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Issue Date: 25 November 2019

CASE NO.: 2017-OFC-00006

In the Matter of

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

v.

ORACLE AMERICA, INC.,
Defendant.

ORDER DENYING DEFENDANT’S MOTION TO COMPEL DEPOSITIONS

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. Currently pending is Oracle’s Motion to Compel the Depositions of the Persons OFCCP Intends to Call as Witnesses and Who OFCCP Refused to Identify Based on the Government Informants’ Privilege or, in the Alternative, Motion in Limine No. 1 to Preclude the Testimony of those Witnesses (“Oracle’s Motion to Compel Depositions” or “DM”).

For the reasons set forth below, Oracle’s Motion to Compel Depositions is denied.

BACKGROUND

OFCCP alleges that Oracle engages in “widespread” discrimination at its headquarters facility against “women, Asians, and African Americans or Blacks in compensation.” SAC at ¶ 11. Oracle denies these allegations. As part of the compliance review and discovery in this litigation, OFCCP solicited and interviewed Oracle employees to provide information and potential evidence relevant to the case. Oracle sought to discover who had relevant knowledge of the claims at issue, which included the Oracle employees who spoke with OFCCP. OFCCP demurred, invoking the government informant privilege, as well as various other claims of privilege. On June 10, 2019, I issued an Order Granting in Part and Denying in Part Defendant Oracle America Inc.’s Second Motion to Compel Plaintiff OFCCP to Produce Documents and Further Respond to Interrogatories, part of which dealt with OFCCP’s claims of privilege. The June 10, 2019, order

sustained OFCCP's invocation of the government informant privilege, allowing that OFCCP could withhold the names and identifying information for the current and former Oracle employees it had interviewed as part of its investigation and case development. OFCCP was ordered, however, to provide Oracle with redacted witness statements and interview notes, with only opinion work product and identifying information redacted. Litigation continued through the summer and into the fall over the extent of the redactions, resulting in several more orders directing OFCCP to disclose the factual content of its interview notes so that Oracle could prepare for hearing.

Since OFCCP's claim of the government informant privilege was sustained, Oracle would be notified of OFCCP's employee witnesses only when witness lists were exchanged. In the pre-hearing schedule adopted on March 6, 2019, this information was to be exchanged on November 8, 2019. However, subsequent events required delaying the date for expert depositions, which in turn compressed the remainder of the pre-hearing schedule. In the current schedule, pre-hearing filings were due on November 21, 2019. The parties agreed to exchange their witness lists on November 19, 2019. OFCCP's list includes 22 employee witnesses. Although Oracle should have received properly redacted interview notes for these witnesses during discovery, it only learned of their identities on November 19, 2019, 16 days before hearing. OFCCP also provided less redacted interview notes for these witnesses at that time, removing all government informant redactions.¹

In the briefing before the June 10, 2019, order, Oracle argued that the identity of Oracle employees who had spoken with OFCCP should be disclosed because otherwise there would be a need for additional discovery close to the hearing. While the June 10, 2019, order sustained the government informant privilege claims, it also recognized the due process values implicated in the situation and attempted to fashion a solution that would ensure that Oracle had fair access to the relevant facts through OFCCP's notes, insofar as they related to the underlying facts. A footnote in the June 10, 2019, order (p. 13 n.10) addressed the potential need for later discovery:

Given the additional production that will be ordered here, it is not evident that there will be any need for further discovery of the witnesses identified for hearing. Insofar as there is such a need later in the case, I see no good reason to think that it would require any delay in the hearing. Given the volume of papers filed and the number of lawyers appearing in one form or another, the parties should have no difficulty arranging for and conducting short depositions of witnesses after they are disclosed, insofar as this turns out to actually be necessary.

On November 7, 2019, Oracle filed its Motion to Compel Depositions. Oracle stresses the later portions of the note quoted above, complaining that OFCCP has refused to agree to dates for depositions of the soon-to-be-disclosed witnesses. It contends that it is entitled to question witnesses beyond the scope of the interview notes and is not required to take OFCCP's representations at face value. Oracle also points out that OFCCP has been reluctant to comply with court orders about production of the interview notes. It alleges that even with subsequent orders requiring production, OFCCP continues to employ excessive, unsanctioned redactions. DM at 1-2. Oracle seeks an order compelling the depositions of any newly disclosed witnesses prior to hearing² as well as the interview notes for those witnesses without any government informant redactions. In the alternative it asks that any testimony of not previously disclosed witnesses be excluded. *Id.* at 2.

¹ These notes should thus have contained only opinion work product redactions.

² Oracle agrees to limit any depositions to three hours or less. DM at 3 n.1.

On November 21, 2019, OFCCP filed an Opposition to Oracle’s Motion to Compel Depositions (“PO”). OFCCP complains that Oracle is attempting to reopen discovery on the eve of hearing, or have witnesses excluded where the government informant privilege was properly claimed. It reports that it has “repeatedly” expressed concern that it did not have enough time to prepare for hearing, but that Oracle has resisted its efforts to procure a continuance. OFCCP contends that making 22 witnesses available for depositions in the short time before hearing is impractical and unwarranted—accusing Oracle of waiting “until the last minute to create the most difficult situation possible.” OFCCP adds that Oracle was already given OFCCP’s redacted interview notes and has access to its employees’ personnel records. It adds that when the witnesses were disclosed, it provided further interview memos without the government informant redactions. In OFCCP’s view, the current situation is a result of Oracle’s trial and pre-trial scheduling choices, and it must bear the costs of those decisions. PO at 1-3.

DISCUSSION

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

After commencement of the action, any party may take the testimony of any person, including a party, having personal or expert knowledge of the matters in issue, by deposition upon oral examination. A party desiring to take a deposition shall give reasonable notice in writing to every other party to the proceeding, and may use an administrative subpoena. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice shall also set forth the categories of documents the witness is to bring with him to the deposition, if any. A copy of the notice shall be furnished to the person to be examined unless his name is unknown.

41 C.F.R. § 60-30.11(a); *see also* 41 C.F.R. § 60-30.15(m) (subpoena authority).

Oracle’s argument for an order compelling the depositions centers on basic principles of discovery, and the rules providing it the right to conduct depositions to prepare for trial. Oracle asserts that it is denied “the full rights granted it by law” if OFCCP is able to present the testimony of witnesses that it did not have the opportunity to depose. DM at 4-5. It maintains that depositions are necessary to prepare for cross-examination and that OFCCP’s interview memos are not sufficient to allow it a fair chance to prepare. *Id.* at 5-6.³ Oracle further contends that OFCCP’s

³ Oracle also asks for unredacted interview memos for the witnesses disclosed, complaining that OFCCP refused to provide those materials after it filed declarations from Oracle employees in the summary judgment briefing. DM at 6. Based on subsequent briefing, OFCCP has provided new versions of the notes/statements with the government informant privilege redactions removed.

sharp litigation practices support an order compelling depositions, pointing to indications that OFCCP has attempted to obscure or hide facts from Oracle. *Id.* at 6-7.

OFCCP responds that it did not withhold the identity of witnesses—it invoked the government informant privilege and was sustained in subsequent orders. It adds that Oracle already has the interview notes, making depositions unnecessary. *Id.* at 6. It argues that Oracle has misrepresented the implications of the authority it cites and that here Oracle is already in possession of the information it needs to prepare for trial—interview notes and personnel files. *Id.* at 6-8. It also adds that these witnesses cannot be compelled to appear at this point and it would be unfair to require them to appear for depositions on short notice or be precluded from testifying at trial. *Id.* at 8.

Oracle is correct that the tools of discovery allow it to conduct depositions and that there is a legitimate reason to conduct these particular depositions. OFCCP is correct that there are significant practical difficulties with conducting depositions at this time. Indeed, it is questionable whether these individuals could even be given “reasonable notice” to appear. The June 10, 2019, order expressed confidence that the professionals representing both parties in this case would be able to amicably work out an agreeable solution. This has not occurred.

The issue is really scheduling. Fact discovery closed on July 3, 2019. Oracle’s motion requests that fact-discovery be re-opened a week and a half before hearing for new depositions. This would require an alteration of the scheduling order. Under Federal Rule of Civil Procedure 16(b), “[a] schedule may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). Good cause exists when the scheduling order “cannot reasonably be met despite the diligence of the party seeking the extension.” Fed. R. Civ. P. 16 Advisory Committee Note to the 1983 Amendment to Subdivision (b). A request for modification may be denied where the party seeking modification has not been diligent about pursuing the requested relief. *See Southern Grouts & Mortars, Inc. v. 3M Co.*, 575 F.3d 1235, 1241-43 (11th Cir. 2009). “The central inquiry under Fed. R. Civ. P. 16(b)(4) is whether the requesting party was diligent.” *DRK Phot v. McGraw-Hill Global Educ. Holdings, LLC*, 870 F.3d 978, 989 (9th Cir. 2017); *see also Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992). “If the party seeking the modification ‘was not diligent, the inquiry should end’ and the motion to modify should not be granted.” *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (quoting *Johnson*, 975 F.2d at 609).

