



Issue Date: 26 June 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 REGARDING COMMUNICATIONS WITH ORACLE EMPLOYEES

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 has been pending at the Office of Administrative Law Judges (“OALJ”) since January 17, 2017. Plaintiff Office of Federal Contract Compliance Programs (“OFCCP”) filed the operative Second Amended Complaint (“SAC”) on March 13, 2019. Defendant Oracle America, Inc. (“Oracle”) answered on April 2, 2019. Hearing is set to begin on December 5, 2019. On May 17, 2019, Oracle filed a Motion to Correct OFCCP’s Misleading Communications to Oracle’s Employees, along with a supporting memorandum (“Oracle’s Motion” or “DM”).¹ OFCCP filed an Opposition (“PO”) on May 31, 2019, and Oracle filed a reply (“DR”) on June 7, 2019. On May 24, 2019, OFCCP filed a Motion for Protective Order or in the Alternative Leave to Amend the Complaint, along with a supporting memorandum (“OFCCP’s Motion” or “PM”).² Oracle filed an Opposition on June 7, 2019.³ On June 17, 2019, OFCCP filed a reply (“PR”).⁴

¹ The motion is supported by a Declaration of Erin M. Connell (“CD1”) with 8 exhibits (“DMX A-H”).

² This motion is supported by a declaration from Norman E. Garcia (“GD”) with one exhibit (“PGX A”), a declaration from Jeremiah Miller (“MD”), and a declaration from Laura C. Bremer (“BD”) incorporating 6 exhibits attached to a declaration by Abigail Daquiz filed on May 17, 2019, (“PX 1-5, 7”) and attaching 5 additional exhibits (“PX 8-12”). OFCCP also relies on a prior declaration from M. Ana Hermsillo, filed on May 17, 2019 (“HD1”) and exhibits attached to a declaration from Ms. Connell filed on May 23, 2019 (“PCX E, G, J, L-O”). It also includes an attached proposed corrective notice (“PX A”).

³ The opposition is supported by another declaration from Ms. Connell (“CD2”) with 18 more exhibits (“DOX A-R”).

⁴ The reply includes a declaration of Kiesha N. Cockett (“KCD”) with one exhibit (“PCX A”) and a second declaration from Ms. Hermsillo (“HD2”) with one exhibit (“PHX A”).

For the reasons set forth below, both motions are denied, but the parties are ordered to conduct future communications as specified below and engage in further meet and confer regarding an agreed corrective notice per the guidance below.

I. Background

The pending motions concern communications by the parties made in the process of attempting to investigate the claims at issue in this case and obtain relevant evidence from current Oracle employees. Oracle objects to OFCCP's communications with its employees and seeks a corrective notice. In response, OFCCP objects to Oracle's communications and seeks a protective order, and/or an opportunity to pursue additional complaints.

A. OFCCP's Letter and Oracle's Objections

Oracle's Motion was prompted by a letter OFCCP sent to various Oracle employees on May 17, 2019 ("OFCCP's Letter"). The full text of the body of OFCCP's Letter is as follows:⁵

We are writing to you because you have been named as a potential injured employee in the Department of Labor's lawsuit *Office of Federal Contract Compliance Programs, United States Department of Labor v. Oracle America, Inc.*, OALJ Case No. 2017-OFC-00006. This case is scheduled to go to trial December 5, 2019, in San Francisco, California. This lawsuit alleges Oracle America, Inc. (Oracle) unlawfully discriminated against its employees by suppressing the pay of its female, Black, and Asian employees. Based on our analysis of Oracle's pay data, we have determined that these employees have been underpaid as much as 20% relative to their peers. We estimate that this discrimination cost these employees at least \$600,000,000 in lost wages from 2013 to the present. The Department of Labor is bringing this lawsuit to end this discrimination, and require Oracle to pay its injured employees for their lost wages.

We are looking to talk to employees who were employed by Oracle any time between 2013 and 2019, who were affected by this discrimination. We want to hear what happened to you. We are specifically looking to talk to **female employees** who worked in **Product Development, Information Technology, and Support lines of business; Black and Asian employees** employed in **Product Development**, particularly if Oracle used your prior salary to set your starting salary, placed you in lower paying positions than your peers or channeled you into lower paying positions throughout your career. We are also looking for **applicants or employees for Product Development jobs** recruited through Oracle's **college recruiting program**.

We want to assure you that you have not been accused of any wrongdoing; and we will keep your identity confidential, unless you volunteer to share your story as a witness in this case.

⁵ An exemplar of the letter is included in DMX A, DOX B and PX 8, as well as PO at 1-2.

If you have information related to our lawsuit, would like to find out whether your wages have been impacted or have any questions about this process you may contact the Department of Labor's Oracle witness line at (213) 894-1591. If no one picks up, please leave your contact information, and we will return your call. You may also send us an email at OFCCPvOracleLitigation@dol.gov.

Thank you in advance for your cooperation in this matter.

It is signed by “Jeremiah Miller, Counsel for Civil Rights, Office of the Solicitor, Department of Labor” and was sent on Office of the Solicitor Seattle office letterhead.

Some of the exchanges between the parties are relevant to the substance of pending motions. After Oracle became aware of OFCCP's Letter, one of its attorneys, Ms. Connell, sent a letter via email to one of OFCCP's attorneys, Mr. Miller, on April 29, 2019, requesting “immediate attention and action.” *See* PX 1; DMX B; DOX C. It asked that OFCCP cease making the alleged misleading statements in the letter and halt communications until a corrective notice was issued. It contended the letter violated 29 C.F.R. § 18.22. It also objected to communications with Oracle managers, referencing California and Washington rules requiring involvement of counsel for an organization when communication with a member could be imputed to the organization. Another of OFCCP's attorneys, Ms. Bremer, replied on April 30, 2019. *See* PX 2; DMX C; DOX D. This letter altered that actual objection Oracle had made, asserting that Oracle's attorneys were claiming that they represented Oracle's managers. On that basis, OFCCP accused Oracle's attorneys of violating ethical rules regarding conflicts of interest among current clients. It further argued that Oracle could not restrict the ability of its employees, including managers, to speak with OFCCP and accused it of intimidating witnesses.

Ms. Connell responded by email on April 30, 2019, copying a number of OFCCP's and Oracle's attorneys, denying the alleged ethical violations and asking for a phone call to discuss the issues. Ms. Bremer responded the next day, but delayed any phone call meet and confer 8 to 9 days in the future. A call was arranged for the next Thursday, 8 days after the request. *See* DMX D; PCX E; DOX E. The call proceeded on May 9, 2019, and was memorialized in a letter from Ms. Connell to Ms. Bremer. The parties continued to disagree about a number of points, but reached agreement on communications with Oracle managers. They agreed the OFCCP could talk to Oracle managers without involving Oracle's counsel so long as they were talking to the managers in their personal capacity and not in a capacity that could bind Oracle. OFCCP confirmed that it was not talking to Oracle managers in that capacity. *See* PX 3; DMX E; DOX F.

The parties thereafter pursued a potential joint corrective notice, *see* DMX F; PCX G ROX G, but this ended in an acrimonious letter from Ms. Bremer to Ms. Connell on May 13, 2019, *see* PX 4; DMX G; DOX H, prompting a responsive letter, *see* PX 5; DMX H; DOX I. Ms. Bremer's last letter reverts to the accusation that Oracle's attorneys were claiming an attorney-client relationship with Oracle's managers, but it continues to acknowledge the point the parties had worked out—that OFCCP could contact Oracle managers without involving Oracle's counsel so long as the managers were not speaking in a manner that would bind Oracle. This tracks the understanding that the parties had reached in March 2019, before OFCCP's Letter to Oracle employees. *See* MD; CD2 at ¶ 7.

B. *Oracle's Motion and OFCCP's Opposition*

Oracle filed its Motion on May 17, 2019. Oracle objects that the OFCCP's Letter is "misleading, false, and coercive" as well as "facially partisan." DM at 1. It complains that the letter

implies that the Department of Labor already has ruled on OFCCP's claims, and that employees should contact the Department of Labor in order to reap the benefit of this purported determination. It fails to clearly explain that no court has decided OFCCP's allegations or that Oracle denies them. As a result, this letter has unfairly prejudiced Oracle and tainted these witnesses' testimony by presenting as a foregone conclusion the very claims OFCCP is attempting to prove.

Id. Per Oracle, OFCCP has refused to make corrections to the letter. It asks that I "order OFCCP to issue a corrective notice, or prohibit OFCCP from introducing into evidence any information obtained through the misleading correspondence." *Id.* at 2.

Oracle contends that the letter violates 29 C.F.R. § 18.22 because it misleads potential witnesses by presenting OFCCP's allegations as determinations of the Department of Labor. Oracle also complains that the letter suggests that there is some sort of finding on damages and that in order to collect some of the \$600,000,000.00 fund, witnesses need to come forward and contact OFCCP. It deems the letter coercive and prejudicial and complains that it improperly omits a statement that Oracle denies the allegations. Though Oracle acknowledges that the letter references an upcoming "trial," it avers that the letter is misleading as to the nature of that trial and as a whole leaves the impression that a determination has been made. Moreover, Oracle argues that the letter telegraphs to potential witnesses "what their testimony should be" if they wish to cover the money OFCCP is "dangling," thereby "manipulate[ing] the evidence that will be presented at trial." *Id.* at 3-5. Oracle further objects that the letter is drafted as a court approved notice or even "sweepstakes advertisement" that suggests a sort of opt-in structure, when in reality there is no fund and no action is required by any employee to recover back wages in the event that Oracle is found liable. *Id.* at 5-6.

