

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DECLARATION OF ERIN M.  
CONNELL IN SUPPORT OF  
REPLY IN SUPPORT OF  
ORACLE AMERICA, INC.'S  
MOTION TO COMPEL OFCCP  
TO PRODUCE DOCUMENTS  
AND FURTHER RESPOND TO  
INTERROGATORIES**

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 Reply in Support of Oracle's Second Motion to Compel OFCCP to Produce Documents and Further Respond to Interrogatories, and to provide the Court with a history of the correspondence regarding Oracle's recent concerns about the correspondence OFCCP has sent to current and former Oracle employees, and regarding the recent allegations OFCCP has raised in response, including allegations that Oracle and Orrick have violated the California Rules of Professional Conduct. 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.

**The Dispute Regarding Declarations Submitted in the *Jewett* Matter**

2. There is a putative class action against Oracle pending in the Superior Court of the State of California, County of San Mateo, captioned *Jewett v. Oracle America, Inc.*, Civil Case No. 17-CIV-02669. The Plaintiffs in the *Jewett* action allege that Oracle pays women in certain job functions in California less than men for substantially similar or equal work in

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Office of Administrative Law Judges  
San Francisco, Ca

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REPLY DECL. OF CONNELL ISO  
MOTION TO COMPEL DOCUMENTS  
AND FURTHER INTERROGATORY  
RESPONSES  
CASE NO. 2017-OFC-00006

violation of California Equal Pay Act (an allegation which Oracle denies). No class has been certified in the case.

3. On January 18, 2019, the *Jewett* Plaintiffs filed a motion for class certification. On March 6, 2019, Oracle filed its opposition to that motion. In connection with Oracle's opposition, Oracle interviewed and obtained sworn declarations from certain Oracle employees, which were filed in the *Jewett* case. Each of the declarations signed by Oracle employees who fall within the *Jewett* Plaintiffs' proposed class definition includes the following statement:

I know that I will be a class member if the case is allowed to proceed as a class action. I understand that the attorneys who interviewed me and assisted in preparing this declaration for me represent Oracle and do not represent me. I was not pressured or required to sign this declaration. I am providing this declaration voluntarily.

4. On April 3, 2019, Plaintiffs in the *Jewett* matter filed evidentiary objections to some of the declarations submitted by Oracle. The objections claim that Oracle's admonition to employees violated California Rule of Professional Conduct Rule 1.13(f) because, according to Plaintiffs, it did not inform the employees that Oracle's interests were or may become adverse to those of the employee.

5. On April 24, 2019, Oracle responded to and disputed the *Jewett* Plaintiffs' evidentiary objections to the Oracle employees' declarations. As Oracle explained in its response to the objections, Oracle's counsel complied with Rule 1.13(f)'s requirements and even provided additional admonitions when conducting interviews with potential class member declarants. Specifically, Oracle explained that at the beginning of each interview, Oracle's counsel informed each of the employee-declarants that the *Jewett* Plaintiffs were alleging that Oracle pays women less than men for equally or substantially similar work. In addition, Oracle's counsel informed the declarants that: (1) Oracle denies the *Jewett* Plaintiffs' allegations; (2) the *Jewett* Plaintiffs were seeking to bring a class action on behalf of themselves and current Oracle employees in California in Information Technology, Product Development, and Support Roles; (3) the counsel conducting the interview represented Oracle, not the employee; (4) the employee was free to

consult an attorney of her choosing; (5) the interview was completely voluntary and she could choose whether to participate at all, or to end the interview at any time; and (6) if she chose to proceed, information she provided might be shared with or used by Oracle to defend against the lawsuit. Attached hereto as **Exhibit A** is a true and correct copy of the relevant portion of Oracle's response to Plaintiffs' evidentiary objections filed in the *Jewett* case.

6. The *Jewett* court has not yet ruled on the evidentiary objections described above.

### **The Dispute Between OFCCP and Oracle In This Matter**

7. On or about April 19, 2019, Oracle learned that OFCCP sent a letter to current and former Oracle employees, using the contact information Oracle provided to OFCCP pursuant to an order by Judge Larsen (the ALJ who previously presided over this matter). Attached hereto as **Exhibit B** is a true and correct copy of an exemplar of the letter that I understand OFCCP sent to current and former Oracle employees.

8. On April 29, 2019, I sent a letter to Jeremiah Miller, Counsel for Civil Rights at the U.S. Department of Labor's Office of the Solicitor, who signed the letter attached as Exhibit B, expressing Oracle's concern that OFCCP's letter was highly misleading and prejudicial to Oracle. Attached hereto as **Exhibit C** is a true and correct copy of my April 29, 2019 letter.

9. On April 30, 2019, Laura Bremer responded to my letter and raised, for the first time, concerns based on the evidentiary objections filed in the *Jewett* matter, described in paragraphs 2-6 above. Attached hereto as **Exhibit D** is a true and correct copy of the April 30, 2019 letter I received from Laura Bremer.

10. Attached hereto as **Exhibit E** 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. Among other things, I confirmed that OFCCP's allegations (raised only in response to the concerns Oracle raised about OFCCP's correspondence with class members) were unfounded, and I confirmed that neither Oracle nor Orrick had either advised the individuals OFCCP calls "class members" that we represent them in this litigation, or that they

need our consent to talk to OFCCP. I also repeated my earlier request for a meet and confer telephone call to discuss Oracle's concern about OFCCP correspondence, but was told OFCCP was not available to speak on this issue until May 9, 2019.

11. Attached hereto as **Exhibit F** 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. Among other things, my letter confirms that both sides agreed on our May 9, 2019 telephone call that OFCCP does not need Oracle's consent 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 that may bind Oracle. My letter also confirmed that both sides agree the plaintiff in this action is OFCCP, that the Department of Labor attorneys litigating this case represent OFCCP and not any current or former Oracle employee, and that there is no attorney-client relationship between the Department of Labor attorneys litigating this case and any current or former Oracle employee. My letter also confirmed that in response to inquiries that Oracle has received from employees about OFCCP's letter, Oracle has 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.

12. Attached hereto as **Exhibit G** 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.

13. Attached hereto as **Exhibit H** is a true and correct copy of a May 13, 2019 letter I received from Ms. Bremer, repeating and making further allegations I believe are unfounded.

14. Attached hereto as **Exhibit I** is a true and correct copy of a May 16, 2019 letter I sent to Ms. Bremer, responding to these allegations, and correcting some of the misstatements in Ms. Bremer's May 13 letter.

15. On May 17, 2019, Oracle filed a Motion to Correct OFCCP's Misleading Communications to Oracle's Employees. Prior to filing that motion, I met and conferred telephonically in good faith with Laura Bremer during our May 9, 2019 telephone call regarding the issues in Oracle's motion, but the parties were unable to reach resolution.

16. On May 20, 2019, Laura Bremer sent me a letter asserting OFCCP's position that Oracle filed its motion while the parties were still meeting and conferring, and accusing Oracle of violating the Rules of Professional Conduct. Ms. Bremer's letter also states that if Oracle does not withdraw its motion "by NOON TOMMOROW," OFCCP would file a motion against Oracle, and would seek to depose Orrick's attorneys (and Oracle's in-house attorneys). Ms. Bremer's letter also asserts that "these consequences can be avoided, however, if Oracle withdraws its premature motion (and never forwards this filing to the OALJ FOIA library)." Attached as **Exhibit J** is a true and correct copy of the May 20, 2019 letter and corresponding exhibits.

17. On May 20, 2019, I sent an email in response to Laura Bremer's letter and agreed to meet and confer on the issue. Attached as **Exhibit K** is a true and correct copy of my May 20, 2019 email.

18. I met and conferred in good faith with Laura Bremer on the afternoon of May 20, 2019 regarding a potential compromise that might lead Oracle to withdraw its pending motion.

19. On May 21, 2019, Laura Bremer sent me an email setting forth a proposal for a "corrective notice." Attached as **Exhibit L** is a true and correct copy of Laura Bremer's May 21, 2019 email to me.

20. On May 21, 2019, I responded to Laura Bremer by email and proposed several edits to OFCCP's proposal. Among other things, the counter-proposal sent on May 21 acknowledges that current and former Oracle employees are free to speak with counsel for either Oracle or OFCCP, but are not obligated to speak to either. Attached as **Exhibit M** is a true and correct copy of my May 21, 2019 email. Also on May 21, I met and conferred telephonically with Ms. Bremer regarding Oracle's counter-proposal. During that call, I invited Ms. Bremer to send another draft of the "corrective notice" and confirmed we would consider further proposed revisions.

21. On May 22, 2019, Laura Bremer sent a letter to me stating that OFCCP rejected Oracle's proposed revisions to the compromise and that it considered the meet and confer process to be at an impasse. Attached as **Exhibit N** is a true and correct copy of Laura Bremer's May 22, 2019 letter to me.

22. On May 22, 2019, I responded to Ms. Bremer's May 20 and May 22 letters explaining that any purported motion by OFCCP would be premature because the parties had not met and conferred telephonically about OFCCP's motion, and responding to several of the unfounded allegations made. Attached as **Exhibit O** is a true and correct copy my May 22, 2019 letter.

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

Executed on May 23, 2019, in San Francisco, California.



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Erin M. Connell

# **EXHIBIT A**

ORIGINAL

5/31  
D23

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11 Attorneys for Defendant  
 12 ORACLE AMERICA, INC.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 14 COUNTY OF SAN MATEO

16 RONG JEWETT, SOPHY WANG, XIAN  
 17 MURRAY, ELIZABETH SUE PETERSEN,  
 18 MARILYN CLARK AND MANJARI KANT,  
 individually and on behalf of all others  
 similarly situated,

19 Plaintiffs,

20 v.

21 ORACLE AMERICA, INC.

22 Defendant.

24 17 - CIV - 02669  
 25 MPAR  
 Memorandum of Points and Authorities in Reply  
 1785639



**FILED**  
 SAN MATEO COUNTY  
 APR 24 2019  
 Clerk of the Superior Court  
 DEWITT CLERK

Case No. 17CIV02669

**ORACLE'S RESPONSE TO  
 PLAINTIFFS' OBJECTIONS TO  
 EVIDENCE SUBMITTED BY ORACLE  
 IN OPPOSITION TO PLAINTIFFS'  
 MOTION FOR CLASS  
 CERTIFICATION**

Date: May 31, 2019  
 Time: 9:00 a.m.

Assigned for all purposes to the Honorable  
 V. Raymond Swope  
 Department 23

Trial Date: Not Set  
 Date Action Filed: June 16, 2017

**FILED BY FAX**

1 basis to exclude Dr. Neumark's presentation of outcomes for the three named Plaintiffs. None  
2 were "randomly" selected from the full dataset; all provide examples of what Dr. Neumark's  
3 aggregate analysis suggests about differing pay outcomes for different women within the  
4 would-be class. *See* Finberg Reply Decl., Ex. C (Saad) at 193:16-194:1 (explaining that Dr.  
5 Saad presented results for these other three putative class members "specifically to identify  
6 that, while Clark, Kant, and Petersen have a particular configuration of their results with  
7 respect to the regression parameters, there are others in this very diverse group of women who  
8 don't look like that at all"). The remaining paragraphs and exhibits at which Plaintiffs direct  
9 this objection—paragraphs 98-109 and exhibits 36-49—merely depict the pay outcomes of  
10 other men and women who have similar values to one of the named Plaintiffs for all of the  
11 regression factors *Dr. Neumark selected*; "random" selection was not the point at all, and thus  
12 Plaintiffs' objection rings hollow.

13 **II. PLAINTIFFS' OBJECTIONS TO DECLARATIONS FROM ELEVEN PUTATIVE**  
14 **CLASS MEMBERS ARE MERITLESS AND SHOULD BE OVERRULED.**

15 **Objection Number 6**

16 **Material Objected To:** The entire Declarations of Ara Adams, Mary June Dorsey,  
17 Julie Min Yang Doyel, Myrna Guerrero, Ashlee Kling, Barbara Lundhild, Bobbi Jo Perrin,  
18 Danica Porobic, Rebecca Swenson, Maryam Tahmasebi, and Vivian Wong in support of Oracle  
19 America, Inc.'s motion for class certification.

20 **Grounds For Objection:** Cal. R. Prof. Conduct, Rule 1.13(f).

21 **Oracle's Response:**

22 Plaintiffs accuse defense counsel of improper conduct, but offer no competent evidence  
23 to support their inflammatory allegations. Pre-certification communications with potential  
24 class members "are generally permitted and also considered to constitute constitutionally  
25 protected speech." *Mevorah v. Wells Fargo Home Mortg., Inc., a div. of Wells Fargo Bank*,  
26 No. C 05-1175 MHP, 2005 WL 4813532, at \*3 (N.D. Cal. Nov. 17, 2005). A court may limit  
27 such communications if they are "misleading, coercive, or improper." *Id.* Yet Plaintiffs submit  
28 no evidence that, at any point, defense counsel's communications ran afoul of this standard. To

1 the contrary, defense counsel at all times behaved professionally and ethically in its interactions  
2 with putative class member declarants.

3 California Rule of Professional Conduct 1.13(f) does not prohibit employer-defendants  
4 from investigating the claims against them or developing facts. It merely requires that when  
5 “dealing with an organization’s constituents, a lawyer representing the organization shall  
6 explain *the identity of the lawyer’s client* whenever the lawyer knows or reasonably should  
7 know that the organization’s interests are adverse to those of the constituent(s) with whom the  
8 lawyer is dealing.” Cal. R. Prof. Conduct, Rule 1.13(f) (emphasis added). As applied in this  
9 case, the rule can be read to require counsel for Oracle to apprise all putative class member  
10 interviewees that the attorney represents Oracle, not the individual.

11 Plaintiffs’ own evidence indicates that Oracle’s counsel did all that and more. Out of an  
12 abundance of caution, Oracle’s counsel went far beyond the Rule’s requirement and provided  
13 robust admonitions when conducting interviews with potential class member declarants. *See*  
14 *Finberg Reply Decl., Ex. O*. At the beginning of each interview, Oracle’s counsel informed  
15 each of the declarants that Plaintiffs are alleging that Oracle pays women less than men for  
16 equally or substantially similar work. *Id.* In addition, Oracle’s counsel informed the declarants  
17 that (1) Oracle denies those allegations; (2) Plaintiffs are seeking to bring the case as a class  
18 action on behalf of themselves and current employees in California in Information Technology,  
19 Product Development, and Support roles; (3) counsel conducting the interview represented  
20 Oracle, not the employee; (4) the employee was free to consult an attorney of her choosing; (5)  
21 the interview was completely voluntary and she could choose to end it at any time; and (6) if  
22 she chose to proceed, information she provided might be shared with or used by Oracle to  
23 defend against the lawsuit. *Id.*<sup>6</sup> Together, these admonitions clearly communicated to the  
24 declarants that their interests were potentially adverse to Oracle, and that any information they

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26  
27 <sup>6</sup> Of note, Plaintiffs ask this court to exclude eleven sworn declarations in their entirety based  
28 solely on an attorney’s description of the type of admonition given (*see Finberg Reply Decl., Ex. O*), without furnishing the Court any evidence that the admonition that was relayed confused or misled any of the declarants at issue.

1 provided could be used in Oracle's defense. There is no basis for accusing Oracle of violating  
2 Rule 1.13(f).

3 *Mevorah*, the only case cited by Plaintiffs, is not to the contrary. Crucially, *Mevorah*—  
4 a federal court case applying California ethical rules—involved a drastically different set of  
5 facts including defense counsel's intentional deception. There, defense counsel told putative  
6 class members that if the plaintiffs prevailed on their misclassification claims, they would be  
7 subject to a system of time-monitoring and lunch period regulation and would lose their  
8 commissions. *Mevorah*, 2005 WL 4813532, at \*4. (internal quotation marks omitted). Defense  
9 counsel therefore purposely mischaracterized the allegations in the case and the relief sought to  
10 make it sound like the declarants' interests were adverse to the plaintiffs and aligned with the  
11 defendant. *See id.* at \*5 (quoting Cal. R. Prof. Conduct 3-600, precursor to Rule 1.13(f))  
12 (faulting defense counsel for failing to "explain [ ] to the [putative class members] it contacted  
13 that 'the organization's interests are or may become adverse to those of the constituent(s) with  
14 whom the member is dealing' and that any information communicated to defendant may be  
15 'used in the organization's interest' if defendant 'becomes adverse to the constituent'").

16 The plaintiffs in *Mevorah* submitted a declaration from one of the class member  
17 interviewees attesting that, after speaking with defense counsel, she believed she would lose  
18 her commission if the plaintiffs won. *Mevorah*, 2005 WL 4813532, at \*4. In light of this  
19 misleading conduct, the court held that defense counsel had violated ethical rules because  
20 "defendant's pre-certification communications were misleading in at least once instance and, if  
21 this one employee was misled, it [was] reasonable to assume that other employees ... may have  
22 been misled." *Id.* at \*5. This holding does not impose any uniform set of admonitions that  
23 must be repeated verbatim in every interaction between defense and potential class members.  
24 Rather, under the circumstances, the court found that defense counsel had actively deceived  
25 potential class members about their interests and failed to offer any further explanation.

26 The *Mevorah* facts are in stark contrast to the present case. First, Oracle did not deceive  
27 potential class member declarants into thinking their interests were aligned with Oracle.

28 Tellingly, Plaintiffs submit *zero* evidence that any of the potential class member declarants felt

1 misled by defense counsel. On the contrary, Oracle clearly communicated to the declarants that  
2 Plaintiffs allege Oracle pays women less than men in violation of the law, and Plaintiffs are  
3 seeking to bring these claims on behalf of a class of female employees that would include each  
4 of them. Finberg Reply Decl., Ex. O.

5 In addition, and unlike what troubled the court in *Mevorah*, Oracle informed the  
6 declarants that information they provided could be used in Oracle's defense. Indeed, the  
7 declarations submitted by these individuals each confirm that the declarants understood that  
8 counsel did not represent them, that their participation was voluntary, and that they would be  
9 class members if Plaintiffs' certification motion were granted: "I know that I will be a class  
10 member if the case is allowed to proceed as a class action. I understand that the attorneys who  
11 interviewed me and assisted in preparing this declaration for me represent Oracle and do not  
12 represent me. Before signing this declaration, I read it carefully to make sure it was accurate,  
13 and it is. I was not pressured or required to sign this declaration. I am providing this  
14 declaration voluntarily." Decl. of Ara Adams (Mar. 6, 2019) ¶ 2; Decl. of Mary June Dorsey  
15 (Mar. 6, 2019) ¶ 2; Decl. of Julie Min Yang Doyel (Mar. 6, 2019) ¶ 2; Decl. of Myrna Guerrero  
16 (Mar. 6, 2019) ¶ 2; Decl. of Ashlee Kling (Mar. 6, 2019) ¶ 2; Decl. of Barbara Lundhild (Mar.  
17 6, 2019) ¶ 2; Decl. of Bobbi Jo Perrin (Mar. 6, 2019) ¶ 2; Decl. of Danica Porobic (Mar. 6,  
18 2019) ¶ 2; Decl. of Rebecca Swenson (Mar. 6, 2019) ¶ 2; Decl. of Maryam Tahmasebi (Mar. 6,  
19 2019) ¶ 2; Decl. of Vivian Wong (Mar. 6, 2019) ¶ 2.

20 There is thus no basis for finding that any potential class member declarants were  
21 misled here. *Mevorah* does not support exclusion of class member declarations where, as here,  
22 there is no evidence that they were obtained through improper means. *See, e.g., Talamantes v.*  
23 *PPG Indus., Inc.*, No. 13-CV-04062-WHO, 2014 WL 4145405, at \*5 (N.D. Cal. Aug. 21,  
24 2014) (distinguishing *Mevorah* and similar cases because defendants did not mischaracterize  
25 the action or threaten retaliation); *Swamy v. Title Source, Inc.*, No. C 17-01175 WHA, 2017  
26 WL 5196780, at \*5 (N.D. Cal. Nov. 10, 2017) (distinguishing *Mevorah* and rejecting challenge  
27 to communications from defendant to putative class that did not "offer a misleading  
28 interpretation of how the suit might affect them").

1 In cases where the facts are closer to this one, courts regularly deny motions to strike  
2 declarations from putative class members that are offered by defense counsel. Where a  
3 defendant-employer advises employees regarding “the nature of the instant case in a neutral  
4 fashion, informs the interviewee that involvement in the case is voluntary, that interviewees  
5 have the right to an attorney, and that [their] interests may be adverse to defendant's interests,”  
6 subsequent interviews and declarations do not run afoul of the California’s ethical rules.  
7 *Maddock v. KB Homes, Inc.*, 248 F.R.D. 229, 237 (C.D. Cal. 2007). “The mere fact that  
8 defendant communicated with its class members regarding the instant suit and requested that  
9 current employees file truthful declarations, absent any evidence that the communications were  
10 misleading or coercive, is insufficient to warrant striking the declarations.” *Id.* See also *Casey*  
11 *v. Home Depot*, No. EDCV142069JGBSPX, 2016 WL 7479347, at \*9-\*10 (C.D. Cal. Sept. 15,  
12 2016) (denying “patently meritless” motion to strike employee declarations where counsel  
13 identified themselves as representing the company in connection with the lawsuit and there was  
14 “no evidence that any of the deponents were ‘coerced’ into providing information to  
15 Defendants’ counsel or executing their [ ] declarations,” and thus finding “insufficient evidence  
16 showing Defendants’ counsel violated California Rule of Professional Conduct 3-600 or  
17 engaged in any other misleading or coercive conduct” warranting exclusion). There is no  
18 question that Oracle’s communications with potential class member declarants were proper,  
19 and Plaintiffs’ objection to the declarations provided by these women should be overruled.

20 **III. PLAINTIFFS’ OBJECTIONS DO NOT SUPPLY ANY BASIS TO EXCLUDE THE**  
21 **KIDDER DECLARATION.**

22 **Objection Number 7**

23 **Material Objected to:** “I have reviewed portions of the brief that I understand Plaintiffs  
24 filed with the court in support of their class certification motion in this case, and read that  
25 Plaintiffs claim, ‘At least through October 31, 2017, Oracle affirmatively imposed wage  
26 inequities by mandating that employees’ starting salaries be tied to their salaries at their past  
27 employer.’ I also read Plaintiffs’ claim that Oracle had a ‘policy of tying salaries to prior pay.’  
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**Oracle's Response:**

Again, this objection mirrors the "incompleteness" portion of Objection Number 1 to Dr. Saad's review and analysis of information contained in specific Oracle job requisitions, and should be overruled for the same reason.

There is nothing misleading about Exhibit 5 to the Hough Deposition. The document is clearly stamped "EXTRACT," and there is no ambiguity that the exhibit did not contain the entire spreadsheet produced as ORACLE\_JEWETT\_00007307. *See* Corrected Mantoan Hough Decl., Ex. A (Hough), Ex. 5; *see also id.* at 59:1-7 (counsel for Oracle stating "this is another extract from an Oracle database, Bates labeled ORACLE-JEWETT 7307"). The purpose of presenting the extract to Dr. Hough was to confirm whether and to what extent she evaluated any of the information therein; in fact, she testified that she did not review the specific job posting information in Exhibit 5 before forming her opinions in the case. *Id.* at 59:16-19. There is no reason to admit the voluminous competing version of the exhibit that Plaintiffs proffer, as the additional information therein has no connection to Dr. Hough's testimony about the exhibit or the purpose for which Oracle is offering the testimony. Plaintiffs' objection should be overruled, given that it furnishes no basis for excluding the evidence that Oracle offered or appending the composite exhibit that Plaintiffs seek to introduce.

Dated: April 23, 2019

Orrick, Herrington & Sutcliffe LLP

By:   
KATHRYN G. MANTOAN  
Attorneys for Defendant  
ORACLE AMERICA, INC.

# **EXHIBIT B**

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](mailto: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 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**

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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.<sup>1</sup> 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.<sup>2</sup> 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.

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

<sup>2</sup> 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  
Page 2

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 DOL<sup>3</sup> 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*

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<sup>3</sup> 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  
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*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 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**

[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](mailto: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 D**



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 (4<sup>th</sup> Cir. 1990). As we have already had to remind you<sup>1</sup>, 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

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<sup>1</sup> 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 4.2<sup>2</sup> -- 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

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<sup>2</sup> 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.<sup>3</sup>

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

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<sup>3</sup> 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.<sup>4</sup> 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.

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<sup>4</sup> 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 E**

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**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 7<sup>th</sup> Street, Suite 3-700  
San Francisco, California 94103  
(415) 625-7757

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**From:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Sent:** Wednesday, May 1, 2019 5:18 PM  
**To:** Oracle Litigation <[Oracle.Litigation@DOL.gov](mailto:Oracle.Litigation@DOL.gov)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>  
**Cc:** Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; Giansello, John <[jgiansello@orrick.com](mailto:jgiansello@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto: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

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**From:** Oracle Litigation <[Oracle.Litigation@DOL.gov](mailto:Oracle.Litigation@DOL.gov)>

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

**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>

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

<[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; Giansello, John <[jgiansello@orrick.com](mailto:jgiansello@orrick.com)>;

Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto: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 7<sup>th</sup> Street, Suite 3-700  
San Francisco, California 94103  
(415) 625-7757

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---

**From:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Sent:** Tuesday, April 30, 2019 4:59 PM  
**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>  
**Cc:** Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; Giansello, John <[jgiansello@orrick.com](mailto:jgiansello@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto: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](mailto:Bremer.Laura@dol.gov)>  
**Sent:** Tuesday, April 30, 2019 3:02 PM  
**To:** Flores, Christine J. <[cflores@orrick.com](mailto:cflores@orrick.com)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>  
**Cc:** Pilotin, Marc A - SOL <[Pilotin.Marc.A@DOL.GOV](mailto:Pilotin.Marc.A@DOL.GOV)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Giansello, John <[jgiansello@orrick.com](mailto:jgiansello@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto: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 7<sup>th</sup> Street, Suite 3-700  
San Francisco, California 94103  
(415) 625-7757

---

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

<[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>; Giansello, John <[jgiansello@orrick.com](mailto:jgiansello@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto: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](mailto:cflores@orrick.com)



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# **EXHIBIT F**



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

**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](mailto:econnell@orrick.com)

D +1 415 773 5969

F +1 415 773 5759

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.<sup>1</sup>

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.

///

///

---

<sup>1</sup> 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.



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 G**

---

**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](mailto:Bremer.Laura@dol.gov)>**Cc:** Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@orrick.com)>; 'Miller, Jeremiah - SOL' <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Gary R. Siniscalco (<[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>) <[grsiniscalco@orrick.com](mailto: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](mailto:Bremer.Laura@dol.gov)**Cc:** [miller.jeremiah@dol.gov](mailto:miller.jeremiah@dol.gov); [Garcia.Norman@dol.gov](mailto:Garcia.Norman@dol.gov); Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Jim Finberg <[jfinberg@altshulerberzon.com](mailto:jfinberg@altshulerberzon.com)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; Grundy, Kayla Delgado <[kgrundy@orrick.com](mailto:kgrundy@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. ConnellOrrick  
San Francisco   
T (415) 773-5566  
[cflores@orrick.com](mailto:cflores@orrick.com)

# **EXHIBIT H**



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.<sup>1</sup> 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.

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<sup>1</sup> 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.<sup>2</sup> 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."<sup>3</sup>

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<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup> 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

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

<sup>4</sup> 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,



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Laura C. Bremer  
Senior Trial Attorney

# **EXHIBIT I**



May 16, 2019

**Via E-Mail**

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

**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  
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."<sup>1</sup> 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.

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<sup>1</sup> 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 M. Connell". The signature is written in a cursive, flowing style.

Erin M. Connell

# **EXHIBIT J**



May 20, 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:

We were quite shocked by the motion you filed in the midst of our meet and confer discussions about the Department of Labor's communications with Oracle's employees – whose interests OFCCP represents in this enforcement action – and the related issue of Oracle's attorneys' failure to properly disclose Oracle's adverse interests in the enforcement action before seeking information from such employees. You signed your declaration in support of the motion on May 16, the same day you responded to my last letter, and Oracle filed the motion less than 24 hours later. I was actually writing a response to that letter when you served the motion. Obviously, the meet and confer was not finished and we are not sure why you were in such a rush to file that meritless brief that blatantly misrepresented the letter OFCCP sent, as well as our meet and confer discussions. In any event, we ask that you withdraw the motion immediately until the meet and confer can be completed.

