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**Issue Date: 13 January 2020**

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 ADMITTING DEPOSITIONS AS DESIGNATED**

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended and associated regulations at 41 C.F.R. Chapter 60. Hearing was held between December 5, 2019, and December 17, 2019. In the course of the hearing, numerous exhibits were admitted, some were excluded, and some were withdrawn.

By the close of the hearing on December 17, 2019, the following exhibits had been admitted: ALJX 1, JX 1 – JX 101, JX 103 – JX 165, PX 1 – PX 2, PX 8 – PX 9, PX 28 – PX 59, PX 61 – PX 87, PX 89 – PX 92, PX 94 – PX 191, PX 193 – PX 262, PX 264 – PX 270, PX 272 – PX 328, PX 330 – PX 435, PX 437 – PX 499, PX 501 – PX 512, DX 1 – DX 89, DX 92, DX 94, DX 98, DX 107 – DX 117, DX 120 – DX 341, DX 343 – DX 438, DX 444 – DX 445, DX 447, and DX 449. On January 7, 2020, I admitted exhibit JX 166, a stipulation filed by the parties. The following exhibits were withdrawn: PX 60, PX 88, PX 93, PX 500, DX 90 – DX 91, DX 93, DX 96 – DX 97, DX 99 – DX 106, DX 118, DX 119, DX 342, and DX 448. And the following exhibits were not admitted: PX 4 – PX 6, PX 192, PX 263, PX 436, PX 513, PX 514, DX 95, DX 446, and DX 450.

At the close of the hearing, a number of exhibits remained pending: JX 102, PX 3, PX 7, PX 10 – PX 27, PX 271, PX 329, DX 439 – DX 443. These exhibits all contained deposition transcripts and videos or errata for the depositions. The parties agreed that the depositions should be considered only as designated. The parties, however, could not come to an agreement on the mechanics required to realize this result. The copies of the depositions, and errata, provided in the exhibits contain the full deposition transcripts and videos. Oracle favored formally admitting the depositions *only* as designated. OFCCP did not disagree in substance, but objected to the burden of having to prepare new copies of the depositions and new videos. The issue was discussed at the hearing and in a December 9, 2019, Order Regarding Objections to Hearing Exhibits. Since the parties were in agreement that only the designated portions should be considered as evidence in the case, I found it proper to admit only the designated portions. Since OFCCP's qualms concerned the

burdens of achieving this end, I directed Oracle to prepare the truncated transcripts and videos. The December 9, 2019, order provided that the above exhibits “containing depositions and errata will be admitted to the record as designated by the parties” and that “[a]fter Oracle prepares the excerpts and the parties are able to meet and confer, the exhibits will be received into evidence.” Later in the hearing, I directed Oracle to make the submissions by 3 p.m. December 20, 2019.

On December 20, 2019, Oracle filed the deposition designations as required. It represented that it had provided the excerpted depositions to OFCCP on December 17, 2019, but that OFCCP had not responded with changes and objections until December 20, 2019. It attached emails indicating as much, as well as OFCCP’s objections sent to Oracle later on December 20, 2019, roughly an hour before the filing was due. After Oracle filed the designations, but also on December 20, 2019, OFCCP filed Objections to Oracle’s Depositions Designations Submitted to the Court.

OFCCP raises a host of objections: that Oracle has made additional objections with the submissions, that Oracle included two depositions from Jane Suhr when only one was included on the exhibit list, that there are multiple errors in the excerpted transcripts and videos, that Oracle’s preamble about the inclusion of objections is misleading, that Oracle did not properly certify that the documents provided were true and correct copies, and that Oracle cannot argue that OFCCP’s objections are late because it was late in providing the excerpts for OFCCP’s review. OFCCP asks that I order Oracle to further meet and confer and to conform the excerpts to the designations.

On December 26, 2019, Oracle filed a Response to OFCCP’s Objections to Oracle’s Deposition Designations. Oracle opposes most of OFCCP’s objections and argues that OFCCP has overstated and misrepresented the errors. But Oracle acknowledges some errors in compiling the excerpts of the depositions and attaches corrected versions of the depositions in question. As to the alleged new objections, Oracle represents that its prefatory statement as to privilege and confidential information referred to objections previously made and that it did not need to make foundational objections previously. Oracle asserts that there is no basis for requiring certifications, but that it will provide them if asked. In regards to the two depositions from Jane Suhr, Oracle states that there are two relevant depositions and that both were reflected in its original designations.

