UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. ORACLE AMERICA, INC., Defendant.	OALJ Case No. 2017-OFC-00006 OFCCP No. R00192699 **DEFENDANT ORACLE AMERICA INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DEPOSITION OF ORACLE AMERICA, INC. PURSUANT TO 41 C.F.R. § 60-30.11 AND FEDERAL RULE OF CIVIL PROCEDURE 30(b)(6)**

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MAY 24 2019

Office of Administrative Law Judges
San Francisco, Ca

4159-0832-4124

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I. INTRODUCTION

Oracle recently produced deposition transcripts and exhibits from the private class action *Jewett v. Oracle America, Inc.*, California Case No. 17-CIV-02669, because OFCCP represented that it would take this testimony into account and narrow the scope of its 30(b)(6) depositions in this action. OFCCP failed to uphold its agreement and now seeks to compel testimony on compensation topics that are thoroughly addressed in the *Jewett* "persons most knowledgeable" ("PMK") depositions, despite its assurances—and its repeated arguments made before this Court—that obtaining the *Jewett* transcripts would result in expedited and efficient discovery in this action. OFCCP also seeks to improperly obtain deposition testimony regarding the substance of Oracle's Affirmative Action Program ("AAP") in violation of the Court's May 13, 2019 Order. OFCCP should be held to its agreement to narrow its deposition requests, and should not be allowed to obtain discovery that flies in the face of the Court's Order. As explained herein, the Court should deny OFCCP's Motion to Compel Deposition of Oracle ("Motion").

First, as to the 30(b)(6) compensation topics (11, 12, and 30), OFCCP represented that it would narrow these topics based on Oracle's production of the *Jewett* PMK transcripts, which contain testimony addressing many of the compensation issues raised in OFCCP's 30(b)(6) topics, including: topics 11(a)-(d) (the development of budgets, the setting and application of salary grades and salary ranges, the criteria considered in setting, awarding, or changing employee compensation, and the setting of compensation for employees of companies acquired by Oracle); topic 12(b) (the impact of transfers and/or promotions on employee compensation); and topic 30 (Oracle's use of prior pay to set pay for new hires). OFCCP's Motion does not dispute that the testimony in the produced *Jewett* transcripts overlaps with its 30(b)(6) topics. Nevertheless, OFCCP has rejected Oracle's request to narrow the compensation topics, despite previously agreeing to do so. Furthermore, OFCCP falsely claims that Oracle refused to produce a witness on these topics, despite Oracle's offer to produce witnesses for portions of each.

OFCCP's Motion as to compensation topics 11, 12, and 30 is also premature. The Court's Pre-Hearing Order requires the Parties to meet and confer in good faith prior to seeking the Court's intervention. *See* February 6, 2019 Pre-Hearing Order. Yet on the same day OFCCP filed its Motion, OFCCP also sent a letter stating that the Parties would discuss Oracle's narrowing request the following Monday, clearly moving to compel before the Parties had concluded their meet and confer. OFCCP should not be permitted to ignore its prior commitment or its meet-and-confer obligations. To the extent the Court is inclined to grant any relief, it should order OFCCP to narrow compensation topics 11, 12, and 30 so they are tailored to exclude topics covered by testimony already contained in the produced *Jewett* PMK transcripts.

Second, OFCCP's so-called "Recordkeeping" topics (9, 18, 19, 26, and 27) improperly seek testimony on the substantive merits of Oracle's AAP, in violation of the Court's March 13, 2019 Order Filing Revised Second Amended Complaint. That Order clearly stated that OFCCP's AAP claims were limited to whether Oracle maintained and made available certain documentation of its AAP to OFCCP. The Court further held that OFCCP had not pled a deficiency claim relating to the compliance of Oracle's AAP with substantive regulatory requirements. OFCCP's AAP-related topics seek testimony on exactly those requirements, as well as testimony on recordkeeping unrelated to records actually required to be made available to OFCCP. Additionally, topic 27 is now moot following the Court's April 30, 2019 Order Adopting Consent Findings. Accordingly, the Court should deny OFCCP's Motion as to these AAP topics.