Overall, I remain concerned, and am even more concerned now that I received this motion, that you are treating this entire discussion as a game. What we are, and have been discussing, are serious and basic elements of our professional obligations and requirements of government contractors. We have not raised these with you out of a desire to "impugn[] [your] integrity and the integrity of [your] colleagues." (May 16, 2019 letter, p.2.) Rather, we are very concerned about coercion of the women, Asian, and Black Oracle employees in the Product Development job function, and women in the Support, and Information Technology job functions at Oracle's headquarters from 2013 to the present (whom I refer to as "members of the protected class" for ease of reference). What we are looking from you and Oracle is a commitment to stop engaging in these prohibited activities and to take steps to ensure that the protected class understands their rights and is not compromised by statements taken from them in a coercive fashion.

Moving to the issues we have been discussing, based on the information that we have been able to uncover thus far -- with no cooperation whatsoever from you -- you appear to have

engaged in conduct which runs afoul of two different rules of professional conduct. First, we received information that Orrick sent emails to members of the protected class, copied to “Emily Sullivan, Managing Counsel in Oracle’s in-house legal department,” requesting a time for an interview. The email disclosed that Orrick is counsel to Oracle in the *Jewett* state class action alleging Oracle engaged in compensation discrimination against women, but it did not disclose the enforcement action by the U.S. Department of Labor against Oracle, that the interview was voluntary, or that Oracle’s interests in these cases is adverse to the employees from whom Oracle requested an interview. I am attaching a redacted copy of the one such email, since although you must know about Orrick’s emails (which I described in my May 13, 2019 letter), your May 16, 2019 contends we have not provided “evidence” of Orrick’s communications.

Next, you have interviewed at least three members of the members of the protected class and secured declarations from them about their claims in this action without disclosing this enforcement action to them, or that your interests are adverse to their interests. (Declarations of Ashlee Kling, Barbara Lindhild, and Julie Min Yang Doyle in support of Oracle’s opposition to Plaintiffs’ motion for class certification, *Jewett v. Oracle Amer., Inc.*, Case No. 17-CIV-02669 (Mar. 6, 2019).) We know Orrick did not disclose your adverse interests because Orrick’s attorney Kathryn Mantoan’s meet and confer email described Orrick’s disclosures made at the start of their interviews to members of the putative class in *Jewett* (some of which were also member of the protected class in this enforcement action) omitted any statement that Oracle’s interests were adverse to the interests of putative class members in *Jewett* or to their interests in the Department of Labor’s enforcement action. (March 22, 2019 email from Kathryn Mantoan (copied to Erin Connell) to Jim Finberg, Exhibit O to Reply Declaration of James M. Finberg in Support of Representative Plaintiffs’ Motion for Class Certification, Case No. 17-CIV-02669, attached for ease of reference.) Indeed, Orrick failed to advise them about the existence of this enforcement action at all, or that OFCCP is representing their interests in this action. Your failure to disclose this adverse interest renders these declarations coerced, along with all of the other communications you had, but so far refuse to disclose, with the protected class. You know that this is an issue, since the plaintiffs in *Jewett* filed objections, pursuant to California Rules of Professional Conduct 1.13(f), seeking to exclude the declarations Orrick obtained – 3 of whom are from women employed at Oracle’s headquarter in the Support, Product Development, or Information Technology job functions – members of the protected class in the Department of Labor’s enforcement action. (Plaintiffs’ Objections to Evidence Submitted by Oracle in Opposition to Plaintiffs’ Motion for Class Certification, *Jewett v. Oracle Amer., Inc.*, Case No. 17-CIV-02669 (Apr. 3, 2019).)<sup>1</sup> Your attempts to dismiss Orrick’s conduct as relating solely to the *Jewett* case, and “not relevant” to the enforcement action is disingenuous, given that the cases both allege claims of compensation discrimination by Oracle against women, and Orrick obtained statements from at least 3 members of the protected class *in this enforcement action*, which it sought to use to defend Oracle against these claims. Declarations of Ashlee Kling,

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<sup>1</sup> I did not cite these objections “as if they were conclusive proof of wrongdoing” by you or your firm. Rather, I cited these filings as proof that you and your firm knew that failing to make such disclosures could draw a similar objection in this enforcement action – that Orrick had violated the California Rules of Professional Conduct in obtaining these declarations and that such coerced evidence Orrick obtained from members of the protected class should be excluded.

Barbara Lindhild, and Julie Min Yang Doyle in support of Oracle's opposition to Plaintiffs' motion for class certification, *Jewett v. Oracle Amer., Inc.*, Case No. 17-CIV-02669 (Mar. 6, 2019).

In addition, Orrick violates Rule 1.7(d)(3) when you continue to assert that you represent members of the protected class in this action. While your May 16, 2019 letter claims that I did not "point to any specific document or proof" to support my statement that "Orrick attorneys falsely represented that Oracle had an attorney-client relationship with Oracle's managers of the protected class," I did point to Kathryn Mantoan's March 22, 2019 email (copied to you). (March 22, 2019 email from Kathryn Mantoan (copied to Erin Connell) to Jim Finberg, Exhibit O to Reply Declaration of James M. Finberg in Support of Representative Plaintiffs' Motion for Class Certification, Case No. 17-CIV-02669, attached for ease of reference.) In the email, she specifically asserts there is nothing wrong with "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." *Id.* As I have explained to you, this cannot be so, as such a relationship is specifically prohibited under Rule 1.7. Both of these rules of professional conduct are in place to prevent attorneys from abusing their position to coerce opposing parties from relinquishing their legal rights. Your conduct toward the protected class is having exactly that coercive effect and I am personally troubled that you continue to refuse to step away from this ethically prohibited conduct. As government attorneys, particularly, as you repeatedly note, we do have an interest "in the law being observed," and your willingness to make blatant misrepresentations during your meet and confers and to the Court, while appearing to disregard the law, particularly with respect to coercive and ethically prohibited conduct, is highly troubling.

The Rules of Professional Conduct are designed to ensure that attorneys do not use their position to coerce adverse parties to relinquish legal rights. As you know, 41 CFR Section 60-1.32 also specifically prohibits government contractors from intimidating or coercing workers from participating in this enforcement proceeding. You requested a legal basis for our position (which you set up as a strawman argument in your May 16, 2019 letter, by misstating our position). Our actual position is that Oracle violated this provision by contacting an unknown number of members of the protected class without disclosing that Oracle's interests are adverse in the enforcement action, and by using methods to secure declarations from them that were coercive, particularly given Oracle's position as their employer who controls their livelihood (and for many, their ability to remain in the United States on their work visas). Despite the seriousness of OFCCP's concerns, you did not wait for a response to your requests for additional information supporting OFCCP's concerns that Oracle and its attorneys' communications with employees violated ethical rules and OFCCP regulations prohibiting coercion of employees or interference with employees' cooperation with OFCCP. Had you waited, I would have provided you with several recent orders the Department of Labor obtained orders from federal courts sanctioning employers and their counsel engaging in similar conduct finding that interviews by attorneys representing employers in actions brought by the Department of Labor were coercive and enjoining employers' attorneys from communicating with employees about issues related to the litigation without disclosing that their interests were adverse or that the interviews were

voluntary.<sup>2</sup>

Indeed, Orrick's conduct here is precisely the kind federal courts have found to be unlawful because of the chilling effect that such coercive, involuntary interviews have on employees. *See e.g. Acosta v. Sw. Fuel Mgmt., Inc.*, No. CV 16-4547 FMO (AGRx), 2018 WL 739425, at \*4 & n.3, 5-9 (C.D. Cal. Feb. 2, 2018) vacated in part on other grounds 2018 WL 2207997 (C.D. Cal. Feb. 20, 2018) (granting temporary restraining order against employer and its attorneys who procured coerced declarations from employees); *Acosta v. Austin Elec. Servs. LLC*, 322 F. Supp. 3d 951, 956-57, 959, 961 (D. Ariz. 2018) (granting temporary restraining order, finding interviews were coercive where employer's attorneys did not inform employees that interviews were voluntary, that the government had determined they may be owed back wages, or that their statements may affect their rights and recovery under the lawsuit); *see also Acosta v. Nuzon*, No. SACV 16-00363-CJC-(KESx), 2019 WL 1460622 (C.D. Cal. Feb. 19, 2019) (denying defendants' motion for summary judgment on retaliation claim). Significantly here, in analyzing the coercive nature of the declarations procured by attorneys, courts have cited the following as evidence of coercive circumstances: (1) employees were directed to meet with defense counsel; (2) employees were not advised that meetings and declarations were voluntary; (3) defense counsel did not advise employees that they had a right to the assistance of the Department of Labor or an attorney; (4) employees were not advised that the interview could be adverse to their interests, including their right to recover back wages; (5) employees were not informed that the Department of Labor had "determined" the employees might be owed back wages. *See Sw. Fuel Mgmt.*, 2018 WL 739425 at \*2; *Austin Elec. Servs.*, 332 F.Supp. 3d at 959-960; *Nuzon*, 2019 WL 1460622 at \*5. These circumstances mirror Orrick's communications with members of the protected class in this litigation. As in the cited cases, Oracle and its counsel's conduct violates provisions prohibiting interference with employees' participation in Department of Labor proceedings and coercion of employees, including 41 C.F.R. 60-1.32.

Despite the seriousness of OFCCP's concerns, Oracle doubled down and filed a motion that itself is a coercive act that seeks to chill employees' communications with the OFCCP – suggesting in a public document that OFCCP's communications with employees are improper. In the motion you filed this past Friday and in the letters you sent to us preceding this motion that are attached to that motion, you directly demand to stop communications between the protected class and the government. Indeed, in the motion, you propose punishing the communications between the protected class and the government by seeking to have all evidence struck based on such communications. From our communications with the protected class, the class is, in fact, VERY confused by the positions taken by Oracle and Orrick. Class members have advised us that they understood that Orrick represented them in this action and that they were not allowed to talk to the government. We do not believe that Judge Clark will appreciate Orrick using the OALJ as a tool to chill the communications between the Department of Labor

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<sup>2</sup> These orders also make it clear that the interests of Oracle's employees who are members of the protected class are adverse to Oracle's interests in this action now – the Professional Rules of Conduct would be of little use if they did not apply until the claims were adjudicated. Oracle's position that Oracle's interests in this enforcement action are not adverse to its employees in the protected class reveals another deep misapprehension of its duties under the Rules of Professional Conduct.

and members of the protected class about their claims in this enforcement action, and as a tool for violating 41 CFR 60-1.32.

Moving to the consequences of your prohibited conduct for this litigation, if Oracle does not withdraw its unfounded motion by NOON TOMORROW (with the aim of negotiating a resolution), we intend to file a motion to amend the complaint to add a violation of 41 CFR 60-1.32, and to seek a preliminary injunctive, directing Oracle and its attorneys to cease its coercive conversations with members of the protected class, enjoining Orrick and Oracle's coercive conduct that violates their attorneys' duties of professional responsibility and OFCCP regulations, excluding evidence obtained through such methods, and other relief. We would also seek discovery related to these issues, including depositions of Orrick's attorneys (and Oracle's in-house attorneys), who are at the center of Oracle's coercive conduct. I am attaching an Order the Department of Labor obtained compelling the deposition of defense counsel in such circumstances.

We believe these consequences can be avoided, however, if Oracle withdraws its premature motion (and never forwards this filing to the OALJ FOIA library). While my letter stated that Oracle's suggested corrective notice is unnecessary, and described the paucity of "corrective" statements in the proposal as evidence of the weakness of Oracle's position that OFCCP's letter to class members was in any way misleading, I did not refuse to send such a letter. If the real thrust of what you want communicated to the class is that Oracle denies these allegations, we have no problem sending a letter stating that. In fact, when Oracle served its motion, I was in the process of writing a letter to suggest including some of the statements Oracle seeks in a letter to the protected class, which would also include the disclosures we seek – advising members of the protected class that neither Oracle nor Orrick represent the protected class in this action. Instead, it is OFCCP that is representing the interests of the protected class. In addition to disclosure of Oracle's adverse interest, an assurance that any conversations are NOT mandatory, no class member should feel compelled or required to talk to Oracle or its counsel, and Oracle agrees that no class members should be discouraged or prevented from freely talking to the government.

If the corrective notice could be sent, as we propose, then Oracle could talk in the future to those members of the protected class who received it without fear that either Orrick or Oracle's in-house counsel has run afoul of the bar rules when it communicates with members of the protected class who received the letter. It would also go a long way to preventing future coercive communications.

Erin M. Connell  
May 20, 2019  
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I will call you later this afternoon to discuss our proposal. Please let me know when you are available.

Sincerely,



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Laura C. Bremer  
Senior Trial Attorney

Subject:Jewett v. Oracle

Date:Mon, 11 Feb 2019 [REDACTED]

From:Smith, David R <dsmith@orrick.com>

To [REDACTED]

CC:Emily Sullivan <emily.sullivan@oracle.com>

Dear [REDACTED]

I am an attorney with the law firm of Orrick, Herrington & Sutcliffe LLP, which represents Oracle in its defense of an ongoing lawsuit against the company (*Jewett v. Oracle*). In order to gather information relevant to the case, we would like to speak with a number of ICs, including you. You have not been singled out in any way, but we believe you may have relevant information to share.

We would like to schedule a time to speak with you over the next week – you do not need to do anything to prepare for the call. Will you please provide me with some times when you are available for an hour-long call? I can provide more background about the case on the call.

I have copied Emily Sullivan, Managing Counsel in Oracle's in-house legal department, in the event you have any questions about this outreach or the interview we'd like to conduct.

Thanks in advance for your time – we greatly appreciate it.

David Smith

David B. Smith

Senior Associate

**EXHIBIT O**

**From:** Mantoan, Kathryn G. [mailto:kmantoan@orrick.com]

**Sent:** Friday, March 22, 2019 12:07 PM

**To:** John T. Mullan <jtm@rezlaw.com>; Connell, Erin M. <econnell@orrick.com>; Perry, Jessica R. <jperry@orrick.com>; Grundy, Kayla Delgado <kgrundy@orrick.com>; Fleetwood, Carl W. <cfleetwood@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>

**Cc:** Jim Finberg <jfinberg@altshulerberzon.com>; Eve Cervantez <ecervantez@altshulerberzon.com>; Erin M.. Pulaski <emp@rezlaw.com>; William <wpm@rezlaw.com>

**Subject:** RE: Oracle's communications with putative class members

John:

I write to address your request that Oracle "supplement" its production in response to Plaintiffs' RFP No. 44. As an initial matter, we are puzzled by that request, as there is no duty to supplement discovery responses under the California Discovery Act. See *Biles v. Exxon Mobil Corp.*, 124 Cal. App. 4th 1315, 1328 (2004) ("no such duty" to supplement discovery responses under California law). Oracle completed its collection and production in response to RFP No. 44 last September, pursuant to the agreed-upon narrowing of RFP No. 44 that you describe below.

Moreover, your request indiscriminately appears to seek 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. Such a request sweeps too broadly and clearly touches on privileged communications.

Our understanding from Jim is that Plaintiffs are interested in a more limited issue – namely, knowing what (if any) information was given to putative class members whose declarations Oracle submitted about the nature of the case and their interests. That request is, of course, far more narrow than what your email appears to seek. I am hopeful that the information below will address the heart of your request.

In connection with its class certification motion, Oracle tendered declarations from ten putative class members (Adams, Dorey, Guerrero, Kling, Lundhild, Perrin, Porobic, Swenson, Tahmasebi, Wong, and Yang Doyel). I can confirm that Orrick provided information to each of these women orally at the start of the interviews we conducted regarding the nature of the allegations in this case (that Oracle pays women less than men for equal or substantially similar work), as well as information regarding the following:

- Oracle denies those allegations;
- Plaintiffs are seeking to bring the case as class action on behalf of themselves and current and former females employees in California in Information Technology, Product Development, or Support roles;
- the Orrick attorney conducting the interview represents the Company, not the employee, and that the employee is free to consult an attorney of her choosing;

- the interview is completely voluntary and she could choose whether to participate or to end the interview at any time; and
- if she chose to proceed, information she provides might be shared with and used by Oracle for the purpose of defending the Company in the lawsuit.

We trust that this information addresses Plaintiffs' request for additional information. Should you wish to confer further, though, please let me know when we might arrange a call to discuss.

Thank you,  
Katie

**Kathryn G. Mantoan**  
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**From:** John T. Mullan [<mailto:jtm@rezlaw.com>]  
**Sent:** Friday, March 8, 2019 11:53 AM  
**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>  
**Cc:** Jim Finberg <[jfinberg@altshulerberzon.com](mailto:jfinberg@altshulerberzon.com)>; Eve Cervantez <[ecervantez@altshulerberzon.com](mailto:ecervantez@altshulerberzon.com)>; Erin M.. Pulaski <[emp@rezlaw.com](mailto:emp@rezlaw.com)>; William <[wpm@rezlaw.com](mailto:wpm@rezlaw.com)>  
**Subject:** Oracle's communications with putative class members

Erin & Katie,

Following up on our discussion yesterday morning regarding Oracle's communications with putative class members; Plaintiffs sought such communications in their RFP 44 ("All DOCUMENTS constituting or RELATING TO any COMMUNICATION with any COVERED EMPLOYEE regarding this lawsuit (Case No. : 17CIV02669), including but not limited to any communications with any Covered Employee regarding whether or not to opt out in response to the *Belaire* Notice mailed in this case on January 25, 2018). Following meet and confer, the parties agreed that you would produce non-privileged communications between putative class members and counsel, Human Resources employees, and Vice-Presidents related specifically to the *Jewett v. Oracle America, Inc.* lawsuit counsel. See June 22, 2018 letter from Kathryn G. Mantoan to James M. Finberg.

We request that you supplement your production to RFP 44 by producing more recent responsive communications, including those pertaining to your interviews with putative class members.

Thank you,  
John

---

JOHN T. MULLAN | PARTNER  
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D-03

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PETERSEN, MARILYN CLARK, and  
15 MANJARI KANT, on behalf of themselves  
and all others similarly situated  
16

17 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
18 COUNTY OF SAN MATEO

19 RONG JEWETT, SOPHY WANG, and  
XIAN MURRAY, on behalf of  
20 themselves, and ELIZABETH SUE  
PETERSEN, MARILYN CLARK, and  
21 MANJARI KANT, on behalf of  
themselves and all others similarly  
22 situated,

23 Plaintiffs,

24 vs.

25 ORACLE AMERICA, INC.,

26 Defendant.  
27

Case No.: 17-CIV-02669

[Assigned for all purposes to Hon. V. Raymond Swope]

**REDACTED**

**PLAINTIFFS' OBJECTIONS TO EVIDENCE  
SUBMITTED BY ORACLE IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION**

Hearing Date: May 31, 2019

Hearing Time: 9:00 a.m.

Location: Dept. 23

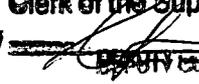
Complaint Filed: June 16, 2017

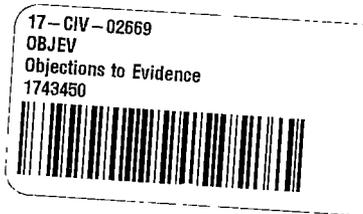
/ Trial Date: No date set  
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**FILED**  
**SAN MATEO COUNTY**

APR 08 2019

Clerk of the Superior Court

BY  DEPUTY CLERK



1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court Rules 3.1352 and 3.1354, Representative Plaintiffs  
3 Elizabeth Sue Petersen, Marilyn Clark, and Manjari Kant hereby object to select portions of the  
4 evidence filed in support of Defendant Oracle America, Inc.'s Opposition to Plaintiffs' Motion for  
5 Class Certification. Plaintiffs believe other evidence submitted by Oracle is also inadmissible, but  
6 tried to make objections sparingly, understanding that the Court will give little weight to evidence  
7 that lacks foundation, is speculative, or not relevant.

8 Plaintiffs respectfully request that the Court strike the objectionable portions of the  
9 evidence as specifically set forth below. Plaintiffs also respectfully request that the Court issue  
10 written rulings with respect to their evidentiary objections, and have provided a proposed form of  
11 order on which the Court can indicate whether each objection is sustained or overruled.

12 **II. EVIDENTIARY OBJECTIONS TO THE DECLARATION OF ALI SAAD, PH.D.**  
13 **IN SUPPORT OF DEFENDANT'S OPPOSITION TO CLASS CERTIFICATION.**

14 Portions of Dr. Saad's report, specifically ¶¶8-12, 19-109, and Exhibits 4-49, are not  
15 reliable, are not based on facts upon which a reasonable labor economist would rely, and are not  
16 based on specialized knowledge. These portions of his report would not be helpful to the trier of  
17 fact. Accordingly, they are not admissible under Cal. Evid. Code § 801. *See Sargon Enterprises*  
18 *Inc. v. University of S. Cal* (2012) 55 Cal. 4th 717, 771-72 (excluding expert testimony that is  
19 (1) based on matter of a type on which an expert may not reasonably rely; (2) based on reasons  
20 unsupported by the material on which the expert relies; or (3) speculation). "An expert opinion  
21 has no value if its basis is unsound.... [T]he matter relied on must provide a reasonable basis for  
22 the particular opinion offered.... [A]n expert opinion based on speculation or conjecture is  
23 inadmissible." *Id.* at 770 (internal quotation omitted). An expert must employ in the courtroom  
24 "the same level of intellectual rigor that characterizes the practice of an expert in the relevant  
25 field." *Id.* at 772 (internal quotation omitted).<sup>1</sup>

26 \_\_\_\_\_  
27 <sup>1</sup> Understanding that most objections to expert testimony ultimately go to weight, rather  
28 than to admissibility, Plaintiffs make their evidentiary objections to Dr. Saad's Report only once,  
rather than repeating them in a separate motion to strike.

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**Objection Number 1**

**Material Objected to:** Saad Report, ¶¶8-9, 19-30 (with respect to Dr. Saad’s opinion that broad salary ranges indicate that employees with the same job title are performing different work).

**Grounds for Objection:** Prior Inconsistent Statement (Cal. Evid. Code §§ 770, 780). Dr. Saad conceded (1) that in another case he treated people in jobs with very similar job salary ranges to Oracle’s as performing substantially similar work, Finberg Reply Decl. (“FRD”), Ex. C (Saad) at 56:6-63:24; FRD, Ex. H (*Bridewell* Report) at ¶39, and (2) that a pay range of 50% by itself does not indicate that employees assigned to that job code are doing substantially different work, FRD, Ex. C (Saad) 49:20-50:24.

Not Based Upon Matter Reasonably Relied On By Expert (Cal. Evid. Code § 801). Dr. Saad could not identify any peer-reviewed articles saying that a broad pay range for a job code means that employees assigned to that job code are performing different work. FRD, Ex. C (Saad) 44:3-47:23. Dr. Saad acknowledges that tech companies tend to have broad pay ranges for each job, FRD, Ex. C (Saad) 47:24-49:13, and that Oracle’s salary ranges are based on market data about tech sector jobs, FRD, Ex. C (Saad) at 65:10-66:5.

Rule of Completeness (Cal. Evid. Code § 356). Dr. Saad relied on incomplete quotations from requisitions, but the documents as a whole undercut his arguments [REDACTED]. [REDACTED]. FRD, ¶17, Ex. N.

**Objection Number 2**

**Material Objected to:** Saad Report ¶¶ 10, 31-61, Exhibits 4-23 (with respect to Dr. Saad’s opinion with regard to alleged “variability” in Dr. Neumark’s model).

**Grounds for Objection:** Not Based Upon Matter Reasonably Relied On By Expert (Cal. Evid. Code § 801). Dr. Saad can identify no peer-reviewed literature where the author found statistical significance, but said that the result was not meaningful because the estimated effect was not the same for everyone, or that used the methods Dr. Saad used to create exhibits 4, 5, or 9. FRD, Ex. C (Saad) at 97:13-99:25, 119:6-128:13, 126:6-131:14. Dr. Saad acknowledged that regressions will *always* have results above and below the regression line, and that statistical

1 significance measures how tightly points are clustered around the regression line, with points  
2 clustered more tightly at higher standard deviations. FRD, Ex. C (Saad) 102:10-104:16, 235:22-  
3 236:5, 236:23-238:8. *See also* FRD, Ex C (Saad) 105:5-106:19 (in his Exs. 4 and 9, more women  
4 are paid less than expected under a null hypothesis than are paid more than expected). *See also*  
5 Neumark Rebuttal Report at ¶34 (explaining why Dr. Saad’s analysis is meaningless).

6 **Objection Number 3**

7 **Material Objected to:** Saad Report ¶¶62-77, exhibits 24-26 (with respect to his “cluster  
8 analysis”).

9 **Grounds for Objection:** Not Based Upon Matter Reasonably Relied On By Expert (Cal.  
10 Evid. Code § 801). Dr. Saad could identify no peer-reviewed literature supporting his technique  
11 of using clusters of words from requisitions to show that persons are not performing substantially  
12 similar work, FRD, Ex. C (Saad) at 192:25-194:3, 222:3-24. *See also* Neumark Rebuttal Report at  
13 ¶10.e.

14 **Objection Number 4**

15 **Material Objected to:** Saad Report ¶¶ 78-95, exhibits 27-34 (with respect to his criticism  
16 of Dr. Neumark’s prior pay analysis).

17 **Grounds for Objection:** Not Based Upon Matter Reasonably Relied On By Expert (Cal.  
18 Evid. Code § 801). Dr. Saad reached his results only after discarding 85% of the available data.  
19 Neumark Rebuttal Report at ¶33.

20 **Objection Number 5**

21 **Material Objected to:** Saad Report ¶¶96-109, exhibits 35-49.

22 **Grounds for Objection:** Not Based Upon Matter Reasonably Relied On By Expert (Cal.  
23 Evid. Code § 801). Dr. Saad conceded that the examples he used for his charts were not selected  
24 randomly. FRD, Ex. C (Saad) at 192:25-194:3 (referring to persons identified in ¶¶96-97 of his  
25 report).

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1 **III. EVIDENTIARY OBJECTIONS TO ORACLE'S PUTATIVE CLASS MEMBER**  
2 **DECLARATIONS**

3 **Objection Number 6**

4 **Material Objected To:** The entire Declarations of Ara Adams, Mary June Dorsey, Julie  
5 Min Yang Doyel, Myrna Guerrero, Ashlee Kling, Barbara Lundhild, Bobbi Jo Perrin, Danica  
6 Porobic, Rebecca Swenson, Maryam Tahmasebi, and Vivian Wong in support of Oracle America,  
7 Inc.'s motion for class certification.

8 **Grounds For Objection:** The Court should decline to consider Oracle's declarations from  
9 putative class members because they were obtained in violation of California's Rules of  
10 Professional Conduct. Pursuant to California Rule of Professional Conduct Rule 1.13(f), lawyers  
11 representing a corporation must explain the identity and adversity of the lawyer's client whenever  
12 the lawyers know, or reasonably should know, that the organization's interests are adverse to those  
13 of the constituents with whom the lawyer is dealing:

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

18 Cal. Rules of Prof. Conduct 1.13(f) (emphasis added); *see Mevorah v. Wells Fargo Home Mortg.,*  
19 *Inc., a div. of Wells Fargo Bank* (N.D. Cal., Nov. 17, 2005) 2005 WL 4813532, at \*4 ("It does not  
20 appear from the record currently before this court that defendant properly explained to the  
21 [putative class members] it contacted that 'the organization's interests are or may become adverse  
22 to those of the constituent(s) with whom the member is dealing' and that any information  
23 communicated to defendant may be 'used in the organization's interest' if defendant 'becomes  
24 adverse to the constituent.'") (quoting Cal. Rule of Prof. Conduct 3-600).<sup>2</sup>

25 <sup>2</sup> The executive summary accompanying Rule 1.13(f) expressly contemplates the rule  
26 carrying forward the same duties previously imposed under Rule 3-600(D): "Paragraph (f) *carries*  
27 *forward* the duty imposed by current rule 3-600(D) requiring a lawyer for the organization to  
28 explain who the client is when it is apparent that the organization's interests *are or may become*  
adverse to those of a constituent with whom the lawyer is dealing. California Rule of Professional  
Conduct Rule 1.13 at "Executive Summary" (emphasis added).

1 Here, while Oracle's putative class member declarants were notified that they were  
2 speaking with Oracle's counsel and that they would potentially be class members should a class be  
3 certified in this matter, they were not expressly informed that their interests were, or could  
4 become, adverse to their employer. See Adams Decl. ¶ 2, Dorsey Decl. ¶ 2, Doyel Decl. ¶ 2,  
5 Guerrero Decl. ¶ 2, Kling Decl. ¶ 2, Lundhild Decl. ¶ 2, Perrin Decl. ¶ 2, Porobic Decl. ¶ 2,  
6 Swenson Decl. ¶ 2, Tahmasebi Decl. ¶ 2, Wong Decl. ¶ 2. Further, Oracle's counsel  
7 acknowledged in a March 22, 2019, communication that putative class members who were  
8 contacted by Oracle were not expressly informed that their interests were adverse. See FRD Ex.  
9 O, March 22, 2019 e-mail from Kathryn Mantoan to John T. Mullan.

