

RECEIVED

JUN 07 2019

Office of Administrative Law Judges

**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

**ORACLE AMERICA, INC.'S
OPPOSITION TO OFCCP'S
MOTION FOR PROTECTIVE
ORDER OR IN THE
ALTERNATIVE LEAVE TO
AMEND THE COMPLAINT**

**ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

CASE NO. 2017-OFC-00006

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL BACKGROUND.....	3
A. Oracle Produced Contact Information for Its Employees to OFCCP	4
B. OFCCP Requests Oracle’s Permission to Contact Its Employees.....	4
C. OFCCP Sends Its Misleading Letter In April 2019	4
D. Oracle’s Communications with Employees in Jewett v. Oracle.....	5
E. OFCCP Has No Evidence of Employees Being Discouraged or Retaliation	6
F. Oracle Requests a Corrective Notice and OFCCP Refuses	7
III. ARGUMENT.....	9
A. Oracle’s Letter and Legal Arguments Are Not “Witness Intimidation”	9
B. Oracle’s Communications With Its Employees Were Appropriate	11
C. OFCCP Does Not Represent Oracle’s Employees or Their “Interests”	15
D. OFCCP’s Proposed Notice Is Unnecessary and Prejudicial to Oracle	17
E. The Court Should Not Permit OFCCP to Amend its Complaint.....	18
IV. CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Acosta v. Austin Electric Servs. LLC</i> , 322 F. Supp. 3d 951 (D. Ariz. 2018)	14
<i>Acosta v. Sw. Fuel Mgmt., Inc.</i> , 2018 WL 739425 (C.D. Cal. Feb. 2, 2018).....	14
<i>Bobryk v. Durand Glass Mfg. Co.</i> , No. 12-cv-5360 (NLH/JS), 2013 WL 5574504 (D.N.J. Oct. 9, 2013)	12
<i>Camp v. Alexander</i> , 300 F.R.D. 617 (N.D. Cal. 2014).....	14
<i>Coles v. Marsh</i> , 560 F.2d 186 (3rd Cir. 1977)	18
<i>Donovan v. Teamsters Union Local 25</i> , 103 F.R.D. 550 (D. Mass, 1984).....	16
<i>E.E.O.C. v. SVT, LLC</i> , 297 F.R.D. 336 (N.D. Ind. 2014)	12
<i>Gulf Oil Co. v. Bernard</i> , 452 U.S. 89 (1981).....	18
<i>Kuhl v. Guitar Ctr. Stores, Inc.</i> , No. 07 C 0214, 2008 WL 5244570 (N.D. Ill. Dec. 16, 2008)	12
<i>Lapointe v. Target Corp.</i> , No. 16-CV-216, 2017 WL 3288506 (N.D.N.Y. Mar. 24, 2017)	12
<i>McLaughlin v. Liberty Mut. Ins. Co.</i> , 224 F.R.D. 295 (D. Mass. 2004).....	18
<i>Mevorah v. Wells Fargo Home Mortg., Inc.</i> , 2005 WL 4813532 (N.D. Cal. Nov. 17, 2005)	15
<i>NSB Techs., Inc. v. Specialty Direct Mktg., Inc.</i> , No. 03 CV 2323, 2004 WL 1918708 (N.D. Ill. Aug. 20, 2004)	10
<i>O’Connor, et al. v. Uber Tech., Inc., et al.</i> , No. 13-cv-03826-EMC, 2017 WL 3782101 (N.D. Cal. Aug. 31, 2017)	10

<i>Perez v. Clearwater Paper Corp.</i> , 2015 WL 685331 (D. Idaho Feb. 17, 2015).....	16
<i>U.S. ex rel Purcell v. MWI Corp.</i> , 209 F.R.D. 21 (D.D.C. 2002).....	16
<i>Ross v. Wolf Fire Prot., Inc.</i> , 799 F. Supp. 2d 518 (D. Md. 2011).....	18
<i>Sjoblom v. Charter Commc'ns, LLC</i> , 2007 WL 5314916 (W.D. Wis. Dec. 26, 2007).....	13
<i>Somerson v. Mail Contractors of Am.</i> , 2003 WL 22855212 (ARB Nov. 25, 2003).....	14
<i>Utlely v. Varian Assocs., Inc.</i> , 811 F.2d 1279 (9th Cir. 1987).....	16
<i>Wright v. Adventures Rolling Cross Country, Inc.</i> , 2012 WL 2239797 (N.D. Cal. June 15, 2012).....	14

I. INTRODUCTION

OFCCP asks this Court to send a letter to thousands of Oracle's employees stating that anything the employees tell Oracle could be used to diminish the amount of money they receive from this case. Combined with its recent misleading letter to employees touting a nonexistent finding of \$600,000,000 in lost wages, OFCCP is engaging in the very conduct of which it accuses Oracle: coercing witness testimony with false and misleading statements.

OFCCP wants its letter sent to every current and former Oracle employee in the job functions at issue here, regardless of whether the employee received OFCCP's initial misleading letter, regardless of whether Oracle or OFCCP intends to speak with the employee, and regardless of whether the employee's testimony will be presented at trial. Accurately anticipating Oracle's response, OFCCP preemptively denies it is "in pursuit of litigation advantage." But OFCCP's edits to Oracle's proposed corrective notice remedying OFCCP's misleading April 4 letter give the game away:

You may agree to participate in the lawsuit on behalf of ~~either Oracle or~~ OFCCP, including testifying at the hearing later this year, without negative consequences from Oracle ~~or from OFCCP~~.

In OFCCP's view, it represents Oracle's employees (or their "interests"), Oracle's employees cannot participate in this lawsuit on behalf of Oracle, and it is appropriate to warn potential witnesses they may receive less money if they provide information to Oracle.

OFCCP has it all backwards. It does not represent Oracle's employees, in actuality or with respect to "their interests." OFCCP has one objective: ensuring that a federal contractor complies with Executive Order 11246. If OFCCP is able to successfully establish a violation of that Order, some of Oracle's employees may be third-party beneficiaries of this proceeding. Similarly, it is wholly inappropriate for OFCCP to demand that Oracle tell its own employees that it is adverse to them. Oracle is adverse to OFCCP, not its employees, and Oracle maintains its position that OFCCP's allegations are meritless.

Like its prior submissions, OFCCP does not include any evidence justifying its bombastic

ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR TO AMEND COMPLAINT

rhetoric about “witness intimidation” and “coercive conduct.” OFCCP contends that “hundreds of Oracle’s employees have advised OFCCP that they fear reprisal if they participate in this litigation.” Plaintiff’s May 24, 2019 Motion for a Protective Order or in the Alternative Leave to Amend the Complaint (“Mtn.”), at p. 1. Oracle has no idea what OFCCP is referring to. No evidence is submitted supporting that astonishing statement.

In fact, OFCCP’s entire motion is premised on only three actions by Oracle: (1) sending a letter to OFCCP asking it to stop sending misleading communications to its employees; (2) filing a motion to correct OFCCP’s misleading letter when it refused to send a corrective notice; and (3) submitting employee declarations in a separate case. Mtn. at pp. 13-17.

Thus, according to OFCCP, it can send misleading letters to Oracle’s employees implying they should contact OFCCP to receive their share of a hypothetical fund of lost wages, but when Oracle objects to OFCCP or to the Court, it is Oracle who is improperly influencing witness testimony. And OFCCP’s eagerness to carry water for the *Jewett* plaintiffs is inexplicable. The declarations OFCCP cites would never appear in this case but for OFCCP. Moreover, not once does OFCCP ever articulate any harm to it from these declarations. To the contrary, only last month OFCCP confidently reassured this Court that Oracle’s request for the testimony of employees with whom OFCCP spoke reflects “a fundamental mischaracterization of what this case is about and how the Department will prove its case” because “the Department does not intend to prove its case through the testimony of the thousands of individual employees at issue here” and that instead, OFCCP’s case will be “largely statistical” and “not turn on the testimony of any individual employees[.]” See OFCCP’s May 17, 2019 Opposition to Oracle’s Second Motion to Compel (“OFCCP May 17 Opp. to 2nd MTC”), at pp. 3-4. OFCCP’s position is clear: the testimony of Oracle’s witnesses is immaterial when Oracle wants it, but of paramount significance when used to justify sending a prejudicial letter to Oracle’s employees.

The limited evidence OFCCP does submit is mischaracterized beyond recognition. Oracle asked OFCCP on April 29, 2019 to stop sending misleading letters, and to cease

**ORACLE’S OPPOSITION TO OFCCP’S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

communications with its employees resulting from the misleading letter, until a corrective notice was issued. From this, OFCCP fabricates a contention by Oracle that it represents its employees. Mtn. at p. 1. As Oracle has previously explained, the letter says nothing of the sort. OFCCP also repeatedly asserts that multiple employees told OFCCP they believed interviews with Oracle's counsel were mandatory. *See* Mtn. at pp. 2 (“some report that they did not understand, that these interviews ... were not mandatory”); 5 (“OFCCP received information from Oracle employees that they did not feel that such interviews were voluntary”); 15 (“employees have reported to OFCCP that they believed participation is mandatory.”). The only evidence supporting all three of those statements is one sentence from OFCCP's counsel about a single purported employee: “The informant from whom I received the email (Exhibit A) stated that she did not feel that the interview was voluntary and wished to remain confidential for fear of retaliation by Oracle.” May 23, 2019 Declaration of Norman E. Garcia in Support of OFCCP's Motion for Protective Order and Alternative Motion for Leave to Amend (“Garcia Decl.”), ¶ 4. It speaks volumes that the only evidence OFCCP can scrape together is its own counsel's declarations. And Oracle is not even permitted to challenge this evidence because OFCCP contends it is all highly confidential and privileged. The Court should disregard all of it as self-serving, multiple-hearsay mush.

In addition, the relief requested by OFCCP is disproportionate to any purported harm. There is no need to send a letter to employees whom no party will ever contact. OFCCP should also not be permitted to amend its complaint again based on these specious allegations. The Court should deny OFCCP's motion as a transparent attempt to influence witness testimony and prejudice Oracle.

II. FACTUAL BACKGROUND

OFCCP attempts to portray Oracle's legal arguments to OFCCP and the Court as efforts to stymie employees' ability to contact OFCCP. As explained below, all of Oracle's actions were proper, and it is entitled to raise concerns to OFCCP and this Court without being accused of

ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR TO AMEND COMPLAINT

intimidating witnesses.

A. Oracle Produced Contact Information for Its Employees to OFCCP

OFCCP's motion includes a backdoor request for additional contact information for Oracle's employees in addition to its request for a mass mailing. Mtn. at pp. 3, 18. Oracle already produced contact information in 2017 for all current and former employees in its PT1 job group and Product Development, Information Technology, and Support job functions in compliance with Judge Larsen's Order. Mtn. at p. 3. There is no need to provide any additional contact information.

B. OFCCP Requests Oracle's Permission to Contact Its Employees

As OFCCP acknowledges, it emailed Oracle's counsel on March 14, 2019 to request permission to contact Oracle's managers. The parties eventually agreed that OFCCP could contact Oracle's managers without Oracle's counsel present, as long as the managers were only asked about their individual experiences and their responses were not used as party admissions or to otherwise bind Oracle as statements of its policies or practices. *See* Declaration of Erin M. Connell in Support of Oracle's America, Inc.'s Opposition to OFCCP's Motion for Protective Order or in the Alternative Leave to Amend the Complaint ("Connell Decl."), ¶ 7. In fact, as recently as May 9, 2019 both parties again agreed 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. *Id.*, Ex. F.

C. OFCCP Sends Its Misleading Letter In April 2019

As explained in Oracle's pending Motion to Correct OFCCP's Misleading Communications to Oracle's Employees, Oracle became aware in April 2019 that OFCCP sent a letter to Oracle employees stating in part that "we have determined that [female, Black, and Asian] employees have been underpaid as much as 20% relative to their peers. We estimate that

**ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

this discrimination cost these employees at least \$600,000,000 in lost wages from 2013 to the present.” *Id.*, Ex. B. The letter assured employees (including managers) that they were not being accused of wrongdoing and encouraged them to contact OFCCP to find out if their wages were affected. *Id.*

On April 29, 2019, Oracle sent OFCCP a letter objecting to the misleading communication and requesting that OFCCP stop communicating with its employees “until a corrective notice – approved by Oracle – is sent.” *Id.*, Ex. C. Oracle also rescinded the parties’ agreement allowing OFCCP to have *ex parte* contact with its managers. Contrary to OFCCP’s mischaracterization of the letter, Oracle did *not* tell OFCCP it needed Oracle’s consent to speak with its employees – in fact, Oracle has confirmed multiple times its agreement with OFCCP that the only circumstances under which OFCCP needs Oracle’s consent is in situations where OFCCP is speaking to Oracle managers regarding statements or actions that may be binding upon Oracle. *Id.*, ¶ 7; Exs. C, D, F.

Also on April 29, 2019, Oracle served Requests for Admission on OFCCP, asking it to “Admit that [OFCCP] does not accuse any ORACLE [female/Black/Asian] manager of any wrongdoing with respect to the claims asserted against ORACLE in the Second Amended Complaint.” *Id.*, Ex. R. On May 24, 2019, OFCCP responded, objecting but admitting in relevant part that “OFCCP admits that it has not named any Oracle employees as a defendant in this matter. Except as expressly admitted, OFCCP denies.” *Id.* OFCCP’s April 4, 2019 letter was therefore additionally misleading because it was sent to managers and claimed they are not being accused of wrongdoing, but OFCCP has now denied that it is not accusing Oracle’s managers of wrongdoing.

D. Oracle’s Communications with Employees in *Jewett v. Oracle*

As this Court is aware, there is a separate putative class action against Oracle pending in San Mateo Superior Court brought by private plaintiffs alleging Oracle violated California’s Equal Pay Act. As part of its opposition to the plaintiffs’ motion for class certification, Oracle

**ORACLE’S OPPOSITION TO OFCCP’S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

employees submitted declarations discussing the wide variety of responsibilities and skills associated with similar or identical job titles. OFCCP attaches three of the declarations to its Motion. Each contains the following statements:

- The employee is making the declaration in support of Oracle’s position that the case should not be certified as a class action.
- The employee knows they will be a class member if the case is allowed to proceed as a class action.
- The employee understands that the attorneys who interviewed her and assisted in preparing her declaration represent Oracle and do not represent her.
- The employee was not pressured or required to sign the declaration, and it was provided voluntarily.

May 24, 2019 Declaration of Laura C. Bremer in Support of OFCCP’s Motion for Protective Order and Alternative Motion for Leave to Amend (“Bremer Decl.”), Ex. 9. Oracle also provided additional admonitions to its employees when obtaining these declarations, including that the interview was completely voluntary, that the employee was free to consult an attorney of her choosing, and that any information the employee provided may be used to assist Oracle with defending itself. *See* May 17, 2019 Declaration of Abigail Daquiz in support of OFCCP’s Opposition to Oracle’s Second Motion to Compel (“Daquiz Decl. ISO Opp. to 2nd MTC”), Ex. 7.

E. OFCCP Has No Evidence of Employees Being Discouraged or Retaliation

OFCCP contends that it has received “strong” reports by employees of fears of retaliation or discouragement to contact OFCCP. Mtn. at p. 6. The only evidence submitted is the declaration of Ana Hermosillo, one of OFCCP’s counsel. The declaration contains Ms. Hermosillo’s characterization of purported conversations with Oracle employees. In some cases (it is not disclosed which), Ms. Hermosillo did not even speak directly with the Oracle employee, and she is apparently conveying what another OFCCP attorney told her. May 17, 2019

ORACLE’S OPPOSITION TO OFCCP’S MOTION FOR PROTECTIVE ORDER OR TO AMEND COMPLAINT

Declaration of M. Ana Hermsillo in support of OFCCP's Opposition to Oracle's Second Motion to Compel, ¶ 1. Oracle has no ability to respond to these vague statements because OFCCP refuses to provide any more information about them, citing the government informant's and common interest privileges. The lack of admissible or competent evidence supporting OFCCP's key allegations demonstrates how meritless OFCCP's motion is.

F. Oracle Requests a Corrective Notice and OFCCP Refuses

As explained more fully in Oracle's pending Motion to Correct OFCCP's Misleading Communications to Oracle's Employees and Declaration of Erin M. Connell, Oracle requested that OFCCP correct its misleading letter, but OFCCP refused. Connell Decl., ¶¶ 7-24, Exs. B-P.

On April 29, 2019, Oracle's counsel sent a letter to OFCCP objecting to the letter. *Id.*, Ex. C. OFCCP responded on April 30 and raised, for the first time, complaints about Oracle's communications with its employees. The parties exchanged correspondence between April 30 and May 2, 2019, in which Oracle confirmed that neither it nor its attorneys ever claimed to represent its employees in this litigation. Oracle also sought to meet and confer with OFCCP about its misleading letter, but was told OFCCP was not available for a week. *Id.*, Ex. E.

The parties eventually met and conferred on May 9, 2019. In that conference, both sides agreed that OFCCP does not need Oracle's consent to speak to Oracle's current managers in their personal capacity regarding potential claims they may have against Oracle, but OFCCP does need Oracle's permission to speak to Oracle's current managers with respect to any act or omission that may bind Oracle. *Id.*, Ex. F. Oracle also confirmed it was providing a form response to inquiries from employees regarding OFCCP's misleading letter, which states in part that employees are free to speak with OFCCP if they wished and Oracle would not take any adverse actions against them for doing so. *Id.*

On May 10, 2019, Oracle sent OFCCP a proposed corrective notice for its letter. *Id.*, Ex. G. The parties exchanged further correspondence but were unable to reach resolution, and on May 17, Oracle filed its Motion to Correct OFCCP's Misleading Communications to Oracle's

**ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

Employees.

On May 20, 2019, OFCCP's counsel sent a letter accusing Oracle of violating the Rules of Professional Conduct and demanding that Oracle withdraw its motion "by NOON TOMORROW," or OFCCP would move to amend its complaint and seek to depose Oracle's in-house and external counsel. OFCCP's letter further warned, "these consequences can be avoided, however, if Oracle withdraws its premature motion (and never forwards this filing to the OALJ FOIA library)." *Id.*, Ex. J.

On May 22, 2019, OFCCP sent a letter rejecting Oracle's proposed corrective notice and declaring "it is apparent we will be unable to reach a compromise. We are now at an impasse and will file a motion seeking a protective order, injunctive relief and/or for leave to amend our complaint to add a claim for violation of 41 CFR 60-1.32." *Id.*, Ex. N.

On May 23, 2019 at 12:45 p.m., OFCCP sent another letter to Oracle, this time requesting a response two hours later, by 3 p.m. that day. *Id.*, Ex. P. That May 23 letter was a complete reversal of OFCCP's position from the day before and now included OFCCP's edits to Oracle's proposed corrective notice. OFCCP's edits, which also constitute its proposed notice to the class here, include:

- Deleting language stating that OFCCP's allegations were unproven and that no finding of discrimination or lost wage had been made;
- Adding a warning that any information shared with Oracle may be used to eliminate or reduce any money the employee would receive; and
- Removing any suggestion that employees could participate in this action on behalf of Oracle, including deleting Oracle's contact information.

Id.

The parties met and conferred on May 23 and discussed the proposed corrective notice. On May 24, Oracle's counsel wrote to OFCCP summarizing their discussions. Oracle expressed concern that OFCCP's inconsistent positions, accusations of misconduct against Oracle and its

**ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

counsel, and threats of motion practice appeared to be designed to coerce and intimidate Oracle into sending the prejudicial notice to the class that OFCCP requests in this motion. *Id.*, Ex. Q. That email also attached Oracle’s counter-proposal to OFCCP’s edits to the corrective notice. *Id.* That same day, May 24, 2019, OFCCP responded and rejected Oracle’s counter-proposal and filed this Motion.

III. ARGUMENT

OFCCP’s motion is meritless. OFCCP attempts to portray Oracle’s legal briefs and arguments to the Court as somehow influencing its employees. And Oracle’s declarations from the separate *Jewett* case are not relevant here. Further, the relief requested by OFCCP – a letter blast to all employees potentially affected by this action encouraging them to contact OFCCP and discouraging them from providing information to Oracle, regardless of whether either party intends to contact the employee – is a highly disproportionate response to any perceived harm.

As noted above, OFCCP identifies only three actions by Oracle that it contends intimidate and coerce witnesses: (1) Oracle’s April 29, 2019 letter to OFCCP asking it to stop contacting its employees until a corrective notice is issued; (2) Oracle’s subsequent Motion to Correct OFCCP’s Misleading Communications to Oracle’s Employees that it filed after OFCCP refused to send a notice; and (3) Oracle collecting and submitting declarations in the *Jewett* case in opposition to plaintiffs’ motion for class certification.

A. Oracle’s Letter and Legal Arguments Are Not “Witness Intimidation”

With regard to the first two issues, as Oracle explained above and in its pending Motion to Correct OFCCP’s Misleading Communications to Oracle’s Employees, OFCCP’s April 4, 2019 letter was misleading because it suggested the Court had already found discrimination by Oracle (including \$600,000,000 in purportedly lost wages), and that employees should contact OFCCP to determine whether their wages were affected, while failing to mention that Oracle disputed the allegations and that no determination as to discrimination had been made. *See*

Oracle’s May 17, 2019 Motion to Correct Misleading OFCCP’s Misleading Communications at

ORACLE’S OPPOSITION TO OFCCP’S MOTION FOR PROTECTIVE ORDER OR TO AMEND COMPLAINT

pp. 3-6; *see also O'Connor, et al. v. Uber Tech., Inc., et al.*, No. 13-cv-03826-EMC, 2017 WL 3782101, at *7 (N.D. Cal. Aug. 31, 2017) (ordering corrective notice for misleading email sent to class members by plaintiff's counsel). Oracle was entirely justified in raising these complaints to OFCCP and asking that it cease communications until the parties agreed on a proper set of disclosures to be made to employees. Contrary to OFCCP's contentions, Oracle's April 29, 2019 letter said **nothing** about Oracle representing its employees and OFCCP's deliberate misconstruction of the letter is not well-taken. 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., ¶ 11.

OFCCP also contends that because Oracle described these requests in its "publicly filed" Second Motion to Compel and Motion to Correct OFCCP's Misleading Communications, Oracle is "doing everything in its power to confuse, intimidate and convince its employees there is something improper about communicating with the government." Mtn. at p. 16. That is false. In fact, when Oracle employees asked Oracle about OFCCP's letter – for example, wondering whether it was a hoax or how OFCCP got their contact information – Oracle provided employees with a form response that stated in part "It is entirely up to you whether to speak to OFCCP, including by responding to the letter you received. You are not obligated to do so, although you are free to talk to them if you wish to do so. Oracle will not take any adverse action against you if you do choose to speak to OFCCP." Connell Decl., ¶ 12.

It is patently unfair that Oracle cannot even advocate for its position in letters and briefs without OFCCP accusing it of intimidating witnesses. The litigation privilege exists for a reason. *See, e.g., NSB Techs., Inc. v. Specialty Direct Mktg., Inc.*, No. 03 CV 2323, 2004 WL 1918708, at *4 (N.D. Ill. Aug. 20, 2004) (recognizing a federal litigation privilege that allows litigants to fully litigate disputes without fear of facing subsequent derivative actions). There is a difference between mass mailings sent by OFCCP directly to employees and arguments Oracle made to OFCCP and the Court in letters and legal briefs. OFCCP's concern that numerous Oracle

**ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

employees are logging on to the Court's FOIA reading room and actively following the parties' discovery disputes and changing their behavior accordingly is pure speculation. Certainly there is no evidence of this. Further, nothing in any of Oracle's writings say anything about *employees contacting OFCCP*. Oracle's concern is with *OFCCP contacting Oracle's employees* with misleading communications. OFCCP's contention is therefore hypothetical, implausible, and irrelevant.

Unsurprisingly, OFCCP's motion fails to articulate any alleged harm from Oracle's letter and briefs. Previously OFCCP crowed about hundreds of Oracle employees contacting it in response to its misleading April 4, 2019 letter. *See* OFCCP May 17 Opp. to 2nd MTC at p. 6. Now, OFCCP contends that Oracle's subsequent letter and motion – which were only prepared and sent in the last four weeks – have chilled employee communications to such a degree that a mass-mailed letter to thousands of Oracle employees is warranted, regardless of whether the employees received OFCCP's misleading April 4 letter or whether either party intends to contact the employee. Moreover, OFCCP's requested relief makes no sense in light of the fact it unambiguously represented that it will use very little employee testimony at trial. *Id.* at pp. 3-4. The Court should deny OFCCP's motion because Oracle's actions in asserting its legal position were appropriate, OFCCP has not identified any harm, and the requested remedy goes far beyond the purported harm.

B. Oracle's Communications With Its Employees Were Appropriate

OFCCP also contends that declarations submitted by Oracle employees in the *Jewett* action in support of Oracle's opposition to the plaintiff's motion for class certification were improper because "Oracle through its counsel systematically contacted female members of the protected class, demanded their participation in interviews with Oracle's attorneys, secured sworn declarations under penalty of perjury from several class members to be used in Oracle's defense, all while failing to provide employees the information needed to make a free and informed decision about whether to participate." Mtn. at p. 13. None of that is correct.

**ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

According to OFCCP, here is Oracle “demanding” employees’ participation:

I am an attorney with the law firm of Orrick, Herrington & Sutcliffe LLP, which represents Oracle in its defense of an ongoing lawsuit against the company (*Jewett v. Oracle*). In order to gather information relevant to the case, we would like to speak with a number of ICs, including you. You have not been singled out in any way, but we believe you may have relevant information to share.

Garcia Decl., Ex. A. In addition, as noted above, Oracle expressly advised employees that their participation was entirely voluntary, they could end the interview at any time, and any information they gave could be used by Oracle in its defense of the litigation. Daquiz Decl. ISO Opp. to 2nd MTC, Ex. 7. As further evidence of these instructions, each of the three employee-declarants specifically states that she understands the declaration supports Oracle’s position that this case should not be certified as a class action, the employee knows she will be a class member if the case proceeds, the attorney who interviewed her represents Oracle and not her, that the employee was not pressured or required to sign the declaration, and that it was provided voluntarily. Bremer Decl., Ex. 9.

Oracle is permitted to contact its employees to understand OFCCP’s claims and prepare a defense. *See, e.g., E.E.O.C. v. SVT, LLC*, 297 F.R.D. 336, 342 (N.D. Ind. 2014) (permitting employer’s communications with unrepresented employees because not allowing such discovery would impair the employer’s ability to investigate the plaintiff’s claims). Indeed, courts regularly approve of admonitions similar to those used by Oracle here. *See, e.g., Bobryk v. Durand Glass Mfg. Co.*, No. 12-cv-5360 (NLH/JS), 2013 WL 5574504, at *2 (D.N.J. Oct. 9, 2013) (employees were properly told that (i) the attorneys represented the employer in a lawsuit brought by a former employee; (ii) the plaintiff sought class action status but no court had ruled yet; (iii) the employee’s information would be used to support the employer’s legal arguments; (iv) the employee was not required to speak with the attorneys and the employer would retaliate for not speaking with them); *Lapointe v. Target Corp.*, No. 16-CV-216 (GTS/CFH), 2017 WL 3288506, at *6 (N.D.N.Y. Mar. 24, 2017); *Kuhl v. Guitar Ctr. Stores, Inc.*, No. 07 C 0214, 2008 WL 5244570, at *5 (N.D. Ill. Dec. 16, 2008).

ORACLE’S OPPOSITION TO OFCCP’S MOTION FOR PROTECTIVE ORDER OR TO AMEND COMPLAINT

OFCCP also contends that Oracle failed to disclose “key information,” namely, “that if OFCCP (or the *Jewett* plaintiffs) prevailed they would be entitled to pay adjustment and back pay, and that the information they provided could adversely affect their ability to recover that compensation.” Mtn. at p. 15. OFCCP fails to explain why Oracle should be required to tell employees that it is interviewing in connection with one case (*Jewett*), that if in another case a different plaintiff (OFCCP) prevails, the employee might get a pay adjustment or back pay. Certainly OFCCP cites no law or case requiring such a prejudicial and one-sided admonition. It is apparent OFCCP wants the Court to conflate this case with *Jewett*. They are separate and Judge Swope in the *Jewett* matter can evaluate the matters pending before him.

Further, OFCCP contends that “Oracle’s attorneys did not disclose that the information employees provided about their jobs—which may have seemed innocuous—could be used by Oracle to argue that they had not been subjected to discrimination.” *Id.* As evidenced by their declarations, the employees at issue here are educated and sophisticated, and understand Oracle’s and the *Jewett* plaintiffs’ respective positions. One declaration states “I have never considered gender in making my [compensation] recommendations.” Bremer Decl., Ex. 9 at Lundhild Decl., ¶ 20. Another states, “I do not feel disadvantaged as a woman at Oracle.” Bremer Decl., Ex. 9 at Guerrero Decl., ¶ 9. These employees plainly understood their statements were being used to support Oracle’s legal positions. This situation is not at all like the cases OFCCP cites (discussed below) involving employees who are given pre-printed declarations and instructed to sign them. For example, the employer in *Sjoblom*, cited by OFCCP, was sanctioned for telling employees they were attending a training, but then having them meet with attorneys to sign declarations, while failing to tell employees they might be part of the lawsuit and that the declarations were waivers. *Sjoblom v. Charter Commc'ns, LLC*, 2007 WL 5314916, *3-4 (W.D. Wis. Dec. 26, 2007). Here, each of the three declarations submitted with OFCCP’s motion acknowledges that the employees would be class members if the *Jewett* class is certified. Bremer Decl., Ex. 9.

Again, OFCCP’s lack of evidence is telling. OFCCP submits no evidence that these

**ORACLE’S OPPOSITION TO OFCCP’S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

employees did not “understand[] the full consequences of assisting Oracle’s counsel.” Mtn. at p. 16. And despite mischaracterizing the Garcia Declaration to claim that multiple Oracle employees thought the interviews were not voluntary, OFCCP’s only evidence on this point is the hearsay declaration of its own counsel that a single, unnamed Oracle employee thought the interview was not voluntary.

OFCCP cites no authority supporting its allegations that Oracle’s conduct was improper. Oracle certainly agrees that witnesses should be free from any form of misleading or coercive contact. The cases cited by OFCCP involve egregious conduct that bears no relation to OFCCP’s allegations here. *See, e.g., Somerson v. Mail Contractors of Am.*, 2003 WL 22855212 (ARB Nov. 25, 2003) (plaintiff sent anonymous emails and set up an anonymous website insulting and threatening defendant’s counsel and managers); *Camp v. Alexander*, 300 F.R.D. 617 (N.D. Cal. 2014) (employer sent letter to employees claiming lawsuit could cause bankruptcy, thereby implicitly threatening employees’ job security).

Likewise, the cases OFCCP cites about communications with employees are in opposite. Mtn. at pp. 13-17. In *Acosta v. Sw. Fuel Mgmt., Inc.*, 2018 WL 739425 (C.D. Cal. Feb. 2, 2018), employees were instructed by their employer to meet with defense counsel (and some were driven there by management) and sign declarations, which they were not given copies of. That is nothing like the case here. In *Acosta v. Austin Electric Servs. 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. Employees were also not told their declarations were related to ongoing litigation. Here, Oracle’s employees were fully informed of the circumstances of the declarations they submitted in *Jewett*. In *Wright v. Adventures Rolling Cross Country, Inc.*, 2012 WL 2239797 (N.D. Cal. June 15, 2012), the employer sent employees a notice stating that participating in the lawsuit could affect their reputations and professional futures because everything would be public, that the litigation would cost employees more money than they would receive, and that they shouldn’t plan any travel for the future. In

**ORACLE’S OPPOSITION TO OFCCP’S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

Mevorah v. Wells Fargo Home Mortg., 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. ISO Opp. to 2nd MTC, Ex. 7; Connell Decl., ¶ 5 & Ex. A.

OFCCP seems unsure of whether to accuse Oracle of violating any rules of professional conduct. It acknowledges that it initially believed Oracle's conduct violated RPC 1.13(f), Mtn. at p. 7, but having now apparently read that rule and seeing that it sensibly does not require Oracle's counsel to disclose to employees that they are adverse, OFCCP's new position is that "RPC 1.13(f), combined with the requirements of RPC 1.7, requires corporate counsel to explain in writing the identity and adversity of a lawyer's client 'whenever the lawyers know, or reasonably should know, that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.'" Mtn. at p. 12 (emphasis added). But even this newly-alloyed argument fails. RPC 1.7 addresses dual representation of current clients. Oracle's counsel does not claim to be representing Oracle's employees and therefore RPC 1.7 is irrelevant. All RPC 1.13(f) requires is that "a lawyer representing the organization **shall explain the identity of the lawyer's client** whenever the lawyers knows . . . that the organization's interests [may be] adverse[.]" (emphasis added). It is undisputed that Oracle so advised its employees, and provided additional admonitions. Daquiz Decl. ISO Opp. to 2nd MTC, Ex. 7; Connell Decl., ¶¶ 3, 5 & Ex. A. The rule does not require Oracle's attorneys to opine that Oracle's interests are adverse to its employees. Oracle therefore met and exceeded its obligations when communicating with employees.

C. OFCCP Does Not Represent Oracle's Employees or Their "Interests"

OFCCP assumes that Oracle and the Court will accept "the decidedly non-controversial
**ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

fact that OFCCP in this action represents the interests of the protected class.” Mtn. at p. 11. In fact, OFCCP does not. OFCCP’s mandate is enforcing Executive Order 11246, which prohibits federal contractors from discriminating in employment decisions. That does not mean OFCCP represents the so-called interests of Oracle’s employees. To the extent a monolithic “interest” can be assigned to 70,000+ employees, it would be working for an organization that does not discriminate, which is Oracle’s position. *If* OFCCP proves a violation of Executive Order 11246, some of Oracle’s employees may receive a distribution of funds. That makes them, at most, third-party beneficiaries of this proceeding. This action is between OFCCP and Oracle, and the nebulous “interests” of Oracle’s employees do not define the parties’ roles and responsibilities with respect to these third parties.

The cases cited by OFCCP either support Oracle or are not applicable. Mtn. at pp. 9-12. For example, in *Utley v. Varian Assocs., Inc.*, 811 F.2d 1279 (9th Cir. 1987), the Ninth Circuit merely held that OFCCP has the exclusive right to enforce Executive Order 11246, *not* that OFCCP represents aggrieved employees or their interests. Indeed, the cases OFCCP cites recognize a distinction between agencies pursuing claims on behalf of specific individuals and agencies merely enforcing certain laws. *See, e.g., Perez v. Clearwater Paper Corp.*, 2015 WL 685331, at *2 (D. Idaho Feb. 17, 2015) (common interest exists between an OSHA whistleblower and the government because, unlike here, “Congress has provided for the enforcement of the Act through government suits based on individual claims.”); *U.S. ex rel Purcell v. MWI Corp.*, 209 F.R.D. 21 (D.D.C. 2002) (common interest in *qui tam* action); *Donovan v. Teamsters Union Local 25*, 103 F.R.D. 550 (D. Mass, 1984) (attorney-client relationship exists between government and witnesses where government also served as complaining union member’s lawyer).

It is also inaccurate – if not offensive – to assert that Oracle’s interests are “directly adverse” to its own employees’. Mtn. at p. 12. Oracle’s position is that it has not engaged in any discrimination and that OFCCP’s allegations are false. Its employees certainly do not have an

**ORACLE’S OPPOSITION TO OFCCP’S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

interest in working for a discriminatory organization. It is also worth noting OFCCP's fixation on "back pay or pay adjustments." Mtn. at p. 6. Although OFCCP insists it is prosecuting this case on behalf of Oracle employees and to ensure that Oracle does not discriminate, OFCCP's myopic focus on the size of the potential award – in both the letter it already sent and the letter it asks this Court to order be sent – suggests it is more interested in a self-serving, face-saving press release.

D. OFCCP's Proposed Notice Is Unnecessary and Prejudicial to Oracle

Even if the Court were to grant OFCCP's motion, OFCCP's proposed remedy causes more problems than it solves. OFCCP asks the Court to "either order Oracle to provide OFCCP with the contact information for the full protected class so that OFCCP can send the notice itself or order Oracle to issue the notice to all current employees within the protected class." Mtn. at p. 18. There are numerous issues with OFCCP's proposed notice.

First, the proposed notice tells employees that anything they say to Oracle could be used to reduce the amount of money they receive. That alone is sufficient reason to dismiss this entire motion and the proposed notice as a thinly-veiled scheme to dissuade employees from speaking with Oracle.

Second, the proposed notice says that employees can participate in this lawsuit only on behalf of OFCCP. It is therefore unfairly prejudicial because it does not tell employees they are free to participate on Oracle's behalf. OFCCP even deleted Oracle's contact information from Oracle's proposed corrective notice.

Third, there is no need to send a notice to employees with whom Oracle or OFCCP will never speak – particularly one filled with overtures that Oracle has done, or will do, something retaliatory or deceptive.

Fourth, there is also no need to send a notice to all Oracle employees because OFCCP has said their testimony will not be used to prove its case at trial.

OFCCP's notice is a solution in search of a problem. A court should not exercise its

**ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**

power to restrict an employer's communications with employees unless there is a "specific record showing by the moving party of the particular abuses by which it is threatened[,] . . . giving explicit consideration to the narrowest possible relief which would protect the respective parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 (1981) (citing *Coles v. Marsh*, 560 F.2d 186, 189 (3rd Cir. 1977)); see also *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 295, 297-98 (D. Mass. 2004) (denying motion to preclude communications where no "abuse took place as a result of [d]efendant's communications with the alleged putative class members"); *Ross v. Wolf Fire Prot., Inc.*, 799 F. Supp. 2d 518, 527 (D. Md. 2011) (denying plaintiffs' motion for protective order where communications were not in "bad faith"). OFCCP has not made that showing here.

E. The Court Should Not Permit OFCCP to Amend its Complaint

If OFCCP cannot have its notice sent to thousands of employees, it alternatively seeks leave to amend its complaint to add a violation of 41 CFR § 60-1.32.¹ This request is meritless and should be denied. As explained above, OFCCP has no evidence that Oracle engaged in any of the conduct barred by 41 CFR § 60-1.32, such as harassing or intimidating witnesses in retaliation for assisting OFCCP with its investigation. OFCCP has not even identified a single employee who would qualify.

OFCCP's requested amendment would also greatly expand the scope of this action and turn it into a circus of attorney depositions. OFCCP has already threatened to depose Oracle's in-house and external counsel regarding Oracle's communications with class members. Connell

¹ **§ 60-1.32 Intimidation and interference.** (a) The contractor, subcontractor or applicant shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

- (1) Filing a complaint;
- (2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Order or any other Federal, state or local law requiring equal opportunity;
- (3) Opposing any act or practice made unlawful by the Order or any other Federal, state or local law requiring equal opportunity; or
- (4) Exercising any other right protected by the Order.

(b) The contractor, subcontractor or applicant shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion or discrimination. The sanctions and penalties contained in this part may be exercised by OFCCP against any contractor, subcontractor or applicant who violates this obligation.

ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR TO AMEND COMPLAINT

Decl., Ex. J. Oracle would likewise be entitled to depose OFCCP and its counsel regarding its communications with Oracle's employees. And both parties may seek to depose employees who communicated with Oracle or OFCCP. This type of "discovery about discovery" is unnecessary. Allowing an amendment to add a brand-new cause of action would also prejudice Oracle because it would chill Oracle's ability to set forth its legal arguments in letters and legal briefs to OFCCP without OFCCP accusing it of intimidating witnesses.

IV. CONCLUSION

For all the foregoing reasons, the Court should deny OFCCP's request for a protective order or to amend its complaint.

June 7, 2019

Respectfully submitted,

GARY R. SINISCALCO
ERIN M. CONNELL
WARRINGTON S. PARKER



ORRICK, HERRINGTON & SUTCLIFFE LLP

The Orrick Building

405 Howard Street

San Francisco, CA 94105-2669

Telephone: (415) 773-5700

Facsimile: (415) 773-5759

Email: grsiniscalco@orrick.com

econnell@orrick.com

wparker@orrick.com

Attorneys for Defendant

ORACLE AMERICA, INC.

**ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR PROTECTIVE ORDER OR
TO AMEND COMPLAINT**