U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 02 July 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 DENYING PLAINTIFF'S MOTION FOR CLARIFICTION OR RECONSIDERATION

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. It involves Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") and Defendant Oracle America, Inc. ("Oracle"). It has been pending at the Office of Administrative Law Judges ("OALJ") since January 17, 2017. On June 10, 2019, I issued an Order Granting in Part and Denying in Part Defendant Oracle America Inc.'s Second Motion to Compel Plaintiff OFCCP to Produce Documents and Further Respond to Interrogatories ("June 10, 2019, Order"). On June 17, 2019, OFCCP filed a Motion for Clarification or, in the Alternative, for Reconsideration of the Court's Order Requiring Production of Documents Protected by the Attorney Work Product Doctrine ("Motion for Clarification or Reconsideration" or "PMR").[1] On June 24, 2019, Oracle filed an Opposition to this motion ("Opposition" or "DOR").

For the reasons below, the Motion for Clarification or Reconsideration is denied.

I. BACKGROUND

On May 3, 2019, Oracle filed its Second Motion to Compel Plaintiff OFCCP to Produce Documents and Further Respond to Interrogatories and on May 17, 2019, OFCCP filed its opposition to that motion. Oracle replied on May 24, 2019. This completed the briefing. The June 10, 2019, Order granting in part and denying in part Oracle's motion followed.

[1] The motion is supported by a declaration from M. Ana Hermosillo ("HD") and a declaration from Charles Song with one attached exhibit. The Song declaration describes the meet and confer process on this motion and attempts to make Oracle's production of documents an issue. By necessity, this order only deals with the issues in the June 10, 2019, Order.

In broad summary and as relevant here, Oracle sought production of documents relating to communications with third parties that related to various allegations in the Second Amended Complaint ("SAC"). OFCCP responded by making a number of privilege claims: that the government informant privilege protected the identifies of all those that it communicated with, that the work product doctrine protected its records of communications, and that the attorney-client privilege as extended by the common interest doctrine protected all responsive documents because the privilege extended to all Oracle employees who might communicate with OFCCP. Oracle also posed a series of interrogatories asking for the facts supporting allegations in the SAC. OFCCP responded by referring to prior interrogatory responses and invoking Fed. R. Civ. P. 33(d) to refer Oracle to documents. The same documents were listed in all but one of the responses and all of the responses pointed to thousands of pages of material. In response to another interrogatory, OFCCP refused to disclose any Oracle employees with knowledge of facts, invoking the government informant privilege. In another, it declined to give any anecdotal evidence of discrimination beyond what was in the old investigatory file, citing attorney-client privilege as extended by the common interest doctrine.

The June 10, 2019, Order granted in part OFCCP's claim of the government informant privilege. It allowed OFCCP to redact identifying information, but required it to re-do prior redactions so that only identifying information was redacted. Since the order accepted OFCCP's claim of the government informant privilege, it also denied Oracle's motion to compel identification of individuals with knowledge of the allegations as to Oracle employees. The order denied OFCCP's claim of the attorney client privilege as extended via the common interest doctrine to all Oracle employees, or "potential" class members. It also denied a narrower claim related to counsel in an overlapping state case, *Jewett*, on the grounds that OFCCP had failed to submit or incorporate evidence of a joint strategy. OFCCP's claim of work product protection to defeat production of responsive documents was granted in part and denied in part. It was denied as to documents representing outgoing communications to third parties and incoming communications from third parties.

As particularly relevant now, OFCCP's work product protection claim was also denied as to interview notes and similar documents that catalogued communications with Oracle employees. These were protected work product, but the Order found that the qualified privilege had been overcome, but *only* as to the factual content of these documents. This conclusion followed for relatively simple reasons that derive from OFCCP's tactical decisions in this case. Usually this sort of material would remain protected and a party-opponent would need to conduct its own interviews or depositions of individuals with knowledge of the allegations. But here OFCCP invoked the government informant privilege to prevent that disclosure. Given the number of employees, and the likelihood that only a small number would have relevant evidence, it was impracticable for Oracle to interview or depose everyone in order to find those who had relevant information. As discussed in other orders, OFCCP has also been resistant to Oracle talking to its own employees. As a result, OFCCP was in potential possession of factual evidence from Oracle employees, which could include anecdotal evidence of discrimination or evidence of discriminatory policies or practices at Oracle, that it had not shared with Oracle and that Oracle had no practical way of retrieving on its own.

Both the government informant privilege and work product protection are qualified. I determined that in this case, the purposes served by the government informant privilege were more

pressing. The June 10, 2019, Order thus ordered OFCCP to produce redacted versions of its interview notes and similar documents. It allowed redactions for both information that would disclose the identity of the Oracle employee and any "opinion" work product. It also compelled further responses to the interrogatories. While the Order permitted OFCCP to continue to refer to its document productions to respond to interrogatories, it required that OFCCP identify the documents containing the responsive facts with more particularity. The Order directed OFCCP to make its claims of privilege consistent with Fed. R. Civ. P. 26(b)(5)(A) and to make continuing responsive disclosures as required by the discovery rules. *See* Fed. R. Civ. P. 26(e). Consistent with the rules specific to this proceeding, OFCCP was given 25 days to respond. *See* 41 C.F.R. §§ 60-30.09(a), 60-30.10(d).

On June 17, 2019, OFCCP filed its motion for clarification or reconsideration. OFCCP deems the June 10, 2019, Order "highly unusual" and "respectfully" seeks clarification or reconsideration so that it can comply with the Order. PMR at 1. OFCCP first asks for reconsideration of the legal standard applied in the finding that work product protection would yield as to some documents related to OFCCP's interviews of Oracle employees. *Id.* at 2-4. In a later, but related, section, OFCCP seeks "clarification" or how Oracle met the standard applied, representing that this will aid its compliance. *Id.* 8-9. OFCCP further argues that the June 10, 2019, order is flawed as written and will create additional motion practice and unintended consequences. *Id.* at 4-5. OFCCP also proposes that "robust amended interrogatory response" would render the production of documents unnecessary. *Id.* at 6-7. The motion also contains a request to submit further evidence at some later time. *Id.* at 2 n.2. Ultimately OFCCP seeks clarification and/or an order denying Oracle's motion to compel the interview notes, or a conversion of that order into one to answer interrogatories or a stay of the order while OFCCP answers interrogatories. *Id.* at 10.

Oracle opposes OFCCP's motion. It contends that OFCCP has not met the reconsideration standard, has presented no new points that were not already considered, and is only expressing disagreement with, or "grumbling" about, the outcome. DOR at 1-2. Oracle avers that the June 10, 2019, Order already distinguishes between ordinary and opinion work product and no clarification is needed. *Id.* at 2-3, 9-10. In Oracle's view, the deleterious consequences OFCCP alleges result from a misreading of the scope of the order. *Id.* at 4-7. As to OFCCP's proposal to answer interrogatories instead of producing documents, Oracle responds that OFCCP should do both as required by the Order, which is not a "tentative ruling" or "invitation to negotiate." *Id.* at 7-9.

II. 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 rules 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 Federal Rules do not contain a standard for a "motion for clarification." *See Grede v. FCStone, LLC*, 867 F.3d 767, 787 (7th Cir. 2017); *Barton v. Uniserv Corp.*, 2016 U.S. Dist. LEXIS 119052, at *7-8 (N.D. Ill. Aug. 30, 2016). But parties may ask a court to clarify the meaning of a prior order and these motions are generally recognized and allowed. *See Nehmer v. VA*, 494 F.3d 846, 860 (9th Cir. 2007); *Barnes v. D.C.*, 289 F.R.D. 1, 13 n.6 (D.D.C. 2012); *cf.* Fed. R. Civ. P. 7(b)(1)

(motions must only be "in writing unless made during a hearing or trial," "state with particularity the grounds for seeking the order," and "state the relief sought"). While courts generally permit motions for clarification, they differ on how they are treated and which standards they apply. *See United States v. Philip Morris USA, Inc.*, 793 F. Supp. 2d 164, 168-69 (D.D.C. 2011) (discussing cases).

As a distinct motion, "[t]he general purpose of a motion for clarification is to explain or clarify something ambiguous or vague, not to alter or amend." *Id.* at 168 (quoting *Resolution Trust Corp. v. KPMG Pear Marwick, et al.*, No. 92-1373, 1993 U.S. Dist. LEXIS 16546 at *5 (E.D. Pa. June 8, 1993)).

> Where a decision contains a ministerial error or ambiguity that leaves the parties genuinely unsure of the court's intent, it is appropriate for the parties to seek clarification. But properly understood, the purpose of a motion for clarification is not to re-litigate a matter that the court has considered and decided. Where a party seeks to alter or modify the result, rather than merely to grasp its meaning or scope in the face of an actual and material ambiguity, the proper recourse is a motion for reconsideration.

SAI v. Transp. Sec. Admin., No. 14-403, 2015 U.S. Dist. LEXIS 192323, at *7-8 (D.D.C. Apr. 19, 2015) (internal citation omitted) (citing *Philip Morris*, 793 F. Supp. 2d at 168-69).

The nomenclature given to a motion does not control its meaning. *See Catz v. Chalker*, 566 F.3d 839, 841 (9th Cir. 2009) (citing *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 635 (9th Cir. 1989); *United States v. Hart*, 933 F.2d 80, 94 (1st Cir. 1991). Where a motion for clarification seeks to alter the order and does not ask for clarification of a vague or ambiguous portion of the order, courts construe it a motion for reconsideration and apply the standards applicable to such motions. *See, e.g.*, *Univ. of Colo. Health at Mem. Hosp. v. Burwell*, 164 F. Supp. 3d 56, 61 (D.D.C. 2016); *Philip Morris*, 793 F. Supp. at 168-70; *see also Cohea v. Grannis*, No. 1:12-cv-01739-LJO-MJS, 2015 U.S. Dist. LEXIS 49728, at *6-8 (E.D. Cal. Apr. 14, 2015) (treating motion for clarification as motion for reconsideration; *Hiken v. DOD*, 872 F. Supp. 2d 936, 939 (N.D. Cal. 2012) (same); *Dish Network LLC v. Sonicview USA, Inc.*, No. 09-cv-1553-L, 2012 U.S. Dist. LEXIS 134867, at *2-4 (S.D. Cal. Sept. 19, 2012) (same); *Moore v. USC Univ. Hosp., Inc.*, No. CV 07-7850 PA, 2009 U.S. Dist. LEXIS 139598, at *3-4 (C.D. Cal. Oct. 26, 2009) (same). Some courts have treated such motions as a motion for relief from judgment under Rule 60(a) or 60(b). *See, e.g., Sialoi*, 2014 U.S. Dist. LEXIS 27521, at *3-4; *Harmston v. City & Cty. of San Francisco*, No. C 07-01186 SI, 2008 U.S. Dist. LEXIS 9622, at *3-4 (N.D. Cal. Jan. 29, 2008). Others treat a motion for clarification as a motion only under Rule 60(a) for the correction of clerical mistakes. *See, e.g., Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, No. CV 03-5965 PSG, 2007 U.S. Dist. LEXIS 105172, at *3 (C.D. Cal. Nov. 14, 2007).

