IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Plaintiff, vs. Orkin, LLC, et al., Defendants.	No. CV-10-1094-PHX-ROS **PROPOSED ORDER**

The parties have filed cross-motions for summary judgment. For the following reasons, the motion filed by Defendants Orkin LLC and Orkin, Inc. ("Orkin") will be granted and the motion filed by the Equal Employment Opportunity Commission will be denied.

BACKGROUND

A. Orkin's Structure And Hiring Process

Orkin provides pest control services throughout the United States. In 2005 or 2006, Orkin decided to implement a door-to-door summer sales program in certain locations. Orkin employee Brad Harris was named program supervisor. In December 2006 or January 2007, Harris met with Brandon McNeil to discuss the possibility of McNeil becoming the area manager for the door-to-door program in Arizona. The employment relationship between Orkin and McNeil in early 2007 is confusing. McNeil was not employed by Orkin at that time. To be hired, McNeil would have "to recruit a group of summer salespeople." (Doc. 143 at 7). Thus, McNeil was responsible for recruiting salespeople for Orkin but McNeil would not be formally hired until he had already recruited a sufficient number of salespeople.

McNeil did eventually recruit a sufficient number of people and was hired by Orkin. In April 2007, Orkin made a payment to McNeil for "retroactive pay back to January 2, 2007." (Doc. 144-2 at 54).

B. McNeil's Recruitment Efforts

Orkin did not give McNeil explicit guidance on how he should recruit salespeople. According to his deposition, McNeil remembers Orkin advising him that younger salespeople had enjoyed more success in the past. McNeil also remembers Orkin suggesting he post ads on Craigslist. In January 2007, McNeil drafted and posted job listings on Craigslist. Those postings were titled "$6000 signing bonus for motivated summer sales rep here in Phoenix!!!!" The body of the posts stated:

> You will be working for Orkin Pest Control, with the potential to make thousands this summer. . . .
>
> We have a option for $6000 signing bonus for experienced sales people. Many of our top salespeople made $40k plus in 4 months last year. . . . If you think you might be potentially interested or just would like to get some more info on this job, please just call and I will be more than willing to explain details
> call Brandon
> 480-577-3636
>
> Great for College students and RM's[1] looking to work hard in the summer and go to school during the other months.
> We are seeking an experienced, energetic, and capable recruiter to assist in hiring returned LDS missionaries for seasonal employment and be familiar with door to door marketing.

Orkin did not review the ads before or after they were posted.

C. Contact With Thomas Kokezas

In late January or early February 2007, Thomas Kokezas saw the postings on Craigslist. On February 2, 2007, Kokezas called the number listed in the ad and spoke with McNeil. During that conversation, McNeil asked Kokezas about his sales experience and also asked McNeil his age. Kokezas said he was 51 years old. Kokezas complained to McNeil that the Craigslist ad was discriminatory based on religion because Kokezas was not

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[1] The terms "RM" and "returned LDS missionaries," refers to individuals who served proselyting missions for the Mormon Church.

a member of the Mormon Church. The conversation ended with McNeil stating he would call Kokezas back.

After not hearing from McNeil for a few days, Kokezas called him again. During this call Kokezas asked McNeil if he had not called him back because of Kokezas' age. McNeil informed Kokezas that he asked all individuals responding to the ad their age. After this second conversation, Kokezas called Orkin's home office to complain about McNeil's allegedly discriminatory conduct. Kokezas spoke with an employee in Human Resources. That employee reported Kokezas' call to the Assistant Vice President of Human Resources. After discussing the call with an in-house attorney, the Assistant Vice President asked Steve Brietweiser, Orkin's Southwest Region Manager, to contact Kokezas. Brietweiser called Kokezas to discuss his complaints.

During the call with Brietweiser, Kokezas complained about age and religious discrimination. Brietweiser "assured Kokezas that Orkin's policy was not to consider age as a factor" when making hiring decisions. (Doc. 132 at 6). Brietweiser and Kokezas then discussed Kokezas' prior work experience and desired work hours. Based on that conversation, Brietweiser suggested Kokezas apply for a commercial sales position. Brietweiser believed they were in agreement that such a position would be the "best fit" for Kokezas. Therefore, Brietweiser gave Kokezas the phone number for Steve Kirkendall, Orkin's Commercial District Sales Manager. Brietweiser later called Kirkendall to tell him Kokezas would be calling. Kokezas made repeated attempts to reach Kirkendall but he was unable to do so.

