

**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

PLAINTIFF'S NOTICE OF UNAVAILABILITY OF EXPERT WITNESS

RECEIVED

SEP 09 2019

**Office of Administrative Law Judges
San Francisco, Ca**

In an effort to be transparent with the Court regarding events that impact the schedule of this case, Plaintiff OFCCP provides notice to the Court that the depositions of the expert witnesses scheduled to take place this week have been cancelled. Due to an unexpected serious health issue impacting OFCCP's expert witness, OFCCP notified Oracle that the deposition of its expert, scheduled to take place on September 12, 2019, would have to be taken off calendar for this week and rescheduled for a later date, after OFCCP's expert becomes available to testify. OFCCP notified counsel for Oracle on Friday, September 6, 2019 of the necessity of cancelling and rescheduling this deposition as soon as OFCCP learned that its expert would be unavailable for deposition on the scheduled date.

While OFCCP was prepared to take the deposition of Oracle's expert on September 13, 2019, as scheduled, Oracle has cancelled that deposition as well. *See* Emails between Laura Bremer and Erin Connell (September 9, 2019), attached hereto.¹ OFCCP anticipates obtaining more information on Wednesday, September 12, 2019, about the health of its expert and her availability for deposition. OFCCP will continue to keep this Court and Oracle promptly informed so that scheduling consequences regarding the rescheduling of both experts' depositions can be addressed.

Date: September 9, 2019

UNITED STATES DEPARTMENT OF
LABOR
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Counsel


LAURA C. BREMER
Senior Trial Attorney

¹ OFCCP does not attach its correspondence with Oracle's counsel dated September 6, 2019, because it contains private medical information. However, should the Court wish to receive additional information before OFCCP provides a status update, OFCCP is willing to file correspondence describing its expert's medical condition under seal, and/or is available for a conference with the Court.

Bremer, Laura - SOL

From: Bremer, Laura - SOL
Sent: Monday, September 9, 2019 2:47 PM
To: Connell, Erin M.
Subject: OFCCP v. Oracle

Erin,

I am responding to the email you sent to me at 1:57 today. We intend to advise the Court that you cancelled the deposition of Dr. Saad upon being notified that we needed to reschedule Dr. Madden's deposition. Your continued discussion about moving the hearing date is premature since we don't have any information yet about when the depositions of both experts can be scheduled. As to earlier discussions about moving the hearing date, as you know, that discussion concerned a disruption arising from an entirely different issue (a personal matter which should not be disclosed in correspondence that will be filed with the Court), which has since been resolved.

This scheduling delay in schedule is not in OFCCP's interest and we have been forced to seek it for reasons which are entirely out of our control. This is not the first or only case in my career in which schedule changes have to be made to accommodate developments with witnesses or counsel. Just as in those other cases, I am sure we can work together to recommend a scheduling plan once we can nail down the new schedule for the expert depositions. Given that the current schedule provides that summary judgment and Daubert motions are due in a little more than two weeks from now, we continue to think it is important to advise the Court as we believe adjustments in these dates will be necessary since the expert depositions cannot proceed this week.

I am filing the notice to the Court directly, attaching this correspondence so that the Court is appraised of your views.

Laura

Bremer, Laura - SOL

From: Connell, Erin M. <econnell@orrick.com>
Sent: Monday, September 9, 2019 1:57 PM
To: Bremer, Laura - SOL
Subject: RE: Expert Depositions

Laura,

As stated in my email below, the primary reason we are not willing to go forward with Dr. Saad's depo this week is because we don't know when Dr. Madden will be available for deposition, and allowing OFCCP to go forward with deposing Oracle's expert this week when it is unknown when Oracle will be able to do the same would materially prejudice Oracle. And while our proposal below is not ideal, we still think it is preferable to moving the entire hearing. We continue to think this development does not warrant moving the hearing. As you know from our conversation last month when you asked us to join (or not oppose) a request to the ALJ to move hearing to March 2020, we want the hearing to stay as scheduled. We welcome other suggestions if you have any.

Thanks,
Erin

From: Bremer, Laura - SOL <Bremer.Laura@dol.gov>
Sent: Monday, September 9, 2019 1:31 PM
To: Connell, Erin M. <econnell@orrick.com>
Subject: RE: Expert Depositions

Erin,

Since OFCCP believes cancellation of the expert depositions scheduled for this week will impact the schedule for the case, OFCCP believes this information should be conveyed to the Court immediately, rather than waiting until the parties have additional information (which is anticipated later this week). Accordingly, OFCCP intends to notify the Court of the deposition cancellations today.

With respect to the expert depositions, OFCCP disagrees that Oracle is entitled to depose OFCCP's expert first, simply because OFCCP is the plaintiff. I also noted during our call that it will be more difficult to reschedule two depositions than one. Nevertheless, since you stated that Oracle will not agree to having OFCCP depose Dr. Saad before Oracle deposes Dr. Madden, we have cancelled our travel plans and the court reporter for that deposition.

Finally, I've discussed your creative proposal that the parties file Daubert motions and summary judgment motions before the parties depose the experts. Given (1) the importance of expert testimony to this case, (2) our expectation that both the summary judgment motions and Daubert motions will address the experts' opinions, and (3) the parties' inability to question the experts on their opinions until they are deposed, it would be unreasonable and prejudicial to require that the Daubert motions and summary judgment motions be briefed before the experts are deposed.

While OFCCP has diligently worked to meet the Court's deadlines, our expert's unavailability for deposition next week was unanticipated and outside our control. After we obtain additional information about Dr. Madden's condition this week, we plan to make a supplemental filing with the Court regarding the schedule for the case.

Regards,

Laura C. Bremer
Senior Trial Attorney

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U.S. Department of Labor
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San Francisco, California 94103
(415) 625-7757

From: Connell, Erin M. <econnell@orrick.com>
Sent: Monday, September 9, 2019 11:01 AM
To: Bremer, Laura - SOL <Bremer.Laura@dol.gov>
Subject: RE: Expert Depositions

Hi Laura,

To clarify, our position is that Dr. Saad's deposition should not go forward this week while we wait to find out when Dr. Madden can be available. As we discussed, part of this rationale is that we don't believe Dr. Madden's present unavailability for deposition warrants moving the entire hearing, and one possible way to accommodate her while keeping the hearing date as scheduled would be that both sides would move forward with their motions for summary judgment and *Daubert* motions without deposing the experts. Then, once Dr. Madden is available, we would find mutually agreeable dates to depose both experts prior to the hearing. Accordingly, moving forward with Dr. Saad's deposition now would put Oracle at a material disadvantage in light of the fact that Dr. Madden is not available. We also believe, as we have stated before, that because OFCCP is the plaintiff in this case, we are entitled to depose Dr. Madden before OFCCP deposes Dr. Saad.

I also explained that in our view, it is premature to contact the Court today, as we anticipate having additional information about Dr. Madden's availability on Wednesday, and at that time should be in a better position to formulate a joint request (or different requests) in terms of modifications to the scheduling order (if any) to accommodate her medical issues.

Thanks,
Erin

From: Bremer, Laura - SOL <Bremer.Laura@dol.gov>
Sent: Monday, September 9, 2019 10:50 AM
To: Connell, Erin M. <econnell@orrick.com>
Subject: Expert Depositions

Erin,

This email confirms our conversation today regarding scheduling issues. You stated that Oracle would not present Dr. Saad for deposition until OFCCP presents Dr. Madden for deposition. Accordingly, we are notifying the court reporter and our team that both expert depositions scheduled for this week are being cancelled. I will contact you later about our filing with the Court regarding the cancellations.

Regards,

Laura C. Bremer
Senior Trial Attorney
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CERTIFICATE OF SERVICE

I, Laura C. Bremer, certify that on this 9th day of September, 2019, the foregoing **PLAINTIFF'S NOTICE OF UNAVAILABILITY OF EXPERT WITNESS** was served on the following individuals by email at the following addresses:

ERIN M. CONNELL (econnell@orrick.com)
GARY R. SINISCALCO (grsiniscalco@orrick.com)
WARRINGTON S. PARKER, III (wparker@orrick.com)
JOHN GIANSELLO (jgiansello@orrick.com)
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as requested by attorneys for Defendant Oracle America, Inc.



U.S. Department of Labor