

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

RECEIVED
MAY 17 2019
Office of Administrative Law Judges
San Francisco, Ca

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 ERIN M.
CONNELL IN SUPPORT OF
DEFENDANT ORACLE
AMERICA, INC.'S MOTION TO
CORRECT OFCCP'S
MISLEADING
COMMUNICATIONS TO
ORACLE'S EMPLOYEES**

I, Erin M. Connell, declare as follows:

1. I am a partner with Orrick, Herrington & Sutcliffe LLP, attorneys of record for defendant Oracle America, Inc. ("Oracle"). I make this declaration in support of Oracle's Motion To Correct OFCCP's Misleading Communications To Oracle's Employees. I have personal knowledge of the facts set forth herein, except where stated on information and belief, and if called as a witness could competently testify thereto.

2. Attached hereto as **Exhibit A** is a true and correct copy of an exemplar letter that I understand OFCCP sent to current and former Oracle employees.

3. Attached hereto as **Exhibit B** is a true and correct copy of an April 29, 2019 letter I sent to Jeremiah Miller, Counsel for Civil Rights at the U.S. Department of Labor's Office of the Solicitor, who sent OFCCP's letter attached hereto as Exhibit A.

4. Attached hereto as **Exhibit C** is a true and correct copy of an April 30, 2019 letter I received from Laura Bremer, responding to my April 29, 2019 letter.

5. Attached hereto as **Exhibit D** is a true and correct copy of an email exchange between me, Laura Bremer, and others, dated April 30, 2019 – May 2, 2019, following Ms. Bremer's April 30, 2019 letter to me.

6. Attached hereto as **Exhibit E** is a true and correct copy of a May 9, 2019 letter I sent to Ms. Bremer that memorializes the telephonic meet and confer I conducted with her earlier that day.

7. Attached hereto as **Exhibit F** is a true and correct copy of a May 10, 2019 email I sent containing Oracle's proposed corrective notice to the employees who received OFCCP's letter.

8. Attached hereto as **Exhibit G** is a true and correct copy of a May 13, 2019 letter I received from Ms. Bremer.

9. Attached hereto as **Exhibit H** is a true and correct copy of a May 16, 2019 letter I sent to Ms. Bremer.

10. In response to inquiries that Oracle received about OFCCP's letter (for example, from employees wondering if it was a hoax or wondering how OFCCP got their personal contact information), Oracle provided the following form response:

The Office of Federal Contract Compliance Programs (OFCCP), an agency within the United States Department of Labor, has brought an enforcement action against Oracle that includes allegations of hiring and compensation discrimination in certain jobs at Oracle's headquarters location in Redwood Shores, California. Oracle denies OFCCP's allegations and believes they have no merit. As part of the litigation process, the Administrative Law Judge who was previously overseeing the case allowed OFCCP to obtain personal contact information from Oracle for some of Oracle's employees, including yours. It is entirely up to you whether to speak to OFCCP, including by responding to the letter you received. You are not obligated to do so, although you are free to talk to them if you wish to do so. Oracle will not take any adverse action against you if you do choose to speak to OFCCP. If you have additional questions about the case, please feel free to respond to this email.

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11. I met and conferred telephonically in good faith with Laura Bremer on May 9, 2019 regarding the issues in Oracle's, motion but the parties were unable to reach resolution.

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

Executed on May 16, 2019, in San Francisco, California.



Erin M. Connell

Exhibit A

U.S. Department of Labor

Office of the Solicitor
300 Fifth Ave., Suite 1120
Seattle, Washington 98104-2397
(206) 757-6762
FAX (206) 757-6761



REDACTED

April 4, 2019

Dear [REDACTED]

We are writing to you because you have been named as a potential injured employee in the *Department of Labor's lawsuit Office of Federal Contract Compliance Programs, United States Department of Labor v. Oracle America, Inc.*, OALJ Case No. 2017-OFC-00006. This case is scheduled to go to trial December 5, 2019, in San Francisco, California. This lawsuit alleges Oracle America, Inc. (Oracle) unlawfully discriminated against its employees by suppressing the pay of its female, Black, and Asian employees. Based on our analysis of Oracle's pay data, we have determined that these employees have been underpaid as much as 20% relative to their peers. We estimate that this discrimination cost these employees at least \$600,000,000 in lost wages from 2013 to the present. The Department of Labor is bringing this lawsuit to end this discrimination, and require Oracle to pay its injured employees for their lost wages.

We are looking to talk to employees who were employed by Oracle any time between 2013 and 2019, who were affected by this discrimination. We want to hear what happened to you. We are specifically looking to talk to **female employees** who worked in **Product Development, Information Technology, and Support lines of business; Black and Asian employees** employed in **Product Development**, particularly if Oracle used your prior salary to set your starting salary, placed you in lower paying positions than your peers or channeled you into lower paying positions throughout your career. We are also looking for **applicants or employees** for **Product Development jobs** recruited through Oracle's **college recruiting program**.

We want to assure you that you have not been accused of any wrongdoing; and we will keep your identity confidential, unless you volunteer to share your story as a witness in this case.

If you have information related to our lawsuit, would like to find out whether your wages have been impacted or have any questions about this process you may contact the Department of Labor's Oracle witness line at (213) 894-1591. If no one picks up, please leave your contact information, and we will return your call. You may also send us an email at OFCCPvOracleLitigation@dol.gov.

Thank you in advance for your cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeremiah Miller", written over a horizontal line.

Jeremiah Miller
Counsel for Civil Rights
Office of the Solicitor
Department of Labor

Exhibit B



April 29, 2019

Via E-Mail

Jeremiah Miller
Counsel for Civil Rights
U.S. Department of Labor, Office of the Solicitor
300 Fifth Avenue, Suite 1120
Seattle, WA 98104

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

Erin M. Connell

E econnell@orrick.com
D +1 415 773 5969
F +1 415 773 5759

Re: OFCCP v. Oracle; OALJ Case No. 2017-OFC-00006
OFCCP's Contact with Current and Former Oracle Employees

Dear Jeremiah:

This letter requires immediate attention and action. It has come to Oracle's attention that you have been sending, on behalf of the Department of Labor ("DOL"), letters and/or emails to both current and former Oracle employees regarding this case. We are surprised and disappointed to see that the correspondence contains misleading, false and coercive statements in violation of the Rules of Practice and Procedure for Administrative Hearings Before the OALJ and contrary to Judge Clark's advisement in his March 6, 2019 Order Granting Conditional Leave to File a Second Amended Complaint. DOL (and OFCCP) must immediately cease making these statements and halt communications with current and former employees until a corrected notice – approved by Oracle – is sent. We also ask that you immediately produce all written communications between DOL and/or OFCCP and any current or former Oracle employee resulting from this misleading, false and coercive correspondence.¹ If DOL and OFCCP are not willing to take these steps, we will have no choice but to raise this issue with Judge Clark, and seek appropriate evidentiary sanctions.

Statements in Violation of the Rules of Practice and Procedure

As you know, attorneys practicing before the OALJ are prohibited from (1) threatening, coercing, intimidating, deceiving, or knowingly misleading a witness or potential witness and (2) knowingly making or presenting false or misleading statements, assertions, or representations about a material fact related to the proceeding. 29 CFR § 18.22.² These prohibitions are similar to, but broader than, related prohibitions in the applicable rules of professional conduct. The correspondence received by current and former Oracle employees violates this rule in several respects.

¹ For the avoidance of doubt, an example of the correspondence at issue is enclosed with this letter.

² The Court's February 6, 2019 Pre-Hearing Order indicates that these proceedings will be governed by 41 CFR Part 60-30. In the absence of any contrary provisions in that part, however, the general rules contained at Part 18 apply.



Jeremiah Miller
April 29, 2019
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First, the correspondence is misleading in that it implies that the person receiving the letter may be entitled to a portion of the alleged \$600,000,000 referenced, but they should contact DOL³ to find out, and/or see how they can help DOL obtain this money from Oracle. Specifically, the letter states there are "\$600,000,000 [in] lost wages" at issue in the case and DOL is seeking to "require Oracle to pay its injured employees for their lost wages." Later, the letter states the recipient can contact DOL if s/he "would like to find out whether [his/her] wages have been impacted." These statements indicate that in order to reap the potential benefits of OFCCP's \$600,000,000 claim, the recipient must assert their wages have been impacted by contacting DOL. Accordingly, your letter improperly suggests that this case has an opt-in structure, without clarifying that a person need take no action to benefit from OFCCP's claims (in the event OFCCP prevails in this action) and to be eligible for relief. It also implies there is a fund of money waiting to be recouped.