Third, OFCCP should not be allowed to obtain testimony for the period beyond the Parties' mutually agreed-upon document discovery cutoff date of January 18, 2019. Instead, the time period covered by OFCCP's 30(b)(6) depositions should coincide with the document discovery cutoff. Failure to do so could create difficulties arising out of questions about documents postdating the cutoff. Furthermore, OFCCP may seek to use such questions as a

rationale to reopen document discovery. OFCCP's Motion should be denied as to the temporal scope of the depositions.

Since the Court lifted its stay in this action on January 22, 2019, OFCCP has consistently and disingenuously sought to portray Oracle as a bad actor in its correspondence and motion practice in an apparent effort to construct an inaccurate picture of Oracle's efforts to respond to OFCCP's discovery requests. As explained below, Oracle has not engaged in a "strategy of delay and obstruction," (Motion, at 1) but has raised legitimate objections and concerns to OFCCP's proposed 30(b)(6) topics. Oracle has tried to work through these issues during meet-and-confer, to no avail. For these reasons, OFCCP's Motion should be denied.[1]

II. RELEVANT FACTUAL BACKGROUND

A. Oracle Produced *Jewett* Deposition Transcripts Based on OFCCP's Representation That Doing So Would Narrow and Streamline Discovery

For several months, Oracle has worked tirelessly to respond to OFCCP's voluminous discovery requests—including over 230 requests for production, 45 requests for admission, and 19 interrogatories—which included OFCCP's demand that Oracle produce all deposition transcripts of witnesses deposed in the *Jewett* litigation. Declaration of Jonathan Riddell in Support of Defendant Oracle America, Inc.'s Opposition to Plaintiff's Motion to Compel Deposition of Oracle America, Inc. Pursuant to 41 C.F.R. § 60-30.11 and Federal Rule of Civil Procedure 30(b)(6) ("Riddell Decl."), ¶ 3. Oracle produced deposition transcripts and exhibits for four *Jewett* PMK witnesses. *Id.*, ¶¶ 4, 6, Ex. D (April 5 Giansello Letter). Oracle agreed to do so strictly because OFCCP committed to first reviewing the *Jewett* PMK transcripts and narrowing its 30(b)(6) topics to avoid duplicating subjects covered in those transcripts. *See id.*, ¶¶ 4-5, Ex. C (March 26 Garcia Email) ("As stated previously, after we review [the *Jewett*

[1] It is not clear what OFCCP means when it states that "[t]he topics expressly identified in this motion encompass all additional topics to which Oracle also objects . . . ." Motion, at 5 n.4. As OFCCP has only requested an order compelling testimony on certain, specifically identified topics, and does not appear to raise arguments on its other 30(b)(6) topics. This Opposition addresses only the topics that are the subject of OFCCP's Motion. Any request by OFCCP for an order on topics not identified in its Motion is improper.

PMK transcripts], we may determine that it is unnecessary to depose some of the witnesses, or may choose to limit our questioning. Thus, providing the depositions will likely lead to efficiencies for both parties."); *see also id.*, Ex. B (February 21 Garcia Email) ("[OFCCP's] request for [*Jewett*] depositions would also render discovery in this action more efficient, as it may eliminate the need for us to duplicate depositions.").

B. OFCCP Did Not Uphold Its Agreement to Narrow Its Deposition Notice

Oracle informed OFCCP that it would produce the *Jewett* PMK transcripts and exhibits by April 5, 2019, and did produce them on April 5 as promised." *Id.*, ¶ 6, Ex. C (March 29 and April 2 Giansello Emails), Ex. D (April 5 Giansello Letter). That same day, OFCCP served its Notice of Deposition hours before receiving the *Jewett* PMK transcripts and despite acknowledging that the transcripts were forthcoming. *Id.*, ¶ 7; Declaration of Jeremiah Miller in Support of OFCCP's Motion to Compel the Deposition of Oracle America, Inc. Pursuant to 41 C.F.R. § 60-30.11 and Federal Rule of Civil Procedure 30(b)(6) ("Miller Decl."), ¶ 4, Ex. D (OFCCP's Amended Notice of Deposition). Oracle timely objected, agreeing to produce a witness as to some topics and seeking to meet and confer on others. Riddel Decl., ¶ 8; Miller Decl., Ex. E (Objections to OFCCP's 30(b)(6) Deposition Notice).

In the meet-and-confer discussions and correspondence that followed, OFCCP repeatedly misrepresented the Parties' positions and continued to rebuff Oracle's requests to narrow its 30(b)(6) topics based on the *Jewett* PMK transcripts. OFCCP claimed, falsely, in its purported meet-and-confer "Memorialization Letter" that Oracle had refused to produce a witness to testify on the compensation topics. *Id.*, ¶¶ 9-11, Ex. E (April 19 Song Letter). OFCCP further stated that it would not narrow its 30(b)(6) topics despite acknowledging that it had not even finished reviewing the *Jewett* PMK transcripts. *Id.*, ¶ 11, Ex. E at 1 (April 19 Song Letter). Oracle responded the next business day to correct the factual inaccuracies in the April 19 Song Letter. *Id.*, ¶¶ 12-15, Ex. F (April 22 Riddell Letter). Once in possession of the *Jewett* PMK transcripts, OFCCP refused to honor its agreement to review the *Jewett* PMK testimony and limit the scope

of its 30(b)(6) Notice accordingly. OFCCP instead demanded that Oracle prepare witnesses for all of the noticed topics, including those explained in the *Jewett* PMK testimony. *Id.* ¶ 10.

C. OFCCP Prematurely Moved to Compel Before The Parties Finished the Required Meet and Confer Process

After receiving Oracle's April 22 letter, OFCCP delayed further meet and confer discussions until informing Oracle, on May 2, 2019, that it had completed its review of the *Jewett* PMK transcripts and would not agree to limit its 30(b)(6) topics in any way. *Id.*, ¶ 19, Ex. I (May 2 Santos Letter). OFCCP also failed to address a number of points raised in Oracle's April 22 letter. *Id.* Oracle responded in writing on May 8, again raising OFCCP's change in course and failure to provide an explanation, and specifically requesting that OFCCP evaluate the *Jewett* PMK testimony and identify areas where it desired further testimony to clarify or elaborate on compensation topics 11, 12, and 30. *Id.*, ¶ 20, Ex. J (May 8 Riddell Letter). Oracle further requested that OFCCP respond regarding its availability on May 10 or May 13, 2019. *Id.*

On May 10, OFCCP responded in writing as to certain issues but failed to indicate if it was willing to honor its agreement with respect to the *Jewett* PMK transcripts. *Id.*, ¶ 22, Ex. K (May 10 Song Letter). Counsel for OFCCP stated, "the remaining issues raised in your letter will be addressed at our meet and confer on May 13, 2019." *Id.*, ¶¶ 22-23, Ex. K at 1 (May 10 Song Letter). Instead, OFCCP filed its Motion that same day, without further meet and confer.[2] *Id.*, ¶ 24.

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[2] Given that OFCCP apparently already had its Motion drafted and ready to file, with over 175 pages of exhibits attached to OFCCP's Miller Declaration, it seems unlikely that it had any intent to exhaust meet and confer discussions regarding 30(b)(6) testimony before moving to compel.

III. ARGUMENT

A. Oracle Should Not Be Compelled to Produce a Witness on Compensation Topics Already Covered in the Produced *Jewett* Transcripts

1. OFCCP Should Be Held to Its Agreement to Narrow Topics 11, 12, and 30 Based on the Produced *Jewett* Transcripts

Consistent with OFCCP's assertion that it "has no intention of seeking information already revealed in the *Jewett* depositions," Motion, at 4, the Court should hold OFCCP to its agreement to narrow the scope of compensation topics 11, 12, and 30. Specifically, several of the topics noticed in OFCCP's 30(b)(6) Notice overlap with material discussed in the *Jewett* PMK topics, including: topics 11(a)-(d) (the development of budgets, the setting and application of salary grades and salary ranges, the criteria considered in setting, awarding, or changing employee compensation, and the setting of compensation for employees of companies acquired by Oracle); topic 12(b) (the impact of transfers and/or promotions on employee compensation); and topic 30 (Oracle's use of prior pay to set pay for new hires). OFCCP's Motion does not dispute that the testimony in the produced *Jewett* transcripts overlaps with its 30(b)(6) topics. To the contrary, it acknowledges the overlap. *See, e.g.*, Motion, at 10, 11 n.13, 14 (stating it will "streamline depositions based on the prior testimony in *Jewett*").

