orrick

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

May 21, 2019

Via E-Mail

Charles Song
Office of the Solicitor
U.S. Department of Labor
350 South Figueroa Street, Suite 370
Los Angeles, CA 90071

Re: OFCCP v. Oracle, Inc., et al., Case No. 2017-OFC-00006

Dear Mr. Song:

I write to follow up on our May 14, 2019 telephone discussion and your May 15, 2019 letter regarding various discovery matters. I address the issues you raise, correct certain inaccuracies mentioned in your letter, and memorialize Oracle's positions with respect to our discussions.

OFCCP's Proposal Regarding Its 30(b)(6) Deposition Notice Topics 7 & 8

We understand that OFCCP proposes to limit deposition Topics 7 and 8 to four identified spreadsheets, provided that OFCCP can request written responses from Oracle to remaining data questions to rely on in litigation. The four spreadsheets are:

1. ORACLE_HQCA_0000062858 (AAP_Location List.xlsx)
2. ORACLE_HQCA_0000062859 (Candidate Offers.xlsx)
3. ORACLE_HQCA_0000360321 (OFCCP (H-1B_E-3 Holders) - fixed dates v2.xlsx)
4. ORACLE_HQCA_0000364082-182 (cost center listings and hierarchies)

As we discussed, and as my colleague J.R. Riddell explained in his May 8, 2019 email, it is simply not feasible to prepare a 30(b)(6) witness for unanticipated, detailed, technical questions about these or other data spreadsheets, and it makes the burden associated with that method of seeking clarifying information grossly disproportionate to any potential value. Complicated technical questions about what the files contain and mean take substantial time to research, as evidenced between the parties' existing, detailed data correspondence. *See, e.g.,* Oracle's letters dated Nov. 28, 2017, Dec. 8, 2017, Dec. 18, 2017, June 29, 2018, and July 13, 2018. Of note, these four spreadsheets are among those for which

written explanations have already been provided, and we are frankly at a loss to understand what additional clarification or information about them OFCCP thinks it needs. We think that, if you review those letters, it will be obvious why depositions are not a practicable means to obtain the additional information you may be seeking. The most efficient and accurate way to exchange information about complex data compilations like this is for OFCCP to formulate in writing the precise questions it wants answered in order to allow for adequate research into the technical answers.

OFCCP's Proposed Stipulation to RFA Set Two

During our May 14 meet and confer call, we discussed stipulating to the authenticity of the documents Oracle produced. Oracle is willing to stipulate to authenticity; however, the parties must articulate the specific terms of such an agreement. Among other things, the stipulation must be reciprocal, and it would not apply to issues relating to admissibility or other evidentiary considerations. Please let us know by May 23 whether OFCCP will agree to develop such a stipulation.

During our May 14 discussion and in your May 15 letter, you also said that you would confirm whether OFCCP would grant Oracle a two-week extension of the present May 24, 2019 deadline to respond to OFCCP's Second Set of Requests for Admissions. You have now offered to extend our time to May 31. We will use our best efforts to meet that deadline. However, the request was warranted because OFCCP produced just last week – despite Oracle's earlier repeated requests – 180 files of documents it is asking Oracle to authenticate. Some of those files were corrupt and inaccessible. Oracle has been reviewing the accessible files that were produced and working with OFCCP to obtain access to those that have technical problems. Accessible versions of those corrupt files were produced only yesterday. The material that OFCCP is asking Oracle to authenticate is voluminous; and the technical difficulties have exacerbated and protracted an already difficult review. Therefore, we cannot guarantee that our response(s) will be complete by the 31st.

OFCCP's Requests for Documents

OFCCP continues to insist that Oracle must identify any deficiencies or missing documents in its productions. Not only is OFCCP's position erroneous, it inverts the burden of discovery. As the propounding party of the discovery, the burden to identify any perceived missing or deficient information always remains with the OFCCP. Besides, as we have stated before, Oracle does not believe that there are deficiencies or missing documents in its productions.

Oracle understands that some documents related to the resolved hiring claims may also have some relationship to compensation. Much of the compensation-related information that may be in or referenced in hiring-related documents is simply duplicative of information in the produced databases and other documents that have already been produced. Nevertheless, Oracle has produced certain responsive, non-privileged hiring-related documents in good faith. To the extent the OFCCP believes any responsive, non-privileged documents that are not substantially duplicative of information and documents already produced are still missing from the production, OFCCP must identify them. Oracle is not required to guess (nor could it) which documents OFCCP believes are missing or why OFCCP believes they are reasonably necessary such that the burden of retrieving, reviewing, and producing them is proportionate to the needs of this case at this late date.

