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May 19, 2017

VIA HAND DELIVERY

Hon. Christopher Larsen
United States Department of Labor
Office of Administrative Law Judges
Federal Building
90 Seventh Street, Room 4-815
San Francisco, CA 94103-1516

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MAY 19 2017

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Re: *OFCCP v Oracle America, Inc.*
OALJ Case No. 2017-OFC-00006

Dear Judge Larsen:

Pursuant to the Court's Order After Pre-Hearing Conference dated May 10, 2017, Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") and Defendant Oracle America, Inc. ("Oracle") write jointly to notify the Court that the parties have largely reached an agreement as to the scope of a protective order, with the exception of one issue about which the parties have extensively met and conferred and remain unable to reach an agreement. Attached to this letter is Oracle's proposed protective order with OFCCP's proposed edits identified in tracked changes. This letter sets forth the parties' respective position on the disputed issue below, and the parties submit this remaining disputed issue to the Court for resolution.

PARAGRAPH 7.1: OFCCP'S ABILITY TO USE CONFIDENTIAL INFORMATION OBTAINED IN THIS CASE FOR PURPOSES OTHER THAN PROSECUTING, DEFENDING, OR ATTEMPTING TO SETTLE THIS ACTION

Oracle's Position

Oracle's proposed protective order contains a standard provision, at paragraph 7.1, that confidential information produced in this action be used "only for prosecuting, defending or attempting to settle this action," except where disclosure is required by law. This provision is based on the Northern District of California's model, which the parties used as a template (except where OFCCP took the position that federal law required a change or the parties agreed a change was appropriate, neither of which is the case here). This provision is necessary to ensure that OFCCP cannot circumvent the procedural and constitutional safeguards that apply to other OFCCP compliance evaluations for the sake of "efficiency." OFFCP's arguments to the contrary misstate the actual effect of the provision and ignore the fact that virtually identical provisions

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are commonplace in similar cases involving government agencies, including the Department of Labor and the EEOC.

Although Oracle agreed to two exceptions to the scope of paragraph 7.1 as part of the parties' negotiations,¹ OFCCP nevertheless will not agree to the rest of this provision, on the basis that OFCCP wants to use confidential information produced by Oracle in this litigation in any other audit or litigation of its choice. Notably, despite Oracle's request, OFCCP has provided no authority to support any entitlement to such a sweeping ability to freely use confidential information obtained in one matter in connection with other matters.

Oracle's proposed provision would not hamper OFCCP's ability to *disclose* Oracle's confidential information with OFCCP employees or its counsel, including those with no involvement in this litigation or the underlying audit. (See Paragraph 2.8 of the proposed protective order, defining a "Party" to whom Protected Material may be disclosed). The provision merely bars OFCCP from *using* the confidential information produced in this action in other open, pending or future OFCCP compliance evaluations, claims, or litigation.

Indeed, provisions like the one at issue here are commonplace, and constitute one of the primary reasons parties enter into protective orders. In fact, both the DOL and the EEOC have entered into protective orders with similar provisions in the recent past. *See, e.g., EEOC v. Sterling Jewelers*, W.D.N.Y. Case No. 08-CV-0706 (Dkt. No. 206) at ¶ 10 ("Confidential Information as defined herein, disclosed by a Producing Party to any Receiving Party, may be used solely for purposes of this action or the Arbitration Proceeding(s) from the arbitrator."); *Edward C. Hugler, Acting Secretary of Labor v. Himanshu Bhatia*, C.D. Cal. Case No. 8:16-cv-01548-JVS-JCG (Dkt. No. 29) (Exh. H to Connell Decl. filed in support of Mot. for Protective Order "Connell Decl." at p. 8, ¶ 7.1 ("A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this Action only for prosecuting, defending, or attempting to settle this Action."); *Thomas E. Perez, Sec'y of Lab. v. Vesuvio's Pizza*, M.D.N.C. Case No. 1:15-cv-00519-LCB-LPA (Dkt. No. 30-1) Exh. H. to Connell Decl. at p. 17, ¶ 1 ("By entering into this SPO, the Secretary and his counsel and the

¹ These exceptions provide that "OFCCP may share Protected Material with (1) the Equal Employment Opportunity Commission (EEOC) to the extent required pursuant to the Memorandum of Understanding between the Department of Labor and the EEOC and (2) any other federal agency where disclosure is required by law, provided that the EEOC and/or other federal agency is provided a copy of this Protective Order prior to receipt of the Protected Material."

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Defendants and their counsel shall only use information and/or documents disclosed pursuant to this SPO for purposes of litigating this action . . .”). There is no reason for a departure from that practice here.