Oracle proposes requiring OFCCP to issue a protective notice, argues that I have the authority to mandate such notice, and contends that other courts have ordered such corrections in similar circumstances. *Id.* at 7-8. It adds that it has been providing a form responses to employees who inquire about OFCCP's communication, as follows:

The Office of Federal Contract Compliance Programs (OFCCP), an agency within the United States Department of Labor, has brought an enforcement action against Oracle that includes allegations of hiring and compensation discrimination in certain jobs at Oracle's headquarters location in Redwood Shores, California. Oracle denies OFCCP's allegations and believes they have no merit. As part of the litigation process, the Administrative Law Judge who was previously overseeing the case allowed OFCCP to obtain personal contact information from Oracle for some of Oracle's employees, including yours. It is entirely up to you whether to speak to OFCCP, including by responding to the letter you received. You are not obligated to do so, although you are free to talk to them if you wish to do so. Oracle will not take any adverse action against you if you do choose to speak to OFCCP. If you have additional questions about the case, please feel free to respond to this email.

Id. at 8; CD1. Replying to meet and confer correspondence, Oracle contends that this letter is not at all coercive, properly represents the status of the case, and makes clear that employees are free to speak to OFCCP without fear of retaliation. *Id.* at 9.

OFCCP responds that Oracle has misrepresented the communication and taken portions out of context. PO at 1. It maintains that as a whole “the letter does not reasonably state or imply that the Court has already ruled on the allegations in this case, that a fund has already been established to compensate employees, or that employees must contract the Department to recover.” *Id.* at 2. It defends its use of language referencing determinations as accurate because “Plaintiff, OFCCP, United States Department of Labor *did* make a determination that Oracle failed to comply with its nondiscrimination obligations after a compliance review, consistent with the regulations,” which led to the case here. *Id.* In addition, it represents that it is willing to send a corrective notice, provided that the notice address Oracle’s alleged coercive communications. *Id.* at 2-3. The proposed correction addressing Oracle’s communications is provided in PX A and proposes sending it to the entire “class,” regardless of whether or not they received communications from OFCCP or Oracle. *Id.* at 11-12.

OFCCP maintains that Oracle violated the meet and confer requirements in that it was willing to work further toward resolution with a corrective notice. *Id.* at 6-7. As to the merits, OFCCP stresses that the letter refers to allegations and an upcoming trial such that a reasonable person would not think that “the Court” had “ruled on the allegations in this lawsuit.” *Id.* at 7. It asserts that its use of “determination” was accurate and in context refers to the position of OFCCP, not a finding after hearing. *Id.* at 7-8. It deems the use of Department of Labor letterhead proper since the Office of the Solicitor is part of the Department of Labor. *Id.* at 8 n.6. OFCCP also rejects the contention that the letter suggests the existence of a fund or an opt-in structure. *Id.* at 8-9. It asserts that it is in a privileged relationship with the employees and is litigating on their behalf, so there is nothing improper in seeking out evidence. OFCCP explains that it included language about not accusing individuals of wrongdoing because it is not naming any individual defendants and wanted to assure people that they need not be fearful of talking to the government. *Id.* at 10-11.

In reply, Oracle complains that OFCCP takes the position that “it has broad leeway to say what it wishes to Oracle employees, while Oracle—who employs these person—cannot talk to its employees at all or at least without some stern words of caution.” DR at 1. Oracle maintains that the letter from OFCCP was misleading, pointing in particular to OFCCP’s equivocation about whether it is accusing Oracle managers of wrongdoing, which OFCCP incorrectly treats as equivalent to “named as a defendant.” *Id.* at 1, 3-4. Oracle also complains that OFCCP’s agreement to a corrective notice is really just a mechanism to complain about Oracle’s alleged misdeeds, a matter beyond the scope of this motion. *Id.* at 1-2, 4-5. As to the alleged failure to meet and confer, Oracle asserts that the process was complete and it fulfilled its requirements. *Id.* at 2, 4. Oracle also opposes any claim that the Solicitor of Labor is in a privileged relationship with Oracle employees. *Id.* at 2-3, 5-7.

C. OFCCP’s Motion and Request for “Immediate Hearing”

After Oracle’s Motion was filed, the informal disputes between the parties continued, including a May 20, 2019, letter from Ms. Bremer to Ms. Connell accusing Oracle of misconduct along with a statement that OFCCP would file its motion here unless Oracle withdrew its now

pending motion and not provide an electronic copy to OALJ for Freedom of Information Act posting.⁶ Ms. Bremer indicated that OFCCP would seek to amend the complaint to accuse Oracle of retaliation violations and would seek injunctive relief to bar Oracle's attorneys' "coercive communications." The letter stated that OFCCP would start deposing Oracle's attorneys. *See* PCX J; DOX J. Over the next few days, the parties again traded proposals about a potential corrective notice addressing the various concerns, but were unable to agree to a resolution. *See generally* BD; CD2; PCX L-O; PX 10-12; DOX K-Q. Oracle's motion was not withdrawn and OFCCP's Motion followed.

OFCCP's Motion also centers on communications with Oracle's current and former employees—Oracle's communications. It seeks a protective order limiting those communications or, in the alternative, leave to further amend the complaint to add new allegations. OFCCP represents that its motion is required to "redress increasing witness intimidation by Oracle" and that it "does not file this motion or make these allegations lightly or in pursuit of litigation advantage." PM at 1. OFCCP alleges that Oracle has discouraged its employees from communicating from OFCCP and asked OFCCP to cease its communications with Oracle employees. *Id.* OFCCP also complains that Oracle's attorneys have asserted an attorney-client relationship with some employees and thereby violated applicable Rules of Professional Conduct., as well as committed additional violations of the regulations implementing EO 11246. *Id.* at 1-2. OFCCP's particular complaint is that Oracle contacted its employees and set up meetings about a related litigation in which overlapping claims were discussed. OFCCP maintains that employees were not initially told that the meetings were optional and that during these meetings employees were told about the other case, but not the OFCCP matter. OFCCP complains that Oracle employees were not told that providing information in the interviews was contrary to their interests. *Id.* at 2. It asserts that Oracle is intimidating and coercing witnesses, in violation of the regulations. It asks that I require distribution of notice to class members and restrain "Oracle from future intimidation and coercion of workers and witnesses in this matter." *Id.* at 2-3.

The contacts at issue in the motion relate to a similar case, *Jewett v. Oracle America, Inc.*, No. 17-CIV-02669 ("*Jewett*"), that is pending in California state court in the Superior Court for San Mateo County. A sample communication initiating those interviews is as follows:

I am an attorney with the law firm of Orrick, Herrington & Sutcliffe LLP, which represents Oracle in its defense or an ongoing lawsuit against the company (*Jewett v. Oracle*). In order to gather information relevant to the case, we would like to speak with a number of ICs, including you. You have not been singled out in any way, but we believe you may have relevant information to share.

We would like to schedule a time to speak with you over the next week - you do not need to do anything to prepare for the call. Will you please provide me with some times when you are available for an hour-long call? I can provide more background about the case on the call.

I have copied Emily Sullivan, Managing Counsel in Oracle's in house legal department, in the event you have any questions about this outreach or the interview we'd like to conduct.

⁶ This was subsequently clarified to mean seeking leave to not provide a copy. *See, e.g.*, DOX P at 2 n.1.

Thanks in advance for your time – we greatly appreciate it.

PM at 5; GD; PGX A. OFCCP avers that some employees did not “feel” that the interviews were voluntary. At the interviews some employees signed declarations relevant to the *Jewett* case, including statements about job duties. Oral disclosures of some sort were given at the interviews, but did not include discussion of this case. PM at 5-6.

OFCCP asserts that its contacts have expressed a fear of retaliation for participating in this manner or asking questions/making complaints about compensation. *Id.* at 6-7. OFCCP states that it advised Oracle that its conduct violated applicable ethical rules and the regulations at issue here, but that it would not agree to a corrective notice. *Id.* at 7-8. OFCCP claims that it “represents” the interest of Oracle’s employees and that thereby the Solicitor of Labor “indirectly” represents Oracle’s employees in some manner. *Id.* at 9-12. It accuses Oracle’s attorneys of violating various ethical rules involving conflicts of interest and disclosure of conflicts to constituents of an organization. *Id.* at 12-13. It argues that Oracle has been interfering with and intimidating witnesses in various ways. *Id.* at 13-16. OFCCP also complains that Oracle has maintained that OFCCP must get its consent before it communicates with Oracle employees, manifesting interference in OFCCP’s processes. *Id.* at 16. And it points to Oracle’s request in its motion for evidentiary sanctions, alleging that this is interference and an attempt to punish employees for talking to OFCCP. *Id.* at 17.

OFCCP asks that a protective order be entered, though what it means by a protective order is that I order the distribution of a “corrective notice” authored and signed by one of OFCCP’s attorneys, *see* PX A, that I require Oracle to provide that information to any witness it plans to speak to 24 hours in advance, and that Oracle be forced to disclose to OFCCP the details of its contacts with any witnesses so that it can decide what further remedies to institute. *Id.* at 17-19. While officially OFCCP does not go so far as to demand that I bar any such communications, it proposes a pre-emptive, prophylactic communication to all employees Oracle might ever speak to that conveys OFCCP’s message about the case and encourages contacting OFCCP’s attorneys. *See* PX A. In the alternative, OFCCP asks for leave to amend the complaint so that it may add allegations that Oracle violated 41 C.F.R. § 60-1.32 based on “the facts described in this motion.”⁷ PM at 19-20.

On June 5, 2019 (before Oracle’s opposition to OFCCP’s opposition was due), OFCCP filed what was styled as a “Request for Immediate Hearing.” This letter was prompted by OFCCP’s discovery that Oracle was arranging interviews with employees about this case—something that had not occurred or OFCCP was not aware of when it filed its original motion. Counsel for OFCCP represented that the communications did not make various advisements and that Oracle employees who had contacted counsel “feel they are required to attend these interviews.” OFCCP accused Oracle’s attorneys of violating two rules of professional conduct and intimidating/coercing witnesses. No evidence was offered. Oracle filed a responsive letter on June 7, 2019. It maintained that it was entitled to talk to its own employees and develop a defense, and that the interviews were voluntary and included appropriate disclosures. On June 11, 2019, OFCCP filed an unsolicited reply. On June 12, 2019, I struck the reply and denied the request for an immediate hearing on the grounds that the filing was a motion and OFCCP had not complied with the various requirements governing motion practice in this case. I noted that pending motions addressed the same subject

⁷ Though phrased an “alternative” request, I take OFCCP to be seeking both forms of relief simultaneously.

matter and that briefing was ongoing at OFCCP's request. I also briefly explained the status of the case.

D. Oracle's Opposition and OFCCP's Reply

Oracle filed an opposition to OFCCP's motion on June 7, 2019. It alleges that it is OFCCP that is "coercing witness testimony with false and misleading statement" both in the original communications and in the proposed corrective notice. DO at 1. It points out that during the meet and confer process, OFCCP struck language from an attempted mutual notice that would have informed Oracle's employees that they could participate in this lawsuit on behalf of Oracle and that OFCCP would not subject them to negative consequences, removing language stating that the allegations were unproven, and adding an admonition that sharing information with Oracle might reduce the money an employee would receive. *Id.* at 1, 8. Oracle contends that OFCCP does not represent Oracle's employees or their interests and the Oracle does not oppose its employees. In its view, the adverse parties are OFCCP and Oracle, who disagree about whether there is any violation to remedy. *Id.* at 1, 15-17.

Oracle complains that OFCCP has offered no evidence to support its "bombastic rhetoric." It asserts that there has been no witness intimidation and it has engaged in no coercive conduct. In its view, the motion is based on objections to OFCCP's misleading communications, a motion challenging those communications, and the use of declarations in a different case. *Id.* at 1-2. It accuses OFCCP of mischaracterizing the supporting evidence that was submitted. *Id.* at 2-3. It notes that the only evidence OFCCP appears to have is declarations from its own attorneys and since based on secret evidence OFCCP will not share, is incapable of being challenged. *Id.* at 3. It argues that writing a letter and filing a motion in litigation is not witness intimidation and that its communications with its employees have been proper. *Id.* at 9-15. Oracle deems the proposed corrective notice disproportionate to any purported harm and contends that OFCCP should not be permitted to amend its complaint based on "specious allegations." *Id.* at 3, 17-19.

In its reply brief, OFCCP disclaims any interest in procuring an order preventing Oracle from speaking with employees. Instead it asks that a protective order be issued that requires Oracle to provide a notice to all class members, in the form suggested by OFCCP. PR at 1. It contends that because Oracle represents that it already provides much of the information in the notice orally, it concedes that the information must be shared. *Id.* It consequently accuses of Oracle of keeping "its employees in the dark" and "attempt[ing] to harvest a litigation benefit from employee confusion and fear." *Id.* at 2. In OFCCP's view, the "inherent power-imbalance in the employment relationship" renders a request for an interview "inherently coercive absent safeguards to ensure that any cooperation is truly voluntary." *Id.* at 2-3. It asserts that oral representations once the interview has begun are insufficient. *Id.* at 3. As to the email invitations, OFCCP contends that they are inadequate because they do not disclose that the interviews are voluntary, inform employees about the nature of the case and their interests, or provide other information. *Id.* at 4.

OFCCP maintains that Oracle did not rebut its evidence that Oracle employees fear retaliation in this case. It asserts that it does not need to provide testimony of witnesses to establish this fear, since the same witnesses would be afraid to offer that testimony. Rather, it contends that the reports of counsel are sufficient. *Id.* at 4-5. Based on the alleged general fear of reprisal, OFCCP deems the manner in which interviews are requested "extremely coercive" in that the email is sent to the employee's work email address, copies in house counsel, requests a time for the

interview, and does not notify employees that participation is voluntary or other information about the case. *Id.* at 6. OFCCP avers that Oracle has not articulated why this information should not be provided in advance. *Id.* at 6-7. It further maintains that the interviews should not be considered voluntary with the information it proposes providing and that Oracle has not articulated a good reason to prevent the provision of the information. *Id.* at 7-8. And OFCCP maintains that it represents the interests of the employees of Oracle because it is seeking to recovery backpay on their behalf. *Id.* at 8-9.

II. Discussion

Oracle's Motion and OFCCP's Motion both concern communications between the attorneys in this case and Oracle's employees. The discussion below reviews the relevant rules potentially in play and then discusses the merits of both motions. It concludes by considering any appropriate remedies.

There is some dispute and confusion as to who "represents" Oracle's current and former employees in this case. As explained in prior orders, the answer is "no one." Oracle's current and former employees are not and cannot be parties to this case. While there is a sense of "represent" in which OFCCP "represents" some of the abstract interests of some of Oracle's employees, those employees, and managers in particular, also have potential abstract interests with their employer in this unique action. Ultimately, Oracle's employees are entitled to decide for themselves what their interests are, whether to participate as a witness in this action, and how to participate. Since these issues have been addressed in prior orders, the point will not be belabored below. I repeat from the Order Denying OFCCP's Request for an Immediate Hearing:

There should no confusion that the parties to this case are OFCCP and Oracle, and counsel represent one or the other of those parties. The case is currently in litigation and there has been no decision on the merits. No counsel appearing in this case represents Oracle's current or former employees. Any interviews conducted by any party are voluntary and the employee may leave at any time without any reprisal. This information can be passed on to any Oracle employees that either side wishes to interview.

A. Relevant Legal and Ethical Rules

A number of legal provisions are in some way relevant to the issues raised by the parties. The Rules of Practice and Procedure Before the Office of Administrative Law Judges⁸ provide that a "representative must be diligent, prompt, and forthright when dealing with parties representative and the judge, and act in a manner that furthers the efficient, fair, and orderly conduct of the proceedings." 29 C.F.R. § 18.22(c). An attorney may not, among other things, "[t]hreaten, coerce, intimidate, deceive or knowingly mislead a party, representative, witness, potential witness, judge, or anyone participating in the proceeding regarding any matter related to the proceeding." 29 C.F.R.

⁸ 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. OALJ's rules apply in the sense of "local rules," providing standards and directions for practicing in this forum. *See* Pre-Hearing Order at 2 n.2.

§ 18.22(d)(1). An attorney must also not “[k]nowingly make or present false or misleading statements, assertions or representations about a material fact or law related to the proceeding.” 29 C.F.R. § 18.22(d)(2); *cf.* Fed. R. Civ. P. 11(b)(3); 29 C.F.R. § 18.35(b)(3).

An attorney must also adhere to the rules of conduct applicable to any jurisdiction where he or she is admitted to practice. 29 C.F.R. § 18.22(c). Attorneys in this case appear to be licensed in either California or Washington. California rules provides that “a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer” and that when dealing with a represented corporation, such communications shall not be made to a “current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.” Cal. R. Prof. Conduct 4.2(a)-(b).⁹ Washington has a substantially similar rule. *See* Wash. R. Prof. Conduct 4.2.

As to communicating with unrepresented persons, California requires that:

a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

Cal. R. Prof. Conduct 4.3(a). Washington’s rule is essentially the same. Wash. R. Prof. Conduct 4.3.

Rule 1.7 of the California and Washington Rules of Professional Conduct governs conflicts of interest that can arise regarding current clients. The rule requires disclosure of the conflict and written informed consent to the representations by each client, though in some instances, dual representation cannot continue, such as when the two parties make claims against each other. Cal. R. Prof. Conduct 1.7; Wash. R. Prof. Conduct 1.7. Under California’s rules, when an organization is the client, “[i]n dealing with an organization’s constituents, a lawyer representing the organization shall explain the identity of the lawyer’s client whenever the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituent(s) with whom the lawyer is dealing.” Cal. R. Prof. Conduct 1.13(f). Washington has the same basic rule. Wash. R. Prof. Conduct 1.13(f).

A portion of the regulations implementing EO 11246 also has potential relevance to these motions. 41 U.S.C. § 60-1.32 provides:

(a) The contractor, subcontractor or applicant shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

⁹The California Rules of Professional Conduct underwent a substantial revision, effective November 1, 2018. Oracle points to the old version of the rules. *See* DM at 7. The relevant conduct occurred after the effective date of the new rules, so I cite to the new rules. On the pertinent questions, there were no substantive change.

- (1) Filing a complaint;
- (2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Order or any other Federal, state or local law requiring equal opportunity;
- (3) Opposing any act or practice made unlawful by the Order or any other Federal, state or local law requiring equal opportunity; or
- (4) Exercising any other right protected by the Order.

(b) The contractor, subcontractor or applicant shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion or discrimination. The sanctions and penalties contained in this part may be exercised by OFCCP against any contractor, subcontractor or applicant who violates this obligation.

The procedural rules applicable in this proceeding provide an ALJ with “all powers necessary” to fulfill his or her “duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order.” 41 U.S.C. § 60-30.15. This includes the power to impose various sanctions. *Id.* at § 60-30.15(j). Both parties agree that as part of these powers, an ALJ has the power to order corrective notices to employees who might be witnesses and/or beneficiaries of the action. Although this case is not and could not be a class action, caselaw that has developed around pre-certification communications with putative class members is informative (and relied upon by both parties). In that context, the Supreme Court has cautioned that any interference in communications “should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981). If interference is warranted, the result should be “a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.” *Id.* at 102. A judge may limit communications in ongoing litigation if the order is grounded in good cause and issued with a heightened sensitivity for first amendment concerns. Good cause is determined by looking to “the severity and the likelihood of the perceived harm; the precision with which the order is drawn; the availability of a less onerous alternative; and the duration of the order.” *Kleiner v. First Nat’l Bank*, 751 F.2d 1193, 1205-06 (11th Cir. 1985). Other remedies exist beyond restricting communications: the judge may exclude witnesses or declarations, or issue a corrective notice. *See Acosta v. Sw. Fuel Mgmt., Inc.*, No. CV164547FMOAGR, 2018 WL 2207997, at *3-4 (C.D. Cal. Feb. 20, 2018).

B. Oracle’s Motion

The underlying question in Oracle’s Motion is whether OFCCP’s Letter was misleading or in some other way improper. Oracle contends that it is and asks for remedies, including a corrective notice. DM at 1-2. OFCCP avers that it is not, though it expresses openness to a corrective notice. PO at 1-3. However, Oracle is correct that OFCCP’s gestures towards a corrective notice attempt to change the subject. DR at 1-2. The corrective notice proposed by OFCCP in PX A does not really address the alleged inaccuracies in OFCCP’s communication. Rather, it is an attempt to engage in additional communication soliciting witnesses and warning current and former employees about communicating with Oracle. The issue in Oracle’s Motion is OFCCP’s communication and

any corrective notice would address *that* communication. OFCCP's position on that issue is that the communication was not misleading in a manner requiring correction.

1. Oracle Satisfied the Meet and Confer Requirements

As a preliminary matter, OFCCP argues that the meet and confer requirements were not met prior to the filing of Oracle's motion. *See* PO at 6-7. The Pre-Hearing Order in this case contains a meet and confer requirement:

The parties must meet and confer prior to filing any motion. They must actually engage in a good faith, verbal discussion to resolve the dispute prior to seeking court intervention. The parties must include a statement that the meet and confer has occurred and the position of each party when the motion is filed. No meet and confer is required for any dispositive motions, but for all other motions, including any in limine motions and any *Daubert* objections, proof of the meet and confer is required.

Pre-Hearing Order at 3.

The history was discussed above and I have reviewed the correspondence. I find that the requirements were satisfied in this case. The meet and confer requirements are not a checkbox formality and I will deny motions when no meet and confer has occurred. But those requirements are also not litigation tools that can be used for tactical advantage by delaying meetings unreasonably or preventing bringing a dispute for adjudication. The process was not ideal, but it was robust enough to meet the requirements. Oracle sent a letter to OFCCP requesting immediate attention on April 29, 2019. *E.g.* PX 1. OFCCP responded the next day with a robust letter. *E.g.* PX 2. That same day, counsel for Oracle sought a verbal conversation—a necessary step prior to filing a motion—copying a number of different attorneys. OFCCP's response was that it would be 8-9 days before any telephonic conversation could occur. *E.g.* DMX D.

The realities of litigation and the multiple demands placed on attorneys may make immediate meetings impracticable. But there is no good reason that in a case with this many lawyers that requested meet and confer conferences cannot be arranged within five business days. Here, that should have been considerably less. OFCCP's attorneys were able to draft a long, detailed letter within one day, but somehow were *all* unavailable for a simple conversation for 8-9 days. This was gamesmanship. Claiming extended unavailability was a transparent tactic to delay any motion and ensure that any corrective notice would be pushed further into the future, guaranteeing OFCCP the benefit of responses to its communication for additional time even if correction were made.

OFCCP's attorneys are not alone in this gamesmanship. Recently I rejected Oracle's arguments that the meet and confer requirements had not been met when Oracle had unreasonably delayed a meeting to discuss the issue. The point of the meet and confer requirements is to have counsel actually talk and resolve their disputes without needing to adjudicate issues attorneys ought to be able to figure out on their own.¹⁰ It was *not* intended as another litigation tool designed to slow

¹⁰ The parties appear to have adopted a confrontational meet and confer approach rather than a collaborative approach to resolving issues. Whether intentional or not, the parties are shifting the responsibility to the court for resolving what appear to be issues well within their capabilities to figure out on their own. The parties have teams of attorneys assigned to this matter and extensive resources. Their inability to resolve issues that most attorneys should, can, and do work out

down or thwart the resolution of issues in the case. As to the issues raised in Oracle's motion, the meet and confer process was finished by the time the motion was filed.

2. OFCCP's Mandate is Not At Issue

Part of Oracle's argument charges that OFCCP has violated its mandate and a prior order in this case by not attempting to develop an evenhanded understanding of whether or not there has been any discrimination, instead presuming that the conclusion has been reached and then presenting that conclusion on Department of Labor letterhead. It complains that "the letter crosses the line into improper advocacy and partisanship under the imprimatur of the U.S. Government." DM at 6; *see also id.* at 2, 4. This point can be dealt with quickly.

As OFCCP argues, there was nothing improper about the letterhead used in the letter. *See* PO at 8 n.6. It was sent by the Office of the Solicitor and so was properly placed on Office of the Solicitor letterhead. The Office of the Solicitor, OFCCP, and OALJ are *all* part of the Department of Labor and all use variants of Department of Labor letterhead. That may engender some confusion. But the confusion is the result of the realities of administrative adjudication, not any act or omission by OFCCP or the Office of the Solicitor.

Oracle also misapprehends my role in this matter insofar as it thinks there is any recourse here for what it alleges is improper advocacy or prejudgment by OFCCP and the Solicitor's office. The Solicitor's office works as advocates for positions taken by client agencies. I have previously reminded counsel for OFCCP of what it means to be an attorney working for the government, and the extra responsibilities associated with that role that distinguish it from an attorney in private practice. Similarly, the role of OFCCP is not just to prevail in litigation, it is to remedy discrimination. This would recommend keeping an open mind so long as investigation is continuing in some manner. Government litigation, for both the client and the attorney, is different from private litigation.

I am authorized to adjudicate this case and to supervise the behavior of the parties and their attorneys in this forum. *See generally* 41 C.F.R. § 60-30.15. I am not authorized to dictate agency policy for either OFCCP or the Solicitor, which is a matter for agency and departmental leadership. The issues raised exceed my authority, so I will not address the validity of the complaints here.

3. OFCCP's Letter is Not Misleading to the Degree Oracle Contends

Considering the letter in question as a whole, it is not nearly as misleading as Oracle contends. The letter as a whole does not convey the sense that the matter is finished or that there are already damages awarded. It is directed to "potential injured employee[s]" and refers to an upcoming "trial." It first characterizes the claims as something that the Department of Labor "alleges" and talks about why the Department of Labor is "bringing the lawsuit." It is clear that the letter is meant to solicit witness testimony in assistance of the prosecution, not simply to divide monies recovered in a prosecution that as included. A reasonable reader would not think, based on

in most cases places an enormous burden on the limited resources of this agency. I have mentioned this before—stop with the invective and contentious email communications, get on the phone or meet in person, and get these issues resolved.

this letter, that the matter has somehow concluded and money is available in some sort of common fund from which individuals can recover by contacting OFCCP.

3. Nonetheless, OFCCP's Letter is Misleading in Some Ways

That said, the letter is somewhat misleading in a number of ways that are more than trivial. First, the letter doesn't state that Oracle denies the allegations. This might unnecessarily create confusion, especially when combined with use of words like "determined." Best practices and fair presentation of the status of the case would have acknowledged Oracle's position. The letter also fails to clearly state that there is no need to contact OFCCP in order to receive any damages that are awarded—and that contacting OFCCP will not increase an individual's potential award. These points are left ambiguous. A reasonable reader might be unsure about whether an opt-in was necessary. The reference to \$600,000,000.00 in damages is perplexing. The Second Amended Complaint referred to a total of \$401,000,000.00 in damages. *See* SAC at ¶ 17. Though it was clear that the amounts would grow over time as the alleged discrimination continued, nearly \$200,000,000.00 is a significant difference to find in less than a month. It is not clear why a number needed to be included at all. In addition, the letter omits significant aspects of the lawsuit. OFCCP is not just seeking to end the discrimination and require Oracle to pay its injured workers—it is trying to cancel all of Oracle's federal contracts and debar Oracle from entering into any future federal contracts until OFCCP is satisfied. *See* SAC at 16 (Prayer for Relief ¶¶ (b)-(c)). Since many if not most of the recipients of this letter are Oracle employees, it is troubling that OFCCP would omit these significant pieces of this case. Before an individual decides whether or not to get involved, they should be apprised of what the case is seeking, and everything the case is seeking.

The letter is also problematic in terms of the level of detail it goes into in reference to the evidence sought. After stating who it wanted to talk to, OFCCP unnecessarily added, "particularly if Oracle used your prior salary to set your starting salary, placed you in lower paying positions than your peers or channeled you into lower paying positions throughout your career." It looks like OFCCP is telegraphing to Oracle employees what their testimony should be if they want to help OFCCP recover \$600,000,000.00 and increase that individual's pay by up to 20%. This will ultimately be an evidentiary question and credibility issue that Oracle can raise with OFCCP's witnesses.

4. OFCCP's Representation About Employee Wrongdoing

OFCCP's Letter states, in bold type, "We want to assure you that you have not been accused of any wrongdoing." Oracle contends that OFCCP has not been forthright about whether this representation is true. *See* DR at 3-4. The letter was sent to managers. Oracle acts through its managers. OFCCP's complaint appears to be in part based on a disparate treatment theory. Treating an employee or class of employees unfavorably based on a protected characteristic is prohibited. Oracle treats employees various ways through the acts of its managers—some of them make decisions and take actions that could constitute the disparate treatment that is then imputed to Oracle. So if the managers are not being accused of any wrongdoing, it would at least appear that

OFCCP is no longer pursuing a disparate treatment theory.¹¹ But there are no other indications that this is true.

OFCCP's explanation for its statement in the letter is that it isn't naming any managers as defendants. *See* PO at 10-11. But there is an obvious and important difference between being accused of wrongdoing and being named as a defendant. OFCCP may only be pursuing enforcement against Oracle, but if Oracle discriminated through actions taken by some managers, those managers would be accused of wrongdoing and may face repercussions elsewhere. An individual may be accused of wrongdoing without being named as a defendant (e.g. an unindicted co-conspirator). On a disparate treatment claim against only an organization, this appears to be an almost necessary feature—the organization is accused of wrongdoing because one of its members allegedly engaged in wrongdoing on behalf of the organization. OFCCP explains that it included this statement so that employees “are not fearful of contacting [OFCCP].” *Id.* at 10. That is a valid concern, but it doesn't support the conclusion OFCCP wishes to draw. Quite the opposite. The statement that a recipient is not accused of wrongdoing may encourage witnesses to approach OFCCP, but if that statement is false, this is simply misleading a witness to procure evidence. That is precisely what is not permitted.

In its opposition to OFCCP's motion, Oracle points to responses to requests for admissions in which Oracle asked OFCCP to admit that OFCCP “does not accuse any ORACLE manager of any wrongdoing with respect to the claims asserted against ORACLE in the Second Amended Complaint.” It propounded the same requests as to “female managers,” “Black manager,” and “Asian manager.” After making objections, OFCCP responded to each request by stating “OFCCP admits that it has not named any Oracle employees as a defendant in this matter. Except as expressly admitted, OFCCP denies.” DOX R. The adequacy of this response is the subject of further motion practice. As relevant here, Oracle maintains that the response is effectively an admission that the letter was misleading. DO at 5. I agree. If OFCCP is not accusing any managers of wrongdoing, it should have answered the Requests for Admissions differently and plainly admitted that it was not accusing any managers of wrongdoing. If OFCCP has not named any employees as a defendant but either is or may be accusing managers of wrongdoing, it should not have sent a letter making assurances otherwise. This is troubling, all the more so because it was admittedly done to encourage the recipients to provide information to OFCCP.

5. Conclusion

OFCCP's Letter contains some more than trivial misleading aspects and one statement that appears to be incorrect. The letter is also overly suggestive of the substance of the evidence OFCCP seeks. OFCCP may believe that if it casts the case in a certain light it is more likely to procure witnesses willing to assist its endeavor, but OFCCP's attorneys may not knowingly mislead potential witness about the nature of the proceeding. *See* 29 C.F.R. § 18.22. As a whole the letter is not nearly as misleading or prejudicial as Oracle contends. On the most important points, OFCCP's letter accurately conveys that the matter remains pending adjudication. I defer consideration of what, if anything, needs to be done to remedy those aspects that are misleading until after OFCCP's counter-Motion is considered.

¹¹ It is possible that OFCCP intends to argue that no manager engaged in any wrongful disparate treatment but that Oracle as an entity nonetheless did. It isn't clear at this point how that would work, but this doesn't bar OFCCP from pursuing whatever theories it wishes, which will be evaluated at a later date.

C. OFCCP's Motion

OFCCP argues that witness coercion and intimidation should not be tolerated. PM at 8-9. That is undisputed. What is disputed is whether Oracle has done anything that is objectionable. OFCCP points to several varieties of alleged misconduct, though only one sort is seriously at issue here and even there the dispute is ultimately somewhat narrow.

1. Oracle's Legal Positions are Not Witness Coercion or Intimidation

OFCCP argues that Oracle has engaged in coercion and intimidation by taking positions in its letters to OFCCP about OFCCP's communications, including requesting that OFCCP halt its communications and making claims about representing its attorneys representing its employees. PM at 16. OFCCP also argues that Oracle has interfered with the case and intimidated witnesses by seeking evidentiary sanctions in response to OFCCP's communications, maintaining that this request is a "direct effort" to prevent its employees from participating in this proceeding and that the motion is "frivolous." PM at 17. Oracle complains that it should be permitted to send letters to opposing counsel and file motions without being accused of witness intimidation. It avers that this is fundamentally different from mass mailing letters directly to Oracle employees. DO at 10-11.

Regardless of the accuracy of OFCCP's representations of Oracle's statements—which will be discussed further below—these are not grounds for the findings OFCCP seeks. Oracle filed a motion contending that OFCCP's Letter was misleading and improper. Oracle over-stated the issues, but OFCCP's Letter was misleading in non-trivial ways. The motion was certainly not frivolous. Oracle asked that evidentiary sanctions be instated against OFCCP. This is *not* an attempt to punish employees or interfere with the proceeding. To the contrary, it is a remedy that could be instituted for OFCCP's improper coercion of witnesses based on misrepresentations about the status of the case. Such a remedy is explicitly provided for in the powers of an ALJ under the regulations. *See* 41 C.F.R. § 60-30.18(j)(1). It is also unclear why a position taken in letters to opposing counsel amounts to the violation OFCCP alleges. Oracle is entitled to take legal positions, even legal positions OFCCP does not like. If those positions are incorrect, the remedy is that they should be rejected.

2. Rule 1.7 Is Not Relevant

OFCCP also alleges that Oracle's lawyers have violated their ethical obligations by claiming to jointly represent Oracle and its employees without disclosing a conflict, as required to Rules 1.7(d)(3) and 1.13(f) of the applicable Rules of Professional Conduct. While it officially disclaims any request for sanctions, it maintains that this an indication of Oracle's intimidation and coercion. PM at 12-13; *see also* PR at 3. Oracle rejects this claim, asserting that it more than complied with Rule 1.13(f) and that Rule 1.7 does not apply at all since there was no client relationship between Oracle's attorneys and Oracle employees. DO at 15.

Rule 1.7 of the Rules of Professional Conduct in Washington and California concerns conflicts of interest that can arise among current clients and the circumstances in which representation may continue. In those circumstances it requires disclosure of the conflict to both clients and informed written consent of both clients. In some instances, representation cannot continue, even with disclosure and informed written consent. One of those instances is when the

representation involves the assertion of a claim by one client against the other. Cal R. Prof. Conduct 1.7; Wash R. Prof. Conduct 1.7. OFCCP contends that Oracle's attorneys have violated this rule.

In the original motion at issue, Oracle explained that after OFCCP's Letter there was dispute over OFCCP's contact with Oracle's managers, given that they could, in their managerial capacity, bind Oracle. But the parties were able to resolve that dispute and agreed that OFCCP could contact managers in their personal capacities, i.e. as employees, not managers. DM at 3, 6-7. In its opposition, Oracle states that the parties had previously agreed that OFCCP could contact Oracle's managers in their individual capacities. After Oracle learned of what it believed was a misleading communication from OFCCP, it demanded that OFCCP cease the communication and issue a corrective notice. It then revoked its consent to contact Oracle managers, though the parties again came to an agreement such that OFCCP must get permission only where the managers are being communicated with in a manner that could be binding on Oracle. DO at 4-5, 7. As to Rule 1.7, Oracle objects that it has never maintained that its attorneys represent Oracle employees and accuses OFCCP of "deliberate misconstruction" on this point. *Id.* at 10.

I have reviewed the correspondence and discussed it above. Oracle's attorneys never claimed that they represented Oracle's managers. They claimed that Rule 4.2 of the relevant Rules of Professional Conduct applied. That rule requires, in the pertinent part, that if a communication is being made with a constituent of an organization on a subject matter concerning in act or omission of that constituent that might be binding on or imputed to the organization, counsel for the organization must be involved or give consent. Cal R. Prof. Conduct 1.7; Wash R. Prof. Conduct 1.7. Invocation of Rule 4.2 is not a claim to represent the constituent. Rule 1.7 has no application in this situation—there are no conflicts between clients because the individual employees are not clients of Oracle's attorneys. Oracle's claim is only that when those individuals are communicating in a manner that is binding on Oracle, its attorneys need to be involved. This is correct and a point that, as far as I can tell, the parties figured out and agreed to on their own.

It is disappointing that OFCCP's attorneys—through the meet and confer, the motion, and the reply brief—have continued to make this argument based on a misrepresentation of Oracle's position. Accusing an attorney of misconduct is a serious thing and should not be done lightly or for litigation advantage. But contrary to OFCCP's claims, *see* PM at 1, that is precisely what OFCCP and its attorneys appear to have done on this point. Immediately after the representation of how grave the situation was, OFCCP leveled accusations that 1) Oracle was demanding a halt to all communications with its employees to interfere in OFCCP's investigation; and 2) Oracle "contended that it had an attorney-client relationship with some members of the protected class *in this litigation.*" *Id.* (emphasis in the original). The first assertion was materially misleading—Oracle had demanded a correction to what it believed—in part correctly—to be misleading and coercive communications. Telling a government agency to be truthful with the public is not interference. The second accusation was incorrect. Oracle and its attorneys never made that assertion. Instead OFCCP's attorneys attributed that position to Oracle, maintained that it was false, and then accused Oracle's attorneys of serious ethical violations that would result if the position were true.

OFCCP's attorneys should have seen the Rule 1.7 did not apply. The parties resolved the Rule 4.2 issue on their own, and at that point OFCCP and its attorneys should have known that Rule 1.7 didn't apply. The issue was solved and there was no need to present it further. Yet some of OFCCP's attorneys have continued to resurrect the point, both in making serious allegations of

professional misconduct against Oracle's attorneys and as part of an argument that taking a position in a letter constitutes witness intimidation and coercion.¹² Going forward, the attorneys should be mindful that when they sign a document filed in this case, they certify "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that, among other things "(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and "(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b); *see also* 29 C.F.R. § 18.35(b).

3. Rule 1.13(f) Has Application and Bears on the Accusations of Intimidation and Coercion

Rule 1.13(f) does have application to this case. It provides that when an organization is the client, "[i]n dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing." Cal. R. Prof. Conduct 1.13(f); *see also* Wash R. Prof. Conduct 1.13(f). Oracle's attorneys represent Oracle and so, per that rule, when they know or reasonably should know that an employee has interests that are adverse to those of the Oracle, they should explain the identity of the client.

OFCCP's Motion was prompted based on Oracle's interviews in *Jewett*. Oracle subsequently began arranging interviews in this case, leading to the Request for Immediate Hearing and the argument in/declarations attached to OFCCP's reply brief. In *Jewett*, Oracle engaged in interviews of its own employees and procured, in some instances, declarations that it used to oppose class certification. In procuring those depositions, Oracle provided oral disclosures at the beginning of the interview about the nature of the *Jewett* case, Oracle's denial of the allegations, the fact that the *Jewett* plaintiffs were pursuing a class action, an explanation that the attorneys represented Oracle rather than any employees, a statement that the interviews were voluntary and could be ended at any time, and an explanation that if she chose to proceed, information might be shared with Oracle or used in defense of the lawsuit. *See* PX 7. The declarations contain statements that they are voluntary, that they were reviewed by the declarant for accuracy, that there was no pressure to sign, and that the declarant understood that the attorneys who she had met with represented Oracle. *See* CD2 at ¶ 3-5; PX 9.

Ms. Hermosillo's first declaration asserts that she has talked to current and former Oracle employees and that "almost all" express a fear of retaliation and wish to remain confidential, "[s]ome" seek to verify that they are talking to someone at the Department of Labor by verifying the phone number, "[a] few" verify by requesting a work email from Ms. Hermosillo, in "multiple interviews" Ms. Hermosillo provides assurances that she will not reveal information to the employee's manager, and "more than one" fear being blacklisted due to their participation. HD1 at ¶¶ 1-7. Ms. Hermosillo further declares that some employees have reported coercion or adverse actions related to questions about pay and offers a "few representative examples." *Id.* at ¶¶ 8-12. Ms. Hermosillo reports that some employees have reported retaliation for self-advocacy outside the pay context, and again provides a "few representative examples." *Id.* at ¶¶ 13-16. The Garcia declaration represents that the individual who provided him a copy of an email from Oracle's

¹² This same accusation was also leveled in briefing on Oracle's Second Motion to Compel.

attorneys in relation to the *Jewett* case did not “feel” that the interview was voluntary and feared retaliation. GD at ¶ 4.

OFCCP submitted additional evidence after Oracle began arranging interviews in this case. Ms. Hermosillo’s second declaration reports that she has been contacted by two employees who had received an email from Oracle’s attorneys requesting a meeting along the same lines as the email requests in the *Jewett* case. HD2 at ¶ 2; PHX A. Per Ms. Hermosillo, the employees feared meeting with Oracle’s attorneys and feared retaliation if they did not. They did not know whether or not the meeting was mandatory. HD2 at ¶ 3. A third employee was aware that interviews had been requested of others and was afraid of being interviewed as well. The employee was not aware whether the interview was mandatory. *Id.* at ¶ 4. Ms. Cockett’s declaration is similar. She reports being contacted by an employee who had received an email interview request of the same form used in *Jewett*. CD at ¶ 2; PCX A. This employee was both afraid of meeting with Oracle’s attorneys and afraid of the consequences of non-compliance. CD at ¶ 3. The employee did not know if the meeting was voluntary. *Id.*

OFCCP alleges that Oracle’s attorneys are violating Rule 1.13(f) and that in this and other conduct they are intimidating, impeding, and interfering with the proceeding because they are not providing the information needed before securing statements and declarations from these employees that could harm the claims in *Jewett* and/or this case. PM at 13. It then points to a series of other cases where it contends similar interviews were found coercive. *Id.* at 13-16. OFCCP draws particular attention to Oracle’s alleged failure to advise its employees that the interviews were voluntary in the initial contact. It also complains that Oracle’s attorneys did not tell the employees that OFCCP had alleged that they were victims of discrimination, that if OFCCP prevailed they might receive money, and that any statements might be harmful to the *Jewett* case or this case. It avers that the email deprived the employees of a chance to talk to OFCCP about the matter before talking to Oracle. PM at 15-16.

OFCCP’s reply brief crystallizes its argument nicely. Oracle is arranging interviews with employees. Though Oracle is apparently orally advising employees that the interview is voluntary and disclosing some information about the nature of the case and the identity of the attorney’s client at the start of the interview, OFCCP is concerned that this information is incomplete and should be provided earlier in the process. *See* PR 2-3, 6-8. OFCCP asserts that it has produced evidence that Oracle’s employees fear retaliation, rendering the interviews inherently coercive. *Id.* at 3-6. Its proposed remedy is a notice, signed by counsel for OFCCP, that Oracle must provide to all “class” members and that provides the additional information. *Id.* at 1, 10.

Oracle replies that its communications in *Jewett* were proper and all of the employees it spoke with and who signed declarations were given multiple admonitions to ensure that their participation was knowing and voluntary. DO at 5-6. Oracle states that all of OFCCP’s statements about its contacts with employees in the *Jewett* case are incorrect. It maintains that it never demanded any interviews and that Oracle “expressly advised employees that their participation was entirely voluntary, they could end the interview at any time, and any information they gave could be used by Oracle in its defense of the litigation.” It points to the declarations themselves, which contain multiple admonitions. DO at 11-12. Oracle maintains that it is entitled to contact its own employees as part of preparing a defense in this case. *Id.* at 12. As to the non-disclosure of this matter in the *Jewett* interviews, Oracle states that it was no obligation to make those disclosures in a

different case. It argues that the employees in question understood the situation and that their statements could be used to assist Oracle. It asserts that there is no reason for this case to include an adjudication of issues pending in *Jewett*. *Id.* at 13. Oracle asserts that OFCCP has presented no evidence of a witness being discouraged or of any retaliation, instead relying on vague allegations based on multiple levels of hearsay. *Id.* at 6-7, 13-14. Further, it argues that all of the cases relied upon by OFCCP are off point and involve different sets of facts where there was actual coercion. *Id.* at 14-15. It maintains that its counsel complied with all applicable ethical rules. *Id.* at 15.

OFCCP, at times, characterizes Oracle's position as denying employees information. PR at 1. But as it recognizes at other times, *id.* at 6-7, that isn't actually Oracle's position. The parties essentially dispute *when* the information should be provided, the *extent* of the information to be provided, *how* that information should be provided, and *who* should provide the information. Oracle's practice appears to be for *Oracle's attorney* to provide *basic* information about the case and the client *orally* to the employee *during* the interview. OFCCP would prefer that more *extensive* information be provided over the signature of *OFCCP's attorney* in a *writing* distributed by Oracle *prior* to the interview.

4. There Has Been No Established Violation of Rule 1.13(f)

Although Rule 1.13(f) is relevant, there is no evidence that Oracle's attorneys have violated that rule in this case.¹³ It requires explaining the identity of the organizational client when dealing with a constituent when the lawyer knows or reasonably should know that the interests are adverse. Oracle submitted evidence that its attorneys are doing just that at the start of the interview. OFCCP has submitted no evidence to contradict those claims. In part, OFCCP's complaint appears to be that the explanations are insufficient in some way, perhaps by not including additional information—for instance explaining that the interests are “directly adverse” and giving the employee instructions on how to talk to OFCCP.

But OFCCP doesn't point to any legal requirement that goes beyond the text of the rule. So long as Oracle's attorneys explain the basic nature of the case and make clear that they represent Oracle and not the individual employee, they appear to have complied with the rule. Similarly, if Oracle's attorneys adequately explained the nature of the *Jewett* case—and the evidence submitted suggests they did—I don't follow how it would be a violation to not talk about this case. It is undisputed that those interviews were for *Jewett* and insofar as there is overlap, the position of Oracle vis a vis the “constituents” in this case would be the same as in the *Jewett* case, rendering further discussion superfluous. OFCCP appears to want a more robust rule, but it hasn't pointed to authority for its expansive reading.

The other aspect that OFCCP finds problematic is the *timing* of the disclosure. It takes the position that this should be done in the initial email. The initial email *does* clearly identify the client—Oracle. It does not explain the nature of the case or fully explain that the lawyer represents Oracle and not the employee. That is done at the beginning of the interview. Best practice would be to include this information when scheduling the meeting, but the rule doesn't require that. So long as the disclosure comes before the interview begins, no ethical violation has been established.

¹³ This finding is not meant to address the question in *Jewett*, which involves different argument and different evidentiary submissions.

5. There Has Been No Witness Coercion or Intimidation To This Point

OFCCP's central argument is that the conduct of Oracle's attorneys, and the time of the disclosures, is tantamount to witness coercion or intimidation (which could occur outside of a strict violation of one of the applicable ethical rules). A unilateral communications scheme with witnesses or potential parties in ongoing litigation can be coercive, especially when there is an unequal business relationship between the parties. See *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1202 (11th Cir. 1985); *Acosta v. Sw. Fuel Mgmt., Inc.*, No. CV164547FMOAGR, 2018 WL 2207997, at *2 (C.D. Cal. Feb. 20, 2018) (citing *Zamboni v. Pepe W. 48th St. LLC*, 2013 WL 978935 (S.D.N.Y. 2013)). The general concern in these case is that employers will leverage their authority and power over employees to discourage participation and to solicit opt-out declarations from their employees in wage-and-hour class action suits. E.g. *Camp v. Alexander*, 300 F.R.D. 617, 619 (N.D. Cal. 2014).

This concern is irrelevant here. Oracle's employees cannot opt-out (or opt-in) here. More importantly, when remedial action is ordered by the court due to such an attempt, the attempt was nearly invariably accompanied by egregiously misleading and coercive behavior by the defendant. See *Acosta v. Austin Elec. Servs. LLC*, 322 F. Supp. 3d 951, 961 (D. Ariz. 2018) (misrepresenting to employees the purpose of obtaining declarations); *Acosta v. Sw. Fuel Mgmt., Inc.*, No. CV164547FMOAGR, 2018 WL 739425, at *2 (C.D. Cal. Feb. 2, 2018), *vacated in part* 2018 WL 2207997 (C.D. Cal. Feb. 20, 2018) (soliciting declarations which contradicted what would have been present in video evidence which was intentionally spoliated); *Camp*, 300 F.R.D. at 620, 622 (threatening the jobs of all employees if the lawsuit succeeded and threatening that employee's private information would be made public during discovery); *Wright v. Adventures Rolling Cross Country, Inc.*, No. C-12-0982 EMC, 2012 U.S. Dist. LEXIS 83505, at *5-6, *8-9 (N.D. Cal. June 15, 2012) (making misleading and threatening statements about the impact of litigation on defendants and plaintiff's counsel's motivations); *Sjoblom v. Charter Communs., LLC*, No. 3:07-cv-0451-bbc, 2007 U.S. Dist. LEXIS 94829, at *6-7, *10 (W.D. Wis. Dec. 26, 2007) (failing to inform employees that signing a declaration might waive their right to participate in the class, and making misleading statements about the confidentiality of communications with plaintiff's counsel); *Wang v. Chinese Daily News, Inc.*, 236 F.R.D. 485, 488 (C.D. Cal. 2006) (threatening retaliation for participating in a suit); *Mevorah v. Wells Fargo Home Mortg., Inc.*, No. C 05-1175 MHP, 2005 U.S. Dist. LEXIS 28615, at *5 (N.D. Cal. Nov. 17, 2005) (misrepresenting statements by employees in affidavits they were then asked to sign).

OFCCP has not established any actual coercive conduct by Oracle that is found in cases where courts intervene. The evidence of coercion and intimidation is sparse—far less than has been asserted in the briefs and letters on the issue. OFCCP has only offered declarations of its own attorneys. It has not introduced any direct evidence of intimidation or coercion or any witness / declaration that describes the fear or Oracle's conduct in the employee's own words. The declarations do not quote from statements. Nothing was offered for in camera review. The second Hermosillo declaration and the Cockett declaration use almost identical verbiage to describe interactions with different people. This is unlikely to be a simple restatement of what was said—it is likely that the attorneys either steered the individuals to the statements in the declarations or that the declarations are the attorney's restatements and re-conceptualizations of what was said.

OFCCP's reply devotes considerable effort to arguing that the unattributed hearsay of its attorneys can be considered as evidence of context, as evidence of state of mind, or for the purposes of preliminary relief. PR at 5. But the evidence was not offered for these limited purposes, and if so offered, could not assist OFCCP's position. OFCCP is accusing Oracle and its attorneys of

intimidating and coercing witnesses and asking that I order them to do something differently and make corrective notice to redress the coercive behavior. This evidence is being offered to establish “widespread fear of retaliation” based on Oracle’s actions. *Id.* This is not just a matter of “state of mind” and it isn’t “context.” Nor is OFCCP seeking preliminary relief. OFCCP has made serious allegations of attorney misconduct, yet has offered nothing specific to sustain those claims. It contends otherwise, relying on the first Hermosillo declaration, but that declaration only described generalities, even in what was purported to be specific examples, each of which lacks details about context—who, what, where, when, why, how. There may be cases in which this sort of evidence could suffice, but this is not one of them. OFCCP’s reply argues that the evidence wasn’t rebutted. PR at 4-6. There is a sense in which this is correct, but only because OFCCP designed its evidence to be incapable of rebuttal. It enlisted some of its attorneys to sign declarations that kept all details secret, preventing examination or fair evaluation of the evidence. Its position is essentially that I should just defer to its attorneys.

Even were I to credit the totality of the declarations submitted, they would not establish any misconduct by Oracle and its attorneys. Ms. Hermosillo’s first declaration would only tend to establish a general fear of retaliation, but this is likely to exist to some degree in *any* case involving employees who are cooperating with the government in a suit against their employer. As discussed in the order on the motion that this declaration was submitted to oppose, that generalized fear warrants protecting the identity of informants—relief OFCCP was granted. But it does not justify a protective order or corrective notice. Oracle and its attorneys haven’t *done* anything related to these interviews to create the generalized fear Ms. Hermosillo describes. Given the timing of the declaration, they could not have. Next, Mr. Garcia’s declaration would establish that *one* employee did not “feel” that the *Jewett* interview was voluntary and wished to remain confidential because he or she feared retaliation. Ms. Hermosillo’s second declaration together with Ms. Cockett’s declaration would establish that a sum total of *three* employees “did not know” if the meeting requested in this case was voluntary and feared both meeting with the attorneys and refusing to do so.

This is not surprising. Most people fear speaking with attorneys and don’t want to be involved in litigation. Oracle’s employees are involved in this case not by choice, but because they are potential witnesses and/or potential beneficiaries of a backpay award. It is unfortunate that being pulled into this litigation will make some employees feel scared or unhappy, but that does not justify inhibiting Oracle’s investigation of the claims or ordering Oracle to engage in communications on OFCCP’s behalf. OFCCP is seeking significant amounts of money in relief coupled with the cancellation of contracts and prevention of future government contracting. It should not be surprised or taken aback that Oracle intends to put on a defense and develop evidence. The “mere fact” that Oracle communicated with its employees about the case as part of its efforts to investigate the case and prepare a defense is not grounds for any corrective action. *See Maddock v. KB Homes, Inc.*, 248 F.R.D. 229, 237 (C.D. Cal. 2007); *see also Casey v. Home Depot*, No. EDCV 14-2069 JGB (SPx), 2016 U.S. Dist. LEXIS 192441, at *28-30 (C.D. Cal. 2016); *Talamantes v. PPG Indus.*, No. 13-cv-04062-WHO, 2014 U.S. Dist. LEXIS 116990, at *15-17 (N.D. Cal. Aug. 21, 2014).

Part of OFCCP’s argument is that it is *per se* coercive and intimidating for an employer to schedule interviews with an employee. This point has some merit, but not the significance OFCCP attaches to it. In an employment relationship, an email from an attorney representing the employer requesting an interview does not feel voluntary, even if the request is ambiguous on that point.

Here, the record reflects that the point is clarified when the interview begins and from that point the employee knows that the interview is voluntary. But by that point, the employee is already at the interview. Yet despite this power imbalance, employers routinely speak with employees about pending litigation in which the unrepresented employee may be a witness. This is part of preparing a defense. Coercion and intimidation are a *danger* in such situations, but the danger alone does not prevent an employer from speaking with witnesses, or doing so without the list of robust disclosures OFCCP prefers. Reviewing the cases cited by both parties, the general rule, rather, is that the attorneys must comply with the applicable ethical requirements and not take actions that exploit the relationship to coerce or intimidate the witnesses. Cases where courts have entered remedies of some sort involve fact patterns where there is something more than simply the employment relationship.

The first case OFCCP relies on in its argument, *see* PM at 9, is revealing on the point. As quoted by OFCCP, *Camp v. Alexander* noted that “[t]he caselaw nearly universally observes that employer-employee contact is particularly *prone* to coercion...” 300 F.R.D. 617, 624 (N.D. Cal. 2014) (emphasis added). But *Camp* and the various cases it discusses *all* involve further acts by the employer that exploited the risk and actualized the coercion or intimidation—misleading statements, threats, frustration of contact with plaintiffs’ counsel, disparagement of plaintiffs’ counsel, etc. *Camp* does point out that omissions can render *ex parte* communications misleading. *Id.* But this happens when an employer seeks to procure some action, like settlement of a claim or opting out of a class action, based on a material omission. *See, e.g., County of Santa Clara v. Astra USA, Inc.*, 2010 U.S. Dist. LEXIS 78312, at *13-15 (N.D. Cal. July 8, 2010).

The nearest approximation of the rule OFCCP seeks is a case like *Kleiner*, where the unequal power created by the employment relationship is found to justify a limit on communications absent a particularized finding of abusive conduct. 751 F.2d at 1206. But *Kleiner* and most of the cases OFCCP relies upon involve situations where the employee is being asked to abandon legal rights by opting out of a class or settling a claim.¹⁴ *Kleiner*’s particular concern was with in-person solicitation of opt-out notices as part of a concerted campaign. This case involves no such dynamic. There is no evidence that Oracle’s employees are being asked to surrender anything in terms of legal rights, or even that they have any legal rights at issue to surrender. OFCCP’s concern is that the employees might give Oracle information that would assist Oracle, and potentially harm the monetary interests of the employee. But so long as Oracle’s attorneys are making the necessary disclosures before the interviews go forward, the communication is not inherently coercive.

Omissions can also be misleading for the reasons discussed above—a party might omit significant aspects of the case and the relief demanded that would be less attractive to the recipient. Or it might fail to state that the opposing party denied the allegations. Oracle’s comparative omission is that the request for an interview does not make explicit that the interview is voluntary and explain the nature of the case, but as soon as Oracle’s attorneys do speak to Oracle employees, they explain that the interview is voluntary and make the required disclosures. This demarcates

¹⁴ *Bublitz v. E.I. DuPont de Nemours & Co.*, 196 F.R.D. 545, 548-49 (S.D. Iowa 2000) fits this model as well. There the district court ordered “minimal” restrictions on communications with putative class-members absent any showing of coercive or intimidating conduct, but in the particular context where the communications were going to involve settlement offers for the claims in question. That cannot occur here. While in answer to questions from Oracle’s attorneys, an employee may communicate evidence that could be beneficial for Oracle and work against an award of backpay down the road, no Oracle employee is being asked to settle or waive any entitlement to backpay and nor could this be requested. The particular dangers present in these cases are thus not present here.

Oracle's behavior from the cases in which omissions are found problematic. Moreover, Oracle's communications do not "chill" participation in this litigation. They do not discourage employees from contacting or cooperating with OFCCP. They encourage employees to participate by talking to Oracle. Both parties and their counsels should be seeking the same thing from participating employees—the truth. If, because of conduct in the interviews or interactions, the participation is manipulated by one party or another, that is an issue to be addressed in evaluating the evidence.

While OFCCP is correct "that the existence of an employer/employee relationship increases the possibility of coercion, [i]t is not enough that a *potentially* coercive situation exists." *In re M.L. Stern Overtime Litig.*, 250 F.R.D. 492, 298 (S.D. Cal. 2008) (quoting *Burrell v. Crown Cent. Petroleum, Inc.*, 176 F.R.D. 249, 244 (E.D. Tex. 1997) (emphasis in original)). "Unlike" cases where courts intervene in communications, OFCCP "present[s] no evidence that a coercive environment was created by Defendant or that coercive tactics were used to influence" the content of employees' communications with Oracle. *Id.* OFCCP has not pointed me to any case where a court took the significant step of interfering in communications between an employer and employee, who was not a party to the case or represented by counsel, on such a meagre basis.

