

**UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS, UNITED  
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DECLARATION OF  
WARRINGTON PARKER IN  
SUPPORT OF DEFENDANT  
ORACLE AMERICA, INC.'S  
MOTION FOR ENTRY OF  
PROTECTIVE ORDER, OR, IN  
THE ALTERNATIVE, FOR  
ORDER THAT PROTECTIVE  
ORDER IS IN EFFECT PENDING  
RESOLUTION OF ISSUES  
CONCERNING PROTECTIVE  
ORDER**

I, Warrington Parker, declare as follows:

1. I am an attorney duly admitted to practice in the State of California. I am a partner at the law firm of Orrick, Herrington & Sutcliffe LLP, attorneys of record for Defendant Oracle. I make this declaration on personal knowledge, and, if sworn as a witness, could competently testify to the following facts as set forth below.

2. On May 26, 2017, Administrative Law Judge Christopher Larsen issued a Protective Order governing discovery in the instant matter. A true and correct copy of the Protective Order is attached hereto as **Exhibit A**.

3. On May 19, 2017, Oracle and Plaintiff, Office of Federal Contract Compliance Programs (“OFCCP”), submitted a Joint Letter to Judge Christopher Larsen regarding the parties’ respective positions concerning a Protective Order governing discovery in the instant matter. A true and correct copy of the May 19, 2017 Joint Letter is attached hereto as **Exhibit B**.

4. On May 24, 2017, Plaintiff sent an email correspondence regarding discovery in the instant matter being governed by Judge Larsen’s then-pending May 26, 2017 Protective Order. A true and correct copy of the May 24, 2017 email correspondence is attached hereto as **Exhibit C**.

5. On October 15, 2018, Judge Larsen issued an Order granting Oracle’s Motion to Reassign the instant matter. The October 15, 2018 Order is attached hereto as **Exhibit D**.

6. Pursuant to 29 C.F.R. § 18.52(a) and this Court’s February 6, 2019 Order, the undersigned hereby certifies that the movant has in good faith conferred with the OFCCP, engaging in written and verbal discussion, in an effort to resolve the dispute prior to seeking court intervention. First, the parties engaged in written discussion.

7. On January 31, 2019, Plaintiff sent a letter to Oracle responding to Oracle's January 24, 2019 letter to Plaintiff regarding Plaintiff's obligations under the Protective Order in the instant matter. A true and correct copy of the January 31, 2019 letter is attached hereto as **Exhibit E**.

8. On January 24, 2019, Oracle sent a letter to Plaintiff regarding Plaintiff's obligations under the Protective Order in the instant matter. A true and correct copy of the January 24, 2019 letter is attached hereto as **Exhibit F**.

9. On February 4, 2019, Oracle sent a letter to Plaintiff regarding Plaintiff's obligations under the Protective Order in the instant matter. A true and correct copy of the February 4, 2019 letter is attached hereto as **Exhibit G**.

10. On February 6, 2019, Plaintiff sent Oracle a letter regarding meeting and conferring with Oracle with respect to the Protective Order in the instant matter. A true and correct copy of the February 6, 2019 letter is attached hereto as **Exhibit H**.

11. On February 7, 2019, Plaintiff sent an email correspondence to Oracle regarding issues with respect to the Protective Order in the instant matter. A true and correct copy of the February 7, 2019 e-mail correspondence is attached as **Exhibit I**.

12. Next the parties engaged in a verbal meet-and-confer discussion on February 13, 2019. The parties' positions at that meet-and-confer discussion are set forth in an email sent that same day. On February 14, 2019, the parties continued to meet and confer by email. A true and correct copy of the email that reflects the verbal meet and confer and the follow up on February

14, 2019 is attached hereto as **Exhibit J**.

I declare under penalty of perjury under the laws of the United States and California that the foregoing is true and correct.

Executed on February 14, 2019, at San Francisco, California.

A handwritten signature in blue ink is written over a horizontal line. The signature is stylized and appears to be 'Warrington Parker'.

Warrington Parker

# EXHIBIT A



Issue Date: 26 May 2017

CASE NO.: 2017-OFC-00006

*In the Matter of:*

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

vs.

ORACLE AMERICA, INC.,  
*Defendant.*

### PROTECTIVE ORDER

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, and associated regulations at 41 C.F.R. Chapter 60. It is currently set for hearing in San Francisco, California, on June 26, 2018.

The parties have met and conferred with respect to issuance of a Protective Order in this matter. The court, having considered the stipulations and arguments of the parties,<sup>1</sup> orders:

#### 1. PURPOSES AND LIMITATIONS

Discovery activity in this action may involve production of confidential, trade secret, or private information for which public disclosure may not be warranted. This Order does not confer blanket protections on all disclosures or responses to dis-

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<sup>1</sup> The parties disagree on paragraph 7.1 of their Proposed Stipulated Protective Order, which would limit the use of "Protected Material" only to "prosecuting, defending, or attempting to settle this action," with certain exceptions. The court concludes that Oracle's cited authorities, including the Fourth Amendment, restrain the government's ability to acquire information in the first place, rather than limiting the use of that information once the government has acquired it. Therefore, in issuing this order, the court neither limits nor extends OFCCP's authority, as otherwise provided under law, to use "Protected Material" it has properly obtained in compliance with this Protective Order. The court accordingly excises most of paragraph 7.1 and all of paragraph 7.2, subsection (g), as they appear in the Proposed Stipulated Protective Order.

covery. The protection it affords from public disclosure and use extends only to the information or items that are entitled to protection under applicable legal principles. This Protective Order cannot, and therefore does not, afford protections inconsistent with any statute (*e.g.*, the Freedom of Information Act and the Records Disposal Act), regulation, or other law.

This Protective Order does not entitle the parties to file confidential information under seal. A party designating material as confidential must seek permission from the court to have its material designated as confidential filed under seal.

## 2. DEFINITIONS

2.1 Challenging Party: a party that challenges the designation of information or items under this Order.

2.2 "CONFIDENTIAL" Information or Items: information (regardless of how it is generated, stored, or maintained) or tangible things that, based on the Designating Party's good faith belief, may be subject to Freedom of Information Act ("FOIA") Exemptions 4 or 6, 5 U.S.C. § 552(b)(4) or (6).

2.3 Counsel: any attorney serving as legal counsel for a party, as well as their support staff.

2.4 Designating Party: a Party that designates information or items that it produces in disclosures or in responding to discovery as "CONFIDENTIAL."

2.5 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter.

2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action.

2.7 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action.

2.8 Party: either Party, meaning the Office of Contract Compliance Programs ("OFCCP") and Oracle America, Inc. ("Oracle"), (collectively "Parties") including any officers, directors, employees, consultants, and Counsel (and their support staffs).

2.9 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this action.

2.10 Professional Vendors: persons or entities that provide litigation support services (e.g. photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

2.11 Protected Material(s): any Disclosure or Discovery Material that is designated as "CONFIDENTIAL."

2.12 Receiving Party: a Party that received Disclosure or Discovery Material from a Producing Party.

### 3. SCOPE

This Order covers not only Protected Material (as defined above), but also (1) all copies, excerpts, summaries, compilations of, or written materials containing Protected Material, and (2) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material. However, this Order does not cover the following information: (a) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; and (b) any information known to the Receiving Party before the disclosure in this proceeding by means other than through the Designating Party's production in the underlying compliance evaluation or obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party. Any use of Protected Material at a hearing on a dispositive motion or the final hearing shall be governed by a separate agreement or order.

### 4. DURATION

Even after final disposition of this litigation, the confidentiality obligations imposed by this Order remain in effect unless a Designating Party agrees otherwise, an order otherwise directs, or a subsequent change in the law or regulation provides otherwise. If Counsel become aware of a change in law or regulation that affects the terms of this provision during the pendency of this litigation, such Counsel will advise Counsel for the other Party. Final disposition is the later of (1) dismissal of all claims and defenses in this action, with or without prejudice; or (2) final judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including the time limits for filing any motions or applications for extension of time under applicable law.

## 5. DESIGNATING PROTECTED MATERIAL

5.1 Designating Material for Protection. Each Party that designates information or items for protection under this Order must take care to limit any such designation to material that qualifies under the appropriate standards. Mass, indiscriminate, or routinized designations are prohibited. If it comes to a Designating Party's attention that information or items that it designated for protection do not qualify for protection, the Designating Party must promptly notify the other Party that it is withdrawing the mistaken designation.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order or as otherwise stipulated or ordered, Disclosure and Discovery Material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

(a) for information in discovery form (e.g., paper or electronic documents, but excluding transcripts of depositions or other pretrial or trial proceedings), to the extent practicable, that the Producing Party affix the legend "CONFIDENTIAL" to each page that contains protected material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party will make reasonable efforts clearly to identify the protected portion(s). A Party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copies and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed "CONFIDENTIAL." After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order. Then, before producing the specified documents, the Producing Party must affix the "CONFIDENTIAL" legend to each page that contains Protected Material.

(b) for testimony given in deposition or in other pretrial or trial proceedings, that the Designating Party identify all protected testimony on the record at the time of testimony or in a written notice served on all parties within 14 days of delivery of the final transcript.

(c) for information produced in some form other than documentary, including the production of electronic files in native format that cannot be marked as "CONFIDENTIAL," and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the medium or container in which the information or item is stored the legend "CONFIDENTIAL." If only a portion or portions of the information or item warrant protection, the Producing Party shall make reasonable efforts to identify the protected portion(s).

5.3 Inadvertent Failure to Designate. If timely corrected, meaning corrected as soon as practicable after discovered, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with this Order.

5.4 Designations of Material Produced by Another Party. If any Party in good faith deems material it provided in the underlying compliance evaluation that is produced by another Party in this litigation to constitute "CONFIDENTIAL" information as defined in this Protective Order, it may timely designate such material, meaning designated as soon as practicable after discovered. Upon such timely designation, the Parties must make reasonable efforts to assure that the material is treated in accordance with this Order.

## 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party may challenge a designation of confidentiality at any time. A Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party initiates the dispute resolution process by providing written notice of each designation it is challenging and providing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made under this specific paragraph of this Order. The Parties must attempt to resolve each challenge in good faith and must begin the process by conferring within 14 days of the date of service of the notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to the next stage of the challenge process only if it has first engaged in this meet-and-confer process, or establishes that the Designating Party is unwilling to participate in the meet-and-confer process in a timely manner.

6.3 Judicial Intervention. If the Parties cannot resolve a challenge without the ALJ's intervention, the Designating Party may file and serve a motion to retain confidentiality within 21 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet-and-confer process will not resolve their dispute, whichever is earlier, unless the Parties agree to extend this time period. Each such motion must be accompanied by a competent declaration affirming that the movant has complied with the meet-and-confer requirements imposed in the preceding paragraph. Failure by the Designating Party to make such a motion including the re-

quired declaration within the time indicated by this paragraph, or as otherwise agreed by the Parties, automatically waives the confidentiality designation for each challenged designation. In addition, the Challenging Party may file a motion challenging a confidentiality designation within the time indicated by this paragraph, or as otherwise agreed by the Parties, including a challenge to the designation of a deposition transcript or any portions thereof. Any motion brought under this provision must be accompanied by a competent declaration affirming that the movant has complied with the meet-and-confer requirements imposed by the preceding paragraph.

The burden of persuasion in any such challenge proceedings is on the Designating Party. Unless the Designating Party has waived the confidentiality designation by failing to file a motion to retain confidentiality as described above, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation until the ALJ rules on the challenge.

The procedures set forth in this Section 6 do not apply to responses to requests for information under FOIA, which are governed by Section 9 below.

## 7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Storage of Protected Material. Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures access is limited to the persons authorized under this Order.

