

**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. 8 TO EXCLUDE
INTERVIEW NOTES AND
THEIR CONTENTS**

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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* to preclude OFCCP from introducing interview memos or their content. OFCCP prepared interview memos purportedly reflecting Oracle employees’ responses to interview questions asked by OFCCP during the course of the audit that preceded the filing of OFCCP’s complaint against Oracle. These memos are hearsay. They are not verbatim accounts of what was said. They have not been adopted by the witnesses. And they are inaccurate based on the deposition of a witness who OFCCP questioned about said interview memo that reportedly reflected what she said during her OFCCP interview.

For these reasons, the interview memos and their contents should be excluded.¹

II. STATEMENT OF FACTS

During the compliance audit, OFCCP conducted interviews of Oracle employees. OFCCP then prepared “interview memos” or “notes” that OFCCP claims reflect the interviews. *See, e.g.*, OFCCP’s Opp. to Oracle’s Mot. to Compel OFCCP to Comply with the Court’s Discovery Orders Regarding Redacted Interview Memoranda and 30(b)(6) Testimony, at 2, Aug. 13, 2019 (“OFCCP took notes of interviews during the compliance review”).

These interview memos have not been adopted by the witnesses.² With the exception of one interview memo not at issue in this motion—that of Lisa Gordan’s interview—OFCCP does not claim otherwise.

¹ In this motion Oracle seeks to include all OFCCP audit interview memos with the exception of Lisa Gordon’s interview dated January 9, 2015. Oracle reserves any and all objections to the admissibility of that document, but rather than moving to exclude it *in limine*, will address its evidentiary issues at the hearing as necessary.

² According to OFCCP, typically the interview memos are provided to a witness for review contemporaneously (or near contemporaneously) so that a witness can review the memos for accuracy. *See* Omnibus Declaration of Warrington Parker in Support of Oracle’s Motions in Limine (“Parker Decl.”), Ex. F (6/26/19 Jane Suhr Dep.)

The accuracy (or not) of these interview memos has been put to the test at least once in this case. In the deposition of Madhavi Cheruvu, OFCCP essentially read portions of the interview memo OFCCP claimed reflected the interview of Ms. Cheruvu, and asked her to adopt the interview memo's recitation of what was purportedly said by Ms. Cheruvu. Ms. Cheruvu repeatedly testified that the memo was not accurate. *See* Parker Decl., Ex. D (June 11, 2019 Cheruvu Dep.) 33:3-15 (“Q [reading from interview notes]: ‘I was looking at companies. I did not know anyone at Oracle prior to hire.’ Is this correct? . . . A: I did not say that.”); *id.* 39:22-40:13 (“Q: . . . Looking at the next paragraph in [the notes from your interview] it says, ‘I do HR for the engineering organization that I support, handling all aspects of acquisitions’ . . . Was this correct in March 2015? . . . A: No, it was not.”); *id.* 43:14-18 (“Q: . . . Looking at the next paragraph in [the notes from your interview], it says, ‘Sometimes, I’m asked for my input in determining starting wages for employees.’ Was that true in March 2015? A: No, it is not true.”); *id.* 57:17-24 (“Q. Next, looking at [the notes from your interview], . . . it says, ‘If it’s a key or critical hire . . . they would consult with me to see what kind of starting salary we could offer to make it attractive.’ Was that true in March 2015? . . . A: I – no, it is not.”); *id.* 60:20-61:1 (“Q: I’m looking at the next paragraph [in the notes from your interview]. It says, ‘I look at the skills they have on their resume and look for what kind of skills they possess which are key to us.’ Was that statement true in March 2015? . . . A: No, it was not true.”); *id.* 311:23-312:8 (“Q [reading from interview notes]: ‘During the focal time, if I’m seeing big masses of promotions, I’ll look at how many senior positions are in the group.’ Is that a true statement for – by you in March 2015? . . . A: No.”).

82:10-84:5, 96:14-97:22, 98:1-3; Ex. G (6/18/19 Milton Crossland Dep.) 75:10-86:15. In violation of that practice, OFCCP did not make the memos available until five or six months after the interviews.

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III. ARGUMENT

A. The Interview Memos Are Inadmissible Hearsay

The interview memos that OFCCP seeks to admit into evidence are hearsay, and should be excluded as such. *See* 29 C.F.R. § 18.802 (“Hearsay is not admissible except as provided by these rules . . .”). “Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted.” 29 C.F.R. § 18.801. In fact, the interview notes contain hearsay within hearsay, as they purport to reflect what was said by a person other than the author. *See, e.g., Hook v. Regents of Univ. of California*, 394 F. App’x 522, 531 (10th Cir. 2010) (noting there were “multiple layers of hearsay” contained in the interview notes because “[e]ach interview contains at least two statements: the recording of each interview, and the underlying content”); *United States v. Harris*, 2018 WL 1990520, at *1 (D. Haw. Apr. 25, 2018) (“The interview summaries constitute double hearsay. First, the report itself is hearsay. Second, the agent’s summary of what a witness said in an interview is hearsay.”).

Moreover, the unsigned interview notes are particularly unreliable. They do not purport to be verbatim recounts of what was said. They are merely summaries of what another party said. *See, e.g., United States v. Sampson*, 898 F.3d 287, 308 (2d Cir. 2018) (FBI agent’s notes from investigative interview were hearsay); *Wills v. Diehl*, 2013 WL 5592957, at *11 (D. Or. Oct. 10, 2013) (“Plaintiff seeks to admit the summary of Burrows’s telephone conversation with Dr. Woods for the truth of the matters contained in that summary. Burrows’s interview summary, however, is hearsay.”); *Miller v. Link*, 2009 WL 10679668, at *2 (S.D. Ohio Sept. 8, 2009) (“The challenged interview summaries and witness statements are unquestionably

hearsay.”). Moreover, they were summaries by a party (OFCCP) who had a less than amicable relationship with Oracle at the time. And they have been shown to be inaccurate.

As such, the interview notes should be excluded as hearsay. Due to their unreliability, the interview notes should also be excluded on the additional basis that they would confuse the issues, waste a significant amount of time, and mislead the Court. *See* 29 C.F.R. § 18.403.

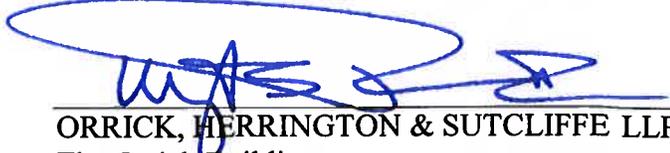
IV. CONCLUSION

For the foregoing reasons, Oracle respectfully requests that the Court preclude OFCCP from offering into evidence interview memos or their contents.

Respectfully submitted,

November 15, 2019

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