

**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

**DEFENDANT ORACLE AMERICA
INC.'S OPPOSITION TO OFCCP'S
MOTION TO COMPEL *JEWETT*
DOCUMENTS**

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San Francisco, Ca

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I. INTRODUCTION

Oracle has been producing to OFCCP documents also produced in *Jewett v. Oracle America, Inc.*, California State Case No. 17-CIV-02669, in response to OFCCP's document requests since the beginning of this case, provided they are relevant to OFCCP's case. In addition, more recently, Oracle produced unredacted *Jewett* deposition transcripts and relevant documents (as they were produced in the *Jewett* matter) to OFCCP that are arguably relevant to OFCCP's claims.¹ But, as this Court may know, the *Jewett* case and OFCCP's case are not exact mirrors of one another. *Jewett* is a private class-action alleging violations of California statutes requiring proof of different elements and implicating different evidence than OFCCP's federal law discrimination claims. Moreover, the state law claims in *Jewett* apply to *all Oracle's offices in California*. OFCCP has asserted federal law discrimination claims only as to one office, Oracle's headquarters ("HQCA") in Redwood Shores. Thus, while *Jewett* and the OFCCP's case share a small sub-set of Oracle employees, otherwise there are thousands more employees at issue in *Jewett*. As a result, in the *Jewett* case what Oracle produced in discovery, the depositions, the expert materials, the written discovery responses, and the meet-and-confer correspondence are broader and address issues not present in this case.

In this light, OFCCP's Motion to Compel *Jewett* Documents ("Motion") is its latest act of gamesmanship in a series of misguided efforts to obtain materials to which it is not entitled. OFCCP demands the production of (1) *all* deposition transcripts and exhibits from *Jewett*, including expert depositions; (2) *all* produced expert materials, (3) *all* written discovery requests and responses, and (4) *all* meet-and-confer correspondence (collectively, the "*Jewett* Material").

First, OFCCP fails to demonstrate why it needs *Jewett* Material not already produced. This is telling as OFCCP claims to have had a common interest agreement with the *Jewett*

¹ To be clear, despite OFCCP baseless allegation, Oracle did not redact any *Jewett* Material before producing it to OFCCP – instead, Oracle produced the material just as it was produced in *Jewett*.

plaintiffs allowing it to communicate at will with plaintiffs' counsel. In addition, as is noted below, courts do require such specificity. Courts have disallowed what one court called "piggyback" discovery requests, *i.e.*, requests that simply ask for all documents and materials from some other litigation.

It is little wonder that OFCCP cannot articulate why it needs the discovery. The claims are different, as noted, with different elements, requiring different evidence. The putative class in that case is not limited to Oracle's headquarters location in Redwood Shores, which is the subject of this litigation. And, importantly, Oracle already has produced all relevant documents produced in the *Jewett* litigation (including, for example, all documents relevant to Oracle's compensation practices and guidelines), as well as transcripts for the depositions that are arguably relevant to this litigation.

The closest that OFCCP comes to articulating any sort of particularized need is that it will make discovery more efficient. Empirically, that is not so. Oracle produced deposition transcripts and exhibits in *Jewett* in part based on OFCCP's representations that it would take those depositions into account and narrow the scope of its depositions. OFCCP has now rebuffed any request to narrow depositions in this case on that basis. To quote OFCCP, OFCCP "is entitled to its own depositions in this action and will not agree to modify its notice to remove topics that may have been discussed in other, according to Oracle, irrelevant litigation to which OFCCP was not a party." Connell Decl. Ex. L at 1 (Apr. 19, 2019 Song Letter).

Second, producing the *Jewett* Material would threaten legitimate confidentiality concerns and privacy rights of third-parties. Because *Jewett* is a putative class-action lawsuit on behalf of employees throughout California, the *Jewett* Material contains personal identifying information and highly-sensitive information (including employee-specific compensation information) regarding numerous Oracle employees with no connection to this litigation. It also contains commercially sensitive information about Oracle offices other than HQCA. Producing the *Jewett* Material in this case puts that confidential, private, and highly-sensitive information at

greater risk of public disclosure, not least of which because of the risk of potential FOIA exposure in this case.

Third, OFCCP’s demands are not proportional to the needs of the case. Given the lack of relevance and probative value of the *Jewett* Material and the extensive, uncompromising nature of OFCCP’s requests, the Court should refuse to impose such an uneven burden on Oracle. Moreover, much of the *Jewett* Material sought by OFCCP—those materials that do not implicate confidentiality and privacy concerns—is available as a matter of public record (including, for example, expert reports, which were filed by the parties in connection with their pending motions regarding class certification and summary judgment).