OFCCP argues that Oracle waited too long to seek an order permitting these depositions by not raising the issue with OFCCP until October 25, 2019. It maintains that there is simply too little time to conduct the depositions considering the hearing date and intervening Thanksgiving holiday. OFCCP represents that it attempted to work out a compromise in which some witnesses were deposed, but that Oracle refused. PO at 1-2, 5, 8-9. Oracle contends that it did not wait too long to make its motion because the depositions could not be held until after the witnesses were disclosed, so there was nothing to compel until that occurred. DM at 5 n.5.

This last point is correct. The earliest Oracle could notice these proposed depositions was when the witnesses were disclosed. Until then, it was impossible for Oracle to know who to depose. But Oracle’s diligence in conducting the depositions is not my main concern. In filing a motion to compel the depositions at this time, Oracle is implicitly moving to amend the scheduling order to re-open discovery. The issue is whether Oracle has been diligent in requesting this change—it did not know who the potential witnesses were or who to notice in order to seek a modification of the

scheduling order to permit late depositions. Oracle has known since June 10, 2019, that it would be placed in this predicament because OFCCP's claim of the government informant privilege was sustained. At that point, Oracle knew that when OFCCP disclosed its witnesses, it would find out the identity of these potential sources of information for the first time.

It would have been premature to immediately seek an alternation of the scheduling order to allow for late depositions. The June 10, 2019, order expressed hope and expectation that the parties would be able to figure this one out without the need for further litigation. But based on the submissions now, Oracle did not take any action to try to set up these late depositions until October 25, 2019. By that point a significant amount of time had passed and several important things had changed. First, the June 10, 2019, order also intimated that depositions would be unnecessary because Oracle would have OFCCP's interview notes. Oracle contends the notes are insufficient and that OFCCP has a history of non-compliance with the June 10, 2019, order to provide the notes, which it avers has prevented full preparation. But Oracle would have known immediately after the June 10, 2019, order of any difficulty created by being limited to OFCCP's notes and would have known long before the end of October that OFCCP was not being forthcoming in its production. Oracle brought that issue to my attention at the end of July.

Second, originally pre-hearing exchanges were scheduled for early November, which would have provided a little less than a month for any abbreviated depositions of newly disclosed witnesses. But subsequent events compressed the schedule—something Oracle knew about in September. The result was an order that delayed the pre-hearing exchanges to November 21, 2019. This was later than the date proposed by Oracle, but only slightly—Oracle proposed pre-hearing exchanges of November 18, 2019. In the process of briefing changes to the pre-hearing schedule in September 2019, Oracle did not broach the issue of the need for additional pre-hearing depositions. It did not build those depositions into its proposed schedule and advocated a compression that significantly reduced the available time for any such depositions.

As soon as Oracle reached the conclusion that it had a need for these depositions, it should have promptly taken the steps needed to arrange for them. This is a matter that could have been discussed between the parties much earlier than the end of October, and should have been included as part of Oracle's proposed changes to the pre-hearing schedule in the parties' September 19, 2019, joint status report. Had Oracle diligently pursued the issue then, modifications to the schedule might have been considered that would have made these depositions practicable. For instance, though the briefing schedules needed to be compressed, the pre-hearing exchanges could still have occurred at an earlier date, leaving a reasonable time to notice and conduct short depositions.

Instead Oracle waited to raise the issue left open in the June 10, 2019, order until the end of October 2019, with the result that little more than a week prior to hearing I am presented with a request to re-open fact discovery. As matters stands, depositions of the newly identified witnesses are not practicable and would require delaying the hearing. Oracle does not seek this remedy, and in any case, it would not be warranted. I find that Oracle was not diligent in seeking to modify the schedule and reopen discovery. The motion to compel addition depositions is thus denied.

In the alternative, Oracle asks that any undisclosed witness be excluded from offering testimony at hearing, deeming it sharp litigation practices to assert a privilege until the eve of hearing only to waive it to present testimony from witnesses never disclosed to the opposing party. DM at 7-8. This motion is denied as well. Oracle has known for months that OFCCP would be identifying

witnesses for the first time during the pre-hearing exchanges. Significant steps were taken to cure any prejudice this would cause, with multiple orders compelling OFCCP to make fuller disclosure of its interview notes. The June 10, 2019, order left open the possibility of depositions, but Oracle did not diligently move to procure them.⁴

ORDER

Oracle's Motion to Compel the Depositions of the Persons OFCCP Intends to Call as Witnesses and Who OFCCP Refused to Identify Based on the Government Informants' Privilege or, in the Alternative, Motion in Limine No. 1 to Preclude the Testimony of those Witnesses is denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

⁴ If OFCCP improperly redacted the interview notes for the newly identified witnesses and Oracle can show that it has suffered actual, concrete prejudice due to this failure, some evidentiary remedy may be appropriate. However, the remedy Oracle seeks here is categorical and based on entirely hypothetical prejudice. OFCCP offered limited depositions and that seems like a reasonable means to resolve any further disputes.