

From: [Bremer, Laura - SOL](#)
To: [Mantoan, Kathryn G.](#); [Miller, Jeremiah - SOL](#); [Garcia, Norman - SOL](#)
Cc: [Parker, Warrington](#); [Connell, Erin M.](#)
Subject: RE: Oracle Schedule
Date: Thursday, February 14, 2019 5:14:05 PM
Attachments: [image003.png](#)
[Index of Data Spreadsheets identifying spreadsheets to supplement - to Oracle.pdf](#)

Katie,

With respect to the data, at the time Oracle produced the data in October 2017, it was already out-of-date and Oracle recognized that it would need to supplement the data it produced. Nevertheless, in an effort to streamline discovery and obtain information from Oracle more quickly, I am attaching an index showing data files that we are willing to forego at this time. The index lists the data files Oracle previously produced, with the red file names indicating those files we are not requesting Oracle to supplement at this time. Of course, if Oracle intends to use the data in any of the red data files that we currently don't believe we need, we request that you supplement the data for them, since our expert(s) will need to review the data. Also, I note that we are providing this list before we complete discovery and before we have taken any depositions (including depositions regarding the data), so we reserve the right to request additional data based on the discovery we conduct. However, this list provides our good faith determination of the data files for which we are willing to forego supplementation.

I understand that pulling attachments may more difficult than pulling the data from Oracle's databases into Excel spreadsheets. We request that the data be produced on a rolling basis, as it is pulled. Moreover, for the court's hearing date to work, we will need to obtain all the data in time for our experts to analyze it and prepare expert reports. As you know, Oracle made its first data production eight months after the initial RFPs requesting data, and over three months after our letter detailing the data requested. Obviously, we need the data much sooner to stick to the Court's schedule for the case. Therefore, we need a final deadline for the production of both documents and data in the schedule.

Sincerely,

Laura C. Bremer
Senior Trial Attorney
Office of the Solicitor
U.S. Department of Labor
90 7th Street, Suite 3-700
San Francisco, California 94103
(415) 625-7757

THIS IS A PROTECTED COMMUNICATION--DO NOT DISCLOSE OUTSIDE OF THE DEPARTMENT OF LABOR: *This email contains attorney work product and may include privileged material protected by the attorney client privilege, the deliberative process privilege, the government informer privilege, and other applicable privileges. This email may not be disclosed to third parties without the express consent of the Solicitor's Office. If you think you received this e-mail in error, please notify the sender*

Exhibit P-230

immediately.

From: Mantoan, Kathryn G. <kmantoan@orrick.com>

Sent: Thursday, February 14, 2019 3:13 PM

To: Bremer, Laura - SOL <Bremer.Laura@dol.gov>; Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>

Cc: Parker, Warrington <wparker@orrick.com>; Connell, Erin M. <econnell@orrick.com>

Subject: RE: Oracle Schedule

Laura:

Warrington passed along your message and asked that I reply to you today. We are still in the process of considering all the scheduling-related points addressed in your email, but write now to provide additional factual information to inform our discussion of one point, and to request that you better explain your position with respect to another.

As concerns the deadline to produce data and documents: your expectation that “Oracle should be able to supplement the data it already produced within a few weeks” is unrealistic and fails to reflect the complexity involved in extracting historical data for thousands of individuals from multiple active and legacy data repositories. To provide just a few examples of the complicating factors at work here: First, Oracle’s systems have had several modifications since the original database inquiry that will require an evaluation of whether the previous scripts are usable in the exact same format, which is doubtful. If the scripts need to be updated then this may take a substantial amount of work to rewrite and test them. Second, the department responsible for pulling scripts has had personnel changes, in the regular course of business, and so the same personnel who did the original database inquiry may not be available to rework the scripting and testing; new personnel would require additional time to get up to speed. Third, the department responsible for the database inquiry has other business duties and tasks other than to work on this particular litigation and therefore, our requests would have to be queued behind and along with other important requests. Fourth, some of the data files previously provided were accompanied by tens of thousands of attachments (*i.e.*, separate documents that relate to and/or are referenced within the data). Identifying and compiling these attachments is time-intensive as they may be stored and organized separate from the database, and need to be accessed and retrieved separately. Finally, the process of QCing data pulls of this scope and size can itself take several weeks. We look forward to receiving what you indicate will be a pared-down list of data requests and discussing specifics with you at that time.

As concerns the timing of expert disclosures: we note that you provide no authority for your claim that “[t]he rules provide for simultaneous disclosure of expert reports.” Can you please identify the rule(s) that you contend so provide? We do not see any such requirement in either the FRCP or the CFR provisions that ALJ Clark has ordered will govern proceedings in this case. See Notice of Hearing And Pre-Hearing Order (Feb. 6, 2019) at I.B (referencing 41 CFR Part 60-30).

To the extent you have in mind FRCP 26(a)(2)(D), the rule provides that “[a] party must make these disclosures at the times and in the sequence that the court orders”—which is exactly what the proposed scheduling order will ask ALJ Clark to do. FRCP 26(a)(2)(D)(ii) further provides that where

an expert is “intended solely to contradict or rebut evidence on the same subject matter identified by another party,” that expert can provide a report within 30 days after an expert disclosure by the opposing party on the “same subject matter.” The word “simultaneous” appears nowhere in that rule. Indeed, the Advisory Committee Notes to the 1993 Amendments to FRCP 26 expressly state that “in most cases **the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures** with respect to that issue” (emphasis added).

Oracle’s proposal for staggered disclosures is the only one that makes sense in light of the applicable rules and in the context of this case. Oracle has no obligation to introduce an expert to opine on, for example, statistical analyses of Oracle’s data (or any other “subject matter”) unless and until OFCCP introduces such evidence. If OFCCP tendered no statistical expert, Oracle likely would not either (as there would be no suggestion by OFCCP that statistical evidence could prove its claims). Presumably for this reason, staggered disclosure schedules are regularly entered in pattern and practice cases brought by the EEOC. (We can provide a list of recent examples if requested.) Such a schedule is appropriate here as well.

Please let us know if you would like to discuss any of these points further.

Thanks,
Katie

Kathryn G. Mantoan

Attorney

Orrick

San Francisco

Portland 

T +1-415-773-5887

T +1-503-943-4870

kmantoan@orrick.com

From: Bremer, Laura - SOL [<mailto:Bremer.Laura@dol.gov>]

Sent: Thursday, February 14, 2019 11:09 AM

To: Parker, Warrington <wparker@orrick.com>

Cc: Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>

Subject: Oracle Schedule

Warrington,

This email responds to your email regarding the schedule in the Oracle case. Attached is the submission made to Judge Clark that shows our scheduling positions assuming a December 2019

hearing date. I've revised that column to substitute dates that Judge Clark set in his order (which are shown in bold). The column to the left shows items still in discussion. I discuss the outstanding issues in further detail below.

Written Discovery Deadline/Deadline to Produce Data and Documents

We are willing to move up the deadline for RFPs one month (not interrogatories and RFAs), if the deadline of production of documents is moved to 45 days after the last date for serving RFPs. Moreover, we want to make it clear that the deadline for producing documents is the final deadline; it does not justify waiting until that date to produce documents. We have already requested most, if not all, of the documents/data we expect to request, and are counting on Oracle to produce such documents well before the final deadline.

We expect that Oracle should be able to supplement the data it already produced within a few weeks. Oracle's systems witnesses stated that data is extracted from Oracle's databases by writing script to extract it. Oracle has already written the scripts to extract the data, and should need to make only minor revisions to it (such as changing the date of the information requested) to supplement the date. Nevertheless, to make Oracle's job easier, we are willing to forgo our requests that certain data be supplemented. I will send a list later today.

We are asking for data that we previously requested, but did not receive. I will send a separate list of this data this week. At this time, we do not anticipate requesting any data that we have not yet identified in the RFPs we already served, and various meet and confer letters. Oracle should also be able to produce this data well before the final deadline for producing data and documents.

We also anticipate that motions to compel will be filed, as necessary, while discovery is open. We see no reason to change the typical rule that motions to compel fact discovery must be filed by the close of fact discovery (7/5/19).

Expert Disclosures

We agree to the dates for expert disclosures, but disagree that Oracle does not need to make an initial expert disclosure because of the burdens of proof. The rules provide for simultaneous disclosure of expert reports. This is also the practice before the OFCCP, including in the *Analogic* case, which Oracle cited in its opposition to the motion for leave to amend. As the Rutter Guide states, pursuant to Fed. R. Civ. Proc. 26(a)(2), "[e]ach expert who may be called to give opinion evidence at trial under FRE 702, 703, or 705 must be identified." Schwarzer, *Federal Civil Procedure Before Trial* § 11:367 (Rutter Guide). Further, "[d]isclosure is not limited to experts who will be called on direct examination. Those who may be called to *rebut or impeach* opposing experts must also be identified," unless they are called "solely for rebuttal purposes." *Id.* at § 11:368. The "Practice Pointer" states, "Inappropriately characterizing an expert's analysis as 'rebuttal' can result in the exclusion of his or her testimony." *Id.* at § 11:369. As we understand Oracle's position, its expert cannot properly be characterized as "purely rebutting" our expert. If Oracle waits until the rebuttal disclosure to disclose its expert, we would have no opportunity to rebut your expert. We do not agree to any stipulation changing the applicable expert disclosure rules, and do not believe that

Oracle's proposal makes sense, given the compressed schedule for this case.

Deadlines for Briefing Dispositive and Daubert Motions

Our proposals are similar, the only difference being that our briefs are due on Fridays, whereas Oracle's are due on a Monday and Wednesday. Is there any reason Oracle does not want the briefs due on Fridays?

Briefing for Motions in Limine

Since Judge Clark ordered that all briefing be completed by the date that we had planned to submit the motions, I included a new proposed briefing schedule in the attachment.

I am available today, if you would like to discuss the outstanding issues.

Sincerely,

Laura C. Bremer
Senior Trial Attorney
Office of the Solicitor
U.S. Department of Labor
90 7th Street, Suite 3-700
San Francisco, California 94103
(415) 625-7757

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.

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

In the course of our business relationship, we may collect, store and transfer information about you. Please see our privacy policy at <https://www.orrick.com/Privacy-Policy> to learn about how we use this information.