Finally, this is not OFCCP’s only attempt to obtain the *Jewett* Material. Although OFCCP plainly lacks authority to issue document subpoenas on third parties, it nevertheless served an invalid subpoena on *Jewett* counsel for the *Jewett* Material it now seeks to compel. OFCCP only withdrew the subpoena after Oracle made clear it would seek court intervention. Once OFCCP withdrew the invalid subpoena, Oracle offered reasonable compromises and even produced the unredacted transcripts and exhibits from eight depositions in the *Jewett* case with arguable relevance to this matter. Unsatisfied, OFCCP demands the remaining *Jewett* Material. And it now claims that Oracle’s burden and proportionality argument should be discounted because had Oracle not challenged the *ultra vires* subpoena, OFCCP would have the documents without any burden to Oracle. To state this argument reveals its utter lack of merit.

As established herein, OFCCP’s Motion should be denied.

II. RELEVANT FACTUAL BACKGROUND

A. OFCCP’s Discovery Requests and Subpoena.

The Discovery Requests. On January 30, 2019, OFCCP served Oracle with its fifth set of requests for production (“RFPs”). See April 22, 2019 Declaration of Norm Garcia (“Garcia Decl.”), Ex. 1. RFP No. 166 seeks “all unredacted deposition transcripts of depositions taken in

the *Jewett et al. v. Oracle America, Inc.* California state case number 17-CIV_02669 litigation.” *Id.* RFP No. 168 requests all written discovery requests, responses, and meet-and-confer correspondence exchanged between the parties in *Jewett*, including all interrogatories, requests for admission, requests for production, and any correspondence between *Jewett* counsel related to discovery. *Id.*

The Subpoena. Two weeks after serving the discovery requests, OFCCP sought to circumvent the discovery process. On February 15, 2019, OFCCP served the *Jewett* plaintiffs with an invalid subpoena seeking documents identical to RFP Nos. 166 and 168—even before Oracle’s responses and objections to the RFPs were due. Garcia Decl., Ex. 2, Ex. A, at 3-4. OFCCP failed to provide Oracle with a notice and a copy of the invalid subpoena as the Code of Federal Regulations and the Federal Rules of Civil Procedure require. *See* 29 C.F.R. § 18.56(b)(1); Fed. R. Civ. P. 45(a)(4). Oracle only learned of OFCCP’s invalid subpoena when the *Jewett* plaintiffs contacted Oracle pursuant to the Protective Order in that case. Declaration of Erin Connell (“Connell Decl.”) ¶ 2, Ex. A (Feb. 16, 2019 Finberg Email), Ex. B (Feb. 19, 2019 Connell Letter). Although OFCCP ultimately withdrew the invalid subpoena, it did so only after Oracle confirmed with OFCCP (and OFCCP all but conceded) it had no legal authority to obtain or serve the invalid subpoena in the first place, and purporting to require plaintiffs’ counsel in *Jewett* to produce documents pursuant to it would have violated the *Jewett* protective order. *See* Connell Decl. Ex. B (Feb. 19, 2019 Connell Letter); Ex. C at 1 (Feb. 26, 2019 Connell Email), Ex. D at 1 (Feb. 26, 2019 Garcia Email).

Thereafter, Oracle and OFCCP met and conferred regarding the fifth set of RFPs as Oracle initially proposed.

B. Oracle Produced That Which Is Relevant to OFCCP’s Claims.

Oracle Produced Deposition Transcripts and Deposition Exhibits. As noted, the claims in *Jewett* and this case are not the same. Nonetheless, because there is some overlap between the

cases, Oracle produced *Jewett* “persons most knowledgeable” (PMK) deposition transcripts for those witnesses that arguably could bear on the issues in this case. On April 5, 2019, Oracle produced a total of 2,633 pages of unredacted deposition transcripts and exhibits for the following *Jewett* PMK witnesses: Anje Dodson, Vice President of Human Resources; Kris Edwards, Senior Director of U.S. Compensation; Chad Kidder, Director of Talent Advisory; and Kate Waggoner, Senior Director of Global Compensation. Connell Decl. Ex. J (Apr. 5, 2019 Giansello Letter)

In so doing, Oracle relied on OFCCP’s representations that it would (1) review this testimony in an effort to determine whether it could narrow its own 30(b)(6) topics and (2) provide prior notice before noticing any 30(b)(6) topics on similar topics. *See, e.g.*, Connell Decl. Ex. H at 3, 6 (Mar. 29 and Mar. 26, 2019 Garcia Emails).

Oracle also agreed to produce the deposition transcripts and exhibits for four witnesses who previously worked at HQCA and are thus arguably relevant on that basis. *Id.* at 2 (Apr. 2, 2019 Giansello Email). On April 12, 2019, Oracle produced 3,179 pages of transcripts and deposition exhibits for the following individuals that worked at Oracle’s HQCA location: Plaintiff Rong Jewett; Plaintiff Xian Murray; Srividhya Subramanian, and Plaintiff Sophy Wang. Connell Decl. Ex. K (Apr. 12, 2019 Giansello Letter).

Oracle Did Not Redact the Transcripts or Exhibits. Contrary to OFCCP’s assertions (Motion at 1 n.1), Oracle made no redactions to the eight *Jewett* deposition transcripts or exhibits, let alone “significant redactions.” *See* Garcia Decl. ¶ 6. What Oracle produced are the entire transcripts and the exhibits as recorded and marked by the Court Reporter in *Jewett*.

Certain exhibits to the depositions of Rong Jewett and Xian Murray contain redactions. Those redactions were made by the *Jewett* plaintiffs—not by Oracle—prior to their production in the *Jewett* litigation. In short, Oracle produced to OFCCP the *Jewett* deposition transcripts and exhibits exactly as marked at those depositions with no additional alterations or redactions.

*The Documents At Issue:*² Oracle has objected to producing the remaining six *Jewett* deposition testimony and exhibits as irrelevant and implicating serious issues of privacy and confidentiality: Plaintiff Marilyn Clark; Plaintiffs’ Expert Leaetta Hough; Plaintiff Manjari Kant; Plaintiffs’ Expert David Neumark; Plaintiff Elizabeth Sue Petersen; and Oracle’s Expert Ali Saad. Connell Decl. Ex. H at 1 (Apr. 2, 2019 Giansello Email). None of these remaining *Jewett* plaintiffs worked at HQCA during the relevant period of this litigation. Connell Decl. ¶ 4, Ex. C at 5 (Feb. 22, 2019 Connell Email).

Oracle has also disputed the relevance of, and burden associated with, RFP No. 168, which seeks all written discovery and discovery-related correspondence from *Jewett*. Despite the existence of a “common interest agreement” with the *Jewett* plaintiffs, OFCCP did not identify at meet-and-confer specific materials responsive to this request that it felt were relevant and required production, instead asserting that its request for “all documents you provided to or received from the plaintiffs in [*Jewett*]. . . related to written discovery requests” was sufficiently specific. Connell Decl. Ex. E at 5 (Mar. 12, 2019 Garcia Letter). Nor did OFCCP ever provide a justification for its blanket request for every single piece of written correspondence between counsel for Oracle and counsel for the *Jewett* plaintiffs that relates to discovery, instead simply asserting that it “does not believe” that production of these documents would be burdensome. Connell Decl. Ex. G at 1-2 (Apr. 1, 2019 Garcia Letter).

² OFCCP does not seek at this time to compel production in response to RFP No. 167, which seeks all documents produced by *Jewett* parties, but states that it “reserves the right to compel” these documents. Motion at 2 n.2. Any such motion would be unwarranted and unnecessary. Oracle has produced to OFCCP hundreds of documents that were also produced in the *Jewett* case, provided they are relevant to OFCCP’s case. These documents include, among other things, policies, practices, procedures, and training documents related to compensation and performance appraisals, as well as information relating to employees at Oracle’s Redwood Shores location.

C. **OFCCP Represented, Falsely, That the Produced *Jewett* Depositions Would Narrow and Expedite Discovery.**

OFCCP repeatedly said it would narrow its discovery were Oracle to produce the *Jewett* Material. On February 21, 2019, OFCCP argued that its “request for depositions would also render discovery in this action more efficient, as it may eliminate the need for us to duplicate depositions.” Connell Decl. Ex. C at 6 (Feb. 21, 2019 Garcia Email). On March 25, 2019, OFCCP stated that “[p]roviding the documents, to include depositions, may be beneficial to both sides because they may obviate the need for depositions of the people deposed or may streamline their depositions.” Connell Decl. Ex. F at 1 (Mar. 25, 2019 Garcia Letter). And during a March 26, 2019 meet and confer, OFCCP stated that:

[A]fter we review [the *Jewett* PMK transcripts], we may determine that it is unnecessary to depose some of the witnesses, or may choose to limit our questioning. Thus, providing the depositions will likely lead to efficiencies for both parties.

