

**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

**ORACLE AMERICA, INC.'S
OPPOSITION TO OFCCP'S
MOTION FOR
CLARIFICATION OR, IN THE
ALTERNATIVE, FOR
RECONSIDERATION OF THE
COURT'S ORDER
REQUIRING PRODUCTION
OF DOCUMENTS
PROTECTED BY THE
ATTORNEY WORK PRODUCT
DOCTRINE**

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Office of Administrative Law Judges
San Francisco, CA

**ORACLE'S OPPO. TO OFCCP'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR
RECONSIDERATION OF THE COURT'S ORDER REQUIRING PRODUCTION OF DOCUMENTS
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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. OFCCP DOES NOT MEET THE STANDARD FOR RECONSIDERATION	2
III. THE JUNE 10 ORDER DISTINGUISHES BETWEEN WORK PRODUCT AND OPINION WORK PRODUCT	2
IV. THE ORDER WILL NOT CAUSE ANY UNINTENDED CONSEQUENCES.....	4
A. The Order Only Applies to OFCCP.....	4
B. OFCCP’s Complaints about the Order Are Irrelevant or Inapplicable.....	5
V. OFCCP SHOULD PROVIDE PROPER INTERROGATORY RESPONSES AND INTERVIEW NOTES, AS REQUIRED BY THE ORDER.....	7
VI. THERE IS NOTHING UNCLEAR ABOUT THE COURT’S ORDER REQUIRING PRODUCTION OF NOTES OF CALLS WITH ORACLE EMPLOYEES.....	9
VII. CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re AgriBioTech, Inc.</i> , 319 B.R. 207 (D.Nev. 2004).....	2
<i>Barren v. Coloma</i> , 2012 WL 3616021 (D. Nev. Aug. 21, 2012)	2
<i>Better Gov’t Bureau, Inc. v. McGraw</i> , 106 F.3d 582 (4th Cir. 1997)	3
<i>Garcia v. City of El Centro</i> , 214 F.R.D. 587 (S.D. Cal. 2003)	10
<i>Koch Materials Co. v. Shore Slurry Seal, Inc.</i> , 208 F.R.D. 109 (D.N.J. 2002).....	8
<i>Oklahoma v. Tyson Foods, Inc.</i> , 262 F.R.D. 617 (N.D. Okla. 2009).....	8
<i>Penk v. Or. State Bd. of Higher Educ.</i> , 816 F.2d 458 (9th Cir. 1987)	10
<i>In re Perez</i> , 749 F.3d 849 (9th Cir. 2014)	5
<i>S.E.C. v. Berry</i> , 2011 WL 825742 (N.D. Cal. Mar. 7, 2011).....	3
<i>Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.</i> , 5 F.3d 1255 (9th Cir. 1993)	1
<i>Zamani v. Carnes</i> , 491 F.3d 990 (9th Cir. 2007)	4
Other Authorities	
Fed. R. Civ. P. 26(b)(3)(B)	9

I. INTRODUCTION

Oracle finds itself re-briefing a motion it already won. Every argument in OFCCP's Motion For Clarification, etc., was squarely addressed by the Court in its extensive June 10 Order. Indeed, the Order was nearly as long as the briefing on the motion it granted. OFCCP's Motion provides no new facts, no new law, and no changed circumstances. There is nothing to reconsider.

It is apparent OFCCP understands the Court's Order. It just does not like it. OFCCP quibbles with the Court over the legal standard to apply to work product, belatedly offers to provide evidence and argument supporting its rejected arguments, and attempts to negotiate regarding the implementation of its June 10 Order.

Perhaps what is most perplexing is how little regard OFCCP gives to the Court's thoughtful balancing of the parties' respective interests in the Order. The Court allowed OFCCP to withhold the identities of employees with whom it communicated and ordered it to provide only the facts it obtained from these employees. The Order recognized that "Oracle must have a fair opportunity to defend itself" and that "[a]ny entity accused of this sort of wrongdoing would legitimately want to explore the evidence related to the allegations, including requesting documents reflecting communications about them." Order at 9. Yet OFCCP's Motion acknowledges none of Oracle's or the Court's interest in a fair proceeding. It is just ten pages of grumbling about why it should not have to comply with the Order.

OFCCP's Motion does not even explain what authority it was brought under. It may have been cathartic to file but it is legally meritless. The Court should deny it for all the reasons set forth below.

II. OFCCP DOES NOT MEET THE STANDARD FOR RECONSIDERATION

“Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.” *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). OFCCP does not contend that any of these factors are present here. Its motion should be denied for that reason alone. *See, e.g., Barren v. Coloma*, 2012 WL 3616021, at *1 (D. Nev. Aug. 21, 2012) (denying motion for reconsideration of order denying motion to compel because a “motion for reconsideration is not an avenue to re-litigate the same issues and arguments upon which the court already has ruled.”) (citing *In re AgriBioTech, Inc.*, 319 B.R. 207, 209 (D. Nev. 2004)).

III. THE JUNE 10 ORDER DISTINGUISHES BETWEEN WORK PRODUCT AND OPINION WORK PRODUCT

OFCCP first requests that the Court reconsider ordering OFCCP to produce its interview memos with Oracle employees. OFCCP is concerned that the Court “may have misconstrued the exact nature of those notes and how they were produced.” Mot. at 2. OFCCP proceeds to explain its proprietary information-gathering process: “attorneys steered the conversations to specific topics and asked specific questions related to information the attorneys believed to be relevant.” *Id.*

It is not clear how this differs from the understanding set forth in the Court’s June 10 Order. The Order states that “OFCCP’s interview notes and other documentation of communications with Oracle’s current and former employees about this case, regardless of who prepared them and when they were prepared,” are discoverable. Order at 26. It contemplates that these notes were not verbatim transcriptions of interviews because it expressly allows OFCCP to redact “any reflections of attorney opinions or impressions[.]” *Id.* at 27. The fact that OFCCP never gave employees copies of the notes or asked them to confirm the notes were

**ORACLE’S OPPO. TO OFCCP’S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR
RECONSIDERATION OF THE COURT’S ORDER REQUIRING PRODUCTION OF DOCUMENTS
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accurate is immaterial.

In response to the Order, OFCCP contends that it is not “possible to segregate ‘facts’ from ‘opinion’ in any production of the attorney’s notes.” *Id.* Of course, in opposing Oracle’s motion, OFCCP represented it had reviewed its “earlier designations of privilege and painstakingly reproduced hundreds of pages of documents redacted to minimally protect the identities of employees while disclosing strictly factual information to Oracle.” *See* OFCCP’s May 17, 2019 Opposition to Oracle’s Second Motion to Compel at 5. Now faced with a Court Order directing it to produce facts, OFCCP suddenly claims it is unable to comply. At bottom, OFCCP’s position is that all of its notes of conversations with potential witnesses are opinion work product and that it will not produce any of them in response to the Court’s Order.

The Court’s Order already distinguishes between these two types of work product and there is nothing to reconsider or clarify. The cases OFCCP cites do not change anything. Mot. at 3. *Better Gov’t Bureau, Inc. v. McGraw*, 106 F.3d 582 (4th Cir. 1997) and *S.E.C. v. Berry*, 2011 WL 825742 (N.D. Cal. Mar. 7, 2011) simply discuss the difference between opinion and fact work product. The Court is allowing OFCCP to redact its opinion work product. Order at 26.

OFCCP’s Motion contains a stray footnote requesting the opportunity to provide additional briefing or oral argument supporting its assertion of the common interest privilege. Mot. at FN2. As the Court stated when denying OFCCP’s prior request for oral argument, “No explanation was given as to the exact point requiring argument and why it had not been adequately addressed in the briefing.” Order at FN3. Once again, OFCCP does not explain the additional evidence it would submit on the common interest privilege, or what undisclosed arguments it has that are so compelling they could not be committed to writing in the “extensive and detailed” briefing already submitted by the parties. *Id.* This request should be denied.

