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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

**OFCCP'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY  
JUDGMENT ON ORACLE'S AFFIRMATIVE DEFENSES RE CONCILIATION**

## I. INTRODUCTION

Oracle's opposition to OFCCP's Motion for Partial Summary Judgment on its conciliation defenses confirms that there are no material factual disputes and that OFCCP is entitled to judgment as a matter of law. As explained by the OFCCP's Memorandum, OFCCP satisfied its conciliation obligation before bringing this enforcement action by providing notice of the violations and the evidence underlying them to Oracle and engaging in ten months of written and verbal discussions with Oracle—including the exchange of multiple letters and an in-person meeting—in an effort to secure voluntary compliance. Those efforts more than satisfy the Agency's requirement to conciliate under *Mach Mining*.

Oracle's argument that there are genuine issues for trial is unavailing. Notably, Oracle does not dispute—and therefore has conceded—the material uncontested facts regarding conciliation which OFCCP attached to its motion. *See* 41 C.F.R. § 60-30.23(d). Instead, Oracle attempts to argue that a genuine issue for trial exists because OFCCP should be subject to a more “exacting” standard than the one set forth in *Mach Mining*. Oracle's arguments are contrary to the reasoning of *Mach Mining* and decades of OFCCP precedent recognizing that OFCCP has the discretion to determine the manner in which it attempts to conciliate. Indeed, Oracle fails to cite a single case that supports its claim that OFCCP's efforts were insufficient. Because the material facts regarding conciliation are undisputed, and OFCCP's efforts here are equal to or exceed the requirements of *Mach Mining* and OALJ precedent, summary judgment on Oracle's sixth affirmative defense should be granted.

Similarly, Oracle's opposition confirms that this Court should grant summary judgment in favor of OFCCP on Oracle's thirtieth affirmative defense regarding the supposed “new” claims in the Second Amended Complaint. As OFCCP noted in its Memorandum, this court

already considered—and rejected—Oracle’s argument that OFCCP was required to separately conciliate the refinement of its claims which OFCCP made after conducting discovery. Although Oracle argues that the law of the case does not preclude the Court from reconsidering its earlier decision, it fails to make any new arguments that would warrant reconsideration—nor has it responded to any of the authority that OFCCP cited in its motion. In short, regardless of whether or not the law of the case doctrine applies, Oracle has given the court no reason to reach a different conclusion.

Finally, Oracle’s argument that this court should defer ruling on the motion under Federal Rule of Civil Procedure Rule 56(d) is meritless. Oracle has no need for discovery here. The only facts relevant to whether OFCCP fulfilled its conciliation obligation—namely, whether it provided Oracle notice of the violations and an opportunity to resolve them—are already known by Oracle and documented in the undisputed record of the parties’ communications. Applying *Mach Mining*, it is undisputed that OFCCP has met its burden with respect to its duty to conciliate. Further discovery cannot disclose that OFCCP somehow did less to conciliate than what the undisputed record shows. As a result, there is no need to delay a ruling on this motion to await further discovery. In fact, Oracle’s intent to take depositions on this issue underscores the need for a decision now to prevent wasteful discovery on matters that are undisputed.

For these reasons, and as explained more fully below, the Court should grant partial summary judgment in favor of OFCCP on Oracle’s affirmative defenses regarding conciliation.

## II. ARGUMENT

### A. Oracle fails to show that there are any genuine issues for trial regarding Oracle’s sixth affirmative defense.

#### i. *Mach Mining sets forth the standard for reviewing OFCCP’s conciliation efforts.*

There is no genuine dispute that OFCCP’s efforts to conciliate before filing this action satisfied the standard set forth by the Supreme Court in *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645. *See* Mem. Points and Authorities (“Mem.”), at 5-8. Oracle does not deny this. Rather, Oracle argues that *Mach Mining* does not apply because the E.O.’s regulation’s use of the term “reasonable efforts” implies a more “exacting” standard than the one applicable to the EEOC. *Opp.* at 1. This argument is meritless.

First, as the only other ALJ who has addressed this issue persuasively reasoned, the *Mach Mining* standard applies here because OFCCP and EEOC share nearly identical conciliation requirements—and similar flexibility in determining how to attempt conciliation in any given case. *See* Order Granting OFCCP Motion for Summary Judgement and Denying Analogic Motion for Summary Decision (“Analogic Order”), 2017-OFC-1 (ALJ Aug. 16, 2017), at 11-15. OFCCP, like EEOC, is not required by the E.O. regulations to take any specific steps or measures in conciliation, or to dedicate any set amount of resources or time. *See Mach Mining*, 135 S. Ct. at 1654; Analogic Order at 14; 41 C.F.R. § 60-1.20(b). Further, as with EEOC, OFCCP alone decides whether to resolve violations through a settlement agreement or resort to litigation. *See Mach Mining*, 135 S. Ct. at 1654; 41 C.F.R. 60-1.26(b)(1) (“referral [to the Solicitor for enforcement] may be made . . . when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate”). Oracle’s effort to distinguish *Mach Mining* because Title VII states that EEOC shall “endeavor” to conciliate, while the E.O. regulation provides OFCCP shall make “reasonable efforts” to conciliate is unconvincing. *See* Mem. at 6 n.3. As the *Analogic* decision reasoned in rejecting an argument identical to the one Oracle makes here, the meanings of the terms “endeavor” and “reasonable efforts” in this context are not

substantially different.<sup>1</sup> Analogic Order at 14. Moreover, the Supreme Court’s decision did not turn on the meaning of the term “endeavor” but on the substantial discretion granted to EEOC to determine how to conduct conciliation, which OFCCP shares. *See* Analogic Order at 14 (explaining the similarities between the EEOC and OFCCP’s authority to determine how to conciliate). This ample discretion—not the term “endeavor”—was the basis for the Supreme Court’s decision that a narrow standard of review governs EEOC’s conciliation efforts, and should also guide this Court’s review here. *See Mach Mining*, 135 S. Ct. at 1654.

Second, even before *Mach Mining*, Administrative Law Judges have for decades held that OFCCP’s obligation to make reasonable efforts to conciliate is relatively minimal and affirmed that OFCCP met its obligation, for example, with a few telephone calls or a short in-person meeting with the contractor. *See* Mem. at 6-7 (citing cases) *see also OFCCP v. Priester Constr. Co.*, 78-OFCCP-11, 1983 WL 411026, at \*13 (Sec’y Order Feb. 23, 1983) (finding that OFCCP made reasonable efforts by offering to discuss the violations, exchanging letters, and meeting with employer). Despite Oracle’s effort to distinguish *OFCCP v. Central Power & Light Co.*, 82-OFC-5 (Mar. 30, 1987), on the ground that in that case the parties had reached an impasse, there is no requirement in the regulation or the case law that OFCCP bargain to impasse in every case.<sup>2</sup> To the contrary, the case law and regulations demonstrate that the Agency has the discretion in each case to determine the manner in which it conciliates and at what point to refer a matter for enforcement. *See* Mem. at 6-7; 41 C.F.R. 60-1.26(b)(1). Oracle has failed to cite a

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<sup>1</sup> If anything, the definition of the term “endeavor”—which means to make a “serious determined effort” or “strive to achieve”—implies a more serious effort than “reasonable efforts,” as a “reasonable” effort means only an effort that is “moderate, not extreme, well balanced, or fair.” *See* Analogic Order at 14, n.20.

<sup>2</sup> In any event, as noted below, here OFCCP determined that further conciliation was unlikely to be successful—in other words, that the parties were at impasse—when it referred the matter for enforcement. *See infra* n.4, 5.

single case that supports the supposed “exacting” conciliation standard that it claims applies to OFCCP. Thus, its arguments should be rejected and this Court should follow *Mach Mining*.

ii. *Oracle has failed to show any genuine issues for trial.*

Applying the correct legal standard, Oracle has failed to raise any genuine disputes for trial regarding the adequacy of OFCCP’s pre-suit conciliation. Instead, Oracle levels a series of irrelevant accusations regarding the substance of OFCCP’s demands, the content of its conciliation discussions, and the timing of its decision to refer the matter for enforcement. Opp. at 2. Although OFCCP disagrees with Oracle’s characterizations of the manner in which OFCCP conciliated<sup>3</sup> this Court need not decide the veracity of Oracle’s statements because even if they were true they would not raise a genuine issue for trial. It is clear that OFCCP has discretion in any given case to determine “the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.” *Mach Mining*, 135 S. Ct. at 1654; *see also* Analogic Order at 15; 41 C.F.R. § 60-1.26(b)(1). Indeed, even before *Mach Mining*, DOL precedent rejected the notion that Administrative Law Judges must police the content of OFCCP’s demands in conciliation. *See Priester*, 1983 WL 411026, at \*13 (finding that OFCCP adequately conciliated despite employer’s claim that OFCCP had made only a “take it or leave it offer”). Thus, Oracle’s argument that OFCCP should have taken a different tone in conciliation, should have continued negotiations longer, and should have provided more detailed

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<sup>3</sup> Among other things, Oracle’s claim that OFCCP “abruptly” cut off negotiations is counter to the undisputed fact that OFCCP did not file this enforcement proceeding until nearly 10 months after it had begun attempting to conciliate with Oracle. Mem. at 2-5. OFCCP did not “abruptly” cut off negotiations but instead referred the matter for enforcement after Oracle refused to make a settlement offer and instead continued to repeat the same legal arguments and objections that OFCCP had already addressed in the parties’ previous correspondence. *See* Mem. at 4-5. Likewise, the record of the parties’ communications does not support the assertion that OFCCP took an “adversarial” and “confrontational” approach in negotiations. *See* Memo. at 2-5; Holman-Harries Decl. Exs. E-G; Siniscalco Decl. Exs. I-V.

demands for relief and more information regarding its regression analysis are meritless. Opp. at 2. Under *Mach Mining*, the Agency has discretion to make the strategic decisions regarding the manner in which it attempts to achieve voluntary compliance from a contractor before initiating enforcement, and the duration that its efforts should proceed. 135 S. Ct. at 1654.

Again, the ALJ's decision in *Analogic* is persuasive. There, the contractor, similar to Oracle, argued that OFCCP had not provided it with "sufficient information about the regression model its audit expert used to enable the company to understand and replicate the analysis." *Analogic* Order at 3. The court rejected those arguments based on the "wide latitude" granted to OFCCP to determine the manner in which conciliation efforts are performed, noting that OFCCP was not required to "share every document *Analogic* sought during conciliation" or to "provide every piece of evidence or data it may eventually rely upon at trial during the conciliation process." *Analogic* at 15. Thus, Oracle's attempt to distinguish *Analogic* on the ground that OFCCP had provided more information about its regression analysis to the employer is contrary to the facts of that case and the rationale of the court's decision.<sup>4</sup> Opp. at 10.

Here, like in *Analogic*, the undisputed facts show that OFCCP's efforts to conciliate were adequate as a matter of law. *See* Mem. at 7-8. As in *Analogic*, OFCCP provided notice of the violations to Oracle and engaged in months of written and verbal discussions with Oracle in an effort to resolve them. *See* Mem. at 2-5. That OFCCP did not provide every document or piece of evidence demanded by Oracle does not undermine the sufficiency of its conciliation. Indeed, OFCCP must have the discretion in individual cases to determine the extent of information to

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<sup>4</sup> In any event, Oracle's assertion that OFCCP never provided "essential information" regarding the regression analysis is not accurate. Opp. at 2. The NOV contained detailed information about the regression analysis, the variables used, and the results, *see* Stat. Mat. Facts ¶ 3; Holman Harries Decl., Ex. E., and OFCCP provided further details and the full instruction set for the statistical analysis to Oracle in October 2017, before the parties began mediation.

share.<sup>5</sup> This court, following *Analogic* and *Mach Mining*, should reject Oracle’s request that it conduct a “searching” review of the substance of the parties’ communications beyond what is required. Opp. at 9. As the judge in *Analogic* noted, “[r]equiring reviewing courts to assess the merits of those discussions would essentially result in a mini-trial of the allegations at the conciliation stage.” *Analogic* Order at 15. There is no reason for the Court to undertake this unnecessary exercise.

Finally, Oracle’s reliance on Judge Larsen’s decision denying summary judgment is misplaced. Opp. at 11. First, it should be emphasized that OFCCP never brought a motion for summary judgment on this issue before Judge Larsen; rather, it was Oracle’s motion for summary judgment, not OFCCP’s, which Judge Larsen denied. Further, to the extent the decision found there were material disputes as to whether OFCCP satisfied its obligation to make reasonable efforts to conciliate, the rationale of the court’s decision is not persuasive because it did not apply the narrow standard of review set forth in *Mach Mining* or the DOL precedent

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<sup>5</sup> Although not dispositive to this motion, it bears noting that any difference in the amount of statistical information shared in this case versus *Analogic* was the result of Oracle’s own response to the NOV. While in *Analogic*, the parties’ statisticians spoke and exchanged information related to the statistical analysis, the reason that did not happen here is because throughout conciliation Oracle repeatedly denied that any statistical analysis at all could be done on its workforce. *See, e.g.* Sinsicalco Decl. Exs. K (May 25, 2016 Position Statement) at 3 (arguing that Oracle’s statistical model, based on comparing employees in the same job title, is “defective” and “no counter-statistical model is warranted” because Oracle’s employees are not “fungible” and no two employees have the same job); Ex. Q (October 31, 2016 letter) at 7 (arguing that “generalized statistics” that might be probative in other cases are “not meaningful here” because Oracle does not have employees who are “fungible” in their roles). Oracle’s continued refusal to acknowledge the validity of the statistical evidence indicating gross disparities in the compensation of its employees based race and gender was the primary reason that OFCCP determined that further conciliation would be futile. *See* Siniscalco Decl. Ex. R. Under *Mach Mining*, OFCCP has the discretion to make that call, and it exercised that discretion appropriately here.

holding that OFCCP's obligation regarding conciliation is relatively minimal. As set forth above, applying the correct standard, there are no genuine disputes of material fact.<sup>6</sup>

B. OFCCP is entitled to summary judgment on Oracle's thirtieth affirmative defense.

This Court has already decided that OFCCP's additional allegations in the SAC—which were refinements of its original claims based on the parties' discovery to date—did not require separate conciliation. Order Granting Conditional Leave to File Second Amend Complaint (“Order”), at 9-11. Although the court noted that it was not required to decide this issue in the context of the motion for leave to amend, it chose to do so “in the interest of efficiency.” *Id.* at 9.

Rather than respond to the Court's reasoning, Oracle dedicates the majority of its opposition to arguing that the law of the case doctrine does not preclude review of the Court's prior decision. *Opp.* at 13-16. The Ninth Circuit has recognized there is some ambiguity regarding the application of the law of the case to a trial court's previous rulings. *See Mark H. v. Lemahieu*, 513 F.3d 922, 932 n.8 (9th Cir. 2008) (noting there are conflicting decisions regarding whether and to what extent the law of the case doctrine applies to previous decisions of the district court). However, Oracle has not made any new arguments that would warrant reconsideration. Nor has it made any effort to distinguish the legal authority cited by OFCCP that supports the Court's previous decision on this issue. *See Mem.* at 9-10. Oracle's failure to make any substantive arguments confirms that judgment should be granted in OFCCP's favor. As the Court noted, “[f]orcing OFCCP to . . . engage in futile conciliation [of the SAC allegations] would serve no purpose except to further delay resolution of this matter.” Order at 11.

C. Oracle's assertion that it requires more discovery is baseless.

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<sup>6</sup> Also, Oracle has taken the position that Judge Larsen was not constitutionally competent to make any rulings in this case. Accordingly, it cannot rely on his prior rulings to bind this Court.

Oracle’s argument that a decision on this motion should be deferred under Rule 56(d) should be rejected. Under Rule 56(d), summary judgment may be deferred only when the non-moving party shows “by affidavit or declaration” that “for specified reasons, it cannot present facts essential to justify its opposition.” Oracle’s claim to need discovery to oppose this motion is meritless. The record of the parties’ communications is fully documented and Oracle is well-aware of all material facts. *See Mem.* at 2-5. As discussed above, applying *Mach Mining*, it is undisputed that OFCCP has met its duty to conciliate. Further discovery cannot disclose that OFCCP somehow did less to conciliate than the undisputed record establishes, so it would be pointless to await further discovery.<sup>7</sup> Oracle’s intent to take these depositions underscores the need for a prompt ruling on this motion to prevent waste of the parties’ resources in the limited time remaining for discovery.

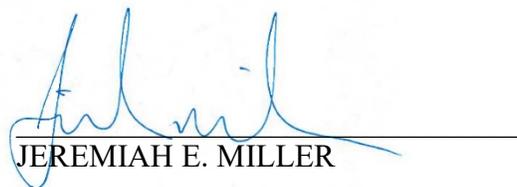
### III. CONCLUSION

For the reasons stated above, and those set forth in OFCCP’s Memorandum in Support of its Motion for Partial Summary Judgment, OFCCP request that the court grant summary judgment in favor of OFCCP on Oracle’s sixth and thirtieth affirmative defenses.

DATED: May 10, 2019

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<sup>7</sup> Tellingly, the affidavit from Oracle’s counsel fails to describe any of the “the specific facts” it “hopes to elicit” from the depositions or explain why the “sought-after facts are essential to oppose summary judgment”—which are prerequisites for relief under Rule 56(d). *See Martin v. James River Ins. Co.*, 366 F. Supp. 3d 1186, 1186 (D. Nev. 2019) (citing *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008)).

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