OFCCP argues that since Oracle does not oppose providing employees with the information it wishes to impart, it should not oppose the proposed protective notice. PR at 6-7. This misses the mark. The "corrective notice" that OFCCP proposes that Oracle send to its employees who are members of the "classes" is another letter from counsel for OFCCP designed to solicit witnesses. While correcting some of the misrepresentations in OFCCP's Letter, it contains somewhat robust warnings against speaking to Oracle. It provides contact information for OFCCP and encouragement to contact OFCCP, but no information about Oracle. *See* PX A. Any "correction" of Oracle's communications should apply only to the employees who received the communications in need of correction. Yet OFCCP would have me compel Oracle to distribute this letter more widely.

To get to the version presented for compelled dissemination in PX A, OFCCP, among other things, struck language that would have advised employees that they could participate in the lawsuit on behalf of Oracle, if they so choose—leaving only the statement that Oracle's employees could participate on behalf of OFCCP. *See* ROX P. This is incorrect. Oracle's employees are free to participate in this case in whatever manner they wish without fear of retaliation. And OFCCP removed Oracle's contact information for any questions, leaving only its own contact information available for employees and producing a situation that a recipient would only have clear means to get OFCCP's side of the story. *See id.* When the roles are reversed, this sort of one-sidedness has been found to render a communication improperly coercive. *See Astra*, 2010 U.S. Dist. LEXIS 78312 at *22-23. Where, as here, there is no finding that communications from a defendant "were misleading, intimidating, or otherwise improper," courts have declined to order any corrective notice where it appears to be an attempt to a plaintiff to bolster its litigation position. *See Swamy v. Title Source, Inc.*, No. C 17-01175 WHA, 2017 U.S. Dist. LEXIS 186535, at *13-14 (N.D. Cal. Nov. 10, 2017).

I agree with OFCCP that best practice would be to inform employees prior to the meetings about the nature of the case and that such meetings are voluntary. *See Quezada v. Schneider Logistics Transloading & Distribution*, 2013 WL 1296761, *6 (C.D. Cal. 2013); *Mevorah*, 2005 U.S. Dist. LEXIS 28615, at *15. However, it is not established that Oracle's failure to do so rises to the level of misconduct where it would constitute a breach of ethical duties or witness coercion and

intimidation. Absent a stronger showing of misrepresentation or coercion, Oracle's alleged past actions would be better addressed at hearing as evidence of the credibility of any resulting declarations. *Cf. Sw. Fuel Mgmt., Inc.*, 2018 WL 2207997, at *3 (proceeding to trial on merits as opposed to evidentiary hearing in face of improper contact allegations).

6. Motion to Amend Complaint

OFCCP makes an alternative request for leave to amend the complaint so that it may add allegations that Oracle violated 41 C.F.R. § 60-1.32 based on “the facts described in this motion.” PM at 19-20. Oracle opposes on the grounds that there is no evidence of any violation against any employee and that the proposed amendment would vastly expand the scope of this action and lead to depositions of all the counsel involved as well as all employees who have sat for interviews. Oracle further contends that allowing amendment would create prejudice in this proceeding because it would chill its ability to make arguments in letters and briefs without being accused of witness intimidation. DO at 18-19. The alternative motion is not discussed in the reply.

Complaints may be amended once “as a matter of course before an answer is filed.” 41 C.F.R. § 60-30.5(c). “Other amendments of the complaint or of the answer to the complaint shall be made only by leave of the Administrative Law Judge or by written consent of the adverse party; and leave shall be freely given where justice so requires.” *Id.*; *see also* Fed R. Civ. Proc. 15(a)(1)-(2). “This policy is to be applied with extreme liberality.” *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102 (9th Cir. 2018) (internal quotation marks omitted) (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003)); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). But “[t]he liberal amendment policy prescribed by Rule 15(a) does not mean that leave will be granted in all cases.” Wright and Miller, 6 Federal Practice & Procedure Civ. § 1487 (3d ed.).

“In assessing whether leave to amend is proper, courts consider ‘the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment.’” *United States ex. Rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989)); *see also Caswell v. Calderon*, 363 F.3d 832, 837 (9th Cir. 2004) (relevant factors are bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the pleadings were previously amended). In weighing factors, “it is the consideration of prejudice to the opposing party that carries the greatest weight.” *Eminence Capital*, 316 F.3d at 1052 (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185 (9th Cir. 1987)).

Amendment is not proper at this juncture. OFCCP has not made any credible allegations of coercion or intimidation that would violate the regulations cited. This case is proceeding to hearing. The prejudice of allowing amendment at this stage would be considerable. Amendment would require another indefinite delay in the proceedings which would take on a dual focus—both a litigation and a litigation of the litigation. Discovery would have to re-opened and restarted. It would need to be taken on most of the attorneys involved, likely requiring both sides to procure or assign new attorneys to the case. An extraordinary amount of resources have been poured into this case, much of which would be wasted if there is a new operative complaint at this late stage that would take the action in a very different direction. This case has already been pending since January 17, 2017. It is time to move forward to a resolution. If Oracle is discriminating against its employees, it needs to end, and the sooner the better. If Oracle is not discriminating against its employees, this litigation needs to end so the parties can move on.

D. *Appropriate Remedies*

OFCCP has not established any misconduct by Oracle that alone merits retrospective corrective action. The communications are not ideal, but there is no deficiency justifying intervention. If it turns out that the manner of Oracle's investigation and interviews, after they go forward, involve coercion or intimidation, that may create evidentiary and credibility difficulties for Oracle. Parties muddy their own evidentiary pool at their own risk. Prospectively, in its communications with Oracle employees about this case, Oracle should be clear at the outset that interviews are voluntary and provide a simple statement of the nature of the case.

In its dealings with Oracle employees, OFCCP should be clear that 1) Oracle denies the allegations; and 2) there is no need to cooperate to receive any potential damages and cooperation will not change an individuals' potential award. OFCCP should be consistent in the damages it alleges. If it continues to seek cancellation of contracts and debarment, it must include these results in statements of what the enforcement action is seeking. If it is no longer seeking cancellation or debarment, it should file dismissal papers to that effect. If OFCCP is not accusing any Oracle manager who received the letter of wrongdoing, it should state that plainly and revise its theories as appropriate. If it is or *may be* accusing those managers of wrongdoing, it must not offer assurances otherwise.

As for the past communications, initially I find Oracle's response to employees who inquire about OFCCP's communication appropriate. Oracle may continue to provide that form response to employees (or former employees) who reach out to it with questions about the letter. Oracle seeks two sorts of more robust remedies, an evidentiary sanction and a correction notice. DM at 2, 7-8. I begin with the evidentiary sanction. Oracle asks for preemptive evidentiary bar of any testimony or other evidence produced through this correspondence. PM at 2. OFCCP argues that Oracle's request for evidentiary sanctions is "extreme, excessive, and disproportionate" relief for any harm and would "punish" employees and interfere with their right to testify in violation of the regulations. PO at 3; *see also id.* at 12-13. Oracle's request is premature and the suggested sanction is not justified at this time. The issues Oracle raises are better addressed later, perhaps in reference to credibility.

Oracle also asks that I order a corrective notice. PM at 7-8. But Oracle overstates the degree to which the letter is misleading. OFCCP convincingly argues that the cases pointed to by Oracle are not comparable to this case. *See* PO at 8-9. In *O'Connor v. Uber Technologies, Inc.*, No. 13-cv-03826-EMC, 2017 WL 3782101 (N.D. Cal. Aug. 31, 2017), the district court ordered the parties to develop a corrective notice to be distributed to all members of the class after a misleading communication was sent by class counsel. But that case involved two things that this case does not. First, class counsel had misused contact information for class members in violation of a protective order in the case. *Id.* at *5-6. OFCCP did nothing of the sort. Second, in *O'Connor*, the communication was misleading in that it implied that in order to protect individual rights, it was necessary for class members to sign up as clients of the law firm representing the class in their individual capacities. In reality, there was no urgency and if forced to proceed individually, class members did not have to become individual clients of class counsel. *Id.* at *6-7. This case is not a class action and none of the current and former employees could even become clients of the Solicitor. An underlying concern in *O'Connor* was misleading solicitation of business and the likelihood that individual drivers would think they had to pursue individual cases with the law firm.

Put otherwise, *their* rights to a choice of representation were being compromised. Nothing equivalent has happened here.

The other case relied upon by Oracle, *Hoffman v. United Telecommunications*, 111 F.R.D. 332 (D. Kansas 1986), is also off point in that it involved what was effectively a solicitation for new claims and a proposed questionnaire that, as described by the court, was more significantly misleading than the letter here. *Id.* at 336. OFCCP is not, in this letter, searching out new claims, it is seeking evidence for its pending claim. And though I have agreed that aspects of the letter are misleading or poorly drafted, the letter does not convey that a finding of liability has been made.

While I will not order a corrective notice at this time, some clarification is needed from the parties consistent with the discussion above. Based on the filings, the parties are both interested in a corrective notice. Given the guidance above, further meet and confer may lead to an agreement, which is in the interests of both parties. The parties must engage in a further meet and confer process, which should be in person or voice communication and not email, to attempt to come to agreement about a notice to the recipients of the prior communications from the parties that fairly expresses the nature of the litigation and neutrally provides information to the potential witnesses. It is also far preferable that the parties agree to a corrective notice rather than having one imposed. The parties must file a joint status update regarding the outcome of their meet and confer within 14 days of this order. The joint status update may not exceed five pages. There is no reason the parties should be unable to work out a mutually agreeable course of action given the guidance above. After I review the joint status update, I will determine what further compelled action, if any, is necessary.

ORDER

1. Oracle's Motion to Correct OFCCP's Misleading Communications to Oracle's Employees is denied.
2. OFCCP's Motion for Protective Order or in the Alternative Leave to Amend the Complaint is denied.
3. The parties must further meet and confer about an agreed corrective notice and file a joint status update within 14 days of this order.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge