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Issue Date: 10 June 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 GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL *JEWETT* DOCUMENTS

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 has been pending at the Office of Administrative Law Judges ("OALJ") since January 17, 2017. Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") filed the operative Second Amended Complaint ("SAC") on March 13, 2019. Defendant Oracle America, Inc. ("Oracle") answered the SAC on April 2, 2019. Hearing is set to begin on December 5, 2019. On April 22, 2019, OFCCP filed a Motion to Compel *Jewett* Documents, along with a memorandum in support of the motion ("PM") and a declaration from Norman E. Garcia with eight attached exhibits ("PX 1-8"). Oracle filed an Opposition to OFCCP's Motion to Compel *Jewett* Documents ("DO") on May 6, 2019, accompanied by a declaration from Erin Connell with 13 attached exhibits ("RX A-M"). On May 16, 2019, OFCCP filed a permitted Reply in Support of Plaintiff's Motion to Compel *Jewett* Documents ("PR"). It is accompanied by a declaration from Jeremiah Miller with four additional exhibits ("PX A-D") in two separate volumes.

For the reasons set forth below, OFCCP's Motion to Compel *Jewett* Documents is granted in part and denied in part.

I. LEGAL STANDARD

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 rules 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. The Rules of Evidence in the Rules of Practice and Procedure for Administrative Hearings Before OALJ apply to this case. 41 C.F.R. § 60-1.26(b)(2).

The pending motion concerns production of documents, which is governed by 41 C.F.R. § 60-30.10:

> (a) After commencement of the action, any party may serve on any other party a request to produce and/or permit the party, or someone acting on his behalf, to inspect and copy any unprivileged documents, phonorecords, and other compilations, including computer tapes and printouts which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

41 C.F.R. § 60-30.10(a); *see also* Fed. R. Civ. P. 34. "Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time and place for making the inspection and performing the related acts." 41 C.F.R. § 60-30.10(c). "An objection [to a request] must state whether any responsive materials are being withheld on the basis of that objection." Fed. R. Civ. P. 34(b)(2)(C).

The scope of discovery is governed by Rule 26 of the Federal Rules of Civil Procedure:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). Further:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Fed. R. Civ. P. 26(b)(2)(C).

If a party believes that disclosure or discovery responses have been inadequate, it may, after conferring or attempting to confer in good faith, file a motion compelling discovery, including a motion to produce documents. 41 C.F.R. § 60-30.10(d); Fed R. Civ. P. 37(a)(1), (3)(B)(iv). If a motion to compel is denied or denied in part, the court may issue a protective order under Rule 26(c). Fed. R. Civ. P. 37(a)(5)(B)-(C). Under Rule 26(c), a court "may for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, among other things, forbidding or limiting the discovery. Fed. R. Civ. P. 26(c)(1).

II. DISCUSSION

Jewett v. Oracle America, Inc., No. 17-CIV-02669 ("*Jewett*") is a California state law case pending in the Superior Court for San Mateo County. It is a putative class action making claims for sex discrimination by Oracle at locations across California. *See* PX 7. This matter is an enforcement proceeding within the U.S. Department of Labor brought by OFCCP to enforce EO 11246. Presently it involves claims of sex and race discrimination in three job functions at Oracle's headquarters facility in Redwood Shores, California, from 2013 and ongoing. *See* SAC at ¶¶ 11-32. The issue now is whether or not material produced in *Jewett* must also be produced here. OFCCP requested a broad array of documents. Oracle made some production, but withheld some documents. OFCCP was not satisfied. This motion followed.

A. Requests, Responses, and Current Contentions[1]

Three requests for the production of documents ("RFP") are related to the issue in this motion. RFP No. 166[2] instructed, "Produce all unredacted deposition transcripts of depositions taken in the *Jewett et al. v. Oracle America, Inc.,* California state case number 17-CIV-02669 litigation." Oracle responded:[3]

> Oracle incorporates by reference its General Objections and its Objections to Specific Definitions set forth above. Oracle further objects to this Request to the extent it seeks information protected by the attorney-client privilege or the attorney work product doctrine. Oracle further objects to this Request on the ground that it is grossly overbroad, unduly burdensome, oppressive and seeks documents that are neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence. Oracle further objects to this Request on the grounds that it manifests harassing intent on its face by its wholesale attempt to interrupt and disrupt Oracle's motion and trial preparations in a case to which OFCCP is not a party and in which it has no direct interest. The *Jewett* litigation is a different case. There, plaintiffs allege violation of the California Equal Pay Act, violation of the California Labor Code, and violation of the California Business and Professions Code, and the putative class spans throughout California (including approximately 166 separate location codes). It is not limited to Oracle's Redwood Shores, California, headquarters, and the three remaining class representatives in the *Jewett* case never worked at Oracle's Redwood Shores, California, headquarters. The two proceedings, therefore, are not congruent; moreover, their lack of congruence makes this Request as stated exponentially oppressive, in that confidential Oracle information subject to a protective order has been produced to the *Jewett* plaintiffs, inclusive of deposition testimony and exhibits, and substantial portions of that confidential information have no bearing on this proceeding. Similarly, Oracle is

[1] Significant portions of the briefing and attached exhibits relate to a subpoena that OFCCP procured from this office and then served of *Jewett* plaintiffs' counsel in order to receive the materials. Oracle subsequently disputed the authority of agencies to issue subpoenas in this action and OFCCP withdrew the subpoena. Though this is relevant to this motion historically—it explains why this motion ended up being filed—there are no live disputes that need to be decided on the issue for me to adjudicate here. Hence, I do not address the briefing and other materials addressed to this topic.

[2] The text of the requests for production are taken from PX 1.

[3] Oracle's responses are taken from PX 3.

> bound by the terms of the protective order in the *Jewett* litigation as it relates to testimony, documents and exhibits provided or produced by the *Jewett* plaintiffs.
>
> Without waiver of the foregoing objection, and subject thereto, Oracle is willing to consider production to OFCCP of certain information or documents from the *Jewett* case upon reasonable specification thereof and identification by OFCCP of such information or documents pursuant to the meet and confer process. However, unless and until the parties come to an agreement on a protective order for this case, Oracle will not produce information or documents in arguable violation of the protective order in force in the *Jewett* litigation, nor will Oracle produce information or documents from the *Jewett* litigation that unduly infringe upon the privacy rights of third party individuals or that is not relevant to OFCCP's claims in this proceeding.

Second, in RFP No. 167, OFCCP stated: "Produce all DOCUMENTS YOU produced to OR received from the plaintiffs in the *Jewett et al. v. Oracle America, Inc.,* California state case number 17-CIV-02669 litigation that were not previously produced in this litigation." Oracle responded: "Oracle incorporates by reference its Objections to Specific Definitions set forth above. Oracle further responds to this Request as follows: See Response and Objections to Request No. 166, *supra*."

And RFP No. 168:

> Produce all DOCUMENTS YOU provided to OR received from the plaintiffs in the *Jewett et al. v. Oracle America, Inc.,* California state case number 17-CIV-02669 litigation RELATED TO written discovery requests (e.g., interrogatories, requests for admissions, requests for the production of DOCUMENTS) to include the discovery requests, the responses AND meet AND confer COMMUNICATIONS RELATED TO the discovery requests OR responses. This request does not include the DOCUMENTS actually produced RELATED TO the responses, but it does include any AND all COMMUNICATIONS RELATED TO the written discovery requests OR responses thereto.

Oracle's response to RFP No. 168 was the same as its response to RFP No. 167.

OFCCP acknowledges that Oracle subsequently did produce some deposition transcripts. But it has not produced other responsive material, to include depositions from the three expert witnesses in *Jewett*. PM at 2; *see also* PX 4; DX J; DX K. Oracle explains that it has produced 2,633 pages of deposition transcripts and attached exhibits from "persons most knowledgeable" depositions, as well as 3,179 pages of material from depositions of the four individuals (three of whom are named Plaintiffs) who worked at Oracle's headquarters. Though the exhibits contain redactions, those redactions were made by the *Jewett* plaintiffs prior to their introduction at the deposition. Oracle made no additional redactions to these materials. RO at 4-5. Oracle has not produced six depositions, three from experts in the case and three from named plaintiffs who did not work at Oracle's headquarters. It has also refused to produce discovery materials and correspondence from *Jewett*. *Id.* at 6. A protective order limits the use of confidentiality-designated material in *Jewett*, but disclosure may be made with the express written consent of the other party. *See* PX 5. Counsel for the *Jewett* plaintiffs has consented to production of some of the material. *See* PX 6; DX G.

OFCCP contends that it is seeking "highly relevant" materials from an "overlapping" case covering the "same subject matter" with "shared allegations" of gender discrimination at Oracle's headquarters. PM at 1; *see also* PR at 1-2 (deeming material "highly relevant" and related to the "core elements"). It avers that it is seeking this information so that discovery in this matter can be more efficient. PM at 2-3. OFCCP argues that the materials requested are "highly relevant" since the "core claim" in both is gender discrimination and they are otherwise "overlapping" in terms of "geographical areas and timeframes." *Id.* at 3. While OFCCP recognizes that *Jewett* differs in that it covers offices outside of the one headquarters facility at issue in this case, it points out that the *Jewett* case "alleged" that Oracle has centralized control over employment/compensation policies and practices and on that basis claims that testimony and other material from other offices are relevant to this case. It thus deems any relevance objection "frivolous." *Id.* at 4; *see also* PR at 3-5. It asserts that it has established a "need" for these materials, but that in any case the standard is only relevance and these documents go "to the core of the case." PR at 3.

In addition, OFCCP argues that any privacy concerns are baseless because there is a protective order in this case and the *Jewett* plaintiffs have consented to production. PM at 4. OFCCP deems any claim that the requests are overly broad and burdensome meritless because Oracle prevented OFCCP from gaining the same material from the *Jewett* plaintiffs via a subpoena and thus Oracle created any burden. OFCCP thus asks that I order Oracle to produce "all unredacted deposition transcripts and exhibits, which Oracle must supplement with any future depositions taken in *Jewett,* including all expert depositions, all produced expert materials, written discovery requests and responses, and meet-and-confer correspondence." *Id.* at 5. OFCCP thus seeks production of documents in RFP 166 and RFP 168. It is not seeking to compel production in response to RFP No. 167 "at this time." *Id.* at 2, n.2.

Oracle has a different take. It avers that while similar, this case and *Jewett* are different cases in different forums involving different claims under different laws. It stresses that *Jewett* concerns all of Oracle's California offices, not just its headquarters, and so only a proper sub-set of potential class members overlap. Oracle represents that it has already produced materials that overlap, as well as depositions from *Jewett* that might be relevant to this claim. It argues that OFCCP has not shown any need for the additional materials and that OFCCP's representation that it will make discovery more efficient is incorrect, since OFCCP is also insisting on its own depositions on top of those conducted in *Jewett*, and after receiving other *Jewett* material only sought further discovery. RO at 1-2, 8-10.

Oracle also argues that the request raises confidentiality concerns in that the requested material contains personal identifying information and sensitive compensation information about Oracle employees throughout California, many of whom have no connection to this case because they never worked at the headquarters facility. Oracle also maintains that the *Jewett* material contains commercially sensitive information related to other facilities. Oracle worries that producing the information here could expose that information—both because production here means exposure to the federal government generally and because the protective order in this case is subservient to the Freedom of Information Act ("FOIA"). *Id.* at 2-3, 10-11. In addition Oracle argues that the requested production is not proportional to the needs of the case.[4] *Id.* at 3, 12-13.

[4] I consider objections made in the original response but not mentioned or discussed in the opposition waived, with the exception of any questions of relevance, since that is the threshold showing of the requesting party.

B. Are the Requested Materials Relevant?

The threshold question is relevance, since only relevant information is discoverable.[5] Fed. R. Civ. P. 26(b)(1). For discovery purposes, "relevance" is "constructed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978). Four categories of documents are at issue, which I reorganize slightly: 1) *Jewett* expert reports, deposition transcripts, and underlying material; 2) deposition transcripts from three *Jewett* plaintiffs who did not work at Oracle's headquarters; 3) *Jewett* written discovery requests and responses; and 4) *Jewett* meet and confer correspondence.

1. Jewett *Expert Reports, Depositions, and Underlying Material*

I begin with the expert material from *Jewett*. OFCCP argues that all of this material is relevant to the case in this forum. PM at 5. Oracle argues that they need not be produced because OFFCP has "not articulated" why they would be relevant to this case. DO at 9. OFCCP responds that the expert material in *Jewett* is relevant here because the two cases overlap—as to location, putative class members, and timeframe—and the expert materials "involve Oracle's compensation policies, employee job duties and responsibilities, employee review/evaluation policies, how Oracle's use of prior pay affects employee pay, Oracles' view of its own employee practices…" It asserts that these matters are also relevant to this case. PR at 4.

The publically available versions of the expert reports were submitted with OFCCP's reply. *See* PX B; PX C; PX D. Based on the filings, these reports, and the accompanying declaration, I understand OFCCP to seek three things related to the *Jewett* experts. First, it seeks unredacted versions of the expert reports, with appendices. Second, it seeks depositions of the experts in the *Jewett* matter with attachments, as those attachments were originally produced. And third, it seeks expert "material" comprising the source data for the expert reports, at least for Dr. Neumark (PX C).

I do not accept OFCCP's representation that these materials are "highly relevant" or go to the "core" of this matter. Overlap is not equivalence and seeking information about facilities not at issue in this case is exploration of new claims, not development of evidence on this matter. To meet the relevance bar, the requested material must be relevant to the claims and defenses in the instant case—not simply the general subject matter of the case. Discovery is not a tool to develop new complaints; it is a tool to explore the complaints being litigated. Fed. R. Civ. P. 26 Advisory Committee Note to the 2000 Amendment to Subdivision (b)(1). *This* case is limited to three job functions at Oracle's headquarters. Evidence relating to other facilities is not relevant to the claims

[5] The parties also vigorously dispute the good faith of OFCCP in making these requests, and in particular the representation that this discovery will make other discovery more efficient. OFCCP contends that giving it access to discovery from the *Jewett* case will eliminate redundancies. PM at 2-3. Oracle contests this claim—it argues that OFCCP has empirically not used production of *Jewett* material to make discovery more efficient since at the same time it was requesting and being given some *Jewett* materials it was insisting on broad, redundant discovery of its own and refuses to limit its other discovery here based on what is provided from the *Jewett* case. DO at 7-8, 12. OFCCP takes umbrage at these accusations, maintaining that it has done "everything in its power to create efficiency in the discovery process." PR at 2. It argues that the production has allowed it to streamline some discovery. *Id.* at 8-9. Though redundancy could be a rationale to limit discovery under Fed. R. Civ. P. 26(b)(2)(C), Oracle has not made a clear assertion (or compelling argument) that the inefficiencies it alleges rise to the level where further discovery should be limited. There is no need, then, to delve into the parties' disputes about the most efficient way to conduct discovery.

and defenses in this case. If OFCCP wants to investigate other Oracle facilities (or job functions), it should to follow its regular process and procedures to do so.

Any expert material that provides analysis covering all of Oracle's California facilities will only be *partially* applicable to the issues in this matter. An expert report from *Jewett* could not simply substitute in for a probative expert report here. Both OFCCP and Oracle will need to engage their own experts to provide opinions on the claims and defenses in this particular case. My impression is that they both have done so. OFCCP's response is that Oracle facilities are so similar in pertinent respects that evidence of one is evidence of another. But this is an unsubstantiated allegation, and an allegation that does not need to be decided in this case.[6] In this case, only one Oracle facility is at issue and there are not questions as to the appropriate degree and sort of commonality as between facilities. There is more than enough data and available evidence from employees at Oracle's headquarters facility and the job functions at issue here.

The authority cited by OFCCP, *Carter Vallace Inc. v. Hartz Mountain Indus., Inc.*, does not assist its claim. While the case did reject the argument that a deposition from a prior case was irrelevant in the context of a subsequent case with different parties and a different claim, that finding was based on the conclusion that the cases involved "substantially similar allegations" about "conduct [that] occurred during overlapping periods of time" and where the subject matter of the depositions was "arguably as relevant to this action as to the [other]." 92 F.R.D. 67, 70 (S.D.N.Y. 1981). That point doesn't carry over here. There is some overlap in facilities but also significant divergence. Opinions about compensation of Oracle employees in California as a whole are *much* less relevant to this case than to *Jewett*. The "core" of this matter relates to Oracle's headquarters and evidence probative of OFCCP's claims will relate to Oracle's headquarters.

However, OFCCP is correct that at least some of the expert material from *Jewett* meets the relevance bar here, even if it does not go to the core of the matter. There is some overlap and the claims are similar, so those portions of the materials from *Jewett* that address the overlapping areas in the two cases are relevant. Oracle's claim is that because the expert opinions in *Jewett* pertain to the headquarters facility *and* Oracle's other facilities, those opinions are not relevant to issues surrounding the headquarters facility alone. This isn't right. An opinion about "A and B" is, in part, an opinion about "A." The headquarters facility is a component, and likely significant component, of the basis for the expert opinions in *Jewett*, even if those opinions take a broader focus. On its own, the *Jewett* material is not likely to be probative because of the different focus of the case. Nor do I find that this material is necessary admissible—its tendency to confuse issues because of the different focus *may* substantially outweigh its probative value. *Cf.* 20 C.F.R. § 18.403. But the question in discovery does not require a determination of probative value or admissibility. Fed. R. Civ. P. 26(b)(1); *cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29-30 (1984). It is bare relevance, and given the overlap, the material meets the low relevance bar.

