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**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,**

Plaintiff,

v.

ORACLE AMERICA, INC.

Defendant.

Case No. 2017-OFC-00006

**OFCCP'S OPPOSITION TO ORACLE'S MOTION FOR SUMMARY JUDGMENT ON
THE ISSUE OF OFCCP'S CONCILIATION EFFORTS**

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. FACTUAL BACKGROUND3

III. ARGUMENT5

 A. Legal Standard5

 B. It is undisputed that OFCCP satisfied its obligation to engage in “reasonable efforts” to conciliate before filing the Complaint5

 1. Administrative Law Judges have consistently held that OFCCP’s duty to conciliate under the Executive Order is minimal.....6

 2. OFCCP’s conciliation efforts exceed the Supreme Court’s standard of review in *Mach Mining* for Title VII cases.....8

 C. There is no basis to “adopt a more searching analysis” to OFCCP’s conciliation efforts than the Supreme Court performed in *Mach Mining*.....10

 D. Oracle’s remaining arguments about confidentiality, the contractual nature of OFCCP’s jurisdiction, and the Agency’s alleged political motivations are unavailing.....12

 E. An alleged failure to conciliate does not warrant the harsh remedy of dismissal.....13

IV. CONCLUSION.....14

CASES

Albino v. Baca,
747 F.3d 1162 (9th Cir. 2014) 5

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 5

Arizona ex rel. Horne v. Geo Grp., Inc.,
816 F.3d 1189 (9th Cir. 2016)..... 9

Bank of Am. v. Solis,
2014 WL 4661287 (D.D.C. 2014)..... 9

Branch v. Phillips Petroleum Co.,
638 F.2d 873 (5th Cir. 1981)..... 12

Brinkerhoff v. Montoya,
1981 WL 201 (N.D. Tex. 1981)..... 12

Carroll v. OFCCP,
2017 WL 395100..... 13

EEOC v. Agro Distribution, LLC,
555 F.3d 462 (5th Cir. 2009)..... 9

EEOC v. Alia Corp.,
842 F. Supp. 2d 1243 (E.D. Cal. 2012)..... 13

EEOC v. Amsted Rail Co.,
169 F. Supp. 3d 877 (S.D. Ill. 2016) 10

EEOC v. Asplundh Tree Expert Co.,
340 F.3d 1256 (11th Cir. 2003)..... 9

EEOC v. CollegeAmerica Denver, Inc.,
2015 WL 6437863 (D. Colo. 2015) 10

EEOC v. Dimensions Healthcare Sys.,
188 F. Supp. 3d 517 (D. Md. 2016) 10

<i>EEOC v. GNLV Corp.</i> , 2015 WL 3467092 (D. Nev. 2015)	10
<i>EEOC v. IPS Industries, Inc.</i> , 2010 WL 5441993 (N.D. Miss. Dec. 28, 2010)	9
<i>EEOC v. Klingler Elec. Corp.</i> , 636 F.2d 104 (5th Cir. 1981).....	14
<i>EEOC v. Mach Mining, LLC</i> , 161 F. Supp. 3d 632 (S.D. Ill. 2016)	10
<i>EEOC v. OhioHealth Corp.</i> , 115 F. Supp. 3d 895 (S.D. Ohio 2015).....	9, 10
<i>EEOC v. Sensient Dehydrated Flavors Co.</i> , 2016 WL 4399367 (E.D. Cal. 2016)	10
<i>EEOC v. Zia Co.</i> , 582 F.2d 527 (10th Cir. 1978).....	14
<i>Emerson Elec. Co. v. Schlesinger</i> , 609 F.2d 898 (8th Cir. 1979).....	12
<i>Geo Grp., Inc. v. E.E.O.C.</i> , 137 S. Ct. 623 (2017).....	9
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985)	13
<i>OFCCP v. Central Power & Light Co.</i> , 1987 WL 774235 (ALJ, Mar. 30, 1987)	6
<i>OFCCP v. Commonwealth Aluminum</i> , 82-OF-6, 1994 WL 16197757 (Ass't Sec'y's Order Feb. 10, 1994).....	6
<i>OFCCP v. East Kentucky Power Cooperative, Inc.</i> , Case No. 1985 OFC 7 (ALJ, Mar. 21, 1988).....	6
<i>OFCCP v. Priester Constr. Co.</i> , 78-OFCCP-11, 1983 WL 411026 (Sec'y's Order Feb. 23, 1983)	6

