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**MAY 31 2019**

Office of Administrative Law Judges  
San Francisco, Ca

**UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

Plaintiff,

v.

**ORACLE AMERICA, INC.**

Defendant.

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Case No. 2017-OFC-00006

**PLAINTIFF OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR'S OPPOSITION TO DEFENDANT  
ORACLE AMERICA, INC.'S "MOTION TO CORRECT OFCCP'S MISLEADING  
STATEMENTS TO ORACLE'S EMPLOYEES"**

## I. INTRODUCTION

Oracle's motion to correct alleged coercive communications to Oracle's employees is premised on selective quotations taken out of context and misrepresentations about the letter which OFCCP sent to the female, black, and Asian current and former employees of Oracle who are the alleged victims of discrimination in this case and on whose behalf OFCCP is seeking relief. The full text (apart from the address and the signature block) of the letter at the heart of this dispute ("the letter") is below.

Dear \_\_\_\_\_

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.

Declaration of Jeremiah Miller ("Miller Decl."), Ex. B.<sup>1</sup>

Read as a whole, as Oracle concedes it must be, the letter does not reasonably state or imply that the Court has already ruled on the allegations in this case, that a fund has already been established to compensate employees, or that employees must contact the Department to recover. The letter describes the recipient as a "potential" injured employee, it states this lawsuit "alleges" discrimination and that the case "is scheduled to go to trial" in December, and it refers to damages that the Department "estimates." Although Oracle complains that the letter informed employees that "we have determined" that female, black, and Asian employees were underpaid, this is an accurate statement. The Plaintiff, OFCCP, United States Department of Labor *did* make a determination that Oracle failed to comply with its nondiscrimination obligations after the compliance review, consistent with the regulations. *See* 41 C.F.R. 60-1.20, 1.26, 1.28. Without this determination, this enforcement proceeding could not have commenced. *See* 41 C.F.R. 60-1.26(a).

Although OFCCP does not believe that the letter requires any correction, OFCCP has advised Oracle that it is willing to send a notice to employees that contains the primary information that Oracle argues was missing; specifically, that Oracle denies the allegations, that the Court has not yet ruled, and that employees are not required to contact OFCCP to become

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<sup>1</sup> The declarations of Jeremiah Miller, Laura Bremer, and Norman Garcia referenced in this brief are attached to the Plaintiff's Motion for a Protective Order filed on May 24, 2019.

part of this lawsuit. Indeed, during the meet and confer following Oracle's premature filing of this Motion, OFCCP agreed to include much of the language Oracle requested.

Of course, as described in OFCCP's Motion for a Protective Order or in the Alternative to Amend the Complaint ("Motion for a Protective Order") (filed May 24, 2019), any court-ordered notice to employees must also correct the harm caused by Oracle's own coercive communications with members of the protected classes. Employees must be informed of their right to participate in this proceeding, that Oracle's attorneys do not represent them, and that any communications with either party or their counsel are voluntary. The proposed notice included as Attachment A to OFCCP's Motion for a Protective Order contains this information. This notice should be sent to all members of the protected classes, not just the recipients of OFCCP's original letter, as Oracle has not provided complete contact information for all affected employees. In short, all of the issues that Oracle raised in this motion can be resolved by granting OFCCP's requested relief in its Motion for a Protective Order filed last week.

Oracle's proposed alternative relief—precluding the testimony of all employees who have communicated with OFCCP in response to the letter—is extreme, excessive, and disproportionate to any alleged harm (which OFCCP denies) resulting from alleged omissions in that communication. To the extent the letter caused any confusion among employees who are members of the protected classes, silencing employees who have come forward to share information with the Department would not correct any such harm; it would punish employees and interfere with their right to testify in violation of 41 C.F.R. 60-1.32.

## **II. BACKGROUND**

The letter at issue here was sent by the Office of the Solicitor to current and former employees of Oracle who are the alleged victims of discrimination in this case, and on whose

behalf OFCCP is seeking relief in this proceeding. Miller Decl., Ex. B. The Solicitor’s Office mailed the letter in April 2019, using contact information that Oracle was compelled by Judge Larsen to produce. Declaration of Laura Bremer (“Bremer Decl.”), ¶ 2. To reduce employees’ fear of contacting the Department, the letter informed employees that they are not accused of any wrongdoing by the Department and that their identity would be kept confidential unless they volunteered to testify. Miller Decl., Ex. B.

On April 29, 2019, Oracle’s attorneys wrote to the Solicitor’s Office, claiming that the letter contained “misleading, false and coercive” statements—and demanding that the Solicitor’s Office “halt all ongoing communications” with *all* members of the protected classes. Declaration of Abigail Daquiz (“Daquiz Decl.”), Ex. 1.<sup>2</sup> The next day, the Solicitor’s Office responded to Oracle’s accusations and explained in detail why its claims about the letter were inaccurate. Daquiz Decl., Ex. 2. The Solicitor’s Office also raised concerns about Oracle’s assertion that the Solicitor’s Office had acted “inconsistent” with California Rule of Professional Conduct 4.2, which prohibits attorneys from communicating with represented individuals without the consent of opposing counsel. *Id.* By invoking Rule 4.2, Oracle’s attorneys appeared to claim that they both represented Oracle *and* represented employees who are alleged victims of discrimination in this action *against* Oracle—raising concerning conflict of interest issues. *Id.*; *see also* Bremer Decl., ¶ 4.

The parties exchanged further meet and confer letters, and spoke on the phone on three occasions. Bremer Decl., ¶¶ 4-18. When the Solicitor’s Office asked about Oracle’s communications with employees who are members of the protected classes, Oracle only

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<sup>2</sup> The declaration of Abigail Daquiz referenced in this brief was attached to the Plaintiff’s Opposition to Oracle’s Second Motion to Compel Discovery, and was filed on May 17, 2019.

admitted to communications with an unspecified set of employees who had inquired about OFCCP's letter. Bremer Decl., ¶ 6. Later, the Solicitor's Office learned that Oracle's attorneys had directly contacted class members (who had not asked about OFCCP's letter) to extract information and affidavits, some of which Oracle used in its defense of claims of pay discrimination in the *Jewett* litigation. Bremer Decl., ¶ 8. The Solicitor's Office raised serious concerns about those communications, and asked Oracle to provide more information, including a list of members of the protected classes with whom Oracle and its attorneys had communicated, documents reflecting the communications, and questions asked to members of the protected classes. Bremer Decl., ¶ 8, Daquiz Decl., Ex. 4. Oracle ignored OFCCP's requests for more information. Bremer Decl., ¶¶ 6, 12.

On May 16, 2019, while the parties' meet and confer discussions about both the letter and Oracle's communications with class members were still ongoing, counsel for Oracle expressed the mistaken understanding that OFCCP would not agree to send any notice to the members of the protected classes. Daquiz Decl. at Ex. 5. The next day, Friday, May 17, before the Solicitor's Office had the opportunity to correct that misstatement, Oracle filed this Motion. Bremer Decl., ¶ 9; Declaration of Erin Connell ("Connell Decl."), Ex. J.<sup>3</sup> The following Monday, the Solicitor's Office responded to Oracle's May 16th letter and proposed a joint notice—to be sent to all members of the protected classes—which would provide accurate information about the lawsuit and address both parties' concerns about the other side's communications with employees. Bremer Decl., ¶ 13. Although the Solicitor's Office accepted many of the edits from Oracle in subsequent discussion, Oracle refused to agree to certain key

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<sup>3</sup> The Connell Declaration was filed by Oracle on May 23, 2019, in support of Oracle's Reply in support of its motion to compel.

provisions. Bremer Decl., ¶¶ 17-19. Thus, OFCCP filed its own Motion for a Protective Order last week.<sup>4</sup>

In its Motion, Oracle claims that the Solicitor's Office agreed that it does not represent members of the protected classes and that its communications with those employees are not privileged. Mot. At 2-3. This is not accurate. During the parties' meet and confer discussions, the Solicitor's Office advised Oracle that the Solicitor's Office represents the interests of those employees as the alleged victims of discrimination in this enforcement proceeding, and that its communications with those employees are therefore privileged. *See* Daquiz Decl., Ex. 4 at 2-3.

### III. ARGUMENT

#### A. Oracle violated its meet and confer obligations by filing the Motion.

Oracle filed this motion while the parties were still engaged in ongoing discussions related to each side's communications with the employees who are the alleged victims of discrimination in this lawsuit. *Supra* Part II. The Tuesday after this Motion was filed, OFCCP proposed a joint notice to be sent to all members of the protected classes that would have addressed all of Oracle's concerns about the supposed deficiencies in the letter from the Solicitor's Office. Connell Decl. at Ex. L. Additionally, the notice would have provided employees with the information necessary to address Oracle's counsel's coercive communications with members of the protected classes. *Id.*

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<sup>4</sup> OFCCP rejects Oracle's characterization of OFCCP's meet and confer correspondence as "freighted with invective and personal attacks." Mot. at 3. The current dispute began with Oracle's frivolous letter of April 29, 2019, accusing OFCCP of violating rules of procedure, this Court's orders, the Rules of Professional Conduct and demanding that OFCCP cease all contact with the members of the protected classes. OFCCP has responded with an aim toward protecting members of the protected classes from undue intimidation or interference, nothing more. *See* Connell Decl. at Ex. D.

