be followed to provide an opportunity for conciliation.

EEOC v. Firestone Tire and Rubber Co., 366 F. Supp. 273, 278 (D. Md. 1973).

> In response, the EEOC spends eight pages of its brief arguing that its pre-litigation actions are not subject to judicial review. It may be true that the EEOC's investigation and conciliation efforts are committed to EEOC discretion by law, or that neither the reasonable cause determination nor the conciliation results constitute "final agency action," but this argument misses the mark. Swissport seeks to have this Court review not the correctness of the EEOC's determinations but rather whether it discharged its administrative duties that are a prerequisite to seeking judicial relief. Whether the EEOC fulfilled its statutory prerequisites to suit is a proper issue for the Court to decide. *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982).

EEOC v. Swissport Fueling, Inc., 916 F. Supp.2d 1005, 1025 (D. Ariz. 2013).

> Although courts have taken different approaches when evaluating the EEOC's duty to engage in conciliation, there is no disagreement that the statutory duty is a real one rather than a mere formality.

EEOC v. La Rana Hawaii, LLC, 888 F. Supp.2d 1019 (D. Haw. 2012)

> The question on the record here is whether in the context of the ADEA's statutory conciliation/persuasion/conference obligation, the EEOC has fulfilled its responsibility here. That means that the questions presented are not whether the EEOC conciliated as well as it could have, or whether it did so in the manner which this or any other court might prefer, or whether it used its very best efforts, but whether the record demonstrates that what did occur was in reality good faith "conciliation." . . . "[T]he Court concludes that the process utilized here does not pass over that low bar. . . . It is difficult for the Court to discern how the EEOC's actions here would indicate a meaningful

> desire to actually engage in a process of "persuasion," "conference," or "conciliation."

EEOC v. Ruby Tuesday, Inc., 2013 WL 241032 *5-6 (W.D. Pa. Jan. 22, 2013).

Moreover, the EEOC knows that there is a legal difference between requiring a process and requiring a particular outcome. Indeed, later in its brief, as part of its fall-back argument that a reviewing court should take only a cursory look at conciliation, the EEOC itself cites the example of the National Labor Relations Act. (Br. 33). That statute requires parties to engage in a process of negotiation, subject to judicial review, without requiring the parties to reach a particular outcome. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Similarly, the EEOC may decide to file suit when there has been no conciliation agreement "acceptable to the Commission," but that does not absolve the EEOC of engaging in a meaningful conciliation process before reaching that decision. *See Ruby Tuesday*, 2013 WL 241032 at *8 (although the EEOC could be right that conciliation would have proved futile, that does not change fact its letters "were more akin (to) surface bargaining than an attempt at conciliation or persuasion"); s*ee also The Chicago Junction Case*, 264 U.S. 258, 264-65 (1924) (because the agency's discretion to make a decision "after hearing" implied there was a duty of making that decision only after a proper hearing process, the court rejected the agency's argument that its discretion to make a decision precluded judicial review).

b. The EEOC's Legislative "History" Is False.

In its attempt to suggest that Title VII's legislative history supports the agency's position, the EEOC has misrepresented the debate that occurred on the Senate floor on February 14, 1972 and what it means for divining congressional intent about judicial review. (Br. 11-12). Not only does the EEOC pretend that the Senate was debating the reviewability of the conciliation process, which it was not, the EEOC has distorted the ultimate outcome of the debate that did occur. Although one would not know it from reading the EEOC's brief, Congress ultimately decided to *remove* a provision that would have *limited* judicial review. Thus, to the extent that this debate is relevant to the issue before the Court, it demonstrates a congressional intent *in favor* of retaining judicial review.

First, the debate between Senators Javits and Ervin (and Allen and Williams) was not at all about the reviewability of whether the EEOC engaged in the process of conciliation. Instead, the debate was about the reviewability of the EEOC's determination, after engaging in conciliation, that it still could not reach an acceptable conciliation agreement. *See* 118 Cong. Rec. 3799, 3803-3807 (Feb. 14, 1972). Indeed, the specific subject of the debate was the italicized portion of the following provision, included in the original bill, which explicitly precludes judicial review of the EEOC's determination:

> If the Commission determines after attempting to secure voluntary compliance under subsection (b) that it is unable to secure from the respondent a conciliation agreement acceptable to the Commission and to the person aggrieved, *which determination shall not be reviewable in any court*, the Commission shall issue and cause to be served upon the respondent a complaint . . .

117 Cong. Rec. 31712 (Sept. 14, 1971), S. 2515 at Sec. 4 (proposing to add as §706(f)) (emphasis supplied).

During the debate, Senator Ervin objected to the italicized language that would have precluded judicial review of the EEOC's determination, 118 Cong. Rec. 3799 (Feb. 14, 1972), and Senator Allen then proposed an amendment to strike the language. 118 Cong. Rec. 3803 (Feb. 14, 1972). The ensuing debate was about Senator Allen's amendment. *Id.* at 3803-3807. There was no debate about whether the EEOC must attempt conciliation or about whether the question of its compliance with that obligation was subject to judicial review. In fact, even this original version of the bill presupposed that the EEOC would have already engaged in conciliation as required by (what became) 29 U.S.C. §2000e-5(b).