Indeed, OFCCP claimed in its recent Memorandum in Support of Motion to Compel *Jewett* Documents that "Prompt production of the deposition transcripts . . . will facilitate efficient discovery in this matter and assist the parties to meet the discovery cutoff and hearing schedule established by this Court." April 22, 2019 OFCCP Motion to Compel *Jewett* Documents, at 1; *see also* May 16, 2019 Reply in Support of Plaintiff's Motion to Compel *Jewett* Documents, at 2 (asserting it has "streamlined discovery and reduced time spent in depositions" and "has done (and will continue to do) *everything* in its power to create efficiency in the discovery process") (emphasis added). To be clear, this is exactly what Oracle has been asking of OFCCP in its meet and confer – a commitment that OFCCP will not ask about issues that

these witnesses have already testified to (in some cases multiple times). To date, OFCCP has offered only non-committal, illusory statements that it "does not intend to be duplicative." Motion, at 10. Such assurances do nothing to reduce the burden on Oracle or its witnesses, who must still prepare for the likelihood that OFCCP will choose to retread ground already covered in the produced transcripts. If it is unwilling to commit to narrowing its topics in an enforceable way, then its representation to the Court is also illusory.[3]

OFCCP misleadingly treats Oracle's request that OFCCP limit its compensation topics as if it were made in a vacuum, blustering about the prejudice OFCCP would allegedly suffer (which is nonexistent), while completely ignoring that Oracle's voluntary production was expressly based on OFCCP's commitment to use those transcripts to narrow its 30(b)(6) topics. Oracle is not inventing an objection to these topics out of whole cloth; it is objecting that OFCCP should be held to its commitments.[4] For the same reason, OFCCP's reliance on *Am. Airlines, Inc. v. Travelport Ltd.*, No. 4:11-CV-244-Y, 2012 WL 12884824, at *2 (N.D. Tex. Sept. 19, 2012) to argue that it would be prejudiced if unable to "make its own decisions on which questions to ask and how, which exhibits to ask about and how, and whether to seek clarification or elaboration from witnesses on specific answers" is misplaced. Motion, at 10. *American Airlines*, an unreported court order out of the Northern District of Texas, is entirely distinguishable because the parties in that case did not have an agreement about using prior testimony to facilitate more efficient discovery in the litigation.

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[3] OFCCP also asks the Court to issue an order requiring the parties to specify a time within three days to meet and confer regarding any request. *See* Motion, at 1 n.1. In addition to being vague and unclear, OFCCP's request ignores the realities of litigation, wherein client commitments, massive document productions, witness availability, motion practice, responses to other outstanding requests, and any number of other factors may limit counsel's availability. Moreover, OFCCP's request is particularly strident given that OFCCP itself has at times been unable to respond to Oracle's communications for much longer than three days.

[4] OFCCP makes much of the fact that Oracle has contested the relevance of testimony from the *Jewett* case. In support, it cites a statement in a letter reserving Oracle's rights on the relevance issue, and a statement in Oracle's opposition to a separate motion to compel that Oracle believes the transcripts are arguably relevant. *See* Motion, at 3. Neither is relevant to the instant Motion. Oracle continues to have doubts about the relevance of much of the testimony in *Jewett* to this matter; nevertheless, OFCCP (knowing Oracle's position) specifically stated it would narrow its deposition topics in exchange for Oracle producing the transcripts.

Since OFCCP has represented that it has no intention of seeking information revealed in the *Jewett* PMK depositions (Motion, at 4), it should have no issue identifying information that was already revealed in the depositions to appropriately narrow its 30(b)(6) topics. Thus, should the Court find it appropriate to grant relief as to the compensation topics, it should order OFCCP to narrow its 30(b)(6) Notice as to topics 11, 12, and 30 based on the *Jewett* PMK testimony.

2. Oracle Has Not Refused to Produce a Witness on Topics 11, 12, and 30, and Has Otherwise Properly Objected to These Topics

Despite OFCCP's aggressive rhetoric, Oracle has *not* refused to produce a witness on topics 11, 12, and 30. *See* Motion, at 7; Riddel Decl. ¶¶ 12-15, Ex. F at 6-9 (April 22 Riddell Letter). To the contrary, Oracle informed OFCCP at the Parties' first meet and confer that it would produce a witness as to portions of each of the compensation topics but that Oracle wanted OFCCP—consistent with its agreement—to narrow the scope of its topics so that Oracle's witness(es) need not testify on duplicative subject matter. *Id.* OFCCP's decision to cast Oracle's legitimate objections as a complete refusal is hyperbole.[5] To be sure, Oracle agreed to produce witnesses as follows:

Topic 11. Oracle agreed that, at a minimum, subtopics 11(e) and (f) contained new areas of discovery and that it would produce a witness to testify to those and other issues agreed upon by the Parties during meet and confer. *Id.*, ¶ 13, Ex. F at 6-7 (April 22 Riddell Letter).

Topic 12. Oracle properly objected as to topic 12, which covers policies, practices, and procedures in "assigning" workers and the impact of those "assignments" on their compensation, because Oracle does not "assign" workers to particular jobs or products. *Id.*, ¶ 14, Ex. F at 7 (April 22 Riddell Letter) (explaining same). As a result, there are no policies, practices, or procedures regarding the "assigning of workers . . ." to particular jobs or products as the

[5] With respect to these compensation topics, OFCCP makes the incredible claim that "Oracle remarkably seems to be taking the position that, contrary to its obligations as a federal contractor, it has not established any company-wide compensation policies and practices aimed at implementing the steps it promised to take to prevent discrimination in its Affirmative Action Plan (AAP) . . ." Motion, at 2. Put bluntly, this is a completely baseless reading of Oracle's objections, and it is unsurprising that OFCCP includes no supporting citation to a statement by Oracle supposedly asserting this position. *Id.*, at 3 (citing only Oracle's AAP and Executive Order 11246).

topic purports to include. *Id.* However, because topic 12 also refers to compensation, Oracle stated *in its initial response to OFCCP* that it would produce a witness to testify to the compensation-related portions of the topic (subject to the Parties' discussions about narrowing). *Id.*; *see also* Miller Decl., Ex. E at 17-18.[6]

Topic 30. Oracle stated that it was not refusing to produce a witness as to topic 30 but wanted OFCCP to clarify what more it still needed considering Oracle had produced three *Jewett* transcripts from three different witnesses exhaustively testifying about the same subject matter. Riddell Decl. ¶ 15, Ex. F at 8-9 (April 22 Riddell Letter).

Ultimately, OFCCP knows, but obfuscates, that Oracle said it would produce a witness for portions of each of these topics. Oracle otherwise properly objected to OFCCP's Notice. For these reasons, OFCCP's Motion falls flat and should be denied as to these topics.

3. OFCCP's Motion Should Also Be Denied Because Of The Undue Burden It Would Impose on Witnesses

OFCCP's Motion should further be denied as to compensation topics 11, 12, and 30 because its 30(b)(6) Notice is unduly burdensome. OFCCP effectively ignores Oracle's position that it is burdensome to require its witnesses to prepare for and sit through repetitive depositions on subjects to which they have already testified. OFCCP cares not that deponents are real people, with their own jobs, families, and schedules.[7] Far from being a minor consideration, the range of subjects on which a witness must prepare imposes as much of a burden, if not more, than the length of the deposition itself. Moreover, this burden is incurred regardless of whether OFCCP ultimately decides, of its own accord, not to ask certain questions at the deposition.

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[6] Despite Oracle's clear and repeated explanation that Oracle does not "assign" workers to particular jobs, footnote 15 of OFCCP's Motion purposefully misreads a parenthetical describing the incorrect premise upon which topic 12 is based as a tacit admission that Oracle has had a witness testify to that premise. OFCCP is fully aware of Oracle's position on "assignments," as it was explained in Mr. Riddell's April 22 letter to counsel for OFCCP. Riddell Decl., Ex. F at 7.

[7] OFCCP's continued indifference to the costs imposed by its discovery requests has been noted by this Court. *See* Order Granting in Part and Denying in Part OFCCP's Motion to Compel Historical Data of Comparator Employees ("Historical Data Order"), at 10 n.7 (directing Parties "to consider and minimize the costs of litigation").

Oracle's request that OFCCP commit to limiting its topics to avoid duplicative subject matter is reasonable and will reduce the cost and burden for the witnesses and both Parties.

While OFCCP pats itself on the back for supposedly seeking efficiencies, its position in its Motion is to the contrary. OFCCP now has the benefit of *three* depositions for Ms. Waggoner relating to compensation issues—two PMK transcripts from the *Jewett* case in addition to OFCCP's own deposition on May 1, 2019—as well as a 30(b)(6) interview of Ms. Waggoner that OFCCP elected to take in lieu of a transcribed deposition, all of which covered compensation-related topics. Riddell Decl., ¶ 26. Moreover, OFCCP also has transcripts for the depositions of Kris Edwards and Chad Kidder that provide testimony regarding compensation. *Id.*

Furthermore, despite OFCCP's self-avowed desire to streamline discovery, OFCCP rejected Oracle's suggestion that it consider combining the 30(b)(6) and individual depositions of witnesses into a single day or consecutive days where the same witness was set to testify to both. *See* Riddell Decl., Ex. F at 9 (April 22 Riddell Letter), Ex. H (April 23 Connell Email). Specifically, OFCCP refused Oracle's request to conduct Ms. Waggoner's individual and 30(b)(6) depositions on a single day or consecutive days, and deposed Ms. Waggoner in her individual capacity only in Denver, Colorado, on May 1, 2019. Riddell Decl., ¶¶ 16-18, Exs. G (April 22 Miller Email), H (April 23 Connell Email and April 23 Miller Email). Now, OFCCP expects Oracle to fly Ms. Waggoner to San Francisco so they can depose her again, claiming it's not a matter of inconvenience, but that OFCCP is entitled to require Oracle to produce the witness in California. It goes without saying that requiring Ms. Waggoner to sit for yet another deposition on subjects she has already testified to repeatedly is unduly burdensome. Given that OFCCP boasts that it did not take its full time with Waggoner during their most recent deposition, it is unclear why they could not have combined her depositions or what more OFCCP needs to ask her (and OFCCP has repeatedly refused to say). Motion, at 10, n.11. Accordingly, OFCCP's Motion should be denied as to compensation topics 11, 12, and 30.

B. OFCCP's Motion Should Be Denied as to "Recordkeeping" Topics 9, 18, 19, 26 and 27 Because They Violate the Court's March 13, 2019 Order

1. OFCCP's Motion Should Be Denied as to Topics 18, 19, and 26 Because They Improperly Seek Testimony on the Substantive Compliance of Oracle's Affirmative Action Program

OFCCP argues that it is entitled to testimony on whether Oracle "maintain[ed] and ma[d]e available" documentation of its AAP. Motion, at 14. However, the actual language of OFCCP's topics shows that its inquiry reaches far beyond mere "recordkeeping" and into the substantive merits of Oracle's AAP, in violation of the Court's March 13, 2019 Order filing OFCCP's Revised SAC. *See* March 13, 2019 Order Filing Revised Second Amended Complaint. The Order expressly states that the Court had been "concerned" about whether OFCCP was attempting to amend its complaint to include a deficiency claim that Oracle's AAP was "inconsistent with *substantive* regulatory requirements," and that such a claim "would be problematic because it would take the litigation in a new and different direction, requiring assessing compliance with a broad swathe of requirements that were not at issue in the compliance review." March 13, 2019 Order Filing Revised Second Amended Complaint, at 2. (emphasis added). Despite the limits set by the Court's Order, OFCCP served 30(b)(6) topics that overtly target the substance of Oracle's AAP.[8]

In short, OFCCP's claim is limited to whether Oracle did or did not turn over required AAP documentation. Nothing more. Yet OFCCP's topics conspicuously demand testimony on substantive AAP requirements, including:

- Oracle's policies, procedures, and practices for fulfilling its obligations pursuant to 41 C.F.R. §§ 60-2.11 through 2.17, which define and establish the fundamental substantive requirements for AAPs. (Topic 18).

[8] As this Court has stated, "discovery is not a tool 'to develop new claims or defenses that are not already identified in the pleadings.'" Historical Data Order, at 3 (quoting Fed. R. Civ. P. 26 Advisory Committee Note to the 2000 Amendment to Subdivision (b)(1)).

