



**Issue Date: 09 December 2019**

CASE NO.: 2017-OFC-00006

*In the Matter of*

OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS,  
U.S. DEPARTMENT OF LABOR,  
Plaintiff,

v.

ORACLE AMERICA, INC.,  
Defendant.

**ORDER REGARDING OBJECTIONS TO HEARING EXHIBITS**

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, (“EO 11246”) and associated regulations at 41 C.F.R. Chapter 60. It involves Plaintiff Office of Federal Contract Compliance Programs (“OFCCP”) and Defendant Oracle America, Inc. (“Oracle”) and has been pending at the Office of Administrative Law Judges (“OALJ”) since January 17, 2017. Hearing began on December 5, 2019. Currently pending are a number of objections to hearing exhibits, which are addressed below.

**I. BACKGROUND**

On November 21, 2019, the parties made their pre-hearing filings: a Joint Pre-Hearing Statement, a Joint Witness List, a Joint Exhibit List, OFCCP’s Exhibit List, and Oracle’s witness list. On November 26, 2019, the parties filed a Joint Amended Exhibit List and Oracle filed an Amended Exhibit List. OFCCP filed an Amended Hearing Exhibit List on November 27, 2019. Oracle filed a Second Amended Exhibit List on December 3, 2019, and OFCCP filed a Second Amended Hearing Exhibit List on December 4, 2019. The Joint Amended Exhibit List contains 165 exhibits (“JX 1-165”). OFCCP’s Second Amended Hearing Exhibit List offers 512 exhibits (“PX 1-512”). Oracle’s Second Amended Exhibit List contains 445 exhibits (“DX 1-445”). At the beginning of the hearing I also marked the parties’ stipulations as Administrative Law Judge Exhibit (“ALJX”) 1.

Under the pre-hearing schedule, motions in limine were filed on November 15, 2019. The motions in limine raised a number of evidentiary objections. Since the motions in limine were filed before the exchange of exhibit lists, the parties could not make specific objections to particular exhibits, a point left for later determination. The issue was discussed during the November 26, 2019, telephonic pre-hearing conference and memorialized in the November 29, 2019, Order

Following Pre-Hearing Conference. At the time of the pre-hearing conference, the parties were meeting and conferring about objections to hearing exhibits in an attempt to narrow their objections and reach some areas of agreement. I ordered the parties to file a status update by noon on December 2, 2019.

OFCCP and Oracle filed an Exhibit Status report on December 2, 2019. They agreed that

All exhibits are deemed authentic [sic] and deemed admissible and do not need a sponsoring witness save for [PX 60] and [PX 132] and those to which the parties specifically objected as reflected in the attached objections by Oracle and OFCCP's objections to exhibits [DX 88-91, DX 93, DX 95-97, DX 99-106, and DX 117-119]. The admissibility of the documents to which an objection has been made will be determined by the Court.

The parties planned to subject their objections by close of business on December 2, 2019, and their responses by noon on December 4, 2019. In regards to depositions:

Whether the Court wishes the submission of the entirety of a deposition and its accompanying errata or just those portions that have been designated will be left to the Court's decision. Whatever the Court's decision in this regard, the parties agree that the Court should only read those portions that are designated or counter-designated. And if there are objections, of course, the Court will need to review those portions of the deposition to which there is an objection.

Later on December 2, 2019, OFCCP filed Objections to Oracle's Exhibits ("PO") and Oracle filed Objections to OFCCP's Amended Hearing Exhibit List ("DO"). OFCCP objects as follows:

<b>Objection Number</b>	<b>Exhibit Number</b>	<b>Basis for Objection</b>
PO1	DX 88	Relevance; Lack of Foundation; Hearsay
PO2	DX 89	Relevance; Lack of Foundation; Hearsay
PO3	DX 90	Relevance; Lack of Foundation; Hearsay
PO4	DX 91	Relevance; Lack of Foundation; Hearsay
PO5	DX 93	Relevance; Lack of Foundation; Hearsay
PO6	DX 95	Relevance; Lack of Foundation; Hearsay
PO7	DX 96	Relevance; Lack of Foundation; Hearsay
PO8	DX 97	Relevance; Lack of Foundation; Hearsay
PO9	DX 99	Relevance; Lack of Foundation; Hearsay
PO10	DX 100	Relevance; Lack of Foundation; Hearsay
PO11	DX 101	Relevance; Lack of Foundation; Hearsay
PO12	DX 102	Relevance; Lack of Foundation; Hearsay
PO13	DX 103	Relevance; Lack of Foundation; Hearsay
PO14	DX 104	Relevance; Lack of Foundation; Hearsay
PO15	DX 105	Relevance; Lack of Foundation; Hearsay
PO16	DX 106	Relevance; Lack of Foundation; Hearsay
PO17	DX 118	Hearsay; Lack of Foundation
PO18	DX 119	Hearsay; Lack of Foundation

PO at 2-3.

Oracle objects to the following exhibits.

<b>Objection Number</b>	<b>Exhibit Number</b>	<b>Basis for Objection</b>
DO1	PX 3	Admission of Entire Deposition
DO2	PX 4	Hearsay; Untimely Disclosed Opinion
DO3	PX 5	Hearsay; Untimely Disclosed Opinion
DO4	PX 6	Hearsay; Untimely Disclosed Opinion
DO5	PX 7	Admission of Entire Deposition
DO6	PX 10	Admission of Entire Deposition
DO7	PX 11	Admission of Entire Deposition
DO8	PX 12	Admission of Entire Deposition
DO9	PX 13	Admission of Entire Deposition
DO10	PX 14	Admission of Entire Deposition
DO11	PX 15	Admission of Entire Deposition
DO12	PX 16	Admission of Entire Deposition
DO13	PX 17	Admission of Entire Deposition
DO14	PX 18	Admission of Entire Deposition
DO15	PX 19	Admission of Entire Deposition
DO16	PX 20	Admission of Entire Deposition
DO17	PX 21	Admission of Entire Deposition
DO18	PX 22	Admission of Entire Deposition
DO19	PX 23	Admission of Entire Deposition
DO20	PX 24	Admission of Entire Deposition
DO21	PX 25	Admission of Entire Deposition
DO22	PX 26	Admission of Entire Deposition
DO23	PX 27	Admission of Entire Deposition
DO24	PX 57	Hearsay
DO25	PX 60	Lack of Foundation; Inadvertently Produced Document
DO26	PX 88	Hearsay; Lack of Foundation
DO27	PX 93	Hearsay; Lack of Foundation
DO28	PX 99	Lack of Foundation; Incomplete Document
DO29	PX 106	Lack of Foundation; Incomplete Document
DO30	PX 171	Lack of Foundation; Best Evidence Rule
DO31	PX 192	Highly Redacted; Hearsay; Lack of Foundation
DO32	PX 255	Hearsay as to email attachment
DO33	PX 263	Relevance
DO34	PX 264	Relevance
DO35	PX 271	Admission of Entire Deposition
DO36	PX 329	Admission of Entire Deposition
DO37	PX 436	Untimely Disclosed Opinion
DO38	PX 450	Relevance
DO39	PX 451	Relevance
DO40	PX 499	Lack of Foundation; Produced After Discovery

		Cutoff
DO41	PX 500	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff
DO42	PX 501	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff
DO43	PX 502	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff
DO44	PX 503	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff
DO45	PX 504	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff
DO46	PX 505	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff

DO at 2-6.

On December 4, 2019, OFCCP filed Response to Oracle’s Objections to Trial Exhibits (“PR”) and Oracle filed a Response to OFCCP’s Objections to Oracle’s Exhibits (“DR”). OFCCP filed Deposition Designations, Counter Designations, Response to Oracle’s Deposition Designation Objections and Objections to Oracle’s Deposition Designations on December 4, 2019. Oracle filed Deposition Designations on December 5, 2019. The status of the depositions was discussed with the parties at the beginning of the hearing on December 5, 2019. Oracle clarified that it objects to all of the depositions coming into the record in full, not just those listed in OFCCP’s exhibits. As a result, there remain issues with the following additional exhibits: JX 102 and DX 439 – DX 443.

## **II. DISCUSSION**

This proceeding is governed by the “Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30.” 41 C.F.R. § 60-1.26(b)(2). Where the regulations in 41 C.F.R. §§ 60-30.1 *et seq.* do not provide a rule, the Federal Rules of Civil Procedure apply. 41 C.F.R. § 60-30.1. Where a rule is needed and neither 41 C.F.R. Part 60-30.1 nor the Federal Rules supply one, the Rules of Practice and Procedure for Administrative Hearings Before OALJ in 29 C.F.R. Part 18, subpart A apply. *See* Pre-Hearing Order at 2 n.2. ALJs are empowered to “Receive, rule on, exclude, or limit evidence and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious.” 41 C.F.R. § 60-30.15(h). The Office of Administrative Law Judges’ Rules of Evidence found in 29 C.F.R. part 18, subpart B apply to any evidentiary issues. 41 C.F.R. § 60-30.18. These rules generally follow the Federal Rules of Evidence. *See* 29 C.F.R. §§ 18.101 *et seq.*

Based on the filings and as confirmed at the hearing, there are no objections to or issues with the following exhibits, which were admitted into evidence at the hearing on December 5, 2019:

- ALJX 1
- JX 1 – JX 101
- JX 103 – JX 165
- PX 1 – PX 2

- PX 8 – PX 9
- PX 28 – PX 56
- PX 58 – PX 59
- PX 61 – PX 87
- PX 89 – PX 92
- PX 94 – PX 98
- PX 100 – PX 105
- PX 107 – PX 170
- PX 172 – PX 191
- PX 193 – PX 254
- PX 256 – PX 262
- PX 265 – PX 270
- PX 272 – PX 328
- PX 330 – PX 435
- PX 437 – PX 449
- PX 452 – PX 498
- PX 506 – PX 512
- DX 1 – DX 87
- DX 92
- DX 94
- DX 98
- DX 107 – DX 117
- DX 120 – DX 438
- DX 444 – DX 445

The remaining exhibits have pending objections or other issues in need of resolution. This order resolves those objections and issues so far as possible. However, given the nature of some of the objections, resolution must be deferred.

