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

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

Plaintiff,

v.

**ORACLE AMERICA, INC.**

Defendant.

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Case No. 2017-OFC-00006

**OFCCP'S OPPOSITION TO ORACLE AMERICA INC.'S MOTION TO COMPEL THE  
DEPOSITIONS OF THE PERSONS OFCCP INTENDS TO CALL AS WITNESSES AND  
WHO OFCCP REFUSED TO IDENTIFY BASED ON THE GOVERNMENT  
INFORMANTS' PRIVILEGE OR, IN THE ALTERNATIVE, MOTION IN LIMINE NO.  
1 TO PRECLUDE THE TESTIMONY OF THOSE WITNESSES**

## INTRODUCTION

On the eve of trial, Oracle requests to reopen discovery and depose the 22 third-party employee witnesses that OFCCP has included on its witness list. If the third-party employee witnesses are not available in the 10 business days before trial, Oracle would have this Court preclude them from testifying at the trial. Oracle's demand is unfair to its own employees and is unsupported by law.

This Court held that OFCCP properly withheld the identities of these witnesses during the discovery period. In its March 6, 2019 Order, the Court set the deadline for witness exchanges on November 8, 2019 and for the trial to begin December 5, 2019. The Court later granted the parties' request to move back the expert discovery and dispositive motion deadlines, and moved the joint witness exchange to November 21, 2019. Fact discovery closed on July 3, 2019. In the schedules the parties exchanged and presented to the Court over the past two months regarding the pre-trial deadlines, Oracle never mentioned that it required time to reopen discovery and depose all third-party employee witnesses.

Over the last two months, OFCCP repeatedly raised concerns that the hearing date set for December 5, 2019 left the parties without the necessary time to adequately prepare for such a significant trial. This preparation includes but is not limited to: briefing dispositive pre-trial motions and oppositions, briefing challenges to expert testimony and the oppositions, drafting all pre-trial filings such as the joint statement and stipulations, litigating numerous motions to seal, exchanging exhibits and preparing the joint exhibit binders, and exchanging witness lists. This voluminous work has been far more compressed than is customary in federal court proceedings. In response, Oracle has insisted that the hearing must proceed on December 5, 2019, and that ample time existed to prepare for trial. Having not raised this issue to OFCCP, or to the Court with respect to scheduling, Oracle now demands that OFCCP make all third-party witnesses available during Thanksgiving week for deposition, and demands the exclusion of these employee witnesses if they cannot appear in the narrow window between their disclosure to Oracle on November 19 and the commencement of trial on December 5, 2019.

Oracle has waited until the last minute to create the most difficult situation possible for its own employees to participate in this proceeding, without explaining why these employees— apart from likely having travel and other plans with family and friends over Thanksgiving— should be denied the right to participate in the proceeding. Oracle has long been on notice that that OFCCP may call employee witnesses to testify at trial who will provide anecdotal evidence that Oracle discriminates against black, Asian, and female employees in compensation, and evidence about Oracle's compensation policies and practices. In addition, because the Court ordered OFCCP to produce all attorney notes to Oracle, Oracle has also long been aware that OFCCP counsel has interviewed hundreds of Oracle employees. OFCCP's witness list, provided to Oracle on November 19, 2019, includes 22 of these third-party employee witnesses. This employee testimony will provide the Court with anecdotal evidence of employees' real life experiences at Oracle to support OFCCP's expert analysis finding that Oracle discriminates against black, Asian, and female employees in pay. These employee witnesses cannot be compelled to testify in this case, yet have bravely agreed to come forward to provide their stories to the Court.

During discovery, Oracle claimed it needed to know the identities of these current and former employees. This Court disagreed, finding the government's informant privilege shielded the employees' identities from Oracle. Specifically, the Court found that the government's informant privilege encourages informants to come forward with information and protects them from retaliation. The Court found that these important considerations outweighed Oracle's need to know the identities of these current and former employees during the discovery period. Those same principles apply to Oracle's proposed eve-of-trial depositions. These witnesses are third parties who, OFCCP and Oracle agree, cannot be compelled to testify at trial or at a deposition. Requiring additional deposition testimony from employees about their lived experience of Oracle's compensation practices over a widely observed national holiday just days before trial, runs a significant risk of dissuading these employees from testifying altogether.