<i>OFCCP v. S. Pac. Transp. Co.</i> , 79-OFC-10, 1982 WL 889275 (OALJ Nov. 9, 1982).....	6
<i>Mach Mining, LLC v. E.E.O.C.</i> , 135 S. Ct. 1645 (2015).....	2, 6, 8, 9, 10, 11, 14
<i>Moore, II v. Shands Jacksonville Med. Ctr., Inc.</i> , 2010 WL 5137417 (M.D. Fla. 2010).....	12
<i>Nissan Fire & Marine Ins. Co. v. Fritz Cos.</i> , 210 F.3d 1099 (9th Cir. 2000).....	5
<i>Rhode Island Comm'n for Human Rights v. Graul</i> , 120 F. Supp. 3d, 120-21 (D. R.I. 2015).....	11
<i>Sierra Club v. Jackson</i> , 648 F.3d 848 (D.C. Cir. 2011).....	13
<i>Suter v. Artist M.</i> , 503 U.S. 347 (1992).....	11
<i>United States v. Thurston Motor Lines, Inc.</i> , 718 F.2d 616 (4th Cir. 1978).....	7

STATUTES

42 U.S.C. § 3610(b)(1) 11

5 U.S.C. §§ 701 *et seq.*..... 9

RULES

Fed. R. Civ. P. 56(c) 5

Fed. R. Civ. P. 56(f)..... 3, 5

REGULATIONS

Executive Order 11246 1, 9, 13, 14

29 C.F.R. § 18.72(a)..... 5

41 C.F.R. 60-1.20(b)..... 2, 3, 5, 6, 8, 10, 13, 14

41 C.F.R. § 60-1.26(b)(1) 11

41 C.F.R. § 60-30.23..... 5

I. INTRODUCTION

Before filing suit on January 17, 2017, OFCCP spent ten months trying to secure Oracle's voluntary compliance with the antidiscrimination provisions of Executive Order 11246 through conciliation and persuasion. The record of the parties' conciliation is undisputed and fully documented:

- On March 11, 2016, OFCCP issued a Notice of Violation ("NOV") that put Oracle on notice of the discrimination violations at issue, the evidence that OFCCP relied on to support the violations, and the specific remedies it was seeking. The NOV concluded by inviting Oracle to contact OFCCP "to begin conciliation and resolution of the specified violations."
- Between late March and April, OFCCP invited Oracle to meet in person to discuss the violations. Oracle refused, and instead demanded that before any conversation could take place OFCCP must answer 56 interrogatories—many of which called for privileged information. In the spirit of cooperation, OFCCP provided written responses to more than 40 of Oracle's questions.
- In May, rather than provide evidence to rebut the allegations, Oracle asked OFCCP to withdraw the NOV on procedural grounds. OFCCP disagreed with Oracle's legal arguments, and thus on June 8, 2016, the Agency issued a Notice to Show Cause why enforcement proceedings should not be initiated.
- Between June and September, Oracle failed to provide any evidence to rebut the discrimination allegations. In September, Oracle finally agreed to meet with OFCCP to discuss the violations.
- On October 6, the parties met in person for two hours. At the meeting, OFCCP provided a damages estimate and invited Oracle to make a counteroffer or to provide rebuttal evidence. Three weeks later, Oracle sent OFCCP a letter containing additional legal arguments but no substantive rebuttal evidence or settlement proposal.
- In December, OFCCP sent Oracle another letter urging the company to submit rebuttal evidence or else the matter would be referred to the Solicitor's Office. Oracle did not respond.
- A week before filing the Complaint, the Solicitor's Office sent Oracle a final demand letter. Oracle never made a settlement offer.

Given this timeline, there is no dispute that OFCCP met its obligation under 41 C.F.R. 60-1.20(b) to make “reasonable efforts” to secure Oracle’s compliance through conciliation and persuasion.

Contrary to Oracle’s assertions, the law is well settled regarding OFCCP’s conciliation obligation. Administrative Law Judges have consistently held that OFCCP’s duty to conciliate is left broadly to the agency’s discretion and may be satisfied by, for example, a few telephone calls or a short in-person meeting with the contractor—far less than what OFCCP did in this case. Further, the Supreme Court’s decision in *Mach Mining*—which is directly on point here—provides that an enforcement agency’s obligation to conciliate before filing a complaint is satisfied by providing the defendant with notice of the violations and an opportunity to remedy them. Here, OFCCP issued a detailed NOV describing the allegations and the evidence relied upon, responded to Oracle’s multiple requests for information, offered several times to meet with Oracle to discuss the NOV, disclosed a back wages estimate, and participated in a two-hour face-to-face meeting with Oracle to discuss the allegations. These efforts far exceed what the Supreme Court required in *Mach Mining*.