D. EEOC Proceedings

Based on his interactions with McNeil and Brietweiser, Kokezas filed a Charge of Discrimination with the EEOC. The EEOC issued its Letter of Determination in August 2009. That letter concluded there was reasonable cause to believe Orkin had discriminated against Kokezas. Orkin requested reconsideration of that determination. When denying reconsideration, the EEOC informed Orkin that it would be "contacted shortly by Ms. Julie Hammer, Investigator, to begin conciliation discussions." Shortly thereafter, Ms. Hammer

sent Orkin an initial letter regarding conciliation. That letter stated the EEOC would be seeking "full back pay" from "April 16, 2007 . . . until this matter is resolved." Ms. Hammer informed Orkin the EEOC planned to seek compensatory damages but the amount had not yet been determined. Orkin was invited to submit an offer for consideration. Ms. Hammer also laid out a variety of other conditions, such as Orkin posting a notice and providing a personal letter of apology to Kokezas.

On September 11, 2009, Orkin wrote to Ms. Hammer, asking her to calculate the amount of back pay the EEOC was seeking. Orkin pointed out that the position at issue was seasonal, meaning the reference to "full back pay . . . until this matter is resolved" was confusing. Orkin also stated it would await a demand regarding compensatory damages. Orkin hoped that the demand would be a "reasonable one and that an explanation accompanies the amount demanded, which should reflect the seasonal nature of the position at issue." Orkin agreed to the other conditions sought by Ms. Hammer.

Ms. Hammer responded and requested additional information regarding the pay earned by other summer sales representatives in the Phoenix area during 2007. On the issue of compensatory damages, Ms. Hammer stated:

> The Commission will be seeking $250,000 in compensatory damages for Mr. Kokezas. The Charging Party felt depressed and experienced weight loss, shock, frustration, anxiety, loss of enjoyment of life, difficulty trusting others, and other pecuniary and non-pecuniary losses.

(Doc. 132-3 at 116). Orkin responded by letter dated September 17, 2009. In doing so, Orkin provided the information requested regarding back pay but rejected the $250,000 demand for compensatory damages. (Doc. 132-3 at 120). Orkin asked Ms. Hammer to provide information "as to whether [Kokezas] sought any medical treatment in connection with his alleged emotional damages, along with the type of medical care provider (for example, a social worker or psychologist), the frequency of any treatment or medical visits, and any other specifics that would aid [Orkin] in making a counter-offer . . . ." Orkin noted that $250,000 was "an extremely high amount of compensatory damages" and the amount seemed "patently unreasonable and unrealistic because, among other reasons, the position

at issue [was] merely a seasonal one." After receiving Orkin's response, Ms. Hammer calculated the appropriate amount of back pay. (Doc. 132-3 at 123). Ms. Hammer stated Kokezas had been unable to obtain another job during the relevant four month period in 2007. Thus, she calculated back pay in the amount of $7,140.98 "based on the average weekly salary of the summer sales representatives in 2007 over a four-month period." Regarding compensatory damages, Ms. Hammer reiterated that the Commission was seeking $250,000. This amount was justified because Kokezas:

> felt depressed and experienced weight loss, shock, frustration, anxiety, loss of enjoyment of life, difficulty trusting others, and other pecuniary and non-pecuniary losses. [Kokezas] has also seen a psychiatrist to help cope with his losses.

(Doc. 132-3 at 123). Orkin wrote back to Ms. Hammer and stated it was willing to pay the amount of back pay proposed by the EEOC. (Doc. 132-3 at 127). The amount of compensatory damages, however, remained "unreasonable." Orkin was willing to pay $2,500 in compensatory damages unless the EEOC allowed Orkin to review Kokezas' medical records or have a "direct discussion" with Kokezas "concerning his alleged mental anguish." Ms. Hammer responded by lowering the amount of compensatory damages requested to $225,000. (Doc. 132-3 at 131). This amount was justified because Kokezas:

> felt depressed and experienced weight loss, shock, frustration, anxiety, loss of enjoyment of life, difficulty trusting others, and other pecuniary and non-pecuniary losses. [Kokezas] has also seen a psychiatrist to help cope with his losses. The Commission declines to provide copies of Mr. Kokezas' medical records at this time.

