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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.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DEFENDANT ORACLE  
AMERICA, INC.'S MOTION TO  
COMPEL THE DEPOSITIONS  
OF THE PERSONS OFCCP  
INTENDS TO CALL AS  
WITNESSES AND WHO OFCCP  
REFUSED TO IDENTIFY BASED  
ON THE GOVERNMENT  
INFORMANTS' PRIVILEGE OR,  
IN THE ALTERNATIVE,  
MOTION IN LIMINE NO. 1 TO  
PRECLUDE THE TESTIMONY  
OF THOSE WITNESSES**

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## I. INTRODUCTION

As this Court may recall OFCCP responded to various Oracle discovery requests by claiming the government informants' privilege, which this Court sustained. *See* 6/10/2019 Order Granting and Denying Oracle's Second Motion to Compel ("6/10/2019 Order"). In sustaining the assertion of the privilege, this Court did order that OFCCP provide interview memos, but allowed that OFCCP could redact identifying information of those interviewed. The Court also noted as follows: "the parties should have no difficulty arranging for and conducting short depositions of witnesses after they are disclosed, insofar as this turns out to actually be necessary." 6/10/2019 Order at 13 n. 10.

The parties have agreed to exchange witness lists on November 19, 2019. In anticipation of the exchange of witness lists, and thus, the disclosure of the identity of previously undisclosed witnesses, Oracle asked OFCCP what dates could be set for deposition. *See* Declaration of Kayla Grundy ("Grundy Decl."), filed herewith, Ex. A at 5 (10/25/2019 K. Grundy email to N. Garcia).

In response, OFCCP said that it will not allow Oracle to take depositions. According to OFCCP, the "situation has drastically changed from when the Court issued that order." Grundy Decl., Ex. C at 2, 4 (N. Garcia emails to K. Grundy). What OFCCP appears to mean by this is that this Court's Order requiring OFCCP to re-do the overbroad redactions on its interview memos obviated the need for depositions. Not so.

Depositions remain necessary for at least two reasons. First, Oracle is entitled to question witnesses beyond the scope of any OFCCP interview memo. Moreover, Oracle is not required to take an interview memo at face value. *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993) ("Only by examining a witness live can a lawyer use the skills of his trade to plumb the depths of a witness' recollection, using . . . any new tidbits that usually come out in the course of answering carefully framed and pin-pointed deposition questions.").

Second, the interview memos remain redacted in ways that this Court instructed OFCCP were improper. As an example, OFCCP's latest re-production of the interview memos (its third

attempt to satisfy its discovery obligations and comply with the Court's order) still has non-responsive redactions despite this Court's clear Order otherwise. *See* October 7, 2019 Order at 24-26 ("The June 10, 2019, order did not authorize OFCCP to unilaterally modify the order to redact material that it decided was non-responsive."). And due to these redactions, Oracle is certainly unsure that the remaining redactions are true to this Court's Order.

As of the filing of this motion, Oracle does not know how many people will be disclosed for the first time in the November 19 witness list exchange. But Oracle files this motion now for this reason: were Oracle to wait until November 19, Oracle would have to request an expedited briefing schedule because this motion could not be decided in the normal course before the December 5 hearing date. Oracle has sought expedited briefing in the past. It is willing to do so here. But Oracle is cognizant that this is not this Court's preferred approach.

So, Oracle seeks an order compelling the depositions of persons not previously disclosed by OFCCP on the basis of the government informant's privilege. Moreover, Oracle seeks the interview memos without the redactions that OFCCP made for the purpose of protecting the identity of any such witness.

There is another remedy that Oracle requests in the alternative. This Court should exclude any testimony by a witness on OFCCP's witness list whose identity was not previously disclosed due to OFCCP's assertion of the government informants' privilege and who OFCCP refuses to provide for deposition. This request is consistent with the rule that a party may not advantage itself by asserting a privilege during discovery—thereby avoiding discovery—only to waive that privilege immediately before or at trial.

## **II. STATEMENT OF FACTS**

During the discovery phase of this case, in March 2019, Oracle requested the names of any individuals of whom OFCCP was aware with facts underlying OFCCP's allegations and any documents related thereto. *See* 6/10/2019 Order; Grundy Decl., Ex. D (Defendant Oracle's Interrogatories, Set Two, March 15, 2019). Oracle did so because it has a right to information held by OFCCP relating to this case, including interview memos and the identity of witnesses.

