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Issue Date: 03 December 2019

CASE NO.: 2017-OFC-00006

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

ORACLE AMERICA, INC.,
Defendant.

ORDER GRANTING OFCCP SUMMARY JUDGMENT AS TO ORACLE'S AFFIRMATIVE DEFENSES RELATED TO THE SHOW CAUSE NOTICE AND CONCILIATION

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, ("EO 11246") and associated regulations at 41 C.F.R. Chapter 60. Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") contends that Defendant Oracle America, Inc. ("Oracle") violated EO 11246 and associated regulations by engaging in widespread sex and race discrimination at its headquarters facility. Hearing is set to begin on December 5, 2019. On November 25, 2019, I issued an order on OFCCP's and Oracle's cross-motions for summary judgment. In that order, I directed the parties to provide further briefing as to the remedies available for Oracle's affirmative defenses related to the Show Cause Notice and conciliation, and ordered Oracle to show cause why OFCCP should not be granted summary judgment on those defenses.

After considering the parties' responses, OFCCP is granted summary judgment on Oracle's affirmative defenses related to the Show Cause Notice and conciliation on the grounds that those claims have been mooted by the subsequent history of this case.

BACKGROUND

This case has been pending at the Office of Administrative Law Judges ("OALJ") since January 17, 2017, when the original complaint was filed. A lengthy compliance review preceded the litigation. After the initial complaint was filed, the case was assigned to Judge Christopher Larsen, who ruled on various discovery and other motions. On October 30, 2017, Judge Larsen granted a joint motion to stay the case so that the parties could pursue mediation. The stay was subsequently extended on several occasions and the case was reassigned to me. The stay ended on January 23, 2019. OFCCP filed the operative Second Amended Complaint ("SAC") on March 13, 2019.

OFCCP generally alleges that Oracle engages in "widespread" discrimination at its headquarters facility against "women, Asians, and African Americas or Blacks in compensation." SAC at ¶ 11; *see also id.* at ¶¶ 12-17. Oracle filed an Answer ("DA") on April 2, 2019, generally denying the allegations, DA at 1-7, and pleading 39 affirmative defenses, *id.* at 7-14.[1] One of these affirmative defenses, #6, contended that OFCCP had not satisfied its conciliation obligations. *Id.* at 6. Other defenses (e.g. #5, #10, #14, #22) claimed deficiencies related to the compliance review. *Id.* at 8-11.

The conciliation issue has been previously litigated. On April 21, 2017, Oracle filed a Motion for Summary Judgment or, in the Alternative, to Stay the Proceedings for Failure to Conciliate. Judge Larsen denied both motions on June 19, 2017. On May 23, 2019, I denied OFCCP's Motion for Partial Summary Decision on Oracle's Affirmative Defenses Re: Conciliation. The parties filed cross-motions for summary judgment on October 21, 2019, opposition on November 1, 2019, and replies on November 8, 2019. Oracle also sought partial summary judgment. On November 25, 2019, I denied the cross-motions for summary judgment and granted Oracle's motion for partial summary judgment as to 1) disparate impact claims except for a claim based on reliance on prior salary; and 2) OFCCP's refusal of access claims. Oracle was granted summary judgment on the refusal of access claims on the grounds that there was no remedy available to OFCCP, given subsequent events.

As relevant now, Oracle sought summary judgment based on two procedural challenges: 1) there was no reasonable cause when OFCCP issued the show cause notice; and 2) OFCCP did not fulfill its conciliation requirement. This aspect of Oracle's motion was denied for two independent reasons: a) reasonable disputes remained on the underlying material facts regarding whether OFCCP met these requirements; and b) it was unclear what remedy Oracle could receive for a violation, given the subsequent history of the case. The November 25, 2019, order then observed:

> For both of these procedural issues, it appears that there is no appropriate remedy for Oracle given the subsequent events in this particular case. That would render the issues essentially moot, with no need to devote hearing time or adjudicatory resources to these historical disputes. OFCCP's earlier motion for summary judgment on conciliation was denied, since that motion was brought solely on the merits of the issue. OFCCP responded to Oracle's procedural affirmative defenses by arguing that no remedy was available, but it did not properly move for summary judgment on these issues.

Oracle was thus "ordered to show cause why OFCCP should not be granted summary judgment on Oracle's affirmative defenses involving the Show Cause Notice and conciliation." Any response from Oracle or OFCCP was due on December 2, 2012. On December 2, 2012, Oracle filed a Response to Order to Show Cause Re: Oracle America, Inc.'s Affirmative Defenses for Lack of Reasonable Cause and Failure to Conciliate ("DR"). OFCCP also filed a Response to Order to Show Cause Re: Summary Judgment on Oracle's Procedural Defenses ("PR").

[1] Affirmative defense #25 was struck in an October 8, 2019, order.

LEGAL STANDARD

This proceeding is governed by the "Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30." 41 C.F.R. § 60-1.26(b)(2). Where the regulations in 41 C.F.R. §§ 60-30.1 *et seq.* do not provide a rule, the Federal Rules of Civil Procedure apply. 41 C.F.R. § 60-30.1. Where a rule is needed and neither 41 C.F.R. Part 60-30.1 nor the Federal Rules supply one, the Rules of Practice and Procedure for Administrative Hearings Before OALJ in 29 C.F.R. Part 18, subpart A apply. *See* Pre-Hearing Order at 2 n.2.

The regulations provide that OFCCP, at any time after 20 days have passed since the commencement of the action, "may move with or without supporting affidavits for a summary judgment of all claims or any part." 41 C.F.R. § 60-30.23(a). "The defendant may, at any time after commencement of the action, move [] for summary judgment in its favor as to all claims or any part." 41 C.F.R. § 60.23(b). Rule 56(f) of the Federal Rules of Civil Procedure provides that "After giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant . . ." Fed. R. Civ. P. 56(f); *see also, e.g., Albino v. Baca*, 747 F.3d 1162, 1176-77 (9th Cir. 2014).

After receiving the motion and any opposition, "[t]he judgment sought shall be rendered forthwith if the complaint and answer, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 41 C.F.R. § 60-30.23(e); *see also* Fed. R. Civ. P. 56(a). In a motion for summary judgment, the burden is on the moving party to present evidence that shows "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party presents such evidence, the non-moving party "may not rest upon mere allegations or denials of his pleading, but … must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

When considering a motion for summary decision, an ALJ does not assess credibility or weigh conflicting evidence, as all evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences made in its favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n.*, 809 F.2d 626, 630-31 (9th Cir. 1987). To prevent summary decision, however, the non-moving party must have more than a mere "scintilla" of evidence supporting its position. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). The non-moving party must designate certain facts in dispute, *Anderson*, 477 U.S. at 250, and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In ruling on a motion for summary the decision, the ALJ does not weigh evidence or determine the truth of the matter, but evaluates "whether there is the need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 249-50.

DISCUSSION

Under EO 11246, The Secretary of Labor is responsible for securing compliance and is empowered to conduct investigations and hearings. *See* §§ 201, 205-206, 208. The regulations

provide for sequential process of investigation and enforcement. First, OFCCP engages in a compliance evaluation, which can include a compliance review (with desk audit or on-site review), off-site records review, a compliance check, and/or a focused review. 41 C.F.R. § 60-1.20(a). "When the Deputy Assistant Secretary has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted." 41 C.F.R. § 60-1.28.

OFCCP is subject to a conciliation requirement after it completes a compliance review: "[w]here deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion." *Id.* at § 60-1.20(b); *see also* EO 11246 § 209(b). Enforcement proceedings are initiated after those efforts fail. 41 C.F.R. § 60-1.26(a)-(b). EEOC is also subject to a conciliation requirement[2], which was the subject of the Supreme Court's decision in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015). It held that the conciliation obligation was subject to judicial review since the language in the statute is "mandatory, not precatory." *Id.* at 1651-52. EEOC has a great deal of discretion and flexibility, but does require an "endeavor" to conciliate. So courts properly examine the substance of whether there was conciliation but should not take a "deep dive" approach to policing conciliation. *Id.* at 1652-55. EEOC was required only to "inform the employer about the specific allegation" and then "try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice." *Id.* at 1655-56. As elaborated in the May 23, 2019, order, OFCCP's conciliation requirement is substantially similar *except* that it requires a "reasonable effort" rather than an "endeavor." For that reason, some inquiry into whether the effort or endeavor was reasonable is a proper subject for review.

Shortly after this case was filed at OALJ, Oracle sought summary judgment on conciliation, or in the alternative a stay of the proceedings so that the parties could conciliate further. Judge Larsen denied these motions, finding that genuine disputes remained about who was being reasonable and whether OFCCP had made reasonable efforts. Though Judge Larsen also denied a stay, he observed that nothing prevented the parties from attempting to negotiate a settlement outside of formal litigation. The parties thereafter filed a joint motion for a stay so that they could mediate, a stay that was repeatedly extended and lasted 16 months. Through the course of this case, Oracle has been afforded discovery and has been able to probe the bases for OFCCP's charges, and the reasonable cause OFCCP has developed for pursuing them.

The November 25, 2019, order came to the tentative conclusion that OFCCP should be granted summary judgment on these two procedural defenses on the grounds that they were now moot—given subsequent developments in the case, there was no meaningful remedy available. Oracle had been given the bases for OFCCP's allegations, so requiring OFCCP to re-issue a Show Cause Notice at this point would accomplish nothing. And since the parties had completed the functional equivalent of conciliation through extended mediation—the alternative remedy Oracle originally sought for the alleged failure to conciliate—there was no further meaningful remedy to order.

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[2] "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b).

In its response, Oracle argues otherwise. It contends that for both alleged procedural violations, it should be granted a dismissal with prejudice on all of OFCCP's claims. DR at 1-2. OFCCP argues that the tentative conclusions in the order to show cause were correct and that both procedural challenges have been mooted by subsequent events. PR at 1-2. The parties begin their arguments with the conciliation issue, so I begin the analysis with that issue as well.

A. Conciliation Requirement

Oracle contends that the proper remedy for failure to fulfill the conciliation requirement is a dismissal with prejudice. DR at 1. It argues that under *Mach Mining*, conciliation is a mandatory pre-suit requirement.

> Oracle was entitled to a reasonable conciliation process, and to this day has never received one. As a matter of precedent, principle, and public policy, OFCCP should not be permitted to make vague, unreasonable demands during conciliation and when those inevitably fail, force Oracle to endure years of contentious, unflattering, and expensive litigation without consequence.

Id. In Oracle's view, if OFCCP did not fulfill its conciliation requirements, the entire action violates EO 11246 and the regulations. *Id.* It points to several cases involving the EEOC where dismissal was ordered for failure to conciliate and contends that under the applicable regulations, I have the power to terminate proceedings through dismissal. *Id.* at 1-2.

OFCCP contends that it satisfied its conciliation requirements, but that even if it did not, the issue is mooted by the fact that the parties spent over a year attempting to mediate the case and reached an impasse. PR at 2. OFCCP argues that the appropriate remedy for failure to satisfy the conciliation requirements is usually a stay, pointing to a string of cases supporting this result. *Id.* at 2-4. It contends that the cases relied upon by Oracle are inapposite, involving different sorts of fact patterns. *Id.* at 3 n.1. Next, OFCCP argues that no remedy is available in the current circumstances, since a stay for conciliation would be fruitless in the circumstances. *Id.* at 3-4. In sum,

> 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 [sic] 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.

Id. at 4.

Oracle's argument does not properly address the question in this case. It argues for the conclusion that failure to conciliate may result in dismissal in an appropriate case. The order to show cause portion of the order on cross-motions for summary decision didn't disagree. After explaining why there appeared to be no remedy now for a failure to conciliate in 2016, note 24 explained:

> This reasoning is specific to the facts and history in this case. An argument that there is *never* a remedy for failure to conciliate since subsequent events change the posture would not be convincing. The particular history of this case—its length in

> litigation, the animus between the parties, and the fact that a long mediation was conducted—make it unlikely that any remedy would be available here.

Oracle's argument that an ALJ has the power to dismiss a case and that it can be an appropriate remedy for a failure to conciliate in some circumstances is thus off-point. They don't speak to the real issue raised—whether there is a remedy available *here*.

Conspicuously absent from Oracle's entire argument is any reference to or discussion of the 16 month stay for mediation that the parties agreed to in the Fall of 2017, after Judge Larsen denied Oracle's motion for summary judgment on conciliation. Notably, at that time Oracle's alternative argument was for a stay so that the parties could engage in the conciliation process. OFCCP thereafter voluntarily provided Oracle with the alternative remedy it had requested—it agreed to a stay so that the parties could try to informally resolve the case. Oracle had a choice at that point. It could have pressed its conciliation argument and pushed for hearing on the merits. That might have resulted in a dismissal. Or it could accept the alternative remedy on offer and engage in the functional equivalent of conciliation. It chose the latter, and the parties spent significant time trying to informally resolve the case. The point of the order to show cause was that it appeared that the conciliation issue had been subsequently mooted by the parties' conduct in this case—between 2017 and 2019, OFCCP had provided Oracle with the informal resolution process that Oracle claimed it was denied in 2016. Oracle fails to fairly meet this issue, ignoring the particular point raised in the order to show cause.