Nor can Oracle speculate as to which documents OFCCP remains interested. During our call, and as reflected in your letter, you identified at least three documents that you agreed Oracle had no need to produce additional information on because they related to the resolved hiring claims: ORACLE_HQCA_00000042030, ORACLE_HQCA_00000042049, and ORACLE_HQCA_00000042045. This recognition reflects the proportionality and burden problems inherent in demands for "all documents related to" something or other, when there is no dispute that Oracle has produced enormous quantities of documents and data over the past three years, including over 500,000 documents and millions of data points.

Consistent with our position, Judge Clark just last Thursday recognized in his most recent Order that "OFCCP has been provided with a great deal of compensation data," and "OFCCP has compensation data for [an] employee not just for the class period, 2013 onwards, but going back through the employee's entire Oracle tenure." Order Granting in Part and Denying in Part OFCCP's Motion to Compel Historical Data of Comparator Employees at 4, Case No. 2017-OFC-00006 (May 16, 2019). At this late stage of the case, when exhaustive compensation data and documents have been produced on thousands of employees for a six-year period, requiring Oracle to sift through every nook and cranny of its headquarters business to see if there are some additional documents that contain some information or some kind of information relating to the compensation of individual employees, when such employee compensation information has been systematically produced from the repositories in which it is regularly maintained in the ordinary course of business, would impose manifest undue burden and transgress any reasonable criteria of proportionally related to the scope of the case, as Judge Clark has recognized as well. *See discussion id.* at 9.

With respect to the specific Requests for Production in Set Six, discussed in our conference on Tuesday and referred to in your letter from Wednesday, we have the following comments:

RFP 46

You are correct that we deem the request for Ms. Westerdahl's emails excessively tardy and unreasonable. There was an agreement almost two years ago with respect to production of additional Westerdahl emails pursuant to RFP No. 46. OFCCP never followed up on that agreement and re-interposed this demand only at the end of last month. At this point, considering the volume of material that would need to be retrieved and reviewed, and considering that Ms. Westerdahl's responsibilities are Human Resources, not compensation, we do not believe the burden of the requested production is justified by the minimal potential and redundant relevance of anything that might be uncovered.

RFP 80

As noted above, and in your letter, even you recognize that documents related to hiring (and you identified specific items) no longer have any or any significant relevance now that the hiring and selection claims formerly in this case have been resolved. RFP No. 80 is directed to Affirmative Action Plan ("AAP") documents, as to which Oracle previously produced documents in various categories. The requested AAP documents deal with selection procedures, goals, etc., which are no longer at issue in this case. Beyond that, they would be relevant only to claims about deficiencies in Oracle's AAP, but no such claim has ever been asserted. Indeed, Judge Clark has held that such claims cannot be brought into this case at this point. You are also correct that we object to this Request on the grounds of the 2015 proportionality amendments to Rule 26 of the Federal Rules of Civil Procedure, and the Advisory Committee's comments on those amendments. Therefore, we do not intend to produce any further documents in response to RFP No. 80 unless you can specifically identify anything responsive that has not otherwise been made available to OFCCP and that relates directly to the compensation claims remaining in this case.

RFP No. 185

This Request is confusingly compound, seeking documents concerning both race and gender on the one hand, and eligibility to work on the other hand, concerning both college recruits and employees in the IT, PD, and Support Job Functions. To the extent it concerns college recruits in any manner, such request seeks information about matters that area no longer at issue in the case. Likewise, the issue of work eligibility is, as alleged in the Second Amended Complaint ("SAC"), almost entirely a matter related to college recruits. The only allegation in the SAC that in any way references work eligibility is Paragraph 39, which speculatively contends a "strong preference for a workforce that is dependent on Oracle for authorization to work in the United States contributes to Oracle's suppression of Asian employees' wages." However, the immediate predicate for that contention is "that Oracle strongly favored hiring students studying in the United States pursuant to student visas." That is a college recruiting/hiring claim, so it also is no longer part of this case. As for the race and gender component of this compound request, and with respect only to employees (not hiring or recruiting), OFCCP has six years of data on the compensation population, making this

Request entirely redundant. Therefore, Oracle continues to object to this Request on the grounds that it is no longer relevant, if it ever was, and beyond that, that its redundancy and severely attenuated relationship to a compensation theory that is entirely speculative makes it, at this late date, unduly burdensome and not proportionate to the needs of this case.

RFP No. 189

You are correct that we maintain that, other than the US Employee Handbook, long-since produced, we do not believe, after diligent review and inquiry, that there are further responsive documents and that we do not believe we are withholding anything responsive.

RFP No. 190

You are correct that our position is that this Request is substantially duplicative of the vast amounts of information produced on prior compensation in the databases, including any references to prior compensation in the various comment fields in those databases, and that determining whether prior salary was "reviewed" – an inherently argumentative request – in the course of determining any individual employee's starting Oracle salary would require an impossibly burdensome individualized review of, among other things, emails related to thousands of employees and of hundreds of potential decision-makers. As a result, the Request is, at this late date, unduly burdensome and not proportionate to the needs of this case.

RFP No. 191

You are correct that our response is that we have produced all documents we understand, after diligent review and inquiry, to be responsive and are not aware of anything we are withholding with respect to this Request. We did refer you to Document No. 5400 in addition to the October 2017 policy, both of which have been produced to you.

RFPs Nos. 192-193, 195

As with RFP No. 190, the information requested here is redundant of exhaustive information produced in the databases and other documents, and duplicative of readily accessible information reflecting pay changes and pay decisions in the data columns and

comment fields in the workflow data and other spreadsheet data on the compensation population already produced. Anything beyond that would require a massive employee-by-employee email and other search and review for any reference which might possibly have some connection to a pay change or a pay decision for a particular employee. At this late stage of this litigation, the Requests are unduly burdensome and not proportionate to the needs of this case.

RFP No. 202

Our response here is the same as our comments with respect to further production of documents pursuant to RFP No. 80, *supra*.

RFP Nos. 204 & 205

You are correct that our response was that we would not produce documents responsive to these Requests on the basis that a motion to compel regarding historical data was pending before the Court. Last Thursday, the Court decided that motion, and in alignment and compliance with Judge Clark's Order, Oracle will produce compensation histories of all Oracle employees at its headquarters in the relevant job functions who were employed in those areas at some point between January 1, 2010 and January 1, 2013, to the extent such information has not already been produced for employees who continued in employment beyond January 1, 2013. *Id.* at 11.

Requests for Discovery Conferences

As my colleague Jake Heath explained during our May 14 discussion and in his subsequent correspondence, Oracle is not opposed to having regular case management conferences with the ALJ in which the parties discuss pending discovery-related issues. However, for efficiency purposes and to avoid unnecessarily burdening the ALJ with discovery issues that are not, in fact, disputes or on which the parties have not in fact reached an impasse, Oracle proposed a process to be followed prior to raising any discovery-related issues with the ALJ:

(1) The propounding party who believes a discovery response is deficient or requires additional response or production of further documents or information first prepares a letter explaining (a) specifically what it is the party wants and (b) why the party is entitled to it;

(2) Within 5 business days of receipt of the letter described in (1), the responding party would provide a written response; and

(3) Within 5 business days of receipt of the response described in (2), the parties would meet and confer.

The parties would then only bring those disputes to the ALJ on which they had reached an impasse following the meet and confer described in (3). Of course, nothing would prevent the parties from responding or meeting and conferring sooner if feasible given the breadth and complexity of the discovery request(s) at issue.

In your May 16 correspondence, you argue that Oracle's proposal is an attempt "to delay the process of referring discovery disputes to the Court rather than expediting it." On the contrary, Oracle proposed this schedule to allow the parties sufficient time to investigate alleged discovery deficiencies, provide an adequate response, and reach a compromise where possible. The 3 business days OFCCP suggested must cap any discussion period following identification of a discovery dispute is unworkable given the complexity and number of issues OFCCP typically raises in a single letter. Given the ALJ's previous refusal to have regularly-scheduled case management conferences, the parties should take extra care to avoid raising with him unnecessary issues that the parties are fully capable of resolving themselves. In that regard, it makes sense to bring to the ALJ's attention discovery issues only where there is truly an impasse, even after the parties have laid out their positions in writing and subsequently discussed them.

We recognize that there is limited time left for discovery. However, if the parties are thoughtful and raise only meaningful discovery disputes, we should be able to avoid numerous CMCs with discovery-related issues. Notwithstanding, Oracle may be willing to shorten from 5 business days to 3 business days the outside limit during which the meet and confer

discussion described in step (3) needs to occur after a written response is provided. However, we are not willing to shorten the 5 business day period allowed for a written response to a discovery deficiency letter (i.e., the time frame in step (2) above). Please let us know by May 23 whether OFCCP agrees with this approach.

Very truly yours,

John D. Giansello

4135-0656-3356.7