***A. Objections Resolved By Order Regarding Motions in Limine***

The December 2, 2019, Order Regarding Motions in Limine (“OIL”) dealt with a number of evidentiary issues and in doing so, resolved several of the pending objections. The order granted Oracle’s Motion in Limine #1 insofar as it sought to exclude the late produced expert reports of Dr. Madden. OIL at 7-13. Four of Oracle’s objections involve this material: DO2 to PX 4, DO3 to PX 5, DO4 to PX 6, and DO37 to PX 436. DO at 2, 5. OFCCP acknowledges that they resolved by the Order Regarding Motions in Limine. PR at 1, 8-9. For the reasons stated in that order, DO2, DO3, DO4, and DO37 are sustained and PX 4, PX 5, PX 6, and PX 436 are not admitted.

Four of Oracle’s objections involve points raised in its Motion in Limine #9: DO33 to PX 263, DO34 to PX 264, DO38 to PX 450, and DO39 to PX 451. DO at 5; *see also* PR at 8-9. That motion challenged the relevance of financial information about Oracle and the pay of its executives. In the Order Regarding Motions in Limine, I overruled the objection as to limited financial information about Oracle on the grounds that it was appropriate background, but I sustained the

objection as to executive compensation. OIL at 21-23. Accordingly, DO33 is sustained and DO34, DO38, and DO39 are overruled. PX 263 is not admitted. PX 264, PX 450, and PX 451 are admitted.

### ***B. Admission of Depositions***

Most of the objections concern the admission of depositions and errata sheets for depositions. Oracle generally objects to the admission of the entire deposition: DO1 to PX 3, DO5 to PX 7, DO6 to PX 10, DO7 to PX 11, DO8 to PX 12, DO9 to PX 13, DO10 to PX 14, DO11 to PX 15, DO12 to PX 15, DO12 to PX 16, DO13 to PX 17, DO14 to PX 18, DO15 to PX 19, DO16 to PX 20, DO17 to PX 21, DO18 to PX 22, DO19 to PX 23, DO20 to PX 24, DO21 to PX 25, DO22 to PX 26, DO23 to PX 27, DO35 to PX 271, and DO36 to PX 329. *See* DO at 2-5. As reflected in the December 2, 2019, status report and confirmed at the beginning of the hearing, both parties agree that at least those portions of the deposition that are properly designated should come into the record. They also agree that regardless of what is admitted, I should only consider those portions of the depositions that are properly designated. The question is whether the entire deposition is admitted or if only those particular portions become part of the record. *See also* PR at 1-3, 8.

At the beginning of the hearing, the dispute appeared to be more mechanical than substantive—Oracle believe that preparing revised exhibits and videos would not be difficult while OFCCP worried about the disruption to what had already been prepared. In addition, the parties confirmed that the same issues were involved with the other exhibits containing depositions: JX 102 and DX 439 – DX 443. I took the issue under submission and later on December 5, 2019, provided a ruling, as confirmed below.

Since the parties agree that only the designated portions should be considered in reaching a decision, it is appropriate to only admit those portions properly designated by the parties. That avoids additional clutter of the record, as well as the potential for errors or confusion in what should be considered in reaching a decision. DO1, DO5, DO6, DO7, DO8, DO9, DO10, DO11, DO12, DO12, DO13, DO14, DO15, DO16, DO17, DO18, DO19, DO20, DO21, DO22, DO23, DO35, and DO36 are sustained. PX 3, PX 7, PX 10, PX 11, PX 12, PX 13, PX 14, PX 15, PX 15, PX 16, PX 17, PX 18, PX 19, PX 20, PX 21, PX 22, PX 23, PX 24, PX 25, PX 26, PX 27, PX 271, and PX 329 will be admitted as designated by the parties. In addition, JX 102, DX 429, DX 440, DX 441, DX 442, and DX 443 will be admitted as designated by the parties. Since Oracle is the party seeking a revision of the depositions to reflect the designations, Oracle shall be responsible for preparing the replacement transcripts and video depositions reflecting the designations, including any errata. After Oracle and OFCCP meet and confer and agree that the revisions are appropriate, these exhibits will be admitted into the record.

