



Orrick, Herrington & Sutcliffe LLP

The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669

+1 415 773 5700

orrick.com

Kathryn G. Mantoan

E kmantoan@orrick.com

D +1 415 773 5887

F +1 415 773 5759

March 14, 2019

Laura C. Bremer
U.S. Department of Labor
Office of the Solicitor
90 Seventh Street, Suite 3-700
San Francisco, CA 94103

Re: OFCCP's Requests for Supplemental Data Production

Dear Laura:

I write in response to your letter dated March 6, 2019. Thank you for agreeing in that letter to Oracle's proposed end date of January 18, 2019 for supplementation of the relevant populations and data files. Below I write to address in turn the other issues you raised.

Scope of Supplementation of Group II (Hiring) Data Files

On February 14, 2019, OFCCP provided a list of all of the files previously produced for Group II (Hiring) for which it was requesting supplementation. Oracle agrees to supplement all of the files requested by OFCCP through January 18, 2019 for individuals relevant to OFCCP's revised and narrowed recruiting and hiring claims (*i.e.*, individuals hired into Oracle through the "college recruiting" program). However, Oracle does not agree to supplement any of those Group II (Hiring) files with respect to individuals not hired through the college recruiting program, given that OFCCP's Second Amended Complaint limits its hiring claim along these lines. *See* Second Am. Compl. at 14 n. 1 ("At this time, OFCCP is only pursuing a hiring claim focused on Oracle's college and university hiring program."). OFCCP's suggestion that Oracle must supplement its database with experienced hiring data as well is not appropriately tailored. We are not aware of any authority that would support discovery related to claims that a party has dismissed or clarified that it is not asserting. Moreover, OFCCP's argument that Oracle must supplement data regarding experienced hires because OFCCP may amend its SAC again to include experienced hires is inconsistent with Judge Clark's ruling on OFCCP's motion for leave to amend.

OFCCP incorrectly focuses on what it perceives to be the burden of drafting revised scripts tailored to the narrower hiring population now at issue. While we appreciate OFCCP's



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acknowledgement that drafting scripts can be burdensome, drafting scripts is not the sole factor in assessing burden. Pulling massive amounts of data, quality checking, and executing complex scripts are also burdensome. In addition, and perhaps more significantly, Oracle will not agree to produce confidential employment and personnel data of third-party employees unconnected to the scope of the claims now at issue in the case.

Furthermore, OFCCP states that “all (or virtually all) of the experienced hires in the PT1 job group from 2017 to 2019 are also in the compensation pool.” This fact, if true, undermines OFCCP’s reason for asking Oracle to produce data for all experienced hires, as Oracle has already agreed to supplement data out of iRecruitment and Taleo for the compensation population.

Finally, OFCCP represents that it needs additional experienced hiring data because it claims to have found “inconsistent” entries in the data produced to date. Not so. Data coded differently in different databases or sources does not mean it is inconsistent. For example, it would not be inconsistent for managers to label an individual who transferred from an Oracle international affiliate to Oracle America, Inc. as an “international transfer” or a “new hire”; both or either may be correct, depending on the data field in which the information is recorded and the purpose for which it is recorded.

“Available Updated Data, If Any”

OFCCP takes issue with Oracle’s agreement in its February 27 letter to “provid[e] *readily available updated data, if any*, for both the original compensation population and the updated compensation population through January 18, 2019” (emphasis added), subject to the limitations set forth in that letter. The February 27 letter referenced “readily available updated data, if any” primarily because certain of the data files previously produced were pulled from legacy systems no longer in use, such that additional entries post-dating Oracle’s earlier production would not exist. For example, Oracle will not be providing supplemental data from the GSI database for the original compensation population because there is none; all available data in GSI has already been produced for those individuals and later entries in the data fields at issue now reside in Fusion.

Educational Data for Oracle Employees in Compensation Population

OFCCP asks Oracle to “confirm that you will be producing [tabs (1) APL_EMPLOYMENT_HISTORY, (2) APL_QUALIFICATIONS, and (3) APPLICANT_PROFILES] for the compensation population” in HQCA_IREC_DATA.xlsx. But Oracle’s February 27 letter already expressly stated that we anticipate producing such data on a



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rolling basis, and will update OFCCP promptly if we encounter any unexpected extraction issues that would impact completion of that production. For avoidance of doubt, Oracle will produce these fields both for the original compensation population and the supplemental compensation population through January 18, 2019.

Your March 6 letter further requests that Oracle commit to producing all “additional educational data” for all individuals in compensation and/or hiring populations. Oracle has produced, and will supplement, information on education for these populations that is available in Oracle’s centralized HRIS data systems. Oracle has also produced, and will continue to produce, resumes stored in those systems for the populations at issue, which generally also contain educational information. As you are no doubt aware from your review of the data files and attachments produced to date, those systems do not capture and record educational information for all individuals in the populations – by way of just two examples, for individuals hired into Oracle years before those central data repositories were active, or others who joined Oracle through acquisitions. Oracle has conducted a reasonably diligent search, and is producing the education data it discovers pursuant to that reasonable search. We are not withholding or refusing to produce any educational data we have discovered pursuant to that search. We also readily acknowledge that neither party may use education data (or any data) in motion practice or at the hearing that was requested in discovery and not produced. We do not believe there remains any dispute on this issue, as Oracle will continue to produce available data within its centralized databases responsive to OFCCP’s requests, and anticipates completing this production within the deadlines set for data production.

Compa-Ratios From International Affiliates of Oracle America, Inc.

While Oracle is willing to continue to meet and confer on this topic, Oracle maintains its objections to producing compa-ratio data for employees of its international affiliates.

OFCCP has not explained why production of international compa-ratio data, in addition to what is already available in the extensive data Oracle has produced, is warranted here. As OFCCP acknowledges in its February 15 letter, Oracle has already produced prior pay information for individuals in the compensation population, including international transfer employees’ prior pay data, in the file ORACLE_HQCA_0000070747 (HQCA_IREC_DATA.xlsx), tab “OFFER_CANDIDATES,” column BC (“CANDIDATE_CURRENT_SALARY_ATV”).¹ In addition, Oracle has also already produced the comments provided by hiring and/or HR

¹ Such information was also previously provided in ORACLE_HQCA_0000128176 (PT1_HQCA_IREC_MAIN.xlsx) for experienced hires, but given OFCCP’s more limited hiring claims in the operative complaint, such information is no longer relevant.

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managers in the iRecruitment approval workflow for new hires, which OFCCP can readily review to identify where a hiring and/or HR manager referenced the individual's compa-ratio at an international affiliate. *See, e.g.*, ORACLE_HQCA_0000070747 (HQCA_IREC_DATA.xlsx), tab "OFFER APPROVAL COMM HISTORY," column H ("COMMENTS") at VACANCY_NAME IRC1971522 (emphasis added) ("We are requesting approval to relocate [REDACTED] to the US. ... [REDACTED] is currently at Sr. Manager level and we are requesting to transfer him at the same level. We have discussed the management opportunity here at HQ with [REDACTED] and he is interest in moving to Headquarters. He has a **current comparatio 94.6% with a salary of [REDACTED]** We have discussed compensation with [REDACTED] and he believes he cannot accept a salary of less than [REDACTED]. Hence, we are requesting approval for a salary of [REDACTED] which maps to the [REDACTED]."); *id.* at VACANCY_NAME IRC2351658 (emphasis added) ("This request is for approval to facilitate an international transfer from IDC to US-HQ for our top candidate, [REDACTED] as a Software Developer 3 in [REDACTED] for [REDACTED] team. ... **Currently [REDACTED] salary is [REDACTED] (IDC IC3 software developer range-[REDACTED]) for a comparatio of 98.** Proposing an annual salary of [REDACTED] as an Senior Software Developer (US IC3 software developer range [REDACTED]) for a comparatio of 103. Within [REDACTED] benchmark for IC3(HQ only) of [REDACTED]."). OFCCP has not articulated any reason that it also needs Oracle to separately pull each individual's pre-transfer compa-ratio at an Oracle affiliate when it already has such extensive information.

Moreover, the request as framed clearly seeks information that is not in Oracle America, Inc.'s possession, custody or control. *See* Fed. R. Civ. P. 34(a)(1) (party only obligated to produce only those records that are in its "possession, custody, or control"). OFCCP suggests in its February 15 and March 6 letters that it is entitled to international compa-ratio data because "Oracle has access to this information and it would have been reviewed by managers." But that claim is wrong both factually and legally. While it is true that some hiring managers may have obtained information regarding an individual's compa-ratio at an international affiliate as part of processing a particular transfer into Oracle America, Inc., this information is not available to those managers as a matter of course. Rather, if an individual was employed at an international affiliate, a hiring manager or HR representative or manager would have to request the international compa-ratio data specifically for that individual. Such requests are often oral and are not directly reflected or recorded in any central HRIS data source (*e.g.*, Workforce Compensation; iRecruitment). Moreover, the Ninth Circuit has expressly rejected the argument that merely because a party has access to information means that it has possession, custody or control over it. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999) (refusing to

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“define ‘control’ in a manner that focuses on the party’s practical ability to obtain the requested documents,” and holding instead that “the legal control test is the proper standard”).²

OFCCP’s Request for Data for Individuals Outside the Populations At Issue

As noted above, the parties appear to be in agreement as to the end date for production of updated data for the compensation and hiring populations, as those populations are framed by OFCCP’s Second Amended Complaint. Oracle maintains its objections, however, to OFCCP’s request for historical compensation data for all Oracle HQCA employees who worked in the Product Development, Support, or IT job functions at any time since 1985.

OFCCP’s March 6 letter incorrectly states that “Oracle does not claim that producing historical data would be burdensome.” To the contrary, my February 27 letter clearly stated that OFCCP’s request further “compounds the oppression and burden OFCCP seeks to impose on Oracle” Lest there be any doubt, Oracle opposes producing three decades of historical data for employees *who never worked at HQCA after January 1, 2013 and are undisputedly outside of the populations at issue* as oppressive and unduly burdensome, as well as disproportionate to the needs of the case.

Additionally, OFCCP’s discussion of burden is inappropriately cabined to a discussion of how easy it would be to write a script to extract nearly 30 years’ worth of additional data. OFCCP speculates—without basis—that it would be easier to write a script to pull all historical compensation data anywhere in its data repositories, instead of a more limited and tailored subset. This is factually incorrect. Moreover, OFCCP focuses too narrowly on the drafting of the script in its burden analysis. The complexity of executing the script, as well as the volume of the data that it returns, also contribute to the burden. And again, OFCCP ignores the privacy rights of third-party employees unconnected to the scope of the claims now at issue in the case, and further ignores that *Oracle has agreed to produce historical data for the employee populations at issue who worked during the liability period*. We are unaware of any legal authority that would require Oracle to produce the additional and monumentally burdensome volume of pre-liability discovery you seek; if you are aware of any that you believe would require such production, we ask that you provide it now. If you do not identify any such authority, we will presume it is because none exists. *Cf.* Fed. R. Civ. P. 26(b)(1) (limiting scope

² Furthermore, even if Oracle had legal control over data of a separate legal entity and international affiliate, the likely burden of obtaining this data would be disproportionate to its relevance and the needs of the case.

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of discovery to that which is “proportional to the needs of the case, considering” (*inter alia*) “whether the burden or expense of the proposed discovery outweighs its likely benefit”).

Please contact me if you would like to discuss these matters further. In the meantime, as we have indicated previously, Oracle is working diligently to pull supplemental data related to the claims at issue in the litigation and will produce such files on a rolling basis.

Very truly yours,



Kathryn G. Mantoan