10 In fact, Oracle's interests are directly adverse to the interests of the putative class member  
11 declarants, but the putative class member declarants likely do not know that. [REDACTED]

12 [REDACTED]

13 [REDACTED]. See Neumark Rebuttal Report ¶35, Exhibit 17.

14 **IV. EVIDENTIARY OBJECTIONS TO ORACLE'S MALE MANAGER**  
15 **DECLARATIONS**

16 **Objections to Chad Kidder Declaration dated March 1, 2019.**

17 **Objection Number 7**

18 **Material Objected to:** "I have reviewed portions of the brief that I understand Plaintiffs  
19 filed with the court in support of their class certification motion in this case, and read that  
20 Plaintiffs claim, 'At least through October 31, 2017, Oracle affirmatively imposed wage inequities  
21 by mandating that employees' starting salaries be tied to their salaries at their past employer.' I  
22 also read Plaintiffs' claim that Oracle had a 'policy of tying salaries to prior pay.' Those claims are  
23 not consistent with my knowledge of and experience at Oracle, and I believe the claims to be  
24 inaccurate." (Kidder Declaration ¶ 3, page 1, lines 22-27).

25 **Grounds for Objection:** Prior Inconsistent Statement (Cal. Evid. Code §§ 770, 780). "Q.  
26 Do you know why Oracle sought prior compensation information? MS. PERRY: Object to form.  
27 Vague; ambiguous; overbroad. THE WITNESS: Based on my own experience, it was to  
28 determine if a hiring manager had the necessary budget in which to pay a candidate." Finberg

1 Decl. ISO Class Cert., Ex. D (Kidder) 29:25-30-6. Lack of Foundation/No Personal Knowledge  
2 (Cal. Evid. Code §§ 403, 702(a), 800). Defendant has not laid proper foundation for Mr. Kidder to  
3 speak to Oracle's former policy of tying salaries to prior pay. Mr. Kidder is a recruiter, not a  
4 hiring manager, and his knowledge in this area has not been established. *See* Kidder Decl., ¶¶ 2, 4  
5 (“... I manage the recruiting team for the United States responsible for filling opening positions  
6 related to software development.” “At Oracle, hiring managers are the individuals primarily  
7 responsible for making starting compensation decisions.”).

8 **Objection Number 8**

9 **Material Objected to:** “At Oracle, hiring managers are the individuals primarily  
10 responsible for making starting compensation decisions. Hiring managers often, but not always,  
11 consult with members of the recruiting staff who may have been involved in the candidate's  
12 recruitment process. Starting and sign-on pay decisions can be based on a variety of factors  
13 including a candidate's skill, abilities, relevant prior experience, and product knowledge, as well  
14 as the needs of the job, the hiring market, how the position fits into business's strategy, and the  
15 urgency of filling the position. The line of business, team, and product on which an employee  
16 may work can also play important roles in determining the level of starting compensation, as the  
17 skills required and experience relevant to different roles can vary dramatically in their availability  
18 in the market. The ideal candidate for a particular role—due to his or her particular set of  
19 attributes and knowledge—may have competing offers, or may otherwise demand (and be able to  
20 command) particular salary or other compensation elements. To meet Oracle's business needs,  
21 this may lead to different compensation packages being offered to applicants in different roles,  
22 even if those roles share the same system job title (or job code).

23 After selecting the candidate to hire and determining the starting pay to offer, the hiring  
24 manager is responsible for submitting information explaining the justification for the hire. The  
25 justification captures details specific to the candidate, which can include, but not be limited to,  
26 education, work history, product knowledge and expertise, relevant years of experience, location,  
27 and significant former employees.” (Kidder Declaration ¶ 4-5, page 1-2, lines 28-18).

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1 Code §§ 403, 702(a), 800). Defendant has not laid a foundation for Mr. Kidder to speak to the  
2 policies and practices of Oracle’s hiring managers in linking salary to prior pay. Mr. Kidder is a  
3 recruiter, not a hiring manager, and his knowledge in this area has not been established.

4 **V. EVIDENTIARY OBJECTIONS BASED UPON THE COMPLETENESS**  
5 **DOCTRINE.**

6 The completeness doctrine, codified at California Evidence Code section 356, seeks to  
7 avoid the misleading impressions that can be created when evidence is taken out of context. To  
8 diminish this risk, Section 356 states in part:

9 ...when a detached act, declaration, conversation, or writing is given in evidence,  
10 any other act, declaration, conversation, or writing which is necessary to make it  
understood may also be given in evidence.

11 Cal. Evid. Code § 356. Plaintiffs make the following evidentiary objections to Defendant’s  
12 incomplete and misleading presentation of the evidence.

13 **Deposition Testimony of Plaintiff Marilyn Clark dated September 14, 2018.**

14 **Objection Number 10**

15 **Material Objected to:** Oracle cites the incomplete deposition testimony of Plaintiff Clark  
16 in its Opposition brief: “Plaintiff Clark acknowledges that a database administrator teammate with  
17 the same job title, who reported to the same manager, performed a ‘different kind of work than  
18 what I did.’” Opp. at 11, *citing* MSJ Connell Decl. Ex. G (Clark Dep.) 158:7-158:16.

19 **Grounds for Objection:** Lack of Foundation/No Personal Knowledge/Incomplete  
20 Evidence, to the extent that Plaintiff Clark testified that she does not recall Mr. Pradhan’s “day to  
21 day” responsibilities, but rather only knew that he worked on supporting a different product than  
22 her. FRD, Ex. E (Clark Dep.) 157:14- 158:19. (Cal. Evid. Code §§ 356, 403, 702(a), 800).  
23 Incomplete Evidence, to the extent that Plaintiff Clark testified that even though the products and  
24 operating systems that database administrators worked on might differ, the fundamental work  
25 database administrators performed was the same, and she could fill in for her comparators when  
26 they were out (Cal. Evid. Code § 356): “Q. Now, you talked about how on occasion, in addition  
27 to CRM, you performed database administrator functions for some of the other products. Tell us  
28 about that. MS. MANTOAN: Objection; vague and ambiguous. THE WITNESS: Like I stated

1 before, when people were either on vacation or possibly on a medical leave or out sick, I was, on  
2 occasion, asked to perform their duties because they were gone, and I had no problem taking care  
3 of FSCM or HR platform and tools, which is another group within the QAE organization. Q. And  
4 did you need additional training to do that? A. No. Q. Why not? THE WITNESS: Because the  
5 work was very similar to what you did for CRM, and I was provided with instructions on how to  
6 do it. Q. What do you mean by the work was similar? A. The basic database administration  
7 duties were - - the procedures followed were similar for each of the different software products.  
8 Q. And you primarily used the IBM platform, but did you have the knowledge, skills, and abilities  
9 to use other platforms? A. Yes. Q. Which ones? A. Oracle, Db2 UNIX, and, on occasion, I did  
10 Sybase. Q. Would you say you were proficient in those other platforms? THE WITNESS: Yes.”  
11 FRD., Ex. E (Clark Dep.) 269:19-271:5.

12 **Deposition Testimony of Plaintiff Elizabeth Sue Petersen dated September 14, 2018.**

13 **Objection Number 11**

14 **Material Objected to:** Oracle cites the incomplete deposition testimony of Plaintiff  
15 Petersen in its Opposition brief: “Plaintiff Petersen states that her more experienced teammate  
16 knew ‘a lot of things that ... [she] did not know,’ and was ‘proficient in a lot of things that [she]  
17 was not.’” Opp. at 12, *citing* MSJ Connell Decl. Ex. L (Petersen Dep.) 85:6-16.

18 **Grounds for Objection:** Incomplete Evidence (Cal. Evid. Code § 356), to the extent that  
19 Plaintiff Petersen testified that Owen Richards was more proficient in certain products only when  
20 she first began working at Oracle: “Q. What about Owen? Were there other products that Owen  
21 was more proficient with than you were? A. I had - - yeah. He - - he was in the POT longer than  
22 I was. I had just come in, so there were a lot of things that he know that I did not know. Q. Like  
23 what? A. A (sic) procurement purchasing. I had - - when Owen was there, he left shortly after I  
24 permanently came into PO, so he was proficient in a lot of things that I was not.” MSJ Connell  
25 Decl. Ex. L (Petersen Dep.) 85:6-16.

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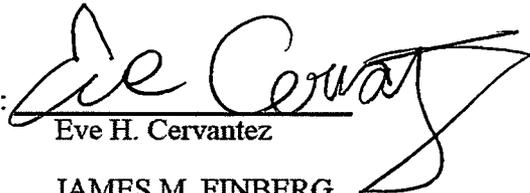
**Objection Number 13**

**Material Objected to:** Mantoan Decl. ISO Motion to Strike Hough Ex. A (Hough Dep) Ex. 5.

**Grounds for Objection:** Incomplete Evidence (Cal. Evid. Code § 356). Ex. 5 to Dr. Hough's deposition is an extract from a spreadsheet produced by Oracle, ORACLE\_JEWETT\_00007307, containing job postings for the Software Developer 4 position. The extracted version used by Oracle at the deposition, and filed with the Court in support of its Motion to Strike Hough and its Opposition to Class Certification, omits multiple columns from the spreadsheet, including the columns labeled [REDACTED]

[REDACTED] FRD ¶22, Ex.S. The omitted columns are identical or near-identical for each Software Developer 4 position. *Id.*

Dated: April 3, 2019

By:   
Eve H. Cervantez

JAMES M. FINBERG  
EVE CERVANTEZ  
PEDER J. THOREEN  
Altshuler Berzon LLP

JOHN MULLAN  
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*Attorneys for Plaintiffs ELIZABETH SUE PETERSEN, MARILYN CLARK, and MANJARI KANT, on behalf of themselves and all others similarly situated,*

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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION**

**R. ALEXANDER ACOSTA,  
Secretary of Labor, United States  
Department of Labor,**

**Plaintiff,**

**v.**

**NUZON CORPORATION, et al.,**

**Defendants.**

**Case No.: SACV 16-00363-CJC(KESx)**

**ORDER DENYING DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT [Dkt. 202]**

**I. INTRODUCTION**

The Secretary of Labor for the United States Department of Labor (“the Secretary”) brings this action against Defendants Nuzon Corporation, Margaret’s Villa, Inc., Geraldo Ortiz, Lilibeth Ortiz, Fil-Lyd Investments, LLC, and Juanjo Investments,

1 LLC, for violations of the Fair Labor Standards Act (“FLSA”). (Dkt. 149 [Second  
2 Amended Complaint, hereinafter “SAC”].) Before the Court is Defendants’ motion for  
3 partial summary judgment on the Secretary’s retaliation claim. (Dkt. 202 [hereinafter  
4 “Mot.”].) For the following reasons, the motion is **DENIED**.<sup>1</sup>

## 6 **II. BACKGROUND**

8 Defendants operate residential care facilities for adults with disabilities. (SAC  
9 ¶¶ 4–7.) Defendants employ caregivers and Licensed Vocational Nurses to care for the  
10 patients at each facility. (*Id.* ¶¶ 11–12.) In February 2016, the Secretary filed this action,  
11 alleging that Defendants violated the FLSA’s recordkeeping, minimum wage, and  
12 overtime requirements. (*See* Dkt. 1.) In June 2018, the Secretary amended the complaint  
13 to add a retaliation claim under FLSA. (*See generally* SAC.) The Secretary’s retaliation  
14 claim is premised on two theories: (1) that Defendants retaliated by forcing sixteen  
15 employees to sign declarations in connection with the Secretary’s FLSA claims and  
16 (2) that Defendants retaliated by issuing eviction notices to employees who lived at  
17 Defendants’ residential care facilities. (*Id.* ¶¶ 17–18, 30–32.) Defendants move for  
18 partial summary judgment with respect to the first theory.

19  
20 The following facts are undisputed. In October 2016, Defendants hired the law  
21 firm of Carlson & Jayakumar LLP, with Jehan Jayakumar as lead trial counsel. (Dkt.  
22 204-1 [Secretary’s Statement of Genuine Disputes of Material Fact and Opposition to  
23 Defendants’ Statement of Uncontroverted Facts and Conclusions of Law, hereinafter  
24 “UF”] 2.) Shortly after being retained, Mr. Jayakumar advised Defendants that it would  
25 be beneficial to allow defense counsel to obtain declarations from Defendants’  
26

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27  
28 <sup>1</sup> Having read and considered the papers presented by the parties, the Court finds this matter appropriate  
for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set  
for February 25, 2019, at 1:30 p.m. is hereby vacated and off calendar.

1 employees. (UF 3.) To obtain these declarations, defense counsel conducted interviews  
2 over two periods, in May 2017 and again in November 2017. (UF 7.) A managerial  
3 employee, Ruby Ann Lamig, coordinated with employees to arrange the dates and  
4 locations for the interviews. (UF 14.) The interviews primarily took place at the  
5 employees' place of work or at a coffee shop near one of the residential facilities. (UF  
6 16.) Defendants paid employees for their time at the interviews. (UF 18.)

7  
8 At the interviews, defense counsel asked questions regarding the employee's hours  
9 and working conditions. (UF 37.) One employee left the interview after a few minutes,  
10 and another employee answered questions but left early. (UF 29.) Some employees were  
11 asked to review and comment upon written time records that defense counsel had brought  
12 with them to the interviews. (UF 39.) Defense counsel took notes during the interviews  
13 and used them to draft declarations. (UF 41–42.) The declarations included retrospective  
14 information about hours worked, employee time cards and recordkeeping, employee job  
15 titles and duties, and work locations. (UF 44.) Mr. Jayakumar reviewed all draft  
16 declarations before they were sent to Lilibeth Ortiz. (UF 46.) Mrs. Ortiz and Ms. Lamig  
17 then distributed the declarations to current employees for them to sign. (UF 47.) Former  
18 employees received draft declarations directly from the attorneys. (*Id.*) Some employees  
19 refused to sign the declaration, and some employees made handwritten changes to their  
20 declarations before signing. (UF 52–53.)

21  
22 The parties dispute many other details regarding what happened before, during,  
23 and after the interviews. First, the parties dispute whether employees attended the  
24 interviews voluntarily. Defendants assert that the interviews were completely voluntary  
25 and attended only by willing participants. However, the Secretary submits declarations  
26 from three employees that suggest that the employees did not have a choice about  
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1 whether to attend the interviews.<sup>2</sup> According to one employee, “[t]he way that the  
2 owners scheduled the interviews made it feel like [he] had to interview with the attorney  
3 whether [he] wanted to or not and made [him] worry that something bad might happen to  
4 [him] from the interviews.” (See Dkt. 215-1 [Declaration of Godofredo Loyola,  
5 hereinafter “Loyola Decl.”] ¶ 4.) Similarly, another employee testified, “I did not want to  
6 go to the interview but because it was my boss/landlord telling me to go to the interview,  
7 I felt like I had no choice and had to answer the attorney’s questions.” (Dkt. 215-3  
8 [Declaration of Roberto Manalansan, hereinafter “Manalansan Decl.”] ¶ 4.) And a third  
9 employee stated that she was specifically told that “the interview with the attorney was  
10 not optional.” (Dkt. 215-2 [Declaration of Jeanette Suarez, hereinafter “Suarez Decl.”] ¶  
11 3.)

12  
13 Second, the parties dispute whether the attorneys fully informed the employees  
14 about their rights. Defendants assert that defense counsel provided a series of verbal  
15 disclosures at the beginning of the interview. (See Dkt. 202-6 Ex. A [Declaration of  
16 Jehan N. Jayakumar, hereinafter “Jayakumar Decl.”] ¶¶ 7–8.) Defendants also provided  
17 at least some employees with a written memorandum that told employees to make sure  
18 the declaration was accurate and to handwrite any necessary changes. (UF 51.) But  
19 employees testified that neither Defendants nor defense counsel told them about the  
20 purpose of the meeting, who the attorney was, for whom the attorney worked, and that  
21 the interview was about the Department of Labor investigation. (Loyola Decl. ¶¶ 4–5;  
22 Suarez Decl. ¶¶ 3–4; Manalansan Decl. ¶¶ 4, 7.)

23  
24 Third, the parties dispute whether employees voluntarily signed the declarations,  
25 whether they were fully informed of the consequences of signing the declarations, and  
26

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27 <sup>2</sup> Defendants objected to these declarations on the ground that the Secretary originally did not disclose  
28 the identities of the employee-declarants. (See Dkt. 209-1 [Evidentiary Objections] at 1–3, 6–8, 11–13.)  
After the Court denied the Secretary’s application for *in camera* review, the Secretary filed unredacted  
versions of these declarations. (See Dkts. 214, 215.) Accordingly, these objections are MOOT.

1 whether these solicited declarations contained false or misleading testimony. Defendants  
2 assert defense counsel explained that the interviewee was under no obligation to sign the  
3 declaration. (Jayakumar Decl. ¶ 9.) The Secretary disputes this. One employee states  
4 that she was told to sign the declaration, was not informed that she did not have to sign it,  
5 and did not have enough time to read the entire declaration and correct mistakes. (Suarez  
6 Decl. ¶ 6.) Other employees testify that they were told to sign the declaration and felt  
7 pressured to sign it because their boss and landlord told them to do so. (Loyola Decl. ¶ 7;  
8 Manalansan Decl. ¶ 8.) The employees were never given copies of their declarations.  
9 (Loyola Decl. ¶ 8; Manalansan Decl. ¶ 8; Suarez Decl. ¶ 6.)  
10

### 11 **III. LEGAL STANDARD**

12

13 The Court may grant summary judgment on “each claim or defense—or the part of  
14 each claim or defense—on which summary judgment is sought.” Fed. R. Civ. P. 56(a).  
15 Summary judgment is proper where the pleadings, the discovery and disclosure materials  
16 on file, and any affidavits show that “there is no genuine dispute as to any material fact  
17 and the movant is entitled to judgment as a matter of law.” *Id.*; see also *Celotex Corp. v.*  
18 *Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the initial  
19 burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*,  
20 477 U.S. at 325. A factual issue is “genuine” when there is sufficient evidence such that  
21 a reasonable trier of fact could resolve the issue in the nonmovant’s favor. *Anderson v.*  
22 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is “material” when its resolution  
23 might affect the outcome of the suit under the governing law, and is determined by  
24 looking to the substantive law. *Id.* “Factual disputes that are irrelevant or unnecessary  
25 will not be counted.” *Id.* at 249.  
26

27 Where the movant will bear the burden of proof on an issue at trial, the movant  
28 “must affirmatively demonstrate that no reasonable trier of fact could find other than for

1 the moving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).  
2 In contrast, where the nonmovant will have the burden of proof on an issue at trial, the  
3 moving party may discharge its burden of production by either (1) negating an essential  
4 element of the opposing party’s claim or defense, *Adickes v. S.H. Kress & Co.*, 398 U.S.  
5 144, 158–60 (1970), or (2) showing that there is an absence of evidence to support the  
6 nonmoving party’s case, *Celotex Corp.*, 477 U.S. at 325. Once this burden is met, the  
7 party resisting the motion must set forth, by affidavit, or as otherwise provided under  
8 Rule 56, “specific facts showing that there is a genuine issue for trial.” *Anderson*, 477  
9 U.S. at 256. A party opposing summary judgment must support its assertion that a  
10 material fact is genuinely disputed by (i) citing to materials in the record, (ii) showing the  
11 moving party’s materials are inadequate to establish an absence of genuine dispute, or  
12 (iii) showing that the moving party lacks admissible evidence to support its factual  
13 position. Fed. R. Civ. P. 56(c)(1)(A)–(B). The opposing party may also object to the  
14 material cited by the movant on the basis that it “cannot be presented in a form that  
15 would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2). But the opposing party must  
16 show more than the “mere existence of a scintilla of evidence”; rather, “there must be  
17 evidence on which the jury could reasonably find for the [opposing party].” *Anderson*,  
18 477 U.S. at 252.

19  
20 In considering a motion for summary judgment, the court must examine all the  
21 evidence in the light most favorable to the nonmoving party, and draw all justifiable  
22 inferences in its favor. *Id.*; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *T.W.*  
23 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630–31 (9th Cir. 1987).  
24 The court does not make credibility determinations, nor does it weigh conflicting  
25 evidence. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992).  
26 But conclusory and speculative testimony in affidavits and moving papers is insufficient  
27 to raise triable issues of fact and defeat summary judgment. *Thornhill Publ’g Co. v. GTE*  
28 *Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). The evidence the parties present must be

1 admissible. Fed. R. Civ. P. 56(c). “If the court does not grant all the relief requested by  
2 the motion, it may enter an order stating any material fact—including an item of damages  
3 or other relief—that is not genuinely in dispute and treating the fact as established in the  
4 case.” Fed. R. Civ. P. 56(g).

#### 6 **IV. DISCUSSION**

8 Defendants move for partial summary judgment on the Secretary’s retaliation  
9 claim. Under the FLSA, it is unlawful “for any person . . . to discharge or in any other  
10 manner discriminate against any employee because such employee has filed any  
11 complaint or instituted or caused to be instituted any [FLSA] proceeding . . . or has  
12 testified or is about to testify in any such proceeding.” 29 U.S.C. § 215(a)(3). To  
13 establish a violation of the FLSA’s anti-retaliation provision, a party must show that:  
14 (1) an employee “engaged in or was engaging in activity protected under federal law,”  
15 (2) the employee was subjected to “an adverse employment action,” and (3) the protected  
16 activity was a “motivating reason” for the adverse action. *See Avila v. L.A. Police Dep’t*,  
17 758 F.3d 1096, 1102–04 (9th Cir. 2014); *see also* 29 U.S.C. § 215(a)(3). Adverse action  
18 is defined broadly to include any act that “well might have dissuaded a reasonable worker  
19 from making or supporting a” claim of a violation of the FLSA. *Burlington N. & Santa*  
20 *Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th  
21 Cir. 2000) (defining adverse action as one “reasonably likely to deter employees from  
22 engaging in protected activity”).

23  
24 Courts have found employers to take adverse action in violation of the FLSA when  
25 they solicit and extract declarations from their employees under coercive circumstances.  
26 *See Acosta v. Austin Elec. Servs., LLC*, 322 F. Supp. 3d 951, 958 (D. Ariz. 2018) (“[A]n  
27 employer is prohibited from obtaining, under coercive circumstances, employee  
28 declarations, particularly declarations that are relevant to and go to the heart of pending

1 claim that the employee failed to fully compensate employees.”); *Acosta v. Sw. Fuel*  
2 *Mgmt., Inc.*, 2018 WL 739425, at \*4 (C.D. Cal. Feb. 2, 2018) (“[S]oliciting and  
3 extracting coerced declarations . . . constitutes an adverse employment action for  
4 purposes of the FLSA anti-retaliation provision.”). Extracting coerced declarations from  
5 employees violate FLSA’s anti-retaliation provision because “[a]n employee may . . . be  
6 deterred from participating in an ongoing [Department of Labor] investigation” by  
7 possibly believing “that the coerced declaration can subsequently be used against her to  
8 claim (albeit mistakenly) that the employee perjured herself.” *Sw. Fuel*, 2018 WL  
9 739425, at \*4 n.3.

10  
11 At least two trial courts in this circuit have examined whether an employer’s  
12 solicitation of employee declarations can amount to retaliation. In *Acosta v. Southwest*  
13 *Fuel Management, Inc.*, an employer under investigation by the Department of Labor for  
14 underpaying its employees began instructing its employees to attend meetings with  
15 defense counsel on work time. 2018 WL 739425, at \*6. Representatives of the employer  
16 drove some employees to the meetings. *Id.* At the meetings, defense counsel did not tell  
17 employees that the meeting was voluntary, that the Department of Labor had determined  
18 the employee was owed back wages, and that the employee might be giving up these  
19 wages by signing the statement. *Id.* at \*5–6. The attorney then presented the employee  
20 with a declaration to sign, and employees signed it because they felt they would lose their  
21 job or have their hours cut if they did not sign. *Id.* at \*6. After the employees signed the  
22 declaration, they were not provided with a copy of the consent form or the declaration  
23 that he or she signed. *Id.* Based on this, the court concluded that the Secretary was likely  
24 to prevail on his retaliation claim and that an injunction limiting the employer’s ability to  
25 communicate with its employees was warranted. *Id.* at \*7–9, *vacated in part on other*  
26 *grounds*, 2018 WL 2207997 (C.D. Cal. Feb. 20, 2018) (concluding entry of a preliminary  
27 injunction “limiting and/or restricting [the employer’s] ability to communicate with their  
28

1 employees” was warranted, but deciding “the better course [would be] to proceed to a  
2 trial on the merits”).

3  
4 Similarly, in *Acosta v. Austin Electronic Services LLC*, the court found that a  
5 preliminary injunction was warranted where the employer conducted an “audit,” in which  
6 outside counsel asked employees about issues in a Department of Labor investigation,  
7 including whether the employees had been instructed to underreport their hours worked  
8 and whether they had been paid for all hours worked. 322 F. Supp. 3d at 959, 961. The  
9 employer instructed employees to attend interviews for the audit on work time. *Id.* at  
10 958–59. The attorneys never informed the employees that the interviews were voluntary  
11 or that employees could leave. *Id.* at 959. The employees were not told they could  
12 consult a neutral person, such as a lawyer. *Id.* After the interviews, employees were  
13 presented with declarations for their signature, under penalty of perjury. *Id.* The  
14 declarations did not inform employees that they might be within the group of employees  
15 on whose behalf the Department of Labor was seeking back wages and that signing the  
16 declarations might adversely affect the exercise of their FLSA rights. *Id.* Employees  
17 stated that they felt “blindsided” by the interviews, felt they could not decline to  
18 participate in the interviews, and felt uncomfortable and upset both by the questions and  
19 length of questioning. *Id.* at 960. In determining that these actions likely violated the  
20 FLSA’s anti-retaliation provision, the court noted:

21  
22 [I]n the context of this litigation, the deterrent effect of the [employers’]  
23 actions in obtaining their employees’ declarations is obvious. Once [the  
24 employers] obtained the declarations, employees with legitimate claims  
25 would be faced with a dire choice. If these employees later testified in this  
26 suit that they had not, in fact, been adequately compensated, [the employers]  
27 could not only use their declarations for impeachment, but could also  
28 threaten employees for making false statements under penalty of perjury. Faced with this choice, employees with legitimate claims might decide to forgo their statutory right to compensation, simply to ensure their later testimony in this case remained consistent with the declarations [the employers] obtained under questionable circumstances. These concerns are

1 further heightened considering [the employers] employ vulnerable  
2 populations such as convicts, immigrants, and refugees.

3 *Id.* at 962. The court issued a limited injunction that prohibited the defendants from  
4 seeking any declarations regarding their timekeeping policy and pay that were not  
5 exclusively forward-looking. *Id.* The injunction also required the employer to inform its  
6 employees that the interviews were voluntary and to provide employees with copies of  
7 any declarations they signed. *Id.*

8  
9 At the same time, the FLSA does not prohibit all efforts by an employer to  
10 investigate possible violations and prepare a defense against alleged FLSA violations.  
11 An employer may permissibly take actions to educate its employees about company  
12 policies, investigate wrongdoing, and take corrective action based upon any wrongdoing  
13 uncovered. *See id.* at 958. For instance, in *Mata v. City of Los Angeles*, the court  
14 concluded that internal affairs investigatory interviews “seeking to determine whether  
15 and to what extent [employees] have failed to comply with [the employer’s] express,  
16 written overtime policy” were not actionable and would not be enjoined. *Mata v. City of*  
17 *L.A.*, 2008 WL 11338102, at \*4 (C.D. Cal. July 3, 2008). And in the context of a Title  
18 VII case, the Ninth Circuit has concluded that “group therapy sessions . . . designed to  
19 better inform the [employer’s] workforce of its sexual harassment policy” and “deal with  
20 a traumatic workplace situation” were not retaliatory. *Brooks v. City of San Mateo*, 229  
21 F.3d 917, 928–29 (9th Cir. 2000).