Some of OFCCP’s objections are frivolous. OFCCP complains that Oracle took 12 days to produce the excerpts and gave it only three days to respond, and then did not correct the errors that OFCCP identified. But creating the excerpts and video clips is a much more time consuming process than simply verifying that they contained the designated portions. OFCCP complained earlier about the potential burden of revising the exhibits, so I am not sympathetic to a complaint now that Oracle wasn’t able to do this at the pace OFCCP would have preferred. Oracle gave OFCCP three days to review the preparations. Given the vast number of attorneys who have appeared on behalf of OFCCP, it should have not been difficult to review Oracle’s creations in a much shorter timeframe. Instead, OFCCP did not produce its objections and complaints to Oracle until an hour before Oracle’s filing deadline. At the very least, OFCCP should have intervened and asked to have Oracle’s deadline extended so that it would have time to address the identified issues. Instead it put Oracle in the situation of being subject to a 3pm deadline with the adjudicator and receiving corrections and objections just after 2pm, meaning that Oracle had to either miss its deadline or not incorporate the corrections. In any event, the point is somewhat mooted by Oracle’s submission of corrected excerpts on December 26, 2019.

OFCCP's complaint about misleading statements as to objections is likewise frivolous. Its issue seems to be that Oracle has not been strictly consistent in how it described the objections contained within the excerpts. The end result is that where an objection was designated, it is in the excerpt. Where it was not designated, it is not in the excerpt. This is proper, and so far as I can tell, OFCCP has no complaint about this result. Rather, it points to language in some of the many communications and filings in this case that described the included portions differently. There is nothing to adjudicate here. Oracle appears to have misspoken, but the end result as to the objections within the depositions is as the parties agreed. Likewise, I do not entirely follow OFCCP's insertion of new procedural requirements on verifications. The full depositions were already filed; Oracle's task was only to excerpt those filings to match the designations. I did not require Oracle to file the suggested verifications, OFCCP did not ask for them before it objected, and OFCCP does not point to some other basis for this requirement.

However, some OFCCP's complaints have merit. Oracle did not simply complete the task it was given. The deposition excerpts containing the designations were meant to replace the depositions and errata that were included as exhibits. Instead of limiting itself to this mechanical task, Oracle has, in some instances, added material by including, within the deposition excerpts, objections that were not made in the deposition itself and errata that are not part of the record in this case.

Oracle represents that the new objections are only to one of Ms. Waggoner's depositions and are foundational—and hence were not waived when they were not raised at the deposition. But this was waived when it was not made when the parties filed their objections to the exhibits prior to the hearing. The time for making objections has passed. The hearing is completed. New objections are summarily overruled. Lack of foundation and personal knowledge will go to weight. I also do not follow Oracle's addition of privilege objections and claims that OFCCP has designated testimony over which privilege was claimed. If privilege was claimed in the deposition, but the witness answered the question anyway and testified to privileged material, the privilege was waived when the testimony was given in front of OFCCP's attorneys. If Oracle is only objecting that OFCCP has designated questions calling for privileged information and objections that directed the witness not to answer, the objection fails. Neither the questions nor the assertions of a privilege are themselves privileged.

Oracle also does not dispute that it added errata from the *Jewett* case that were not present in the record in this case.<sup>1</sup> This was improper. Ideally, errata would have been included, but if Oracle possessed those errata, it should have provided them to OFCCP so that the errata could be added as an exhibit, or offered them as an exhibit of its own accord. Instead Oracle has apparently supplemented the record submitted in the exhibits at the hearing, including new information. This was not part of the task assigned to Oracle. To be clear, I find no bad faith in Oracle's approach—it appears that Oracle simply thought it would be best to be complete and add the information, and based on the instance I reviewed, the addition is inconsequential. But the task was to take the exhibits provided and cull them down to what the parties agreed should be admitted. New information should not have been added in this process.

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<sup>1</sup> This happened at least once in the Waggoner deposition from the *Jewett* matter dated July 26, 2018, and marked as PX 22. The record here contains no errata for this deposition, but Oracle's deposition designation adds errata.

In addition, Oracle has added an exhibit in its completion of the ministerial task of providing excerpted copies of the previously identified exhibits. As OFCCP points out, Oracle has submitted excerpted depositions for two depositions from Jane Suhr—a 30(b)(6) deposition from June 26, 2019, and a deposition in her personal capacity of the same date. Yet the exhibit lists only include one deposition from Ms. Suhr—the 30(b)(6) deposition of June 26, 2019, which is marked as DX 443. Oracle responds that its December 5, 2019, deposition designations contain designations for both depositions. This is correct, but misses the point. The deposition designations could no more add a new exhibit than the later filing of deposition excerpts could add a new exhibit. The parties were given years to prepare their cases and decide what evidence to introduce. Oracle submitted multiple exhibit lists. It uniformly listed one deposition of Jane Suhr, not two. The exhibits it submitted at hearing only contain one Suhr deposition, the 30(b)(6) deposition. Oracle hasn't sought leave to amend its exhibit list to add a new exhibit. Rather, the aim appears to be to slide the additional deposition into evidence as a new exhibit as part of the process of producing excerpts of the depositions included in the exhibits.<sup>2</sup>

At the hearing and in the December 9, 2019, order, I indicated that the depositions and errata would be admitted as designated. OFCCP and Oracle agreed to this. The only thing that remained was to prepare copies and video clips corresponding to the designations. The parties have not been able to complete this task cooperatively. Instead, Oracle appears to have used the occasion to supplement the submissions and OFCCP has raised a number of frivolous objections and made its objections in a manner that inhibited resolution. Oracle made corrections based on OFCCP's feedback, but OFCCP has not indicated whether or not its concerns have been allayed. The expectation appears to be that the adjudicator will figure out what exactly all of OFCCP's objections/corrections were, and then independently review the excerpts and videos to determine whether or not the point has/had merit and whether it was rectified. That is not an efficient use of adjudicatory resources and somewhat defeats the purpose of preparing the excerpts to begin with.

The hearing is over and I am weary of the bickering and petty gamesmanship. At this point, I do not have confidence that these parties could complete the task of producing excerpts that they agree represent the designations without seeking momentary partisan advantage or imposing some burden or expense on the other. I will therefore impose a solution.

The pending exhibits are as follows:

<b>Exhibit</b>	<b>Contents<sup>3</sup></b>
JX 102	Waggoner Deposition of May 1, 2019
PX 3	Madden Deposition of October 10, 2019
PX 7	Saad Deposition of October 11, 2019
PX 10	Baxter PMK Deposition of July 3, 2019

<sup>2</sup> Oracle has not provided cross-references between the excerpts it filed and the actual exhibits in the record that they are meant to replace. This makes it difficult to even figure out *what* is being admitted where and creates an entirely unnecessary complication.

<sup>3</sup> "*Jewett*" is a case pending in California State Court that raises some similar allegations. "PMK" stands for "person most knowledgeable"—i.e., a deposition taken on behalf of an organization. In this matter these depositions were taken under Rule 30(b)(6) of the Federal Rules of Civil Procedure and in prior orders have been described as "Rule 30(b)(6) depositions" and the like. I use "PMK" here because some of these depositions come from *Jewett* and thus would not have been taken pursuant to Rule 30(b)(6).

PX 11	Carrelli Deposition of May 24, 2019
PX 12	Cheruvu Deposition of June 11, 2019
PX 13	Errata for Cheruvu Deposition of June 11, 2019
PX 14	Dodson <i>Jewett</i> PMK Deposition of July 26, 2018
PX 15	Edwards <i>Jewett</i> PMK Deposition of October 16, 2018
PX 16	Holman-Harries Deposition of May 8, 2019
PX 17	Errata for Holman-Harries Deposition of May 8, 2019
PX 18	Holman-Harries PMK Deposition of August 1, 2019
PX 19	Errata for Holman-Harries PMK Deposition of August 1, 2019
PX 20	Kidder <i>Jewett</i> PMK Deposition of October 23, 2018
PX 21	Loaiza Deposition of June 14, 2019
PX 22	Waggoner <i>Jewett</i> PMK Deposition of July 26, 2018
PX 23	Errata for Waggoner Deposition of May 1, 2019
PX 24	Waggoner PMK Deposition of July 19, 2019
PX 25	Errata for Waggoner PMK Deposition of July 19, 2019
PX 26	Westerdahl Deposition of May 30, 2019
PX 27	Errata for Westerdahl Deposition of May 30, 2019
PX 271	Errata for Madden Deposition of October 10, 2019
PX 329	Errata for Saad Deposition of October 11, 2019
DX 439	Atkins Deposition of June 10, 2019
DX 440	Brunetti PMK Deposition of July 17, 2019
DX 441	Leu Deposition of July 1, 2019
DX 442	Ratliff PMK Deposition of June 26, 2019
DX 443	Suhr PMK Deposition of June 26, 2019

On December 4, 2019, OFCCP filed a document that contained a) OFCCP's deposition designations; b) OFCCP's deposition counter designations; and c) Oracle's deposition counter designations. Oracle filed its deposition designations on December 5, 2019. On December 13, 2019, Oracle filed a supplemental deposition designation. OFCCP objected to this filing during the hearing, but I overruled the objection.