Oracle now claims it needs to depose all 22 third-party employee witnesses in the ten business days before the hearing for two related reasons: (1) because "it is entitled to question

witnesses beyond the scope of any OFCCP interview memo” and (2) because those interview memos contain redactions. First, because Oracle has full access to the complete personnel file and records relating to any former or current Oracle employee, Oracle is well equipped to cross-examine the employees at the hearing well beyond the scope of any OFCCP interview memo. Oracle has had the factual portions of any interview notes for months, and OFCCP has removed the government informant redactions from its notes for the identified trial witnesses. Further, the employee testimony is largely anecdotal and is not offered to support an individual claim of discrimination, but to offer the Court the color of employees’ lived experiences of Oracle’s compensation policies, some of which contradicts Oracle’s claims in this action regarding its policies. Thus, it is simply not the case that these last-minute depositions of Oracle’s employees are necessary here. Second, this Court has upheld any remaining redactions on any interview notes from the Solicitor’s Office, despite Oracle’s repeated motions demanding the full withdrawal of all redactions, and Oracle now has in its possession OFCCP’s interview notes with all government informant redactions removed for the employees on OFCCP’s witness list.

Oracle must take responsibility for its trial and pre-trial scheduling choices. If reopening discovery to conduct depositions of its former and current employees is as critical as Oracle now claims, it should have raised this scheduling demand months ago. Oracle’s current and former employees have a protected right to participate in this proceeding, a right which cannot be sacrificed merely because Oracle failed to timely file its motion to reopen discovery, or even alert the Court or OFCCP to the time that must be allocated in the schedule to ensure third parties have the chance to make themselves available. *See* 41 C.F.R. § 60-1.32. OFCCP is ready for trial and Oracle’s current and former employees want to participate in this proceeding. The trial should proceed immediately according to the Court's scheduling order.

### **STATEMENT OF FACTS**

In its March 6, 2019 Scheduling Order, the Court set the deadline for pre-trial filings, including the parties’ joint witness list, for November 8, 2019, and for the trial to begin on December 5, 2019. Order of March 6, 2019 Approving Pre-hearing Schedule (“March 6, 2019

Order”). That same March 6, 2019 Order set July 3, 2019, as the date for the close of discovery. During discovery, Oracle did not seek to depose any current or former employee who Oracle knew had spoken with OFCCP during its audit or afterwards. Decl. of Norman E. Garcia (“Garcia Decl.”), ¶ 2.

In early September, the parties filed a number of briefs with the Court as a consequence of OFCCP’s need to move back the close of expert discovery to accommodate the unforeseen illness of its expert witness. *See* Joint Request for Scheduling Conference of September 11, 2019; OFCCP Mot. Requesting Modification of Scheduling Order of September 12, 2019; Joint Status Report Re OFCCP’s Expert’s Availability of September 19, 2019. As part of that scheduling discussion, both parties submitted proposed schedules for pre-trial filings and deadlines. Joint Status Report of September 19, 2019. In Oracle’s proposed pre-trial schedule, Oracle did not raise or mention that it required time to reopen discovery to depose OFCCP’s employee trial witnesses. *See id.*<sup>1</sup> In response to the parties’ petitioning of the Court regarding the extension of the expert deadlines, the Court extended the dispositive motion deadline and pushed back the deadlines for the parties’ pre-trial filings based on the parties’ recommended schedules, including the joint witness list, to November 21, 2019. *See* Order of September 24, 2019 Modifying Pre-hearing Schedule and Denying Continuance Request. The parties agreed to exchange their witness lists internally on November 19, 2019 in order to accommodate the joint filing to the Court on November 21. Decl. of Kayla Grundy of November 11, 2019 (“Grundy Decl.”), Ex. A at 7.

The parties filed motions for summary judgment and motions to exclude expert testimony on October 21, 2019. OFCCP attached to its motion for summary judgment declarations from employee witnesses providing anecdotal and other testimony regarding their experience and understanding of Oracle’s compensation policies. *See* Decl. of Norman E. Garcia of October 21, 2019, Exs. 97-104.

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<sup>1</sup> Oracle has been on notice of both the fact that OFCCP intends to call employee witnesses to testify at trial, and that OFCCP counsel has interviewed over 200 Oracle employees in 2019. Garcia Decl., ¶ 6; *see* OFCCP’s Opp. Mot. to Oracle America Inc.’s Mot. to Compel of May 17, 2019.

On October 25, 2019, Oracle notified OFCCP that it wanted to depose any third-party employee witness OFCCP planned to designate *after* the November 19 initial exchange of witness lists and *before* trial on December 5. Garcia Decl., ¶ 3; Grundy Decl. ¶ 2, Ex. A at 5. Oracle did not request or seek to arrange the deposition of any of the employee witnesses who provided declarations in support of OFCCP's dispositive motions in the month that passed between October 21 and November 20. Garcia Decl., ¶ 5. The Thanksgiving holiday falls on November 28, which OFCCP counsel raised to Oracle's attention during the meet and confer regarding Oracle's late demand to reopen discovery. *Id.*, ¶ 4; Grundy Decl., Ex. C at 4. Additionally, the parties agree that the witnesses cannot be compelled to attend a deposition. Garcia Decl., ¶ 10, Ex. C. The parties met and conferred on November 4 but did not reach agreement on the necessity or timing of employee depositions. *See* Grundy Decl., Ex. C at 1.

On November 19, 2019, OFCCP provided Oracle with the names of 22 third-party employee witnesses who OFCCP intends to call at trial. Garcia Decl., ¶ 9. At this time, OFCCP also provided Oracle with the interview notes for these identified witnesses without the government informant redactions. *Id.* On November 19, 2019, Oracle also provided OFCCP with the names of 21 Oracle-affiliated witnesses who Oracle intends to call at trial. *Id.*, ¶ 10. Oracle has not produced to OFCCP the personnel files for the employee witnesses it has designated as trial witnesses, most of whom were not identified by Oracle during discovery as possessing information relevant to the claims at issue here. *Id.*

Despite OFCCP's belief that Oracle has no need to reopen discovery and depose any employee witnesses designated by OFCCP as trial witnesses, OFCCP has continued to seek a compromise with Oracle by offering to produce some but not all employees for pre-trial depositions if Oracle withdraws its motion to exclude their testimony. *Id.*, ¶ 8, Ex. A. OFCCP offered to attempt to facilitate the depositions of three employee witnesses in the days following Thanksgiving weekend. *Id.* Oracle has already taken seven depositions during discovery and has not sought leave of the Court to exceed each side's limit of 10 ten depositions.<sup>2</sup> Oracle rejected OFCCP's proposal. *Id.*

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<sup>2</sup> *See* 41 C.F.R. § 60-30.1; Fed. R. Civ. P. 30(a)(2)(i).

## ARGUMENT

### A. An Order Compelling Depositions is Not Warranted.

Oracle complains, yet again, that OFCCP improperly refused to identify witnesses during discovery. This is false. OFCCP, as this Court has held, properly invoked the government's informant privilege. *See* Order of June 10, 2019. The factual content of communications with employees, including of notes taken by OFCCP's attorneys, has been long produced to Oracle. Oracle has not been denied the substance of any information it needs to defend this action and it also has the identities of the witnesses who will provide anecdotal testimony. Thus, the numerous eve-of-trial depositions Oracle now seeks are unnecessary here.<sup>3</sup>

In its motion, Oracle misstates the law on its right to cross examine the third-party employee witnesses by relying on *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993). The *Shoen* court addressed the question of whether a journalist could be compelled to produce documents and testify during discovery about a source. *Id.* at 1290. The Ninth Circuit found that the journalist's work was privileged and he could not be compelled to testify because the plaintiffs had not established that they had exhausted all other sources of obtaining the same information. *Id.* at 1297. The court's comments about live cross-examination that Oracle cites were made in reference to the fact that plaintiffs had not yet attempted to obtain the information from *other sources*. *Id.* *Shoen* stands for the proposition that a properly invoked privilege can preclude a party from obtaining information subject to that privilege during discovery. *Id.* That is precisely what has happened here. OFCCP has properly invoked the government's informant privilege and complied with its dictates. Oracle can cross-examine witnesses at the trial, but it has been properly denied the right to do so during discovery.

Further, it is not necessary to depose the employee witnesses for purposes of cross-examination. In order to support its purported need to depose the employee witnesses for the purposes of cross-examination, Oracle cites to *U.S. v. Meyer*, 398 F.2d 66, 72 (9th Cir. 1968).

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<sup>3</sup> The Court anticipated this outcome when it ordered the production of attorney notes stating, "Given the additional production that will be ordered here, it is not evident that there will be any need for further discovery of the witnesses identified for hearing." Order of June 10, 2019 at 13, n. 10.

However, unlike here, *Meyer* involved expert witnesses who were real estate appraisers testifying on the central issue in dispute: the value of land. *Id.* at 67. The *Meyer* court found it would be improper to allow the experts to testify at trial when the government did not produce their appraisals or allow the witnesses to answer deposition questions about their appraisals. *Id.* at 72-73. Here, OFCCP has produced—and Oracle has long possessed—the factual portions of all notes, including the notes from OFCCP’s litigation attorneys, of any conversations with the employee witnesses. Additionally, as OFCCP has identified employee witnesses, OFCCP has also provided the employee interview notes without the government’s informant privilege redactions. Finally, the employee witnesses here are not experts, but will instead provide anecdotal testimony regarding their experiences at Oracle. OFCCP does not offer employee testimony to support an individual claim of discrimination but instead to give color to the statistical case through employees’ real life, anecdotal experiences.

Oracle’s reliance on *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 96 (9th Cir. 2001) is also misplaced because, here, there is no surprise as to what the employee witnesses will say or what kind of evidence will be offered. Oracle has access to the full personnel files of each third-party employee witness OFCCP has designated as a trial witness and, as a result, is in a far superior position to OFCCP in relation to the employee witnesses that Oracle designated as trial witnesses, most of whom were not identified in Oracle’s discovery responses or depositions, and for whom OFCCP—unlike Oracle—does not have the benefit of reviewing their personnel files. Again, the factual components of employee interviews conducted by OFCCP investigators during the compliance review and OFCCP attorneys during this litigation have been disclosed to Oracle. In *Columbia Pictures*, the Ninth Circuit upheld a District Court’s evidentiary ruling barring a defendant from using advice of counsel as a defense where the defendant refused to answer detailed questions about his interactions and communications with counsel at a deposition. *Id.* That is not the situation in this case. Here, OFCCP provided to Oracle the substance of the facts known to OFCCP relating to Oracle’s employees. Only the identity of the employee was withheld, pursuant to the Court’s order, until the Court-ordered witness disclosure deadline.

The Court should permit employee witnesses who agree to testify at trial to do so, regardless of their availability during the ten-day window between the parties' filing of their witness lists and the start of trial. It is not fair or practical for Oracle to insist on deposing the employee witnesses, under threat of exclusion, in this narrow period, especially given that this ten-day period includes Thanksgiving week, a very common week for people in the United States to have travel and other personal plans with their families.

This case has been in litigation for years and there are precious few days until the start of the trial. Oracle has waited far too long to demand, for the first time, that it be allowed to depose all 22 employee witnesses in the days just before trial. The initial pre-trial deadlines, including the trial date, were set in March—seven months ago. The parties have been negotiating over pre-trial scheduling of various matters for the past two months. During the past months of pre-trial schedule negotiation, at no time before October 25 did Oracle raise the issue of reopening discovery to take employee depositions. Garcia Decl., ¶ 3. Additionally, OFCCP provided declarations from employees in support of OFCCP's summary judgment or *Daubert* motions filed on October 21. Oracle did not seek to depose any of those declarants in the time before the witness exchange, instead insisting that all depositions take place after the witness exchange on November 19. *Id.*, ¶ 5.

Oracle cites to *Acosta v. Austin Electric Services LLC, et al.*, 2018 WL 4963291 \*2 (D. Ariz.), to support its contention that the depositions should be allowed days before trial but omits the significant facts that the *Austin* court: (1) ordered the reopening of discovery for the limited purpose of deposing or interviewing trial witnesses as part of the original scheduling order, and (2) that window was open 10-12 *weeks* before trial, not 10 *days*. *Id.* at \*1. By contrast, Oracle's delay in seeking these depositions creates the untenable proposition that if an employee is not available on very short notice Thanksgiving week, or immediately before the trial, that employee will not be allowed to participate in the trial. Such a result runs directly counter to the purpose and intent of the Executive Order and its implementing regulations. *See e.g.*, 41 C.F.R. 60-1.32.<sup>4</sup>

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<sup>4</sup> Further, Oracle has not sought leave of the Court to conduct additional discovery after the close of discovery, and has not sought leave, nor has the Court granted leave to exceed each side's limit of 10 depositions. *See* 41 C.F.R. § 60-30.1; Fed. R. Civ. P. 30(a)(2)(i). Oracle has taken

Oracle has made its scheduling choices and it cannot benefit from its own failure to raise this issue earlier by excluding witness testimony where neither OFCCP nor Oracle's employees have done anything wrong.

**B. OFCCP Properly Invoked the Government's Informant Privilege and Complied with all Orders Regarding Redactions.**

Oracle continues to complain about the redactions made to investigator and attorney notes to protect the identity of government informants. As this Court found, OFCCP has properly invoked the government's informant privilege for the important purpose of encouraging informants to come forward, and shielding them from retaliation. *See* Order of June 10, 2019.

It is difficult to understand Oracle's complaint regarding the redactions. The notes attached to Exhibit E of counsel's declaration do not contain any "non-responsive" redactions. The document attached to Exhibit F that contains the "non-responsive" redaction is C-228, DOL 0042892, which, as the Court noted in its October 7, 2019 Order, contains only the interview script. Order of October 7, 2019 at 7, n. 9. Thus, Oracle's argument that there are impermissible redactions on the document is baseless. Oracle has had the factual portions of the interview notes for months and can cross-examine the anecdotal witnesses at hearing using this knowledge. The redacted notes form no basis to exclude properly noticed witnesses days before trial.

**C. Witness Exclusion is Not Warranted Because Deposition Testimony of Non-parties Cannot be Compelled.**

The parties agree that third-party witnesses cannot be compelled to participate in these proceedings (*See* Garcia Decl., Ex. B), yet anecdotal evidence provides important support to statistical evidence by bringing "the cold numbers to life." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The witnesses, some of whom do not live in the San Francisco Bay area, have not arranged to be available for depositions before the trial. OFCCP's ability to

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seven depositions during the course of discovery and OFCCP offered to attempt to facilitate the remaining three allowed without leave of the Court. Oracle rejected this proposal. Garcia Decl. ¶ 8, Ex. A.

procure employee witnesses to testify at the hearing will be adversely affected if the employees also have to appear on short notice the week of Thanksgiving, or in the few days immediately before trial. OFCCP is concerned that Oracle's demand to depose its current and former employees, given that Oracle has ample information at its fingertips and does not need such discovery, is being advanced to discourage employees from participating in this proceeding.

### CONCLUSION

It is unnecessary for Oracle to depose the third-party employee witnesses on the eve of trial. These witnesses will offer anecdotal evidence to show how Oracle's policies lead to compensation discrimination. Their testimony is in support of the statistical case and cannot independently lead to any ruling against Oracle. It is unfair to exclude third-party witnesses—whose depositions cannot be compelled—who are not available for depositions Thanksgiving week. The Court should allow employee witnesses to participate in the hearing to determine whether Oracle violated the Executive Order and Oracle's motion should be denied.

If the Court permits Oracle to depose OFCCP's third-party witnesses, OFCCP asks that the order be bilateral, obliging Oracle to make its third-party employee witnesses available for deposition by OFCCP and that Oracle immediately produce the complete personnel files for each of its third-party witnesses prior to the presentation of such employees for deposition by OFCCP. OFCCP is ready and prepared for trial to commence on December 5, but if the Court permits Oracle to reopen discovery, OFCCP asks the Court to continue the trial so that all third-party witnesses subject to reopened discovery have a fair chance to make themselves available upon request by OFCCP or Oracle.

DATED:      November 21, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I am over 18 years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On November 21, 2019, I served the foregoing OPPOSITION TO ORACLE AMERICA INC.'S MOTION TO COMPEL THE DEPOSITIONS OF THE PERSONS OF CCP INTENDS TO CALL AS WITNESSES AND WHO OF CCP REFUSED TO IDENTIFY BASED ON THE GOVERNMENT INFORMANTS' PRIVILEGE OR, IN THE ALTERNATIVE, MOTION IN LIMINE NO. 1 TO PRECLUDE THE TESTIMONY OF THOSE WITNESSES, and SUPPORTING DECLARATION OF NORMAN E. GARCIA on Defendant Oracle America, Inc. by serving its attorneys below via electronic mail, pursuant to the parties' agreement:

Gary R. Siniscalco: [grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)

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

Date: November 21, 2019



HAILEY McALLISTER