See Connell Decl. Ex. H at 6 (Mar. 26, 2019 Garcia Email) On March 29, 2019, OFCCP then assured Oracle that it would “agree to give prior notice to Oracle before noticing PMK depositions on the same topics in the notice of depositions for [the *Jewett*] depositions and will meet and confer with Oracle to attempt to resolve disputes” provided that OFCCP received the transcripts before filing its 30(b)(6) deposition notice. *Id.* at 4 (Mar. 29, 2019 Garcia Email).

OFCCP did not live up to its word. On March 29, 2019 and again on April 2, 2019, Oracle told OFCCP that it would be producing the PMK deposition transcripts and exhibits by April 5, 2019. Connell Decl. Ex. H at 1, 4 (Apr. 2 and Mar. 29, 2019 Giansello Emails). Oracle did so. Connell Decl. Ex. J (Apr. 5, 2019 Giansello Letter). On that same day, *before* Oracle produced the PMK transcripts and exhibits, OFCCP served its amended notice of 30(b)(6) depositions. Connell Decl. Ex. I (OFCCP’s Amended 30(b)(6) Deposition Notice). OFCCP did not provide any notice and obviously did not first review the PMK materials to limit its 30(b)(6) topics. Connell Decl. Ex. M at 2-3 (Apr. 22, 2019 Riddell Letter).

Since receipt of the PMK depositions and exhibits, OFCCP has steadfastly refused to honor its commitment to review the *Jewett* PMK testimony and limit any overlapping topics for deposition. *Id.* at 3. OFCCP has admitted that it has not completed its review of the *Jewett* transcripts over two weeks after Oracle produced the documents. *Id.*

OFCCP has argued that it “is entitled to its own depositions in this action and will not agree to modify its notice to remove topics that may have been discussed in other, according to Oracle, irrelevant litigation to which OFCCP was not a party.” Connell Decl. Ex. L at 1 (April 19, 2019 Song letter). OFCCP then demanded that Oracle prepare witnesses for all of OFCCP’s noticed 30(b)(6) topics, even those that were covered and explained in the *Jewett* PMK testimony. Connell Decl. Ex. M at 3 (Apr. 22, 2019 Riddell Letter).

III. LEGAL ARGUMENT

A. OFCCP’s Is Not Entitled to the Irrelevant Documents It Now Seeks.

It is well settled that a party can only seek discovery regarding a matter relevant to a claim or defense at issue in a matter. Fed. R. Civ. P. 26(b)(1). OFCCP argues that the “overlap” between the *Jewett* litigation and this case renders *all* documents produced in the former relevant to the latter. Motion at 3. Specifically, OFCCP argues that the *Jewett* Material is “highly relevant as both cases have a similar core claim—gender pay discrimination” and because both cases involve the same job functions and “[t]he geographical areas and timeframes of the cases are overlapping.” *Id.* OFCCP’s position is baseless.

Oracle has recognized that there are some shared features in this case with the *Jewett* case, which is why Oracle has produced in this case documents also produced in *Jewett* when those documents are relevant to both matters. But there are also features that are not common to both cases, and OFCCP’s arguments rely on gross oversimplifications that omit key distinctions between the two cases. For one, the claims in *Jewett* differ from the claims here. In *Jewett*, the Plaintiffs allege violations of the California Equal Pay Act, violation of the California Labor

Code, and violation of the California Business and Professions Code, which involve different evidence from the discrimination claims alleged here. Moreover, the scope of the *Jewett* litigation differs from the scope of this case. The putative class in *Jewett* spans the entire state of California (including approximately 166 separate location codes) and is not limited to HQCA or the Redwood Shores office, which is the subject of this litigation. Indeed, the three remaining class representatives in *Jewett*—whose deposition transcripts and exhibits are, *inter alia*, the subject of this Motion—never worked at Oracle’s Redwood Shores location.