Not only are similar provisions frequently agreed to in cases like this, but to allow the Agency unlimited use of Oracle’s confidential information to bolster its investigations into other establishments would be inconsistent with the governing regulations and ignores OFCCP’s constitutional obligations. OFCCP’s regulations provide for establishment-based reviews. The regulations require “a contractor establishment” to develop a written affirmative action plan. . .” (41 CFR 60-1.12 (b)), provide for a desk audit of that AAP (41 CFR 60-1.20 (a)(1)(i)), and allow an onsite review, conducted at the contractor’s “establishment.” 41 CFR 60-1.25 (a)(1)(ii). In reviewing the Agency’s efforts to obtain documents from a contractor during an establishment audit, “[t]he critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.” *Reich v. Montana Sulphur*, 32 F.3d 440, 444 (9th Cir. 1994). “Even if the test is met, a Fourth Amendment ‘reasonableness’ inquiry must also be satisfied.” *Id.* at 444 n. 5; *see also United Space Alliance v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011) (OFCCP’s compliance with its Fourth Amendment obligations is a prerequisite for it to begin an audit or seek information from a contractor). The Fourth Amendment requires that the request be “limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome.” *Donovan v. Lone Steer*, 464 U.S. 408, 415 (1984). These requirements afford protection “for a subpoenaed employer by allowing him to question the reasonableness of the subpoena” through judicial review. *Id.*

These regulations and the Fourth Amendment set forth the confines of OFCCP’s authority and limit the scope of its investigative power to a particular establishment. If OFCCP and a contractor cannot agree that the request is reasonable, OFCCP may bring a denial of access case pursuant to the expedited proceedings provisions in 41 CFR 60-30.31. OFCCP’s unsupported insistence that it may freely use the confidential information produced in this action in any other audit or action of its choice is tantamount to proclaiming that it may exceed the scope of its regulatory authority, and to insisting that Oracle waive in advance its Fourth Amendment rights in every other audit or action OFCCP pursues.

To be clear, Oracle’s concern about this issue is not an abstract one. OFCCP has scheduled more than **40** separate compliance evaluations of separate Oracle facilities since early 2013, and several of those compliance reviews remain open today. The

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instant matter emanates from single establishment review where OFCCP scheduled and limited its review to Oracle's Redwood Shores facility. Now, OFCCP demands unfettered use of any confidential document Oracle produces in this litigation for use in any pending and any future separate and distinct audits. But OFCCP's regulations and the Fourth Amendment clearly confine audits to specific establishments and require that OFCCP meet its obligation to establish that its requests are relevant to the specific matter at issue and not unreasonable. Further, the Fourth Amendment affords Oracle the opportunity to object to an unreasonable request and OFCCP's recourse is to seek a remedy by way of an access case, where the disputed issue will be fairly adjudicated by an ALJ. Allowing OFCCP unfettered authority to use the documents gained in discovery here in other matters would permit the Agency to bypass the limits placed on it by its regulations and the Fourth Amendment and provide no recourse for Oracle.

In its Opposition to Oracle's Motion for Protective Order, as well as in the parties' meet and confer, OFCCP presented two arguments (neither supported by any authority) to support its position that it should be free to use confidential information in other matters. First, OFCCP stated that it would not impose any "burden" on Oracle since the information is already in OFCCP's possession. This glib response is beside the point. The regulations and Fourth Amendment require not only that information sought by an administrative agency not be unduly burdensome for the other party to produce, but also that the information be *relevant to the matter at issue*. See *Reich*, 32 F.3d at 444 (evidence must be "relevant and material to the investigation"). The vast majority of the confidential information that Oracle has and will produce in this matter is comprised of data involving employees *at the Redwood Shores facility* – the particular establishment at issue in the underlying audit. Before OFCCP attempts to utilize that establishment-specific confidential information in other audits – for example, by aggregating that data with other data to support a finding of violation – Oracle is entitled to contest whether that data is relevant for the matter under review.

Second, OFCCP argued that it should be able to use confidential information obtained in this litigation in other compliance reviews or audits because otherwise the protective order would "stop the Agency from talking to itself and sharing information critical for efficiently completing its mission." As an example, OFCCP postulates that, under Oracle's proposed paragraph 7.1, if an Oracle compensation official admitted to discriminating in setting compensation nationwide, OFCCP would be "entirely unable to share this clearly relevant information with itself in relation to other reviews." OFCCP is wrong. First, it is unclear how the hypothetical admission that Oracle discriminates nationally would be subject to the protective order at all. Second, and more fundamentally, the protective order does not preclude OFCCP from internal sharing of information or from the benefits it gains to its collective knowledge; it precludes only actual use

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in other cases of the specific confidential information produced in this case. The confidential information produced in this case may not be relevant, appropriate, or admissible in other compliance evaluations or litigation depending on the facts of those cases, and Oracle has a constitutional right to the appropriate notice and process in each separate case. Clearly, given that it is commonplace for the EEOC and other government agencies to enter into protective orders with similar provisions restricting use of confidential information to the matter in which it was produced, government agencies are capable of “completing their mission” without exceeding their regulatory authority or bypassing private parties’ constitutional rights.

OFCCP’s Position

OFCCP has worked diligently to fashion a stipulated protective order that complies with federal law and satisfies Oracle’s goals of protecting its proprietary information and its employees’ private information. However, Oracle’s proposed restriction on OFCCP’s *internal* use of purportedly confidential material to this case only serves none of these purposes. OFCCP cannot agree to this restriction, which prevents OFCCP from doing its job and serves only to shield Oracle from potential additional liability.

First, Oracle’s use restriction impedes OFCCP’s law enforcement efforts. For instance, if OFCCP unearthed an email detailing how a manager discriminated against an employee based on religion, Oracle’s restriction would bar OFCCP from using that email to initiate a new enforcement proceeding to vindicate that employee’s rights. Similarly, if OFCCP discovered in this case—which involves Oracle’s headquarters—that Oracle employs a nationwide practice that depresses women’s compensation relative to men, Oracle’s proposed use restriction would bar OFCCP from using that evidence in its reviews of Oracle’s other establishments. To vindicate employees’ rights, under the use restriction, OFCCP would need to seek Oracle’s blessing to use such evidence for these other purposes. Such a procedure would place the fox in charge of the investigative and enforcement henhouse, undermining OFCCP’s ability to perform its mission.

Second, Oracle’s use restriction would be costly in both time and money. As Oracle has acknowledged, OFCCP currently has a number of other open reviews against Oracle. OFCCP, like the rest of the federal government, must operate as efficiently as possible to maximize the limited taxpayer-funded resources it has. To that end, OFCCP coordinates its enforcement efforts, including through coordinating its teams and resolving multiple compliance evaluations and other proceedings against a single employer in a global fashion.² Oracle’s proposed use

² See, e.g., Press Release, Mar. 22, 2012, *available at* <https://www.dol.gov/opa/media/press/ofccp/OFCCP20120507.htm> (resolution of violations across 22 facilities); Press Release, Nov. 19, 2015, *available at* <https://www.dol.gov/opa/media/press/ofccp/OFCCP20152242.htm> (global resolution of facilities across country).

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restriction would prevent such cost-saving coordination efforts, putting in place what would amount to be an adversarial and invasive procedure over how OFCCP processes information in its possession.

To justify its restriction, Oracle has only invoked the Fourth Amendment and an OFCCP regulation. However, as explained further below, the Fourth Amendment—which protects against unreasonable searches and seizures—does not restrict how the government uses information it obtains, so long as that information is obtained lawfully. Nor is Oracle’s use restriction mandated by the requirement that contractors give OFCCP access to information that “may be relevant” to a compliance evaluation. 41 C.F.R. § 60-1.43. The regulation’s plain language governs what a contractor must give OFCCP; it does not restrict, as Oracle argues, OFCCP’s use of information. Moreover, the Eighth Circuit rejected a similar argument made against the Equal Employment Opportunity Commission (“EEOC”) over three decades ago. *See Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 905-906 (8th Cir. 1979) (obtaining information through OFCCP does not circumvent statute defining EEOC’s entitlement to information). Indeed, § 60-1.43 expressly authorizes OFCCP to use information it obtains to enforce any law within its jurisdiction and can be shared to enforce Title VII, which is outside of OFCCP’s jurisdiction.

Oracle’s desire to limit its liability through its use restriction does not constitute the requisite good cause to tie OFCCP’s hands and restrict use of purportedly confidential evidence to this case only. *See Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211-12 (9th Cir. 2002) (moving party “bears the burden of showing specific prejudice or harm will result if no protective order is granted”). The Court should thus reject Oracle’s proposed language, and accept OFCCP’s version.

Courts Reject Protective Orders That Hamstring Law Enforcement by Restricting the Use of Evidence.

OFCCP “is charged with conducting periodic reviews of entities that have contracted with the government to ensure that the contractors have complied with their non-discrimination and affirmative action obligations.” *Bd. of Governors of Univ. of N. Carolina v. U.S. Dep’t of Labor*, 917 F.2d 812, 815 (4th Cir. 1990). Materials disclosed in those reviews may be used for any purpose to enforce Executive Order 11426, the Civil Rights Act of 1964, and any law within OFCCP’s jurisdiction. *See* 41 C.F.R. § 60-1.43; *see also id.* § 60-1.7 (reports required under OFCCP regulation “shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act”).

To promote efficient law enforcement, it is OFCCP policy “to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment.” 41

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C.F.R. § 60-40.1. To that end, under its Memorandum of Understanding (“MOU”) with the EEOC, OFCCP “shall share any information relating to the employment policies and/or practices of employers holding government contracts or subcontracts that supports the enforcement mandates of each agency as well as their joint enforcement efforts.” MOU § 1(a), *available at* https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm. Over contractors’ objections, courts have approved OFCCP’s and the EEOC’s coordinated efforts. *See, e.g., Emerson*, 609 F.2d at 907 (rejecting challenge to MOU); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 666 (4th Cir. 1977). Because “[b]oth agencies are charged with the responsibility of eliminating employment discrimination,” sharing information between the two agencies “facilitates the operation of both agencies and eliminates wasteful duplication of effort.” *Reynolds Metals*, 564 F.2d at 668.

Oracle’s use restriction does the precise opposite, preventing OFCCP from sharing information internally and taking cost-effective steps to coordinate its enforcement efforts. Under Oracle’s proposal, absent Oracle’s permission, OFCCP is barred in perpetuity from using information obtained in this case for any other law enforcement purpose OFCCP may ever have for that information. This would be an incongruous result, particularly since OFCCP can share such information with the EEOC, which could use the information for any purpose, while OFCCP was barred from sharing the information internally and doing the same. Amplifying this incongruity is that, while Oracle is barred from interfering with its employees reporting wrongdoing to OFCCP (41 C.F.R. § 60-1.32), the use restriction would enable Oracle to interfere with OFCCP’s ability to share evidence of wrongdoing among its compliance personnel. No good cause exists to support such a restriction that would prevent OFCCP from doing its job and increase taxpayers’ costs.

With this in mind, courts readily reject protective orders that waste public resources and hamstring agencies in carrying out their functions. *See, e.g., Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978) (“We are impressed with the wastefulness of requiring government counsel to duplicate the analyses and discovery already made.”); *United States ex rel. Kaplan v. Metro. Ambulance & First-Aid Corp.*, 395 F. Supp. 2d 1 (S.D.N.Y. 2005) (rejecting limit on government’s use of discovery to case as doing so would “limit[] the government’s ability to perform its functions as a health oversight agency”); *United States ex rel. Stewart v. La. Clinic*, No. Civ. A. 99-1767, 2002 WL 31819130, at *10 (E.D. La. Dec. 12, 2002) (same); *see also Barker v. Engineered Steel Concepts, Inc.*, No. 2:09-MC-72-PRC, 2010 WL 4852640, at *3 (N.D. Ind. Nov. 22, 2010) (rejecting use restriction that “prohibits the NLRB from carrying out its responsibility to share information with other government agencies”). Here, by preventing the left hand from using what the right hand has in grasp, OFCCP will be at Oracle’s mercy in being able to ensure Oracle fulfills all of its non-discrimination obligations. Oracle’s attempt to put itself in charge of OFCCP’s law enforcement functions, through confidentiality designations, prevents OFCCP from fulfilling its responsibilities efficiently.

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Indeed, courts have long rejected arguments that a protective order is necessary to prevent use of discovery in one case in another case or that a protective order is necessary to prevent a party from sharing information with another party. It is well-established that “where the discovery sought is relevant . . . the mere fact that it may be used in other litigation does not mandate a protective order.” *Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992). And, going further than the issue presented here, “courts have refused to enter protective orders which prevent disclosure to others litigating similar issues on the grounds that the Federal Rules of Civil Procedure do not foreclose collaboration in discovery.” *Grady*, 594 F.2d at 597; *see also Cipollone v. Liggett Grp., Inc.*, 113 F.R.D. 86, 91 (D.N.J. 1986) (“[S]o long as the interests of those represented in the initial litigation are being fully and ethically prosecuted, the Federal Rules do not foreclose the collaborative use of discovery.”); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980) (noting that “sharing information obtained through discovery . . . may allow for effective, speedy, and efficient representation”). Here, if a protective order is not warranted to prevent sharing of discovery with other parties, it is certainly not necessary here where OFCCP would only be sharing the discovery internally with teams working on other proceedings involving Oracle.

Because Oracle’s use restriction interferes with OFCCP’s law enforcement functions, the Court should reject it.

The Fourth Amendment Does Not Provide Good Cause Supporting Oracle’s Use Restriction.

Oracle insists that the Fourth Amendment requires a protective order restricting OFCCP’s use of confidential materials. This novel argument, for which Oracle offered no support during the meet-and-confer process, is readily dismissed.

The Fourth Amendment protects “against unreasonable searches and seizures.” U.S. Const. amend. IV. This prohibition does not restrict how the government uses information it obtains, so long as that information is obtained lawfully. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (“The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.”); *Johnson v. Quander*, 440 F.3d 489, 499 (D.C. Cir. 2006) (if evidence is obtained “in conformance with the Fourth Amendment, the government’s storage and use of it does not give rise to an independent Fourth Amendment claim”); *Green v. Berge*, 354 F.3d 675, 680 (7th Cir. 2004) (“[T]he fourth amendment does not control how properly collected information is deployed.”) (Easterbrook, J., concurring). Demonstrating this principle are the myriad cases establishing that the Fourth Amendment permits law enforcement agencies to use lawfully obtained fingerprint and DNA evidence to prosecute crimes other than the one leading to the collection of such evidence. In such cases, the Fourth Amendment is not implicated because there is no “separate search under

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the Fourth Amendment.” *Boroian v. Mueller*, 616 F.3d 60, 68 (1st Cir. 2010) (citing various cases).

Here, as with fingerprint and DNA evidence maintained criminal law enforcement agencies, there is no “search” triggering Fourth Amendment protections if OFCCP simply uses information it obtains in this litigation for another purpose. OFCCP will be lawfully obtaining evidence through the discovery process, which the Court oversees and various procedural rules govern. Oracle has not argued, nor could it credibly, that obtaining discovery through this litigation violates the Fourth Amendment given the existing procedural restrictions on discovery. *See, e.g., Lease v. Fishel*, No. 1:07–CV–0003, 2009 WL 922486, at *5 (M.D. Pa. Apr. 3, 2009) (noting safeguards under procedural rules “ensure that civil discovery does not run afoul of the Fourth Amendment”); *United States v. Int’l Business Machines Corp.*, 83 F.R.D. 97, 103 (S.D.N.Y. 1979) (“[I]t is clear that the fourth amendment if applicable would hold subpoenas in civil litigation to a standard of reasonableness no more rigorous than that imposed by rule 45(b).”). Thus, the Fourth Amendment does not restrict OFCCP’s use of information it obtains from Oracle through discovery in this case.

Insofar as Oracle argues that Fourth Amendment restrictions on administrative subpoenas are somehow triggered here, Oracle fares no better. While courts have used such restrictions to evaluate what OFCCP can request in a compliance evaluation, no court has ever applied that analysis to what OFCCP may use in an investigation. In any event, the Supreme Court established long ago that the function of such subpoenas “is essentially the same as. . . the court’s in issuing other pretrial orders for the discovery of evidence” and are subject to the same constitutional limitations. *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 216 (1946). Therefore, as noted above, if OFCCP obtains evidence pursuant to the discovery rules governing this case, the Fourth Amendment is satisfied.

OFCCP Regulation Does Not Provide Good Cause Supporting the Use Restriction.

Finally, Oracle has argued that the regulation requiring contractors to give OFCCP information that “may be relevant” to a compliance evaluation somehow bars OFCCP’s use of evidence obtained in this case for other law enforcement purposes. *See* 41 C.F.R. § 60-1.43. *Emerson* rejected a nearly identical argument contractors made in attempting to halt sharing between OFCCP and the EEOC. There, contractors argued that the EEOC’s ability to obtain evidence from OFCCP was an end run around a statute providing that the EEOC may access information that “is relevant to the charge under investigation.” *See Emerson*, 609 F.2d at 905. The court rejected the argument, noting that the statutory language did not pertain to “information in the lawful possession of another agency.” *Id.* The court also rejected the argument because “the information sought by the EEOC from the OFCCP is, almost by definition, relevant to a pending employment discrimination charge.” *Id.*

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Here, as in *Emerson*, the regulatory language does not address how OFCCP may use information it lawfully possesses. However, even if it did, evidence OFCCP obtains through this litigation involving Oracle's employment practices is likely to satisfy the "may be relevant" standard in the context of other cases. Thus, § 60-1.43 offers no basis to restrict OFCCP's use of information.

Respectfully submitted,



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