Second, the letter is false and misleading in that OFCCP fails to adequately describe its allegations as just that – allegations that Oracle denies, and instead describes them as determinations that already have been made, as if there has been some type of adjudication of OFCCP's claims. Specifically, the correspondence states:

Based on our analysis of Oracle's pay data, we have determined that these employees have been underpaid as much as 20% relative to their peers. We estimate that this discrimination cost these employees at least \$600,000,000 in lost wages from 2013 to the present. The Department of Labor is bringing this lawsuit to end this discrimination, and require Oracle to pay its injured employees for their lost wages.

Again, referring to DOL instead of OFCCP is problematic for the reasons described in footnote 2. It is also problematic for the separate reason that the ALJ presiding over this matter also works for DOL, further underscoring the misleading nature of saying DOL "determined" that Oracle engaged in discrimination. More fundamentally, OFCCP has yet to prove any of its allegations in court. Failing to properly couch them as allegations (or note that Oracle disputes OFCCP's "determinations") is not only misleading, it is materially misleading. The same can be said of OFCCP's statement that "we are looking to talk to employees who were employed by Oracle any time between 2013 and 2019, *who were affected*

³ We also note that the letter is on DOL letterhead, and repeatedly states that DOL – not OFCCP – is suing Oracle and has "determined" that Oracle has engaged in discrimination. You obviously know the plaintiff in the case is OFCCP – not DOL. Accordingly, it appears OFCCP is misrepresenting that DOL is the plaintiff solely as a means of intimidating recipients (who may have never heard of OFCCP), and/or to give more credence to OFCCP's alleged "determination" of discrimination, based on the notion that recipients of the letter may give more deference to conclusions drawn by DOL than OFCCP.



Jeremiah Miller
April 29, 2019
Page 3

by this discrimination." (emphasis added). Obviously, no discrimination has been proven, yet your letter gives the impression it is a foregone conclusion.

Statements Contrary to Judge Clark's Order

In addition to containing misleading, false and coercive statements in violation of the Rules of Practice and Procedure, OFCCP's letter is contrary to Judge Clark's admonishment in his March 6, 2019 Order. As you surely recall, Judge Clark specifically admonished that "[c]ounsel of the government has an interest only in the law being observed, not in victory or defeat in any particular litigation," citing *Reid v. U.S. INS*, 949 F.2d 287, 288 (9th Cir. 1991). Yet, in its correspondence, OFCCP makes no attempt to hide the fact that it is only interested in speaking to current or former Oracle employees who support its allegations of discrimination. Rather than making a neutral statement of the facts and practices at issue and soliciting former or current employees to contact OFCCP to comment on those allegations or relay their own personal anecdotes, OFCCP states "[w]e are looking to talk to employees who were employed by Oracle any time between 2013 and 2019, *who were affected by this discrimination.*" (emphasis added). The letter then goes on to specifically call out the various alleged affected groups. Far from a neutral request for information to determine if, indeed, the law has been broken, OFCCP's tactics are clearly aimed at victory in this litigation.

Contact with Oracle Current Managers

As you know, under the Rules of Professional Conduct for both California and Washington, contact with Oracle's current managers is only permitted with Oracle's consent "if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization ... [or] may constitute an admission on the part of the organization." Cal. R. Prof. Conduct 2-100(B)(2); *see also* Wash. R. Prof. Conduct 4.2. We previously agreed not to object to OFCCP's communications with current managers subject to certain conditions; namely, that OFCCP (not DOL generally) would only speak to current managers about their individual experiences and would not use the information gleaned from these *ex parte* communications against Oracle as admissions. We also emphasized that Oracle expected OFCCP to uphold its discovery obligations with respect to these communications and to abide by the rules of professional conduct more generally. *See* March 28, 2019 Email from Jeremiah Miller to Erin Connell re Contact with Current Managers (and preceding thread). As described above, OFCCP's correspondence is inconsistent with the Rules of Professional Conduct. Additionally, OFCCP has not complied with its discovery obligations with respect to these contacts. Indeed, in response to Oracle's Requests for Production relating to communications with third parties, including potential class members (*see e.g.*, RFP 137), OFCCP responded with a litany of baseless objections and assertions of privilege and a vague assertion that "OFCCP will supplement its responses as appropriate." Needless to say, these communications are responsive to Oracle's requests, are not privileged, and should have been produced already.



Jeremiah Miller
April 29, 2019
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OFCCP's Confirmation That OFCCP Is Not Accusing Class Member Managers of Any Wrongdoing

With respect to OFCCP's confirmation that no class members (including managers) are being accused by OFCCP of any wrongdoing, we will be serving a Request for Admission to confirm OFCCP's position on this issue.

* * *

Oracle asks that OFCCP (and DOL) immediately cease sending current and former Oracle employees any letter or email containing these misleading, false, coercive statements, and halt all ongoing communications that have resulted from the misleading, false, coercive correspondence until a corrective communication (approved by Oracle) is sent. Additionally, in light of this misconduct by DOL and OFCCP, Oracle hereby rescinds its prior consent for OFCCP to contact Oracle's current managers. And, for the avoidance of doubt, although we never granted DOL permission to contact current managers in the first place, we do not consent to any DOL communications with current managers now.

Please confirm by COB tomorrow (Tuesday, April 30) if OFCCP will agree to these conditions. If not, please let us know when on Wednesday, May 1, you (or someone from your team) can be available for a telephonic call to meet and confer on this time-sensitive matter. Alternatively, if you plan to attend Ms. Waggoner's deposition in Denver, we can meet and confer on this issue once her deposition is complete. Again, if we are not able to reach agreement, we intend to promptly bring this situation to Judge Clark's attention, and will seek appropriate evidentiary sanctions.

Very truly yours,

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

Erin M. Connell

U.S. Department of Labor

Office of the Solicitor
300 Fifth Ave., Suite 1120
Seattle, Washington 98104-2397
(206) 757-6762
FAX (206) 757-6761



REDACTED

April 4, 2019

Dear [REDACTED]

We are writing to you because you have been named as a potential injured employee in the *Department of Labor's lawsuit Office of Federal Contract Compliance Programs, United States Department of Labor v. Oracle America, Inc.*, OALJ Case No. 2017-OFC-00006. This case is scheduled to go to trial December 5, 2019, in San Francisco, California. This lawsuit alleges Oracle America, Inc. (Oracle) unlawfully discriminated against its employees by suppressing the pay of its female, Black, and Asian employees. Based on our analysis of Oracle's pay data, we have determined that these employees have been underpaid as much as 20% relative to their peers. We estimate that this discrimination cost these employees at least \$600,000,000 in lost wages from 2013 to the present. The Department of Labor is bringing this lawsuit to end this discrimination, and require Oracle to pay its injured employees for their lost wages.

We are looking to talk to employees who were employed by Oracle any time between 2013 and 2019, who were affected by this discrimination. We want to hear what happened to you. We are specifically looking to talk to **female employees** who worked in **Product Development, Information Technology, and Support lines of business; Black and Asian employees** employed in **Product Development**, particularly if Oracle used your prior salary to set your starting salary, placed you in lower paying positions than your peers or channeled you into lower paying positions throughout your career. We are also looking for **applicants or employees** for **Product Development jobs** recruited through Oracle's **college recruiting program**.

We want to assure you that you have not been accused of any wrongdoing; and we will keep your identity confidential, unless you volunteer to share your story as a witness in this case.

If you have information related to our lawsuit, would like to find out whether your wages have been impacted or have any questions about this process you may contact the Department of Labor's Oracle witness line at (213) 894-1591. If no one picks up, please leave your contact information, and we will return your call. You may also send us an email at OFCCPvOracleLitigation@dol.gov.

Thank you in advance for your cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeremiah Miller", written over a horizontal line.

Jeremiah Miller
Counsel for Civil Rights
Office of the Solicitor
Department of Labor

Exhibit C



April 30, 2019

VIA ELECTRONIC MAIL ONLY

Erin M. Connell
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,

Dear Erin,

We are in receipt of your April 29, 2019 letter demanding “immediate attention and action.” The concerns you raise are utterly baseless and could have been easily addressed in a quick phone conversation. Nevertheless, we respond immediately because the positions you assert in this letter suggests you or Oracle are taking action to intimidate or chill the rights of the protected class, which includes current Oracle managers employed in the Product Development, Support, and Information Technology job functions.

In your letter, you “rescind [Oracle’s] prior consent for OFCCP to contact Oracle’s current managers” and reiterate that “we do not consent to any DOL communications with current managers now.” By rescinding your “consent” to these class members’ communications with the government, you appear to demand that the government cease talking to these class members. This demand reveals a deeply concerning misapprehension of the OFCCP’s mission, Oracle’s obligations as a contractor, and the California Rules of Professional Conduct.

OFCCP is charged with ensuring that federal contractors “complied with their non-discrimination and affirmative action obligations,” pursuant to Executive Order 11246. *See Bd. Of Governors of Univ. of N. Carolina v. U.S. Dept. of Labor*, 917 F.2d 812, 815 (4th Cir. 1990). As we have already had to remind you¹, federal contractors are prohibited from intimidating, coercing or otherwise retaliating against any individual who has or may engage in “assisting or participating in any manner” in an investigation, hearing, or any activity related to administration of Executive Order 11246. 41 C.F.R. § 60-1.32. In other words, Oracle cannot interfere with its

¹ Soon after filing this lawsuit, OFCCP warned Oracle about its duty to refrain from intimidating individuals from furnishing information or participating in an investigation or hearing. 41 CFR 60-1.32. In early 2017, OFCCP learned that Oracle had begun laying off employees and offering severance agreement that included language requiring employees to “use [their] best efforts to cause such claims [relating to employment status with Oracle] to be withdrawn, dismissed or otherwise terminated with prejudice,” and waiving any right to personal recovery in a lawsuit brought by an agency on their behalf. After OFCCP raised concerns, Oracle agreed to provide notice to employees who had recently signed severance agreements of their rights to cooperate with OFCCP in this lawsuit.

employees – including its current managers – from communicating with OFCCP about their claims of pay discrimination against Oracle.

Your reliance on California Rule of Professional Conduct 4.2² -- which prohibits attorneys from communicating with represented individuals without consent – appears to rest on the flawed assumption that you and your firm represent current Oracle managers who have pay discrimination claims against Oracle in this lawsuit. Erin, the position you assert not only ignores Rule 4.2(c) and comment 8, which expressly authorize government lawyers to contact informants pursuant to laws protecting employees' rights to equal employment opportunity – it constitutes a clear and unequivocal violation of Rule 1.7 of the Rules of Professional Conduct. Rule 1.7 governs the limitations on attorneys representing two or more parties with adverse interests. While permitting written consent to some conflicts in some cases, Rule 1.7(d)(3) specifically prohibits any attorney from attempting to represent parties with adverse interests in the *same litigation*.

Here, the communications to which you are objecting are communications between OFCCP managers *who are in the protected class* -- which means they have pay discrimination claims against Oracle, your client. The claims for pay discrimination on behalf of those Oracle managers are represented in this litigation by Department of Labor attorneys, not by you or your firm. You cannot instruct these managers that they cannot speak to the government about these workers' claims *against* Oracle, your client. Further, you cannot advise Oracle managers that you or your firm represents them: you unmistakably have a clear conflict of interest and you cannot assert that position consistent with your ethical obligations.

We fully understand that Oracle is put in an uncomfortable position because its managers are among the members of the protected class here. It is the reason that we reached out months ago to advise you that we were in communication with these managers in the protected class and that we were going to discuss with these class members their claims against Oracle. As we explained at the time, we had no intention then, and have no intention now, of seeking to use statements by these protected class members as corporate admissions.

Given your complete misapprehension of your role in relation to the management members of the protected class, we seek immediate assurances that you and your firm have not and will not interfere with communications between the protected class and the government. Specifically, we need to know whether you have advised members of the protected class falsely and improperly that you or your office represents them in this litigation or that Oracle must give its "consent" to communicate with the government about these protected class members' claims in this lawsuit. If you have improperly chilled and discouraged management class members through such instructions or advice, we demand that you issue an immediate corrective notice. If you fail to provide these assurances, we will be forced to bring this to the Court's attention, as we cannot sit idly by and let such interference with protected rights occur.

As to the alleged concerns you referenced in your letter regarding OFCCP's communications with the protected class, OFCCP complied with all ethical and statutory obligations in communicating with the Oracle employees on whose behalf OFCCP seeks relief in

² Rule 4.2 is effective November 1, 2018, and replaces Rule 2-100, cited in your letter.

this enforcement action. Because OFCCP's letter to employees and communications with them are entirely appropriate, OFCCP will not submit to Oracle's demands. OFCCP welcomes the Court's scrutiny of the letter OFCCP sent to members of the protected class, as it properly seeks to welcome confidential communications between the protected class and the government.

The Department of Labor Necessarily Communicates with Employees

This case arises out of regulations authorizing OFCCP to seek relief on behalf of victims of discrimination, and authorizing the Solicitor of Labor to bring enforcement actions to both seek such relief and enjoin violations. 41 CFR 60-1.26. In enforcing Executive Order 11246 on behalf of victims of discrimination – in this case Oracle's former and current employees in the Product Development, Support and Information Technology job functions (including managers) – the Department of Labor necessarily relies on information obtained from these victims.

Nevertheless, Oracle refused to produce contact information for its employees during the compliance review and during the first 9 months of this enforcement action, thereby blocking OFCCP's ability to contact the individuals on whose behalf OFCCP seeks relief. As OFCCP explained in its motion to compel contact information for Oracle's current and former employees, the Supreme Court recognizes that the Secretary of Labor necessarily relies upon "information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Kasten v. St. Gobain Performance Plastics Corp.*, 531 U.S. 1, 11-12 (2011). When the ALJ ordered Oracle to produce contact information for all Oracle's current and former employees in the Product Development, Support, and Information Technology lines of business at its headquarters (which included both individual contributors and managers), everyone anticipated that OFCCP would use the contact information to communicate with Oracle's current and former employees for whom the Department of Labor seeks relief. Indeed, the Court compelled Oracle to produce contact information for managers, rejecting Oracle's arguments that any order to produce contact information should be limited to non-managers, or include instructions not to make *ex parte* contacts with managers. Now, however, Oracle complains about the letters OFCCP sent to those employees using the contact information the ALJ compelled Oracle to produce.³

OFCCP has been transparent in notifying Oracle that it intended to communicate with Oracle's current managers in their individual capacity about their individual experience outside the presence of counsel for Oracle. OFCCP agreed that it would not seek to use statements by those managers as admissions of Oracle in this matter. (See 3/22/19 email from Jeremiah Miller to Erin Connell.) You responded that this proposed agreement "sounds like it would comply" with the Rules of Professional Conduct. (3/27/19 email from Erin Connell to Jeremiah Miller.) Your April 29, 2019 letter, however, takes a different position.

As explained above, although we notified you of our intent, OFCCP did not need Oracle's consent to communicate with Oracle's managers. First, we explicitly agreed that OFCCP would communicate with managers about their individual claims, and would not use statements by those managers as admissions of Oracle. Cal. R. Prof. Conduct 4.2 (b) (prohibiting

³ Similarly, although the Court previously compelled Oracle to produce contact information, Oracle refuses to produce supplemental contact information, interfering with OFCCP's ability to contact employees hired in 2017 or thereafter for whom OFCCP also seeks relief.

communications with a current employee of a represented corporation “if the subject of the communication is any act or omission of such person in connection with the matter which *may be binding upon or imputed to the organization* for purposes of civil or criminal liability.” (emphasis added.) In addition, the Rule explicitly permits communications “authorized by law, including communications pursuant to statutory schemes, such as those “protecting . . . equal employment opportunity;” and, “government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants,” in the context of legitimate investigative activities.” Rule 4.2(c), and comment 8. The Department of Labor brings this action to protect the equal employment opportunities of Oracle’s employees, including its managers, and seeks relief on their behalf. The California Rules of Professional Conduct explicitly authorize the Department’s lawyers to communicate with such employees in these circumstances.

Although OFCCP did not need Oracle’s permission to contact current managers as it proposed to do, Oracle nevertheless sought to extract an agreement that OFCCP would produce the privileged communications between the current managers who communicated with OFCCP about their individual experiences, as a condition to permitting OFCCP’s (entirely proper) contact with OFCCP’s employees. OFCCP refused to agree to Oracle’s condition, since providing this information would reveal privileged information between OFCCP’s attorneys and the employees for whom they seek relief (i.e., the identities of government informants), subject managers to likely retaliation by Oracle, and reveal Department of Labor attorneys’ work product. As OFCCP explained in its meet and confer letters in response to Oracle’s requests that OFCCP produce communications between OFCCP and Oracle’s employees, the identities of, and identifying information provided by, class members and others who make reports to the government are protected by the government’s informant privilege. *See Martin v. New York City Transit Auth.*, 148 F.R.D. 56, 63 (E.D.N.Y. 1993) (citing *Dole v. Local 1942, Int’l Bhd. of Elec. Workers, AFL-CIO*, 870 F.2d 368, 370–71 (7th Cir. 1989)). Department of Labor attorneys’ notes of these communications are work product. Oracle’s dismissive characterizations of OFCCP’s privilege objections as “baseless” are false and misleading.

Indeed, Oracle’s insistence that it receive the names of employees who provided information to the government, and obtain the privileged substance of those communications raises further concern about Oracle’s intentions. Retaining the informants’ privilege, which protects the identities of employees who cooperate and provide information to the government, is critical to the government obtaining information to enforce the Executive Order, and to ensure that employees are not harmed when they cooperate. Oracle has a reputation for aggressiveness and ruthlessness. We have received numerous reports from Oracle’s employees and managers of intimidation and retaliation against employees who sought to stand up for their rights, including rights to be paid equitably.⁴ We reiterate that it is improper for Oracle to demand that OFCCP produce information about its communications with informants, or to seek to condition our communications with class members on waiving such privileges.

⁴ We are mystified by your request for confirmation that “no class members (including managers) are being accused of any wrongdoing.” As you are well aware, this action is brought against Oracle America, Inc., the federal contractor, not against any individual executives or managers. We felt compelled to include such an assurance in the letter due to the climate of fear that Oracle appears to have created regarding employees, particularly managers, asserting their rights to communicate with the government regarding their pay discrimination claims against Oracle.

Oracle Mischaracterizes OFCCP's Letter to Oracle Employees

Oracle's demand that OFCCP cease communicating with its employees on the ground that OFCCP violated a provision prohibiting attorneys from "threatening, coercing, intimidating, deceiving, or knowingly misleading a witness . . ." (29 C.F.R. § 18.22), seeks to turn provisions intended to prevent retaliation against employees and witnesses who cooperate in lawsuits on their heads. Oracle seeks to use this protective provision as a weapon to block OFCCP's ability to obtain information from the employees on whose behalf OFCCP brought this enforcement action. Oracle's attempts to characterize OFCCP's letter to class members as coercive or misleading rest on blatant misrepresentations of the letter.

Oracle falsely contends that OFCCP "fails to adequately describe its allegations as just that – allegations," and "instead describes them as determinations that already have been made." To the contrary, the OFCCP letter explicitly states that the lawsuit "alleges" discrimination, "[t]his case is scheduled to go to trial December 5, 2019," and provides an "estimate" of lost wages. In other words, OFCCP's letter makes it clear that the case is currently being litigated.

Quoting several portions of OFCCP's letter out of context, Oracle claims they "indicate that in order to reap the potential benefits of OFCCP's \$600,000 claim, the recipient must assert their wages have been impacted by contacting DOL." OFCCP's letter says nothing of the sort. Instead, it provides several reasons a potential witness "may call": "If you have information related to our lawsuit, would like to find out whether your wages have been impacted or have any questions about this process you may contact the Department of Labor's Oracle witness line." This statement from the letter also contradicts Oracle's assertion that OFCCP "is only interested in speaking to current or former Oracle employees who support its allegations of discrimination."

Finally, while acknowledging that recipients "may have never heard of OFCCP," Oracle nonetheless asserts that "referring to DOL instead of OFCCP is problematic." Perplexingly, you complain that the letter was sent "on Department of Labor letterhead." It was sent by Jeremiah Miller, who is an attorney for the Department of Labor, on our office's letterhead. As you know, our office filed this lawsuit. I'm not sure what letterhead you would suggest we use that would be less "misleading." Moreover, you inaccurately claim that the letter refers to "DOL instead of OFCCP." In fact, the letter references the lawsuit "Office of Federal Contract Compliance Programs, United States Department of Labor v. Oracle America," which is accurate, since OFCCP is part of the Department of Labor, and this case was filed by the Solicitor of Labor. Your comments suggest that Oracle seeks to obscure the fact that the Department of Labor has filed a pay discrimination case against it. Moreover, your objection to OFCCP "specifically call[ing] out the various alleged affect groups" also suggests you seek to hide from employees whether our lawsuit seeks relief on their behalf.

The letter OFCCP sent to class members was accurate, and the Department of Labor will not be intimidated from communicating with class members on whose behalf OFCCP seeks relief by Oracle's baseless accusations and threats of sanctions.

* * *

Oracle's April 29, 2019 raises concerns that Oracle not only seeks to prevent OFCCP from communicating with Oracle's current managers, but that it has taken action or intends to take action to chill class members from communicating with OFCCP. Your letter reveals a misapprehension of your role in connection with the Oracle managers on whose behalf OFCCP seeks relief, and we are concerned that Oracle has made inaccurate representations to protected class members that may chill their communications with us. Such actions would violate the Professional Rules of Conduct that you cite, as well as regulations prohibiting retaliation against employees and interference with actions brought by the Department of Labor. Accordingly, we request immediate assurance that neither Oracle nor your firm has advised members of the protected class falsely that your office represents them in this litigation, that Oracle must give its "consent" before class members can communicate with the government, or taken any other action to discourage class members from communicating with the government regarding their claims. We look forward to hearing from you.

Sincerely,



Laura C. Bremer

Exhibit D

From: Connell, Erin M.
Sent: Thursday, May 2, 2019 9:24 AM
To: Bremer, Laura - SOL; Oracle Litigation; Miller, Jeremiah - SOL
Cc: Pilotin, Marc A - SOL; Garcia, Norman - SOL; Siniscalco, Gary R.; Parker, Warrington; Mantoan, Kathryn G.; Grundy, Kayla Delgado; Giansello, John; Kaddah, Jacqueline D.
Subject: RE: OFCCP v Oracle; OALJ Case No. 2017-OFC-00006

2pm next Thursday works for me – I will send a calendar invite and call in number. Thanks.

From: Bremer, Laura - SOL <Bremer.Laura@dol.gov>
Sent: Thursday, May 2, 2019 9:19 AM
To: Connell, Erin M. <econnell@orrick.com>; Oracle Litigation <Oracle.Litigation@DOL.gov>; Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Parker, Warrington <wparker@orrick.com>; Mantoan, Kathryn G. <kmantoan@orrick.com>; Grundy, Kayla Delgado <kgrundy@orrick.com>; Giansello, John <jgiansello@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>
Subject: RE: OFCCP v Oracle; OALJ Case No. 2017-OFC-00006

Erin,

We did take your request to meet and confer seriously – as demonstrated by the 6-page response the next day. If you want to discuss the issues further, how about next Thursday at 2 p.m.?

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

From: Connell, Erin M. <econnell@orrick.com>
Sent: Wednesday, May 1, 2019 5:18 PM
To: Oracle Litigation <Oracle.Litigation@DOL.gov>; Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Parker, Warrington <wparker@orrick.com>; Mantoan, Kathryn G. <kmantoan@orrick.com>; Grundy, Kayla Delgado <kgrundy@orrick.com>; Giansello, John <jgiansello@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>; Bremer, Laura - SOL <Bremer.Laura@dol.gov>
Subject: RE: OFCCP v Oracle; OALJ Case No. 2017-OFC-00006

Laura,

My request for a phone call is not a “demand. Nor do I understand why neither you nor Jeremiah appear willing to discuss this serious issue with me. I asked Jeremiah to do so after Kate’s deposition today was finished (by mid-afternoon, so there was plenty of time), but he said he was not prepared. Now, you say you aren’t willing to talk to me about this until Thursday or Friday of next week – even though at the start of the

lengthy letter you sent to me yesterday, you explicitly state that my concerns “could have been easily addressed in a quick phone conversation.”

As to the timing of my response, I take the allegations of ethical violations seriously, and felt they needed to be immediately addressed. And, as to who has the better characterization of your letter, as I said in depo several times today, “the document speaks for itself.”

Taking at face value that you are so busy preparing for depositions that you can’t have a “quick phone conversation” until next Thursday, please let me know when you are available for a call. As of right now, my calendar on Thursday is open.

Thanks,
Erin

From: Oracle Litigation <Oracle.Litigation@DOL.gov>

Sent: Wednesday, May 1, 2019 4:52 PM

To: Connell, Erin M. <econnell@orrick.com>; Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>

Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Parker, Warrington <wparker@orrick.com>; Mantoan, Kathryn G.

<kmantoan@orrick.com>; Grundy, Kayla Delgado <kgrundy@orrick.com>; Giansello, John <jgiansello@orrick.com>;

Kaddah, Jacqueline D. <jkaddah@orrick.com>; Bremer, Laura - SOL <Bremer.Laura@dol.gov>

Subject: RE: OFCCP v Oracle; OALJ Case No. 2017-OFC-00006

Erin,

Once again, you misrepresent both the tone and the content of our letters. The letter I sent to you yesterday did not contain “inflammatory allegations.” Rather, it expressed concern based on the misstatements in your April 29 letter, and accordingly sought assurances “that neither Oracle nor your firm has advised members of the protected class falsely that your office represents them in this litigation, that Oracle must give its ‘consent’ before class members can communicate with the government, or taken any other action to discourage class members from communicating with the government regarding their claims.” My request cannot be construed as an allegation that Oracle *had* taken such actions.

Your immediate response to my letter yesterday demanding that I meet and confer about OFCCP’s letter to the protected class members is perplexing, given that the 6-page letter that I sent to you yesterday responded in detail to your accusations about OFCCP’s letter to class members. Given the upcoming depositions, if you would like to discuss these issues further, I suggest that we talk next week on Thursday or Friday.

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

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From: Connell, Erin M. <econnell@orrick.com>
Sent: Tuesday, April 30, 2019 4:59 PM
To: Bremer, Laura - SOL <Bremer.Laura@dol.gov>; Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Parker, Warrington <wparker@orrick.com>; Mantoan, Kathryn G. <kmantoan@orrick.com>; Grundy, Kayla Delgado <kgrundy@orrick.com>; Giansello, John <jgiansello@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>
Subject: FW: OFCCP v Oracle; OALJ Case No. 2017-OFC-00006

Dear Laura and Jeremiah,

I write to confirm receipt of the attached letter. Setting aside the aggressive tone of the letter, which seems directed more at me personally than at my client Oracle, it contains inflammatory allegations for which OFCCP has absolutely no factual support, and that are entirely meritless. Chief among them is that either Oracle or Orrick has taken – or intends to take – actions to chill class members from communicating with OFCCP. Nothing could be further from the truth, and there is absolutely no basis to accuse my client, me or my firm of engaging in ethical violations. Nor has Oracle or “my office” advised members of the protected class that we represent them in this litigation, or that they need our consent to talk to OFCCP.

So, having now acquiesced to OFCCP’s demand for the immediate assurances above, and having confirmed no ethical violations by my client, my firm, or me personally – when are you available to meet and confer about OFCCP’s misleading, false and coercive correspondence to current and former Oracle employees and managers?

Thanks,
Erin

From: Bremer, Laura - SOL <Bremer.Laura@dol.gov>
Sent: Tuesday, April 30, 2019 3:02 PM
To: Flores, Christine J. <cflores@orrick.com>; Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>; Connell, Erin M. <econnell@orrick.com>; Parker, Warrington <wparker@orrick.com>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Grundy, Kayla Delgado <kgrundy@orrick.com>; Mantoan, Kathryn G. <kmantoan@orrick.com>; Giansello, John <jgiansello@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>
Subject: RE: OFCCP v Oracle; OALJ Case No. 2017-OFC-00006

Please see the attached letter responding to your April 29, 2019 letter.

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

From: Flores, Christine J. <cflores@orrick.com>
Sent: Monday, April 29, 2019 10:59 AM
To: Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Bremer, Laura - SOL <Bremer.Laura@dol.gov>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>; Connell, Erin M. <econnell@orrick.com>; Parker, Warrington <wparker@orrick.com>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Grundy, Kayla Delgado <kgrundy@orrick.com>; Mantoan, Kathryn G.

<kmantoan@orrick.com>; Giansello, John <jgiansello@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>

Subject: OFCCP v Oracle; OALJ Case No. 2017-OFC-00006

Please see attached correspondence from Erin Connell.

Christine J. Flores

Executive Assistant
Secretary to Erin M. Connell

Orrick
San Francisco 
T (415) 773-5566
cflores@orrick.com



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Exhibit E



May 9, 2019

Via E-Mail

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

Re: OFCCP v. Oracle; OALJ Case No. 2017-OFC-00006
OFCCP's Contact with Current and Former Oracle Employees

Dear Laura:

I write to confirm our meet and confer call this afternoon regarding the OFCCP's communications with current and former Oracle employees. We were able to confirm agreement on a number of preliminary matters, although serious disagreements remain with respect to OFCCP's letter.

Areas of Agreement

First, we confirmed both sides agree that the plaintiff in this case is OFCCP, and the attorneys in your office represent OFCCP. Accordingly, we further agreed that neither you nor your colleagues represent or are seeking to represent any current or former Oracle employee, and therefore do not have an attorney-client relationship with any current or former Oracle employee.

Second, we agreed that pursuant to California Rule of Professional Conduct 4.2, OFCCP does not need Oracle's permission to speak to Oracle's current managers in their personal capacity regarding potential claims they may have against Oracle, but OFCCP does need Oracle's permission to speak to Oracle's current managers with respect to any act or omission by the manager that may bind Oracle. You further confirmed that no one in your office is speaking to any current Oracle employees regarding their acts as a manager; and you are not seeking to bind Oracle by these managers' statements.¹

Finally, you confirmed your position that the statement in OFCCP's correspondence to current and former Oracle employees (including managers) that they "have not been accused of any wrongdoing" is an accurate statement. In turn, we confirmed our position that if such is the case, we expect that OFCCP will be admitting the Requests for Admission we recently served that track the language of OFCCP's letter.

///

///

¹ We also acknowledged there is a discovery dispute concerning disclosure of these communications that is being addressed separately, including in Oracle's pending motion to compel.

Orrick, Herrington & Sutcliffe LLP
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405 Howard Street
San Francisco, CA 94105-2669
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Erin M. Connell

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D +1 415 773 5969
F +1 415 773 5759



Laura Bremer
May 9, 2019
Page 2

Areas of Disagreement

We continue to disagree with respect to whether OFCCP's letter to Oracle's current and former employees is misleading. We suggested a corrective notice is warranted. You disagreed, but agreed to consider a corrective notice if we send you a draft (and we agreed to do so).

You also asked if Oracle has had any communications with any employees regarding OFCCP's letter. I confirmed Oracle has had such communications. Specifically, in response to inquiries Oracle has received about the letter (for example, from employees wondering if it was a hoax or wondering how OFCCP got their personal contact information), Oracle has used a form response, which I read to you during the call. You requested a copy of the language, which I agreed to send. It reads as follows:

The Office of Federal Contract Compliance Programs (OFCCP), an agency within the United States Department of Labor, has brought an enforcement action against Oracle that includes allegations of hiring and compensation discrimination in certain jobs at Oracle's headquarters location in Redwood Shores, California. Oracle denies OFCCP's allegations and believes they have no merit. As part of the litigation process, the Administrative Law Judge who was previously overseeing the case allowed OFCCP to obtain personal contact information from Oracle for some of Oracle's employees, including yours. It is entirely up to you whether to speak to OFCCP, including by responding to the letter you received. You are not obligated to do so, although you are free to talk to them if you wish to do so. Oracle will not take any adverse action against you if you do choose to speak to OFCCP. If you have additional questions about the case, please feel free to respond to this email.

I also reiterated that part of the reason we found the accusation of coercive conduct by Oracle in your April 30 letter to be so offensive is because the statement above is the opposite of coercion – it specifically informs employees they are free to speak to OFCCP if they choose to do so, and Oracle will not take any retaliatory actions against them.

We also informed you that Oracle intends to bring a motion seeking evidentiary sanctions regarding this letter, which we continue to believe is misleading. Surprisingly, you indicated that should Oracle pursue a motion against OFCCP, OFCCP may pursue a counter motion. When I asked the basis of any such potential motion, you stated it would be based on the notion that some portion of the above statement also is misleading, though you could not identify what is misleading about it, nor what relief you would seek. We disagree with the assertion that the statement above is in any way misleading. In any event, I confirmed that because you were not able to articulate what relief OFCCP would seek in any such motion, we believe OFCCP still has an obligation to meet and confer if OFCCP does intend to bring it.



Laura Bremer

May 9, 2019

Page 3

I will follow up regarding a proposed corrective notice.

Very truly yours,

A handwritten signature in blue ink that reads "Erin M. Connell". The signature is written in a cursive, flowing style.

Erin M. Connell

Exhibit F

Attachments:

2019-05-09 Bremer.pdf

From: Connell, Erin M.**Sent:** Friday, May 10, 2019 4:21 PM**To:** Bremer, Laura - SOL <Bremer.Laura@dol.gov>**Cc:** Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>; Parker, Warrington <wparker@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>; Grundy, Kayla Delgado <kgrundy@orrick.com>; 'Miller, Jeremiah - SOL' <Miller.Jeremiah@dol.gov>; Gary R. Siniscalco (<grsiniscalco@orrick.com>) <grsiniscalco@orrick.com>**Subject:** FW: OFCCP v Oracle; OALJ Case No. 2017-OFC-00006

Hi Laura,

As a follow up our call and my letter yesterday, a proposed draft of a corrective notice is below.

Thanks,

Erin

On April 4 my office sent you a [letter/email] regarding the lawsuit *Office of Federal Contract Compliance Programs, United States Department of Labor v. Oracle America, Inc.*, OALJ Case No. 2017-OFC-00006. I am writing to clarify some of the statements in that letter to ensure they were not misleading. Our previous correspondence described the pending lawsuit that the Office of Federal Contract Compliant Programs ("OFCCP") has brought against Oracle. I write to confirm that OFCCP's claims, including the claims of discriminatory pay against Oracle, are accusations only. Oracle denies them. They have not been proven in court or in any judicial forum, meaning there has been no determination that any lost wages are due. In the event there is such a determination, you will be informed regardless of whether you previously have been in communication with my office.

From: Flores, Christine J.**Sent:** Thursday, May 9, 2019 4:52 PM**To:** Bremer.Laura@dol.gov**Cc:** miller.jeremiah@dol.gov; Garcia.Norman@dol.gov; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Connell, Erin M. <econnell@orrick.com>; Jim Finberg <jfinberg@altshulerberzon.com>; Parker, Warrington <wparker@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>; Grundy, Kayla Delgado <kgrundy@orrick.com>**Subject:** OFCCP v Oracle; OALJ Case No. 2017-OFC-00006

Please see attached correspondence from Erin Connell.

Christine J. FloresExecutive Assistant
Secretary to Erin M. ConnellOrrick
San Francisco 
T (415) 773-5566
cflores@orrick.com



Exhibit G



May 13, 2019

VIA E-MAIL

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

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

Dear Erin:

On April 29, 2019, you initiated a meet and confer making accusations about a letter OFCCP had sent to protected class members, *whose interests OFCCP represents* in this action. Only by blatantly misrepresenting the content of OFCCP's letter to members of the protected class notifying them about this lawsuit and providing them with our contact information were you able to portray OFCCP's letter as misleading.

The audacity of your meet and confer letter did not stop there. Your accusation that our office violated professional rules of conduct also exhibited an alarming misunderstanding of the proper roles of counsel in this enforcement action, where attorneys for the U.S. Department of Labor represent the interests of the protected class (which includes current employees of Oracle), and Orrick represents Oracle, whose interests are *adverse* to the interests of current and former Oracle employees in this action. The demand you made in your letter that we "halt" ongoing communications with Oracle's current managers revealed a deep misunderstanding about the respective roles of attorneys for the Department of Labor and Orrick and raised red flags that perhaps Orrick sought to obscure misrepresentations it had made to Oracle employees about Orrick's role, coercive communications it had made, or its own violation of the California Rules of Professional Conduct.

Concerned by your April 29, 2019 letter, I requested assurances from you, both in my April 30, 2019 letter and during our meet and confer call on May 9, 2019 about Orrick's communications with members of the protected class in this action, and statements about who represented them. While we had been transparent with you, notifying you in advance of our intention to communicate with current Oracle managers and letting you know the confines of the communications we intended, you obscured your communications with the members of the protected class, whose interests we represent. In your email response to my April 30, 2019 letter and during our meet and confer call on May 9, 2019, you expressed shock that I raised concerns about your communications with members of the protected class, and, by choosing your words

very carefully, you sought to mislead me and reassure me that Orrick and Oracle have engaged appropriately with class members.

After our meet and confer discussion on May 9, 2019, I learned that Orrick attorneys had sent coercive and misleading emails to current Oracle employees in the protected class at its headquarters, had engaged in interviews with protected class members that violated the California Code of Professional Conduct, and that you personally had been included in the meet and confer discussions and briefing defending Oracle's similar transgressions in the *Jewett* class action over the past several months. Despite my questions during our meet and confer, you never mentioned that Orrick attorneys reached out to Oracle employees in the protected class to arrange interviews, had interviewed such employees, or the coercive and misleading contents of these communications. You were personally involved in the *Jewett* meet and confer discussing Orrick's violation of California Rules of Professional Conduct 1.13(f) for failing to disclose that Oracle's interests are adverse to the protected class members, and in Oracle's briefing opposing class certification in the *Jewett* case that relied on declarations from putative class members that plaintiffs sought to exclude on the ground that they were obtained in violation of the California Rules of Professional Conduct. Plaintiff's Objections to Evidence Submitted by Oracle in Opposition to Plaintiffs' Motion for Class Certification, *Jewett v. Oracle America, Inc.*, Case No. 17-CIV-02669 (Apr. 2, 2019), at 5:1-6:1; Exhibit O to Reply Declaration of James M. Finberg in Support of Representative Plaintiffs' Motion for Class Certification.¹ Three out of the seven declarations at issue were members of the protected class whose interests we represent in this enforcement action. Disturbingly, in the discussions in the *Jewett* case, Orrick attorneys falsely represented that Oracle had an attorney-client relationship with Oracle's managers of the protected class (whose interests we represent in this case), even though representation of parties with adverse interests is prohibited by the California Rules of Professional Conduct. Your failure to mention these communications during our meet and confer is extremely troubling.

This letter discusses the highly concerning communications that Oracle had with members of the protected class in this action and did not disclose, despite my repeated requests for information about Orrick's and Oracle's communications with protected class members during our meet and confer. I then address the various misstatements of our meet and confer made in your "confirming" letter dated May 9, 2019; and, respond to your suggestion for a "corrective notice."

OFCCP's Representation of the Interests of the Protected Classes in This Action

Your letter misstates what I said during the meet and confer about OFCCP's representation of the protected class. I said during our call, and confirm now, that the plaintiff in this case is OFCCP, U.S. Department of Labor. Our office, the Office of the Solicitor, U.S.

¹ See the March 22, 2019, e-mail of Orrick attorney Kathryn G. Mantoan to a *Jewett* attorney John Mullan that you were copied on stating: "your request indiscriminately appears to see communications with putative class members who are current managers at Oracle, with whom in-house counsel and Orrick may communicate regarding their decisions as managers under the umbrella of attorney-client privilege." Exhibit O to Reply Declaration of James M. Finberg in Support of Representative Plaintiffs' Motion for Class Certification

Department of Labor, represents OFCCP. In this role, we represent the interests of workers. In this case, we represent the interests of former and current Oracle employees, including current managers of Oracle (who are in the protected class). I acknowledged that we do not *directly* represent any Oracle employees, and that we do not have a *direct* attorney client relationship with Oracle employees. To be clear, however, as you know from our meet and confer discussions regarding discovery matters, we do assert a common interest privilege with current and former Oracle employees based on the common interests of OFCCP, who we directly represent, and our representation of the interests of former and current employees in this lawsuit in pursuing their claims against Oracle.

Given your attempts to establish an attorney-client relationship with Oracle's managers who are in the protected class in the *Jewett* case, it is important to be clear that Orrick does not represent such managers. Oracle does not represent any members of the protected classes in this enforcement action – women in the Product Development, Support, and Information Technology job functions, and Asians and Blacks in the Product Development job function at Oracle's headquarters -- including current managers.

Orrick's Communications with Protected Class Members Violate the California Code of Professional Conduct and Regulations Prohibiting Contractors from Coercive and Misleading Conduct

During our meet and confer conversation on May 9, 2019, I expressed concern about Oracle's communications with members of the protected class, given that Oracle does not represent their interests in this lawsuit. In your May 10, 2019 letter, I see that you very carefully convey my question as "if Oracle has had any communications with any employees *regarding OFCCP's letter.*" In response to this specific question, you disclosed a form response that Oracle and Orrick sent to class members who inquired about OFCCP's letter to class members. When I asked if Oracle sent these form responses to all class members or just those who inquired, you were quick to state that the form responses were only sent to individuals who reached out to Oracle, and that Oracle was not reaching out to class members who had not contacted it. We also asked if Oracle tracked who Oracle had send the forms to, and expressed concern about Oracle causing contacted employees or managers to feel pressured or coerced.

Despite our expressed concerns and questions about the communications Oracle and Orrick had with members of the protected class, you never disclosed that Orrick initiated contact with current Oracle employees who are members of the protected class in this action, and who had not asked about OFCCP's letter. Orrick's communications were extremely misleading, coercive, and violate the California Code of Professional Conduct. Specifically, Orrick contacted current Oracle employees, copying Oracle's in-house counsel, and asked to interview them *without disclosing*:

- There is a current pending enforcement action between Oracle and the U.S. Department of Labor for compensation discrimination based on gender and race;

- The interests of Oracle and their employees in the protected classes are adverse in this action (as well as the state class action);
- Orrick represents Oracle in the enforcement action;
- OFCCP represents the interests of Oracle employees in the protected classes in the enforcement action;
- Cooperating with Orrick may adversely impact the protected class member's potential recovery in this case (and the state action).