- The making, keeping, and maintaining of *all* personnel or employment records to comply with *all* OFCCP regulations (Topic 19), which necessarily includes records beyond those that are required to be kept and made available to OFCCP.

- Oracle's policies, procedures, and practices related to "developing and maintaining: how [Oracle] identif[ies] or determine[s] problem areas, action-oriented programs, and internal audit and reporting systems under 41 C.F.R. §§ 60-2.17(b) through (d)" (Topic 26), which is redundant of topic 18, and by its own language seeks to examine how Oracle goes about fulfilling substantive requirements.

These topics go well beyond the mere maintaining and making available of required documentation. Indeed, they inquire into the structure, content, components, and running of Oracle's AAP and seek testimony about records beyond those actually required to be made available to OFCCP. This is precisely the kind of expansion of claims to which Oracle objected and against which the Court warned.[9] OFCCP's attempt at an end run around the Court's order should not be permitted.

2. OFCCP's Motion Also Should Be Denied As To Topic 9 Because It Attempts to Circumvent the Court's March 13, 2019 Order

Topic 9 demands testimony on Oracle's "document retention and/or destruction and computer-based record-keeping [including] all personnel or employment records made or kept by you to comply with OFCCP regulations; and includes [Oracle's] written affirmative action program and its documentation." Miller Decl., Ex. D at 6. Topic 9 is thus effectively identical to topic 19. While topic 9 also purports to extend further (to Oracle's general document and electronic recordkeeping procedures[10]), its inclusion with other AAP-related requests makes clear that OFCCP views it as another way to get at the substance of Oracle's AAP. OFCCP may

[9] OFCCP's intent to dig into the substantive merits of Oracle's AAP is apparent from the fact that it felt the need to serve numerous 30(b)(6) topics on a seemingly simple question (whether or not required records were produced). In fact, OFCCP's Notice included *twelve* topics related to Oracle's AAP (topics 9 and 17-27). That OFCCP has moved for an order to compel on only five of these topics is a tacit acknowledgment of its overreach.

[10] Oracle previously produced a witness, Lisa Ripley, to testify broadly as to Oracle's high-level document and electronic recordkeeping policies. OFCCP elected to conduct a 30(b)(6) interview of Ms. Ripley, rather than a deposition. Oracle did not produce Ms. Ripley to testify as to recordkeeping specific to Oracle's AAP. Riddell Decl., ¶ 27.

only inquire into documents actually required to be made available under AAP regulations. It does not have carte blanche to investigate "all personnel or employment records" that may have been used or considered, however minimally, "to comply" with AAP regulations.

3. OFCCP's Motion Should Be Denied as to Topic 27 Because It Is Moot Per the April 30, 2019 Order Adopting Consent Findings

Topic 27, which also seeks information beyond OFCCP's recordkeeping claims, is now moot following the entry of the Court's April 30, 2019 Order Adopting Consent Findings. That Order "resolve[d] the hiring allegations concerning Oracle's college recruitment program and the related compliance/record-keeping allegations." April 30, 2019 Order Adopting Consent Findings, at 2. As a result, there are no longer any claims relating to hiring at issue in this case, and topic 27, which cites 41 C.F.R. §§ 60-3.4 and 60-3.15 (relating to hiring and not compensation), no longer seeks information relevant to any claim in the case. Accordingly, OFCCP's Motion as to topic 27 should be denied.

C. OFCCP's Motion Should Be Denied to the Extent It Seeks Testimony Beyond the Parties' Agreed-Upon January 18, 2019 Cut-off for Document Discovery

OFCCP's deposition Notice improperly seeks testimony beyond the Parties' mutually agreed-upon document and data discovery cutoff date of January 18, 2019. Riddell Decl., ¶ 28, Ex. L (March 6 Bremer Letter). OFCCP's Motion should be denied as to any testimony that relates to any period beyond the document discovery cutoff date because it could create difficulties for the witness and for Oracle. For example, a witness could be required to review or testify regarding documents that were not produced to OFCCP because they postdated January 18, 2019. *Id.*, Ex. F at 4 (April 22 Riddell Letter). Furthermore, OFCCP may seek to use an extension of the 30(b)(6) topics to the present as a rationale to potentially reopen document discovery based on its deposition.