While the facts and the law support the conclusion that OFCCP met its conciliation obligations under the Executive Order, Oracle nonetheless argues that it is entitled to summary judgment on this issue because OFCCP did not dismiss the NOV, adopt Oracle’s legal theories, or disclose privileged information. The Court must reject this argument. As the Supreme Court made clear in *Mach Mining*, a court reviewing an agency’s conciliation efforts “looks only to whether the [agency] attempted to confer about a charge, and not to what happened (i.e., statements made or positions taken) during those discussions.” *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1654 (2015). Thus, Oracle’s complaints about OFCCP’s strategic decisions during the conciliation cannot and do not support Oracle’s request for summary judgment.

For these reasons, which are discussed more fully below, the Court should deny Oracle's summary judgment motion, instead hold that as a matter of law OFCCP satisfied its obligations to conciliate under 41 C.F.R. 60-1.20(b).¹

II. FACTUAL BACKGROUND

On March 11, 2016, OFCCP sent Oracle a 12-page Notice of Violation ("NOV"), which alleged ten separate violations of the Executive Order. Declaration of Shauna Holman-Harries in support of Oracle's Motion for Summary Judgment ("Holman-Harries Decl.") at ¶ 9, Ex. E. Among other things, the NOV alleged that Oracle had unlawfully discriminated against non-Asians in its hiring practices and against women and minorities in its compensation practices. *Id.* The NOV described the evidence that the Agency had gathered to support its discrimination findings, the statistical methodology it used, and the remedies it sought. *Id.*

About two weeks after issuing the NOV, OFCCP invited Oracle to participate in a face-to-face meeting to discuss the violations. Declaration of Jane Suhr ("Suhr Decl.") ¶ 4. Oracle refused to meet. Instead, the company sent OFCCP a list of 56 questions, including "[p]lease explain why OFCCP compliance staff made no request to review application materials on site" and "[h]ow many different models, iterations, and computations did the statistician run besides the three listed in Attachment A?" Declaration of Gary Siniscalco in support of Oracle's Motion for Summary Judgment ("Siniscalco Decl.") at ¶ 2, Ex. I. OFCCP responded in writing to 41 of the questions, identifying 15 questions that invaded the agency's deliberative process. *Id.* ¶ 3, Ex. J. Even after OFCCP responded to these requests, Oracle continued to refuse to meet. Instead,

¹ See Fed. R. Civ. P. 56(f) (permitting court to grant summary judgment for the nonmovant or consider summary judgment on its own after identifying the material facts that may not be genuinely in dispute). As explained in this brief, the undisputed facts support granting OFCCP summary judgment on the conciliation issue. If the Court prefers, however, the Secretary will follow the Court's procedures for filing an affirmative motion for summary judgment.

Oracle insisted that OFCCP should withdraw the NOV because it was “procedurally defective.” *Id.* ¶ 4, Ex. K. Notably, Oracle provided no substantive response to the violations. *Id.*

Three months passed and still Oracle provided no evidence to rebut OFCCP’s findings. Thus, on June 8, 2016, OFCCP issued a Notice to Show Cause why enforcement proceeding should not be initiated. Siniscalco Decl. ¶ 5, Ex. L. Oracle responded by re-asserting its challenges to OFCCP’s methodology and legal theories. *Id.* ¶ 6, Ex. M. Nonetheless, OFCCP repeated its invitation to Oracle for a face-to-face meeting to discuss the violations on September 9, 2016. *Id.* ¶ 7, Ex. N. OFCCP offered during the meeting to address any substantive issues Oracle might have with the violations because, as OFCCP explained, “simply attacking OFCCP’s statistical findings, without indicating how the purported errors affect the results, is insufficient” to justify withdrawing the NOV or show cause notice. *Id.* Finally, Oracle agreed to meet. *Id.* ¶ 8.

The parties met in person for two hours on October 6, 2016. During the meeting, OFCCP invited Oracle to provide any competing statistical analysis or additional information it believed was relevant. OFCCP also responded to questions about its statistical model and provided a damages estimate with the caveat that the Agency would need more information from Oracle to refine its back pay calculations. Suhr Decl. ¶¶ 6-7; Siniscalco Decl. ¶ 10. OFCCP concluded by stating that to avoid litigation, Oracle would need to do more than repeat the same legal positions that OFCCP had already rejected. Suhr Decl. ¶ 6. Once again, however, Oracle did not offer any rebuttal evidence or make a settlement offer. *Id.* ¶ 8.

