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

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

DECLARATION OF ABIGAIL DAQUIZ IN SUPPORT OF OFCCP'S OPPOSITION TO ORACLE AMERICA INC.'S MOTION TO COMPEL OFCCP TO PRODUCE DOCUMENTS AND FURTHER RESPOND TO INTERROGATORIES

I, Abigail G. Daquiz, state and declare as follows:

1. I am a Senior Trial Attorney for the U.S. Department of Labor, Office of the Solicitor. I submit this declaration in support of OFCCP's Opposition to Defendant's Motion to Compel. I have personal knowledge of the matter set forth in this declaration, and I could and would competently testify thereto if called upon to do so.

2. Attached to this declaration as **Exhibit 1** is a true and correct copy of a letter from Erin Connell, counsel for Oracle America, Inc., to Jeremiah Miller, Counsel for Civil Rights, Office of the Solicitor, dated April 29, 2019, regarding contacts with Oracle employees.

3. We have recently learned from Oracle employees that sometime in February of 2019 Oracle's attorneys began communicating directly with employees for whom OFCCP seeks relief in this enforcement action. An Orrick attorney, copying a managing counsel from Oracle's in-house legal department, asked to arrange an interview to gather information related to the *Jewett* state class action. The *Jewett* case alleges that Oracle discriminated against women in compensation in the job functions at issue in this enforcement action. *See, gen. Jewett, et al. v.*

Oracle America, Inc., Case No. 17-CIV-02669, Superior Court of the State of California, County of San Mateo. It appears that Oracle asked for these meetings without informing employees that Oracle's interests were adverse to the employees' interests in either the *Jewett* case or this enforcement action brought against Oracle by OFCCP. Further, it appears that Oracle did not advise the employees that the meetings were not mandatory.

4. Attached to this declaration as **Exhibit 2** is a true and correct copy of a letter from Laura Bremer, Senior Trial Attorney, Office of the Solicitor to Ms. Connell, dated April 30, 2019, regarding contacts with Oracle employees.

5. Attached to this declaration as **Exhibit 3** is a true and correct copy of a letter from Ms. Connell to Ms. Bremer, dated May 9, 2019, regarding contacts with Oracle employees.

6. Attached to this declaration as **Exhibit 4** is a true and correct copy of a letter from Ms. Bremer to Ms. Connell, dated May 13, 2019, regarding contacts with Oracle employees.

7. Attached to this declaration as **Exhibit 5** is a true and correct copy of a letter from Ms. Connell to Ms. Bremer, dated May 16, 2019, regarding contacts with Oracle employees.

8. Attached to this declaration as **Exhibit 6** is a true and correct copy of Plaintiffs' Objections to Evidence Submitted by Oracle in Opposition to Plaintiffs' Motion for Class Certification, filed on April 8, 2019, in *Jewett, et al. v. Oracle America, Inc*.

9. Attached to this declaration as **Exhibit 7** is a true and correct copy of an email from Ms. Kathryn Mantoan, counsel for Oracle, to Mr. Mullan, *et al.*, dated March 22, 2019, regarding Oracle's communications with putative class members, filed as Exhibit O to an attorney declaration in support of Plaintiffs' Objections to Evidence Submitted by Oracle in Opposition to Plaintiffs' Motion for Class Certification, filed on April 8, 2019, in *Jewett, et al. v. Oracle America, Inc.*, where Oracle's counsel claims that Oracle's in-house and outside counsel have an attorney-client relationship with current Oracle managers who are putative class members in the *Jewett* lawsuit brought against Oracle. It also describes disclosures Oracle attorneys made during interviews with Oracle employees, which do not identify the instant enforcement action brought by OFCCP. Three of the declarations Oracle obtained as a result of

these interviews and filed in opposition to the motion to class certification in the *Jewett* lawsuit were by women whose interests OFCCP represents in this enforcement action.

10. In 2017, OFCCP responded to Oracle's requests by producing the investigative file maintained by the agency as part of the compliance review. OFCCP withheld documents only to protect the identity of the government's informants, to protect information covered by the deliberative process privilege, investigative files privilege, and information protected by the attorney-client privilege and work product doctrine.

11. In October of 2017, OFCCP supplemented its document production and interrogatory responses. OFCCP reviewed the production and earlier designations of privilege and reproduced hundreds of pages of documents redacted to minimally protect the identities of employees while disclosing strictly factual information to Oracle. The parties continued to engage in a dialogue over the production.

12. In March of 2019, when the case was reopened, the parties propounded new sets of discovery requests. Mr. Warrington Parker, III, counsel for Oracle, raised again his client's objections to OFCCP's redaction of certain documents from the compliance review and began the meet and confer process in preparation for renewing their motion to compel. OFCCP, again, further reviewed the file, and disclosed parts of interview notes and statements that had been redacted to protect information covered by the investigative files privilege.

13. OFCCP continued to attempt to work with Oracle's attorneys to come to agreement about what Oracle was requesting, and offered explanations and support for the government's insistence on protecting current and former employees from retaliation and blacklisting in the industry.

14. In discovery, Oracle produced contact information for its employees. As part of OFCCP's preparation for the hearing in this matter, counsel for the Department have contacted current and former Oracle employees to discuss their experiences as they relate to OFCCP's enforcement action through letters and emails.

15. Counsel for OFCCP is in the process of reviewing large volumes of documents, including 13,000 documents received on May 13, 2019. After much negotiation, OFCCP has taken two depositions, with others calendared for the coming weeks. Negotiations regarding a Fed. R. Civ. P. 30(b)(6) motion has stalled and OFCCP has had to file a motion to compel that deposition.

16. In March of 2017, counsel for OFCCP learned that Oracle had required numerous protected class employees whom it laid off to sign severance agreements requiring them to actively undermine any actions—including by a government agency—that could be brought for claims on their behalf. Attached to this declaration as **Exhibit 8** is a true and correct copy of an email exchange between my colleague Natalie Nardecchia and Ms. Connell, regarding these severance agreements, dated March 13, 2017 including the identified attachments.

17. Attached to this declaration as **Exhibit 9** is a true and correct copy of an email exchange between Ms. Nardecchia and Ms. Connell dated March 21, 2017 including the identified attachments consisting of drafts of a notice regarding the severance agreements.

18. Oracle only removed the unlawful language and sent a corrective notice clarifying the rights of their employees to participate in government actions when the Department demanded that it do so. Attached to this declaration as **Exhibit 10** is a true and correct copy of an email exchange between Ms. Nardecchia and Ms. Connell dated April 14, 2017, including the identified attachment, that summarizes the agreement regarding the corrective notices to affected individuals.

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed in Seattle, Washington on May 17, 2019.

ABIGAIL G. DAQUIZ
Senior Trial Attorney

Exhibit 1

Declaration of Abigail Daquiz

orrick

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April 29, 2019

Via E-Mail

Jeremiah Miller
Counsel for Civil Rights
U.S. Department of Labor, Office of the Solicitor
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Seattle, WA 98104

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

Dear Jeremiah:

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

Statements in Violation of the Rules of Practice and Procedure

As you know, attorneys practicing before the OALJ are prohibited from (1) threatening, coercing, intimidating, deceiving, or knowingly misleading a witness or potential witness and (2) knowingly making or presenting false or misleading statements, assertions, or representations about a material fact related to the proceeding. 29 CFR § 18.22.[2] These prohibitions are similar to, but broader than, related prohibitions in the applicable rules of professional conduct. The correspondence received by current and former Oracle employees violates this rule in several respects.

[1] For the avoidance of doubt, an example of the correspondence at issue is enclosed with this letter.
[2] The Court's February 6, 2019 Pre-Hearing Order indicates that these proceedings will be governed by 41 CFR Part 60-30. In the absence of any contrary provisions in that part, however, the general rules contained at Part 18 apply.

First, the correspondence is misleading in that it implies that the person receiving the letter may be entitled to a portion of the alleged $600,000,000 referenced, but they should contact DOL[3] to find out, and/or see how they can help DOL obtain this money from Oracle. Specifically, the letter states there are "$600,000,000 [in] lost wages" at issue in the case and DOL is seeking to "require Oracle to pay its injured employees for their lost wages." Later, the letter states the recipient can contact DOL if s/he "would like to find out whether [his/her] wages have been impacted." These statements indicate that in order to reap the potential benefits of OFCCP's $600,000,000 claim, the recipient must assert their wages have been impacted by contacting DOL. Accordingly, your letter improperly suggests that this case has an opt-in structure, without clarifying that a person need take no action to benefit from OFCCP's claims (in the event OFCCP prevails in this action) and to be eligible for relief. It also implies there is a fund of money waiting to be recouped.

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

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

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

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

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

Statements Contrary to Judge Clark's Order

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

Contact with Oracle Current Managers

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

OFCCP's Confirmation That OFCCP Is Not Accusing Class Member Managers of Any Wrongdoing

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

* * *

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

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

Very truly yours,

Erin M. Connell

U.S. Department of Labor

Office of the Solicitor
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Seattle, Washington 98104-2397
(206) 757-6762
FAX (206) 757-6761

REDACTED

[redacted]

April 4, 2019

Dear [redacted]

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

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

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

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

Thank you in advance for your cooperation in this matter.

Sincerely,

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

Exhibit 2

Declaration of Abigail Daquiz

U.S. Department of Labor

Office of the Solicitor
90 7th Street, Suite 3-700
San Francisco, California 94103

April 30, 2019

VIA ELECTRONIC MAIL ONLY

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

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

Dear Erin,

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

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

OFCCP is charged with ensuring that federal contractors "complied with their non-discrimination and affirmative action obligations," pursuant to Executive Order 11246. *See Bd. Of Governors of Univ. of N. Carolina v. U.S. Dept. of Labor*, 917 F.2d 812, 815 (4th Cir. 1990). As we have already had to remind you[1], federal contractors are prohibited from intimidating, coercing or otherwise retaliating against any individual who has or may engage in "assisting or participating in any manner" in an investigation, hearing, or any activity related to administration of Executive Order 11246. 41 C.F.R. § 60-1.32. In other words, Oracle cannot interfere with its

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

Working To Improve The Lives of America's Working Families

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

Your reliance on California Rule of Professional Conduct 4.2[2] -- which prohibits attorneys from communicating with represented individuals without consent – appears to rest on the flawed assumption that you and your firm represent current Oracle managers who have pay discrimination claims against Oracle in this lawsuit. Erin, the position you assert not only ignores Rule 4.2(c) and comment 8, which expressly authorize government lawyers to contact informants pursuant to laws protecting employees' rights to equal employment opportunity – it constitutes a clear and unequivocal violation of Rule 1.7 of the Rules of Professional Conduct. Rule 1.7 governs the limitations on attorneys representing two or more parties with adverse interests. While permitting written consent to some conflicts in some cases, Rule 1.7(d)(3) specifically prohibits any attorney from attempting to represent parties with adverse interests in the *same litigation.*

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

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

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

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

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

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

The Department of Labor Necessarily Communicates with Employees

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

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

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

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

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

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

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

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

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

Oracle Mischaracterizes OFCCP's Letter to Oracle Employees

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

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

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

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

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

* * *

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

Sincerely,

Laura C. Bremer

Exhibit 3

Declaration of Abigail Daquiz

orrick

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Erin M. Connell

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May 9, 2019

Via E-Mail

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

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

Dear Laura:

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

Areas of Agreement

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

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

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

/ / /

/ / /

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

Areas of Disagreement

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

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

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

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

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

I will follow up regarding a proposed corrective notice.

Very truly yours,

Erin Connell

Erin M. Connell

Exhibit 4

Declaration of Abigail Daquiz

U.S. Department of Labor

Office of the Solicitor
90 7th Street, Suite 3-700
San Francisco, California 94103

May 13, 2019

VIA E-MAIL

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

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

Dear Erin:

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

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

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

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

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

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

<u>OFCCP's Representation of the Interests of the Protected Classes in This Action</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>OFCCP's Communications with Oracle's Managers</u>

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

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

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

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

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

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

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

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

Next Steps

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

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

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

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

[4] You suggest the following language:

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

March 11, 2016.

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

Sincerely,

Laura C. Bremer
Senior Trial Attorney

Exhibit 5

Declaration of Abigail Daquiz

orrick

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May 16, 2019

Via E-Mail

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

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

Dear Laura:

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

Erin Connell

Erin M. Connell

Exhibit 6

Declaration of Abigail Daquiz

D-03

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

FILED
SAN MATEO COUNTY
APR 08 2019
Clerk of the Superior Court
By DEPUTY CLERK

17-CIV-02669
OBJEV
Objections to Evidence
1743450

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

RONG JEWETT, SOPHY WANG, and XIAN MURRAY, on behalf of themselves, and ELIZABETH SUE PETERSEN, MARILYN CLARK, and MANJARI KANT, on behalf of themselves and all others similarly situated, Plaintiffs, vs. ORACLE AMERICA, INC., Defendant. _____/	Case No.: 17-CIV-02669 [Assigned for all purposes to Hon. V. Raymond Swope] **REDACTED** **PLAINTIFFS' OBJECTIONS TO EVIDENCE SUBMITTED BY ORACLE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Hearing Date: May 31, 2019 Hearing Time: 9:00 a.m. Location: Dept. 23 Complaint Filed: June 16, 2017 Trial Date: No date set

I. INTRODUCTION

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

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

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

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

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[1] Understanding that most objections to expert testimony ultimately go to weight, rather than to admissibility, Plaintiffs make their evidentiary objections to Dr. Saad's Report only once, rather than repeating them in a separate motion to strike.

Objection Number 1

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

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

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

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

Objection Number 2

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

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

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

Objection Number 3

Material Objected to: Saad Report ¶¶62-77, exhibits 24-26 (with respect to his "cluster analysis").

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

Objection Number 4

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

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

Objection Number 5

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

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

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

Objection Number 6

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

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

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

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

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

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

In fact, Oracle's interests are directly adverse to the interests of the putative class member declarants, but the putative class member declarants likely do not know that. [redacted]. *See* Neumark Rebuttal Report ¶35, Exhibit 17.

IV. EVIDENTIARY OBJECTIONS TO ORACLE'S MALE MANAGER DECLARATIONS

Objections to Chad Kidder Declaration dated March 1, 2019.

Objection Number 7

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

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

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

Objection Number 8

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

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

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Grounds for Objection: Prior Inconsistent Statement (Cal. Evid. Code §§ 770, 780). "Q. Do you know why Oracle sought prior compensation information? MS. PERRY: Object to form. Vague; ambiguous; overbroad. THE WITNESS: Based on my own experience, it was to determine if a hiring manager had the necessary budget in which to pay a candidate." Finberg Decl. ISO Class Cert., Ex. D (Kidder) 29:25-30-6. Irrelevant (Cal. Evid. Code §§ 210, 350). Speaking in the present tense, Mr. Kidder never states that the hiring practices he describes in paragraphs four and five of his declaration were in effect during the relevant time period (prior to October 2017, when it is acknowledged that Oracle stopped asking applicants or new hires for prior pay information). Lack of Foundation/No Personal Knowledge (Cal. Evid. Code §§ 403, 702(a), 800). Mr. Kidder is a recruiter, not a hiring manager, and cannot speak competently to the role hiring managers play in setting compensation.

Objection Number 9

Material Objected to: "Notwithstanding the 'mandatory' field on the new hire justification form (before October 2017), there has never been any policy at Oracle that required starting pay to bear any relationship to the value entered for 'Candidate Current Salary.' I am not aware of any managers formulaically using prior pay to determine starting pay, nor am I aware of any Oracle policy instructing managers to do so. In my experience, starting pay offers for hires with which I have been involved are driven by a host of factors specific to the role and the candidate—primary among these being the budget available for filling the role at issue, and the business's need for the specific skills, experience, and talents that the individual candidate brings to the role." (Kidder Declaration ¶ 6, page 2-3, lines 22-1).

Grounds for Objection: Prior Inconsistent Statement (Cal. Evid. Code §§ 770, 780). "Q. Do you know why Oracle sought prior compensation information? MS. PERRY: Object to form. Vague; ambiguous; overbroad. THE WITNESS: Based on my own experience, it was to determine if a hiring manager had the necessary budget in which to pay a candidate." Finberg Decl. ISO Class Cert., Ex. D (Kidder) 29:25-30-6. Speculation and conjecture, as to hiring managers using prior pay to determine starting pay (conclusory allegations rather than statements of fact) (Cal. Evid. Code §§ 702, 800). Lack of Foundation/No Personal Knowledge (Cal. Evid.

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

V. EVIDENTIARY OBJECTIONS BASED UPON THE COMPLETENESS DOCTRINE.

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

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

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

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

Objection Number 10

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

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

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

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

Objection Number 11

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

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

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Objections to Kathryn Mantoan Declaration In Support Of Motion To Strike Testimony of Leaetta Hough dated March 6, 2019.

Objection Number 12

Material Objected to: Mantoan Decl. ISO Motion to Strike Hough Ex. A (Hough Dep) Ex. 4.