By filing this Motion before the parties had fully met and conferred, Oracle violated its obligations under the Court's order and the Rules of Practice of this Court. Notice of Hearing and Prehearing Order at III.A.3, February 6, 2019; 29 C.F.R. 18.33(c)(3). Accordingly, the Court should decline to rule on this Motion. Instead, the Court should resolve the dispute in the context of OFCCP's Motion for a Protective Order, which was filed only after exhausting the possibility of resolving the dispute without Court intervention.

B. The letter to members of the protected classes is not misleading, false, or coercive.

Setting aside Oracle's failure to fully meet and confer, none of its arguments about the letter have merit. Oracle argues that (1) the letter misrepresents OFCCP's allegations in this case as "holdings of this court" and fails to make clear that the court has not yet ruled; (2) that the letter "falsely implies a fund has been established and coerces Oracle employees to contact the DOL to recover"; and (3) that the letter is "contrary to Judge Clark's order and OFCCP's mandate." Mot. at 4-6. Each of these arguments is baseless.

*First*, read as a whole, a reasonable person receiving this letter would clearly understand that the Court has not yet ruled on the allegations in this lawsuit. The letter states that the recipient of the letter is a "potential" injured employee, that the lawsuit "alleges" discrimination, and that the case is "scheduled to go to trial" in December. Any lay person reading that one party "alleges" discrimination in a case that is "scheduled to go to trial" would understand this to mean that the other side is contesting that allegation and that the Court has not yet ruled. While Oracle complains that the letter advised employees "we have determined" that female, black, and Asian employees have been underpaid relative to their peers, this is an accurate statement. In fact, this

case would not be before the Court if such a determination had not been made.<sup>5</sup> *See* 41 C.F.R. 60-1.20(a) (requiring OFCCP to “determine” whether discrimination has occurred through the compliance review); 41 C.F.R. 60-1.26(a) (providing that enforcement proceeding can be brought only after OFCCP “found” a violation of the Executive Order). Moreover, read in context, this statement is clearly a description of the Plaintiff’s position—not a ruling of the Court. Immediately following the “we have determined” sentence, the letter goes on to state that the Department brought this lawsuit to “end this discrimination, and require Oracle to pay its injured employees for their lost wages.” Miller Decl., Ex. B. Oracle’s claim that the letter somehow states or implies that Oracle has already been found liable by this Court is contrary to the language of the letter.<sup>6</sup>

*Second*, nothing in the letter states or suggests that a fund has already been established or that the case has an “opt-in” structure. The letter says that the purpose of the lawsuit is to recover back wages and end the discrimination. The letter expressly states that the plaintiff “estimates” that the discrimination cost employees \$600 million. There is nothing in the letter indicating that employees must contact DOL to recover wages already in a fund. Notably, Oracle’s proposed corrective notice *does not seek to correct nonexistent statements about a supposed fund*. Thus,

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<sup>5</sup> Oracle also should have made a disclosure to any class member from whom it sought information that OFCCP had made this determination. *See Acosta v. Southwest Fuel Mgmt.*, 2018 WL 2207997, at \*2 (C.D. Cal. 2018) (emphasis added) (citing defense counsel’s failure to inform employee that the plaintiff, U.S. Department of Labor “had *determined* that he was owed back wages” as evidence that communication with the employee during ongoing litigation between the employer and the Department was coercive and misleading).

<sup>6</sup> Oracle also argues that the fact that letter was on “official U.S. Department of Labor letterhead” somehow created a false impression. Mot. at 4. The letter was signed by Jeremiah Miller, an attorney for the Department of Labor, on the Solicitor’s Office’s letterhead. As the Office of the Solicitor filed this lawsuit, it is unclear what letterhead would be more appropriate. OFCCP also uses “official U.S. Department of Labor letterhead.”

the facts here are not analogous to *O'Connor v. Uber Techs., Inc.*, 2017 WL 3782101, at \*7 (N.D. Cal. Aug. 31, 2017), *appeal dismissed*, 2017 WL 6398066 (9th Cir. Sept. 27, 2017). There, the court's core concern was about the way in which the letter at issue misled employees into believing that they had to sign up as a client of the plaintiff's firm in order to preserve their rights. Here, by contrast, there is no language in the Department's letter that similarly implies that employees are "obligated to take any action at this time to preserve their rights." *Id.*<sup>7</sup> Indeed, the letter says "you *may*" contact the Department for several reasons, including if the employee has information or has questions. Miller Decl., Ex. B.

*Finally*, the letter is not contrary to OFCCP's mandate. OFCCP's mandate is to enforce the Executive Order on behalf of the employees of federal contractors. *See generally* 41 C.F.R. Part 60. In so doing, *OFCCP represents the interests of Oracle's current and former employees who are the alleged victims of discrimination in this case.* As the Supreme Court held in the analogous context of EEOC enforcement actions, the "EEOC acts... at the behest of and for the benefit of specific individuals" and "it acts also to vindicate the public interest in preventing employment discrimination." *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 326 (1980); *see also OFCCP v. Washington Metropolitan Transit Authority*, Case No. 84-OFC-8 at 13 (Asst.

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<sup>7</sup> The other case Oracle cites, *Hoffman v. United Telecommunications, Inc.*, 111 F.R.D. 332 (D. Kan. 1986) is also inapposite. *Hoffman* concerned the attempt by EEOC, as an intervener in a private action, to send *all* of an employer's current and former employees *and* applicants for employment a questionnaire without any indication that those employees would have relevant information. *Id.* at 333. By contrast, OFCCP has only contacted members of the protected classes using contact information provided by Oracle limited to the current and former employees at issue in this suit. That contact has only sought to make members of the protected classes aware of the suit and to invite them to contact OFCCP. In fact, this case is more analogous to cases where courts have held that EEOC has a privileged relationship with the identified class members, that the Agency's contacts with them cannot be suppressed, and that the contents of those contacts are privileged. *See infra* n.8 (collecting cases).

Sec’y. 1989) (“OFCCP does not litigate solely on behalf of private parties but, like EEOC, ‘is concerned with the public interest, not with exclusively private interests.’”) (citation omitted). Like the EEOC, OFCCP is bringing this enforcement action both to vindicate the public interest in enforcing the Executive Order and to obtain appropriate relief for the individual female, black, and Asian employees of Oracle who are the alleged victims of discrimination. There is nothing improper about the Solicitor’s Office seeking to develop evidence in support of OFCCP’s claims and to hear from the employees on whose behalf it is seeking relief—and with whom it shares a privileged relationship.<sup>8</sup> To the contrary, this is standard litigation practice.

For the same reasons, Oracle’s claim that it was somehow misleading for OFCCP to advise members of the protected classes that they are not personally accused of wrongdoing is baseless. The Solicitor’s Office included this statement to ensure that these employees—whose interests as potential victims of discrimination OFCCP is advancing—are not fearful of contacting the Department. As Oracle is aware, this lawsuit is about whether Oracle has complied with its contractual agreements with the United States government and the parties to this action are OFCCP, United States Department of Labor and Oracle. OFCCP cannot and will

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<sup>8</sup> Because OFCCP represents the interests of members of the protected classes, Oracle may not seek discovery of OFCCP’s communications with those members of the protected class. *See* Oppn. Second Mot. to Compel Discovery (filed on May 17, 2019) at 16-17 (discussing the application of the attorney-client privilege and work-product doctrine to OFCCP’s communications with members of the protected classes by operation of the common interest rule). OFCCP did not provide Oracle with its privileged letter, and Oracle’s request for the contents of OFCCP’s communications in this Motion is wholly improper. *See, e.g., Bauman v. Jacobs Suchard, Inc.*, 136 F.R.D. 460, 462 (N.D. Ill. 1990) (denying a motion to compel production of EEOC’s letter to current and former employees who were members of a class action brought by EEOC on the basis that “the EEOC, through its attorneys, are essentially acting as *de facto* counsel for the employees”); *EEOC v. Chemtech Int’l Corp.*, 1995 WL 608333 at \*1 (S.D. Tex. 1995) (finding “because the EEOC and the private citizen have many identical interests, the attorney-client privilege is essentially a joint prosecution privilege that extends to communications between a party and the attorney for a co-litigant”).

not seek to name any individual employees of Oracle as defendants. There was nothing improper about OFCCP reassuring the potential victims of discrimination in this case that they are not potential defendants. To the contrary, this statement was necessary to ensure they are not fearful of communicating with the government. Moreover, there is nothing in Oracle's proposed corrective notice that would address this supposedly misleading statement.

C. OFCCP does not oppose a supplemental notice that provides accurate information to employees, but the notice Oracle proposes is inaccurate.