7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered by the ALJ or permitted in writing by the Designating Party, in addition to the individuals encompassed by the definition of Receiving Party above, a Receiving Party may disclose any information or item designated "CONFIDENTIAL" only to:

- (a) the ALJ and her or his personnel;
- (b) court reporters and their staff to whom disclosure is reasonably necessary for this litigation;
- (c) experts (as defined in this Order), professional jury or trial consultants, mock jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" in the form attached as Exhibit "A" to the "[Proposed] Stipulated Protective Order" which the Parties submitted to the court on May 19, 2017.
- (d) witnesses or potential witnesses in the action who have not been or applied to be Oracle employees to whom disclosure is reasonably necessary for this litigation, unless otherwise ordered by the ALJ, and who have signed the "Acknowledgment and Agreement to Be Bound" in the form attached as Exhibit "A" to the

"[Proposed] Stipulated Protective Order" which the Parties submitted to the court on May 19, 2017.

(e) witnesses or potential witnesses in the action who have been or applied to be Oracle employees to whom disclosure is reasonably necessary for this litigation, unless otherwise ordered by the ALJ, and who have signed the "Acknowledgment and Agreement to Be Bound" in the form attached as Exhibit "B" to the "[Proposed] Stipulated Protective Order" which the Parties submitted to the court on May 19, 2017.

(f) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information; and

(g) recipients to whom disclosure is required by law, regulation, or court order.

Nothing in this Protective Order limits or is intended to limit the way a Party uses its own Protected Material.

#### 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as "CONFIDENTIAL," that Party will (1) promptly notify in writing the Designating Party (and such notification must include a copy of the subpoena); (2) promptly notify in writing the party that caused the subpoena or other order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order (and such notification must include a copy of this Protective Order); and (3) cooperate in good faith with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected. If the subpoena is served on OFCCP or its agents, the agency will follow the procedures for handling such subpoenas set forth at 29 C.F.R. §§ 2.20-2.25 in responding to the subpoena. To the extent permitted by law and regulation, where the Designating Party timely seeks a protective order in the proceedings from which the subpoena arose, the Party served with the subpoena or court order shall not produce any information designated in this action as "CONFIDENTIAL" before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party's permission. The Designating Party bears the burden and expense of seeking protection in that court of its confidential material, and nothing in this Order authorizes or encourages a Receiving Party in this action to disobey a lawful directive from another court.

## 9. PROTECTED MATERIAL REQUESTED UNDER THE FREEDOM OF INFORMATION ACT

If OFCCP or OFCCP's Counsel receive a request under FOIA that seeks Protected Material, OFCCP or OFCCP's Counsel shall respond consistent with the U.S. Department of Labor's rules for processing requests for records under FOIA, 29 C.F.R. Part 70. With respect to material marked in good faith as CONFIDENTIAL, OFCCP shall follow the procedures set forth at 29 C.F.R. § 70.26 before any disclosure is made under FOIA.

## 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures; (b) use its best efforts to retrieve all unauthorized copies of the Protected Material; (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order; and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" in the form attached as Exhibit "A" to the "[Proposed] Stipulated Protective Order" which the Parties submitted to the court on May 19, 2017. If the person or persons to whom unauthorized disclosures were made refuses to execute the "Acknowledgement and Agreement to Be Bound," or otherwise to comply with this Protective Order, and judicial intervention is required, the Receiving Party will, at its own expense, use its best efforts to maintain the protection of the improperly-disclosed material.

## 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Protected Party gives notice to Receiving Parties that certain inadvertently-produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in 29 C.F.R. § 18.51(e)(2), which is adopted by reference. This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Under Federal Rule of Evidence 502, and by agreement of the Parties, no Party shall be deemed to have waived claims of privilege as a result of production in this matter.

## 12. MISCELLANEOUS

12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the ALJ or any court in the future.

12.2 Right to Assert Other Objections. No Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

12.3 Filing Protected Material. If a Receiving Party intends to file with the Office of Administrative Law Judges ("OALJ") briefs, exhibits or other materials containing material designated "CONFIDENTIAL" by the opposing Party, the Receiving Party must give notice both to the Producing Party, and to this court, of the filing of the document at the time of filing or before.

If the Designating Party seeks to have the Protected Material sealed, the Designating Party must file a motion to seal under 29 C.F.R. § 18.85(b) within ten business days of the filing of the Protective Material.

A motion under this provision is not subject to the Court's pre-filing requirement.

### 13. FINAL DISPOSITION

Following final disposition of this case, as defined in paragraph 4 above, Protected Materials in OFCCP's possession must be maintained and disposed of under the Federal Records Disposal Act, 44 U.S.C. §§ 3301, *et seq.*; any applicable regulations promulgated thereunder; and any other applicable law. Pending disposal of the records, the confidentiality obligations imposed by this Order remain in effect consistent with Paragraph 4 (DURATION).

SO ORDERED.



Digitally signed by John C. Larsen  
DN: CN=John C. Larsen,  
OU=Administrative Law Judge, O=US  
DOL, Office of Administrative Law  
Judges, L=San Francisco, S=CA, C=US  
Location: San Francisco CA

CHRISTOPHER LARSEN  
Administrative Law Judge

SERVICE SHEET

Case Name: OFCCP\_v\_ORACLE\_AMERICA\_INC\_

Case Number: 2017OFC00006

Document Title: **Protective Order**

I hereby certify that a copy of the above-referenced document was sent to the following this 26th day of May, 2017:



Digitally signed by VIVIAN CHAN  
DN: CN=VIVIAN CHAN, OU=LEGAL  
ASSISTANT, O=US DOL Office of  
Administrative Law Judges, L=San  
Francisco, S=CA, C=US  
Location: San Francisco CA

**VIVIAN CHAN**  
LEGAL ASSISTANT

Gary Siniscalco, Esq  
Orrick, Herrington & Sutcliffe, LLP  
The Orrick Building  
405 Howard Street  
SAN FRANCISCO CA 94105-2669  
*{Hard Copy - Regular Mail}*

Office of Federal Contract Compliance Programs  
U. S. Department of Labor  
Room C-3325, FPB  
200 Constitution Ave., N.W.  
WASHINGTON DC 20210  
*{Hard Copy - Regular Mail}*

CSC-Lawyers Incorporating Service  
Registered Agent for Oracle America, Inc.  
2710 Gateway Oaks Drive, Suite 150N  
SACRAMENTO CA 94065  
*{Hard Copy - Regular Mail}*

U. S. Department of Labor  
Office of the Solicitor  
Room S-2002, FPB  
200 Constitution Ave., N.W.  
WASHINGTON DC 20210  
*{Hard Copy - Regular Mail}*

Regional Solicitor  
U. S. Department of Labor  
Suite 3-700  
90 Seventh Street  
SAN FRANCISCO CA 94103-1516  
*{Hard Copy - Courier}*

Associate Solicitor  
Civil Rights Division  
U. S. Department of Labor  
Suite N-2464, FPB  
200 Constitution Ave., N.W.  
WASHINGTON DC 20210  
*{Hard Copy - Regular Mail}*

# EXHIBIT B

May 19, 2017

**VIA HAND DELIVERY**

Hon. Christopher Larsen  
United States Department of Labor  
Office of Administrative Law Judges  
Federal Building  
90 Seventh Street, Room 4-815  
San Francisco, CA 94103-1516

Re: *OFCCP v Oracle America, Inc.*  
OALJ Case No. 2017-OFC-00006

Dear Judge Larsen:

Pursuant to the Court's Order After Pre-Hearing Conference dated May 10, 2017, Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") and Defendant Oracle America, Inc. ("Oracle") write jointly to notify the Court that the parties have largely reached an agreement as to the scope of a protective order, with the exception of one issue about which the parties have extensively met and conferred and remain unable to reach an agreement. Attached to this letter is Oracle's proposed protective order with OFCCP's proposed edits identified in tracked changes. This letter sets forth the parties' respective position on the disputed issue below, and the parties submit this remaining disputed issue to the Court for resolution.

**PARAGRAPH 7.1: OFCCP'S ABILITY TO USE CONFIDENTIAL INFORMATION OBTAINED IN THIS CASE FOR PURPOSES OTHER THAN PROSECUTING, DEFENDING, OR ATTEMPTING TO SETTLE THIS ACTION**

**Oracle's Position**

Oracle's proposed protective order contains a standard provision, at paragraph 7.1, that confidential information produced in this action be used "only for prosecuting, defending or attempting to settle this action," except where disclosure is required by law. This provision is based on the Northern District of California's model, which the parties used as a template (except where OFCCP took the position that federal law required a change or the parties agreed a change was appropriate, neither of which is the case here). This provision is necessary to ensure that OFCCP cannot circumvent the procedural and constitutional safeguards that apply to other OFCCP compliance evaluations for the sake of "efficiency." OFFCP's arguments to the contrary misstate the actual effect of the provision and ignore the fact that virtually identical provisions

Hon. Christopher Larsen  
May 19, 2017  
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are commonplace in similar cases involving government agencies, including the Department of Labor and the EEOC.

Although Oracle agreed to two exceptions to the scope of paragraph 7.1 as part of the parties' negotiations,<sup>1</sup> OFCCP nevertheless will not agree to the rest of this provision, on the basis that OFCCP wants to use confidential information produced by Oracle in this litigation in any other audit or litigation of its choice. Notably, despite Oracle's request, OFCCP has provided no authority to support any entitlement to such a sweeping ability to freely use confidential information obtained in one matter in connection with other matters.

Oracle's proposed provision would not hamper OFCCP's ability to *disclose* Oracle's confidential information with OFCCP employees or its counsel, including those with no involvement in this litigation or the underlying audit. (See Paragraph 2.8 of the proposed protective order, defining a "Party" to whom Protected Material may be disclosed). The provision merely bars OFCCP from *using* the confidential information produced in this action in other open, pending or future OFCCP compliance evaluations, claims, or litigation.

Indeed, provisions like the one at issue here are commonplace, and constitute one of the primary reasons parties enter into protective orders. In fact, both the DOL and the EEOC have entered into protective orders with similar provisions in the recent past. *See, e.g., EEOC v. Sterling Jewelers*, W.D.N.Y. Case No. 08-CV-0706 (Dkt. No. 206) at ¶ 10 ("Confidential Information as defined herein, disclosed by a Producing Party to any Receiving Party, may be used solely for purposes of this action or the Arbitration Proceeding(s) from the arbitrator."); *Edward C. Hugler, Acting Secretary of Labor v. Himanshu Bhatia*, C.D. Cal. Case No. 8:16-cv-01548-JVS-JCG (Dkt. No. 29) (Exh. H to Connell Decl. filed in support of Mot. for Protective Order "Connell Decl." at p. 8, ¶ 7.1 ("A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this Action only for prosecuting, defending, or attempting to settle this Action."); *Thomas E. Perez, Sec'y of Lab. v. Vesuvio's Pizza*, M.D.N.C. Case No. 1:15-cv-00519-LCB-LPA (Dkt. No. 30-1) Exh. H. to Connell Decl. at p. 17, ¶ 1 ("By entering into this SPO, the Secretary and his counsel and the

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<sup>1</sup> These exceptions provide that "OFCCP may share Protected Material with (1) the Equal Employment Opportunity Commission (EEOC) to the extent required pursuant to the Memorandum of Understanding between the Department of Labor and the EEOC and (2) any other federal agency where disclosure is required by law, provided that the EEOC and/or other federal agency is provided a copy of this Protective Order prior to receipt of the Protected Material."

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Defendants and their counsel shall only use information and/or documents disclosed pursuant to this SPO for purposes of litigating this action . . .”). There is no reason for a departure from that practice here.

Not only are similar provisions frequently agreed to in cases like this, but to allow the Agency unlimited use of Oracle’s confidential information to bolster its investigations into other establishments would be inconsistent with the governing regulations and ignores OFCCP’s constitutional obligations. OFCCP’s regulations provide for establishment-based reviews. The regulations require “a contractor establishment” to develop a written affirmative action plan. . .” (41 CFR 60-1.12 (b)), provide for a desk audit of that AAP (41 CFR 60-1.20 (a)(1)(i)), and allow an onsite review, conducted at the contractor’s “establishment.” 41 CFR 60-1.25 (a)(1)(ii). In reviewing the Agency’s efforts to obtain documents from a contractor during an establishment audit, “[t]he critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.” *Reich v. Montana Sulphur*, 32 F.3d 440, 444 (9th Cir. 1994). “Even if the test is met, a Fourth Amendment ‘reasonableness’ inquiry must also be satisfied.” *Id.* at 444 n. 5; *see also United Space Alliance v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011) (OFCCP’s compliance with its Fourth Amendment obligations is a prerequisite for it to begin an audit or seek information from a contractor). The Fourth Amendment requires that the request be “limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome.” *Donovan v. Lone Steer*, 464 U.S. 408, 415 (1984). These requirements afford protection “for a subpoenaed employer by allowing him to question the reasonableness of the subpoena” through judicial review. *Id.*

These regulations and the Fourth Amendment set forth the confines of OFCCP’s authority and limit the scope of its investigative power to a particular establishment. If OFCCP and a contractor cannot agree that the request is reasonable, OFCCP may bring a denial of access case pursuant to the expedited proceedings provisions in 41 CFR 60-30.31. OFCCP’s unsupported insistence that it may freely use the confidential information produced in this action in any other audit or action of its choice is tantamount to proclaiming that it may exceed the scope of its regulatory authority, and to insisting that Oracle waive in advance its Fourth Amendment rights in every other audit or action OFCCP pursues.

To be clear, Oracle’s concern about this issue is not an abstract one. OFCCP has scheduled more than **40** separate compliance evaluations of separate Oracle facilities since early 2013, and several of those compliance reviews remain open today. The

Hon. Christopher Larsen  
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instant matter emanates from single establishment review where OFCCP scheduled and limited its review to Oracle's Redwood Shores facility. Now, OFCCP demands unfettered use of any confidential document Oracle produces in this litigation for use in any pending and any future separate and distinct audits. But OFCCP's regulations and the Fourth Amendment clearly confine audits to specific establishments and require that OFCCP meet its obligation to establish that its requests are relevant to the specific matter at issue and not unreasonable. Further, the Fourth Amendment affords Oracle the opportunity to object to an unreasonable request and OFCCP's recourse is to seek a remedy by way of an access case, where the disputed issue will be fairly adjudicated by an ALJ. Allowing OFCCP unfettered authority to use the documents gained in discovery here in other matters would permit the Agency to bypass the limits placed on it by its regulations and the Fourth Amendment and provide no recourse for Oracle.

In its Opposition to Oracle's Motion for Protective Order, as well as in the parties' meet and confer, OFCCP presented two arguments (neither supported by any authority) to support its position that it should be free to use confidential information in other matters. First, OFCCP stated that it would not impose any "burden" on Oracle since the information is already in OFCCP's possession. This glib response is beside the point. The regulations and Fourth Amendment require not only that information sought by an administrative agency not be unduly burdensome for the other party to produce, but also that the information be *relevant to the matter at issue*. See *Reich*, 32 F.3d at 444 (evidence must be "relevant and material to the investigation"). The vast majority of the confidential information that Oracle has and will produce in this matter is comprised of data involving employees *at the Redwood Shores facility* –the particular establishment at issue in the underlying audit. Before OFCCP attempts to utilize that establishment-specific confidential information in other audits – for example, by aggregating that data with other data to support a finding of violation – Oracle is entitled to contest whether that data is relevant for the matter under review.

Second, OFCCP argued that it should be able to use confidential information obtained in this litigation in other compliance reviews or audits because otherwise the protective order would "stop the Agency from talking to itself and sharing information critical for efficiently completing its mission." As an example, OFCCP postulates that, under Oracle's proposed paragraph 7.1, if an Oracle compensation official admitted to discriminating in setting compensation nationwide, OFCCP would be "entirely unable to share this clearly relevant information with itself in relation to other reviews." OFCCP is wrong. First, it is unclear how the hypothetical admission that Oracle discriminates nationally would be subject to the protective order at all. Second, and more fundamentally, the protective order does not preclude OFCCP from internal sharing of information or from the benefits it gains to its collective knowledge; it precludes only actual use

in other cases of the specific confidential information produced in this case. The confidential information produced in this case may not be relevant, appropriate, or admissible in other compliance evaluations or litigation depending on the facts of those cases, and Oracle has a constitutional right to the appropriate notice and process in each separate case. Clearly, given that it is commonplace for the EEOC and other government agencies to enter into protective orders with similar provisions restricting use of confidential information to the matter in which it was produced, government agencies are capable of “completing their mission” without exceeding their regulatory authority or bypassing private parties’ constitutional rights.

### **OFCCP’s Position**

OFCCP has worked diligently to fashion a stipulated protective order that complies with federal law and satisfies Oracle’s goals of protecting its proprietary information and its employees’ private information. However, Oracle’s proposed restriction on OFCCP’s *internal* use of purportedly confidential material to this case only serves none of these purposes. OFCCP cannot agree to this restriction, which prevents OFCCP from doing its job and serves only to shield Oracle from potential additional liability.

First, Oracle’s use restriction impedes OFCCP’s law enforcement efforts. For instance, if OFCCP unearthed an email detailing how a manager discriminated against an employee based on religion, Oracle’s restriction would bar OFCCP from using that email to initiate a new enforcement proceeding to vindicate that employee’s rights. Similarly, if OFCCP discovered in this case—which involves Oracle’s headquarters—that Oracle employs a nationwide practice that depresses women’s compensation relative to men, Oracle’s proposed use restriction would bar OFCCP from using that evidence in its reviews of Oracle’s other establishments. To vindicate employees’ rights, under the use restriction, OFCCP would need to seek Oracle’s blessing to use such evidence for these other purposes. Such a procedure would place the fox in charge of the investigative and enforcement henhouse, undermining OFCCP’s ability to perform its mission.

Second, Oracle’s use restriction would be costly in both time and money. As Oracle has acknowledged, OFCCP currently has a number of other open reviews against Oracle. OFCCP, like the rest of the federal government, must operate as efficiently as possible to maximize the limited taxpayer-funded resources it has. To that end, OFCCP coordinates its enforcement efforts, including through coordinating its teams and resolving multiple compliance evaluations and other proceedings against a single employer in a global fashion.<sup>2</sup> Oracle’s proposed use

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<sup>2</sup> See, e.g., Press Release, Mar. 22, 2012, *available at* <https://www.dol.gov/opa/media/press/ofccp/OFCCP20120507.htm> (resolution of violations across 22 facilities); Press Release, Nov. 19, 2015, *available at* <https://www.dol.gov/opa/media/press/ofccp/OFCCP20152242.htm> (global resolution of facilities across country).

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restriction would prevent such cost-saving coordination efforts, putting in place what would amount to be an adversarial and invasive procedure over how OFCCP processes information in its possession.

To justify its restriction, Oracle has only invoked the Fourth Amendment and an OFCCP regulation. However, as explained further below, the Fourth Amendment—which protects against unreasonable searches and seizures—does not restrict how the government uses information it obtains, so long as that information is obtained lawfully. Nor is Oracle’s use restriction mandated by the requirement that contractors give OFCCP access to information that “may be relevant” to a compliance evaluation. 41 C.F.R. § 60-1.43. The regulation’s plain language governs what a contractor must give OFCCP; it does not restrict, as Oracle argues, OFCCP’s use of information. Moreover, the Eighth Circuit rejected a similar argument made against the Equal Employment Opportunity Commission (“EEOC”) over three decades ago. *See Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 905-906 (8th Cir. 1979) (obtaining information through OFCCP does not circumvent statute defining EEOC’s entitlement to information). Indeed, § 60-1.43 expressly authorizes OFCCP to use information it obtains to enforce any law within its jurisdiction and can be shared to enforce Title VII, which is outside of OFCCP’s jurisdiction.

Oracle’s desire to limit its liability through its use restriction does not constitute the requisite good cause to tie OFCCP’s hands and restrict use of purportedly confidential evidence to this case only. *See Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211-12 (9th Cir. 2002) (moving party “bears the burden of showing specific prejudice or harm will result if no protective order is granted”). The Court should thus reject Oracle’s proposed language, and accept OFCCP’s version.

***Courts Reject Protective Orders That Hamstring Law Enforcement by Restricting the Use of Evidence.***

OFCCP “is charged with conducting periodic reviews of entities that have contracted with the government to ensure that the contractors have complied with their non-discrimination and affirmative action obligations.” *Bd. of Governors of Univ. of N. Carolina v. U.S. Dep’t of Labor*, 917 F.2d 812, 815 (4th Cir. 1990). Materials disclosed in those reviews may be used for any purpose to enforce Executive Order 11426, the Civil Rights Act of 1964, and any law within OFCCP’s jurisdiction. *See* 41 C.F.R. § 60-1.43; *see also id.* § 60-1.7 (reports required under OFCCP regulation “shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act”).

To promote efficient law enforcement, it is OFCCP policy “to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment.” 41

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C.F.R. § 60-40.1. To that end, under its Memorandum of Understanding (“MOU”) with the EEOC, OFCCP “shall share any information relating to the employment policies and/or practices of employers holding government contracts or subcontracts that supports the enforcement mandates of each agency as well as their joint enforcement efforts.” MOU § 1(a), *available at* [https://www.eeoc.gov/laws/mous/eeoc\\_ofccp.cfm](https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm). Over contractors’ objections, courts have approved OFCCP’s and the EEOC’s coordinated efforts. *See, e.g., Emerson*, 609 F.2d at 907 (rejecting challenge to MOU); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 666 (4th Cir. 1977). Because “[b]oth agencies are charged with the responsibility of eliminating employment discrimination,” sharing information between the two agencies “facilitates the operation of both agencies and eliminates wasteful duplication of effort.” *Reynolds Metals*, 564 F.2d at 668.

Oracle’s use restriction does the precise opposite, preventing OFCCP from sharing information internally and taking cost-effective steps to coordinate its enforcement efforts. Under Oracle’s proposal, absent Oracle’s permission, OFCCP is barred in perpetuity from using information obtained in this case for any other law enforcement purpose OFCCP may ever have for that information. This would be an incongruous result, particularly since OFCCP can share such information with the EEOC, which could use the information for any purpose, while OFCCP was barred from sharing the information internally and doing the same. Amplifying this incongruity is that, while Oracle is barred from interfering with its employees reporting wrongdoing to OFCCP (41 C.F.R. § 60-1.32), the use restriction would enable Oracle to interfere with OFCCP’s ability to share evidence of wrongdoing among its compliance personnel. No good cause exists to support such a restriction that would prevent OFCCP from doing its job and increase taxpayers’ costs.

With this in mind, courts readily reject protective orders that waste public resources and hamstring agencies in carrying out their functions. *See, e.g., Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978) (“We are impressed with the wastefulness of requiring government counsel to duplicate the analyses and discovery already made.”); *United States ex rel. Kaplan v. Metro. Ambulance & First-Aid Corp.*, 395 F. Supp. 2d 1 (S.D.N.Y. 2005) (rejecting limit on government’s use of discovery to case as doing so would “limit[] the government’s ability to perform its functions as a health oversight agency”); *United States ex rel. Stewart v. La. Clinic*, No. Civ. A. 99-1767, 2002 WL 31819130, at \*10 (E.D. La. Dec. 12, 2002) (same); *see also Barker v. Engineered Steel Concepts, Inc.*, No. 2:09-MC-72-PRC, 2010 WL 4852640, at \*3 (N.D. Ind. Nov. 22, 2010) (rejecting use restriction that “prohibits the NLRB from carrying out its responsibility to share information with other government agencies”). Here, by preventing the left hand from using what the right hand has in grasp, OFCCP will be at Oracle’s mercy in being able to ensure Oracle fulfills all of its non-discrimination obligations. Oracle’s attempt to put itself in charge of OFCCP’s law enforcement functions, through confidentiality designations, prevents OFCCP from fulfilling its responsibilities efficiently.

