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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.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**REPLY IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT OR, IN  
THE ALTERNATIVE, TO STAY  
THE PROCEEDINGS FOR  
FAILURE TO CONCILIATE**

**RECEIVED**

**MAY 26 2017**

**Office of Administrative Law Judges  
San Francisco, Ca**

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## I. INTRODUCTION

OFCCP has not met its burden to show that it satisfied Executive Order 11246's prerequisite to make "reasonable efforts" to conciliate prior to initiating this enforcement action. Rather, the undisputed facts demonstrate that OFCCP's purported efforts to conciliate amounted to its refusal to provide even the most basic factual information supporting its allegations of discrimination, demand for a rebuttal statistical analysis while refusing to provide Oracle its own, and failure to provide a specific conciliation proposal—let alone a draft conciliation agreement—yet demanding that Oracle provide a "counter-proposal." The pertinent authorities demonstrate that these types of sham conciliation attempts are not reasonable as a matter of law, and do not suffice. Because OFCCP has failed to meet its burden<sup>1</sup> to show it made reasonable conciliation efforts, the ALJ should dismiss this action, or at minimum, order a stay so that reasonable conciliation efforts can be made.

## II. OFCCP FAILED TO ENGAGE IN REASONABLE EFFORTS TO CONCILIATE

### A. "Reasonable Efforts" Require More Than Mere "Minimal Efforts"

In its opposition, OFCCP proclaims that ALJ decisions have "repeatedly" considered what constitutes reasonable efforts to conciliate under 41 C.F.R. § 60-1.20(b) and have concluded that the requirement is "minimal," Opp'n p. 6, citing the *Central Power, East Kentucky Power, South Pacific Transportation*, and *Commonwealth Aluminum* decisions. Not so. Those cases did *not* involve the Executive Order or section 60-1.20(b), and they did *not* involve the reasonable efforts standard. Rather, those cases are each decades-old ALJ decisions<sup>2</sup> that addressed OFCCP's duty to conciliate under the Rehabilitation Act and its former implementing

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<sup>1</sup>OFCCP, not Oracle, has the burden to show that it made reasonable efforts to conciliate prior to initiating the enforcement action. Decision and Order, *OFCCP v. Priester Constr. Co.*, 78-OFCCP-11, 1983 WL 411026, at \*13 (Dep't of Labor Feb. 23, 1983) ("OFCCP has the burden of showing" that it satisfied its duty to conciliate); *see also Dunlop v. Res. Scis. Corp.*, 410 F. Supp. 836, 843 (N.D. Okla. 1976) ("[T]he burden to conciliate falls on the Secretary."); Recommended Decision and Order, *OFCCP v. S. Pac. Transp.*, 1982 WL 889275, at 13 (Dep't of Labor Nov. 9, 1982) ("noting "the plaintiff[s] obligation to attempt conciliation" and discussing the plaintiff "carrying its burden to conciliate").

<sup>2</sup>*Central Power & Light Co.* is of questionable precedential value as it is a recommended decision, and both parties filed exceptions to the recommendation to the Secretary for Employment Standards but apparently entered into a consent decree before the Secretary could address them.

regulations. At the time of each of those decisions, the operative regulations of the Rehabilitation Act did not require “reasonable efforts” but only “efforts” to “secure compliance through conciliation.” 41 C.F.R. § 60-741.26(g)2 (1991) (“where an investigation indicates that the contractor has not complied with the requirements of the Act or this part, efforts shall be made to secure compliance through conciliation and persuasion within a reasonable time”) *quoted in* Recommended Decision, *OFCCP v. Central Power & Light Co.*, 1987 WL 774235, \*2 (Dep’t of Labor Mar. 30, 1987); *see also* Recommended Decision and Order, *OFCCP v. East Kentucky Power*, No. 1985 OFC 7 (Dep’t of Labor March 21, 1988) (the Rehabilitation Act’s regulation requires “only that efforts be made”).<sup>3</sup> Thus, the *Central Power*, *East Kentucky Power*, *South Pacific Transportation*, and *Commonwealth Aluminum* decisions do not address the critical issue of what constitutes “reasonable efforts” to conciliate.

