

JANET M. HEROLD
Regional Solicitor
IAN H. ELIASOPH
Counsel
LAURA M. BREMER
Acting Counsel
Office of the Solicitor
UNITED STATES DEPARTMENT OF LABOR
90 7th Street, Suite 3-700
San Francisco, California 94103
Tel: (415) 625-7746
Fax: (415) 625-7772
Email: eliasoph.ian@dol.gov

**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'S RESPONSE TO ORDER TO SHOW CAUSE RE:
SUMMARY JUDGMENT ON ORACLE'S PROCEDURAL DEFENSES**

In the Court's Order of November 25, 2019, the Court invited the parties to submit briefing relating to OFCCP's Show Cause Notice and Conciliation. Oracle's affirmative defenses included dismissal of OFCCP's Second Amended Complaint ("SAC") for OFCCP's alleged failure to properly conciliate. As explained below the Court should reject Oracle's

affirmative defenses for two key reasons: (1) its claims are mooted and (2) the parties are at an impasse.

I. Oracle's Failure to Conciliate Claims are Mooted.

As OFCCP explained in its briefs regarding the parties' cross motions for summary judgment, the record is clear that OFCCP gave Oracle appropriate notice of the violations OFCCP's audit revealed and the parties attempted, but failed, to identify a resolution during months of conciliation discussions, including an in-person meeting. OFCCP agrees with the Court, however, that it need not make factual findings on this topic, since as the parties spent more than a year attempting in good faith to mediate this dispute post-filing of this enforcement action, any contention that further discussion of the parties' dispute is necessary must be mooted by the parties' extensive mediation efforts in 2017 and 2018.

In *EEOC v. Moore & Moore, Inc.*, 2010 WL 11594995, at *1 (D.N.M. May 4, 2010), a settlement conference was scheduled to occur after the Defendant filed its motion for summary judgment challenging the sufficiency of EEOC's conciliation efforts, and EEOC declared itself ready and willing to participate in court-supervised mediation. The court held that the conciliation challenge was moot:

Thus, Defendants have obtained the relief they sought in their motion, and in fact have obtained all the relief they are entitled to under Tenth Circuit precedent. Defendants' motion is therefore moot and will be denied on that basis. *See, e.g., Neely v. Ortiz*, 241 Fed.Appx. 474 (10th Cir. 2007, unpublished) (request for injunctive relief ordering that prisoner be given Interferon treatments was moot, because prisoner had begun to receive such treatments and district court could no longer grant any effective relief).

Id.

Similarly, Oracle has already obtained all the relief to which it is entitled when it participated in the post-complaint mediation in 2017 and 2018. As this Court appropriately noted in its Order:

[A]t this point in time, the parties have been pursuing matters for years and any conciliation would be futile. The point appears to be further mooted because the parties, after the enforcement proceeding was

initiated, mutually agreed to an extended stay to mediate the case. That appears to be functionally equivalent to any conciliation effort and would be the result of any finding that . . . OFCCP failed to engage in reasonable conciliation efforts.

Order at 21. As is evident here, Oracle's claims regarding conciliation are mooted at this point.

In addition to the extensive post-complaint mediation, the parties are at an impasse, which would make any further conciliation efforts futile.¹ As the Court acknowledged in its Order, EEOC cases hold that if conciliation efforts are insufficient, the appropriate remedy is to stay proceedings and require additional conciliation. *See, e.g., EEOC v. OhioHealth Corp.*, 115 F. Supp. 3d 895, 899 (S.D. Ohio 2015) (when attempt at conciliation has been made, but it is less than is required, the appropriate action is to stay the proceedings to allow more conciliation); *EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243, 1257 & n. 5 (E.D. Cal. 2012) (citing *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981); *EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107, 1115-16 (E.D. Wash. 2012); *EEOC v. La Rana Hawaii*, 888 F. Supp. 2d 1019, 1046 (D. Hawaii 2012); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). The courts repeatedly hold in no uncertain terms that insufficient conciliation should not result in dismissal.

In *United States v. Thurston Motor Lines, Inc.*, 718 F.2d 616, 617 (4th Cir. 1978), the Fourth Circuit made the same common sense observation as this Court when rejecting Defendant's defense regarding alleged inadequate conciliation of an OFCCP denial of access petition, explaining that the remedy for a defense that OFCCP failed to conciliate is *not* dismissal but an order staying the proceedings while conciliation occurs. As the *Thurston* Court explained, an order to stay proceedings to permit conciliation is counterproductive when the parties'

¹ The cases Oracle cites in its Response to this Court's Order to show cause are distinguishable in that in two of the three cases, the EEOC made *no* attempt at conciliation pre-filing. *E.E.O.C. v. CVS Pharmacy, Inc.*, 70 F. Supp. 3d 937, 942 (N.D. Ill. 2014) (undisputed that the EEOC did not engage in conciliation); *E.E.O.C. v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2015 WL 8773440, at *3 (N.D. Iowa Dec. 14, 2015) (distinguishing *Mach Mining* where "no investigation occurs"). In the final case that Oracle cites, the Court was clear that the dismissal remedy was only being ordered because the EEOC not only failed to meet the ADEA's conciliation requirements, but also its notice requirements, which caused "protracted delay." *E.E.O.C. v. CollegeAmerica Denver, Inc.*, 2015 WL 6437863 (D. Colo. Oct. 23, 2015). None of these cases involved a situation where the parties stayed the litigation for an extended mediation.

positions make plain that they are at impasse: “[t]his is essentially a legal inquiry, and [given] that the parties are in complete disagreement about it . . . it is obvious that any attempt by [the parties] to resolve such differences by agreement would have been fruitless, [and] judicial resolution of the controversy in this proceeding should not be foreclosed.” *Id.* The court’s explanation applies with equal force, since the record is clear that, despite the best efforts of the parties during an extended mediation, “[t]his is the kind of dispute which is well beyond the possibility of conciliatory resolution.” *Id.*

The federal court in *EEOC v. City of Chicago*, 1987 WL 16229 (N.D. Ill. August 26, 1987) reached the same conclusion, holding that the Defendant was not entitled to a stay to allow for more conciliation because the parties had reached impasse. *Id.* at *2. The court acknowledged that the remedy for an affirmative defense relating to inadequate conciliation is a stay, not dismissal, because “opportunity for full and exhaustive conciliation is thereby afforded without jeopardizing the injured persons’ right of ultimate access to the courts.” *Id.* at *3 (citing *Marshall v. Sun Oil Co. of Pennsylvania*, 592 F.2d 563, 566 (10th Cir.), *cert. denied*, 444 U.S. 826 (1979)). The court explained:

Therefore, the question to be asked is not whether conciliation was adequate in August, 1985, but rather whether anything would be accomplished by issuing a stay in August of 1987. It is the City’s position that claims arising out of the 1981 examination are time-barred, that it never had a discriminatory rule to be enjoined, and that it punctually ameliorated any questionable practices. These positions on the respective claims demonstrate that the parties have reached an impasse, and that further conciliation would accomplish little. Accordingly, a stay would be inappropriate at this time.

City of Chicago, 1987 WL 16229, at *2. Even assuming *arguendo* that OFCCP’s conciliation efforts were insufficient, which they were not, the only alternative would be to stay the proceedings and allow for more conciliation. However, as this Court is well aware, allowing for more conciliation will be futile and a waste of resources because the parties have reached an impasse in resolving this matter. *See, e.g.*, Order at 21.

II. Oracle's Rationale For A Dismissal Remedy Regarding its Claim that OFCCP's Show Cause Notice Was Not Supported by Reasonable Cause Is Wrong.

This Court directed Oracle to show cause as to why it would get a meaningful remedy should the Court rule favorably for it on the issue of whether had reasonable cause to believe there was a violation at the time it issued the show cause order. Order at 19, 21. Oracle comes up with two arguments. The first is simply that if Oracle were to prevail on this issue, then it would mean that OFCCP failed to meet a procedural pre-requisite of suit. However, this does not answer this Court's question, which asks what the remedy would be, not whether OFCCP should have had reasonable cause before proceeding.

Oracle's second argument seems to be that the Show Cause Notice serves the function of ensuring that the search that occurs after the show cause notice is consistent with the Fourth Amendment and that failure to have reasonable cause to proceed with an enforcement actions, by definition, results in a Fourth Amendment violation. From this already complex argument, Oracle goes further by arguing that all discovery in this matter should thereby be excluded under a "fruit of the poisoned tree" analysis. Importantly, Oracle raised none of these contorted arguments or claims in the extensive summary judgment by the parties or in its objections to discovery requests, and it appears that with this filing, Oracle seeks an Eleventh Hour amendment of its Affirmative Defenses, without properly moving this Court for leave.

This novel and rather complicated argument mixes apples and oranges and should be given no credence. As an initial matter, Oracle cites no evidence that the show cause notice of 41 C.F.R. § 60-1.28 serves any constitutional function related to the Fourth Amendment. Indeed, given that, as here, the show cause notice will usually be issued after the investigation—i.e. after OFCCP has gathered evidence in the desk audit and conducted its on-site review—it makes little sense to read Section 60-1.28 as serving this purpose.² Rather, the Department has explained the

² This case began with a review that was the result of a neutral selection plan, a fact that Oracle has put on no material evidence to dispute. *See* OFCCP Motion for Summary Judgment, Statement of Uncontested Facts No. 8-9. Searches conducted pursuant to such plans are consistent with the Fourth Amendment. Even if that remains a subject of dispute, it is wholly divorced from the issue of whether issuance of the show cause notice was warranted and if there is an available remedy at these points in these proceedings should the Court determine otherwise.

purpose of the Show Cause Notice in *Honeywell*, and its purpose is not to ensure Fourth Amendment compliance, but simply to put the contractor on notice of the violations. *Honeywell*, No. 77-OFCCP-3, 1993 WL 1506966, at *8 (June 2, 1993) (the “basic purpose of the show cause procedure in the regulations . . . is, to assure due process in Executive Order enforcement proceedings by putting a defendant on notice of the charges”).

Analogous Title VII case law makes clear that the process afforded to litigants itself is the remedy for any deficiency in a show cause notice. Like the EEOC’s determinations, an OFCCP show cause notice “does not adjudicate rights and liabilities; it merely places the defendant on notice of the charges against him. If the charge is not meritorious, procedures are available to secure relief, i.e. a *de novo* trial. . . .” *Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984) (citing *EEOC v. E.I. Dupont de Nemours & Co.*, 373 F. Supp. 1321, 1338 (D.Del.1974)); *see also EEOC v. Sterling Jewelers Inc.*, 801 F.3d 96, 101 (2d Cir. 2015), *cert. denied*, 137 S. Ct. 47 (2016) (“courts may not review the sufficiency of an investigation—only whether an investigation occurred”). Courts recognize that any other rule would create an unnecessary distraction about the adequacy or efficacy of the agency’s investigation, rather than keeping the focus on the actual question: whether the employer violated the law. *Keco Indus., Inc.*, 748 F.2d at 1100

Even, assuming *arguendo*, that the show cause notice is intended to serve a Fourth Amendment purpose, Oracle predicates its flawed theory on the application of the requirements set forth in *Marshall v. Barlow*, 436 U.S. 307, 320 (1978). However, that case law is plainly inapplicable to documents produced in discovery. As the Ninth Circuit has held, where there is judicial oversight (as there is here), any constitutional concerns are mitigated as there is an adjudicator ensuring reasonable limits on what is produced. *Hyster Co. v. United States*, 338 F.2d 183, 186–87 (9th Cir. 1964) (“[T]here is available to Hyster, in a petition to modify or set aside the demand, the safeguards afforded by rules 34 and 30(b). The court has a broad discretion to protect Hyster from an unreasonable demand. And it is only ‘unreasonable’ searches and seizures to which the Fourth Amendment refers. We do not find the demand unreasonable on its

face, and Hyster has made no attempt to show that it is unreasonable in its actual application to Hyster.”).³

Moreover, to the extent Fourth Amendment case law applies at all, OFCCP did not search Oracle’s premises and the *Barlow* reasonable search standard is simply inapplicable. As the Supreme Court has made clear:

It is plain to us that those cases [*Barlow* and its progeny] turned upon the effort of the government inspectors to make non-consensual entries into areas not open to the public. As we have indicated, no such entry was made by appellants in this case. Thus the enforceability of the administrative subpoena duces tecum at issue here is governed, not by our decision in *Barlow's* as the District Court concluded, but rather by our decision in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946). In *Oklahoma Press* the Court rejected an employer's claim that the subpoena power conferred upon the Secretary of Labor by the FLSA violates the Fourth Amendment.

“The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law *415 and made after adequate opportunity to present objections”

327 U.S., at 195, 66 S.Ct., at 498 (footnotes omitted).

³ As one treatise further explains with respect to the relationship between civil discovery and the Fourth Amendment in cases where the government is a party:

The Supreme Court has held that there is no constitutional barrier to investigation of records by a governmental agency “if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” A proper request for production under Rule 34 would seem to satisfy those tests. If the person requested to allow inspection does not wish to do so he or she may object to the inspection; discovery will then not be had until the court, on motion by the party seeking discovery, compels production. Although the court need not find “good cause” on the motion to compel discovery, it does have ample power to protect from an unreasonable examination and this is all that the Fourth Amendment requires.

§ 2202 Purpose, Construction, and Validity of Rule, 8B Fed. Prac. & Proc. Civ. § 2202 (3d ed.).

Donovan v. Lone Steer, Inc., 464 U.S. 408, 414–15 (1984); *see also United States v. New Orleans Public Service, Inc.*, 734 F.2d 226, 227 (5th Cir. 1984), cert. denied, 469 U.S. 1180 (1985). *Cf.*, *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943); *Donovan v. Union Packing Co. of Omaha*, 714 F.2d 838, 839 (8th Cir. 1983) (administrative subpoena for records required under OSHA not subject to Fourth Amendment restrictions.)

Finally, even if discovery in this matter were deemed a Fourth Amendment search, Oracle has consented by participating in these proceedings and agreeing to produce compensation information in response to OFCCP’s discovery requests and this Court’s orders. *Cf. United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 93–94 (D.D.C. 2011) (rejecting argument that OFCCP’s request for compensation information violated the Fourth Amendment because the company consented to that request). Under the Fourth Amendment, a revocation of consent does not apply retroactively to render unreasonable the search conducted prior to the time of revocation. *Jones v. Berry*, 722 F.2d 443, 449 and n.9 (9th Cir. 1983), cert. denied, 466 U.S. 971 (1984) (documents seized by the IRS prior to revocation of consent were not suppressed); *United States v. Black*, 675 F.2d 129, 138 (7th Cir. 1982), cert. denied, 460 U.S. 1068 (1983) (Defendant cannot retroactively revoke consent to a search to suppress evidence obtained before the revocation; cocaine discovered prior to revocation of consent was not suppressed); *Mason v. Pulliam*, 557 F.2d 426, 429 and n.3 (5th Cir. 1977), *citing United States v. Young*, 471 F.2d 109 (7th Cir. 1972), cert. denied, 412 U.S. 929 (1973) (attempted rescission did not retroactively render the original consent invalid); *State v. Johns*, 679 S.W.2d 253, 262 (Mo. 1984) (en banc) (“We reject the notion one can revoke his or her consent to a search after incriminating evidence has been discovered”), cert. denied sub nom. *Johns v. Missouri*, 470 U.S. 1034 (1985). Oracle has not shown that it was ordered to produce discovery by this Court over objections that were specific to its Fourth Amendment privileges.

Oracle’s eleventh hour insertion of a whole new defense in this case must be rejected. The defense is not coherent, is unsupported by case law, and such defenses and contentions were waived long ago.

CONCLUSION

Oracle's affirmative defenses have been mooted by the extensive time, resources and energy the parties dedicated to discussing and trying to find a resolution to their dispute. The parties are simply at impasse and the matter is ripe for judicial resolution. Dismissal of Oracle's affirmative defenses relating to the adequacy of conciliation and OFCCP's related pre-filing notices and orders is appropriate as these defenses have been mooted by the parties' extensive settlement discussions in 2017 and 2018. Precious hearing time, in addition to the Court's and the parties' time and resources, should not be spent further on an issue for which the remedy has already been realized by Oracle.

Respectfully submitted,

December 2, 2019

KATE O'SCANNLAIN
Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

BY: /s/ Ian H. Eliasoph
IAN H. ELIASOPH
Counsel

LAURA C. BREMER
Acting Counsel

DAVID L. EDELI
Trial Attorney

Attorneys for Plaintiff OFCCP

CERTIFICATE OF SERVICE

I am over 18 years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On December 2, 2019, I served the foregoing

OFCCP'S RESPONSE TO ORDER TO SHOW CAUSE RE:

SUMMARY JUDGMENT ON ORACLE'S PROCEDURAL DEFENSES

on Defendant Oracle America, Inc. by serving its attorneys below via electronic mail, pursuant to the parties' agreement:

Erin Connell (econnell@orrick.com)

Gary Siniscalco (grsiniscalco@orrick.com)

Warrington Parker (wparker@orrick.com)

John Giansello (jgiansello@orrick.com)

Kayla Grundy (kgrundy@orrick.com)

Jacqueline Kaddah (jkaddah@orrick.com)

I declare under penalty of perjury that the above is true and correct.

Date: December 2, 2019

/s/ Llewlyn D. Robinson

LLEWLYN ROBINSON