Indeed, courts have long rejected arguments that a protective order is necessary to prevent use of discovery in one case in another case or that a protective order is necessary to prevent a party from sharing information with another party. It is well-established that “where the discovery sought is relevant . . . the mere fact that it may be used in other litigation does not mandate a protective order.” *Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992). And, going further than the issue presented here, “courts have refused to enter protective orders which prevent disclosure to others litigating similar issues on the grounds that the Federal Rules of Civil Procedure do not foreclose collaboration in discovery.” *Grady*, 594 F.2d at 597; *see also Cipollone v. Liggett Grp., Inc.*, 113 F.R.D. 86, 91 (D.N.J. 1986) (“[S]o long as the interests of those represented in the initial litigation are being fully and ethically prosecuted, the Federal Rules do not foreclose the collaborative use of discovery.”); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980) (noting that “sharing information obtained through discovery . . . may allow for effective, speedy, and efficient representation”). Here, if a protective order is not warranted to prevent sharing of discovery with other parties, it is certainly not necessary here where OFCCP would only be sharing the discovery internally with teams working on other proceedings involving Oracle.

Because Oracle’s use restriction interferes with OFCCP’s law enforcement functions, the Court should reject it.

***The Fourth Amendment Does Not Provide Good Cause Supporting Oracle’s Use Restriction.***

Oracle insists that the Fourth Amendment requires a protective order restricting OFCCP’s use of confidential materials. This novel argument, for which Oracle offered no support during the meet-and-confer process, is readily dismissed.

The Fourth Amendment protects “against unreasonable searches and seizures.” U.S. Const. amend. IV. This prohibition does not restrict how the government uses information it obtains, so long as that information is obtained lawfully. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (“The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.”); *Johnson v. Quander*, 440 F.3d 489, 499 (D.C. Cir. 2006) (if evidence is obtained “in conformance with the Fourth Amendment, the government’s storage and use of it does not give rise to an independent Fourth Amendment claim”); *Green v. Berge*, 354 F.3d 675, 680 (7th Cir. 2004) (“[T]he fourth amendment does not control how properly collected information is deployed.”) (Easterbrook, J., concurring). Demonstrating this principle are the myriad cases establishing that the Fourth Amendment permits law enforcement agencies to use lawfully obtained fingerprint and DNA evidence to prosecute crimes other than the one leading to the collection of such evidence. In such cases, the Fourth Amendment is not implicated because there is no “separate search under

the Fourth Amendment.” *Boroian v. Mueller*, 616 F.3d 60, 68 (1st Cir. 2010) (citing various cases).

Here, as with fingerprint and DNA evidence maintained criminal law enforcement agencies, there is no “search” triggering Fourth Amendment protections if OFCCP simply uses information it obtains in this litigation for another purpose. OFCCP will be lawfully obtaining evidence through the discovery process, which the Court oversees and various procedural rules govern. Oracle has not argued, nor could it credibly, that obtaining discovery through this litigation violates the Fourth Amendment given the existing procedural restrictions on discovery. *See, e.g., Lease v. Fishel*, No. 1:07–CV–0003, 2009 WL 922486, at \*5 (M.D. Pa. Apr. 3, 2009) (noting safeguards under procedural rules “ensure that civil discovery does not run afoul of the Fourth Amendment”); *United States v. Int’l Business Machines Corp.*, 83 F.R.D. 97, 103 (S.D.N.Y. 1979) (“[I]t is clear that the fourth amendment if applicable would hold subpoenas in civil litigation to a standard of reasonableness no more rigorous than that imposed by rule 45(b).”). Thus, the Fourth Amendment does not restrict OFCCP’s use of information it obtains from Oracle through discovery in this case.

Insofar as Oracle argues that Fourth Amendment restrictions on administrative subpoenas are somehow triggered here, Oracle fares no better. While courts have used such restrictions to evaluate what OFCCP can request in a compliance evaluation, no court has ever applied that analysis to what OFCCP may use in an investigation. In any event, the Supreme Court established long ago that the function of such subpoenas “is essentially the same as. . . the court’s in issuing other pretrial orders for the discovery of evidence” and are subject to the same constitutional limitations. *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 216 (1946). Therefore, as noted above, if OFCCP obtains evidence pursuant to the discovery rules governing this case, the Fourth Amendment is satisfied.

***OFCCP Regulation Does Not Provide Good Cause Supporting the Use Restriction.***

Finally, Oracle has argued that the regulation requiring contractors to give OFCCP information that “may be relevant” to a compliance evaluation somehow bars OFCCP’s use of evidence obtained in this case for other law enforcement purposes. *See* 41 C.F.R. § 60-1.43. *Emerson* rejected a nearly identical argument contractors made in attempting to halt sharing between OFCCP and the EEOC. There, contractors argued that the EEOC’s ability to obtain evidence from OFCCP was an end run around a statute providing that the EEOC may access information that “is relevant to the charge under investigation.” *See Emerson*, 609 F.2d at 905. The court rejected the argument, noting that the statutory language did not pertain to “information in the lawful possession of another agency.” *Id.* The court also rejected the argument because “the information sought by the EEOC from the OFCCP is, almost by definition, relevant to a pending employment discrimination charge.” *Id.*

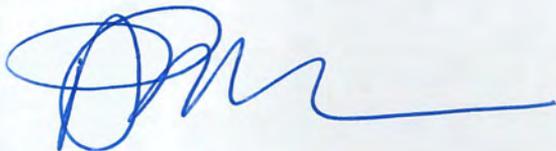
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Here, as in *Emerson*, the regulatory language does not address how OFCCP may use information it lawfully possesses. However, even if it did, evidence OFCCP obtains through this litigation involving Oracle's employment practices is likely to satisfy the "may be relevant" standard in the context of other cases. Thus, § 60-1.43 offers no basis to restrict OFCCP's use of information.

Respectfully submitted,



Erin M. Connell  
Trish Higgins  
ORRICK, SUTCLIFFE & HERRINGTON LLP  
Attorney for Defendant Oracle America, Inc.



Marc A. Pilotin  
Trial Attorney  
OFFICE OF THE SOLICITOR  
Attorney for Plaintiff OFCCP

**UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS, UNITED  
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**[PROPOSED] STIPULATED  
PROTECTIVE ORDER**

1. PURPOSES AND LIMITATIONS

Discovery activity in the above captioned action may involve production of confidential, trade secret, or private information for which public disclosure may not be warranted.

Accordingly, the Office of Federal Contract Compliance Programs, United States Department of Labor (“OFCCP”) and Oracle America, Inc. (each a “Party” and collectively the “Parties”) hereby stipulate to and petition the court to enter the following Stipulated Protective Order.

The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the information or items that are entitled to protection under applicable legal principles. The parties further acknowledge that this Stipulated Protective Order cannot, and therefore does not, afford protections inconsistent with any statute (*e.g.*, the Freedom of Information Act and the Records Disposal Act), regulation, or other law.

The parties further acknowledge that this Stipulated Protective Order does not entitle them to file confidential information under seal; the party designating material as confidential must seek permission from the court to have its material designated as confidential filed under seal.

2. DEFINITIONS

2.1 Challenging Party: a Party that challenges the designation of information or items

under this Order.

2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that, based on the Designating Party’s good faith belief, may be subject to Freedom of Information Act (“FOIA”) Exemptions 4 or 6, 5 U.S.C. § 552(b)(4) or (6).

2.3 Counsel: any attorney serving as legal counsel for a party, as well as their support staff.

2.4 Designating Party: a Party that designates information or items that it produces in disclosures or in responding to discovery as “CONFIDENTIAL.”

2.5 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter.

2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action.

2.7 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action

2.8 Party: Either Party, meaning the Office of Contract Compliance Programs and Oracle America, Inc. (collectively “Parties”) including any officers, directors, employees, consultants, and Counsel (and their support staffs).

2.9 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this action.

2.10 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

2.11 Protected Material(s): any Disclosure or Discovery Material that is designated as “CONFIDENTIAL.”

2.12 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

3. SCOPE

The protections conferred by this Order cover not only Protected Material (as defined above), but also (1) all copies, excerpts, summaries, compilations of, or written materials containing Protected Material, and (2) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material. However, the protections conferred by this Order do not cover the following information: (a) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; and (b) any information known to the Receiving Party prior to the disclosure in this proceeding by means other than through the Designating Party’s production in the underlying compliance evaluation or obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party. Any use of Protected Material at a hearing on a dispositive motion or the final hearing shall be governed by a separate agreement or order.

4. DURATION

Even after final disposition of this litigation, the confidentiality obligations imposed by this Order shall remain in effect unless a Designating Party agrees otherwise, an order otherwise directs, or a subsequent change in the law or regulation provides otherwise. If Counsel become aware of a change in law or regulation that affects the terms of this provision during the pendency of this litigation, such Counsel will advise Counsel for the other Party. Final disposition shall be deemed to be the later of (1) dismissal of all claims and defenses in this action, with or without prejudice; and (2) final judgment herein after the completion and

exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including the time limits for filing any motions or applications for extension of time pursuant to applicable law.

5. DESIGNATING PROTECTED MATERIAL

5.1 Designating Material for Protection. Each Party that designates information or items for protection under this Order must take care to limit any such designation to material that qualifies under the appropriate standards. Mass, indiscriminate, or routinized designations are prohibited. If it comes to a Designating Party's attention that information or items that it designated for protection do not qualify for protection, the Designating Party must promptly notify the other Party that it is withdrawing the mistaken designation.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order or as otherwise stipulated or ordered, Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

(a) for information in documentary form (e.g., paper or electronic documents, but excluding transcripts of depositions or other pretrial or trial proceedings), to the extent practicable, that the Producing Party affix the legend "CONFIDENTIAL" to each page that contains protected material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party will make reasonable efforts to clearly identify the protected portion(s). A Party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed "CONFIDENTIAL." After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order. Then, before producing the specified documents, the Producing Party must affix the "CONFIDENTIAL" legend to each page that contains Protected Material.

(b) for testimony given in deposition or in other pretrial or trial proceedings, that the Designating Party identify all protected testimony on the record at the time of testimony or in a written notice served on all parties within 14 days of delivery of the final transcript.

(c) for information produced in some form other than documentary, including the production of electronic files in native format that cannot be marked as “CONFIDENTIAL”, and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the medium or container in which the information or item is stored the legend “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection, the Producing Party shall make reasonable efforts to identify the protected portion(s).

5.3 Inadvertent Failures to Designate. If timely corrected, meaning corrected as soon as practicable after discovered, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party’s right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

5.4 Designations of Material Produced by Another Party. If any Party in good faith deems material it provided in the underlying compliance evaluation that is produced by another Party in this litigation to constitute “CONFIDENTIAL” information as defined in this Protective Order, it may timely designate such material, meaning designated as soon as practicable after discovered. Upon such timely designation, the Parties must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party may challenge a designation of confidentiality at any time. A Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and providing the basis

for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of the Protective Order. The Parties shall attempt to resolve each challenge in good faith and must begin the process by conferring within 14 days of the date of service of the notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, the explain the basis for the chosen designation. A Challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first or establishes that the Designating Party is unwilling to participate in the meet and confer process in a timely manner.

6.3 Judicial Intervention. If the Parties cannot resolve a challenge without the ALJ's intervention, the Designating Party may file and serve a motion to retain confidentiality within 21 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and confer process will not resolve their dispute, whichever is earlier, unless the Parties agree to extend this time period. Each such motion must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to make such a motion including the required declaration within the time indicated by this paragraph, or as otherwise agreed by the Parties, shall automatically waive the confidentiality designation for each challenged designation. In addition, the Challenging Party may file a motion challenging a confidentiality designation within the time indicated by this paragraph, or as otherwise agreed by the Parties, including a challenge to the designation of a deposition transcript or any portions thereof. Any motion brought pursuant to this provision must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed by the preceding paragraph.

The burden of persuasion in any such challenge proceeding shall be on the Designating

Party. Unless the Designating Party has waived the confidentiality designation by failing to file a motion to retain confidentiality as described above, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation until the ALJ rules on the challenge.

The procedures set forth in this section 6 do not apply to responses to requests for information under the FOIA, which are governed by section 9 below.

## 7. ACCESS TO AND USE OF PROTECTED MATERIAL

~~7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party in connection with this case only for prosecuting, defending, or attempting to settle this action. Furthermore, such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with the provisions of paragraph 13 below (FINAL DISPOSITION). Consistent with the foregoing limitation, Protected Material may not be used by a Party or Counsel in furtherance or any open, pending or future OFCCP compliance evaluation, OFCCP conciliation process, claims or litigation other than the above captioned action. Additionally, Protected Material may not be shared with any other governmental departments or agencies outside the OFCCP, except that OFCCP may share Protected Material with (1) the Equal Employment Opportunity Commission (EEOC) to the extent required pursuant to the Memorandum of Understanding between the Department of Labor and the EEOC, and (2) any other federal agency where disclosure is required by law, provided that the EEOC and/or other federal agency is provided a copy of this Protective Order prior to receipt of Protected Material.~~

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Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered by the ALJ or permitted in writing by the Designating Party, in addition to the individuals encompassed by the definition of Receiving Party above, a Receiving Party may

disclose any information or item designated “CONFIDENTIAL” only to:

(a) the ALJ and her or his personnel;

(b) court reporters and their staff to whom disclosure is reasonably necessary for this litigation;

(c) experts (as defined in this Order), professional jury or trial consultants, mock jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(d) witnesses or potential witnesses in the action who have not been or applied to be Oracle employees to whom disclosure is reasonably necessary for this litigation, unless otherwise ordered by the ALJ, and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(e) witnesses or potential witnesses in the action who have been or applied to be Oracle employees to whom disclosure is reasonably necessary for this litigation, unless otherwise ordered by the ALJ, and who have signed the “Acknowledgement and Agreement to Be Bound (Exhibit B);

(f) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information;

(g)(1) the Equal Employment Opportunity Commission (EEOC) to the extent required pursuant to the Memorandum of Understanding between the Department of Labor and the EEOC, and (2) any other federal agency where disclosure is required by law, provided that the EEOC and/or other federal agency is provided a copy of this Protective Order prior to receipt of Protected Material; and ~~(g)(1); and~~

(h) recipients to whom disclosure is required pursuant to law, regulation, or court order.

Nothing in this Protective Order limits or is intended to limit the way a Party uses its own Protected Material.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as “CONFIDENTIAL,” that Party will (1) promptly notify in writing the Designating Party (and such notification shall include a copy of the subpoena); (2) promptly notify in writing the party that caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order (and such notification shall include a copy of this Protective Order); and (3) cooperate in good faith with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected. If the subpoena is served on OFCCP or its agents, the agency will follow the procedures for handling such subpoenas set forth at 29 C.F.R. §§ 2.20-2.25 in responding to the subpoena. To the extent permitted by law and regulation, where the Designating Party timely seeks a protective order in the proceedings from which the subpoena arose, the Party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL” before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party’s permission. The Designating Party shall bear the burden and expense of seeking protection in that court of its confidential material – and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

9. PROTECTED MATERIAL REQUESTED UNDER THE FREEDOM OF INFORMATION ACT

If OFCCP or OFCCP’s Counsel receive a request under FOIA that seeks Protected Material, OFCCP or OFCCP’s Counsel shall respond consistent with the U.S. Department of Labor’s rules for processing requests for records under FOIA, 29 C.F.R. part 70. With respect to material marked in good faith as CONFIDENTIAL, OFCCP shall follow the procedures set forth at 29 C.F.R. § 70.26 before any disclosure is made under FOIA.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected

Material to any person or in any circumstance not authorized under this Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, and (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order and (d) request such person or persons to execute the “Acknowledgement and Agreement to Be Bound” that is attached hereto as Exhibit A. If the person or persons to whom unauthorized disclosures were made refuses to execute the “Acknowledgment and Agreement to Be Bound” (Exhibit A) or to otherwise comply with this Protective Order, and judicial intervention is required, the Receiving Party will, at its own expense, use its best efforts to maintain the protection of the improperly disclosed material.

11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in 29 C.F.R. § 18.51(e)(2), which is adopted by reference. This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502, and by agreement of the Parties, no Party shall be deemed to have waived claims of privilege as a result of production in this matter.

12. MISCELLANEOUS

12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the ALJ or any court in the future.

12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

12.3 Filing Protected Material. If a Receiving Party intends to file with the Office of Administrative Law Judges (“OALJ”) briefs, exhibits or other materials containing material designated “CONFIDENTIAL” by the opposing Party, the Receiving Party must give notice to the Producing Party of the filing of the document at the time of filing or before.

If the Designating Party seeks to have the Protected Material sealed, the Designating Party must file a motion within ten business days of the filing of the Protective Material a motion to seal pursuant to 29 C.F.R. § 18.85(b).

A motion pursuant to this provision is not subject to the Court’s pre-filing requirement.

13. FINAL DISPOSITION

Following final disposition of this case, as defined in paragraph 4 above, the parties agree that Protected Materials in OFCCP’s possession will be maintained and disposed of pursuant to the requirements of the Federal Records Disposal Act, 44 U.S.C. §§ 3301, *et seq.*, any applicable regulations promulgated thereunder, and any other applicable law. Pending disposal of the records, the confidentiality obligations imposed by this Order remain in effect consistent with paragraph 4 (DURATION).

IT IS SO STIPULATED.

Date: May \_\_, 2017

Respectfully submitted,

NICHOLAS C. GEALE  
Acting Solicitor of Labor

JANET M. HEROLD  
Regional Solicitor

IAN H. ELIASOPH  
Counsel for Civil Rights

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MARC A. PILOTIN  
Trial Attorney  
UNITED STATES DEPARTMENT OF LABOR  
Office of the Solicitor  
90 7th Street, Suite 3-700  
San Francisco, CA 94103  
Telephone: (415) 625-7769  
Fax: (415) 625-7772  
E-Mail: Pilotin.Marc.A@dol.gov

*Attorneys for Plaintiff OFCCP*

Date: May \_\_, 2017

---

ERIN M. CONNELL  
GARY R. SINISCALCO  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
The Orrick Building  
405 Howard Street  
San Francisco, CA 94105-2669  
Telephone: (415) 773-5969  
E-Mail: econnell@orrick.com  
E-Mail: grsiniscalco@orrick.com

*Attorneys for Defendant Oracle America, Inc.*

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Protective Order that was issued by the United States Department of Labor Office of Administrative Law Judges on \_\_\_\_\_ in the case of *Office of Federal Contract Compliance Programs, United States Department of Labor v. Oracle America, Inc.*, OALJ Case No. 2017-OFC-00006. I agree to comply with and to be bound by all the terms of this Protective Order. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States Department of Labor Office of Administrative Law Judges for the purpose of enforcing the terms of this Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_

EXHIBIT B

NOTICE OF RIGHTS AND AGREEMENT TO ORDER REGARDING MATERIAL  
DESIGNATED CONFIDENTIAL

The U.S. Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) has filed a lawsuit against Oracle America, Inc. (“Oracle”) alleging that Oracle has engaged in discriminatory employment practices at its Redwood Shores facility on account of race and sex. Specifically, OFCCP alleges that, with respect to certain specific job categories, Oracle has discriminated against its female, African American, and Asian employees in compensation and has discriminated against its African American, Hispanic and White applicants in hiring.

You have been provided information that Oracle has disclosed as part of that lawsuit and has designated as “Confidential” because the company believes the information constitutes (1) trade secrets or confidential commercial information; or (2) personnel records the disclosure of which would be an invasion of personal privacy. This information is subject to the attached Order by the U.S. Department of Labor Office of Administrative Law Judges. By signing below, you declare under penalty of perjury that you have read the attached Protective Order, that you agree to comply with and to be bound by all the terms of the Order, and promise not to disclose any information or item that is subject to this Order to any person or entity except in strict compliance with the provisions of this Order. You further agree to submit to the jurisdiction of the U.S. Department of Labor Office of Administrative Law Judges for the purpose of enforcing the terms of the Protective Order, even if such enforcement proceedings occur after termination of this Order.

Your agreement is limited to the specific information Oracle has identified as confidential, and you retain rights protecting your ability to discuss your experiences in applying to or being employed by Oracle. You have the right to discuss your experiences with Oracle with law enforcement agencies and legal counsel of your choosing. If you are a current or former Oracle employee, you also have the right to discuss the terms and conditions of your

employment with your Oracle colleagues.

In addition, Oracle may not intimidate or harass you, threaten or interfere in any way, or take any other adverse actions against you for talking or having talked to anyone at the Department of Labor about Oracle's employment practices, giving testimony in the case that OFCCP has brought against Oracle, or otherwise participating in the administrative proceedings and litigation under the Executive Order. In other words, no adverse actions can be taken against you for talking or having talked to anyone at the Department of Labor, for giving testimony in the case that OFCCP has brought against Oracle, or for otherwise participating in the administrative proceedings brought by OFCCP. If you feel that Oracle has in any way interfered with your ability to do so or has harassed, intimidated, threatened, coerced, or discriminated against you for doing so, please contact the Department of Labor.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_

# EXHIBIT C

[REDACTED]

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**From:** Bremer, Laura - SOL <Bremer.Laura@dol.gov>  
**Sent:** Wednesday, May 24, 2017 1:45 PM  
**To:** Connell, Erin M.; Pilotin, Marc A - SOL  
**Cc:** Siniscalco, Gary R.; Riddell, J.R.; Eliasoph, Ian - SOL; Kaddah, Jacqueline D.  
**Subject:** RE: OFCCP v. Oracle - Protective Order

Erin,

As we have indicated, since the parties have agreed to every provision of the protective order, except for one, the protective order issue should no longer present an obstacle to Oracle producing information and documents to OFCCP. Accordingly, we will agree that documents and information Oracle produces after the proposed protective order was submitted to Judge Larson on May 19, 2017 will be governed by the most restrictive version of the protective order, pending a ruling by Judge Larson. Once Judge Larson issues a Protective Order, the documents and information Oracle produces after May 19, 2017 will be governed by that Order. We look forward to receiving Oracle's production.

Laura C. Bremer  
Senior Trial Attorney  
Office of the Solicitor  
U.S. Department of Labor  
90 7<sup>th</sup> Street, Suite 3-700  
San Francisco, California 94103  
(415) 625-7757

This message may contain information that is privileged or otherwise exempt from disclosure under applicable law. Do not disclose without consulting the Office of the Solicitor. If you believe you received this e-mail in error, please notify the sender immediately.

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**From:** Connell, Erin M. [mailto:econnell@orrick.com]  
**Sent:** Wednesday, May 24, 2017 9:55 AM  
**To:** Pilotin, Marc A - SOL; Bremer, Laura - SOL  
**Cc:** Siniscalco, Gary R.; Riddell, J.R.; Eliasoph, Ian - SOL; Kaddah, Jacqueline D.  
**Subject:** OFCCP v. Oracle - Protective Order

Marc and Laura,

We are in receipt of correspondence from both Marc and Norm dated yesterday regarding discovery, and plan to respond substantively to both letters today. In the meantime, however, I want to clarify one issue addressed in both letters: the protective order. Although we have not heard from Judge Larsen regarding the final terms of the protective order, the correspondence seemed to indicate that OFCCP would be willing to abide by the protective order even before it is entered. As you note in your email yesterday, there is only one provision about which the parties dispute (the provision allowing OFCCP to use confidential information for matters other than this litigation). If OFCCP is willing to confirm now that it will abide by the terms of the protective order the parties proposed, including the additional limitation Oracle proposed unless and until Judge Larsen enters something different, we will do the same, and will begin producing our documents.

Please confirm.

Thanks,

Erin

**Erin M. Connell**

Partner

Orrick

San Francisco 

T +1-415-773-5969

M +1-415-305-8008

econnell@orrick.com



Employment Blog

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# EXHIBIT D

**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: 15 October 2018**

CASE NO.: 2017-OFC-00006

*In the Matter of:*

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

vs.

**ORACLE AMERICA, INC.,**  
*Defendant.*

**ORDER GRANTING MOTION TO REASSIGN**

This matter arises under Executive Order 11246 (30 Fed.Reg. 12319), as amended, and associated regulations at 41 C.F.R. Chapter 60. It is not currently set for hearing.

Plaintiff moves for an Order reassigning this case for decision to another Administrative Law Judge under *Lucia v. Securities And Exchange Commission*, \_\_\_ U.S. \_\_\_, 138 S.Ct. 2044, 201 L.Ed.2d 464, 2018 U.S. LEXIS 3836, 2018 WL 3057893 (2018). What is more, before the Supreme Court issued its decision in the *Lucia* case, I denied Defendant's motion to disqualify me from hearing this case on the grounds an Administrative Law Judge is an "officer" of the United States, and I had, at the time of Defendant's motion, not been appointed to office consistent with the Appointments Clause of the Constitution, U.S. Const. art. II, §2.

While the Secretary of Labor appointed me on December 21, 2017, I took significant action in this case before that appointment. Under *Lucia*, I should have granted Defendant's motion, and must now grant Plaintiff's motion to reassign this

case. At the direction of the District Chief Administrative Law Judge, I transfer this case to Administrative Law Judge Richard M. Clark for all further proceedings.

SO ORDERED.



Digitally signed by John C. Larsen  
DN: CN=John C. Larsen,  
OU=Administrative Law Judge, O=US  
DOL Office of Administrative Law  
Judges, L=San Francisco, S=CA, C=US  
Location: San Francisco CA

CHRISTOPHER LARSEN  
Administrative Law Judge

## SERVICE SHEET

Case Name: OFCCP\_v\_ORACLE\_AMERICA\_INC\_

Case Number: 2017OFC00006

Document Title: **ORDER GRANTING MOTION TO REASSIGN**

I hereby certify that a copy of the above-referenced document was sent to the following this 15th day of October, 2018:



Digitally signed by MARYANNE B. BALLARD  
DN: CN=MARYANNE B. BALLARD, OU=LEGAL  
ASSISTANT, O=US DOL Office of Administrative  
Law Judges, L=San Francisco, S=CA, C=US  
Location: San Francisco CA

**MARYANNE B. BALLARD**  
LEGAL ASSISTANT

Nisha Parekh, Esq.  
US Department of Labor  
Office of the Solicitor  
350 South Figueroa Street, Ste 370  
LOS ANGELES CA 90071  
*{Hard Copy - Regular Mail}*

Associate Solicitor  
Civil Rights Division  
U. S. Department of Labor  
Suite N-2464, FPB  
200 Constitution Ave., N.W.  
WASHINGTON DC 20210  
*{Hard Copy - Regular Mail}*

Gary Siniscalco, Esq  
Orrick, Herrington & Sutcliffe, LLP  
The Orrick Building  
405 Howard Street  
SAN FRANCISCO CA 94105-2669  
*{Hard Copy - Regular Mail}*

Office of Federal Contract Compliance Programs  
U. S. Department of Labor  
Room C-3325, FPB  
200 Constitution Ave., N.W.  
WASHINGTON DC 20210  
*{Hard Copy - Regular Mail}*

CSC-Lawyers Incorporating Service  
Registered Agent for Oracle America, Inc.  
2710 Gateway Oaks Drive, Suite 150N  
SACRAMENTO CA 94065  
*{Hard Copy - Regular Mail}*

U. S. Department of Labor  
Office of the Solicitor  
Room S-2002, FPB  
200 Constitution Ave., N.W.  
WASHINGTON DC 20210  
*{Hard Copy - Regular Mail}*

Laura C Bremer, Esq.  
Marc A. Pilotin, Esq.  
Ian H. Elisaoph, Esq.  
90 7th Street, Ste 3-700  
SAN FRANCISCO CA 94103-6704  
*{Hard Copy - Regular Mail}*

# EXHIBIT E



January 31, 2019

--- By Email

Erin M. Connell  
ORRICK HERRINGTON & SUTCLIFFE LLP  
405 Howard Street  
San Francisco, CA 94105  
econnell@orrick.com

RE: OFCCP v. Oracle America, Inc.  
Office of Administrative Law Judges, Case No. 2017-OFC-00006

Dear Ms. Connell,

I write to respond to your letter of January 23, 2019, asserting that the materials filed by OFCCP in connection with its Motion for Leave to File a Second Amended Complaint violate a protective order.

First, as you successfully argued on behalf of Oracle, Judge Larsen was not properly appointed at the time he entered a protective order in this matter on May 30, 2017. Accordingly, his rulings are likely unenforceable, and so there is no protective order to be enforced in this case at this time.

Second, even if the protective order that Judge Larsen entered in 2017 was in effect, nothing in our filing violates that order.

You have asserted that “the dollar figures and employee counts contained in your proposed SAC – including but not limited to the various charts” violate the supposed protective order because they are confidential information or are “summaries” that might “reveal” such information. We do not agree.

To the extent that you are objecting to our inclusion of the results of our analyses of the information produced by Oracle as a “summary,” we do not have the same understanding of that provision in the order. We believe that the restriction on summaries is intended to prevent wholesale disclosures of confidential information by rearranging the format of that information.

Here, employee counts, estimated damages and other specific data in the proposed SAC are the result of our analysis of the many sources of data Oracle produced. We never understood the protective order to prevent us from discussing our models and results, and would challenge any attempt to read the bar on “summaries” to include our analysis.

To the extent that you are objecting to our inclusion of certain information because you believe it to be “confidential information,” we believe you are incorrect about the applicability of that term to the information in the proposed SAC.

The protective order entered by Judge Larsen defines “confidential information” as information that would be withheld subject to FOIA exemptions 4, 5 or 6. Though you do not say, we assume you believe that FOIA’s exemption for “trade secrets and commercial or financial information obtained from a person and privileged or confidential...” applies to employee counts or “dollar figures.” 5 U.S.C. § 552(b)(4). This is in error.

The counts of employees in the broad job functions identified in the SAC do not reveal the inner workings of Oracle’s business. There is detailed information about Oracle’s employee counts in a variety of public sources, including in public court filings and on the internet. As an example, the counts in the SAC are analogous to the bulk numbers reported in EEO-1 data, an information source routinely produced in response to FOIA requests. In fact, the counts in the proposed SAC provide less information than data from the EEO-1, to the extent that the EEO-1 categories are fixed, while Oracle’s internal designation of Product Development, Support and IT do not have published definitions. In any event, as Oracle has maintained that smaller groups are essential for understanding its business, the counts in our SAC identifying the number of employees in broad job functions present no commercial risk to Oracle.

For the “dollar figures,” it is unclear whether you mean our estimated damages or the example amounts in several tables. In either case we disagree that those numbers are subject to Exemption 4.

Our estimated damages are the results of a detailed statistical model. While we have provided sufficient information for Oracle to understand how those models work, there is insufficient information in the SAC for a third party to reconstruct individual or group pay information provided by Oracle.

As for the examples included in the tables, those are simply an expression of the pay gap relative to an average over *all employees* for whom we have data in 2016. The example amounts could permit a person to determine the average; but, again, the proposed SAC provides insufficient information to deduce individual or group pay.

We do not believe that Oracle could prevail in proving that there would be any commercial harm from the release of this information, particularly in light of the disclosures already made in unsealed briefings in this litigation.

Set against the total absence of commercial impact that could result from a competitor using the employee counts or dollar figures in the SAC is the government’s interest in effectively enforcing the laws on behalf of the public. Litigation in the public interest cannot occur in the dark.<sup>1</sup>

As you know, we did agree to stipulate to the protective order Judge Larsen signed in 2017 when

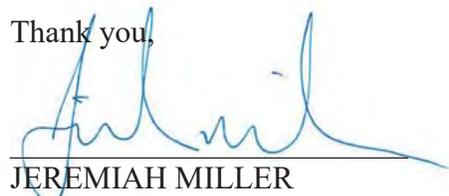
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<sup>1</sup> Also, Oracle has repeatedly suggested that the First Amended Complaint was insufficiently detailed to permit it to understand the allegations made by OFCCP. In the SAC, we have provided enough information that there should be no doubt as to those allegations, while at the same time withholding information that could be used to gain a competitive understanding of Oracle’s business. This amendment should focus discovery and permit a more precise and efficient hearing to resolve the allegations.

we spoke on January 18, 2019. However, we are concerned that there isn't a meeting of the minds about that protective order, given your apparent interpretation of the protective order as described in your January 23rd letter.

We are willing to meet with you to discuss what protective order, if any,<sup>2</sup> we might agree to in this case.

Thank you,



JEREMIAH MILLER  
Acting Counsel for Civil Rights

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<sup>2</sup> We also note that the OALJ provides a process for sealing documents to the extent that Oracle believes they must be protected from public disclosure.

# EXHIBIT F



January 24, 2019

**Via E-Mail**

Laura C. Bremer  
Office of the Solicitor  
U.S. Department of Labor  
90 7th Street, Suite 3-700  
San Francisco, CA 94103

**Orrick, Herrington & Sutcliffe LLP**

The Orrick Building  
405 Howard Street  
San Francisco, CA 94105-2660  
+1 415 773 5700

[orrick.com](http://orrick.com)

**Erin Connell**

**E** [econnell@orrick.com](mailto:econnell@orrick.com)  
**D** +1 415 773 5969  
**F** +1 415 773 5759

Re: *OFCCP v. Oracle, Inc.*, Case No. 2017-OFC-00006  
Breach of Stipulated Protective Order

Dear Ms. Bremer:

I write on behalf of Oracle, Inc. to alert you that your Motion for Leave to File a Second Amended Complaint (“SAC”) with Exhibits filed on January 22, 2019 (“Motion”), breached the parties’ Stipulated Protective Order (“PO”). The PO protects not only material designated as confidential, but also “all copies, excerpts, summaries, compilations of, or written materials containing [such material], and . . . any testimony, conversations, or presentations . . . that might reveal [such material].” Section 3.

As you readily acknowledge, the dollar figures and employee counts contained in your proposed SAC – including but not limited to the various charts – are derived from data and documents that Oracle produced and designated as confidential pursuant to the PO. By including these numbers in the proposed SAC, OFCCP has breached the parties’ agreement and violated the Court’s order. Furthermore, as a result of OFCCP’s breach and violation, Oracle’s confidential information has been published in national news articles – several of which contain online links to the SAC – and made available to competitors.

Oracle intends to raise this issue with the Court and expects OFCCP to take all appropriate actions to mitigate and cure its breach. Additionally, going forward, Oracle demands that OFCCP refrain from further disclosing Oracle’s confidential information and abide by the terms of the PO, which continues to govern the confidential information Oracle has produced to date.

Sincerely,

A handwritten signature in blue ink that reads "Erin M. Connell".