Furthermore, demonstrating some overlap between the two cases does not warrant granting OFCCP’s motion. Instead, OFCCP “must specifically ask for the documents [it] wants and be able to demonstrate that the information [it] seeks is relevant to [its] claims in this case.” *Chen v. Ampco Sys. Parking*, No. 08-cv-0422, 2009 WL 2496729, at *3 (S.D. Cal. Aug. 14, 2009) (“[T]he fact that [defendant] produced certain documents in the state cases does not necessarily make them discoverable in this case.”); *see also Racing Optics v. Aevoe Corp.*, No. 2:15-cv-1774, 2016 U.S. Dist. LEXIS 98776, at *6-7 (D. Nev. July 28, 2016) (holding that requests that “appear to seek every document produced or generated in [prior litigation] . . . constitute impermissible ‘piggybacking’ discovery”).³

OFCCP should be held to this burden, especially where, as here, OFCCP and the *Jewett* plaintiffs’ counsel claim to have entered into a “common interest agreement.” Given such an agreement, OFCCP could conceivably identify with specificity the *Jewett* deposition transcripts and written discovery that it believes are relevant to this matter and their probative value. But it has not, opting instead to argue indiscriminately that *all* the *Jewett* Material is relevant to this case when that is plainly untrue. OFCCP has not articulated why the *Jewett* experts’ testimony and analysis is relevant to this case. The testimony of the *Jewett* plaintiffs who never worked at

³ Just to highlight an example of why a claim of “overlap” without more is insufficient: OFCCP is seeking, among other things, meet-and-confer letters. Meet-and-confer letters based on different discovery requests for claims that have different elements are not probative of anything in this case.

the HQCA location at issue in this litigation is similarly irrelevant. Further, OFCCP offers absolutely no justification as to how an indiscriminate collection of discovery-related correspondence between counsel is probative to any matter in this litigation.

Oracle already has produced the deposition transcripts of its PMK witnesses and the witnesses who worked in the geographic location relevant to this case. *See* Section II.B, *supra*. Because OFCCP has not carried its burden of demonstrating the relevance of the remaining *Jewett* Material, its Motion must be denied.

B. Compelling the Production of the *Jewett* Material Would Undermine Third Parties' Legitimate Privacy Interest.

Courts have long “recognize[d] a constitutionally-based right of privacy that can be raised in response to discovery requests.” *Zuniga v. W. Apartments*, No. CV 13-4637 JFW (JCX), 2014 WL 2599919, at *3 (C.D. Cal. Mar. 25, 2014); *see also Lawrence v. Hoban Mgmt., Inc.*, 305 F.R.D. 589, 591 (S.D. Cal. 2015); *Stallworth v. Brollini*, 288 F.R.D. 439, 444 (N.D. Cal. 2012). Here, OFCCP’s discovery requests seek deposition transcripts, expert materials, and written discovery that include private and confidential information.

OFCCP cites the Protective Order in this case and the *Jewett* plaintiffs’ consent to production of the materials at issue. Motion at 4. But, as Oracle has explained on numerous prior occasions in this litigation, the Protective Order in this case protects confidential information from getting into the hands of *third* parties to this litigation. The existence of a Protective Order in this matter does nothing to address Oracle’s objection to providing the government, a *party* to this litigation, with confidential information bearing no relevance to this litigation, namely, the constitutionally-protected information of employees with no connection to the geographic location at issue in this case and thus with no connection to this case at all. This is especially true where, as here, the information produced may become subject to a FOIA

request, which could result in a protracted legal effort and use of judicial resources to prevent disclosure and ultimately the publication of the material.

Oracle values the privacy of its employees and is indeed compelled by the California Constitution to protect the privacy interests of its employees. *See* Cal. Const. Art. 1, § 1; *see also Board of Trustees v. Super. Ct.*, 119 Cal. App. 3d 516, 524-25 (Cal. Ct. App. 1981). The consent of the *Jewett* plaintiffs is not enough to override these concerns for the privacy of other third parties whose information is included in the *Jewett* Material.

When an employee's right to privacy is implicated by a discovery request, "the party seeking discovery must demonstrate a compelling need for discovery, and that compelling need must be so strong as to outweigh the privacy right when these two competing interests are carefully balanced." *Lawrence*, 305 F.R.D. at 591 (quoting *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011)). Here, OFCCP has failed to show even the specific relevance of the *Jewett* Materials, let alone articulate a compelling need for them. Accordingly, OFCCP fails the balancing test required for production of these materials.

In addition to employee privacy concerns, Oracle has an interest in maintaining the confidentiality of commercial or financial information. *See* April 24, 2019 Order Granting Unopposed Motion to Seal ("With particularized information about Oracle's compensation structure, a competitor could out-bid/out-compete Oracle in the labor market by ascertaining the offers that Oracle will likely make and altering its offers and negotiating position accordingly in order to attract the top talent."). Here, the *Jewett* Material sought by Plaintiffs contains not only confidential information about Oracle's compensation structure and employee salaries at HQCA, but about its practices and employees at non-HQCA locations, which are not relevant to this litigation.

C. Despite Asserting an Interest in “Efficiency” and “Streamlining” Discovery, OFCCP Has Made No Effort to Streamline Discovery Based on the *Jewett* Materials Already Produced.

OFCCP contends that the *Jewett* Material should be produced in the interest of efficiency, so as to “avoid wasting resources pursuing irrelevant or unproductive lines of inquiry here.” Motion at 2. Even if accepted as valid, OFCCP’s purported intent to “engage in efficient discovery” rings utterly hollow considering the road that has led the parties to this Motion. Despite its purported concern about efficiency, OFCCP has propounded an incredible 237 RFPs, *with over 100 served since January 2019*. Indeed, in the course of meeting and conferring about the PMK deposition transcripts that Oracle ultimately produced, OFCCP made the same arguments and representations it now makes in its Motion about the importance and usefulness of these materials for the purpose of facilitating efficient discovery. OFCCP repeatedly represented that it would use the *Jewett* PMK transcripts to narrow its discovery where possible, *see* Connell Decl. Ex. H at 3, 6 (Mar. 29 and Mar. 26, 2019 Garcia Emails), and Oracle produced the *Jewett* PMK transcripts with that understanding in mind. Yet once Oracle produced the transcripts, OFCCP reneged on its prior representations and demanded that Oracle prepare witnesses for *all* of its 30(b)(6) topics, even those that were thoroughly covered and explained in the *Jewett* testimony. Connell Decl. Ex. M at 3 (Apr. 22, 2019 Riddell Letter). OFCCP’s conduct with respect to the materials already produced undermines its representations about avoiding unnecessary repetition or reduction of burden.

D. OFCCP’s Requests Are Disproportionate To The Needs Of The Case And The Undue Burden Of The Discovery Outweighs Any Alleged Benefit.

OFCCP’s demands are not “proportional to the needs of the case,” nor would “the burden or expense” of production outweigh any benefit. *See* Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering [1] the importance of the issues at

stake in the action, [2] the amount in controversy, [3] the parties' relative access to relevant information, [4] the parties' resources, [5] the importance of the discovery in resolving the issues, and [6] whether the burden or expense of the proposed discovery outweighs its likely benefit.”); accord 29 C.F.R. § 18.51(b)(4); *Gilead Scis., Inc. v. Merck & Co., Inc.*, No. 5:13-cv-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) (“No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old [Rule 26] language to that effect is gone. Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case.”).

As an initial matter, to the extent not protected by privacy and confidentiality issues (there was a protective order in place in *Jewett*) much of the *Jewett* Material should be available to OFCCP, either through the public record or through its “common interest agreement” with the *Jewett* plaintiffs. Second, as explained above, the limited probative value of the material sought by this Motion does not justify Oracle expending the time and effort to gather, review, and produce these documents. With document production scheduled to close in one week, this is little more than a diversion from more useful and productive activities for all parties involved.

OFCCP contends that Oracle's argument that its requests are overly broad and unduly burdensome are “undermined by the fact that Oracle prevented the lead plaintiff in *Jewett* from providing the same material to OFCCP.” Motion at 4. OFCCP thus concludes that “any burden is of Oracle's own making” because OFCCP “would likely already have the documents responsive to RFPs 166 and 168 . . . with minimal, if any, burden to Oracle if Oracle had not prevented the *Jewett* plaintiffs from complying with OFCCP's subpoena.” *Id.* First, OFCCP ignores that the confidentiality concerns at issue cannot be unilaterally waived by the *Jewett* plaintiffs. More importantly, OFCCP mischaracterizes what occurred: Oracle did not “prevent” the *Jewett* plaintiffs from complying with OFCCP's subpoena. Rather, OFCCP chose to

withdraw the subpoena once Oracle pointed out OFCCP's lack of subpoena authority and the *ultra vires* nature of the subpoena.

IV. CONCLUSION

For the foregoing reasons, OFCCP is not entitled to the documents it seeks to compel.

May 6, 2019

Respectfully submitted,

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