

Additionally, OFCCP objects to this topic as overly broad and unduly burdensome, and premature at this early stage of discovery. Oracle's proposed deposition topics are virtually identical to its interrogatories, which also sought facts supporting OFCCP's contentions, which remain uniquely in Oracle's custody and control. To date, OFCCP has not obtained significant discovery from Oracle, including much of the data and documents that Oracle refused to produce during the compliance review (*see* Amended Complaint ¶¶ 1-15) and has not produced in this litigation. OFCCP should be provided the opportunity to conduct discovery and maintain flexibility about its contentions that it will present at the hearing before being deposed on such topics. *See* the cases cited in OFCCP's responses to Oracle's amended interrogatories, and Federal Rules of Civil Procedure 26(c), and 30(d)(3).

Furthermore, OFCCP objects to this premature topic because Oracle is attempting to benefit from its unclean hands of repeatedly failing to produce requested information during the compliance review and needlessly complicating OFCCP's acquisition of this same information during discovery. For example, as repeatedly identified in the documents that OFCCP produced during this litigation and the underlying investigation, Oracle refused to produce: applicant and hiring data, such as data regarding name of school attended and prior degrees earned, years of prior work experience and prior salary before being hired by Oracle, compensation data such as the 1/13/13 snapshot, Oracle's pay equity analysis, employee personnel actions, employee contact information, data for the 2012 applicant flow log, internal complaints, external arbitration complaints, documents regarding compensation and hiring, etc. Additionally, in this litigation, Oracle, in its written document production responses identified that it would not be producing any responsive documents for 55 requests or 60% of OFCCP's document production requests. This failure to produce is in addition to refusing to produce a person for the Rule 30(b)(6) deposition that OFCCP noticed. Moreover, this topic is premature to the extent it will be the subject of forthcoming expert testimony. Also, OFCCP objects to this topic insofar as it seeks disclosure of information protected under Fed. R. Civ. P. 26(b)(4)(D).

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OFCCP additionally objects to the terms “statistical data used,” “the analysis and methodologies used,” and “the computations used.” For these three terms the context of “used” it is not known and it is not clear to which “statistical data,” “analysis,” “methodologies” and “computations” that Oracle is referring.

Finally, OFCCP objects to this topic as duplicative; Oracle has previously requested this information through its interrogatories, and OFCCP has already provided information responsive to this topic in its production of documents.

**TOPIC 7:** The records, materials and evidence that Oracle failed or refused to produce as alleged in Paragraphs 12 and 13 of the Amended Complaint, including:

- a. the records, materials and evidence sought by OFCCP;
- b. the information sought by OFCCP that were contained in the records, materials, and evidence;
- c. the date(s) that OFCCP requested the records, materials and evidence;
- d. the date(s) of ORACLE’s refusal;
- e. ORACLE’s reasons, if any, for refusing to produce or provide the records and materials and evidence;
- f. As to each record, each material and each item of evidence that OFCCP claims ORACLE failed or refused to produce, the specific allegation(s) contained in Paragraph 7 to 10 that the OFCCP contends can be supported by ORACLE’s failure or refusal to produce.

**OBJECTION TO TOPIC 7:**

OFCCP incorporates the general objection stated above, and further objects to this topic to the extent it seeks information protected by the attorney-client privilege, attorney work-product doctrine, the government’s deliberative process privilege, the governmental privilege for investigative files and techniques, the government’s informant privilege, the trial preparation

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privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.

OFCCP further objects to this topic as irrelevant, since it seeks information regarding the sufficiency of OFCCP's underlying investigation, which is not the issue in this proceeding. The Court's role in this case is to conduct a *de novo* analysis of OFCCP's allegations, not to evaluate the sufficiency of OFCCP's investigation. *OFCCP v. Florida Hospital of Orlando*, ARB Case No. 11-011 (ARB 2013); *see* OALJ OFCCP Deskbook, Section IV(A) ("review by the ALJ is *de novo*").