*See generally* Oracle's Second Mot. To Compel, dated May 3, 2019.

In response, OFCCP asserted the government informants' privilege refusing to disclose the identities of individuals.

This Court entered an Order on this issue. It allowed Oracle access to redacted interview memos with the proviso that all identifying information could be removed. In so holding, this Court expressly allowed for the possibility that, once OFCCP's hearing witnesses were revealed, "the parties should have no difficulty arranging for and conducting short depositions of witnesses after they are disclosed, insofar as this turns out to actually be necessary." *See* 06/10/2019 Order at 13, n. 10.

Now that time has come. But OFCCP refuses. OFCCP contends that depositions need not be taken because Oracle has the interview memos. Grundy Decl., Ex. C (11/04/2019 N. Garcia email to K. Grundy). As is noted below, that is not enough.<sup>1</sup>

In addition, there have been three separate orders on these interview memos. In the most recent, this Court noted that "[i]t simply appears that OFCCP is trying to hide likely witnesses and prevent Oracle from learning information that could impact that witness' credibility." 10/7/2019 Order at 13.

And it still appears that way. OFCCP continues to redact based on non-responsiveness, which this Court's last Order noted was "impermissible." *Compare* 10/7/2019 Court Order at 25-26 *with* Grundy Decl., ¶ 7, Ex. E; ¶ 8, Ex. F. In this Court's words, "[OFCCP] has improperly used this basis to redact information that is relevant and material to this litigation." 10/07/2019 Court Order at 26.

Of course, beyond this, Oracle cannot determine whether OFCCP was true to this Court's Order. But certainly, such a blatant violation of this Court's directive *not* to redact on the basis of non-responsiveness gives one pause.

One final fact, the parties met and conferred telephonically on November 4, 2019.

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<sup>1</sup> Oracle also made it clear to OFCCP during the meet and confer process leading up to this motion that Oracle will agree to reasonable conditions for any deposition. During the call, Oracle agreed to limit the depositions to three hours or less, and OFCCP still refused to produce the witnesses. Grundy Decl., ¶ 4.

Grundy Decl., ¶ 4. The parties exchanged correspondence before and after that telephonic meet and confer. *Id.* Ex. C.<sup>2</sup>

### III. ARGUMENT

#### A. A Court Order Compelling Deposition is Warranted.

The federal administrative discovery requirements and the federal discovery rules expressly grant every party to pending litigation the right to take oral deposition. Fed. R. Civ. P. 26, 30; 41 C.F.R. § 60-30.11 (“[A]ny party may take the testimony of any person, including a party, having personal or expert knowledge of the matters in issue, by deposition upon oral examination.”).<sup>3</sup>

The principal purpose of the federal discovery rules is to remove surprise at trial by allowing the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); see *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998) (“Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute.”). In short, adherence to pretrial discovery procedures is vital in order to “make litigation less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent possible.” *Clark v. California*, 2010 WL 11636686, at \*1 (N.D. Cal. Mar. 10, 2010).

To allow OFCCP to introduce testimony from witnesses undisclosed before the close of fact discovery and without permitting Oracle to depose the witness does not give Oracle the full

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<sup>2</sup> Despite asserting that there was no need for depositions, OFCCP argued during the meet and confer process that OFCCP should be permitted to depose Oracle’s witnesses if Oracle is permitted to depose the witnesses OFCCP did not disclose before close of fact discovery and intends to call at trial. Grundy Decl., ¶ 4. This argument fails. While Oracle requested that OFCCP identify any individuals with knowledge of the underlying facts *before the close of fact discovery*, OFCCP never did. See Grundy Decl., Ex. G. In addition, OFCCP must know the facts surrounding any relevant person. OFCCP conducted a year-long audit and interviewed Oracle employees and managers. OFCCP received documents from Oracle during discovery that revealed the names of persons. OFCCP had the opportunity to depose all those whose names appear on produced documents, whose names came up in deposition or during the audit period or who OFCCP interviewed during the audit period. In contrast, and for the persons whose names have not been revealed by OFCCP, Oracle had no such opportunities. See 6/10/2019 Order at 13 (noting that non-disclosure of identity handicaps Oracle).

