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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.

Case No. 2017-OFC-00006

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Office of Administrative Law Judges
San Francisco, Ca

**OFCCP'S OPPOSITION TO ORACLE AMERICA INC.'S MOTION TO
COMPEL OFCCP TO PRODUCE DOCUMENTS AND FURTHER RESPOND TO
INTERROGATORIES**

I. INTRODUCTION

In its motion to compel, Oracle seeks to buck settled precedent establishing protection for informants long recognized as crucial to effective law enforcement. Oracle asks this Court to compel—among other things— (1) the identities of individual Oracle employees who have risked their livelihood to provide information to the Department¹ in this enforcement action; (2) notes and memos of the Department’s attorneys memorializing impressions regarding conversations with informants which are plainly shielded by the work product doctrine; and (3) confidential communications between the Department’s attorneys and the members of the protected class and their counsel, all of which are also well protected under settled precedent establishing the common interest privilege.

The Department cannot overstate the importance of maintaining the confidentiality of the identities of employees who have come forward with information. In order for the Department to achieve its mission, it is dependent on employees reporting violations of federal law: employees are the Department’s eyes and ears. *Kasten v. Saint–Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1333 (2011). As Oracle well knows, if it succeeds in outing the hundreds of informers in this case, thousands of workers will be chilled from talking to the government across the tech industry and across California.

Here, Oracle employees have shared information with the Department only under the express promise of confidentiality. Indeed, nearly all Oracle informers explicitly have expressed tremendous fear of retaliation by Oracle. This exceptionally high number of reports of fear and concern regarding confidentiality is driven by the fact that the threat of retaliation is disturbingly real. As detailed herein, Oracle has a documented history of discouraging employees from talking to anyone about their work conditions, and particularly discouraging communications with law enforcement.

¹ “Department” is used interchangeably here with Plaintiff “OFCCP”.

Indeed, the lengths Oracle will go is no better illustrated than by the coercive conduct by Oracle and its counsel that has come to light in recent days, actions which violate not just unambiguous prohibitions under the California Rules of Professional Conduct but also the specific anti-retaliation provisions applicable to all government contractors. 41 C.F.R. § 60-1.32. First, as incredibly echoed in its briefing before this Court on the instant motion, Oracle has demanded that the Department cease communicating *in this litigation* with the protected class on the basis that Oracle and its counsel—contrary to an express prohibition under Rule 1.7(d)(3) of the California Rules of Professional Conduct—somehow represent these Oracle workers and Oracle refuses to “consent” to OFCCP’s communications with the protected class.² In fact, the interests of Oracle and the protected class are directly adverse *in this litigation*, making plain not just the ethical impermissibility of Oracle’s claim of representation but also the illegality of its efforts to interfere, coerce and intimidate its workforce from talking to the government.³ Indeed, Oracle’s brazen demand that the Department stop talking to members of the protected class is in direct contravention of 41 C.F.R. § 60-1.32 prohibiting interference with employee rights to participate in this matter, as well as their First Amendment right to petition their government.

Second, in just the last week, it has come to the Department’s attention *partially by informants* that Oracle and its attorneys, conducted coercive interviews of the protected class, in an attempt to coerce their employees into providing sworn testimony undermining their own claims in this case and in the pending state court litigation.⁴ In a campaign commenced earlier this year, Orrick attorneys systematically contacted the protected class and advised them that they were expected to appear for interviews with them.⁵ They were not advised in this

² Declaration of Abigail Daquiz (“Daquiz Decl.”) ¶ 2, Ex. 1 (Letter from Erin Connell, counsel for Oracle America, Inc., to Jeremiah Miller, Counsel for Civil Rights, Office of the Solicitor, dated April 29, 2019, regarding contacts with Oracle employees). The related correspondence that follows this April 29, 2019 letter are attached to the Daquiz Declaration as Exhibits 2-5.

³ OFCCP does not need Oracle’s consent to speak with any of its employees. Further, Rule 4.2 of the California Rules of Professional Conduct permits government attorneys to speak to represented parties.

⁴ Daquiz Decl., ¶ 3.

⁵ *Id.*

notification that their participation in these interviews was not mandatory.⁶ Indeed, according to the letters sent by Oracle counsel to the protected class and the admissions by Oracle counsel in the state court litigation, Oracle employees were not advised about this enforcement action by the Department, that the employees were members of the protected class who were due back wages and pay increases should this enforcement action prevail, and, *critically*, that Oracle's interests were *directly adverse* to these employees' interests.⁷ Again, as reported by the Department's informants and made plain by even a casual perusal of the California Rules of Professional Conduct – which unambiguously required Orrick under Rule 1.13 to have identified that Oracle's interests were *adverse to the members of the protected class*, rendering any statement secured coerced as a matter of law—Oracle is repeatedly seeking to intimidate and coerce its employees from participating in this action.⁸ Federal courts have sanctioned employers and their attorneys who have engaged in virtually identical conduct. *See e.g. Acosta v. Sw. Fuel Mgmt., Inc., No. CV 16-4547 FMO (AGRx)*, 2018 WL 739425, at *4 & n.3, 5-9 (C.D. Cal. Feb. 2, 2018) vacated in part on other grounds 2018 WL 2207997 (C.D. Cal. Feb. 20, 2018) (granting temporary restraining order against employer and its attorneys who procured coerced declarations from employees); *Acosta v. Austin Elec. Servs. LLC*, 322 F. Supp. 3d 951, 956-57, 959, 961 (D. Ariz. 2018) (same).

Even aside from Oracle's clear record of obstruction and interference which dictate the denial of its demand here for more information to fuel its unlawful campaign of coercion, Oracle has not and cannot articulate any legitimate need or even a due process interest in seeking the Department's communications with the class. Instead, Oracle's claims for discovery of the materials at issue in this motion reflect a fundamental mischaracterization of what this case is

⁶ *Id.*

⁷ Daquiz Decl., ¶¶ 8-9, Exhibits 6 (Plaintiffs' Objections to Evidence Submitted by Oracle in Opposition to Plaintiffs' Motion for Class Certification in *Jewett, et al. v. Oracle America, Inc.*, Case No. 17-CIV-02669, Superior Court of the State of California, County of San Mateo); and Exhibit 7 (Email regarding Oracle's communications with putative class members, dated March 22, 2019, as an exhibit to Plaintiff's Objections in *Jewett*).

⁸ Daquiz Decl. ¶ 3.

about and how the Department will prove its case. This case does not assert discrimination against individual employees, and the Department does not intend to prove its case through the testimony of the thousands of individual employees at issue here. Rather, this case is about Oracle's failure to abide by its obligations as a federal contractor to take affirmative action to identify and correct systemic compensation discrimination against women, Asians, and Blacks in its workforce – obligations Oracle agreed to perform in exchange for accepting hundreds of millions of taxpayers' dollars each year. The Department's proof will be largely statistical, and the lost compensation it seeks will be based on formulaic calculations, consistent with well-established OFCCP precedent.

At trial, this case will not turn on the testimony of any individual employees, but on the broad scale, statistical evidence of discrimination revealed by Oracle's pay data for the thousands of employees. With ten days allotted for trial, the majority of the evidence and testimony at trial will focus on the data and the clear disparities expressed therein—and what Oracle did or did not do to identify and correct them. This evidence will be more than sufficient to establish Oracle's disparate treatment of women and men, and Whites and minorities in their compensation. To the extent that OFCCP calls employee witnesses at trial, their testimony will be offered to provide anecdotal color or context about the lived experience of employees to further support the statistical evidence of Oracle's intentional discriminatory treatment of women and minorities, or to rebut Oracle's counterfactual assertions regarding the working conditions at Oracle. The crux of OFCCP's case and the relief OFCCP seeks, is based on statistical evidence and Oracle's failure to abide by its affirmative action obligations.

As this case is in the middle of discovery, OFCCP has not yet determined which informants it will specifically call as witnesses. Both parties are under an order requiring them to disclose witnesses one month before trial, and OFCCP will comply with that order. Oracle will have ample time to prepare for the testimony of those trial witnesses. Consistent with DOL case law and policy, the identities of the Department's informants—who may number in the hundreds and the vast majority of whom will never testify in this proceeding—must be protected.

II. FACTUAL BACKGROUND

A. OFCCP has diligently complied with its discovery obligations.

Oracle's motion fundamentally mischaracterizes OFCCP's conduct during discovery in this case. The parties engaged in discovery following the filing of the Complaint and First Amended Complaint. OFCCP responded to Oracle's requests by producing the investigative file maintained by the agency as part of the compliance review. Daquiz Decl. ¶ 10. OFCCP withheld documents only to protect the identity of the government's informants, to protect information covered by the deliberative process privilege, investigative files privilege, and information protected by the attorney-client privilege and work product doctrine. *Id.* It is, and was, OFCCP's position that the compliance review is largely irrelevant to the claims alleged.

Oracle was unsatisfied and moved to compel further production and responses to interrogatories, resulting in Judge Larsen's Order, dated Sept. 11, 2017.⁹ Oracle selectively relies on this order and mischaracterizes what it required throughout its motion. Oracle also implies throughout its argument that OFCCP has ignored Judge Larsen's instructions. Motion at 7, 15, and 18. It has not. Within the time ordered, OFCCP promptly supplemented its document production and interrogatory responses. Daquiz Decl. ¶ 11. OFCCP reviewed the production and earlier designations of privilege and painstakingly reproduced hundreds of pages of documents redacted to minimally protect the identities of employees while disclosing strictly factual information to Oracle. All the while, the parties continued to engage in a dialogue over the production. *Id.*

This matter was then stayed starting on October 30, 2017 and remained effectively stayed until this Court denied Oracle's Motion to Dismiss on Jan. 11, 2019. When the case was reopened, the parties propounded new sets of discovery requests. Oracle raised again its objections to OFCCP's redaction of certain documents from the compliance review and began

⁹ It has been Oracle's position that Judge Larsen's decisions have no force and effect but, nevertheless, Oracle continues to cite to the Order Granting in Part and Denying in Part Defendant's Motion to Compel and Defendant's Motion to Designate Witnesses, Sept. 11, 2017.

anew its improper efforts to seek the identities of the workers who have contacted OFCCP. Daquiz Decl., ¶ 12. OFCCP, again, further reviewed the file, and disclosed parts of interview notes and statements that had been redacted to protect information covered by the investigative files privilege. *Id.* OFCCP continued to attempt to work with Oracle’s attorneys to come to agreement about what Oracle was requesting, and offered explanations and support for the government’s insistence on protecting current and former employees from retaliation and blacklisting in the industry. Daquiz Decl., ¶ 13.

As part of OFCCP’s preparation for the hearing in this matter, counsel for the Department have contacted current and former Oracle employees to discuss their experiences as they relate to OFCCP’s enforcement action. Using contact information for the employees provided by Oracle, OFCCP counsel sent a letter by mail and by email to the employees in April, 2019.¹⁰ Since that letter, counsel has heard from hundreds of employees. Many of these employees have described a culture of fear, where employees are discouraged and frequently face clear retaliation, including termination, from making complaints about their compensation and other working conditions. Declaration of M. Ana Hermosillo (“Hermosillo Decl.”), *gen.* ¶¶ 2-16. Specifically, employees report great fear of reprisal and retaliation if Oracle learns they are communicating with OFCCP. *Id.*, ¶ 5-6.

B. OFCCP has produced all documents and information not squarely protected by the informers’ privilege or the work product and common interest privileges.

OFFCP has produced all information relating to its investigation and claims which are not squarely protected by the informer’s privilege or the work product and common interest privileges. Thus, the documents and information that Oracle seeks in this motion fall into the following categories:

¹⁰ Oracle has accused OFCCP of misleading and coercing the class members with this communication. Motion at 6. Oracle attached OFCCP’s letter to the protected class; OFCCP welcomes the Court’s review as the letter is clearly not coercive or improper. See Parker Decl., Exhibit 14 (Letter from Mr. Miller to Oracle employees, April 4, 2019).

Pre-filing documents and information regarding Informant identities

- Unredacted interview memoranda of Oracle employees taken during the compliance review (Motion at 5). OFCCP has produced all interview memoranda with the only redactions related to the identities of government informants.

Post-complaint attorney work-product and confidential privileged communications and information regarding Informant identities

- Communications with the plaintiffs and attorneys representing them in the state court matter, *Jewett v. Oracle America, Inc.* (Motion at 5). This includes both Solicitor's office's work product and correspondence between the Solicitor's office and counsel for the plaintiffs. Parker Decl. Ex. 10, RFP Nos. 232-243.
- Communications between the Solicitor's office and current and former Oracle employees (Motion at 5-6). Oracle already is in possession of the single letter sent by the Solicitor's office to the protected class. Oracle's demand here seeks Solicitor's office's work product regarding conversations between the Solicitor's office and informants, the Solicitor's office's internal communications about these conversations, correspondence from employees, and documents from employees.¹¹ Parker Decl. Ex. 10, RFP Nos. 104, 106, 111, 116, 121, 123, 131, 134, 137, 140, 151, 154, 157, 170, 175, 180, 185, 202.
- Supplemental responses to interrogatories including the identities of the current and former Oracle employees who have talked to the Solicitor's office (Motion at 16, Interr. 27); more anecdotal evidence (Motion at 17, Interr. 49); and information about Oracle's policies that operate to disparately impact its employees (Motion at 18, Interr. 50).

Oracle's complaints about the sufficiency of the responses to their Interrogatories are premised on their mischaracterization of what is actually contained in the responses. Motion at 12-18.¹² OFCCP has answered Oracle's very broad interrogatories to provide factual narrative responses, appropriate references to specific documents produced in this matter by both parties, and appropriate references to previous discovery answers. Oracle is wrong when it argues that

¹¹ As OFCCP has advised Oracle, OFCCP is currently reviewing any documents produced by informants to the government and is preparing to supplement its production with any non-privileged documents or redacted documents to protect the identity of the informants.

¹² Oracle implies that the responses to the Second Set of Interrogatories *only* refer to previous responses, when, in fact, the responses include a narrative description and direct Oracle to the documents, correspondence and data-sets that constitute the facts underlying the SAC, in accordance with Fed. R. Civ. P. 33(d). *See, gen.*, OFCCP's responses to Oracle's Interrogatories, Set Two, Parker Decl., Ex. 11.

OFCCP's did not sufficiently respond to interrogatories when making reference to records or other interrogatory responses.¹³ Discovery is ongoing and OFCCP is in the process of reviewing large volumes of documents and data Oracle has recently produced and deposing Oracle personnel. Daquiz Decl. 15. To date, OFCCP has answered Oracle's very broad interrogatories in good faith in and is committed to supplementing its responses as required by the rules and will do so as soon as possible given the ongoing discovery disputes¹⁴ and volume of data and documents. However, it is clear that Oracle's real aim is to attempt to find out who the government's informants are, one way or another, and the Court should not allow it.

III. ARGUMENT

A. Oracle improperly seeks to circumvent longstanding law and policy protecting the identity to government informants.

- i. The informant privilege protects from disclosure the information and material requested by Oracle.

Oracle seeks to discover confidential documents and information—including fully unredacted interview notes, communications, and names of employees—that are clearly privileged because they identify or tend to identify government informants.¹⁵ It is well-established that the law protects the identities of people who cooperate with the government during investigations of wrongdoing. *See Roviario v. United States*, 353 U.S. 53, 59, 1 L. Ed. 2d 639 (1957). This privilege is especially critical to the laws that the Department of Labor enforces because without assurances of confidentiality, employees are afraid to come forward and report violations of the law. *See, e.g., Kasten*, 131 S.Ct. at 1333 (2011) (noting that, without protection,

¹³ OFCCP identified specific documents in response to interrogatories pursuant to Fed. R. Civ. P. 33(d). These responses included a description of the documents and identified them by bates number. When information sought by an interrogatory is a subset of information sought by another interrogatory, it is proper to answer by referring to earlier answers. *Equal Rights Ctr. v. Post Properties, Inc.*, 246 F.R.D. 29, 33 (D.D.C. Oct. 18, 2017).

¹⁴ Oracle's refusal to allow OFCCP to conduct specific discovery about its compensation policies is hindering OFCCP's ability to completely respond to Interr. No. 50. *See* OFCCP's Motion to Compel a Fed. R. Civ. P. 30(b)(6) deposition regarding its compensation policies, filed on May 10, 2019.

¹⁵ As explained below, many of these materials are also attorney work product and confidential communications with individuals with shared interests that are immune from discovery. *See* infra § III.B-C.

fear of economic reprisal compels employees to “quietly . . . accept substandard [working] conditions”); *In re Perez*, 749 F.3d 849, 856 (9th Cir. 2014); *USDOL v. Jacksonville Shipyards, Inc.*, 89-OFC-1 (Sec’y July 19, 1990).¹⁶

Reflecting this importance, it is well-settled policy that the Department promises confidentiality to people who provide information to the Department’s representatives in investigations and enforcement proceedings. *See Jacksonville Shipyards, Inc.*, 89-OFC-1 (recognizing that “[w]ithout being able to give reasonable assurances of confidentiality [to employees] during an investigation, an important channel of information may be dried up”); *see also, e.g.* 29 C.F.R. § 10.41(b) (noting that “[i]t is the policy of the Department of Labor to protect the identity of its confidential sources”). It is only through these assurances of confidentiality that the Department can ensure that employees may candidly communicate with it without fear of reprisal.¹⁷

ii. The need for confidentiality is especially strong here due to the concrete threat of retaliation.

As decades of precedent demonstrates, confidentiality for employees who risk their livelihood and reputation to share information with the government about wrongdoing by their employers is essential to effective enforcement of the laws. *See In re Perez*, 749 F.3d 849, 856 (9th Cir. 2014) (noting that the informant privilege is “a particularly effective means” of preventing retaliation). Indeed, under well-established law, this privilege is so important that the Department may invoke the informant privilege “as a matter of right” and need not establish a particularized threat of retaliation. *See JBS USA Holdings, Inc.*, 2015-OFC-1, at 22.

¹⁶ *See also, e.g., Donald Braasch Constr., Inc.*, 17 O.S.H. Cas. (BNA) ¶ 2082 (O.S.H.R.C. Mar. 3, 1997) (recognizing importance of protecting the identities of employees who provide information in OSHA investigations); *OFCCP v. JBS USA Holdings, Inc. et al.*, 2015-OFC-1 (ALJ Apr. 7 2016) (citing *Wirtz v. B. A. C. Steel Prod., Inc.*, 312 F.2d 14, 16 (4th Cir. 1962)) (noting that the average employee is “keenly aware of his dependence upon his employer’s goodwill, not only to hold his job but also for the necessary job references essential to employment elsewhere”).

¹⁷ OFCCP properly invoked this privilege with respect to all material documents is at issue in this motion. *See* Declaration of Craig E. Leen, Director, OFCCP, dated May 13, 2019, attached; *see also* Declaration of Thomas Dowd, Acting Director OFCCP, filed with OFCCP’s Opposition to Oracle’s First Motion to Compel.

Here, employees' very real fear of retaliation requires protecting the privilege. In interviews, Oracle informants have repeatedly expressed that they are afraid of retaliation by Oracle if their cooperation with the Department in this case is discovered. Hermosillo Decl. ¶ 2. Indeed, numerous informants have agreed to speak with the Department only on the condition of anonymity. *See, id.* ¶ 5. Additionally, informants have experienced retaliation in the past when they have voiced concerns over their pay or other working conditions. *Id.* ¶¶ 6-16. Specifically, OFCCP has received reports of Oracle terminating employees who lodge complaints or express concern about working conditions. *Id.* ¶ 16. For some informants, even basic demographic information exposes them to risk because they belong to groups who are drastically under-represented at Oracle and therefore could be identified by process of elimination. *Id.* ¶ 7. To protect these employees from retaliation, the Department must be allowed to make good on its promise to protect their identities from disclosure.

Further, Oracle, during the course of this litigation, has taken actions that have confirmed employees' fear of retaliation is well-founded:

First, while this enforcement proceeding was ongoing, Oracle required numerous protected class employees whom it laid off to sign severance agreements requiring them to actively undermine any actions—including by a government agency—that could be brought for claims on their behalf. *See* Daquiz Decl., ¶¶ 16-17, Exs. 8 and 9 (email exchanges dated March 13, 2017 and March 21, 2017, regarding Oracle's severance agreements). Oracle only removed the unlawful language and sent a corrective notice clarifying the rights of their employees to participate in government actions when the Department demanded that it do so. *Id.*, ¶ 18, Ex. 10 (email exchange dated April 14, 2017 regarding Oracle's severance agreements).

Second, as described above, Oracle has implemented a two-part campaign to coerce and discourage employees from providing information to the government *in this action*, in clear violation of anti-retaliation provisions. 41 C.F.R 60-1.32. Although OFCCP just learned of Oracle's coercive acts in the last few days, months ago Oracle's attorneys began communicating directly with class members—whose interests are directly adverse to Oracle—and attempting to

obtain declarations about the subject matter of this litigation that could undermine the employees' interests. Oracle did so without informing employees of these adverse interests, contravening their ethical obligations. Daquiz Decl., Ex. 6; *see* California R. of Prof. Conduct 1.13(f) (requiring corporation lawyers to explain that their client's interests are adverse when communicating with class members); *Mevorah v. Wells Fargo Home Mortg, Inc., a div. Of Wells Fargo Bank* (N.D. Cal., Nov. 17, 2005) 2005 WL 4813532, at *4. Oracle's actions are on all fours with conduct by employers that federal courts have found to be unlawful precisely because of the chilling effect that coercive, involuntary interviews have on employees. *See, e.g. Sw. Fuel Mgmt., Inc.*, 2018 WL 739425, at *4 & n.3, 5-9 (employer's interviews likely violated federal anti-retaliation law because they were "reasonably likely to deter employees from engaging in the protected activity of testifying or otherwise asserting their rights"); *Austin Elec. Servs. LLC*, 322 F. Supp. 3d at 956-57, 959, 961 (interviews were coercive where employer's attorneys did not inform employees that interviews were voluntary, that the government had determined they may be owed back wages, or that their statements may affect their rights and recovery under the lawsuit).

In addition to this coercive demand, Oracle demanded not less than two weeks ago that OFCCP halt its communications with the protected class allegedly because Oracle did not "consent" to the communications. Daquiz Decl., Ex. 1 (Letter from Ms. Connell to Mr. Miller dated April 29, 2019). Again, Oracle explicitly attempts to claim it represents the interests of the protected class seeking relief *against Oracle* for unlawful pay discrimination. Of course, OFCCP has not agreed to either Oracle's unlawful demand to cease communications with the protected class or Oracle's "representation" of the adverse protected class in this action. Nevertheless, the fact that Oracle has made this demand, including reiterating it in this public motion to compel, makes plain that it is doing everything in its power to confuse, intimidate and convince its employees that there is something improper about communicating with the government.

OFCCP is still investigating these late-breaking revelations from Oracle and Orrick about their unabashedly improper attorney communications and unlawful coercion of the protected

class into giving information and testimony outside the presence of, and without the assistance of, OFCCP – *the government agency which is charged with representing the interests of the protected class in this case*. However, it is clear at this point that Oracle will attempt to interfere with protected class member’s attempts to communicate with the government. The identities of employees who have cooperated with the Department must be kept confidential to protect them from retaliation and to ensure effective law enforcement in the future. If the Department cannot promise employees confidentiality, then many of employees will not be willing to speak with the Department, undermining OFCCP’s enforcement of the anti-discrimination provisions agreed to by government contractors in exchange for taxpayer funds.

- ii. The privilege cannot possibly yield in this case because Oracle has no need to know the identities of government informants.

Due to the critical nature of this privilege to the Department’s effective law-enforcement, an employer seeking to overcome this well-established privilege bears the heavy burden of showing a “compelling need” for the identities of informants that outweighs the strong public interests at stake in protecting the identities of these individuals. *In re Perez*, 749 F. 3d at 850. Here, there is no way that the privilege can yield because Oracle has not and cannot demonstrate a need to know who has communicated with the government.

First, Oracle already knows the universe of potential witnesses in this case, as all informants are a subset of Oracle’s own current or former employees. The identity of who among those employees has elected to share information with the Department is simply not relevant to any of the issues in this case. *See Wirtz v. Continental Fin. & Loan Co. of W. Ind.*, 326 F.2d 561, 563 (5th Cir. 1964) (noting that the identities of persons who provided information to the Secretary is “utterly irrelevant” to the issues to be tried). Specific to the OFCCP context, a contractor cannot possibly show a need to know the identities of informants who are a subset of its own current and former employees. *See JBS USA Holdings, Inc.*, 2015-OFC-1, at 22 (“Defendants already possess the names of all of its employees and applicants. Exposure of the

specific employees or applicants would only subject the informants to the possibility of retaliation.”). Moreover, as the Court observed, the disclosure would not truly assist Defendants in preparation of their defense. *See id.* (“As previously stated, the undersigned shall conduct a *de novo* review of the evidence which is presented at the hearing. If an informant is eventually identified to testify at the hearing, Defendants will be made aware of the witnesses' identities and complaints/grievances in accordance with the Notice of Hearing and Pre-Hearing Order issued by the undersigned. For those informants whose testimony is not relied upon in Plaintiff's case, their identities shall remain protected and the possibility for retaliation eliminated.”)

Second, with regard to the employees who *will not testify*, Oracle has no need to know their identities that would overcome their interest in being free from retaliation. *See In re Perez*, 749 F.3d at 859 (holding that employer was not entitled to know the identities of informants who will not be called as witnesses); *see also JBS USA Holdings, Inc.*, 2015-OFC-1, at 22. The non-testifying informants have the right to remain confidential – and OFCCP has promised confidentiality based on Department policy and well-settled case law. Protection for these employees is consistent with longstanding privilege intended to guarantee that citizens and employees feel comfortable reporting violations of law to law enforcement. *See In re Perez*, 749 F.3d at 855-56. This privilege not only advances important law enforcement interests, by protecting employees from the threat of economic retaliation, it furthers their constitutional right to petition the government for redress under the First Amendment. *See McDonald v. Smith*, 472 U.S. 479, 482, 105 S. Ct. 2787, 2789, 86 L. Ed. 2d 384 (1985) (noting that the First Amendment guarantees “the right of the people ... to petition the Government for a redress of grievances.”).¹⁸

Even as to any employees who ultimately testify in this case, Oracle can't carry the heavy burden of showing a need that outweighs the interest in confidentiality at this stage in the

¹⁸ Consistent with the First Amendment right to petition the government and the long-standing law on the government's informant privilege, Rule 4.2 of the California Rules of Professional Conduct regarding communications also excludes government attorneys from the rule prohibiting contact with represented parties. Cal. Rules of Prof. Conduct. 4.2 (c)(1) and Comment 8.

litigation. This case is still in discovery and OFCCP has not yet determined which, if any, of the hundreds of informants who have communicated with the Agency it will call as witnesses at trial. There is a procedure and deadline for identifying witnesses and to the extent Oracle is asking OFCCP to identify its witnesses now – seven months before trial – this request is premature and improper. *See Brock v. R.J. Auto Parts & Serv., Inc.*, 864 F.2d 677, 678 (10th Cir. 1988) (reversing trial court order granting motion to compel the Secretary to disclose its trial witnesses during discovery, “the defendant has failed to demonstrate any need for the information it seeks, and the trial court was not justified in deviating from standard trial procedure by requiring the premature identification of witnesses”). Oracle has not identified any compelling reason why it should be entitled to this information now.

Moreover, Oracle’s motion ignores the relatively limited role that employee testimony will play in this case. As noted, OFCCP has alleged systemic discrimination by Oracle encompassing thousands of employees at its headquarters facility, with preliminary analyses showing statistical disparities in excess of the minimum that is compelling evidence of intentional discrimination. *See SAC at ¶¶ 11-32* (describing disparities in the pay of women and men and whites and non-whites); *Palmer v. Shultz*, 815 F.2d 84, 92 (D.C. Cir. 1987) (holding that disparities exceeding 1.96 standard deviations are generally accepted as statistical evidence of discriminatory intent). Workers may give testimony providing some context for the statistical evidence of discrimination, and explaining their experience of Oracle’s compensation practices, but their testimony is not necessary to prove liability.¹⁹ *See Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (noting that employee testimony may bring “the cold numbers convincingly to life”); *id.* at 360 (to establish liability, “the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim.”) Nor is it

¹⁹ As a threshold matter, individual employees are unlikely to have the breadth of knowledge of the data related to Oracle’s employment practices necessary to fully explain OFCCP’s statistical analysis. Moreover, with only ten days for trial, most of the trial time inevitably will focus on the data and expert testimony.

necessary to prove damages. *See OFCCP v. Bank of Am.*, 2016 WL 2892921, at *13 (DOL Admin. Rev. Bd. Apr. 16, 2016) (noting the propriety of formulaic, class-wide relief in complex cases involving large classes over extended periods of time).²⁰ Further, Oracle itself cannot rely on testimony from a few individual employees to defeat the statistical evidence of systemic discrimination that OFCCP will present. *See Int'l Bhd. of Teamsters*, 431 U.S. at 360 (In a pattern or practice case, once the government has proved its prima facie case, the employer must “meet” the government’s proof by demonstrating that the government’s statistics were inaccurate or insignificant).

OFCCP will disclose its yet-to-be-determined witnesses to Oracle consistent with the deadlines set forth in the Pretrial Order. If any of those witnesses provided statements during the compliance evaluation, OFCCP will produce the unredacted interview memoranda from those interviews to Oracle at that time. Oracle does not and cannot possibly show a credible need for those statements before then. Department judges and federal courts have repeatedly recognized that an employer’s need for impeachment material does not overcome the public interest in the government’s informants privilege until after the Secretary has designated which employees will be called as witnesses at trial.. *See, e.g., Am. Future Sys., Inc.*, 2013 WL 5728674, at *4-5 (approving the Secretary’s proposal to disclose prior statements “at the pre-trial conference or when a witness is used to support a motion for summary judgment”); *Administrator, WHD, DOL v. Elderkin*, ARB Case No.99-033, 99-048 (ARB Jun. 30, 2000), available at 2000 WL 960261, at *13 (affirming the right of Department attorneys to withhold prior statement of testifying witness collected during investigation until witness testified at trial).²¹

²⁰ Unlike a “representative sample” case under the Fair Labor Standards Act, where the government seeks to reconstruct wages owed based on testimony of individual workers about the hours they worked and the amount they were paid. *See, e.g., McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) *cert. denied* 488 U.S. 1040 (1989).

²¹ *See also, e.g., Perez v. Sunshine Motel Inn, LLC*, 2016 WL 10586147, at *3 (E.D. Wash. Sept. 12, 2016) (noting that courts often do not require disclosure of documents identifying informants until the pretrial phase); *Perez v. L & J Farm Picking, Inc.*, 2013 WL 5446625, at *3 (S.D. Fla. Sept. 30, 2013) (“Defendants have failed to show a need to require the Secretary to disclose the identity of its trial witnesses two and a half months early.”); *Massman-Johnson (Luling)*, 8 O.S.H. Cas. (BNA) ¶ 1369 (O.S.H.R.C. May 2, 1980) (holding that unredacted witness statements may be withheld until after the witness testifies on direct examination).

Because the government’s informant privilege provides protection for individuals who cooperate with the Department, and Oracle has not and cannot demonstrate any need for identifying information, Oracle has no entitlement to the material it seeks in this motion. The Court should deny Oracle’s attempt to infringe on this longstanding and critical privilege.

B. Oracle improperly attempts to infringe on the common interest rule by seeking OFCCP’s communications with class members and *Jewett* plaintiffs’ counsel

Oracle misconstrues the scope and application of the common interest doctrine, particularly with respect to cases such as this where the government, as the plaintiff, acts in its capacity to protect interests of aggrieved individuals—such as Oracle employees—to vindicate violations of the law. Contrary to Oracle’s mistaken assertions, the common interest doctrine, as an extension of the attorney-client privilege and the work product privilege, applies here and protects OFCCP’s communications with both possible class members and counsel for the *Jewett* plaintiffs, which Oracle improperly seeks.

- i. OFCCP’s communications with prospective class members are protected under the common interest doctrine.

The common interest privilege, or joint defense privilege, is an extension of the attorney-client privilege and the work product doctrine. *U.S. v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012). The privilege applies if “(1) the communication is made by separate parties in the course of a matter of common [legal] interest; (2) the communication is designed to further that effort; and (3) the privilege has not been waived.” *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D.Cal. 2007).²²

Cases such as this one, where the government sues to enforce laws that protect the rights of individuals, present a distinct formulation of the common interest rule. While the government does not directly represent individuals injured by violations of the law it enforces, it does

²² Courts have held that the privilege extends not only to cooperating defendants but also cooperating plaintiffs. *U.S.ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685–686 (S.D.Cal.1996).

represent their interests.²³ Thus, as is the case here, the individuals injured by violations of a law meant to protect them and the governmental agency charged with enforcing that law clearly share a common interest. *U.S. v. Gumbaytay*, 276 F.R.D. 671, 674 (M.D. Ala. 2011).

Accordingly, courts have long recognized, in Title VII and numerous other contexts, that communications between aggrieved individuals and the government's attorneys are privileged even though no classic attorney-client relationship exists.²⁴ This is consistent with the long-standing purpose of the attorney-client privilege, which is intended "...to encourage full and frank communication between attorneys and their clients and thereby *promote broader public interests in the observance of law and administration of justice.*" *Upjohn Co. v. United States*, 449 U.S. 389 (1981) (emphasis added).²⁵ Significantly here, numerous class members only provided candid information to OFCCP with the assurance that such communication would remain confidential.

Oracle is not entitled to OFCCP's communications with possible class members. The common interest rule protects these communications because, while OFCCP seeks relief in this matter on behalf of the public interest, OFCCP also seeks relief for Oracle employees who were paid less than their white and male counterparts.

²³ The government can enforce an important public interest while also acting "at the behest of and for the benefit of specific individuals." *General Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 326 (1998)

²⁴ See *Gumbaytay*, 276 F.R.D. at 675-76 (communications between non-party victims and the government were protected by attorney-client privilege through the common interest doctrine); *EEOC v. International Profit Associates, Inc.*, 206 F.R.D. 215, 222 (N.D. Ill. 2002); *EEOC v. DiMare Ruskin, Inc.*, 2012 WL 12067868, at *6 (M.D. Fla. Feb. 15, 2012); *Perez v. Clearwater Paper Corp.*, 2015 WL 685331, at *2 (D. Idaho Feb. 17, 2015); *Donovan v. Teamsters Union Local 25*, 103 F.R.D. 550 (D. Mass. 1984).

²⁵ Prospective class members do not need to be represented by counsel in order for their communications to be privileged under the doctrine here. *Gumbaytay*, 276 F.R.D. at 675 (citing cases). Indeed, this would unfairly limit application of the rule when the government seeks to enforce the rights of a group of individuals who may or may not be represented by private counsel. In the instance where the government seeks to vindicate the rights of class, some of whom are represented by private counsel, those members without counsel would be unjustly denied the benefit, afforded to those who could secure private representation, of maintaining their communication with the government confidential. This is significant as the doctrine encompasses prospective litigation; the currently unrepresented parties may bring a future claim. *Gonzalez*, 669 F.3d at 980 (citing *U.S. v. Aramony*, 88 F.3d 1369, 1392 (4th Cir.1996) (unnecessary that there be actual litigation in progress for privilege to apply); *In re Grand Jury Subpoenas*, 902 F.2d at 249.

ii. Oracle is not entitled to communications with *Jewett* plaintiffs’ counsel.

Similarly, Oracle is not entitled to OFCCP’s communications with *Jewett* plaintiffs’ counsel relating to this matter, regardless of when the communication took place. Oracle specifically seeks communications between OFCCP’s attorneys and the *Jewett* plaintiffs’ attorneys. This is improper. Counsel for OFCCP and counsel for the *Jewett* plaintiffs share a common interest in litigating the overlapping claim that Oracle discriminates against women in pay. The parties’ interests do not, as Oracle purports, need to be identical for the common interest rule to apply. *In re: Imperial Corp. of America*, 179 F.R.D. 286, 289 (S.D.Cal 1995) (citing *In re Grand Jury Subpoena Duces Tecum*, 406 F.Supp. 381, 392 (S.D.N.Y. 1975) (applying the privilege where a lawsuit between the codefendants was foreseeable). Rather, the inquiry is whether sufficient commonality of interests exists. *Id.* A sufficient commonality of interests exists here, where the parties each pursue gender-based discrimination claims grounded in the same factual allegations. *Compare* OFCCP Second Am. Compl. (SAC); *Jewett* SAC.

The common interest rule also protects unproduced documents and communications reflecting OFCCP’s common interest agreement with *Jewett* counsel (see RFP Nos. 234-235) as these fall under the common interest doctrines’ extension of the work-product privilege. *See U.S.ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685–686 (S.D.Cal.1996) (applying work-product privilege through common interest doctrine). Accordingly, Oracle is not entitled to documents, including communications relating to the parties’ common interest agreement with plaintiffs’ counsel, which were in anticipation of litigation and protected as attorney work product. To the extent that Oracle seeks OFCCP’s Common Interest Agreement that OFCCP entered into with *Jewett* counsel, OFCCP has already produced the Agreement.²⁶

²⁶ Oracle also incorrectly argues that *Jewett* plaintiffs’ disclosures are discoverable because they are subject to disclosure under FOIA. Motion at 11. This is incorrect. Oracle cites *Lucaj v. Federal Bureau of Investigation*, 852 F.3d 541 (6th Cir. 2017), but that case involved a narrow interpretation of the “inter- or intra-agency” threshold for applying FOIA Exemption 5. Here, the *Jewett* plaintiff’s communications are also protected by FOIA Exemption 7. *See N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (describing the purpose of the exemption as preventing “harm [to] the Government’s case in court”). Given this express purpose, FOIA cannot be used as a sword to undermine the litigation privileges from which a private party would benefit. *See Kirk v. U.S. Dept. of Justice*, 704 F. Supp. 288, 291 (D.D.C. 1989).

C. Oracle improperly seeks protected attorney work product.

Oracle asks OFCCP to produce all notes from interviews with any witnesses – even after litigation was anticipated and commenced. Oracle’s requests cover two categories of interview documents: 1) those created by OFCCP investigators during the compliance review, which OFCCP produced redacted to protect informants, and 2) interview notes created by OFCCP’s attorneys during the litigation which are withheld as attorney work product. To be clear, Oracle now attempts to obtain *attorney notes* from their discussions with witnesses.

It is well-established that the work production doctrine protects from disclosure materials prepared in anticipation of litigation by a party, an attorney, or other representatives of the party. *S. Union Co. v. Sw. Gas Corp.*, 205 F.R.D. 542, 548 (D. Ariz. 2002) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)) (Silver, J.); Fed.R.Civ.P. 26(b)(3). Rule 26(b)(3) distinguishes between ordinary work product, which requires a party show substantial need in order to compel disclosure, and opinion work product including the mental impressions, conclusions, opinions, or legal theories of an attorney, which is entitled to nearly absolute protections. *See O’Connor v. Boeing N. Am., Inc.*, 216 F.R.D. 640, 642 (C.D. Cal. 2003) (citation omitted); *S. Union Co.*, 205 F.R.D. at 548 (citing *Holmgren v. State Farm Mutual Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992)). “Notes and memoranda of an attorney, or an attorney’s agent, from a witness interview are opinion work product entitled to almost absolute immunity.” *O’Connor*, 216 F.R.D. at 643.²⁷

Here, OFCCP’s post-litigation interview notes are entitled to absolute immunity from disclosure. Oracle has not articulated *any* need for witness interview notes to overcome the ordinary work-product protection, let alone a showing that could overcome the nearly absolute protection of the mental impression of OFCCP attorneys.

²⁷ *See also U.S. S.E.C. v. Talbot*, 2005 WL 1213797, *1 (C.D.Cal.2005) (an attorney’s notes and memoranda of witnesses’ oral statements constitute opinion work product because “when taking notes an attorney focuses on those facts she deems legally significant.”).

IV. CONCLUSION

For the foregoing reasons, Oracle's motion to compel OFCCP's work product and information revealing the identities of its employees who have communicated with OFCCP should be denied.

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Respectfully submitted,

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