### ***C. OFCCP's Objections***

OFCCP makes 18 objections, but the objections fall into two categories. PO1 through PO16 target exhibits “describing Oracle’s good faith efforts to advance diversity in the workplace” in various ways: DX 88 – DX 91, DX 93, DX 95 – DX 97, and DX 99 – DX 106. OFCCP objects that “these documents are not relevant because this case is not about disabilities, veterans and Oracle’s global outreach efforts.” PO at 2 (footnote omitted). OFCCP contends that the

documents do not bear on the allegations OFCCP has made or the issues identified for hearing. *Id.* OFCCP also objects that there is a lack of foundation for the documents and that “the information in these documents is hearsay from the person composing the document about what allegedly happened.” *Id.*

Oracle “does not oppose OFCCP’s objection to [DX 95].” DR at 1. PO6 is therefore sustained and DX 95 is not admitted. Oracle contends that OFCCP’s other objections are meritless. It argues that the exhibits are relevant “because they outline and discuss some of Oracle’s Diversity & Inclusion programs and strategies, including with respect to Asians, women, and African-Americans.” Since Oracle’s intent as to these groups is at issue, Oracle asserts that these internal efforts are “entirely relevant.” *Id.* at 1-2. As to the hearsay objection, Oracle maintains that the exhibits are not being offered to prove the contents of the exhibits but to show Oracle’s state of mind and intentions. *Id.* at 2. Oracle finds the objection to lack of foundation “puzzling” since OFCCP has otherwise advocated admission of exhibits without a sponsoring witness. It represents that a witness will be called at hearing to lay the appropriate foundation. *Id.*

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” 29 C.F.R. § 18.401; *see also* Fed. R. Evid. 401. Relevant evidence is generally admissible, subject to the other rules of evidence; irrelevant evidence is inadmissible. 29 C.F.R. § 18.402; *see also* Fed. R. Evid. 402. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of issues, or misleading the judge as trier of fact, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” 29 C.F.R. § 18.403; *see also* Fed. R. Evid. 403; 41 C.F.R. § 60-30.15(h). The exhibits in question are relevant. Oracle’s state of mind is at issue in this case. I must decide if Oracle intentionally discriminated in the ways OFCCP alleged. Other evidence about Oracle’s intentions surrounding diversity and equal opportunity generally has some bearing on that issue. OFCCP’s objections properly go to weight, but they are not a reason to exclude the evidence entirely. PO1 – PO5 and PO7 – PO16 are overruled as to relevance.

“Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted.” 29 C.F.R. § 18.801(c); *see also* Fed. R. Evid. 801(c). Hearsay is generally not admissible. 29 C.F.R. § 18.802; *see also* Fed. R. Evid. 802. Two sorts of statements, however, are excluded from the definition of hearsay: prior statements by a testifying witness in certain circumstances and admissions by a party opponent, including one by an agent of the party that is within that agent’s scope of agency. 29 C.F.R. § 18.801(d); *see also* Fed. R. Evid. 801(d). In addition, if a statement is offered into evidence for another purpose beyond establishing the truth of the matter asserted, it is not hearsay and may be taken as evidence for that other purpose, if it is otherwise proper. Finally, even where a statement is hearsay, there are 30 exceptions to the rule along with an additional 5 exceptions when the witness is unavailable. 29 C.F.R. §§ 18.803-18.804; *see also* Fed. R. Evid. 803-804. PO1 – PO5 and PO7 – PO16 are overruled as to hearsay. I accept Oracle’s representations that the exhibits are not offered to prove the truth of the content of the newsletters, but as evidence of Oracle’s state of mind. They will be considered for that purpose only.

This leaves OFCCP’s objections to lack of foundation. Oracle states that it will call a witness who will lay the foundation for these documents. PO1 – PO5 and PO7 – PO16 are

deferred as to the lack of foundation objection and DX 88 – DX 91, DX 93, DX 96 – DX 97, and DX 99 – DX 106 are taken under submission. After the foundation is provided, Oracle should move to have the exhibits admitted into the record. Again, DX 95 is not admitted.

Second, PO17 and PO18 target DX 118 and DX 119, which describe “OFCCP’s interview with [a] current or former Oracle employee.” OFCCP objects that they “are hearsay because they represent the information that one person identified as coming from this person’s interview of an Oracle employee.” PO at 2. OFCCP also objects that these exhibits lack foundation “because the circumstances in which the communications in which these notes took place were not provided and are known only to the people who were present when these interviews occurred.” *Id.* at 3. In response, Oracle withdraws the exhibits, explaining that they were put into the record because Oracle believed that the individuals involved might be testifying. Since they are not, Oracle agrees that it will not use the exhibits. Therefore, DX 118 and DX 119 are deemed withdrawn and objections PO17 and PO18 are overruled as moot.