<sup>3</sup> Administrative law forums often look to federal law for guidance. See 41 C.F.R. § 60-30.1 (“In the absence of a specific provision, procedures shall be in accordance with the Federal Rules of Civil Procedure.”).

rights granted to it by law.<sup>4</sup> And Oracle did nothing to waive any such rights. In fact, Oracle has pursued them tirelessly. There is no basis in fact or law to allow OFCCP to deprive Oracle of its right to depose persons with knowledge of the facts and whom OFCCP plans to call as witnesses.<sup>5</sup>

Nor is this some fishing expedition. The precise purpose of any deposition would be for the purposes of cross-examination. And the Ninth Circuit has recognized that “[p]retrial discovery is particularly important to preparation for effective cross-examination of such witnesses, and is commonly employed for that purpose. . . . Rule 26(d)(1) expressly authorizes use of depositions for the purpose of contradicting or impeaching the testimony of deponent as a witness.” *United States v. Meyer*, 398 F.2d 66, 72 (9th Cir. 1968) (finding that denying an oral deposition where opposing party refused to produce documents with underlying facts would “foreclose [ ] access to material essential to the proper litigation of the issue. . . .”). As such, the federal discovery rules and administrative requirements not only permit depositions without leave, but also grant this Court inherent power to compel a party to produce a witness for deposition where the information is not reasonably accessible. Fed. R. Civ. P. 37(a); Fed. R. Civ. P. 30; 41 C.F.R. § 60-30.11 (permitting a party to seek an order for failure to produce a witness).

OFCCP’s response that the interview memos are enough is not viable. First, this Court

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<sup>4</sup> It likely does not need to be said, but out of an abundance of caution: “once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.” *Youngblood v. Gates*, 112 F.R.D. 342, 347 (C.D. Cal. 1985) (holding that the informants’ privilege did not apply where identity of informants was already known and, for the other informants, government made no showing that a particular injury would occur if their identities were disclosed). Further, “the privilege should not preclude disclosure in this case where . . . the person giving information is to be called as a witness by the Government at trial, there being nothing to protect. . . .” *United States v. Julius Doochin Enterprises, Inc.*, 370 F. Supp. 942, 945 (M.D. Tenn. 1973).

<sup>5</sup> Oracle anticipates that OFCCP will argue that its request for a deposition was made too late. However, as OFCCP’s opposition to Oracle’s motion to compel (and this Court’s subsequent Order) made clear, the government informant privilege is not waived until disclosure of witnesses on OFCCP’s witness list. Any depositions could, therefore, only be taken after the November 19, 2019 exchange of witness lists. This is true regardless of whether Oracle made this request three months ago or on October 25, 2019, when it did. See OFCCP’s 5/17/19 Oppo. Brief at 15 (“OFCCP will disclose its yet-to-be-determined witnesses to Oracle consistent with the deadlines set forth in the Pretrial Order.”); 6/10/2019 Order at 13 n.10. Indeed, OFCCP indicated as recently as November 4, 2019 that it has yet to finalize its witness list. Grundy Decl., ¶ 4.

accepted that the interview memos alone would not be enough. This Court's June 10 Order would not have mentioned the possibility of depositions otherwise.

Second, Oracle cannot be stuck with facts that OFCCP elicited. Nor can Oracle be stuck with a series of redactions, hoping that whatever the witness says happens to be in some unredacted portion of the memo.

Third, the discovery rules affirmatively *do not* require Oracle to simply accept the words that OFCCP put in some memo after asking only the questions that OFCCP wished to ask. *Acosta v. Austin Elec. Servs. LLC*, 2018 WL 4963291, at \*2 (D. Ariz. Oct. 15, 2018) (affirming where lower court ordered Government to produce unredacted interview statements of informant trial witnesses and re-opened fact discovery to permit defendants to interview and depose informant trial witnesses).

Lastly, OFCCP should be required to produce the interview memos of any witness disclosed on its witness list without those redactions that were made to protect the identity of that witness.

Oracle would not think it had to make this request. However, in its Motion for Summary Judgment, OFCCP filed declarations of Oracle employees. Oracle asked OFCCP to provide the unredacted interview notes for those persons given the waiver of any government informants' privilege. OFCCP refused. Grundy Decl., ¶ 10, Ex. H.