22  
23 Here, there remains a dispute of material fact as to whether Defendants solicited  
24 declarations in a manner that would have “dissuaded a reasonable worker from making  
25 or supporting” a claim under the FLSA. *See Burlington*, 548 U.S. at 68. A reasonable  
26 factfinder could determine that Defendants extracted the declarations under coercive  
27 circumstances. Defendants served as both employer and landlord to their employees.  
28 (*See* Dkt. 205-2 Ex. L; Manalansan Decl. ¶ 2.) Mrs. Ortiz and Ms. Lamig purportedly

1 directed the employees to meet with defense counsel. (Loyola Decl. ¶¶ 3–4; Suarez Decl.  
2 ¶ 3; Manalansan Decl. ¶ 3.) In one conversation, Ms. Lamig blamed the interviews on  
3 the fact that an employee had made another complaint. (See Loyola Decl. ¶ 3.)  
4 Defendants then ensured employee attendance at these meetings by personally scheduling  
5 them, having the meetings take place at the workplace, and in some circumstances  
6 driving the employees to the meetings. (Loyola Decl. ¶¶ 3–5; Suarez Decl. ¶¶ 3–4;  
7 Manalansan Decl. ¶¶ 3–5.) Employees testified that they were never told that the  
8 meeting was optional. (Suarez Decl. ¶ 3; Loyola Decl. ¶ 5.) Defense counsel did not  
9 advise the employees that they had a right to the assistance of the Department of Labor or  
10 an attorney or that the interview could be adverse to their interests, including their right to  
11 recover back wages. (Dkt. 204-13 Ex. G [Deposition of Jehan Noel Jayakumar] at  
12 34:11–13, 45:22–46:17; Dkt. 204-12 Ex. F [Deposition of Gagan Vaideeswaran] at  
13 76:19–22.) And when presented with the drafted declarations, the employees stated they  
14 felt obligated to sign them. (Manalansan Decl. ¶ 8.)

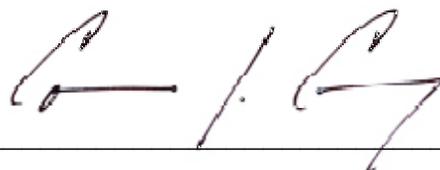
15  
16 Defendants argue that the Secretary erroneously asserts that the “FLSA imposes a  
17 set of fifteen or more hoops an employer must jump through before [even] speaking with  
18 unrepresented witnesses” and that these requirements have no support in the law. (Dkt.  
19 209 [Reply] at 3–4.) But, as discussed above, the FLSA prohibits adverse action that  
20 would “dissuade[] a reasonable worker from making or supporting” a FLSA claim. See  
21 *Burlington*, 548 U.S. at 68. An employee who is coerced into signing a declaration may  
22 be dissuaded from participating in an ongoing Department of Labor investigation or from  
23 testifying against her employer. See *Sw. Fuel*, 2018 WL 739425, at \*4 n.3; *Austin*, 322 F.  
24 Supp. 3d at 962. Because there remains a disputed issue of material fact as to whether  
25 Defendants took adverse action by the way in which they solicited declarations,  
26 Defendants’ motion for summary judgment is **DENIED**.<sup>3</sup>

27  
28 <sup>3</sup> Defendants object to portions of the employees’ declarations on the grounds that the testimony lacks foundation, is vague, and amounts to improper witness testimony. (See generally Evidentiary

1 **V. CONCLUSION**

2  
3 For the foregoing reasons, Defendants' motion for summary judgment is  
4 **DENIED.**

5  
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7  
8 DATED: February 19, 2019



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10 CORMAC J. CARNEY  
11 UNITED STATES DISTRICT JUDGE  
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28 Objections.) Since the Court does not rely on these portions of the declarations, it is not necessary for the Court to rule on Defendants' objections.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:16-cv-00363-CJC-KESx

Date: July 30, 2018

Title: SECRETARY OF LABOR v. NUZON CORPORATION, et al.

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PRESENT:

THE HONORABLE KAREN E. SCOTT, U.S. MAGISTRATE JUDGE

Jazmin Dorado  
Courtroom Clerk

Not Present  
Court Reporter

ATTORNEYS PRESENT FOR  
PLAINTIFF:  
None Present

ATTORNEYS PRESENT FOR  
DEFENDANTS:  
None Present

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**PROCEEDINGS (IN CHAMBERS):**      **Order GRANTING Motion to Compel  
and DENYING Motion to Quash  
(Dkt. 163)**

**I. BACKGROUND.**

On February 16, 2018, Plaintiff Secretary of Labor (“Plaintiff”) filed a motion in limine to exclude from evidence certain employee declarations allegedly obtained via coercion. (Dkt 106.) On February 26, 2018, Defendants Nuzon Corporation, et al. (“Defendants”) opposed the motion. (Dkt. 122.) In support of their opposition, Defendants filed declarations by trial counsel Jehan Jayakumar (Dkt. 122-3) and former associate at Mr. Jayakumar’s firm, Gagan Vaideeswaran (Dkt. 122-2) providing factual testimony about how the employee interviews were conducted and the declarations obtained.

On May 23, 2018, Plaintiff moved for leave to file a Second Amended Complaint (“SAC”) adding a claim that Defendants violated Section 15(a)(3) of the Fair Labor Standards Act (“FLSA”) at 29 U.S.C. § 215(a)(3). (Dkt. 137.) In briefing, Plaintiff explained that he would need only “limited discovery” to support the new claim, including “depositions of defense counsel to cross-examine them on the declarations” submitted to oppose the motion in limine. (Dkt. 147 at 8.) The Secretary noted that he would not pursue such discovery if Defendants withdrew their attorneys’ declarations. (Id. at n. 4.)

The Court granted the motion for leave to amend. (Dkt. 148.) Plaintiff filed a SAC. (Dkt. 149.) In the SAC, Plaintiff alleges that Defendants scheduled “mandatory” meetings

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. 8:16-cv-00363-CJC-KESx

Date: July 30, 2018

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between employees and defense counsel and “required” or “pressured” employees to sign declarations drafted by defense counsel. (SAC ¶ 17.) After the parties did not reach a settlement, Defendants also provided employees eviction notices, conveying an alleged threat that any employees who refused to cooperate with defense counsel could be evicted. (SAC ¶ 18.) Plaintiff alleges that the timing and manner of the actions amounted to “intimidating and threatening” employees. (SAC ¶ 31.)

Plaintiff served subpoenas for deposition testimony with requests for production (“RFPs”) on attorneys Mr. Jayakumar (Dkt. 163-4 at 13-14) and Ms. Vaideeswaran (*id.* at 18-19). Plaintiff also served separate document subpoenas on those individuals. (Dkt. 163-5 at 10-12 [Jayakumar]; *id.* at 13-15 [Vaideeswaran].)

On July 26, 2018, the parties filed a discovery motion in the form of a joint stipulation, with Plaintiff moving to compel compliance with the subpoenas and Defendants moving to quash the subpoenas. (Dkt. 163-1 [“JS”].) The motions are set for hearing on August 21, 2018. (*Id.* at 1.) This is beyond the extended discovery cutoff date. (See Dkt. 148 [new cutoff date is 60 days after June 19, 2018].)

The Court finds these motions appropriate for resolution without oral argument and VACATES the hearing set for August 21, 2018. Fed. R. Civ. Proc. 78; Local Rule 7-15.

## II. MOTION TO COMPEL COUNSEL’S DEPOSITIONS.

### A. Legal Standard.

Defendants cite law from the Eighth Circuit that attorney depositions are only permitted when “no other means exist to obtain the information” and the information is not merely relevant, but “crucial” to preparation of the case. (JS at 17 (emphasis omitted), citing Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).)

Plaintiff cites a recent Central District case, Boeing Co. v. KB Yuzhnoye, No. 13-cv-00730-ABA-JWx, 2015 WL 12803452 (C.D. Cal. Nov. 3, 2015), which held as follows:

As an initial matter, there is no Ninth Circuit precedent addressing the proper standards for the Court to consider in this situation. The Ninth Circuit Court of Appeals has not adopted the Eighth Circuit’s reasoning in [Shelton] and its progeny, i.e. Pamida[, Inc. v. E.S. Originals, Inc.], 281 F.3d 726 (8th Cir. 2002)]. Rather, the Court finds the Second Circuit’s reasoning in In re Subpoena Issued to Dennis Friedman (“In re Friedman”), 350 F.3d 65, 71-72 (2d Cir. 2003), to be the persuasive authority in allowing attorney deposition (herein trial testimony). In Friedman, the Second Circuit (similar to the Ninth Circuit) never adopted the Shelton rule and noted that “the standards set forth in Rule 26 require a flexible approach to lawyer depositions whereby the judicial officer supervising discovery

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:16-cv-00363-CJC-KESx

Date: July 30, 2018

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takes into consideration all of the relevant facts and circumstances to determine whether the proposed deposition would entail an inappropriate burden or hardship.” Id. at 72. As the Second Circuit articulated, whether a lawyer’s testimony should take place requires the Court to take into consideration various factors ....

Id. at \*9. Those factors include (1) the need to depose counsel; (2) counsel’s role in the litigation and the matter on which discovery is sought; (3) the risk of encountering privilege and work product issues; and (4) the extent of discovery already conducted. Id.

Consideration of the Friedman factors is more consistent than the Shelton approach with the spirit of Rules 1 and 26 of the Federal Rules of Civil Procedure.

**B. The Need to Depose Counsel.**

Defendants argue that the subpoenas are not necessary because (1) Plaintiff can obtain the same information via discovery directed at the interviewed employees, and (2) counsel “already submitted declarations explaining what actually happened,” obviating any need for further discovery. (JS at 4-5, 13.) Nothing in the discovery rules prohibits deposing multiple witnesses about the same events and Defendants’ counsel may have unique insights into the overall process of obtaining the declarations. Further, fact declarations are frequently tested by subsequent depositions.

Defendants also argue that discovery into Plaintiff’s new FLSA claim is not necessary because the new claim “has no support in law.” (Id. at 4; see id at 19 (“[N]ot once [h]as Plaintiff offered a satisfactory explanation as to how counsel’s alleged conduct could possibly constitute retaliation under the FLSA.”).) But Judge Carney granted Plaintiff leave to add the retaliation claim, making it a claim in the litigation for purposes of Rule 26(b)(1) (defining the permissible scope of discovery) until there is a judicial ruling dismissing it. In their briefing, Defendants contend that, to establish a violation of the FLSA’s anti-retaliation provision, a “party must show that: (1) an employee ‘engaged in or was engaging in activity protected under federal law,’ (2) the employee was subjected to ‘an adverse employment action[,]’ and (3) the protected activity was a ‘motivating reason’ for the adverse action.” (JS at 19 (citing Avila v. Los Angeles Police Dep’t, 758 F.3d 1096, 1102-04 (9th Cir. 2014)); see Acosta v. Sw. Fuel Mgmt., No. 16-cv-4547 FMO (AGRx), 2018 WL 739425, at \*4 (C.D. Cal. Feb. 2, 2018) (same).) The SAC alleges that Defendants “intend to use [the declarations] against employees if they testify at trial” and that “[e]mployees face an ongoing threat of forced interviews and coerced declarations if they testify at trial or cooperate with the Department of Labor investigation.” (SAC ¶ 17.)

Plaintiff is entitled to explore facts underlying those allegations and has demonstrated a sufficient need for the requested discovery.

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**C. Counsel’s Role in the Litigation and the Matter on which Discovery Is Sought.**

Defense counsel were key participants in the allegedly coercive interviews and declaration drafting. While Mr. Jayakumar is lead trial counsel (a factor that weighs against his deposition), Ms. Vaideeswaran is no longer counsel for Defendants.

The concern that Plaintiff will ask counsel inappropriate questions about privileged matters can be addressed by limiting the scope of the depositions to questions testing the veracity of counsel’s earlier declarations or showing the content/circumstances of counsel’s communications with Defendants’ employees.

Defendants argue that counsel were not “involved in any way with the alleged eviction conduct” such that no “questioning should be permitted under any circumstance” on that topic. (JS at 13.) Per the SAC, the eviction notices allegedly contributed to the coercion experienced by employees. Plaintiff can ask questions relevant to that allegation, including, but not limited to, inquiring when defense counsel learned about the eviction notices and rescission, whether employees ever asked counsel about the eviction notices, and what (if anything) defense counsel told employees about the notices.

**D. The Risk of Encountering Privilege and Work Product Issues.**

Defendants argue that the “subpoenas subject Mr. Jayakumar and Ms. Vaideeswaran to undue burden and require disclosure of privileged information ....” (*Id.* at 17.) Defendants’ “undue burden” argument is based on the position (rejected above) that the discovery sought is irrelevant. Regarding privilege, the proposed discovery seeks largely non-privileged information. Deposition questions about circumstances and content of counsel’s communications with the employees would not seek privileged information.

Plaintiff states, “The Secretary has agreed to proceed incrementally, determining first whether there may be any need to seek privileged or otherwise protected information. The currently requested discovery may reveal a need to pursue such information, including if evidence shows that defense counsel participated in Defendants’ issuance of retaliatory eviction notices against Defendants’ employees, which the Secretary may do if that need arises.” (*Id.* at 12 n. 3.) This proposed procedure adequately protects against discovery that would improperly seek privileged information.

**E. The Extent of Discovery Already Conducted.**

Plaintiff argues, “The Secretary propounded written discovery requests to Defendants regarding the retaliation claim on June 22, 2018 and will take the Ortizes’ depositions on August 9, 2018. Because the Court has allowed only sixty days for discovery (discovery closes on

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August 20, 2018), the Secretary could not wait for responses from the Defendants before issuing subpoenas for documents from and depositions of defense counsel.” (JS at 9.)

Defendants respond, “Plaintiff has not exhausted other discovery means to elicit this information; and Plaintiff’s argument that he simply does not have time to wait to complete other discovery is a distortion and violation of Judge Carney’s June 29, 2018 Order (Dkt. 148), in which the Court authorized only ‘limited discovery’ for a brief, sixty-day time period ...” (Id. at 5.)

Given the unusual procedural posture of this case, the Court will not require Plaintiff to complete discovery from the interviewed employees and Defendants before permitting discovery directed at defense counsel, because to do so under the current discovery schedule would essentially preclude the discovery.

**III. MOTION TO COMPEL RESPONSES TO RFPS.**

Plaintiff also requests that Mr. Jayakumar and Ms. Vaideeswaran “produce the documents requested in [Plaintiff’s] subpoenas.” (JS at 3.) As set forth above, Plaintiff served on both attorneys (1) deposition subpoenas with document requests, and (2) separate document subpoenas. (Dkt. 163-4 at 13-19 [deposition subpoenas]; Dkt. 163-5 at 10-15 [document subpoenas].) The subpoenas contain identical document demands.

In response, Defendants assert, “Plaintiff has already withdrawn the document requests issued by subpoenaed [sic] to Defendants’ Attorneys because it was clear they were duplicative.” (JS at 22.) Defendants cite the declaration of their counsel Andrew Saxon, who states that on July 19, 2018, Defendants “confirmed [their] agreement with Plaintiff’s counsel that Plaintiff was withdrawing his Document Subpoenas and the document requests attached to the Deposition Subpoenas.” (Dkt. 163-9 [Saxon Decl.] ¶ 7.) As documentary support of this agreement, Defendants submit an e-mail dated July 19, 2018, from Plaintiff’s counsel stating:

[W]e can confirm that we are withdrawing the document subpoenas as you represented [Ms. Vaideeswaran] does not possess any responsive documents and that Defendants agree that the document requests sent to Defendants reach documents in your firm as we have discussed and emailed.

(Dkt. 163-10 at 2.) Later that same day, Defendants’ counsel responded:

I understand that you are also withdrawing the document requests attached to the deposition subpoenas as well. Please let me know if my understanding is in error.

(Id.)

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It does not appear that Plaintiff responded to, or objected to, the second email.<sup>1</sup> Accordingly, given the parties' exchange, Plaintiff withdrew the subpoenas' document requests to Mr. Jayakumar and Ms. Vaideeswaran based on the assessment that other document demands to Defendants requested the same documents.

**IV. FEES.**

Both sides requested an award of fees, but neither side submitted a declaration quantifying the amount of fees sought. The Court declines to award Plaintiff fees, without prejudice to Plaintiff seeking the fees incurred in connection with this motion if Plaintiff is required to seek judicial assistance again to obtain compliance with the subpoenas consistent with this order.

Initials of Deputy Clerk JD

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<sup>1</sup> Because the Court issues this order before the deadline to file supplemental briefing, Plaintiff has not had the opportunity to respond to Defendants' evidence. If Plaintiff disputes that it withdrew its document requests, then it may advise the Court in a subsequent filing.



1 statements, declarations (whether signed or unsigned), signature pages, and drafts thereof;” (4)  
2 “order[] defendants’ attorneys who were involved in securing or attempting to secure declarations  
3 from non-managerial employees to submit to a deposition concerning the circumstances under  
4 which these declarations were solicited or secured;” (5) “enjoin[] Defendants and their attorneys  
5 from asking or coercing any witnesses to sign a declaration or other written statement about their  
6 wages or other terms and conditions of their employment;” (6) “provid[e] for costs and expenses  
7 to reimburse the Secretary for having to prepare and bring this application;” and (7) “order[] all  
8 such other relief as may be appropriate, just, and proper, including imposing sanctions against  
9 Defendants and Defendants’ attorneys.” (Dkt. 184, Application at 1-2) (footnote omitted).  
10 Defendants filed an Opposition on January 25, 2018. (See Dkt. 188, Defendants’ Response to  
11 Secretary’s Application for Temporary Restraining Order [] (“Opposition”). The Secretary filed a  
12 Reply on January 27, 2018. (See Dkt. 189, Secretary’s Reply [] (“Reply”).

### 13 **BACKGROUND**

14 On June 23, 2016, plaintiff R. Alexander Acosta,<sup>1</sup> Secretary of the United States  
15 Department of Labor (“DOL”) (“plaintiff” or “the Secretary”) filed a complaint against defendants  
16 Southwest Fuel Management, Inc. dba Brea Car Wash Detail & Castrol Express Lube  
17 (“Southwest”), Vahid David Delrahim (“V. Delrahim”), and Martin Lizarraga (“Lizarraga”), asserting  
18 claims for violations of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, et seq. (See Dkt.  
19 1, Complaint). Plaintiff filed a First Amended Complaint (“FAC”) on November 29, 2016, adding  
20 as defendants Goldenwest Solutions Group, Inc. (“Goldenwest”) and California Payroll Group, Inc.  
21 (“CPG”), (see Dkt. 42, FAC), and the operative Second Amended Complaint (“SAC”) on May 22,  
22 2017, adding Shannon Delrahim (“S. Delrahim”) as a defendant. (See Dkt. 102, SAC). The  
23 Secretary alleges that defendants violated the FLSA by failing to pay their employees overtime  
24 and the federal minimum wage, and by failing to maintain, keep and preserve records of  
25  
26

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27  
28 <sup>1</sup> R. Alexander Acosta was sworn in as the Secretary of Labor on April 28, 2017, (see Dkt. 102, SAC at 1) and replaced Thomas E. Perez as plaintiff. (See Dkt. 1, Complaint at 1-2).

1 employees and their wages, including by requiring their employees to work “off the clock.” (See  
2 id at ¶¶ 1, 14-18).

3 On May 2, 2017, the Special Master found that defendants “failed to preserve and not  
4 destroy emails, text messages and video recordings, and failed to instruct all employees and  
5 others to preserve potentially responsive documents[.]”<sup>2</sup> (See Dkt. 99, Special Master’s Order of  
6 May 2, 2017, at 9). The Special Master found that “Defendants’ intentional spoliation of evidence  
7 warrants sanctioning[.]” (See id.). Because “Southwest’s and Delrahim’s resistance to preserving  
8 the Brea Videos supports the reasonable inference that Defendants acted with the intent to  
9 deprive the Secretary of the use of the videos[.]” the Special Master found “that the videos are  
10 unfavorable to Defendants Southwest and Delrahim.” (See id. at 23-24). The Special Master had  
11 previously concluded that Southwest was “deliberately and willfully stone-walling on discovery.”  
12 (See id. at 6) (internal quotation marks omitted).

13 Approximately two months after the Special Master’s ruling, defendants’ counsel began  
14 gathering declarations from current employees stating that the employees never worked “off the  
15 clock.” (See, e.g., Dkts. 172-32–172-37, 172-39, Joint Evidentiary Appendix at Exhibits (“Exhs.”)  
16 122-45, 147-53, 158-59, 161, 183-85 (“Employee Declarations”)). Defendants disclosed the 37  
17 declarations for the first time when they submitted their briefing in the cross motions for summary  
18 judgment on November 21, 2017. (See id.). Approximately 34 of the 37 submitted declarations  
19 were signed by employees in July 2017. (See Dkts. 172-32–172-37, 172-39 at Exhs. 122-45, 147-  
20 53, 158-59, 161, 183-85, Employee Declarations).

21 The Secretary brings the instant Application because of defendants’ and their counsel’s  
22 alleged misconduct related to “solicit[ing] from their clients’ employees statements that contradict  
23 what the video evidence would have shown to be true.” (Dkt. 185-1, Secretary’s Memorandum  
24

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25 <sup>2</sup> Defendants have filed objections to this order, (see Dkt. 107, Defendants’ Objections to  
26 Special Master’s Order Re Plaintiff’s Request for Sanctions for Spoliation of Evidence), on which  
27 the court has not yet ruled. Defendants’ objections are “limited to the inferences the Special  
28 Master made in her Order,” namely “the adoption of any presumption against Defendants[.]” (See  
id. at 1). Should the court not concur with or accept the findings and conclusions of the Special  
Master, it may revisit this Order.

1 of Points and Authorities (“Memo.”) at 2) (emphasis omitted). The Secretary contends that:  
2 “Defendants’ counsel was well aware that they do not represent the employees and that their  
3 clients’ interests are adverse to the [workers’] interests[;]” defendants are “keenly aware of the  
4 economic power their clients had over the employee declarants and that these workers were  
5 required to speak with defense counsel on work time and as a condition of employment[;]” “the  
6 Secretary had identified specific damages for each of the employee declarants and thus . . .  
7 defense counsel was seeking waivers that are unenforceable[;]” and, “the declarations were  
8 coercive, and thus Defendants were potentially securing false testimony from their employees[.]”  
9 (See id.). According to the Secretary, the “information gathered to date . . . suggests that defense  
10 counsel abandoned their ethical duties and failed to safeguard the integrity of the fact-finding  
11 process [and that] Defendants and their counsel should be enjoined from discussing this case with  
12 employees or soliciting declarations while the Secretary completes his investigation.” (Id.). Based  
13 on “Defendants’ intentional spoliation of evidence and defense counsels’ bad faith attempts to  
14 further obscure the factual record in this case[.]” (see id. at 9), and the alleged violation of the  
15 FLSA these actions constitute, the Secretary asks for a temporary restraining order and  
16 preliminary injunction. (See id. at 2-3, 9).

### 17 LEGAL STANDARD

18 Rule 65 provides courts with the authority to issue temporary restraining orders and  
19 preliminary injunctions. Fed. R. Civ. P. 65(a) & (b). The purpose of a preliminary injunction is to  
20 preserve the status quo and the rights of the parties until a final judgment on the merits can be  
21 rendered, see U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010), while  
22 the purpose of a temporary restraining order is to preserve the status quo before a preliminary  
23 injunction hearing may be held. See Wahoo Intern., Inc. v. Phix Doctor, Inc., 2014 WL 2106482,  
24 \*2 (S.D. Cal. 2014). The standards for a temporary restraining order and a preliminary injunction  
25 are the same. See Stuhlbarg Int’l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839 n. 7 (9th  
26 Cir. 2001); Rowe v. Naiman, 2014 WL 1686521, \*2 (C.D. Cal. 2014) (“The standard for issuing a  
27 temporary restraining order is identical to the standard for issuing a preliminary injunction.”).  
28

1 “A preliminary injunction is an extraordinary remedy never awarded as of right.” Winter v.  
2 Natural Res. Def. Council, Inc., 555 U.S. 7, 24, 129 S.Ct. 365, 376 (2008). “A plaintiff seeking a  
3 preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to  
4 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his  
5 favor, and that an injunction is in the public interest.” Id., 555 U.S. at 20, 129 S.Ct. at 374; Garcia  
6 v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (same). The Ninth Circuit also  
7 employs a “sliding scale” formulation of the preliminary injunction test under which an injunction  
8 could be issued where, for instance, “the likelihood of success is such that serious questions going  
9 to the merits [are] raised and the balance of hardships tips sharply in plaintiff’s favor[.]” Alliance  
10 for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (internal quotation marks and  
11 alteration marks omitted), provided the other elements of the Winter test are met. See Angelotti  
12 Chiropractic, Inc. v. Baker, 791 F.3d 1075, 1081 (9th Cir. 2015), cert. denied, 136 S.Ct. 2379  
13 (2016) (“Serious questions going to the merits and hardship balance that tips sharply towards  
14 plaintiffs can also support issuance of a preliminary injunction, so long as there is a likelihood of  
15 irreparable injury and the injunction is in the public interest.”) (internal quotation marks and  
16 alteration marks omitted).

17 A preliminary injunction “should not be granted unless the movant, by a clear showing,  
18 carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S.Ct. 1865,  
19 1867 (1997) (emphasis in original) (internal quotation marks omitted); Silvas v. G.E. Money Bank,  
20 449 F.Appx. 641, 644 (9th Cir. 2011) (same). Indeed, the moving party bears the burden of  
21 meeting all prongs of the Winter test. See Alliance for the Wild Rockies, 632 F.3d at 1135; DISH  
22 Network Corp. v. FCC, 653 F.3d 771, 776 (9th Cir. 2011), cert. denied 132 S.Ct. 1162 (2012) (“To  
23 warrant a preliminary injunction, [plaintiff] must demonstrate that it meets all four of the elements  
24 of the preliminary injunction test established in Winter[.]”). The decision of whether to grant or  
25 deny a preliminary injunction is a matter of the district court’s equitable discretion. See Winter,  
26 555 U.S. at 32, 129 S.Ct. at 381.

## 27 DISCUSSION

28 As an initial matter, there is an issue as to the timeliness of the disclosures of the subject

1 declarations. As noted above, even though the vast majority of the declarations were signed by  
2 the employees in July 2017, (see Dkts. 172-32–172-37, 172-39 at Exhs. 122-45, 147-53, 158-59,  
3 161, 183-85, Employee Declarations), defendants did not disclose them until November 21, 2017,  
4 approximately four months later, (see id.; Dkt. 188, Opposition at 2), and three months after the  
5 fact discovery cutoff of August 11, 2017. (See Dkt. 62, Court’s Order of January 23, 2017, at 2).  
6 Defendants argue that the employee declarations are work product and not responsive to any  
7 document requests because they are testimony, so there was no need to disclose them. (See  
8 Dkt. 188, Opposition at 12-13). However, signed declarations from third party witnesses are not  
9 protected work product. See Kuhl v. Guiter Center Stores, Inc., 2008 WL 5244570, \*6 (N.D. Ill.  
10 2008) (“Because they do not contain any legal advice, litigation strategy, or confidential  
11 communications, this Court cannot determine how the signed Statements could be protected by  
12 the work product doctrine or any related privilege.”); Camilotes v. Resurrection Health Care Corp.,  
13 2012 WL 245202, \*7 (N.D. Ill. 2012) (“Defendants have failed to establish that the signed  
14 declarations are protected from disclosure by the work product doctrine, which protects attorney  
15 impressions but does not protect non-privileged facts.”); Gonzalez v. State of Fla. Dep’t of Mgmt.  
16 Servs., 124 F.Supp.3d 1317, 1326-27 (S.D. Fla. 2015) (disagreeing with contention that  
17 declaration constituted work product). What’s more, it is clear that defendants should have  
18 produced the declarations and the names, addresses and telephone numbers of the employee  
19 declarants as soon as defendants and/or their counsel determined that the declarations and  
20 employee declarants contained discoverable information that defendants were considering using  
21 to support their defenses in this action. See, e.g., Fed. R. Civ. P. 26(a)(1)(A)(i)&(ii); Fed. R. Civ.  
22 P. 26(e).

23 I. LIKELIHOOD OF SUCCESS ON THE MERITS.

24 “The first factor under Winter is the most important – likely success on the merits.” Garcia,  
25 786 F.3d at 740. The Ninth Circuit has recognized that an injunction may be granted if “serious  
26 questions going to the merits were raised and the balance of hardships tips sharply in plaintiff’s  
27 favor[.]” so long as the moving party demonstrates irreparable harm and shows that the injunction  
28 is in the public interest. See Alliance for the Wild Rockies, 632 F.3d at 1131 (internal quotation

1 marks and alteration marks omitted).

2 The FLSA provides that it is unlawful “for any person . . . to discharge or in any other  
3 manner discriminate against any employee because such employee has filed any complaint or  
4 instituted or caused to be instituted any proceeding under or related to this chapter, or has testified  
5 or is about to testify in any such proceeding.” 29 U.S.C. § 215(a)(3). This anti-retaliation provision  
6 prevents “fear of economic retaliation from inducing workers quietly to accept substandard  
7 conditions.” Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 12, 131 S.Ct. 1325,  
8 1333 (2011) (internal quotation marks omitted). The FLSA’s anti-retaliation provision “should be  
9 interpreted broadly, to give effect to the statute’s remedial purpose.” In re Majewski, 310 F.3d  
10 653, 655 (9th Cir. 2002).

11 To establish a violation of the FLSA’s anti-retaliation provision, a party must show that: (1)  
12 an employee “engaged in or was engaging in activity protected under federal law,” (2) the  
13 employee was subjected to “an adverse employment action[,]” and (3) the protected activity was  
14 a “motivating reason” for the adverse action. See Avila v. Los Angeles Police Dep’t, 758 F.3d  
15 1096, 1102-04 (9th Cir. 2014); see also 29 U.S.C. § 215(a)(3).

16 Here, the court is persuaded that the Secretary has established likelihood of success on  
17 the merits with respect to the FLSA’s anti-retaliation provision. First, the 37 employees who  
18 signed declarations regarding their wages and working conditions are potential witnesses in this  
19 litigation engaged in protected activity by “testif[y]ing or [being] about to testify in” a proceeding  
20 under the FLSA. See 29 U.S.C. § 215(a)(3); Mitchell v. Robert DeMario Jewelry, 361 U.S. 288,  
21 292, 80 S.Ct. 332, 335 (1960) (“effective enforcement could thus only be expected if employees  
22 felt free to approach officials with their grievances”); Perez v. Fatima/Zahra, Inc., 2014 WL  
23 2154092, \*2 (N.D. Cal. 2014) (“These threats, although taken in anticipation of employees  
24 engaged in protected activity, are ‘no less retaliatory than action taken after the fact.’”) (quoting  
25 Sauers v. Salt Lake Cnty., 1 F.3d 1122, 1128 (10th Cir. 1993)); see also Lambert v. Ackerley, 180  
26 F.3d 997, 1005 n. 3 (9th Cir. 1999), cert. denied, 528 U.S. 116 (2000) (If the FLSA “is to function  
27 effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety  
28 and quality problems.”) (internal quotation marks omitted).

1 Second, defendants' actions constitute an adverse action because those actions are  
2 "reasonably likely to deter employees from engaging in protected activity." See, e.g., Ray v.  
3 Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000) (holding that because Title VII "does not limit its  
4 reach only to acts of retaliation that take the form of cognizable employment actions such as  
5 discharge, transfer, or demotion[,]" "decreas[ing an employee's] ability to influence workplace  
6 policy" qualified as an adverse employment action) (internal quotation marks omitted); Perez v.  
7 J&L Metal Polishing, Inc., 2016 WL 7655766, \*5 (C.D. Cal. 2016) ("[T]hreats of retaliation are also  
8 a basis for injunctive relief."); Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57,  
9 63-64, 126 S.Ct. 2405, 2409, 2412 (2006) ("the antiretaliation provision [of Title VII] does not  
10 confine the actions and harms it forbids to those that are related to employment or occur at the  
11 workplace."); Arias v. Raimondo, 860 F.3d 1185, 1190-92 (9th Cir. 2017), cert. denied, 2018 WL  
12 311387 (2018) (discussing Burlington and applying it's reasoning to the FLSA); United States v.  
13 Oregon State Med. Soc., 343 U.S. 326, 333, 72 S.Ct. 690, 695 (1952) ("All it takes to make the  
14 cause of action for relief by injunction is a real threat of future violation or a contemporary violation  
15 of a nature likely to continue or recur."). As discussed below, the Secretary has provided sufficient  
16 evidence that defendants' "intimidation tactics are reasonably likely to deter [their] employees from  
17 participating in the investigation." J&L Metal Polishing, Inc., 2016 WL 7655766, at \*6; see Harris  
18 v. Acme Universal, Inc., 2014 WL 3907107, \*2 (D. Guam 2014) (enjoining employer who urged  
19 former employees to withdraw their FLSA complaints, made threats, and coerced them into  
20 signing false statements about their working conditions); (see, e.g., Dkt. 184-10, Declaration of  
21 Jean Lui ("Lui Decl.") at ¶ 9). Thus, the court finds that soliciting and extracting coerced  
22 declarations, which may include false and/or misleading testimony, constitutes an adverse  
23 employment action for purposes of the FLSA's anti-retaliation provision.<sup>3</sup>

24  
25 <sup>3</sup> Intimidating interviews and signed, coerced declarations are reasonably likely to deter  
26 employees from engaging in the protected activity of testifying or otherwise asserting their rights  
27 under the FLSA. For example, an employee may believe that she will face termination at work for  
28 failure to comply with the company's "request" to sign a declaration – as the evidence shows  
occurred here, (see Dkt. 184-10, Lui Decl. at ¶ 9) ("the employee told me that he signed it because  
he felt he would lose his job or have his hours cut if he did not sign.") – or for stating that she has  
violated a company policy. (See, e.g., Dkt. 172-32, at Exh. 123, Declaration of Antonio Rodriguez)

1 Third, causation is established as defendants sought and obtained signed declarations only  
2 two months after the Special Master sanctioned them for intentionally destroying evidence. (See  
3 Dkt. 99, Special Master’s Order of May 2, 2017; Dkts. 172-32–172-37, 172-39 at Exhs. 122-45,  
4 147-53, 158-59, 161, 183-85, Employee Declarations (approximately 34 of 37 declarations signed  
5 in July)); Whalen v. Roanoke Cty. Bd. of Sup’rs, 769 F.2d 221, 225 (4th Cir. 1985), on reh’g, 797  
6 F.2d 170 (4th Cir. 1986) (upholding a jury’s finding of causation where a three-year interval  
7 occurred between the protected activity and the adverse action).

8 Defendants do not attempt to rebut the Secretary’s contentions regarding protected activity  
9 or causation, or that the coerced declarations constitute an adverse employment action. (See,  
10 generally, Dkt. 188, Opposition). Instead, defendants argue only that the “Secretary has not and  
11 cannot meet its burden to show abuse or coercion by Defendants.” (Id. at 6). Defendants assert  
12 that the consent form “described the nature of the instant action, and the fact that the employee  
13 may be eligible to collect money or obtain other remedies” and stated that any information an  
14 employee shares “may be used in the lawsuit in a way that could affect their rights in the lawsuit.”  
15 (Id. at 7). The form also states that “the interview and/or giving a written statement are voluntary,  
16 and that there will be no retaliation against the employee if he or she declines to participate.” (Id.)

17  
18  
19 (“One of the company’s policies is that if we are working we have to be punched in . . . and I have  
20 always followed it.”). An employee may also be deterred from participating in an ongoing DOL  
21 investigation if, for instance, she believes that the coerced declaration can subsequently be used  
22 against her to claim (albeit mistakenly) that the employee perjured herself. See Talavera v.  
23 Leprino Foods Co., 2016 WL 880550, \*5 (E.D. Cal. 2016) (“the mandatory nature of the meetings,  
24 the fact that they were conducted at the workplace during working hours, and the linking of the  
25 lawsuit with the possibility of criminal perjury charges created a risk of coercion and potential for  
26 chilling participation. Regardless of Mr. Tuttrup’s true intent, his role as the head onsite manager  
27 can transform suggestions, requests, or observations into directives or threats.”); (see also Dkts.  
28 172-32–172-37, 172-39 at Exhs. 122-45, 147-53, 158-59, 161, 183-85, Employee Declarations)  
(employees signed declarations “under penalty of perjury”). The Ninth Circuit has broadly  
interpreted FLSA’s anti-retaliation provision, bringing into its ambit not only terminations, but also  
other threatening or intimidating actions by the employer or its attorneys. See Arias, 860 F.3d at  
1186-88 (holding that worker may proceed with retaliation action against employer’s attorney, who  
allegedly contacted Immigration and Customs Enforcement during the pendency of a wage and  
hour lawsuit); id. at 1190 (The FLSA’s retaliation provision’s “purpose is to enable workers to avail  
themselves of their statutory rights in court by invoking the legal process designed by Congress  
to protect them.”).

1 Finally, defendants argue that “the form emphasizes that the interviewer only wants to hear truthful  
2 information, and, if preparing a written statement, wants the statement to be completely accurate.”  
3 (See id.). According to defendants, the “consent forms are not waivers” and “the factual  
4 declarations themselves are not waivers either[.]” (See id. at 8). Defendants’ assertions are  
5 unpersuasive.

6 While the forms make a vague reference that “[a]t some point, you may be eligible to collect  
7 money and/or obtain other remedies[.]” (see Dkt. 184-4, Declaration of Nancy E. Steffan (“Steffan  
8 Decl.”) at Exh. C (“Voluntary Interview Consent Forms”)), they fail to inform employees that they  
9 are among a group of workers on whose behalf the Secretary seeks back wages and/or that the  
10 Secretary has already computed wages owed to them. (See, generally, id.); see, e.g., Sjoblom  
11 v. Charter Comm’ns, LLC, 2007 WL 5314916, \*3 (W.D. Wis. 2007) (sanctioning employer who  
12 obtained affidavits from potential FLSA class members in “blitz campaign” that included a consent  
13 form describing litigation but failing to “notify them that they might be entitled to become a part of  
14 the lawsuit”). The consent forms also do not reveal that defendants were found to have  
15 intentionally destroyed video evidence of the employee working off the clock, or even that the  
16 information they share might adversely affect their rights in the lawsuit. (See, generally, Dkt. 184-  
17 4, Voluntary Interview Consent Forms; id. (stating only that it “could affect” their rights)).  
18 Moreover, despite the consent forms’ representation that a worker’s decision to speak to defense  
19 counsel is voluntary, there is no analogous statement as to whether signing a declaration is  
20 voluntary or involuntary. (See, generally, id.). Under the circumstances, defendants’ “failure to  
21 provide sufficient information relating to [the Secretary’s and the employees’] claims so that the  
22 employees could make an informed decision” raises serious concerns as to whether the employee  
23 declarants were misled and/or whether the employees voluntarily and intelligently understood and  
24 agreed to sign the consent form and declaration. See Gonzalez v. Preferred Freezer Servs. LBF,  
25 LLC, 2012 WL 4466605, \*2 (C.D. Cal. 2012); id. (“Omission of important information relating to  
26 a plaintiff’s case or claims is misleading.”); id. at \*1 (granting motion to order defendants to release  
27 names and contact information of individuals from whom defendant attempted to extract releases  
28 that “did not state when this unnamed lawsuit was filed, the name of the former employee, the

1 names of the employee's attorneys, the attorneys' contact information, or the period of time  
2 covered by the release" as it "was misleading in many ways.").

3 Further, the Secretary has put forth evidence of coercive circumstances surrounding the  
4 interviews and the signing of the consent forms and declarations. (See Dkt. 184-10, Lui Decl.; Dkt.  
5 184-11, Declaration of Patricia Gatica ("Gatica Decl."); Dkt. 184-12, Declaration of Maribel M.  
6 Tapia ("Tapia Decl."); Dkt. 184-13, Declaration of Claudia R. Cotne-Martinez ("Cotne-Martinez  
7 Decl.")). Employees were instructed by their managers to attend meetings with defense counsel  
8 on work time, to "sign papers" or provide a declaration, and some employees were even driven  
9 to the meetings by company representatives. (See Dkt. 184-10, Lui Decl. at ¶ 5; Dkt. 184-11,  
10 Gatica Decl. at ¶ 5; Dkt. 184-12, Tapia Decl. at ¶ 5; Dkt. 184-13, Cotne-Martinez Decl. at ¶ 5); see  
11 also Perez v. Blue Mountain Farms, 961 F.Supp.2d 1164, 1171 (E.D. Wash. 2013) ("the interviews  
12 that have occurred may have been tainted by the presence of supervisors and video cameras").  
13 "The caselaw nearly universally observes that employer-employee contact is particularly prone  
14 to coercion[.]" Camp v. Alexander, 300 F.R.D. 617, 624 (N.D. Cal. 2014).

15 Employees were not told that the Secretary had already concluded that they were owed  
16 back wages. (See Dkt. 184-10, Lui Decl. at ¶¶ 6, 9; Dkt. 184-13, Cotne-Martinez Decl. at ¶¶ 5,  
17 10). Nor were the employees provided with a copy of any of the documents they signed. (See  
18 Dkt. 184-10, Lui Decl. at ¶¶ 7, 9, 10; Dkt. 184-13, Cotne Decl. at ¶¶ 7, 10); see Guifi Li v. A Perfect  
19 Day Franchise, Inc., 270 F.R.D. 509, 518 (N.D. Cal. 2010) (in concluding that meetings with  
20 employees "were inherently coercive[.]" court considered the failure "to provide copies of the  
21 opt-out forms to workers to take away with them"). The court also has serious concerns as to not  
22 only the written consent forms, but also the verbal representations made to the employees and  
23 whether the employees were misled or otherwise coerced into believing the "interview" was  
24 "voluntary." For example, one employee stated that he was called into the car wash office directly  
25 by defense counsel, was not told the meeting was optional, and signed the declaration for fear he  
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1 would lose his job or have his hours cut.<sup>4</sup> (See Dkt. 184-10, Lui Decl. at ¶ 9). Another employee  
2 relayed that “a car wash manager held a meeting with all of the employees [and] told the  
3 employees that the company’s attorneys wanted to meet with them.” (See Dkt. 184-13, Cotne-  
4 Martinez Decl. at ¶ 9). The employee was then driven by the same manager to meet with  
5 attorneys at a hotel on a subsequent day. (See *id.*). For another employee who was driven to and  
6 from the car wash to another office, the round-trip, interview, preparation, review and signing of  
7 both the declaration and consent form took about one hour; for another, the entire “meeting with  
8 the attorney lasted at most five minutes[.]” (Dkt. 184-13, Cotne-Martinez Decl. at ¶¶ 7, 10; see Dkt.  
9 184-10, Lui Decl. at ¶ 5), casting doubt on the integrity of the alleged fact-gathering process and  
10 the resulting declarations. Finally, employees have come forward to state that testimony in their  
11 solicited declarations is false or, at a minimum, misleading. (See, e.g., Dkt. 184-10, Lui Decl. at  
12 ¶ 7) (declaration stated “the employee never had to wait to clock in” but employee told investigator  
13 that currently he did have to wait to clock in and counsel did not ask about the past).

14 Based on the largely undisputed evidence before the court, the court concludes that  
15 defendants’ conduct, especially as it relates to the meetings between defendants’ counsel and the  
16 employees and content of the consent form, was inherently coercive.<sup>5</sup> See, e.g., Guifi Li, 270

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18 <sup>4</sup> Defendants argue that the Secretary’s proffered evidence, four declarations from DOL  
19 investigators, “consist solely of hearsay[.]” “do not identify the individuals who allegedly claim they  
20 were coerced” and “are not admissible or competent evidence[.]” (See Dkt. 188, Opposition at 8).  
21 However, it is “within the discretion of the district court to accept this hearsay for purposes of  
22 deciding whether to issue [a] preliminary injunction.” Republic of the Philippines v. Marcos, 862  
23 F.2d 1355, 1363 (9th Cir. 1988) (*en banc*).

24 <sup>5</sup> Defendants claim that one employee did not sign a declaration and thus did not feel  
25 coerced. (See Dkt. 188, Opposition at 10) (“this employee refused to sign what he was given . .  
26 . and he is still employed, as Cotne-Martinez refers to this unidentified individual as a current  
27 employee.”). However, “[e]ven though [one employee] was offered the [declaration], rejected it,  
28 and contacted [the Secretary], this does not mean that every employee who received the  
[declaration] was sufficiently informed.” Gonzalez, 2012 WL 4466605, at \*3. In fact, the Secretary  
has provided evidence that at least three employees felt pressured and intimidated into signing.  
(See Dkt. 184-10, Lui Decl. at ¶¶ 9, 10; Dkt. 184-13, Cotne-Martinez Decl. at ¶ 10); see also  
O’Connor v. UBER Techs., Inc., 2016 WL 122943, \*1, 3 (N.D. Cal. 2016) (declining to stay an  
order enjoining defendant’s communications with putative class members, and requiring a  
corrective cover letter and revised arbitration agreement, where defendant sent an agreement to  
current employees that caused actual confusion and could preclude putative class members from

1 F.R.D. at 518 (“Defendants admit that they presented opt-out forms to workers during required,  
2 one-on-one meetings with managers during work hours and at the workplace . . . [and] that they  
3 failed to provide copies of the opt-out forms to workers to take away with them[.] Based on these  
4 undisputed facts, the Court concludes that these meetings were inherently coercive.”). Each of  
5 the individual factors noted above could have led to coerced declarations. But the number of  
6 factors here leaves little doubt that the signed declarations and consent forms were collected  
7 under coercive circumstances. Further, the sequence and context of the interviews – which took  
8 place after the Special Master found that defendants intentionally destroyed video evidence of the  
9 subject of solicited employee testimony – only serves to underscore the coercive nature of  
10 defendants’ conduct.

11 In short, the court finds that plaintiff is likely to prevail on his claim that defendants violated  
12 FLSA’s anti-retaliation provision. In the alternative, the court finds that plaintiff raised “serious  
13 questions going to the merits[.]” See Alliance for the Wild Rockies, 632 F.3d at 1131.

14 Plaintiff is also likely to prevail on his claim under § 11(a) of the FLSA, which gives the  
15 Secretary the power to: (1) “investigate and gather data regarding the wages, hours, and other  
16 conditions and practices of . . . employment”; (2) “enter and inspect” workplaces and records; and  
17 (3) “question [] employees, and investigate such facts, conditions, practices, or matters as he may  
18 deem necessary or appropriate to determine whether any person has violated” the FLSA. 29  
19 U.S.C. § 211(a). The FLSA grants the Secretary these investigatory powers because the statute’s  
20 enforcement relies “not upon continuing detailed federal supervision or inspection of payrolls, but  
21 upon information and complaints received from employees seeking to vindicate rights claimed to  
22 have been denied.” Kasten, 563 U.S. at 11, 131 S.Ct. at 1333 (internal quotation marks omitted).

23 The Secretary argues that defendants violated the FLSA’s investigations and inspections  
24 provision “by securing declarations from their current employees under inherently coercive  
25 circumstances . . . precisely the kind of employer intimidation that chills employees’ cooperation  
26 with a wage and hour litigation.” (See Dkt. 185-1, Memo. at 14). As the court found above, the

27 \_\_\_\_\_  
28 participating in ongoing litigation).

1 circumstances surrounding the collection of declarations demonstrates a strong likelihood of  
2 coercion or duress. See supra at § I. Thus, the court finds that there is a strong likelihood of  
3 success on the merits for plaintiff’s claims of violations of § 11(a) of the FLSA. In the alternative,  
4 the court finds that plaintiff raised “serious questions going to the merits” as to whether defendants  
5 interfered with the Secretary’s investigatory powers under § 11(a) of the FLSA. See Alliance for  
6 the Wild Rockies, 632 F.3d at 1131.

7 II. IRREPARABLE HARM.

8 As a general rule, plaintiff must demonstrate that he is likely to suffer irreparable harm in  
9 the absence of the temporary restraining order or preliminary injunction. See Winter, 555 U.S. at  
10 20, 129 S.Ct. at 374. However, “the standard requirements for equitable relief need not be  
11 satisfied when an injunction is sought to prevent the violation of a federal statute which specifically  
12 provides for injunctive relief.” Antoninetti v. Chipotle Mexican Grill, Inc., 643 F.3d 1165, 1175-76  
13 (9th Cir. 2010), cert. denied, 563 U.S. 956 (2011) (internal quotation marks and alteration marks  
14 omitted). The Secretary seeks to enjoin defendants from violating the FLSA, which specifically  
15 provides for injunctive relief, see 29 U.S.C. § 217, so the Secretary need not prove irreparable  
16 harm. See Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 869 (9th Cir.), cert. denied,  
17 464 U.S. 846 (1983); Marxe v. Jackson, 833 F.2d 1121, 1128 n. 3 (3d Cir. 1987) (collecting cases  
18 in which the court “appl[ied] federal statutes expressly providing injunctive relief without a showing  
19 of irreparable injury”).

20 However, even assuming the Secretary was required to show irreparable harm, the court  
21 is satisfied that the Secretary has done so.<sup>6</sup> It is well-established that “allegations of retaliation

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23 <sup>6</sup> Defendants argue that the Secretary delayed in filing the instant Application and that it  
24 should be denied or heard on a regularly noticed motion schedule because the “application for a  
25 TRO was ultimately filed . . . eight weeks and six days after the Secretary first received the  
26 declarations in question.” (See Dkt. 188, Opposition at 1-4). The court is not persuaded,  
27 because, as defendants admit, (see id. at 3), the Secretary only received the consent forms on  
28 January 11, 2018, 12 days before the filing of the instant Application. (See id.). Further, the  
Secretary promptly met and conferred with defendants to attempt to informally resolve the issues  
raised, investigated the circumstances to determine whether emergency injunctive relief was  
justified, and filed the Application after the government shut down ended on January 23, 2018.  
(See Dkt. 189, Reply at 2, 4).

1 for the exercise of statutorily protected rights represent possible irreparable harm far beyond  
2 economic loss . . . because retaliatory action for protected activity carries with it the risk that  
3 employees may be deterred from engaging in legitimate conduct.” Arcamuzi v. Continental Air  
4 Lines, Inc., 819 F.2d 935, 938-39 (9th Cir. 1987) (footnote and citation omitted). Indeed,  
5 “[u]nchecked retaliation . . . and the resulting weakened enforcement of federal law can itself be  
6 irreparable harm in the context of a preliminary injunction application.” Mullins v. City of New York,  
7 626 F.3d 47, 55 (2d Cir. 2010) (internal quotation marks omitted). The Secretary has provided  
8 evidence that his investigation and the employees’ exercise of their FLSA rights have been  
9 impaired by defendants’ conduct. (See Dkt. 184-10, Lui Decl. at ¶¶ 4-9; Dkt. 184-11, Gatica Decl.  
10 at ¶¶ 4-5; Dkt. 184-12, Tapia Decl. at ¶¶ 4-5; Dkt. 184-13, Cotne-Martinez Decl. at ¶¶ 4-10); see  
11 also Perez, 2014 WL 2154092, at \*3 (“Plaintiff will not be able to gather the information necessary  
12 to conduct the investigation.”). The court is also persuaded that the Secretary’s complainants –  
13 all of whom are low wage workers – will be irreparably harmed if the “fear of economic retaliation  
14 [] induc[es] workers quietly to accept substandard conditions.” Kasten, 563 U.S. at 12, 131 S.Ct.  
15 at 1333 (internal quotation marks omitted); see Socias v. Vornado Realty, L.P., 297 F.R.D. 38, 40  
16 (E.D.N.Y. 2014) (“Low wage employees . . . often face extenuating economic and social  
17 circumstances and lack equal bargaining power; therefore, they are more susceptible to  
18 coercion[.]”).

### 19 III. BALANCE OF HARDSHIPS.

20 The harm that will be caused to plaintiff should defendants be allowed to interfere with the  
21 Secretary’s investigation, and deny employees their rights to testify and be free from retaliation,  
22 far outweighs the harm to defendants. Defendants will suffer no hardships, as the Secretary  
23 merely “seeks only an order requiring Defendants to comply with the law[.]” (See Dkt. 185-1,  
24 Memo. at 16); Carrillo v. Schneider Logistics, Inc., 823 F.Supp.2d 1040, 1046 (C.D. Cal. 2011)  
25 (“Plaintiffs request only that defendants be required to comply with . . . federal and state law.  
26 Defendants will suffer no hardships other than those associated with bringing their recordkeeping  
27 procedures and paycheck information into compliance with state and federal requirements – costs  
28 that defendants should already be incurring.”).

1 Based on the conduct of defendants and their counsel throughout the course of this case  
2 – conduct for which the Special Master has imposed sanctions – and the record before the court,  
3 the court could institute a complete prohibition on contacting employee witnesses. Nonetheless,  
4 the court will, in an abundance of caution, narrow the proposed temporary restraining order. See  
5 Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179, 1198 (9th Cir. 2016), cert. denied, 137  
6 S.Ct. 2291 (2017) (finding that the district court did not abuse its discretion because it “carefully  
7 considered the scope of the injunction and tailored it to match the risk of harm it identified and  
8 minimize the impact on [defendant’s] legal business”). Defendants will be able to continue to seek  
9 out and obtain employee testimony to support their defense, but given the evidence of incomplete  
10 and/or misleading information and the coercive circumstances surrounding the interviews,  
11 defendants will be prohibited from meeting with the employees in connection with this lawsuit  
12 outside the presence of counsel for the Secretary.<sup>7</sup>

13 In short, the court concludes that balance of hardships tips sharply in favor of plaintiff.

14 IV. PUBLIC INTEREST.

15 The court gives substantial weight to the fact that “the Secretary seeks to vindicate a  
16 public, and not a private right.” Perez v. Jie, 2014 WL 1320130, \*2 (W.D. Wash. 2014) (quoting  
17 Marshall v. Chala Enterprises, Inc., 645 F.2d 799, 808 (9th Cir. 1983)). There is a strong public  
18 interest in favor of enforcement of the FLSA, which seeks to eliminate “labor conditions detrimental  
19 to the maintenance of the minimum standard of living” of workers. 29 U.S.C. § 202(a).  
20 Defendants thus have no legitimate interest in preventing plaintiff from conducting what appears  
21 to be a reasonable and lawful investigation. See Perez, 2014 WL 2154092, at \*3.

22 The court concludes that the Secretary has, by a clear showing, carried his burden of  
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24 <sup>7</sup> Given that the court’s order will not prevent defendants from talking to their employees  
25 about this case, defendants’ prior restraint arguments are unpersuasive. (See Dkt. 188,  
26 Opposition at 15-16). The limited order balances any alleged First Amendment rights of the  
27 employers against its employees’ rights under federal statutes designed to protect them. See  
28 Horizon Air Indus., Inc. v. Nat’l Mediation Bd., 232 F.3d 1126, 1136 (9th Cir. 2000), cert. denied,  
533 U.S. 915 (2001) (“An employer’s free speech right . . . is not absolute, however, and must be  
balanced against the employees’ rights to associate freely and to be free of coercion, which can  
sneak in through seemingly-neutral employer communications”).

1 persuasion of showing that a temporary restraining order should issue. See Mazurek, 520 U.S.  
2 at 972, 117 S.Ct. at 1867. The Secretary has established that he is likely to succeed on the merits  
3 of his claims under both 29 U.S.C. §§ 211(a) and 215(a)(3). See supra at § I. In the alternative,  
4 the Secretary has at a minimum raised “serious questions going to the merits” of his claims under  
5 both 29 U.S.C. §§ 211(a) and 215(a)(3). See supra at § I.; Alliance for the Wild Rockies, 632 F.3d  
6 at 1131. Although the Secretary is not required to demonstrate irreparable harm when he seeks  
7 “to prevent the violation of a federal statute [the FLSA] which specifically provides for injunctive  
8 relief[,]” see Trailer Train Co., 697 F.2d at 869; 29 U.S.C. § 217, the Secretary has established  
9 that he and the employee complainants are likely to suffer irreparable harm in the absence of a  
10 temporary restraining order. See supra at § II. Finally, the balance of equities tips sharply in  
11 plaintiff’s favor, see supra at § III.; Alliance for the Wild Rockies, 632 F.3d at 1131, and an  
12 injunction is in the public interest. See supra at § IV.

#### 13 V. SCOPE OF TEMPORARY RESTRAINING ORDER.

14 The court adopts only the provisions that are necessary to prevent retaliation and  
15 interference by defendants. See Perez, 2014 WL 2154092, at \*3 (“The Court adopts only those  
16 provisions that are reasonably necessary to accomplish this goal before the preliminary injunction  
17 motion can be heard.”); J&L Metal Polishing, Inc., 2016 WL 7655766, at \*6–8 (narrowing the scope  
18 of a temporary restraining order in case involving FLSA violations). Although this is not a class  
19 action in the traditional sense, the court heeds the Supreme Court’s instruction that “an order  
20 limiting communications between parties and potential class members should be based on a clear  
21 record and specific findings that reflect a weighing of the need for a limitation and the potential  
22 interference with the rights of the parties.” Gulf Oil Co. v. Bernard, 452 U.S. 89, 101, 101 S. Ct.  
23 2193, 2200 (1981). Given “the finding of actual or imminent abuse” the court has made here, see  
24 supra at § I.; Gulf Oil, 452 U.S. at 98, 101 S.Ct. 2198, the court will issue “a carefully drawn order  
25 that limits speech as little as possible, consistent with the rights of the parties under the  
26 circumstances.” Gulf Oil, 452 U.S. at 102, 101 S.Ct. at 2201.

27 Finally, the court is troubled by the allegations leveraged against defendants’ counsel.  
28 (See, generally, Dkt. 185-1, Memo.). The court is persuaded that the circumstances here,

1 particularly in light of the Ninth Circuit’s recent Arias decision, may justify an order permitting  
2 defendants’ counsel to be deposed.<sup>8</sup> See 860 F.3d at 1186. At this time, the court will not impose  
3 such an order. In their response to the Order to Show Cause Why a Preliminary Injunction Should  
4 Not Issue, the parties shall address this issue and apply the test set forth in In re Subpoena Issued  
5 to Dennis Friedman, 350 F.3d 65, 71-72 (2d Cir. 2003). See Boeing Co. v. KB Yuzhnoye, 2015  
6 WL 12803452, \*9 (C.D. Cal. 2015) (“The Ninth Circuit Court of Appeals has not adopted the Eighth  
7 Circuit’s reasoning in Shelton v. American Motors Corp., 805 F.2d 1323, 1327-28 (8th Cir. 1986)  
8 and its progeny[.] Rather, the Court finds the Second Circuit’s reasoning in [Friedman] to be the  
9 persuasive authority in allowing attorney deposition[.]” (internal citation omitted).

### 10 CONCLUSION

11 Based on the foregoing, IT IS ORDERED THAT:

12 1. Plaintiff’s Application for Temporary Restraining Order and Order to Show Cause Why  
13 a Preliminary Injunction Should Not Issue (**Document No. 184**) is **granted** in part and **denied** in  
14 part, as set forth herein.

15 2. The Secretary shall be awarded attorneys’ fees and costs incurred in connection with  
16 the instant Application. The Special Master shall make the determination as to amount of  
17 attorneys’ fees and costs.

18 3. Defendants, their agents, and their counsel are hereby enjoined from taking any further  
19 steps to retaliate or discriminate in any way against any current or former employee of the 12 car  
20 washes at issue in this litigation, or any potential witness in this litigation, including communicating  
21 with any non-managerial worker regarding any underpayment or nonpayment of wages due or  
22 other violation of the FLSA outside the presence of counsel for the Secretary. Defendants and  
23 their counsel shall not coerce or otherwise encourage any employee to sign any declaration or  
24 other document purporting to or having the potential effect of relinquishing the employee’s rights

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26 <sup>8</sup> In their Opposition, defendants claim that the Secretary provides no authority justifying  
27 deposing counsel. (See, generally, Dkt. 188, Opposition at 14-15). In fact, the Secretary provides  
28 ample authority, including Arias, 860 F.3d at 1191-92. (See Dkt. 185, Application at 10; see also  
Dkt. 189, Reply at 8-9).

1 under the FLSA. See J&L Metal Polishing, Inc., 2016 WL 7655766, at \*6-8 (court enjoined  
2 defendants from: “retaliating or discriminating in any way, including threatening to terminate,  
3 actually terminating or threatening physical violence against any employee or witness cooperating  
4 in the Secretary’s litigation or investigation because the employee or witness exercises any right  
5 protected under the FLSA[;]” “communicating with any worker regarding underpayment or  
6 nonpayment of wages due or other violation of the [FLSA] outside the presence of counsel for the  
7 Secretary[;]” and “coercing any of their employees to sign waivers or other document[s] purporting  
8 to relinquish their rights under the FLSA[.]”).

9 4. Defendants shall, no later than **February 23, 2018**, produce all documents associated  
10 with securing or attempting to secure declarations from non-managerial employees, including all  
11 notes, memos, forms, communications, recordings, statements, declarations (whether signed or  
12 unsigned), signature pages, and drafts thereof, to the Secretary. Defendants shall also provide  
13 the Secretary with a list of all employees (and their contact information) interviewed, and/or for  
14 whom defendants drafted, solicited, or obtained declarations, no later than **February 16, 2018**.

15 5. For any document that is withheld and/or redacted on the basis of the work-product  
16 protection, defendants shall provide a privilege log at the time the documents are produced, i.e.,  
17 by the deadline set forth in paragraph four above. The privilege log shall contain sufficient  
18 information to enable the court to determine whether *each element* of the work product protection  
19 has been satisfied. The privilege log shall comply with Form No. 11:A as set forth in the California  
20 Practice Guide: Federal Civil Procedure Before Trial (The Rutter Group 2017). Any document that  
21 contains both protected and responsive information shall be redacted to eliminate any reference  
22 to the work-product protection. However, defendants may not redact information that they believe  
23 is irrelevant. See Flynn v. Goldman, Sachs & Co., 1991 WL 238186, at \*2 (S.D.N.Y. 1991) (“[I]f  
24 material really is irrelevant, it will be inadmissible at trial and little harm can flow from discovery  
25 except the expense of production[.]”); Seafirst Corp. v. Jenkins, 644 F.Supp. 1160, 1165 (W.D.  
26 Wash. 1986) (party must disclose whole report even if parts are irrelevant; disclosure of irrelevant  
27 material causes no harm and “partial disclosure may tend to distort the tenor of the reports[.]”).

28 6. Defendants shall, no later than **February 23, 2018**, submit for in camera review to the

1 Special Master all documents<sup>9</sup> that defendants claim are entitled to the work-product protection.  
2 After reviewing the documents and conducting whatever proceedings the Special Master deems  
3 appropriate, the Special Master shall prepare written findings as to the applicability of the work-  
4 product protection as to each document produced by defendants.

5 7. The Special Master shall also conduct proceedings with respect to the 37 declarations  
6 that are the subject of the instant Application. Given that the vast majority of the declarations were  
7 signed in July 2017, and not produced until November 2017, the Special Master shall determine  
8 whether defendants' violated their discovery obligations under, among other things, Fed. R. Civ.  
9 P. 26 and 37 (e.g., supplementing disclosures and discovery responses) by failing to produce the  
10 declarations and/or provide the names and addresses of the subject declarants for approximately  
11 four months. If the Special Master determines that defendants have violated any of their discovery  
12 obligations, the Special Master may impose and/or recommend the appropriate sanctions to be  
13 imposed. In particular, the Special Master shall address whether defendants should be precluded  
14 from using at trial or in support of or in response to any motion the aforementioned 37  
15 declarations, including whether the declarations should be stricken, whether the court should  
16 exclude the 37 witnesses at trial, whether and the amount of attorney's fees and costs to be  
17 awarded, and any other appropriate sanction(s) the Special Master deems appropriate. The  
18 Special Master shall conduct whatever proceedings she believes are appropriate to decide these  
19 issues.

20 8. The parties are reminded that they must comply with the court's previous orders relating  
21 to the appointment of the Special Master. (See, e.g., Dkt. 69, Court's Order of February 13, 2017;  
22 Dkt. 87, Court's Order of April 4, 2017; Dkt. 110, Court's Order of May 26, 2017).

23 9. Defendants shall provide a copy of this Order to each individual named defendant and  
24 the President and General Counsel for each corporate entity or business no later than one  
25 business day from the filing date of this Order. No later than three business days from the filing  
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27 <sup>9</sup> The court has already concluded that signed declarations are not subject to the work  
28 product doctrine's protection.

1 date of this Order, defendants' counsel shall provide a declaration, under penalty of perjury, setting  
2 forth the name and business address of each person who received a copy of this Order.

3 10. Defendants shall forthwith provide a copy of this Order to all persons acting in concert  
4 or participating with defendants in business operations. Defendants shall provide all necessary  
5 information about this Order to such parties. Defendants shall keep a log with the names and  
6 addresses of all persons who have been provided with a copy of this Order.

7 11. Defendants shall file their written response to the Order to Show Cause why a  
8 preliminary injunction should not be issued no later than **5:00 p.m. on February 6, 2018**. Plaintiff  
9 shall file his reply to defendants' written response no later than **5:00 p.m. on February 10, 2018**.  
10 Counsel for the parties shall attend a hearing regarding the Order to Show Cause on **February**  
11 **13, 2018, at 2:30 p.m.**

12 12. The Clerk shall serve a copy of this Order on the Special Master.

13 Dated this 2nd day of February, 2018.

14 /s/

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16 Fernando M. Olguin  
17 United States District Judge  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

R Alexander Acosta,  
Plaintiff,

v.

Austin Electric Services LLC, et al.,  
Defendants.

No. CV-16-02737-PHX-ROS  
**ORDER**

Plaintiff Secretary of Labor (“Plaintiff”) alleges Defendants Austin Electric Services LLC and Toby Thomas, Austin Electric’s President, (collectively “Defendants”) violated the Fair Labor Standards Act (“FLSA”) by failing to pay employees overtime compensation and by failing to keep employee records. (Doc. 1). Plaintiff moved, pursuant to Federal Rule of Civil Procedure 65(b), for a temporary restraining order and preliminary injunction preventing Defendants from interviewing their employees regarding this litigation and from obtaining their employees’ declarations, (Doc. 119), and Plaintiff’s supplemental briefing requests a variety of additional relief. (Doc. 153). For the foregoing reasons, Plaintiff’s motion will be granted in part and denied in part.

**BACKGROUND**

Plaintiff’s complaint alleges Defendants failed to pay their employees overtime compensation and failed to keep employee records, in violation of the FLSA. (Doc. 1). Although discovery is closed,<sup>1</sup> Defendants—apparently without notifying their counsel in

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<sup>1</sup> The parties completed the majority of discovery in October 2017, although they have

1 this litigation—hired separate counsel, Mses. Pace and Sellers, who then began  
2 interviewing Defendants’ employees, allegedly in connection with a company-wide,  
3 neutral human resources audit (the “audit”). According to Defendants, this audit was an  
4 appropriate administrative function of the company in that it sought employee input on a  
5 variety of matters including safety practices, anti-discrimination and anti-harassment  
6 policies, equipment, timekeeping, paid time off, and paid sick leave. During the audit,  
7 Defendants’ employees were gathered together for interviews, following which  
8 employees were given declarations to sign. These declarations purportedly addressed the  
9 topics discussed in the interview: safety practices, anti-harassment/anti-discrimination,  
10 and, of significance here, timekeeping practices. (Doc. 124).

11 Plaintiff alleges Defendants subverted the administrative audit’s alleged neutral  
12 purpose by using it to take from employees information about this lawsuit, specifically  
13 whether employees previously gave information to Plaintiff relevant to this case and, if  
14 so, the nature of the information provided. Plaintiff further alleges employees were not  
15 informed the interviews were voluntary, and that the declarations employees were asked  
16 to sign were to be used in this litigation as waivers of employees’ claims to back-pay. As  
17 such, Plaintiff requested that this Court enjoin Defendants from continuing the audit.

18 The Court reviewed the parties’ initial filings in connection with Plaintiff’s motion  
19 and held a hearing on June 1, 2018. (Doc. 135). At that hearing, counsel for both parties  
20 surprisingly stated that neither of them had seen or reviewed the employee declarations  
21 that were the subject of Plaintiff’s request for a preliminary injunction. Because the  
22 declarations’ content was crucial to resolving Plaintiff’s motion, the Court ordered  
23 Defendants to produce a random sampling of declarations for the Court’s and Plaintiff’s  
24 review. (Doc. 135).<sup>2</sup> Defendants submitted the declarations on June 8, 2018, (Doc. 146),  
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26 stipulated to reopen discovery 75 days before trial to permit Defendants to interview and  
27 depose Plaintiff’s informer witnesses. (Docs. 50; 84).

28 <sup>2</sup> The Court also ordered both parties to refrain from interviewing Defendants’ employees  
until Plaintiff’s motion was resolved. (Docs. 123; 135). The limitations on Plaintiff will  
now be lifted.

1 which the Court and Plaintiff reviewed.

2 There are three types of declarations, each concerning one of three subjects:  
3 safety, professional workplace conduct, and timekeeping/pay. The declarations were  
4 allegedly available in both English and Spanish, and interpreters were provided. Since  
5 only the timekeeping/pay declaration is relevant here, it will be discussed.

6 The timekeeping/pay declaration appears to follow two formats. Defendants do  
7 not explain the reasons for using one format as opposed to the other, but the primary  
8 difference between the two is temporal. Thus, the first declaration format is retrospective  
9 in that it asks employees to state, under penalty of perjury, that they “record all the hours  
10 [they] work on a timesheet,” that they “do not work extra hours unless they are included  
11 on [the] timesheet,” that “[n]o one has instructed [them] to underreport the hours [they]  
12 work,” and, finally, that they “have been paid for all hours that [they] worked at the  
13 Company.” (Doc. 146). This format is reproduced below:

**DECLARATION OF**

I, \_\_\_\_\_, declare under penalty of perjury that the following is true and correct. If called to testify in Court about these matters, I could and would competently testify to the following:

1. I am over the age of 18 and a resident of \_\_\_\_\_ County, Arizona.
2. I have personal knowledge of the matters stated in this Declaration.
3. I am a \_\_\_\_\_ with Austin Electric Services, LLC (the “Company”).
4. I record all the hours I work on a timesheet that I complete and give to the Company each week. I do not work extra hours unless they are included on my timesheet.
5. I have never been told by anyone to not record the hours I work on my timesheet.
6. No one has instructed me to underreport the hours I work.
7. I understand that the Company requires employees to accurately record the hours they work each day.
8. I have been paid for all hours that I worked at the Company.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2018.

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

1 In some instances, however, employees made changes or additions to the  
2 retroactive declaration format that have some relevancy. (Docs. 146 at 61, 65; 159 at 4).  
3 For example, it is telling that one employee amended the retroactive declaration format  
4 with the words “[g]oing forward” so paragraph 4 read “*Going forward*, I record all the  
5 hours I work on a timesheet that I complete and give to the Company each week . . . .”

6 The second timekeeping/pay declaration format is forward-looking, and asks  
7 employees to state, under penalty of perjury, that they “will record all the hours [they]  
8 work on a timesheet,” “will not work extra hours unless they are included on [the]  
9 timesheet,” and will notify human resources or their field operations manager if someone  
10 instructs them to underreport their hours. Based upon the sample set of declarations  
11 Defendants produced, it appears this format was used far less frequently since, of the  
12 twenty-one timekeeping/pay declarations Defendants produced, only four were forward-  
13 looking. The forward-looking declaration format is shown below:

**DECLARATION OF \_\_\_\_\_**

I, \_\_\_\_\_, declare under penalty of perjury that the following is true and correct. If called to testify in Court about these matters, I could and would competently testify to the following:

1. I am over the age of 18 and a resident of \_\_\_\_\_ County, Arizona.
2. I have personal knowledge of the matters stated in this Declaration.
3. I am a \_\_\_\_\_ with Austin Electric Services, LLC (the “Company”).
4. I will record all the hours I work on a timesheet that I complete and give to the Company each week. I will not work extra hours unless they are included on my timesheet.
5. If someone tells me to not record the hours I work on my timesheet, I will immediately call my field operations manager or payroll/human resources.
6. I understand from today forward that the Company requires employees to accurately record the hours they work each day.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2018.

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

1 After Defendants produced the employee declarations, Plaintiff then filed  
2 supplemental briefing in support of its application for an injunction. (Doc. 153). In it,  
3 Plaintiff argued the declarations show Defendants are retaliating against employees by  
4 soliciting coerced declarations containing false and misleading testimony, that the  
5 declarations are designed to identify employees who are cooperating with Plaintiff, that  
6 the declarations may undermine Plaintiff's claims for back-pay because they are certainly  
7 relevant to the underlying lawsuit, and that employees who signed the declarations may  
8 now be hesitant to give full and accurate statements in this action, if doing so would  
9 contradict their signed declarations. Plaintiff also requested additional relief beyond an  
10 injunction, including that Defendants' employees receive a curative notice reassuring  
11 them of their FLSA rights and rectifying Defendants' misconduct. (Docs. 153; 161). In  
12 response, Defendants argued they took steps to ensure the employee interviews were not  
13 coercive, that Defendants have a right to interview employees about working conditions,  
14 that an injunction is not necessary, and that employees need not receive notification that  
15 these declarations were inappropriately obtained. (Doc. 159). Plaintiff replied,  
16 reiterating many of the same arguments made previously. (Doc. 161). The Court held  
17 oral argument on August 8, 2018.

## 18 ANALYSIS

### 19 I. Plaintiff's Motion for an Injunction

20 Four factors determine whether a preliminary injunction should issue: (1) whether  
21 the party requesting the preliminary injunction has made a strong showing that it is likely  
22 to succeed on the merits; (2) whether that party will likely suffer irreparable harm absent  
23 a preliminary injunction; (3) whether the party has demonstrated the balance of equities  
24 tips in its favor; and (4) whether the party has demonstrated the injunction is in the public  
25 interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations  
26 omitted).<sup>3</sup> “The rules of evidence do not apply strictly to preliminary injunction

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27 <sup>3</sup> Following *Winter*, the Ninth Circuit has articulated the standard as requiring: (1)  
28 “serious questions going to the merits;” (2) a “balance of hardships” that “tips sharply”  
towards the party requesting the injunction; (3) a “likelihood of irreparable injury” and

1 proceedings,” and thus courts may consider evidence that would normally be  
2 inadmissible. *See Herb Reed Enterprises, LLC v. Fla. Entm’t Mgmt., Inc.*, 736 F.3d  
3 1239, 1250 n.5 (9th Cir. 2013) (citing *Republic of the Philippines v. Marcos*, 862 F.2d  
4 1355, 1363 (9th Cir. 1988) (“It was within the discretion of the district court to accept . . .  
5 hearsay for purposes of deciding whether to issue the preliminary injunction.”).<sup>4</sup> Here,  
6 Plaintiff argues the Court should grant an injunction because Defendants’ employee  
7 interviews are retaliatory and are obstructing Plaintiff’s investigation, both of which are  
8 ongoing FLSA violations that should be halted.<sup>5</sup>

9       There is an exquisite balance which guides when a preliminary injunction should  
10 be granted in a situation such as this, which can be understood by analyzing the following  
11 cases. The first is presented in *Acosta v. Southwest Fuel Management, Inc.* There, an  
12 employer under investigation by the Department of Labor for underpaying its employees  
13 began instructing employees “to attend meetings with defense counsel on work time.”  
14 *Acosta v. Sw. Fuel Mgmt., Inc.*, No. CV164547FMOAGR, 2018 WL 2207997, at \*2

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15  
16 (4) that the injunction is “in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632  
17 F.3d 1127, 1135 (9th Cir. 2011).

18 <sup>4</sup> As mentioned at oral argument, there is reason to believe that the declarations are not  
19 hearsay, or if they are hearsay, they are at least reliable because they were apparently  
20 simultaneously given to the Department of Labor at the conclusion, and in one case  
21 during, the stressful interviews.

22 <sup>5</sup> Plaintiff makes two additional arguments. For one, Plaintiff argues Defendants are  
23 attempting to circumvent the Court’s scheduling order, in which the Court stated Plaintiff  
24 need not disclose the identities of its informer witnesses until 75 days before trial. This  
25 argument is not meritorious. The scheduling order merely states that Plaintiff need not  
26 disclose the identity of its informer witnesses until 75 days before trial. The scheduling  
27 order does not, however, prohibit Defendants from legitimately independently learning  
28 the identity of Plaintiff’s informer witnesses. Of course, Defendants may not use  
coercion in doing so. Beyond this, Plaintiff also requests to add a claim against  
Defendants and the lawyer responsible for collecting these employee declarations. (Doc.  
153 at 8). However, since this request was raised for the first time in Plaintiff’s  
supplemental briefing in support of its motion for an injunction, the Court will not grant  
Plaintiff’s request. Instead, the Court will give Plaintiff leave to file a separate motion  
requesting leave to amend its complaint to add this claim, and will order Defendants to  
respond to the motion.

1 (C.D. Cal. Feb. 20, 2018). Employees were not told the meetings were voluntary and, in  
2 some instances, employees were driven to the meetings by management or other  
3 company representatives. *Id.* During these meetings, employees were instructed “to  
4 ‘sign papers’ or provide a declaration” under “penalty of perjury.” *Id.* Employees were  
5 not informed that, by signing the declarations, they “might be giving up [back] wages.”  
6 *Id.* Employees also were not informed that the Department of Labor had determined the  
7 employees might be owed back wages stemming from the Department of Labor’s  
8 ongoing lawsuit, or the time period the lawsuit covered. *Id.* Employees were not given  
9 copies of their signed declarations unless they specifically asked for them. *Id.* Further,  
10 the Department of Labor was not informed of the interviews, and was not present when  
11 they occurred. *Id.*

12 Based on this, the court concluded an injunction either limiting or restricting the  
13 employer’s ability to communicate with its employees was warranted. *Id.* at \*3 (granting  
14 temporary restraining order); *see also Acosta v. Sw. Fuel Mgmt., Inc.*, No.  
15 CV164547FMOAGR, 2018 WL 739425, at \*4 (C.D. Cal. Feb. 2, 2018), vacated in part  
16 on other grounds, No. CV164547FMOAGR, 2018 WL 2207997 (C.D. Cal. Feb. 20,  
17 2018) (concluding entry of a preliminary injunction “limiting and/or restricting [the  
18 employer’s] ability to communicate with their employees” was warranted, but deciding  
19 the “better course [would be] to proceed to a trial on the merits”).

20 Specifically, the court first concluded that, because the employees who signed  
21 declarations concerning their wages and working conditions, under coercive  
22 circumstances, were potential witnesses in the Department of Labor’s suit for back-pay,  
23 the Department of Labor would likely prevail on a claim that Defendants’ actions  
24 violated the FLSA’s anti-retaliation provision. *Acosta v. Sw. Fuel Mgmt., Inc.*, 2018 WL  
25 739425, at \*4-\*7; 29 U.S.C. § 215(a)(3) (The FLSA provides that it is unlawful “for any  
26 person . . . to discharge or in any other manner discriminate against any employee  
27 because such employee has filed any complaint or instituted or caused to be instituted any  
28 proceeding under or related to this chapter, or has testified or is about to testify in any

1 such proceeding.”).

2 In addition, the court concluded that “allegations of retaliation for the exercise of  
3 statutorily protected rights represent possible irreparable harm . . . because retaliatory  
4 action for protected activity carries with it the risk that employees may be deterred from  
5 engaging in legitimate conduct.” *Id.* at \*8 (citations omitted). Further, the court  
6 concluded that, because the Department only sought an order “requiring [the employer]  
7 to comply with the law,” the balance of hardships tipped in the Department’s favor. *Id.* at  
8 \*9. And finally, the court concluded that, because “[t]here is a strong public interest in  
9 favor of enforcement of the FLSA,” restricting defendants’ conduct would be in the  
10 public interest. *Id.*

11 In addition, to “eliminate any prejudice or adverse impact caused by defendants’  
12 coercive conduct,” the court in *Acosta v. Southwest Fuel Management* subsequently  
13 struck the employees’ declarations and forbade the employer from introducing them for  
14 any purpose at trial, both because they resulted from coercion and because “they were not  
15 timely disclosed.” *Acosta v. Sw. Fuel Mgmt., Inc.*, 2018 WL 2207997, at \*2. And to  
16 further cure any prejudice, the court ordered that employees receive a notice including  
17 information about the lawsuit, a reminder that employees need not speak with the  
18 Department of Labor or the employer about the claims, that speaking with their employer  
19 might adversely impact the Department of Labor’s ability to collect back-wages on the  
20 employees’ behalf, and that their employer could not retaliate against them for working  
21 off-the-clock, even if it violated company policy. *Id.* at \*5.

22 In sum, *Acosta v. Southwest Fuel Management* demonstrates it is wrong for an  
23 employer to obtain employee declarations under coercive circumstances, and that a  
24 preliminary injunction may issue to prevent such action. However, as set forth below, an  
25 employer’s legitimate efforts to educate its employees about company policies, or to  
26 investigate prior violations of company policy, are not actionable.

27 Applying these principles, in *Mata v. City of Los Angeles*, the court concluded that  
28 internal affairs investigatory interviews “seeking to determine whether and to what extent

1 [employees] have failed to comply with [the employer’s] express, written overtime  
2 policy” were not actionable, and would not be enjoined. *Mata v. City of Los Angeles*, No.  
3 CV076782GAFJWJX, 2008 WL 11338102, at \*4 (C.D. Cal. July 3, 2008).<sup>6</sup> Likewise, in  
4 the context of a Title VII case, the Ninth Circuit concluded that “group therapy sessions .  
5 . . . designed to better inform the [employer’s] workforce of its sexual harassment policy”  
6 and “deal with a traumatic workplace situation” were not retaliatory. *Brooks v. City of*  
7 *San Mateo*, 229 F.3d 917, 928–29 (9th Cir. 2000).

8 Together, *Brooks* and *Mata* demonstrate that an employer may take action to  
9 educate its employees about company policies, investigate wrongdoing, and take  
10 corrective action based upon wrongdoing uncovered. But an employer is prohibited from  
11 obtaining, under coercive circumstances, employee declarations, particularly declarations  
12 that are relevant to and go to the heart of a pending claim that the employer failed to fully  
13 compensate employees. This is what happened in both *Acosta v. Southwest Fuel*  
14 *Management* and in this case.

15 Though there was competent evidence offered by the parties, this Court can  
16 resolve the case based on the undisputed evidence. That undisputed evidence establishes  
17 the following. First, the structure of the audit must be understood in the context in which  
18 it arose. Defendants hired separate counsel, Mses. Pace and Sellers, for the purpose of  
19 conducting this audit. Pace explains that she was selected to conduct the audit in part  
20 because she and Scott Tonn (“Tonn”), Defendant Austin Electric’s co-owner, “are friends  
21 and next door neighbors” who “talk frequently about a variety of topics as both of [them]  
22 are active in civic and construction industry professional endeavors.” (Doc. 145 at 2).  
23 Pace explains that she was aware of Tonn’s “frustration” that the Department of Labor  
24 was insisting it was noncompliant, despite that Austin Electric “believed it was in  
25 compliance and has spent a lot of resources to ensure compliance.” (*Id.* at 3). Pace states

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27 <sup>6</sup> Further distinguishing *Mata*, it is important to note that, there, the employer had an  
28 existing, well-recognized policy requiring the employer to investigate violations of  
overtime reporting policies. *Mata*, 2008 WL 11338102, at \*3. Defendants have  
presented no evidence suggesting such a policy existed here.

1 that she was “surprised that DOL was insisting that Austin Electric continued to be out of  
2 compliance,” since Austin Electric “appeared to have very good policies in place” and  
3 “was very transparent” with employees. (*Id.*). Despite that the purported purpose of the  
4 audit was to uncover wrongdoing, these representations by counsel indicate a lack of  
5 neutrality, and bias against the Department of Labor, when the audit was instituted.

6 Further, despite that Pace and Defendants were obviously acutely aware of the  
7 Department of Labor’s ongoing investigation, neither explains why Defendants’ counsel  
8 in this litigation were not notified that Defendants were hiring outside counsel and  
9 conducting an audit, particularly considering the audit concerned critical issues involved  
10 in this litigation. Pace and Defendants also do not offer any explanation why the  
11 Department of Labor was not informed that this audit would be occurring.<sup>7</sup>

12 Regarding the audit itself, the undisputed evidence establishes what follows.  
13 Employees were instructed to attend interviews on work time. (Doc. 124-1 at 18-19 ¶ 57;  
14 Doc. 124-2 at 2 ¶ 6). When conducting the employee interviews, Pace and Sellers never  
15 informed the employees that the interviews were voluntary, or that employees could  
16 leave. (Doc. 124-1 at 19 ¶ 58 (“[T]he subject of whether employees had a choice to  
17 decline the interview never came up.”). The interviews generally lasted an hour,  
18 although some employees’ interview processes took significantly longer. (Docs. 124-1 at  
19 18-19; 124-2 at 2). The interview outline suggests employees would be told that, if they  
20 had questions, they “can always talk to” their supervisor or the operating manager, (Doc.  
21 147 at 2), but that employees were not told they could consult a neutral person, such as a  
22 lawyer.

23 During the interviews employees were asked about the specific events in this  
24 litigation, including whether they had been instructed to underreport their hours worked

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25  
26 <sup>7</sup> A hypothesized explanation might be that the auditors intended that the audit would be  
27 used only internally to assist the company in developing best practices to ensure  
28 compliance with the law and to establish a good working environment for employees. If  
that was truly the motive, Defendants and Defense counsel should have no objection to  
precluding the use of the declarations in this, or any, litigation.

1 and whether they had been paid for all hours worked. (Docs. 124-1 at 10, 15, 18-19; 124-  
2 2 at 2-3; 147). These are the critical issues in this litigation.

3 More particularly, the interview outline states employees would be asked whether  
4 they “accurately record all . . . hours worked” and whether “anyone instructed [them] to  
5 NOT report all the hours [they] work.” (Doc. 147 at 5). Then, regardless of an  
6 employee’s response and likely to solidify the point, the interview outline asks employees  
7 “[s]o no one has told you to underreport the hours you work?” (*Id.*). Beyond this, the  
8 interview outline also notes that, at the conclusion of the interview, employees should be  
9 asked “[h]ave you ever been interviewed about human resources matters before,” and  
10 states that, if employees indicate they had been interviewed by a government agency such  
11 as the Department of Labor, they should be asked “the circumstances,” the “concerns or  
12 issues,” “whether they have any questions,” and, specifically, whether “the agency [told  
13 the employee] that there was any issues or anything wrong or that you were owed money,  
14 etc?” (Doc. 147 at 7). Consistent with this, Pace and Sellers clearly acknowledge that  
15 they inquired into Defendants’ employees’ contacts with government agencies, including  
16 the Department of Labor, and asked whether the government agency indicated the  
17 company had engaged in any wrongdoing. (Docs. 124-1 at 11-12; 124-2 at 3).

18 However, although the questions to be asked during the interview were  
19 documented, it appears employees’ specific answers during the interview were not  
20 recorded. In fact, the only employee answers that were recorded were apparently those  
21 recorded in the written declarations which followed the interviews, declarations which  
22 were pre-prepared by the interviewers and were not open-ended forms to be completed  
23 by employees.

24 More specifically, following their interviews, employees were presented with  
25 declarations for their signature, under penalty of perjury. (Docs. 146; 147 at 7). The  
26 declarations did not inform employees that they could consult counsel prior to signing the  
27 declarations, or any other neutral person, or that their decision to sign the declaration was  
28 voluntary. (Doc. 146). Further, the declarations did not state that employees might be

1 within the group of employees on whose behalf the Department of Labor was seeking  
2 back wages. (*Id.*). Employees also were not informed that, by signing these declarations,  
3 employees might adversely affect the exercise of their FLSA rights. (Doc. 145-1 at 18).  
4 This despite the fact that, as previously noted, the majority of the timekeeping/pay  
5 declarations are retroactive. (Doc. 146). In particular, these retroactive declarations  
6 asked employees to declare, under penalty of perjury, that they “record all the hours  
7 [they] work on a timesheet,” that they “do not work extra hours unless they are included  
8 on [the] timesheet,” that “[n]o one has instructed [them] to underreport the hours [they]  
9 work,” and, finally, that they “have been paid for all hours that [they] worked at the  
10 Company.” (*Id.*).

11 Moreover, the record does not indicate that employees were given a choice  
12 between forward-looking and retrospective declaration formats. (*Id.*). And in fact, at  
13 least one employee who *had* worked overtime and had *not* been paid for all hours worked  
14 was given the retroactive declaration format to sign. (*Id.* at 61). In addition, a second  
15 employee who received the retroactive declaration specifically edited it in an attempt to  
16 make it exclusively forward-looking. (*Id.* at 65). Further, it is particularly significant  
17 that employees received declarations covering three topics—safety, professional  
18 workplace conduct, and timekeeping/pay—but only the timekeeping/pay declaration  
19 asked employees to make retroactive statements.<sup>8</sup> (Doc. 146).

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21 <sup>8</sup> The safety and professionalism at work declarations, which employees were also asked  
22 to sign during the interview, asked employees to declare, among other things, that they  
23 “understand and agree to follow the Company’s safety policies, practices, and  
24 procedures,” “know to report injuries that occur at work,” “will not make inappropriate  
25 comments,” and “will not make inappropriate touchings of other employees.” Raising  
26 questions regarding the neutrality of the audit, these declarations did not, for example,  
27 ask employees to declare, under penalty of perjury, that they had *never* made  
28 inappropriate comments or inappropriate touchings, that they *had* reported all injuries  
that occurred at work, or that they *had* followed the Company’s safety policies. (Doc.  
146). It cannot be gainsaid that any declaration-collection conducted during an audit that  
was designed to be completely neutral, as to provide employees with knowledge of  
company policies and to ensure employees knew them, would merely need to be  
prospective, not retrospective.

1 After signing these declarations, employees were not provided a copy of the  
2 declarations they signed, despite that they were signed under penalty of perjury.<sup>9</sup> (Doc.  
3 145-1 at 19). And all of this occurred in the context of an ongoing, highly antagonistic  
4 lawsuit, brought by Department of Labor, alleging Defendants both failed to properly  
5 compensate employees for hours worked and failed to maintain accurate employee  
6 records. (Doc. 1).

7 As a result, several employees contacted Plaintiff to express concerns. It was at  
8 this point that Plaintiff, for the first time, learned Defendants were conducting an audit.  
9 Employees stated the interviews “began with Defendants’ attorneys initially asking safety  
10 related questions” but “very quickly” transitioned to asking questions regarding the  
11 claims involved in this litigation. Specifically, employees reported being asked whether  
12 they provided information to Plaintiff about Defendants’ alleged FLSA violations and, if  
13 so, what information they provided. Some employees said they lied during the interview  
14 for fear they would be retaliated against for reporting Defendants’ FLSA violations to the  
15 government. In addition, employees stated they felt “blindsided” by the interviews, felt  
16 they could not decline to participate in the interviews, and felt “uncomfortable and upset  
17 both by the questions and length of questioning.” Moreover, “at least one employee”  
18 reported that, when he asked if his participation was required, he was informed it was “a  
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20  
21 <sup>9</sup> Defendants submitted a letter—not a declaration—from Ms. Pace, in which Ms. Pace  
22 represents that “[i]t was the plan and still is the intent to provide employees with copies  
23 of their declarations . . . upon conclusion of the HR audit.” (Doc. 145-1 at 19).  
24 However, Ms. Pace’s letter did not indicate she ever told the employees that they would  
25 later receive copies of their signed declarations and precisely when that would occur.  
26 Moreover, the declarations do not state that employees would later receive a copy of their  
27 signed declarations. Likewise, the interview outline does not indicate that employees  
28 should be informed they would receive a copy of their signed declarations at a future  
date. Indeed, nothing suggests Defendants’ employees were given any reason to expect  
that they would later receive copies of their declarations, or that they should ask for  
copies of their signed declarations if they did not. The fact that employees were not  
simply provided copies of the declarations they signed is further evidence of the coercive  
nature of Defendants’ conduct. *Acosta v. Sw. Fuel Mgmt., Inc.*, 2018 WL 2207997, at \*2.

1 mandatory interview.”<sup>10</sup> (Doc. 119).

2 Beyond the employees’ statements, other circumstances of the audit instill  
3 concern. As previously stated, Defendants do not represent that they have previously  
4 conducted such an audit at any point prior to the commencement of this litigation.  
5 (August 8, 2018 Hr’g Tr.). Further, although Pace states that audits such as this are  
6 “common tools used by employers to evaluate the working environment and the  
7 companies’ compliance with applicable labor and employment laws,” (*Id.* at 4), nothing  
8 suggests that the collection of retroactive declarations during such audits in any way  
9 serves that purpose. Indeed, retroactive declaration-collection goes far beyond what  
10 would be included in any traditional “audit.” *See* Marriam-Webster’s Collegiate  
11 Dictionary 81 (11th ed. 2004) (defining an audit as “a methodical examination and  
12 review”). Further, though Pace represents that audits such as this may disclose  
13 “unknown rogue managers or employees,” nothing suggests managers were interviewed  
14 as part of this audit, or that managers were asked to sign retroactive declarations  
15 regarding their actions. Taken together, these actions suggest this audit—and particularly  
16 the collection of retroactive declarations—was taken in response to this litigation, and for  
17 the purpose of quashing employees’ back-pay claims.

18 Defendants’ conduct is sufficient to warrant the issuance of a limited injunction.<sup>11</sup>

19 \_\_\_\_\_  
20 <sup>10</sup> Plaintiff did not submit any declarations from the employees regarding their  
21 interviews, because the scheduling order permits Plaintiff to keep its informer witnesses’  
22 identities confidential until 75 days before trial. (Docs. 50; 84). Instead, Plaintiff  
23 submitted two declarations from Wage and Hour Investigators who spoke with  
24 employees regarding their interviews. Defendants argued the Court could not consider  
25 the employees’ statements in these declarations because they were hearsay. Defendants  
26 are incorrect. The rules of evidence do not apply strictly to preliminary injunction  
27 proceedings, and thus this Court may consider the employees’ statements for the purpose  
28 of deciding whether to issue a preliminary injunction. *See Acosta v. Sw. Fuel Mgmt.*,  
2018 WL 739425, at \*6 n.4. And even if the Court did not consider them, it is clear an  
injunction is warranted based upon the remainder of the undisputed facts recounted  
above.

<sup>11</sup> During oral argument on August 8, 2018, Defendants argued *In re M.L. Stern Overtime Litig.*, 250 F.R.D. 492 (S.D. Cal. 2008), demonstrates an injunction is unwarranted. Defendants are incorrect, and that case is easily distinguishable on its facts. In *M.L.*

1 As in *Acosta v. Southwest Fuel Management*, here Plaintiff is likely to succeed on the  
2 merits of a claim that Defendants' actions in obtaining its employees retroactive  
3 declarations, under coercive circumstances and during a pending Department of Labor  
4 investigation into Defendants' payment practices, violated the FLSA's anti-retaliation  
5 provision. *Acosta v. Sw. Fuel Mgmt., Inc.*, 2018 WL 739425, at \*4-\*7. It is irrelevant  
6 that Defendants did not know *which* of its employees were potential witnesses in the  
7 Department of Labor's suit for back-pay, since the audit was intended to include all of  
8 Defendants' employees, and thus necessarily would include employees with claims.

9 Moreover, as in as in *Acosta v. Southwest Fuel Management, Inc.*, the employees'  
10 pursuit of their statutorily protected rights to full compensation allegedly triggered  
11 Defendants' retaliatory conduct. This suggests irreparable harm may result from the  
12 continuation of the audit, as employees may be deterred from engaging in protected  
13 conduct. *Id.* at \*8. Indeed, in the context of this litigation, the deterrent effect of the  
14 Defendants' actions in obtaining their employees' declarations is obvious. Once  
15 Defendants obtained the declarations, employees with legitimate claims would be faced  
16 with a dire choice. If these employees later testified in this suit that they had not, in fact,  
17 been adequately compensated, Defendants could not only use their declarations for  
18 impeachment, but could also threaten employees for making false statements under  
19 penalty of perjury. Faced with this choice, employees with legitimate claims might  
20 decide to forgo their statutory right to compensation, simply to ensure their later  
21 testimony in this case remained consistent with the declarations Defendants obtained

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22  
23 *Stern*, a putative class action, the defendant-employer mailed a letter containing a survey  
24 to the putative class members. Among other things, this letter expressly disclosed that it  
25 concerned the pending litigation and noted that the employer's intent was to "offer  
26 compensation to [the putative class members] in exchange for a release of [their] claims  
27 against [the employer]." *Id.* at 494-95. In addition, the letter suggested employees  
28 "make a decision for yourself," encouraged them to consult with an "attorney of your  
choosing," and even provided contact information for both plaintiff's and defendants'  
counsel. *Id.* at 495. Most importantly, the plaintiff in *M.L. Stern* provided no evidence  
that employees "experienced coercion or felt misled." *Id.* at 494, 497. Here, the situation  
is distinguishable in each regard.

1 under questionable circumstances. These concerns are further heightened considering  
2 Defendants employ vulnerable populations such as convicts, immigrants, and refugees.  
3 (August 8, 2018 Hr’g Tr.).

4 Further, as in *Acosta v. Southwest Fuel Management*, Plaintiff only seeks an order  
5 requiring Defendants to comply with the law, meaning the balance of hardships tips in  
6 favor of granting an injunction tailored to address the interviews’ coercive elements. *Id.*  
7 at \*9. And finally, because “[t]here is a strong public interest in favor of enforcement of  
8 the FLSA,” the issuance of a limited injunction would be in the public interest. *Id.*

9 Thus, the Court will issue a limited injunction designed to address these elements  
10 of Defendants’ interviews and declarations. Defendants will be prohibited from  
11 requesting employees sign any declarations concerning Defendants’ timekeeping policy  
12 and pay that are not exclusively forward-looking, which will ensure Defendants do not  
13 coerce employees into in any way abandoning the pursuit of their statutorily protected  
14 rights to full compensation. *See generally Acosta v. Sw. Fuel Mgmt., Inc.*, 2018 WL  
15 2207997, at \*2. In addition, the Court will require that employees be informed that the  
16 meeting is voluntary, be allowed to leave, and be provided copies of any declarations  
17 signed. *Id.* Finally, Defendants should inform employees that they are not to divulge any  
18 information they reported to the Department of Labor regarding their wages and this  
19 lawsuit. Under no circumstances may employees’ contacts with the Department of Labor  
20 be inquired into.

21 Limiting the injunction in this manner will enable Defendants to safely continue  
22 meeting with employees to educate them regarding the company’s timekeeping, safety,  
23 and anti-discrimination and anti-harassment policies, and to solicit employee feedback.  
24 *See Brooks*, 229 F.3d 917, 928–29; *Mata*, 2008 WL 11338102, at \*4. In addition,  
25 limiting the injunction in this manner will not undermine an employer’s freedom of  
26 speech. *See Acosta v. Sw. Fuel Mgmt., Inc.*, 2018 WL 2207997, at \*5; *see generally*  
27 *Horizon Air Indus., Inc. v. Nat’l Mediation Bd.*, 232 F.3d 1126, 1136 (9th Cir. 2000),  
28 cert. denied, 533 U.S. 915 (2001) (“An employer’s free speech right . . . is not absolute,

1 however, and must be balanced against the employees' rights . . . to be free of  
2 coercion[.]") (citation and internal quotation marks omitted).

3 Further, to "eliminate any prejudice or adverse impact caused by [D]efendants'  
4 coercive conduct," first, employees' backward-looking declarations will be stricken such  
5 that Defendants cannot use them at trial for any purpose.<sup>12</sup> See *Acosta v. Sw. Fuel Mgmt.,*  
6 *Inc.*, 2018 WL 2207997, at \*3. Second, Defendants' employees must be given notice, as  
7 set forth at Doc. 153-1. See *Acosta v. Sw. Fuel Mgmt., Inc.*, 2018 WL 2207997, at \*5  
8 (requiring that curative notice be given to employees). Finally, Defendants will be  
9 required to produce redacted versions of all worker declarations. These actions will  
10 obviate, at this time, any need for the other relief Plaintiff requests in its supplemental  
11 briefing.

12 To be clear, although this Court acknowledges Defendants had a legitimate reason  
13 for inquiring into their employees' compliance with timekeeping and other policies, and  
14 even for securing declarations stating that employees will comply with those policies  
15 going forward, in the context of this case, Defendants have articulated no legitimate  
16 reason—and the Court cannot think of one—for requesting their employees sign  
17 retroactive declarations stating, under penalty of perjury, that they have never  
18 underreported their hours, have never been instructed to underreport their hours, and have

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19 <sup>12</sup> The Court considered permitting Defendants to use the declarations for impeachment.  
20 But Defendants have repeatedly represented to this Court that the audit—and specifically  
21 the gathering of these declarations—was not for use in this litigation. If so, then  
22 preventing Defendants from using the declarations in this litigation should cause  
23 Defendants no prejudice, particularly since Defendants will have an opportunity to  
24 depose Plaintiff's informer witnesses prior to trial. (Doc. 84). Alternatively, if  
25 Defendants obtained the employee declarations for use in this litigation, then they were  
26 obtained outside of the time permitted for discovery, were not timely disclosed, and were  
27 conducted without notifying Plaintiff's counsel. If so, this would be improper. See Fed.  
28 R. Civ. P. 30(b)(1), 31(a)(3) (requiring that the opposing party receive notice of  
depositions by oral and written questions); Fed. R. Civ. P. 16(f) (permitting the imposition  
of sanction for a party's failure to obey a scheduling order); see also Fed. R. Civ. P.  
30(b)(5) (requiring that depositions by oral examination be conducted before an  
appropriate officer); Fed. R. Civ. P. 30(d)(2), 37 (permitting the imposition of sanctions  
for deposition and discovery misconduct).

1 been fully compensated for all work done. Likewise, inquiring into employees' contacts  
2 with government agencies regarding this litigation serves no legitimate investigatory or  
3 educational purpose. Thus, these actions will be enjoined.

4 **II. Defendants' Motion to Deny Plaintiff's Motion for its Failure to File a Reply**

5 Separately, due to Plaintiff's failure to file a reply in support of its original motion  
6 requesting injunctive relief, Defendants requested Plaintiff's motion be denied, that the  
7 hearing be vacated, and that Defendants be awarded fees and costs. (Doc. 129). Yet, the  
8 failure to file a reply is clearly not a basis to deny a motion. L.R. Civ. 7.2(d) (providing  
9 that a party may file "a reply memorandum if that party so desires"). Thus, Defendants'  
10 motion will be denied.

11 **III. Defendants' Supplement Regarding Newly-Discovered Evidence**

12 During oral argument on August 8, 2018, Plaintiff's counsel represented that he  
13 had submitted a "referral for criminal prosecution" based upon the actions of Ms. Petrilli,  
14 a former employee of the Department of Labor who submitted a declaration on  
15 Defendants' behalf in this case. At that time, the Court cautioned Plaintiff's counsel  
16 about pursuing such a course of action without clear authority.

17 However, in light of Plaintiff's stated decision to refer Ms. Petrilli for criminal  
18 prosecution, Defendants now request this Court stay its ruling on Plaintiff's preliminary  
19 injunction motion to permit Defendants to submit briefing on the issue of Ms. Petrilli's  
20 criminal prosecution. Specifically, Defendants argue that on the same day Plaintiff's  
21 counsel informed this Court that it was referring Ms. Petrilli for criminal prosecution,  
22 Plaintiff took Ms. Petrilli's deposition in another matter, during which Plaintiff inquired  
23 into her consulting practice without informing her that she had been referred for criminal  
24 prosecution regarding actions she had taken in connection with her consulting practice.  
25 Defendants argue that Plaintiff's actions implicate the doctrine of unclean hands, which  
26 should bar the equitable relief Plaintiff seeks here. Defendants represent that they intend  
27 to submit briefing on the matter no later than Monday, August 20, 2018.

28 Even if Defendants' allegations are true, the parties agree that Ms. Petrilli's

1 deposition was taken in connection with another lawsuit. (Docs. 169; 170). If Plaintiff  
2 indeed deposed Ms. Petrilli in another proceeding without informing her of her Fifth  
3 Amendment rights, assuming that was required, this Court trusts that such misconduct  
4 can be adequately dealt with in that proceeding. Further, why Defendants would have  
5 consulted with Ms. Petrilli in the first place is beyond comprehension considering  
6 Defendants received privilege logs and discovery from Plaintiff showing that Ms. Petrilli  
7 was involved in this very litigation during her employment with the Department of Labor.  
8 (Doc. 170). For these reasons, Defendants' request to stay these proceedings further will  
9 be denied. Further, Defendants will not be granted leave to file a motion regarding  
10 Plaintiff's alleged misconduct.

11 Accordingly,

12 **IT IS ORDERED** Plaintiff's Motion, (Doc. 119), is **GRANTED IN PART** and  
13 **DENIED IN PART**. Defendants may continue meeting with employees to inform them  
14 regarding the company's timekeeping policies, to solicit their feedback regarding a  
15 variety of other company policies, and to investigate employees' compliance with  
16 company policies, although not policies relevant to this litigation without this Court's  
17 prior approval. Defendants may not ask employees to sign any declarations regarding  
18 Defendants' timekeeping policy unless those declarations are exclusively forward-  
19 looking. Employees must be informed the meeting is voluntary, be offered a neutral  
20 witness, be permitted to leave, and be provided copies of any declarations signed.  
21 Employees' contacts with the Department of Labor may not be inquired into.

22 **IT IS FURTHER ORDERED** all backward-looking employee declarations are  
23 stricken, and employees shall receive notice from Defendants as set forth above.

24 **IT IS FURTHER ORDERED** Plaintiff may resume communications with  
25 Defendants' employees.

26 **IT IS FURTHER ORDERED** Defendants' Motion, (Doc. 129), is **DENIED**.

27 **IT IS FURTHER ORDERED** Defendants' request for leave to file a motion  
28 regarding Plaintiff's deposition of Ms. Petrilli, (Doc. 169), is **DENIED**.

1           **IT IS FURTHER ORDERED** no later than August 22, 2018, Defendants shall  
2 provide redacted copies of all employee declarations to Plaintiff.

3           **IT IS FURTHER ORDERED** no later than August 31, 2018, Plaintiff shall file a  
4 motion requesting leave to amend its complaint. Defendants shall file a response no later  
5 than September 14, 2018, and Plaintiff shall file a reply no later than September 21, 2018.

6           **IT IS FURTHER ORDERED** the Court will expeditiously resolve the parties'  
7 pending motions for partial summary judgment and motion for expert discovery. Thus,  
8 this matter is ready to be set for trial on Plaintiff's current claims, though not on any new  
9 claims raised in Plaintiff's anticipated motion for leave to amend.

10           **IT IS FURTHER ORDERED** Plaintiff shall disclose the identities of its informer  
11 witnesses who will testify at trial, and any unredacted documents relating to them, no  
12 later than **October 1, 2018**.

13           **IT IS FURTHER ORDERED** discovery shall reopen for a period of 15 business  
14 days, beginning **October 15, 2018**, and ending **November 2, 2018**, to allow Defendants  
15 the opportunity interview and/or depose the Secretary's informer witnesses and other  
16 individuals who may be disclosed in the documents and information the Secretary  
17 produces pursuant to paragraphs (U) and (V) of the Court's prior scheduling orders.

18           **IT IS ORDERED** all Motions in Limine are due **November 13, 2018**. Responses  
19 are due **November 27, 2018**. No replies are permitted unless ordered by the Court. Prior  
20 to filing any Motion in Limine, the parties must confer and discuss the contents of each  
21 planned motion. No Motion in Limine should be filed if the other party does not oppose  
22 the relief requested.

23           **IT IS FURTHER ORDERED** the Joint Proposed Pretrial Order, if not already  
24 filed, is due **December 4, 2018**.

25           **IT IS FURTHER ORDERED** the parties will separately file their Proposed  
26 Findings of Fact and Conclusions of Law no later than **December 18, 2018**

27           **IT IS FURTHER ORDERED** no later than **December 18, 2018**, the parties shall  
28 deliver to chambers excerpts of the deposition testimony they propose to present at trial,

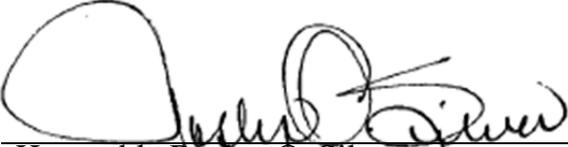
1 in compliance with the procedures available on the Court’s website (found in Deposition  
2 Designation Procedure for Judge Silver), including but not limited to: Plaintiffs  
3 highlighting in yellow the portions they wish to offer and Defendants highlighting in blue  
4 those portions they wish to offer. If either party objects to the proposed testimony, a  
5 specific and concise objection (e.g., “Relevance, Rule 402”) shall be placed in the margin  
6 adjacent to the proposed testimony.

7 **IT IS FURTHER ORDERED** a final pretrial conference is set for **January 8,**  
8 **2019, at 10:30 A.M.**

9 **IT IS FURTHER ORDERED** trial to the Court is set for **January 15, 2019, at**  
10 **8:30 A.M.** Estimated length of trial is 8 days.

11 **IT IS FURTHER ORDERED** the parties shall comply with the Exhibit  
12 Procedures found on the Court’s website at [www.azd.uscourts.gov](http://www.azd.uscourts.gov) / Judges’ Information  
13 / Orders, Forms & Procedures for Hon. Roslyn O. Silver.

14 Dated this 17th day of August, 2018.

15  
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23  
24  
25  
26  
27  
28  
Honorable Roslyn O. Silver  
Senior United States District Judge

# **EXHIBIT K**

---

**From:** Connell, Erin M.

**Sent:** Monday, May 20, 2019 3:33 PM

**To:** 'Bremer, Laura - SOL' <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>

**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>

**Subject:** RE: OFCCP v. Oracle

Laura,

I am in receipt of your letter. Suffice it to say, I disagree with much of its content, including the repeated allegations that Oracle and Orrick have violated the rules of professional conduct, and the assertion that the motion we filed on Friday was premature. Nevertheless, I'm willing to discuss and consider your suggestion that OFCCP will send a corrective notice. I am available today at 4:30 and you can reach me at 415.773.5969.

Thanks,

Erin

**Erin M. Connell**

Partner

Orrick

San Francisco 

T +1-415-773-5969

M +1-415-305-8008

[econnell@orrick.com](mailto:econnell@orrick.com)



Employment Blog



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**From:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>

**Sent:** Monday, May 20, 2019 2:44 PM

**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>

**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>

**Subject:** OFCCP v. Oracle

Please see the attached correspondence.

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

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# **EXHIBIT L**

---

**From:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>

**Sent:** Tuesday, May 21, 2019 9:51 AM

**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>

**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>

**Subject:** RE: OFCCP v. Oracle

Erin,

This email follows our meet and confer today about potentially resolving the parties' disputes about their communications with Oracle's employees. We discussed preparing a statement to be sent to Oracle former and current employees regarding this lawsuit. We propose the following to be sent jointly to all Asians, Blacks, and/or females who were employed at Oracle's headquarters in the Product Development job function at any time from 2013 to the present, and all females who were employed at Oracle's headquarters in the Support and/or Information Technology job functions at any time from 2013 to the present:

We are writing to you about the lawsuit that the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") brought and is pending against Oracle: *OFCCP, U.S. Dept. of Labor v. Oracle America, Inc.*, OALJ Case No. 2017-OFC-00006. In the lawsuit, OFCCP alleges that since 2013, Oracle engaged in compensation discrimination against Asian, Black, and female employees in the Product Development, Support, and Information Technology job functions at Oracle's Redwood Shores headquarters. Oracle denies these allegations.

The case is scheduled to go to hearing before an administrative law judge in December 2019. OFCCP seeks relief for current and former female, Black, and Asian Oracle employees, including managers, in the Product Development, Support, and Information Technology job functions. To remedy these violations, OFCCP seeks to recover back wages lost as a result of the alleged discrimination. OFCCP also seeks changes to Oracle's compensation practices going forward, including adjustments in pay rates to correct for gender and/or race discrimination reflected in pay rates. If OFCCP wins its lawsuit and money is awarded to former and current Oracle employees, you will be notified at that time.

In the lawsuit brought by OFCCP, Oracle's interests are adverse to the interests of the Oracle employees who may receive lost compensation or have their pay increased if OFCCP wins the lawsuit. If Oracle or its attorneys contact you to ask questions in connection with this lawsuit (or a similar case called *Jewett v. Oracle*), you are not required to talk to them. Oracle's attorneys do not and cannot represent you because they represent Oracle, whose interests are adverse to the female, Black and/or Asian employees for which OFCCP's action seeks to recover back wages and increased pay moving forward. It is up to you whether you provide information to Oracle or its attorneys, and there will be no negative consequences to you if you do not agree to any request for an interview or request for information by Oracle concerning these claims of alleged gender and race pay discrimination.

OFCCP may have reached out to you in recent months and you are free to provide information to OFCCP and its attorneys that relates to this lawsuit, and may agree to participate in the lawsuit, including testifying at the hearing later this year, without negative consequences from Oracle. Federal law

prohibits any federal contractor from discouraging, intimidating, or preventing any employee from providing information to the government, including providing testimony to the administrative law judge.

If you have any questions about the lawsuit or wish to provide information to OFCCP, you may contact the Department of Labor's Oracle witness line at (213) 894-1591. You may also contact the Oracle witness line if you believe you Oracle treated you negatively after you provided information to OFCCP or asserted your rights under Labor laws. If no one picks up, please leave your contact information and one of OFCCP's attorneys will return your call. You may also send an email to OFCCP's attorneys at [OFCCPvOracleLitigation@dol.gov](mailto:OFCCPvOracleLitigation@dol.gov). Your communications with OFCCP will be treated confidentially. Documents and orders in the lawsuit are also available at [website for the FOIA reading room.]

During our call, you suggested Oracle would be willing to withdraw its motion filed Friday regarding OFCCP's communications with Oracle's employees, but stated that these issues were also raised in the opposition to Oracle's motion to compel filed on Friday. We addressed the issue in OFCCP's opposition in response to Oracle raising these issues in its motion to compel, which is already posted in the FOIA reading room. We propose the following to minimize the damage of these filings to the extent possible:

- By May 22, 2019, Oracle withdraws its motion filed on May 17, 2019, regarding OFCCP's communications with Oracle's employees, and does not send it to the FOIA library;
- By noon on May 23, 2019, Oracle files an amended motion to compel without the argument or exhibits discussing OFCCP's communications with Oracle's employees, and sends the amended motion to compel to the FOIA library;
- By 4 p.m. on May 23, 2019, OFCCP files an amended opposition to Oracle's motion to compel documents and interrogatories (originally filed on 5/17/19), removing the portions of the opposition and exhibits discussing this issue, and sends the amended opposition and exhibits to the FOIA reading room (but does not send the original opposition);
- Oracle does not raise issues about the propriety of OFCCP's communications with Oracle employees in its reply brief to the motion to compel;
- We prepare a joint letter to Judge Clark stating that the issue regarding OFCCP's and Oracle's communications with former and current Oracle employees about this case has been resolved, which provides the notice that the parties agree to send; this letter is posted to the FOIA library;
- We schedule a conference call with Judge Clark to notify him that the parties have resolved this issue. We will ask him to disregard any argument or exhibits regarding this issue. We ensure that he agrees to the proposal about the filings to send to the FOIA reading room. We should make this request today, and seek a conference on Wednesday, May 22, 2019.

