

**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 IN
LIMINE NO. 7 TO PRECLUDE
OFCCP FROM OFFERING
EVIDENCE NOT PRODUCED
DURING DISCOVERY**

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**Office of Administrative Law Judges
San Francisco, Ca**

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I. INTRODUCTION

Defendant Oracle America, Inc. (“Oracle”) hereby moves for an order *in limine* precluding OFCCP from offering documents, testimony or evidence not provided or produced by OFCCP in discovery, including the introduction of testimony or evidence relating to matters that OFCCP’s 30(b)(6) witnesses refused to disclose during deposition. The introduction of such documents, testimony or evidence would be fundamentally unfair and unduly prejudicial to Oracle and, therefore, must be excluded.

This Court has noted that “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. . . .” October 7, 2019 Order Granting in Part and Denying in Part Defendant’s Motion to Compel OFCCP to Comply With the Court’s Discovery Orders (“10/7/2019 Court Order”) at 4. These tactics have not been limited to OFCCP’s production of interview notes. OFCCP has deployed these tactics, including in its discovery responses, in its document productions, and in deposition.

Oracle now asks the Court to hold OFCCP to what it disclosed.

II. ARGUMENT

A. Preclusion Is Warranted

The Federal Rules of Civil Procedure expressly contemplate exclusion of undisclosed evidence. Fed. R. Civ. P. 37(c)(1) (“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”).¹

To allow OFCCP to introduce documents or evidence or elicit testimony that it has not provided or produced during discovery would render the federal administrative discovery requirements and the federal discovery rules toothless. *See, e.g.*, 41 C.F.R. § 60-30.9, *et seq.*

¹ 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.”).

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); *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).

As such, as the Ninth Circuit has noted, “[p]reclusionary orders ensure that a party will not be able to profit from its own failure to comply.” *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980); *Tacori Enters. v. Beverly Jewellery Co.*, 253 F.R.D. 577, 584–85 (C.D. Cal. 2008) (preclusionary rule applied to 30(b)(6) testimony). In fact, in addition to the sanctions provided by the FRCP, the Court has the inherent power under the rules of evidence to exclude evidence if its probative value is outweighed by the danger that its admission will cause unfair prejudice, confuse the issues, or mislead the jury. Fed. R. Evid. 403; 29 C.F.R. § 18.403.

In short, OFCCP should not be allowed to introduce testimony, evidence or documents not provided in discovery. This is particularly so given the efforts Oracle has had to engage in to obtain the discovery that it did.

B. OFCCP’s Litigation Practices Justify Granting This Motion Should It Attempt to Introduce Evidence or Facts Not Produced or Disclosed.

Throughout this litigation, Oracle has repeatedly requested that OFCCP provide and produce any information supporting its claims so that Oracle could prepare its defense in this matter. OFCCP has repeatedly rebuffed Oracle’s requests, requiring Oracle to seek—and obtain—orders compelling discovery responses. Still, OFCCP has provided only cramped

responses. As an example, after having to obtain an order allowing Oracle to take depositions of OFCCP's 30(b)(6) witness, OFCCP repeatedly instructed the witness to cabin his answers to facts known to OFCCP *at the time the SAC was filed*. When specifically asked whether OFCCP has any facts post-dating the filing of the SAC that support its allegations, counsel for OFCCP instructed the witness not to answer. *See, e.g., Omnibus Declaration of Warrington Parker in Support of Oracle's Motions in Limine ("Parker Decl."), Ex. E (08/14/2019 Deposition Transcript of PMK Sean Ratcliff) at 17:7-21:22, 158:14-159:18.*²

Given this, OFCCP should be held to its responses and disclosures. Fed. R. Civ. P. 37(b)–(c) (permitting sanction of evidence preclusion where a party has failed to disclose or properly supplement its discovery responses or to comply with court orders). *Sumitomo Marine & Fire Ins. Co.*, 617 F.2d at 1369 (affirming evidence preclusion where the government failed to timely comply with the court's order compelling discovery responses and stating that "[t]he effectiveness of and need for harsh measures is particularly evident when the disobedient party is the government").

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² By way of another example, just yesterday OFCCP produced for the first time 7 documents which largely purport to be emails from 2007, 2011, and 2015. These documents were not produced during the discovery period and they should be excluded from evidence in this case. *See Parker Decl.* ¶ 12, Ex. J.

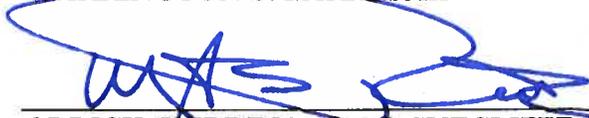
III. CONCLUSION

For the foregoing reasons, Oracle respectfully requests that this Court grant its Motion *in limine* precluding OFCCP from offering documents, testimony or evidence not identified or produced by OFCCP in discovery, including the introduction of evidence that OFCCP's 30(b)(6) witnesses refused to disclose during deposition.

November 15, 2019

Respectfully submitted,

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