

in the conference, which is defined as the ability to “exercise discretion to settle the case” without consulting any other person. (*See Id.* at 1-2 and n.1) The order further provides that the failure to comply with its provisions may result in sanctions. (*Id.* at 5)

2. These provisions of the Magistrate’s order would impose an unwarranted hardship upon the SEC during its participation in the Settlement Conference.

3. The SEC consists of five Commissioners, appointed by the President with the advice and consent of the Senate. *See* 15 U.S.C. § 78d(a). Only the Commissioners themselves may authorize the commencement of a securities enforcement action. *See* 15 U.S.C. § 78u(d)(1). Similarly, only the Commissioners have authority to settle such an action.¹ *See* 17 C.F.R. § 202.5(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).

4. Accordingly, the SEC normally requires its staff to negotiate a proposed settlement, prepare a detailed written memorandum for review and comment by the various Offices and Divisions of the SEC, and then present the proposal for consideration by the Commissioners at one of the SEC’s regular closed meetings – a process that normally requires at least six weeks.²

¹ Although the SEC is permitted to delegate its functions to its staff, the entire Commission always retains the right to review (and reject) any such action. *See* 15 U.S.C. § 78d-1(b).

² These limitations were summarized in the SEC’s September 4, 2015 settlement demand letter to all parties in this case, with a copy provided to the Magistrate Judge. In addition, during the parties’ December 17, 2015 telephonic status conference with the Magistrate Judge, counsel for the SEC also advised the other participants in the call of the SEC’s intent to file a motion regarding the SEC’s settlement conference representation, and there were no objections.

5. Because of their daily involvement in other SEC business, it simply is not feasible for the Commissioners to attend dozens of settlement conferences each year in cases pending throughout the United States. Under existing law, the SEC is not permitted to delegate “on-the-spot” settlement authority to a member of its staff. Any such settlement proposal still could be reviewed (and rejected) by the entire Commission. Therefore, requiring any SEC official to participate in the upcoming settlement conference with “final” settlement authority would impose a substantial legal hardship.

6. Indeed, the Federal Rules of Civil Procedure acknowledge the unique position occupied by federal agencies during settlement discussions. The Advisory Committee Notes to Rule 16 of the Federal Rules of Civil Procedure caution that:

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 the appropriate representative should ordinarily be left to the party and its counsel.

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

7. Although a federal district court may have the *power* to require that a party representative with full settlement authority participate in settlement conferences, a 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.” *In re Stone*, 986 F.2d 898, 903 (5th Cir. 1993).

In *Stone*, the Fifth Circuit held that a standing district court order requiring federal government agencies to have representatives with full settlement authority present at all settlement conferences constituted an abuse of discretion.³ The Court of Appeals also held that the District Judge 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.

8. The SEC respectfully requests that this Court permit David Glockner, the Regional Director from the SEC’s Chicago Regional Office, to represent the SEC at the settlement conference. Mr. Glockner is the SEC’s highest ranking officer within the Chicago Regional Office, and is ultimately responsible for the litigation of this matter. Mr. Glockner also is familiar with the facts and issues in this case, and the SEC’s litigation and settlement positions. Although Mr. Glocker does not, and will not, have “final settlement authority” over this case, his consent would be required before any settlement proposal negotiated by the parties could be submitted to the Commission for approval. If the parties agree on the terms of a proposed settlement at that conference, then Mr. Glockner and the SEC’s attorneys will promptly submit a formal recommendation to the SEC’s Commissioners for their consideration and approval.

9. Counsel for the SEC recently contacted counsel for each of the Defendants in this case regarding the reasons for filing this motion, and proposed that Mr. Glockner serve as the SEC’s representative. By December 29th each of the parties had agreed that Mr. Glockner should be permitted to represent the SEC during the upcoming settlement conference.

³ Specifically, the Court of Appeals determined that Department of Justice regulations granted the power to approve settlements only to certain senior officials; those regulations were justified by the agency’s interest in centralized and consistent decision-making; the degree to which those regulations interfered with the operations of the courts was insignificant; and the district court abused its discretion by failing to respect those regulations. *See* 986 F.2d at 904.

WHEREFORE, Plaintiff Securities and Exchange Commission respectfully requests that this Court enter an order allowing David Glockner to represent the SEC at the parties' upcoming settlement conference, without "final settlement authority."

Dated: December 30, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2015, I served copies of *Plaintiff's Unopposed Motion to Modify Settlement Conference Procedures* on all counsel of record through the Court's ECF filing system.

/s/Robert M. Moye
Robert M. Moye