



March 14, 2019

VIA E-Mail (garcia.norman@dol.gov; bremer.laura@dol.gov)

Norman E. Garcia, Esq.
Senior Trial Attorney
United States Department of Labor
90 Seventh Street, Room 3-700
San Francisco, CA 94103

Re: *OFCCP v. Oracle America, Inc.*
OALJ Case No. 2017-OFC-00006; OFCCP No. R00192699

Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019-6142
+1 212 506 5000
orrick.com

John D. Giansello

E jgiansello@orrick.com
D +1 212 506 5217
F +1 212 506 5151

Dear Mr. Garcia and Ms. Bremer:

We respond to your discovery letter of March 6, 2019. We understand, and we ask you to understand, that at this late stage, it is unproductive to exchange invective, accusation and self-serving distortions of fact. Accordingly, we have kept our responses to your various contentions short and to the point. Given the constrained period of time left for discovery and the capacious opportunity OFCCP already has had to develop its case—both during the audit and during prior extensive discovery in this litigation—the focus going forward should be on a proportionate and ordinate pursuit of the remaining information reasonably necessary for OFCCP to prosecute its claims and meet Oracle’s defenses. In other words, it is time for both sides to make choices, set priorities and abide by them.

In our responses, we have indicated numerous areas where we are willing to work with OFCCP to define, clarify and limit what is sought. In so doing, we were cognizant of the further discovery may be necessary, *reasonable*, and *practicable*, given the limited time, in order to avoid what could easily become an out-of-control exercise in data and document retrieval, review and production. Unfortunately, instead of focusing on particular areas where progress can be made (and leaving the remainder, if necessary, for resolution by the Court), OFCCP generally has responded with unfounded accusations, distortions of fact, extended complaints about our objections and reiterated categorical demands that we comply with OFCCP’s requests as written. We do not believe that is a method reasonably calculated to resolve disputes that can be resolved, and so we ask you to change course in a cooperative direction.

With those considerations in mind, in that spirit, and with awareness of the burdens on both parties at this point, we now address your principal points.

Exhibit P-200



Norman E. Garcia, Esq.

March 14, 2019

Page 2

Larry Lynn's emails

Your contentions that we “specifically committed to producing 7,887 e-mails” and that “[t]he 7,887 e-mails from the sample period are the responsive emails” is erroneous. As we have explained several times before, the “responsive e-mails” are a subset of “e-mails” that needed to be reviewed. The agreement with Mr. Pilotin clearly recognized this distinction. The 7,887 number we gave OFCCP was germane to two things discussed at the time: (1) determining a reasonable length for a review period (*e.g.*, 3 vs. 18 months); and (2) whether OFCCP would agree to the use of search terms to narrow the review set. We produced the e-mails we found responsive. OFCCP never pursued the agreed-upon procedure further. Nor has OFCCP to date articulated a significant basis for needing additional Lynn emails at this late date.

Moreover, your contention that Mr. Lynn really had 17,480 e-mails in the 18-month sample period is pure speculation and invalidly assumes that he sent and received e-mails at a constant rate over the course of four years. Notwithstanding these distortions and misplaced arguments, and OFCCP's unexplained failure to follow-through with the agreement reached with Mr. Pilotin with regard to developing a reasonable search procedure for Mr. Lynn's e-mail mailbox, we *again* ask for an explanation of why additional emails are needed, and further ask that you suggest how you think any such search, review and production can be accomplished before discovery closes. Because we are running out of time, we do not believe this matter can remain unsettled for more than another week.

Larry Lynn's non-email documents in relation to RFP 24

This discussion, extending over four pages, is a series of afterthought requests, now retroactively read into RFP 24, almost entirely from a single lengthy document, the Sourcing Handbook produced at ORACLE_HQCA-0000020125 to 20179. The prior meet-and-confer discussions and agreement regarding college recruiting and RFP No. 24 were for e-mails only. The documents now belatedly requested here were not part of those discussions, and we deem requests for them unduly burdensome and out of order at this late date. Moreover, footnote 1 to this discussion, in addition to being a frivolous semantic quibble (Mr. Pilotin's letter clearly said “resumes,” not resumes and something else), is misplaced in a discussion of RFP 24, as even you acknowledge. The language of our February 27, 2019 letter you address was not, as you suggest,



Norman E. Garcia, Esq.

March 14, 2019

Page 3

directed by us to RFP 24. It is in a separate paragraph directed to the Request concerning college_us@oracle.com. Accordingly, your accusation that we have taken “comments for one RFP and substitute[d] them for another” is simply wrong.

Production from the College Recruiting in-box

First, we have produced, most recently last Friday, the resumes and emails with attached resumes that were contained in the college recruiting in-box through FY 2017. It turns out that some of that material dates from prior to FY 2017. We are continuing our review of the in-box to produce the same materials through January 18, 2019. With regard to your further remarks in this section, and without getting into an extended analysis and discussion of the procedures addressed in ORACLE_HQCA-0000020125, *et seq.*, we are informed that the “spreadsheets and communications” referenced in 20175-76 were documents concerning Larry Lynn’s review of prior year intern resumes, not materials submitted by persons expressing an interest in being hired into full time positions in the PT1 job group. Hence, the referenced spreadsheets and communications would not be responsive in any event, since they do not concern “College Recruits” as that term is defined (persons who expressed interest or applied through the college recruit program for PT1 positions). As to the remainder of your discussion and questions concerning the college recruiting inbox, we advise you that, as explained by Ms. Cohn in her 2017 interview, the practice was that, since mid-2013, all resumes that were sent to Lynn from the inbox were entered into Resumate, whether the candidate was approved to proceed further or not, and they can be accessed there. As noted, we did make a production of these emails and resumes last Friday, and we are in the process of updating the production of resumes and emails through January 18, 2019. Similarly, we have committed to updating our Resumate database production, which includes resumes.

Temporal scope

We decline your invitation to withdraw our standing temporal scope objection. Your arguments in that connection are specious and disingenuous. There is no daylight between Warrington Parker’s remark concerning our willingness to cooperate in discovery in light of Judge Larsen’s orders and the reservation of our standing objection that the relevant actionable period for this litigation is confined to January 1, 2013, through June 30, 2014, and hence that discovery outside



Norman E. Garcia, Esq.

March 14, 2019

Page 4

that period is not relevant nor proportionate and is unduly burdensome. It is not unusual to produce documents and information in discovery subject to objections, and that is all Mr. Parker was talking about. Your contention that “[m]aintaining a general objection to the temporal scope in discovery is mutually exclusive from ‘not intend[ing] to offer a temporal scope objection to discovery as a general matter’” is another *non sequitur* and simply your *ipse dixit*.

Filing of confidential documents

To the extent the matters addressed in this scrambled discussion (*e.g.*, the referenced Exhibit R and its statistics, which OFCCP seems to be claiming is an admission of some sort by Oracle, is actually a letter from OFCCP to Oracle), are not moot by reason of the Court’s Order of February 20, 2019, they are the subject of separate discussions between the parties and will not be addressed further here.

Immigration, citizenship, visas and work eligibility

First, this is not a case about immigration enforcement or citizenship discrimination. Nor is it a case about national origin discrimination. (OFCCP had been attempting to claim national origin discrimination against “Americans,” but it has abandoned that claim.) What is attempted to be alleged here is discrimination on the basis of race or ethnicity only. Under those circumstances, we fail to see any proximate relevance of immigration, visa, citizenship or work eligibility information to the disposition of those claims, and, notwithstanding our request, OFCCP has articulated no rationale meeting those concerns. Notably, many of the requested documents could be retrieved only by arduous and expensive manual review of files, including some not directly maintained by Oracle. Second, much of OFCCP’s argument in this section relies on information produced in ORACLE_HQCA_3616. That document is a snapshot spreadsheet created and produced during OFCCP’s audit. The audit covered a much broader scope than the issues presently alive in this litigation. Third, the “Exhibit Q” cited in this section, and its references to citizenship of applicants, was cited only for the purpose of demonstrating that OFCCP’s use of census data to identify the pool of available applicants (which at that point included both experienced hires and college recruits), was a fatally flawed statistical comparison; it had nothing otherwise to do with “hiring Asians on visas.” Race and ethnicity data are available and have been produced, and they can be argued to prove or disprove OFCCP’s hiring



Norman E. Garcia, Esq.

March 14, 2019

Page 5

and wage discrimination claims. The granular background immigration, visa and citizenship data mining OFCCP attempts to impose on Oracle at this late date is simply not necessary for any reasonable purpose here.¹

Supposed frivolous objections

Initially, it bears note that this section begins by admitting that, as of October 2017, Oracle had produced almost 400,000 Bates-stamped pages to OFCCP, and OFCCP is also aware that Oracle is presently engaged in the onerous undertaking of updating both that production and millions of data points that have also been produced.² Beyond that, this section addresses specifically RFPs 141, 144 and 146, our objections there speak for themselves, given the cumulative, imprecise and sometimes impenetrable language of the requests, and we have not refused to provide discovery subject to our objection. As for proportionality, we are aware of no authority that measures it solely on the basis of the magnitude of a plaintiff's unproved claims, and you have cited none. Indeed, a standard of that nature would license bankrupting a defendant simply by the allegation of extravagant damages claims no matter how fanciful. And your characterization of "just" four years of data is gratuitous, knowing what you do about the volume of data Oracle has already produced here. As for RFP No. 141, we have addressed the issues you raise in our responses above concerning Larry Lynn's emails and the college recruiting in-box, from which we have been producing materials to you as recently as last Friday. We remind you that, in our response to RFP No. 141, we stated our willingness to attempt to reach agreement with you on reasonable parameters for further searches that might be reasonably related to the Request. Our posture with regard to RFPs Nos. 144 & 146 is – and was – substantially the same, and we remind you again of the continuing production of both emails and resumes made last Friday. We also reiterate, in connection with No. 146, that the practice was that all college recruiting inbox resumes sent to

¹ The extended discussion in this section of "Exhibit R" is either a mistake or willfully disingenuous. In that argument, OFCCP misrepresents as admissions of Oracle its own flawed statistics set forth in a letter *from it to Oracle*. Additionally, footnote 2, concerning our objections to the scope of RFPs 131 to 139, effectively refutes itself, admitting that three of those requests indeed do seek voluminous information going back to 1985.

² OFCCP's contentions about supposed frivolous objections and delaying tactics on Oracle's part are ironic in light of OFCCP's protracted stonewalling of Oracle in complying with Judge Larsen's orders to produce its statistical models and employee interview notes on which it is relying for its pleading allegations.



Norman E. Garcia, Esq.

March 14, 2019

Page 6

Mr. Lynn, whether the applicant was approved for further proceedings or not, were entered into Resumate, which is also being updated.

Pay equity and related documents

Your remarks recognize that Oracle's pay analyses "to assess legal compliance" were conducted by Mr. Siniscalco, who was and is outside counsel to Oracle. As a result of the proceedings with Judge Larsen you incompletely reference, Oracle re-reviewed RFPs Nos. 71 and 72, which, as stated, are specifically tethered to 41 C.F.R. § 60-2.17 and determined that, within the terms of those Requests as stated, Oracle does not have any responsive documents. That remains our position.

Identification of withheld documents

In connection with your reliance on F.R.C.P. Rule 34(b)(2)(C), we call your attention to F.R.C.P. Rule 1: "These rules * * * should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." We would also note that the common sense interpretation of an objection on the grounds of vagueness or ambiguity is that the matter being addressed is not understood. In that light, your apparent demand that we specifically identify every item that might be being withheld in connection with each objection each time it is asserted is the very essence of oppression. We do not think that is what the rule intends, and, if it did, it would apply equally to you in that form as well. We remain ready and willing to have further discussions with you to focus upon and identify the remaining discovery that is reasonably necessary for both sides to prepare for dispositive motions and trial in this case.

Very truly yours,

A handwritten signature in black ink, appearing to read "John D. Gianseho". The signature is fluid and cursive, with a large initial "J" and "G".

John D. Gianseho

cc: Jeremiah Miller, Esq. (via email to miller.jeremiah@dol.gov)