Oracle proposed that in addition to producing witnesses to testify through the January 18 document and data discovery cutoff, it would permit questioning of a witness on the

30(b)(6) topic(s) in their personal capacity through the date of the witness's testimony, expressly conditioned on OFCCP's agreement that it would not use such testimony to try to reopen document discovery. *See* Riddell Decl., Ex. J (May 8 Riddell Letter). Though OFCCP rejected this proposal and stated (without a counteroffer) that the Parties had "reached an impasse," *see* Riddell Decl., ¶ 22, Ex. K at 1 (May 10 Song Letter), Oracle believes that the Parties could have worked toward an agreement. However, as OFCCP has brought the matter before the Court, Oracle asks that the Court deny OFCCP's Motion, limit the temporal scope of OFCCP's 30(b)(6) topics to January 18, 2019, and make clear that OFCCP cannot use its depositions to reopen discovery to seek documents beyond the Parties' agreed-upon cutoff date.

D. OFCCP's Motion To Compel Should Be Denied Because it is Premature

Finally, OFCCP's Motion is premature. The Court's Pre-Hearing Order expressly provides that "[t]he parties must meet and confer prior to filing any Motion [and] must actually engage *in a good faith,* verbal discussion to resolve the dispute prior to seeking court intervention." Feb. 6, 2019 Pre-Hearing Order, at 3 (emphasis added). As is clear from the Parties' May 8 and May 10, 2019 correspondence, the Parties had not concluded their meet and confer with respect to several of the topics at issue in OFCCP's Motion. *See* Riddell Decl., Exs. J (May 8 Riddell Letter), K (May 10 Song Letter). Clearly, the discussion of the issue of narrowing topics in light of the *Jewett* PMK transcripts was still ongoing. Yet, instead of addressing the outstanding issues that OFCCP acknowledged in its May 10 letter, OFCCP moved to compel that same day, in violation of the Court's order that the Parties meet and confer in good faith *prior* to filing motions.[11]

While OFCCP strains to paint Oracle as intransigent, the fact remains that OFCCP has reneged on its prior agreement and made no offer of compromise whatsoever on any of the topics

[11] In footnote 2 of its Motion, OFCCP implies that Oracle should have moved the Court for a protective order. Such a motion would also be premature. As the meet and confer process is ongoing, a motion for a protective order would not have been proper (and, in fact, would violate the Pre-Hearing Order). Motion, at 5 n.2. Oracle, of course, reserves its right to seek a protective order when the Parties have actually concluded their meet and confer process.

at issue in its Motion. Instead, it has refused to budge while accusing Oracle of misconduct. Oracle, by contrast, agreed to produce documents (e.g., the *Jewett* PMK transcripts) that would assist in limiting the necessary topics for deposition and has stated that it would produce a witness to testify to portions of OFCCP's compensation-related topics, while seeking to meet and confer regarding the remaining portions. Rather than work with Oracle to address its objections and streamline discovery, OFCCP has treated the meet and confer process as a mere box to check and brought its Motion before that process had concluded. OFCCP's Motion should be denied on this ground alone.

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IV. CONCLUSION

Oracle respectfully requests that the Court deny OFCCP's Motion. Alternatively, the Court should order OFCCP to (1) narrow the scope of its 30(b)(6) Deposition Notice as to the compensation topics (11, 12, and 30) to prevent unnecessary duplication of material covered in the *Jewett* PMK testimony; (2) withdraw its improper "recordkeeping" related topics (9, 18, 19, 26, and 27), in light of the Court's March 13 and April 30, 2019 Orders; and (3) limit its deposition questions to the period of January 1, 2013, to January 18, 2019.

Respectfully submitted,

May 24, 2019

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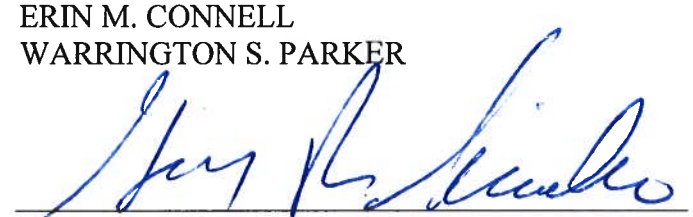

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