While this resolution is not perfect, given that Oracle's original position will be posted in the FOIA library, while OFCCP's will not, it seems to be the best solution available at this time. We look forward to hearing from you later today about this proposal.

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

---

**From:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>

**Sent:** Tuesday, May 21, 2019 9:39 AM

**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>  
**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle

Hi Laura,  
I'm following up on our discussion from yesterday afternoon. Per our conversation, I thought I would hear from you last night, and so am simply checking on the status of things.  
Thanks,  
Erin

---

**From:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>  
**Sent:** Monday, May 20, 2019 3:39 PM  
**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>  
**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle

Erin,

I will call you then.

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

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**From:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Sent:** Monday, May 20, 2019 3:33 PM  
**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>  
**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle

Laura,  
I am in receipt of your letter. Suffice it to say, I disagree with much of its content, including the repeated allegations that Oracle and Orrick have violated the rules of professional conduct, and the assertion that the motion we filed on Friday was premature. Nevertheless, I'm willing to discuss and consider your suggestion that OFCCP will send a corrective notice. I am available today at 4:30 and you can reach me at 415.773.5969.  
Thanks,  
Erin

**Erin M. Connell**  
Partner

Orrick  
San Francisco   
T +1-415-773-5969  
M +1-415-305-8008  
econnell@orrick.com



Employment Blog



---

**From:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>  
**Sent:** Monday, May 20, 2019 2:44 PM  
**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>  
**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>  
**Subject:** OFCCP v. Oracle

Please see the attached correspondence.

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

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# **EXHIBIT M**

---

**Attachments:**

Corrective Notice to Employees.docx

**From:** Connell, Erin M.**Sent:** Tuesday, May 21, 2019 2:46 PM**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Shwartz, Robert S. <[rshwartz@orrick.com](mailto:rshwartz@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>**Subject:** RE: OFCCP v. Oracle

Hi Laura,

In advance of our call at 3, we have considered the proposal below, and have some revisions to it.

First, the corrective notice should be sent by OFCCP, and not jointly. It also should go only to the individuals to whom you sent the April 4 correspondence – not to the entire purported class. We have also made edits reflected in track changes in the attached.

Regarding the rest of the proposal, if you agree to the corrective notice, we will agree to withdraw our motion requesting a corrective notice (the motion filed last Friday).

Regarding the motion to compel, we will agree to file a revised version of our motion to compel that omits arguments regarding the propriety of OFCCP's communications with Oracle employees, as well as preemptive arguments about the propriety of our communications with class members in Jewett. We also agree to omit the correspondence on those issues from the supporting attorney dec.

In exchange, OFCCP would agree to file a revised opposition that removes all arguments about *both* the propriety of OFCCP's contact with Oracle employees (including the back and forth between the parties and the attached correspondence), *and also* the propriety of Oracle's communications and contacts with Oracle employees – both here and in Jewett. OFCCP also would agree to omit the correspondence on those issues from the supporting attorney dec.

Then in our reply, we won't address those issues, either.

We can discuss further an appropriate letter to Judge Clark, but generally speaking, we envision no more than a short correspondence explaining the parties have engaged in further meet and confer discussions that have negated the need for the motion we filed on Friday (and therefore we are withdrawing it), and also saying we have narrowed the issues of dispute raised in our motion to compel. Accordingly, we are filing a revised version of the motion to compel (and OFCCP will file a revised opposition) that omit those issues, and will be sending the revised versions to FOIA.

Thanks,  
Erin

---

**From:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>**Sent:** Tuesday, May 21, 2019 9:51 AM**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D.

<[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>

Cc: McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>

**Subject:** RE: OFCCP v. Oracle

Erin,

This email follows our meet and confer today about potentially resolving the parties' disputes about their communications with Oracle's employees. We discussed preparing a statement to be sent to Oracle former and current employees regarding this lawsuit. We propose the following to be sent jointly to all Asians, Blacks, and/or females who were employed at Oracle's headquarters in the Product Development job function at any time from 2013 to the present, and all females who were employed at Oracle's headquarters in the Support and/or Information Technology job functions at any time from 2013 to the present:

We are writing to you about the lawsuit that the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") brought and is pending against Oracle: *OFCCP, U.S. Dept. of Labor v. Oracle America, Inc.*, OALJ Case No. 2017-OFC-00006. In the lawsuit, OFCCP alleges that since 2013, Oracle engaged in compensation discrimination against Asian, Black, and female employees in the Product Development, Support, and Information Technology job functions at Oracle's Redwood Shores headquarters. Oracle denies these allegations.

The case is scheduled to go to hearing before an administrative law judge in December 2019. OFCCP seeks relief for current and former female, Black, and Asian Oracle employees, including managers, in the Product Development, Support, and Information Technology job functions. To remedy these violations, OFCCP seeks to recover back wages lost as a result of the alleged discrimination. OFCCP also seeks changes to Oracle's compensation practices going forward, including adjustments in pay rates to correct for gender and/or race discrimination reflected in pay rates. If OFCCP wins its lawsuit and money is awarded to former and current Oracle employees, you will be notified at that time.

In the lawsuit brought by OFCCP, Oracle's interests are adverse to the interests of the Oracle employees who may receive lost compensation or have their pay increased if OFCCP wins the lawsuit. If Oracle or its attorneys contact you to ask questions in connection with this lawsuit (or a similar case called *Jewett v. Oracle*), you are not required to talk to them. Oracle's attorneys do not and cannot represent you because they represent Oracle, whose interests are adverse to the female, Black and/or Asian employees for which OFCCP's action seeks to recover back wages and increased pay moving forward. It is up to you whether you provide information to Oracle or its attorneys, and there will be no negative consequences to you if you do not agree to any request for an interview or request for information by Oracle concerning these claims of alleged gender and race pay discrimination.

OFCCP may have reached out to you in recent months and you are free to provide information to OFCCP and its attorneys that relates to this lawsuit, and may agree to participate in the lawsuit, including testifying at the hearing later this year, without negative consequences from Oracle. Federal law prohibits any federal contractor from discouraging, intimidating, or preventing any employee from providing information to the government, including providing testimony to the administrative law judge.

If you have any questions about the lawsuit or wish to provide information to OFCCP, you may contact the Department of Labor's Oracle witness line at (213) 894-1591. You may also contact the Oracle witness line if you believe you Oracle treated you negatively after you provided information to OFCCP or asserted your rights under Labor laws. If no one picks up, please leave your contact information and one of OFCCP's attorneys will return your call. You may also send an email to OFCCP's attorneys at [OFCCPvOracleLitigation@dol.gov](mailto:OFCCPvOracleLitigation@dol.gov). Your communications with OFCCP will be treated

confidentially. Documents and orders in the lawsuit are also available at [website for the FOIA reading room.]

During our call, you suggested Oracle would be willing to withdraw its motion filed Friday regarding OFCCP's communications with Oracle's employees, but stated that these issues were also raised in the opposition to Oracle's motion to compel filed on Friday. We addressed the issue in OFCCP's opposition in response to Oracle raising these issues in its motion to compel, which is already posted in the FOIA reading room. We propose the following to minimize the damage of these filings to the extent possible:

- By May 22, 2019, Oracle withdraws its motion filed on May 17, 2019, regarding OFCCP's communications with Oracle's employees, and does not send it to the FOIA library;
- By noon on May 23, 2019, Oracle files an amended motion to compel without the argument or exhibits discussing OFCCP's communications with Oracle's employees, and sends the amended motion to compel to the FOIA library;
- By 4 p.m. on May 23, 2019, OFCCP files an amended opposition to Oracle's motion to compel documents and interrogatories (originally filed on 5/17/19), removing the portions of the opposition and exhibits discussing this issue, and sends the amended opposition and exhibits to the FOIA reading room (but does not send the original opposition);
- Oracle does not raise issues about the propriety of OFCCP's communications with Oracle employees in its reply brief to the motion to compel;
- We prepare a joint letter to Judge Clark stating that the issue regarding OFCCP's and Oracle's communications with former and current Oracle employees about this case has been resolved, which provides the notice that the parties agree to send; this letter is posted to the FOIA library;
- We schedule a conference call with Judge Clark to notify him that the parties have resolved this issue. We will ask him to disregard any argument or exhibits regarding this issue. We ensure that he agrees to the proposal about the filings to send to the FOIA reading room. We should make this request today, and seek a conference on Wednesday, May 22, 2019.

While this resolution is not perfect, given that Oracle's original position will be posted in the FOIA library, while OFCCP's will not, it seems to be the best solution available at this time. We look forward to hearing from you later today about this proposal.

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

---

**From:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>

**Sent:** Tuesday, May 21, 2019 9:39 AM

**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>

**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>

**Subject:** RE: OFCCP v. Oracle

Hi Laura,

I'm following up on our discussion from yesterday afternoon. Per our conversation, I thought I would hear from you last night, and so am simply checking on the status of things.

Thanks,

Erin

---

**From:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>  
**Sent:** Monday, May 20, 2019 3:39 PM  
**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>  
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**Subject:** RE: OFCCP v. Oracle

Erin,

I will call you then.

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

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**From:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>  
**Sent:** Monday, May 20, 2019 3:33 PM  
**To:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>  
**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>  
**Subject:** RE: OFCCP v. Oracle

Laura,

I am in receipt of your letter. Suffice it to say, I disagree with much of its content, including the repeated allegations that Oracle and Orrick have violated the rules of professional conduct, and the assertion that the motion we filed on Friday was premature. Nevertheless, I'm willing to discuss and consider your suggestion that OFCCP will send a corrective notice. I am available today at 4:30 and you can reach me at 415.773.5969.

Thanks,

Erin

**Erin M. Connell**  
Partner

Orrick  
San Francisco   
T +1-415-773-5969  
M +1-415-305-8008  
[econnell@orrick.com](mailto:econnell@orrick.com)



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---

**From:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>  
**Sent:** Monday, May 20, 2019 2:44 PM  
**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>; James, Jessica R. L. <[Jessica.james@orrick.com](mailto:Jessica.james@orrick.com)>  
**Cc:** McAllister, Hailey - SOL <[mcallister.hailey@DOL.GOV](mailto:mcallister.hailey@DOL.GOV)>; Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>  
**Subject:** OFCCP v. Oracle

Please see the attached correspondence.

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

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In the course of our business relationship, we may collect, store and transfer information about you. Please see our privacy policy at <https://www.orrick.com/Privacy-Policy> to learn about how we use this information.

As a follow up to the April 4, 2019 correspondence sent by my office, we are again writing to you about the lawsuit that the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") brought and is pending against Oracle: OFCCP, U.S. Dept. of Labor v. Oracle America, Inc., OALJ Case No. 2017-OFC-00006. In the lawsuit, OFCCP alleges that since 2013, Oracle engaged in compensation discrimination against Asian, Black, and female employees in the Product Development, Support, and Information Technology job functions at Oracle's Redwood Shores headquarters. Oracle denies these allegations. They have not been proven in court or in any judicial forum, meaning there has been no determination that Oracle engaged in any discriminatory conduct or that any lost wages are due.

The case is scheduled to go to hearing before an administrative law judge in December 2019. OFCCP seeks relief for current and former female, Black, and Asian Oracle employees, including managers, in the Product Development, Support, and Information Technology job functions. ~~To remedy these violations~~As a remedy, OFCCP seeks to recover back wages it claims were lost as a result of the alleged discrimination. OFCCP also seeks changes to Oracle's compensation practices going forward, including adjustments in pay rates ~~to correct for~~in the event it proves the existence of gender and/or race discrimination reflected in pay rates. If OFCCP wins its lawsuit and money is awarded to former and current Oracle employees, you will be notified at that time, regardless of whether you respond to this correspondence.

~~In the lawsuit brought by OFCCP, Oracle's interests are adverse to the interests of the Oracle employees who may receive lost compensation or have their pay increased if OFCCP wins the lawsuit. If Oracle or its attorneys contact you to ask questions in connection with this lawsuit (or a similar case called Jewett v. Oracle), you are not required to talk to them, although you are free to do so. Oracle's attorneys do not and cannot represent you because they represent Oracle, whose interests are adverse to the female, Black and/or Asian employees for which OFCCP's action seeks to recover back wages and increased pay moving forward. It is up to you whether you provide information to Oracle or its attorneys, and there will be no negative consequences to you if you do not agree to any request for an interview or request for information by Oracle concerning these claims of alleged gender and race pay discrimination.~~

~~OFCCP-You may have received recent correspondence sent by my office on behalf of the U.S. Department of Labor may have reached out to you in recent months regarding this lawsuit. You are not required to respond to that correspondence in order to recover any money in this case. You are not required to respond to that correspondence at all, and are not required to talk to OFCCP or any attorneys from the U.S. Department of Labor, although and you are free to provide information to OFCCP and its attorneys that relates to this lawsuit if you choose to do so. You, and may agree to participate in the lawsuit on behalf of either Oracle or OFCCP, including testifying at the hearing later this year, without negative consequences from Oracle or from OFCCP. Federal law prohibits any federal contractor from discouraging, intimidating, or preventing any employee from providing information to the government, including providing testimony to the administrative law judge.~~

If you have any questions about the lawsuit or wish to provide information to OFCCP, you may contact the Department of Labor's Oracle witness line at (213) 894-1591. ~~You may also contact the Oracle witness line if you believe you Oracle treated you negatively after you provided information to OFCCP or~~

~~asserted your rights under Labor laws.~~ If no one picks up, please leave your contact information and one of OFCCP's attorneys will return your call. You may also send an email to OFCCP's attorneys at OFCCPvOracleLitigation@dol.gov.

Alternatively, you may contact Oracle with any questions you may have at (650) 506-5200, or by sending an email to [employment\\_legal\\_us@oracle.com](mailto:employment_legal_us@oracle.com).

~~Your communications with OFCCP will be treated confidentially. Documents and orders in the lawsuit are also available at [website for the FOIA reading room.]~~

# **EXHIBIT N**



May 22, 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 May 22, 2019, we suggested a compromise to resolve the parties' disputes about their respective communications with former and current Oracle employees for whom OFCCP seeks relief in its enforcement action. As we said in my May 22, 2019 letter to you, we suggested a letter that would include "some of the statements Oracle seeks in a letter to the protected class, which would also include the disclosures we seek – advising members of the protected class that neither Oracle nor Orrick represent the protected class in this action. Instead, it is OFCCP that is representing the interests of the protected class. In addition to disclosure of Oracle's adverse interest, an assurance that any conversations are NOT mandatory, no class member should feel compelled or required to talk to Oracle or its counsel, and Oracle agrees that no class members should be discouraged or preventing from freely talking to the government." We also emphasized, "What we are looking from you and Oracle is a commitment to stop engaging in these prohibited activities and to take steps to ensure that the protected class understands their rights and is not compromised by statements taken from them in a coercive fashion." During a telephone call later Monday afternoon, we agreed that OFCCP would send a proposal to Oracle in an attempt to resolve the parties' disputes about communications with the Oracle employees.

We drafted a proposed notice to be sent to all current and former Oracle employees for whom OFCCP seeks relief. You responded with a counter-proposal, which only addresses Oracle's issues with OFCCP's letter (which we believe are frivolous), while failing to address OFCCP's concerns with Oracle's communications with the employees for whom OFCCP seeks relief. Importantly, Oracle refused to send the notice to all members of the protected class, or provide the contact information that would allow OFCCP to do so. This prevents all interested employees from receiving information about the case and Oracle and its counsel's role in it. You deleted a statement notifying employees about their rights under anti-retaliation laws. And, you

Erin M. Connell  
May 22, 2019  
Page 2

deleted statements informing employees that their interests in this enforcement action are adverse to Oracle's.

Since Oracle refuses to be candid with the protected class that Oracle's interests are *adverse* to theirs in this action, and refuses even to advise employees that federal law protects their rights to participate freely in this proceeding, Oracle's counter-proposal fails to address our concerns. We explored Oracle's positions during our call yesterday afternoon, and you made it clear that Oracle would not change its position on these key issues. Given Oracle's positions, it is apparent we will be unable to reach a compromise. We are now at an impasse and will file a motion seeking a protective order, injunctive relief and/or for leave to amend our complaint to add a claim for violation of 41 CFR 60-1.32.

Sincerely,



Laura C. Bremer  
Senior Trial Attorney

# **EXHIBIT O**



May 22, 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*

Dear Laura:

I write in response to your letters dated May 20 and May 22, 2019. Suffice it to say, we disagree with most of the assertions contained therein, and believe they misrepresent the events at issue. Moreover, you have not met and conferred telephonically about your threatened motion, as required by Judge Clark. Indeed, through your motion, it appears OFCCP is attempting to deflect attention away from OFCCP's own misleading communications, and to prevent Oracle from speaking to its own managers and employees as part of its defense in this case.

As laid out in the Motion to Correct OFCCP's Misleading Communications to Oracle's Employees that we filed last Friday, the parties' present disputes regarding contacts with current and former Oracle employees began on April 29, 2019, when Oracle raised concerns about the misleading letter OFCCP has been sending to current and former Oracle employees. OFCCP responded by making, for the first time, multiple inflammatory and unfounded accusations that Oracle has been engaged in coercive communications with its own employees, based on objections to evidence filed in the pending *Jewett* litigation in California state court. As we've explained multiple times (including in our responses to those objections to evidence), the assertion by *Jewett* counsel that under Professional Rule of Conduct 1.13(f) counsel for Oracle had an obligation to explicitly tell Oracle employees when interviewing them that Oracle's interests are adverse to theirs is baseless. The plain language of the rule does not state any such obligation – instead, in circumstances where the employer's counsel knows or should know that the individual's interests are or might become adverse to the employer, counsel for the employer must inform the employee as to the identity of the lawyer's client. The text of this section of the rule states:

1.13 (f) 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.

Here, as you know from the email on which you rely, counsel for Oracle plainly did that, and also gave the employees sufficient information that communicated to them that their interests were potentially adverse to Oracle, and that any information they provided could be used in Oracle's

**Orrick, Herrington & Sutcliffe LLP**

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Laura Bremer  
May 22, 2019  
Page 2

defense. *See* March 22, 2019 email from Kathryn Mantoan to John Mullan. Indeed, the declarations signed by these employees each confirm that the declarants understood that counsel did not represent them, that their participation was voluntary, and that they would be class members if plaintiffs' certification motion was granted: "I know that I will be a class member if the case is allowed to proceed as a class action. I understand that the attorneys who interviewed me and assisted in preparing this declaration for me represent Oracle and do not represent me. Before signing this declaration, I read it carefully to make sure it was accurate, and it is. I was not pressured or required to sign this declaration. I am providing this declaration voluntarily."

Accordingly, because counsel for Oracle (Orrick) gave every putative class member in *Jewett* with whom they spoke appropriate and comprehensive admonitions before speaking with them, as confirmed by the declarants themselves, the situation here is nothing like in the cases on which you purport to rely. During our telephone call on Monday, as well as in your May 20 letter, you assert that substance aside, the admonitions given were insufficient because they were not sent to employees in writing ahead of the interviews, but instead were provided orally over the telephone. Tellingly, however, you cite no authority for this assertion, plainly because none exists.

In any event, because the communications and declarations at issue relate to the *Jewett* matter, and because Oracle has never relied upon or introduced those declarations into evidence here, the communications on which you base your inflammatory allegations are beside the point. Likewise, there is no obligation to disclose information regarding this matter when speaking to employees about the *Jewett* matter, because the purpose of the interviews was to gather declarations for use in *Jewett* and not here.

You also make the baseless assertion that Oracle (and/or Orrick) takes the position that we represent current and former Oracle employees in connection with this action, in violation of Rule 1.7(d)(3). Yet you cite only the March 22, 2019 email referenced above as "support" for this assertion. That email, which is attached here, says no such thing. Instead, it simply acknowledges that when counsel for Oracle speaks to its current managers in their managerial capacity (*i.e.*, about the employment decisions that are at issue in ongoing litigation and for which Oracle would be liable if they are proved to be discriminatory), those communications are protected under "the umbrella of attorney-client privilege." As we explained to you on the phone yesterday, in those circumstances, we would be speaking to those managers as if they *are* Oracle, whom we obviously do represent.

You further assert that Oracle's Motion to Correct OFCCP's Misleading Communications to Oracle's Employees is itself a coercive act that seeks to chill employees' communications with OFCCP. By that logic, anything Oracle does to defend itself in this action is coercive. The only relief requested is that OFCCP be directed to send a corrective notice to the employees to whom the original misleading letter was sent, or be barred from introducing in evidence any information



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gathered pursuant to it. The motion is not directed at Oracle employees in any way, and your letter does not explain how it could be coercive or chill communications.

Indeed, it is ironic that you accuse Oracle of engaging in bad faith motion practice when in the same May 20 letter in which you make that assertion, you demand that Oracle withdraw its motion in less than 24 hours' time, and threaten that if Oracle does not acquiesce to OFCCP's demand, OFCCP will file a motion to amend its complaint to add a violation of 41 CFR 60-1.32 and to seek a preliminary injunction apparently seeking to prohibit Oracle and its counsel from speaking to Oracle's own employees. You also insist that Oracle "never forwards this filing [*i.e.*, its pending motion] to the OALJ FOIA library," even though you know Judge Clark has ordered the parties to forward all filings to the OALJ FOIA library within four business days. Setting aside the impropriety of OFCCP's insistence in this regard, your letter conveys that OFCCP's real concern is that Oracle's motion regarding OFCCP's misleading communication to Oracle employees "never" becomes part of the public record.

Your letter of today, May 22, contains similar false allegations and misrepresentations. Contrary to the characterization of our communications this week, many of which are laid out in emails and therefore speak for themselves, Oracle has not "refuse[d] to be candid" with its own employees. As you know, the relief sought in our pending motion is a "corrective notice" that would go to the individuals to whom OFCCP sent its misleading April 4 letter, and the purpose would be to clarify some of the letter's misstatements. You proposed that Oracle should withdraw that motion, and instead Oracle and OFCCP would send a new, joint letter to *all* current and former Oracle employees who work or have worked in Oracle's Product Development, IT or Support job functions at Oracle's headquarters location from January 1, 2013 to the present (not merely those who received OFCCP's prior letter), and that, among other things, it would state to Oracle's current and former employees that Oracle's interests are adverse to theirs and that OFCCP represents their interests. As we already have explained, we disagree that Oracle's interests are "adverse" to its current and former employees, particularly managers who make the very pay decisions that OFCCP claims are discriminatory. Moreover, both sides agree that the plaintiff in this case is OFCCP, and OFCCP does not represent Oracle employees. Accordingly, the party adverse to Oracle is OFCCP – not Oracle's employees. That Oracle chooses not to affirmatively send a letter like the one OFCCP suggests is not some type of nefarious act aimed at coercing employees. As we have assured you, if and when Oracle or its counsel chooses to speak to any employee about this litigation, it will give appropriate admonitions at that time.

And, while it is a relatively minor point given the much larger problems contained in your letters, it is incorrect that Oracle's counter-proposal "only addresses Oracle's issues with OFCCP's letter," and fails to address OFCCP's purported concerns about Oracle's contacts with employees. To the contrary, the counter-proposal contained many of the statements OFCCP requested, including that Oracle's counsel does not represent them, that they are not obligated to speak to Oracle or its



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counsel if they are contacted, and that there will be no negative consequences if they choose not to speak to Oracle or its counsel. It also is untrue that I “made it clear that Oracle would not change its position” with respect to including a statement notifying employees about their rights under anti-retaliation laws. I explicitly invited you to propose a revised draft, and specifically said we would consider language on that point.

Should you choose to abide by Judge Clark’s order and meet and confer telephonically regarding OFCCP’s motion, please let me know.

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

**From:** Mantoan, Kathryn G. [mailto:kmantoan@orrick.com]  
**Sent:** Friday, March 22, 2019 12:07 PM  
**To:** John T. Mullan <jtm@rezlaw.com>; Connell, Erin M. <econnell@orrick.com>; Perry, Jessica R. <jperry@orrick.com>; Grundy, Kayla Delgado <kgrundy@orrick.com>; Fleetwood, Carl W. <cfleetwood@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>  
**Cc:** Jim Finberg <jfinberg@altshulerberzon.com>; Eve Cervantez <ecervantez@altshulerberzon.com>; Erin M.. Pulaski <emp@rezlaw.com>; William <wpm@rezlaw.com>  
**Subject:** RE: Oracle's communications with putative class members

John:

I write to address your request that Oracle "supplement" its production in response to Plaintiffs' RFP No. 44. As an initial matter, we are puzzled by that request, as there is no duty to supplement discovery responses under the California Discovery Act. *See Biles v. Exxon Mobil Corp.*, 124 Cal. App. 4th 1315, 1328 (2004) ("no such duty" to supplement discovery responses under California law). Oracle completed its collection and production in response to RFP No. 44 last September, pursuant to the agreed-upon narrowing of RFP No. 44 that you describe below.

Moreover, your request indiscriminately appears to seek 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. Such a request sweeps too broadly and clearly touches on privileged communications.

Our understanding from Jim is that Plaintiffs are interested in a more limited issue -- namely, knowing what (if any) information was given to putative class members whose declarations Oracle submitted about the nature of the case and their interests. That request is, of course, far more narrow than what your email appears to seek. I am hopeful that the information below will address the heart of your request.

In connection with its class certification motion, Oracle tendered declarations from ten putative class members (Adams, Dorey, Guerrero, Kling, Lundhild, Perrin, Porobic, Swenson, Tahmasebi, Wong, and Yang Doyel). I can confirm that Orrick provided information to each of these women orally at the start of the interviews we conducted regarding the nature of the allegations in this case (that Oracle pays women less than men for equal or substantially similar work), as well as information regarding the following:

- Oracle denies those allegations;
- Plaintiffs are seeking to bring the case as class action on behalf of themselves and current and former female employees in California in Information Technology, Product Development, or Support roles;
- the Orrick attorney conducting the interview represents the Company, not the employee, and that the employee is free to consult an attorney of her choosing;

- the interview is completely voluntary and she could choose whether to participate or to end the interview at any time; and
- if she chose to proceed, information she provides might be shared with and used by Oracle for the purpose of defending the Company in the lawsuit.

We trust that this information addresses Plaintiffs' request for additional information. Should you wish to confer further, though, please let me know when we might arrange a call to discuss.

Thank you,  
Katie

**Kathryn G. Mantoan**  
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**From:** John T. Mullan [<mailto:itm@rezlaw.com>]  
**Sent:** Friday, March 8, 2019 11:53 AM  
**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>; Mantoan, Kathryn G. <[kmantoan@orrick.com](mailto:kmantoan@orrick.com)>  
**Cc:** Jim Finberg <[jfinberg@altshulerberzon.com](mailto:jfinberg@altshulerberzon.com)>; Eve Cervantez <[ecervantez@altshulerberzon.com](mailto:ecervantez@altshulerberzon.com)>; Erin M.. Pulaski <[emp@rezlaw.com](mailto:emp@rezlaw.com)>; William <[wpm@rezlaw.com](mailto:wpm@rezlaw.com)>  
**Subject:** Oracle's communications with putative class members

Erin & Katie,

Following up on our discussion yesterday morning regarding Oracle's communications with putative class members; Plaintiffs sought such communications in their RFP 44 ("All DOCUMENTS constituting or RELATING TO any COMMUNICATION with any COVERED EMPLOYEE regarding this lawsuit (Case No. : 17CIV02669), including but not limited to any communications with any Covered Employee regarding whether or not to opt out in response to the *Belaire* Notice mailed in this case on January 25, 2018). Following meet and confer, the parties agreed that you would produce non-privileged communications between putative class members and counsel, Human Resources employees, and Vice-Presidents related specifically to the *Jewett v. Oracle America, Inc.* lawsuit counsel. See June 22, 2018 letter from Kathryn G. Mantoan to James M. Finberg.

We request that you supplement your production to RFP 44 by producing more recent responsive communications, including those pertaining to your interviews with putative class members.

Thank you,  
John

---

JOHN T. MULLAN | PARTNER  
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