There are limits to this point—some or even most of the expert reports, depositions, and underlying materials may be relevant, but not necessarily *all* of that material is relevant. If the expert report, deposition, or underlying material concerns *only* the headquarters facility, it is relevant. If the expert report, deposition, or underlying material concerns *both* the headquarters facility and other

[6] *Jewett* is a putative class action covering all of California, so the degree of commonality is an issue in that case—hence the allegation in *Jewett* that OFCCP relies on here. But it would be highly circuitous, to say the least, to decide a proxy for the class certification question in *Jewett* as part of a discovery dispute here so that OFCCP may seek to prove things about one facility with information about another.

facilities in California, then it is relevant. But if the expert report, deposition, or underlying material concerns *only* other facilities in California, then it is not relevant. The various cases cited by the parties here reach different outcomes, but they all point to the same basic rule: material produced in one case is not necessarily discoverable in another case, but those materials that pertain to overlapping areas of the two cases are discoverable in the similar case.

Hence, aspects of the unredacted expert reports that either address the headquarters facility or facilities generally are relevant; aspects that address *only* other facilities are not. The same holds for the expert depositions and attached exhibits. If the deposition testimony (and exhibits) relate to the headquarters facility or Oracle's facilities more generally, it is relevant to this case for the purposes of discovery. If the expert is testifying only about other facilities, that portion of the transcript is not relevant. The underlying material that OFCCP seeks appears to by the source data that served as the basis of Dr. Neumark's report/opinion and perhaps the other reports/opinions as well. This would likely involve compensation and other information for Oracle employees throughout California, including but not limited to the headquarters. Applying the reasoning above, some of this information is relevant, some of it is not. The source material that pertains to Oracle's headquarters and the job functions at issue is relevant. The source material regarding compensation etc. that relates only to Oracle's other facilities, and job functions is not relevant. Those are different cases. Based on relevance, Oracle need not produce portions of the expert material that relate solely to other facilities, but it cannot withhold the entirety of those materials on the grounds that portions are not relevant.

2. *Additional Deposition Transcripts*

Six deposition transcripts (with exhibits) are at issue, though OFCCP also seeks all future transcripts. PM at 5. Three of these transcripts, the expert transcripts, were discussed above. The other three deposition transcripts are from named plaintiffs in *Jewett* who never worked at Oracle's headquarters. Oracle contends that since the headquarters alone is at issue in this case, the evidence from these individuals is not relevant to the issues in this case. DO at 9-10. OFCCP replies that the experts in *Jewett* reviewed these additional depositions and that the "transcripts also likely include employee experiences at Oracle related to their work, pay, promotions, training, initial pay at hiring, information Oracle asked and/or evaluated of [sic] employees to establish pay and other employment decisions." PR at 5.

I do not find OFCCP's assertions compelling on this point. The mere fact that a *Jewett* expert reviewed the material does not make it relevant to *this* case. The expert reports and depositions are relevant, but only *partially* so because they only partially pertain to the particular class(es) at issue in this claim. Parts of the expert opinions that pertain to other facilities are not relevant and parts that relate to all of the facilities are only partially relevant. OFCCP does not need to prove anything about Oracle's other facilities or prove anything about uniformity across Oracle facilities. Hence, deposition testimony from individuals who never worked at the headquarters facility isn't relevant even if it is informative of their experiences at Oracle. OFCCP isn't litigating their experiences. To prove allegations about "work, pay, promotions, training, initial pay at hiring, information Oracle asked [of] and/or evaluated [about] employees to establish pay and other employment decisions" in this case, OFCCP and Oracle will need to present evidence that relates to Oracle's headquarters facility. There is no dearth of such evidence to be found. There are thousands of class members and comparators. OFCCP and Oracle both have their contact information.

Revealingly, in the section of its reply addressing proportionality, OFCCP states that "[t]here is no question that materials related to Oracle's compensation of women at its headquarters facility in California are relevant." PR at 6. This is true. But it changes the issue: *these* depositions do *not* relate to "Oracle's compensation of women at the headquarters facility" because they record testimony from individuals who never worked at the headquarters facility. I agree with OFCCP that *some* of the material from *Jewett* is relevant, and may even be "highly relevant." But it does not follow that *all* material is relevant. There is a sensible medium: material from *Jewett* that concerns the job functions and facility at issue in this case is relevant to this case. These three depositions do not fall into that category and so are not relevant. I am in no position to determine the relevance of future depositions, but the parties should be able to apply the finding above: they are relevant if they pertain to the headquarters facility and the relevant job functions, either in whole or in part; otherwise they are not relevant.

3. Written Discovery Requests and Responses

Third, OFCCP asks that I compel Oracle to produce the written discovery requests and responses in *Jewett*. PM at 5. While Oracle acknowledges that some material from *Jewett* has relevance (and has produced some material) it argues that not all material is relevant and it should not be compelled to indiscriminately produce all discovery requests and responses in the case. It deems the request impermissible "piggybacking" discovery and argues that since OFCCP and counsel for the *Jewett* plaintiffs are supposedly cooperating, OFCCP should be able to articulate which particular discovery material from *Jewett* is relevant to this case and why, instead of indiscriminately requesting everything. DO at 9. OFCCP argues that the discovery responses are relevant because they were reviewed by the experts in *Jewett* and were considered in reaching their opinions. PR at 5. In addition, "[d]iscovery responses also likely identify information, data, and documents Oracle created and maintained related to employee pay and compensation decisions. Discovery responses also likely include relevant information about job duties and responsibilities in the three functions." *Id.*

Oracle's point that OFCCP should have been able to specify which discovery responses were relevant has some merit. OFCCP did not dispute that it has access to the discovery requests and so could have defined its discovery more narrowly. But Oracle's conclusion does not follow—the point that the request should have been more narrowly tailored does not compel the conclusion that it should be denied in full. One of the cases relied on by Oracle, *Chen v. Ampco Sys. Parking*, did reason in this manner, but in the context of determining whether the discovery was unduly burdensome—a point that turns on balancing. No. 08-cv-0422, 2009 U.S. Dist. LEXIS 71633, at *8-9 (S.D. Cal. Aug. 14, 2009). The two cases in *Chen* also were more significantly different than the two at issue here. *See id.* at *5-6. The same was true in the other case cited by Oracle on this point, *Race Optics v. Aevoe Corp.*, 2016 U.S. Dist. LEXIS 98776, at *5-7 (D. Nev. July 27, 2016). Both *Chen* and *Race Optics* involved the need to curtail overly broad discovery that attempted to piggyback on other cases that were not substantially similar. In that situation, a court is not in a good position to ascertain the narrower range of material that is discoverable and denial of the request entirely naturally follows. But in cases like this, where there is a more significant overlap and defining the

portions of the responsive documents that are relevant is relatively easy to do, other options are available.[7]

The relevance finding here follows from the above. The fact that the experts in *Jewett* reviewed material does not make it relevant here. The expert reports/testimony is only partially relevant here and only part of what they reviewed is relevant here. I do agree with OFCCP that some of the discovery responses are likely to contain relevant information. But some are likely not to contain relevant information due to the (in ways) broader nature of the *Jewett* litigation. Discovery responses that relate to different job functions or facilities do not contain relevant evidence and will not lead to relevant evidence—they would only contain and lead to evidence about other facilities and job functions. Discovery responses that relate, in whole or part, to the job functions at issue and the headquarters facility are relevant or could lead to relevant evidence.

4. Meet and Confer Correspondence

Last, OFCCP requests production of the various meet and confer correspondence in *Jewett*. PM at 5. Oracle responds that these correspondence between attorneys in a separate matter have no relevance to the claims in this matter and that OFCCP has failed to explain how this sort of "indiscriminate" collection of correspondence is pertinent to this case. DO at 9-10. OFCCP's only response on this point is that "[t]he experts even reviewed correspondence between counsel to explain the data and documents to understand, presumably, the meaning of some data." PR at 5.

Just because an expert in a different case reviewed something doesn't make it relevant in every related case. It depends on what was reviewed and why. The material at issue here is letters and emails between attorneys in the *Jewett* case on various issues that emerged during discovery in that litigation. I don't really understand how this could be relevant to the claims and defenses in that litigation. What counsel for Oracle and counsel for *Jewett* disputed in the *Jewett* discovery, the positions they took, and the way they resolved their disputes (or didn't) has no bearing on this case. This case is not a litigation over Oracle's behavior in another case, or a re-litigation of the disputes in that case.[8]

C. Do Confidentiality Concerns Require Limits to Discovery?

Oracle contends that constitutionally-based privacy rights justify limiting discover in this case. While it acknowledges that a protective order exists in this case, it is concerned about providing all of this private and confidential information to the government to use as it might, especially where the material involves many individuals who are not part of this case and locations that are not at issue in this case. Oracle also worries that once the information is provided to the government, it may be subject to FOIA, which would take precedence over the protective order in this case. It also objects that indiscriminately turning material over to the government in this matter could jeopardize its confidential commercial and financial information related to sites that are not at

[7] If, as Oracle suggests, the request is denied because it is overly broad, the result would also allow OFCCP to craft a narrower request, which would likely lead right back to the current juncture.

[8] In a concurrently issued order, I reach the same conclusion as to communications between counsel for OFCCP and counsel for the *Jewett* plaintiffs. Only where those communications pertain to *this* case and the substantive claims and defenses therein are those communications relevant. Since this discovery request seeks communications solely in and about the *Jewett* litigation, none of the response documents would be relevant. The internal minutiae in one case isn't relevant to the claims and defenses in another—often it isn't even relevant to the claims and defenses in the same case.

issue here. DO at 10-11. OFCCP charges that Oracle's privacy concerns are "spurious" and "Oracle is only acting in its own interest in withholding documents and information that would help resolve this case." OFCCP deems the protective orders in both cases sufficient protection. PR at 2, 7.

There are two potential confidentiality issues referenced by the parties, but neither needs to be substantively addressed. The first is the impact of the protective order in *Jewett*, which provides that with certain exceptions not relevant here, material designated as confidential may not be disclosed to other people without express written consent of the other parties or an order from the Superior Court. *See* PX 5 at ¶ 4; *see also* DX A; DX E; PX A. OFCCP represents that "[t]he *Jewett* plaintiffs consented to production of the documents OFCCP now moves to compel." PM at 2; *see also* PX 6.[9] Oracle does not challenge that representation. Regardless, if the material is discoverable here potential issues that might arise in a different forum are not a matter I need to resolve.

The second potential confidentiality issue concerns production of private compensation and other information for employees who worked only at other facilities. Oracle is correct that the protective orders in the two cases are different in that here, but not *Jewett*, confidential information is provided to the government and here, but not in *Jewett*, FOIA limits the protective order and opens the possibility of confidential information being disseminated to the public. But given the findings as to relevance, there are no issues to consider. Material related to Oracle's headquarters is relevant and compensation information for those employees has already been provided to OFCCP. Any consideration and balancing of privacy interests has been done and is addressed in the protective order in this case. The additional privacy and confidentiality concerns raised by Oracle pertain to other facilities and employees who worked at those facilities. But since that information is not relevant to this case, it need not be produced.

D. Is the Proposed Discovery Proportional?

Rule 26 requires both that discovery be relevant and

> proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed R. Civ. P. 26(b)(1).

Oracle contends that the discovery at issue is not proportional because the material in question has limited, questionable probative value and the material not otherwise confidential or private is already available to OFCCP through the public record or directly from the *Jewett* plaintiffs. DO at 12-13. OFCCP replies that any burden is of Oracle's own making because it prevented *Jewett* plaintiffs from providing the material to OFCCP. PM at 4. Oracle retorts that this ignores the confidentiality concerns that could not unilaterally be waived by the *Jewett* plaintiffs and

[9] The email requesting consent references unredacted deposition transcripts with exhibits and written discovery requests and responses. Unredacted expert reports, materials underlying the expert reports, and meet and confer correspondence were not mentioned, though the first two could be encompassed within written discovery responses. The potential differences between protective orders due to impact of FOIA is not mentioned. PX 6.

mischaracterizes the history—Oracle states that it objected to use of a subpoena that lacked any legal authority, which led to its withdrawal by OFCCP. DO at 13-14. OFCCP replies that if Oracle will permit the *Jewett* plaintiffs to provide all of the material in question, it will withdraw the motion. PR at 1. It also argues that Oracle failed to establish any actual burden in producing the documents in question and that there is "no question" that any burden is outweighed by the importance of the documents. *Id.* at 6.

There is no need to wade into the disputes about who created the burden here and the propriety that everything that happened in the past. The relevant material includes the unredacted expert reports, the expert deposition transcripts, the portions of the expert source material that relate to Oracle's headquarters and the three job functions at issue, and the discovery requests and responses related to the same. The importance of the discovery of these materials to the resolution of the issues here is uncertain, but likely to be small. Oracle and OFCCP will need to hire and rely on their own experts and provide their own witnesses. But I agree with OFCCP that the burden is quite small—and at least that Oracle has not established any significant burden. The expert reports and depositions should be easy to produce. The other material will likely require some redactions, but not a burden that overcomes the issues at stake, the amount in controversy, the relative access to the information, and the parties' resources. Moreover, it is quite likely that most of the material in question was already produced—this order does not expand the temporal, job function, or geographic scope of the compensation data previously agreed to or ordered in this case and other discover materials from *Jewett* related to the headquarters facility were likely subject to prior discovery here. I thus find that discovery of the relevant material is proportional to the needs of the case.

E. What Must Be Produced?

The last issue is specifying what exactly must be produced. The unredacted expert reports, unredacted expert deposition transcripts, and expert source material are relevant, *unless* the material in question relates *only* to facilities outside of Oracle's headquarters or pertains to different job functions. Discovery is appropriate as to those materials. Oracle must produce the unredacted expert reports and the unredacted expert depositions with exhibits as they were entered in the deposition.[10] *If* portions of the expert reports, depositions, and supporting exhibits contain material that *solely* relates to other facilities or job functions, Oracle may redact those portions, except that it may not redact any material that has already been produced in the public record. Any redactions must be made in a manner that makes clear the nature of the material redacted and the rationale for the redaction. Oracle must also produce any expert source material that relates to Oracle's headquarters facility and the job functions at issue *unless* that information was previously produced in this case. If that material has previously been produced, Oracle should inform OFCCP of where it can be found.

Some of the discovery requests and responses are also relevant and should be produced. Based on the briefing, both parties already have the discovery *requests* in *Jewett*, but neither party opted to submit them with this motion. It is not possible, then, to specify *which* discovery responses must be provided with any particularity.[11] Discovery responses that pertain, in whole or part, to

[10] So if redactions were made prior to the introduction of the exhibit at the deposition, the exhibit may be produced as it was redacted when it was introduced.

[11] At one point, PR at 9, OFCCP complains that Oracle should not be permitted to be the arbiter of what is relevant. I agree and have given guidelines here. Those guidelines can only be generally stated. OFCCP's thought appears to be

Oracle's headquarters facility and the three job functions at issue are relevant and discoverable. Oracle must produce that material subject to two potentially significant exceptions. First, Oracle may redact or remove portions of responses that do not relate at all to the headquarters facilities. Any redactions/removals should be plainly indicated in a manner that allows OFCCP to understand why material was redacted/removed. Second, Oracle does not need to provide material or responses that are duplicative of discovery that has already occurred in this case, or materials and information provided during the investigative stage. If any material is withheld on this basis, Oracle should point OFCCP to where the information was provided previously.

Deposition transcripts and exhibits for individuals who never worked at the headquarters facility and meet and confer correspondence in *Jewett* are not relevant to the claims and defenses in this case and do not need to be produced. Expert material and discovery responses that relate solely to facilities other than the headquarters facility or job functions not at issue here are not relevant and need not be produced.

ORDER

1. Plaintiff's Motion to Compel *Jewett* Documents if granted in part and denied in part.

2. The motion is granted as to the unredacted expert reports, expert deposition transcripts and exhibits, underlying expert material, and discovery requests and responses insofar as the materials in question relate, in whole or in part, to Oracle's headquarters facility and the three job functions at issue in this case. Oracle must produce these documents to OFCCP within 25 days of the date of this order. *Cf.* 41 C.F.R. § 60-30.10(d).

3. The motion is denied as to any portions of the expert reports, expert deposition transcripts and exhibits, underlying expert material, and discovery requests that solely relate to Oracle facilities or job functions not at issue in this case. The motion is also denied as to the deposition transcripts with exhibits of individuals who never worked at Oracle's headquarters facility and the meet and confer correspondence from the *Jewett* case.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

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that *everything* should be produced and then *it* can be the arbiter of what is relevant. That does not work either. If OFCCP wanted more precise delineation of what exactly was relevant and needed to be produced, its recourse was to submit the discovery requests so more precise guidance could be provided. It declined to do so.