Second, despite the EEOC's insistence to the contrary, the statements made by Senator Javits during the debate do not support the EEOC's position in this case. Senator Javits's statements make clear that his concern was only that the court not be empowered (by Senator Allen's proposed amendment) to impose a particular agreement on the parties. 118 Cong. Rec. 3806. He said so repeatedly. "I have never heard of a case in which a court could force anybody to make a settlement." *Id.* "[I]t seems to me inconceivable that . . . we would substitute the court for the parties insofar as a settlement is concerned." 118 Cong. Rec. 3807 (Feb. 14, 1972). "I cannot see how we could possibly encompass this kind of provision related to settlements. . . . I know of no lawyer who would for a moment think that we could submit this to the courts as to whether the parties should settle." *Id.*

In fact, as regards the issue actually before this Court, it appears (although the record is less than clear and the issue was not before the Senate) that Senator Javits believed there should and would be some form of judicial review of whether the EEOC engaged in the process of conciliation: "If the Commission acts and the statute calls for a determination, the Commission runs the risk that its decision may be upset if the court determines, on review — and there *is* adequate judicial review — that the necessary procedures provided by law were not complied with . . ." 118 Cong. Rec. 3806 (emphasis supplied). At the very least, Senator Javits, unlike the EEOC, showed he understood the difference between the obligation to engage in the conciliation process and an obligation to accept a particular offer.

Third, to the extent the debate is relevant to the issue before this Court, the EEOC has distorted the debate's outcome and what it says about congressional intent. The language precluding judicial review was ultimately removed from the enacted version of Title VII. *See* 29 U.S.C. §2000e-5(f)(1). Thus, contrary to the EEOC's description, the fact is that Senators Ervin and Allen ultimately prevailed on the provision being debated, and Senator Javits ultimately lost.[4] Moreover, the conclusion to be drawn about congressional intent is exactly the opposite of that

[4] Thus, the EEOC's statement, "In the end, the proposal to require judicial review of conciliation was 'soundly rejected,'" is flat out false. (Br. 12). First, there was no proposal to require judicial review of anything. The proposal being debated was an amendment to strike the language precluding judicial review of the EEOC's determination that no agreement could be reached. Second, the amendment did not address the reviewability of whether there was a conciliation process as required by the statute, but only of whether the EEOC had appropriately determined the process had not yielded an acceptable agreement. Third, and most important, although the amendment striking the provision was rejected on February 14, 1972, its proponents ultimately prevailed because it was omitted from the final legislation.

contended by the EEOC. It makes no sense to conclude from the deletion of a provision precluding judicial review that Congress intended there to be no judicial review. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442 (1987) (internal punctuation and citation omitted).

3. The Non-Disclosure Provision Does Not Preclude Judicial Review.

The EEOC attempts next to avoid judicial review of its conciliation efforts by citing to confidentiality provisions that say nothing about judicial review of conciliation. The EEOC should not be permitted to distort provisions designed to protect the integrity of the conciliation process by using them as a shield to hide its failure to engage in one. In fact, the argument is so unfounded that the EEOC's primary authority about confidentiality, the opinion in *EEOC v. Philip Services Corp.*, 635 F.3d 164 (5th Cir. 2011), actually confirms one of the most probing standards for judicial review of its conciliation efforts announced by any court.

> Upon revocation of an alleged settlement agreement, the Commission is permitted to bring suit on the merits, so long as a good faith attempt at conciliation is made. See, e.g. Agro Distrib., 555 F.3d at 468 (finding that the EEOC has fulfilled its statutory duty to attempt conciliation if it '(1) outline[s] to the employer the reasonable cause for its belief that Title VII has been violated, (2) offer[s] an opportunity for voluntary compliance; and (3) respond[s] in a reasonable and flexible manner to the reasonable attitudes of the employer).

Id. at 169. The actual issue in *Philips Services* was whether the EEOC could enforce an alleged oral conciliation agreement. As the Fifth Circuit pointed out, the

EEOC's own regulations require that "the terms of the conciliation agreement shall be reduced to writing . . ." *Id.* at 168.

For good reason, every court to consider the EEOC's conciliation obligation has found it subject to judicial review, and no court has held that the confidentiality provision precludes review. *See, e.g., Asplundh,* 340 F.3d at 1261 n.3 (noting the confidentiality provision in an opinion affirming dismissal of the EEOC's lawsuit, and granting the employer attorneys' fees, due to EEOC's failure to reasonably conciliate). First, for all its bluster about the non-disclosure provisions and the accompanying criminal penalties, the EEOC fails to mention that those provisions apply only to the EEOC. (Br. 9). "Nothing . . . may be made *public by the Commission, its officers or employees* . . ." 42 U.S.C. §2000e-5(b) (emphasis supplied). Second, even if the provisions applied to employers, the EEOC is well-aware that judicial review can be accomplished under seal to avoid revealing information to the "public." *See e.g., EEOC v. US Steel Corp.*, 877 F. Supp.2d 278, 289 (W.D. Pa. 2012) ("The Court found that EEOC violated Section 2000e-5(b) and sealed the contested filings"); *EEOC v. Hammon Plating Corp.*, 2007 WL 174461 *1 (N.D. Cal. Jan. 22, 2007) ("In opposing this motion, the EEOC applied for and obtained, an order permitting it to file under seal the evidence it contends shows it made sufficient efforts to obtain a conciliation agreement."). Third, as courts and the EEOC itself have acknowledged, the "used as evidence" language of the provision does not preclude consideration of the EEOC's conciliation efforts for the purpose of reviewing the EEOC's compliance with its own pre-suit obligation. If it

did, the EEOC would have the "blank check" that Congress warned about. The provision must be read *in pari materia* with the overall statute and harmonized with it. *See Mach Mining*, 2013 WL 217770 at *4. Thus, the district court correctly found that the confidentiality language, like that of Fed. R. Evid. 408, precludes introduction of conciliation matters only to prove or disprove a claim on the merits, but not for collateral proceedings such as contesting the EEOC's conciliation efforts. *Id.*; *see also EEOC v. McGee Bros. Co., Inc.*, 2011 WL 154148 *2 (W.D.N.C. April 21, 2011) (granting *motion in limine* to keep conciliation materials from the jury because "an alleged defect in the conciliation process . . . is a question for the Court.").[5]

Moreover, courts are not the only ones who believe the confidentiality provision does not apply when courts are reviewing information for the purpose of checking the EEOC's statutory conciliation efforts. In *EEOC v. US Steel Corp.*, the EEOC recently argued that it should be able to introduce evidence regarding its conciliation proposal and the employer's response, explaining "EEOC would not be using any conciliation documents in an attempt to establish the merits of its discrimination claims against Defendant." *See* EEOC's Brief In Support of Its Motion for Clarification, No. 2:10-cv-01284-NBF (W.D. Pa. Oct. 2, 2012) (Doc. 238, p. 8). In *EEOC v. Bloomberg, L.P.*, the EEOC submitted detailed information about

[5] Notably, the court in *Branch v. Phillips Petroleum Co.*, 638 F.2d 873 (5th Cir. 1981), the only other authority relied on by the EEOC for its confidentiality argument, also analogized the confidentiality provision to Rule 408. *Id.* at 881 n.6. *Branch* however is generally inapposite because it did not involve the EEOC's right to bring suit despite its own breach of duty, but instead an employer's attempt to enforce a subpoena issued to the EEOC in litigation between the employer and the employee-plaintiff.

its conciliation efforts, none of which was submitted under seal. *See* EEOC's Brief, at 2010 WL 2103196 (S.D.N.Y. May 14, 2010).

4. The Informality Of The Process Does Not Suggest Non-Review.

The EEOC's argument about the informality of conciliation similarly lacks merit. Courts regularly review factual issues without the benefit of boardroom-style minutes. Thus, it makes no sense to suggest that the lack of a formal record indicates some congressional intent that there be no review. Indeed, the litany of courts that have reviewed the EEOC's conciliation efforts (all without a formal record) demonstrates the emptiness of the EEOC's argument. *See, supra at I.C., I.E.2.a.*; *see also infra* at I.E.7.[6]

5. Case Law Supports The Reviewability Of Conciliation.

Despite the fact that every court to consider the issue has rejected its position, the EEOC claims that case law "confirms" that conciliation is not judicially reviewable. (Br. 12-14). The EEOC's claim is obviously inaccurate, and again its argument depends on conflating separate issues and distorting the facts. For example, to the extent this Court addresses the conciliation requirement at all in

[6] The EEOC's cited authority, *ICC v. Locomotive Eng'rs*, 482 U.S. 270, 283-84 (1987) does not stand for the proposition for which it is cited or otherwise support the EEOC's position. The case holding is merely that the ICC's order refusing to reconsider a prior order is subject to an "abuse of discretion" standard and can be challenged only where there is "new evidence" or "changed circumstances." *Id.* at 278, 284. The Court also rejects the suggestion of the concurring opinion that there should be review of the decision to deny reconsideration. Among its reasons, the Court points out that there is seldom any way to review the ICC's order denying reconsideration because such orders seldom gives reasons for the denial. In contrast, as regards EEOC conciliation, the district court would not be reviewing an adjudicative order at all, much less the reasons for it, but rather the objective facts pertaining to the plaintiff EEOC's compliance with a statutory condition precedent. *Id.* at 283-84.

Elgin Teachers Ass'n., 27 F.3d 292, the opinion suggests this Court agrees with the Sixth and the Tenth Circuits that courts can and should review the EEOC's compliance with the statute. *Id.* at 294. The Seventh Circuit explicitly found that "the EEOC must pursue conciliation," *Id.*, an obligation that would be meaningless without court review. *Mach Mining*, 2013 WL 217770 at *2 (finding *Elgin Teachers* supports defendant's position). Moreover, this Court cited both the Tenth Circuit's opinion in *Zia* and the Sixth Circuit's opinion in *Keco Indus. w*ith approval. *Elgin Teachers*, 27 F.3d at 294. In both cases, the court of appeals confirmed that district courts may review whether the EEOC conciliated in good faith. *Keco Indus.*, 748 F.2d at 1102 ("After examining the record in this case we are persuaded that the EEOC sought to conciliate the class-based claim with Keco on a good faith basis."); *Zia*, 582 F.2d at 533 ("[I]t has generally been held that a showing of some effort is a precondition of bringing suit. . . . We hold that the EEOC is required to act in good faith in its conciliation efforts.").

The EEOC's characterization of *Elgin Teachers* is thus in error. The actual holding in *Elgin Teachers* affirmed summary judgment against the EEOC based on its inability to provide evidence to support its claim that a teacher's union discriminated against female teachers. 27 F.3d at 296. The opinion does also address the defendant's additional contention that the EEOC lacked the right to sue in the first place. *Id.* at 294. But that analysis is directed to the issue of whether, after conciliation, the EEOC was "prudent" in its decision to pursue litigation against the union in light of the facts that the union had already made the changes

the EEOC had requested, that the teachers would end up bearing the cost of defending the suit, and that suing would drain resources from the EEOC's ability to pursue other claims. *Id.* The EEOC's discretion to pursue litigation *after* compliant conciliation is not the issue in this case.

Similarly, *EEOC v. Caterpillar, Inc.*, 409 F.3d 831 (7th Cir. 2005) not only addresses a completely different issue than the one now before this Court, the authority it relies on supports the conclusion that the EEOC's conciliation obligation is judicially reviewable. In *Caterpillar*, the court answered in the negative the district court's certified question as to whether, in the course of considering the scope of the EEOC's investigation, it could review the correctness of the EEOC's reasonable cause finding regarding the existence of discrimination. *Id.* at 832-33. But, as several courts have concluded, that is a distinct issue from the one now before the Court. As Judge Feinerman held in *EEOC v. St. Alexius Med. Ctr.*, 2012 WL 6590625 *2 (N.D. Ill. Dec. 18, 2012):

> But *Caterpillar* held only that courts may not review the EEOC's determination that there is probable cause to bring suit against an employer. The Seventh Circuit said nothing about conciliation; in fact, it suggested that the EEOC's pre-suit conciliation obligation was "irrelevant" to its decision. This court will not read *Caterpillar* as having implicitly disagreed with the consensus, adopted by all circuits to have addressed the issue, that the EEOC's pre-suit conciliation efforts are subject to at least some level of judicial review.

Id. .

> It may be true that the EEOC's investigation and conciliation efforts are committed to EEOC discretion by law, or that neither the reasonable cause determination nor the conciliation results constitute "final agency action," but this argument misses the mark. [The employer] seeks to have this Court review *not the correctness of the*

> *EEOC's determinations but rather whether it discharged its administrative duties* that are a prerequisite to seeking judicial relief.

Swissport Fueling, 916 F. Supp.2d at 1025 (emphasis supplied); *see also Keco Indus.*, 748 F.2d at 1101-02 (finding that the EEOC's "reasonable cause" finding is not reviewable and that the EEOC's conciliation efforts are); *EEOC v. United Rd. Towing*, 2012 WL 1830099 *3-4 (N.D. Ill. May 11, 2012) (same).

Moreover, as demonstrated by *Caterpillar* itself, there are good reasons to treat the two issues differently. First, the reasonable cause finding is a preliminary determination that there is sufficient merit to the claims to proceed toward litigation of those claims. Thus, as the Sixth Circuit has explained, "[i]f the charge is not meritorious, procedures are available to secure relief, i.e. a de novo trial in the district court." *Keco Indus.*, 748 F.2d at 1100; *see also EEOC v. Chicago Miniature Lamp Works*, 526 F. Supp. 974, 975 (N.D. Ill. 1981) ("Title VII defendants receive a de novo trial on charges of discrimination. Were EEOC to file a complaint of widespread discrimination when its investigation had in fact failed to support its finding, defendants would not be prejudiced as to the final outcome of the litigation."). Of course, that is not true of the EEOC's conciliation efforts. While the "correctness" of a reasonable cause finding on the merits of the discrimination charge will eventually be checked by the court, whether the EEOC engaged in meaningful conciliation will not be unless it is directly subject to judicial review. *Caterpillar*'s reliance on *Georator Corp. v. EEOC*, 592 F.2d 765, 767 (4th Cir. 1979), *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 243-43 (1980), *Stewart v. EEOC*, 611 F.2d 679, 683 (7th Cir. 1979), and *Borg-Warner Protective Serv. Corp., v.*

EEOC, 245 F.3d 831, 835-36 (D.C. Cir. 2001), all references to court discussions about the unavailability of immediate judicial review when later review is available, suggest the availability of later review guided its decision. Second, as the Supreme Court and this Court have recognized, finding that an action is within the agency's non-reviewable discretion is more appropriate regarding matters within the particular expertise of the agency, whereas judicial review is more appropriate in matters of judicial expertise, such as statutory construction. *Barlow*, 397 U.S. at 165-66; *Cardoza v. Commodity Futures Trading Comm'n.*, 768 F.2d 1542, 1549 (7th Cir. 1985). Arguably, identifying whether there is reasonable cause to suspect discrimination is within the expertise of the EEOC; determining whether the EEOC complied with its obligation to conciliate as required by Title VII is clearly not.

McCottrell v. EEOC, 726 F.2d 350 (7th Cir. 1983) is also easily distinguished and, to the extent relevant at all, supports judicial review of the EEOC's conciliation efforts. The case stands only for the proposition that a charging party cannot sue the EEOC for finding there is "no reasonable cause" to his charge. *Id.* at 351. As this Court emphasized, however, Mr. McCottrell was not left without a judicial remedy. "Congress has provided that a plaintiff's remedy in a case such as this is to commence a suit in the district court against the party allegedly engaged in discrimination. A plaintiff is there entitled to *de novo* review of his claims." *Id.* at 352. In this case, the EEOC seeks to deprive employers of any judicial review of its conciliation obligation.[7]

[7] Moreover, claims brought against administrative agencies are subject to the strictures of the Administrative Procedures Act. As the EEOC admits, its lawsuit against Mach Mining

The issue was similar in *Stewart v. EEOC*, 611 F.2d 679 (7th Cir. 1979), where Mr. Stewart tried to sue the EEOC because the agency had failed to make any reasonable cause finding in a timely manner. The Court concluded, "As an adequate remedy in a court is available to appellants herein, their claims in this case are without merit." *Id.* at 684. If the EEOC prevails in this appeal, no such remedy will be available to employers denied the conciliation required by Title VII.

The EEOC's citation to *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006) is, if possible, even less relevant to the issue before this court. In *Doe*, this Court simply rejected the employer's argument that its employee had a duty to cooperate, during the EEOC-provided conciliation, prior to bringing her own suit. *Id.* at 709-710 ("[T]he statute does not impose a duty of cooperation, whether during or after the statutory period."). The EEOC, on the other hand, admits it has a duty to conciliate prior to bringing suit. (Br. 21). The EEOC just does not want the courts to check whether it fulfilled the duty it admits Congress imposed on it.

6. The APA Argument Is A Straw-Man.

The EEOC's next argument, about the Administrative Procedure Act ("APA"), is a pure straw-man because this action is not governed by the APA. The EEOC admits as much. (Br. 14-15). The strictures of the APA apply only when a private person wants to initiate litigation against an administrative agency. 5 U.S.C. §702; *Mach Mining*, 2013 WL 319337 at *4 n.1. Here, it is the EEOC that both initiated

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is not. (Br. 14-15). *See also Mach Mining*, 2013 WL 217770 *3 ("The EEOC has failed to provide any caselaw that supports its extension of the APA to preclude judicial review of conciliation.").

the machinery of litigation and that wishes to escape judicial scrutiny of whether it first met its congressionally-mandated obligation to conciliate.

Moreover, the EEOC is also wrong when it suggests that the "underlying principles" of the APA support its position. (Br. 14). They do not. First, with the most circular of reasoning, the EEOC argues that review under the APA is not available because review is precluded by Title VII. (Br. 15). That assumes the very question at issue, and as set forth above, it assumes wrongly. Moreover, it hardly matters that the APA is not available to a party who is not making a claim under the APA.

Second, the EEOC says that APA review would be unavailable because the conciliation process is "committed to agency discretion by law." (Br. 15) (citing 5 U.S.C. § 701(a)(2)). But that is not true. Again, the EEOC has conflated the issues by repeatedly pointing to the "acceptable to the Commission" language of 42 U.S.C. §2000e-5(f)(1). (Br. 16, 17). That the EEOC may have discretion to accept or reject a particular offer after engaging in the conciliation process does not give it the discretion to shirk its non-discretionary obligation to engage in the conciliation process required by Congress. And it certainly does not give it the right to avoid judicial review of that process. Moreover, this Court has recognized that § 701(a)(2) only "applies in certain circumstances where courts are unqualified to decide whether an agency has abused its discretion." *Cardoza*, 768 F.2d at 1549. Courts, not the EEOC, have the expertise to construe and apply the statutory provision requiring the agency to conciliate. *See also Barlow*, 397 U.S. at 166 (finding that

statute giving the Secretary of Agriculture discretion to promulgate regulations in his discretion did not leave him the discretion to define a statutory term because the "controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of construction."). Moreover, when the issue is whether a party acted in good faith, *see O'Grady*, 857 F.2d at 392 (affirming district court which "reasoned that the EEOC is required to undertake good faith conciliation efforts"), a concept with which courts are familiar, it makes little sense to leave the EEOC to judge its own conduct.

Even the three criteria identified by the EEOC as relevant to determining whether a matter has been "committed to agency discretion" do not support its conclusion of non-reviewability. It is not true that there is no standard that could govern the EEOC's conciliation process. (Br. 16).[8] Almost every court of appeals has set forth a standard for the EEOC's conduct during the process. Moreover, the EEOC itself has proposed a Quality Control Plan that defines a "quality conciliation" as one in which "[t]he Commission informs the parties of the proposed categories of relief and how monetary terms were reached" and "[t]he Commission responds appropriately to reasonable offers made by the parties." *See* www.eeoc.gov/eeoc/newsroom/release/quality_controlplan_2013.cfm.[9] It is also not

[8] The "no law to apply" test has been severely criticized, and found relevant only to situations so particularly within an agency's expertise that a presumption of unreviewability has been created and, even then, only in the sense that an APA plaintiff might overcome the presumption by showing there is a law to apply. *Cardoza*, 768 F.2d at 1548-49.

[9] An agency's compliance with its own guidelines is subject to judicial review when they are "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion." *Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 247 (D.C.

true that the language in Title VII requiring conciliation suggests that the EEOC can decide to conduct that conciliation however it sees fit. Although the comparison may be indicative of the EEOC's sense of self-importance, there is no corollary in Title VII's conciliation requirement to the explicit discretion that the National Security Act gives the Director of the Central Intelligence to terminate an employee of the CIA. (Br. 17) (citing *Webster v. Doe*, 486 U.S. 592, 594 (1988)). Finally, the construction of a statutory term, and its application to particular facts, is hardly "the sort" of decision traditionally found judicially unreviewable. (Br. 18).

The EEOC's second APA argument is that Mach Mining could not prevail on an APA claim, if it had brought one, which the EEOC admits it did not, because there was no "final agency action." (Br. 19). But the "final agency action" rule exemplifies why the APA does not apply where the agency is the plaintiff. The rule prevents premature judicial intervention that "denies the agency the opportunity to correct its own mistakes and to apply its expertise" and "piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *Standard Oil*, 449 U.S. at 242. Here, the EEOC is the one that initiated judicial intervention, and although it deems itself to have finished its conciliation role, the EEOC would still deprive employers of all opportunity to have the courts review how it played that role. It is one thing for an agency to claim that it is premature to sue it or to claim it cannot be sued for interlocutory actions; it is

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Cir. 2003). This is true even where the guidelines are less formal than published regulations. *Donovan v. Federal Clearing Die Casting Co.,* 695 F.2d 1020, 1031 (7th Cir. 1983) (J. Pell, dissenting).

another for the agency to file a lawsuit and then claim its duty to conciliate first is immune from review.

> It may be true that the EEOC's investigation and conciliation efforts are committed to EEOC discretion by law, or that neither the reasonable cause determination nor the conciliation results constitute "final agency action," but this argument misses the mark. Swissport seeks to have this Court review not the correctness of the EEOC's determinations but rather whether it discharged its administrative duties that are a prerequisite to seeking judicial relief. Whether the EEOC fulfilled its statutory prerequisites to suit is a proper issue for the Court to decide. *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982).

Swissport Fueling, Inc., 916 F. Supp.2d at 1025..

7. Checks And Balances Are Integral To Good Government.

The EEOC also claims that the court should simply take its word that "the requisite conciliation occurred." That would be convenient, but history demonstrates that the EEOC's word on the subject is not always accurate. *See, e.g., CRST Van Expedited*, 679 F.3d at 672 (failure to conciliate claims of class members prior to filing lawsuit); *Agro*, 555 F.3d at 468 (failure to communicate with employer and to respond "in a reasonable and flexible manner to the reasonable attitudes of the employer," including by propounding "take-it-or-leave-it demand" without support "as a weapon to force settlement"); *Asplundh*, 340 F.3d at 1260 (demanding remedy that was "impossible to perform" while failing to provide reasonable time to respond or theory of liability*); EEOC v. Pet, Inc.*, 612 F.2d 1001, 1002 (5th Cir. 1980) (unacceptable "all-or-nothing approach" by ending effort to conciliate class claims because employer refused to reinstate charging party); *Ruby Tuesday*, 2013 WL 241032 at *6-8 (mere "surface bargaining" where the EEOC made demand for

millions of dollars and affirmative remedial measures, without providing "basis for that monetary demand" or sufficient time to respond or any effort to confer, despite employer's willingness to discuss further); *Swissport Fueling*, 916 F. Supp.2d at 1036 (the EEOC failed to "respond in a reasonable manner to the reasonable attitudes of the employer" by "making a sincere and reasonable effort to negotiate," including by refusing to identify the class members for whom it sought compensatory damages which was unreasonable under the facts of the case); *La Rana*, 888 F. Supp.2d at 1045 (failure to provide "exchange of relevant and specific information"); *EEOC v. Bloomberg, L.P.*, 751 F. Supp.2d 628, 642 (S.D.N.Y. 2010) (failure to provide information necessary for employer to evaluate the EEOC's demand and formulate a counteroffer); *High Speed Enter.*, 2010 WL 8367452 at *5 ("failure, despite repeated requests, to provide information about how it calculated its damages"); *EEOC v. Bimbo Bakeries USA, Inc.*, 2010 WL 598641 *7 (M.D. Pa. Feb. 17, 2010) ("the failure to hold a conference has been an important factor in determining that the EEOC has not fulfilled its statutory duty to conciliate"); *First Midwest Bank*, 14 F. Supp.2d at 1032-33 (failure to provide information regarding calculation of damages). *See also Sears, Roebuck*, 839 F.2d 302, 358 (7th Cir. 1988) ("The EEOC therefore badly abused the investigation, predetermination settlement, and conciliation statutory prerequisites to suit . . .").

This record may explain why no court has ever adopted the EEOC's position that it should sit in judgment of its own compliance with the statute. But the lack of merit in the EEOC's argument is not simply the result of its past failures. The

EEOC's argument would change the fundamental principle of checks and balances. It is one thing to allow the EEOC to allege what it believes about the presence of discrimination, an issue the jury would ultimately decide, but a far different thing to take its word for both what occurred at a conciliation to which it was a party and for whether what occurred complies with the statute. Not surprisingly, courts and parties do not always agree on what is "requisite" and/or on what "occurred." To allow the EEOC to be the judge of its own conduct and its own compliance with the statute would be to give it the very "blank check" that the Congress has warned it did not write. *See Bowen*, 476 U.S. at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

8. Review Promotes Efforts At Resolution Through Conciliation.

Contrary to the EEOC's claim, Congress' goal of resolving claims through conciliation would not be well-served by leaving the EEOC's conciliation efforts without judicial review. (Br. 23). First, the EEOC has often fallen short of Title VII's conciliation requirement, failings that would have gone unaddressed without judicial review. *See, supra*, at I.E.7. (litany of cases describing the EEOC's failure to conciliate). Second, when Congress gave the EEOC the authority to file suit, it did so based upon the premise that the potential for judicial intervention would incentivize employers to resolve cases through conciliation, *see*, *Kimberley-Clark, 511 F.2d at 1357*, and there is no reason to think judicial intervention would not have the same effect on the EEOC's efforts. Third, the EEOC has not been truthful when it suggests its incentives to resolve cases are a sufficient guarantee of its

conciliation efforts. In fact, the EEOC has other institutional incentives that favor prematurely ending conciliation in favor of litigation. For example, the EEOC may pay short shrift to conciliation where it gains publicity by filing suit.[10] Moreover, an EEOC District Office may be reviewed more favorably in Washington when it dismisses another charge of discrimination, and files another lawsuit, prior to the close of the fiscal year, September 30.[11] Not insignificantly, in this case, the EEOC ended conciliation with Mach and filed suit and a press release on Sep. 27, 2011. *See EEOC v. Mach Mining, LLC*, 3:11-cv-00879 (S.D. Ill), Doc. 1 (Complaint) and EEOC Press Release, dated 9-27-2011, entitled Mach Mining Sued by EEOC for Sex Discrimination, www.eeoc.gov/eeoc/newsroom/release/9-27-11d.cfm.

It is disingenuous for the EEOC to argue that lack of judicial review of whether it properly conciliated would further the goal of conciliation. As one court noted:

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[10] *See, e.g., Asplundh*, 340 F.3d at 1261, n.3 ("The chronology of events in this case lend themselves to the interpretation that the Commission's haste may have been motivated, at least in part, by the fact that conciliation, *unlike litigation*, is not in the public domain. . . . We note that the record reveals that the EEOC office in Miami, which is prosecuting this case, has apparently already made public by way of comments to the *New York Times* that this case involves the allegation of a noose incident."); *EEOC v. CRST Van Expedited, Inc.*, 07-CV-95, 2009 WL 2524402, at *19, n.25 ("The court expresses no view as to whether the trial attorneys for the EEOC acted in bad faith. The court notes that, upon filing the Complaint, the EEOC's higher-level attorneys issued a press release entitled: "Trucking Giant CRST Sued for Sexual Harassment of Female 'Team' Drivers," in which Chicago District Office Regional Attorney John Hendrickson and Chicago District Office Director Jack Rowe made comments).

[11] *See EEOC v. St. Alexius Center*, 1:12-cv-07646 (N.D. Ill.), Doc. 120-1, p.21 (wherein the former General Counsel of the EEOC states: "[t]he date of conciliation failure, in my experience, indicates that conciliation may have been artificially forced the EEOC District Office to enhance the District Office fiscal year reporting data, which closes at the end of September each year. Resolution of additional investigations and filing of additional suits by the Chicago District Office likely would bear favorably on headquarters' evaluations of the work done by the District Office in the fiscal year.").

> The Commission argues that by eliminating the aforementioned claims of discrimination from this litigation, and by requiring the administrative process to begin anew, this court is causing a waste of the Commission's resources and a delay in the eradication of employment discrimination...However, the argument cuts both ways, and there are equally valid reasons for having EEOC fully investigate and conciliate before bringing suit on a claim.…The Commission wants to pursue through discovery those issues which it chose not to pursue in conciliation. This approach leads to the abuse of discovery. Congress maintained the provisions for conciliation and voluntary compliance when it passed the 1972 Amendments in order to prevent interminable litigation which would be a burden on both EEOC and the district courts, not to mention the entities which are sued. *See EEOC v. Hickey-Mitchell Co.,* 507 F.2d 944, 948 (8th Cir. 1974). Our decision stands on the ground that the Commission has not fulfilled the requirements of Title VII. A concomitant result is that the litigation will be relatively simple and the issues to be tried will be capable of more practical adjudication.

Allegheny Airlines, 436 F. Supp. 1300, 1307 (W.D. Pa. 1977). *See also CRST Van Expedited, Inc.*, 2009 WL 2524402, at *18 (N.D. Iowa Aug. 13, 2009) ("Ultimately, when the EEOC only does enough to satisfy the 'conciliation checkbox,' the opportunity for mediation, arbitration or settlement and the quality of judicial decision-making is potentially diminished because more cases will require formal adjudication.…Congress recognized that the judicial system is not always the most efficient or best medium for resolving employment disputes; therefore, the EEOC should only take a matter to trial if conciliation proves to be impossible.").

II. The Standard that Should Be Applied to the EEOC's Conciliation Efforts.

Having established that there should be judicial review of conciliation, the next question is what standard should be applied to the EEOC's conciliation conduct.

What is required is a good faith conciliation process that, as Congress intended, provides the employer a meaningful opportunity to resolve the issues. "The courts have interpreted the statute to mean precisely what it says. Nothing less than a reasonable effort to resolve with the employer the issues raised by the complainant will do." *Asplundh,* 340 F.3d at 1259 (quoting *Klingler Elec. Corp.,* 636 F.2d at 107)). And whether the EEOC has fulfilled that pre-suit obligation is the inquiry to

be made by the reviewing court.

"[T]he fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances." *Klingler,* 636 F.2d at 107. Courts agree that whether the EEOC has conciliated in good faith depends heavily on how it interacts with and responds to the employer. And thus judicial review of whether the EEOC has conciliated in good faith must also allow for inquiry into how and whether the EEOC has interacted with and responded to the employer. *Prudential Fed. Sav. & Loan Ass'n.,* 763 F.2d at 1169. ("Courts have recognized that because conciliation involves at least two parties, we must evaluate one party's efforts with an eye to the conduct of the other party.").[12] To occur in good faith, "conciliation

[12] Although courts nominally have different standards, even under what has been described as the more "deferential" standard of the Sixth and Tenth Circuits, not just any attempt at conciliation will suffice. Thus, the Sixth Circuit also recognizes that the process must be engaged in "good faith." *Keco*, 748 F.2d at 1102. And the Tenth Circuit recognized in *Prudential* that courts must "evaluate one party's efforts with an eye to the conduct of the other," such that the EEOC must make "a sincere and reasonable effort to negotiate by providing the defendant an adequate opportunity to respond to all charges and negotiate possible settlements." *Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d at 1169.

must have context and provide for an exchange of relevant and specific information between the parties." *La Rana*, 888 F. Supp.2d at 1045.

In general, a "good faith attempt at conciliation" thus requires that the EEOC: (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. *Agro*, 555 F.3d 462, at 468, *Klingler,* 636 F.2d at 107.[13] Because cases differ, however, conciliation too must be viewed as "a flexible and responsive process which necessarily differs from case to case." *Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d at 1169;[14] *EEOC v. Menard, Inc.*, 2009 WL 1708628, at *1 (S.D. Ill. June 17, 2009) (same).[15]

As such, depending upon the facts of a given case, a court may determine that good faith requires the EEOC to respond to an employer's request to explain why the employer may be held liable (*i.e.*, the results of its investigation). *See, e.g., La Rana*, 888 F. Supp.2d at 1045 ("The EEOC's obstinate refusal to offer any information, including the results of its investigation, does not demonstrate 'a

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[13] In essence, courts should evaluate the EEOC's conduct in conciliation similarly to how courts evaluate bargaining under the NLRA. *See, e.g., General Elec. v. NLRB*, 916 F.2d 1163, 1167-68 (7th Cir. 1990) ("The duty to supply information under § 8(a)(5) turns upon 'the circumstances of the particular case'"); *J.I. Case v. NLRB*, 253 F.2d 149, 152 (7th Cir. 1958). *See also NLRB v. Harvstone Manufacturing Corp.*, 785 F.2d 570, 579 (7th Cir. 1986) ("the general consensus today is that 'for all practical purposes,' a refusal to disclose alone constitutes a failure to bargain in good faith.").

[14] Again, the supposedly deferential Tenth Circuit thus makes clear that it intends for courts to review, on a case by case basis, the responsiveness of the EEOC to determine whether its conduct amounts to good faith under the circumstances.

[15] "[T]hese pre-lawsuit requirements are elements that must be proven by the EEOC in order to show that it and the individuals on whose behalf it seeks relief are entitled to relief." *EEOC v. Global Horizons, Inc.*, 2013 WL 1534056 *9 (E.D. Wash. April 12, 2013).

willingness to work toward settlement,'" because "a fundamental element of working toward settlement is providing a reasonable amount of information to make settlement a possibility"); *High Speed Enter.*, 2010 WL 8367452, at *5; *Bloomberg*, 751 F. Supp.2d at 641-42.

Similarly, where the EEOC is demanding substantial monetary damages, the EEOC may be required to explain how it reached its demand and sufficient information to evaluate and respond to that demand. *See, e.g., EEOC v. Bloomberg, L.P.,* 751 F. Supp.2d at 642 ("the EEOC cannot, when the employer reasonably asks for information to formulate a monetary counteroffer, make substantial monetary demands and require employers simply to pony up or face a lawsuit"); *La Rana*, 888 F. Supp.2d at (citing *EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271, 277 (7th Cir. 1980)); *EEOC v. State of Arizona*, 824 F. Supp. 898, 902 (D. Az. 1991). *Ruby Tuesday*, 919 F. Supp.2d 587; *First Midwest Bank, N.A.*, 14 F. Supp.2d at 1032-33.

The EEOC may, in some cases, be required to identify and conciliate the individuals on whose behalf it makes significant monetary and non-monetary demands. *See, e.g.*, *Swissport Fueling, Inc.*, 2013 U.S. Dist. LEXIS 2054, at *74 ("Given the facts of the present case, a rule that allowed the EEOC to seek monetary relief for claimants not identified or conciliated prior to bringing suit would not be appropriate."); *High Speed*, 2010 WL 8367452; *EEOC v. Dillard's Inc.*, 2011 WL 2784516, at *5 (S.D. Cal. July 14, 2011) (citing *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 607 (9th Cir. 1982)); *EEOC v. United Parcel Service, Inc.*, 2011 WL 4538450 (N.D. Ill. Sep. 28, 2011); *First Midwest Bank, N.A.*, 14 F. Supp.2d at

1032-33. *See also EEOC v. O'Grady*, 857 F.2d 383, 392-93 (7th Cir. 1988 (affirming district court decision that statute of limitations should be tolled because the EEOC could not fulfill required "good faith conciliation efforts" until employer complied with subpoena for information so that the EEOC could identify potential claimants); *EEOC v. United Parcel Serv.*, 94 F.3d 314, 318 (7th Cir. 1996) ("[EEOC] may, to the extent warranted by an investigation reasonably related in scope to the allegations of the underlying charge, seek relief on behalf of individuals beyond the charging parties who are *identified* during the investigation.").

Similarly, good faith conciliation may require the EEOC to provide identifying information in cases where the EEOC demands that an employer hire certain claimants, so the employer can determine whether they are qualified. *See, e.g., UMB Bank*, 432 F. Supp. 948, 954-55 (the EEOC failed to conciliate in good faith where it refused employer's repeated requests to determine whether claimant was qualified for the job); *First Midwest Bank, N.A.*, 14 F. Supp.2d at 1021-33.

Where the employer has requested a meeting with the EEOC to discuss issues and negotiate a possible settlement, good faith may require the EEOC to engage in the "conference" required by Title VII. *See, e.g., Ruby Tuesday,* 919 F. Supp.2d at 597 (even under deferential standard, the EEOC's "[c]onciliation by letter" did not constitute conciliation; Much of the EEOC briefing contends that the EEOC did its duty because the Defendant did not ask for a conciliation conference, but that misses the point – if, as it says, the EEOC is in the driver's seat when it comes to conciliation, it cannot complain that the Defendant was remiss in failing to

grab the steering wheel"); *EEOC v. Pacific Maritime Assoc.,* 188 F.R.D. 379, 380-381 (D. Or. 1999); *First Midwest Bank,* 14 F. Supp.2d at 1032-1033; *EEOC v. Hugin Sweda, Inc.,* 750 F. Supp. 165, 167 (D.N.J. 1990); *EEOC v. One Bratenahl Place Condominium Ass'n,* 644 F. Supp. 218, 221 (N.D. Ohio 1986) (no good faith conciliation where the employer "indicated its willingness to meet and negotiate a conciliation [and] [s]uch a meeting would have provided a forum for the free exchange of ideas and proposals to hopefully reach mutually accepted remedies"). [16]

[16] Although not certified by the district court, nor requested by this Court, EEOC argues that if a court finds it failed to fulfill its statutory duty to conciliate, the only appropriate remedy is a stay of the case for further conciliation. As with a court's review of the EEOC's conciliation conduct, the remedy should also be determined on a case-by-case basis. While a stay may be an appropriate remedy under certain instances, sometimes dismissal of the unconciliated claims is the appropriate remedy. *See, e.g., CRST*, 679 F.3d at 677; *Swissport*, 916 F. Supp.2d at 1039-40; *Hibbing Taconite,* 266 F.R.D. at 273; *Allegheny Airlines*, 436 F. Supp. at 1307 (dismissal of unconciliated claims "prevent[s] interminable litigation which would be a burden on both EEOC and the district courts, not to mention the entities which are sued," and the result of dismissal of unconciliated claims will be a simplified case for trial). Notably, the EEOC has conceded that review of a district court's decision to stay or dismiss an EEOC lawsuit for failure to properly conciliate is for abuse of discretion. *See CRST*, 670 F.3d at 917.

CONCLUSION

As has every other court to consider the issue, this Court should find that whether the EEOC has fulfilled its statutory obligation to conciliate is subject to judicial review. Further, the Court should find that the EEOC is obligated to conciliate in good faith, providing the employer a meaningful opportunity to resolve the issues, by being reasonable and being responsive to the employer's legitimate requests such that an employer may evaluate and formulate a response to the EEOC's demands.

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WITH TYPE-VOLUME TYPEFACE AND LENGTH LIMITATIONS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,649 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: August 22, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 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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