The damage of your contacts and requests for cooperation of class members against their interests is compounded by Oracle's failure to provide employees with information about OFCCP's enforcement action. From our meet and confer discussion, I understand that Oracle has provided information about the enforcement action *only* to employees who ask. Thus, employees who have not asked Oracle about the enforcement action may not know about it, may not know Orrick's role in it, and may unwittingly provide information that is adverse to their interests in this case. Further, Orrick's communication to current Oracle employees, on behalf of Oracle, with a cc: to the Managing Counsel in Oracle's in-house legal department is intimidating and coercive in violation of OFCCP regulations. *See* 41 CFR 60-1.32 (requiring contractors "to ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion or discrimination" because a person may participate in a hearing or exercise any right under the Executive Order). An employee receiving such a communication under the authority of a high-ranking manager in Oracle's legal department would (and did) feel pressured to respond, and believed they would be targeted for retaliation if they did not cooperate. And, the only contact Orrick provided if a person had questions was to Oracle's Managing Counsel in Oracle's in-house legal department – again, whose interests were adverse the employees', and who did not disclose these adverse interests.

Orrick is already aware that these actions violate its ethical duties under the California's Rules of Professional Conduct. On April 3, 2019, the Plaintiffs in the *Jewett v. Oracle* lawsuit filed objections in that action, seeking to exclude declarations of putative class members filed by Oracle in that case for violation of California Rule of Professional Conduct 1.13. The Plaintiffs sought to exclude the declarations obtained by Orrick, stating "Pursuant to California Rule of Professional Conduct Rule 1.13(f), lawyers representing a corporation must explain the identity and adversity of the lawyer's client whenever the lawyers know, or reasonably should know, that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing:

In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's *interests are adverse* to those of the constituent(s) with whom the lawyer is dealing.

Cal. Rules of Prof. Conduct 1.13(f) (emphasis added); *see Mevorah v. Wells Fargo Home Mortg,*

Inc., a div. of Wells Fargo Bank (ND. Cal., Nov. 17, 2005) 2005 WL 4813532, at *4 (“It does not appear from the record currently before this court that defendant properly explained to the [putative class members] it contacted that ‘the organization’s interests are or may become adverse to those of the constituent(s) with whom the member is dealing’ and that any information communicated to defendant may be ‘used in the organization’s interest’ if defendant ‘becomes adverse to the constituent’”) (quoting Cal. Rule of Prof. Conduct 3-600).” Plaintiffs’ Objections to Evidence Submitted by Oracle in Opposition to Plaintiffs’ Motion for Class Certification, *Jewett v. Oracle America, Inc.*, Case No. 17-CIV-02669 (filed Apr. 3, 2019). You were personally involved in the briefing on these motions, signing the brief Oracle filed in opposition to plaintiffs’ motion for class certification in the *Jewett* case, and copied on the meet and confer communications discussing the violations.

Orrick’s contacts with the protected class in this enforcement action were even more coercive and misleading than in the *Jewett* case. In the communications to *Jewett* putative class members, the Orrick attorneys at least disclosed that there was a class action and that the putative class members were potentially class members, but—critically—did not disclose that their interests were potentially adverse. Plaintiffs’ Objections to Evidence Submitted by Oracle in Opposition to Plaintiffs’ Motion for Class Certification, *Jewett v. Oracle America, Inc.*, Case No. 17-CIV-02669 (filed Apr. 3, 2019) at 5:1-6:11; Exhibit O to Reply Declaration of James M. Finberg in Support of Representative Plaintiffs’ Motion for Class Certification that is the previously referenced e-mail in footnote 1. Orrick did not even make the minimal disclosure that it made in the *Jewett* case – that it represented Oracle in an enforcement action brought by the Department of Labor – even though the Department of Labor already represents the interests of members of the class without having to clear class certification hurdles. Critically, as in *Jewett*, Orrick failed to disclose that it represented Oracle, which has adverse interests to the protected class members it sought out to interview to develop evidence adverse that could harm their claims and relief in this enforcement action. And, it failed to disclose the attorneys who represented employees’ interests – in this enforcement action, the Office of the Solicitor of Labor does.

Orrick’s communications with members of the class that our office represents are highly concerning, as are your attempts to deceive me about the communications.

OFCCP’s Communications with Oracle’s Managers

After our meet and confer discussions, you now acknowledge that pursuant to California Rule of Professional Conduct 4.2, OFCCP does not need Oracle’s permission to speak to Oracle’s current managers in their personal capacity regarding potential claims they may have against Oracle. You incorrectly suggest, however that we agreed to seek permission to speak to Oracle’s current managers in some situations. We never approached you regarding these conversations out of a concern that *Orrick* represented these managers. You obviously do not and cannot as Oracle’s interests and the interests of the protected class are *adverse*. For the same reason, we do not need your permission to speak to current managers. Instead, as we explained when we approached you, there are many managers in the protected class. We represent the

interests of those managers, and indeed share a common interest with all in the protected class, and thus we need to communicate with those managers (and the managers need to talk to us) about their claims. What we sought to assure about is that we have no intention of trying to secure declarations or statements from those managers which we will seek to use as admissions, or as statements of policy by Oracle. We are exploring with them their claims, including Oracle's alleged defenses. Like all members of the protected class, the managers in the protected class are witnesses who can provide the Court with direct evidence of their understanding of Oracle's compensation policies, based on their experiences while working for Oracle.

OFCCP's Letter to Members of the Protected Class Employed by Oracle

In our meet and confer discussion on May 9, 2019, you began to reveal the strategy behind your puzzling insistence that our letter to class members notifying them of this enforcement action and providing contact information should they choose to call us is somehow "misleading." You argued that Oracle could leverage your strained accusations into a basis for excluding class members from testifying in this action. Perhaps you believe that by attacking OFCCP's communications with class members first, Orrick and Oracle can claim a false equivalency when we inevitably discovered and objected to Orrick and Oracle's very serious violations of ethical conduct and violations of OFCCP regulations in their communications with the protected class members, who we represent. This strategy suffers from obvious flaws. Fundamentally, your accusations are baseless -- you can only conjure outraged accusations about the content of OFCCP's letter by misrepresenting the letter. Further, the sanction you propose would harm the very people it was intended to protect -- you seek to take a provision intended to protect individuals from coercion and misrepresentation and use it to prevent those very individuals from providing evidence in support of their claims.

While your May 9, 2019 letter continues to assert "OFCCP's letter to Oracle's current and former employees is misleading," the bases for this assertion seem to be dwindling. During our meet and confer call, you focused on the sentence in OFCCP's letter that "We want to assure you that you have not been accused of any wrongdoing." As I indicated in our meet and confer discussion, calling this statement misleading is really a stretch. As you well know, OFCCP brought this enforcement action against Oracle as a federal contractor. OFCCP has brought no claims against individual Oracle employees; nor does it have authorization to do so.² You obviously agree, since your request for a "corrective notice" included no "correction" to the sentence that "We want to assure you that you have not been accused on any wrongdoing."³

² This statement does not say that Oracle's managers took no actions in their capacity as agents of Oracle that could be used against Oracle in this case. Obviously, some of Oracle's managers took actions in the scope of their employment with Oracle that we will use to support the allegations that Oracle engaged in wrongdoing. This conduct will not be used to allege any wrongdoing by individual managers at Oracle.

³ Instead, in your May 9, 2019 confirming letter, you indicate that you are now in agreement that the statement is accurate. Then, you state that you "expect that OFCCP will be admitting the Requests for Admission" it served that purportedly track the language of the letter. As I stated during our meet and confer on May 9, 2019, we will respond to your RFAs when they are due. However, I note that your RFAs did not track the exact language contained in our

Your “corrective” notice shows how little even Oracle can find to correct in our letter.⁴ The only correction you suggest—to “clarify” that the claims are accusations only and have not been proven—is unnecessary. The original letter already stated that you are “a potential injured employee,” the “case is scheduled to go to trial December 5, 2019,” the “lawsuit *alleges* Oracle America, Inc. (Oracle) unlawfully discriminated against its employees,” and our “estimate” of lost wages. The paucity of statements that Oracle’s letter attempts to “correct,” shows the weakness of Oracle’s accusations that the original letter was misleading. Of course, it is now apparent that Oracle’s feigned outrage was never about the content of our letter, but served as a cover for the transgressions by Oracle and its attorneys.

Next Steps

Since the compliance review, Orrick has engaged in a strategy of making vociferous accusations against OFCCP’s conduct on every conceivable issue (no matter how minor or whether it was entirely concocted by its creative lawyers) in an attempt to defend Oracle against substantive and serious claims that Oracle violated its obligations as a federal contractor and federal law to pay its women and minorities equitably. Orrick’s strategy of attacks against OFCCP as a defense, and its deceptiveness on behalf of Oracle has risen to a new level, however, with your lack of candor during this meet and confer process, the meritless positions you have taken, and most significantly, in your communications with Oracle’s employees, whose interests are adverse to your clients.

We are still considering our response to your unethical and intimidating conduct towards Oracle employees. However, at a minimum by May 16, 2019, we request that you provide:

- A list of every member of the protected classes in this action with whom you have communicated since March 11, 2016, identifying when each communication occurred, and who participated;
- All documents constituting, evidencing, or reflecting your communications with whom you have communicated since March 11, 2016; and,
- The questions you asked members of the protected classes in this action since

letter. Rather, your RFAs added language that was broader the language in OFCCP’s letter to class members.

⁴ You suggest the following language:

“On April 4 my office sent you a [letter/email] regarding the lawsuit Office of Federal Contract Compliance Programs, United States Department of Labor v. Oracle America, Inc., OALJ Case No. 2017-OFC-00006. I am writing to clarify some of the statements in that letter to ensure they were not misleading. Our previous correspondence described the pending lawsuit that the Office of Federal Contract Compliant Programs (“OFCCP”) has brought against Oracle. I write to confirm that OFCCP’s claims, including the claims of discriminatory pay against Oracle, are accusations only. Oracle denies them. They have not been proven in court or in any judicial forum, meaning there has been no determination that any lost wages are due. In the event there is such a determination, you will be informed regardless of whether you previously have been in communication with my office.”

March 11, 2016.

We hope that you will display more candor in response to this letter than in our prior communications on these topics.

Sincerely,



Laura C. Bremer
Senior Trial Attorney

Exhibit H



May 16, 2019

Via E-Mail

Laura C. Bremer
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San Francisco, CA 94103

Orrick, Herrington & Sutcliffe LLP

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**Re: OFCCP v. Oracle; OALJ Case No. 2017-OFC-00006
Contact with Current and Former Oracle Employees**

Dear Laura:

This letter responds to your letter dated May 13, 2019, which insisted on a response by today. I will not endeavor to address every misrepresentation or bit of invective in that letter, much of which is directed at me and/or my firm. Instead, I write to confirm my understanding of where the parties are at an impasse and to correct several of the misguided allegations made.

Your May 13 letter correctly notes that, on April 29, 2019, I wrote to your colleague, Jeremiah Miller, expressing concerns about the content of OFCCP's mass mailing to current and former Oracle employees. I attached a copy of OFCCP's mass mailing to employees, and identified the specific portion(s) of that letter we believed were misleading, false, and coercive, including the suggestion that the Department of Labor already had concluded that Oracle engaged in widespread discrimination and that recipients of the letter should contact your office in order to collect part of the purported \$600,000,000 at issue. I explained that OFCCP's use of the misleading letter and communications with current and former employees pursuant to it must stop, as suggested that an appropriate, mutually agreed-upon corrective notice could address Oracle's concerns. I also requested that OFCCP refrain from repeating any of the identified misleading, false, and coercive content in the future, and requested a telephone call on May 1, 2019 to discuss the concerns I had raised.

On April 30, 2019, you responded to my letter raising concerns about OFCCP's conduct by making several separate allegations against Oracle, Orrick and me personally. That same day, I corrected several of the misstatements in your April 30 letter, and (again) requested a telephone call. We further discussed these concerns on May 9, 2019 (the first date on which you said you were available for a call), and I sent you a letter confirming the content of our discussion on that same day. The next day (May 10, 2019) I e-mailed you the proposed text of short, factual proposed corrective notice:

On April 4 my office sent you a [letter/email] regarding the lawsuit *Office of Federal Contract Compliance Programs, United States Department of Labor v. Oracle America, Inc.*, OALJ Case No. 2017-OFC-00006. I am writing to clarify some of the statements in that letter to ensure they were not misleading. Our previous correspondence described the pending



Laura C. Bremer

May 16, 2019

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lawsuit that the Office of Federal Contract Compliant Programs ("OFCCP") has brought against Oracle. I write to confirm that OFCCP's claims, including the claims of discriminatory pay against Oracle, are accusations only. Oracle denies them. They have not been proven in court or in any judicial forum, meaning there has been no determination that any lost wages are due. In the event there is such a determination, you will be informed regardless of whether you previously have been in communication with my office.

The next business day, I received your May 13 letter. That letter appears to confirm that you will not agree to send, or even further discuss, a proposed corrective notice. Beyond that confirmation, the bulk of your May 13 letter is devoted to impugning my integrity and the integrity of my colleagues. I write briefly here to address those accusations, which are wholly unfounded and unrelated to the concerns I have raised. Instead, they appear to be an attempt to deflect attention away from those concerns, in the hopes that we will be intimidated and back away from them.

As an initial matter, your May 13 letter asserts that your office "represent[s] the interests of the protected class," notwithstanding that no "class" has been (or, given the forum, will be) certified in this case. You declare that Oracle's "interests are *adverse* to the interests of current and former employees in this action" (emphasis in original), a position which is tenable only if one presupposes the truth of OFCCP's allegations of sweeping top-to-bottom pay discrimination—which, as you know, Oracle denies. You accuse me of harboring "a deep misunderstanding of the respective roles of attorneys for the Department of Labor and Orrick," despite the fact that ALJ Clark previously cautioned "the government particularly" that "Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation." Order Granting Conditional Leave to File Second Am. Compl. (Mar. 6, 2019) at 14 (citing *Reid v. U.S. INS*, 949 F.2d 287, 288 (9th Cir. 1991)); see also *id.* at 13 (describing other "troubling" and "disingenuous" litigation conduct by OFCCP). Suffice it to say, we disagree that it is Orrick who misunderstands the proper roles and relationships at issue. Oracle and its counsel have a right to investigate the sweeping allegations OFCCP has made—including through talking to current and former employees about their experiences—and we are confident that ALJ Clark would not embrace any understanding of the applicable rules that would bar Oracle from doing so.

Next, your May 13 letter obliquely asserts that you "learned"—only subsequent to our May 9 call—that "Orrick attorneys had sent coercive and misleading emails to current Oracle employees in the protected class at its headquarters."¹ You proceed to recite evidentiary objections raised by plaintiffs' counsel in the *Jewett v. Oracle* case to declarations submitted in a separate state court proceeding as if they were conclusive proof of wrongdoing by me and my firm. Again, allegations (especially by counsel you acknowledge are not operating independently of your office) are not findings, and should not be treated as such. We obviously deny them.

¹ Again, no "class" has been certified here or in any other forum.



Laura C. Bremer

May 16, 2019

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Your letter goes on to state (as if it were fact) that "Orrick attorneys falsely represented that Oracle had an attorney-client relationship with Oracle's managers of the protected class," but fails to provide any evidence or point to any specific document or proof to support this claim. To confirm, this allegation has no merit whatsoever. You end by asserting that "Oracle's communications with members of the class that [the Solicitor of Labor] **represents** are highly concerning" (emphasis added), though again you identify no such communications (and both you and your colleague, Abigail Daquiz, have acknowledged that you do *not* represent any "members of the class").

If you intend to take the untenable position that Oracle and Orrick are prohibited from speaking with any current (or former) employees at HQCA in PRODEV, INFTECH, or SUPP about the case—simply because OFCCP has made as-yet-unproven allegations that relate to them—we request you provide the legal basis for any such position, so we promptly can have it addressed by ALJ Clark. If not, we ask that you dispense with opaque allegations of impropriety and blanket demands for information (including core attorney work product) like those at the end of your May 13 letter, and instead focus on specific, concrete concerns you have (if any) about particular communications.

I do not think it is productive to further address your accusations of unethical conduct, or the remainder of your letter predicated on them. You have not identified any specific emails, communications, or representations that I or others at Orrick sent or made that you contend are improper (as I did in my April 29 letter by attaching the specific mass mailing we believe is problematic). More fundamentally, your allegations appear to relate to communications in the *Jewett* case, which (unlike this case) is a putative class action pending in California state court, and therefore those communications are not relevant to the concerns we have raised here.

Very truly yours,

A handwritten signature in blue ink that reads "Erin Connell". The signature is written in a cursive, flowing style.

Erin M. Connell