U.S. Department of Labor

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

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

Issue Date: 18 October 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 ORACLE'S MOTION FOR A PROTECTIVE ORDER OR, IN THE ALTERNATIVE, TO STRIKE WITHOUT PREJUDICE TO SUBSEQUENT MOTIONS AND OBJECTIONS CONCERNING THE DISPUTED EXPERT MATERIALS

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 for Protective Order Preventing OFCCP from Introducing or Relying on Untimely Expert Analyses, or, in the Alternative, Motion to Strike ("Oracle's Motion" or "DM"), which is opposed by OFCCP.

For the reasons set forth below, Oracle's Motion is denied without prejudice to subsequent motions or objections concerning the disputed expert materials.

BACKGROUND

OFCCP alleges that Oracle engages in "widespread" discrimination at its headquarters facility against "women, Asians, and African Americas or Blacks in compensation." SAC at ¶ 11. Oracle denies these allegations. Based on the representations by both parties during the extensive motion practice, statistical evidence is an important part of this case. Both parties have conducted analyses, prepared expert reports, and intend to offer expert opinions in support of and opposition to dispositive motions and, if necessary, at hearing. Both parties appear to intend to file *Daubert* motions. After the case was reassigned to me and hearing was set, the parties negotiated a prehearing schedule, which was approved in a March 6, 2019, order. As relevant here, initial expert disclosures were due on July 19, 2019, rebuttal expert disclosures were due on August 16, 2019, and

expert discovery closed on August 30, 2019. On August 8, 2019, I approved a change to the prehearing schedule that extended the close of expert discovery to September 13, 2019.

Shortly before the planned depositions of the statistical experts, a medical issue arose concerning OFCCP's expert and the depositions were cancelled. The parties agreed that the pre-hearing schedule needed to be modified to account for this unexpected and unfortunate development, but disagreed about how the various deadlines would need to change. On September 24, 2019, after reviewing the submissions concerning OFCCP's expert and the proposed schedules of OFCCP and Oracle, I agreed that the pre-hearing scheduled needed to be modified, but declined to adopt the schedule proposed by either party. Instead, I imposed a new schedule that extended each of the dates, while retaining the original hearing dates. As relevant here, under that schedule—the schedule currently in force—expert discovery closed on October 11, 2019. Dispositive and *Daubert* motions must be filed by October 21, 2019. And, as has been the case since March 6, 2019, the deadline for initial expert disclosures was July 19, 2019, and the deadline for rebuttal expert disclosures was August 16, 2019.

Late in the afternoon on October 11, 2019, Oracle filed its Motion for Protective Order Preventing OFCCP from Introducing or Relaying on Untimely Expert Analyses, or, in the Alternative, Motion to Strike.[1] Oracle complains that OFCCP "has continued serving Oracle with statistical analyses from its expert Dr. Janice Madden after rebuttal reports were due." DM at 1. Oracle represents that OFCCP has served new expert analyses, backup data, and expert declarations, on October 3, 9, and 11, 2019. It states that some of the material had been created by September 5, 2019, but withheld until October and that OFCCP continued to produce more material while the expert depositions were proceeding and even during the deposition of Oracle's expert. *Id.* at 1, 4-5. It believes that OFCCP plans to submit additional declarations and analyses with the briefing on the dispositive motions. *Id.*

Oracle characterizes these additional analyses and declarations as unauthorized sur-rebuttal or post-rebuttal analyses, which are not provided for in the schedule. *Id.* at 1, 4. Oracle also contends that OFCCP has refused to meet and confer about the issue and asserts, "OFCCP's conduct is a flagrant, premeditated violation of the Court's scheduling order that severely prejudices Oracle and throws expert discovery into disarray." *Id.* at 1. Oracle alleges that OFCCP's conduct is prejudicial to Oracle because it makes OFCCP's expert's opinions into "moving targets," creating problems for the expert depositions, motion practice, and hearing preparation. *Id.* at 2.

As a remedy, Oracle asks that I issue "a protective order confirming that the Court's expert disclosure deadlines are final and barring OFCCP from introducing into evidence any of these untimely expert analyses, whether in support of a motion of at the hearing." *Id.* As alternative relief, Oracle asks that I "strike any untimely expert analyses OFCCP submits with its summary judgment or *Daubert* motions." *Id.* Given the impending summary decision and *Daubert* motion deadline, Oracle also asked that I rule on its motion on an expedited basis. *Id.*

Oracle's Motion was filed late on a Friday afternoon before a holiday weekend. No official action was possible until the following Tuesday. After reviewing the filing, I agreed that it was appropriate to attempt to decide the motion on an expedited basis before dispositive and *Daubert*

[1] Oracle's Motion is accompanied by a declaration from Erin Connell attaching eight exhibits, DX A-H, which mostly consist of emails between various representatives of the parties.

motions were due. On the morning of October 15, 2019, I issued an Order Setting Expedited Briefing Schedule. OFCCP was given until noon Pacific Time on October 17, 2019, to file any opposition. Oracle was not allowed any reply brief.

Shortly before noon on October 17, 2019, OFCCP filed an Opposition to Oracle's Motion for Protective Order, and in the Alternative Motion to Strike Re: Charts Prepared by OFCCP's Expert ("OFCCP's Opposition" or "PO").[2] OFCCP takes issue with Oracle's rendition of the history, asserting that Oracle "reneged" on an agreement to meet and confer later and instead made a "hyperbolic motion" that is "rife with legal and factual misrepresentations.[3] PO at 1. OFCCP declares that it has "fully complied with the parties' [sic] expert discovery scheduling order." *Id.*

OFCCP explains that its expert never had an opportunity to respond the critiques made in Oracle's expert's rebuttal report and thus produced "charts" doing so, which were provided to Oracle as soon as they were received. OFCCP represents that these charts "are not new opinions by Dr. Madden, do not reflect any new methodologies to analyze the data, or rely on new data [sic]." Some of the charts respond to Oracle's expert while others deal with hypotheticals that OFCCP wished to pose to Oracle's expert. *Id.* at 1-2. Even if the new charts are supplemental reports and opinions, OFCCP argues that they were provided as soon as they were finalized and before the close of expert discovery. *Id.* at 2. In addition, OFCCP contends that the Oracle's Motion is not the procedurally proper mechanism to object to evidence that may be offered either in a motion for summary decision or at trial. *Id.* at 2-3.

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.

The procedural rules in 41 C.F.R. part 60-30 do not address expert reports, but do give an ALJ expansive powers to regulate the course of the hearing and exclude evidence. *See* 41 C.F.R.

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[2] OFCCP's Opposition is accompanied by a declaration from Laura C. Bremer attaching eight exhibits, PX A-H. These include the initial and rebuttal expert reports and excerpts of depositions, as well as some of the new material. Portions of OFCCP's Opposition focus on assertions about the merits—which expert is more credible or what the evidence shows. *See* PO at 2-8. Those claims are irrelevant to the pending dispute and are ignored. Insofar as Oracle makes similar merits assertion, those claims are ignored as well. Additionally, I have not reviewed the content of the expert reports submitted with OFCCP's Opposition and have not considered how any report might bear on the merits of the complaint.

[3] OFCCP complains about the order requiring it to submit a brief by October 17, 2019, alleging that this deprived it of an opportunity to object to the procedural flaws and inaccuracies in the motion and "substantially" prejudices it. PO at 1. To the contrary, OFCCP was given a full opportunity to raise whatever procedural objections it wishes and to correct any inaccuracies—it has filed an opposition. OFCCP knew that Oracle had filed the motion on Friday, immediately when it was filed, and was given nearly a week to respond. It knew about the underlying issues much earlier, since these allegedly late disclosures have been a point of dispute since they were first made. Since it appeared appropriate to address the issue before *Daubert* and dispositive motions were due, it was necessary to impose a schedule allowing for an order to be issued on Friday. The schedule provided gave OFCCP almost the entirety of the available time.

§ 60-30.15. Federal Rule of Civil Procedure 26(a)(2) governs the disclosure of expert testimony. Parties must disclose the identity of any expert witness they intend to use at trial. Fed. R. Civ. P. 26(a)(2)(A). If the expert is one retained or specifically employed to provide expert testimony, the disclosure must be accompanied by a report that contains:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the facts or data considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed R. Civ. P. 26(a)(2)(B).

Rule 26(a)(2)(D) governs the time for the required disclosures:

> A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
> (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
> (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party [] within 30 days after the other party's disclosure.

Fed. R. Civ. P. 26(a)(2)(D). Rebuttal reports are limited to the same subject matter of the report being rebutted. *E.g. Scott v. Chipotle Mexican Grill, Inc.*, 314 F.R.D. 33, 44 (S.D.N.Y. 2016). As discussed above, in this case the parties negotiated and agreed to deadlines for the disclosure of initial and rebuttal expert reports and those deadlines were adopted as part of the pre-hearing scheduling order.

Oracle contends that the new expert analyses and materials violate the scheduling order in this case and are thus inadmissible. It argues that there is no good cause for modifying the disclosure deadlines and that in any case, OFCCP did not seek an amendment to those deadlines—it just served the materials. Oracle avers that the supposed need to rebut its expert's rebuttal report is not a basis for new analyses and that if OFCCP wanted its expert to have the ability to offer such a rebuttal or a rebuttal report, it should have agreed to or procured a different disclosure schedule. DM at 6-7. Oracle also argues that OFCCP cannot introduce these additional materials as "hypotheticals" or "additional details" as these are not permissible exceptions to the disclosure rules. While it acknowledges that expert reports may be supplemented when there is need to fix an incomplete or incorrect disclosure, it asserts that this is not what OFCCP is doing in the additional materials and that supplementation is not a means to evade expert disclosure deadlines. DM at 8-9.

OFCCP contends that the additional materials do not represent new opinions because Dr. Madden's ultimate opinions did not change. Rather, she ran new analyses taking into account some of the critiques of Oracle's expert, which "bolster" her opinions in the prior reports. PO at 5-6. It

asserts that this was necessary because of the opinions contained in Oracle's rebuttal expert report. *Id.* at 1-2. OFCCP argues that an expert may elaborate on and explain opinions in a prior without having to produce an additional report. It accuses Oracle of attempting to limit its expert to reading her report into the record. OFCCP further accuses Oracle of taking inconsistent positions by posing hypotheticals to experts while at the same time seeking to limit it from doing the same. *Id.* at 9-10.

The stated need for procuring and then producing the new materials is not an important consideration. There is a scheduling order in this case. It is based on the schedule OFCCP and Oracle proposed. 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).

Though OFCCP complains about the schedule in its opposition here, it never sought to modify the schedule as to the relevant deadlines: initial reports were due on July 19, 2019, and rebuttal reports were due on August 16, 2019. A party is not entitled to independently alter an order. If OFCCP determined that there was good cause for further reports, its remedy was to renegotiate the matter with Oracle and file a motion (opposed or unopposed) to alter the deadlines to add subsequent production of additional rebuttal reports. The predicament of not having an opportunity to produce a rebuttal to Oracle's rebuttal report should have been apparent to OFCCP when it negotiated the schedule. It would certainly have been obvious as soon as it received Oracle's rebuttal report. Yet no relief was sought.

OFCCP argues it is not seeking to alter the scheduling order; it is maintaining that it has complied with that order and that the new material produced is not a "report" that needed to be disclosed earlier. Expert disclosures must be supplemented as ordered or "if the party learns that in some material respect the disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e)(1); *see also* Fed. R. Civ. P. 26(a)(2)(E). This "duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures [] are due." Fed. R. Civ. P. 26(e)(2). Supplements, however, may not be used as a means to extend the deadline for the disclosure of expert reports. *In re C.F. Bean L.L.C.*, 841 F.3d 365, 371 (5th Cir. 2016) (citing *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 571 (5th Cir. 1996)); *see also In re Bear Stearns Co.*, 263 F. Supp. 3d 446, 451 (S.D.N.Y. 2017).

The question, then, would be whether or not this recently produced material qualifies as an expert report. OFCCP is correct that experts are not strictly limited to reading the contents of their report into the record—but it is incorrect insofar as it contends that so long as the ultimate opinion remains the same, later supplements do not qualify as reports. The rule provides what must be in a report, including "(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them…" Fed R. Civ. P. 26(a)(2)(B). Insofar as the material produced after the agreed final date for production of rebuttal reports adds new bases and reasons for the conclusions etc., it would appear to be a new report including new analyses.

OFCCP resists this line of reasoning, and resolution would turn on exactly what OFCCP submits in motion practice or attempts to offer into evidence. There is no need to pursue the point further, however, since I find that there is no appropriate remedy that can be provided at this juncture and based on the present submissions.