Furthermore, even under what OFCCP describes as a “minimal efforts” requirement, in each case OFCCP had either presented a settlement demand, or the contractor clearly communicated that it would not even consider a particular type (or any type) of relief, or the case is otherwise wholly inapposite. *See Central Power*, 1987 WL 774235, \*2 (“Plaintiff insisted that the defendant employ and provide back pay to each individual” but “Defendant . . . refused to consider back pay for any of the individuals.”); *East Kentucky Power*, 1985 OFC 7 (Mar. 21, 1988) (“East Kentucky rejected the Conciliation Agreement proposed by the OFCCP at the meeting”); *S. Pac. Transp. Co.*, 1982 WL 889275, at \*2 (defendant “indicat[ed] that it had no desire or intent to conciliate”; “defendant made clear that it was ‘not interested’”); Final Decision and Order, *OFCCP v. Commonwealth Aluminum*, 1994 WL 16197757, at \*2 (Dep’t of Labor Feb. 10, 1994) (in a case involving individual complainants, rejecting the argument that conciliation did not take place because OFCCP did not communicate the contractor’s settlement

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<sup>3</sup> In 1996, and subsequent to the cases OFCCP cites, the Agency adopted new regulations that substantively changed the “efforts” language to “reasonable efforts” for claims under the Rehabilitation Act. *See* Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, 61 Fed. Reg. 19336-01, 1996 WL 209743 (May 1, 1996).

offers to the individual complainants).<sup>4</sup>

Here, by contrast, it is undisputed that despite Oracle's repeated requests for a concrete settlement demand or a proposed conciliation agreement, OFCCP never provided one. Nor did Oracle ever clearly communicate that it would not even consider a particular type of relief. Hence, OFCCP failed to satisfy even the "minimal efforts" standard that it erroneously argues is applicable.

**B. The Undisputed Evidence Demonstrates That OFCCP's Purported Efforts to Conciliate Were Not Reasonable**

As explained in Oracle's moving papers, "reasonable efforts" require, at minimum, notice of the charges and the basis for the charges, exchange of information and views, and notice of the remedies OFCCP seeks (*e.g.*, a proposed conciliation agreement) and an opportunity for the contractor to so remedy. Motion at pp. 12-17. Here, as OFCCP admits, "[t]he record of the parties' conciliation is undisputed and fully documented." Opp'n p. 1. That undisputed evidence demonstrates that OFCCP failed to engage in such reasonable efforts.

**OFCCP failed to provide notice of all charges:** The Notice of Violation (NOV) provided no notice of recruiting and hiring charges for any time period other than January 1, 2013 through June 30, 2014. Holman-Harries Decl., Exh. E (NOV); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 73 (1984) (EEOC has pre-filing duty to identify, among other things, "the periods of time in which [the Agency] suspects the discrimination to have been practiced").

**OFCCP failed to provide information regarding the basis for the charges:** The NOV is devoid of any factual details regarding the basis for the charges. With respect to the recruiting and hiring violation and the compensation violations, it alleges that a statistical analysis supports the charges, and purports to report the "standard deviations" generated by a "regression analysis" that the Agency had run, but the NOV fails to provide sufficient information to allow replication

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<sup>4</sup> The only case OFCCP cites that arises under the Executive Order and its "reasonable efforts" conciliation provision is *Priester Constr. Co.*, 1983 WL 411026, at \*13, and in that case also OFCCP presented a settlement demand during the conciliation process. Furthermore, the case is factually distinguishable as that employer was alleged to have not complied with ongoing affirmative action goals and timetables after the Equal Opportunity Specialist made himself available for discussion and to answer questions, and after providing a list of community organizations for the employer to contact to satisfy its obligations.

of the analysis.<sup>5</sup> Moreover, despite repeated requests, OFCCP refused to provide the statistical models themselves or any further information about the models. Siniscalco Decl. ¶ 9 and Exh. I, pp. 1-3. Nor, despite repeated requests, would OFCCP identify the favored “comparators”—*i.e.*, specific persons allegedly similarly situated to those who were allegedly disfavored. Holman-Harries Decl. ¶ 11, Exh. B, p. 1, Exh. H, p. 7; Siniscalco Decl. ¶ 9; Exh. I, pp. 1-2. Accordingly, Oracle was provided *no information other* than the Agency’s bald assertions that its undisclosed statistical analysis, which Oracle did not have sufficient information to replicate, would yield results sufficient to demonstrate Oracle had engaged in discrimination.

### **OFCCP Failed to Present a Proposed Conciliation Agreement or Settlement**

**Demand:** Commencing in June 2016, Oracle repeatedly requested “a specific proposal by OFCCP regarding the monetary relief it believes is due to particular identified individuals, and a proposed conciliation agreement.” Siniscalco Decl., Exh. M, p. 6; *see also* Siniscalco Decl., Exh. U, p. 2 (requesting that OFCCP “promptly provide Oracle with a specific and appropriate set of proposed monetary remedies and other provisions that would reasonably and in good faith allow Oracle to assess the Agency’s conciliation demands”). It is undisputed that the Agency never did so. At the October 6 conciliation meeting, no conciliation agreement was presented, proposed, or discussed. Siniscalco Decl. ¶ 10. Additionally, OFCCP stated at the conciliation meeting that it was not prepared to discuss any remedy, monetary or non-monetary, for the alleged recruiting violation. *Id.* The Agency offered orally—never in writing—what it described as a “high level” proposal regarding the “approximate” monetary relief to address the alleged compensation violations. Siniscalco Decl. ¶ 10; Suhr Decl. ¶ 7. As for the alleged hiring violations, OFCCP pointed to a broad dollar range—with the high end figure nearly three times more than the low

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<sup>5</sup> For example, the NOV alleges that the Agency’s statistical analysis shows that “non-Asian” applicants were discriminated against in favor of Asian applicants, “particularly Asian Indians,” but fails to identify the individuals whom OFCCP considered to be “Asian Indians.” Holman-Harries Decl., Exh. E, pp. 1-2 (NOV, Violation 1). Furthermore, in response to Oracle’s request for information on the methodology OFCCP used to classify applicants as “Asian Indians,” OFCCP replied that the factors included “surname,” without identifying which surnames it deemed to be “Asian Indian.” Siniscalco Decl., Exh. J, p. 6, No. 8. Without either the statistical model or identification of the specific persons allegedly favored, Oracle lacked sufficient information to replicate OFCCP’s purported statistical analysis.

end figure—that the Agency *might* demand once it had reviewed mitigation evidence, though it conceded it currently lacked any such information. Siniscalco Decl. ¶ 10; Suhr Decl. ¶7. And, when Oracle asked how OFCCP had determined the numbers it was using, OFCCP stated that it would not provide those calculations at that time (and it never did). Siniscalco Decl. ¶ 10. No remedies for the five other violations alleged in the NOV (Violations 6-10) were discussed. *See* Suhr Decl. ¶ 7 (at the conciliation meeting, OFCCP discussed remedies “for the compensation violations and for recruiting and hiring violations”).

**OFCCP’s lack of engagement and single-minded demand for a “rebuttal statistical analysis”:** Rather than the exchange of information and views contemplated by the term “conciliation,” the events OFCCP characterizes as a conciliation process primarily amounted to its single-minded demand for a “rebuttal statistical analysis” from Oracle, despite its refusal to provide Oracle with its own statistical model. Over and over, OFCCP stated it would not even consider information from Oracle other than a “rebuttal statistical analysis,” which, of course, Oracle has no obligation to create or produce. *See, e.g.,* Siniscalco Decl., Exh. J, p. 4 (demanding, within two weeks, “a rebuttal to the NOV, through statistical evidence”), Exh. L, p. 2, Exh. O, pp. 2-4, 38, 44-47. At one point OFCCP even conditioned its willingness to participate in conciliation—a regulatory requirement—on Oracle’s provision of a rebuttal statistical analysis. Siniscalco Decl., Exh. O, p. 2. While the Opposition asserts that Oracle did not provide *any* substantive rebuttal response supported by evidence, the evidence shows otherwise. *See, e.g.,* Siniscalco Decl., Exh. K, pp. 10-21, and Exh. Q. It simply did not provide the one and only thing that OFCCP was willing to so much as consider and which Oracle has no obligation to create: a rebuttal statistical analysis.

**OFCCP abruptly ended the conciliation process before any impasse had been reached:** Following the October 6 meeting, at which both sides agreed progress had been made, *see* Siniscalco Decl. ¶ 11, Exh. P, as requested, Oracle provided a further substantive response to the allegations in the NOV, *see* Siniscalco Decl., Exh. Q. Five weeks later, and with no intervening communications, OFCCP responded that it had “referred this matter for enforcement

proceedings to the Solicitor's Office." Siniscalco Decl., Exh. R, p. 7. When Oracle contacted the Solicitor's Office to request that the matter be referred to OFCCP to complete the conciliation process, *see* Siniscalco Decl., Exh. S, the Solicitor's Office responded that Oracle needed to present "its best and final counteroffer" within three days or it could file an administrative complaint. Siniscalco Decl., Exh. T, p. 2. And when Oracle contacted the Solicitor's Office to reiterate that it had received no offer for it to counter, and again requested that the Agency provide "a specific and appropriate set of proposed monetary remedies and other provisions that would reasonably and in good faith allow Oracle to assess the Agency's conciliation demands," *see* Siniscalco Decl., Exh. U, p. 2, the Solicitor's Office responded by filing an administrative complaint that very afternoon.

**C. OFCCP Fails to Distinguish The Authorities Which Show That These Undisputed Facts Demonstrate That OFCCP Failed to Engage in Reasonable Conciliation Efforts**

As explained in Oracle's motion, these undisputed facts demonstrate that OFCCP failed to make the required reasonable efforts to conciliate. Motion, pp. 12-17. In its opposition, OFCCP makes only a perfunctory attempt to distinguish the numerous authorities Oracle cited in its motion. First, OFCCP argues that Oracle's reliance on EEOC cases pre-dating *Mach Mining*—specifically the *Asplundh*, *Agro*, and *IPS* cases—is misplaced. While *Mach Mining* held that the Title VII "endeavor" conciliation requirement does not require that the conciliation efforts be "reasonable" and therefore disapproved prior EEOC cases that applied a reasonableness requirement, the Executive Order's conciliation requirement by its plain language *does* require that conciliation efforts be "reasonable." Hence, the pre-*Mach Mining* EEOC cases Oracle discusses in its motion remain instructive in determining whether conciliation efforts of claims under the Executive Order are "reasonable."<sup>6</sup>

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<sup>6</sup> *See EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003) ("a 'reasonable' effort to resolve with the employer includes 'at a minimum [to] make clear to the employer the basis for the EEOC's charges against it'"); *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009) ("By repeatedly failing to communicate with Agro, the EEOC failed to respond in a reasonable and flexible manner to the reasonable attitudes of the employer."); *EEOC v. IPS Industries, Inc.*, 2010 WL 5441993, at \*2 (N.D. Miss. Dec. 28, 2010) ("[B]ecause the defendant repeatedly requested information surely necessary to any conciliation and because the EEOC inexplicably

OFCCP next contends that the post-*Mach Mining* cases Oracle cites are all distinguishable because in each the EEOC “failed to conciliate altogether.” Opp’n, p. 9. Yet in the very next sentence, OFCCP acknowledges that in *OhioHealth*, 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.” Opp’n p. 10. The same scenario is true here, except that OFCCP did not send Oracle *any* demand letter. Furthermore, in *OhioHealth* the EEOC, in fact, presented a proposed conciliation agreement to the contractor, but, like here, failed to explain the calculations supporting the requested monetary relief. For that reason, the *Ohio Health* court found that “the conciliation process could have been nothing but a sham. The calculation would necessarily inform if not outright shape the parties’ positions, and in the absence of such information the EEOC can hardly be said to have ‘given the employer an opportunity to remedy the allegedly discriminatory practice.’” 115 F. Supp. 3d at 899.<sup>7</sup>

OFCCP argues that other cases Oracle cites—the *CollegeAmerica*, *GNLV*, and *Sensient* cases—are distinguishable because they involved the agency’s failure to disclose information or to attempt to conciliate certain issues it sought to pursue in litigation. Opp’n p. 10. Yet the same is true here: OFCCP failed to disclose its statistical model or other factual detail that provided the alleged basis for its claims, failed to provide any proposed conciliation agreement or concrete settlement demand, and failed to even discuss remedies for some of the claims that it seeks to pursue in this litigation.<sup>8</sup>

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refused to provide even this basic information, the court finds the EEOC did not respond in a reasonable and flexible manner to the reasonable attitudes of the employer.”).

<sup>7</sup> OFCCP notes that three district court cases observed that the *OhioHealth* court reviewed the reasonableness of EEOC’s conciliation efforts. Opp’n p. 10, n. 4. Since reasonableness is the standard that applies to OFCCP’s conciliation efforts, that critique is inapplicable here.

<sup>8</sup> OFCCP contends that the NOV provided Oracle with sufficient notice of the remedies OFCCP was seeking through the conciliation process. Opp’n p. 7. Nonsense. The NOV simply lists boilerplate corrective actions such as “cease the discriminatory compensation practices,” “provide make-whole remedies,” and “provide training.” Holman-Harries Decl., Exh. E.

### **III. THE SCOPE OF JUDICIAL REVIEW APPLICABLE HERE IS MUCH BROADER THAN IN MACH MINING**

As explained in Oracle's motion at pp. 19-23, the "reasonable efforts" mandated by the Executive Order and its implementing regulations require a higher standard of agency conduct and greater judicial scrutiny of the conciliation process than under the Title VII administrative process. OFCCP's arguments to the contrary are not persuasive.

#### **A. "Reasonable Efforts" Is Not Identical to "Endeavor"**

First, OFCCP argues that "there is no logical or legal difference between the requirement to make 'reasonable efforts' to conciliate and to 'endeavor' to conciliate." Opp'n p. 11. Not so. "Reasonable" means "[f]air, proper, or moderate under the circumstances; sensible." Black's Law Dictionary (10th ed. 2014). "Endeavor" includes "**any** effort to assay or accomplish some goal or purpose." Black's Law Dictionary (10th ed. 2014) (emphasis added). In other words, the term "reasonable" describes the substance and degree of the effort; the term "endeavor" focuses merely on the attempt to make an effort. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1654 (2015) (noting that "the EEOC need only 'endeavor' to conciliate a claim" and later describing this effort as an "attempt"). Thus, "reasonable efforts" clearly means more than simply endeavoring to conciliate.<sup>9</sup> The plain language of the Executive Order and its implementing regulations do not provide OFCCP with "extensive discretion" over conciliation; rather, they expressly require OFCCP to not just endeavor to conciliate but to make "reasonable" efforts to

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<sup>9</sup> OFCCP's position is belied by its prior recognition that reasonable efforts to conciliate are distinct from mere efforts to conciliate in the context of the Rehabilitation Act. As explained above, prior to 1996, the operative regulation for the Rehabilitation Act provided that "where an investigation indicates that the contractor has not complied with the requirements of the Act or this part, efforts shall be made to secure compliance through conciliation and persuasion within a reasonable time." 41 C.F.R. § 60-741.26(g)2 (1991). Later, OFCCP proposed new regulations that substantively changed the "efforts" language to "reasonable efforts." Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 57 Fed. Reg. 48084-01, at 48099-48100, 1992 WL 296591 (Oct. 21, 1992). In doing so, the OFCCP acknowledged that the amendment changed the conciliation requirement of the Rehabilitation Act to make it consistent with the "reasonable efforts" conciliation requirement in Executive Order 11246: "Paragraph (b) [of the new regulation] specifies that where deficiencies are found, *reasonable conciliation efforts* shall be made pursuant to § 60-741.62. Paragraphs (a) and (b) are not paralleled in the current section 503 regulations, but are generally patterned after selected portions of the compliance review provisions contained in the regulations implementing Executive Order 11246." *Id.* (emphasis added). Thus, OFCCP acknowledged that the de minimis conciliation efforts, which were previously the standard under the Rehabilitation Act regulation, are distinct from the new "reasonable" conciliation efforts that it adopted in order to be consistent with Executive Order 11246.

do so.

OFCCP also argues that “reasonable efforts” is not a sufficiently definite legal concept to be reviewable. Opp’n p. 11. As *Mach Mining* makes clear, “Congress rarely intends to prevent courts from enforcing its directives to federal agencies” and thus “this Court applies a ‘strong presumption’ favoring judicial review of administrative action.” *Mach Mining*, 135 S. Ct. at 1651. Nothing overcomes that presumption with respect to OFCCP’s duty to make reasonable conciliation efforts. Case law is replete with examples of reasonableness as an acceptable standard for judicial review. *See, e.g., Fowler v. United States*, 563 U.S. 668, 670 (2011) (holding that the Government must show that there was “a *reasonable* likelihood” that a relevant communication would have been made to a federal officer for purposes of the federal witness tampering statute) (emphasis added); *Beck v. University of Wisconsin*, 75 F.3d 1130, 1135 (9th Cir. 1996) (court reviewed whether employer made a “reasonable effort” to determine an appropriate accommodation, as required under the Americans with Disabilities Act regulation).<sup>10</sup>

Also instructive is the decision of the Federal Circuit in *Hyatt v. U.S. Patent & Trademark Office*, 797 F.3d 1374 (Fed. Cir. 2015), rejecting a very similar agency argument. In that case, the court rejected the Patent Office’s argument that the determination of whether there are “special circumstances” is not judicially reviewable because “it contains no meaningful standard for reviewing the Director’s determination that particular circumstances qualify as special.” *Id.* at 1382. As the court explained, while “it is true that [the statute] does not lay out a specific process or outline specific considerations for determining the existence of ‘special circumstances,’ ... [w]e reject the PTO’s argument that the lack of enumerated factors means that the statute is unreviewable.” *Id.*

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<sup>10</sup> *Suter v. Artist M*, 503 U.S. 347 (1992), cited by OFCCP, is inapposite. The *Suter* Court held that the requirement under the Adoption Assistance and Child Welfare Act that States use “reasonable efforts” to maintain and reunite families prior to the federal government’s reimbursement of States’ foster care and adoption expenses did not create a private cause of action such that child beneficiaries could sue under the Act, a reimbursement statute.

**B. The Scope of Judicial Review Is Determined by Reference To the Underlying Statutory Language**

Second, OFCCP asserts that the Supreme Court's reasoning in *Mach Mining* was not based on the terms of the applicable conciliation provision. To the contrary, the Court in *Mach Mining* expressly states that, in the EEOC case before it, "the proper scope of judicial review matches the terms of Title VII's conciliation provision." *Mach Mining*, 135 S.Ct. at 1655.

In yet another example of mischaracterizing cases, OFCCP asserts that "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," Opp'n p. 11 n.5, citing just one case: *Rhode Island Comm'n for Human Rights v. Graul*, 120 F. Supp. 3d 110 (D.R.I. 2015). In fact, *Graul* held the exact opposite. It applied a different conciliation standard due to the differences in statutory language: "the [*Mach Mining*] decision relies heavily on the specific conciliation language of Title VII." *Graul*, 120 F. Supp. 3d at 120. Since "[t]he language related to conciliation in the [Fair Housing Act] is very different," the "obligation is different from that of the EEOC's under Title VII." *Id.*

Notably, OFCCP does not address or distinguish the other post-*Mach Mining* cases cited in Oracle's motion, which confirm that the scope of judicial review of an agency's actions depends on the underlying statutory or regulatory language. Motion pp. 20-21, citing *Hyatt*, 797 F.3d at 1383 (because statute did not "exude" discretion, the PTO's determination of whether "special circumstances" justifying disclosure were present was subject to a more probing judicial review) and *EEOC v. CollegeAmerica Denver, Inc.*, 2015 WL 6437863, at \*3 (D. Colo. Oct. 23, 2015) (holding that "the Supreme Court's analysis in *Mach Mining* is limited to Title VII's requirement of conciliation" and does not apply to the conciliation requirements of the ADEA).

**C. The Scope of Review Is Not Affected by the OFCCP and EEOC's MOU**

Third, OFCCP contends that judicial review under the applicable reasonable efforts standard would somehow undermine the work-sharing agreement between the EEOC and OFCCP contained in those agencies' Memorandum of Understanding (MOU). Notwithstanding OFCCP's apparent concern that either it or the EEOC will get confused if they have to follow the

conciliation provisions applicable to the laws they enforce, the MOU itself recognizes that each agency is obligated to follow the requirements of the law at issue. Indeed, the MOU states that when OFCCP is acting as a surrogate for the EEOC, it must act in accordance with the EEOC's conciliation standards, and vice versa. MOU, ¶ 7(d)(4)

[https://www.eeoc.gov/laws/mous/eeoc\\_ofccp.cfm](https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm), (Nov. 9, 2011) (“If the OFCCP investigation of a dual filed complaint/charge results in a reasonable cause finding under Title VII, . . . OFCCP will attempt conciliation to obtain relief, *consistent with EEOC’s standards for remedies*, for all aggrieved persons covered by the Title VII finding.”) (emphasis added); *id.* ¶ 7(d)(4)(ii) (“If conciliation is not successful, OFCCP will consider the E.O. 11246 component of the complaint/charge for further processing *under its usual procedures.*”) (emphasis added).

**D. The Lack of Mandatory Confidentiality, the Lack of A Private Right of Action, and the Contractual Nature of OFCCP’s Jurisdiction Further Support A More Probing Scope of Judicial Review**

As explained in Oracle’s moving papers, a more probing judicial review is appropriate for claims under the Executive Order for reasons in addition to the underlying regulatory language, and reasons that OFCCP fails to competently refute. First, while some aspects of the conciliation process may be exempt from production in response to a FOIA request (as discussed in the *Brinkerhoff* and *Shands Jacksonville* cases cited by OFCCP), OFCCP’s regulations do not contain the same strict promise of confidentiality of conciliation that Title VII does. *Compare* 41 C.F.R. § 60-1.20(f), (g) (limiting discussion of confidentiality to information provided by contractor during compliance evaluation) *with* 42 U.S.C. § 2000e-5(b) (“Nothing said or done during and as a part of such informal [conciliation] endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.”). Indeed, OFCCP publicizes the availability of conciliation agreements on its website: “Please note that not all OFCCP Conciliation Agreements are posted on this site, and that consent decrees are available from the OALJ.” Dep’t of Labor, OFCCP, Freedom of Information Act, <https://www.dol.gov/ofccp/foia/foiareadingroom>.

Second, because there is no private right of action for claims under the Executive Order, the pre-filing conciliation process is more integral to the enforcement scheme as it is the only route through which claims under the Executive Order can be brought. Furthermore, given the contractual nature of OFCCP's jurisdiction, combined with policy reasons of not wanting to deter companies from doing business with the federal government for fear of premature litigation by OFCCP, a more exacting review of whether OFCCP met its regulatory obligation to engage in "reasonable efforts" to conciliate is appropriate. OFCCP does not refute these arguments.

**IV. DISMISSAL IS AN APPROPRIATE REMEDY, AND OFCCP DOES NOT ARTICULATE ANY OPPOSITION TO A STAY OF PROCEEDINGS**

Contrary to the OFCCP's arguments, dismissal is appropriate here. The ALJ has "the power to [t]erminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order[.]" 29 C.F.R. § 18.12(b)(7). OFCCP has not identified any statute, regulation, or executive order that would be inconsistent with dismissal here.

OFCCP merely notes that in some cases where the EEOC was found to have failed to comply with its Title VII duty to conciliate, the remedy was a stay of proceedings. *See EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243 (E.D. Cal. 2012) and *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978). Once again, OFCCP fails to recognize that on this particular issue, Executive Order 11246 differs from Title VII. Title VII expressly authorizes a stay for the purpose of ordering the EEOC to undertake efforts to conciliate. 42 U.S.C. § 2000e-5(f)(1) ("Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance."); *Mach Mining*, 135 S.Ct. at 1656 ("Should the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance. See § 2000e-5(f)(1)"). But unlike Title VII, Executive Order 11246 does not contain any provision regarding a stay of proceedings when conciliation prerequisites have not been met.

Furthermore, dismissal, rather than a stay, is appropriate in circumstances where the agency may have been influenced by improper motives or otherwise acted in bad faith. *See, e.g., Asplundh Tree Expert Co.*, 340 F.3d at 1261, n.3; *Agro Distribution*, 555 F.3d at 468-69, discussed at pp. 24-25 of Oracle's motion.

Although dismissal is appropriate here, in the alternative, the ALJ should stay these proceedings in order for the parties to pursue reasonable efforts at conciliation. Notably OFCCP does not articulate any reason for opposing a stay of proceedings. It does not state that a stay would be unfruitful or that it would prejudice its interests. Accordingly, Oracle requests that, should dismissal not be granted, the ALJ order a stay so that OFCCP may undertake reasonable efforts to obtain voluntary compliance through conciliation.

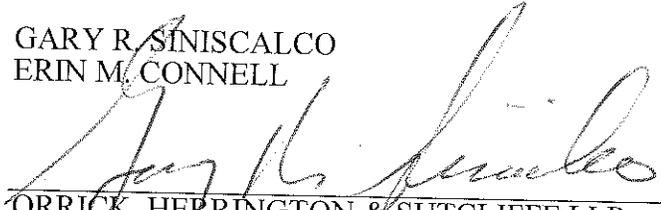
V. CONCLUSION

For the foregoing reasons, the Court should grant Oracle's Motion for Summary Judgment.

Respectfully submitted,

May 26, 2017.

GARY R. SINISCALCO  
ERIN M. CONNELL



ORRICK, HERRINGTON & SUTCLIFFE LLP

The Orrick Building  
405 Howard Street  
San Francisco, CA 94105-2669  
Telephone: (415) 773-5700  
Facsimile: (415) 773-5759  
Email: gsiniscalco@orrick.com  
econnell@orrick.com

Attorneys For Defendant  
ORACLE AMERICA, INC.

**PROOF OF SERVICE BY ELECTRONIC MAIL**

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. My electronic service address is cflores@orrick.com.

On May 26, 2017, I served the interested parties in this action with the following document(s):

**REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, TO STAY THE PROCEEDINGS FOR FAILURE TO CONCILIATE**

by serving true copies of these documents via electronic mail in Adobe PDF format the documents listed above to the electronic addresses set forth below:

Marc A. Pilotin ([pilotin.marc.a@dol.gov](mailto:pilotin.marc.a@dol.gov))

Laura Bremer ([Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov))

Ian Eliasoph ([eliasoph.ian@dol.gov](mailto:eliasoph.ian@dol.gov))

Jeremiah Miller ([miller.jeremiah@dol.gov](mailto:miller.jeremiah@dol.gov))

U.S. Department of Labor, Office of the Solicitor, Region IX – San Francisco

90 Seventh Street, Suite 3-700

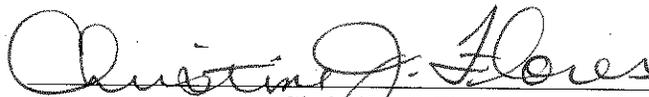
San Francisco, CA 94103

Telephone: (415) 625-7769

Fax: (415) 625-7772

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 26, 2017, at San Francisco, California.

  
Christine J. Flores