

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

CASE NO.: 8:20-cv-00394-MSS-SPF

SECURITIES AND EXCHANGE COMMISSION,)
)
Plaintiff,)
)
v.)
)
KINETIC INVESTMENT GROUP, LLC and)
MICHAEL SCOTT WILLIAMS,)
)
Defendants, and)
)
KINETIC FUNDS I, LLC,)
KCL SERVICES, LLC d/b/a LENDACY,)
SCIPIO, LLC,)
LF42, LLC,)
EL MORRO FINANCIAL GROUP, LLC, and)
KIH, INC. f/k/a KINETIC INTERNATIONAL, LLC,)
)
Relief Defendants.)
_____)

**PLAINTIFF’S UNOPPOSED MOTION FOR PARTIAL RELIEF FROM LOCAL
RULE AND CASE MANAGEMENT REPORT REGARDING
ATTENDANCE AT MEDIATION**

Plaintiff Securities and Exchange Commission moves the Court for an order 1) relieving it of the requirement of Middle District of Florida Local Rule and the Court’s Case Management Report (DE 88 at 11) to have a representative present at mediation “with full authority” to negotiate a settlement; 2) permitting the parties to conduct mediation via video instead of in person in light of the COVID pandemic; and 3) excusing the Receiver from

participation in mediation because all issues of liability have been resolved as to the Receivership Defendants and Relief Defendants (DE 86, Consent and proposed Judgment¹).

1. Relieving the five-member Commission from attendance at mediation

Mediation of this matter is scheduled for August 28, 2020. 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 Rule absent having the five-member Commission present for mediation. Consequently, the Commission requests the Court to allow Andrew O. Schiff, Regional Trial Counsel of the Miami Regional Office, to attend mediation along with undersigned counsel, all of whom will have full authority to negotiate a settlement that the Miami Regional Office will recommend that the Commission approve.

Local Rule 9.05 (c) requires that "unless otherwise excused by the presiding judge in writing, all parties . . . shall be present at the mediation conference, with full authority to negotiate a settlement." Because of the unique statutes and rules that define the authority and obligations of the Commission and its staff, to the extent the Local Rule requires someone with binding authority from the Commission to be present, the Commission respectfully requests to be relieved of that portion of the Local Rule, as we must in all Commission cases for the reasons discussed below.

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

¹ The Commission's motion for entry of the judgment remains pending before this Court. *See* DE 86.

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 the 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).

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. The fact that the Commission is sending a senior staff member from the Miami Regional Office – the office responsible for this litigation – shows the Commission takes this matter seriously.

2. Attendance via video

The mediator selected in this matter has indicated that he has the capability of conducting mediation via video using the Zoom platform. The Commission staff requests that the Court permit the parties to conduct mediation via video in light of the COVID pandemic that makes travel and in person meetings potentially difficult and potentially hazardous.

3. Relieving Receiver from attendance

On May 28, 2020, the Receiver entered into a bifurcated settlement with the Commission that resolves issues of liability against the Receivership Defendant and Relief Defendants. DE 86. The Receiver and the Commission are confident that any remaining monetary issues will likewise be resolved and do not require the assistance of a mediator. Thus, in an effort to streamline the

issues for mediation with Defendant Williams and avoid unnecessary costs and fees for the Receiver's attendance at mediation, we request that the Court excuse the Receiver's participation at mediation.

For all of the aforementioned reasons, the Commission respectfully requests that 1) it be permitted to attend mediation through the trial counsel assigned to this case and the Regional Trial Counsel, who will have full authority to negotiate a settlement to recommend to the Commission for approval; 2) mediation is conducted via video; and 3) the Receiver is excused from participation in mediation.

Rule 3.01(g) Certification

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

August 13, 2020

Respectfully submitted,

By: /s/Christine Nestor & Stephanie N. Moot

Christine Nestor
Senior Trial Counsel
Fla. Bar No. 597211
Direct Dial: (305) 982-6367
E-mail: nestorc@sec.gov

Stephanie N. Moot
Trial Counsel
Fla. Bar No. 30377
Direct Dial: (305) 982-6313
E-mail: moots@sec.gov

Attorneys for Plaintiff
Securities and Exchange Commission
801 Brickell Avenue, Suite 1950
Miami, FL 33131
Facsimile: (305) 536-4154

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on August 13, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

s/Stephanie N. Moot
Stephanie N. Moot

Timonthy W. Schulz, Esq.
Timothy W. Schulz, P.A.
224 Datura Street, Suite 815
West Palm Beach, FL 33401
Telephone: 561-659-1167
Email: schulzt@twslegal.com
e-service@twslegal.com
Counsel for Defendant Williams

Jon A. Jacobson, Esq.
Jacobson Law P.A.
224 Datura Street, Suite 815
West Palm Beach, FL 33401
Telephone: 561-880-8900
Email: jjacobson@jlpa.com
e-service@jlpa.com
Counsel for Defendant Williams

Jordan D. Maglich, Esq.
Quarles & Brady LLP
101 E. Kennedy Blvd., Suite 3400
Tampa, FL 33602
Telephone: 813-387-0300
Email: Jordan.maglich@quarles.com
Counsel for Receiver, Mark A. Kornfeld

Peter J. Grilli
Grilli Mediation
3001 West Azeele Street
Tampa, FL 33609
Email: candace@grillimmediation.com

Mediator
VIA EMAIL