

**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

**DEFENDANT ORACLE
AMERICA, INC.'S MOTION FOR
ENTRY OF PROTECTIVE
ORDER, OR, IN THE
ALTERNATIVE, FOR ORDER
THAT PROTECTIVE ORDER IS
IN EFFECT PENDING
RESOLUTION OF ISSUES
CONCERNING PROTECTIVE
ORDER; MEMORANDUM OF
POINTS AND AUTHORITIES**

INTRODUCTION

Despite the fact that Oracle and OFCCP negotiated and stipulated to a Protective Order, and that Judge Larsen entered that stipulated Protective Order in May 2017, OFCCP now disputes that the Order is valid and enforceable. Oracle seeks by this motion either: (1) entry of that Protective Order by Your Honor affirming that it is valid and enforceable; or (2) an order that the Protective Order as previously entered by Judge Larsen shall be effective pending resolution of the current dispute. Oracle submits that the second form of relief should issue immediately until resolution of this motion.

OFCCP claims that there is not a “meeting of the minds” concerning the terms of certain provisions of the Protective Order, given the parties’ dispute over whether the proposed Second Amended Complaint discloses confidential information, and given the OFCCP’s belief that Oracle has over-designated discovery materials as confidential. Therefore, OFCCP claims that the Protective Order, which it negotiated with Oracle in 2017, and to which it agreed to abide as recently as January 18, 2019, does not govern this matter. For the reasons set forth below, OFCCP’s argument lacks merit and should not pose an obstacle to entry of the Protective Order.

More alarming, OFCCP is now taking the position that it need not abide by the terms of the Protective Order pending its re-entry by Your Honor. Despite its assertion to the contrary less than one month ago, OFCCP now says that it will not abide by the Protective Order, pending resolution of its current dispute. OFCCP says only that it will “agree to not publish, in their *original format*, any document produced in discovery marked confidential without going through the process outlined in Judge Larsen’s protective order.” (Parker Decl., Ex. J (emphasis added).) In an email dated February 14, 2019, OFCCP clarified its position as follows: “We aren’t agreeing to anything regarding ‘summaries’ or ‘compilations’ (or any other part of the protective order).” (*Id.*)

“Original format” is not a term used or defined in the Protective Order. It presumably would allow, for example, OFCCP to lift confidential information from a document and disclose that information, provided the document itself was not disclosed. And, in any case, it creates an

intolerable ambiguity, placing at risk the thousands and thousands of documents produced and the 85 million discrete fields of data—containing personal and private information of employees and confidential information of Oracle.

For this reason, Oracle seeks in the alternative, an order that the Protective Order entered by Judge Larsen remains in place pending resolution of the current dispute concerning the terms of the Protective Order. Adoption of an order of this type allows OFCCP to propose changes to the current Protective Order without risk to Oracle that confidential information, which it produced in reliance on the terms of the stipulated Protective Order, will be disclosed in the meantime. No harm can come to OFCCP as it will only be called upon to abide by the Protective Order it negotiated and agreed to.

I. FACTUAL BACKGROUND

A. OFCCP and Oracle Negotiate the Protective Order, Which Is Then Entered

In May 2017, OFCCP and Oracle negotiated the terms of a Protective Order. Following those negotiations, Oracle and OFCCP submitted the Protective Order to the Court subject to a dispute about a provision which is not at issue here. (Parker Decl., Ex. B.) OFCCP also expressly confirmed that “the parties have agreed to every provision of the protective order, except for one,” and further confirmed “we will agree that documents and information Oracle produces after the proposed protective order was submitted to Judge Larson on May 19, 2017 will be governed by the most restrictive version of the protective order, pending a ruling by Judge Larson. Once Judge Larson issues a Protective Order, the documents and information Oracle produces after May 19, 2017 will be governed by that Order.” (Parker Decl., Ex. C (May 24, 2017 Bremer email re discovery and Protective Order).)

On May 26, 2017, Judge Larsen resolved the dispute and entered the Protective Order. (Parker Decl., Ex. A.) Thereafter, Oracle produced tens of thousands of documents and 85 million discrete fields of data—containing personal and private information of employees and confidential information of Oracle—to OFCCP, according to the terms of the Protective Order. (See Parker Decl., Ex. C.)

B. OFCCP Agrees to Abide by the Protective Order Following Reassignment

On October 15, 2018, Judge Larsen entered an order reassigning this case pursuant to *Lucia v. Securities and Exchange Commission*, 138 S.Ct. 2044 (2018). (Parker Decl., Ex. D.) Concerned that this reassignment vacated all prior rulings, Oracle asked OFCCP whether it would continue to abide by the terms of the Protective Order. On January 18, 2019, OFCCP responded affirmatively, as even it acknowledges. (Parker Decl., Ex. E at 2-3.)

C. The Parties Exchange Meet And Confer Letters Regarding the Protective Order With OFCCP Now Suggesting That the Protective Order Is Not in Effect

On January 22, 2019, OFCCP filed a Motion for Leave to File a Second Amended Complaint.

On January 23, 2019, Oracle wrote a letter stating that the Second Amended Complaint contained confidential information in violation of the Protective Order. In this regard, Oracle noted that the proposed Second Amended Complaint contained summaries and compilations of confidential information which the Protective Order prohibited. (Parker Decl., Ex. F; Ex. A Section 3.)

On January 31, 2019, OFCCP responded. First, it questioned whether the Protective Order was in place. (Parker Decl., Ex. E at 1.) Second, it disputed that the proposed Second Amended Complaint disclosed confidential information. (*Id.* at 1-2.) OFCCP contended that the proposed Second Amended Complaint did not contain summaries or compilations of confidential information because the provisions of the Protective Order prevent “wholesale disclosures of confidential information by rearranging the format of that information.” (*Id.* at 1; Ex. A Section 3.) Third, OFCCP expressed a “concern[.]” that “there isn’t a meeting of the minds about the protective order,” and offered to meet and confer. OFCCP’s basis for this assertion was its disagreement over the summaries and compilations provision of the Protective Order. Moreover, OFCCP asserted that Oracle over-designated discovery materials as confidential and that this was a further basis for its assertion that there was not a meeting of the minds. (Parker Decl., Ex. E at 2-3.)

On February 4, 2019, Oracle responded. (Parker Decl., Ex. G.) Oracle expressed alarm that OFCCP would suggest that the Protective Order might not be in place, noting its January 18, 2019 agreement to abide by its terms. (*Id.* at 2.) Oracle also noted that “paragraph 4 of the [Protective Order] entitled ‘DURATION’ makes clear that the obligations thereunder ‘remain in effect unless a Designating Party agrees otherwise, an order directs otherwise, or a subsequent change in the law of [sic] provides otherwise.’” (*Id.* at 2.)

In addition, Oracle addressed the issues raised by OFCCP. First, Oracle pointed out that Section 3 of the Protective Order forbids the disclosures of summaries and compilations of confidential information. Section 3, Oracle noted, does not limit its scope to “wholesale disclosures.” (*Id.* at 3-4; Ex. A, Section 3.) Second, Oracle noted that to the extent that OFCCP disagrees with Oracle’s designation of discovery materials as confidential, there is a provision in the Protective Order that provides a process for resolving such a disagreement. (Parker Decl., Ex. G at 2-3; Ex. A, Section 6.)

As noted in connection with Oracle’s Opposition to OFCCP’s Motion for Leave to Amend, OFCCP has never challenged Oracle’s confidentiality designations pursuant to Section 6 of the Protective Order. (Decl. of Erin Connell in Support of Defendant Oracle’s Opposition to OFCCP’s Motion for Leave to File a Second Amended Complaint ¶ 11.)

D. Oracle and OFCCP Meet and Confer Telephonically and OFCCP Refuses to Agree to Abide by the Terms of the Protective Order

On February 13, 2019, Oracle and OFCCP met and conferred telephonically. (Parker Decl., Ex. J.) Then to ensure that the parties had thoroughly explored the position taken, on February 14, 2019, by email Oracle initiated further correspondence in which OFCCP set forth its position. (Parker Decl., Ex. J.)

Oracle attempted to have a verbal meet and confer prior to February 13, but its efforts were rebuffed. OFCCP noted that the OFCCP lawyer who would engage in the meet and confer process was not available. OFCCP also represented that there was no urgency because it did not intend to file any documents marked confidential or what Oracle claimed were summaries or

compilations “before [the] meet and confer” between counsel. (Parker Decl., Ex. I; *see also* Parker Decl., Ex. H.)

During the telephonic meet and confer, OFCCP raised the issues it had with the Protective Order that caused it to believe that there was “no meeting of the minds.” (Parker Decl., Ex. J (Warrington Parker Feb. 13 email 3:16 p.m.; Jeremiah Miller Feb. 13 email 17:15 p.m.)) Among those issues were those set forth above in the written meet and confer letters. (*Id.*)

Oracle proposed that OFCCP agree to abide by the terms of the Protective Order pending resolution of OFCCP’s issues with the Protective Order and subject to an understanding that there was a dispute concerning the disclosure of information in the Second Amended Complaint, and subject to the fact that OFCCP does not agree to certain designations. (*Id.* (Parker Feb. 13 email 3:16 p.m.))