Additionally, OFCCP objects to this topic as overly broad and unduly burdensome, and premature at this early stage of discovery. Oracle's proposed deposition topics are virtually identical to its interrogatories, which also sought facts supporting OFCCP's contentions, which remain uniquely in Oracle's custody and control. To date, OFCCP has not obtained significant discovery from Oracle, including much of the data and documents that Oracle refused to produce during the compliance review (*see* Amended Complaint ¶¶ 1-15) and has not produced in this litigation. OFCCP should be provided the opportunity to conduct discovery and maintain flexibility about its contentions that it will present at the hearing before being deposed on such topics. *See* the cases cited in OFCCP's responses to Oracle's amended interrogatories, and Federal Rules of Civil Procedure 26(c), and 30(d)(3).

Furthermore, OFCCP objects to this premature topic because Oracle is attempting to benefit from its unclean hands of repeatedly failing to produce requested information during the compliance review and needlessly complicating OFCCP's acquisition of this same information during discovery. For example, as repeatedly identified in the documents that OFCCP produced during this litigation and the underlying investigation, Oracle refused to produce: applicant and hiring data, such as data regarding name of school attended and prior degrees earned, years of prior work experience and prior salary before being hired by Oracle, compensation data such as

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the 1/13/13 snapshot, Oracle's pay equity analysis, employee personnel actions, employee contact information, data for the 2012 applicant flow log, internal complaints, external arbitration complaints, documents regarding compensation and hiring, etc. Additionally, in this litigation, Oracle, in its written document production responses identified that it would not be producing any responsive documents for 55 requests or 60% of OFCCP's document production requests. This failure to produce is in addition to refusing to produce a person for the Rule 30(b)(6) deposition that OFCCP noticed. Moreover, this topic is premature to the extent it will be the subject of forthcoming expert testimony. Also, OFCCP objects to this topic insofar as it seeks disclosure of information protected under Fed. R. Civ. P. 26(b)(4)(D).

OFCCP further objects to this topic as vague and ambiguous for the following terms "refusing to produce" and "refused to produce." The parties have provided each other with different definitions of what constitutes "refusal to produce" during the investigation and litigation and it is not clear what definition Oracle is referring to in this topic.

OFCCP again objects to the topic as being unduly burdensome, overly broad, not relevant, oppressive and not proportional to the case, since Oracle is already in possession of these communications.

OFCCP also objects to this topic as duplicative, as Oracle has previously requested this information through its interrogatories, and OFCCP provided information responsive to this topic during conciliation.

**TOPIC 8:** As to each allegation of discrimination, the policies, procedures, processes, or tests that OFCCP alleges, if it so alleges, that resulted in a disparate impact.

**OBJECTION TO TOPIC 8:**

OFCCP incorporates the general objection stated above, and further objects to this topic to the extent it seeks information protected by the attorney-client privilege, attorney work-

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product doctrine, the government's deliberative process privilege, the governmental privilege for investigative files and techniques, the government's informant privilege, the trial preparation privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.

OFCCP further objects to this topic as irrelevant, since it seeks information regarding the sufficiency of OFCCP's underlying investigation, which is not the issue in this proceeding. The Court's role in this case is to conduct a *de novo* analysis of OFCCP's allegations, not to evaluate the sufficiency of OFCCP's investigation. *OFCCP v. Florida Hospital of Orlando*, ARB Case No. 11-011 (ARB 2013); *see* OALJ OFCCP Deskbook, Section IV(A) ("review by the ALJ is *de novo*").

Additionally, OFCCP objects to this topic as overly broad and unduly burdensome, and premature at this early stage of discovery. Oracle's proposed deposition topics are virtually identical to its interrogatories, which also sought facts supporting OFCCP's contentions, which remain uniquely in Oracle's custody and control. To date, OFCCP has not obtained significant discovery from Oracle, including much of the data and documents that Oracle refused to produce during the compliance review (*see* Amended Complaint ¶¶ 1-15) and has not produced in this litigation. OFCCP should be provided the opportunity to conduct discovery and maintain flexibility about its contentions that it will present at the hearing before being deposed on such topics. *See* the cases cited in OFCCP's responses to Oracle's amended interrogatories, and Federal Rules of Civil Procedure 26(c), and 30(d)(3).

Furthermore, OFCCP objects to this premature topic because Oracle is attempting to benefit from its unclean hands of repeatedly failing to produce requested information during the compliance review and needlessly complicating OFCCP's acquisition of this same information during discovery. For example, as repeatedly identified in the documents that OFCCP produced during this litigation and the underlying investigation, Oracle refused to produce: applicant and

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hiring data, such as data regarding name of school attended and prior degrees earned, years of prior work experience and prior salary before being hired by Oracle, compensation data such as the 1/13/13 snapshot, Oracle's pay equity analysis, employee personnel actions, employee contact information, data for the 2012 applicant flow log, internal complaints, external arbitration complaints, documents regarding compensation and hiring, etc. Additionally, in this litigation, Oracle, in its written document production responses identified that it would not be producing any responsive documents for 55 requests or 60% of OFCCP's document production requests. This failure to produce is in addition to refusing to produce a person for the Rule 30(b)(6) deposition that OFCCP noticed. Moreover, this topic is premature to the extent it will be the subject of forthcoming expert testimony. Also, OFCCP objects to this topic insofar as it seeks disclosure of information protected under Fed. R. Civ. P. 26(b)(4)(D).

Finally, OFCCP objects to this topic as duplicative, as Oracle has previously requested this information through its interrogatories.

**TOPIC 9:** As to each allegation of discrimination, the anecdotal evidence of discrimination.

**OBJECTION TO TOPIC 9:**

OFCCP incorporates the general objection stated above, and further objects to this topic to the extent it seeks information protected by the attorney-client privilege, attorney work-product doctrine, the government's deliberative process privilege, the governmental privilege for investigative files and techniques, the government's informant privilege, the trial preparation privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.

OFCCP further objects to this topic as irrelevant, since it seeks information regarding the sufficiency of OFCCP's underlying investigation, which is not the issue in this proceeding.

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The Court's role in this case is to conduct a *de novo* analysis of OFCCP's allegations, not to evaluate the sufficiency of OFCCP's investigation. *OFCCP v. Florida Hospital of Orlando*, ARB Case No. 11-011 (ARB 2013); *see* OALJ OFCCP Deskbook, Section IV(A) ("review by the ALJ is *de novo*").

Additionally, OFCCP objects to this topic as overly broad and unduly burdensome, and premature at this early stage of discovery. Oracle's proposed deposition topics are virtually identical to its interrogatories, which also sought facts supporting OFCCP's contentions, which remain uniquely in Oracle's custody and control. To date, OFCCP has not obtained significant discovery from Oracle, including much of the data and documents that Oracle refused to produce during the compliance review (*see* Amended Complaint ¶¶ 1-15) and has not produced in this litigation. OFCCP should be provided the opportunity to conduct discovery and maintain flexibility about its contentions that it will present at the hearing before being deposed on such topics. *See* the cases cited in OFCCP's responses to Oracle's amended interrogatories, and Federal Rules of Civil Procedure 26(c), and 30(d)(3).

Furthermore, OFCCP objects to this premature topic because Oracle is attempting to benefit from its unclean hands of repeatedly failing to produce requested information during the compliance review and needlessly complicating OFCCP's acquisition of this same information during discovery. For example, as repeatedly identified in the documents that OFCCP produced during this litigation and the underlying investigation, Oracle refused to produce: applicant and hiring data, such as data regarding name of school attended and prior degrees earned, years of prior work experience and prior salary before being hired by Oracle, compensation data such as the 1/13/13 snapshot, Oracle's pay equity analysis, employee personnel actions, employee contact information, data for the 2012 applicant flow log, internal complaints, external arbitration complaints, documents regarding compensation and hiring, etc. Additionally, in this litigation, Oracle, in its written document production responses identified that it would not be producing any responsive documents for 55 requests or 60% of OFCCP's document production requests.

