



August 3, 2017

Via E-Mail

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Re: OFCCP v. Oracle America, Inc. Redwood Shores, California (OALJ
Case No. 2017-OFC-00006)

Dear Mr. Pilotin:

I write in response to your letter from yesterday (August 2, 2017), as well as to memorialize and respond to yesterday afternoon's meet and confer discussion about the issues identified in your letter as well as several additional issues.

I. OFCCP's Database-Related Requests

A. ORS Data

As an initial matter, I explained that we maintain our objection to production of data from the ORS system for the same reasons set forth in J.R. Riddell's meet and confer letter dated July 11, 2017; we do not believe that the burden of manually reviewing and producing the data from a standalone system that has not been used for three years is proportionate to the needs of the case, especially where, as we discussed yesterday, to the extent there is data from ORS that was also captured in iRecruitment such as recruiter name, candidate's prior work experience, candidate's resume, etc., you will be receiving that data.

Following our discussion, I asked whether the parties have a remaining dispute on ORS data that will need to be raised with Judge Larsen. You said you would get back to us on the issue, and I requested that you let us know by today in light of the impending meet and confer deadline.

B. Scope of Database Production

In your letter dated August 2, you requested that we inform you of any additional objections that we have not raised regarding production of the data you requested in your June 30 letter. As I explained yesterday, our objection to production of the ORS data is the only remaining substantive objection we have to those requests, but there are several caveats to our agreement to produce data subject to your June 30 requests that I also outlined on the call—specifically, for your requests for compensation-related data, our production will be limited to employees at HQCA during the

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Exhibit P-246



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relevant period in Product Development, IT, and Support, and for your requests for hiring and recruiting-related data, our production will be limited to employees from the relevant period for the PT1 job group at HQCA.

C. College Recruiting Email Inbox

I also reiterated that Oracle is not able to provide “All Resumes submitted to recruiting mailbox” as requested in your June 30 letter due to the fact that this inbox is cleared out at the close of each fiscal year and those emails are not recoverable. You asked whether there are any emails available from this inbox for the most recent fiscal year, and I said we would get back to you on that. Upon further investigation, our understanding is that the inbox still contains emails from FY2017, which recently ended earlier this year, and Oracle agrees to collect and produce non-privileged, responsive documents from this inbox that are related to the PT1 job group for the relevant period as determined by Judge Larsen.

D. Performance Evaluation Screenshot(s)

As I noted on the call, we are following up with the relevant client contacts to obtain the documents that we agreed to produce in response to RFP No. 52 and will provide them to you as soon as possible.

II. OFCCP Notice of Deposition for Joyce Westerdahl

As we discussed on the call, Oracle filed its objections to OFCCP’s notice of deposition for Joyce Westerdahl yesterday. OFCCP acknowledged receipt of those objections, and I explained that our objections to producing Ms. Westerdahl are based on timing and location, as she does not reside in the Bay Area. You said you would get back to us regarding scheduling of this and the other depositions requested in your July 7 notices at some later point.

III. Scheduling Issues

A. OFCCP’s Proposed Production Schedule

You asked us again whether we are able to provide a specific date by which all of the database information you requested in your June 30 letter would be produced. You told us that you intend to seek a production schedule from the Court that will include a timeline for the production of this information. In response, I explained that we still cannot commit to a specific date at this time. I told you that we are speaking with individuals at Oracle on a daily basis to ensure that we will be able to successfully pull and produce the data you have requested. I also informed you that there is

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a team of at least seven Oracle employees who are working almost full-time on your data request at this point. You asked us whether we could promise production within a month or two months, and while I said that we are certainly hopeful that production will occur within this timeframe, Oracle cannot make an absolute commitment to a date, including because we still do not have an order from the Court confirming the relevant time period.

I also explained that any proposed production schedule would be premature when the parties are still debating the scope of discovery at issue. Although we have reached agreement on a number of issues in the last week, there are still remaining areas where the parties have not agreed on the appropriate scope of discovery or production. In particular, the most burdensome and time-consuming requests are those related to emails (which are discussed in greater detail in Section VII below).

B. OFCCP's Proposal Regarding Scheduling of Fact Discovery and Hearing

On yesterday's call, we also discussed OFCCP's proposed revised schedule for this case, including new deadlines for fact discovery and for the hearing. I indicated that Oracle was open to the idea of a joint request to modify the case schedule. Following our meet and confer on this issue and after discussing it internally, I can confirm that Oracle does not oppose OFCCP's proposed request for a continuation of the hearing (and related dates).