As a result of this letter, Orkin raised its offer on compensatory damages to $3,000 but the EEOC rejected that offer. After that rejection the conciliation process was deemed complete and the EEOC filed suit. (Doc. 132-3 at 135).

The complaint alleged seven claims for relief but the EEOC has now abandoned two claims related to document retention. The remaining five claims are: violating the Age Discrimination in Employment Act ("ADEA") by failing to hire Kokezas; violating the ADEA by printing a "discriminatory advertisement"; violating Title VII by failing to hire Kokezas due to his religious affiliation; violating Title VII by printing a religiously

"discriminatory advertisement"; and retaliating against Kokezas by refusing to hire him due to his reporting discriminatory conduct. The complaint originally sought relief on behalf of a class of individuals. The EEOC, however, was not able to identify any other class members, leaving Kokezas the sole interested party.

E. Kokezas' Deposition Testimony

During his deposition, Kokezas was asked to explain how he had been damaged by Orkin. Kokezas stated he "felt rejected, felt . . . upset and . . . kind of confused. Felt let down [and] humiliated." (Doc. 132-2 at 78). He was then asked a series of specific questions. First, he was asked whether his weight had "increased by more than 10 pounds or decreased by more than 10 pounds at any time since the end of 2006." Kokezas stated: "Not that I recall." (Doc. 132-2 at 78). Second, he was asked whether he was still "feeling real bad" based on his interactions with Orkin after April 2007. Kokezas stated he was "[n]ot really sure," but the interactions were "still bothering" him as of the date of his deposition. Kokezas was then asked whether he had been depressed since the start of 2007. (Doc. 132-2 at 78). He stated that he had been depressed, but he couldn't state when the depression began. According to Kokezas, he "may have been feeling depressed since [he] was 10 years old." (Doc. 132-2 at 79). When asked specifically whether the phone conversation with McNeil caused him to become depressed, Kokezas stated "probably not." When pressed for a more definite answer, Kokezas reiterated he was "probably not" contending McNeil caused his depression. (Doc. 132-2 at 79).

Next, Kokezas was asked whether there had been "any change in how [he] trusted people or didn't trust people generally after [he] spoke with Brandon McNeil and then had conversations with people at Orkin." Kokezas responded: "I don't know. You know, it's probably an individual basis, how you trust people." Kokezas clarified that it had "always" been this way for him. (Doc. 132-2 at 79). Kokezas was then asked whether he "saw any doctor as a result of any medical problem that the incidents with Orkin caused." (Doc. 132-2 at 79). Kokezas responded "I don't think so." Defense counsel sought clarification whether Kokezas saw "any mental health practitioner, a psychiatrist, a psychologist, a counselor,

based on what happened between you and Brandon McNeil and then Orkin." (Doc. 132-2 at 79). Kokezas responded "I don't – I don't believe so." Finally, Kokezas admitted that he might have told individuals at the EEOC that he had experienced "shock" and that he might have said he "had had a loss of enjoyment of life." (Doc. 132-2 at 80). Kokezas was unable to explain the shock or loss of enjoyment of life in any meaningful way.[2]

F. Explanation for EEOC's Conciliation Activities

The inconsistences between the statements made by the EEOC investigator during conciliation and Kokezas during his deposition prompted the Court to call for additional briefing by the EEOC. (Doc. 161). In its additional briefing, the EEOC states "Kokezas told the EEOC Investigator that he was seeing a psychiatrist to help him cope with his losses." (Doc. 166 at 1). But the EEOC then goes on to explain that Kokezas' statements during his deposition are evidence of his position "that although he was seeing a psychiatrist at various times in his life he was probably not doing so because of his experience with Orkin." (Doc. 166 at 1). The EEOC apparently does not realize this statement contradicts the position it took during conciliation; Kokezas either saw a psychiatrist due to his interactions with Orkin or he did not. It is unclear when the EEOC first learned that Kokezas was "probably not" seeing a psychiatrist due to his experience with Orkin.

The EEOC's additional briefing also states "medical records of Kokezas' visit with a psychiatrist existed at the time of conciliation but Kokezas was unwilling to provide the records to the EEOC." (Doc. 166 at 1). In other words, the EEOC did not have the benefit of reviewing Kokezas' medical records prior to representing that his psychiatric injuries were severe. Moreover, the EEOC has not explained the basis for its representations during conciliation that Orkin caused Kokezas to lose weight and to lose his ability to trust people.

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[2] The EEOC submitted a declaration by Kokezas with their summary judgment filings. That declaration averred Kokezas "felt shocked and frustrated" as well as "angry" due to his interactions with Orkin. The declaration does not mention depression, weight loss, or seeing a psychiatrist. (Doc. 144-1 at 6).

ANALYSIS

The parties have filed cross-motions for summary judgment.[3] In its motion, Orkin presents a variety of arguments, including the argument that the EEOC failed to engage in good faith conciliation efforts prior to filing suit. The Court agrees the EEOC's behavior during conciliation fell well short of its statutory obligation. Because the appropriate consequence of this failure is dismissal, the Court need not reach Orkin's other arguments or the arguments presented by the EEOC.

I. Standard For Summary Judgment

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When determining whether a genuine dispute exists, the evidence of the non-moving party is to believed, and all reasonable inferences drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal citations omitted).

II. The EEOC's Conciliation Obligation

Prior to 1972, the EEOC's role in employment discrimination charges was limited to investigating such charges and engaging in "informal methods of conciliation and

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[3] The EEOC also filed a very strange motion to strike certain evidence submitted by Orkin in its summary judgment briefing. (Doc. 141). Orkin filed an opposition to that motion, pointing out it was improper under Local Rule 7.2. Orkin seeks the attorneys' fees it incurred in opposing the motion. In reply, the EEOC argued its mistake was one of "form, not substance." The EEOC also argued Orkin should have told the EEOC about Local Rule 7.2 before the EEOC filed the motion. This latter position is, needless to say, bizarre; Orkin is not responsible for making sure the EEOC does not violate the Local Rules. But the Court declines to award Orkin its attorneys' fees because the EEOC's actions appear to be simply careless rather than malicious.

persuasion." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 358 (1977). At that time, only the person aggrieved by the allegedly unlawful practice could file suit if conciliation failed. *Id.* This changed with passage of the Equal Employment Opportunity Act of 1972. In that Act, "Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Id.* In authorizing the EEOC to file suit, Congress imposed a specific requirement that, prior to filing suit, the EEOC must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b).

Courts have long recognized this statutory obligation of conciliation as evidence of a Congressional preference for the EEOC to seek "voluntary compliance" rather than forced compliance through litigation. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2674 (2009); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982) ("[V]oluntary agreements are the preferred means of achieving the objectives of Title VII."). Despite this preference, the Ninth Circuit has not provided guidance on how district courts should determine whether the EEOC has satisfied its conciliation obligation. It is well-established that the EEOC's informal efforts must be taken in "good faith." *See, e.g.*, *EEOC v. Zia Co.*, 582 F.2d 527, (10th Cir. 1978) ("The law declares that the Commission 'shall' seek conciliation; it is inconceivable to us that good faith efforts are not required."). But "[t]here is a split among the [circuit courts] regarding the proper standard for reviewing whether the EEOC has" met that standard. *EEOC v. Timeless Investments, Inc.*, 734 F. Supp. 2d 1035, 1052 (E.D. Cal. 2010).

"The Second, Fifth, and Eleventh Circuits require courts to evaluate the reasonableness and responsiveness of the EEOC's conduct under all the circumstances. Under this standard, the EEOC must at least: (1) outline to the employer the reasonable cause for its belief that a violation of the law has occurred; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer." *EEOC v. Alia Corp.*, 2012 WL 393510, at *9 (E.D. Cal. Feb. 6, 2012).

Alternatively, the Sixth and Tenth Circuits have adopted a standard which forbids court inquiry into any substantive aspect of the conciliation. "Under this standard, a court should only determine whether the EEOC made an *attempt* at conciliation. The form and the substance of those conciliations is within the discretion of the EEOC . . . and is beyond judicial review." *Id. See also EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984). In other words, the more-deferential standard is not really that the EEOC act in "good faith," but merely that the EEOC must act. Under the more-deferential standard, the EEOC could make any demand it wished during conciliation, including a demand not possible in litigation (*i.e.*, damages well above the statutory cap), and a reviewing court would be compelled to conclude the statutory obligation had been met.

District courts in the Ninth Circuit disagree on which approach is preferable.[4] *EEOC v. High Speed Enterprise, Inc.*, 2010 WL 8367452 (D. Ariz. Sept. 30, 2010). Courts have not explained, and this Court cannot see, how complete deference to the EEOC's conciliations efforts can be reconciled with a requirement that conciliation be in "good faith." If good faith means anything, it must mean there are limits to the EEOC's actions. This Court recently adopted the less-deferential approach and that approach remains the appropriate one to preserve the statutory requirement as more than a toothless formality. *See EEOC v. High Speed Enterprise, Inc.*, 2010 WL 8367452 (D. Ariz. Sept. 30, 2010) ("[T]he statutory duty is a real one rather than a mere formality . . . ."). Therefore, the Court must examine the substance of the EEOC's conciliation efforts.

III. The EEOC's Conciliations Efforts Were Not Reasonable

Under the less-deferential approach to evaluating the EEOC's efforts, the Court must determine whether the EEOC responded "in a reasonable and flexible manner" to Orkin's efforts and whether Orkin was provided "an opportunity to confront all the issues." *EEOC*

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[4] Perhaps due to the more-deferential standard making little sense, even those courts claiming to apply the more-deferential standard still look to the substance of the EEOC's actions. *See, e.g.*, *EEOC v. Evans Fruit Co., Inc.*, 2012 WL 1899194, at *7 (E.D. Wash. May 24, 2102).

v. High Speed Enterprise, Inc., 2010 WL 8367452, at *3 (D. Ariz. Sept. 30, 2010). The facts regarding conciliation in this case are troubling and, the Court hopes, unique. They show the EEOC did not behave in a reasonable and flexible manner.

During conciliation, the EEOC claimed its request for an extraordinarily large amount of compensatory damages was justified because Kokezas suffered "weight loss, shock, frustration, anxiety, loss of enjoyment of life, difficulty trusting others, and other pecuniary and non-pecuniary losses." During his deposition, Kokezas was only able to confirm some of these allegations. Kokezas confirmed that he had suffered "shock" and that it was possible he had experienced a loss of enjoyment of life. He was not, however, able to recall any weight loss associated with the discrimination allegations and he said the alleged discrimination "probably" did not make him depressed. Moreover, Kokezas was unable to explain or even confirm that the alleged discrimination had resulted in him experiencing difficulty trusting others.

During conciliation the EEOC also made the unequivocal statement that Kokezas had "seen a psychiatrist to help cope with his losses." Given the amount of compensatory damages demanded, Orkin requested access to Kokezas' medical records or at least the opportunity to discuss the psychiatric harm with Kokezas. In response, the EEOC reiterated that Kokezas had "seen a psychiatrist to help cope with his losses" but the EEOC "decline[d] to provide copies of Mr. Kokezas' medical records." This may have been an attempt to falsely convey that the EEOC had the medical records and that the EEOC had corroborated the extreme level of Kokezas' harm. But regardless of the EEOC's subjective motivation in making this statement, Kokezas later explicitly disavowed that he had sought mental health treatment due to Orkin. The EEOC claims this was only because Kokezas' did not want his medical records disclosed but the EEOC does not explain why it was appropriate to base its conciliation demand on harm that Kokezas himself had no interest in pursuing.

Viewed as a whole, the EEOC did not respond to Orkin "in a reasonable and flexible manner" nor was Orkin provided "an opportunity to confront all the issues." *EEOC v. High Speed Enterprise, Inc.*, 2010 WL 8367452, at *3 (D. Ariz. Sept. 30, 2010). The EEOC did

not make any meaningful effort to investigate the harm Kozekas suffered before making the initial demand for $250,000.[5] From the very beginning of conciliation, the EEOC represented Kokezas suffered certain harms which he did not (*e.g.*, weight loss and need for psychiatric care) and exaggerated the true extent of the harm Kozekas did suffer. When asked to substantiate Kozekas' harm, the EEOC refused to provide anything but did imply it had medical records it did not actually have. The EEOC does not explain how it valued Kozekas' claims at such a high level nor does it explain how Orkin could fairly and intelligently discuss an appropriate level of compensation for Kokezas given the decision to exaggerate or fabricate the extent of his harm.[6] Good faith conciliation requires more than demanding a very large number supported by exaggerated or fabricated harm, resisting a request to substantiate that harm, falsely implying supporting medical records exist but refusing to produce them, and then declaring the conciliation over when the employer fails to pay that amount.

There is one final point which must be emphasized. The finding that the EEOC failed to conciliate in good faith is not based solely on the amount of damages the EEOC requested. Compensatory damages, such as damages due to pain and suffering, are notoriously difficult to quantify. The EEOC has wide discretion when deciding the amount of such damages to request during conciliation and generally the size of that request would not be sufficient to

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[5] At his deposition, Kokezas stated he was unaware the EEOC was seeking this amount to settle his claim. (Doc. 132-2 at 81). This failure to communicate with Kokezas regarding the amount requested during conciliation casts further doubt that the EEOC was engaged in a good faith effort to determine an appropriate amount to remedy the alleged harm caused by Orkin.

[6] The goal of conciliation is to "eliminate any . . . alleged unlawful employment practice," not simply to obtain the maximum monetary settlement. 42 U.S.C. § 2000e-5(b). Exaggerating or fabricating a claimant's emotional suffering is inappropriate as it increases the likelihood that conciliation will fail and does not have an obvious connection to the elimination of unlawful employment practices.

find the EEOC did not meet its statutory obligation.[7] *Cf. EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) (under deferential standard "a court should not examine the details of the offers and counteroffers between the parties."). But the fact that the EEOC requested $250,000 in this case does factor into the Court's analysis. *See EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (viewing EEOC's "insupportable demand for compensatory damages as weapon to force settlement"). Based on the level of compensatory damages demanded by the EEOC, one would expect the EEOC to have compelling evidence supporting that demand. Indeed, the EEOC led Orkin to believe its demand was based on medical evidence. Here, however, instead of compelling evidence to support its demand, the EEOC changed course during litigation and decided to pursue only "garden variety" damages. (Doc. 166 at 2). The EEOC was free to litigate this case as it believed appropriate, but the fact that it explicitly repudiated the level of damages sought during conciliation is telling.

If the EEOC had conducted an adequate investigation and acted reasonably during conciliation, this matter might have been resolved prior to litigation. Unfortunately, the EEOC chose to demand $250,000 and was unable to offer any convincing factual basis supporting this amount. In these circumstances, the level of the EEOC's demand is further proof that conciliation was not attempted in good faith.

IV. Dismissal Is Appropriate Sanction

Having concluded the EEOC did not conciliate in good faith, the remaining issue is the appropriate remedy. The EEOC argues that a stay to allow the parties to conciliate would be appropriate while Orkin argues the Court should dismiss the case. Under the facts presented here, dismissal is appropriate.

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[7] The EEOC does not have a completely free hand when determining the level of damages demanded during conciliation because certain demands might reflect a clear failure to conciliate in good faith. For example, oftentimes the level of back pay is susceptible to relatively precise calculation. A conciliation demand for an impossibly high amount in back pay might show the EEOC was not acting in good faith.

In another case presenting a failure by the EEOC to engage in good faith conciliation, this Court determined that a stay to allow for conciliation was appropriate. *EEOC v. High Speed Enterprise, Inc.*, 2010 WL 8367452 (D. Ariz. Sept. 30, 2010). That case presented a close question and the Court concluded dismissal would have been too harsh of remedy. But here, the undisputed facts are that the EEOC made false and misleading statements during its conciliation efforts in an attempt to extract a significantly larger settlement than it had evidence to support. In fact, the evidence developed during litigation established the EEOC's representations during conciliation had very little relation to reality. Rather than reserving "judicial action as a last resort," the EEOC's actions effectively rendered litigation inevitable. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003). In these circumstances, dismissal is appropriate. *See also EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (dismissal appropriate when EEOC does not conciliate in good faith).

Accordingly,

IT IS ORDERED Orkin's Motion for Summary Judgment (Doc. 131) is **GRANTED**.

IT IS FURTHER ORDERED the EEOC's Motion for Partial Summary Judgment (Doc. 133) is **DENIED**.

IT IS FURTHER ORDERED the Motion to Strike (Doc. 141) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED the Motion to Amend (Doc. 156) is **DENIED**.

IT IS FURTHER ORDERED the Motion for Extension of Time (Doc. 162) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED the Clerk of Court shall enter judgment in favor of Defendants.