Grounds for Objection: Incomplete Evidence (Cal. Evid. Code § 356). Ex. 4 to Dr. Hough's deposition is an extract from a spreadsheet produced by Oracle, ORACLE_JEWETT_00007304, containing job postings for the Software Developer 4 position. The extracted version used by Oracle at the deposition, and filed with the Court in support of its Motion to Strike Hough and its Opposition to Class Certification, omits multiple columns from the spreadsheet, including the columns labeled [redacted] FRD ¶21, Ex. R. The omitted columns are identical or near-identical for each Software Developer 4 position. *Id.*

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Objection Number 13

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

Grounds for Objection: Incomplete Evidence (Cal. Evid. Code § 356). Ex. 5 to Dr. Hough's deposition is an extract from a spreadsheet produced by Oracle, ORACLE_JEWETT_00007307, containing job postings for the Software Developer 4 position. The extracted version used by Oracle at the deposition, and filed with the Court in support of its Motion to Strike Hough and its Opposition to Class Certification, omits multiple columns from the spreadsheet, including the columns labeled [redacted] FRD ¶22, Ex.S. The omitted columns are identical or near-identical for each Software Developer 4 position. *Id.*

Dated: April 3, 2019

By: Eve H. Cervantez

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

Exhibit 7

Declaration of Abigail Daquiz

EXHIBIT O

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

John:

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

Moreover, your request indiscriminately appears to seek communications with putative class members who are current managers at Oracle, with whom in-house counsel and Orrick may communicate regarding their decisions as managers under the umbrella of attorney-client privilege. Such a request sweeps too broadly and clearly touches on privileged communications.

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

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

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

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

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

Thank you,
Katie

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

Erin & Katie,

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

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

Thank you,
John

JOHN T. MULLAN | PARTNER
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Exhibit 8

Declaration of Abigail Daquiz

From: Nardecchia, Natalie - SOL
To: Erin Connell (econnell@orrick.com)
Cc: Pilotin, Marc A - SOL; Bremer, Laura - SOL
Subject: OALJ Case No. 2017-OFC-00006; OFCCP v. Oracle
Date: Monday, March 13, 2017 1:06:59 PM
Attachments: Proposed Order re Severance Agreements Motion - to Orrick 3.13.17.pdf
Oracle Severance Agreements Motion ADDENDUM A to Orrick 3.13.17.pdf

---

Dear Ms. Connell:

I am one of the attorneys for OFCCP in the proceeding against Oracle, OALJ Case No. 2017-OFC-00006.

I am writing to meet and confer with you regarding an urgent issue that has come to OFCCP's attention. OFCCP recently learned that Oracle has begun laying off its employees and offering severance agreements that threaten to chill employee cooperation with OFCCP and thereby interfere with OFCCP's litigation. These agreements violate the anti-intimidation and discrimination provisions of 41 C.F.R. § 60-1.32.

As you know, contractors violate 41 C.F.R. § 60-1.32, where they fail "to take all necessary steps to ensure that no person intimidates, threatens, coerces or discriminates against any individual for the purpose of interfering with, inter alia, furnishing information, or assisting or participating in any manner in an investigation or hearing…. [It] is not necessary to base that conclusion on a finding of actual coercion." *OFCCP v. Uniroyal, Inc.*, Case No. OFCCP 1977-1, 1979 WL 258004, at *20 (June 28, 1979). Indeed, a "failure to take all appropriate action to avoid possible coercion or intimidation constitutes a violation of 41 CFR 60-1.32, regardless of whether [the contractor] successfully coerced or intimidated any employees." *Id*.

Here, Oracle has failed to take any, much less "all necessary steps" to ensure there is no intimidation or coercion, or unlawful interference into OFCCP's prosecution of this case. On the contrary, Oracle's severance language has the effect of unlawfully intimidating and coercing its employees, and threatens to severely chill witness cooperation in this matter. Among other things, the severance agreement language puts an undue and improper burden on the employee to use his or her "best efforts to cause [any and all possible claims] to be withdrawn, dismissed or otherwise terminated with prejudice." Employees are very likely to have the mistaken impression that they cannot or should not talk to or assist OFCCP in its proceedings in this case. It also is harassing and retaliatory to demand that Oracle employees "cause" any claims, including claims brought by OFCCP, to be "withdrawn, dismissed or otherwise terminated." Employees will likely even fear negative consequences for having simply spoken to or expressed a complaint to OFCCP in the past, as the severance requires employees to attest that they have no "pending claims" that "in any way arose from or are related to my employment relationship with Oracle." The severance agreement also fails to communicate to the employees that they have the affirmative, inalienable right to communicate with and participate in any proceeding involving any federal agency. The current language obviates this right and misleads employees into believing that this right is conditional or could be "prevented" in some way. It also has the effect of deterring employees from communicating with OFCCP regarding this proceeding and obtaining critical information regarding their ability to recover backpay to which they may be entitled.

We ask that Oracle correct any confusion and quickly come into compliance by taking the steps outlined in the attached proposed order. I have also attached Addendum A, which is referenced in the proposed order. We are open to discussing this with you and will confer in good faith to try and come to an informal resolution. However, if we cannot get this resolved informally, and this week, the Secretary will be filing a motion requesting the relief sought in the attached document. This is a pressing issue to which OFCCP needs resolution. I look forward to hearing from you.

Truly yours,

Natalie

Natalie Nardecchia
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
350 S. Figueroa Street, Suite 370
Los Angeles, CA 90071
Phone: 213 894-3284

This message may contain information that is privileged and exempt from disclosure under law. Do not share or copy without consulting the Office of the Solicitor. If you think you received this e-amil in error, please notify me immediately.

ADDENDUM A

NOTICE CONCERNING INTIMIDATION AND INTERFERENCE

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has filed a lawsuit against Oracle America, Inc., alleging that Oracle has engaged in discriminatory employment practices at its Redwood Shores facility on account of race and sex. Specifically, OFCCP alleges that, and with respect to numerous job categories, Oracle has discriminated against its female, African American, and Asian employees in compensation and has discriminated against its African American, Hispanic and White applicants in hiring.

You may have rights with regard to this proceeding. You have the right to discuss, with legal counsel of your choosing, the potential effect of signing any severance agreement on any rights you may have to recover in any pending litigation, including that brought by OFCCP.

In addition, Oracle, as a contractor with the Federal Government, must comply with the non-discrimination requirements of Executive Order 11246 and related regulations. One of these regulations, at 29 C.F.R. § 60-1.32, provides:

> **Intimidation and interference.**
>
> (a) The contractor, subcontractor or applicant shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:
>
> (1) Filing a complaint;
>
> (2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Order or any other Federal, state or local law requiring equal opportunity;

> (3) Opposing any act or practice made unlawful by the Order or any other Federal, state or local law requiring equal opportunity; or
>
> (4) Exercising any other right protected by the Order.
>
> (b) The contractor, subcontractor or applicant shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion or discrimination. The sanctions and penalties contained in this part may be exercised by OFCCP against any contractor, subcontractor or applicant who violates this obligation.

What this means is that Oracle may not intimidate or harass you, threaten or interfere in any way, or take any other adverse actions against you for talking or having talked to anyone at the Department of Labor (OFCCP) about Oracle's employment practices, giving testimony in the case that OFCCP has brought against Oracle, or otherwise participating in the administrative proceedings and litigation under the Executive Order. This is true whether or not you sign or have signed any severance agreement with Oracle.

If you feel that Oracle has in any way interfered with your ability to do so or has harassed, intimidated, threatened, coerced, or discriminated against you for doing so, please contact the Department of Labor.

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	OALJ Case No. 2017-OFC-00006
Plaintiff,	)	OFCCP No. R00192699
v.	)	
ORACLE AMERICA, INC.,	)	
Defendant.	)	

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR CORRECTIVE ORDER REGARDING SEVERANCE AGREEMENTS

The Court is in receipt of OFCCP's Motion for Corrective Order Regarding Severance Agreements.

Having reviewed OFCCP's assertions therein, and good cause showing, the Court hereby grants OFCCP's Motion.

Oracle is hereby ordered to:

(1) strike the following (or similar) language from any severance agreement Oracle uses, including the one attached to OFCCP's Motion at Exhibit A, ¶ 3:

> I agree that should I learn of any such claims being pursued on my behalf, I will use my best efforts to cause such claims to be withdrawn, dismissed or otherwise terminated with prejudice. I understand that, while I am not prevented by the foregoing language from filing a charge with the EEOC, NLRB, SEC or other similar federal or state agency ("Government Agencies"), or assisting with, testifying and/or participating in such an agency's investigation, hearing, or proceeding, by signing this Agreement, I am waiving my right to any personal recovery, either in my own lawsuit or one brought by such agency on my behalf. I understand this Agreement does not limit my right to receive an award for information provided to any Government Agencies.

(2) substitute the following language, in bold font, where the above language in lieu of the stricken language above:

> **Nothing in this Agreement is intended to, or can, prevent, impede, or interfere with the employee's right to provide truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by any government agency, including the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). In other words, no adverse actions can be taken against you for talking or having talked to anyone at the Department of Labor (OFCCP), for giving testimony in the case that OFCCP has brought against Oracle, or for otherwise participating in the administrative proceedings brought by OFCCP. This is true whether or not you sign or have signed an Agreement with Oracle. You also have the right to discuss, with legal counsel of your choosing, the potential effect of signing this Agreement upon any rights you may have to recover in any pending litigation, including that brought by OFCCP.**

Oracle is required to send to all of its current employees and all former employees who separated within the last two (2) years at its Redwood Shores facility, a notice entitled "Notice Concerning Intimidation and Interference," which is attached as Addendum A to OFCCP's Motion.

IT IS SO ORDERED.

Dated: _____, 2017

_____
STEPHEN R. HENLEY
Chief Administrative Law Judge

Exhibit 9

Declaration of Abigail Daquiz

Daquiz, Abigail - SOL

From: Connell, Erin M. <econnell@orrick.com>
Sent: Tuesday, March 21, 2017 6:23 PM
To: Nardecchia, Natalie - SOL
Cc: Pilotin, Marc A - SOL; Bremer, Laura - SOL; Siniscalco, Gary R.; Kaddah, Jacqueline D.
Subject: RE: OALJ Case No. 2017-OFC-00006; OFCCP v. Oracle
Attachments: Oracle Severance Notice (version 2).docx; Oracle Severance Notice (version 1).docx

Natalie,

I write to follow up on our call last week, and to make a counter-proposal that we believe addresses the concerns OFCCP has raised.

First, I am attaching two draft letters that Oracle has agreed to send to individuals who have received a severance agreement since the filing of the OFCCP lawsuit in January of this year. At present, we believe that includes a total of 58 people. One version of the letter is for those individuals who already have signed Oracle's severance agreement. The second version is for those who have received an agreement, but have not signed it. As you will see, much of the language in the draft letters is taken, nearly verbatim, from the paragraph OFCCP proposed placing in Oracle's severance agreement.

Second, as we proposed last week, Oracle has confirmed it is willing to revise its severance agreement on a go-forward basis to remove the sentence in paragraph 3 that is the focus of your correspondence below, and which states that employees must use their best efforts to have any lawsuit filed on their behalf dismissed. Additionally, Oracle is willing to include the DOL (including OFCCP) in the non-exhaustive list of government agencies specifically named in paragraph 3.

Further, for those individuals who have received a severance agreement since the filing of the OFCCP lawsuit, but who have not signed it, Oracle is willing to provide them with a new version of severance agreement, along with the draft letter attached.

Finally, in response to your additional request during our call for former employee contact information, Oracle will not agree to provide contact information of its former employees without their permission, but is willing to provide certification confirming that the letters (and revised agreements for those who have not signed) have been sent.

We believe the proposed changes to the severance agreement fully comply with the regulation to which you cite. We further believe the letters attached – both of which are based on language provided by OFCCP – appropriately address the concerns raised below. Additionally, for the reasons we discussed on our call, the case to which you cite (*OFCCP v. Uniroyal)* is not on point, and does not require more than Oracle is offering here.

If you would like to discuss this issue further, please let us know and we are happy to schedule an additional meet and confer call.

We look forward to hearing from you.

Thanks,

Erin

Erin M. Connell

Partner

Orrick

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

Employment Blog

From: Nardecchia, Natalie - SOL [mailto:Nardecchia.Natalie@dol.gov]
Sent: Friday, March 17, 2017 11:45 AM
To: Connell, Erin M. <econnell@orrick.com>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Bremer, Laura - SOL <Bremer.Laura@dol.gov>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>
Subject: RE: OALJ Case No. 2017-OFC-00006; OFCCP v. Oracle

Yes, please provide us with your draft Notice by Wednesday of next week so we have time to evaluate.

Thanks,

Natalie

Natalie Nardecchia
U.S. Department of Labor
Office of the Solicitor
213 894-3284

From: Connell, Erin M. [mailto:econnell@orrick.com]
Sent: Thursday, March 16, 2017 3:57 PM
To: Nardecchia, Natalie - SOL
Cc: Pilotin, Marc A - SOL; Bremer, Laura - SOL; Siniscalco, Gary R.; Kaddah, Jacqueline D.
Subject: RE: OALJ Case No. 2017-OFC-00006; OFCCP v. Oracle

Hi Natalie and Marc,

Thanks for the call today. To confirm, we will follow-up next week on the issues we discussed, after further conferring internally and with our client, and after giving further thought to our respective positions to resolve this issue.

Best Regards,

Erin

Erin M. Connell
Partner

Orrick

San Francisco

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

Employment Blog

From: Connell, Erin M.
Sent: Tuesday, March 14, 2017 1:55 PM
To: 'Nardecchia, Natalie - SOL' <Nardecchia.Natalie@dol.gov>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Bremer, Laura - SOL <Bremer.Laura@dol.gov>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>
Subject: RE: OALJ Case No. 2017-OFC-00006; OFCCP v. Oracle

Hi Natalie,
Let's use the conference line below. I will send a calendar invite.
Thanks,
Erin

Call in number – 1-877-211-3621 // Passcode – 175259

From: Nardecchia, Natalie - SOL [mailto:Nardecchia.Natalie@dol.gov]
Sent: Tuesday, March 14, 2017 1:49 PM
To: Connell, Erin M. <econnell@orrick.com>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Bremer, Laura - SOL <Bremer.Laura@dol.gov>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>
Subject: RE: OALJ Case No. 2017-OFC-00006; OFCCP v. Oracle

Erin,

Yes, I can do a call on Thursday at 3:00 pm. Shall I call you?

Thank you,

Natalie

Natalie Nardecchia
U.S. Department of Labor
Office of the Solicitor
213 894-3284

From: Connell, Erin M. [mailto:econnell@orrick.com]
Sent: Monday, March 13, 2017 5:32 PM
To: Nardecchia, Natalie - SOL

Cc: Pilotin, Marc A - SOL; Bremer, Laura - SOL; Siniscalco, Gary R.; Connell, Erin M.; Kaddah, Jacqueline D.
Subject: RE: OALJ Case No. 2017-OFC-00006; OFCCP v. Oracle

Dear Natalie,

Gary Siniscalco and I are available to meet and confer with you on this issue on Wednesday between 11-2 or on Thursday between 2-4. Please let us know a time that works for you.

Thanks,
Erin

Erin M. Connell
Partner

Orrick

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

Employment Blog

From: Nardecchia, Natalie - SOL [mailto:Nardecchia.Natalie@dol.gov]
Sent: Monday, March 13, 2017 1:07 PM
To: Connell, Erin M. <econnell@orrick.com>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Bremer, Laura - SOL <Bremer.Laura@dol.gov>
Subject: OALJ Case No. 2017-OFC-00006; OFCCP v. Oracle

Dear Ms. Connell:

I am one of the attorneys for OFCCP in the proceeding against Oracle, OALJ Case No. 2017-OFC-00006.

I am writing to meet and confer with you regarding an urgent issue that has come to OFCCP's attention. OFCCP recently learned that Oracle has begun laying off its employees and offering severance agreements that threaten to chill employee cooperation with OFCCP and thereby interfere with OFCCP's litigation. These agreements violate the anti-intimidation and discrimination provisions of 41 C.F.R. § 60-1.32.

As you know, contractors violate 41 C.F.R. § 60-1.32, where they fail "to take all necessary steps to ensure that no person intimidates, threatens, coerces or discriminates against any individual for the purpose of interfering with, inter alia, furnishing information, or assisting or participating in any manner in an investigation or hearing…. [It] is not necessary to base that conclusion on a finding of actual coercion." *OFCCP v. Uniroyal, Inc.*, Case No. OFCCP 1977-1, 1979 WL 258004, at *20 (June 28, 1979). Indeed, a "failure to take all appropriate action to avoid possible coercion or intimidation constitutes a violation of 41 CFR 60-1.32, regardless of whether [the contractor] successfully coerced or intimidated any employees." *Id*.

Here, Oracle has failed to take any, much less "all necessary steps" to ensure there is no intimidation or coercion, or unlawful interference into OFCCP's prosecution of this case. On the contrary, Oracle's severance language has the effect of unlawfully intimidating and coercing its employees, and threatens to severely chill witness cooperation in this matter. Among other things, the severance agreement language puts an undue and improper burden on the employee to use his or her "best efforts to cause [any and all possible claims] to be withdrawn, dismissed or otherwise terminated with prejudice." Employees are very likely to have the mistaken impression that they cannot or should not talk to or assist OFCCP in its proceedings in this case. It also is harassing and retaliatory to demand that Oracle employees "cause" any claims, including claims brought by OFCCP, to be "withdrawn, dismissed or otherwise terminated." Employees will likely even fear negative consequences for having simply spoken to or expressed a complaint to OFCCP in the past, as the severance requires employees to attest that they have no "pending claims" that "in any way arose from or are related to my employment relationship with Oracle." The severance agreement also fails to communicate to the employees that they have the affirmative, inalienable right to communicate with and participate in any proceeding involving any federal agency. The current language obviates this right and misleads employees into believing that this right is conditional or could be "prevented" in some way. It also has the effect of deterring employees from communicating with OFCCP regarding this proceeding and obtaining critical information regarding their ability to recover backpay to which they may be entitled.

We ask that Oracle correct any confusion and quickly come into compliance by taking the steps outlined in the attached proposed order. I have also attached Addendum A, which is referenced in the proposed order. We are open to discussing this with you and will confer in good faith to try and come to an informal resolution. However, if we cannot get this resolved informally, and this week, the Secretary will be filing a motion requesting the relief sought in the attached document. This is a pressing issue to which OFCCP needs resolution. I look forward to hearing from you.

Truly yours,

Natalie

Natalie Nardecchia
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
350 S. Figueroa Street, Suite 370
Los Angeles, CA 90071
Phone: 213 894-3284

This message may contain information that is privileged and exempt from disclosure under law. Do not share or copy without consulting the Office of the Solicitor. If you think you received this e-amil in error, please notify me immediately.

NOTICE TO RECIPIENT | This e-mail is meant for only the intended recipient of the transmission, and may be a communication privileged by law. If you received this e-mail in error, any review, use, dissemination, distribution, or copying of this e-mail is strictly prohibited. Please notify us immediately of the error by return e-mail and please delete this message from your system. Thank you in advance for your cooperation.

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For more information about Orrick, please visit *http://www.orrick.com*.

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For more information about Orrick, please visit *http://www.orrick.com*.

Dear XXXXX:

On _____, you signed a severance agreement provided to you by Oracle on _____. Paragraph 3 of that severance agreement includes a sentence that states, “I agree that should I learn of any [claims against Oracle] being pursued on my behalf, I will use my best efforts to cause such claims to be withdrawn, dismissed or otherwise terminated with prejudice.” Oracle is providing you with this letter to clarify and confirm that neither the sentence cited in that Paragraph 3, nor any other provision of the agreement, is intended to, or can, prevent, impede, or interfere with your right to provide truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by any government agency, including the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP). In other words, no adverse actions can be taken against you for talking or having talked to anyone at the Department of Labor (OFCCP), for giving testimony in the case that OFCCP has brought against Oracle, or for otherwise participating in the administrative proceedings brought by OFCCP. This is true whether or not you sign or have signed an agreement with Oracle. As stated in the severance agreement itself, you also have the right to discuss, with legal counsel of your choosing, the effect of signing the severance agreement upon any rights you may have to recover in any pending litigation, including that brought by OFCCP.

If you have any questions about this letter or the severance agreement, please contact _____ at _____.

Best Regards,

_____

Dear XXXXX:

Enclosed is a revised version of the severance agreement Oracle provided to you on _____. Oracle has modified the language in Paragraph 3 to omit the following sentence: “I agree that should I learn of any [claims against Oracle] being pursued on my behalf, I will use my best efforts to cause such claims to be withdrawn, dismissed or otherwise terminated with prejudice.” Oracle also has added the “Department of Labor, including but not limited to the Office of Contract Compliance Programs (“OFCCP”)” to the non-exhaustive list of government agencies specifically named in Paragraph 3. Otherwise, the severance agreement remains unchanged.

Please note that nothing in this severance agreement, or the prior version, is intended to, or can, prevent, impede, or interfere with your right to provide truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by any government agency, including the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP). In other words, no adverse actions can be taken against you for talking or having talked to anyone at the Department of Labor (OFCCP), for giving testimony in the case that OFCCP has brought against Oracle, or for otherwise participating in the administrative proceedings brought by OFCCP. This is true whether or not you sign or have signed an Agreement with Oracle. As stated in the severance agreement itself, you have the right to discuss, with legal counsel of your choosing, the potential effect of signing this Agreement upon any rights you may have to recover in any pending litigation, including that brought by OFCCP.

Please also note that because the enclosed severance agreement is a new agreement, you have additional time to consider it, as reflected in the dates contained in the enclosed severance agreement itself.

If you have any questions about this letter or the enclosed severance agreement, please contact _____ at _____.

Best Regards,

_____

Exhibit 10

Declaration of Abigail Daquiz

Pilotin, Marc A - SOL

From: Connell, Erin M. <econnell@orrick.com>
Sent: Friday, April 14, 2017 4:18 PM
To: Nardecchia, Natalie - SOL
Cc: Pilotin, Marc A - SOL
Subject: RE: Severance Agreements Issue - Oracle
Attachments: Oracle Severance Notice (version 2).docx; Oracle Severance Notice (version 1).docx

Hi Natalie,

Your understanding of Oracle's position on our last call is partially correct, although not entirely. Additionally, to clarify, the date on which Oracle changed its severance agreement (and your understanding of how Oracle changed it is correct) is March 21, 2017.

To clarify, here is a correct summary of Oracle's proposal:

- Oracle will send a notice letter to everyone who signed a severance agreement (and previously worked at HQCA) from March 11, 2016 to March 21, 2017 advising them that the agreement does not foreclose their right to cooperate with OFCCP in its lawsuit,
- Oracle will send a notice letter to everyone who was offered, but didn't sign, their severance agreement (and previously worked at HQCA) from January 17, 2017 to March 21, 2017 advising them that the agreement does not foreclose their right to cooperate with OFCCP in its lawsuit (*and offering them a new agreement*).

The notices (which I previously circulated) are attached. As you note below, Oracle is not willing to offer a new severance agreement to people who were offered one (but didn't sign) between March 11, 2016 and January 16, 2017, and therefore, there is no need for Oracle to contact these people at all.

With respect to contact information, the authority below does not support OFCCP's position. Nor has OFCCP cited any authority for the proposition that Oracle needs to inform these individuals specifically about the lawsuit. Oracle agreed to include information about the lawsuit as a compromise—not because any of the authority OFCCP has provided supports this notion. As we discussed on our last call, if any individual really wants to find out how to contact OFCCP, they can easily do so. Indeed, the OFCCP's complaint in this matter (which specifically names the attorneys representing OFCCP) is available through a link listed in the press release prominently featured on OFCCP's website.

Despite the lack of any authority supporting OFCCP's insistence on including its contact information in the notices Oracle has agreed to send, Oracle would like to resolve this issue without having to go to a hearing before the ALJ. Please provide the phone number you would like included, and we will include it in the notice, as you have requested.

Thanks,
Erin

From: Nardecchia, Natalie - SOL [mailto:Nardecchia.Natalie@dol.gov]
Sent: Tuesday, April 11, 2017 5:27 PM
To: Connell, Erin M. <econnell@orrick.com>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>
Subject: Severance Agreements Issue - Oracle

Dear Erin:

I am writing to memorialize the terms of our potential agreement with regard to the severance agreements in Oracle. I also raise a few points of clarification.

These are the terms of the resolution that we discussed last week (as I understood them):

- Oracle has two draft letters, which it agrees to send to all individuals (at the Redwood Shores location) who have received a severance agreement since March 11, 2016. One version of the letter is for those individuals who already have signed Oracle's severance agreement. The second version is for those who have received an agreement, but have not signed it. (The letters are those attached to your March 21, 2017 email).
- Oracle has revised its severance agreement to delete the following sentence: "I agree that should I learn of any such claims being pursued on my behalf, I will use my best efforts to cause such claims to be withdrawn, dismissed or otherwise terminated with prejudice." In addition, the revised severance agreement lists OFCCP as one of the "Government Agencies" referenced in the sentence beginning with "I understand that, while I am not prevented..."
- Oracle will send a revised severance agreement – consistent with the above changes – along with the above-mentioned letter, to all individuals who have received a severance agreement since January 17, 2017 and who have not yet signed.

Finally, we are firm in our request that Oracle's letters, referenced above in the first bullet point, state as follows – either before or after the contact information provided for Oracle:
If you have any questions or concerns about your rights with regard to the investigation or proceeding brought by OFCCP, you may call __ for more information. [We will provide the number].

On the last request to put OFCCP's contact information on the letter, we believe that this will satisfy Oracle's obligation to "to take all necessary steps to ensure that no person intimidates, threatens, coerces or discriminates against any individual for the purpose of interfering with, *inter alia*, furnishing information, or assisting or participating in any manner in an investigation or hearing...." *OFCCP v. Uniroyal, Inc.*, Case No. OFCCP 1977-1, 1979 WL 258004, at *20 (June 28, 1979); 41 C.F.R. § 60-1.32.

The policy underlying this requirement is that employees must feel free and willing to speak to OFCCP, and OFCCP depends in part upon witness involvement. Interviewing "employees potentially impacted by discriminatory compensation" is "an invaluable way for [OFCCP] to determine whether compensation discrimination in violation of Executive Order 11246 has occurred and to support its statistical findings." *See* 79 FR 55712-02, 2014 WL 4593912 (F.R.), *Proposed Rules*, 41 C.F.R. Part 60-1, RIN 1250-AA06. "[T]he willingness of a contractor's employees to speak openly with OFCCP investigators about a contractor's compensation practices" is paramount to OFCCP's ability to enforce the Executive Order. *Id.* The Supreme Court, in the context of other federal law enforcement agencies, has recognized the same rationale. For instance, the Court has acknowledged that, in order to enforce the Fair Labor Standards Act, the Secretary of Labor necessarily relies, "not upon 'continuing detailed federal supervision or inspection of payrolls,' but upon 'information and complaints received from employees seeking to vindicate rights claimed to have been denied.'" *Kasten v. St.-Gobain Performance Plastics Corp.*, 531 U.S. 1, 11-12 (2011) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). The Ninth Circuit has also noted the importance of the EEOC's ability to talk to employee witnesses regarding discrimination claims. *See, e.g., E.E.O.C. v. McLane Co., Inc.*, 804 F.3d 1051, 1056-57 (9th Cir. 2015) (ordering employer to produce employee contact information).

OFCCP is willing to forego its demand, in this context of the severance agreement issue, for contact information for all severed employees. However, given the concerning language in the severance agreements that were sent out to Oracle employees, there is a serious concern that these employees will not understand that they have the affirmative, inalienable right to communicate with OFCCP and participate in this proceeding. It very likely has had the effect of deterring employees from communicating with OFCCP regarding this proceeding and obtaining critical information regarding their ability to recover backpay to which they may be entitled. By providing OFCCP's contact information in

the letter – and not solely directing employees to contact Oracle, this will ensure that employees understand they have the right to contact OFCCP with regard to that proceeding. Furthermore, the current version of the letter suggests that employees should contact Oracle *to get information about OFCCP's proceeding*, which could present a conflict of interest or the opportunity for unlawful interference. This is particularly true since OFCCP does not know – from the letters – to whom the employees are being directed or what that individual would potentially say regarding OFCCP's proceeding. Instead of creating these opportunities for further interference, OFCCP's position is that Oracle will fulfill its duty to take "all necessary steps" to protect against interference by also providing OFCCP's contact information in the letters.

Please let me know your client's response.

Thank you,

Natalie

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