**B. OFCCP's Litigation Practices Warrant Compelling OFCCP To Produce For Deposition Witnesses Not Disclosed Before The Close of Fact Discovery.**

This Court knows from reading motions to compel that OFCCP has been far from gracious in providing discovery—and that is being kind. OFCCP has reluctantly relinquished facts and documents and almost all have only been provided when ordered by the Court. “OFCCP ha[s] deployed privileges and discovery non-responses in a way that effectively deprived Oracle from gaining knowledge of the evidence it might face or the underlying facts about its employees' experience. . . .” 10/7/2019 Court Order at 4.

This Court's observation on October 7 is still salient. OFCCP continues to provide

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interview memos that are redacted on the basis of non-responsiveness. Grundy Decl., ¶ 7, Ex. E; ¶ 8, Ex. F. OFCCP is doing this despite this Court’s clear order that this is “impermissible.” 10/7/2019 Court Order at 25-26. And it comes after OFCCP has had to file three briefs to get to this point—the Motion to Compel, which gave rise to the Order to produce interview memos; the Opposition to OFCCP’s Motion for Reconsideration; and the Motion to Compel Compliance with this Court’s June 10 Order.

Against this backdrop, there can be no question that depositions are warranted. Oracle should not have to rely on OFCCP to provide all relevant information—good or bad to OFCCP.

It should be left to Oracle to decide what is relevant and not OFCCP’s determination of what that means. To say the least, OFCCP has done far from a stellar job at making this determination.

**C. Should OFCCP Fail to Produce Any Witnesses for Deposition, Preclusion of Witness Testimony is Warranted.**

This Court has the inherent power to ensure fairness to both parties. One power this Court has is to ensure that the parties have had adequate opportunity to conduct discovery and to ensure that sharp practices are not rewarded. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (noting that federal courts are “vested with broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial. Within this discretion lies the power . . . to exclude testimony of witnesses whose use at trial is in bad faith or would unfairly prejudice an opposing party”); *see also* Fed. R. Civ. P. 37; Fed. R. Evid. 403; 29 C.F.R. § 18.403.

Moreover, whether or not OFCCP was entitled in the first instance to assert the government informants’ privilege, it certainly is not entitled to then take advantage of that privilege when it decides to waive it. This is very little different than a party claiming the attorney-client privilege during discovery and then waiving the privilege immediately before trial or at trial. Rightly, courts have condemned that practice and excluded that evidence. *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir.

2001) (“The court may fashion remedies to prevent surprise and unfairness to the party seeking discovery. For example, where the party claiming privilege during discovery wants to testify at the time of trial, the court may ban that party from testifying on the matters claimed to be privileged.”); *see also Int’l Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 186 (M.D. Fla. 1973) (“Fundamental fairness and justice requires that if the defendant intends to waive the privilege at trial by the introduction of evidence within that privilege, then the defendant will be required to allow discovery with regard to matters material to that testimony.”); *Gregury v. Greguras*, 205 A.3d 1230 (Pa. 2019) (“The common thread running through these rules and cases is that one party should not be permitted to withhold information from the other party and then surprise that party with it at trial.”). So here.

To refuse to reveal the names of persons during discovery that have facts relating to this case only to be able to place them on the stand is a practice that is sharp. It is also a practice that deprives Oracle of its rights to informed discovery. It should not be sanctioned by this Court.

Here, the Court should exclude the testimony of any witnesses who OFCCP does not produce for deposition prior to the commencement of the hearing on December 5.

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**IV. CONCLUSION**

Like the court in *Acosta*, which expressly permitted defendant to “interview and/or depose” informant witnesses following their belated disclosure on account of the government informant’s privilege, this Court should order OFCCP to produce its intended informant witnesses for deposition prior to the start of the hearing. Otherwise, this Court should not allow those witnesses to testify. In short, Oracle respectfully requests that this Court grant its Motion to compel OFCCP to produce for deposition any of its witnesses undisclosed prior to the close of fact discovery or, in the alternative, to preclude OFCCP *in limine* from introducing the testimony of any witness not produced for deposition.

Respectfully submitted,

November 7, 2019

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