OFCCP left the October 6th meeting with the understanding that Oracle would respond to the NOV in substance or provide a meaningful settlement proposal. *Id.* at ¶ 9. Oracle’s follow-up communications, however, only included small amounts of new information and rehashed the company’s legal and statistical counterarguments. Siniscalco Decl. ¶ 12, Ex. Q. After Oracle failed to respond to OFCCP’s letter again urging the company to submit rebuttal evidence, in

December 2016, OFCCP referred the matter to the Solicitor's Office. *Id.* ¶ 13, Ex. R. In January, the Solicitor sent Oracle a letter offering a final opportunity to resolve the matter without litigation. *Id.* ¶ 15, Ex. T. Once again, Oracle made no settlement offer. *Id.* ¶ 16, Ex. U. Thus, on January 17, 2017, OFCCP filed the Complaint.

III. ARGUMENT

A. Legal Standard

A party is entitled to summary judgment only if “no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” 29 C.F.R. § 18.72(a); 41 C.F.R. § 60-30.23; *see also* Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party carries both the initial burden of production and the ultimate burden of persuasion that there is no genuine dispute of material fact. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). A fact is material only if it “might affect the outcome of the suit under the governing law Factual disputes that are irrelevant or unnecessary will not be counted.” *Liberty Lobby*, 477 U.S. at 248.

Moreover, “where the party moving for summary judgment has had a full and fair opportunity to prove its case, but has not succeeded in doing so, a court may enter summary judgment for the nonmoving party.” *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014) (citations omitted); Fed. R. Civ. P. 56(f).

As set forth below, the undisputed evidence in this case does not support Oracle's request for summary judgment. Rather, the undisputed facts show that, as a matter of law, OFCCP complied with its pre-suit obligation to conciliate.

B. It is undisputed that OFCCP satisfied its obligation to engage in “reasonable efforts” to conciliate before filing the Complaint.

Under 41 C.F.R. 60-1.20(b), where, as here, a compliance review reveals a deficiency in the contractor's compliance with the Executive Order, OFCCP shall make “reasonable efforts [] to secure compliance through conciliation and persuasion.” *Id.* As set forth below, the undisputed

facts show that OFCCP exceeded this requirement under the minimal standards articulated by ALJs in OFCCP enforcement cases and by the Supreme Court in *Mach Mining* in the analogous Title VII context.

1. Administrative Law Judges have consistently held that OFCCP's duty to conciliate under the Executive Order is minimal.

Contrary to Oracle's assertion, the standard for determining what constitutes "reasonable efforts" to conciliate in OFCCP cases is not an open question. This issue has been repeatedly considered by Administrative Law Judges, all of whom have concluded that OFCCP's duty to conciliate under 41 C.F.R. 60-1.20(b) is minimal. For example, in *OFCCP v. Central Power & Light Co.*, Case No. 1982 OFC 5, 1987 WL 774235, *2 (ALJ, Mar. 30, 1987), the ALJ found that a 15-minute meeting to discuss appropriate remedies satisfied OFCCP's conciliation obligation. As the court held, the fact that the parties quickly reached an impasse because the contractor refused to consider back pay for rejected applicants did not negate OFCCP's reasonable attempts to conciliate. In addition, in *OFCCP v. East Kentucky Power Cooperative, Inc.*, Case No. 1985 OFC 7 (ALJ, Mar. 21, 1988), the court found that several telephone conversations and one face-to-face meeting with the contractor were sufficient to satisfy OFCCP's duty to conciliate. Finally, in *OFCCP v. S. Pac. Transp. Co.*, 79-OFC-10, 1982 WL 889275 (OALJ Nov. 9, 1982), the ALJ opined that a law-enforcement agency such as OFCCP has discretion to take multiple positions during conciliation and that this does not demonstrate bad faith or a refusal to conciliate. As the judge explained, "[t]he failure of the agency to volunteer to back down from its position, particularly in the absence of sign of reciprocation, does not prove lack of good faith." *Id.*; see also *OFCCP v. Commonwealth Aluminum*, 82-OFC-6, 1994 WL 16197757 (Ass't Sec'y's Order Feb. 10, 1994) (holding OFCCP to a minimal standard for conciliation); *OFCCP v. Priester Constr. Co.*, 78-OFCCP-11, 1983 WL 411026, at *13 (Sec'y's Order Feb. 23, 1983) (rejecting claim that "take it or leave it" conciliation position violated OFCCP's duty).

Here, OFCCP gave Oracle notice of the discrimination violations, responded in writing to Oracle's request for information, disclosed its damages estimates, and met in person with Oracle for two hours in an attempt to persuade Oracle to come into compliance. These efforts exceed the minimal standard articulated by the ALJs in the above cases as well as satisfy the plain meaning of the term "reasonable."

Contrary to Oracle's assertion, OCCP did not "stonewall" regarding its analysis or "refuse to engage" with Oracle's concerns or evidence. In the NOV and during conciliation, OFCCP disclosed detailed information about the violations and the evidence it relied on to support its findings, including information about the data used to conduct the statistical analysis and the remedy sought for each allegation of discrimination. After the NOV was issued, OFCCP engaged in extensive correspondence with Oracle addressing these violations, and even answered more than 40 questions posed by Oracle about the Agency's conclusions.

Oracle's claim that OFCCP "failed to sufficiently inform Oracle of the remedies it sought" is likewise without merit. The NOV specifically identified the remedies that OFCCP sought for each violation. Further, there is no dispute that during the October 6, 2016 meeting, OFCCP provided Oracle with a range of back pay it believed was owed to Oracle's employees. OFCCP was forced to provide a range—and not a precise dollar amount—because Oracle had refused to give OFCCP sufficient information to calculate a more precise figure.

Finally, while OFCCP diligently responded to Oracle's requests for additional information, Oracle never provided a substantive response to the NOV. Rather, at all times before the Complaint was filed, Oracle's main response was to raise procedural objections or argue against OFCCP's statistical methods and legal framework. Conciliation does not require OFCCP to adopt Oracle's legal position or statistical analyses. In *United States v. Thurston Motor Lines, Inc.*, 718 F.2d 616, 617 (4th Cir. 1978), the court found that OFCCP's decision not to conciliate a legal question regarding coverage under the Executive Order did not bar OFCCP

from bringing an enforcement action. As the court explained, “[t]his is essentially a legal inquiry, and [given] that the parties are in complete disagreement about it. . . . it is obvious that any attempt by [the parties] to resolve such differences by agreement would have been fruitless, [and] judicial resolution of the controversy in this proceeding should not be foreclosed.” *Id.* Thus, while OFCCP disagreed with Oracle’s legal challenges to the NOV, this does not mean that OFCCP shirked its responsibility to engage in reasonable conciliation efforts.

2. OFCCP’s conciliation efforts exceed the Supreme Court’s standard of review in *Mach Mining* for Title VII cases.

In addition to meeting the standards articulated by ALJs in OFCCP cases, OFCCP’s robust conciliation efforts exceed the Supreme Court’s “relatively barebones” standard of review set out *Mach Mining*. In that case, the Court held that, in order to satisfy its statutory conciliation obligation under Title VII, the EEOC must inform the employer “what the employer has done and which employees (or what class of employees) have suffered as a result” and “try to engage the employer in some form of discussion . . . so as to give the employer an opportunity to remedy the allegedly discriminatory practice.” 135 S. Ct. at 1655-56. Critically, this review does not reach “strategic decisions” by the agency, such as “whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer’s counter-offers” or “the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief” because those elements of conciliation were clearly left to the discretion of the agency. *Id.* at 1654.

Because, as explained in more detail below, Title VII features a nearly identical pre-filing conciliation requirement as 41 C.F.R. 60-1.20(b), this Court should follow *Mach Mining*. Here, OFCCP’s conciliation efforts exceed what the Supreme Court deemed adequate in that case. The NOV described the nature of the violations, the class of employees affected, and the Agency’s demands for relief. Further, OFCCP responded in writing to Oracle’s information demands and gave Oracle multiple opportunities to come into compliance—including meeting in person with

Oracle for two hours. This more than satisfies the test under *Mach Mining*.

The Ninth Circuit recently applied *Mach Mining* to an analogous case involving an alleged failure to conciliate. *See Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1206 (9th Cir. 2016), *cert. denied sub nom. Geo Grp., Inc. v. E.E.O.C.*, 137 S. Ct. 623 (2017).² In that case, an employer alleged that the EEOC and Arizona’s Civil Rights Division failed to conciliate a charge of discrimination brought by a class of female employees. *Id.* at 1194. In reversing the district court’s award of summary judgment to the employer on this issue, the Ninth Circuit held that the EEOC and Arizona satisfied their conciliation obligation when they met with the employer and discussed their claims and demands for relief. *Id.* at 1199. Here, OFCCP engaged in same level of conciliation, if not more, as the Ninth Circuit blessed in *Arizona ex rel. Horne*. Accordingly, Oracle’s request for summary judgment should be denied.

Oracle’s reliance on EEOC cases pre-dating *Mach Mining* is misplaced, as those cases were decided before the Supreme Court established the appropriate test. *See Oracle Mem.* at 12, 14, 15.³ The post-*Mach Mining* cases that Oracle cites are likewise not on point. In those cases, unlike here, the EEOC failed to conciliate altogether. For example, in *EEOC v. OhioHealth*

² Ninth Circuit and D.C. Circuit cases are binding in these proceedings because challenges to OFCCP enforcement actions must be brought under the Administrative Procedure Act (“APA”), 5. U.S.C. §§ 701 *et seq.*, in one of these two jurisdictions. *See id.*; *Bank of Am. v. Solis*, 2014 WL 4661287, at *3 (D.D.C. 2014) (analyzing a challenge to the Secretary’s enforcement under EO 11246 under the APA).

³ For example, *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003), which Oracle frequently cites and relies upon, was vacated and replaced by *Mach Mining*. *See Mach Mining*, 135 S. Ct. at 1651, fn. 1 (“We granted certiorari... to address” conciliation in light of the conflicting rulings of “[o]ther Courts of Appeals” – and specifically referencing the *Asplundh* holding as an example). The other pre-*Mach Mining* cases that Oracle cites are likewise factually distinguishable and no longer valid. *See, e.g., EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (agency “repeatedly failed to communicate with” defendant and “abandoned its role as a neutral investigator.”); *EEOC v. IPS Industries, Inc.*, 2010 WL 5441993, *2 (N.D. Miss. Dec. 28, 2010) (agency failed to respond to employer’s “very specific requests” regarding the basis of the agency’s demand).

Corp., 115 F. Supp. 3d 895 (S.D. Ohio 2015), the EEOC sent a take-it-or-leave-it demand letter, failed to disclose a damages estimate, and then declared conciliation efforts to have failed despite OhioHealth's having made it clear that it was ready and willing to negotiate; under these facts, the court held that the EEOC made "no actual attempt at conciliation." *Id.* at 899 (emphasis in original).⁴ Unlike the EEOC in *OhioHealth*, OFCCP made multiple efforts to conciliate and provided Oracle with significant information about its claims, including back pay estimates. The other post-*Mach Mining* cases that Oracle cites are inapposite because they involved the agency's failure to disclose or attempt to conciliate key issues involved in the dispute. *See e.g.*, *EEOC v. CollegeAmerica Denver, Inc.*, 2015 WL 6437863, * 2-3 (D. Colo. 2015) (separation agreements violating the ADEA not included in conciliation); *EEOC v. GNLV Corp.*, 2015 WL 3467092, * 5 (D. Nev. 2015) (employee claims from outside the group of employees specified by EEOC during conciliation could be excluded); *EEOC v. Sensient Dehydrated Flavors Co.*, 2016 WL 4399367, at *6 (E.D. Cal. 2016) (no discovery for allegations of discrimination not in EEOC's reasonable cause determination letter).

C. There is no basis to "adopt a more searching analysis" to OFCCP's conciliation efforts than the Supreme Court performed in *Mach Mining*.

Oracle argues that because 41 C.F.R. 60-1.20(b) requires OFCCP to make "reasonable efforts" to conciliate, while Title VII requires the EEOC to "endeavor" to conciliate, OFCCP has a "more stringent obligation" to conciliate than the Supreme Court articulate in *Mach Mining*.

⁴ Three other courts have found *OhioHealth*'s ruling incompatible with *Mach Mining*. *See, e.g.*, *EEOC v. Mach Mining, LLC*, 161 F. Supp. 3d 632, 635 (S.D. Ill. 2016) (finding that OhioHealth's ruling conflicted "with *Mach Mining*'s rejection that the EEOC is required to lay out the factual and legal bases for its position and/or provide calculations underlying its monetary demands.") (internal citations omitted); *EEOC v. Amsted Rail Co.*, 169 F. Supp. 3d 877, 885 (S.D. Ill. 2016) (same); *EEOC v. Dimensions Healthcare Sys.*, 188 F. Supp. 3d 517, 523 (D. Md. 2016) (same).