You also mentioned on yesterday's call that OFCCP will be requesting monthly case management conferences with the Court. I stated that Oracle has no substantive objection to this request. Upon further reflection, I now also underscore that Oracle may seek more frequent or additional case management conferences should that prove necessary as a result of OFCCP's continued failure to provide appropriate or meaningful responses to Oracle's discovery requests.

IV. OFCCP's Requests for Production

A. RFP No. 83: Employee Contact Information

During our call, you confirmed that OFCCP has rejected Oracle's proposed compromise on contact information, including the use of a *Belair* notice prior to releasing any such information. More fundamentally, **you confirmed that OFCCP remains unwilling to compromise in any way with respect to its request for contact information.** As you know OFCCP has requested contact information for *all current and former employees* who worked in the PT 1 job group, Product Development, IT and Support during the relevant time period. As drafted, Request No. 83 is not even limited to Oracle's headquarters location ("HQCA"), which is the only location at issue in this case. It also is not limited to the purported class of victims within those job functions and job group

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– instead, it asks for contact information for everyone. Indeed, as the PT1 job group, OFCCP’s claim is for hiring and recruiting discrimination. Accordingly, the purported “victims” are applicants – not employees, making it wholly inappropriate that OFCCP’s request for contact information includes employees in the PT 1 job group. Request No. 83 also seeks not only name and home address, but also home phone number, mobile number, and home and personal email addresses. Even if OFCCP is willing to limit its request to HQCA, it still encompasses the contact information for thousands of current and former employees (including managers). And, even if this request was limited to the time period at issue in the audit (which it is not), it would entail contact information for more than 5,000 Oracle employees.

In support of OFCCP’s refusal to compromise, you cite one case: *Benedict v. Hewlett-Packard Co.*, No. 13-CV-0119-LHK, 2013 WL 3215186 (N.D. Cal. June 25, 2013). We have analyzed *Benedict* and find it entirely distinguishable. Because you are listed as plaintiff’s counsel on that case, you surely are aware of the many ways in which the facts and circumstances in *Benedict* differ from the facts and circumstances here. First, *Benedict* involved only the disclosure of contact information for the putative class members that the named plaintiffs sought to represent. OFCCP’s request for contact information is far broader than the purported class of victims here. Second, the class members whose contact information was at issue in *Benedict* were not management employees. As we discussed yesterday, you are seeking the personal contact information for managers all the way up to the level of Thomas Kurian, and for whom Oracle has a right to have a representative present for any discussions with OFCCP about this case. As we also discussed yesterday, some of the managers whose contact information you seek are responsible for making compensation and hiring decisions as to other class members. This too, presents a conflict of interest not present or addressed in *Benedict*.

Furthermore, in *Benedict*, the court’s decision not to order a *Belair* process was based on the fact that HP has a “Global Master Privacy Policy,” which “effectively puts employees on notice that their personal information may be transferred to third parties under certain conditions.” *Benedict v. Hewlett-Packard Co.*, 2013 WL 3215186 at *2. Oracle has no such policy. The court further based its decision not to require a *Belair* notice on the fact that all employee contact information would be designated under the protective order as “Highly Confidential – Attorney’s Eyes Only,” which presumably meant it could be shared only with counsel, and also meant that it could be used only for the purposes of the *Benedict* litigation, and would “require destruction of the Class List upon final disposition of the action.” *Id.* at *1, *2. Here, none of those protections exist. Instead, once disclosed, you would be permitted to share the contact information with OFCCP, OFCCP would be permitted to use the contact information in other matters involving Oracle, and OFCCP would be

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allowed to maintain the employee contact list in perpetuity.¹ Indeed, as you know, OFCCP insisted on these terms when negotiating the protective order.

Moreover, the contact information ordered produced in *Benedict* included *only* name, last known address, job title and dates in that position. Importantly, it did *not* include emails addresses or phone numbers. The *Benedict* court specifically acknowledged that phone numbers were not at issue, and distinguished this fact from situations where contact information requests did include phone numbers. *Id.* at *2 (citing *Willner v. Manpower, Inc.*, No. 11–2846 JST (MEJ), 2013 U.S. Dist. LEXIS 43821, at *6–7 (N.D.Cal. March 27, 2013) for the proposition that an “opt-out procedure was unnecessary for disclosure of names and addresses of putative class members, but would be required if phone numbers were requested”).

