

EXHIBIT D

U.S. Department of Labor

Office of the Solicitor
90 7th Street, Suite 3-700
San Francisco, California 94103



April 17, 2017

VIA ELECTRONIC MAIL

Erin M. Connell
Orrick Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105-2669
grsiniscalco@orrick.com
econnell@orrick.com

Re: *OFCCP v. Oracle America, Inc.*, Case No. 2017-OFC-00006,
Meet and Confer Letter

Dear Erin,

This letter responds to questions raised in your March 23, 2017 meet and confer letter and March 31, 2017 email, regarding OFCCP's position that a protective order is unnecessary in this case.

OFCCP has consistently rejected Oracle's request for a protective order, since Oracle first sent a proposed draft on March 15, 2017. As noted in Norman Garcia's March 27, 2017 letter, Oracle has waived its opportunity to seek a protective order by failing to bring a motion prior to the deadline for the response to the requests for production of documents (and similarly, by failing to bring a protective order prior to the date noticed for the 30(b)(6) deposition).

Moreover, as I already explained during our meet and confer call on March 15 and in my March 22 letter, OFCCP's position is that, generally, a protective order is inappropriate because of the protections and restrictions FOIA and the Privacy Act impose. Indeed, many of the specific provisions Oracle proposes, which appear to be pulled from the standard protective order used in the Northern District of California, conflict with FOIA and other federal law. For instance, sections 7.1 and 9 of Oracle's proposed protective order make broad guarantees of confidentiality and predetermine the application of FOIA exemptions. However, Administrative Review Board and Secretary decisions provide that broad guarantees of confidentiality are impermissible. *See, e.g., Koeck v. Gen. Elec. Consumer & Indus.*, ARB Case No. 08-068, 2008 WL 7835869, at *3 (Admin. Rev. Bd. Aug. 28, 2008) (providing that "no assurances of confidentiality can be given in advance of an FOIA request"); *Jordan v. Sprint Nextel Corp.*, No. ARB Case No. 06-105, 2008 WL 7835837, at *7 (Admin. Rev. Bd. June 19, 2008) (same); *Debose v. Carolina Power & Light Co.*, No. 92-ERA-14, 1994 WL 897419, at *3 (Sec'y Feb. 7, 1994) (same). Likewise impermissible are determining that FOIA exemptions apply out of context, as Oracle's proposed order seeks to do. *See Debose*, 1994 WL 897419, at *3 ("[I]t

would not be appropriate, in the absence of an FOIA request, to determine now whether any exemption is applicable.”). Section 13 of the proposed order requires return or destruction of produced protected materials. But such a provision is likewise inappropriate, in light of the Department’s obligations under the Federal Records Disposal Act, 44 U.S.C. §§ 3301, *et seq.* See, e.g., *See, e.g., EEOC v. Kronos Inc.*, 694 F.3d 351, 359 (3d Cir. 2012) (“Courts must exercise caution when issuing confidentiality orders so as not to demand that the EEOC destroy government documents, including notes and memoranda, in conflict with the EEOC’s duty to obey the requirements of the FRDA.”).

Oracle, as the proponent of a protective order, has not provided any authority demonstrating that its proposed protective order is appropriate in the administrative context. Instead, it has used the absence of a protective order as an improper excuse for withholding documents and deposition testimony.

Discovery needs to move forward and we ask Oracle drop its refusal to produce documents and testimony on the grounds that no protective order has been issued. However, if Oracle intends to seek a protective order, it should promptly move for one. If it has not done so by the end of this week, OFCCP intends to file a motion to compel next week based on Oracle’s failure to provide discovery based on its protective order objections.

Sincerely,

JANET HEROLD
Regional Solicitor

By: /s/ Laura C. Bremer
LAURA C. BREMER
Senior Trial Attorney

KIMBERLY A. ROBINSON
Trial Attorney



EXHIBIT E

From: [Connell, Erin M.](#)
To: [Bremer, Laura - SOL](#); [Pilotin, Marc A - SOL](#)
Cc: [Siniscalco, Gary R.](#); [Miller, Jeremiah - SOL](#); [Riddell, J.R.](#); [Kaddah, Jacqueline D.](#); [Eliasoph, Ian - SOL](#)
Subject: RE: OFCCP v Oracle - protective order meet and confer
Date: Thursday, April 20, 2017 1:49:40 PM
Attachments: [image002.png](#)

Laura,

We regret that OFCCP remains unwilling to engage with us regarding the appropriate scope of a protective order to govern this case. To the extent OFCCP raises concerns with specific provisions of the protective order we have proposed, the Agency offers no proposed compromise or alternative. Instead, OFCCP continues to take the position that no protective is warranted at all. In light of the Agency's threat to file a motion to compel if Oracle does not file a motion for a protective order by tomorrow, Oracle intends to do so. Please note that as indicated in prior correspondence, the motion for a protective order is without prejudice to Oracle's position that this case should not be in litigation at all because OFCCP did not meet its pre-litigation administrative prerequisites prior to filing its complaint, as articulated in Oracle's Answer.

Thanks,

Erin

From: Bremer, Laura - SOL [mailto:Bremer.Laura@dol.gov]
Sent: Monday, April 17, 2017 3:13 PM
To: Connell, Erin M. <econnell@orrick.com>; Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>
Cc: Siniscalco, Gary R. <grsiniscalco@orrick.com>; Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>; Riddell, J.R. <jriddell@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>; Eliasoph, Ian - SOL <Eliasoph.Ian@dol.gov>
Subject: RE: OFCCP v Oracle - protective order meet and confer

Erin,

Please see the attached response.

Laura C. Bremer
Senior Trial Attorney
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(415) 625-7757

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From: Connell, Erin M. [<mailto:econnell@orrick.com>]
Sent: Friday, April 14, 2017 8:51 AM
To: Pilotin, Marc A - SOL
Cc: Bremer, Laura - SOL; Siniscalco, Gary R.; Miller, Jeremiah - SOL; Riddell, J.R.; Kaddah, Jacqueline D.; Eliasoph, Ian - SOL
Subject: OFCCP v Oracle - protective order meet and confer

Marc,

I am following up on our last correspondence regarding a protective order. In your April 4 email, you indicated you would follow up regarding my request for a reasoned explanation and legal authority regarding OFCCP's position that it would not enter into a protective order in this case. We have not heard from you. In the interim, however, we have learned that the ALJ in the OFCCP's ongoing litigation against Google entered a protective order to prevent the public release of Google's confidential compensation information. We also have read that in connection with the OFCCP's litigation against Google, Regional Solicitor Janet Herold informed the press that the Department of Labor "has received compelling evidence of very significant discrimination against women in the most common positions at Google headquarters," and that the "government's analysis at this point indicates that discrimination against women in Google is quite extreme, even in this industry." We were surprised by the Regional Solicitor's public statements, both because they relate to ongoing litigation, and because—as we understand it—OFCCP has made no formal or administrative finding of pay discrimination in connection with compliance evaluation underlying the ongoing litigation. The Regional Solicitor's public statements do underscore, however, the need for a protective order here, to ensure Oracle's confidential information remains properly protected.

Please confirm by Tuesday, April 18 whether OFCCP will agree to a protective order in this matter. If not, we intend to raise this issue with the ALJ at the appropriate time.

Finally, please note that Oracle's engagement in these meet and confer efforts, and in discovery generally, is without prejudice to Oracle's position that this matter should not be in litigation at all because OFCCP did not comply with its administrative prerequisites prior to filing its complaint, as articulated in Oracle's Answer.

Thanks,

Erin

Erin M. Connell

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