This novel argument is not supported by textual analysis or case law and must be rejected.

First, there is no logical or legal difference between the requirement to make “reasonable efforts” to conciliate and to “endeavor” to conciliate. The definition of endeavor is “[a] systematic or continuous effort to attain some goal.” Black’s Law Dictionary (10th ed. 2014). In the most basic terms, a “reasonable” effort is that which is “just, proper, ordinary or usual.” *Id.* Both “endeavor” and “reasonable efforts” thus require some form of regular or ordinary conscious effort. Importantly, as the Supreme Court has recognized, the term “reasonable efforts,” without other legislative explanation and interpretation, is not sufficiently definite to permit a court to review if “reasonable efforts” were undertaken. *Suter v. Artist M.*, 503 U.S. 347, 360, 363 (1992) (plaintiff could not bring 1983 claim against state for failing to comply with “reasonable efforts” directive in Act; “[h]ow the state was to comply with this directive . . . was, within broad limits, left up to the State”).

Second, the Supreme Court’s reasoning in *Mach Mining* was not based on the word “endeavor” but on numerous aspects of Title VII’s conciliation requirement that are shared in the OFCCP context. As in Title VII, OFCCP’s conciliation requirement “smacks of flexibility,” as it does not “devote a set amount of time or resources” for conciliation, nor does it require that OFCCP “involve any specific steps or measures.” 135 S.Ct. at 1654. Similarly, as with EEOC’s ability to file suit whenever it is “unable to secure terms acceptable to the Commission,” *id.* (internal quotes omitted) (emphasis added), OFCCP may refer a case for litigation “when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate.” 41 C.F.R. § 60-1.26(b)(1).⁵

⁵ Moreover, courts have generally applied the principles of *Mach Mining* to statutes other than Title VII with little regard for differences in the language of various laws’ requirements for conciliation. See *Rhode Island Comm’n for Human Rights v. Graul*, 120 F. Supp. 3d, 120-21 (D. R.I. 2015) (applying *Mach Mining* review to a provision of the Fair Housing Act providing that an agency “shall, to the extent feasible, engage in conciliation with respect to” a complaint of discrimination) (citing 42 U.S.C. § 3610(b)(1)).

Third, since the “common goal of the EEOC and the OFCCP is to eradicate employment discrimination,” courts have long recognized that “the functions of the agencies are closely related, and . . . Congress intended the two agencies to cooperate and share information when possible.” *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 903 (8th Cir. 1979). This cooperation is furthered by a longstanding Memorandum of Understanding (MOU) between the agencies that provides for work-sharing and expressly authorizes OFCCP to serve as an agent for the EEOC in conciliating dual-filed claims.⁶ Oracle’s argument would undermine this long-standing regime by requiring that Executive Order claims be conciliated under a separate standard from Title VII claims.

Given the almost identical text and common structure and purpose of the Title VII and Executive Order conciliation process, the *Mach Mining* standard applies in OFCCP matters.

D. Oracle’s remaining arguments about confidentiality, the contractual nature of OFCCP’s jurisdiction, and the Agency’s alleged political motivations are unavailing.

Oracle’s argument comparing the confidentiality of OFCCP and EEOC conciliation proceedings is confusing and irrelevant to Oracle’s motion. Oracle appears to argue that this Court should exercise greater scrutiny over OFCCP’s conciliation efforts because they are not confidential. Contrary to Oracle’s assertion, however, as a matter of policy, OFCCP’s conciliation efforts are protected as confidential. *See Brinkerhoff v. Montoya*, 1981 WL 201, at *2 (N.D. Tex. 1981) (OFCCP’s conciliation “process is a valuable dispute resolution mechanism and the confidentiality of these processes has been deemed to be essential to the efficacy of this type of process”) (citing *Branch v. Phillips Petroleum Co.*, 638 F.2d 873 (5th Cir. 1981)); *Moore, II v. Shands Jacksonville Med. Ctr., Inc.*, 2010 WL 5137417, at *3 (M.D. Fla. 2010)

⁶ See Section 7(d)(4) of the MOU, available here: https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm .

(treating the discoverability of OFCCP conciliation materials as indistinguishable from EEOC conciliation materials). Oracle’s assertions otherwise do nothing to advance its argument.⁷

Oracle offers no legal support for its claim that the “contractual nature of OFCCP’s jurisdiction” mandates “a more exacting review” and a “heightened standard” for conciliation. Oracle Mem. at 22-23. OFCCP’s contractual obligations are spelled out in the Executive Order, and the implementing regulations—not contract law principles—define OFCCP’s pre-suit obligations.

