

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO.: 20-CV-325-T-35AEP

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRIAN DAVISON, et al.,

Defendants.

PLAINTIFF'S UNOPPOSED MOTION FOR PARTIAL RELIEF FROM CASE
MANAGEMENT AND SCHEDULING ORDER REGARDING
ATTENDANCE AT MEDIATION

Plaintiff Securities and Exchange Commission moves for an order relieving it of the requirement in the Court's Case Management and Scheduling Order (D.E. 175) to have a representative present at mediation "with full authority to settle." The rules and regulations governing the Commission as well as the Commission's policies require the five-member Commission to review and approve any settlement of litigation the Commission has commenced. Accordingly, we are unable to comply with this Court's Case Management Order absent having the five-member Commission present for mediation.

Because of the unique statutes and rules that define the authority and obligations of the Commission and its staff, to the extent the Case Management Order

requires someone with binding authority from the Commission to be present, the Commission respectfully requests to be relieved of that portion of the Order, as we must in all SEC cases for the reasons discussed below. Instead, the Commission requests the Court allow Senior Trial Counsel and lead attorney for the SEC on this matter, Alise Johnson, and Eric Bustillo, Regional Director of the Miami Regional Office, to attend the mediation. Ms. Johnson and Mr. Bustillo will have full authority to negotiate a settlement that the Miami Regional Office will recommend that the Commission approve.

The Securities and Exchange Commission consists of five Commissioners, appointed by the President with the advice and consent of the Senate. *See* Section 4(a) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78d(a). Only the five Commissioners may authorize commencement of a securities enforcement action such as this one. Exchange Act § 21(d)(1), 15 U.S.C. § 78u(d)(1). Just as only the Commissioners may authorize an enforcement action, only the Commissioners, and not their staff, have authority to settle such an action. *See* 17 C.F. R. § 202.50(f) (“In the course of the Commission’s investigations, civil lawsuits, and administrative proceedings, the staff, with appropriate authorization, may **discuss** with persons involved the disposition of such matters by consent, by settlement, or in some other manner”) (emphasis added).

Because only the five Commissioners acting as a body may approve a settlement, it is impossible for the Commission to have a representative with binding authority to

settle the case present at mediation. Both the Federal Rules of Civil Procedure and the federal courts have recognized the unique position that agencies of the federal government occupy when it comes to having a representative with binding authority present at settlement conferences. For example, the Advisory Committee Notes to the 1993 Amendments to Rule 16 of the Federal Rules of Civil Procedure discuss the status of government agencies attending pretrial conferences at which settlement may be discussed:

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier or someone else would depend on the circumstances. **Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is a recommendation to the body or board with ultimate decision-making responsibility.** The selection of appropriate representative should ordinarily be left to the party and its counsel.

Advisory Committee Notes to 1993 Amendments to Rule 16 of the Federal Rules of Civil Procedure (emphasis added).

Clearly, the Federal Rules contemplate the exact situation the Commission faces here - the inability to have a person with "on-the-spot" settlement authority present. Furthermore, federal courts considering the issue have held that it is not always possible for federal government agencies to have a representative with binding authority

present at settlement conferences. In *In re Stone*, 986 F.2d 898 (5th Cir. 1993), the Fifth Circuit held a standing district court order requiring federal government agencies to have representatives with full settlement authority present at all settlement conferences was an abuse of discretion.

While finding that the district court had the inherent power to manage its own docket and require the government to have a representative with full settlement authority “at least reasonably and promptly accessible” at pre-trial conferences, the Fifth Circuit also stated that “a district court must consider the unique position of the government as a litigant in determining whether to exercise its discretion in favor of issuing such an order.” *Id.* at 903 (footnote omitted).

In *Stone*, the U.S. Attorney’s Office objected to the district court order because, as the Commission does, it had regulations requiring that only certain officers (such as the Assistant Attorney General) could approve a settlement. The Court in *Stone* found that the goal of centralized and consistent decision-making justified the regulations, and “given the insignificant interference with the operation of the courts, the district court abused its discretion in not respecting those regulations.” *Id.* at 904. The Court also found that the district court should have considered “less drastic” alternatives prior to “as a last resort” requiring persons with authority to settle to attend a pre-trial conference. *Id.* at 905.

Because only the five Commissioners may approve any settlement of this case, the Commission is in a different posture than an individual party. It cannot have a person with full settlement authority present. That is not to say that the Commission cannot or will not attend mediation and attempt to negotiate in good faith. It instead requests to send the lead counsel most familiar with this case, who will have full authority to negotiate a settlement that the Miami Regional Office will then recommend to the Commission approval.

For all of the aforementioned reasons, the Commission respectfully requests that it be permitted to attend mediation through the trial counsel assigned to this case.

Rule 3.01(g) Certification

Pursuant to Middle District Local Rule 3.01(g), undersigned counsel conferred with counsel for Defendant Rybicki, who has no objection to the proposed relief.

June 08, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 8, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send a notice of such filing to all counsel of record.