Although the initial letter was not misleading, OFCCP is not opposed to sending employees a supplemental notice containing the information that Oracle contends should have been included. However, the notice that Oracle has proposed is inappropriate. First, as explained in OFCCP's Motion for a Protective Order, any Court-ordered notice to employees must include additional information to remedy the harm caused by Oracle's attorney's direct contacts with members of the protected classes.<sup>9</sup> The notice should advise employees that Oracle's attorneys do not represent their interests in this matter, that they do not have to speak with Oracle's attorneys, and that they cannot be retaliated against by Oracle for participating in this proceeding. All of this information is included in the proposed notice filed with OFCCP's motion for a protective order as Attachment A.

It is critical that this notice go to all current and former employees of Oracle who are members of the protected classes, not just the ones who received the letter from the Solicitor's Office. Notably, OFCCP did not have complete contact information for all members of the protected classes at the time it mailed this letter, as Oracle has refused to supplement the

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<sup>9</sup> Oracle misrepresents OFCCP's concerns about Oracle's contacts with members of the protected classes as limited to its response to employees who contacted Oracle about the letter. *See* Mot. at 8-9. OFCCP's concern are much broader, and outlined in detail in OFCCP's Motion for a Protective Order.

information it provided two years ago, despite having been compelled by Judge Larsen to produce it. Garcia Decl. ¶ 6, Bremer Decl. ¶ 8. Additionally, Oracle has also refused to identify which employees its attorneys contacted in recent months, despite the Solicitor's request for this information. Bremer Decl. ¶ 8, Daquiz Decl. Ex. 4 at 7. Any joint or supplemental notice to members of the protected classes should go to *all* employees who are members of the protected classes in this case. If the Court does not grant that relief, then, at a minimum, the notice should go to those employees who received the letter from OFCCP and the employees whom Oracle's attorneys contacted.

Finally, Oracle's proposed notice is inaccurate insofar as it states that "there has been no determination that any lost wages are due." Mot. at 8. It not accurate to state that "no determination" has been made regarding lost wages, as OFCCP, pursuant to the regulations, *has* made a determination, based on data provided in the compliance, that Oracle *has* underpaid its female, black, and Asian employees relative to their peers. *Supra* Part. II.B.

D. Oracle's alternative request to exclude witness testimony is disproportionate to alleged harm and violates the E.O. regulations.

Oracle's alternative relief—that any testimony from employees who have responded to OFCPC's letter should be barred—is extreme, disproportionate, and unlawful. As discussed in OFCCP's Motion for Protective Order, 41 C.F.R. 60-1.32 prohibits interference with employees' rights to participate in this litigation. Even assuming that the letter could have caused confusion among employees about the status of the case, Oracle's request to preclude the testimony of those employees who came forward to talk to OFCCP does nothing to address this alleged confusion. Rather, it punishes employees, many of whom expressed fear of reprisal from Oracle, for communicating with OFCCP. Such an outcome not only fails to address any alleged confusion, it is entirely disproportionate to whatever harm was caused by a misunderstanding

regrading Oracle's denial of OFCCP's claims. Even if the letter were in some way unclear, which it is not, silencing employees who provided information to the government is not appropriate.<sup>10</sup>

#### IV. CONCLUSION

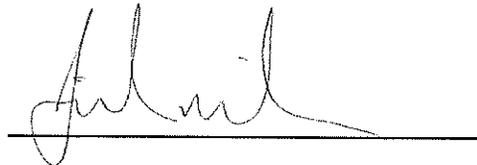
For reasons stated above, Oracle's motion should be denied. In the alternative, to remedy any alleged confusion, the Court should order Oracle to email the notice included in Attachment A to OFCCP's Motion for a Protective Order to all current and former employees who are members of the protected classes in this lawsuit. Alternatively, the Court should order Oracle to provide contact information, including private email addresses, for those employees so that OFCCP can send the notice.

DATED: May 31, 2019

Respectfully submitted,

KATE O'SCANNLAIN  
Solicitor of Labor

JANET M. HEROLD  
Regional Solicitor



JEREMIAH MILLER  
Counsel for Civil Rights

*Attorneys for OFCCP*

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<sup>10</sup> Oracle argues that its accusations about the letter justifies its demand for privileged communications between the Department and any current or former Oracle employee who received the letter. In doing so Oracle employs its misrepresentations of the letter to support yet another attempt obtain confidential informant information protected under both the government's informant privilege and the attorney-client privilege *via* the common interest rule.

CERTIFICATE OF SERVICE

I certify that on May 31, 2019, the foregoing PLAINTIFF OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR'S OPPOSITION TO DEFENDANT ORACLE AMERICA, INC.'S "MOTION TO CORRECT OFCCP'S MISLEADING STATEMENTS TO ORACLE'S EMPLOYEES" was served upon the following individuals via email at the following addresses:

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*/s/ Alicia Lacey-Oha*

U.S. Department of Labor