In short, *Benedict* does not apply here. OFCCP’s request for contact information is grossly overbroad. To the extent any contact information is disclosed, it must be limited to purported victims, and it must be subject to a *Belaire* notice given that the protective order governing this case does not contain the protections that existed in *Benedict*.² Moreover, your argument that the *Google* decision’s numerical limits do not apply is unconvincing. Contrary to your arguments, OFCCP’s request for contact information here *does* encompass several thousand current and former employees, just like in *Google*. Moreover, Judge Berlin in *Google* did not address the privacy concerns Oracle raises here, nor did he address the concern about disclosing the contact information of managers at Oracle – who not only can bind the company, but who also are responsible for making the compensation and hiring decisions at issue in the present litigation.

For all of these reasons, Oracle maintains its position that the appropriate course forward is disclosure of contact information for a limited number of individual contributor (*i.e.*, non-manager) class members subject to a *Belaire* procedure that puts them on notice that their contact information will be disclosed, and gives them the opportunity to object to such disclosure. We previously suggested 20 percent as a numerical limit, and continue to believe that is an appropriate sampling.

¹ Given the concerns Judge Berlin raised in *Google* about potential data breaches, this fact is particularly germane.

² As we discussed on the call, it does not matter that the plaintiff here is a federal agency. The constitutionally protected privacy rights at issue belong to Oracle’s employees and former employees, and are not waived by virtue of the fact that their employer is a government contractor who was sued by OFCCP. You have cited no case law for the proposition that employees waive their privacy rights when they become employed by a federal contractor, and we are aware of no such authority.

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Please let us know if OFCCP is willing to accept this proposal, has a counter-proposal, or continues to maintain its position that it will not compromise in any way.

B. RFPs Related to Transfer Employees

On yesterday's call, I confirmed that the understanding reflected in your letter dated August 2, 2017 regarding Oracle's production of documents and data related to transfer employees is correct, subject to the more limited definition of transfer employee that you outlined in our meet and confer dated July 27, 2017, and as reflected in my letter dated July 28, 2017.

C. RFP No. 65: Various Practice, Policy or Procedure Documents

As noted yesterday, Oracle withdraws its objections to this request as modified and clarified in your letter dated August 2, 2017. However, as I noted on our call, Oracle's withdrawal of its objections to this request is made in the spirit of compromise and in no way amounts to a concession that job assignments are relevant to this litigation (they are not).

D. RFP Nos. 67, 68, and 69

With respect to these requests, you proposed limiting the scope of the employee complaints, lawsuits, or other surveys/summaries/reports or presentations covered by these requests to include any allegations of race or gender discrimination involving the PT 1 job group or the Product Development, IT or Support lines of business at HQCA during the relevant time period. We believe this scope continues to be overbroad. Rather, we propose the following scope: employee complaints, lawsuits, or other surveys/summaries/reports or presentations regarding race discrimination in the PT 1 job group at HQCA during the relevant time period, and employee complaints, lawsuits, or other surveys/summaries/reports or presentations regarding race or gender discrimination in Product Development, IT or Support at HQCA during the relevant time period. Please let us know if this proposal on scope is agreeable.

As for the types of internal "complaints" that Oracle is willing to produce in response to Request No. 67, I explained on our call that the challenge here is that Oracle does not "track" or have a central repository of all complaints made to its HR department, with the exception of complaints made to the ethics hotline. Thus, responding to this request as drafted would be incredibly burdensome and disproportionate to the case. We are still discussing with our client whether we can agree to produce complaints beyond those made through the ethics hotline or that were accompanied by a demand letter (the proposal I made in my July 31 letter). We will follow up on this issue as soon as we are able to do so.

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E. RFP No. 70: Government Contracts

For RFP No. 70, you stated that OFCCP is open to a stipulation but requests a more precise figure regarding the value of Oracle's federal contracts. In response, Oracle agrees to provide more precise dollar amounts. We suggest a stipulation whereby Oracle stipulates that it has been a covered federal contractor for over 20 years and the total amount of its government contracts has exceeded \$100 million each year since 2013. Please let us know if this proposal is acceptable.

F. RFP Nos. 78, 79, 80, 87, and 88

Following the exchange of correspondence this week and our meet and confer discussions yesterday, the parties agree that they are not able to reach agreement on these requests and that they will need to be raised with Judge Larsen.

G. RFP No. 54

For RFP No. 54, I confirmed yesterday that Oracle will produce responsive, non-privileged documents in response to this request in light of the written clarification found in your letter dated August 2, 2017.

H. RFP Nos. 27 and 28: Employee Referral Program

As we discussed yesterday and as reflected in my letter dated July 31, 2017, Oracle agrees to produce documents sufficient to identify those persons who were hired as a result of Oracle's Employee Referral Program during the relevant time period. For RFP No. 28, as of the time of my July 31 letter, we were still working with the client to determine whether and how we would be able to provide documents sufficient to identify which employees received bonuses as a result of the program during the relevant time period. As noted yesterday, however, we can now confirm that we will be able to provide you with documents sufficient to identify those employees who received bonuses due to the program.

I. RFP No. 29: Documents Related to Affirmative Defenses

In light of your proposed modification to this request, which addresses our primary objections premised on the attorney work product and attorney-client privileges, Oracle agrees to produce responsive, non-privileged documents.

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J. RFP No. 64

As noted yesterday, Oracle agrees to produce responsive, non-privileged documents in response to RFP No. 64, pursuant to the modification reflected in your letter dated August 2, 2017.

V. Production of Policy Documents

You asked us whether Oracle has completed its production of all policies, practices, and procedures as of now. We are still confirming this point, and will follow up as soon as we have an answer.

VI. Scope of OFCCP's Requests Relating to Recruiting and Hiring Claims

On yesterday's call, I asked you for clarification regarding OFCCP's position on the scope of its recruiting and hiring discrimination claim, as well as the discovery requests that relate to it. In response, OFCCP confirmed that it is limiting this claim to the PT 1 job group at HQCA, and therefore its discovery requests related to this claim seek only data and documents for the PT1 job group, as opposed to both the PT1 job group and the Product Development line of business.

VII. Review and Production of Email in Response to Certain Requests

For the first time and only two days before the close of the meet and confer process, OFCCP indicated that it was willing to consider Oracle's repeated invitations to discuss an approach to narrowing OFCCP's overbroad and disproportionate requests for emails. Your colleague, Laura Bremer, noted that Norm Garcia's June 30 letter requests that Oracle produce all of its past and future search terms by July 14; however, as J.R. Riddell explained in his July 11 letter, this request was not only untenable but made no sense in light of the fact that we were still engaged in seeking clarification on many of your RFPs before we could even begin to know what we were searching for, let alone which search terms we would use in those searches. We have repeatedly made our position clear during the meet and confer process that it is OFCCP's burden to justify or narrow the scope of its incredibly broad and disproportionate requests. *See Gilead Sciences, Inc. v. Merck & Co.*, No. 5:13-cv-04057, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) ("a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case"). To that end, we have invited OFCCP on multiple occasions—including in our Amended and Supplemental Responses and Objections themselves—to work with us on ways to limit these requests in a meaningful and tailored way. The fact that OFCCP now wishes to discuss these issues three weeks after our Amended Responses and Objections were filed and months after we first raised this possibility is concerning and frustrating to say the least.

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On yesterday's call, we specifically discussed a number of your requests that, as currently written, would require the collection, review, and production of thousands of emails. OFCCP asked that Oracle provide additional information and "metrics" to support its claims that OFCCP's requests are overly burdensome as well as proposals for how to mitigate that burden through search terms and sampling. Oracle now responds as follows:

A. RFP No. 17: Communications with Domestic Colleges and Universities

In response to this request, Oracle has collected the emails of sixteen custodians in College Recruiting (including Larry Lynn and Chantal Dumont). Collectively, these custodians have 620,938 documents for the period of January 1, 2013 to January 17, 2017.

Oracle proposes limiting the number of documents for review through the use of search terms consisting of the domain name addresses for the universities identified in the so-called "College Recruiting Sourcing Handbook" as the schools from which Oracle actively recruits. For example, this search would include any correspondence to or from a person with an email address ending in @stanford.edu, @yale.edu, @caltech.edu, etc. Once that is done, Oracle is willing to review and produce responsive documents from any sample month of OFCCP's choosing from the 1/1/13 to 6/30/14 time period and any sample month of OFCCP's choosing beyond the 6/30/14 time period that is within the relevant period as determined by the ALJ.

B. RFP Nos. 18 and 22: Communications with College Recruiters And Interview Notes

Request No. 18 implicates the same sixteen custodians as RFP 17. As noted above, these custodians have 620,938 documents for the period of January 1, 2013 to January 17, 2017.

With respect to interview notes, as we have noted before, there is no central repository for interview notes related to the hiring process (although Request No. 22 specifically notes that it includes a request for emails that might reflect notes or records of interviews).

Oracle proposes limiting the number of documents for review, and that are potentially responsive to these requests, through the use of search terms consisting of the names of all college applicants to PT1 positions during the relevant period. Following this search, Oracle is willing to review and produce responsive documents from any sample month of OFCCP's choosing from the 1/1/13 to 6/30/14 time period and any sample month of OFCCP's choosing beyond the 6/30/14 time period that is within the relevant period as determined by the ALJ.

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C. RFP Nos. 24 and 25 (Larry Lynn and Chantal Dumont)

For Larry Lynn, Oracle has collected a total of 44,344 documents for the period of January 1, 2013 to January 17, 2017. For Chantal Dumont, Oracle has collected a total of 86,942 documents for the period of January 1, 2013 to January 17, 2017. As part of Oracle's proposal for RFP Nos. 17 and 18, which are described above, their emails would be included in the set of documents to be searched, and following this search, Oracle would produce responsive documents from any sample month of OFCCP's choosing from the 1/1/13 to 6/30/14 time period and any sample month of OFCCP's choosing beyond the 6/30/14 time period that is within the relevant period as determined by the ALJ.

D. RFP Nos. 39, 40, 42-45: Communications Related to Experienced Recruits and Transfers

These requests seek all communications with recruiters related to hiring experienced recruits, all interview notes or records for experienced recruits, and all communications "stating, summarizing, supporting, or explaining" any decisions on the hiring process for an experienced recruit, respectively.

As we have noted before, there was no central repository for interview notes related to the hiring process. And as we have also explained, "all communications" regarding the hiring process for an applicant to a requisition seeking an experienced recruit would potentially include the emails of hundreds of Oracle's hiring managers.

Nevertheless, in response to this request, Oracle has collected the emails of 38 custodians in Professional Recruiting. Collectively, these custodians have 767,283 documents for the period of January 1, 2013 to January 17, 2017. Oracle proposes limiting the number of documents for review through the use of search terms consisting of the names of applicants to PT1 positions at HQCA during the relevant period and all requisition numbers associated with PT1 positions at HQCA during the relevant period. Following this search, Oracle is willing to review and produce responsive documents to these requests from any sample month of OFCCP's choosing from the 1/1/13 to 6/30/14 time period and any sample month of OFCCP's choosing beyond the 6/30/14 time period that is within the relevant period as determined by the ALJ.

E. RFP 46: Joyce Westerdahl's Emails

For Joyce Westerdahl, Oracle has collected a total of 29,502 documents for the period of January 1, 2013 to January 17, 2017. As a senior executive with only limited knowledge of the relevant facts of this litigation, Ms. Westerdahl's emails are of limited relevance to this matter. As written, OFCCP's



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request seeks a variety of documents of no relevance to this case, including “promotions,” “retaliation,” “unfair treatment,” and “hostile work environment” among other things. Accordingly, Oracle proposes limiting the number of documents for review through the following search terms:

- compensation w/10 (Support or “Information Technology” or IT or “Product Development”)
- (hir! OR recruit!) w/10 (“Professional Technical” OR PT1)

Following this search, Oracle is willing to review and produce responsive documents to these requests to the extent they relate to compensation for the Product Development, IT, and Support lines of business or hiring or recruiting for the PT1 job group from any sample month of OFCCP’s choosing from the 1/1/13 to 6/30/14 time period and any sample month of OFCCP’s choosing beyond the 6/30/14 time period that is within the relevant period as determined by the ALJ.

* * *

Please let us know of these proposed compromises are acceptable.

Very truly yours,

A handwritten signature in blue ink that reads "Erin M. Connell". The signature is written in a cursive, flowing style.

Erin M. Connell