OFCCP refused. OFCCP stated “We can agree to not publish, in their *original format*, any document produced in discovery marked confidential without going through the process outlined in Judge Larsen’s protective order.” (*Id.* (Miller Feb. 13 email 3:08 p.m. (emphasis added))). OFCCP continued “[we] think our disputes about the definition of ‘summary’ and ‘compilation’ prevent us from agreeing to a more comprehensive statement.” (*Id.*)

Oracle noted that the term “original format” did not appear in the Protective Order, that OFCCP’s position contradicted its position of January 18, 2019 (mentioned above), and that this position appeared to be of little purpose were OFCCP not going to release what Oracle considered to be confidential information. (*Id.* (Parker Feb. 13 email 3:16 p.m.))

In an email sent on February 14, seeking to ensure there was clarity on the position taken by OFCCP, OFCCP reiterated that it would agree not to publish ““original format”” documents. When asked to clarify how this agreement was different than the Protective Order, OFCCP stated the following:

1. We aren’t agreeing to anything regarding “summaries” or “compilations” (or any other part of the protective order)—this is just about the publishing of documents marked confidential.

2. This agreement is intended to be temporary until the parties agree to a new protective order.

(*Id.* (Miller Feb. 14 email 12:10 p.m.).)

Finally, in the meet and confer process, Oracle notified OFCCP that it would file this motion seeking two forms of relief: (1) entry of the Protective Order; or (2) entry of the Protective Order subject to and pending and meet and confer on the topic of the Protective Order.

(*Id.* (Parker Feb. 13 email 3:16 p.m.); (Parker Feb. 14 email 12:28 p.m.).)

II. ARGUMENT

A. The Court Should Enter the Protective Order

OFCCP negotiated the Protective Order and agreed to all of its provisions, subject to one provision not at issue here. It reaffirmed its commitment to the Protective Order on January 18, 2019. It should be held to that Protective Order.

To be sure, the parties now have at least two disputes. First, there is a dispute whether the proposed Second Amended Complaint contains summaries and compilations of confidential information in violation of Section 3 of the Protective Order. Second, there is a dispute over whether Oracle designated documents and information as confidential when they do not deserve that designation.

Neither of these disputes justify OFCCP's position that it can simply walk away from its agreements to abide by the terms of the Protective Order. And the fact that there is a dispute does not support the argument that there was "no meeting of the minds."

In this regard, OFCCP has the burden—as it is making the claim—to show that there was no meeting of the minds "because the parties understood entirely different things by the written terms of the agreement." *Warehousemen's Union Local No. 206 v. Continental Can Co.*, 821 F.2d 1348, 1350 (9th Cir. 1987); *see also DCIPA, LLC v. Lucile Slater Packard Children's Hosp. at Stanford*, 868 F. Supp. 2d 1042, 1053 (D. Or. 2011) ("The term 'meeting of the minds' is 'a much abused metaphor,' and requires only that there be mutual assent to the terms of the agreement." (citation omitted)). OFCCP has not set forth any facts that would meet this

standard.

Instead, OFCCP simply argues that there is a difference in interpretation: OFCCP's position that the Protective Order only prevents "wholesale disclosures of confidential information by rearranging the format of that information" (Parker Decl., Ex. E at 1.); and Oracle's position that the Protective Order cannot bear such a construction. (Parker Decl., Ex. G at 3-4.)

That is not enough. As the Ninth Circuit has noted "[t]he fact that differences subsequently arise between the parties as to the construction of the contract . . . is not itself sufficient to affect the validity of the original contract or to show that the minds of the parties did not meet with respect thereto.'" *Warehousemen's Union*, 821 F.2d at 1350-51 (quoting 17 C.J.S. *Contracts* § 31).

The fact that OFCCP's position is a matter of interpretation is established by its unsupported interpretation of Section 3 of the Protective Order. OFCCP's proffered interpretation of Section 3—that it only prevents the "wholesale disclosures of confidential information by rearranging the format of that information" (Parker Decl., Ex. E at 1.)—is not supported by any reasonable interpretation of its terms. And as courts have held, unexpressed subjective intent that is unsupported by the objective contract terms is insufficient to unwind a contract. *E.g., Block v. eBay, Inc.*, 747 F.3d 1135, 1138 (9th Cir. 2014) ("It is not the parties' subjective intent that matters, but rather their objective intent, as evidenced by the words of the contract." (citations and internal quotation marks omitted)); *Buckley v. Terhune*, 441 F.3d 688, 695 (9th Cir. 2006) ("Although the intent of the parties determines the meaning of the contract, the relevant intent is objective—that is, the objective intent as evidenced by the words of the instrument, not a party's subjective intent." (quoting *Badie v. Bank of Am.*, 67 Cal.App.4th 779, 802 n.9 (1998))); *Warehousemen's Union*, 821 F.2d at 1350 (noting that "where there are objective manifestations of the parties' intent to create a contract, the court need look no further.").

As for the second dispute—Oracle's alleged over-designation of discovery materials as

confidential—this certainly cannot warrant a refusal to enter the Protective Order. The Protective Order has a procedure for challenging designations. (Parker Decl., Ex. A, Section 6.) To date, OFCCP has not availed itself of those provisions. (Decl. of Erin Connell in Support of Defendant Oracle’s Opposition to OFCCP’s Motion for Leave to File a Second Amended Complaint ¶ 11.) So, there is no lack of meeting of the minds. The minds met. OFCCP agreed to a method of challenging Oracle’s designations.

OFCCP’s argument that there are many designations it wishes to challenge is no answer either. There is simply no demonstrable proof of this assertion. OFCCP has not even tried to avail itself of Section 6 of the Protective Order.

For these reasons, the Protective Order should be entered.

B. At the Least, This Court Should Enter the Protective Order Pending Resolution of Any Disputes

At the very least, this Court should enter the Protective Order pending resolution of the current dispute. Oracle produced confidential documents and information in reliance on the Protective Order. Absent a Protective Order, Oracle faces palpable risk that OFCCP will release confidential information in some format, other than what OFCCP calls the “original format.”

First, OFCCP only agreed that it would not release discovery materials marked confidential or what Oracle claimed were summaries or compilations only until the meet and confer with OFCCP counsel. That meet and confer happened on February 13, 2019, so the assurance no longer holds. (Parker Decl., Exs. I, J.) Second, OFCCP is clearly walking away from the Protective Order. It is now limiting the scope of its compliance with the Protective Order to confidential information in its “original format.” Nothing more. (Parker Decl., Ex. J.) Third, were OFCCP not planning to release confidential information in some format, it could simply agree to abide by the Protective Order pending resolution of any issues. It did not.

There is no harm that OFCCP would suffer. OFCCP agreed to abide by the terms of the Protective Order “[e]ven after final disposition of this litigation” (Parker Decl., Ex. A Section 4.) Therefore, holding OFCCP to its agreement until resolution of the present issues

cannot be considered harm.

Also, if OFCCP is not planning to release confidential information in some format, then Oracle is assured of protection and OFCCP suffers no harm. Were it to have such plan, there still could be no harm. OFCCP has abided by the Protective Order in the past without complaint or challenge. It can certainly wait a bit longer.

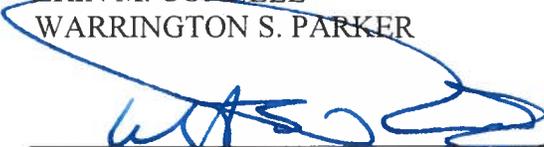
III. CONCLUSION

The Protective Order should be entered. OFCCP agreed to it twice—in May 2017 and in January 2019. The parties' disputes can be resolved within the confines of that Protective Order. But at the least, the Protective Order should be in place while the parties try to resolve any issues. That OFCCP would not agree to at least that proposal indicates that Oracle's confidential information is at risk of disclosure in some format or another. For the reasons set forth above, Oracle respectfully requests that the Court grant this motion.

February 14, 2019

Respectfully submitted,

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CERTIFICATION

Pursuant to 29 C.F.R. § 18.52(a), the undersigned hereby certifies that the movant has in good faith conferred with the OFCCP in an effort to resolve the dispute without the judge's action. Pursuant to this Court's February 6, 2019 Order, the undersigned also certifies that the parties engaged in a good faith, verbal discussion to resolve the dispute prior to seeking court intervention. The parties' verbal discussion took place on February 13, 2019, and the parties' positions at that meet-and-confer are represented in the February 13 and 14 emails in Exhibit J. The parties also earlier exchanged letters on January 24, January 31, and February 4, 2019. *See* Exs. F and E.

SIGNED: 14 FEBRUARY 2019

By 