Rule 60(a) provides that a "court may correct a clerical mistake or a mistake arising from oversight or omission wherever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). More substantive relief is available with a motion for reconsideration under Rule 59(e) or Rule 60(b). *See Sialoi v. City of San Diego*, No. No. 11-cv-2280-W, 2014 U.S. Dist. LEXIS 27521, at *3 (S.D. Cal. Mar. 3, 2014) (citing *Hinton v. Pac. Enters.*, 5 F.3d 391, 395 (9th Cir. 1993)). Rule 59(e) allows for a "motion to alter amend a judgment," which "must be filed no later than 28 days after the entry of the judgment." Fed R. Civ. P. 59(e); *see also* Fed R. Civ. P. 52(b); 29 C.F.R. 18.93 (OALJ motion for reconsideration rule providing for 10 days to file). Rule 60(b) provides that

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed R. Civ. P. 60(b). Rule 60(b) motions must be filed in a "reasonable time." Fed R. Civ. P. 60(c). It is a form of extraordinary relief and requires a showing of exceptional circumstances. *E.g. Engleson v. Burlington N. R. Co.*, 972 F.2d 1038, 1044 (9th Cir. 1992) (citing *Ben Sager Chem. Int'l v. E. Taqosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977)); *see also Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007).

"'[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in controlling law.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). "A motion for reconsideration 'may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.'" *Id.* (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (emphasis in original)). "The rule offers an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Kona Enters.*, 229 F.3d at 890 (quoting 12 James Wm. Moore et. al., Moore's Federal Practice § 59.30[4] (3d ed. 2000)). "'A party seeking reconsideration must show more than a disagreement with the Court's Decision.'" *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1131 (E.D. Cal. 2001) (quoting *Bermingham v. Sony Corp. of Am.*, 820 F. Supp. 834, 856-57 (D.N.J. 1993)). To prevail, "a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Id.* (citing *Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986)).

Reconsideration under Rule 59(e) or 60(b), as written, is available only after judgment. Fed R. Civ. P. 59, 60; *see also Balla v. Idaho State Bd. Of Corrections*, 869 F.2d 461, 466-67 (9th Cir. 1989); *Motorola, Inc. v. J.B. Rodgers Mech. Contrs., Inc.*, 215 F.R.D. 581, 582 n.1 (D. Ariz. 2003). OALJ's parallel rule, referring to decisions, is the same. *See* 29 C.F.R. § 18.93. However, trial courts have inherent authority to reconsider, modify, or overturn interlocutory orders prior to a final decision in the case. *See Credit Suisse First Boston Corp. v. Grunswald*, 400 F.3d 1119, 1124 (9th Cir. 2005); *U.S. v. Martin*, 225 F.3d 1042, 1049 (9th Cir. 2000); *see also* Fed. R. Civ. P. 52(b), 54(b); *City of L.A. v. Santa Monica BayKeeper*, 254 F.3d 882, 885, 888 (9th Cir. 2001); *see generally* Wright and Miller, 8 Fed. Prac. & Proc. Civ. § 4478.1 (3d ed.).

In exercising this authority, courts generally follow the same standard for reconsideration under Rule 59(e) or 60(b), or a close variant. *See Motorola*, 214 F.R.D. at 583-86 (surveying practice in district courts in the Ninth Circuit). Some district courts adopt local rules on the subject. For instance, the Central District of California requires a motion for reconsideration of an interlocutory order to show "a material difference in fact or law" than that presented to the court and which could not have been known by the moving party earlier, the emergence of new material facts or a change in law since the decision, or "a manifest showing of a failure to consider material facts presented to

the [judge]." Cent. Dist. Cal. L.R. 7-18 (June 2019). In the Northern District of California, a party must procure leave of the court to file and is prohibited from making arguments already presented. Reconsideration is only granted when there is a material difference in law or fact from that presented from the court that could not have been ascertained through reasonable diligence by the moving party, the emergence since the order of new material laws or fact, of a "manifest failure" to consider material facts or legal arguments presented prior to the interlocutory order. N. Dist. Cal. L.R. 7-9 (May 2018).

OALJ has no rule providing a standard for reconsideration of interlocutory orders. Courts generally have more flexibility in reviewing and reconsidering interlocutory orders. *See Carlson v. Boston Scientific Corp.*, 856 F.3d 320, 325 (4th Cir. 2017). But standard practice requires more than expressing disagreement with the prior order and does not grant reconsideration based on repetition of arguments previously made or that could have been made earlier. *See Mustaga v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1178-79 (9th Cir. 1998) (reviewing denial of reconsideration for an interlocutory order for newly discovered evidence, clear error, manifest injustice, or change in controlling law); *Motorola*, 215 F.R.D. at 585-86 (summarizing standard practices). Accordingly, a party seeking reconsideration of an interlocutory order should point to an intervening change in controlling law, newly discovered evidence, or the necessity "to correct clear error or prevent manifest judgment." Reconsideration is not warranted based on evidence that could have been presented earlier, as an attempt to "rehash" prior arguments, or simply because the party disagrees with the prior decision. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 649 F. Supp. 2d 1063, 1069-70 (E.D. Cal. 2009).

III. DISCUSSION

A. Reconsideration of the Legal Standard and Clarification of How It Was Met

OFCCP first avers that the June 10, 2019, Order "may have misconstrued the exact nature of [OFCCP's interview] notes and how they were produced." PMR at 2. OFCCP represents that in dealing with Oracle employees, it has not conducted "open-ended conversations" but instead its attorneys have "steered the conversations to specific topics" and made notes of information that the attorney "determined may be relevant and useful for litigation." *Id.* at 2-3; *see also* HD at ¶¶ 2-4. OFCCP notes that the Order directed it to produce "ordinary" work product and to redact "opinion" work product. It "is concerned, however, that the Court's order may lead to significant disagreement and confusion because it does not address the distinction between these two types of work product as they may appear in an attorney's notes." PMR at 3. OFCCP suggests that it cannot segregate facts and opinion because the facts may give insight into the attorney's opinions. It then suggests that the facts should be considered opinion work product and therefore Oracle should be required to make a showing beyond the substantial need/undue hardship test for production to be made. *Id.* at 3-4. Oracle expresses some confusion as to this aspect of the motion, noting that the June 10, 2019, order distinguished between opinion and ordinary work product and directed OFCCP to redact opinions and produce facts reflected in the interview notes. It expresses skepticism at OFCCP's claimed inability to segregate opinions and facts in these sorts of notes and sees OFCCP's statements as a prelude to a refusal to comply with the order. DOR at 2-3.

Later OFCCP asks for "clarification" of how Oracle met the substantial need test, stating that the order does not explain to OFCCP how that test was met. It argues that the proof in this case is statistical and Oracle's defense will respond to that. While it avers that anecdotal evidence

will be part of its case, it contends that Oracle cannot defend on that basis. It represents that the evidence will not be dispositive for either party. OFCCP asks that I "clarify" which evidence Oracle has substantial need for so that it can decide what it needs to produce. PMR at 8-9. Oracle responds that this argument was already considered. In its view, OFCCP is attempting to determine what Oracle should be arguing and then produce only information that it would like Oracle to use in defense of its claims. Oracle represents that the June 10, 2019, order was already specific about what could be redacted and what needed to be produced. It observes that the information is relevant for Oracle because it should be able to contest the anecdotal evidence that OFCCP may present. DOR at 9-10.

This later aspect of OFCCP's motion is not a motion for clarification. It is simply disagreement with the order and a demand that it change. The order plainly told OFCCP what it needed to produce, what redactions it could make on what basis, and how it should make its redactions. The line of argument OFCCP re-hashes was considered. It remains unconvincing. OFCCP has not articulated its legal theories and has sought, as it may, to keep its manner of proof open-ended. This is a discrimination claim and statistical evidence will be prevalent. It is proceeding, potentially, on both a disparate treatment and disparate impact claim. In a disparate treatment claim, evidence of treatment at Oracle could be important. In a disparate impact claim, evidence of informal policies and practices and their impact could be important. OFCCP has also alleged that Oracle in some manner channels certain employees to certain jobs.

These are all claims that could involve evidence from Oracle employees. OFCCP is gathering that evidence. That is reason enough to allow Oracle to prepare a defense by being informed what factual evidence it may face. Oracle should not have to guess at OFCCP's actual theories and strategies. If OFCCP were to stipulate that it will present no evidence from Oracle employees, outside of those who have testified via deposition or been interviewed by both parties, that would be grounds for reconsideration as it would change the terrain of the case. But it has not done so.

OFCCP's earlier argument about the proper legal test is poorly framed. OFCCP officially asks that the order be reconsidered because it applied the wrong test. This isn't right. The June 10, 2019, order applied the test applicable to ordinary or fact work product and found it met for the notes recording interviews of Oracle employees in this case. It did not apply a more stringent test applicable to opinion work product because it did not order OFCCP to produce opinion work product. The issue isn't the test—it is OFCCP's hint that all of its interview notes constitute opinion work product.

Parts of these sorts of notes will often contain opinion work product. This is why courts are reluctant to order production of such notes. The June 10, 2019, Order did not order full production of the notes—it directed OFCCP to redact the portions that contain opinions and produce the rest. What OFCCP is really after is a pre-emptive determination that all of its notes constitute opinion work product, and so need not be produced. All of the information that OFCCP presents could have been presented earlier. OFCCP declined to produce any privilege logs or fulsome description of what it possessed. Even here the descriptions are very general and confusing. The mere fact that an attorney might be able to make guesses about opinions from facts does not turn all records of fact into opinion work product. As it is, Oracle can already guess at the sorts of areas OFCCP is probing—OFCCP did file a complaint and Oracle possesses OFCCP's solicitation that explicitly stated the evidence it was looking for. The proposition that records of facts are opinions because an

attorney recorded the facts is a curious one—and would tend to render "ordinary" work product an empty category.

In any event, OFCCP is essentially asking for an advisory opinion sanctioning an overly-broad redaction plan. I decline that invitation. The order is the same as before: redact the opinions and produce the facts. Discovery is about providing both sides with mutual knowledge of the facts. "Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Because OFCCP elected not to tell Oracle who possesses the relevant facts—and I have condoned its doing so under the government informant privilege—there needs to be another way to apprise Oracle of the facts.

B. Judicial Efficiency and Unintended Consequences

In one section of its motion, OFCCP contends that the June 10, 2019, Order will lead to inefficiencies and unintended consequences. It predicts that additional motion practice will follow since the parties will dispute compliance and the propriety of the redactions. PMR at 4. It also avers that the order creates an ongoing duty for both parties to supplement their discovery and privilege logs based on discussions with witnesses. *Id.* at 4-5. And OFCCP suggests that the order will lead it to seek discovery of interviews Oracle has and will conduct. *Id.* at 5. It muses that it has equal need to explore Oracle's defenses and on that basis should be entitled to Oracle's notes. *Id.* at 5 n.6.

Oracle responds that OFCCP is misreading the June 10, 2019, Order, which applies only to OFCCP's production of the particular documents at issue. Oracle avers that the issues addressed in the Order were the result of OFCCP's conduct and that it did not engage in similar behavior. It complains that if OFCCP has similar issues with Oracle's responses, it should follow the prescribed meet and confer process and pursue a motion if necessary. Oracle adds that it cannot claim the government informant's privilege to shield the identity of individuals with knowledge of the facts, so the considerations in the June 10, 2019, order do not apply to it. DOR at 4-5. As to the potential need for additional motion practice, Oracle argues that this is just OFCCP predicting that it will not comply with the order. It responds that a "party predicting that its compliance with an order will be unsatisfactory is not a reason to withdraw the order. It is a reason to enforce it." *Id.* at 5-6.

Oracle is correct that OFCCP is over-reading the order. It only deals with the categories of documents that were at issue in the motion presented. The result largely flowed from OFCCP's tactical decision to attempt to deploy privileges to shield relevant facts from Oracle by withholding the facts, opposing Oracle's attempts to investigate the facts, and withholding responses that would allow Oracle to investigate the facts. If Oracle knew who to interview or depose, the production would be unnecessary. If the June 10, 2019, Order leads to additional motion practice, it will be the result of a failure by one or both parties to engage in good faith. I will not effectively vacate an order because a party predicts that its mode of compliance will create additional problems.

OFCCP also worries that turning over notes could chill its conversations with informants and put them at risk for retaliation. PMR at 5. I do not follow the worries about retaliation. The June 10, 2019, Order specifically stated that identifying information could be redacted. Not all information is identifying, just like not all information is opinion. In any event, this is a problem that OFCCP created. It could have avoided this by retrieving questionnaires or something similar, but chose otherwise.

OFCCP next complains that the June 10, 2019, Order undercuts the parties' agreement not to log attorney work product after December 16, 2016.[2] It contends that if the order is correct, then the parties will need to re-catalogue all work product in the case. PMR at 5. Oracle disagrees, contending that the parties cannot override an order by mutual agreement and that the need to produce privilege logs applies only to the particular documents in OFCCP's possession that were at issue in the order. DOR at 6-7. The June 10, 2019, Order was critical of OFCCP's failure to produce any privilege log, but that point holds regardless of any private agreement. The parties can regulate behavior amongst themselves, they cannot change the Federal Rules or bind my application of them. Once the assertion of privilege was disputed and subject to adjudication, OFCCP should have produced a privilege log or some sort of equivalent that would have permitted reasoned evaluation of the privileges claimed.

The June 10, 2019, Order directed OFCCP to make its redactions in accordance with Fed R. Civ. P. 26(b)(5)(A). That order holds. However, it is not nearly as broad as OFCCP contends. It only holds in respect to claims of privilege related to the documents subject to the Order. So there is no need for either party to go back and modify practice as between themselves. I decide concrete disputes presented in properly filed motions and issue orders related to those disputes. The dispute here was over a particular sort of document—interview notes and the like for Oracle employees. Because of the dispute and the Order's acknowledgement that some claims of privilege will justify withholding/redacting documents, a privilege log or the functional equivalent is required. For documents not at issue in the June 10, 2019, Order, that Order has nothing to say.

C. Interrogatory Response in Lieu of Document Production

In lieu of responding to Oracle's requests for production of documents as ordered, OFCCP proposes that it make responses to Oracle's interrogatories, which it claims will reduce the need for the production of documents. It again deems the June 10, 2019, Order "highly unusual" and "anticipates" that its interrogatory responses will answer the worries therein. OFCCP then claims that "it will be impossible to meaningfully comply with the requirement to produce attorney work product notes while also protecting the identity of the workers interviewed." OFCCP represents that it will redact "most of the factual information" on a claim that it might be used to identify the informant, rendering its response not very useful to Oracle.[3] It makes the same claim as to its opinion work product, stating that when it complies with the June 10, 2019, order there will be "very little factual information to be produced." It proposes interrogatory responses as a substitute. PMR at 6-7.

Oracle replies that OFCCP should not treat the June 10, 2019, Order as the start of a negotiation or a tentative ruling. It states that OFCCP has long been promising to provide robust supplemental interrogatory responses, but has not done so. It sees OFCCP's position as a claim that

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[2] It would have been prudent to submit this information earlier. Oracle filed a motion to compel, which OFCCP opposed on the grounds of privilege. Failure to produce a privilege log in a timely manner can lead to forfeiture of privileges. *See BNSF v. United States Dist. Court*, 408 F.3d 1142, 1149 (9th Cir. 2005). An agreement to not exchange privilege logs would have forestalled that line of argument and explained why a privilege log had not been forthcoming originally. In any event, Oracle did not press that line of argument and production was not ordered on that basis.

[3] The Hermosillo declaration attempts to support this point. HD at ¶ 5. However, the government informant privilege does not permit withholding information on the grounds that a creative attorney can postulate some way in which the information could narrow the potential sources. Nor does the declaration state facts that would tend to establish that Ms. Hermosillo has the sort of intimate knowledge of Oracle necessary to substantiate the speculation.

it will be withholding all factual information in the interview notes, in defiance of the June 10, 2019, Order, but proposes to somehow address the need for discovery with interrogatory responses. In Oracle's view, however, carefully redacted notes in compliance with the Order address all of OFCCP's concerns and it is too late now for OFCCP to decide which parts of discovery it will participate in. It contends that OFCCP has resisted any discovery of facts underlying its claim, that at this point is simply demanding that I engage in further explanation to satisfy and convince OFCCP, and that the order already provided lengthy consideration of the arguments properly presented. DOR at 7-9.

If OFCCP wanted to obviate the need for production of the documents reflecting interview notes by making "robust" interrogatory responses, it should have made robust interrogatory responses. Its responses were plainly deficient. OFCCP's opposition to Oracle's motion didn't even make an argument attempting to defend its responses. Insofar as OFCCP did offer responses, it was via referring to its production of documents. Now that it is ordered to produce documents, it asks that it answer via interrogatories. Even were I inclined at this time to entertain this late proposal, OFCCP should have filed its interrogatory responses with its motion, showing that it was making real responses that might change the considerations.

I expect OFCCP and its attorneys to engage in good faith redactions in compliance with the June 10, 2019, Order, and to make both timely production of redacted responsive documents and supplemental interrogatory responses.

D. Request to Submit Additional Evidence

In a note OFCCP observes that the June 10, 2019, Order determined that OFCCP did not establish that the common interest doctrine extended the attorney client privilege to cover all communications with "members of the protected classes." It notes that this finding observed that OFCCP did not argue for or support its claims. OFCCP retorts that it "respectfully" points to an attachment submitted by Oracle on a separate motion back on February 5, 2019, as containing a common interest agreement and then "requests that the Court permit OFCCP to provide additional evidence and argument supporting the invocation of the doctrine by briefing or oral argument." PMR at 2 n.2. Oracle responds that this is unjustified since OFCCP has not adequately explained the need and that the parties have already been allowed to extensively brief the issues. DOR at 3.

The June 10, 2019, Order considered two potential claims of the common interest doctrine. In one, OFCCP claimed that it applied to all potential "class" members, which it understood to mean all Oracle employees. This unprecedented claim was rejected, in large part on the grounds that OFCCP had no joint strategy with all Oracle employees. There was also a possibly narrower common interest doctrine extension to the individuals involved specifically in the *Jewett* state litigation. OFCCP didn't argue sufficiently for that narrower extension and didn't submit or reference any evidence that would lead to the conclusion that the joint strategy existed—something that Oracle disputed. The Order observed that the submissions in this case have been voluminous and that if a party wished to incorporate prior exhibits it could do so by reference—but that I would not conduct a document review for the attorneys in this case. If the parties want me to consider a document in support of or opposition to a motion, they need to point me to that document, not hope I will find it for them.

OFCCP's "respectful" reference to a document filed by Oracle in relation to a different motion could not support its broad claim for attorney-client protection extending to all Oracle employees. It could only assist the narrower claim, though to do so there would require some finding that the individuals signing the document had the necessary authority. Regardless, this is not properly submitted on reconsideration—it is not newly discovered evidence or evidence that OFCCP can be excused for not realizing was at issue. It had made the claim of privilege. It made the litigation decision not to submit or reference any evidence that might support the claim. Even were this proper, OFCCP hasn't even submitted its additional evidence or argument. Instead it asks for an opportunity to do so. The opportunity to submit argument and evidence on the point was in opposition to the original motion. At the least, one would expect the additional argument and evidence on reconsideration. Instead, this appears to be a request that a portion of the order be vacated or stayed so that at some point in the future OFCCP can brief it and submit evidence. OFCCP had a full and fair opportunity to submit its argument and evidence. A motion for reconsideration is not a proper vehicle for such a request.

ORDER

1. OFCCP's Motion for Clarification or Reconsideration is denied.

2. OFFCP shall make its discovery responses as directed in the June 10, 2019, order.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge