

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

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**REPLY IN SUPPORT OF  
ORACLE AMERICA, INC.'S  
MOTION TO COMPEL OFCCP  
TO PRODUCE DOCUMENTS  
AND FURTHER RESPOND TO  
INTERROGATORIES**

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Office of Administrative Law Judges  
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## I. INTRODUCTION

OFCCP's brief opposes remarkably little of Oracle's motion. It is instead a thoroughly evidence-free attack on Oracle intended as a diversion from Oracle's arguments. OFCCP does not identify a single instance of alleged retaliation. Indeed, the only evidence OFCCP can muster is its own counsel's double-hearsay declaration, unadjudicated objections from a separate case, and a mischaracterized meet and confer letter. That is it. Without evidence for its sensationalist allegations, OFCCP's opposition, like its recent meet and confer correspondence, is simply a collection of gratuitous smears of Oracle and its counsel.

OFCCP repeatedly contends that Oracle engaged in "coercive" interviews of employees in the separate *Jewett* matter, which it alleges "unambiguously" violate the California Rules of Professional Conduct. While irrelevant to this dispute, the opposite is true. Oracle's interviews were appropriate and its admonitions exceeded those required under the Rules.

OFCCP's unfounded attacks on Oracle are an effort to distract from its unsupportable discovery positions. For example, OFCCP twists itself into a pretzel trying to explain its "informant" evidence. This evidence is all at once (1) vital to OFCCP's "law enforcement" function; (2) insignificant evidence of minimal value at trial; (3) highly confidential and privileged; and (4) permissible to disclose when cited against Oracle in a motion.

OFCCP is also withholding relevant documents under the common interest privilege, yet provides no evidence or authority upon which the Court can conclude that a U.S. Government agency charged with enforcing federal laws shares a common interest with private litigants. The Court should reject OFCCP's effort to dramatically expand the scope of the common interest privilege to conceal relevant and unprivileged communications with unrepresented third parties.

At bottom, OFCCP's position is this: it can interview and communicate with potential witnesses freely, refuse to provide Oracle with any resulting evidence, and disclose the testimony it intends to use a month before trial begins. Recognizing the manifest unfairness to Oracle, OFCCP downplays the importance of this evidence. But one party's characterization of its

evidence cannot be a basis to withhold it. OFCCP intends to use this evidence at trial. It is therefore discoverable and should be produced.

So, what is Oracle seeking? The facts underlying this case. The names of persons with knowledge of facts—which is not the same as asking whether they are government “informants.” See *Sec’y of Labor, United States Dep’t of Labor v. Kazu Constr., LLC*, 2017 WL 628455, at \*5 (D. Haw. Feb. 15, 2017). The substance of what people have told OFCCP so that Oracle can prepare a defense. And real, substantive answers to interrogatories—not undifferentiated citations to thousands of pages of documents.

**II. THE INFORMANT AND COMMON INTEREST PRIVILEGES DO NOT PROTECT ALL OF OFCCP’S COMMUNICATIONS AND DOCUMENTS**

OFCCP’s refusal to produce unredacted interview notes, its communications with Oracle’s employees, and its communications with third parties and with *Jewett* counsel is based on a misapplication of the informant and common interest privileges, combined with baseless claims of retaliation or coercion. These fears are contrived, lack any basis in evidence, and do not constitute an excuse for OFCCP to avoid its discovery obligations.

**A. The Government Informant’s Privilege Does Not Protect Facts**

Based on the government informant’s privilege, OFCCP withholds three types of information. First, OFCCP refuses to disclose the identity of persons with knowledge of facts of the case, regardless of whether they are informants. Second, it redacts so much of its witness interview memos that they are useless. Third, it conceals the names of witnesses.

Taking on the first point, OFCCP is wrong. Courts have held that the identity of a person with knowledge of the facts should be disclosed, and that doing so does not impinge on the government informant’s privilege. See, e.g., *Solis v. New China Buffet No. 8, Inc.*, 2011 WL 2610296, at \*4 (M.D. Ga. Jul. 1, 2011); see also, *Perez v. KDP Hospitality, LLC*, 2016 WL 2746926, at \*2 (W.D. Mo. May 6, 2016); *Sec’y of Labor v. Kazu Constr., LLC*, 2017 WL 628455, at \*5, *supra*. OFCCP cites no case holding OFCCP may withhold this information.

As for the second issue—blanket redactions—Oracle is entitled to know the facts in OFCCP’s possession. OFCCP’s solution—that these materials will be provided in full when witnesses are disclosed on November 8, 2019, one month before trial—makes a mockery of the Court’s trial schedule.<sup>1</sup> The discovery period and the period to bring summary judgment motions mean little if Oracle has to wait until eve of trial to obtain facts. OFCCP does not even propose a number of potential witnesses. Opp. at 4. This is prejudicial and raises due process concerns, because Oracle will be forced to investigate, depose, and prepare for an unknown number of witnesses, presenting unknown testimony, fewer than four weeks before trial. OFCCP should produce its unredacted interview notes and communications with potential witnesses.<sup>2</sup>

OFCCP contends that it has produced interview memoranda “minimally” redacting only the identities of government informants. Opp. at 5; 7. That is demonstrably not true. As evidenced by Exhibit 13 to the Parker Declaration, enormous swaths of these redacted interview memos provide no useful information to Oracle. OFCCP should provide these memos and communications in a redacted format that removes **only** identifying information. *See* Mot. at 9.

As to the third point—revealing identities—if OFCCP is correct that redactions must be in place depriving Oracle of all information, then the government informant’s privilege must yield. It is not an absolute privilege. *Acosta v. Five Star Automatic Fire Prot., LLC*, 2017 WL 10604137, at \*2 (W.D. Tex. May 30, 2017) (informant’s privilege is qualified and balanced against the fundamental requirements of fairness and disclosure in the litigation process). Indeed, OFCCP’s argument implicitly admits that it is only a matter of *when* should the government informant’s privilege yield. Oracle says now, given that discovery is closing and the parties are going to trial. OFCCP says shortly before trial. The government informant’s privilege does not defeat due process and fairness. OFCCP agreed to the case schedule and there is no provision for

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<sup>1</sup> The discovery cutoff is July 3, 2019. Trial is set for December 5, 2019.

<sup>2</sup> Oracle’s requests call for communications with third parties (including Oracle employees), as well as interview memos and notes. Thus, this issue regarding communications is broader than just Oracle employees. And not all communications implicate the government informant’s privilege, such as an OFCCP email to an Oracle employee.

discovery that it wanted to withhold until the eleventh hour.

As noted above, OFCCP also contradicts itself about the importance of this evidence. *Compare* Opp. at 1 (informants are “crucial to effective law enforcement.”) *with* Opp. at 4 (“this case will not turn on the testimony of any individual employees”). OFCCP’s actions speak louder than its words. It is asserting meritless objections, redacting relevant information, and mass-mailing letters asking Oracle’s employees to contact it. Yet when Oracle asks for those conversations, OFCCP claims this evidence will be an afterthought. Opp. at 14. Regardless of how OFCCP characterizes this evidence, Oracle is entitled to it.

**B. OFCCP’s Arguments Regarding Coercion Are Outrageous and Baseless**

Over and over, OFCCP makes dire-sounding allegations about retaliation or coercion. Yet, no evidence is presented. These claims are nothing more than vicious red herrings. They are intended to besmirch and inflame passion. They do not excuse OFCCP’s discovery obligations.

OFCCP’s first argument is a perfect example of this. OFCCP accuses Oracle of asserting that it represents the employees whom OFCCP is seeking to contact. Opp. at 2. This is false. But even were it true, there is no case cited and virtually no argument made that this somehow allows OFCCP to avoid production. As for the falsity, the **only** evidence OFCCP cites is Oracle’s April 29, 2019 meet and confer correspondence, which says nothing of the sort. Declaration of Erin Connell in Support of Reply in Support of Oracle’s Second Motion to Compel (“Connell Decl.”), Ex. C. To the contrary, Oracle fully understands that OFCCP is entitled to speak to employees, including managers. But contact with Oracle’s managers raises particular concerns because managers potentially have the ability to bind Oracle with their statements, and because OFCCP’s allegations of intentional discrimination are necessarily directed at Oracle managers who make the decisions at issue. Thus, **both parties acknowledged and agreed** as recently as May 9 that OFCCP does not need Oracle’s consent to speak to Oracle’s managers in their personal capacity regarding potential claims they may have against Oracle (Connell Decl., Exs. C, D, F), but

OFCCP does need Oracle's consent to speak to Oracle's current managers with respect to any act or omission by the manager that may bind Oracle. Connell Decl., Ex. F.

To be clear, **at no point has Oracle claimed to represent its employees in this action with respect to any potential claims they may have against Oracle.** Connell Decl., Exs. C, E-G, I, K, M, & O. The cited April 29, 2019 letter certainly never says that. *Id.*, Ex. C. Yet OFCCP represents to this Court that "Oracle **explicitly** attempts to claim it represents the interests of the protected class seeking relief against Oracle for unlawful pay discrimination." Opp. at 11 (emphasis added).

Similarly, OFCCP mischaracterizes Oracle's March 22, 2019 email regarding whether communications with managers can be privileged. Daquiz Decl., ¶ 7. That email simply acknowledges that when Oracle's counsel speaks to current managers in their managerial capacity (*i.e.*, about the employment decisions at issue in this litigation), those communications are privileged. *See, e.g., Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1492 (9th Cir. 1989).

OFCCP also dredges up a two-year-old issue involving severance agreements. Opp. at 10. But according to OFCCP's own evidence (Daquiz Decl., Exs. 8-10), Oracle offered to, and did, correct any perceived issues within **eight days** of being notified. Here, OFCCP would not even meet and confer for over a week regarding its misleading letter to Oracle's employees. Connell Decl., Ex. E.

Next, OFCCP contends that Oracle has improperly communicated with *Jewett* class members. Opp. at 10. All OFCCP cites are objections by Oracle's opposing counsel. Daquiz Decl., Ex. 6. No court has ruled on them. Connell Decl., ¶ 6. An adversary's objections are not evidence. Moreover, OFCCP misrepresents California Rule of Professional Conduct 1.13(f).<sup>3</sup>

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<sup>3</sup> That rule provides: "In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows\* or reasonably should know\* that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing."

See Connell Decl., Exs. H, J, L, & N. All this rule requires is that the attorney “explain the identity of the lawyer’s client” when the organization’s interests are adverse. The rule does **not** require Oracle’s attorneys to opine that Oracle’s interests are adverse to its employees. Here, Oracle’s attorneys disclosed to employees that they represent Oracle, that any information they provided could be used in Oracle’s defense, and far more. Daquiz Decl., Ex. 7; Connell Decl., ¶¶ 3, 5 & Ex. A. Oracle met and exceeded its obligations when communicating with employees. But none of this matters. OFCCP is simply parroting the *Jewett* plaintiffs’ objections because it has nothing to complain about in this action.

Further, all of the cases OFCCP cites about misleading communications are inopposite. *Opp.* at 11. In *Mevorah v. Wells Fargo Home Morg., Inc.* the court found that the description of the action that defense counsel gave to interviewees was deceptive because it led interviewees to believe they would lose their professional status and commissions if the plaintiff prevailed. 2005 WL 4813532 (N.D. Cal. Nov. 17, 2005). There is no claim here that Oracle misrepresented the nature of this action to employees. In fact, Oracle expressly advised interviewees that information they provided could be used to support its position. Daquiz Decl., Ex. 7; Connell Decl., ¶ 5 & Ex. A. In *Acosta v. Sw. Fuel Mgmt., Inc.*, 2018 WL 739425 (C.D. Cal. Feb. 20, 2018), employees were instructed by their employer to meet with defense counsel and sign declarations, which they were not given copies of. That is nothing like the case here. Lastly, in *Acosta v. Austin Electric Services LLC*, 322 F. Supp. 3d 951 (D. Ariz. 2018), the defendant presented employees with pre-printed forms and required them to make statements under penalty of perjury that waived their claims. Again, that is nothing like this case.

Tellingly, OFCCP does not identify **one person** in this case whom Oracle has interviewed as making any claim of retaliation. Instead, OFCCP cites unspecified claims about people Oracle knows nothing about. The allegations are described so vaguely Oracle cannot even provide a response. *See* Hermosillo Decl., ¶¶ 1-16. Regardless, none of this mudslinging entitles OFCCP to withhold relevant information.

OFCCP claims that “[i]t is clear at this point Oracle will attempt to interfere with protected class member’s attempts to communicate with the government.” Opp. at 12. This is a serious charge and OFCCP’s evidence does not support it. In fact, the prepared statement that Oracle provided to its employees who inquired about OFCCP’s misleading letter demonstrates that Oracle is scrupulous about its communications with employees. Connell Decl., ¶ 11 & Ex. F.

Unsurprisingly, OFCCP cannot even articulate any harm from all this supposed malfeasance. OFCCP hypothesizes a “chilling” effect, while simultaneously boasting that “hundreds” of employees contacted it regarding its recent letter. Opp. at 6; 11. OFCCP also promises the “vast majority” of these witnesses will never testify because OFCCP’s statistics are the real key to its case. Opp. at 4; 14. In other words, OFCCP is claiming it has been prejudiced by losing access to irrelevant evidence that it already has too much of and plans not to use.

**C. OFCCP’s Promise Of Confidentiality Does Not Justify Denying Discovery**

OFCCP contends that neither memos nor communications can be produced because Oracle employees only spoke with it under the express promise of confidentiality. Opp. at 10. This is a problem of OFCCP’s own making. OFCCP knew Oracle seeks its communications with third parties (and thus putting this promise into its April 4 letter to Oracle’s employees is another reason this letter is misleading.)<sup>4</sup> It is not a defense to the discoverability of relevant documents that OFCCP promised they would not be produced. OFCCP is not an agency confidentially investigating whether to bring criminal charges against a company. OFCCP is the plaintiff in litigation that it instigated. It knows that discovery obligations accompany litigation. What OFCCP characterizes as an “investigation” is, in fact, its preparation for trial against Oracle.

Further, OFCCP has partially disclosed these purportedly confidential and privileged interviews to oppose Oracle’s motion. *See* Hermosillo Decl., ¶¶ 1-16. This is the quintessential improper use of privilege “as both a sword and a shield.” *Theranos, Inc. v. Fuisz Technologies, Ltd*, 2013 WL 2153276, at \*1 (N.D. Cal. May 16, 2013) (where defendant “may have cherry-

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<sup>4</sup> Of note, OFCCP’s April 4 letter merely states that employees’ identities will be confidential, not facts. Connell Decl., Ex. B.

picked selective communications that are favorable to him,” selective disclosure of privileged communications was a waiver both to those specific communications and the subject matter). Oracle has no ability to respond to these vague concerns of retaliation from unnamed employees (or, if true, to investigate and remediate any unlawful retaliation). The low quality of OFCCP’s evidence (all of which is double- and some even triple-hearsay) demonstrates how far it is reaching to conjure fears of retaliation. *See* Hermosillo Decl., ¶ 1.

### **III. THE COMMON INTEREST PRIVILEGE REQUIRES A COMMON INTEREST AND AN ATTORNEY-CLIENT RELATIONSHIP**

OFCCP also withholds communications with Oracle’s employees and counsel in the *Jewett* litigation under a purported common interest privilege. Opp. at 16-18.

OFCCP cites *U.S. v. Gumbaytay* for the proposition that “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.” Opp. at 17. But *Gumbaytay*’s holding was limited to claims “where counsel for the government has filed suit to enforce the rights of aggrieved persons under the Fair Housing Act.” 276 F.R.D. 671, 676 (M.D. Ala. 2011). Indeed, *Gumbaytay* is specifically limited to “government suits raising individual claims, [where] the purpose of the United States’ lawsuit is to obtain relief on an individual’s behalf[.]” *Id.* Here, OFCCP is not stepping into the shoes of private attorneys to pursue justice on behalf of aggrieved individuals. Its role is to ensure that federal contractors comply with federal laws on behalf of the federal government. That OFCCP believes it also represents the amorphous “interests” of Oracle’s employees does not mean it is acting for those individuals.

The EEOC cases OFCC cites all involve situations where the EEOC sued on behalf of specific individuals and was, for all practical purposes, the individuals’ attorneys. Opp. at FN 24; *see E.E.O.C. v. Int’l Profit Assocs., Inc.*, 206 F.R.D. 215, 219 (N.D. Ill. 2002) (“all the women interviewed ... expressed their desire to be represented by the EEOC”); *E.E.O.C. v. DiMare Ruskin, Inc.*, 2012 WL 12067868, at \*6 (M.D. Fla. Feb. 15, 2012) (“After the EEOC undertakes

to file suit seeking relief for individual victims of discrimination, it ... stands in the role of attorney for those individuals.”); *Perez v. Clearwater Paper Corp.*, 2015 WL 685331, at \*2 (D. Idaho Feb. 17, 2015) (common interest exists between government and employee only because OSHA “gives the Secretary of Labor sole enforcement authority in a retaliation case. There is no private right of action.”); *Donovan v. Teamsters Union Local 25*, 103 F.R.D. 550, 553 (D. Mass. 1984) (“the Court is of the opinion that the DOL’s lawyers are in fact Mr. Foley’s lawyers”).

Here, OFCCP has confirmed it does not represent any of Oracle’s employees. Opp. at 16 (“the government does not directly represent individuals injured by violations of the law”). Thus all of OFCCP’s authority above is distinguishable and inapplicable.

Indeed, Judge Larsen agreed with Oracle, as he previously ordered OFCCP to produce “any writings in its possession, custody, or control comprising or memorializing communications with third parties which support the material factual allegations.” 9/11/2017 Order, at 61. *U.S. ex rel. Burroughs v. DeNardi Corp.*, cited by OFCCP (Opp. at 18), also supports Oracle’s arguments: “Percipient facts cannot achieve the protected status under the attorney-client privilege by merely repeating them to an attorney. 167 F.R.D. 680, 686 (S.D. Cal. 1996).

OFCCP vaguely contends that it has a “sufficient commonality” of interests with the *Jewett* plaintiffs, but does not include the *Jewett* complaint that it asks the Court to review. Opp. at 18. There is therefore no evidence upon which the Court can base its conclusion. Moreover, OFCCP cites *Burroughs, supra*, as justification to withhold documents and communications exchanged with the *Jewett* counsel. Mot. at 18. *Burroughs*, however, was limited to the unique regime under the False Claims Act, which “sets forth a scheme whereby plaintiff and the government act together to prosecute the action.” *Id.* (noting that the “action may not be dismissed unless the government gives written consent”; the “government can settle or dismiss the action without the consent of the plaintiff”; that “[f]or all practical purposes, plaintiff and the government are essentially the same party” and that “[a]ll of plaintiff’s claims, litigation strategies, and ultimate goals, are all asserted on behalf of the government.”).

Here, *Jewett* plaintiffs' counsel are not asserting claims on behalf of, or in tandem with, the government. They are private litigants attempting to directly represent Oracle's employees through a class action. OFCCP is seeking to enforce federal laws against a federal contractor. That the two actions may share some similar factual allegations does not create a common interest between the government and a private plaintiff, and OFCCP cites no contrary authority.

#### **IV. OFCCP'S INTERROGATORY RESPONSES ARE INSUFFICIENT**

OFCCP does not seriously dispute that its interrogatory responses are lacking. It halfheartedly contends that it has provided appropriate responses. Opp. at 7. These bland reassurances do nothing to address the specific concerns Oracle raised with OFCCP's interrogatory responses. The responses cite thousands of pages of documents, making it impossible for Oracle to identify which parts are relevant, or cite wholly irrelevant documents. Mot. at 14-15. OFCCP also has not provided the anecdotal evidence it admits it intends to introduce at trial (Mot. at 17-18; Opp. at 4), nor affirmed that its list of Oracle's policies and practices that it contends have a disparate impact is complete. Mot. at 18-19.

OFCCP does not address at all Oracle's arguments that OFCCP must provide the identity of persons with knowledge of the facts relating to OFCCP's allegations: Mot. at 17; *see* Section II.A., *supra*. OFCCP likewise ignores Oracle's arguments that it improperly incorporated by reference numerous prior interrogatory responses rendered irrelevant by the SAC. Mot. at 12-14.

OFCCP promises it is "committed to supplementing its responses as required by the rules and will do so as soon as possible given the ongoing discovery disputes and volume of data and documents." Opp. at 8. This action has been pending over two years and followed an eighteen-month compliance review. OFCCP cannot at this point hide behind a purported need to review documents produced by Oracle. The Court should order OFCCP to supplement and complete its responses, or be barred from introducing any undisclosed evidence at trial.

#### **V. CONCLUSION**

For all these reasons, Oracle respectfully requests that the Court grant Oracle's motion.

May 23, 2019

Respectfully submitted,

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