Oracle points to three cases to support its position. DR at 1-2. None are persuasive on the undisputed facts in this case. *EEOC v. CVS Pharm., Inc.*, 809 F.3d 335 (7th Cir. 2015) involved a situation where the EEOC entirely *refused* to engage in conciliation. *Id.* at 337-38. Oracle does not allege that OFCCP refused to conciliate. It is undisputed that OFCCP did engage in some conciliation—Oracle simply argues that it was so inadequate that it does not qualify as a reasonable effort. Further, OFCCP willingly engaged in extended informal resolution efforts while the case was in this forum, something entirely absent from *CVS Pharm.* Similarly, *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2015 U.S. Dist. LEXIS 166797 (N.D. Iowa Dec. 14, 2015), involved a case where the EEOC had engaged in no investigation or conciliation efforts at all in reference to the claims that were dismissed.[3] *Id.* at *2-3. Last, *EEOC v. CollegeAmerica Denver, Inc.*, No. 14-cv-01232-LTB-MJW, 2015 U.S. Dist. LEXIS 144302 (D. Colo. Oct. 23, 2015) involved another case in which the EEOC had not investigated or conciliated the dismissed claims in any manner and had not provided the required notice of the claims. *Id.* at *5-7.

Mach Mining held that conciliation was mandatory, but it also stated that "[s]hould the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance." 135 S. Ct. at 1656. OFCCP points to a string of cases in which this was the remedy afforded.[4] *See* PR at 2-4. Cases involving the EEOC partly turn

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[3] Moreover, the underlying dismissal order in the case barred the EEOC from pursuing the un-investigated and un-conciliated claims in the present action and dismissed the complaint without indicating whether the dismissal was with or without prejudice. *See EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2009 U.S. Dist. LEXIS 71396, at *66-67 (N.D. Iowa Aug. 13, 2009). Though the point arose later, the nature of the dismissal was never definitively decided. *See EEOC v. CRST Van Expedited, Inc.*, 277 F. Supp. 3d 1000 (N.D. Iowa 2017)

[4] *EEOC v. More & Moore, Inc.*, Civ. No. 09-951 BB/ACT, 2010 U.S. Dist. LEXIS 154148, at *2-3 (D.N.M. May 4, 2010) (proper remedy for failure to conciliate is stay so conciliation can proceed and request mooted when EEOC agrees to

on a statutory provision permitting a stay for the EEOC to undertake efforts to ensure voluntary compliance. *See* 42 U.S.C. § 2000e-5(f)(1). There is no such provision in the regulations here, but neither is there any provision suggesting dismissal as a remedy. Oracle's argument for dismissal hinges on the broad array of powers available to an ALJ in processing a case, including remand or dismissal. *See* 29 C.F.R. § 18.12(b)(7). ALJs also have authority to "[r]egulate the course of proceedings." *See* 29 C.F.R. § 18.12(b)(1); *see also* 41 C.F.R. § 60-30.15(f). That includes the power to stay proceedings to allow the parties to pursue informal efforts to resolve the dispute. In fact, that is precisely what Judge Larsen did back in 2017. The issue raised in the order to show cause was why any remedy would be provided here, given the subsequent history in which Oracle accepted the alternative remedy proposed, a stay for informal settlement efforts, rather than pursuing its argument for dismissal. Again, that isn't an issue Oracle squarely meets.

The conciliation requirement mandates reasonable informal efforts to resolve a claim. Oracle contends that OFCCP did not do this in 2016, an issue where genuine disputes remain. But there is no dispute (genuine or otherwise) that Oracle and OFCCP engaged in an extended mediation effort between 2017 and 2019. OFCCP voluntary gave Oracle what it demanded—an extended informal attempt to resolve the case. Oracle did not have to "endure years of contentious, unflattering, and expensive litigation"—it could have pressed for quick resolution and adherence to the original hearing schedule or it could have settled the case.

There is no genuine dispute that OFCCP made some efforts to conciliate in 2016. There is genuine dispute over whether those efforts were reasonable and satisfied OFCCP's particular conciliation requirement. Neither party is entitled to summary judgment on that point. But *if* I find for Oracle on the issue, the appropriate remedy would be a remand to OFCCP to allow for conciliation or a stay of the case so that informal efforts can be undertaken. But the parties already engaged in informal efforts to resolve the case in an extended mediation, which was unsuccessful. A stay or remand, given the particular circumstances of this case, would be futile. The issue is moot. It was mooted by the actions the parties undertook during the course of the litigation.

This parallels the determination that Oracle was entitled to summary judgment on OFCCP's denial of access claim. Since Oracle had subsequently provided access to the relevant portions of the documents in litigation, OFCCP had already received the remedy it would be entitled to and the only thing that remained was a historical grievance. Similarly, OFCCP provided Oracle with informal efforts to resolve the claim by agreeing to the stay that Oracle originally requested for that purpose. Oracle remains aggrieved over OFCCP's conduct during the compliance review and conciliation process, but as with OFCCP, this is now a merely historical dispute. Given the

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mediation); *EEOC v. OhioHealth Corp.*, 115 F. Supp. 3d 895, 899 (S.D. Ohio 2015) (staying case after finding that EEOC engaged in "no actual attempt at conciliation"); *EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243, 1257 n.5 (E.D. Cal. 2012) (noting that even if it was determined that EEOC did not conciliate in good faith, the remedy where at least some attempt at conciliation was made would be a stay, not dismissal); *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) (stay, not dismissal, appropriate remedy unless there is "grossly arbitrary and unreasonable conduct or substantial prejudice to the defendant"); *EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107, 1115-16 (E.D. Wash. 2012) (conciliation requirement non-jurisdictional and so stay is appropriate remedy); *EEOC v. La Rana Hawaii*, 888 F. Supp. 2d 1019, 1046 (D. Hawaii 2012) (ordering stay after finding failure to conciliate in good faith); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) (inquiry into the duty of good faith conciliation presents choice between hearing the claim or staying proceedings to allow for further conciliation efforts—absence of good faith conciliation does not require dismissal).

particular history of this case, no meaningful remedy is available, so OFCCP is entitled to summary judgment on the conciliation defense.

B. Show Cause Notice

As to the Show Cause Notice, Oracle states that it is a mandatory prerequisite to filing, and as such, warrants dismissal if violated. DR at 2. Further, Oracle argues that if OFCCP did not meet the reasonable cause standard for issuing the Show Cause Notice, then all of the evidence gathered since was gathered in violation of the Fourth Amendment as it applies to administrative inspections. *Id.* at 2-3. Oracle reasons that the standard remedy for a Fourth Amendment violation is exclusion, so the result should be that all of OFCCP's current evidence is excluded. *Id.* at 3-4. In Oracle's view, a lesser sanction would be inappropriate because OFCCP should not be permitted to "backdate" its determinations to fulfill its procedural requirements. *Id.* at 4. It maintains that the case should thus be dismissed with prejudice. *Id.*

OFCCP avers that in simply stating that the Show Cause Notice is a procedural requirement, Oracle is not articulating a meaningful remedy. PR at 5. It recognizes that Oracle makes a more substantive argument involving a Fourth Amendment claim, but OFCCP argues that this is a highly complex argument that was never pled as an affirmative defense and never mentioned in any prior briefing or discovery. OFCCP contends that Oracle is seeking implicit and improper amendment at its pleadings on the cusp of hearing. *Id.* Substantively, OFCCP argues that the Show Cause Notice does not serve any constitutional function of satisfying the Fourth Amendment, pointing out that it is issued after the search of records has occurred. Its purpose is to put a contractor on notice, something that has been amply accomplished in this case. *Id.* at 5-6. Further, insofar as Oracle is now contending that all evidence obtained in this proceeding came in violation of the Fourth Amendment, OFCCP asserts that the case law Oracle relies on does not apply to the discovery process in litigation and Oracle consented to any search by participating in the proceeding. *Id.* at 6-8.

Oracle's argument is somewhat peculiar. To begin with, it presumes that the Show Cause Notice has a much more important place than can be fairly read into the regulatory scheme. It is a standalone provision using permissive language. *See* 41 C.F.R. § 60-1.28. This contrasts markedly with the regulatory language surrounding the conciliation requirement, which is mandatory, built into the compliance review process, and made a prerequisite to file suit. 41 C.F.R. §§ 1-20(b), 1-26(b)(1). OFCCP's standard operating procedure may be otherwise, but Oracle's argument for a remedy attaches a massive amount of significance to a procedural step that cannot bear the weight.

The Answer did not attach this sort of weight to the Show Cause Notice. Affirmative Defense #5 contains the broadest claim for a procedural violation, stating that "OFCCP has failed to comply with its own regulations and/or internal policies and procedures" in a variety of ways. DA at 8. The Show Cause Notice isn't mentioned at all. *Id.* One could creatively read a defense premised on the Show Cause Notice into Affirmative Defense #10, the allegation that "OFCCP failed to exhaust its administrative remedies and prerequisites to suit as to all claims in its Complaint." *Id.* at 9. But again, there is no mention of the Show Cause Notice as carrying the significance Oracle has now found—it never identifies the Show Cause Notice as such a prerequisite. The same holds for #22. *See id.* at 10-11. The Show Cause Notice is mentioned in #14, but only as part of defense to limit OFCCP to the allegations contained in it and the Notice of

Violation. *Id.* at 9. It is mentioned in #31 as well, but only as part of a claim that OFCCP has no authority to issue such a document. *Id.* at 12.

Oracle's reliance on the Fourth Amendment in this context is entirely new as well. OFCCP's argument is very persuasive on this point. Oracle pled affirmative defenses invoking the Fourth Amendment, but these concerned the selection process for the compliance review (#26) and a claim that the prosecution was politically motivated (#27). There are no other mentions of the Fourth Amendment in the Answer and Oracle has not sought to amend its Answer to assert an affirmative defense on this basis. Recently, I denied OFCCP's motion to amend the complaint to contain a new Affirmative Action Plan compliance claim. Were there such a request from Oracle, it would lead to the same result. Hearing is days away and discovery is long closed. Oracle's new affirmative defense can't even be found in Oracle's summary judgment briefing, which made no mention of the Fourth Amendment. As far as I can tell, this whole issue has been newly invented by Oracle in response to the order to show cause. It is far too late to be adding large, complicated, new issues to the hearing.

Oracle's idea appears to be that it can provide some material as requested during the compliance review and provide the rest through discovery, all the while sitting silently on a Fourth Amendment claim it never mentioned or pursued, only to change course immediately before hearing with a new claim to have all of the evidence, most of which it provided without any order, excluded. Oracle actively participated in the discovery process, providing information to OFCCP and procuring information from OFCCP. It repeatedly invoked the processes available to procure information in the proceeding, yet now appears to take the position that the whole administrative process violated the Fourth Amendment. To make this sort of claim coherent, it needs to function as a collateral attack. But this is not the forum to pursue that claim.

The remainder of the argument related to the Show Cause Notice focuses on the claim that OFCCP did not fulfill a procedural requirement, warranting dismissal. This can perhaps be found in the Answer, but any remedy would redress the harm of the violation. OFCCP convincingly points out that the purpose of the Show Cause Notice is to put the contractor on notice of the violation. *See* 41 C.F.R. § 60-1.28; *U.S. Dep't of Labor v. Honeywell, Inc.*, No. 77-OFCCP-3, slip op. at 8 (Sec'y June 2, 1993) ("The basic principle of the show cause procedure is to assure due process, one element of which is fair notice of alleged violations"). The only harm related to the Show Cause Notice that can be read into the affirmative defenses in the Answer is lack of notice of the violations at issue. But there can be no genuine dispute that Oracle has subsequently been put on notice of the allegations and has had a full opportunity to develop a defense. I conclude that no remedy is available given subsequent events and OFCCP is entitled to summary judgment on the issue.

ORDER

1. OFCCP is granted summary judgment on Oracle's affirmative defenses involving the Show Cause Notice and conciliation.

2. This case will proceed to hearing on the remaining claims and defenses on December 5, 2019.

3. In light of the ruling above, the parties should review their exhibit lists to determine which exhibits are no longer relevant and can be withdrawn. Alternatively, if the parties

believe that the exhibits should remain part of the record, they should be prepared to identify which exhibits pertain only to the conciliation or Show Cause Notice issues.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge