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

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

Plaintiff,

v.

**ORACLE AMERICA, INC.**

Defendant.

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Case No. 2017-OFC-00006

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OFCCP'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT ON ORACLE'S S AFFIRMATIVE  
DEFENSES RE CONCILIATION**

## I. INTRODUCTION

OFCCP moves for partial summary judgment on Oracle's affirmative defenses alleging that OFCCP failed to satisfy its conciliation obligation under 41 C.F.R. 60-1.20(b). *See* Answer to Second Amend. Compl. ("Answer"), Aff. Def. 6, 30. OFCCP's extensive efforts to conciliate before filing the Complaint are fully documented by undisputed evidence. After issuing a Notice of Violations ("NOV") in March 2016, OFCCP spent nearly 10 months attempting to resolve the violations with Oracle, exchanging numerous letters and emails about a range of issues related to the NOV, meeting in person with Oracle to discuss the violations and the evidence underlying them, and inviting Oracle to make a settlement offer. These extensive and undisputed efforts—though unsuccessful—more than satisfied the Agency's conciliation obligation. Indeed, under the Supreme Court's decision in *Mach Mining*—which is directly on point here—an Agency satisfies its obligation by (1) providing the employer with notice of the violation; and (2) engaging in "some form of discussion" to give the employer an opportunity to remedy the allegedly discriminatory practice. *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1654 (2015). There is no genuine dispute that OFCCP satisfied this test.

Moreover, Oracle's claim that OFCCP was required to separately conciliate the allegations in the Second Amended Complaint ("SAC"), *see* Answer, Aff. Def. 30, is barred by the law of the case. The Court has already ruled that OFCCP was not required to engage in additional conciliation because the SAC does not contain any new claims that are outside the scope of this litigation. On the contrary, the SAC merely refined and streamlined OFCCP's original claims—adding detail to some and narrowing others—based on the parties' discovery.

To require OFCCP to conciliate these refinements of the Complaint would be counterproductive to the purpose of discovery.

As set forth further below, the material facts regarding the conciliation are undisputed and this issue is ripe for adjudication by the Court. A ruling on this motion is necessary to streamline the issues and promote efficiency in discovery and at trial. In particular, committing discovery resources to this topic would be wasteful in light of the undisputed facts surrounding conciliation. There is no need for the parties or the Court to spend any further time considering what happened during the conciliation because this case turns on the merits of OFCCP's discrimination allegations against Oracle, not on procedural issues. For these reasons, which are discussed more fully below, the Court should enter partial summary judgment in OFCCP's favor and hold that as a matter of law OFCCP satisfied its obligation to conciliate under 41 C.F.R. 60-1.20(b).

## **II. MATERIAL UNCONTESTED FACTS**

Before filing suit on January 17, 2017, OFCCP spent nearly ten months trying to secure Oracle's voluntary compliance with the antidiscrimination provisions of the Executive Order through conciliation and persuasion. Statement of Material Uncontested Facts ("Stat. Mat. Facts"), ¶¶ 2-17. Those conciliation efforts included the exchange of numerous emails and letters discussing the underlying violations, the statistical evidence at issue, and Oracle's arguments and objections, an in-person meeting in which OFCCP outlined potential remedies for purposes of conciliation, based on the limited information available, and invitations to Oracle to make a settlement offer. *See id.* The record of the parties' conciliation is undisputed and fully

documented. *See generally* Declaration of Shauna Holman-Harries (“Holman Harries Decl.”); Declaration of Gary Siniscalco (“Siniscalco Decl.”).<sup>1</sup>

On March 11, 2016, after the compliance review, OFCCP sent Oracle the NOV which alleged ten separate violations of the Executive Order at Oracle’s Redwood Shore Headquarters (“HQCA”). Stat. Mat. Facts ¶ 2. Among other things, the NOV alleged (1) disparities in the compensation of women relative to men employed in the Product Development, Information Technology, and Support job functions at Oracle’s HQCA; (2) disparities in the pay of Asian and black or African American employees relative to white employees in Oracle’s Product Development job function at Oracle’s HQCA; and (3) disparities in the hiring non-Asian applicants relative to Asian applicants. Stat. Mat. Facts ¶ 3; Holman Harries Decl., Ex. E. The NOV described the statistical evidence that substantiated the Agency’s findings, and the remedies it sought. Stat Mat Facts ¶ 3; Holman-Harries Decl., Ex. E. Additionally, the NOV expressly invited Oracle to contact the Agency to begin the conciliation process. Stat. Mat. Facts ¶ 4; Holman-Harries Decl. Ex. E.

In late March, OFCCP invited Oracle to meet in person and conciliate the violations. Stat. Mat. Facts ¶ 5; Holman-Harries Decl., Ex. G. Two weeks later, Oracle declined the invitation, stating that it preferred “written communication.” Stat. Mat. Facts ¶ 6; Siniscalco Decl., Ex. I at 5. Over the next six months, the parties engaged in extensive written correspondence regarding the violations. Stat. Mat. Facts ¶¶ 7-13. In April, OFCCP responded in writing to 41 questions posed by Oracle about the NOV, explaining that other questions invaded on the Agency’s

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<sup>1</sup> These declarations were attached to Oracle’s Motion for Summary Judgment, or in the Alternative, to Stay the Proceedings for Failure to Conciliate filed April 21, 2017. OFCCP can provide courtesy copies if needed.

deliberative process. Stat. Mat. Facts ¶ 7; Siniscalco Decl. Ex J at 5-11. On May 25, Oracle sent a position statement objecting to the NOV on various procedural and legal grounds. Stat. Mat. Facts ¶ 8; Siniscalco Decl. ¶ 4, Ex. K. On June 8, OFCCP responded that Oracle’s arguments had failed to rebut the violations, and issued a Show Cause Notice (“SCN”). Stat. Mat. Facts ¶ 9; Siniscalco Decl. Ex. L. On June 29, Oracle objected to the SCN and complained that the parties had not conciliated. Stat. Mat. Facts ¶ 10; Siniscalco Decl. Ex. M at 2. In September, OFCCP responded to Oracle’s objections, and again invited Oracle to meet in person to discuss the violations. Stat. Mat. Facts ¶¶ 11, 13; Siniscalco Decl. Exs. N, O at 44-46.

On October 6, OFCCP met with Oracle in person. Stat. Mat. Fact ¶ 14; Siniscalco Decl. ¶ 9. During that meeting, the parties discussed the issues raised in their written correspondence, and OFCCP reiterated its view that Oracle’s arguments thus far had failed to rebut the disparities identified in the NOV. Stat. Mat. Facts ¶ 14; Siniscalco Decl. ¶ 9. OFCCP outlined a range of potential monetary remedies for purposes of conciliation, noting that the amounts were based on limited information and would be subject to revision, and asked Oracle to respond by the end of the month. Stat. Mat. Facts ¶ 14; Siniscalco Decl. ¶¶ 10-11.

Three weeks later, Oracle submitted an additional statement repeating many of the same arguments it had made in previous correspondence, but failing to provide any settlement offer or rebuttal statistics. Stat. Mat. Facts ¶ 15; Siniscalco Decl. Ex. Q. After reviewing the submission, OFCCP decided to refer the matter for enforcement proceedings. Stat. Mat. Facts ¶ 16. On December 9, OFCCP sent a detailed response advising Oracle that the matter was being referred for enforcement. *Id.*; Siniscalco Decl. Ex. R. In January 2017, the Solicitor’s Office offered a final opportunity for Oracle to make a settlement offer. Stat. Mat. Facts ¶ 17; Siniscalco Decl.

Ex. T. Oracle declined to do so. Stat. Mat. Facts ¶ 18; Siniscalco Decl. Ex. U. Thus, on January 17, OFCCP filed the Complaint. Stat Mat. Facts ¶ 19.

### III. ARGUMENT

#### A. The undisputed facts demonstrate that OFCP satisfied its conciliation obligation under the standard set forth in *Mach Mining*.

In its sixth affirmative defense, Oracle challenges the sufficiency of OFCCP’s conciliation efforts prior to filing the Complaint. *See* Answer, Aff. Def. 6.<sup>2</sup> The EO regulations governing OFCCP’s conciliation obligation state that OFCCP shall make “reasonable efforts to secure compliance through conciliation and persuasion.” 41 C.F.R. § 60-1.20(b). As set forth below, the undisputed facts demonstrate that OFCCP satisfied this requirement.

The standard governing OFCCP’s conciliation obligation is well-settled. Under the Supreme Court’s decision in *Mach Mining v. E.E.O.C.*—which is directly on point here—an agency satisfies its obligation by (1) providing notice of the violations – telling the employer “what the employer has done and which employees (or what class of employees) have suffered as a result”; and (2) trying “to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice.” 135 S. Ct. 1645, 1655-56 (2015). Because Title VII features a nearly identical pre-filing conciliation requirement as 41 C.F.R. 60-1.20(b), the standard established by *Mach Mining* applies here. *See OFCCP v. Analogic Corp.*, 2017-OFC-00001 (ALJ Aug. 16, 2017), at 13-14 (adopting *Mach Mining* in review of whether OFCCP met its conciliation obligation); *see also*

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<sup>2</sup> The defense states: “As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that OFCCP has failed to meet its obligation to engage in reasonable conciliation efforts and, on that basis, has violated its own regulations, and denied Oracle substantive and procedural due process.” Answer, Aff. Def. 6.

*OFCCP v. Washington Metropolitan Area Transit Authority*, 84-OFC-8, slip op. at 5-6 (Sec’y Mar. 30, 1989) (recognizing that OFCCP and EEOC share similar conciliation obligations ); *OFCCP v. Nat. City Bank of Cleveland*, 80-OFC-31, at 15 (Sec’y Sept. 9, 1982) (noting that the agencies share “comparable responsibilities and scope of discretion” in determining how to resolve violations).<sup>3</sup>

Similarly, Administrative Law Judges have long held that OFCCP’s duty to conciliate under the regulations is relatively minimal. *See, e.g., OFCCP v. Central Power & Light Co.*, 82-OFC-5, 1987 WL 774235 at \*2 (ALJ Mar. 30, 1987) (finding that a 15-minute meeting to discuss appropriate remedies satisfied OFCCP’s conciliation obligation); *OFCCP v. East Kentucky Power Cooperative, Inc.*, Case No. 1985 OFC 7, at 14 (ALJ, Mar. 21, 1988) (finding that several telephone conversations and one face-to-face meeting with the contactor were

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<sup>3</sup> Any effort by Oracle to distinguish *Mach Mining* because the EO regulations use the term “reasonable efforts” to conciliate while Title VII states that the EEOC shall “endeavor” to conciliate should be rejected. As another court explained, *Mach Mining* did not turn on the term “endeavor,” but instead on the leeway granted to EEOC to determine how to conciliate, which OFCCP shares:

As an initial matter, there is little difference between a requirement to make “reasonable efforts” to conciliate and the Title VII requirement that the EEOC “endeavor” to conciliate. The *Mach Mining* Court’s decision did not turn on the meaning of “endeavor”; instead it relied, in part, upon the EEOC’s flexibility in conciliation efforts. The conciliation regulation under the EO requires OFCCP to make “reasonable efforts” to secure compliance through conciliation and persuasion. 41 C.F.R. § 60-1.20((b). The regulation reflects OFCCP has similar flexibility and latitude in its conciliation attempt. For example, the regulation does not require OFCCP to “devote a set amount of time or resources” for conciliation and does not require OFCCP to “involve any specific steps or measures in its conciliation effort.” *Mach Mining*, 135 S. Ct. at 1654.

*Analogic*, 2017-OFC-00001 at 14.

sufficient to satisfy OFCCP’s duty to conciliate). As the judge in *East Kentucky* observed, the regulations—similar to Title VII—“do not specify what form conciliation efforts should take, but only that efforts be made.” *Id.*

Here, the undisputed facts demonstrate OFCCP satisfied its obligation to engage in reasonable conciliation efforts before filing suit. First, OFCCP provided notice of the violations through the NOV and SCN, identifying the type of discrimination alleged, the employees affected, and the Agency’s proposed remedies. Second, OFCCP engaged in extensive written and verbal discussions in an effort to provide Oracle an opportunity to remedy the violations. This included the exchange of multiple emails and letters, an in-person meeting, a discussion of potential remedies for purposes of conciliation, and invitations to Oracle to make a settlement offer. By the time OFCCP filed the Complaint in January 2017, OFCCP had spent nearly ten months attempting to conciliate the violations. These efforts more than satisfy the requirements of *Mach Mining*. Any argument that OFCCP should have continued discussions longer, or responded differently to Oracle’s arguments must be rejected. As *Mach Mining* holds, the scope of judicial review does not reach “strategic decisions” by the agency, such as “the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief” –as those decisions are left to the Agency. 135 S. Ct. at 1654. Likewise, it is clear under *Mach Mining* that “the kind and extent of discussions” in conciliation are solely within the Agency’s discretion.<sup>4</sup> *Id.* at 1656.

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<sup>4</sup> Following this directive, courts applying *Mach Mining* have declined to review the “substantive terms of the bargaining between [the employer] and the [agency],” as that would infringe on the Agency’s discretion to decide how to conciliate. *See Analogic Corp.*, 2017-OFC-00001, at 13 (quoting *EEOC v. Jetstream Ground Services, Inc.*, 134 F. Supp. 3d 1298, 1316 (D. Colo. 2015)). In short, the adequacy of conciliation is a question of “process,” not “substance,” and any

A recent ALJ decision on this issue is instructive. In *OFCCP v. Analogic Corp.*, the court held that OFCCP satisfied its obligation under *Mach Mining*. 2017-OFC-00001 (ALJ Aug. 16, 2017).<sup>5</sup> In that case, prior to bringing suit, OFCCP issued an NOV identifying the type of discrimination OFCCP had uncovered in the compliance review, and the employees affected by the violations. *Id.* at 15. Following the NOV, OFCCP made “several attempts” over “several months” to secure the contractor’s compliance, including by “exchanging several e-mails and telephone conferences, the exchange of views and documents, and a settlement offer.” *Id.* Applying *Mach Mining*, the Court held that these efforts were adequate as a matter of law, and granted summary judgment in favor of OFCCP on the employer’s conciliation defense.

Here, as in *Analogic*, OFCCP’s efforts to conciliate were sufficient as a matter of law. In addition to providing a detailed NOV describing the discrimination allegations and the class of employees at issue, OFCCP spent nearly ten months engaging in extensive written and verbal discussions with Oracle in an effort to resolve the violations without litigation. The Agency’s actions clearly satisfied its obligation under *Mach Mining*.

**B. Oracle’s thirtieth affirmative defense is barred by the law of the case.**

In its thirtieth affirmative defense, Oracle claims that OFCCP failed to conciliate “numerous new claims” alleged in the SAC.<sup>6</sup> The Court should grant summary judgment in

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argument regarding the substance of the parties’ communications is beyond the scope of the Court’s review. *See id.*

<sup>5</sup> A copy of this decision is included in the compendium attached to OFCCP’s Reply in Support of the Motion for Leave to File a Second Amended Complaint, filed on February 2, 2019.

<sup>6</sup> This defense states: “As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that OFCCP’s failure to conciliate the numerous new claims in its Second Amended Complaint is contrary to law (including the U.S. Constitution), its regulations, and its

favor of OFCCP on this defense because this issue has already been decided. *See Juliana v. United States*, 339 F. Supp. 3d 1062, 1085 (D. Or. 2018) (the law of the case doctrine precludes “a court . . . from reexamining an issue previously decided by the same court”) (quoting *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002)).

In the Order granting leave for the Secretary to file the SAC, the Court expressly held that OFCCP was not required to conciliate any of the additional allegations in the SAC. *See Order Granting Conditional Leave to File Second Amend Complaint (“Order”)*, at 9-11. As the Court explained, additional conciliation is not required because the SAC does not allege any “new claims” that are outside the scope of the original Complaint. First, the allegation regarding prior salary is not a “new claim” – it simply adds “more detail and substance” to OFCCP’s original claim of compensation discrimination, which OFCCP already conciliated. Order at 9. Second, the continuing violations allegations are not “new claims,” as they arise out of the same underlying violations that OFCCP already conciliated.<sup>7</sup> *Id.* Third, even assuming OFCCP’s job channeling/assigning allegations can be deemed “new claims,” they fall within the same “general scope” as OFCCP’s original compensation claims (involving the same class of employees at the same facility), and therefore require no separate conciliation. Order at 11.

The Court’s adjudication of this issue was correct and consistent with the reasoning of other courts that have declined to require additional conciliation of amendments on judicial

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policies, and all of these new claims should be dismissed based on that failure.” Answer, Aff. Def. 30.

<sup>7</sup> *See also Analogic*, 2017-OFC-00001, at 19 (“[t]here is nothing requiring OFCCP to conciliate continuing violations”); *OFCCP v. Enterprise RAC Company of Baltimore LLC*, 2016-OFC-0006 (ALJ Mar. 27, 2017), at 5-6 (holding OFCCP could pursue claims of continuing violations without conducting additional conciliation).

economy grounds. *See OFCCP v. JBS USA et al.* Case No. 2017-OFC-00002, at 3 (ALJ Apr. 23, 2018) (OFCCP was not required to separately conciliate entirely new claims of gender discrimination not covered by the compliance audit, but learned during discovery, in part, on judicial economy grounds); *OFCCP v. Bank of America*, ARB Case No. 13-099, 2016 WL 2892921, \*25 (Apr. 16, 2016) (“it was not necessary for the OFCCP to separately investigate, make findings, and attempt to conciliate each additional violation by BOA because it would be impractical and inefficient since the case was already in litigation”); *see also OFCCP v. Honeywell, Inc.* No. 77-OFCCP-3, slip op. at 5-6 (Sec’y June 2, 1993) (rejecting employer objection that complaints not included in Show Cause Notice were beyond scope of hearing because employer clearly had notice of them). As the Court rightly decided, “forcing OFCCP to . . . engage in futile conciliation would serve no purpose except to further delay resolution of this matter.” Order at 11. Further, it would be contrary to the purpose of discovery to require OFCCP to engage in conciliation when it has simply refined its claims based on the information produced in discovery.<sup>8</sup>

**C. A ruling on this motion is necessary to streamline the parties’ remaining discovery and the issues at trial.**

Because the material facts are undisputed and OFCCP satisfied its conciliation obligation as a matter of law, there is no need for the parties or the Court to spend any further time in this litigation considering what happened in the conciliation. In particular, committing discovery resources to this issue would be wasteful in light of the lack of any genuine disputes. At trial, this

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<sup>8</sup> To require OFCCP to separately conciliate every new theory or allegation made based on discovery would reward employers who withhold evidence during the compliance review. Here, for example, Oracle blocked OFCCP’s request for complete compensation data, refusing to produce any data at all from 2013, which limited OFCCP’s ability to fully analyze and detect the sources of the disparities until it obtained additional data in discovery.

case will turn on the merits of OFCCP's discrimination allegations, not procedural issues, and that should be the focus of the remaining litigation.<sup>9</sup>

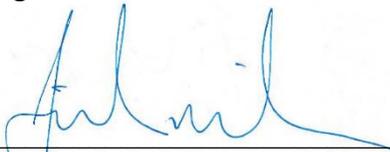
#### IV. CONCLUSION

The record is undisputed that before filing the Complaint, OFCCP engaged in diligent efforts to secure Oracle's compliance with the antidiscrimination provisions of Executive Order 11246 through conciliation and persuasion. Because OFCCP's efforts satisfy 41 C.F.R. 60-1.20(b) and the *Mach Mining* test, the Court should grant OFCCP partial summary judgment on Oracle's sixth affirmative and thirtieth affirmative defenses and hold that OFCCP satisfied its conciliation obligation as a matter of law.

DATED: April 17, 2019

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<sup>9</sup> Indeed, even assuming there were genuine disputes regarding OFCCP's conciliation, under *Mach Mining* the only remedy for any alleged deficiencies would be to stay the case and order OFCCP to engage in further conciliation. *Mach Mining*, 135 S. Ct. at 655. That has already occurred. During the year-long stay, OFCCP participated in multiple mediation sessions with Oracle in an effort to resolve the violations. Despite those efforts, the parties were unable to reach an agreement. Any further delay for purposes of conciliation would be unwarranted.