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IV. THE ORDER WILL NOT CAUSE ANY UNINTENDED CONSEQUENCES

OFCCP is also concerned that complying with the Court's Order will result in "unintended consequences." Mot. at 4. This section of OFCCP's Motion does not request clarification or reconsideration of anything. It attempts to portray the order as applying to both parties (which is not the case), and complains about complying with the Order.

A. The Order Only Applies to OFCCP

Going well beyond seeking reconsideration or clarification, OFCCP makes an entirely new request to the Court: that the June 10 Order be applied equally to Oracle.

OFCCP believes that the Order "appears to create an ongoing duty for the parties to supplement their discovery and update their privilege log every time one of their attorneys talks to a potential witness", which will "necessarily lead to Plaintiff needing additional discovery into any interviews Oracle has conducted with current or former employees and managers." Mot. at 4-5. In fact, the Order only addressed OFCCP's discovery obligations. This sort of "whataboutism" fails. Oracle served document requests for OFCCP's interview notes with potential witnesses and interrogatories seeking the facts underlying its claims. OFCCP objected, asserting a kaleidoscope of privilege and work product objections. Oracle met and conferred extensively over these objections and eventually moved to compel, addressing each objection. It explained why the information it sought is relevant and necessary for a fair proceeding, and why it could not obtain the information elsewhere. The Court granted Oracle's motion and ordered OFCCP to produce the notes, subject to certain limitations protecting each side's respective interests. Now, OFCCP is attempting to cut to the front of the line and portray Oracle as also subject to the Court's Order. But OFCCP has not followed any of the required factual or procedural predicates. There are no pending discovery requests by OFCCP on this topic before the Court and therefore no way to determine what OFCCP is entitled to. If OFCCP wanted Oracle's notes of interviews with its employees, or communications with its employees, or the

ORACLE'S OPPO. TO OFCCP'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION OF THE COURT'S ORDER REQUIRING PRODUCTION OF DOCUMENTS PROTECTED BY THE ATTORNEY WORK PRODUCT DOCTRINE

witnesses supporting Oracle's defenses, it could have served discovery requests for them and the parties could have followed the proper procedures.

Nor has OFCCP even attempted to argue that it is unable to obtain facts without access to similar documents reflecting Oracle's interviews of employees or that it meets the requirements for a waiver of Oracle's fact work-product protections.¹ That is because OFCCP cannot point to a set of facts and circumstances comparable to those faced by Oracle (and noted by this Court) in obtaining discovery in this action. The facts and circumstances faced by Oracle (such as an inability to depose OFCCP's potential witnesses) are largely the result of decisions and actions taken by OFCCP (such as the assertion of the informant's privilege), which are finely detailed in this Court's June 10 Order. Order at 23-26. For example, the Court's balancing of the parties' interests in the Order relied in part on *In re Perez*, 749 F.3d 849 (9th Cir. 2014), which involved the Department of Labor opposing a request for identification of hundreds of individuals who had provided information. The Ninth Circuit found that the government informant's privilege protected the identities of these informants. *Id.* at 858-59. Unlike the Department of Labor in *Perez* or OFCCP here, Oracle cannot assert the government informant's privilege. OFCCP therefore has done literally nothing to show how the facts and circumstances faced by Oracle apply to it. OFCCP assertion that this Court's Order applies to both parties, or should so apply, fails.

B. OFCCP's Complaints about the Order Are Irrelevant or Inapplicable

OFCCP contends, without apparent irony, that the Order may "result in significant additional motion practice that will be burdensome to this Court[.]" *Id.* OFCCP expects that

¹ These arguments would not be valid in any reply brief, particularly a reply brief on a motion for reconsideration. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (affirming denial of motion for reconsideration when district court refused to consider argument because the "district court need not consider arguments raised for the first time in a reply brief").

Oracle will not agree that all of its redactions are necessary, which will lead to additional motions. *Id.* A party predicting that its compliance with an order will be unsatisfactory is not a reason to withdraw the order. It is a reason to enforce it.

OFCCP hypothesizes that the Order will have a “chilling effect” on its communications with employees. Mot. at 5. OFCCP already made this argument in its Opposition. *See* MTC Opp. at 1; 9-15. The Court permitted OFCCP to redact information that would withhold employees’ identities. Yet OFCCP persists. It claims that producing redacted attorney notes “could” chill future employees from coming forward and “could” chill employees who have already communicated with it. Mot. at 5. The Court rejected OFCCP’s evidence-free fearmongering and speculation the first time and should do so again.

OFCCP also asserts that the Court’s Order “undercuts the parties’ agreement” regarding recording work product in their privilege logs, and that “if the Court is correct” that Oracle has a substantial need for these facts, “both sides” will need to amend their privilege logs to record “all” attorney work product. Mot. at 5. None of that is right.

First, Oracle certainly does not contend that any agreement between the parties controls over the Court’s Order. OFCCP should log its attorney notes as work product as ordered by the Court.

Second, “both sides” will not need to amend their logs because Oracle was not ordered to do anything. As explained above, OFCCP has not taken any of the steps necessary to seek the same relief that Oracle requested and was granted here. Oracle did not take positions in discovery that resulted in the June 10 Order. OFCCP cannot piggyback on its own discovery failures to draw a false equivalence between it and Oracle. Further, because OFCCP is the plaintiff and carries the burden here, it is not in Oracle’s position of defending itself against OFCCP’s vague allegations.

Third, OFCCP will not need to log “all” work product created, because the Order only

ORACLE’S OPPO. TO OFCCP’S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION OF THE COURT’S ORDER REQUIRING PRODUCTION OF DOCUMENTS PROTECTED BY THE ATTORNEY WORK PRODUCT DOCTRINE

addresses notes, memoranda, and other documents reflecting communications with Oracle employees. Order at 14; 26-27.

OFCCP should just comply with the Order.

V. **OFCCP SHOULD PROVIDE PROPER INTERROGATORY RESPONSES AND INTERVIEW NOTES, AS REQUIRED BY THE ORDER**

OFCCP treats the Order as though it was a tentative ruling. It asks that “before” the Court require it to produce notes of interviews with potential witnesses, it be permitted to provide the supplemental interrogatory responses it was also ordered to produce. Mot. at 6. OFCCP contends that “most of the factual information in the attorney notes could be used to identify the informant.” *Id.* This factual information OFCCP intends to redact includes “job title, hire date, exact salary, work group and manger”, as well as the ethnicity and gender of the employee. Mot. at FN7. Thus, according to OFCCP, “the Court’s order leaves very little factual information to be produced[.]” Mot. at 7. Yet, at the same time, OFCCP claims its supplemental interrogatory responses “will fully addresses the Court’s concerns.” *Id.* at 6. Thus, OFCCP’s cohesive position with regard to the facts it was ordered to produce is: (1) the facts cannot be separated from its attorneys’ opinions and mental impressions; (2) the facts will have to be redacted because they reveal the identities of employees; and (3) all the facts will be provided in robust supplemental interrogatory responses that will satisfy everyone’s concerns.

OFCCP proposes it provide “summaries” of factual information contained in the attorney notes it was ordered to produce as answers to interrogatories. Song Decl., ¶ 5. That does not work. OFCCP has been promising to supplement its interrogatory responses since it first served them. *See*, 4/29/2019 Daquiz Ltr at 8.² It even promised to supplement them in its Opposition to

² The 4/29/2019 letter from Abigail Daquiz to Warrington Parker is attached as part of Exhibit 12 to the Declaration of Warrington Parker in Support of Oracle’s Second Motion to Compel, filed May 3, 2019. Oracle will re-file this document should the Court so request.

Oracle's Second Motion to Compel. MTC Opp. at 8. But OFCCP has never explained what information it intends to put in its proposed interrogatory responses, or why its interrogatory responses would be acceptable but carefully-redacted notes pursuant to the Court's Order would not be. Moreover, OFCCP's proposed summaries of the contents of the notes would potentially omit factual information material to Oracle. *See, e.g.*, Order at 7 (“[E]ven if OFCCP does not intend to use the evidence, Oracle may wish to do so as part of its defense.”). Likewise, OFCCP's proposal to stay production of the notes pending its submission of the interrogatory responses is just another delay tactic, less than two weeks from the end of discovery.

The Court already ruled that Oracle has a substantial need for these facts so it has “a fair opportunity to prepare a defense[.]” Order at 25. A Court order is not an invitation to negotiate. OFCCP chose to spend discovery in this case fighting at every turn to prevent Oracle from getting interview notes, from getting comprehensive interrogatory responses, and from getting the facts underlying its claims. At no point has OFCCP demonstrated the sort of good faith participation in the discovery process that would entitle it to the benefit of the doubt. It has obscured, obstructed, delayed, and now filed a motion that reads like an opposition to the Court's Order. Oracle has no ability to respond to arguments about what lie beneath these sheets of redactions because OFCCP is holding all the cards. As the Court stated in its Order, “OFCCP's “say-so” is insufficient to establish a claim for privilege.” *Id.* at 14. The Court should enforce its Order as written and reject OFCCP's repeated attempts to seek another round of briefing, request oral argument, or ask the Court to explain itself because “even if the Court is correct,” OFCCP finds it “unclear” why it was ordered to produce its attorney notes. Mot. at 7. The Court's Order is 44 pages of clarity and it should not spend additional effort mollifying OFCCP.

Again, the cases cited by OFCCP support Oracle's position or are irrelevant. *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 122 (D.N.J. 2002) specifically holds that a plaintiff “cannot withhold relevant information on the basis of attorney work product.” In

ORACLE'S OPPO. TO OFCCP'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION OF THE COURT'S ORDER REQUIRING PRODUCTION OF DOCUMENTS PROTECTED BY THE ATTORNEY WORK PRODUCT DOCTRINE

that case, the defendant did not seek actual documents, but merely certain information contained in them. Here, Oracle has specifically requested OFCCP's notes of its calls with Oracle employees, and has shown a substantial need for them, with which the Court agreed. The notes should be produced. *Oklahoma v. Tyson Foods, Inc.*, 262 F.R.D. 617, 630 (N.D. Okla. 2009) merely held that interrogatories are "preferred" to *depositions* for disclosing work product because there is less risk of inadvertently disclosing opinion work product. Here, there is no risk of disclosing opinion work product because the Court permitted OFCCP to redact it before producing its notes.

VI. THERE IS NOTHING UNCLEAR ABOUT THE COURT'S ORDER REQUIRING PRODUCTION OF NOTES OF CALLS WITH ORACLE EMPLOYEES

OFCCP also seeks clarification because the Court did "not explain what type of evidence it believes Oracle has established a 'substantial need' for and thus it will be difficult for Plaintiff to properly redact in a manner that will comply with the Court's order." Mot. at 8. OFCCP then rehashes its prior argument about the primacy of its statistical case and contends that anecdotal evidence obtained from its calls with Oracle employees "is relevant and admissible," but that because it is not "dispositive for either party," it "cannot be the type of the evidence the Court has determined Oracle has a substantial need for." Mot. at 9.

This exact argument was considered and rejected by the Court in its Order. *See* Order at 6 ("[E]ven if OFCCP only intends this sort of evidence to play a minor role, it remains relevant and subject to discovery."). The Court specifically held that "Oracle has shown it has 'substantial need' for the factual information reflected in these documents because it must prepare for hearing with some understanding of the evidence it may face and the ability to investigate and present a defense to that evidence." *Id.* at 25-26.

OFCCP wants the Court to "clarify what type of evidence is included in the Court's determination that Oracle has a substantial need to access." Mot. at 9. OFCCP is looking

ORACLE'S OPPO. TO OFCCP'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION OF THE COURT'S ORDER REQUIRING PRODUCTION OF DOCUMENTS PROTECTED BY THE ATTORNEY WORK PRODUCT DOCTRINE

through the wrong end of the telescope. It should not be deciding what evidence is “dispositive” to Oracle’s case and producing only that. It should be redacting **only** information that identifies employees or reveals its opinion work product. The Order was quite clear on this point:

OFCCP must therefore produce documents chronicling the factual content of communications with third parties. In doing so, OFCCP may redact any identifying information on the basis of the government informant privilege and any reflections of attorney opinions or impressions consistent with Fed. R. Civ. P. 26(b)(3)(B). **All redactions must be made based on one of these claims of privilege and must be limited to only material subject to the two privileges at issue.**

Order at 27 (emphasis added).

The cases cited by OFCCP all confirm why Oracle is entitled this information. In *Penk v. Or. State Bd. of Higher Educ.*, 816 F.2d 458 (9th Cir. 1987), the Ninth Circuit held that in the employment context, where, as here, there is a “high regard for subjective personnel qualities and characteristics”, a defendant should be permitted to challenge the plaintiff’s statistical analysis with anecdotal evidence demonstrating why the statistics alone do not explain the pay disparities and why the plaintiff’s comparators are inappropriate. That is why the information at issue here is relevant. In *Garcia v. City of El Centro*, 214 F.R.D. 587 (S.D. Cal. 2003), the court denied the plaintiff’s request for witness interviews because he had access to the witnesses and could interview them himself. OFCCP does not cite any case for its contention that if evidence is not dispositive, it does not meet the substantial need test.

OFCCP’s reheated arguments offer nothing for the Court to reconsider or clarify.

OFCCP should comply with the Order as written.

VII. CONCLUSION

The only new argument in OFCCP’s entire Motion can be found in the Conclusion, which begins, naturally, with the preliminaries. OFCCP contends that because Oracle raised two affirmative defenses asserting that any pay disparities are the result of bona fide, non-

ORACLE’S OPPO. TO OFCCP’S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION OF THE COURT’S ORDER REQUIRING PRODUCTION OF DOCUMENTS PROTECTED BY THE ATTORNEY WORK PRODUCT DOCTRINE

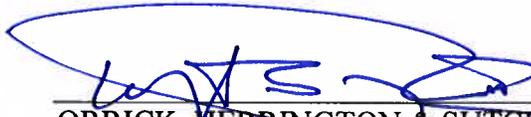
discriminatory factors, "Oracle has sufficient information to prepare its defense." Mot. at 10.
This argument, like everything else in OFCCP's motion, should be rejected.

For all the reasons set forth above, Oracle requests that the Court deny OFCCP's motion.

June 24, 2019

Respectfully submitted,

GARY R. SINISCALCO
ERIN M. CONNELL
WARRINGTON S. PARKER



ORRICK, HERRINGTON & SUTCLIFFE LLP

The Orrick Building

405 Howard Street

San Francisco, CA 94105-2669

Telephone: (415) 773-5700

Facsimile: (415) 773-5759

Email: grsiniscalco@orrick.com

econnell@orrick.com

wparker@orrick.com

Attorneys for Defendant

ORACLE AMERICA, INC.

**ORACLE'S OPPO. TO OFCCP'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR
RECONSIDERATION OF THE COURT'S ORDER REQUIRING PRODUCTION OF DOCUMENTS
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PROOF OF SERVICE BY ELECTRONIC MAIL

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. My electronic service address is jkaddah@orrick.com.

On June 24, 2019, I served the interested parties in this action with the following document(s):

ORACLE AMERICA, INC.'S OPPOSITION TO OFCCP'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION OF THE COURT'S ORDER REQUIRING PRODUCTION OF DOCUMENTS PROTECTED BY THE ATTORNEY WORK PRODUCT DOCTRINE

by serving true copies of these documents via electronic mail in Adobe PDF format the documents listed above to the electronic addresses set forth below:

Laura Bremer (Bremer.Laura@dol.gov)
Jeremiah Miller (miller.jeremiah@dol.gov)
Norman E. Garcia (Garcia.Norman@DOL.GOV)
Charles C. Song (Song.Charles.C@dol.gov)
Abigail Daquiz (Daquiz.Abigail@dol.gov)
Marc A. Pilotin (pilotin.marc.a@dol.gov)

U.S. Department of Labor, Office of the Solicitor, Region IX – San Francisco
90 Seventh Street, Suite 3-700
San Francisco, CA 94103
Telephone: (415) 625-7769 / Fax: (415) 625-7772

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 24, 2019, at San Francisco, California.

Jacqueline D. Kaddah