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VIA HAND DELIVERY

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OFFICE OF ADMINISTRATIVE LAW JUDGES
U.S. DEPARTMENT OF LABOR
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JUL 14 2017

Office of Administrative Law Judges
San Francisco, Ca

Re: OFCCP v. Oracle America, Inc., Case No. 2017-OFC-00006,
Request for Court Conference Regarding Discovery Motion

Your Honor:

The Office of Federal Contract Compliance Programs (“OFCCP”) seeks to file a discovery motion for a document production schedule and an order compelling production of certain documents. OFCCP thus respectfully requests the requisite pre-filing conference.

To avoid burdening the Court, OFCCP has worked diligently to resolve as many discovery issues on its own, participating in over 25 hours of telephonic meet-and-confer sessions and drafting over 13 meet-and-confer letters. Of that time, OFCCP has spent approximately 15 hours meeting and conferring with Oracle regarding the agency’s document requests, which has included discussions regarding the issues summarized below. Despite the parties’ efforts, the issues below require motion practice.

I. Request for Document Production Schedule to Assist in Ensuring Efficient, Organized Fact Discovery

Given the sequential steps needed to complete fact and expert discovery, OFCCP proposed to Oracle a document production schedule to ensure those steps could be completed in a timely, orderly fashion. Rather than demand that Oracle produce all documents requested in February 2017 on a certain date, OFCCP’s proposed schedule divided the February 2017 requests into five batches and reasonably requested production of those batches between July 7 and September 29. After each production date, Oracle was asked to provide a privilege log for that batch and a certification that it substantially completed its production of documents responsive to the requests in that batch. Oracle refused to commit to any schedule, going so far to state that it may produce documents up through the end of fact discovery in January 2018.

Without any certainty as to when and in what order Oracle will produce documents, OFCCP cannot coordinate the tasks necessary to litigate this case fully and fairly. Driving much of this need for coordination is, as OFCCP has stated previously, the necessary and extensive expert review and analysis of the factual record, which takes many months. This particularly rings true where—as here—certain data (e.g., an employee’s education and prior experience)

may need to be manually culled from source documents (*e.g.*, resumes). Once that analysis is complete, expert disclosures must then be drafted for the parties' exchange.

Also, without knowing when documents will be produced, OFCCP cannot plan for and schedule depositions. OFCCP has attempted to start scheduling depositions, including for three key Oracle witnesses in September. However, without knowing when those witnesses' documents will be produced, OFCCP cannot finalize those dates. This delay in scheduling depositions also forestalls the expert analysis of the testimony that emerges from the deposition.

Finally, the current open-ended production schedule that may end with the close of fact discovery prejudices OFCCP's ability to follow up on any discovery, including challenging any of Oracle's privilege assertions.

Fact discovery closes on Saturday, January 20, 2018, which is fast approaching given the expert analysis and depositions that have yet to take place. Short of Oracle being directed to produce immediately all documents relevant to OFCCP's February 2017 requests, Oracle should be subject to a production schedule to ensure the orderly completion of fact and expert discovery.

II. Request for Order Compelling Production of Certain Documents and Records

OFCCP seeks to move for an order compelling Oracle to produce the documents below.

Employee Contact Information. OFCCP seeks contact information to contact employees about their employment. *See EEOC v. McLane Co., Inc.*, 857 F.3d 813, 815 (9th Cir. 2017) (such information is relevant to permit EEOC "to contact . . . employees and applicants for employment who have taken [challenged] test to learn more about their experiences"); *Benedict v. Hewlett-Packard Co.*, No. C 13-0119 LHK, 2013 WL 3215186, at *2 (N.D. Cal. June 25, 2013) (ordering production of employee contact information); *Holman v. Experian Info Solutions, Inc.*, No. C 11-0180 CW, 2012 WL 1496203 (N.D. Cal. Apr. 27, 2012) (allowing "discovery of putative class members' confidential information subject to a protective order") (citing cases); *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011) (ordering production "of names, addresses, and telephone numbers" of employees). Despite obtaining the protective order it represented it needed to protect its employees' privacy rights, Oracle refuses to produce this information, objecting again based on its employees' privacy.

Emails of Certain Witnesses. Oracle refuses to produce relevant emails for three key witnesses: Executive Vice President of Human Resources Joyce Westerdahl, Vice President of College Recruiting Larry Lynn, and Director of College Recruiting Chantal Dumont. Because of their roles, these individuals' emails will offer relevant insight into the actual, day-to-day operation of processes central to this case (*e.g.*, recruiting and hiring), which is critically relevant to OFCCP's allegations that unlawful discrimination taints these processes. Notably, although Oracle had committed in March 2017 to producing Mr. Lynn's and Ms. Dumont's emails, it reversed course after the Court denied its motion for judgment on the pleadings.

Mandated Analyses. Various OFCCP regulations required Oracle to perform internal audits of its employment practices to evaluate whether, among other things, the company pays its employees in a non-discriminatory fashion. In addition to being relevant to OFCCP's discrimination claims, documents regarding these analyses are relevant to OFCCP's claim that Oracle failed to comply with its obligations to undertake such analyses. Over employers' objections, the OALJ has ordered production of documents related to these analyses. *E.g.*, Order Granting OFCCP's Mot. to Compel, *OFCCP v. JBS USA Holdings*, No. 2015-OFC-1 (OALJ Nov. 25, 2016) (attached). Oracle refuses to provide its analyses, their supporting documentation, and actions it took in response to them, insisting that they call for a legal conclusion, among other things.

* * *

We look forward to discussing these issues with you.

Respectfully,

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Regional Solicitor

By:



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Attachment

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