No. 15-____

IN THE

Supreme Court of the United States

STERLING JEWELERS INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"), "Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). Title VII requires the Equal Employment Opportunity Commission ("EEOC") to meet certain statutory obligations prior to bringing suit. Among those pre-suit obligations are two duties: the duty to investigate a charge of discrimination, and if reasonable cause is found, the duty to attempt conciliation. 42 U.S.C. § 2000e-5(b). The EEOC is precluded by statute from bringing suit until after it has met those obligations. The statute itself ascribes unique features to the duty to conciliate, including a confidentiality requirement and statutorily-described discretion. These critical factors were discussed at length in the recent decision of *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), wherein this Court provided the standard for judicial review for courts examining whether the EEOC fulfilled its duty of conciliation prior to bringing suit. These features are notably absent, however, in Title VII's description of the EEOC's duty to investigate.

The Question Presented in this matter is:

Whether the United States Court of Appeals for the Second Circuit erred when it concluded, as a matter of first impression, that the Supreme Court's standard for judicial review of the EEOC's statutory duty to conciliate, described in *Mach Mining*, applies equally to the EEOC's statutory duty to investigate, despite the significant and material differences between the duty to attempt conciliation and the duty to conduct an investigation.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Sterling Jewelers Inc. was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

Respondent Equal Employment Opportunity Commission was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the undersigned counsel state that Petitioner Sterling Jewelers Inc.'s indirect parent corporation, Signet Jewelers Limited, a publicly traded company, owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sterling Jewelers Inc. ("Sterling") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 801 F.3d 96 (2d Cir. 2015). The United States District Court for the Western District of New York's decision is reported at 3 F. Supp. 3d 57 (W.D.N.Y. 2014).

JURISDICTIONAL STATEMENT

The Second Circuit's decision was entered on September 9, 2015. The Second Circuit denied a timely petition for panel rehearing or rehearing *en banc* on December 1, 2015. On February 9, 2016, this Court granted Petitioner's request for a 60-day extension of time within which to petition for a writ of certiorari, until April 29, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2000e-5(b) of Title 42 provides in relevant part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission . . . shall make an investigation thereof. . . . If the Commission determines after such investigation 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. 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. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

STATEMENT OF THE CASE

Between May 2005 and November 2006, 19 women filed charges with the Equal Employment Opportunity Commission ("EEOC") against Sterling, alleging gender discrimination in pay and/or promotions. App.17a. Of those 19 charges, four arose from a single store in Massena, New York and eight from stores in the Tampa, Florida area. The charges were initially investigated locally, but were eventually consolidated in the EEOC's Buffalo, New York office and assigned to EEOC Investigator David Ging ("Ging") for investigation. *Id*.

The record evidence—including the investigative files produced by the EEOC and the deposition testimony of both Ging and the EEOC's Rule 30(b)(6) witness—demonstrates that the EEOC failed to conduct any nationwide investigation of Sterling prior to bringing suit.[1] During the litigation, the EEOC

[1] Ging frankly testified that he did not recall performing any fact investigation. App.139a-142a.

admitted that there was "little investigative material in the files beyond the charges, Sterling's responses, and other correspondence." App.24a (quotation omitted). Indeed, the evidence reveals that as the lead investigator, Ging:

- Never spoke to or interviewed a single supporting witness of any Charging Party from any Sterling location;
- Never spoke to or interviewed any current or former employee of Sterling from any Sterling location;
- Never asked to conduct or performed an onsite investigation at any Sterling location;
- Never asked Sterling for any local, regional, or nationwide payroll, promotion, or personnel data;
- Never analyzed any compilation of Sterling's local, regional or nationwide pay, promotion or personnel data;
- Never spoke with anyone who may have analyzed Sterling's local, regional or nationwide pay, promotion or personnel data;
- Never requested from Sterling any local, regional, or national data regarding gender discrimination complaints;
- Never asked Sterling for any local, regional or nationwide data regarding its equal employment opportunity policies or diversity programs; or
- Never informed Sterling that the EEOC was conducting a nationwide investigation into Sterling's pay or promotion practices.

Instead, the EEOC's files reflect only the following limited requests from the EEOC to Sterling: (1) two inquiries regarding Tampa-area stores; (2) one inquiry requesting a job description and a policy, and asking about a corporate relationship; (3) two inquiries regarding Sterling's data storage protocols; and (4) a solicitation to all parties for any additional information, following the failure of conciliation. These are the only items of evidence in the record showing the EEOC's requests for information to Sterling during its multi-year investigation into Sterling's pay and promotion practices. The EEOC never requested that Sterling provide it with any nationwide data—no nationwide payroll, promotions, or personnel data of any kind. Consequently, the EEOC failed to request or review, let alone analyze, any nationwide personnel, pay or promotions data prior to filing suit.

Following an unsuccessful private mediation between Sterling and counsel for the 19 charging parties—a mediation the EEOC also attended—the EEOC issued a Letter of Determination ("LOD") that concluded: "[s]tatistical analysis of pay and promotion data provided by Respondent reveals that Respondent promoted male employees at a statistically significant, higher rate than similarly situated female employees and that Respondent compensated male employees at a statistically significant, higher rate than similarly situated female employees." App.19a-20a. However, prior to issuing its LOD, the EEOC had neither requested nor received any nationwide data that would have permitted it to perform such an analysis. Therefore, it is undisputed that the EEOC did not perform—and could not have performed—any nationwide statistical analysis prior to issuing its LOD.

The EEOC filed its lawsuit on September 23, 2008. *Id*. at 20a. Following extensive discovery, Sterling moved for summary judgment, arguing that the District Court should dismiss the EEOC's nationwide discrimination claims because there was no evidence that it conducted a nationwide investigation of Sterling's employment practices prior to commencing this nationwide pattern-or-practice action. *Id*. On January 2, 2014, the Magistrate Judge issued a Report, Recommendation and Order recommending that summary judgment be granted against the EEOC based on its failure to conduct a nationwide pre-suit investigation. *Id*. at 16a-38a.

The Magistrate Judge began his analysis by observing that, "Sterling's denial of EEOC's performance of a condition precedent (namely, a pre-suit investigation) as an affirmative defense does not shift the burden of proof on that issue to Sterling-instead, it remains the EEOC's burden to prove performance of that condition." *Id*. at 21a (citations omitted).

He then explained the contours of appropriate review:

> [W]hile courts "will not review the sufficiency of the EEOC's pre-suit investigation . . . . courts will review whether an investigation occurred". They may also examine the scope of that investigation, for while "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable", "it must discover such individuals and wrongdoing *during the course of its investigation*". "Where the scope of its pre-litigation efforts [is] limited—in terms of

> geography, number of claimants, or nature of claims—the EEOC may not use discovery in the resulting lawsuit as a fishing expedition to uncover more violations." Accordingly, in determining whether a particular claim may be asserted in an EEOC complaint, "the relationship between the complaint and the scope of the investigation is central". "Courts have limited the EEOC's complaint where it exceeds the scope of the investigation."

Id. at 22a-23a (quotations omitted). He further explained what constitutes an investigation:

> [T]he word 'investigation' connotes a 'thorough' or searching inquiry'". "Dictionary definitions of the word investigate include: '[t]o inquire into (a matter) systematically' ...'to observe or study by close examination and systematic inquiry' . . . 'to examine a crime, problem, statement, etc. carefully, especially to discover the truth'." The EEOC's "duty to investigate is both mandatory and unqualified". The investigation must be "genuine", meaning that the EEOC "cannot defer to the opinions of [the parties]; it has the statutory duty to make an *independent* investigation, reasonable in scope, to determine *for itself*" whether the charge has a factual basis. The mere gathering of information from others does not constitute an "investigation", nor does the parroting of that information without independent analysis.

Id. at 32a-33a (quotations omitted).

Reviewing the competent summary judgment evidence in the record, the Magistrate Judge concluded that "none of the EEOC investigators conducted a nationwide investigation." *Id*. at 26a. He rejected the EEOC's argument that the language in the charges raising class allegations was sufficient to demonstrate that the EEOC had conducted a nationwide investigation, confirming that "the fact that charges were asserted does not by itself prove that they were then investigated, nor does it prove the scope of any investigation which may have occurred." *Id*. at 25a. He similarly rejected the EEOC's argument that Ging's self-serving, unsupported testimony that he "investigated all of these charges as class charges", *id*. at 26a (quotation omitted), was evidence of a nationwide investigation, noting that Ging had failed to specify the type of class at issue (*i.e*., geographic scope) and concluded that Ging's statement therefore did not constitute "evidence that he investigated a *nationwide* class." *Id*.

The Magistrate Judge also rejected the EEOC's efforts to rely on the expert mediation report commissioned by the charging parties' private counsel that was prepared for and used at mediation and subsequently placed in the EEOC's investigative files. The Magistrate Judge cited to the EEOC's repeated assertions of deliberative process privilege and refusal during discovery to identify the purported "statistical analysis" referenced in the LOD and concluded that the EEOC could not oppose summary judgment "by relying upon the information which it withheld from Sterling in discovery." *Id*. at 31a. He recounted his warnings to the EEOC about its repeated privilege assertions when asked about the charging parties' expert mediation report and the EEOC's purported "statistical analysis," and concluded, "[n]one of this

should come as a surprise to the EEOC." *Id* at 30a-31a.

On March 10, 2014, over the EEOC's objections, the District Court adopted the Magistrate Judge's Report, Recommendation and Order. *Id*. at 39a-40a. The EEOC appealed the dismissal of its nationwide pattern or practice claim to the Second Circuit, which reversed the District Court's decision. *Id*. at 2a. In so doing, the Second Circuit extended this Court's reasoning in *Mach Mining* in a conclusory fashion. Conceding that "*Mach Mining* did not address the EEOC's obligation to investigate," the Second Circuit also noted that "Title VII does not define 'investigation' or prescribe the steps that the EEOC must take in conducting an investigation." *Id*. at 7a-8a (quotation omitted). The Second Circuit nonetheless extended *Mach Mining*'s reasoning beyond judicial review of the EEOC's pre-suit duty of conciliation, concluding, without any explanation, that "judicial review of an EEOC investigation is similarly limited: The sole question for judicial review is whether the EEOC conducted an investigation." *Id*. at 8a. The Second Circuit stated, in part:

> In order to prove that it has fulfilled its pre-suit investigative obligation, the EEOC must show that it took steps to determine whether there was reasonable cause to believe that the allegations in the charge are true. *Cf*. 42 U.S.C. § 2000e-5(b) (noting that the purpose of an EEOC investigation is to determine whether "there is reasonable cause to believe that the charge is true"); *EEOC v. Shell Oil Co*., 466 U.S. 54, 71 (1984) ("[T]he purpose of [an EEOC investigation] is to determine whether there is reason to believe those

> allegations are true."). Here, the EEOC's complaint against Sterling alleged nation-wide discrimination; accordingly, the agency must show that it undertook to investigate whether there was a basis for alleging such widespread discrimination. The EEOC need not, however, describe in detail every step it took or the evidence it uncovered. As with the conciliation process, an affidavit from the EEOC, stating that it performed its investigative obligations and outlining the steps taken to investigate the charges, will usually suffice. *See Mach Mining*, 135 S. Ct. at 1656 (concluding that a sworn affidavit from the EEOC stating that it attempted to conciliate will usually establish that the EEOC has met its obligation to conciliate).

Id. at 8a-9a. Importantly, the Second Circuit failed to address the factors that this Court found critical in its analysis of the conciliation obligation in *Mach Mining*, namely the statutory discretion conferred on the EEOC to permit it to explore conciliation in the manner in which it deems appropriate, and the confidentiality requirement that is unique to the conciliation process. Instead, the Second Circuit, with no analysis, painted the investigation duty with a broad brush and stated that it should be evaluated in the same manner as the conciliation duty, and in doing so, also misapplied *Mach Mining* to reviewing the investigation requirement.

REASONS FOR GRANTING THE WRIT

A writ of certiorari is discretionary and granted only for compelling reasons. Such reasons include, but are not limited to, when a United States court of appeals

"has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

Certiorari is warranted because the Second Circuit, as a matter of first impression, extended *Mach Mining* to judicial review of the EEOC's pre-suit duty to investigate, and, in so doing, misapplied *Mach Mining*'s standard for minimal judicial review beyond its reasoning and limited holding. The duty to investigate is a qualitatively different administrative function than conciliation, that is not constrained by statutory confidentiality or discretion. This Court has not settled whether *Mach Mining*'s standard for limited judicial review applies to the EEOC's duty to investigate. In this respect, the Second Circuit's decision extending the limited judicial review standard enunciated in *Mach Mining* to investigations both implicates an important federal question that is unsettled by this Court and conflicts with this Court's reasoning in *Mach Mining*. The standard of judicial review over the EEOC's pre-suit duty to investigate is a matter of great public importance to the nationwide administration of Title VII, the most enforced and litigated civil rights statute in the EEOC's administrative enforcement and systemic discrimination programs. District courts in other circuits have already considered *Mach Mining* and come to different conclusions than those drawn by the Second Circuit, declining to expand its impact beyond conciliation.[2] A discretionary grant of certiorari is

[2] *See, e.g., EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95, 2015 WL 8773440, at *3 (N.D. Iowa Dec. 14, 2015) ("The issue in *Mach Mining* was limited to the sufficiency of the EEOC's

warranted and timely to prevent confusion among courts, including those looking to the Second Circuit as the sole court of appeals to have addressed this critical issue impacting tens of thousands of charges each year.

In fact, the Second Circuit's error is so obvious that the Court should grant certiorari and summarily reverse. *Cf. Torres-Valencia v. United States*, 464 U.S. 44, 44 (1983) (Rehnquist, J., dissenting) ("Summary disposition is of course appropriate where a lower court has demonstrably misapplied our cases in a manner which has led to an incorrect result.").

I. REVIEW IS NECESSARY BECAUSE THE SECOND CIRCUIT'S DECISION IMPROPERLY EXTENDS *MACH MINING* TO THE EEOC'S DUTY TO INVESTIGATE

Supreme Court precedent supports a grant of certiorari where, as here, a court of appeal misinterprets or misapplies the prior decisions of this Court. *See, e.g., Menominee Indian Tribe of Wis. v. United States*, 135 S. Ct. 2927 (2015) (certiorari granted to consider whether court of appeal misapplied prior Supreme Court precedent); *McDaniel v. Brown*, 558 U.S. 120, 121 (2010) (reversal and remand appropriate where lower courts misconstrued Supreme Court precedent); *CSX Transp., Inc. v.*

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conciliation process and the permissible level of judicial inquiry into that process. *Mach Mining* did not address the appropriate remedy when the EEOC fails to engage in any investigation of claims prior to the conciliation process."); *EEOC v. CollegeAmerica Denver, Inc.*, No. 14-CV-01232, 2015 WL 6437863, at *3 (D. Colo. Oct. 23, 2015) (dismissal was appropriate in a case involving the EEOC's failure to provide notice, as well as a failure to conciliate, even in light of *Mach Mining*).

Hensley, 556 U.S. 838, 841-43 (2009) (same). Here, the Second Circuit improperly extended this Court's limited decision in *Mach Mining* and—with no explanation—misapplied this Court's analysis of the appropriate level of judicial review for the confidential process of conciliation, to apply the same limited standard of review to the EEOC's compliance with its pre-suit investigation duty. Granting of certiorari is therefore warranted to settle the applicability of *Mach Mining* to the EEOC's pre-suit duty to investigate, and to correct the Second Circuit's misapplication of precedent wholly unsuited to the EEOC's pre-suit duty to investigate.

A. The Unique Features Of The Duty To Conciliate Were Dispositive In *Mach Mining*

Section 2000e-5(b) of Title 42 provides in relevant part:

> If the Commission determines after such investigation 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. 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. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or

> imprisoned for not more than one year, or both.

42 U.S.C. § 2000e-5(b).

The two unique features of conciliation that informed this Court's limitation of judicial review in *Mach Mining* are materially different (and absent) from the statutory duty to investigate. These features were the touchstones of this Court's analysis in *Mach Mining*.

First, this Court stressed the importance of the statutorily-described discretion over the conciliation process, which "becomes significant when we turn to defining the proper scope of judicial review." *Mach Mining*, 135 S. Ct. at 1652. The Court analyzed those aspects of the statute that confirmed the discretion provided to the EEOC regarding conciliation:

> Every aspect of Title VII's conciliation provision smacks of flexibility. To begin with, the EEOC need only "endeavor" to conciliate a claim, without having to devote a set amount of time or resources to that project. § 2000e-5(b). Further, the attempt need not involve any specific steps or measures; rather, the Commission may use in each case whatever "informal" means of "conference, conciliation, and persuasion" it deems appropriate. *Ibid*. And the EEOC alone decides whether in the end to make an agreement or resort to litigation: The Commission may sue whenever "unable to secure" terms "acceptable *to the Commission*." § 2000e-5(f)(1) (emphasis added). All that leeway respecting how to seek voluntary compliance and when to quit the effort is at

> odds with *Mach Mining*'s bargaining checklist. Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief. For a court to assess any of those choices—as *Mach Mining* urges and many courts have done . . .—is not to enforce the law Congress wrote, but to impose extra procedural requirements. Such judicial review extends too far.

Id. at 1654-55. This Court concluded, based on the EEOC's wide latitude in the conciliation process, that the proper standard of review was a "limited review [that] respects the expansive discretion that Title VII gives to the EEOC over the conciliation process, while still ensuring that the Commission follows the law." *Id*. at 1653.

Second, this Court focused on the importance of confidentiality in the conciliation process, and that a more-than-barebones judicial review could be inconsistent with that statutory requirement. *Id*. at 1655 ("*Mach Mining*'s brand of review would also flout Title VII's protection of the confidentiality of conciliation efforts. The statute . . . provides that '[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission . . . or used as evidence in a subsequent proceeding without the written consent of the persons concerned'—both the employer and the complainant.")

(quotation omitted). As this Court reasoned, by failing to give effect to Title VII's non-disclosure provision, a court would "undermine[] the conciliation process itself, because confidentiality promotes candor in discussions and thereby enhances the prospects for agreement. As this Court has explained, '[t]he maximum results from the voluntary approach will be achieved if' the parties know that statements they make cannot come back to haunt them in litigation. And conversely, the minimum results will be achieved if a party can hope to use accounts of those discussions to derail or delay a meritorious claim." *Id*. (citation omitted).

Underscoring these two key factors unique to the EEOC's pre-suit duty to conciliate—discretion and confidentiality—this Court concluded:

> [The] relatively barebones review allows the EEOC to exercise all the expansive discretion Title VII gives it to decide how to conduct conciliation efforts and when to end them. And such review can occur consistent with the statute's non-disclosure provision, because a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (i.e., statements made or positions taken) during those discussions.

Id. at 1655-56.

B. The Absence From The Pre-Suit Investigation Duty Of Statutory Discretion And Confidentiality Applicable To The Conciliation Duty Materially Impacts The Analysis

This Court's rationale in *Mach Mining* has no application to the EEOC's duty to investigate—a duty

that is neither subject to explicit statutory discretion nor to a statutory requirement of confidentiality that would limit a court's judicial scope of review. Section 2000e-5(b) of Title 42 provides in relevant part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission . . . shall make an investigation thereof.

42 U.S.C. § 2000e-5(b). The plain language of the statute reflects the stark differences between the two duties.

1. The EEOC's Pre-Suit Investigation Duty Is Not Subject To Statutory Discretion

Title VII states simply that the EEOC "shall make an investigation" when it receives a charge. *Id*. Nothing in the statute suggests that Congress intended the word "investigation" to have anything other than its plain meaning. *See FCC v. AT&T Inc*., 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically give the phrase its ordinary meaning") (internal quotation marks omitted); *Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167, 175-76 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (internal quotation marks omitted). The EEOC has chosen not to promulgate regulations that would shed light on what constitutes an investigation. Indeed, in its briefing to the Second Circuit, the EEOC made the murky suggestion—untethered to any language from Title

VII—that an appropriate investigation be defined "as one where the field office has enough evidence to determine whether the statute has or has not been violated." App.82a.

In its analysis in *Mach Mining*, this Court determined that limited judicial review was necessary when examining the EEOC's conciliation efforts because the statute itself conferred great flexibility on the EEOC in how it chose to conciliate and when it decided such efforts should be declared a failure. In contrast, there is no such flexibility or discretion afforded to the EEOC when it comes to meeting its obligation to investigate the claims upon which it subsequently brings suit. Instead, the plain language of the statute requires that the EEOC conduct what would commonly be considered an investigation. As the Magistrate Judge observed, "[T]he word 'investigation' connotes a '*thorough*' or '*searching inquiry*.'" App.32a (quoting *In Re WorldCom, Inc. Secs. Litig*., 346 F. Supp. 2d 628, 678 (S.D.N.Y. 2004)) (emphasis added). "'Dictionary definitions of the word investigate include: "[t]o inquire into (a matter) systematically". . . ["]*to observe or study by close examination and systematic inquiry*". . . "to examine a crime, problem, statement, etc. carefully, especially to discover the truth".'" *Id*. at 32a-33a (quoting *MCI LLC v. Rutgers Cas. Ins. Co*., No. 06 Civ. 4412, 2007 WL 4258190, at *6 (S.D.N.Y. Dec. 4, 2007)) (emphasis added).

There is nothing in the statute that suggests that "a token investigation" or "some investigation" is sufficient. Rather, the EEOC must conduct an actual investigation of the claims the EEOC ultimately determines to pursue in litigation. Indeed, as the EEOC has previously conceded, the scope of its lawsuit

is defined by the scope of its pre-suit investigation. *See EEOC v. The Geo Grp.*, No. 13-16292, 2014 WL 2958056, at *20 (9th Cir. Jun. 18, 2014) ("Geo contends that the scope of the EEOC's suit is limited by the scope of the EEOC's investigation, determination and conciliation. EEOC agrees.") (citation omitted). Thus, while courts are not permitted to review the sufficiency of the EEOC's investigation, judicial review of the *scope* of that investigation is permitted and indeed necessary. The Second Circuit agreed that, "[i]t is especially important for the court and the parties to understand the contours of an EEOC investigation given that . . . the EEOC investigation must be pertinent to the allegations that it ultimately includes in the complaint." App.12a. The Magistrate Judge explained:

> Therefore, while courts "will not review the sufficiency of the EEOC's pre-suit investigation . . . . courts will review whether an investigation occurred". *EEOC v. JBS USA, LLC*, 940 F. Supp. 2d 949, 964 (D.Neb. 2013); *EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 272 (D.Minn. 2009). They may also examine the scope of that investigation, for while "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable", *General Telephone Co. of the Northwest, Inc. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 331, 100 S. Ct. 1698, 64 L.Ed.2d 319 (1980), "it must discover such individuals and wrongdoing during the course of its investigation". *E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012) (emphasis in original). "Where the

> scope of its pre-litigation efforts [is] limited—in terms of geography, number of claimants, or nature of claims—the EEOC may not use discovery in the resulting lawsuit as a fishing expedition to uncover more violations." *Id*. at 675.

Id. at 22a. Accordingly, the EEOC must conduct an actual investigation, the contours of which must correspond to the claims upon which it subsequently brings suit, and there is no statutory discretion or flexibility afforded to the EEOC in this regard. Thus, here, in order to avoid summary judgment, it was the EEOC's burden to prove the existence of a genuine issue of material fact that it actually conducted a *nationwide* pre-suit investigation.

2. The EEOC's Pre-Suit Investigation Is Not Subject To Confidentiality

Moreover, the EEOC's investigation is not subject to confidentiality. Like mediation, EEOC conciliation is confidential because the promise of confidentiality allows the parties to explore resolution with candor and openness, without fear that any representations made in that forum will be used against a party later in litigation. This rationale for a more limited judicial review has no application to an EEOC pre-suit investigation, which is not subject to any confidentiality requirement. In addition, while Title VII's confidentiality requirement for conciliation supports a limited review that can be accomplished by an affidavit unless there is contrary evidence, such a limited review in the investigation context bars a court from effectively evaluating the scope of the EEOC's investigation, despite the fact that the information that could define that scope is available and readily subject to discovery. The Magistrate

Judge's opinion amply demonstrates the value of a more fulsome review of the scope of the investigation in comparison to the scope of claims the EEOC ultimately brings in the resulting litigation, to determine whether the EEOC in fact met its pre-suit investigation obligation. Unlike review of the EEOC's compliance with its conciliation duty, fulsome review of the scope of the investigation need not run afoul of any confidentiality requirements under Title VII.

C. Certiorari Is Appropriate Because The Second Circuit's Misapplication Of *Mach Mining* Substantially Frustrates The Administration Of Title VII

Certiorari is appropriate here because the EEOC's pre-suit investigation duty, and the public assurance of accountability through appropriate judicial review, are indispensable to the proper administration of Title VII's statutory enforcement mechanism that affects tens of thousands of charges, thousands of conciliations, and hundreds of lawsuits every year. This Court has recognized that Congress intended that voluntary compliance be the preferred means of achieving the objectives of Title VII. *See Ricci v. DeStefano*, 557 U.S. 557, 581 (2009); *Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986) ("We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII.") (citations omitted). To effectuate the intention of Congress, Title VII requires that the EEOC follow an integrated, multi-step enforcement procedure, including each and every one of the specified enforcement activities of performing an investigation of the charge, issuing a determination of reasonable cause that the employer has violated Title VII, and

attempting conciliation. *See Occidental*, 432 U.S. at 359.

Yet, while the EEOC's pre-suit activities combine to form one integrated enforcement scheme, not all of its pre-suit duties share the same characteristics. As discussed above, the elements of confidentiality and discretion essential to encourage employers to participate in conciliation are not features of a pre-suit investigation, the results of which must be shared with the employer upon issuance of a reasonable cause determination precisely to encourage conciliation and compliance. Confidentiality is antithetical to disclosure, and a process requiring confidentiality to foster employer participation cannot be reviewed in the same manner as a fundamentally different process resulting in disclosure to engage employer participation. For this reason, the Second Circuit's erroneous extension of *Mach Mining*'s ruling to limit judicial review of the EEOC's compliance with its investigation duty invents limitations on judicial review without any basis in the statute or decisions of this Court. The proper administration of Title VII is frustrated by this *de facto* nullification of the sequential preconditions to litigation because it necessarily permits the commencement of litigation beyond the scope of matters investigated and made the subject of a determination communicated to an employer. Without the assurance of law that a matter must actually be investigated by the EEOC before enforcement litigation is commenced, an employer cannot assume the reliability or completeness of the determination communicated, and cannot reliably engage in meaningful conciliation or compliance efforts, thereby undermining Congressional intent to encourage compliance and conciliation.

Certiorari has been granted where a Court of Appeals has misinterpreted or misapplied a decision of this Court, and that misinterpretation or misapplication has frustrated the proper administration of a federal law. *See United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div., et al*., 358 U.S. 103, 109 (1958) ("We granted certiorari because of the claim that the Court of Appeals misinterpreted our decision in *Mobile*, and on the suggestion that its judgment seriously frustrates the proper administration of the Natural Gas Act.") (citations omitted). Certiorari is appropriate here because the Second Circuit's decision reads into Title VII a new, unfounded, and fundamentally wrong limitation on judicial review that weakens Title VII's enforcement scheme.

II. THE QUESTION PRESENTED IS IMPORTANT TO THE PUBLIC AND RECURRENT, WARRANTING REVIEW UNDER RULE 10(c)

A. The EEOC Is Committed Both To Enforcement Litigation And To Its Nationwide Systemic Discrimination Program

As the primary arm of the federal government charged with nationwide enforcement of federal equal employment opportunity laws, the EEOC received 63,900 charges of discrimination alleging violations of Title VII in 2015.[3] During the same fiscal year, the EEOC issued 1,989 reasonable cause findings

[3] *See Title VII of the Civil Rights Act of 1964 Charges: FY 1997 - FY 2015*, EEOC (Apr. 25, 2016, 11:30 AM), https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm.

implicating Title VII violations.[4] In light of the substantial number of charges filed and investigated each year, the EEOC's fulfillment of its pre-suit obligations is essential to the proper administration of Title VII, and it is therefore imperative and a matter of great public importance that this Court define the proper scope of judicial review of the EEOC's compliance with its pre-suit investigation duty. *See* S. Ct. R. 10(c).

In discharging the "integrated, multistep enforcement procedure" mandated by Title VII, the EEOC "is . . . required to investigate [a] charge and determine whether there is reasonable cause to believe that it is true." *Occidental*, 432 U.S. at 359. This Court has recognized the importance of the EEOC's administrative functions, and the constraints Title VII places on the EEOC's power to litigate in its own name:

> [U]nder the procedural structure created by the 1972 amendments, 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. . . . [T]he EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties.

Id. at 368.

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[4] *Id*.

The EEOC's pre-suit duty to investigate is no mere formality, but is an integral part of a process that prioritizes seeking "cooperation and conciliation" in preference to litigation. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) ("Critical to the compliance scheme is the Commission's role in settling Title VII disputes through conference, conciliation and persuasion before a Title VII plaintiff or the Commission may bring suit.") (citation omitted); *see also EEOC v. Shell Oil*, 466 U.S. at 77-78 ("Congress did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation.") (citation omitted). Consistent with these purposes, the EEOC recorded 631 successful conciliations of reasonable cause determinations implicating Title VII, and 1,138 unsuccessful conciliations in fiscal year 2014.[5]

Nevertheless, during fiscal year 2015, the EEOC filed 83 merit litigations under Title VII, making it the most litigated equal opportunity statute in the EEOC's enforcement portfolio.[6] In addition, the EEOC continued to focus on its national priority of initiating "systemic cases," defined as "pattern or practice, policy and/or class cases where the alleged discrimination

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[5] *See Title VII of the Civil Rights Act of 1964 Charges: FY 1997 - FY 2015*, EEOC (Apr. 25, 2016, 11:30 AM), http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm.

[6] *See Fiscal Year 2015 Performance and Accountability Report*, EEOC, at 34 (Apr. 25, 2016, 11:30 AM), http://www.eeoc.gov/eeoc/plan/upload/2015par.pdf.

has a broad impact on an industry, profession, company, or geographic location."[7]

The EEOC's ambitious systemic program has not been without challenges. In 2005, a Systemic Task Force was formed to determine how the Commission could address systemic discrimination more effectively.[8] Observing that there were gaps in resources, coordination, incentives, and skills among enforcement and legal staff,[9] the Task Force recommended that the EEOC's Systemic Program should be guided by principles including, among others, improving its methods for identifying and investigating systemic cases.[10] The Task Force identified that there are "too few labor economists and statisticians in ORIP[11] and RAS[12] to conduct analyses of data proactively and in response to field requests,"[13] and recommended that ORIP should enhance its efforts to support the Systemic Program.[14] The Task Force also found that in cases where there are indications of class or broad systemic discrimination,

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[7] *See Systemic Task Force Report To the Chair of the Equal Employment Opportunity Commission*, EEOC at 1 (March 2006), *available at* http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf.

[8] *Id*.

[9] *Id*. at 4-5.

[10] *Id*. at 6.

[11] Office of Research, Information and Planning of the Equal Employment Opportunity Commission.

[12] Research and Analytic Services of the Equal Employment Opportunity Commission.

[13] *Systemic Task Force Report To the Chair of the Equal Employment Opportunity Commission* at 10.

[14] *Id*. at 13.

"many EEOC employees are reluctant to expand an investigation beyond the individual charging party, the named facility and/or the particular EEOC office's geographical boundaries. . . ."[15] Precisely these areas of concern manifested in the instant matter, leading the District Court to conclude that the EEOC had failed to conduct a nationwide pattern or practice investigation prior to bringing a nationwide pattern or practice lawsuit against Sterling.

The EEOC's Strategic Plan for Fiscal Years 2012 - 2016 emphasizes as its number one objective to "have a broad impact on reducing employment discrimination at the national and local levels" and to "remedy discriminatory practices and secure meaningful relief for victims of discrimination."[16] Wielding the power and resources of the United States government, year after year, the EEOC has initiated numerous nationwide lawsuits alleging systemic discrimination by employers, and currently counts among its objectives the filing of systemic discrimination lawsuits as a percentage of its merit filings.[17] The

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[15] *Id*. at 18.

[16] *Fiscal Year 2015 Performance and Accountability Report* at 10.

[17] *Id*. at 18. In 2016, the EEOC also proposed significant revisions to the Employer Information Report (EEO-1) (submitted by all employers with more than 100 employees and all federal contractors), adding a new requirement that employers submit compensation data, commencing in 2017. *See* Press Release, *EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports*, (Jan. 29, 2016), http://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm. The EEOC's stated intention is that the new data will assist the agency in identifying possible pay discrimination, and the EEOC would use this data to assess complaints of discrimination, focus agency investiga-

EEOC has set as a Performance Measure to increase the percentage of systemic cases on the Commission's litigation docket to 24 percent by fiscal year 2018.[18] The EEOC filed 16 new systemic lawsuits in fiscal year 2015.[19] Of the 218 lawsuits on the EEOC's active docket at the close of fiscal year 2015, 48 were systemic lawsuits.[20] Thus, by close of fiscal year 2015, the EEOC already increased the percentage of such cases on its docket to 22 percent.[21]

The vast number of charges, conciliations, merit lawsuits and, among them, systemic discrimination lawsuits, underscore that the EEOC's fulfillment of its pre-suit obligations is essential to the proper administration of Title VII. As with the duty to conciliate under *Mach Mining*, the EEOC's stated priorities and activities themselves command that the questions of whether and to what extent courts may review the EEOC's compliance with its pre-suit investigation duty are matters of considerable public importance.

B. The Widespread And Recurring Litigation Conduct Of The EEOC Presents A Public Need For Further Clarification Of The EEOC's Pre-Suit Duties Under Title VII

Congress' limitations on the EEOC's power to initiate litigation were intended to prevent

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tions, and identify existing pay disparities that may warrant further examination. *Id.*

[18] *Fiscal Year 2015 Performance and Accountability Report* at 22.

[19] *Id*. at 34.

[20] *Id*. at 11.

[21] *Id*. at 22.

interminable litigation. *EEOC v. Hickey-Mitchell Co*., 507 F.2d 944, 948 (8th Cir. 1974). Courts of appeal have construed Title VII to require that the EEOC undertake its own investigation before filing suit. *See EEOC v. Pierce Packing Co*., 669 F.2d 605, 608 (9th Cir. 1982) ("Genuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit filed by the EEOC . . . ."); *EEOC v. Delight Wholesale Co*., 973 F.2d 664, 668-69 (8th Cir. 1992) (upholding EEOC's determination of unlawful discharge and wage discrimination upon its "reasonable investigation" of underlying charge of sex discrimination). The EEOC's Systemic Task Force has publicly affirmed the EEOC's obligation to utilize internal resources and personnel to affirmatively conduct systemic investigations.

Nevertheless, a disturbing body of case law has arisen from the EEOC's habitual commencement of high-profile systemic litigation without properly complying with its pre-suit obligations under Title VII. Failures to comply with preconditions of suit have been widespread, variously involving investigation, conciliation, or a combination of these distinct processes.

For example, in *EEOC v. Peoplemark, Inc*., 732 F.3d 584 (6th Cir. 2013), the EEOC filed a complaint against a temporary-employment agency, alleging it had a companywide policy of denying employment to persons with felony records and that this policy had a disparate impact on African Americans. *Id*. at 587. During the investigation, the defendant provided over 18,000 documents demonstrating that the company had no such policy. *Id*. The Sixth Circuit affirmed an award of attorneys' fees to the defendant, finding that, following the defendant's production, the EEOC

should have known that the alleged claim was frivolous, unreasonable, or groundless, yet it still pursued the litigation. *Id*. at 591-92.

In *EEOC v. Propak Logistics, Inc*., 746 F.3d 145 (4th Cir. 2012), more than six and one-half years after an employee filed a discrimination charge, the EEOC brought suit alleging the defendant violated Title VII by refusing to hire a class of individuals based on their national origin. *Id*. at 148-49. The EEOC delayed several witness interviews and ultimately the facility in question closed during the investigation, thus rendering moot the injunctive relief sought by the EEOC. *Id*. at 148-50. The district court held that the EEOC acted unreasonably in pursuing litigation because "it was again reaffirmed [during discovery] that purported victims and witnesses could not be located [and] the facilities were closed." *Id*. at 150 (internal quotation marks omitted). Following the district court's finding that the EEOC acted unreasonably in filing the complaint as a result of a flawed investigation, the Fourth Circuit affirmed an award of attorneys' fees for the defendant. *Id*. at 154.

In *EEOC v. CRST*, the EEOC brought a lawsuit on behalf of approximately 270 female employees who were allegedly subjected to a sexually hostile work environment. 679 F.3d at 664. The district court found that "the EEOC did not conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it [sought] relief at trial before filing the Complaint—let alone issue a reasonable cause determination as to those allegations or conciliate them." *Id*. at 672-73 (citation omitted). The Eighth Circuit affirmed, finding the district court properly found that the EEOC failed to investigate the claims of the remaining 67 allegedly aggrieved parties

(after several others had been dismissed).[22] *Id*. at 673, 676. The Eight Circuit held that "[w]here the scope of its pre-litigation efforts are limited—in terms of geography, number of claimants, or nature of claims—the EEOC may not use discovery in the resulting lawsuit as a fishing expedition to uncover more violations." *Id*. at 676 (internal quotation marks omitted).

Similarly, in *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802 (S.D.N.Y. 2013), the EEOC brought a lawsuit against the defendant after several current and former employees filed charges alleging sex/pregnancy discrimination under Title VII. *Id*. at 805-806. Following its investigation, the EEOC issued an LOD in which the EEOC addressed the allegations of the three charging parties and determined that the alleged discriminatory conduct extended to "other female current and former employees who have taken maternity leave." *Id*. at 812 (citation omitted). The EEOC found reasonable cause of discrimination against the three charging parties and a class of similarly-situated women. *Id*. In addition to challenging the EEOC's conciliation efforts, the employer contended that the EEOC failed to investigate the claims of 29 individual claimants. *Id*. at 813-14. Granting summary judgment for the defendant on the 29 individual claims, the court found no genuine issue of fact remained as to whether the

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[22] The Eighth Circuit further found "[t]he [LOD] did not provide [the defendant] with any notice as to the size of the 'class of employees and prospective employees [subjected] to sexual harassment'"; and during conciliation, the EEOC was unable "to provide [the defendant] names of all class members. . . or an indication of the size of the class." *Id.* at 673, 676 (citations omitted).

EEOC investigated any of these individual claims prior to bringing suit. *Id*.[23] The court disagreed with the EEOC's response to the contention that it failed to meet its pre-suit investigation duties, noting that "[r]ather than presenting evidence that an investigation was commenced into *any* of the remaining Non-Intervenor's claims prior to filing suit, the EEOC trie[d] to divert the Court's attention from the absence of any such investigation by stringing together citations from cases standing for the proposition that courts should refrain from reviewing the sufficiency of the underlying investigation." *Id*. at 814 (citation omitted).

In *EEOC v. American Samoa Gov't*, No. 11-00525, 2012 WL 4758115, at *8-9 (D. Haw. Oct. 5, 2012), the EEOC brought an action against the government defendant and its department of human resources ("DHR"), alleging it subjected an employee and a class of similarly situated individuals to adverse employment actions on the basis of age in violation of the Age Discrimination in Employment Act. *Id*. at *1. During its investigation, the EEOC limited its focus to the DHR, "even though the facts known to the EEOC arguably opened the door to a larger investigation." *Id*. at *8. The scope of conciliation was similarly limited to the DHR. *Id*. After the EEOC later sought governmental-wide remedial relief (as opposed to

[23] The court also noted that "[t]he record show[ed] that the EEOC spurned any efforts to conciliate individual claims beyond those of the [charging parties], let alone offer [the defendant] an opportunity to tailor any class-wide conciliatory efforts to the breadth of *legitimate* claims it might face." *Id*. at 813. Further, "[r]ather than identify to [the defendant] any additional potential claimants (or even respond to [the defendant's] request [to do so]), the EEOC declared conciliation unsuccessful the very next day and filed suit a month later." *Id.*

relief limited to the DHR), the court noted that the "EEOC did not provide the [defendant] notice that it would assert government-wide claims . . . confirmed by the fact that it is only now in this action that the EEOC seeks broad discovery to identify additional class members outside of the DHR. In other words, the EEOC seeks to gather facts in the discovery phase of this action because it did not do so during its investigation." *Id*. at *9. In sum, "[w]here the EEOC did not assert in its investigation a discriminatory government-wide policy and focused on only one department, the [government defendant] would have no reasonable basis to believe that government-wide claims were at issue." *Id*. at *11. Accordingly, since (1) the defendant did not receive notice of government-wide claims; (2) the EEOC failed to investigate such claims; and (3) the EEOC did not conciliate such claims, the court granted the defendant's motion for partial summary judgment. *Id*. at *11-12.

In *EEOC v. Dillard's Inc*., No. 08-CV-1780, 2011 WL 2784516, at *1 (S.D. Cal. July 14, 2011), where a former employee brought a disability charge after being terminated for missing work with an undisclosed illness, the EEOC sought termination documents and other information for 32 employees from the same store location. The EEOC also submitted an offer of conciliation that "did not seek or suggest a process for identifying 'other aggrieved individuals,' 'similarly-situated individuals,' or 'class members,' and it did not seek damages for a putative class." *Id*. at *2. The defendants declined the offer, and the EEOC initiated a lawsuit that referred to "other similarly-situated individuals," and the defendants' "practices," without identifying the other individuals or geographic scope of the alleged practices. *Id*. Granting the defendants' motion to

preclude claims asserted by the EEOC on behalf of individuals other than current and former employees of the defendants' store where the claim arose, the court held, "the EEOC's pre-litigation efforts failed to provide sufficient notice that [the defendants] potentially faced claims on behalf of a nationwide class." *Id*. at *8-9.

In *EEOC v. Outback Steak House of Fla., Inc*., 520 F. Supp. 2d 1250 (D. Colo. 2007), the EEOC alleged that the defendants engaged in a pattern or practice of discriminating against women. *Id*. at 1253-54. The EEOC asked for a variety of information from defendants regarding a three-state region. The defendants submitted information derived in part on their national policies regarding job responsibilities, as well as their national criteria for hiring and promotions. *Id*. at 1255. In response to the defendants' request to stay the litigation, the EEOC submitted a proposal seeking nationwide data from the defendants and explained the EEOC was attempting to "elicit the information necessary to ascertain the scope of the class for whom EEOC seeks relief." *Id*. (citation omitted). In granting the defendants' motion to dismiss the EEOC's nationwide claims, the court found that "the EEOC [had] failed to carry its burden of showing that its investigation put [the defendants] on notice of the national scope of the potential claims against [the defendants]." *Id*. at 1264. Further, with regard to its reasonable cause determination, the court found "the EEOC's failure to indicate with more specificity the potential national scope of the claims against [the defendants] was insufficient to put them on notice of the scope of the potential for a national lawsuit against them." *Id*. at 1267. Rejecting the EEOC's argument that its second conciliation efforts were national in scope, the

court held that "the EEOC failed adequately to notify [the defendants] of the potential national scope of the charges against them, and [was], therefore, limited to seeking legal redress on a regional basis." *Id*. at 1268. Accordingly, the court granted the defendants' motion to dismiss the nationwide claims. *Id*. at 1269.

Finally, in *EEOC v. Jillian's of Indianapolis, Inc*., 279 F. Supp. 2d 974 (S.D. Ind. 2003), four men filed sex discrimination charges with the EEOC, alleging that the defendant's Indianapolis location discriminated against them. *Id*. at 976. The EEOC conducted an investigation of the defendant's Indianapolis location employment practices, and later issued LODs with respect to the four charging parties. *Id*. The EEOC later rescinded these LODs and issued an Amended LOD to include "a class of similarly-situated male applicants and employees to server or hostess duties." *Id*. at 977 (citation omitted). Between the period of issuing the original and amended LODs, the EEOC did not conduct any further investigations. *Id*. The court found that "the EEOC's allegation of a nationwide class in its Amended Complaint did not reasonably grow out of its investigation. Accordingly, neither the underlying charges nor the EEOC's investigation into those charges put [the defendant] on notice that it was subject to a nationwide class action . . . [n]or did the EEOC seek conference, conciliation or persuasion with respect to a nationwide class." *Id*. at 982. The court therefore granted the defendant's motion for summary judgment as to the EEOC's nationwide pattern or practice claim. *Id*. at 984.

This body of case law is necessarily limited to those employers who marshalled the resources to challenge the erosion of Title VII's constraints on the EEOC's power to litigate. The EEOC has responded

by denying the courts' power of judicial review. In *Mach Mining*, the EEOC resisted judicial review of its compliance with its statutory perquisites to commencing litigation, requiring this Court to restate the requirements of Title VII and pronounce a standard specific to the review of the EEOC's pre-suit conciliation duty. Throughout this litigation, the EEOC similarly has resisted judicial review of its compliance with its separate statutory duty to investigate the "pattern or practice" upon which it commenced litigation. In the instant matter, the EEOC investigated less than 20 charges highly concentrated in only two cities (Massena, New York and Tampa, Florida), before launching the widely-touted largest case of its systemic program that implicates a population of more than 40,000 females nationwide who worked for Sterling over more than a decade.

The Second Circuit's misapplication of *Mach Mining* as extending the standard of limited judicial review appropriate to the EEOC's conciliation duty to its separate investigation duty now threatens to reduce pre-suit investigation to a mere pro forma and inscrutable function shielded from review by as little as an affidavit to the file. Tellingly, the EEOC has publicly touted the Second Circuit's decision in a way that signals the agency's intention to continue to resist fulsome review and wield the full force and resources of the United States government on the basis of any investigation at all—unfettered latitude for potential abuse of power that Congress worked diligently to prevent:

> Among the most notable appellate decisions in fiscal year 2015 is *EEOC v. Sterling Jewelers, Inc*., in which the Second Circuit

> agreed with the Commission's position that Title VII does not provide for judicial review of the sufficiency of the Commission's investigation of a charge; and that courts may only conduct a narrow review to ascertain whether an investigation happened at all.

Fiscal Year 2015 Performance and Accountability Report at 34 (emphasis in original).

Allowing the Second Circuit's error to stand also effectively insulates the EEOC from accountability for its underlying tactic of relying on stakeholders (here, private plaintiffs' attorneys) to provide the fruits of their "investigation" in lieu of EEOC personnel affirmatively conducting the "genuine" and "reasonable" investigation that Congress and the circuit courts have required as part of the orderly administration of Title VII.

Under Title VII, the EEOC's pre-suit obligations are preconditions to suit. Courts should and must be able to review effectively whether the EEOC has properly discharged its duties under Title VII and whether the EEOC is litigating only those claims it has investigated prior to initiating litigation. Sterling seeks certiorari of the important federal question of whether and to what extent the courts may review the EEOC's pre-suit duty to investigate, to prevent further erosion of the Congressionally intended constraints upon the EEOC's power to initiate litigation under Title VII.

The misapplication of *Mach Mining* beyond its reasoning and limited holding creates a compelling case for summary reversal.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari and summarily reverse the decision of the Court of Appeals.

Respectfully submitted,

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April 29, 2016

APPENDIX

APPENDIX A

[CERTIFIED COPY ISSUED ON 09/09/2015]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 14-1782

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

STERLING JEWELERS INC.,

Defendant-Appellee.

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AUGUST TERM, 2014

ARGUED: MAY 5, 2015
DECIDED: SEPTEMBER 9, 2015

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Appeal from the United States District Court
for the Western District of New York.
No. 08 Civ. 706–Richard J. Arcara *Judge*.

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Before: WALKER, LYNCH, and LOHIER, Circuit Judges.

This case arises from an Equal Employment Opportunity Commission ("EEOC") enforcement action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), alleging that Defendant-Appellee Sterling Jewelers Inc. ("Sterling")

engaged in a nationwide practice of sex-based pay and promotion discrimination. After discovery, the magistrate judge (Jeremiah J. McCarthy, J.) issued a Report and Recommendation finding that the EEOC failed to prove that it satisfied its statutory obligation to conduct a pre-suit investigation and recommended summary judgment on that basis. On March 10, 2014, the district court (Richard J. Arcara, J.) adopted the magistrate judge's Report and Recommendation, and granted summary judgment to Sterling.

On appeal, the EEOC argues that the district court erred in granting summary judgment because the magistrate judge improperly reviewed the sufficiency of the EEOC investigation rather than whether there was an investigation. We agree. Under Title VII, courts may review whether the EEOC conducted an investigation, but not the sufficiency of an investigation. The EEOC conducted an investigation in this case. Accordingly, we VACATE the district court's summary judgment order and REMAND the case for further proceedings.

BARBARA L. SLOAN, (P. David Lopez, Carolyn L. Wheeler, Jennifer S. Goldstein, *on the brief*), Equal Employment Commission, Office of General Counsel, Washington, D.C. for *Plaintiff-Appellant*.

GERALD L. MAATMAN, JR., (Jeffrey S. Klein, Weil, Gotshal & Manges, LLP, New York, N.Y., David Bennet Ross, William F. Dugan, Daniel B. Klein, Lorie E. Almon, Seyfarth Shaw LLP, New York, N.Y., *on the brief)*, Seyfarth Shaw LLP, New York, N.Y., for *Defendant-Appellee*.

JOHN M. WALKER, JR., *Circuit Judge*:

This case arises from an Equal Employment Opportunity Commission ("EEOC") enforcement action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), alleging that Defendant-Appellee Sterling Jewelers Inc. ("Sterling") engaged in a nationwide practice of sex-based pay and promotion discrimination. After discovery, the magistrate judge (Jeremiah J. McCarthy, J.) issued a Report and Recommendation finding that the EEOC failed to prove that it satisfied its statutory obligation to conduct a pre-suit investigation and recommended summary judgment on that basis. On March 10, 2014, the district court (Richard J. Arcara, J.) adopted the magistrate judge's Report and Recommendation, and granted summary judgment to Sterling.

On appeal, the EEOC argues that the district court erred in granting summary judgment because the magistrate judge improperly reviewed the sufficiency of the EEOC investigation rather than whether there was an investigation. We agree. Under Title VII, courts may review *whether* the EEOC conducted an investigation, but not the sufficiency of an investigation. The EEOC conducted an investigation in this case. Accordingly, we VACATE the district court's summary judgment order and REMAND the case for further proceedings.

BACKGROUND

Sterling is the largest fine jewelry company in the United States, operating chains including Kay Jewelers and Jared–the Galleria of Jewelry. Between 2005 and 2007, the EEOC received 19 individual charges of discrimination from women employed by Sterling in stores located in nine states: California,

Colorado, Florida, Indiana, Massachusetts, Missouri, Nevada, New York, and Texas (the "Charging Parties"). Sixteen of the charges alleged that Sterling engaged in a "continuing policy or pattern and practice" of sex discrimination. *See, e.g.*, App'x 1390. Five investigators initially investigated the charges, but the EEOC later transferred all 19 charges to one investigator, David Ging. Around that time, the EEOC also requested copies of Sterling's company-wide protocols, including policies governing pay, promotion, and anti-discrimination; job descriptions for sales associates and management positions; and computerized personnel files listing employees' hiring dates, responsibilities, and pay and promotion histories.

In 2006, Sterling and the Charging Parties entered mediation and invited the EEOC to participate. Then-EEOC Regional Attorney Elizabeth Grossman, who participated on behalf of the EEOC, and the parties signed a Mediation and Confidentiality Agreement (the "Agreement"), as well as several addenda. Under the Agreement, the EEOC agreed to suspend its investigation during the mediation, and the parties agreed to identify the data relevant to the charges against Sterling and produce all of the documents on which their respective experts would rely in preparing their reports. App'x 3666-68. Based on the data provided by Sterling, labor economist Dr. Louis Lanier, hired by the Charging Parties, conducted a statistical analysis of Sterling's pay and promotion practices. This analysis led Dr. Lanier to find that Sterling paid female employees less and promoted them at slower rates than similarly situated male employees.

Under a confidentiality provision in the Agreement, the EEOC agreed that it would "not rely on, or

introduce as evidence in any court, arbitration, judicial, or other proceeding" information disclosed during the mediation. App'x 3656. However, the parties subsequently signed addenda, stating that the documents exchanged at the mediation could be given to Investigator Ging and permitting certain documents, including Dr. Lanier's analysis, to be placed in the EEOC investigative file if the mediation was unsuccessful.

In November 2007, the mediation failed. Thereupon, Ging sent letters to the parties stating: "I understand that Ms. Grossman has [Sterling's] permission to provide me with its documents exchanged in conjunction with that mediation . . . . [and] that Ms. Grossman has Charging Parties' and [Sterling's] permission to provide me with Dr. Lanier's tables and explanatory notes . . . . " App'x 959-62. Ging also encouraged the parties to provide any additional information they wanted the EEOC to consider during its investigation. The Charging Parties sent Ging a letter summarizing the evidence of "company-wide" discrimination as well as supporting documents, including declarations from the Charging Parties; a declaration from a male employee attesting to his belief that Sterling discriminated against female employees with regard to pay and promotion; and Dr. Lanier's analysis. Sterling did not provide any additional information.

On January 30, 2008, the EEOC issued a Letter of Determination ("LOD") finding that Sterling "subjected Charging Parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation." App'x 1000. The LOD further stated:

> Statistical analysis of pay and promotion data provided by [Sterling] reveals that [Sterling] promoted male employees at a statistically significant, higher rate than similarly situated female employees and that [Sterling] compensated male employees at a statistically significant, higher rate than similarly situated female employees. Witness testimony further corroborates the allegations.

App'x 1000. Then, on September 23, 2008, the EEOC filed suit in the Western District of New York alleging that Sterling engaged in sex-based pay and promotion discrimination in violation of Title VII.

During discovery, approximately seven years after the close of the investigation, the parties deposed two EEOC investigators: Ging and Jennifer Carlo, the investigator assigned to the first of the 19 charges. Ging stated that he "d[id]n't really recall much about [the] investigation," App'x 32, and both investigators invoked the deliberative privilege and declined to answer several of the questions about the investigation.

Following discovery, Sterling moved for summary judgment on grounds that the EEOC had not satisfied its statutory obligation to conduct a pre-suit investigation. The magistrate judge issued a Report and Recommendation, in which he determined that there was "no evidence that [the EEOC] investigated a *nationwide* class" and recommended that the district court grant summary judgment. App'x 83. On March 10, 2014, the district court adopted the Report and Recommendation, granted summary judgment to Sterling, and dismissed the EEOC's action with prejudice. The EEOC timely appealed.

DISCUSSION

"We review an award of summary judgment *de novo*, construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in his favor." *McElwee v. Cnty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012). Summary judgment is only appropriate where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id*. (citing Fed. R. Civ. P. 56(a)).

I. Judicial Review of Title VII Enforcement Actions

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., as amended, prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). Before the EEOC may bring an enforcement action under Title VII, it must discharge certain administrative obligations. The EEOC must: (1) receive a formal charge of discrimination against the employer; (2) provide notice of the charge to the employer; (3) investigate the charge; (4) make and give notice of its determination that there was reasonable cause to believe that a violation of Title VII occurred; and (5) make a good faith effort to conciliate the charges. *See* 42 U.S.C. § 2000e–5(b); *see also Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649-50 (2015). Title VII does not define "investigation" or prescribe the steps that the EEOC must take in conducting an investigation. *Newsome v. EEOC*, 301 F.3d 227, 231 (5th Cir. 2002).

To ensure agency compliance with Title VII, Congress empowered federal courts to review whether the EEOC has fulfilled its pre-suit administrative obligations. *See Mach Mining*, 135 S. Ct. at 1653

(holding that courts may review whether the EEOC has satisfied its obligation to conciliate). The proper scope of that review, however, is an issue of first impression in this Circuit.

In the recently decided case of *Mach Mining*, the Supreme Court provided guidance regarding the scope of judicial review of the EEOC's administrative obligations. *Id*. In the context of the EEOC's obligation to conciliate, the Court explained that judicial review is "narrow" and serves to "enforce[] the statute's requirements . . . that the EEOC afford the employer a chance to discuss and rectify a specified discriminatory practice—but goes no further." *Id*. The Court further explained that a sworn affidavit from the EEOC stating that it satisfied its conciliation obligations but failed to reach an agreement "will usually suffice to show that it has met the conciliation requirement." *Id*. at 1656.

Mach Mining did not address the EEOC's obligation to investigate, but we conclude that judicial review of an EEOC investigation is similarly limited: The sole question for judicial review is whether the EEOC conducted an investigation. As the district and magistrate judges in this case recognized, courts may not review the *sufficiency* of an investigation—only whether an investigation occurred. *EEOC v. Keco Indus., Inc*., 748 F.2d 1097, 1100 (6th Cir. 1984); *see also EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012) ("[T]he nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency." (quoting *Keco*, 748 F.2d at 1100)); *Newsome*, 301 F.3d at 231 (same).

In order to prove that it has fulfilled its pre-suit investigative obligation, the EEOC must show that it

took steps to determine whether there was reasonable cause to believe that the allegations in the charge are true. *Cf.* 42 U.S.C. § 2000e-5(b) (noting that the purpose of an EEOC investigation is to determine whether "there is reasonable cause to believe that the charge is true"); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 71 (1984) ("[T]he purpose of [an EEOC investigation] is to determine whether there is reason to believe those allegations are true."). Here, the EEOC's complaint against Sterling alleged nationwide discrimination; accordingly, the agency must show that it undertook to investigate whether there was a basis for alleging such widespread discrimination. The EEOC need not, however, describe in detail every step it took or the evidence it uncovered. As with the conciliation process, an affidavit from the EEOC, stating that it performed its investigative obligations and outlining the steps taken to investigate the charges, will usually suffice. *See Mach Mining*, 135 S. Ct. at 1656 (concluding that a sworn affidavit from the EEOC stating that it attempted to conciliate will usually establish that the EEOC has met its obligation to conciliate).

There are several reasons for this approach. First, this "limited review respects the expansive discretion that Title VII gives to the EEOC" in investigating discrimination claims, "while still ensuring that the Commission follows the law." *Id.* at 1653. Second, it reflects the fact that "Title VII ultimately cares about substantive results." *Id.* at 1654. Allowing courts to review the sufficiency of an EEOC investigation would "effectively make every Title VII suit a two-step action: First, the parties would litigate the question of whether EEOC had a reasonable basis for its initial finding, and only then would the parties proceed to litigate the merits of the action." *Keco*, 748 F.2d at

1100 (internal quotation marks omitted). Extensive judicial review of this sort would expend scarce resources and would delay and divert EEOC enforcement actions from furthering the purpose behind Title VII—eliminating discrimination in the workplace. *See id; see also Ricci*, 557 U.S. at 577.

II. Application

The EEOC argues that the magistrate judge, while purporting to examine the existence of the EEOC's investigation, actually considered its sufficiency. We agree.

A. The EEOC Investigated the Claims Against Sterling

Testimony from EEOC investigators Ging and Carlo and the investigative file show that the EEOC took multiple steps to investigate the claims against Sterling.[1] As the magistrate judge found, the EEOC received 19 charges, which were "investigated by five EEOC investigators." App'x 74. After receiving a letter from a Charging Party that identified six additional women alleging sex-based discrimination, the EEOC transferred all of the charges to one investigator. That investigator, Ging, testified that he reviewed all of the individual investigative files and investigated "all of the[ ] charges as class charges."App'x 569.

Additionally, the 2,600-page investigative file shows that the EEOC requested and obtained numerous documents related to the charges, including Sterling's

[1] The only statutory pre-suit obligation at issue in this case is the investigation. The parties agreed that the EEOC's participation in the mediation would satisfy its obligation to conciliate in the event that it brought an enforcement action, and there is no dispute concerning the other pre-suit requirements.

company-wide policies governing pay, promotion, and anti-discrimination; witness statements; Sterling's responses to individual allegations; the Charging Parties' personnel documents; company-wide job descriptions; EEO-1 reports; and Dr. Lanier's statistical analysis, which found that Sterling paid and promoted women at statistically significant lower rates than men. Notes from the investigative file also show that the EEOC interviewed at least one Charging Party, Jacquelyn Boyle, in January 2006 and again in February 2006.

In contrast to the cases in which some of our sister circuits concluded that the EEOC did not satisfy Title VII's investigation requirement, it cannot be said here that the EEOC failed to conduct any pre-suit investigation at all. For example, in *EEOC v. Pierce Packing Co.*, the Ninth Circuit held that the EEOC did not conduct a pre-suit investigation where it "obtain[ed] the results of [a two-week Department of Labor] investigation," and "did not conduct an independent investigation." 669 F.2d 605, 606 (9th Cir. 1982). Similarly, in *CRST*, the Eighth Circuit held that the EEOC did not fulfill its investigative obligation because "the EEOC did not investigate the specific allegations of *any* of the 67 allegedly aggrieved persons . . . until *after* the Complaint was filed." *CRST*, 679 F.3d at 675-76. In both *Pierce Packing* and *CRST*, the courts determined that the EEOC failed to take any steps to investigate. That is plainly not the case here. Although Ging acknowledged in discovery that he did not remember much about the investigation, that testimony—given some seven years after the

investigation concluded—is not tantamount to an admission that he failed to conduct an investigation.[2]

Sterling identifies a laundry list of steps the EEOC failed to take in investigating the claims against it. But "the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency." *Keco*, 748 F.2d at 1100; *see also CRST*, 679 F.3d at 674; *EEOC v. Caterpillar*, 409 F.3d 831, 832-33 (7th Cir. 2005); *Newsome*, 301 F.3d at 231. For a court to second guess the choices made by the EEOC in conducting an investigation "is not to enforce the law Congress wrote, but to impose extra procedural requirements. Such judicial review extends too far." *Mach Mining*, 135 S. Ct. at 1654-55.

B. The EEOC Investigation Was Nationwide

Ging's testimony coupled with the documents in the investigative file suffice to demonstrate that the EEOC investigation was nationwide. The investigative file contains 19 charges, 16 of which alleged company-wide class and/or pattern-or-practice discrimination, from nine states across the country (California, Colorado, Florida, Indiana, Massachusetts, Missouri, Nevada, New York, and Texas), and Ging testified that he investigated all of those charges as "class charges." App'x 569. Additionally, the EEOC obtained Dr. Lanier's statistical analysis, based on company-wide computerized data, which found that

[2] The lengthy and costly depositions taken in this case might have been easily avoided by an affidavit from an EEOC investigator outlining the steps taken to investigate the claims. It is especially important for the court and the parties to understand the contours of an EEOC investigation given that, as explained below, the EEOC investigation must be pertinent to the allegations that it ultimately includes in the complaint.

Sterling paid and promoted male employees at statistically significant higher rates than similarly-situated female employees nationwide.[3] The EEOC also obtained Sterling's policies governing pay and promotion, which, Sterling concedes, have nationwide application. This testimony together with these documents is sufficient to establish that the investigation was nationwide.

In concluding that the investigation was not nationwide, the magistrate judge found the word "class" to be ambiguous because it could refer to a local, regional, or nationwide class. We are, however, at a loss to think of a locality or region that would include California, New York, and Texas, and the cases relied on by the magistrate judge are inapposite. The magistrate judge cited *EEOC v. Outback Steak House of Florida, Inc*., for the proposition that a "class can also mean a local or regional class instead of a nationwide class"). But, as the district court in that case explained, "both the charges and the investigation centered around [a] three-state region [Colorado, Montana, and Wyoming], [so] Defendants had every reason to believe that the 'class' the EEOC was referring to in its determination was a *regional* class."

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[3] The magistrate judge concluded that the EEOC could not rely on Dr. Lanier's analysis in showing that the investigation was nationwide because Ging and Carlo invoked the deliberative privilege in response to questions regarding whether Dr. Lanier's analysis was the analysis referred to in the LOD and whether the EEOC independently verified the analysis. But nothing in Title VII suggests that the EEOC must identify the documents referenced in the LOD or, as explained above, independently validate expert analysis. Therefore, the fact that Ging and Carlo declined to answer these questions about Dr. Lanier's analysis creates no bar to the EEOC's reliance on that analysis in establishing the scope of its investigation.

520 F.Supp.2d 1250, 1267 (D. Colo. 2007). Similarly, in *EEOC v. Jillian's of Indianapolis, IN, Inc.*, the EEOC's investigation was confined to a single state. *See* 279 F. Supp. 2d 974, 980 (S.D. Ind. 2003) ("The *nationwide* class named in the EEOC's Amended Complaint is not reasonably anticipated in its investigation into the four charges filed against Jillian's Indianapolis." (emphasis in original)). Because of the limited geographic scope of the investigations in *Outback Steak House and Jillian's*, there was reason to believe the employers did not have notice that the EEOC would bring suit on behalf of a nationwide class. By contrast, here the EEOC investigated charges alleging class-wide discrimination from women in nine states across the country. We therefore conclude that the class Ging referred to was nationwide.

Sterling contends that the EEOC cannot rely on Dr. Lanier's analysis to satisfy its burden of proof because the parties and the EEOC agreed that the materials would not "lose their mediation privilege." Def. Br. at 55. However, the Agreement stated that the EEOC could "not rely on, or introduce as evidence" documents exchanged during mediation "in any court, arbitration, judicial, or other proceeding." App'x 3656. We interpret that Agreement in light of the Fourth Addendum, in which Sterling agreed to have Dr. Lanier's analysis given to Ging and put in the investigative file in the event that the mediation failed.[4] To be sure, there is some tension between various parts of the Agreement and its addenda. We read the whole of the documents,

[4] There is no dispute that Sterling consented to giving Dr. Lanier's analysis to Ging. Ging informed the parties at the close of mediation that he anticipated receiving the mediation documents and that he had the parties' permission to do so. At no time did Sterling raise an objection.

however, to mean that the EEOC was not precluded from relying on the analysis in reaching its own internal determination as to whether there was reasonable cause to believe Sterling violated Title VII. Indeed, what other purpose could the parties have for allowing the EEOC to include Dr. Lanier's analysis in its investigative file if the EEOC could not review the analysis as part of its investigation? Because the EEOC was permitted to rely on Dr. Lanier's analysis in making its reasonable-cause determination, the EEOC properly referenced that analysis as part of the proof that its investigation was nationwide.

CONCLUSION

For the reasons stated above, we VACATE the district court's order granting summary judgment and REMAND the case for further proceedings consistent with this opinion.

APPENDIX B

3 F. Supp. 3d 57; 2014 U.S. Dist. LEXIS 304

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

08-CV-00706(A)(M)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

STERLING JEWELERS INC.,

Defendant.

January 2, 2014, Decided
January 2, 2014, Filed

OPINION

JUDGES: JEREMIAH J. MCCARTHY, United States Magistrate Judge.

OPINION BY: JEREMIAH J. MCCARTHY

REPORT, RECOMMENDATION AND ORDER

Before me are two motions by defendant Sterling Jewelers, Inc. ("Sterling"): a motion for partial summary judgment [336],[1] and a motion to strike portions of the Statement of Facts of plaintiff Equal Employment Opportunity Commission ("EEOC") [370]. Oral argument was held on December 9, 2013

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[1] Bracketed references are to CM/ECF docket entries.

[376]. For the following reasons, Sterling's motion to strike is denied as moot, and I recommend that its motion for partial summary judgment be granted in part and denied in part.

BACKGROUND

Between May 2005 and November 2006, 19 female employees (the "Charging Parties") at Sterling's stores in New York, Florida, California, Massachusetts, Missouri, Nevada, Indiana and Texas filed charges with the EEOC against Sterling on behalf of themselves and similarly situated employees, alleging sex discrimination in pay and/or promotions. EEOC's Brief [362], p. 1. The charges were investigated by five EEOC investigators. [376], p. 12. By June 2007, the charges were transferred to the EEOC's Buffalo office, and were assigned to a single investigator, David Ging. EEOC's Brief [362], p. 1.

On January 25, 2007 the EEOC, Sterling and the Charging Parties entered into a "Mediation and Confidentiality Agreement" calling for the EEOC's participation in a mediation between Sterling and the Charging Parties. [365-13], pp. 2 of 22 *et seq*. That Agreement provided that "the Parties shall not rely on, or introduce as evidence in any court, arbitration, judicial, or other proceeding any information disclosed by any other party, their experts, or by the Mediator regarding such other party in the course of or pursuant to the mediation". *Id.*, ¶10.

During the mediation, counsel for the Charging Parties submitted a statistical analysis of Sterling's pay and promotion data prepared by their expert, Dr. Louis Lanier, dated September 4, 2007 and bearing the legend "For Settlement Purposes Only" [339-32]. The parties subsequently modified the Mediation and

Confidentiality Agreement to provide that the "EEOC may place Dr. Lanier's tables and explanatory notes in its investigatory file. However, such tables shall not lose their mediation privilege". [365-13], p. 10 of 22, ¶4.

In November 2007, Mr. Ging wrote to counsel for the Charging Parties and Sterling, stating:

> "I have been informed by [EEOC] Regional Attorney Elizabeth Grossman that the outside mediation process regarding the above-referenced charges has been on unsuccessful. I understand that Ms. Grossman has [Sterling's] permission to provide me its documents exchanged in conjunction with the mediation which are numbered 0001-3348. I further understand that Ms. Grossman has Charging Parties' and [Sterling's] permission to provide me with Dr. Lanier's tables and explanatory notes prepared in conjunction with the mediation.
>
> Ms. Grossman has agreed that Dr. Lanier's analysis in the underlying data shall not lose its mediation privilege and will not be disclosed to any non-Charging Party.
>
> While the Commission will not be making additional requests for information, both parties are encouraged to provide any further information you wish to be considered by the Commission to me by November 21, 2007."

[363-1], pp. 36-37 of 189.

Although Sterling did not provide any additional information in response to that invitation,[2] on November 30, 2007 counsel for the Charging Parties wrote to Mr. Ging, stating that "[o]ur clients and other women similarly situated to them claim they have been subjected to a pattern and practice of sex discrimination in compensation and promotion decisions at Sterling Jewelers stores. This letter and accompanying exhibits set forth the factual, legal and statistical support of the Charging Parties' claims. We hope this information is helpful to your investigation". [363-1], p. 71 of 189. However, Mr. Ging did not recall having received this letter ([339-24], pp. 187-88), and when asked whether he reviewed it as part of his investigation into the charges against Sterling, he replied "I can't be sure that I did". *Id.*, p. 188.

On January 3, 2008 the EEOC issued a Letter of Determination, stating:

> "The investigation determined that Respondent subjected Charging Parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation. Statistical analysis of pay and promotion data provided by Respondent reveals that Respondent promoted male employees at a statistically significant, higher rate than similarly situated female employees and that Respondent compensated male employees at a statistically

[2] The parties had agreed that "Sterling shall be under no obligation to provide additional information or documentation relating to the Charges" in connection with the EEOC administrative investigation. [365-13], ¶8.

> significant, higher rate than similarly situated female employees. Witness testimony further corroborates the allegations."

[339-34], p. 4.

The EEOC commenced this action on September 23, 2008, alleging that "[s]ince at least January 1, 2003, Sterling has engaged in unlawful employment practices throughout its stores nationwide" by discriminating against female employees in promotion and compensation, in violation of Title VII, 42 U.S.C. §§2000e-2(a) and 2000e-2(k). Complaint [1], ¶¶7, 8. It seeks relief for 19 individual employees (the "Charging Parties") as well as for "other female retail sales employees". *Id.*, ¶6; "Prayer for Relief", ¶¶C-F.

In moving for partial summary judgment, Sterling argues that since there is no evidence that the EEOC conducted a nationwide investigation of its employment practices prior to commencing this action, its claims of nationwide discrimination must be dismissed. Sterling's Memorandum of Law [337], Points I and II. The EEOC responds that "the Courts should not inquire into the sufficiency of [its] investigation". EEOC's Brief [362], p. 5.

ANALYSIS

A. May the Court Inquire as to the Scope of the EEOC's Pre-Suit Investigation?

"[T]he 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. Unlike the typical litigant . . . the EEOC is required by law to refrain

from commencing a civil action until it has discharged its administrative duties." *Occidental Life Insurance Co. of California v. E.E.O.C.*, 432 U.S. 355, 368, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977).

"Before the EEOC is able to file a lawsuit in its name, it must establish that it has met four conditions precedent, namely: the existence of a timely charge of discrimination, the fact that EEOC conducted an investigation, issued a reasonable cause determination, and attempted conciliation prior to filing suit." *E.E.O.C. v. Grane Healthcare Co.*, 2013 U.S. Dist. LEXIS 35869, 2013 WL 1102880, *3 (W.D.Pa. 2013); *Occidental*, 432 U.S. at 359-60; 42 U.S.C. §2000e-5(b).

While the EEOC alleges that "[a]ll conditions precedent to the institution of this lawsuit have been satisfied" (Complaint [1], ¶6), Sterling replies that the claims are "beyond the scope of any administrative charge or the EEOC's investigation thereof, were not subject to administrative investigation . . . processes, and/or were not included in any investigation . . . by the EEOC". Answer [8], Sixth Affirmative Defense. Sterling's denial of EEOC's performance of a condition precedent (namely, a pre-suit investigation) as an affirmative defense does not shift the burden of proof on that issue to Sterling – instead, it remains the EEOC's burden to prove performance of that condition. *See Dynasty Apparel Industries Inc. v. Rentz*, 206 F.R.D. 603, 607 (S.D.Ohio 2002); 2 Moore's Federal Practice, §9.04[4] (Matthew Bender 3d ed.).

The fact that "a district court should not examine the adequacy of an EEOC[ ] investigation" does not mean that it "should not examine whether the investigation occurred at all". *Grane Healthcare*, 2013 U.S. Dist. LEXIS 35869 at *5. "Whether the EEOC

fulfilled its statutory duties as a precondition to suit is a proper issue for the district court to decide . . . . To rule to the contrary would severely undermine if not completely eviscerate Title VII's integrated, multistep enforcement procedure." *Equal Employment Opportunity Commission v. Swissport Fueling, Inc.*, 916 F.Supp.2d 1005, 1036 (D.Ariz. 2013).

Therefore, while courts "will not review the sufficiency of the EEOC's pre-suit investigation . . . . courts will review whether an investigation occurred". *EEOC v. JBS USA, LLC*, 940 F. Supp.2d 949, 964 (D.Neb. 2013); *EEOC v. Hibbing Taconite Co*., 266 F.R.D. 260, 272 (D.Minn. 2009). They may also examine the scope of that investigation, for while "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable", *General Telephone Co. of the Northwest, Inc. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 331, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980), "it must discover such individuals and wrongdoing *during the course of its investigation*". *E.E.O.C. v. CRST Van Expedited, Inc*., 679 F.3d 657, 674 (8th Cir. 2012) (emphasis in original). "Where the scope of its pre-litigation efforts [is] limited – in terms of geography, number of claimants, or nature of claims – the EEOC may not use discovery in the resulting lawsuit as a fishing expedition to uncover more violations." *Id.* at 675.

Accordingly, in determining whether a particular claim may be asserted in an EEOC complaint, "the relationship between the complaint and the scope of the investigation is central". *E.E.O.C. v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp.2d 974, 980 (S.D.Ind. 2003). "Courts have limited the EEOC's complaint where it exceeds the scope of the

investigation." *E.E.O.C. v. Dots, LLC*, 2010 U.S. Dist. LEXIS 129064, 2010 WL 5057168, *2 (N.D.Ind. 2010).

For example, in *E.E.O.C. v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 2013 U.S. Dist. LEXIS 128385, 2013 WL 4799150 **7, 9 (S.D.N.Y. 2013) the court granted summary judgment dismissing the EEOC's claims for individual relief, finding that its pre-suit investigation was class-wide only: "the Court holds that its prior finding that the EEOC satisfied its pre-litigation obligations with respect to a class-wide claim applies to that class-wide claim only and that it must look independently at whether the EEOC fulfilled its statutory pre-litigation requirements with respect to the individual claims upon which it purports to continue this litigation . . . . Thus, the Court holds that no genuine issue of fact remains as to whether the EEOC investigated any of the Section 706 individual claims prior to commencing litigation."

Similarly, in *Jillian*'s the court granted summary judgment dismissing the EEOC's claims of nationwide discrimination, finding that the EEOC had failed to conduct a nationwide investigation: "[t]he *nationwide* class named in the EEOC's Amended Complaint is not reasonably anticipated in its investigation into the four charges filed against Jillian's Indianapolis. The EEOC's investigation of the four charges was conducted entirely with respect to Jillian's Indianapolis. Its Amended Complaint, alleging a nationwide class, has insufficient basis in its actual investigation . . . . For these reasons, we GRANT Jillian's motion for summary judgment with respect to the EEOC's nationwide pattern or practice claim." 279 F.Supp.2d at 980, 983 (emphasis in original).

Therefore, I must decide whether there is a triable issue of fact as to whether the EEOC conducted a nationwide investigation of Sterling's employment practices prior to commencing this action.

B. Can the EEOC Prove that it Conducted a Nationwide Investigation of Sterling's Employment Practices?

Because the EEOC bears the burden of proving that it satisfied all conditions precedent to maintaining this action, Sterling need not prove that the EEOC did *not* conduct a nationwide investigation – rather, in order to avoid summary judgment, the EEOC must point to evidence showing that it *did*. "A defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial. It need only point to an absence of proof on plaintiff's part, and, at that point, plaintiff must designate specific facts showing that there is a genuine issue for trial." *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The EEOC admits that there is "little investigative material in the files beyond the charges, Sterling's responses, and other correspondence." EEOC's Memorandum of Law [110], p. 15. It also admits that Mr. Ging, its sole investigator after June 2007, "has very little memory of what actions he undertook in this investigation conducted over seven years ago". EEOC's Brief [362], p. 13.

Sterling alleges that "[t]here is no evidence produced by EEOC in this litigation suggesting that Investigators Carlo, Melendez, Rawlins, or Thompson [EEOC's four other investigators] conducted any sort of nationwide investigation of Sterling, based on their involvement prior to the transfer of all Charges to Ging". Sterling's Statement of Facts [338], ¶52. In response, the EEOC "objects to the lack of evidentiary support for this 'fact,' and denies in the form and manner alleged. Nearly all the charges filed stated that they were filed on behalf of the charging party and all women similarly-situated at Sterling Jewelers stores". EEOC's Second Amended Statement of Facts [378], ¶52 (citing 12 of the charges asserted by the Charging Parties).

That response is insufficient to controvert Sterling's assertion, because the fact that charges were asserted does not by itself prove that they were then investigated, nor does it prove the scope of any investigation which may have occurred. In opposing the motion, the EEOC "may not rely on conclusory allegations . . . . At the summary judgment stage, a nonmoving party must offer some hard evidence". *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005).

Sterling further alleges that Mr. Ging did not recall investigating any stores besides those in Massena, New York and Tampa, Florida. Sterling's Statement of Facts [338], ¶54 (citing Mr. Ging's deposition testimony). Responding to that assertion, the EEOC "denies in the form and manner alleged. Whatever Mr. Ging recalled or did not recall on the date of his deposition, he conducted a nationwide investigation of the charges against Sterling, which nearly universally stated that they were filed on behalf of all women

similarly-situated to the Charging Parties, and he received information from Charging Parties' attorneys to support the nationwide scope of the allegations against Sterling." EEOC's Second Amended Statement of Facts [378], ¶54.

In support of its position, the EEOC cites Mr. Ging's deposition testimony that he "investigated all of these charges as class charges" ([358-7], p. 171). However, the EEOC may not "trade on the inherent ambiguity in the term 'class' to [its] own advantage". *CRST*, 2009 U.S. Dist. LEXIS 71396, 2009 WL 2524402 *18 (N.D.Iowa 2009), *aff'd*, 679 F.3d 657 (8th Cir. 2012). Mr. Ging did not specify which type of class he investigated – *i.e.*, local, regional, or nationwide. *See E.E.O.C. v. Outback Steak House of Fla., Inc.* 520 F.Supp.2d 1250, 1267 (D.Colo. 2007) (noting that "class" can also mean a local or regional class instead of a nationwide class). Therefore, his statement that he investigated "class" charges constitutes no evidence that he investigated a *nationwide* class.

The EEOC also cites the November 30, 2007 letter from counsel for the Charging Parties, but, as previously noted, Mr. Ging could not recall whether he reviewed that letter. Finally, the EEOC cites the charges asserted by the Charging Parties, which does not prove that those charges were investigated. For these reasons, I adopt Sterling's assertions (Sterling's Statement of Facts [338], ¶¶52, 54) that none of the EEOC investigators conducted a nationwide investigation.

Although the EEOC claims that "Sterling stonewalled the EEOC at every turn" in its attempt to obtain Sterling's nationwide pay and promotion data ([376], p. 10), as previously noted (footnote 2, supra) the parties had agreed that Sterling was under no

obligation to provide additional information in connection with the EEOC administrative investigation. [365-13], ¶8. But for that agreement, the EEOC could have subpoenaed the information from Sterling,[3] but did not do so because it "subsequently received the detailed analysis and tables from Dr. Lanier. So EEOC did not follow through on this". [376], p. 42.

The EEOC now points to Dr. Lanier's analysis as "the key document" proving that it conducted a nationwide investigation ([376], p. 36), stating that:

- "EEOC obtained statistical analysis finding company-wide sex-based disparities in compensation and promotions from the Charging Parties' expert" (EEOC's Letter Brief [382], p. 2);
- "[M]ost assuredly the analyses were reviewed and, obviously, that's what's being referenced in the [letter of] determination" ([376], p. 7);
- "It absolutely was part of the EEOC investigation and it was expressly referenced in the EEOC Letter of Determination . . . . We will fully admit that EEOC did not conduct its own separate statistical analyses. So that what was being referred to, obviously, is the statistical analyses . . . the Lanier table" (*id.*, pp. 14-15);

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[3] "The EEOC has express statutory authority to issue subpoenas requiring the attendance and testimony of witnesses or the production of any evidence during its investigations." *E.E.O.C. v. Deer Valley Unified School District*, 968 F.2d 904, 906 (9th Cir. 1992) (citing 42 U.S.C. §2000e-9, 29 U.S.C. §161(1)).

- "Obviously, it was in the file for a reason. Obviously, it was referenced in the Letter of Determination. So it was not just a piece of paper or a series of analyses that were just sitting in EEOC's file with no one ever looking at it" (*id.*, p. 26);
- "the fact that EEOC credited the evidence presented by charging parties in its Letter of Determination is totally legitimate, it's something that happens all the time" (*id.*, p. 36);
- "there was nothing improper whatsoever about EEOC obtaining and then relying on information and analyses from an 'interested' third party such as Dr. Lanier" (EEOC's Brief [362], p. 10).

I find it more than a little ironic for the EEOC to accuse Sterling of stonewalling, for when Sterling inquired into these *very same* areas during discovery, the EEOC blocked its inquiries:

- when Sterling asked EEOC's Rule 30(b)(6) witness (Jennifer Carlo) "what is the statistical analysis of pay and promotion data that's referenced" in the Letter of Determination, the EEOC directed her not to answer ([339-25], p. 228);
- when Sterling asked Ms. Carlo whether the reference was to Dr. Lanier, the EEOC directed her not to answer (*id.*, pp. 228-29);
- when Sterling asked Mr. Ging "what statistical analysis is being referenced" in

the Letter of Determination, the EEOC directed him not to answer, asserting deliberative privilege ([339-24], p. 230);[4]

- when Sterling asked Ms. Carlo "who reviewed the statistical tables from Dr. Lanier", the EEOC again directed her not to answer, claiming that question "calls for deliberative information" ([339-25], p. 190);
- when Sterling asked Ms. Carlo whether the EEOC "under[took] any validation of Dr. Lanier's work", and whether it "accepted Dr. Lanier's tables or . . . independently verified" them, the EEOC directed her not to answer, claiming that question "calls for deliberations" (*id.*, pp. 184-85);
- when Sterling asked Mr. Ging whether he performed "any fact investigation at all concerning Dr. Lanier's tables", or took "any steps to verify the accuracy of the information in Dr. Lanier's table", the EEOC directed him not to answer, asserting deliberative privilege ([339-24], pp. 197, 200); and
- when Sterling asked Mr. Ging if he knew which witness testimony allegedly corroborated the allegations of nationwide sex discrimination contained in the Letter of Determination, the EEOC directed him

[4] Moreover, Ging did not recall reviewing Dr. Lanier's tables or the November 30, 2007 submission from the claimants' attorneys ([339-24], pp. 186, 188).

not to answer, asserting deliberative privilege (*id.*, p. 231).[5]

Once Sterling filed its Answer [8] denying that the EEOC had conducted a nationwide investigation of its employment practices, the EEOC knew that it would bear the burden of proving compliance with this condition precedent. It also knew that an assertion of privilege (whether properly or not)[6] during discovery might affect its ability to satisfy that burden, since "the claim of privilege is not a substitute for relevant evidence". *United States v. Rylander*, 460 U.S. 752, 761, 103 S. Ct. 1548, 75 L. Ed. 2d 521 (1983). "[A] litigant claiming . . . privilege is not freed from adducing proof in support of a burden which would otherwise have been his." *United States v. Certain Real Property and Premises Known as 4003-4005 5th Ave*., Brooklyn, N.Y., 55 F.3d 78, 83 (2d Cir. 1995). "In other words, a party who asserts the privilege . . . must

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[5] While the EEOC subsequently offered to allow Mr. Ging to answer certain questions in writing in lieu of an oral deposition, this proposal was unacceptable to Sterling ([327], p. 4), and with good reason. *See Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 549 (S.D.N.Y. 1989) ("there are several reasons why oral depositions should not be routinely replaced by written questions . . . . First, the interrogatory format does not permit the probing follow-up questions necessary in all but the simplest litigation. Second, without oral deposition, counsel are unable to observe the demeanor of the witness and evaluate his credibility in anticipation of trial . . . . Finally, written questions provide an opportunity for counsel to assist the witness in providing answers so carefully tailored that they are likely to generate additional discovery disputes").

[6] Without deciding the issue, I noted that "some of the objections . . . I don't think should have been asserted". [327], p. 21. However, the propriety of the objections is not the issue here – rather, the question is whether the EEOC can now rely upon information which it previously withheld as privileged.

bear the consequence of lack of evidence. . . and the claim of privilege will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation." *Id.*[7]

None of this should come as a surprise to the EEOC. On August 15, 2012, I cautioned that the EEOC "can't assert the privilege and then waive the privilege when the charges are attacked" ([295], p. 13). On June 26, 2013, I again warned that the EEOC "can't use a privilege as both a sword and a shield. So if they're saying they're not going to disclose this information to [Sterling], then they're also not going to be allowed to disclose it to the Court to argue that the scope was broader than what [Sterling is] saying it is" ([327], p. 16).[8] Therefore, the EEOC may not now oppose Sterling's motion for summary judgment by relying

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[7] *See also S.E.C. v. Pittsford Capital Income Partners, L.L.C.* 2007 U.S. Dist. LEXIS 62338, 2007 WL 2455124, *14 (W.D.N.Y. 2007) (Telesca, J.), aff'd in part, app. dismissed in part, 2007 U.S. Dist. LEXIS 62338, 2008 WL 5435580 (2d Cir. 2008) (Summary Order) ("when a party invokes [a] privilege . . . courts may then preclude that party from introducing evidence that was not previously available to his or her adversary due to the party's invocation of the privilege"); *Hammond v. Hendrickson*, 1990 U.S. Dist. LEXIS 15039, 1990 WL 179893, *2 (N.D.Ill. 1990) ("Such evidence was never obtained by virtue of Kidder's invocation of the privilege during discovery. Accordingly such evidence shall now be barred").

[8] "It is well established in this Circuit that a party may not use . . . privilege as both a sword and a shield." *Favors v. Cuomo*, 285 F.R.D. 187, 198 (E.D.N.Y. 2012). "In other words, a party cannot . . . affirmatively rely on privileged communications to support its claim . . . and then shield the underlying communications from scrutiny by the opposing party." *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000).

upon the information which it withheld from Sterling in discovery.

Accordingly, I must decide whether the information which the EEOC has *not* withheld from Sterling in discovery is sufficient to prove that it conducted a nationwide investigation prior to commencing this action. In arguing that this question is not judicially reviewable, the EEOC notes that "42 U.S.C. §2000e-5(b) . . . simply provides that EEOC 'shall make an investigation' of a discrimination charge, without . . . any statutory guide on the substance of such investigation, which is committed to the agency's discretion. Like the subsection's conciliation provision, such an open-ended provision looks nothing like a judicially reviewable prerequisite to suit." EEOC's Letter Brief [382], pp. 1-2.[9]

I disagree. Although the statute does not define "investigation", "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning . . . . [T]he word 'investigation' connotes a 'thorough' or 'searching inquiry'". *In re WorldCom, Inc. Securities Litigation*, 346 F.Supp.2d 628, 678 (S.D.N.Y. 2004). "Dictionary definitions of the word investigate include: '[t]o inquire

[9] In support of this argument, the EEOC cites *E.E.O.C. v. Mach Mining, LLC*, 738F.3d171 , 2013 U.S. App. LEXIS 25454, 2013 WL 6698515 (7th Cir. 2013), holding that "an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit." 2013 U.S. App. LEXIS 25454, [WL] at *1. However, the issue here is failure to investigate, not failure to conciliate - and in any event, *Mach Mining* recognizes that unlike the Seventh Circuit, the Second Circuit *does* recognize the defense of failure to conciliate. 2013 U.S. App. LEXIS 25454, [WL] at *11 (citing *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir.1996)).

into (a matter) systematically' . . . 'to observe or study by close examination and systematic inquiry' . . . 'to examine a crime, problem, statement, etc. carefully, especially to discover the truth'." *MCI LLC v. Rutgers Casualty Insurance Co.*, 2007 U.S. Dist. LEXIS 89067, 2007 WL 4258190, *6 (S.D.N.Y. 2007).

The EEOC's "duty to investigate is both mandatory and unqualified". *Martini v. Federal National Mortgage Association*, 178 F.3d 1336, 1346, 336 U.S. App. D.C. 289 (D.C. Cir.1999), *cert. dismissed*, 528 U.S. 1147, 120 S. Ct. 1155, 145 L. Ed. 2d 1065 (2000). The investigation must be "genuine", *Equal Employment Opportunity Commission v. Pierce Packing Co*., 669 F.2d 605, 608 (9th Cir. 1982), meaning that the EEOC "cannot defer to the opinions of [the parties]; it has the statutory duty to make an *independent* investigation, reasonable in scope, to determine *for itself*" whether the charge has a factual basis. *E.E.O.C. v. Michael Construction Co.*, 706 F.2d 244, 252-53 (8th Cir. 1983), *cert. denied*, 464 U.S. 1038, 104 S. Ct. 698, 79 L. Ed. 2d 164 (1984) (emphasis added). The mere gathering of information from others does not constitute an "investigation", *Groves v. Department of Corrections*, 295 Mich. App. 1, 811 N.W.2d 563, 570 (Mich. App. 2011); nor does the parroting of that information without independent analysis. *See MCI*, 2007 U.S. Dist. LEXIS 89067, 2007 WL 4258190, *7 ("the February 16, 2005 letter. . . does not evidence any independent inquiry of the claim. Instead, the Letter simply restates some of the allegations in the Pelcrete Complaint and Plaintiffs' demand letter . . . . This does not constitute an 'investigation' of the claim").

The EEOC alleges that its determination of nationwide discrimination "was based on the documents and information in the investigation files, including the

statistical analysis of Sterling's nationwide personnel and payroll data submitted by Charging Parties". EEOC's Second Amended Statement of Facts [378], ¶109. However, "[s]tatements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment". *Major League Baseball Properties, Inc. v. Salvino, Inc.,* 542 F.3d 290, 310 (2d Cir. 2008).

The only nationwide data specifically identified by the EEOC is Dr. Lanier's September 4, 2007 statistical analysis [339-32], and, having invoked privilege in response to Sterling's inquiries in discovery, the EEOC cannot now be allowed to argue that this was the analysis referred to in its Letter of Determination, or that it took any steps to verify the reliability of that analysis. Absent such proof, there is no evidence that its investigation was nationwide.[10]

While the EEOC accuses Sterling of "gamesmanship, diverting the Court's attention from the merits of EEOC's allegations and Sterling's defenses thereto"

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[10] Moreover, I question whether the EEOC could rely upon the Lanier analysis even if it had *not* invoked privilege during discovery. While the parties agreed that the analysis could be placed in the EEOC's investigative file, they also agreed that it would not lose its mediation privilege - meaning that it could not be relied upon in litigation. As the EEOC's attorney admitted during oral argument, "the mediation agreement may impact the EEOC's ability . . . of using the Lanier analyses for the purposes of this litigation . . . . What is not permitted is for us to say, Your Honor, for example, the Lanier analyses . . . are going to be what EEOC relies on in this court to prove pattern or practice of discrimination. That would be problematic under this agreement" ([376], p. 16). Given that admission, why is it not equally problematic for the EEOC to refer to the Lanier analysis as evidence that it conducted a nationwide investigation, which is a condition precedent to this litigation?

(EEOC's Letter Brief [382], p. 2), it ignores the fact that the absence of a nationwide pre-suit investigation is a defense to the EEOC's nationwide pattern-or-practice claim. "Just as Congress has charged the EEOC with helping ensure that employers do not single out employees on account of certain characteristics, this Court is charged with ensuring that any actions brought before it by the EEOC are within the parameters of the law as set forth by Congress, regardless of how well-intentioned the EEOC's purpose." *Bloomberg*, 2013 U.S. Dist. LEXIS 128385 at *7. "Even the most recalcitrant employer who flouts Title VII's prohibitions against unlawful employment discrimination . . . is due the process that Title VII mandates." 2013 U.S. Dist. LEXIS 128385, [WL] at *10.

The EEOC has already had one opportunity to conduct a pre-suit investigation and to provide discovery as to the scope of that investigation. Once is enough. "In the litigation process, when certain moments have passed, district courts are not required to give parties a 'do over'." *Harleysville Lake States Insurance Co. v. Granite Ridge Builders, Inc*., 2009 U.S. Dist. LEXIS 116817, 2009 WL 4843558, *2 (N.D.Ind. 2009). "[W]here, as here, the EEOC completely abdicates its role in the administrative process, the appropriate remedy is to bar the EEOC from seeking relief . . . and dismiss the EEOC's Complaint." *Bloomberg*, 2013 U.S. Dist. LEXIS 128385 at *10. Therefore, I recommend that the EEOC's claim of a nationwide pattern or practice of employment discrimination by Sterling be dismissed, with prejudice.

C. Should the EEOC's Statement of Facts be Stricken?

Sterling also moves to strike portions of the EEOC's Statement of Facts [362-1] submitted in opposition to its motion for summary judgment, arguing that it "it contains statement[s] that rely on an admissible evidence not in the record, as well as legal argument and generalized conclusory statements" [370]. In response to that motion, the EEOC has submitted an Amended- and Second Amended Statement of Facts [373, 378].

Having already addressed several deficiencies of in the EEOC's factual response to Sterling's summary judgment motion, I do not see the need to address the motion to strike in greater detail at this time. Therefore, in light of my recommendation to dismiss the EEOC's claim of nationwide discrimination by Sterling, the motion to strike is denied, without prejudice to renewal in the event that my recommendation is not adopted by District Judge Arcara.

D. Should I Reconsider the Applicability of the Statute of Limitations?

Sterling also asks me to reconsider my Amended Report and Recommendation [60], subsequently adopted by Judge Arcara [67], dealing with the applicable Statute of Limitations on the EEOC's pattern or practice claim. Sterling's Memorandum of Law [337], Point III. Sterling argues that "since this ruling, there has emerged a uniform body of case law holding that the 300-day limitations period set forth in §706 limits claims under §707. Indeed, since this Court's January 2010 ruling, every court to have considered the matter has held that the 300-day charge-filing period applies to cases brought under

§707 (*id.*, p. 20). While that may be true, none of those decisions are from the Supreme Court or circuit courts of appeal.

"Under the law of the case doctrine, [a] court adheres to its own decision at an earlier stage of the litigation unless there are cogent or compelling reasons not to, such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Sanders v. Sullivan*, 900 F.2d 601, 605 (2d Cir. 1990). In my view, none of those reasons are present here. Therefore, to the extent necessary,[11] I recommend that Sterling's request for reconsideration be denied.

CONCLUSION

For these reasons, Sterling's motion to strike [370] is denied, without prejudice, and I recommend that its motion for partial summary judgment [336] be granted in part and denied in part. Unless otherwise ordered by Judge Arcara, any objections to this Report, Recommendation and Order must be filed with the clerk of this court by January 21, 2014 (applying the time frames set forth in Fed. R. Civ. P. ("Rules") 6(a)(1)(C), 6(d), and 72(b)(2)). Any requests for extension of this deadline must be made to Judge Arcara. A party who "fails to object timely . . . waives any right to further judicial review of [this] decision". *Wesolek v. Canadair Ltd.*, 838 F. 2d 55, 58 (2d Cir. 1988); *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

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[11] Since the only pattern or practice claim alleged by the EEOC is a nationwide pattern or practice claim, this request may be moot if my recommendation to dismiss that claim is adopted.

Moreover, the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance. *Paterson-Leitch Co. v. Massachusetts Municipal Wholesale Elec. Co.*., 840 F.2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 72(b) and (c) of this Court's Local Rules of Civil Procedure, written objections shall "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection . . . supported by legal authority", and must include "a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these provisions may result in the district judge's refusal to consider the objections.

Dated: January 2, 2014

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge

APPENDIX C

3 F. Supp. 3d 57; 2014 U.S. Dist. LEXIS 31524;
121 Fair Empl. Prac. Cas. (BNA) 1891

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

08-CV-00706-A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

STERLING JEWELERS, INC.,

Defendant.

March 10, 2014, Decided
March 10, 2014, Filed

OPINION

ORDER

JUDGES: HONORABLE RICHARD J. ARCARA, UNITED STATES DISTRICT JUDGE.

OPINION BY: RICHARD J. ARCARA

The above-referenced case was referred to Magistrate Judge Jeremiah J. McCarthy pursuant to 28 U.S.C. § 636(b)(1) for pretrial proceedings. On January 2, 2014, Magistrate Judge McCarthy filed a Report and Recommendation (Dkt. No. 383) recommending that the motion of defendant Sterling

Jewelers, Inc., for partial summary judgment (Dkt. No. 336) be granted to the extent that the claim of plaintiff Equal Employment Opportunity Commission of a nationwide pattern or practice of employment discrimination by defendant Sterling be dismissed, with prejudice, and that the motion be otherwise denied, and that defendant's motion to strike (Dkt. No. 370) be denied, without prejudice.

Upon careful consideration of the Report and Recommendation, the objections of plaintiff EEOC, the response to the objections of the EEOC by defendant Sterling, relevant pleadings of the parties, and having heard oral argument on March 7, 2014, the Court hereby adopts the Report and Recommendation, and it is

ORDERED, that pursuant to 28 U.S.C. § 636(b)(1), and for the reasons set forth in Magistrate Judge McCarthy's Report and Recommendation (Dkt. No. 383), defendant Sterling's motion for partial summary judgment is granted in part and the claim of plaintiff EEOC of a nationwide pattern or practice of employment discrimination by defendant Sterling is dismissed, with prejudice, and it is further

ORDERED, that defendant Sterling's motion for partial summary judgment (Dkt. No. 336), and defendant's motion to strike (Dkt. No. 370), are otherwise denied as moot, and it is further

ORDERED, that the Clerk shall enter Judgment dismissing the action, with prejudice.

IT IS SO ORDERED.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
United States District Judge

Dated: March 10, 2014

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of December, two thousand fifteen.

Docket No: 14-1782

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

STERLING JEWELERS, INC.,

Defendant-Appellee,

ARBITRATION CLAIMANTS,

Intervenor.

ORDER

Appellee Sterling Jewelers, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX E

TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 21. CIVIL RIGHTS EQUAL EMPLOYMENT OPPORTUNITIES

42 U.S.C. § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title [42 USCS §§ 2000e-2 or 2000e-3].

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee

(hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation 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. 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. Any person who makes public information in violation of this subsection shall be fined not more than $ 1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice

thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title [42 USCS §§ 2000e et seq.] (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3) (A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title [42 USCS §§ 2000e et seq.], when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has

not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon 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 subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for

appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the

district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a)].

(B) On a claim in which an individual proves a violation under section 703(m) [42 USCS § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court–

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) § 42 USCS § 2000e-2(m)]; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of 29 USCS §§ 101 et seq. not applicable to civil actions for prevention of unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders. In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals. Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) Attorney's fee, liability of Commission and United States for costs. In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed 09/03/2014]

No. 14-782

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

STERLING JEWELERS, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of New York
The Honorable Richard J. Arcara, District Judge

BRIEF OF THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION AS APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed 09/03/2014]

No. 14-1782

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

STERLING JEWELERS, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of New York
The Honorable Richard J. Arcara, District Judge

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

STATEMENT OF JURISDICTION

The Equal Employment Opportunity Commission brought this enforcement action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq*., challenging an alleged nationwide pattern or practice of gender-based pay and promotion discrimination at Sterling Jewelers. District court docket number ("Doc.")1. The district court had jurisdiction under 28 U.S.C. §§1331 and 1345 and 42 U.S.C. §2000e-5(f). On March 10, 2014, the district court adopted the magistrate's Report, Recommendation, and Order (Doc.383) and granted defendant's motion for partial summary judgment, dismissing the claim alleging

nationwide sex discrimination. *See* Doc.392. Judgment was entered on March 11, 2014, dismissing the action with prejudice. Doc.393. The Commission filed a timely notice of appeal, Fed.R.App.P.4(a)(1)(B), on May 12, 2014. Doc.396. This Court has jurisdiction under 28 U.S.C. §1291(a).

STATEMENT OF THE ISSUE

Under Title VII, the Commission may bring suit challenging alleged unlawful employment discrimination once the agency has satisfied certain pre-suit administrative requirements, including a requirement to "investigate" the underlying charge(s) of discrimination. *See* 42 U.S.C. §§2000e-5(b), 2000e-5(f)(1). Courts generally hold that "the nature and extent of an EEOC [administrative] investigation into a discrimination claim [are] matter[s] within the discretion of that agency." *See, e.g.*, *EEOC v. Keco Indus.,* 748 F.2d 1097, 1100 (6th Cir. 1984).

In this case, the magistrate acknowledged that the Commission did at least some investigation; it is undisputed that the other pre-suit requirements were satisfied and the employer knew that the Commission was pursuing nationwide claims of gender-based pay and promotion discrimination. Under these circumstances, did the district court err in dismissing the Commission's Title VII enforcement action, over five years after suit was filed, on the ground that the Commission failed to investigate the claims of nationwide discrimination?

STATEMENT OF THE CASE

1. Nature of the Case and Course of Proceedings

This is an appeal from a judgment of the United States District Court for the Western District of New

York dismissing the Commission's Title VII enforcement action for failure to do a "nationwide investigation" before filing suit. Between 2005 and 2007, the Commission received and investigated nineteen charges against Sterling Jewelers, including several charges that expressly complained of a company-wide pattern or practice of gender-based discrimination in pay and/or promotion. Doc.383 at 1. During 2007 and 2008, the Commission participated in lengthy mediation sessions between the employer and the charging parties, during which expert statistical analyses, as well as other evidence, were exchanged and discussed. The Commission issued a reasonable cause determination in January 2008. In September 2008, the Commission sued Sterling, alleging that because of their sex, Sterling pays female retail sales employees less than similarly-situated male employees and denies female employees promotional opportunities for which they are qualified. Doc.1. In September 2013, Sterling moved for partial summary judgment seeking, *inter alia*, dismissal of the claim alleging a nationwide pattern or practice of sex discrimination. Doc.336; *see* Docs.356-61(exhibits). The Commission opposed the motion. Doc.362; *see* Docs.363-65(exhibits). On January 2, 2014, following oral argument (Doc.381-1: transcript), the magistrate issued a Report, Recommendation, and Order ("Recommendation"), recommending that Sterling's motion be granted. Doc.383. On February 7, the Commission filed objections to the Recommendation (Doc.385), and Sterling responded (Doc.388). On March 10, following oral argument (Doc.395), the district court adopted the magistrate's Recommendation and ordered that the "action [be] dismissed with prejudice." Doc.395 & related docket entry notation. Judgment was entered on March 11, 2014. Doc.393.

2. Statement of Facts

a. The administrative proceedings.

Sterling Jewelers is the largest specialty fine jewelry company in the United States, by sales and number of stores. Headquartered in Akron, Ohio, the company operates a number of jewelry store chains, including Belden Jewelers, JB Robinson Jewelers, Marks & Morgan, Kay Jewelers, and Jared—the Galleria of Jewelry. http://www.sterlingjewelers.com. Evidence uncovered in the investigation indicates that all Sterling chains use the same forms and training materials, as well as largely identical job descriptions, and are covered by the same pay, promotion, and non-discrimination policies. *See, e.g.*, App-1051-1070 (job descriptions), App-1072-1075 (compensation guidelines), App-1077-79 (career path, promotion/ transfer policy); App-1241-1251 (EEO and communication policies, handbook excerpts); App-1307-1308 (sexual harassment conduct code), App-1320-1323 (ethics policy); App-1233 (T.I.P. policy).

Although some work is seasonal, most Sterling employees work as part-time or full-time sales associates. They are paid by a combination of wages, commissions, and bonuses. *See, e.g.*, App-1390 (Boyle); App-1775 (King); *see also* App-3636-3637 (commission structure).

Sterling managers have substantial discretion to set pay rates. Many of the charging parties complained that employees often do not know whether they are being paid fairly because Sterling strictly prohibits employees from discussing their pay rates. App-1390 (Boyle); App-1775 (King); App-1597 (Follett); App-2078 (McConnell); App-2452 (Morse); App-2472 (Pagan); Doc.365-1 at 54 (Scroggins); App-3163 (Smith).

In addition, despite the size of the company, until 2007, Sterling employees interested in advancement were encouraged to advise their supervisors of their interest, but there was no way to register that interest officially. Various charging parties complained that employees were selected for promotion through the "tap-on-the-shoulder" method. App-1596 (Follett); App-2078 (McConnell); App-2452 (Morse); Doc.365-1 at 54 (Scroggins); Doc.3112-3113 (Shahmirzadi); App-3134 (Shiver). In 2007, the company announced a "new process" for "expressing interest in promotional opportunities ... in the future." App-1104 (announcement). The announcement specified that employees desiring advancement should complete a form on the Sterling intranet providing personal data and expressing interest in specific types of jobs. But, the announcement stressed, employees were "not posting for a specific job, rather, for an opportunity to be considered for promotion in the future." *Id.* Because the company does not post vacancies, employees who complete the form may still not know what, if any, positions Sterling is seeking to fill even in their own stores. *Cf.* App-3112 (Shahmirzadi); App-3134 (Shiver).

Between 2005 and 2007, the Commission received nineteen sworn charges from current and former Sterling employees from across the country, including New York, Florida, California, Colorado, Texas, Missouri, Nevada, Massachusetts, and Indiana. *See, e.g.*, App-1024 (Jock: N.Y.); App-1680 (House: Cal.); App-2018--2020 (Maddox: Colo., Texas); App-2027 (McConnell: Ind.); App-2471 (Pagan: Mo.); App-2844 (Rodrigues: Mass.); App-3111 (Shahmirzadi: Nev.); App-3451 (Wolf: Fla.). The women complained that they and "all similarly-situated women" at their chain and Sterling generally experienced gender-based

discrimination in pay, promotion, or both. Sixteen women complained that the company engaged in a "continuing policy" or "pattern or practice" of sex discrimination. App-1390 (Boyle); App-1515-1517 (Davies); App-1597 (Follett); App-1680 (House); App-1774-1776 (King); App-2020 (Maddox); App-2452 (Morse); App-2472 (Pagan); App-2550 (Reed); App-2720 (Rhodes); App-2845 (Rodrigues); App-2973 (Scroggins); App-3112 (Shahmirzadi); App-3134 (Shiver); App-3163 (Smith); App-3220 (Souto-Coons); App-3452 (Wolf); *see*, *e.g.*, App-3211at 58 (noting Smith's charge was "designated class"). At least six attested that they believed the complained-of practice occurred company-wide. App-2452 (Morse); App-2472 (Pagan); App-2720-21 (Rhodes); App-2973 (Scroggins); App-3134 (Shiver); App-3163-3164 (Smith).

Laryssa Jock filed the first charge, without an attorney, with EEOC's Buffalo office, in May 2005. App-1018 (charge); *see also id.* at 1019 (Notice and Request for Information). She complained that she and her "female coworkers" were paid less than similarly-situated male sales associates at a Belden Jewelers in Massena, New York. *See also* App-1024-1025 (amended charge, alleging discrimination against her and "female employees of Sterling Jewelers" at her store and others).

Shortly after Jock filed her charge, five women filed charges with EEOC's Tampa office, also alleging sex discrimination in pay and/or promotion. *See* App-1389-91 (Boyle); App-1774-1776 (King); App-2548 4950 (Reed); App-3220 (Souto-Coons); App-3451-53 (Wolf). However, no other women from New York State filed charges until the following year. After investigating Jock's individual charge, the Buffalo Office issued a notice of right to sue in September 2005. App-1014.

In December 2005, Jock, now represented by counsel, requested reconsideration. The request noted that counsel was representing various women in Florida who were also complaining of gender discrimination in pay and/or promotion. App-1180-82. Alerted to a possible pattern, the Commission responded by reinstating Jock's charge and reassigning the investigation from Jennifer Carlo to David Ging. App-1012 (12/9/2005 Ging letter, Intent to Reconsider). Although an investigator in Florida had already begun investigating the Florida charges, those charges were also transferred to Ging. Doc.356 10(letter); *see also* App-1622-1626 (L.Follett's charge was initially investigated by another investigator before being transferred to Ging). As later charges were filed, they were also transferred to Buffalo and assigned to Ging.[1]

In 2005 and 2006, the Commission issued a number of requests for information ("RFI") that were consistent with a nationwide investigation. For example, the Commission requested copies of Sterling's company-wide pay, promotion, and anti-discrimination policies; company-wide job descriptions for sales associates and various management positions; information concerning the relationship between and among Sterling and its subsidiaries; the total number of Sterling employees nationwide; and copies of Sterling's EEO-1 forms. *See, e.g.*, App-1364-66 (Jock RFI); App-3544-46 & 3626-29 (response to Wolf, Boyle, King, Souto-Coons & Reed RFIs, including 2004 companywide EEO-1 report).

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[1] Before her charge was transferred, Lisa McConnell, from Indiana (App-2077) (amended charge), received a right-to-sue notice, but EEOC then reinstated her charge. App-2102.

In addition, on October 2, 2006, the Commission asked Sterling to "identify any computerized or machine-readable files ... containing data on personnel activities," such as dates of application and hire, employment history, training, work assignments, amounts of pay, and promotions, for Sterling and/or any of its sub-parts since January 1, 2004. *See* Doc.364-11 at 51-52. That autumn, however, Sterling and the charging parties had begun "working toward a private mediation" of the charges, including "an exchange of information suitable for that purpose." *See, e.g.*, App-950 (10/19/2006 letter from C.Janice to D.Ging). To facilitate the proposed mediation, Sterling requested, and the Commission agreed, to "defer" the October 2 information request. *See id.*

On December 5, 2006, in an effort to continue the investigation, the Commission renewed its request that Sterling identify its "computerized or machine-readable [personnel-related] files." App-952-54(DExBB). Rather than comply with this request directly, Sterling sent Ging a letter, noting that the company had "invited" EEOC to participate in the mediation process. App-956-57 (12/27/2116 letter). The company also stated that it had agreed to produce "the relevant data" to the charging parties as part of the mediation process and, so, had asked them to "coordinate the production of relevant information with the EEOC." *Id.* (thanking EEOC "in advance for [its] anticipated cooperation").

Thereafter, the Commission did not subpoena any of the information that Sterling had failed to supply directly. However, the charging parties supplied the Commission with substantial "relevant information," and although the Commission was not a party to the mediation sessions, the then-Regional Attorney of

EEOC's New York District Office, Elizabeth Grossman, participated in the mediation process.

The mediations are an unusual feature of the administrative process in this case. The parties made two main attempts to resolve the case before EEOC issued notices of right to sue. The first attempt took place in June through early October 2007, was governed by the Mediation and Confidentiality Agreement, along with several addenda, and ultimately proved unsuccessful. *See* App-3655-3662; *see also* App-3682 (scheduling first mediation session); App-3683 (scheduling later sessions). The second attempt, an "early neutral evaluation"("ENE") agreed-to after the first mediation failed, took place in January and February 2008, was governed by the Fourth Addendum, an exhibit, and the Rules of Engagement, and also ultimately proved unsuccessful. *See* App-3663-3674.

The details of what transpired during the sessions are, of course, confidential, but the agreements spell out the general contours of the process. Initially, the two sides agreed to exchange documents and other materials in advance of the formal mediation; the materials would include expert analyses of pay and promotion data, using information supplied by Sterling. *See* App-3657-3658. In addition, Sterling agreed that if the mediation were unsuccessful – which it was – Sterling would promptly provide Ging with "the data produced in the mediation" (App-3660 (Addendum)) and EEOC could place all documents received from Sterling, except electronic data and statistical analysis, in its investigative files. *Id.* at 9 (3d Addendum); *see also id.* at 8 (2d Addendum) (agreeing that EEOC's "internal work product concerning its review of Sterling data" would be

"protected from disclosure" by the deliberative process privilege and/or other privileges); App-3677-3678 (1/30-31/2007 emails between EEOC and Sterling, noting, *e.g.*, that materials produced pre-mediation would become part of EEOC's investigative files).

On October 11, 2007, the parties entered into an agreement regarding the ENE. That agreement provides that each side would "present experts to support their respective positions" to a mutually agreed-upon Neutral who would evaluate each side's statistical issues and analyses. The Neutral would then evaluate the "legal sufficiency and persuasiveness of the [respective experts'] methodologies." Fourth Addendum ¶3(a)-(b), App-3663.

The parties also that Grossman could "discuss her impressions, the data and documentation produced by Sterling" with Ging "and other EEOC personnel." *Id.* ¶5; *cf.* App-3651-3652 (Lanier deposition, noting that an EEOC in-house expert also attended the ENE). In addition, EEOC would participate in any subsequent settlement negotiations and would be bound by any agreements the parties reached. App-3664 ¶6. Moreover, if it found cause on any charge, EEOC would "not have to conciliate any probable cause determination, conciliation having been undertaken through the Process." *Id.* ¶7. At the same time, Sterling would not have to provide "additional information or documentation relating to the charges," and the Commission would refrain from filing suit as long as the parties remained "engaged in the Process." *Id.* ¶¶6, 8-9; *id.* at 3666 (12/13/2007 Exhibit to 4th Addendum at 16(v)).

In November 2007, Ging sent letters to each side noting that the mediation had failed and that Sterling had agreed that Grossman would provide him with

over 3000 documents, exchanged during the mediation, along with the tables and notes prepared by charging parties' expert, Dr. Lanier. App-959-61 (undated letters). While acknowledging that the Commission would not send additional requests for information, Ging encouraged each party to submit any other information that the party "wished to be considered." *Id.* Accepting Ging's invitation, in November 2007, charging parties supplied a letter detailing the alleged discrimination, along with a stack of documents, including affidavits from numerous witnesses in various locales. AppApp-1027, 1040- 1158 (11/30/2007 email, letter, and documents). As noted above, one of the exhibits consisted of Dr. Lanier's numerous annotated tables. App-1111-1158. The tables suggested that female employees as a group were promoted more slowly and earned less than similarly-situated male employees. *See, e.g.*, App-1122-1134.

Sterling opted not to provide any additional information. Once reasonable cause was found, however, the company expressed disappointment that, in its view, the Commission "failed to consider the immense volume of evidence produced by Sterling." App-980 (1/14/2008 letter).

b. The LOD and private action

On January 3, 2008, the Commission issued a letter of determination ("LOD") on all of the charges. App-998-1000. Signed by Elizabeth Cadle, then-director of EEOC's Buffalo Office, the LOD found reasonable cause to believe that Sterling "subjected Charging Parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regards to promotion and compensation," in violation of Title VII and the

Equal Pay Act. *Id.* at 31. According to the LOD, "statistical analyses of pay and promotion data provided by [Sterling] reveal[ed] that [the company] promoted male employees at a statistically significant, higher rate than similarly-situated female employees and ... compensated male employees at a statistically-significant, higher rate than similarly-situated female employees." In addition, "[w]itness testimony further corroborate[d] the allegations." *Id.* Then, noting that, after finding cause, EEOC normally engages in conciliation, the LOD invited the parties "to join ... in a collective effort toward a just resolution of the matter." *Id.*

On March 17, 2008, at charging parties' request (App-973-74 (3/6/2006 letter)), the Commission issued each charging party a notice of right to sue. *See, e.g.*, App-971 (Jock's notice). In June, charging parties brought a class arbitration with AAA, alleging pay and promotion discrimination. Following an appeal to this Court, the arbitration action remains pending. *See Jock v. Sterling Jewelers*, 646 F.3d 113, 115-18 (2d Cir. 2011) (discussing arbitration).

c. The EEOC litigation

On September 23, 2008, the Commission brought suit in the Western District of New York, alleging a pattern or practice of gender-based pay and promotion discrimination in violation of Title VII. The complaint includes claims under both disparate treatment and disparate impact theories. Doc.1. Two years later, the charging parties intervened in the EEOC action for the limited purpose of inclusion in the confidentiality order. Doc.139.

In November 2011, during a hearing before the magistrate on a proposed case management order,

Sterling's counsel observed that "the EEOC [had] conducted a nationwide administrative investigation." Doc.203 at 34-35. Objecting to the Commission's insistence on a provision reserving the right to move to amend the complaint after discovery closed, counsel stated that it was "time for the EEOC to tell [Sterling] what the claims [were]" since the case had been pending since 2008, Sterling had produced thousands of documents, and the Commission had conducted a "nationwide administrative investigation." *Id.*

Nevertheless, Sterling also took the position that it was entitled to do extensive discovery, including lengthy depositions of EEOC investigators, several years into the litigation, in order to "nail down" what the company characterized as the "scope of the [administrative] investigation." Doc.360-4 (6/26/2013 hearing transcript at 12); *cf. id.* at 11-12 (magistrate: LOD is not persuasive evidence of scope of investigation). Absent such extensive discovery, the company argued, trying to challenge the investigation would be like "fighting with one hand tied behind [its] back." *Id.* at 14.

In December 2011, over objections, Sterling deposed Investigator Jennifer Carlo, named by EEOC as a Rule 30(b)(6) witness, concerning the EEOC's investigation. *See* App.665 (deposition). Carlo had reviewed all nineteen investigative files before her deposition, but her only previous involvement in the case was her 2005 investigation of Jock's charge. In response to questions testing her memory of the files, Carlo repeatedly stated that the best answer would be in the files, but Sterling would not let her consult them.[2]

[2] For example, in attempting to answer whether, based on her review of the files, there was "any indication that [the Florida investigator] asked for payroll records from other stores outside

When Sterling asked "what was reviewed [in reaching EEOC's determination] above and beyond the charges, the position statements, and the charging parties' counsel's submissions," Carlo answered: "the best source to give you an accurate answer would be in the files more than in my memory but *whatever we have in the files*." App-888 (emphasis added). Citing the deliberative process privilege, Carlo refused to answer questions concerning the preparation of the LOD, including what was relied on and by whom and whether the Commission had independently "validated" Dr. Lanier's statistical tables. *See, e.g.*, App-850 ("validated"), App-887 ("relied upon").

In May 2013, over objections, the company deposed Investigator David Ging, who had largely deferred action on the case during the 2007-08 mediations and had had no involvement at all with it since suit was filed in 2008. *Cf.* App-628-29 (could not recall doing any investigation after LOD issued). Ging knew that he had investigated "all of the charges as class charges." *Id* at 567 ("All means all."). But despite having reviewed the files before his deposition, Ging had little memory of exactly what he had done during the investigation so long before. App-632 ("I don't

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of Brandon or Tampa," Carlo stated, "I would have to look at the files to be sure." Defendant responded, "What's your best recollection, as you sit here today?" Carlo did not recall, so defendant moved on to a different question. When Carlo again stated, "The files are a much more accurate response to your question than what I can give you based on my recollection," defendant asked if anyone else would know the answer by memory. See, e.g., App-787-89 (Carlo: explaining, "My recollection and even my review of the files is a weak substitute to actually looking at the files," adding that while the other investigator could explain her "normal practices," she "had almost no recollection" of the specific files 6-7 years after the fact).

really recall much about my investigation, what I did or didn't do"); *id.* at App-505 ("I have no memory because [that particular incident] happened in 2006," and "there may be no notes" because "I'm notoriously bad at keeping notes").

In addition, Ging invoked the deliberative process privilege to certain questions, including whether he had verified the accuracy of Dr. Lanier's tables (*id.* at 200); "who was involved" in the decision "to conduct a nationwide investigation" (*id.* at 229-30); what "statistical analysis" or "witness testimony" was referenced in the LOD (*id.* at 230-31); and what facts he had discovered that supported allegations in the complaint (*id.* at 237). When Sterling complained that the Commission, invoking privilege, refused to provide the company with supposedly relevant information, the magistrate responded that the Commission could not later cite previously undisclosed information to argue that the investigation was "greater" in scope than the documents reflect. *See* Doc.360-4 at 10-12 (6/26/2013 hearing transcript).

At the close of fact discovery, in September 2013, Sterling moved for "partial" summary judgment, arguing that the Commission had failed to conduct a "nationwide investigation" of the charges. In opposing the motion, the Commission argued that the administrative process is essentially unreviewable but even if it were reviewable, the Commission had satisfied its duty to investigate. It was undisputed that the charges alleged company-wide discrimination; the LOD found reasonable cause to believe that the allegations of nationwide discrimination were true; the company had notice of the nationwide scope of the claims; and the duty to conciliate was satisfied.

3. The Magistrate's Report, Recommendation, and Order

In a Report, Recommendation, and Order ("Recommendation") in January 2014, the magistrate recommended that Sterling's motion be granted. Initially, the magistrate noted that five investigators had investigated the nineteen charges from across the country; that the Commission participated in the mediations; and that the LOD, citing statistical support, states that EEOC's investigation indicated that Sterling subjected female retail sales employees nationwide to a pattern or practice of sex discrimination in pay and promotion. Recommendation at 1-3.

Then, while acknowledging that courts "should not examine the sufficiency of the EEOC pre-suit investigation," the magistrate stated that it could "examine whether the investigation occurred at all" as well as "the scope of that investigation" since the EEOC may challenge only those violations that it uncovers "*during the course of its investigation*." *Id.* at 6 (citing *EEOC v. CRST Van Expedited*, 679 F.3d 657, 674 (8th Cir. 2012) (emphasis in *CRST*). "Courts have limited the EEOC's complaint where it exceeds the scope of the investigation." *Id.* (citation omitted). As examples of this principle, the magistrate cited *EEOC v. Bloomberg*, 967 F.Supp.2d 802, 813-14 (S.D.N.Y. 2013), and *EEOC v. Jillian's of Indianapolis*, 279 F.Supp.2d 974, 980, 983 (S.D. Ind. 2003). Recommendation at 6-7.

Then, applying that principle to this case, the magistrate found no "triable issue of fact" as to whether the EEOC conducted a pre-suit "nationwide investigation" of Sterling's employment practices. Recommendation at 7. Agreeing with Sterling, the magistrate concluded that the Commission failed to

prove that any investigator did such an investigation. *See id.* at 10.

The magistrate noted that Ging has little memory of what he did in the investigation. Recommendation at 9. And, the magistrate continued, EEOC could not rely on Ging's testimony that he had investigated the charges as "class" charges since Ging did not specify whether he meant a "local," "regional," or "nationwide class." *Id.* at 9-10.

The magistrate disagreed with EEOC that Title VII commits the investigation, like conciliation, to the agency's discretion and is not judicially reviewable. Recommendation at 14-15. The magistrate stated that "'[T]he word "investigation" connotes a "thorough" or "searching inquiry."' *Id.* ("ordinary or natural meaning," citing *In re WorldCom, Inc. Sec. Litig.*, 346 F.Supp.2d 628, 678 (S.D.N.Y. 2004)); *see also id.* (citing *MCI LLC v. Rutgers Casualty Ins. Co.*, 2007 WL 4258190, *6 (S.D.N.Y. Dec.4, 2007) ("'inquire into a matter systematically'; 'observe or study by close examination and systematic inquiry'").

Further, the magistrate stated, the Commission may not simply gather information from others without independent analysis. Recommendation at 16 (citing *Groves v. Dep't of Corrections*, 811 N.W.2d 563, 570 (Mich. App. 2011), and *Rutgers Casualty*, 2007 WL 4258190, at *7)). And, the investigation must be "genuine", which means that EEOC "cannot defer to the opinions of [the parties]" but must determine for itself "whether the charge has a factual basis." *Id.* at 15-16 (citing *EEOC v. Pierce Pkg. Co.*, 669 F.2d 605, 609 (9th Cir. 1982); *EEOC v. Michael Constr. Co.*, 706 F.2d 244, 252-53 (8th Cir. 1983) (emphasis and alterations added by magistrate).

The magistrate discounted EEOC's concern that Sterling did not cooperate in the investigation. But for the parties' agreement that Sterling need not provide additional information after the mediation, the magistrate stated, EEOC could have subpoenaed what it needed. Recommendation at 10. Moreover, the magistrate stated, despite being warned that asserting the deliberative process privilege might affect EEOC's ability to prove that it did a nationwide investigation, the Commission repeatedly cited privilege to avoid answering Sterling's inquiries into the LOD, citing privilege. *Id.* at 12-14. In the magistrate's view, the "only nationwide data" identified by EEOC was Dr. Lanier's statistical analysis. But, the magistrate noted, EEOC had invoked the privilege to prevent Ging from answering whether "this was the analysis referred to" in the LOD and whether EEOC "took any steps to verify" that analysis. *Id.* at 14-17. "Absent such proof," the magistrate concluded, "there [was] no evidence that its investigation was nationwide." *Id.* at 17.

Finally, the magistrate stated without relevant citation, while accusing Sterling of "diverting attention from the merits of EEOC's allegations and Sterling's defenses thereto," the Commission "ignore[d] the fact that the absence of a nationwide pre-suit investigation *is* a defense to the EEOC's nationwide pattern-or-practice claim." *Id.* And having failed once "to conduct a pre-suit investigation and to provide discovery as to the scope of that investigation," EEOC should not be allowed to try again. "'[W]here as here EEOC completely abdicate[d] its role in the administrative process, the appropriate remedy is to bar the EEOC from seeking relief ... and dismiss the EEOC's Complaint.'" *Id.* at 17-18 (citing *Bloomberg*, 967 F.Supp.2d at 816).

4. The District Court's Decision

The district court rejected EEOC's objections to the magistrate's Recommendation and, for the reasons stated in the Recommendation, adopted the Recommendation, granted Sterling's motion, and dismissed the case with prejudice. Doc.392.

STANDARD OF REVIEW

The district court's interpretation of Title VII as permitting the dismissal of an otherwise meritorious enforcement action based on EEOC's purported failure to do a nationwide administrative investigation is a legal issue that this Court reviews de novo. *See Price Trucking Corp. v. Norampac Indus.*, 748 F.3d 75, 79 (2d Cir. 2014) (CERCLA interpretation). Review of a grant of summary judgment is also de novo. *See id.* The Court reviews rulings on the work-product privilege for abuse of discretion, determining whether the ruling rests on a legal error, rests on clearly erroneous factual findings, or, though not necessarily the product of either error, "cannot be located within the range of permissible decisions." *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007).

SUMMARY OF ARGUMENT

The district court erred in dismissing this potentially meritorious Title VII action alleging that Sterling engaged in a nationwide pattern or practice of sex discrimination in pay and promotion. The court based its decision on the magistrate's conclusion – issued over five years into the litigation – that EEOC failed adequately to investigate the nineteen charges before filing suit. There is simply no precedent for this ruling.

Title VII requires EEOC to satisfy certain pre-suit administrative requirements. The agency must investigate the underlying charge(s) to determine whether there is reasonable cause to believe that the allegations in the charge(s) are true. Where, as here, EEOC finds cause, it must issue an LOD stating those findings, notify the employer, and attempt to resolve the claims through conciliation.

Here, the magistrate and Sterling agreed that EEOC satisfied all of the pre-suit requirements except the investigation. Moreover, just two years before moving for summary judgment, Sterling itself stated in open court that EEOC had "conducted a nationwide administrative investigation." Nevertheless, the magistrate concluded that EEOC "completely abdicated" its pre-suit administrative duties because, in the magistrate's opinion, the investigation was infirm.

But courts agree that "the nature and extent" of an EEOC investigation are matters "within [EEOC's] discretion," and it is "error" for a district court to inquire into the "sufficiency" of the investigation. In part, this is because an investigation, even if it leads to a finding of reasonable cause, has no "determinative consequences" for an employer or charging party. A cause determination is not binding on either party; adjudication is the exclusive function of the courts where trial is de novo. Moreover, allowing an employer such as Sterling to do extensive discovery into the investigation and then challenge its sufficiency even years after suit is filed diverts the court and the Commission from the real purpose of the litigation – to determine if the employer violated Title VII.

The magistrate gave two reasons for recommending dismissal of the case. Both are flawed. First, the

magistrate concluded that although it did investigate the nineteen charges, EEOC did not prove that it did a "nationwide investigation." The proof failed, the magistrate explained, because EEOC (properly) invoked the deliberative process privilege to prevent its investigators from answering whether they "verified" or "validated" the statistical analysis in the investigative files and whether that analysis was the one referenced in the LOD. But having acknowledged that EEOC did investigate the charges, the magistrate's insistence on proof of a "nationwide investigation" simply end-runs the ban on reviewing the sufficiency of the investigation. Furthermore, nothing requires EEOC to verify or validate a statistical analysis during the investigation – let alone prove that it did so. Nor was EEOC required to identify the statistical evidence referenced in the LOD but if it were required, that fact could easily be inferred from the fact that the investigative files contained only one statistical analysis.

Second, the magistrate improperly defined the word "investigation" as a "thorough" or "searching inquiry" and then faulted EEOC for doing something else. But that definition is ill-suited to Title VII. Indeed, if it had to "searchingly" investigate the 90,000+ charges it receives annually, EEOC would be buried under a mountain of unprocessed charges. Rather, as the agency charged with enforcing Title VII, EEOC has defined an "appropriate investigation" as one where the field office has enough evidence to determine whether the statute has or has not been violated. That definition is entitled to deference. It corresponds neatly with the purpose of an investigation – to determine whether there is reasonable cause to believe the allegations in the charge are true. And Congress has implicitly endorsed it. The magistrate

did not deny that the LOD was adequately supported by the evidence.

In short, it was error to dismiss this potentially meritorious enforcement action based on the magistrate's faulty conclusion that the Commission failed to prove that it adequately investigated the nineteen charges before filing suit. The judgment should be reversed.

ARGUMENT

The district court erred in dismissing this Title VII enforcement action based on the magistrate's conclusion that the Commission failed to prove that it did a pre-suit "nationwide investigation" of charges alleging a pattern or practice of sex discrimination in pay and promotion.

The district court erred in dismissing this Title VII enforcement action based on the magistrate's conclusion that the Commission failed to prove that it did a "nationwide" administrative investigation before filing suit. It is well-settled that courts do not evaluate the sufficiency of an EEOC administrative investigation, yet, despite statements to the contrary, that is effectively what the magistrate did here – evidence showed that the Commission did investigate, but, in the magistrate's judgment, it was not enough. Moreover, it is undisputed that the other pre-suit requirements, including conciliation, were satisfied; Sterling had ample notice of the nationwide scope of the claims, from the charges and the LOD as well as the lengthy mediations; and just two years before moving for summary judgment, Sterling told the magistrate that the Commission had "conducted a nationwide administrative investigation." Furthermore, even if the investigation were inadequate –

which it was not – there is simply no authority for holding that a faulty administrative investigation, standing alone, is a complete defense to liability for an otherwise meritorious Title VII discrimination suit.

A. Title VII does not provide for judicial review of the sufficiency of EEOC's pre-suit investigation.

Title VII authorizes the Commission to sue private employers such as Sterling to remedy unlawful employment practices, including sex-based discrimination in pay and promotion (42 U.S.C. §§2000e-2, 2000e-5(f)(1)), once the Commission satisfies certain administrative requirements. These requirements, which apply whether or not the Commission decides to sue, are set out in section 706(b) of Title VII, 42 U.S.C. §2000e-5(b) (requirements apply "whenever a charge is filed").

The process begins with the filing of a charge. Upon receiving the charge, the Commission must serve notice on the employer, "make an investigation" of the charge, and determine whether "reasonable cause" exists to "believe the charge is true." *Id.* §2000e-5(b). If it does find cause, the Commission issues a cause determination, notifies the employer, and "endeavor[s] to eliminate any such alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion." If the matter is not resolved in conciliation, the Commission "may bring a civil action" against the alleged discriminator. 42 U.S.C. §2000e-5(f)(1); s*ee also Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (EEOC's duties include investigating and attempting to settle disputes as well as conducting litigation).

This case concerns only one of these pre-suit requirements – the investigation. Over five years into

the litigation, the magistrate agreed with Sterling that the Commission failed to satisfy its administrative duty to investigate.

But the Commission does not investigate in the abstract. As the Supreme Court stated, the pre-suit requirements constitute an "*integrated*, multi-step enforcement procedure" (*Occidental*, 432 U.S. at 329 (emphasis added)), so it is odd to extract and segregate out this one requirement – investigation – from all the others. Indeed, the "purpose" of an investigation is "to determine whether there is reason to believe [that the allegations in the charge] are true" – the next step in the procedure. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 71 (1984); *accord Univ. of Pa. v. EEOC*, 493 U.S. 182, 190 (1990); *EEOC v. Keco Indus.*, 748 F.2d 1097, 1100 (6th Cir. 1984). If the agency finds no such reasonable cause, the Commission is directed to dismiss the charge and issue the charging party a notice of right to sue. If it does find cause, the Commission issues an LOD and initiates conciliation. Either way, the proceedings move to the next step in the administrative process. Here, Sterling concedes that the other requirements, including notice and conciliation, were satisfied.

While an "investigation" is required, Title VII does not define the word or "prescribe the manner" for doing one. *See Newsome v. EEOC*, 301 F.3d 227, 231 (5th Cir. 2002). Nor does the statute provide for judicial review of the sufficiency of the agency's investigation, set out a standard for assessing its sufficiency, or suggest a remedy for a faulty investigation since no prejudice has resulted. Accordingly, courts agree that the "nature and extent of an EEOC investigation into a discrimination claim is a matter within the [agency's] discretion." *Keco*, 748 F.2d at 1100; *see CRST*, 679 F.3d

at 674 (quoting *Keco*); *Newsome*, 301 F.3d at 231 (same); *EEOC v. Caterpillar*, 409 F.3d 831, 832-33 (7th Cir. 2005) (refusing to review the scope of EEOC's investigation and strongly suggesting that it is "not a justiciable issue").

In addition, as the magistrate here acknowledged, courts addressing the issue agree that it is "error" for a district court to "inquire into the sufficiency of the Commission's investigation." *Keco*, 748 F.2d at 1100; *EEOC v. N.Y. News*, 1985 WL 2158, *1 (S.D.N.Y. July 26, 1985) (same, adding that "EEOC has full authority to investigate and to decide whether reasonable cause exists"); *see also EEOC v. Grane Healthcare*, 2014 WL 896820, *13-*14 (W.D.Pa. March 6, 2014) (inquiring into the sufficiency of the investigation "would propel the court into the domain which Congress has set aside exclusively for the administrative agency")(citation omitted).

Stated differently, courts "have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in a Commission's investigation." *Caterpillar*, 409 F.3d at 832-33; *see also, e.g. Serrano & EEOC v. Cintas Corp.,* 699 F.3d 884, 904 (6th Cir. 2012) (citing *Keco*); *EEOC v. BOK Fin. Corp.*, 2014 WL 504074, *1 (D.N.M Jan. 28, 2014) (adequacy of investigation is "non-justiciable"); *EEOC v. JBS LLC*, 940 F.Supp.2d 949, 964 (D.Nev. 2013) (court will not review sufficiency); *EEOC v. Hibbing Taconite*, 266 F.R.D. 260, 272-73 (D.Minn. 2009)(not "substance" of investigation). To the extent they review the process at all, courts normally find that the requirement is satisfied if the Commission does "some" investigation; "[w]hether the [agency] could or should do more is within the discretion of the EEOC." *EEOC v. Cal. Psych. Transitions*, 725 F.Supp.2d 1100, 1112-

14 (E.D.Cal. 2010); *accord EEOC v. Swissport Fueling*, 916 F.Supp.2d 1005, 1041 (D.Ariz. 2013).

There are several reasons for this deferential approach. First, as noted above, the purpose of the investigation is to determine whether there is a basis for the charge, so assessing that process would require the court to decide whether the investigation did or did not allow the Commission to make that determination. This would require the court to review the cause (or no-cause) finding. But where, as here, the employer had ample notice of the scope of the claims, the "existence of probable cause to sue is generally and in this instance not judicially reviewable." *See Caterpillar*, 409 F.3d at 832; *Georator v. EEOC*, 592 F.2d 765, 767 (4th Cir. 1979) ("court will not determine whether substantial evidence supported the Commission's pre-adjudication finding of reasonable cause").

And, in any event, it is the duty to conciliate, not investigate, that, as one court put it, lies "at the heart of Title VII." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003)); *cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (noting Congress's intent that "cooperation and voluntary compliance" be the preferred means of achieving Title VII's objectives). Rather than inquire into the sufficiency of the investigation, therefore, courts should instead determine whether the language in the LOD and proposed conciliation agreement (if any) gave the employer sufficient notice of the claims EEOC intends to litigate. *See Cintas*, 699 F.3d at 904 (court should determine whether EEOC's efforts to conciliate asserted claims placed employer on notice of "the prospect of suit"); *see also EEOC v. Mach Min.*, 738 F.3d 171, 184 (7th Cir. 2013) (stating that review of administrative procedures is "satisfied" if "EEOC had

pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient"), *cert. granted*, 134 S.Ct. 2872 (2014).

Second, and relatedly, allowing courts to delve into the sufficiency of the investigation or look behind the cause finding would distract the courts and parties – as it did here – from the "'main purpose of the litigation: to determine whether [the defendant] has violated Title VII.'" *Keco*, 748 F.2d at 1100 (citing *EEOC v. Chicago Miniature Lamp Works*, 526 F.Supp. 974, 975 (N.D. Ill. 1981)); *accord, e.g.*, *EEOC v. NCL Am.*, 536 F.Supp.2d 1216, 1221 (D.Haw. 2008). It would also "turn every Title VII suit into a two-step action": first to litigate the question of whether EEOC had a reasonable basis for its cause finding, and if so, only then to litigate the merits of the action. *Keco*, 748 F.2d at 1100 (citing *Chicago Miniature*, 526 F.Supp. at 975); *see also EEOC v. Gen'l Elec. Co.*, 532 F.2d 359, 370 n.31 (4th Cir. 1975) (courts should not "test the factual basis for Commission action" since "the [substantial] potential for delay and diversion" does not "outweigh" the "limited benefit" to be gained from doing so).

Finally, and importantly, scrutinizing the investigation closely is at odds with a statutory scheme that does not confer that administrative step with "determinative consequences" for either the charging party or the employer. *Georator*, 592 F.2d at 768-69; *see also Gibson v. Missouri Pac. R.R.*, 579 F.2d 890, 891 (5th Cir. 1978)("nothing done or omitted by EEOC" during an investigation affects a party's rights). This is because "Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose

administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts." *Gardner-Denver*, 415 U.S. at 44; *see also Gen'l Elec.*, 532 F.2d at 370 ("Adjudication is the exclusive function of the courts under the Act."). Accordingly, even if the investigation results in a finding of reasonable cause, that finding is not judicially enforceable. Rather, the process simply moves on to conciliation. If conciliation fails, the Commission (or the charging party) may bring an enforcement action in federal district court, but the proceedings there would be de novo. *See, e.g.*, *Georator*, 592 F.2d at 767.

Thus, if an employer like Sterling believes that the LOD lacks a sufficient evidentiary basis, the employer can raise that concern with the Commission. EEOC regulations contemplate that the Commission may, in appropriate circumstances, reconsider a cause determination. *See* 29 C.F.R. 1601.21(b). And if the Commission then brings a lawsuit that is lacking in merit, the employer has the usual remedies including summary judgment on the merits and, in appropriate cases, attorney fees or Rule 11 sanctions. But there is simply no legal authority for what the magistrate did here: allow the employer to engage in extensive discovery into the investigation (despite counsel's comment that the Commission had conducted a "nationwide administrative investigation"); divorce the investigation from its purpose and all other aspects of the administrative process – satisfaction of which is not disputed; and then dismiss an otherwise meritorious enforcement action based solely on perceived inadequacies in the investigation.

B. The magistrate erred in reviewing the sufficiency of the Commission's investigation.

While the magistrate here acknowledged that it should not review the sufficiency of the Commission's investigation, it concluded that it nevertheless could and should determine whether the Commission had conducted an appropriate investigation. *See* Recommendation at 6-7. However, the magistrate's analysis in making this determination for the most part boils down to a review of the sufficiency of the investigation.

1. While purporting to examine the existence and/or scope of the investigation, the magistrate actually considered its "sufficiency."

The magistrate noted that courts may determine "whether an investigation occurred at all" and may assess "the scope of the investigation." Recommendation at 6. Accordingly, the magistrate indicated that it would examine whether the Commission investigated and, if so, whether the scope of the investigation was sufficient, given the claims alleged in the lawsuit. *Id.* at 6-7.

On the first point, the magistrate did not flesh out how it would determine whether any investigation occurred "at all." An example of a case where there was no investigation – or cause finding or conciliation – is *Pierce Packing*, 669 F.2d 605. There, the Commission piggy-backed on a Labor Department investigation and then entered into a pre-determination agreement with the employer. Later, after an "on-site compliance review," the Commission wrote to the employer, identifying new incidents of perceived discrimination and seeking a new or supplemental agreement. When

the employer rejected some proposed changes, the Commission sued, alleging new unlawful employment practices as well as breach of the settlement agreement. *Id.* at 607. The court of appeals affirmed the dismissal of the suit (on jurisdictional grounds) for failure to investigate, find cause, and conciliate, reasoning that the Commission was attempting to "use the [earlier] agreement as a springboard to [later] court enforcement." 660 F.2d at 608.

This case is nothing like *Pierce Packing*. Not only does Sterling admit that all of the other administrative requirements were satisfied, but the magistrate acknowledged that the Commission investigated nineteen charges from around the country. Recommendation at 1. And while the magistrate found Ging's testimony —that he investigated all of the charges as "class" charges – to be ambiguous since he did not specify whether he meant "local," "regional," or "nationwide" classes (*id.* at 9-10), at a minimum, that evidence indicates that he investigated the nineteen charges from around the country as local or regional class charges. Thus, even if nothing else had happened, under the magistrate's own assessment, an investigation occurred. The magistrate simply deemed it insufficient. The sufficiency of the investigation should not be reviewed.

Turning to "scope," the magistrate cited three examples of cases addressing the "scope of the investigation." Recommendation at 6-7 (citing *CRST*, *Jillian's*, and a 2013 decision in *Bloomberg*). The scope cases focus on notice and conciliation. According to those courts, the charge, LOD, and conciliation proposal as well as the investigation in those cases did not forecast the claims the Commission sought to pursue in court. Thus, in *CRST* and *Jillian's*, the

courts determined that the Commission investigated, found cause, and conciliated a handful of individual charges and then attempted to pursue broader claims in court. *See CRST*, 679 F.3d at 676-78 (investigated three charges, attempted to seek relief for all other potential victims it discovered in litigation); *Jillian's*, 279 F.Supp.2d at 979-82 (investigated males in one city based on four individual charges, but, after some discovery, attempted to amend the complaint to address a nationwide class). Conversely, in a 2013 decision, the court in *Bloomberg* concluded that the Commission conciliated and brought class claims but then attempted to litigate individual claims for relief. 967 F.Supp.2d at 813 14. In all three cases, this perceived mismatch raised concern that the employer lacked notice of its full potential exposure and a fair opportunity to settle the claims out of court.

This case is nothing like *CRST*, *Jillian's*, or *Bloomberg*. Here, there is no question that Sterling knew that the Commission was pursuing nationwide claims: the charges, LOD, and mediation/ conciliation all addressed nationwide discrimination. Moreover, Sterling had ample opportunity to resolve the case out of court during the year-long mediation/conciliation. There were no surprises. *Cf. Cintas*, 699 F.3d at 904 (employer had notice EEOC was investigating class-wide instances of discrimination because LOD stated as much). Thus, even assuming *Jillian's* is still good law after *Caterpillar* (a later Seventh Circuit case holding that the investigation is not reviewable), those cases do not support the ruling in this case. Nothing there suggests that where, as here, the employer had ample notice and opportunity to conciliate the full scope of the case, an imperfect investigation, by itself, would justify dismissing an otherwise meritorious Title VII enforcement action.

2. There is no standard for deciding whether a "nationwide investigation" occurred.

The magistrate reasoned that it should determine more than just whether "an investigation occurred"; rather, the magistrate should determine whether the Commission did what the magistrate considered to be a "nationwide investigation." *See* Recommendation at 7. As noted above, Title VII contains no standards by which an appropriate investigation can be measured; that is doubly true for a "nationwide investigation," a term that does not even appear in the statute. This strongly suggests that it is matter within the Commission's discretion.

Here, while concluding that, as a matter of law, the Commission failed to prove that it did a "nationwide investigation," the magistrate never identified the standard it was using to determine that the investigation was infirm. If, as the magistrate acknowledged, the nineteen charges from around the country were investigated as a group of at least "local" or "regional" class charges that alone might well have allowed the Commission to find reasonable cause to believe that the allegations of nationwide discrimination were true.

However, the magistrate may have assumed that a "nationwide investigation" requires statistical evidence. If so, the Commission satisfied that requirement. Dr. Lanier's nationwide statistical analyses were in the investigative files. And, during the mediation, the Commission also had access to Sterling's expert analyses as well as both parties' arguments for and against the respective analyses.

Nevertheless, the magistrate reasoned, the Commission could not prove that "its investigation was

nationwide" because there was no evidence that the "statistical analyses" mentioned in the LOD were in fact Dr. Lanier's analyses or that the Commission "validated" or "verified" those analyses. Recommendation at 16-17. But the fact that the only "statistical analyses" in the files were Dr. Lanier's raises a strong inference that they are what the LOD was referring to. This inference is strengthened by Carlo's testimony that in reaching the cause determination, the Commission reviewed "whatever we have in the files." App-888. Moreover, the magistrate pointed to no authority, nor is there any, for its assumption that the Commission must "verify" or "validate" the analyses, let alone prove that it did so, for its actions to count as an investigation. In essence, therefore, the magistrate simply concluded that the Commission had not done enough to satisfy the magistrate's own interpretation of what a "nationwide investigation" should entail. That was a review of the sufficiency of the investigation, not its existence.

3. The magistrate improperly defined the word "investigation" in cases under federal anti-discrimination law.

While providing no standards for an adequate "nationwide investigation," the magistrate did offer its own definition of word "investigation." Recommendation at 15. The magistrate rejected the Commission's argument that the absence of any statutory definition of the word confirms that Congress intended that it be "a matter within the discretion of the [Commission]." Rather, the magistrate opined, the word should be given what, in the magistrate's view, was its "ordinary and natural meaning." According to the magistrate, the word "investigation" "connotes a 'thorough' or 'searching inquiry.'" Recommendation at 15-16 (or "'to

observe or study by close examination and systematic inquiry'"). And, the magistrate added, the inquiry must be proactive, involving "independent analysis." *Id.* at 16-17. To support that definition, the magistrate quoted sentence fragments, taken out of context, from disparate sources, unrelated to federal discrimination law, including a discussion of the due diligence standard for a securities underwriter (*In re WorldCom*, 346 F.Supp.2d at 678); an insurance company's response to untimely notice of a claim (*Rutgers Casualty*, 2007 WL 4258190, *6); and the application of a state constitutional provision to a public contract bidding process (*Groves*, 811 N.W.2d at 570). There are several problems with this approach.

The definition simply end-runs the ban on reviewing the sufficiency of an investigation. A court cannot determine whether an "inquiry" was "thorough" or "searching" without assessing the sufficiency of the efforts.

Moreover, there is no one-size-fits-all understanding of the word "investigation" to mean a proactive exhaustive inquiry. An "investigatory stop," for example, is by definition "brief" and "minimally intrusive." *See, e.g.*, *Rabin v. Flynn*, 725 F.3d 628, 637 (7th Cir. 2013); *U.S. v. Madrid*, 713 F.3d 1251, 1257 (10th Cir. 2013) ("brief and nonintrusive").

Furthermore, in cobbling this definition together, the magistrate failed to consider the factors that the Supreme Court has identified as relevant to interpreting Title VII. According to the Court, "[t]he plainness or ambiguity of statutory language" should be determined by reference not only to the language itself, but also to "the specific context in which that language is used, and the broader context of the

statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997).

Here, had the magistrate considered "context," it would have recognized that the disputed word concerns an *administrative investigation* having no determinative consequences, not an underwriter's investigation that, if flawed, could be the basis for a Securities Act violation against the underwriter (*In re WorldCom*, 346 F.Supp.2d 628), or an insurance agency's investigation that would determine the company's liability for prejudgment interest (*Rutgers Casualty*, 2007 WL 4258190). Unlike those other entities, the Commission investigates solely to determine whether there is or is not reasonable cause to believe that Title VII or another federal anti-discrimination statute has been violated. This context shows that Congress delegated to the Commission (the expert on reasonable cause determinations), not to courts or the employer, the authority to control the investigation and other aspects of the administrative process.

Similarly, had the magistrate considered the broader context, it would have recognized that the Commission does not need to conduct a proactive, "thorough" or "searching inquiry" into all 90,000+ charges it receives annually. For example, where an independent contractor files a charge, an exhaustive investigation into the merits of her allegations would be pointless since independent contractors are not covered by Title VII. *Cf. Baba v. Japan Travel Bureau Int'l*, 165 F.R.D. 398, 399 & n.2 (S.D.N.Y. 1996), *aff'd*, 111 F.3d 2 (2d Cir. 1997). Given the agency's resources, any such requirement would quickly bury the Commission under a mountain of unprocessed charges.

Thus, however suitable the magistrate's definition of "investigation" may be in other contexts, it does not apply to Title VII or the other laws the Commission enforces. Rather, in this context, since 1995, pursuant to its authority to interpret and enforce federal anti-discrimination laws, the Commission has determined that the "investigation to be made in each case" should simply "be appropriate to the particular charge, taking into account the EEOC's resources." *See* Priority Charge Handling Procedures ("PCHP"), §II.D)(1) INVESTIGATION, included in the Appendix at App-36916.[3] An "appropriate investigation" is "one where the field office determines that a statute has been violated or that there is sufficient information to conclude that further investigation is not likely to result in a [reasonable cause] finding." *See id.* To that end, investigations should involve "only that amount of evidence needed to make an informed decision" on the merits of the charge. *Id.* No less. No more.

Unlike the magistrate's definition, this definition corresponds neatly with the purpose of an investigation – to determine whether there is reasonable cause to believe the statute had been violated. *See, e.g.*, *Shell Oil*, 466 U.S. at 71. As a reasonable interpretation of laws the Commission enforces, it is entitled to deference. *See EEOC v. Commercial Office Prods.*, 486 U.S. 107, 115 (1988) ("EEOC's interpretation of ambiguous language [in Title VII] need only be reasonable to be entitled to deference"); *cf. U.S. v. Mead Corp.*, 533 U.S. 218, 227 (2001) ("[A]gencies

[3] The Procedures are also available at EEOM 2000:151, 154, http://laborandemploymentlaw.bna.com/lerc/2447/splitdisplay.adp?fedfid=6398995&vname=leeeofed&wsn=502118000&searchid=23288137&doctypeid=8&type=score&mode=doc&split=0&scm=2447&pg=0.

charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered."); 42 U.S.C. §2000e-12(a) (authorizing EEOC to "issue, amend, or rescind suitable procedural regulations").

Moreover, in the years since the Commission adopted the PCHP, Congress has enacted three pieces of legislation addressing employment discrimination: the Lilly Ledbetter Fair Pay Act, Pub. L. No.111-2, 123 Stat. 5 (2009) (amending §706 of Title VII); the Americans with Disabilities Act Amendments Act ("ADAAA"), Pub. L. No.110-325, 122 Stat. 3553 (2008) (amending the Americans with Disabilities Act ("ADA")); and the Genetic Information Nondiscrimination Act of 2008 ("GINA"), Pub. L. No.10-233, 233 Stat. 881 (2008). Both the ADA and GINA incorporate by reference Title VII's charge-processing requirements ((42 U.S.C. §12117 ("ADA"), 42 U.S.C. §2000ff-6 (GINA)), without altering the Commission's interpretation of those requirements; *see also* Lilly Ledbetter, Pub.L.111-2 §3 (adding new subsections to 42 U.S.C. §2000e-5(e) without otherwise changing §2000e-5). Where an agency's interpretation of a statute has been brought to Congress's attention, and Congress has not sought to alter that interpretation although it has amended the statute in other respects, "then presumably the legislative intent has been correctly discerned." *See N.Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).[4]

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[4] In addition to defining "investigation," these Procedures direct field offices to prioritize and categorize charges. Shortly after their adoption, the procedures were implicitly approved by Congress. See, e.g., 1995 Sen. Appropriations Comm. Rpt., S.Rep.

Thus, the magistrate was mistaken in defining the word "investigation" in a vacuum, without considering the purpose or context of the statutory requirement, and then deciding that the Commission's investigation was flawed because it failed to match that definition. In fact, to find that the Commission failed to satisfy its duty to investigate, the magistrate would have to determine that the investigation was not "appropriate to the particular charge[s]" because it did not allow the Commission to determine whether there was reasonable cause to believe the statute had been violated. But the magistrate did not find the LOD to be deficient. As noted above, where the employer had ample notice of the scope of the claims, the "existence of probable cause to sue is generally and in this instance not judicially reviewable." *See Caterpillar*, 409 F.3d at 832.

4. The other sentence fragments quoted by the magistrate do not advance the magistrate's conclusion that the Commission failed to satisfy its duty to investigate.

Without attempting to tie these descriptors to the "ordinary or natural meaning" of the word, the magistrate also opined that when doing an investigation, the Commission "'cannot defer to the opinions of [the parties]'" but must "'determine for itself,'" "'independent[ly],'" whether "'the charge has a factual basis.'" Recommendation at 15-16 (citing, *e.g.*,

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No.104-139, at 118 (1995) (stating, "Committee supports the recent changes adopted by the EEOC ... to prioritize and categorize charges based on new charge handling procedures"); 1996 Sen. Appropriations Comm. Rpt., S.Rep. No.104-353, at 122 (1996) (same, slightly increasing appropriations).

Pierce Packing and *Michael*).[5] As noted above, the Commission has satisfied its duty to investigate when it has obtained enough information, by whatever means the agency deems appropriate, to determine whether there is reasonable cause to determine whether the allegations in the charge are true. The scattered sentence fragments from Title VII cases, to the extent they are relevant at all, are not to the contrary.[6]

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[5] If the magistrate meant to imply that EEOC must invariably determine cause "by itself" as well as "for itself," such a requirement would conflict with the statute. Title VII specifies that state and local anti-discrimination agencies get first crack at processing certain charges (42 U.S.C. §2000e-5(c)), and EEOC must "accord substantial weight" to those agencies' "final findings and orders" (§2000e-5(b)).

[6] The magistrate also cited *Martini*, 178 F.3d at 1346, to support its statement that EEOC's "duty to investigate" is "mandatory" and "unqualified." *Martini* does not involve EEOC's compliance with the administrative requirements. Rather, the case rejects EEOC's regulation permitting charging parties to obtain an early notice of right to sue where the Commission certifies that it will not finish processing of the charge within 180 days (42 U.S.C. §2000e-5(f)(1)). The Commission disagrees with *Martini*, which represents a minority view in appellate courts (compare *Walker v. UPS*, 240 F.3d 1268, 1275 (10th Cir. 2001); *Sims v. Trus Joist MacMillan*, 22 F.3d 1059, 1061 (11th Cir. 1994); *Brown v. Puget Sound Elec. A&T Trust*, 732 F.2d 726, 729 (9th Cir. 1984)), on an open question in this Circuit (*Hankins v. Lyght*, 441 F.3d 96, 101 (2d Cir. 2006) (noting caselaw contrary to *Martini* but not needing to decide question). Since the *Martini* plaintiff received her right to sue only 21 days after filing her charge, the court dismissed her suit without prejudice, adding that she could file a new suit after attempting conciliation for another 159 days. 178 F.3d at 1348. However, despite the "mandatory and unqualified" language – which adds nothing to the analysis here – the court did not require EEOC to continue its investigation.

Pierce Packing, discussed above, holds that the Commission cannot "leapfrog" the pre-suit administrative requirements to challenge alleged new violations of Title VII merely because some of the challenged incidents also allegedly violate an earlier pre-determination "settlement" (not "conciliation") agreement. Since the Commission there had never investigated, issued an LOD, or attempted conciliation, the Court concluded that it lacked jurisdiction over the claim. The Court reasoned that because the suit was "to cure alleged unlawful employment practices," the "mandates of Title VII, not general principles of contract law, dictate the procedures which the EEOC must adhere to." *Id.* at 608. Later courts cite the case for its focus on the importance of the LOD and conciliation as prerequisites for suit. *See, e.g.*, *Swissport*, 916 F.Supp.2d at 1036; *see also EEOC v. Philip Servs. Corp.*, 635 F.3d 164, 168 (5th Cir. 2011) (noting "conciliation is the preferred means of achieving [Title VII] objectives," citing *Pierce Packing*).

Michael does not concern the sufficiency of an EEOC investigation; indeed, the Commission was attempting to enforce a subpoena during its investigation. Rejecting an argument that the employer may choose what information, if any, to produce in an investigation, the court concluded that the Commission must decide for itself what it needs to make a reasonable cause determination. 706 F.2d at 252. This unremarkable ruling is consistent with the Commission's view of its authority to control the investigation. But it does nothing to advance the magistrate's view that the Commission insufficiently investigated the claims in this case.

The magistrate also suggested that the Commission acted improvidently in agreeing not to subpoena

information from Sterling since the charging parties were providing it voluntarily. *See id.* at 10. However, whether to seek a subpoena is a matter well within the Commission's discretion. While the Commission may subpoena necessary information that a recalcitrant employer refuses to produce, doing so greatly prolongs the administrative process. Though supposedly "summary" in nature (*EEOC v. Dillon Cos.*, 310 F.3d 1271, 1277 (10th Cir. 2002)), subpoena enforcement proceedings easily add two or more years to an investigation. *See, e.g.*, *EEOC v. UPS*, 587 F.3d 136 (2d Cir. 2009) (enforcement petition filed November 2007; appeal resolved November 2009); *EEOC v. Superior Temp. Servs.*, 56 F.3d 441 (2d Cir. 1995) (subpoena issued November 1992, appeal resolved June 1995); *compare EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984) (defendant's motion to quash filed September 1980, enforcement petition filed February 1981, appeal decided April 1982, Supreme Court decision issued April 1984); *see also EEOC v. Kronos*, 694 F.3d 351 (3d Cir. 2012) (subpoena issued March 2008, first appeal decided September 2010, second appeal decided September 2012)). And, of course, once the court enforces the subpoena, the case simply goes back for production of the materials and further investigation, followed by the LOD and, if cause is found, by efforts to resolve the case voluntarily, in conciliation. Even after that, the Commission could sue, challenging the alleged discrimination, only if conciliation failed and the case were deemed important enough to become one of the fewer than 200 enforcement actions filed each year. Thus, where possible, the Commission does what it did here – obtain the materials it needs to make a reasonable cause finding without resorting to a subpoena. The magistrate's implicit criticism of that decision is unfounded.

Nor is there any preference for information received from the employer over information obtained from other sources. To the contrary, the regulations specify that the Commission "will accept any ... evidence with respect to the allegations of the charge which the person claiming to be aggrieved ... or the [employer] wishes to submit." 29 C.F.R. 1601.15(a). In any event, here, the Commission obtained information from the charging parties as a courtesy to Sterling, who had asked to be excused from providing the same information twice, once to charging parties and again to the Commission. App-956-57 (12/27/2116 letter). Because the evidence the Commission obtained from the charging parties, added to the evidence supplied by the company, allowed the Commission to make a reasonable cause determination, the magistrate should have concluded that Commission satisfied its duty to investigate the allegations in the charges.

5. The Commission investigated the allegations of nationwide sex discrimination by Sterling.

Contrary to the magistrate's recommendation, the Commission satisfied its pre-suit duty to investigate the nationwide allegations in the charges. As noted above, the purpose of an investigation is to determine whether there is reasonable cause to believe that the allegations in the charge (along with any discrimination uncovered in the investigation) are true. Once the Commission achieves that goal, it can and should move on the next step in this "integrated, multi-step procedure," the LOD.

Here, before issuing the LOD, the Commission obtained sufficient evidence to make a cause determination. In addition to information specific to the charging parties and their stores, the Commission

requested information relevant to a company-wide investigation. For example, the Commission sought information about the corporate structure and the number of male and female employees nationwide; the Commission also requested copies of the company's EEO-1 reports; applicable job descriptions; nationwide pay, promotion, and antidiscrimination policies; and information about the personnel-related company data bases, which would apply nationwide. While Sterling did not provide all of the requested information directly to the requesting investigator, the charging parties filled in the gaps and more.

Furthermore, the Commission participated in the mediations where expert and other evidence was exchanged and discussed. Because the EEOC representative was authorized to share her impressions with "other EEOC personnel," it is reasonable to infer that she did so not only with Ging but with others including the office director, who signed the LOD. The LOD sets out the evidentiary basis for the reasonable cause finding.

The magistrate found insufficient evidence that any *investigators* did nationwide investigation. Recommendation at 10. But Title VII does not require that an investigation be conducted by an "investigator." The statute says simply that the *Commission* shall "make an investigation"; "investigators" are not mentioned. 42 U.S.C. §2000e-5(f)(1) (emphasis added); *see also* 29 C.F.R. 1601.15(a) (stating that investigation may be made "by the Commission, an investigator, or any other representative designated by the Commission"). The office director, not an investigator, signed the LOD, so whether Ging, for example, remembered looking at affidavits or Dr. Lanier's tables four or more years earlier says nothing about

whether the Commission was aware of the statistical evidence and other materials proffered by the parties. By narrowly considering only what the investigators could remember and reveal without disclosing privileged information (*see generally* Recommendation at 11-13 (checklist of information Sterling was unable to obtain from Ging and Carlo)), the magistrate overlooked the involvement of the other EEOC personnel.[7]

Thus, rather than scrutinize every step in the Commission's investigation and permit exhaustive discovery into that process, the magistrate should simply have looked at the charges, the LOD, and the stated reasons for the finding of reasonable cause. If questions about notice or the investigation's scope could not be answered from those documents, the magistrate could also have looked the investigative files and/or Requests for Information – which the Commission, per its usual practice, had provided to Sterling during discovery (*see* Doc.109-2 at 4 (Decl.§18)). From the face of these documents, the magistrate could ascertain that the Commission reasonably could make a cause determination. Since none of the other pre-suit requirements were at issue and Sterling was fully aware of its potential exposure – and Sterling had acknowledged the Commission's "nationwide administrative investigation" – the magistrate should have denied Sterling's requests for discovery as well as for summary judgment.

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[7] Moreover, both Ging and Carlo were deposed years after their last connection with the case; each had investigated multiple other cases in the interim. Any lack of memory therefore should be excused. Further, Sterling actually prevented Carlo from consulting the files, turning her deposition into a memory test.

There are important policy reasons for holding that the pre-suit investigation is a matter within the Commission's discretion and, absent truly exceptional circumstances, unreviewable in the district court. Significantly, even if the investigation were less than exhaustive, there would be no cognizable prejudice to the employer. As noted above, nothing said or done at any stage in the administrative process has any determinative consequences.

Yet, if, as the district court here held, employers were free to challenge any alleged defect in the investigation and, if successful, avoid liability for the underlying claim of discrimination, all employers would have reason to do what Sterling did here – drag their feet during the investigation and then delve into the Commission's pre-suit activities during discovery in hopes of developing a non-merits-based challenge. This would seriously distract the Commission and the court from the real issue at hand – the alleged discrimination. *Cf. Univ. of Pa.*, 493 U.S. at 194 (refusing to recognize a privilege for peer review materials, reasoning that the Court was "reluctant to 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").

Moreover, concerns about having a court find that they had conducted an inadequate investigation would spur investigators to leave no stone unturned. This would not benefit employers, who would be subject to ever more detailed requests for information and, if the employer were unresponsive, to subpoena enforcement actions. Investigators would also have to document every move carefully lest, as here, years later, they were questioned about exactly what they

did and looked at at each step in the investigation. As a practical matter, the Commission believes that this would cause the backlog of unprocessed charges to balloon while causing unrepresented charging parties' charges to get short shrift. And as *Keco* predicted (748 F.2d at 1100), it would convert every litigation into a two-step analysis where the merits were reached only if the Commission could satisfy the court – even years after suit was filed – that the LOD was fully supported by an exhaustive pre-suit investigation. Title VII and the public interest would not be well-served by this result.

C. The magistrate erred in dismissing this enforcement action because the Commission refused to waive the deliberative process privilege.

As the magistrate acknowledged, the Commission, like other government agencies, may assert the deliberative process privilege to shield certain information concerning its decisionmaking processes from disclosure during discovery. Nevertheless, the magistrate concluded that the Commission could not satisfy its pre-suit duty to investigate because, during discovery, the Commission, arguing that the information was privileged, refused to disclose what the agency did and relied on in making the reasonable cause determination. *See generally* Recommendation at 10-17. In effect, the magistrate determined that the Commission could prove that it did a sufficient investigation only by waiving the deliberative process privilege and disclosing all aspects of its pre-suit deliberations. Yet, because the information Sterling was seeking was irrelevant to the merits of the discrimination claim or any real defense to that claim, Sterling did not and cannot make a sufficient showing

of particularized need for the information to outweigh the Commission's privilege claim. The magistrate therefore erred in holding that the Commission's refusal to waive the deliberative process privilege and disclose the privileged information justified dismissal of the suit.

The Federal Rules permit discovery of "any nonprivileged matter that is relevant to the claim or defense of any party." Fed.R.Civ.P. 26(b). The information at issue here, however, was, for the most part, protected by the deliberative process privilege, and so was not routinely discoverable under Rule 26(b).

"The deliberative process privilege, a "sub-species of work-product privilege" (*Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002)), "protects communications that are part of the decision-making process of a government agency." *U.S. v.* Farley, 11 F.3d 1385, 1389 (7th Cir. 1993); *see also A. Michael's Piano v. FTC*, 18 F.3d 138, 147 (2d Cir. 1994) (safeguards "the quality and integrity of governmental decisions"). The privilege applies to pre-decisional materials that are "deliberative" in that they "relate[] to the process by which policies are formulated." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005) (citations omitted). "[W]henever the unveiling of factual materials would be tantamount to the 'publication of the evaluation and analysis of the multitudinous facts' conducted by the agency, the deliberative process privilege applies." *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988) (citation omitted). In EEOC cases, the privilege "protect[s] from disclosure pre-decisional documents and other information which 'reveal the give and take of the consultative process' concerning

the EEOC's investigation and its decision regarding whether and how to pursue an enforcement action." *EEOC v. JBS USA*, 2013 WL 5812478, *2 (D.Colo. Oct. 29, 2013)(citing *EEOC v. Continental Airlines*, 395 F.Supp.2d 738, 741 (N.D. Ill. 2005)); *accord EEOC v. BNSF Ry. Co.*, 2014 WL 1571278, *3- *4 (D.Kan. April 18, 2014).

Here, the magistrate faulted the Commission for invoking the privilege to prevent Carlo and Ging from answering certain deposition questions about Dr. Lanier's analysis: "who reviewed [Dr. Lanier's] statistical tables," "whether the EEOC [undertook] any validation of Dr. Lanier's work and whether it accepted [them] or ... independently verified them," whether Ging did "any fact investigation ... concerning Dr. Lanier's tables or took any steps to verify the accuracy of the information in Dr. Lanier's tables," and "which witness statements corroborated the allegations of nationwide sex discrimination." Recommendation at 12-13 (listing questions). The magistrate further concluded that two pieces of this information – whether Dr. Lanier's analysis "was the analysis referred to in the Letter of Determination" and whether EEOC "took any steps to verify the reliability of that analysis" – were critical to EEOC's response to Sterling's summary judgment motion. Since the Commission refused to waive its privilege, the magistrate reasoned, the answers to those questions were not in the record, and "[a]bsent such proof, there is no evidence that its investigation was nationwide." *Id.* at 16-17.

This reasoning is flawed. Virtually all of those questions intruded on the Commission's decisionmaking processes – what the Commission considered, deemed important, and relied on as it went about investigating

and finding cause on the nineteen charges underlying this enforcement action. They therefore fell squarely within the deliberative process privilege. The magistrate did not rule otherwise.[8]

Thus, once the Commission refused to disclose the answers, Sterling could overcome the privilege only by making a sufficient showing of particularized need to outweigh the public interest in nondisclosure. *See Farley*, 11 F.3d at 1389 (sufficient showing of particularized need); *Marriott Int'l Resorts v. U.S.*, 437 F.3d 1302, 1307 (Fed.Cir. 2006)("compelling need"), cited in *In re City of New York*, 607 F.3d 923, 945 (2d Cir.2010); *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (case-by-case assessment, balancing factors such as relevance of evidence, availability of other evidence, seriousness of and government's role in litigation).

But the magistrate did not decide whether the company made the requisite showing, and Sterling could not do so. Not only is the investigatory process a matter within the Commission's discretion but the specific information sought – whether the Commission validated or verified Dr. Lanier's analysis – is relevant at most to an assessment of the *sufficiency* of the investigation. Under these circumstances, faulting the Commission for refusing to waive the privilege – and dismissing the case on that ground – "eviscerate[s] the deliberative process privilege." *See JBS*, 2013 WL 5812478, *1-*2 (citing *EEOC v. Albertson's*, 2008 WL

[8] EEOC agrees that the fact that the "statistical analysis" referenced in the LOD was the one done by Dr. Lanier was not privileged information. As noted above, however, based on the record, the magistrate reasonably should have drawn that inference.

4877046, *5 (D.Colo. Nov. 12, 2008)). The ruling therefore was erroneous.

D. Even if the magistrate had properly concluded that the investigation was flawed, the enforcement action should not have been dismissed at all, and certainly not with prejudice.

Even if the Commission's investigation had been less than thorough, the magistrate erred in dismissing the enforcement action (and, moreover, with prejudice) on that ground. The court cited no authority, nor is there any, for this drastic remedy.

The Commission is not aware of any other cases that turn solely on perceived flaws in the administrative investigation. Indeed, relatively few appellate cases address the administrative process at all, and those that do normally focus on notice and conciliation, neither of which is at issue here. No case suggests a remedy for an insufficient investigation.

The magistrate, however, opined that dismissal was the appropriate remedy here because the Commission had "completely abdicate[d] its role in the administrative process." Recommendation at 17-18. That just is not so. As the magistrate acknowledged, the Commission did at least some investigation, and it is undisputed that it fulfilled all the other aspects of its "role in the administrative process." And, of course, Sterling's counsel stated in a hearing that the Commission had conducted a "nationwide administrative investigation."

Furthermore, while characterizing the Commission's conduct as a "complete abdication" of its administrative role, in the end what the magistrate actually concluded was that the Commission failed to carry its "burden of proof" because it refused to waive

the deliberative process privilege and allow Ging and Carlo to answer two questions. (1) Whether the statistical analysis mentioned in the LOD referred to Dr. Lanier's analysis, and (2) Whether Ging or anyone else had validated or verified that analysis. Recommendation at 16-17. The first was easily inferred from the files; as for the second, since the Commission was not required to validate or verify the analysis, that information, if supplied, would go, at most, to sufficiency – something the magistrate should not be addressing.

In recommending that the case be dismissed, the magistrate again referenced a 2013 decision in *Bloomberg*, where the court concluded that dismissal was appropriate *inter alia* because, according to the court, the Commission had "spurned Bloomberg's offer to conciliate" specific claims. *See* 967 F.Supp.2d at 815 (also noting problems with LOD as well as investigation). Whatever its merits, that ruling is rooted in conciliation and, so, is inapposite to this case.

The Commission recognizes that this Court and a few others have upheld a trial court's decision to dismiss an enforcement action upon determining that the Commission failed to provide the employer with adequate pre-suit notice and an opportunity to conciliate. *See, e.g.*, *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981); *CRST*, 679 F.3d at 677; *Asplundh*, 340 F.3d at 1259 & n.1. These cases do not support the district court's decision here. Unlike the investigation, which leads to no determinative consequences (*see Georator*, 592 F.2d at 767), conciliation is central to the administrative process, so to the extent the Commission made insufficient efforts to conciliate, that could be said to undermine Congress's desire for out-of-court settlements. *See Asplundh*, 340 F.3d at

1260. In most such cases, courts do not dismiss but instead stay the suit pending further conciliation. Courts reason that, by "excus[ing] the employer's (assumed) unlawful discrimination," dismissal "would severely hamper" enforcement of the statute. *See, e.g.*, *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1169 (10th Cir. 1985); *Mach Mining*, 738 F.3d at 184. In a few cases, however, courts have upheld the trial court's decision to dismiss, either with or without prejudice. *See, e.g.*, *Sears*, 650 F.2d at 19 (noting that stay would be preferable but affirming dismissal without prejudice). These courts relied on 42 U.S.C. §2000e-5(f)(1), reasoning that it gives trial courts discretion to remedy a failure to conciliate.[9]

While §2000e-5(f)(1) does refer to conciliation, there is no parallel provision according trial courts discretion over the other pre-suit requirements, including the investigation. Thus, nothing in Title VII suggests that trial courts may dismiss otherwise meritorious EEOC enforcement actions based only perceived inadequacies in the investigation – or other aspects of the administrative process.

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[9] This Court, for example, read §2000e-5(f)(1) as indicating that Title VII "contemplates that the decision of whether to stay proceedings or dismiss the action is committed to the trial court's discretion." See 650 F.2d at 19. But §2000e-5(f)(1) speaks only of "stay," not "dismissal." By its plain terms, the provision gives trial courts discretion to "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." The statute therefore should not be read to authorize dismissal as a remedy for insufficient conciliation. See Mach Mining,738 F.3d at 184 (reasoning that since the wrong claimed by defendant is "purely one of insufficient process," the remedy should be more process. Dismissal is "too final and drastic a remedy for any procedural deficiency in conciliation").

The Commission therefore urges this Court to hold that it was error to dismiss this Title VII enforcement action based solely on the court's conclusion that the Commission failed to prove that it adequately investigated the allegations of nationwide sex discrimination found in the nineteen charges. Based on the charges, the LOD, and, at most, the contents of the investigative files, the Court should hold that the Commission satisfied this pre-suit administrative requirement. As Sterling previously acknowledged, the Commission did conduct a "nationwide administrative investigation" of the allegations in the charges.

CONCLUSION

For the foregoing reasons, the summary judgment should be reversed and the case remanded for further proceedings consistent with this ruling.

Respectfully submitted,

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ADDENDUM

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

[Filed 1/2/14]

08-CV-00706(A)(M)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

STERLING JEWELERS INC.,

Defendant.

REPORT, RECOMMENDATION AND ORDER

Before me are two motions by defendant Sterling Jewelers, Inc. ("Sterling"): a motion for partial summary judgment [336],[1] and a motion to strike portions of the Statement of Facts of plaintiff Equal Employment Opportunity Commission ("EEOC") [370]. Oral argument was held on December 9, 2013 [376]. For the following reasons, Sterling's motion to strike is denied as moot, and I recommend that its motion for partial summary judgment be granted in part and denied in part.

BACKGROUND

Between May 2005 and November 2006, 19 female employees (the "Charging Parties") at Sterling's stores

[1] Bracketed references are to CM/ECF docket entries.

in New York, Florida, California, Massachusetts, Missouri, Nevada, Indiana and Texas filed charges with the EEOC against Sterling on behalf of themselves and similarly situated employees, alleging sex discrimination in pay and/or promotions. EEOC's Brief [362], p. 1. The charges were investigated by five EEOC investigators. [376], p. 12. By June 2007, the charges were transferred to the EEOC's Buffalo office, and were assigned to a single investigator, David Ging. EEOC's Brief [362], p. 1.

On January 25, 2007 the EEOC, Sterling and the Charging Parties entered into a "Mediation and Confidentiality Agreement" calling for the EEOC's participation in a mediation between Sterling and the Charging Parties. [365-13], pp. 2 of 22 *et seq*. That Agreement provided that "the Parties shall not rely on, or introduce as evidence in any court, arbitration, judicial, or other proceeding any information disclosed by any other party, their experts, or by the Mediator regarding such other party in the course of or pursuant to the mediation". *Id.,* ¶10.

During the mediation, counsel for the Charging Parties submitted a statistical analysis of Sterling's pay and promotion data prepared by their expert, Dr. Louis Lanier, dated September 4, 2007 and bearing the legend "For Settlement Purposes Only" [339-32]. The parties subsequently modified the Mediation and Confidentiality Agreement to provide that the "EEOC may place Dr. Lanier's tables and explanatory notes in its investigatory file. However, such tables shall not lose their mediation privilege". [365-13], p. 10 of 22, ¶4.

In November 2007, Mr. Ging wrote to counsel for the Charging Parties and Sterling, stating:

> "I have been informed by [EEOC] Regional Attorney Elizabeth Grossman that the outside mediation process regarding the above-referenced charges has been on unsuccessful. I understand that Ms. Grossman has [Sterling's] permission to provide me its documents exchanged in conjunction with the mediation which are numbered 0001-3348. I further understand that Ms. Grossman has Charging Parties' and [Sterling's] permission to provide me with Dr. Lanier's tables and explanatory notes prepared in conjunction with the mediation.
>
> Ms. Grossman has agreed that Dr. Lanier's analysis in the underlying data shall not lose its mediation privilege and will not be disclosed to any non-Charging Party.
>
> While the Commission will not be making additional requests for information, both parties are encouraged to provide any further information you wish to be considered by the Commission to me by November 21, 2007."

[363-1], pp. 36-37 of 189.

Although Sterling did not provide any additional information in response to that invitation,[2] on November 30, 2007 counsel for the Charging Parties wrote to Mr. Ging, stating that "[o]ur clients and other women similarly situated to them claim they have been subjected to a pattern and practice of sex discrimination in compensation and promotion

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[2] The parties had agreed that "Sterling shall be under no obligation to provide additional information or documentation relating to the Charges" in connection with the EEOC administrative investigation. [365-13], ¶8.

decisions at Sterling Jewelers stores. This letter and accompanying exhibits set forth the factual, legal and statistical support of the Charging Parties' claims. We hope this information is helpful to your investigation". [363-1], p. 71 of 189. However, Mr. Ging did not recall having received this letter ([339-24], pp. 187-88), and when asked whether he reviewed it as part of his investigation into the charges against Sterling, he replied "I can't be sure that I did". *Id.,* p. 188.

> On January 3, 2008 the EEOC issued a Letter of Determination, stating:
>
> "The investigation determined that Respondent subjected Charging Parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation. Statistical analysis of pay and promotion data provided by Respondent reveals that Respondent promoted male employees at a statistically significant, higher rate than similarly situated female employees and that Respondent compensated male employees at a statistically significant, higher rate than similarly situated female employees. Witness testimony further corroborates the allegations."

[339-34], p. 4.

The EEOC commenced this action on September 23, 2008, alleging that "[s]ince at least January 1, 2003, Sterling has engaged in unlawful employment practices throughout its stores nationwide" by discriminating against female employees in promotion and compensation, in violation of Title VII, 42 U.S.C. §§2000e-2(a) and 2000e-2(k). Complaint [1], ¶¶7, 8. It

seeks relief for 19 individual employees (the "Charging Parties") as well as for "other female retail sales employees". *Id*., ¶6; "Prayer for Relief", ¶¶C-F.

In moving for partial summary judgment, Sterling argues that since there is no evidence that the EEOC conducted a nationwide investigation of its employment practices prior to commencing this action, its claims of nationwide discrimination must be dismissed. Sterling's Memorandum of Law [337], Points I and II. The EEOC responds that "the Courts should not inquire into the sufficiency of [its] investigation". EEOC's Brief [362], p. 5.

ANALYSIS

A. May the Court Inquire as to the Scope of the EEOC's Pre-Suit Investigation?

"[T]he 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. Unlike the typical litigant . . . the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Occidental Life Insurance Co. of California v. E.E.O.C.,* 432 U.S. 355, 368 (1977).

"Before the EEOC is able to file a lawsuit in its name, it must establish that it has met four conditions precedent, namely: the existence of a timely charge of discrimination, the fact that EEOC conducted an investigation, issued a reasonable cause determination, and attempted conciliation prior to filing suit." *E.E.O.C. v. Grane Healthcare Co.,* 2013 WL 1102880,

*3 (W.D.Pa. 2013); *Occidental*, 432 U.S. at 359-60; 42 U.S.C. §2000e-5(b).

While the EEOC alleges that "[a]ll conditions precedent to the institution of this lawsuit have been satisfied" (Complaint [1], ¶6), Sterling replies that the claims are "beyond the scope of any administrative charge or the EEOC's investigation thereof, were not subject to administrative investigation . . . processes, and/or were not included in any investigation . . . by the EEOC". Answer [8], Sixth Affirmative Defense. Sterling's denial of EEOC's performance of a condition precedent (namely, a pre-suit investigation) as an affirmative defense does not shift the burden of proof on that issue to Sterling - instead, it remains the EEOC's burden to prove performance of that condition. *See Dynasty Apparel Industries Inc. v. Rentz*, 206 F.R.D. 603, 607 (S.D.Ohio 2002); 2 *Moore's Federal Practice,* §9.04[4] (Matthew Bender 3d ed.).

The fact that "a district court should not examine the adequacy of an EEOC[ ] investigation" does not mean that it "should not examine whether the investigation occurred at all". *Grane Healthcare*, *5. "Whether the EEOC fulfilled its statutory duties as a precondition to suit is a proper issue for the district court to decide . . . . To rule to the contrary would severely undermine if not completely eviscerate Title VII's integrated, multistep enforcement procedure." *Equal Employment Opportunity Commission v. Swissport Fueling, Inc.,* 916 F.Supp.2d 1005, 1036 (D.Ariz. 2013).

Therefore, while courts "will not review the sufficiency of the EEOC's pre-suit investigation . . . . courts will review whether an investigation occurred". *EEOC v. JBS USA, LLC*, 940 F. Supp.2d 949, 964 (D.Neb. 2013); *EEOC v. Hibbing Taconite Co.,* 266

F.R.D. 260, 272 (D.Minn. 2009). They may also examine the scope of that investigation, for while "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable", *General Telephone Co. of the Northwest, Inc. v. Equal Employment Opportunity Commission,* 446 U.S. 318, 331 (1980), "it must discover such individuals and wrongdoing *during the course of its investigation*". *E.E.O.C. v. CRST Van Expedited, Inc.,* 679 F.3d 657, 674 (8th Cir. 2012) (emphasis in original). "Where the scope of its pre-litigation efforts [is] limited - in terms of geography, number of claimants, or nature of claims - the EEOC may not use discovery in the resulting lawsuit as a fishing expedition to uncover more violations." *Id*. at 675.

Accordingly, in determining whether a particular claim may be asserted in an EEOC complaint, "the relationship between the complaint and the scope of the investigation is central". *E.E.O.C. v. Jillian's of Indianapolis, IN, Inc.,* 279 F. Supp.2d 974, 980 (S.D.Ind. 2003). "Courts have limited the EEOC's complaint where it exceeds the scope of the investigation." *E.E.O.C. v. Dots, LLC,* 2010 WL 5057168, *2 (N.D.Ind. 2010).

For example, in *E.E.O.C. v. Bloomberg L.P.,* ___F. Supp.2d___, 2013 WL 4799150 **7, 9 (S.D.N.Y. 2013) the court granted summary judgment dismissing the EEOC's claims for individual relief, finding that its pre-suit investigation was class-wide only: "the Court holds that its prior finding that the EEOC satisfied its pre-litigation obligations with respect to a class-wide claim applies to that class-wide claim only and that it must look independently at whether the EEOC fulfilled its statutory pre-litigation requirements with

respect to the individual claims upon which it purports to continue this litigation . . . . Thus, the Court holds that no genuine issue of fact remains as to whether the EEOC investigated any of the Section 706 individual claims prior to commencing litigation."

Similarly, in *Jillian's* the court granted summary judgment dismissing the EEOC's claims of nationwide discrimination, finding that the EEOC had failed to conduct a nationwide investigation: "[t]he *nationwide* class named in the EEOC's Amended Complaint is not reasonably anticipated in its investigation into the four charges filed against Jillian's Indianapolis. The EEOC's investigation of the four charges was conducted entirely with respect to Jillian's Indianapolis. Its Amended Complaint, alleging a nationwide class, has insufficient basis in its actual investigation . . . . For these reasons, we GRANT Jillian's motion for summary judgment with respect to the EEOC's nationwide pattern or practice claim." 279 F.Supp.2d at 980, 983 (emphasis in original).

Therefore, I must decide whether there is a triable issue of fact as to whether the EEOC conducted a nationwide investigation of Sterling's employment practices prior to commencing this action.

B. Can the EEOC Prove that it Conducted a Nationwide Investigation of Sterling's Employment Practices?

Because the EEOC bears the burden of proving that it satisfied all conditions precedent to maintaining this action, Sterling need not prove that the EEOC did *not* conduct a nationwide investigation - rather, in order to avoid summary judgment, the EEOC must point to evidence showing that it *did*. "A defendant need not prove a negative when it moves for summary judgment

on an issue that the plaintiff must prove at trial. It need only point to an absence of proof on plaintiff's part, and, at that point, plaintiff must designate specific facts showing that there is a genuine issue for trial." *Parker v. Sony Pictures Entertainment, Inc.,* 260 F.3d 100, 111 (2d Cir. 2001). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff". *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986).

The EEOC admits that there is "little investigative material in the files beyond the charges, Sterling's responses, and other correspondence." EEOC's Memorandum of Law [110], p. 15. It also admits that Mr. Ging, its sole investigator after June 2007, "has very little memory of what actions he undertook in this investigation conducted over seven years ago". EEOC's Brief [362], p. 13.

Sterling alleges that "[t]here is no evidence produced by EEOC in this litigation suggesting that Investigators Carlo, Melendez, Rawlins, or Thompson [EEOC's four other investigators] conducted any sort of nationwide investigation of Sterling, based on their involvement prior to the transfer of all Charges to Ging". Sterling's Statement of Facts [338], ¶52. In response, the EEOC "objects to the lack of evidentiary support for this 'fact,' and denies in the form and manner alleged. Nearly all the charges filed stated that they were filed on behalf of the charging party and all women similarly-situated at Sterling Jewelers stores". EEOC's Second Amended Statement of Facts [378], ¶52 (citing 12 of the charges asserted by the Charging Parties).

That response is insufficient to controvert Sterling's assertion, because the fact that charges were asserted does not by itself prove that they were then investigated, nor does it prove the scope of any investigation which may have occurred. In opposing the motion, the EEOC "may not rely on conclusory allegations . . . . At the summary judgment stage, a nonmoving party must offer some hard evidence". *Jeffreys v. City of New York,* 426 F.3d 549, 554 (2d Cir. 2005).

Sterling further alleges that Mr. Ging did not recall investigating any stores besides those in Massena, New York and Tampa, Florida. Sterling's Statement of Facts [338], ¶54 (citing Mr. Ging's deposition testimony). Responding to that assertion, the EEOC "denies in the form and manner alleged. Whatever Mr. Ging recalled or did not recall on the date of his deposition, he conducted a nationwide investigation of the charges against Sterling, which nearly universally stated that they were filed on behalf of all women similarly-situated to the Charging Parties, and he received information from Charging Parties' attorneys to support the nationwide scope of the allegations against Sterling." EEOC's Second Amended Statement of Facts [378], ¶54.

In support of its position, the EEOC cites Mr. Ging's deposition testimony that he "investigated all of these charges as class charges" ([358-7], p. 171). However, the EEOC may not "trade on the inherent ambiguity in the term 'class' to [its] own advantage". *CRST,* 2009 WL2524402 *18 (N.D.Iowa 2009), *aff d,* 679 F.3d 657 (8th Cir. 2012). Mr. Ging did not specify which type of class he investigated - *i.e.,* local, regional, or nationwide. *See E.E.O.C. v. Outback Steak House of Fla., Inc.* 520 F.Supp.2d 1250, 1267 (D.Colo. 2007)

(noting that "class" can also mean a local or regional class instead of a nationwide class). Therefore, his statement that he investigated "class" charges constitutes no evidence that he investigated a *nationwide* class.

The EEOC also cites the November 30, 2007 letter from counsel for the Charging Parties, but, as previously noted, Mr. Ging could not recall whether he reviewed that letter. Finally, the EEOC cites the charges asserted by the Charging Parties, which does not prove that those charges were investigated. For these reasons, I adopt Sterling's assertions (Sterling's Statement of Facts [338], '111152, 54) that none of the EEOC investigators conducted a nationwide investigation.

Although the EEOC claims that "Sterling stonewalled the EEOC at every turn" in its attempt to obtain Sterling's nationwide pay and promotion data ([376], p. 10), as previously noted (footnote 2, *supra*) the parties had agreed that Sterling was under no obligation to provide additional information in connection with the EEOC administrative investigation. [365-13], ¶8. But for that agreement, the EEOC could have subpoenaed the information from Sterling,[3] but did not do so because it "subsequently received the detailed analysis and tables from Dr. Lanier. So EEOC did not follow through on this". [376], p. 42.

The EEOC now points to Dr. Lanier's analysis as "the key document" proving that it conducted a

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[3] "The EEOC has express statutory authority to issue subpoenas requiring the attendance and testimony of witnesses or the production of any evidence during its investigations." E.E.O.C. v. Deer Valley Unified School District, 968 F.2d 904, 906 (9th Cir. 1992) (citing 42 U.S.C. §2000e-9, 29 U.S.C. §161(1)).

nationwide investigation ([376], p. 36), stating that:

- "EEOC obtained statistical analysis finding company-wide sex-based disparities in compensation and promotions from the Charging Parties' expert" (EEOC's Letter Brief [382], p. 2);
- "[M]ost assuredly the analyses were reviewed and, obviously, that's what's being referenced in the [letter of] determination" ([376], p. 7);
- "It absolutely was part of the EEOC investigation and it was expressly referenced in the EEOC Letter of Determination . . . . We will fully admit that EEOC did not conduct its own separate statistical analyses. So that what was being referred to, obviously, is the statistical analyses . . . the Lanier table" (*id*., pp. 14-15);
- "Obviously, it was in the file for a reason. Obviously, it was referenced in the Letter of Determination. So it was not just a piece of paper or a series of analyses that were just sitting in EEOC's file with no one ever looking at it" (*id.,* p. 26);
- "the fact that EEOC credited the evidence presented by charging parties in its Letter of Determination is totally legitimate, it's something that happens all the time"(*id*., p. 36);
- "there was nothing improper whatsoever about EEOC obtaining and then relying on information and analyses from an 'interested' third party such as Dr. Lanier" (EEOC's Brief [362], p. 10).

I find it more than a little ironic for the EEOC to accuse Sterling of stonewalling, for when Sterling inquired into these *very same* areas during discovery, the EEOC blocked its inquiries:

- when Sterling asked EEOC's Rule 30(b)(6) witness (Jennifer Carlo) "what is the statistical analysis of pay and promotion data that's referenced" in the Letter of Determination, the EEOC directed her not to answer ([339-25], p. 228);
- when Sterling asked Ms. Carlo whether the reference was to Dr. Lanier, the EEOC directed her not to answer (ill, pp. 228-29);
- when Sterling asked Mr. Ging "what statistical analysis is being referenced" in the Letter of Determination, the EEOC directed him not to answer, asserting deliberative privilege ([339-24], p. 230);[4]
- when Sterling asked Ms. Carlo "who reviewed the statistical tables from Dr. Lanier", the EEOC again directed her not to answer, claiming that question "calls for deliberative information" ([339-25], p. 190);
- when Sterling asked Ms. Carlo whether the EEOC "under[took] any validation of Dr. Lanier's work", and whether it "accepted Dr. Lanier's tables or . . . independently verified" them, the EEOC directed her not to answer, claiming that question "calls for deliberations" (*id*., pp. 184-85);
- when Sterling asked Mr. Ging whether he performed "any fact investigation at all concerning Dr. Lanier's tables", or took "any steps to verify the accuracy of the information in

[4] Moreover, Ging did not recall reviewing Dr. Lanier's tables or the November 30, 2007 submission from the claimants' attorneys ([339-24], pp. 186, 188).

Dr. Lanier's table", the EEOC directed him not to answer, asserting deliberative privilege ([339-24], pp. 197, 200); and

- when Sterling asked Mr. Ging if he knew which witness testimony allegedly corroborated the allegations of nationwide sex discrimination contained in the Letter of Determination, the EEOC directed him not to answer, asserting deliberative privilege (i, p. 231).[5]

Once Sterling filed its Answer [8] denying that the EEOC had conducted a nationwide investigation of its employment practices, the EEOC knew that it would bear the burden of proving compliance with this condition precedent. It also knew that an assertion of privilege (whether properly or not)[6] during discovery might affect its ability to satisfy that burden, since "the claim of privilege is not a substitute for relevant

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[5] While the EEOC subsequently offered to allow Mr. Ging to answer certain questions in writing in lieu of an oral deposition, this proposal was unacceptable to Sterling ([327], p. 4), and with good reason. *See Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 549 (S.D.N.Y. 1989) ("there are several reasons why oral depositions should not be routinely replaced by written questions . . . . First, the interrogatory format does not permit the probing follow-up questions necessary in all but the simplest litigation. Second, without oral deposition, counsel are unable to observe the demeanor of the witness and evaluate his credibility in anticipation of trial . . . . Finally, written questions provide an opportunity for counsel to assist the witness in providing answers so carefully tailored that they are likely to generate additional discovery disputes").

[6] Without deciding the issue, I noted that "some of the objections . . . I don't think should have been asserted". [327], p. 21. However, the propriety of the objections is not the issue here - rather, the question is whether the EEOC can now rely upon information which it previously withheld as privileged.

evidence". *United States v. Rylander,* 460 U.S. 752, 761 (1983). "[A] litigant claiming . . . privilege is not freed from adducing proof in support of a burden which would otherwise have been his." *United States v. Certain Real Property and Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y.,* 55 F.3d 78, 83 (2d Cir. 1995). "In other words, a party who asserts the privilege . . . must bear the consequence of lack of evidence . . . and the claim of privilege will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation." *Id.*[7]

None of this should come as a surprise to the EEOC. On August 15, 2012, I cautioned that the EEOC "can't assert the privilege and then waive the privilege when the charges are attacked" ([295], p. 13). On June 26, 2013, I again warned that the EEOC "can't use a privilege as both a sword and a shield. So if they're saying they're not going to disclose this information to [Sterling], then they're also not going to be allowed to disclose it to the Court to argue that the scope was broader than what [Sterling is] saying it is" ([327], p. 16).[8] Therefore, the EEOC may not now oppose

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[7] *See also S.E.C. v. Pittsford Capital Income Partners, L.L.C.* 2007 WL 2455124, *14 (W.D.N.Y. 2007) (Telesca, J.), *aff d in part, app. dismissed in part*, 2008 WL 5435580 (2d Cir. 2008) (Summary Order) ("when a party invokes [a] privilege . . . courts may then preclude that party from introducing evidence that was not previously available to his or her adversary due to the party's invocation of the privilege"); *Hammond v. Hendrickson*, 1990 WL 179893, *2 (N.D.I11. 1990) ("Such evidence was never obtained by virtue of Kidder's invocation of the privilege during discovery. Accordingly such evidence shall now be barred").

[8] "It is well established in this Circuit that a party may not use . . . privilege as both a sword and a shield." *Favors v. Cuomo*, 285 F.R.D. 187, 198 (E.D.N.Y. 2012). "In other words, a party cannot

Sterling's motion for summary judgment by relying upon the information which it withheld from Sterling in discovery.

Accordingly, I must decide whether the information which the EEOC has *not* withheld from Sterling in discovery is sufficient to prove that it conducted a nationwide investigation prior to commencing this action. In arguing that this question is not judicially reviewable, the EEOC notes that "42 U.S.C. §2000e-5(b) . . . simply provides that EEOC 'shall make an investigation' of a discrimination charge, without . . . any statutory guide on the substance of such investigation, which is committed to the agency's discretion. Like the subsection's conciliation provision, such an open-ended provision looks nothing like a judicially reviewable prerequisite to suit." EEOC's Letter Brief [382], pp. 1-2.[9]

I disagree. Although the statute does not define "investigation", "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning . . . . [T]he word 'investigation' connotes a 'thorough' or 'searching

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. . . affirmatively rely on privileged communications to support its claim . . . and then shield the underlying communications from scrutiny by the opposing party." *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000).

[9] In support of this argument, the EEOC cites *E.E.O.C. v. Mach Mining, LLC*,__F.3d__, 2013 WL 6698515 (7th Cir. 2013), holding that "an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit." *Id*., *1. However, the issue here is failure to investigate, not failure to conciliate - and in any event, *Mach Mining* recognizes that unlike the Seventh Circuit, the Second Circuit *does* recognize the defense of failure to conciliate. *Id*. *11 (citing *EEOC v. Johnson & Higgins, Inc*., 91 F.3d 1529, 1534 (2d Cir.1996)).

inquiry'. In re *WorldCom, Inc. Securities* Litigation, 346 F.Supp.2d 628, 678 (S.D.N.Y. 2004). "Dictionary definitions of the word investigate include: 'No inquire into (a matter) systematically' . . .`to observe or study by close examination and systematic inquiry' . . . 'to examine a crime, problem, statement, etc. carefully, especially to discover the truth'." *MCI LLC v. Rutgers Casualty Insurance Co.*, 2007 WL 4258190, *6 (S.D.N.Y. 2007).

The EEOC's "duty to investigate is both mandatory and unqualified". *Martini v. Federal National Mortgage Association*, 178 F.3d 1336, 1346 (D.C. Cir.1999), *cert. dismissed*, 528 U.S. 1147 (2000). The investigation must be "genuine", *Equal Employment Opportunity Commission v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982), meaning that the EEOC "cannot defer to the opinions of [the parties]; it has the statutory duty to make an *independent* investigation, reasonable in scope, to determine *for itself*' whether the charge has a factual basis. *E.E.O.C. v. Michael Construction Co.*, 706 F.2d 244, 252-53 (8th Cir. 1983), *cert. denied,* 464 U.S. 1038 (1984) (emphasis added). The mere gathering of information from others does not constitute an "investigation", *Groves v. Department of Corrections,* 811 N.W.2d 563, 570 (Mich. App. 2011); nor does the parroting of that information without independent analysis. *See MCI*, 2007 WL 4258190, *7 ("the February 16, 2005 letter . . . does not evidence any independent inquiry of the claim. Instead, the Letter simply restates some of the allegations in the Pelcrete Complaint and Plaintiffs' demand letter . . . . This does not constitute an 'investigation' of the claim").

The EEOC alleges that its determination of nation-wide discrimination "was based on the documents and

information in the investigation files, including the statistical analysis of Sterling's nationwide personnel and payroll data submitted by Charging Parties". EEOC's Second Amended Statement of Facts [378], ¶109. However, "[s]tatements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment". *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008).

The only nationwide data specifically identified by the EEOC is Dr. Lanier's September 4, 2007 statistical analysis [339-32], and, having invoked privilege in response to Sterling's inquiries in discovery, the EEOC cannot now be allowed to argue that this was the analysis referred to in its Letter of Determination, or that it took any steps to verify the reliability of that analysis. Absent such proof, there is no evidence that its investigation was nationwide.[10]

While the EEOC accuses Sterling of "gamesmanship, diverting the Court's attention from the merits of

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[10] Moreover, I question whether the EEOC could rely upon the Lanier analysis even if it had not invoked privilege during discovery. While the parties agreed that the analysis could be placed in the EEOC's investigative file, they also agreed that it would not lose its mediation privilege - meaning that it could not be relied upon in litigation. As the EEOC's attorney admitted during oral argument, "the mediation agreement may impact the EEOC's ability . . . of using the Lanier analyses for the purposes of this litigation . . . .What is not permitted is for us to say, Your Honor, for example, the Lanier analyses . . . are going to be what EEOC relies on in this court to prove pattern or practice of discrimination. That would be problematic under this agreement" ([376], p. 16). Given that admission, why is it not equally problematic for the EEOC to refer to the Lanier analysis as evidence that it conducted a nationwide investigation, which is a condition precedent to this litigation?

EEOC's allegations and Sterling's defenses thereto" (EEOC's Letter Brief [382], p. 2), it ignores the fact that the absence of a nationwide pre-suit investigation *is* a defense to the EEOC's nationwide pattern-or-practice claim. "Just as Congress has charged the EEOC with helping ensure that employers do not single out employees on account of certain characteristics, this Court is charged with ensuring that any actions brought before it by the EEOC are within the parameters of the law as set forth by Congress, regardless of how well-intentioned the EEOC's purpose." *Bloomberg*,*7. "Even the most recalcitrant employer who flouts Title VIPs prohibitions against unlawful employment discrimination . . . is due the process that Title VII mandates." *Id*.,*10.

The EEOC has already had one opportunity to conduct a pre-suit investigation and to provide discovery as to the scope of that investigation. Once is enough. "In the litigation process, when certain moments have passed, district courts are not required to give parties a 'do over'." *Harleysville Lake States Insurance Co. v. Granite Ridge Builders, Inc*., 2009 WL 4843558, *2 (N.D.Ind. 2009). "[W]here, as here, the EEOC completely abdicates its role in the administrative process, the appropriate remedy is to bar the EEOC from seeking relief . . . and dismiss the EEOC's Complaint." *Bloomberg*, *10. Therefore, I recommend that the EEOC's claim of a nationwide pattern or practice of employment discrimination by Sterling be dismissed, with prejudice.

C. Should the EEOC's Statement of Facts be Stricken?

Sterling also moves to strike portions of the EEOC's Statement of Facts [362-1] submitted in opposition to its motion for summary judgment, arguing that it "it

contains statement[s] that rely on an admissible evidence not in the record, as well as legal argument and generalized conclusory statements" [370]. In response to that motion, the EEOC has submitted an Amended- and Second Amended Statement of Facts [373, 378].

Having already addressed several deficiencies of in the EEOC's factual response to Sterling's summary judgment motion, I do not see the need to address the motion to strike in greater detail at this time. Therefore, in light of my recommendation to dismiss the EEOC's claim of nationwide discrimination by Sterling, the motion to strike is denied, without prejudice to renewal in the event that my recommendation is not adopted by District Judge Arcara.

D. Should I Reconsider the Applicability of the Statute of Limitations?

Sterling also asks me to reconsider my Amended Report and Recommendation [60], subsequently adopted by Judge Arcara [67], dealing with the applicable Statute of Limitations on the EEOC's pattern or practice claim. Sterling's Memorandum of Law [337], Point III. Sterling argues that "since this ruling, there has emerged a uniform body of case law holding that the 300-day limitations period set forth in §706 limits claims under §707. Indeed, since this Court's January 2010 ruling, every court to have considered the matter has held that the 300-day charge-filing period applies to cases brought under §707 (*id*., p. 20). While that may be true, none of those decisions are from the Supreme Court or circuit courts of appeal.

"Under the law of the case doctrine, [a] court adheres to its own decision at an earlier stage of the litigation unless there are cogent or compelling reasons not to, such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Sanders v. Sullivan*, 900 F.2d 601, 605 (2d Cir. 1990). In my view, none of those reasons are present here. Therefore, to the extent necessary,[11] recommend that Sterling's request for reconsideration be denied.

CONCLUSION

For these reasons, Sterling's motion to strike [370] is denied, without prejudice, and I recommend that its motion for partial summary judgment [336] be granted in part and denied in part. Unless otherwise ordered by Judge Arcara, any objections to this Report, Recommendation and Order must be filed with the clerk of this court by January 21, 2014 (applying the time frames set forth in Fed. R. Civ. P. ("Rules") 6(a)(1)(C), 6(d), and 72(b)(2)). Any requests for extension of this deadline must be made to Judge Arcara. A party who "fails to object timely . . . waives any right to further judicial review of [this] decision". *Wesolek v. Canadair* Ltd., 838 F. 2d 55, 58 (2d Cir. 1988); *Thomas v.* Arn, 474 U.S. 140, 155 (1985).

Moreover, the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance. *Patterson-Leitch Co. v. Massachusetts*

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[11] Since the only pattern or practice claim alleged by the EEOC is a nationwide pattern or practice claim, this request may be moot if my recommendation to dismiss that claim is adopted.

Municipal Wholesale Electric Co., 840 F. 2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 72(b) and (c) of this Court's Local Rules of Civil Procedure, written objections shall "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection . . . supported by legal authority", and must include "a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these provisions may result in the district judge's refusal to consider the objections.

Dated: January 2, 2014

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge

APPENDIX G

[1] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs

STERLING JEWELERS, INC.,

Defendant.

Examination Before Trial of DAVID GARY GING, held pursuant to the Federal Rules of Civil Procedure, in the law offices of JAECKLE FLEISCHMANN & MUGEL, LLP, 900 The Avant Building, Buffalo, New York, on Wednesday, May 15, 2013 at 9:01 A.M. before BARBARA BUYERS, CSR, RPR, Notary Public.

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[2] APPEARANCES:

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
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Buffalo, New York 14202,

Appearing for the Plaintiff.

SEYFARTH SHAW LLP,
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Appearing for the Defendant.

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Vice President and Associate General Counsel,
Sterling Jewelers.

[3] INDEX TO WITNESSES

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INDEX TO EXHIBITS CONTINUED

* * *

[5] THE REPORTER: Any stipulations?

MR. DUGAN: No, I don't think so.

DAVID GARY GING, 126 Jackson Street, Youngstown, New York, after being duly called and sworn, testified as follows:

EXAMINATION BY MR. DUGAN:

Q. All right. Mr. Ging, my name is Bill Dugan, and I'm one of the attorneys representing Sterling Jewelers in the case the EEOC has brought against Sterling. And today we're here to ask you a few

questions regarding your involvement in the investigation of certain EEOC charges, okay?

A. Okay.

Q. First, would you like to be called Mr. Ging, David, Dave?

A. Dave is fine.

Q. Dave is fine. Okay. Great. You can call me Bill and Christina Janice is also here from Sterling Jewelers.

MS. JANICE: Good morning.

THE WITNESS: Hi.

MS. BILTEKOFF: Can I just interrupt? Do we

* * *

[106] MR. DUGAN:—from 11/14/2006 until 3/3/2008, isn't that correct?

MS. BILTEKOFF: Objection as to form.

THE WITNESS: You'll have to repeat the question.

BY MR. DUGAN:

Q. Sure. Isn't it true that, by looking at charge detail inquiry page 2737, which indicates no investigation by you from 11/14/2006 to 3/3/2008 and you have no memory of conducting any investigation with Miss King, is it fair to say you conducted no investigation regarding her charge from the time it was assigned to you until 3/3/2008 with the note of conciliation failure?

A. No.

Q. Why not?

MS. BILTEKOFF: Objection as to form.

THE WITNESS: Well, you're assuming that based on a limited number of facts. We don't know what I did. I don't remember. I could have and not taken notes; I could have and not entered the information into the database, which is likely, and I could have and not taken my own personal notes.

BY MR. DUGAN:

Q. So you're saying that you may have conducted an [107] investigation, even though you have no memory of it and there's no document in your file, on the computer, your computer, or the charge detail inquiry of any investigation but it's theoretically possible that you did something—some sort of investigation?

A. Yes.

Q. But you have no facts to support that, right?

MS. BILTEKOFF: Objection, form.

THE WITNESS: Well, I'm not the one that's making this –

MS. BILTEKOFF: Whoa.

BY MR. DUGAN:

Q. What were you going to say?

A. What was the question again, please?

Q. You have no facts to support your speculation that you conducted some sort of investigation for Miss King's charge after it was assigned to you?

MS. BILTEKOFF: I renew my objection. You can answer.

THE WITNESS: I didn't say that—I didn't speculate, you speculated and you asked me why that

speculation could be wrong. My only answer was these are the reasons your speculation could be wrong.

* * *

[243] STATE OF NEW YORK
COUNTY OF ERIE

I, Barbara Buyers, a Notary Public in and for the State of New York, do hereby certify:

That the witness whose testimony appears herein before was, before the commencement of his deposition, duly sworn to testify the truth, the whole truth and nothing but the truth; that such testimony was taken pursuant to notice at the time and place herein set forth; that said testimony was taken down in shorthand by me and thereafter under my supervision transcribed into the English language, and I hereby certify the foregoing testimony is a full, true and correct transcription of the shorthand notes so taken.

I further certify that I am neither counsel for nor related to any parties to said action, nor in anywise interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 20th day of May, 2013.

/s/ Barbara Buyers
Barbara Buyers, CSR, RPR
Notary Public, State of New York

* * *

ERRATA SHEET
CHANGES IN TESTIMONY

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

vs.

STERLING JEWELERS, INC.

David Gary Ging

May 15, 2013

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/s/ David Ging — Signature of Witness

6/18/13 — Date