#### ***D. Oracle’s Remaining Objections***

DO24 involves PX 57, which is described by OFCCP as “Lisa Gordon’s Revisions to OFCCP’s Draft Interview Statement.” Oracle objects that the exhibit is hearsay. DO at 4. OFCCP responds that it is a “party admission” since Ms. Gordon was Oracle’s Director of Compensation at the time. There are potentially two levels of hearsay here. The document is an out of court statement by the OFCCP interviewer recording out of court statements by Ms. Gordon. With this particular document, however, Ms. Gordon has reviewed and edited the statements,<sup>1</sup> which works to make the document her statement (rather than that of the interviewer), eliminating the first level of potential hearsay. It remains an out of court statement by Ms. Gordon. “A statement by a person authorized by the party to make a statement concerning the subject” and “[a] statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship” are admissions of a party-opponent and are not hearsay when offered against the party opponent. 29 C.F.R. § 18.801(d)(2)(iii)-(iv); *see also* Fed. R. Evid. 801(d)(2)(C)-(D). Based on the face of the document, Ms. Gordon was employed by Oracle at the time and was making statements in the scope of her employment. The document is thus not hearsay. DO24 is overruled and PX 57 is admitted. The objected to portion of PX 255 in DO32 involves the same document and the same reasoning applies. *See* DO at 5; PR at 7-8. Thus, DO32 is overruled and PX 255 is admitted.

In DO25, OFCCP alleges that PX 60 lacks foundation and was inadvertently produced. DO at 4. OFCCP responds that Oracle has introduced a similar document, so it will withdraw the exhibit. PX 60 is withdrawn and DO25 is overruled as moot.

DO26 and DO27, concerning PX 88 and PX 93, can be considered together. Both are OFCCP’s interview notes for two Oracle managers, both of whom will testify. Oracle objects that they lack foundation and are hearsay. DO at 3-4. OFCCP responds by pointing to the Order Regarding Motions in Limine, arguing that since both of these individuals will be witnesses, the documents are admissible to show prior inconsistent statements. OFCCP also complains that Oracle offered interview notes for witnesses that it thought would testify. PR at 4-5.

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<sup>1</sup> Oracle only objected on hearsay grounds, so I take the document to be what it purports to be.

As to lack of foundation, these exhibits could be taken under submission until such time as OFCCP is able to lay the appropriate foundation. The hearsay objection is slightly more complicated. The notes involve two potential levels of potential hearsay—the document records statements of the OFCCP interviewer and the OFCCP interviewer is recording statements of the interviewee. As to this second potential level, OFCCP is correct that prior inconsistent statements of a witness testifying at hearing are not hearsay. 29 C.F.R. § 18.801(d)(1)(i); *see also* Fed R. Evid. 801(d)(1)(A).

The first level of potential hearsay creates difficulties, since these notes were not reviewed, edited, and adopted by the interviewee. The documents remain out of court statements of the author of the document. OFCCP points to the Order Regarding Motions in Limine, where these *sorts* of notes were discussed generally. As to the relevant issue, OFCCP argued then that documents would fall under the hearsay exception for records of regularly conducted business. This applies to:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term *business* as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

29 C.F.R. § 18.803(a)(6); *see also* Fed. R. Evid. 803(a)(6). The Order Regarding Motions in Limine did not find that this exception applied. Rather, “It is unclear at this stage and given the briefing presented that these particular notes would qualify, but there is enough uncertainty in the briefing now to caution against exclusion at this point.” OIL at 21.

That order deferred a determination that now must be made. OFCCP has not provided enough to warrant application of the exemption. It is not clear if these sorts of notes are “kept in the course of a regularly conducted business activity” or if OFCCP had a “regular practice” of making such notes during that business activity. This has not been “shown by the testimony of the custodian or other qualified witness.” Based on the prior briefing, Oracle seeks to produce evidence that the notes have indications of a “lack of trustworthiness.” OFCCP may have been misled by a footnote in the Order Regarding Motions in Limine, which referenced the potential admissibility of the notes as prior inconsistent statements. *See* OIL at 21 n.8. Given the placement of the note, OFCCP may have thought that this alone would result in denial of the hearsay objection. However, that point actually only applies to the potential hearsay as between the interviewee and interviewer. It does not apply to the hearsay intrinsic to the document. At this point in the hearing, OFCCP has not been able to provide the foundation for the exhibits or the basis for the business records exemption. Hence, DO26 and DO27 are deferred and PX 88 and PX 93 remain under submission.

Next, DO28 and DO29 challenge two exhibits that contain screenshots or snippets from videos, PX 99 and PX 106. Oracle contends that they lack foundation and are incomplete

documents. DO 4. OFCCP contends that the full video for PX 99 is contained in PX 322, which has already been admitted, and that the excerpts in PX 106 bear indicia of its identity as a training video. It contends that these screenshots are admissible as summaries under Rule 1006. PR at 5-6. That rule provides that “[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined at the hearing may be presented in the form of a chart, summary, or calculation,” so long as the originals or duplicates are made available to other parties. 29 C.F.R. § 18.1006; *see also* Fed. R. Evid. 1006. If a proper foundation has been established for the exhibits, they are admissible as summaries. Since PX 99 is excerpted from PX 322 and PX 322 has been deemed authentic and admitted, DO28 is overruled.

The video related to PX 106 is not in evidence. To authenticate or identify evidence, the proponent of admission must provide “evidence sufficient to support a finding that the matter in question is what its proponent claims.” 29 C.F.R. § 18.901(a); *see also* Fed. R. Evid. 901(a). One way this can be done is through “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” 29 C.F.R. § 18.901(b)(4); *see also* Fed. R. Evid. 901(b)(4). As OFCCP points out, the document here contains Oracle’s logo, it was copyrighted by Oracle, it contains internal Oracle confidentiality markings, and it is Bates stamped as produced by Oracle in discovery in this case. DO29 is overruled and PX 106 is admitted.

DO30 raises somewhat similar issues regarding PX 171. It is spreadsheet related to the 2014 Snapshot that has been manipulated/re-organized in some manner. Oracle objects that the exhibit lacks foundation and on the basis of the best evidence rule, arguing that the exhibit is not the Snapshot that was produced. DO at 4. OFCCP responds that a foundation will be provided through testimony and that the original spreadsheet, in full, is provided in PX 260, which is already admitted into evidence, and PX 171 is admissible as a summary. PR at 6-7. The “best evidence rule” requires the admission of an “original” writing, recording, or photograph to prove the contents thereof, though “duplicates” are admissible to the same extent unless there is a genuine question regarding the authenticity of the original. 29 C.F.R. §§ 18.1001-18.1003; *see also* Fed. R. Evid. 1001-1003. PX 171 is neither an original nor a duplicate—it is a manipulation/re-organization. OFCCP is correct, however, that it may be admissible as a summary, 29 C.F.R. § 18.1006, if proper foundation is provided. OFCCP has yet to lay that foundation, but indicates that it will do so at hearing. Accordingly DO30 is deferred and PX 171 is taken under submission.

In DO31, Oracle complains that PX 192 is highly redacted, is hearsay, and lacks foundation. DO at 5. OFCCP states that Oracle possesses the complete and unredacted version and that the email is a forwarded email from an Oracle recruiter to an applicant and thus is a party admission excluded from the definition of hearsay. PR at 7. The document in question is a nested series of emails—replies and forwards—with significant redactions based on the government informant privilege. OFCCP’s attorneys’ names and contract information are included, but the individual who allegedly forwarded the underlying email to the Solicitor’s office as well as the individual who allegedly sent it remain unidentified with no contact information given. The text of the document mentions Oracle, but with the redactions, there is no indication that this document actually contains an underlying email exchange with anyone from Oracle, let alone someone at Oracle acting in the scope of his or her employment.

OFCCP is offering this document for the truth of the contents. It contends that it is excluded from the definition of hearsay as a party admission. But in so doing, OFCCP is attempting

to foist a party admission onto Oracle while maintaining secrecy about who made the communication to OFCCP and who, if anyone, at Oracle made the underlying communication to the individual who contacted OFCCP. The rules do not allow for this sort of secret proof or covert attachment of an admission in which a party opponent has no opportunity to probe the veracity of the evidence and an adjudicator has no ability to determine that the document involves any party admission at all. DO31 is therefore sustained and PX 192 is not admitted.

The last series of objection, DO40 – DO46, involves issues concerning PX 499 – PX 505. Oracle objects that each of these documents lacks foundation and was produced after the discovery cutoff. For PX 500 – PX 505, Oracle also objects to the submission of an incomplete document. DO at 5-6. OFCCP responds that Oracle is in possession of the complete document in each exhibit and did not produce it during discovery. It reports that OFCCP came into possession of the document only after November 1, 2019, when they were provided by a witness. As to foundation, OFCCP represents that it will establish the needed foundation through testimony. PR at 9-10.

Rule 37(c)(1) provides that “[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). Rule 26(a) requires a variety of initial disclosures and Rule 26(e) requires supplementation of disclosures and discovery responses. Fed. R. Civ. P. 26(a), 26(e). Under Rule 37(c)(1), absent a “substantial justification” an adjudicator “may validly exclude, as a discovery sanction, evidence not produced in discovery.” *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1028 (9th Cir. 2003); *see also Harriman v. Hancock Cnty.*, 627 F.3d 22, 29-30 (1st Cir. 2010).

Exclusion is a self-executing, automatic sanction, unless the party opposing the sanction shows that the failure to disclose was substantially justified or harmless. *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir. 2008); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-07 (9th Cir. 2001). In deciding whether the failure to disclose was substantially justified or harmless, courts look to “(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date.” *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003); *see also Lanard Toys Ltd. v. Novelty, Inc.*, 375 Fed. Appx. 705, 713 (9th Cir. 2010) (applying factors from *David*).

The assertion that Oracle did not produce these documents in discovery is peculiar. They appear to be pictures taken by an employee of a computer screen, sometimes of what appears to be part of that employee’s online personnel file. The exhibits do involve facts previously available, in some manner, to Oracle, and if OFCCP only received the documents after November 1, 2019, for reasons outside its control, then it would appear that the failure to produce them to Oracle earlier is substantially justified. The harm to Oracle is unclear, given that it can cure any prejudice by examining the witness at hearing. Ruling on these objections must be deferred. The exhibits all contain pictures/screenshots related to a witness that OFCCP has indicated that it will call. OFCCP represents that this witness will provide the needed foundation and resolve the issues raised in Oracle’s objections. DO 40 – DO 46 are therefore deferred and PX 499 – PX 505 are taken under submission.

***E. Summary***

OFCCP's objections are resolved as follows:

<b>Objection Number</b>	<b>Exhibit Number</b>	<b>Basis for Objection</b>	<b>Ruling</b>	<b>Result</b>
PO1	DX 88	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 88 is Under Submission
PO2	DX 89	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 89 is Under Submission
PO3	DX 90	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 90 is Under Submission
PO4	DX 91	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 91 is Under Submission
PO5	DX 93	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 93 is Under Submission
PO6	DX 95	Relevance; Lack of Foundation; Hearsay	Sustained	DX 95 is Not Admitted
PO7	DX 96	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 96 is Under Submission
PO8	DX 97	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 97 is Under Submission
PO9	DX 99	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 99 is Under Submission
PO10	DX 100	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 100 is Under Submission
PO11	DX 101	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 101 is Under Submission
PO12	DX 102	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 102 is Under Submission
PO13	DX 103	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 103 is Under Submission
PO14	DX 104	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 104 is Under Submission

PO15	DX 105	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 105 is Under Submission
PO16	DX 106	Relevance; Lack of Foundation; Hearsay	Overruled as to Relevance and Hearsay; Deferred as to Foundation	DX 106 is Under Submission
PO17	DX 118	Hearsay; Lack of Foundation	Overruled as Moot	DX 118 is Withdrawn
PO18	DX 119	Hearsay; Lack of Foundation	Overruled as Moot	DX 119 is Withdrawn

Oracle's objections are resolved as follows:

<b>Objection Number</b>	<b>Exhibit Number</b>	<b>Basis for Objection</b>	<b>Ruling</b>	<b>Result</b>
DO1	PX 3	Admission of Entire Deposition	Sustained	PX 3 will be Admitted as Designated
DO2	PX 4	Hearsay; Untimely Disclosed Opinion	Sustained	PX 4 is Not Admitted
DO3	PX 5	Hearsay; Untimely Disclosed Opinion	Sustained	PX 5 is Not Admitted
DO4	PX 6	Hearsay; Untimely Disclosed Opinion	Sustained	PX 6 is Not Admitted
DO5	PX 7	Admission of Entire Deposition	Sustained	PX 7 will be Admitted as Designated
DO6	PX 10	Admission of Entire Deposition	Sustained	PX 10 will be Admitted as Designated
DO7	PX 11	Admission of Entire Deposition	Sustained	PX 11 will be Admitted as Designated
DO8	PX 12	Admission of Entire Deposition	Sustained	PX 12 will be Admitted as Designated
DO9	PX 13	Admission of Entire Deposition	Sustained	PX 13 will be Admitted as Designated
DO10	PX 14	Admission of Entire Deposition	Sustained	PX 14 will be Admitted as Designated
DO11	PX 15	Admission of Entire Deposition	Sustained	PX 15 will be Admitted as Designated
DO12	PX 16	Admission of Entire Deposition	Sustained	PX 16 will be Admitted as Designated
DO13	PX 17	Admission of Entire Deposition	Sustained	PX 17 will be Admitted as Designated
DO14	PX 18	Admission of Entire Deposition	Sustained	PX 18 will be Admitted as Designated
DO15	PX 19	Admission of Entire Deposition	Sustained	PX 19 will be Admitted as Designated
DO16	PX 20	Admission of Entire Deposition	Sustained	PX 20 will be Admitted as Designated

DO17	PX 21	Admission of Entire Deposition	Sustained	PX 21 will be Admitted as Designated
DO18	PX 22	Admission of Entire Deposition	Sustained	PX 22 will be Admitted as Designated
DO19	PX 23	Admission of Entire Deposition	Sustained	PX 23 will be Admitted as Designated
DO20	PX 24	Admission of Entire Deposition	Sustained	PX 24 will be Admitted as Designated
DO21	PX 25	Admission of Entire Deposition	Sustained	PX 25 will be Admitted as Designated
DO22	PX 26	Admission of Entire Deposition	Sustained	PX 26 will be Admitted as Designated
DO23	PX 27	Admission of Entire Deposition	Sustained	PX 27 will be Admitted as Designated
DO24	PX 57	Hearsay	Overruled	PX 57 is Admitted
DO25	PX 60	Lack of Foundation; Inadvertently Produced Document	Overruled as moot	PX 60 is Withdrawn
DO26	PX 88	Hearsay; Lack of Foundation	Deferred	PX 88 is Under Submission
DO27	PX 93	Hearsay; Lack of Foundation	Deferred	PX 93 is Under Submission
DO28	PX 99	Lack of Foundation; Incomplete Document	Overruled	PX 99 is Admitted
DO29	PX 106	Lack of Foundation; Incomplete Document	Overruled	PX 106 is Admitted
DO30	PX 171	Lack of Foundation; Best Evidence Rule	Deferred	PX 171 is Under Submission
DO31	PX 192	Highly Redacted; Hearsay; Lack of Foundation	Sustained	PX 192 is Not Admitted
DO32	PX 255	Hearsay as to email attachment	Overruled	PX 255 is Admitted
DO33	PX 263	Relevance	Sustained	PX 263 is Not Admitted
DO34	PX 264	Relevance	Overruled	PX 264 is Admitted
DO35	PX 271	Admission of Entire Deposition	Sustained	PX 271 will be Admitted as Designated
DO36	PX 329	Admission of Entire Deposition	Sustained	PX 329 will be Admitted as Designated
DO37	PX 436	Untimely Disclosed Opinion	Sustained	PX 436 is Not Admitted
DO38	PX 450	Relevance	Overruled	PX 450 is Admitted
DO39	PX 451	Relevance	Overruled	PX 451 is Admitted
DO40	PX 499	Lack of Foundation; Produced After Discovery Cutoff	Deferred	PX 499 is Under Submission
DO41	PX 500	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff	Deferred	PX 500 is Under Submission
DO42	PX 501	Lack of Foundation; Incomplete Document; Produced After	Deferred	PX 501 is Under Submission

		Discovery Cutoff		
DO43	PX 502	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff	Deferred	PX 502 is Under Submission
DO44	PX 503	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff	Deferred	PX 503 is Under Submission
DO45	PX 504	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff	Deferred	PX 504 is Under Submission
DO46	PX 505	Lack of Foundation; Incomplete Document; Produced After Discovery Cutoff	Deferred	PX 505 is Under Submission

The objections to the additional depositions are resolved as follows:

Objection Number	Exhibit Number	Basis for Objection	Ruling	Result
NA	JX 102	Admission of Entire Deposition	Sustained	JX 102 will be Admitted as Designated
NA	DX 439	Admission of Entire Deposition	Sustained	DX 439 will be Admitted as Designated
NA	DX 440	Admission of Entire Deposition	Sustained	DX 440 will be Admitted as Designated
NA	DX 441	Admission of Entire Deposition	Sustained	DX 441 will be Admitted as Designated
NA	DX 442	Admission of Entire Deposition	Sustained	DX 442 will be Admitted as Designated
NA	DX 443	Admission of Entire Deposition	Sustained	DX 443 will be Admitted as Designated

Oracle shall be responsible for the preparation of the designated portions of each deposition. For those exhibits under submission, the proponent of admission should move to admit the exhibit into the record once the underlying evidence is presented at hearing. The opposing party may renew the objection at that time.

### **ORDER**

1. The following exhibits are admitted into the record: PX 57, PX 99, PX 106, PX 255, PX 264, PX 450, and PX 451.
2. The following exhibits containing depositions and errata will be admitted to the record as designated by the parties: JX 102, PX 3, PX 7, PX 10, PX 11, PX 12, PX 13, PX 14, PX 15, PX 16, PX 17, PX 18, PX19, PX 20, PX 21, PX 22, PX 23, PX 24, PX 25, PX 26, PX 27, PX 271, PX 329, DX 439, DX 440, DX 441, DX 442, and DX 443. Oracle is responsible for preparing the transcripts and video clips containing the designated

portions and any errata. After Oracle prepares the excerpts and the parties are able to meet and confer, the exhibits will be received into evidence.

3. The following exhibits have been withdrawn: PX 60, DX 118, and DX 119
4. The following exhibits are not admitted: PX 4, PX 5, PX 6, PX 192, PX 263, PX 436, and DX 95.
5. The following exhibits are taken under submission: PX 88, PX 93, PX 171, PX 499, PX 500, PX 501, PX 502, PX 503, PX 504, PX 505, DX 88, DX 89, DX 90, DX 91, DX 93, DX 96, DX 97, DX 99, DX 100, DX 101, DX 102, DX 103, DX 104, DX 105, and DX 106. After the proponent provides the underlying evidence necessary to admit the exhibit, it should move to have the evidence admitted to the record.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge