

EXHIBIT D



Orrick, Herrington & Sutcliffe LLP

The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669

+1 415 773 5700

orrick.com

Kathryn G. Mantoan

E kmantoan@orrick.com

D +1 415 773 5887

F +1 415 773 5759

June 22, 2018

Via E-Mail (jfinberg@altshulerberzon.com)

James M. Finberg
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108

Re: *Jewett v. Oracle America, Inc.*, No. 17-cv-2669 (San Mateo Super. Ct.)
Meet and Confer Regarding Plaintiffs' Requests for Production Nos. 33, 44-50

Dear Counsel:

This letter responds to your letter dated June 12, 2018 and addresses Plaintiffs' Requests for Production Nos. 33 and 44-50, about which the parties have been meeting and conferring.

RFP No. 33: This request seeks documents relating to "complaints or inquires, whether formal or informal" by any member of the putative class regarding compensation, advancements, or promotions; Topic No. 22 of Plaintiffs' PMK Deposition Notice seeks testimony regarding the same issue. Our previously letters dated March 16, 2018 and May 3, 2018 set forth in detail our objections to producing these documents and information, and the inadequacy of Plaintiffs' proffer that they are relevant to willfulness. Rather than respond to our points or requests for authority supporting Plaintiffs' position, you e-mailed on May 14, 2018 asking whether the parties had "completed the meet and confer process such that a motion to compel is now ripe." On our May 22, 2018 meet and confer call, we reiterated our request for any authority requiring production of such documents in a California Equal Pay Act (EPA) case; you said you had an order you would provide—though you indicated it was from a discrimination case rather than an EPA case—but have not provided anything to date.

While we stand by our arguments that information about complaints is irrelevant to the claims Plaintiffs have pled—particularly prior to certification of any class—in the interest of resolving this issue without motion practice, we propose the following compromise: Oracle's response to both RFP No. 33 and PMK Topic No. 22 will be considered complete if (1) an e-mail is sent to members of Oracle's in-house Employment Law department and Human Resources managers asking them to search for and provide to counsel for review (and, if appropriate, production) complaints regarding

James M. Finberg
June 22, 2018
Page 2

unequal compensation on the basis of gender by women employed by Oracle within the Information Technology, Product Development, and Support job functions in California for the appropriate statute of limitations period, and (2) a reasonably diligent search is conducted in EthicsPoint, Oracle's centralized internal repository for Human Resources complaints, to identify the same types of complaints. Please confirm whether Plaintiffs agree to this proposal so that we can undertake searches with agreed-upon parameters.

RFP No. 44: This request seeks documents relating to communications with Covered Employees about this lawsuit. In my May 23, 2018 letter, I memorialized the proposal that Oracle's response to this request be considered complete if an e-mail was sent to counsel, Human Resources employees, and Vice-Presidents asking them to search for and provide to counsel for review (and, if appropriate, production) communications to or from putative class members related specifically to the *Jewett v. Oracle America, Inc.* lawsuit (including but not limited to the *Belair* Notice sent as a part of this case). Our client has agreed to this proposal, and we have begun the process to collect, review, and produce non-privileged communications related to the allegations in the *Jewett v. Oracle America, Inc.* lawsuit. We will make the corresponding production as soon as we are able to do so. Again, however, I reiterate that we already have inquired of our client and are unaware of any "blast" e-mail having been sent from Legal, HR, or any VP regarding this case.

RFP No. 45: This request seeks documents relating to the separate matter of *Office of Federal Contract Compliance Programs (OFCCP) v. Oracle America, Inc.*, which raises different claims under a different statute, covering a different population in a different forum governed by different procedural rules. We have previously explained in detail our objections to this request—see our May 3 and May 12 letters—and your June 12 letter does nothing to undermine those objections.

Your continued reliance on *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165 (2d Cir. 2003) does not satisfy our request that you provide authority supporting your position that you are entitled to complete and wholesale production of every document produced in a separate administrative matter. As noted in my May 23 letter, *Ratliff* involved the question of whether documents that were authored by a foreign entity outside of a federal district court's jurisdiction and transferred to a law firm within the district were discoverable by a subpoena to that firm. Having decided that question in the affirmative, the court in *Ratliff* remanded the case for consideration of any remaining issues, which included Davis Polk's arguments "that the subpoena was overbroad and the documents were irrelevant"—similar arguments to those being asserted by Oracle in this matter. *Id.* at 167. The language you cite in your June 12 letter about how the attorney-client privilege "does not continue when the client voluntarily discloses the documents to a third party, here a government agency" is an



James M. Finberg
June 22, 2018
Page 3

uncontroversial point that does not address the central issue here, which is that you have demanded comprehensive production of all documents exchanged in a separate proceeding while ignoring that the other proceeding is ongoing and involves facts and claims that are wholly irrelevant to this case.

Your reliance on *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993) is also unavailing. *Steinhardt* is distinguishable as there was no contention by the defendant in that case that the plaintiff's request sought documents beyond the scope of the subject of the civil litigation. Rather, the defendant "identified as responsive a memorandum ... previously submitted to the Securities and Exchange Commission," but claimed only that the memo was privileged as attorney work product. *Id.* at 232. Similarly, *Kirkland v. Superior Court*, 95 Cal. App. 4th 92 (2002) is not persuasive here, as the plaintiff in *Kirkland* made a satisfactory showing that its requests were relevant to the litigation. In that case, the plaintiff sought production of testimony, complaints, reports, and other documents produced in an SEC investigation where the specific transactions under government investigation were central to the plaintiff's civil fraud claims. *Id.* at 98. Neither of these cases holds that a document becomes relevant for discovery purposes in a civil litigation matter simply because it was produced to a government entity for a different purpose.

We have already agreed to produce documents that were previously exchanged in connection with the OFCCP audit and administrative proceeding that are also relevant in this matter, pursuant and as responsive to Plaintiffs' discovery requests in this case. But documents that relate or refer to OFCCP's hiring claims, and the agency's claims related to alleged racial disparities, have no relevance to this EPA litigation. You have provided no authority—despite our request that you do so—that would support requiring Oracle to expend the time and energy to redact out this patently irrelevant information to protect the privacy of individuals unrelated to any of the claims at issue here.

Finally, your June 12 letter asserts that Oracle "produced documents to the OFCCP/DOL relevant to the subject matter of the claims in this case that it has not produced in this case." In support of this claim, you identify three documents mentioned by the government in its January 2015 interview (which you incorrectly placed in February 2015) of Lisa Gordon, Compensation Director at Oracle, in connection with a separate audit of Oracle's Pleasanton, CA (PLCA) location. Presumably, you identified these documents by reviewing pleadings at the site where public records of the *OFCCP v. Oracle* proceeding are maintained—a site to which I directed you in my May 23 letter—in which the OFCCP filed notes of its interview with Ms. Gordon from that separate audit as part of a motion to compel. You appear to assume (without basis) that each of these documents was provided to OFCCP in the audit of Oracle's headquarters location (HQCA) to which RFP No. 45 relates. And

you overlook that two of these documents have already been produced in substantially similar form¹ in this case. *See* ORACLE_JEWETT_00000327, ORACLE_JEWETT_00000914. However, to avoid further exchanges and dispute on this point, we are preparing for production in this case a set of these three exact documents.

RFP No. 46: This request seeks Oracle’s EEO-1 reports related to Covered Employees during the “CLASS PERIOD” (an undefined term). We previously asked for authority regarding the relevance of this information, but none of the information or argument in your June 12 letter suffices. Regarding your contention that location groupings for EEO-1 purposes are relevant to the “same establishment” inquiry under the EPA, you have still failed to provide any such authority. Regarding your contention that EEO-1 reports are relevant to Plaintiffs’ required showing of “willfulness” for EPA statute of limitations purposes, your June 12 letter suggests that the statute of limitations period under the EPA (and thus “willfulness” under that statute) is relevant at this pre-certification stage because different remedies may be available under the EPA than are available under Business & Professions Code section 17200 (which you concede has a longer limitations period). But the availability of different remedies under the two statutes (if Plaintiffs could establish liability as to one or both) is not relevant to any pre-certification issues, or even to the issue of the identity of individuals to whom notice would be sent were a class certified (which is the basis on which you previously relied in contending that limitations period issues are relevant at this juncture).

Finally, the cases you cite in your June 12 letter regarding the discoverability of EEO-1 reports in federal cases asserting race and/or gender discrimination are inapposite in this EPA case. You cite four cases for the proposition that “numerous courts have found EEO-1 reports to be relevant and discoverable in the context of employment discrimination claims.” Not all of the cases actually support that proposition, but for those that do, your letter actually notes the key distinction from this litigation: these cases involve employment discrimination claims and the required showing of discriminatory intent that accompanies such claims. For example, in *Witten v. A.H. Smith & Co.*, 100 F.R.D. 446 (D. Md. 1984), the court held that plaintiff was entitled to the EEO-1 reports because they “could contain potentially useful information of *intent* and *motivation* ... particularly in employment discrimination cases where proof of intent is so vital and yet so difficult to obtain.” *Id.* at 454 (emphasis added). Similarly, in *Gatewood v. Stone Container Corp.*, 170 F.R.D. 455 (S.D. Iowa 1996), the court permitted partial discovery of EEO-1 data because “the central issue [in the case]

¹ As is often the case among the documents of large companies with multiple divisions and departments, the same substantive information may be “cut and paste” and thus appear in multiple presentations, documents, *etc.* notwithstanding slight differences in formatting, document titles, *etc.*

concerns the *motive or intent* behind the employment decision.” *Id.* at 458 (emphasis added). And in *Davis v. General Accident Ins. Co. of Am.*, No. CIV.A. 98-4736, 2000 WL 1780235 (E.D. Pa. Dec. 4, 2000), the court found that the EEO-1 reports were “relevant to drawing an inference of racial discrimination, and whether [defendant] was aware of this disparity.” *Id.* at *6. In all of these cases, the relevance of the reports was closely tied to their potential provision of evidence relevant to intent or notice, elements that are simply not present in your FPA claims. Finally, *Ciarrochi v. Provident Nat’l Bank*, 83 F.R.D. 357 (E.D. Pa. 1979) does not address the discoverability or relevance of EEO-1 reports at all. Rather, the court simply observed in a footnote that plaintiff had attempted to rely on EEO-1 reports in its motion to certify a class action Title VII gender discrimination claim, which was ultimately denied. *Id.* at 363 n.7.

Even in cases (unlike this one) where the plaintiff has actually brought a discrimination claim, courts are circumspect about compelling wholesale production of EEO-1 data. In *Gatewood*, the defendant was not compelled to produce its EEO-1 reports in their entirety. Instead, the court determined that only information from the EEO-1 reports that was relevant to plaintiff’s claims of racial discrimination could be produced; all other information was deemed not discoverable. *Id.* at 458. See also *Sullivan v. Bank of America NA*, No. CV-13-01166, 2016 WL 2940013, at *7 (D. Ariz. May 20, 2016) (denying plaintiff’s motion to compel EEO-1 reports in an age discrimination case where “the information contained in the EEO-1 is not relevant to Plaintiff’s claim”). Here, Oracle has already produced and will continue to produce data reflecting the gender, compensation, and work location(s) of Covered Employees for the relevant limitations period, and it is unnecessary and unreasonably burdensome to insist that Oracle now review and redact its EEO-1 reports for the purpose of producing the same data for the same individuals.

Plaintiffs’ continued reliance on authority interpreting different statutes with different elements—including, crucially, an intent requirement—is improper because such authority simply does not govern the claims or attendant scope of discovery in this EPA case, which is properly limited to the question of whether Plaintiffs can establish, through class-wide evidence, that women in the putative class were paid less than men who were performing equal or substantially similar work without adequate justification. If you have any authority ordering discovery of these types of reports in an EPA case, please provide it.

RFP No. 47: This request seeks all “compensation audits” (a term you employed in the request, but did not define) related to Covered Employees during the “CLASS PERIOD” (another undefined term). In your June 12 letter, you protest that Oracle responded to this request subject to its understanding and interpretation of the term “compensation audits.” But it was entirely

proper—indeed, necessary—for Oracle to supply a definition for the central phrase in this request, which Plaintiffs left undefined, before Oracle could formulate a response.

More fundamentally, your suggestion that Oracle was required to conduct “compensation audits” and produce those audits to the government pursuant to federal regulations—such that those “compensation audits” could not have been conducted under attorney-client privilege—is not well-taken. As we noted previously, and you do not appear to dispute, the phrase “compensation audits” appears nowhere in the regulatory provisions you cite. *See* 41 C.F.R. § 60-2.17(d) (requiring that federal contractors “implement an auditing system” that, *inter alia*, “[m]onitor[s] records of ... compensation ... to ensure the nondiscriminatory policy is carried out”). Plaintiffs have separately requested, and Oracle will separately respond regarding, documents reflecting any “pay equity analyses conducted by virtue of Oracle being a federal contractor, including, but not limited to, conducted pursuant to 41 C.F.R. § 60.2.17(d).” *See* Pls.’ RFP No. 51. RFP No. 47, by contrast, by its terms focuses on “compensation audits,” which Oracle has reasonably interpreted to concern analyses and reviews of its pay data (as opposed to other types of “records”). These data analyses were—as my May 23 letter and the categorical privilege log therein already made clear—conducted at the direction of counsel, and for the purpose of informing legal advice to be provided to Oracle. Accordingly, they are privileged. The subject analyses were not—contrary to your baseless assertion—conducted for the purposes of complying with any regulatory obligation, and thus there is no basis for disturbing the privilege protection that clearly attaches to these analyses and communications concerning them.

RFP Nos. 48 & 49: These requests seek documents regarding both how salary ranges were set for Covered Employees, and how salaries were set for these individuals within the applicable salary range. As with other document requests and deposition topics, you appear to acknowledge that it would be unreasonable to ask Oracle to produce documents and information regarding granular details related to the diverse and individualized decisions affecting salary determinations for each of the thousands of employees throughout California across the three separate job functions in Plaintiffs’ proposed class. We appear to be in agreement that Oracle is not required to undertake the burden of collecting and producing, *e.g.*, every document that might relate to every decision about where to situate each Covered Employee within the applicable salary range at any given point in time. Accordingly, we have structured our reasonably diligent searches for responsive documents in an effort to identify generalized information, policies, and documents (to the extent they exist). We are not withholding any such general documents that our searches have identified, and anticipate making a further production next week of additional documents identified through those searches



James M. Finberg
June 22, 2018
Page 7

that Plaintiffs may consider responsive to these requests (in addition to requests in Plaintiffs' Sixth Set of Requests for Production).

RFP No. 50: This request seeks all documents related to Oracle's "AFFIRMATIVE ACTION PROGRAM relating to [its] offices in California," which you defined to encompass any "management tool designed to ensure equal opportunity." As was made clear in our objections to this request, Oracle appropriately objected to this vague definition and interpreted "AFFIRMATIVE ACTION PROGRAM" to have the same meaning required by 41 C.F.R. § 60-2.10, *et seq.*

In your June 12 letter, you asked whether Oracle is withholding any responsive documents and, if so, on what basis. We have previously set forth our objections—including overbreadth and relevance—in response to this request. By way of further explanation, documentation maintained pursuant to 41 C.F.R. § 60-2.10(c) relates to compliance with a host of federal contractor obligations that are entirely unrelated to the claims at issue in this case. Documents related to the availability analyses and placement goals described in 41 C.F.R. §§ 60-2.14 through 2.16, for example, do not relate to compensation and thus are irrelevant to Plaintiffs' EPA claims. Oracle is not required to produce and will not produce documents untethered to the claims in this case, even if they relate to Oracle's "AFFIRMATIVE ACTION PROGRAM" more generally and thus are arguably responsive to this overbroad request. Documentation maintained pursuant to 41 C.F.R. § 60-2.10(c) related to those portions of the "AFFIRMATIVE ACTION PROGRAM" that specifically concern compensation for Covered Employees—for example, documentation related to the requirement of 41 C.F.R. § 60-2.17(d) that contractors "develop and implement an auditing system" that, *inter alia*, "[m]onitor[s] records of ... compensation ... to ensure the nondiscriminatory policy is carried out"—has been and will be produced. As noted in connection with RFP No. 47 *supra*, the privileged analyses of compensation data that we have discussed were not conducted as part of Oracle's "AFFIRMATIVE ACTION PROGRAM" or for the purposes of complying with any regulatory obligation, and thus they are not responsive to this request as we understand it.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Kathryn G. Mantoan".

Kathryn G. Mantoan