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This failure to produce is in addition to refusing to produce a person for the Rule 30(b)(6) deposition that OFCCP noticed. Moreover, this topic is premature to the extent it will be the subject of forthcoming expert testimony. Also, OFCCP objects to this topic insofar as it seeks disclosure of information protected under Fed. R. Civ. P. 26(b)(4)(D).

Finally, OFCCP objects to this topic as duplicative, as Oracle has previously requested this information through its interrogatories.

**TOPIC 10:** The identity, location, custody, and control of all documents concerning the topics listed above, including subparts.

**OBJECTION TO TOPIC 10:**

OFCCP incorporates all objections stated above.

AS TO OBJECTIONS

DATED: June 22, 2017

Respectfully submitted,

NICHOLAS C. GEALE  
Acting Solicitor of Labor

JANET M. HEROLD  
Regional Solicitor

IAN ELIASOPH  
Counsel for Civil Rights

/s/ Laura C. Bremer  
LAURA C. BREMER  
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**CERTIFICATE OF SERVICE**

I am a citizen of the United States of America and am over eighteen years of age. I am not a party to the instant action; my business address is 90 7th Street, Suite 3-700, San Francisco, CA 94103.

On the date indicated below, I served the foregoing **OFCCP'S OBJECTIONS TO DEFENDANT ORACLE AMERICA, INC.'S NOTICE OF DEPOSITION PURSUANT TO 41 C.F.R. § 60-30.11 AND FED. R. CIV. P. 30(B)(6)** by electronic mail, by prior written agreement between counsel, to the following:

Connell, Erin M.: econnell@orrick.com

Kaddah, Jacqueline D.: jkaddah@orrick.com

James, Jessica R. L.: jessica.james@orrick.com

Siniscalco, Gary: grsiniscalco@orrick.com

I certify under penalty of perjury that the above is true and correct.

Executed: June 21, 2017

/s/ Laura C. Bremer

LAURA C. BREMER  
Senior Trial Attorney

Office of the Solicitor  
U.S. Department of Labor

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# EXHIBIT E



March 27, 2017

*Via E-Mail*

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Re: OFCCP v. Oracle America, Inc. Redwood Shores, California (OALJ)  
Case No. 2017-OFC-00006

Dear Ms. Bremer:

We are in receipt of Plaintiff OFCCP's Objections and Answers to Defendant Oracle America, Inc.'s First Request for Production, Set One (RFP). This letter addresses various deficiencies in Plaintiff's responses and represents Oracle America Inc.'s (Oracle) attempt to meet and confer with you to resolve these issues without motion practice.

## I. Executive Privileges

The government must formally invoke any government privilege regardless of the privilege. *United States v. O'Neill*, 619 F.2d 222, 225-26 (3d Cir.1980); *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 388 (5th Cir.1970), *cert. denied sub nom, Aldridge v. Carr*, 400 U.S. 1000, 91 S.Ct. 456, 27 L.Ed.2d 451 (1971). This requirement applies to the executive privilege, *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 543 (D.C.Cir.1977); the official information privilege, *Garber v. United States*, 73 F.R.D. 364, 364-64 (D.D.C.1976); the law enforcement investigatory privilege, *In re Sealed Case*, 856 F.2d 268, 271 (D.C.Cir.1988); and the deliberative processes, or predecisional, privilege, *Mary Imogene Bassett Hosp. v. Sullivan*, 136 F.R.D. 42, 44 (N.D.N.Y.1991). Formal invocation of privilege requirements applies to the Department of Labor. *Martin v. Albany Bus. Journal, Inc.*, 780 F. Supp. 927, 932 (N.D.N.Y. 1992)(absent delegation, requiring Secretary of Labor to formally invoke privilege by personally attesting to its coverage). Here, OFCCP has asserted several executive privileges but has failed to formally invoke the privilege by providing an affidavit that the agency head has personal knowledge of the facts of the case and has personally reviewed the withheld materials. As long as the privileges remain improperly asserted, OFCCP has waived its objections based on these privileges.

## II. OFCCP's General and Specific Objections

OFCCP bears the burden of "clarifying, explaining, and supporting its objections." *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 285 (C.D. Ca. 1986). As described more fully below, OFCCP has not met its burden and, accordingly, must supplement its responses.



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OFCCP objects to the RFPs to the extent that they seek documents subject to at least six different privileges. Yet as explained above, OFCCP has not properly invoked these privileges. Accordingly, OFCCP's objections based on these privileges must be withdrawn, and any documents withheld based on them must be produced. Alternatively, if OFCCP attempts to properly invoke these privileges (and if OFCCP can demonstrate they are not waived), OFCCP must produce a privilege log. Oracle reserves its right to meet and confer further, including by responding in detail to any specific privileges asserted or documents withheld, at that time.

A. Date Restriction Objection.

OFCCP objects to every request on the basis that they seek documentation allegedly created after issuance of the Notice of Violation (NOV). OFCCP alleges that such information after this time frame was prepared in anticipation of litigation and is covered by the work product, trial preparation and attorney-client privileges. This blanket objection is baseless as none of these privileges protect purely factual information. *See, e.g., Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Cal. 2003) ("[B]ecause the work product doctrine is intended only to guard against the divulging of attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within the work product.") (citation omitted)

Second, the date restriction has no legal basis or factual basis as the Agency was obligated to engage in good faith negotiations as part of the conciliation process which defeats a claim that litigation was imminent. Courts hold that the work product doctrine applies if at the time that the materials are prepared, "the probability of litigating the claim is substantial and imminent." *Carner v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (D. Ga. 1982) (holding as much in the insurance claims investigation context); *accord, e.g., McCoo v. Denny's Inc.*, 192 F.R.D. 675, 683 (D.Kan.2000) (requiring that the threat of litigation be "real and imminent," and holding that "even the likely chance of litigation" would not be enough); *Collins v. Mullins*, 170 F.R.D. 132, 134 (W.D.Va.1996) (similar); *Snyder v. Winter*, 159 F.R.D. 14, 15 (W.D.N.Y.1994) (similar); *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 21 (D.Md.1980) (similar); *In re Grand Jury Investigation (Sturgis)*, 412 F.Supp. 943, 948 (E.D.Pa.1976) (holding that "[t]he threat of litigation must be more real and imminent" than pertains when "[a]dvising a client about matters which may or even likely will ultimately come of litigation"); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 43 (D.Md.1974) (similar); *Stix Prods., Inc. v. United Merch. & Mfrs., Inc.*, 47 F.R.D. 334, 337 (S.D.N.Y.1969) (suggesting that the work product doctrine is potentially applicable "[i]f the prospect of litigation is identifiable because of specific claims that have already arisen").

At the time of the NOV, OFCCP was obligated to focus on resolving the matter in good faith rather than preparing for litigation. An NOV advises the contractor that OFCCP is alleging violations of the law. Federal Contract Compliance Manual (FCCM) 8F00. After the NOV, OFCCP offers a



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conciliation process to the contractor during which "reasonable efforts shall be made to secure compliance through conciliation and persuasion." 41 CFR § 60-1.20(b). Courts have regularly enforced this "reasonable efforts" requirement as a prerequisite to suit. *See, e.g., United States v. Thurston Motor Lines, Inc.*, 718 F.2d 616, 617 (4th Cir. 1978) ("Under § 209(b) of [Executive Order 11246], such reasonable efforts [by methods of conference, conciliation, mediation and persuasion] are a prerequisite to the institution of legal action."); *Traylor v. Safeway Stores, Inc.*, 402 F. Supp. 871, 875-76 (N.D. Cal. 1975) (holding that "before [enforcement proceedings] are initiated, the federal contracting agency must make reasonable efforts to secure compliance by means of conference, conciliation, mediation, and persuasion" and that "[i]t is only after exhausting administrative efforts to obtain compliance that the OFCCP can seek to secure compliance through the courts"). For OFCCP to engage in *meaningful* conciliation steps, the Agency cannot at the same time hold the position that the "probability of litigating the claim is substantial and imminent." *Carver*, 94 F.R.D. at 134. Otherwise, the government is not truly negotiating in good faith and failing to meet its conciliation obligations. Indeed, in the instant matter, the Agency issued its NOV on March 11, 2016 and Oracle acknowledged receipt on March 15, 2106. The following day, March 16, OFCCP requested Oracle's position statement. It makes no sense that OFCCP and the Solicitor's Office believed litigation was imminent if it did not even know how Oracle would respond to OFCCP's first indication that discrimination allegedly existed. Unless the Agency admits here that it was not engaging in good faith conciliation efforts, it cannot credibly claim that documents were prepared in anticipation of litigation at any time before conciliation was complete and OFCCP issued its Show Cause Notice (SCN).

Based on the above, please withdraw this objection or revise the time frame to comply with the appropriate legal time frame. Also, please confirm that you will be producing documents with factual data postdating the appropriate time frame.

#### B. Relevance Objections.

OFCCP objects to every request on the grounds of relevance stating that the documents contain information regarding OFCCP's investigative "internal deliberations." This objection is baseless as Oracle's Requests for Production track the allegations in the Amended Complaint as well as OFCCP's pre-enforcement determinations such as the NOV. Such requests are reasonably calculated to lead to the discovery of admissible evidence. *McLeod, Alexander, Powel & Apfel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) ("even if some of [plaintiff's] requests for production were irrelevant, [defendant] must have a valid objection to each one in order to escape the production requirement"). The investigative steps predating the NOV and enforcement action clearly bear on whether OFCCP properly selected Oracle's Redwood Shores facility for review, satisfied its pre-suit obligations to conduct a full investigation, engaged in reasonable efforts to conciliate and had reasonable cause to bring the underlying enforcement action. These issues are



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also at the heart of Oracle's affirmative defenses that OFCCP did not afford Oracle the required due process by failing to follow its compliance manual during the compliance review, failing to comply with its conciliation obligations and failing to have adequate bases to issue the NOV. As such, please withdraw this relevance objection as OFCCP's facts and findings underlying its pre-enforcement findings are clearly at issue.

### III. Request for Production Responses

#### A. Limitation of production to documents in the investigative file.

OFCCP's procedural rules require OFCCP, in response to a document request, to provide all documents which are in its "possession, custody or control." 41 C.F.R section 60-30.10. OFCCP has responded to each and every RFP by stating that it will produce documents in the investigative file for the Redwood Shores audit. Producing documents that are solely within the investigative file does not fulfill OFCCP's discovery obligations. The FCCM lists the categories of documents to be included in the case file as:

- Standard Compliance Evaluation Report (SCER) and Data Pertaining to SCER Findings
- Case Chronology Log, Correspondence and Meeting Notes
- Collective Bargaining and Other Agreements, and Miscellaneous Items
- SOL Opinions, JRC Memoranda and Post SCER Update
- Progress Reports and Quality Audit
- Historical Review Results
- AAP and AAP Support Data

#### FCCM 1B02

The FCCM, however, does not list documents regarding OFCCP's selection of the Redwood Shores facility for review, the statistical analyses performed during any part of the compliance review from the SCER to referral of this matter for enforcement to the Office of the Solicitor, or documents provided to consulting or testifying experts. In addition, there is no mention of collecting and including in the investigative file any document created by the Branch of Expert Analysis or the Branch of Enforcement located in OFCCP's national office. Documents created, reviewed, or



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considered by these and other arms of the Agency's national office may not have been included in the case file. OFCCP is obligated to perform a diligent search for documents throughout the Agency and produce them as they are in the Agency's custody, possession or control. Further, to the extent that regional and district offices, other than those within the San Francisco OFCCP region have been involved in this matter, OFCCP must affirm that it has conducted a search for those materials and will provide them in response to Oracle's RFP. Finally, DOL officials may have spoken with and/or obtained documents from third party representatives such as private attorneys, state governmental officials, the Equal Employment Opportunity Commission and others regarding employment practices at Oracle. Such documents may not be in the investigative file. To fulfill its obligation to provide documents in its possession, custody or control, OFCCP has an obligation to perform a diligent search for and produce *all responsive documents* beyond those in the investigative file.

Based on the above, please supplement your responses to state that you will provide all documents in OFCCP's custody, possession or control.

#### **Response to Request for Production No. 65.**

OFCCP objects to this Request for Production on the grounds that it is "unduly burdensome, duplicative and unnecessary" because the Agency alleges that the request requires it to provide documents that Oracle had previously provided. This objection is factually and legally insufficient. *See, e.g., Jones v. Prince George's County*, No. 00-2902, 2002 U.S. Dist. LEXIS 27319, at \*6 (D.D.C. Oct. 3, 2002) (objection that a request is overly broad or burdensome is "insufficient on its face"); *Verona Energy, Inc. v. J K Petroleum*, 2017 U.S. Dist. LEXIS 420, at \*3 (W.D. La. Jan. 3, 2017) ("Conclusory objections that the requested discovery is 'overly broad,' 'burdensome,' 'oppressive,' and 'irrelevant,' do not suffice.") (citation omitted). First, OFCCP misreads the request as seeking only information regarding documents exchanged between Oracle and OFCCP. This is not what the request seeks. Rather, the request seeks all information related to the allegation that OFCCP requested various records which Oracle refused to produce. This seeks not only the exchange of documents between Oracle and OFCCP but all documents under OFCCP's possession, custody and control which reflect OFCCP's requests, facts regarding OFCCP's decision to not issue a SCN as required by its compliance manual, conversations with third parties regarding the requests and alleged refusals and other information beyond those exchanged between Oracle and OFCCP. Even as to those documents exchanged between Oracle and OFCCP, nothing suggests that OFCCP's obligation to produce documents is excused because Oracle initially provided the documents. The procedural rules require OFCCP to provide documents within its possession, custody or control. Based on the above, please withdraw this objection.



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**Response to Request for Production No. 70**

OFCCP objects to this Request for Production on the grounds that it is unduly burdensome, duplicative and unnecessary<sup>2</sup> because the Agency alleges that it requires it to provide documents that Oracle had previously provided. This objection is factually and legally insufficient. *See, e.g., Jones*, 2002 U.S. Dist. LEXIS 27319, at \*6; *Verona Energy, Inc.*, 2017 U.S. Dist. LEXIS 420, at \*3. First, OFCCP misreads the request as seeking only information regarding documents exchanged between Oracle and OFCCP. This is not what the request seeks. Rather, the request seeks all information related to Oracle's request for additional factual information during conciliation. This seeks not only the exchange of documents between Oracle and OFCCP but all documents under OFCCP's possession, custody or control which reflect Oracle's requests for information, Oracle's objections to the alleged requests for information during conciliation, conversations with third parties regarding the requests and objections beyond those exchanged between Oracle and OFCCP. Even as to those documents exchanged between Oracle and OFCCP, nothing suggests that OFCCP's obligation to produce documents is excused because the parties previously exchanged documents. The procedural rules require OFCCP to provide documents within its possession, custody or control. Based on the above, please withdraw this objection.

Based on the above, we request that you provide supplemental responses to the Request for Production by no later than April 7, 2017. If you do not agree to supplement the responses by then, Oracle will bring a motion to compel seeking further responses.

Very truly yours,

A handwritten signature in cursive script that reads "Erin M. Connell".

Erin M. Connell

cc: Gary R. Siniscalco



April 18, 2017

VIA E-MAIL

Erin M. Connell  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
405 Howard Street  
San Francisco, CA 94105-2669

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

Dear Erin:

This letter responds to your letters dated March 27, 2017, regarding OFCCP's responses and objections to Oracle's first set of document demands and first set of interrogatories.

Defendant's Requests for Production of Documents, Set One

**Government Privileges**

Contrary to Defendants' unsupported assertion, OFCCP is not required to provide *Defendant* with a writing from the agency head invoking the privileges. Plaintiff is only required to provide a formal invocation of the privileges *to the Court* when those privileges are challenged. See Perez v. El Tequila LLC, 2014 WL 5341766, at \*4 (N.D. Okla. 2014) (slip copy) (finding the privilege properly invoked where Plaintiff filed a declaration in response to a motion to compel); cf. Kerr v. U.S. Dist. Court for N. Dist. of California, 511 F.2d 192, 198 (9th Cir. 1975) aff'd, 426 U.S. 394 (1976) (finding error where no formal invocation of a government privilege was made "in the district court"). Oracle has provided no legal authority for its position to the contrary or its arguments that the privileges are "improperly asserted" or "waived."

More to the point, the assertions of each governmental privilege are well-founded. Oracle has not demonstrated any basis for overriding any governmental privilege generally, and has not even pointed to a single document to which a privilege does not apply. Oracle's threat to move to compel is therefore wholly without merit.

The Government's Informants privilege permits the Government to "withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." Roviaro v. United States, 353 U.S. 53, 59 (1957). The Supreme Court explained that the privilege serves in "the furtherance and protection of the public interest in effective law enforcement," by "recogniz[ing] the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourag[ing] them to perform that obligation." Id. Although

Rovario concerned a criminal investigation, it is well settled that the privilege applies equally in the civil context. Dole v. IBEW, 870 F.2d 368, 372 (7th Cir. 1989); Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1072-73 (9th Cir. 2000). Indeed, in civil cases, the privilege “is arguably greater . . . since not all constitutional guarantees which inure to criminal defendants are similarly available to civil defendants.” IBEW, 870 F.2d at 372 (citations omitted).

The Deliberative Process privilege “permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated. . . . It was developed to promote frank and independent discussion among those responsible for making governmental decisions. . . .” FTC v. Warner Commc’ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975), EPA v. Mink, 410 U.S. 73, 87 (1973)). For a document or information to qualify for the privilege, it must be predecisional (prepared to assist a decision maker) and deliberative (its release would expose and undermine the decision making process). Hongsermeier v. C.I.R., 621 F.3d 890, 904 (9th Cir. 2010). Courts must balance the Government’s interest in arriving at competent decisions against the movant’s need for the information; considering “1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” Warner Commc’ns Inc., 742 F.2d at 1161.

The investigative files privilege (or “law enforcement” privilege) permits Plaintiff to withhold information about confidential “law enforcement techniques and procedures.” In re The City of New York, 607 F.3d 923, 944 (2d Cir. 2010); see also N.L.R.B. v. Silver Spur Casino, 623 F.2d 571, 580 (9th Cir. 1980) (recognizing privilege protecting the “informal investigatory . . . process of administrative agencies”). The rationale for the privilege is that “law enforcement operations cannot be effective if conducted in full public view.” Black v. Sheraton Corp. of Am., 564 F.2d 531, 542 (D.C. Cir. 1977). The privilege may be overcome only by a showing of need for the information that outweighs “the public interest in nondisclosure.” In re The City of New York, 607 F.3d at 945 (internal quotation marks and citation omitted).

### **Documents Created After the Issuance of the NOV**

Oracle takes issue with OFCCP’s objections to producing documents created after the issuance of the Notice of Violation (NOV) on the bases of the work product doctrine, trial preparation privilege, and/or attorney-client privilege. However, you have provided no legal support for your client’s position. None of the cases cited in your letter assist Oracle’s novel theories that OFCCP could not have conciliated “in good faith” or in a “*meaningful*” way if it was, after March 11, 2016, anticipating litigation.<sup>1</sup> The work product doctrine protects these documents from disclosure in discovery regardless of OFCCP’s obligations to conciliate as a prerequisite to litigation. OFCCP has no basis to accuse OFCCP of failing to conciliate in good faith – and the fact that OFCCP began preparing for litigation and created documents in

<sup>1</sup> Italics in original.