Oracle asks for a protective order "barring OFCCP from disclosing, introducing, or otherwise relying on any expert analyses, opinions, or conclusions served after August 16, 2019." DM at 11-12. Oracle contends that these additional analyses are prejudicial because this is a complex case and responding to new evidence creates "logistical burdens and expense." Oracle avers that the shifting evidence also inhibits proper motion practice under the pre-hearing schedule, for instance thwarting any *Daubert* motions because Oracle is forced to respond to reports that OFCCP has not yet produced. Oracle also alleges prejudice in having to respond to dispositive and other motions that OFCCP may file based on evidence that is being produced for the first time with the motion. *Id.* at 10-11. If this is not granted, Oracle asks that I "strike any improper and untimely expert opinions, analyses, charts, or reports (including but not limited to the charts OFCCP disclosed on October 3 and 9) that are filed with OFCCP's summary judgment and *Daubert* motions." *Id.* at 11.

OFCCP responds that a protective order is not a proper remedy in this circumstance and that Oracle has not produced any case where a court issued a protective order to exclude expert opinions/reports/testimony. PO at 10. OFCCP is correct. The relevant rule provides that "[a] party or any person from whom discovery is sought may move for a protective order . . . [and] [t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Protective orders may, among other things, forbid disclosure or discovery, specific the terms and time of disclosure or discovery, and limiting the scope of disclosure or discovery. Fed. R. Civ. P. 26(c)(1); *see also* 29 C.F.R. § 18.52(a).

Oracle is seeking to forbid further disclosures, but it is also seeking to exclude evidence. Moreover, in this instance, Oracle is not a "party [] from whom discovery is sought." It is the party receiving material from OFCCP. Oracle is not seeking protection from disclosure of its information or limitations on the use of that information, etc.; it is seeking to prevent OFCCP from disclosing OFCCP's information. Oracle has not pointed to cases where a protective order was used to prospectively exclude evidence and prohibit voluntary disclosures of material to a party-opponent. Nor am I in a position to grant a motion to strike. OFCCP has not submitted any exhibits or declarations with a motion for summary decision (or opposition to such a motion). At this point, there is nothing in the record for me to strike.

Despite the framing in the motion at times, Oracle isn't so much complaining about being sent material by OFCCP—it is complaining that OFCCP is telegraphing that it will be submitting evidence (as exhibits to motions/oppositions or at the hearing) that Oracle believes was not properly disclosed under the applicable rules and scheduling order in this case. When a party fails to comply with the rules governing expert disclosure, "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Cir. P. 37(c)(1). Other appropriate sanctions may be imposed in addition to or in lieu of exclusion. *Id.* Exclusion is a self-executing, automatic sanction, unless the party opposing the sanction shows that the failure to disclose was substantially justified or harmless. *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir. 2008); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-07 (9th Cir. 2001).

Considering the nature of the relief Oracle seeks, the pending motion is properly understood as a motion in limine seeking the prospective exclusion of any evidence of the sort Oracle complains of, or testimony about that evidence. OFCCP takes Oracle to be filing this sort of early motion in limine to exclude evidence. But it argues that Oracle has not shown why "ordinary methods" of challenging evidence, to include objections to evidence in a summary decision motion, ordinary motions in limine, and objections at the hearing are not the proper means to bring its objections. It adds that Oracle is "flout[ing]" the scheduling order by bringing such a motion. Last, it argues that Oracle has insufficiently specified the evidence it seeks to exclude. PO at 10-12. As to the merits of such a motion, OFCCP contends that the cases Oracle cites differ factually from the present situation and that exclusion is inappropriate because the opinions did not change. It further argues that Oracle has not shown the harm it would suffer from the materials at issue, other than the self-imposed harm of declining to depose Dr. Madden about the material. *Id.* at 12-15.

As a motion in limine to exclude evidence, it is premature and insufficiently described. The parties talk about the materials in question in various ways, but given the submissions, I am not entirely sure what exactly I would be excluding. The question may turn, at least in part, in the proper characterization of whatever materials OFCCP is going to offer and that Oracle seeks to exclude. It would also turn on an analysis of whether exclusion is the appropriate sanction if there has been a violation.

OFCCP has not yet offered any evidence, so it is difficult to make determinations about exclusion. If OFCCP attaches material to its dispositive motion that Oracle believes should be excluded as an untimely expert report, it can make appropriate objections at that time. Once it is clearer what OFCCP is offering into evidence, Oracle can file a more well-defined motion in limine if necessary that can be adjudicated in a more concrete fashion.

ORDER

Defendant Oracle's Motion for Protective Order Preventing OFCCP from Introducing or Relying on Untimely Expert Analyses, or, in the Alternative, Motion to Strike is denied without prejudice to subsequent timely motions and objections concerning the disputed expert materials.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge