EXHIBIT A

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MATTHEW FOGG, et al., **Class Agents,** **v.** **MERRICK GARLAND, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE,** **Agency.**	**EEOC NO. 570-2016-00501X** **AGENCY CASE NO. M94-6376**

AGENCY'S SURREPLY IN RESPONSE TO JURISDICTIONAL ISSUES

The United States Marshals Service (USMS or Agency) hereby files the following surreply regarding the Equal Employment Opportunity Commission's (EEOC's or Commission's) jurisdiction over this matter. As an initial matter, the Administrative Judge's Order dated March 22, 2024, instructed the Parties to submit briefing regarding the "jurisdictional issues" arising from Class Agent Fogg's federal court filing. Once an order has been issued regarding the scope of the EEOC's jurisdiction over this matter, the Agency will provide substantive responses, as necessary and appropriate, to the non-jurisdictional arguments raised by Class Agents.[1]

For the reasons set forth below, and in the Agency's Response Brief, the Commission no longer has jurisdiction over this matter.

I. There was No Final Agency Action.

Class Agents appear to agree that the Agency did not take "final action" pursuant to 29 C.F.R. § 1614.204(j)(1). Nevertheless, they contend that the Agency "engaged in a final agency action by settling this case," thereby preventing Class Agent Fogg from filing a civil action under

[1] *See* Agency's Brief in Response to the Equal Employment Opportunity Commission's Order Regarding Jurisdiction, at fn.1 (Apr. 9, 2024) (hereinafter "Agency Response Brief").

29 C.F.R. § 1614.407.[2] Neither the EEOC's regulations nor its case law support this interpretation of agency final action.

Notably, Class Agents do not acknowledge that the proposed settlement agreement remains unsigned by the Parties, despite the EEOC's regulations requiring a resolution to be reduced to writing and "signed by the agent and the agency." 29 C.F.R. § 1614.204(g)(3) ("If the complaint is resolved, the terms of the resolution shall be reduced to writing and signed by the agent and the agency."). Further, Class Agents make no attempt to explain how their interpretation accords with the clear definitions of agency final action set forth in MD-110 and 29 C.F.R. § 1614.204(j)(1).[3] Neither MD-110 nor EEOC's regulations provide for a category of final action that is based on an agency's *intent* to settle, or whether the parties are engaged in the settlement process. Indeed, while Class Agents continue to cite 29 C.F.R. § 1614.204(g)(4) as the principal authority for their arguments, they conceded in their initial motion that the words "final action" do not appear anywhere in this regulation.[4]

Class Agents further contend that when class claims are settled, "there is no 'decision of an administrative judge' for the agency to adopt."[5] To the contrary, agencies that have resolved class claims through settlement have, in fact, taken final action following an administrative judge's final approval of the settlement agreement. *See, e.g.*, *Complainant v. U.S. Postal Service*, EEOC DOC 0520140526, 2014 WL 6085738, at *1 (Nov. 6, 2014) (agency issued final action implementing the administrative judge's final approval of the settlement agreement); *Stella K. v. U.S. Postal Service*, EEOC DOC 2020001920, 2020 WL 5657265, at *1 (Sept. 2, 2020) (same).

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[2] *See* Class Agents' Reply in Support of Motion to Remove Matthew Fogg as Class Agent, at 3 (Apr. 16, 2024) (hereinafter "Class Agents' Reply Brief").
[3] *See* Agency Response Brief, at 3.
[4] *See* Class Agents' Motion to Remove Matthew Fogg as a Class Agent, at 8 (Mar. 22, 2024) (hereinafter "Class Agents' Motion to Remove").
[5] *See* Class Agents' Reply Brief, at 3.

Moreover, contrary to Class Agents' assertion, the Agency has never considered settlement of this matter "complete."[6] Indeed, the EEOC's Administrative Judges' Handbook, Chapter 10, § V, explains that "an agreement to settle a class complaint is not effective unless it is approved by the Administrative Judge after a fairness determination pursuant to the provisions of 29 C.F.R. § 1614.204(g)(4)."[7]

Because the Agency has not taken final action on Class Agent Fogg's complaint, the regulations permitted him to file his civil complaint in district court.

II. The Commission Should Exercise Judicial Restraint During the Pendency of District Court Proceedings.

The Agency disputes Class Agents' characterization that it is seeking to "indefinitely delay" this case. The Agency was fully prepared to move forward with the Fairness Hearing on March 20, 2024, and is disappointed by the current procedural posture of this matter. As stated in the Agency's Response Brief,[8] the Agency advocates that the Commission exercise judicial restraint to take no further action given the pendency of the federal court proceedings in the interests of judicial economy and irreparable harm that could be caused by litigating in two forums. *See, e.g., Nken v. Holder*, 556 U.S. 418, 433 (2009). The Agency's sole interest is ensuring that the novel legal issues resulting from Mr. Fogg's actions are given the necessary legal consideration with the ultimate goal of "getting it right."

[6] *See* Class Agents' Reply Brief, at 3.
[7] Assuming, *arguendo*, that the Commission retains jurisdiction over this matter, Class Agent Fogg's filing will have a significant impact on the litigation and any settlement thereof, including the precise scope and timing of the claims as well as which claims, if any, remain before the Commission and which are appropriately before the federal district court. These issues would need to be carefully evaluated and resolved before the Parties could proceed to a final fairness hearing.
[8] *See* Agency Response Brief at p. 6.

III. The Cases Cited By Class Agents Do Not Support Continued EEOC Jurisdiction.

Class Agents rely on *Heredia v. Small*, EEOC No. 01A22353, 2003 WL 21372755 (EEOC June 5, 2003), and *Joana C. v. Dep't of the Army*, EEOC No. 0120103378, 2017 WL 1174348, (EEOC Mar. 14, 2017), for the proposition that jurisdiction would remain with the EEOC subsequent to the filing by a class agent in federal district court. Their reliance is misplaced because both cases are distinguishable.

In *Heredia*, the complainant had filed a class charge before the EEOC. Prior to a decision certifying the class, the complainant filed suit in federal district court relating to her individual complaint but did not file suit on behalf of a purported class. *See Heredia*, 2003 WL 21372755, *1; *see also Heredia v. Heyman, et al.*, Case No. 98-cv-05351(RLE) (S.D.N.Y. Jul. 28, 1998); *Heredia v. Heyman, et al.,* Case No. 99-cv-08580(DAB) (S.D.N.Y. Aug. 3, 1999). Here, the class complaint filed by Fogg before the EEOC was certified prior to Fogg filing his complaint in federal district court, and he purported to file on behalf of the class in federal district court. Thus, unlike Fogg, *Heredia* did not involve a class agent filing a purported class complaint in district court. Notably, Class Agents' reply does not grapple with *Ted L., Class Agent v. Department of Veterans Affairs*, EEOC DOC 0120182368, 2019 WL 1762014, a case which more similarly mirrors the circumstances in the instant case. In *Ted L.*, the Commission concluded that the administrative judge properly dismissed three administrative class complaints pursuant to 29 C.F.R. § 1614.107(a)(3) where the class agent filed a complaint in federal district court purportedly *on behalf of the class*.

The circumstances in *Joana C.* were likewise dissimilar to the instant case for different reasons. *Joana C.* involved a complainant who filed a class charge before the EEOC. After the Administrative Judge denied certification of the class, and while it was on appeal before the Office of Federal Operations, the complainant withdrew as the named class agent because she resolved

her claims with the Agency. 2017 WL 1174348, at *1. Notably, there is no mention in the opinion of any federal district court filing and the reason for withdrawing as class agent was not based on taking her class claims to federal district court. Thus, unlike Fogg, *Joana C.* did not involve a certified class or a purported class complaint in federal district court.

IV. The Agency's Position Does Not Violate Basic Due Process and Equitable Principles.

Class Agents' claim that the Agency's interpretation of the EEOC regulations and interpretative law violates basic due process and equitable principles is unfounded. The Agency's position regarding jurisdiction is grounded in a plain reading of the EEOC's regulations and well-established judicial norms. Adherence to those norms will ensure that due process and equitable principles are protected.

It has long been held that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The federal courts indisputably provide Class Agents ample "procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Class Agents can be heard on the very issues they seek to litigate before the EEOC. The Supreme Court recognized the "duty" of federal courts to examine potential conflicts amongst class members and protect the rights of parties. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).[9]

A federal court may not be Class Counsel's preferred forum, but it provides Class Agents the "right to pursue th[eir] case" consistent with due process and constitutional principles.[10] Class

[9] To be clear, the Agency has taken no position regarding Fogg's adequacy to represent and "bind" the Class Agents in its briefing. The Agency's position is that an administrative dismissal is warranted by operation of law, i.e., Fogg's filing a civil action under 29 C.F.R. § 1614.407. At the time of his federal filing, Fogg had not been removed as a class representative and no arguments regarding Fogg's purported inadequacy to represent and bind the Class had been made by Class Agents.

[10] *See* Class Agents' Reply Brief, at 23.

Agents can advance the merits of their arguments, including Mr. Fogg's inability to represent the class, in the United States District Court for the District of Columbia.[11] They can also avail themselves of a plethora of procedural vehicles under the Federal Rules of Civil Procedure to protect the interests of the Class as a whole.

The Agency's position regarding jurisdiction also ensures that equitable principles are protected. The putative Class Complaint must be properly adjudicated in one forum, with deference to the federal courts, to prevent simultaneous pursuits of both administrative and judicial remedies on indisputably overlapping matters, wasting critical resources, and creating the potential for inconsistent or conflicting decisions concerning novel legal issues in class action jurisprudence. *See e.g. Ted L., Class Agent v. Department of Veterans Affairs*, EEOC DOC 0120182368, 2019 WL 1762014, at *3 (Apr. 11, 2019). Contrary to Class Counsel's position, these factors weigh heavily in favor of the EEOC's exercise of judicial restraint.

Dated: April 26, 2024

Respectfully submitted,

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[11] Presumably, disqualification arguments can be advanced anew in federal district court. Here, as previously noted, disqualification arguments were made only after Mr. Fogg filed in federal district court.

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that a true and correct copy of the Agency's Surreply in Response to Jurisdictional Issues was served via electronic mail on this 26th day of April 2024 upon the following:

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