Finally, Oracle offers no evidence to support its accusation that this matter is politically motivated. OFCCP began investigating Oracle in September 2014, two years before the 2016 presidential election. The NOV was issued in March 2016; the show cause notice in June 2016; and the parties met in person in October 2016. By the time the Complaint was filed on January 17, 2017, the parties had long reached an impasse. This timeline shows that politics had nothing to do with this case. Furthermore, as a general matter, where the law authorizing agency prosecutions is permissive—as it is here – decisions whether to initiate enforcement proceedings are not judicially reviewable. *See Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011); *see also Carroll v. OFCCP*, 2017 WL 395100, at *3-*4 (D.D.C. 2017) (slip op.) (analyzing OFCCP’s enforcement scheme under EO 11246 in light of *Sierra Club* and *Heckler v. Chaney*, 470 U.S. 821 (1985), and concluding that prosecutorial decisions were unreviewable).

E. An alleged failure to conciliate does not warrant the harsh remedy of dismissal.

Under no circumstances should OFCCP’s alleged failure to conciliate warrant the harsh remedy of dismissal. In cases where the EEOC was found to have failed to conciliate, the remedy imposed by courts was a stay of proceedings to permit further conciliation. *See EEOC v. Alia*

⁷ Oracle’s other argument distinguishing OFCCP cases from private actions under Title VII is also unavailing. Even if the conciliation process under the Executive Order is “more integral” to the enforcement scheme than under Title VII, as discussed in this brief, OFCCP satisfied its conciliation obligations under 41 C.F.R. 60-1.20(b).

Corp., 842 F. Supp. 2d 1243, 1257 & n. 5 (E.D. Cal. 2012) (when any attempt at conciliation has been made, but it is less than is required, the appropriate action is to stay the proceedings to allow more conciliation) (citing *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978)). Here, OFCCP made considerable efforts to engage in conciliation: it made Oracle aware of the nature of the violations alleged, disclosed the necessary remedies, and invited Oracle to engage in a discussion about the violations, as required by *Mach Mining*. Given these facts, there is no basis for dismissing OFCCP's claims or to stay the proceedings to force additional conciliation.

IV. CONCLUSION

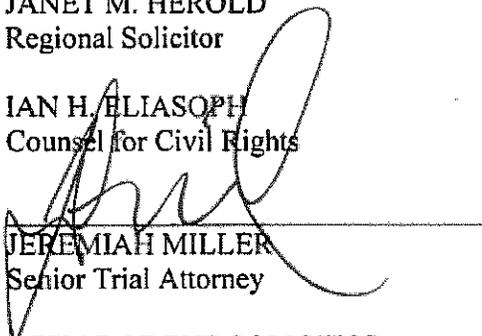
The record is undisputed that before filing the Complaint, OFCCP engaged in diligent efforts to secure Oracle's voluntary compliance with the antidiscrimination provisions of Executive Order 11246 through conciliation and persuasion. OFCCP's efforts satisfy its conciliation obligations under 41 C.F.R. 60-1.20(b). The Court should deny Oracle's motion for summary judgment and grant OFCCP summary judgment on the requirement to conciliate under 41 C.F.R. 60-1.20(b).

DATED: May 12, 2017

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CERTIFICATE OF SERVICE

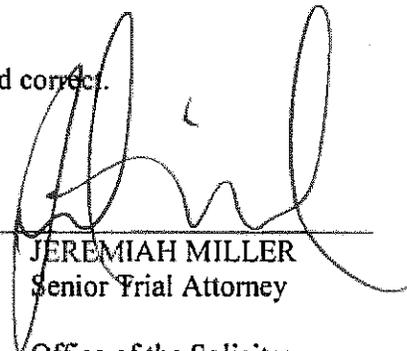
I, Jeremiah Miller, am a citizen of the United States of America and am over 18 years of age. I am not a party to the within action; my business address is 300 Fifth Avenue, Suite 1120, Seattle Washington 98104.

On May 12, 2017, I served the foregoing **OFCCP'S OPPOSITION TO ORACLE'S MOTION FOR SUMMARY JUDGMENT ON THE CONCILIATION ISSUE** in this action **by email**, to:

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I certify under penalty of perjury that the above is true and correct.

Executed: May 12, 2017



JEREMIAH MILLER
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