Erin M. Connell

# EXHIBIT G



Orrick, Herrington & Sutcliffe LLP  
The Orrick Building  
405 Howard Street  
San Francisco, CA 94105-2669  
+1 415 773 5700  
orrick.com

Warrington Parker

E wparker@orrick.com  
D +1 415 773 5740  
F +1 415 773 5759

February 4, 2019

*Via E-Mail*

Jeremiah Miller  
Attorney  
U.S. Department of Labor, Office of Solicitor  
300 Fifth Avenue, Suite 1120  
Seattle, WA 98104

Re: *OFCCP v. Oracle, Inc., et al.*, Case No. 2017-OFC-00006

Dear Mr. Miller:

I write in response to your January 31, 2019 letter in which you assert that OFCCP's public filing of its Motion for Leave to File a Second Amended Complaint ("SAC") is not a breach of the Protective Order ("PO"). You appear to posit that OFCCP is not bound by any PO because it is completely null and void. Alternatively, you contend that OFCCP can disregard its obligations under the PO and publish information Oracle designated Confidential so long as OFCCP disagrees with Oracle's confidentiality designations, and that if Oracle believes documents were improperly filed in the public record that it should follow "the OALJ provide[d] process for sealing documents." I address these erroneous assertions in turn.

First, we are alarmed that you have determined OFCCP can publish information Oracle produced and designated confidential because you have unilaterally determined the PO is no longer applicable. This is plainly bad faith, and if it is truly OFCCP's position that anything Oracle previously produced and designated as confidential is no longer subject to any of the protections afforded by the PO, then the ALJ must be immediately notified. OFCCP is well aware that Oracle agreed to produce its confidential information based *solely* on the understanding that the information was governed by a PO and that your office and OFCCP would treat it as confidential according to the provisions in that PO. In fact, even before the PO was in place the parties jointly wrote to Judge Larsen stating the parties had reached an agreement regarding the order, with the exception of one issue not relevant here. *See* May 19, 2017 letter from M. Pilotin and T. Higgins. Days later, to



Jeremiah Miller  
February 4, 2019  
Page 2

facilitate Oracle's production, Ms. Bremer assured Oracle the information would be treated as confidential.

As we have indicated, since *the parties have agreed to every provision of the protective order, except for one*, the protective order issue should no longer present an obstacle to Oracle producing information and documents to OFCCP. Accordingly, *we will agree that documents and information Oracle produces* after the proposed protective order was submitted to Judge Larson on May 19, 2017 *will be governed by the most restrictive version of the protective order*, pending a ruling by Judge Larson. Once Judge Larson issues a Protective Order, the documents and information Oracle produces after May 19, 2017 will be governed by that Order. We look forward to receiving Oracle's production.

*See* May 24, 2017 L. Bremer e-mail to E. Connell (emphasis added).

Oracle would never have agreed to produce its confidential business and private employee information had it known that OFCCP would renege on its assurances. Moreover, your January 31 letter acknowledges that on January 18, 2019, OFCCP renewed its commitment to be bound by the PO. And paragraph 4 of the PO entitled "DURATION" makes clear that the obligations thereunder "remain in effect unless a Designating Party agrees otherwise, an order directs otherwise, or a subsequent change in the law of regulation provides otherwise." None of these triggers has transpired.

Please let us know immediately if, accounting for the above, you still maintain either that: (1) you were not obligated to comply with the PO at the time you filed the Motion to Leave to File an SAC, or (2) you are no longer obligated to abide by the PO when it comes to the treatment of material Oracle designated confidential and produced subject to the understanding and your agreement that it would be treated as such. If you intend to take either position, we will immediately address the issue with ALJ Clark, on an emergency basis if needed.

Next, you suggest that because you disagree with our determination that certain information is confidential you are somehow relieved of your PO obligations to protect the information from public disclosure until the dispute about confidentiality is resolved. The PO is clear: OFCCP must maintain confidential information in confidence unless and until either: (1) Oracle removes the designation or (2) the ALJ rules the material is not confidential. If you disagree with Oracle's

Jeremiah Miller  
February 4, 2019  
Page 3

confidentiality designations, section 6 of the PO requires that you challenge the designation by giving written notice, and that the parties meet and confer. If the parties cannot resolve a disagreement, the PO provides that OFCCP can file a motion to challenge, and that Oracle can file a motion to retain confidentiality to avoid waiver of the designation. OFCCP may not, as you assert at page 2 of your letter, unilaterally disclose information that OFCCP determines, in its own judgment, does not fall within the definition of Protected Materials. Rather, once Oracle designates information based upon its own good faith determination may be subject to the identified FOIA exemptions, it must be treated as such unless the parties engage in further discussions and/or briefing pursuant to PO Section 6. *See* PO § 6.3 (emphasis added) (“Unless the Designating Party has waived the confidentiality designation . . . , all parties *shall* continue to afford the material in question the level of protection to which it is entitled under the Producing Party’s designation until the ALJ rules on the challenge.”).

Equally clear is that the PO prohibits you from simply putting the information in the public record. Section 12.3 of the PO demands that before filing confidential information you give both the court and Oracle notice at the time of filing, or before, allowing Oracle the opportunity to file a motion to seal under 29 C.F.R. § 18.85(b). Your opinion as to the propriety of our confidentiality designations has no bearing on the obligations set forth by the PO. Footnote 2 of your letter suggests OFCCP fails to appreciate even this most basic concept, in that you “note that the OALJ provides a process for sealing documents to the extent Oracle believes they must be protected from public disclosure.” First, the process to protect materials designated as confidential in this case from public disclosure is set forth in the PO to which OFCCP repeatedly agreed to be bound, not some other OALJ “process.” Second, suggesting Oracle file a motion to seal materials OFCCP put into the public domain because it was either unwilling to acknowledge its obligations under the PO, or disagreed with Oracle’s designations, is nonsensical. Not only is it too late, but you cannot shift the obligation to Oracle without completely undermining the purpose of the PO.

Lastly, Oracle disagrees with your assertion that the information in your SAC does not contain confidential information as defined by section 2.2 of the PO. To begin with, the headcounts in the SAC are a summary or compilation of the confidential information Oracle produced during discovery—exactly the type of information contemplated by the PO. Section 3 provides that the scope of protection extends not only to the actual Discovery Material that is designated as Confidential, but also “summaries, compilations of, or written materials containing Protected

Jeremiah Miller  
February 4, 2019  
Page 4

Materials” or “presentations . . . that might reveal Protected Material.” There is no ambiguity here. While you state you “believe that the restriction on summaries is intended to prevent wholesale disclosures of confidential information by rearranging the format of that information”, that is not what the PO states and it does not comport with the traditional understanding of what constitutes a summary. For example, Federal Rule of Evidence 1006 makes clear that a summary is intended to prove the content of voluminous writings that cannot be conveniently examined in court. In other words, a summary is not simply a wholesale use of information by rearranging the format in which it is represented. Had your office extended Oracle the courtesy of allowing a review of the proposed SAC pre-filing, we would have objected to the public filing of the unredacted SAC and, had OFCCP acted consistent with the PO, those materials would have been appropriately lodged conditionally under seal to afford the parties time to brief, and the ALJ time to rule on, the dispute.

Next, your assertion that the detailed head counts in the SAC are not confidential because Oracle’s EEO reports are public is a red herring. Assuming *arguendo* that EEO headcounts would not be confidential, the groupings in the EEO reports are not tethered to the specific number of people deployed in various job functions and do not disclose the same information as do the various head counts included in your SAC. For example, you provide information about how many individuals Oracle hires on an annual basis from graduate colleges in India, and how many college recruits Oracle hires per year. Even your letter (in footnote 1) acknowledges that it is appropriate to maintain as confidential information that could be used to gain a competitive understanding of Oracle’s business. Divulging Oracle’s recruiting targets inarguably reveals Oracle’s confidential talent strategies. Disclosure of the information would eliminate its competitive value for varied reasons. It provides insight into how Oracle organizes its workforce to maintain competitiveness in developing its products, and it allows competitors to leverage Oracle’s own market research and recruiting strategies to compete in the labor marketplace. Similarly, divulging Oracle’s headcounts per job function provides insight into how Oracle organizes its workforce to maintain competitiveness in the industry. And again, it bears repeating: even if you disagree with these positions, OFCCP is *obligated* to treat the information as confidential in accordance with Oracle’s designations and to allow the ALJ to decide the issue.

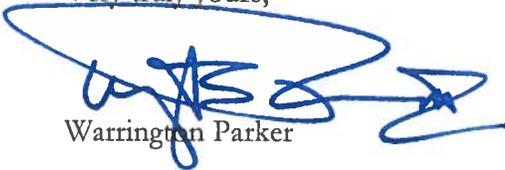
Your assertion that the dollar figures in the SAC are merely analysis and do not reveal confidential information is also inaccurate. You provided information that reveals the average pay of Oracle employees by job function and by tenure. Average pay of Oracle employees in these groups is

Jeremiah Miller  
February 4, 2019  
Page 5

commercially sensitive information, and your claim that such disclosure would not competitively harm Oracle is simply conclusory, and reflects a failure to appreciate the competitive landscape in which businesses like Oracle operate. Again, OFCCP can disagree with whether the information should be protected as confidential, but it does not get to make that determination itself.

In sum, we are seriously troubled by the flagrant disregard by OFCCP and the Solicitor's Office for the treatment of materials Oracle produced subject to your agreement and a protective order in place that afforded continued protection to such materials. Please let me know immediately when you are available this week to discuss these matters, so we may determine how best to move forward, including seeking guidance from the court.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Warrington Parker". The signature is stylized and somewhat illegible, with a large loop at the beginning and a long horizontal stroke at the end.

Warrington Parker

cc: Erin Connell, Esq.

# EXHIBIT H



February 6, 2019

**VIA ELECTRONIC MAIL ONLY**

Warrington Parker  
ORRICK HERRINGTON & SUTCLIFFE LLP  
405 Howard Street  
San Francisco, CA 94105  
econnell@orrick.com

Re: *OFCCP v. Oracle America, Inc.*, Case No. 2017-OFC-00006,  
Protective Order

Dear Warrington,

I am writing to provide a preliminary response to your letter to Jeremiah dated February 4, 2019. As an initial matter, I note that you sent the letter only to Jeremiah, without copying me, contrary to our agreement that you copy me on correspondence in this case. Nevertheless, I wanted to get back to you let you know that Jeremiah is out of the office this week.

Your letter egregiously misrepresents OFCCP's positions, and we plan to address both our actual positions, as well as the various arguments Oracle has raised. Since Jeremiah is taking the lead on this issue, he will respond after he returns. Despite your demand that Jeremiah notify you "immediately" to provide you with a date that he can meet and confer with you on this issue "this week," there appears to be no urgency to resolve the issues you raise before Jeremiah returns to the office next week.

We look forward to talking to you further about these issues.

Sincerely,

A handwritten signature in blue ink that reads "Laura C. Bremer". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Laura C. Bremer

# EXHIBIT I

---

**From:** Bremer, Laura - SOL <Bremer.Laura@dol.gov>  
**Sent:** Thursday, February 7, 2019 3:59 PM  
**To:** Connell, Erin M. <econnell@orrick.com>; Parker, Warrington <wparker@orrick.com>; James, Jessica R. L. <Jessica.james@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>; Siniscalco, Gary R. <grsiniscalco@orrick.com>  
**Cc:** Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>  
**Subject:** RE: Oracle

Erin,

Again, you misrepresent our position regarding the protective order. But, there is no urgency to resolve the protective order issues, because we don't intend to file any documents marked confidential (or information you could claim constituted a summary or compilation of documents you marked confidential) that have not previously been filed, before you meet and confer with Jeremiah on this issue. So, there is no need to waste Judge Clark's time with an emergency motion before the parties can meet and confer.

We are working on a list of the files now. I expect to get that to you next week, as well.

Sincerely,

Laura C. Bremer  
Senior Trial Attorney  
Office of the Solicitor  
U.S. Department of Labor  
90 7<sup>th</sup> Street, Suite 3-700  
San Francisco, California 94103  
(415) 625-7757

---

**From:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Sent:** Thursday, February 7, 2019 9:18 AM  
**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>  
**Cc:** Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>  
**Subject:** RE: Oracle

Hi Laura,

I write regarding two time-sensitive issues.

First, in your letter to Warrington yesterday, you say there is no urgency in resolving the parties' apparent disputes over the protective order. To the extent it is OFCCP's position that it may unilaterally disregard the protective order in its entirety with respect to documents and data Oracle marked confidential and produced pursuant to it, there is urgency in resolving this issue and we would like to raise it with Judge Clark right away. If that is not OFCCP's position – despite Jeremiah's assertion that "there is no protective order to be enforced in this case at this time" – please confirm now.

Second, Oracle is ready to begin updating the database, but we are waiting on you to confirm which fields you believe you need going forward. Given the incredibly tight time-pressure we are under in light of Judge Clark setting the hearing in this calendar year, we would appreciate a prompt response.

Thanks,  
Erin

---

**From:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>  
**Sent:** Wednesday, February 6, 2019 2:27 PM  
**To:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>  
**Cc:** Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>  
**Subject:** Oracle

Warrington,

Please see the attached letter.

Laura C. Bremer  
Senior Trial Attorney  
Office of the Solicitor  
U.S. Department of Labor  
90 7<sup>th</sup> Street, Suite 3-700  
San Francisco, California 94103  
(415) 625-7757

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# EXHIBIT J

**From:** Parker, Warrington  
**Sent:** Thursday, February 14, 2019 12:28 PM  
**To:** 'Miller, Jeremiah - SOL' <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>  
**Cc:** 'Garcia, Norman - SOL' <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; 'Hermosillo, Mary A - SOL SEA' <[Hermosillo.Mary.A@dol.gov](mailto:Hermosillo.Mary.A@dol.gov)>; 'Bremer, Laura - SOL' <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Subject:** RE: OFCCP v. Oracle

Sent a moment too soon.

Thank you for your response. We will be filing a motion seeking the relief set forth in my email of yesterday, which appears in this email string.

**From:** Parker, Warrington  
**Sent:** Thursday, February 14, 2019 12:11 PM  
**To:** 'Miller, Jeremiah - SOL' <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>  
**Cc:** Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Hermosillo, Mary A - SOL SEA <[Hermosillo.Mary.A@dol.gov](mailto:Hermosillo.Mary.A@dol.gov)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Subject:** RE: OFCCP v. Oracle

Thank you.

**From:** Miller, Jeremiah - SOL [<mailto:Miller.Jeremiah@dol.gov>]  
**Sent:** Thursday, February 14, 2019 12:10 PM  
**To:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>  
**Cc:** Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Hermosillo, Mary A - SOL SEA <[Hermosillo.Mary.A@dol.gov](mailto:Hermosillo.Mary.A@dol.gov)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Subject:** RE: OFCCP v. Oracle

Hi Warrington,

Two key differences from our point of view:

1. We aren't agreeing to anything regarding "summaries" or "compilations" (or any other part of the protective order)—this is just about the publishing of documents marked confidential.
2. This agreement is intended to be temporary until the parties agree to a new protective order.

Thanks,  
Jeremiah

Jeremiah Miller  
Acting Counsel for Civil Rights  
telephone: 206-757-6757; fax: 206-757-6761

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**From:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>  
**Sent:** Thursday, February 14, 2019 11:16 AM  
**To:** Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>  
**Cc:** Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Hermosillo, Mary A - SOL SEA <[Hermosillo.Mary.A@dol.gov](mailto:Hermosillo.Mary.A@dol.gov)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Subject:** RE: OFCCP v. Oracle

How is this different than what the Protective Order provides for?

**From:** Miller, Jeremiah - SOL [<mailto:Miller.Jeremiah@dol.gov>]  
**Sent:** Thursday, February 14, 2019 11:15 AM  
**To:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>  
**Cc:** Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Hermosillo, Mary A - SOL SEA <[Hermosillo.Mary.A@dol.gov](mailto:Hermosillo.Mary.A@dol.gov)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Subject:** RE: OFCCP v. Oracle

Hi Warrington,

By agreeing not to publish "original format" documents marked confidential by Oracle without following the procedures in Judge Larsen's protective order, we mean that we will not reproduce and publically file or share the documents that Oracle produced in discovery marked confidential unless we follow the procedures in the protective order.

Please let us know if this satisfies your concern.

Thanks,  
Jeremiah

Jeremiah Miller  
Attorney  
telephone: 206-757-6757; fax: 206-757-6761

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**From:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>  
**Sent:** Thursday, February 14, 2019 2:43 AM  
**To:** Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>  
**Cc:** Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Hermosillo, Mary A - SOL SEA <[Hermosillo.Mary.A@dol.gov](mailto:Hermosillo.Mary.A@dol.gov)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Subject:** RE: OFCCP v. Oracle

Perhaps this may forestall motions practice, please define for me the term "original format." You did during our telephonic meet and confer. But it may be that I did not appreciate fully the definition you provided.

Thank you.

**From:** Parker, Warrington  
**Sent:** Wednesday, February 13, 2019 5:19 PM  
**To:** Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>  
**Cc:** Garcia, Norman - SOL <[Garcia.Norman@dol.gov](mailto:Garcia.Norman@dol.gov)>; Hermosillo, Mary A - SOL SEA <[Hermosillo.Mary.A@dol.gov](mailto:Hermosillo.Mary.A@dol.gov)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Subject:** Re: OFCCP v. Oracle

Your position is noted. I believe it lacks merit. But we have covered these items.

Sent from my iPhone

On Feb 13, 2019, at 17:15, Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)> wrote:

Hi Warrington,

A central reason why we cannot agree to re-entry of Judge Larsen's protective order without significant revisions is that we do not believe there has been a meeting of the minds between the parties about critical provisions of the protective order.

When we agreed to the protective order, it was in the context of Judge Larsen's indication that he would impose an order, and in the context of how Oracle previously interpreted documents as being confidential or not confidential. Previously, in public filings in this litigation, as identified in our reply to the Motion to Amend, Oracle publically shared, *inter alia*, salary, recruiting, span of control, duties and responsibilities, appraisals, visa information, etc. with the Court and public. We also thought that the parties had agreed that the results of our analyses could not be withheld under the protective order.

Until we received a letter from Ms. Connell on January 23<sup>rd</sup>, we thought that we had a shared understanding of the terms of the protective order. We are concerned that Oracle's current position (as expressed in its letters and opposition to our Motion to Amend) would permit it to use confidential information as both a sword when it benefits by publically disclosing the information and then as a shield when we disclose non-trade secret information such as the results of our analyses in our filings. Along with the significant gap between the parties' understanding of "summary" or "compilations" of purportedly confidential information makes it impossible for us to agree to re-entering the old order.

On a related note, when we agreed to the challenge process in Judge Larsen's protective order, we were unaware that Oracle would mark nearly every document it produced "confidential" in light of the documents it had previously publically filed with this court. Based upon Oracle's prior treatment of those documents, we agreed to the challenge procedure in the old protective order. However, given the changed circumstance of Oracle's recent interpretation, including Oracle's apparent position that we could not include publically available factual information in our pleadings, we cannot agree to the current challenge process.

Lastly, as we previously identified, Oracle's current interpretation and its extensive confidential markings means it could hide and thus prevent disclosure of a tremendous amount of factual information about its violations of the executive order under the guise of confidentiality. OFCCP proceeding are open to the public and Oracle cannot use spurious confidentiality arguments to keep the matter secret.

We have covered some of this in more depth in our reply to the Motion to Amend.

Thank you,  
Jeremiah

Jeremiah Miller  
Acting Counsel for Civil Rights  
telephone: 206-757-6757; fax: 206-757-6761

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**From:** Miller, Jeremiah - SOL  
**Sent:** Wednesday, February 13, 2019 3:49 PM  
**To:** 'Parker, Warrington' <[wparker@orrick.com](mailto:wparker@orrick.com)>  
**Cc:** Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Hermosillo, Mary A - SOL SEA <[Hermosillo.Mary.A@dol.gov](mailto:Hermosillo.Mary.A@dol.gov)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Subject:** RE: OFCCP v. Oracle

Hi Warrington,

Your summary below doesn't quite capture our position as to why the protective order can't simply be re-entered. I'll send a written follow up shortly.

Thanks,  
Jeremiah

Jeremiah Miller  
Attorney  
telephone: 206-757-6757; fax: 206-757-6761

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**From:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>  
**Sent:** Wednesday, February 13, 2019 3:16 PM  
**To:** Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>  
**Cc:** Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Hermosillo, Mary A - SOL SEA <[Hermosillo.Mary.A@dol.gov](mailto:Hermosillo.Mary.A@dol.gov)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Subject:** RE: OFCCP v. Oracle

We understand that OFCCP wishes to revisit the language of the protective order as to certain provisions. Some of those issues are

1. Whether and to what extent summaries and compilations are covered;
2. What constitutes commercial harm and FOIA exemption 4

3. The definition of confidential, the process by which to challenge such designations and whether certain items should be exempted from confidential designations.

We discussed, as is noted below, whether OFCCP would abide by the terms of the protective order pending resolution of the above and any other issues OFCCP wished to address. Your proposal is below.

Oracle counter proposed the following: That OFCCP would abide by the terms of the protective order subject to and understanding that there is a dispute concerning the use of information in the Second Amended Complaint and subject to the fact that OFCCP does not agree to certain designations, which I pointed could be addressed using the procedures set forth in the current protective order.

We believe that OFCCP's position is not tenable. First, "original format" is not a defined term. Second, this position contradicts the positions taken before whereby OFCCP did represent that it would abide by the protective order. Third, this position appears to be simply a position taken for little purpose as I understand OFCCP does not intent presently to release summaries or compilations. But if this third point is wrong all the more reason to move before the Court.

Therefore, we will ask the court for two forms of relief: (1) to enter the protective order already agreed to or (2) to enter protective order already agreed to subject to and pending a meet and confer on the topic of the protective order.

**From:** Miller, Jeremiah - SOL [<mailto:Miller.Jeremiah@dol.gov>]  
**Sent:** Wednesday, February 13, 2019 3:08 PM  
**To:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>  
**Cc:** Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Hermosillo, Mary A - SOL SEA <[Hermosillo.Mary.A@dol.gov](mailto:Hermosillo.Mary.A@dol.gov)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>  
**Subject:** RE: OFCCP v. Oracle

Hi Warrington,

As we just discussed, OFCCP amenable to the following understanding with respect to the use of documents marked confidential:

We can agree to not publish, in their original format, any document produced in discovery marked confidential without going through the process outlined in Judge Larsen's protective order.

We can agree to this arrangement while we work out a stipulated protective order. We think our disputes about the definition of "summary" and "compilation" prevent us from agreeing to a more comprehensive statement.

We remain committed to finding a path forward on a protective order as we have previously indicated.

Thanks,  
Jeremiah

Jeremiah Miller  
Acting Counsel for Civil Rights  
telephone: 206-757-6757; fax: 206-757-6761

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**From:** Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>  
**Sent:** Wednesday, February 13, 2019 2:52 PM  
**To:** Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>  
**Subject:** OFCCP v. Oracle

Office 415 773 5740

Cell 415 994 7584

**Warrington S. Parker III**

Partner

Orrick  
San Francisco <[image001.jpg](#)>  
T 415 773 5740  
[wparker@orrick.com](mailto:wparker@orrick.com)

<[image002.png](#)>

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