The portions of the deposition exhibits that were designated in these filings should be admitted into evidence. The parties provided designations for 17 depositions. One of these depositions, however, is the Suhr non-PMK deposition of June 26, 2019, which was not listed as or submitted as an exhibit. Thus, sixteen of the depositions should be admitted as designated. These are:

<b>Exhibit</b>	<b>Contents</b>
JX 102	Waggoner Deposition of May 1, 2019
PX 10	Baxter PMK Deposition of July 3, 2019
PX 12	Cheruvu Deposition of June 11, 2019
PX 14	Dodson <i>Jewett</i> PMK Deposition of July 26, 2018
PX 16	Holman-Harries Deposition of May 8, 2019
PX 18	Holman-Harries PMK Deposition of August 1, 2019
PX 20	Kidder <i>Jewett</i> PMK Deposition of October 23, 2018
PX 21	Loaiza Deposition of June 14, 2019

PX 22	Waggoner <i>Jewett</i> PMK Deposition of July 26, 2018
PX 24	Waggoner PMK Deposition of July 19, 2019
PX 26	Westerdahl Deposition of May 30, 2019
DX 439	Atkins Deposition of June 10, 2019
DX 440	Brunetti PMK Deposition of July 17, 2019
DX 441	Leu Deposition of July 1, 2019
DX 442	Ratliff PMK Deposition of June 26, 2019
DX 443	Suhr PMK Deposition of June 26, 2019

In order to provide a clear record and properly identify the portions of the depositions to be admitted, I have compiled the deposition designations provided by the parties and created new documents for each of the 16 depositions above. These documents have been marked as follows:

<b>Exhibit</b>	<b>Contents</b>
JX 102A	Deposition Designations for Waggoner Deposition of May 1, 2019
PX 10A	Deposition Designations for Baxter PMK Deposition of July 3, 2019
PX 12A	Deposition Designations for Cheruvu Deposition of June 11, 2019
PX 14A	Deposition Designations for Dodson <i>Jewett</i> PMK Deposition of July 26, 2018
PX 16A	Deposition Designations for Holman-Harries Deposition of May 8, 2019
PX 18A	Deposition Designations for Holman-Harries PMK Deposition of August 1, 2019
PX 20A	Deposition Designations for Kidder <i>Jewett</i> PMK Deposition of October 23, 2018
PX 21A	Deposition Designations for Loaiza Deposition of June 14, 2019
PX 22A	Deposition Designations for Waggoner <i>Jewett</i> PMK Deposition of July 26, 2018
PX 24A	Deposition Designations for Waggoner PMK Deposition of July 19, 2019
PX 26A	Deposition Designations for Westerdahl Deposition of May 30, 2019
DX 439A	Deposition Designations for Atkins Deposition of June 10, 2019
DX 440A	Deposition Designations for Brunetti PMK Deposition of July 17, 2019
DX 441A	Deposition Designations for Leu Deposition of July 1, 2019
DX 442A	Deposition Designations for Ratliff PMK Deposition of June 26, 2019
DX 443A	Deposition Designations for Suhr PMK Deposition of June 26, 2019

Each of these new exhibits contains an exhibit marking on the center portion at the top of each page and imposed sequential pagination in the bottom right hand corner of each page. Each exhibit consists of the collected pages from the parties' deposition designations that pertain to the particular deposition in question, with other material on the page redacted so as to avoid confusion. The parties will be provided with copies of each of these new exhibits with the copy of this order sent to counsel.

JX 102A, PX 10A, PX12A, PX 14A, PX 16A, PX 18A, PX 20A, PX 21A, PX 22A, PX 24A, PX 26A, DX 439A, DX 440A, DX 441A, DX 442A, and DX 443A are admitted into evidence.<sup>4</sup> Each exhibit will be attached to/included with the deposition to which it pertains. The transcripts and videos in JX 102, PX 10, PX 12, PX 14, PX 16, PX 18, PX 20, PX 21, PX 22, PX 24, PX 26, DX 439, DX 440, DX 441, DX 442, and DX 443 are admitted insofar as they are described in the

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<sup>4</sup> If any party contends the depositions as designated in this order are in error, they may file a written response not to exceed 7 pages no later than January 15, 2020. Any opposition/reply to the response may not exceed 7 pages and must be filed no later than January 17, 2020.

attached “A” exhibit. They are otherwise not admitted. So, for instance, JX 102 is admitted insofar as it is described in the parties’ designations contained in JX 102A and otherwise not admitted. And so on.

OFCCP’s exhibits contain four depositions that are subject to no deposition designations:

<b>Exhibit</b>	<b>Contents</b>
PX 3	Madden Deposition of October 10, 2019
PX 7	Saad Deposition of October 11, 2019
PX 11	Carrelli Deposition of May 24, 2019
PX 15	Edwards <i>Jewett</i> PMK Deposition of October 16, 2018

Since there are no designations for these exhibits and the parties agreed that the depositions submitted should only be considered insofar as they were designated, these four exhibits are not admitted and are not part of the record for decision.

The remaining pending exhibits involve errata to the depositions:

<b>Exhibit</b>	<b>Contents</b>
PX 13	Errata for Cheruvu Deposition of June 11, 2019
PX 17	Errata for Holman-Harries Deposition of May 8, 2019
PX 19	Errata for Holman-Harries PMK Deposition of August 1, 2019
PX 23	Errata for Waggoner Deposition of May 1, 2019
PX 25	Errata for Waggoner PMK Deposition of July 19, 2019
PX 27	Errata for Westerdahl Deposition of May 30, 2019
PX 271	Errata for Madden Deposition of October 10, 2019
PX 329	Errata for Saad Deposition of October 11, 2019

The plan was to have the errata admitted into evidence only insofar as they related to portions of the depositions admitted into evidence. The parties were unable to accomplish this end in a straightforward manner. Two of these exhibits, PX 271 and PX 329, are errata for depositions that were not admitted. They are thus not admitted as well. As for others, I decline to undertake the task of cross-referencing the designations with the errata to cull the errata to only those portions that pertain to the designations. Errata are meaningless without ascertaining what is being corrected, so there is no danger of confusion if these errata as a whole are admitted—since only the designated portions of the depositions are in evidence, the only errata that could impact a decision are those that relate to the designated portions. Therefore, PX 13, PX 17, PX 19, PX 23, PX 25, and PX 27 are admitted.

**ORDER**

1. The compiled deposition designations in JX 102A, PX 10A, PX 12A, PX 14A, PX 16A, PX 18A, PX 20A, PX 21A, PX 22A, PX 24A, PX 26A, DX 439A, DX 440A, DX 441A, DX 442A, and DX 443A are admitted.
2. The deposition are admitted as follows:
  - a. JX 102 is admitted as specified in JX 102A.

- b. PX 10 is admitted as specified in PX 10A.
  - c. PX 12 is admitted as specified in PX 12A.
  - d. PX 14 is admitted as specified in PX 14A.
  - e. PX 16 is admitted as specified in PX 16A.
  - f. PX 18 is admitted as specified in PX 18A.
  - g. PX 20 is admitted as specified in PX 20A.
  - h. PX 21 is admitted as specified in PX 21A.
  - i. PX 22 is admitted as specified in PX 22A.
  - j. PX 24 is admitted as specified in PX 24A.
  - k. PX 26 is admitted as specified in PX 26A.
  - l. DX 439 is admitted as specified in DX 439A.
  - m. DX 440 is admitted as specified in DX 440A.
  - n. DX 441 is admitted as specified in DX 441A.
  - o. DX 442 is admitted as specified in DX 442A.
  - p. DX 443 is admitted as specified in DX 443A.
- 3. The other portions of the depositions in JX 102, PX 10, PX 12, PX 14, PX 16, PX 18, PX 20, PX 21, PX 22, PX 24, PX 26, DX 439, DX 440, DX 441, DX 442, and DX 443 are not admitted.
  - 4. The depositions in PX 3, PX 7, PX 11, and PX 15 are not admitted.
  - 5. The errata in PX 13, PX 17, PX 19, PX 23, PX 25, and PX 27 are admitted.
  - 6. The errata in PX 271 and PX 329 are not admitted.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge