U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 19 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 DEPOSITION OF ORACLE AMERICA, INC. PURSUANT TO 41 C.F.R. § 60-30.11 AND FEDERAL RULE OF CIVIL PROCEDURE 30(b)(6)

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 May 10, 2019, OFCCP filed a Motion to Compel Deposition of Oracle America, Inc. Pursuant to 41 C.F.R. § 60-30.11 and Federal Rule of Civil Procedure 30(b)(6), along with a supporting memorandum ("PM"), a declaration from Norman Garcia[1] ("GD"), and a declaration from Jeremiah Miller ("MD") with 9 exhibits ("PX 1-9").[2] On May 24, 2019, Oracle filed an Opposition to the motion ("DO"), along with a supporting declaration from Jonathan Riddell ("RD") with 12 exhibits ("DX A-L").

For the reasons set forth below, OFCCP's Motion to Compel Deposition of Oracle America, Inc. Pursuant to 41 C.F.R. § 60-30.11 and Federal Rule of Civil Procedure 30(b)(6) is granted in part and denied in part.

---

[1] Mr. Garcia's declaration attaches one exhibit, but I do not cite it below.

[2] On May 14, 2019, Oracle filed notice that it would be filing a motion to seal portions of OFCCP's motion and PX H. On May 24, 2019, Oracle filed an Unopposed Motion to Seal, along with the proposed redactions. A corrected declaration was filed on May 30, 2019. I granted the Unopposed Motion to Seal on June 4, 2019.

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. Where a rule is needed and neither the rules in 41 C.F.R. Part 60-30.1 nor the Federal Rules of Civil Procedure supply one, the Rules of Practice and Procedure for Administrative Hearings Before OALJ in 29 C.F.R. Part 18, subpart A apply in the manner of local rules. *See* Pre-Hearing Order at 2 n.2.

The pending motion concerns depositions, which are provided for in 41 C.F.R. § 60-30.11:

> After commencement of the action, any party may take the testimony of any person, including a party, having personal or expert knowledge of the matters in issue, by deposition upon oral examination. A party desiring to take a deposition shall give reasonable notice in writing to every other party to the proceeding, and may use an administrative subpoena. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice shall also set forth the categories of documents the witness is to bring with him to the deposition, if any. A copy of the notice shall be furnished to the person to be examined unless his name is unknown.

41 C.F.R. § 60-30.11(a); *see also* 41 C.F.R. § 60-30.15(m) (subpoena authority).

When a deposition is noticed on a party,

> It shall be the obligation of each party to produce for examination any person, along with such documents as may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person. Each party shall be deemed to have control over its officers, agents, employees, and members. Unless the parties agree otherwise, depositions shall be held within the county in which the witness resides or works.

41 C.F.R. § 60-30.11(b).

Federal Rule of Civil Procedure 30 supplements the proceeding-specific rule. As relevant here, it provides that

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the

> organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Fed. R. Civ. P. 30(b)(6).

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. § 60-30.11(b); Fed R. Civ. P. 37(a)(1), (3)(B)(ii). 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

A. Requests, Responses, and Current Contentions

OFCCP served an Amended Notice of Deposition on Oracle on April 5, 2019. Two sets of topics are relevant to this motion.[3] The first concern, generally, compensation practices:

> 11. The processes and factors affecting COMPENSATION of individuals in the Product Development, Information Technology, and Support lines of business at HQCA between January 1, 2013, and the date of the deposition, including base salary, salary increases, stock options, stock grants, and bonuses, including:

[3] The Amended Notice is in PX D and the matters designated are taken from the text of PX D.

a. The budgets YOU develop and provide leaders and managers for headcount, base salary, salary increases, stock options, stock grants, and bonuses, including the cascading of the budgets through different levels of supervisors;

b. The salary grades and salary ranges applicable to each job in Product Development, Support, and Information Technology job functions at HQCA, including how such salary grades are assigned to each job, how salary ranges are assigned to each salary grades, and how markets surveys are used to set such ranges;

c. The criteria YOU consider in setting, awarding, or changing COMPENSATION to individuals in the Product Development, Information Technology, and Support job functions at HQCA, including the role that a new hire's or TRANSFER EMPLOYEE's prior compensation plays in setting initial compensation;

d. The setting of COMPENSATION, salary grades and salary ranges for workers of companies acquired by YOU who work or will work in YOUR Product Development, Information Technology, or Support lines of business at HQCA between January 1, 2013, and the date of the deposition;

e. The setting of COMPENSATION, salary grades and salary ranges for workers who transfer from Oracle affiliates in other countries (such as Oracle India Pvt. Ltd.) into jobs in the Product Development, Support, or Information Technology job functions at HQCA; and

f. YOUR use of COMPA-RATIO for workers who transfer from Oracle affiliates in other countries (such as Oracle India Pvt. Ltd.) into jobs in the Product Development, Support, or Information Technology lines of business at HQCA.

12. YOUR policies, practices, and procedures in assigning of workers in the Product Development, Support, and Information Technology job functions at HQCA between January 1, 2013, to the date of the deposition to products during the time they worked for YOU, and the impact of their assignments on their COMPENSATION. This includes:

a. The method of setting initial job, product, and team assignments for YOUR employees at the time of hire, to include who makes the assignment decision, the factors considered when making this decision, the evaluation and weighting of these factors;

b. The process by which YOUR employees transfer between different jobs and products at HQCA or receive promotions from one of them to another, including the method and means for an employee to seek a promotion or transfer, the method and means for YOU to direct a promotion or transfer, the factors considered by YOU in determining whether to permit a promotion or transfer and any method or means used by YOU to inform YOUR employees of the opportunity to transfer and/ or be promoted for a different job or product; and

c. The process by which YOU determine if a transfer and/ or promotion will result in a COMPENSATION change for an employee, including who is involved in making the COMPENSATION change determination, the factors considered by YOU in determining whether to change

> COMPENSATION, the method and means by which YOU change COMPENSATION.
>
> 30. YOUR policies, procedures, and practices related to how YOU gather and use information about the prior income earned by new hires, including YOUR use of this information to set pay for new hires.

Oracle made a number of general objections and objections to definitions, as well as particular objections to each designated topic.[4] As to topic 11, Oracle objected that the topic was vague and ambiguous and made improper assumptions about the process that budgets were allocated. It also objected that the topic was duplicative of depositions in *Jewett v. Oracle America, Inc.*, No. 17-CIV-02669 ("*Jewett*"), a California state law case pending in the Superior Court for San Mateo County that raises some similar claims. Next, Oracle objected

> on the ground that [the topic] is overbroad, unduly burdensome, and oppressive, particularly because it is unreasonable for Oracle to produce a witness capable of testifying as to all the factors and criteria Oracle considers in setting, awarding, or changing compensation for any given individual in the Product Development, Support, or Information Technology job functions at HQCA given that decision-making is decentralized and involves hundreds of individual front-line and higher level managers, with any given employee's compensation often impacted by the decisions of multiple such managers.

Oracle represented that it was willing to meet and confer further on the topic.

As to topic 12, Oracle incorporated its general objections and added:

> Oracle also objects to the incorrect premise embedded in this topic that Oracle "assigns" employees or directs or controls the jobs to which potential employees apply as potential hires self-select the jobs to which they apply. Oracle further objects to this topic on the ground that it is overbroad, unduly burdensome, and oppressive, particularly because it is unreasonable for Oracle to produce a witness capable of testifying on company-wide compensation "practices" given that decision-making is decentralized and involves hundreds of individual front-line and higher level managers, with any given employee's compensation often impacted by the decisions and "practices" of multiple such managers.

Oracle was willing, however, to produce a witness or witnesses "to testify generally as to the policies, practices, and procedures regarding the determination of initial compensation and compensation changes for employees in the Product Development, Support, and Information Technology job functions at HQCA between January 1, 2013 and January 18, 2019."

In response to topic 30, Oracle objected that it was "overbroad, unduly burdensome, and oppressive, particularly because it is duplicative of testimony and information already provided through the production of transcripts of depositions taken in the *Jewett* matter, as the parties previously discussed the possibility of curtailing and limiting depositions based on the production of

[4] The objections are found in PX E.

those transcripts." Oracle expressed willingness to meet and confer on the topic, "but takes the position that it should not have to produce additional testimony on this topic in light of the multiple PMK witnesses in *Jewett* who already have testified on it, and given that Oracle already has produced the *Jewett* PMK deposition transcripts that have already produced to OFCCP."

The second set of designated matters at issue in this motion concern Oracle's recordkeeping practices:

> 9. YOUR policies and practices regarding document retention and/or destruction and computer-based record-keeping. This includes all personnel or employment records made or kept by YOU to comply with OFCCP regulations; and includes YOUR written affirmative action program and its documentation.
>
> 18. YOUR policies, procedures, and practices related to how YOU fulfill YOUR legal obligations pursuant to 41 C.F .R. 60-1.12(b), 60-1.40(a)(1), 60-1.40(b), 60-2.10(c), and 60-2.11 through 60-2.17.
>
> 19. YOUR policies, procedures, and practices related to how YOU make, keep, and maintain all personnel or employment records to comply with OFCCP regulations.
>
> 26. YOUR policies, procedures, and practices related to developing and maintaining: how YOU identify or determine problem areas, action-oriented programs, and internal audit and reporting systems under 41 C.F.R. 60-2.17(b) through (d).
>
> 27. YOUR policies, procedures, and practices related to creating, maintaining, and make available for inspection YOUR information on impact pursuant to 41 C.F.R. 60-3.4 and 60-3.15.

In reply to topic 9, Oracle made its general/definition objections and then specifically objected

> to the extent that it seeks information or materials that are not relevant to the specific conduct alleged by OFCCP, causes of action or defenses thereto. Oracle also objects on the ground that it previously produced Lisa Ripley as a deponent on this topic, and OFCCP elected to conduct an interview in lieu of a deposition. Oracle also objects to this topic to the extent that it seeks information or materials subject to the attorney-client privilege, the attorney work product doctrine, or any other privilege.

For topic 18, Oracle specifically objected that:

> Oracle objects to this topic to the extent it reaches topic matter that is irrelevant to the claims alleged in OFCCP's Second Amended Complaint and seeks to expand OFCCP's allegations to include a deficiency claim related to the compliance of Oracle's Affirmative Action Programs with regulatory requirements, which is not a proper topic of discovery. The ALJ made clear in his March 13, 2019, Order Filing Revised Second Amended Complaint that any such deficiency claim would be objectionable as it "would take the litigation in a new and different direction," and would require the assessment of requirements "that were not at issue in the

compliance review or in this case up to this point." The Order further stated that the ALJ did not read OFCCP's Second Amended Complaint to "require examining the substantive merits of the Affirmative Action Program." The CPR sections referenced in this topic cover a variety of regulatory requirements, only some of which relate to the keeping of records related to compliance and making such records available for review. To the extent OFCCP seeks a witness to testify to matters relating to the "substantive regulatory requirements of an Affirmative Action Program," or matters otherwise beyond those contemplated by the ALJ's March 13 Order, Oracle objects to the topic as impermissible and beyond the scope of relevant discovery. Oracle also objects to this topic to the extent that it seeks information or materials subject to the attorney-client privilege, the attorney work product doctrine, or any other privilege.

Somewhat similarly, as to topic 19, Oracle specifically objected that:

it is irrelevant to the claims alleged in OFCCP's Second Amended Complaint and seeks to expand OFCCP's allegations beyond those actually pled. Oracle objects to this topic to the extent that it seeks information related to the substantive regulatory requirements applicable to Oracle's Affirmative Action Program or information related to Oracle's Affirmative Action Program beyond the keeping of records related to compliance and the making of such records available for review. Oracle also objects to this topic to the extent that it seeks information or materials subject to the attorney-client privilege, the attorney work product doctrine, or any other privilege.

And as to Topic 26:

Oracle objects to this topic on the ground that it is irrelevant to the claims alleged in OFCCP's Second Amended Complaint and seeks to expand OFCCP's allegations to include a deficiency claim related to the compliance of Oracle's Affirmative Action Programs with substantive regulatory requirements. It is therefore not a proper topic of discovery. The ALJ made clear in his March 13, 2019, Order Filing Revised Second Amended Complaint that any such deficiency claim would be objectionable as it "would take the litigation in a new and different direction," and would require the assessment of requirements "that were not at issue in the compliance review or in this case up to this point." The Order further stated that the ALJ did not read OFCCP's Second Amended Complaint to "require examining the substantive merits of the Affirmative Action Program." As stated, this topic goes beyond the limits set by the March 13 Order and seeks irrelevant information relating to Oracle's Affirmative Action Program generally. Oracle also objects to this topic to the extent that it seeks information or materials subject to the attorney-client privilege, the attorney work product doctrine, or any other privilege.

Finally, in reply to Topic 27:

Oracle objects to this topic on the ground that it is irrelevant to the claims alleged in OFCCP's Second Amended Complaint and seeks to expand OFCCP's allegations beyond those actually pled. Oracle objects to this topic to the extent that it seeks

> information related to the substantive regulatory requirements applicable to Oracle's Affirmative Action Program or information related to Oracle's Affirmative Action Program beyond the keeping of records related to compliance and the making of such records available for review. Oracle also objects to this topic to the extent that it seeks information or materials subject to the attorney-client privilege, the attorney work product doctrine, or any other privilege.

The parties engaged in some meet and confer efforts regarding their disputes, but were unable to mutually resolve their issues in a satisfactory manner.[5] During that process, there were issues with delayed meet and confer meetings, with Oracle unable or unwilling to schedule conferences in a timeframe OFCCP thought should be appropriate. OFCCP broached a requirement of meet and confer availability within three days, but no specifics were discussed and no agreement was reached.

OFCCP contends that the issues presented go to the "core" of this case. PM at 1. It asks for an order compelling Oracle to produce a witness to testify about factors affecting employee compensation (topics 11, 12, 30) and Oracle's recordkeeping practices (topics 9, 18, 19, 26, and 27). *Id.* at 5. It also requests that "the temporal scope of deposition topics extend beyond the subject period to the time of the deposition, as it is relevant to the alleged ongoing violations." *Id.* Next, OFCCP asks that I order the parties to specify a time to meet and confer within three days of any request. *Id.* Finally, OFCCP asks that I implement a procedure whereby I will be on call during depositions to "expeditiously resolve any disputes, objections or instructions to avoid further delays and discovery motion practice." *Id.* at 5-6.

Oracle argues that OFCCP did not comply with the meet and confer requirements in that the parties were still in the process of negotiating when OFCCP filed its motion. DO at 2. As to the "employee compensation" topics, Oracle clarifies that it is willing to produce a witness, but seeks to have OFCCP held to its promise to narrow the scope of the deposition based on the overlapping depositions in *Jewett*. *Id.* at 1. Oracle contends that the "recordkeeping practices" topics go beyond the scope of this case in that they delve into the substantive requirements of an Affirmative Action Plan, which is not an issue in this matter. *Id.* at 2. Oracle also contends that the temporal limit for the depositions should be the agreed document discovery cutoff date, January 18, 2019.[6] *Id.*

B. Meet and Confer Requirements

The Pre-Hearing Order in this case contains a meet and confer requirement:

> The parties must meet and confer prior to filing any motion. They must actually engage in a good faith, verbal discussion to resolve the dispute prior to seeking court intervention. The parties must include a statement that the meet and confer has occurred and the position of each party when the motion is filed. No meet and confer is required for any dispositive motions, but for all other motions, including any in limine motions and any *Daubert* objections, proof of the meet and confer is required.

---

[5] The meet and confer correspondence is in PX A, PX B, PX C and PX F, as well as DX E, DX F, DX G, DX H, DX I, DX J, DX K.

[6] Aside from questions of relevance, which is a threshold issue, objections and arguments not briefed are waived.

Pre-Hearing Order at 3.

Oracle contends that the process was not complete in this case in that OFCCP prepared and filed its motion while the parties still had meet and confers planned and had not reached an impasse. It also complains about delays in OFCCP's responses to its letters/requests to meet and its alleged failure to engage the disagreements at issue in full. DO at 5; *see also* DX I; DX J; DX K. Oracle argues that since the meet and confer process was ongoing, the motion should be denied as premature. It also complains that in that process Oracle made compromises and produced documents, but OFCCP has "refused to budge while accusing Oracle of misconduct," and that "[r]ather than work with Oracle to address its objections and streamline discovery, OFCCP has treated the meet and confer process as a mere box to check and brought this motion before that process has concluded." DO at 14-15.

As I recently informed the parties, the meet and confer requirements are not idle and I will deny motions when no meet and confer has occurred. At the same time, the meet and confer requirement is also not a litigation tool to delay matters by delaying meetings or simply maintaining that progress might still be made. I have reviewed the meet and confer correspondence submitted, as well as the declarations. The process was far from ideal, and further progress might have been made if both parties worked together in good faith.

But while the process was not ideal, Oracle does not have clean hands in this matter. The need for some delay in arranging for meetings is understandable, but in a case with a large number of attorneys doing work on both sides, there is no good reason that requested meet and confer conferences cannot be arranged within five business days. The point of meet and confer is to have the parties engage in some actual discussion before bringing the matter for adjudication. I find that enough of a process occurred in this instance to satisfy the requirement.

C. Topics 11, 12, and 30

As to the "employee compensation" topics (11, 12, 30), OFCCP contends that they are directly relevant and that it would be "absurd" and "perverse" to limit its depositions on the grounds that Oracle also was deposed in a related case. OFCCP represents that it intends to use the *Jewett* depositions to streamline questioning, but that it should not be required to forfeit its depositions and ability to "make its own decisions on which questions to ask and how, which exhibits to ask about and how, and whether to seek clarification or elaboration from witnesses on specific answers." PM at 9-10; *see also* GD; PX F. As to Topic 12 in particular, OFCCP deems it important to receive testimony about how jobs and work roles given its claim in the SAC that Oracle assigns workers in a discriminatory manner, but maintains that even if Oracle is correct that it plays no role in placement, it should produce a witness to testify to that fact. PM at 11-12. OFCCP further contends that it would be a violation not to have company-wide compensation practices and so unless Oracle is committing additional violations, it should not be burdensome to produce a witness on this topic. *Id.* at 12-13. It makes the same arguments as to topic 11, adding that there is evidence that compensation decisions are subject to review by senior leadership. *Id.* at 13-14; *see also* PX G; PX H.

Oracle represents that it has worked "tirelessly" to respond to "voluminous discovery requests" and that it produced the overlapping *Jewett* depositions to OFCCP only on the agreement that OFCCP would review those deposition transcripts and on that basis narrow the topics for

30(b)(6) depositions in this case. DO at 3-4; *see also* RD at ¶ 4-6; DX B; DX C; DX D. It avers that OFCCP has not lived up to that agreement in that it sought the depositions at issue here on the same day that it received the *Jewett* depositions and has subsequently refused to narrow the topics to reflect matters already covered in the *Jewett* depositions. DO at 4-5; *see also* DX I; DX K. Oracle states that it is willing to produce a witness it response to the topics at issue. DO at 8-9; *see also* DX F. But it argues that OFCCP should be held to its agreement to narrow the scope of those topics in light of the *Jewett* depositions and not seek testimony on overlapping topics. DO at 6. It complains that OFCCP's representations have been "illusory" and fail to reduce the burden on Oracle and its witnesses to prepare for the depositions because the topics themselves are not narrowed. *Id.* at 6-7. In Oracle's view, the dispute is about holding OFCCP to its promises about efficient discovery.[7] *Id.* at 7-8.

There is no dispute that these topics are relevant and Oracle does not oppose producing a witness to discuss portions of them. Oracle's opposition, rather, is based on the assertion that OFCCP promised to narrow the topics based on the overlapping *Jewett* depositions, but has not done so. To begin with, I agree that just because there are overlapping depositions does not render depositions in this case improper. Overlapping is not equivalent, and OFCCP has a right in discovery to probe different aspects of the topics designated and to probe the overlapping areas in a different way. OFCCP also makes a compelling point in regards to topic 12—if the topic is poorly formulated because Oracle does not assign employees to jobs, then Oracle can prepare a witness to testify to that point in response to that aspect of the topic. The same holds for Oracle's alleged decentralization—a responsive witness on the topic may simply make that point under oath on Oracle's behalf.

Oracle focuses on representations about efficiency made by OFCCP, but it overstates OFCCP's representations and, having reviewed the exhibits, I do not find any promise that could be enforced and the actual statements are more equivocal than firm promises. *See* DX B; DX C. I do not read too much into OFCCP's noticing depositions the same day the *Jewett* transcripts were received, but it is troubling that even after receiving the *Jewett* depositions OFCCP's attorneys maintain that it would not limit the topics. *See* DX E. With its current motion, one of OFCCP's attorneys declares that OFCCP does not intend to be duplicative, *see* GD, and I will not restrict OFCCP's depositions on this basis. But OFCCP should make a good faith effort to narrow the topics for the overlapping depositions in this case and to share the claimed efficiency gains with Oracle and the designated witnesses by providing information about how the 30(b)(6) deposition topics will be narrowed. No later than 7 days before each scheduled 30(b)(6) deposition, OFCCP shall provide counsel for Oracle with a written statement of which topics have been narrowed or a brief explanation of why narrowing was not possible.

Oracle also argues that the motion as to these topics should be denied because it is unduly burdensome. Oracle complains that it is too burdensome on it and its employees to have to prepare and sit through depositions that are redundant. It contends that the broad range of topics listed requires substantial preparation, even if OFCCP decides later to limit the length of the deposition. It notes that Ms. Waggoner has already provided three depositions that are available to OFCCP, including a personal deposition in this case, and that the other witnesses likely to appear in the

[7] Oracle argues that argues that the case relied upon by OFCCP—*American Airlines, Inc. v. Travelport Ltd.*, No. 4: 11-CV-244-Y, 2012 WL 12884824 (N.D. Tex. Sept. 19, 2012)—is off-point because it involved no prior agreement between the parties to limit the scope of the depositions. DO at 7.

30(b)(6) depositions have been previously deposed as well. DO at 9-10; *see also* RD at ¶ 26. Oracle further complains that OFCCP has rejected proposals to streamline the process and reduce burdens on witnesses, for instance by combining 30(b)(6) and personally depositions, and demanding that Ms. Waggoner be flown from Denver to San Francisco for another deposition on the same topics. *Id.* at 10; *see also* RD at ¶ 16.

Oracle's claimed burdens are overstated. Though the individuals chosen by Oracle may have already been deposed personally, these are not repeat depositions—a 30(b)(6) deposition is of the organization, not the individual selected to respond on behalf of the organization. Moreover, repeated depositions in different cases is a hazard of being party to multiple suits. If Oracle's compensation practices draw scrutiny in multiple forums, it will have to answer questions in multiple forums. I also find that the amount of preparation involved is somewhat exaggerated. If, as Oracle contends, the topics here largely overlap with those in the *Jewett* depositions, it will already have prepared witnesses to give testimony on behalf of the organization. Updated preparation will be needed, but Oracle will not need to start from scratch. Efficiency is not the only consideration, and I agree with OFCCP that depositions on behalf of Oracle on these topics is important for the resolution of that case. That importance outweighs the burdens Oracle alleges.

D. Topics 9, 18, 19, 26, and 27

OFCCP asserts that the "records retention" topics (9, 18, 19, 26, 27) "are directly relevant to OFCCPs [sic] claim that Oracle failed to maintain and make available to OFCCP documentation of its compliance with its obligations, including the obligation to develop and maintain an Affirmative Action Program as required under the regulations." PM at 14. It asserts that the topics were drafted in light of the SAC that was approved and filed and represents that it does not intend to expand the litigation into new areas. "Rather, OFCCP seeks information on how, or if, Oracle complied with its recordkeeping obligations, which OFCCP claims Oracle did not do." *Id.* at 14-15.

Oracle contends that these topics go to the substance of its Affirmative Action Plan ("AAP") and are not, as represented, merely probes of recordkeeping. It argues that in the March 13, 2019, Order Filing Revised Second Amended Complaint I understood the complaint to not contest the substantive requirements of an AAP, but that these topics, when appreciated, do precisely that. DO at 11-12. It recognizes that topic 9 is more generally stated, but contends that it is really an attempt to expand the complaint into the substantive requirements of the AAP. It takes the position that "OFCCP may only inquire into documents actually required to be made available under AAP regulations. It does not have carte blanche to investigate 'all personnel or employment records' that may have been used or considered, however minimally, 'to comply' with AAP regulations." *Id.* at 12-13. Oracle notes that it already produced a witness in relation to "Oracle's high-level document and recordkeeping policies." *Id.* at 12 n.10; *see also* RD at ¶ 27. Finally, Oracle argues that given the portions of this case that have settled, topic 27 is now moot. DO at 13.

To begin with, I agree that topic 27 is moot. On April 30, 2019, I issued an Order Adopting Consent Findings regarding College Recruiting Program Allegations that resolved, as represented by the parties "hiring and related recordkeeping allegations in connection with Oracle's College Recruiting (CR) program as set forth in OFCCP's [SAC] including but not limited to ¶¶ 33-40, 44(b), 44(e), 46, and 48." Consent Findings and Order (Arp. 25, 2019) at 1. Topic 27 relates to 41 C.F.R. 60-3.4 and 60-3.15, which are both part of the regulations concerning employee selection procedures and deal with recordkeeping requirements related to those procedures. After the depositions were

originally noticed, the related claims settled and it has not explained what other relevance this topic might have. Therefore, inquiry into topic 27 is excluded.

Turning to the AAP-related topics, the SAC alleges:

> Oracle failed to maintain and make available to OFCCP documentation of its compliance with its obligation to develop and maintain an Affirmative Action Program by failing to maintain and make available documentation of its organizational profile, job group analysis, placement of incumbents in job groups, determination of availability, comparing incumbency to availability, placement goals, and internal audits of its employment processes…

SAC at ¶ 47. Oracle objected to this part of the SAC on the grounds that this allegation was improper in an amended complaint because it expanded the issues beyond those that were part of the compliance review and prior complaints. I overruled this objection, explaining:

> I do not understand OFCCP to be attempting to take this litigation in the direction envisioned by Oracle. In the March 6, 2019, order, I was concerned about whether or not OFCCP was attempting to amend the complaint and assert that based on a substantive analysis of the Affirmative Action Program developed and maintained by Oracle, it is deficient in some way because it is inconsistent with the substantive regulatory requirements of an Affirmative Action Program. That sort of amendment would be problematic because it would take the litigation in a new and different direction, requiring assessing compliance with a broad swathe of requirements that were not at issue in the compliance review or in this case up to this point. Oracle's objection focuses on the reference to the various aspects of the required documentation, which viewed alone could seem to be implicating a deficiency claim. But the verbs describing Oracle's alleged violation are more important—in sequence OFCCP alleges a failure to "maintain and make available," to "develop and maintain," and to "maintain and make available." I read and understand this as another compliance claim, which is also consistent with OFCCP's emailed communication to Oracle about ¶ 47 attached to Oracle's letter. I do not understand this to be a "deficiency" claim that would require examining the substantive merits of the Affirmative Action Program. Therefore, I will allow this proposed amendment.

Order Filing Revised Second Amended Complaint at 2. OFCCP did not contest or correct my understanding of what was at issue in the SAC in relation to the AAP.

In discovery, "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). But discovery must be relevant to the claims and defenses pled in the case—discovery is not a tool "to develop new claims or defenses that are not already identified in the pleadings." Fed. R. Civ. P. 26 Advisory Committee Note to the 2000 Amendment to Subdivision (b)(1). So inquiry into whether, in fact, Oracle "developed" and "maintained" an AAP is relevant—inquiry into whether the AAP that was developed and maintained was adequate or compliant is not. If OFCCP wants to probe those points, it will need to follow its own procedures and engage in an investigation followed by conciliation. If OFCCP

believed that my interpretation of the SAC was wrong, it should have contested that interpretation at the time.

Topic 18 concerns "policies, procedures, and practices related to how YOU fulfill YOUR legal obligations pursuant to 41 C.F.R. 60-1.12(b), 60-1.40(a)(l), 60- 1.40(b), 60-2.10(c), and 60-2.11 through 60-2.17." These regulations are all cited in ¶ 47 of the SAC, but with one *very* significant difference:

> *See* 41 C.F.R. §§ 60-1.12(b) ("A contractor ... must maintain its current AAP and documentation of good faith effort..."), 60-l.40(a)(l) [(]"Each nonconstruction ...contractor must develop and maintain a written affirmative action program for each of its establishments"), 60-1.40(b) ("Nonconstruction contractors should refer to part 60-2 for specific affirmative action Requirements"), 60-2.l0(c) ("Contractors must maintain and make available to OFCCP documentation of their compliance with §§ 60-2.11 through 60-2.17").

41 C.F.R. §§ 60-1.12(b), 60-1.40(a)(l), and 60-2.10(c) are all regulations addressing the development and maintenance of an AAP. They are proper topics of inquiry. 41 C.F.R. § 60-1.40(b) merely points to what an Affirmative Action Plan is. It contains no independent legal obligations. If taken to implicate whether or not the requirements in part 60-2 are met, this would expand the complaint into the substance of an AAP. It is thus not an appropriate topic of inquiry. The significant difference is that 41 C.F.R. §§ 60-2.11 through 60-2.17 were *not* part of the list of regulations at issue in the SAC—in the section above they appear *only* in a quotation from the recordkeeping provision in 41 C.F.R. § 60-2.10(c). Whether or not, and how, Oracle complied with its legal objections in 41 C.F.R. §§ 60-2.11 through 60-2.17 is not an issue in this case. The notice of deposition, however, tacitly and perhaps inadvertently moved "60-2.11 through 60-2.17" from a quote in a parenthetical into the list of regulations at issue. OFCCP may not shoehorn a substantive probe of Oracle's AAP into a recordkeeping allegation. Topic 18 is thus appropriate as to 41 C.F.R. §§ 60-1.12(b), 60-1.40(a)(l), and 60-2.10(c) but inappropriate as to 41 C.F.R. § 60-1.40(b) and 41 C.F.R. §§ 60-2.11 through 60-2.17.

Topic 26 also goes beyond the scope of the SAC. The SAC alleged that Oracle had "refuse[d] to produce any detailed compensation structure, conducted pursuant to 41 C.F.R. § 60.2.17(b)-(d)..." and "provide any evidence that it complied with the other requirements of 41 C.F.R. § 60-2.17." SAC at ¶ 45; *see also id.* at ¶ 44(d). Topic 26 attempts to probe Oracle's "policies, procedures, and practices related to developing and maintaining: how [Oracle] identif[ies] or determine[s] problem areas, action-oriented programs, and internal audit and reporting systems under 41 C.F.R. 60-2.17(b) through (d)." That is not a recordkeeping inquiry and would lead into substantive examination of Oracle's compliance with the AAP requirements, exceeding the scope of the SAC as understood when filed.

Topics 9 and 19 are more general. Topic 19 queries Oracle's "policies, procedures, and practices related to how [Oracle] makes, keeps, and maintains all personnel or employment records to comply with OFCCP regulations." This is a proper topic of inquiry, but *only* as to the OFCCP regulations specifically at issue in the SAC that remain at issue. Oracle must produce a witness to testify on the topic, but limited in that important respect. Topic 9 is an even more general probe into all of Oracle's document retention and recordkeeping procedures. This topic has some background relevance, but it is uncontroverted that Oracle already produced a witness to address it.

See RD at ¶ 27. No compelling reason has been given as to why it must do so again. Topic 9 will therefore be removed.

In sum, Oracle must produce a witness to testify as to topic 18 limited to 41 C.F.R. §§ 60-1.12(b), 60-1.40(a)(l), and 60-2.10(c) and topic 19 limited to the OFCCP recordkeeping regulations specifically at issue in the SAC. It need not produce a witness to address other aspects of topics 18 and 19 or to address topics 9, 26, and 27.

E. Temporal Limit on Testimony on Deposition Topics

OFCCP argues that it is entitled to seek testimony covering the identified topics through the date of the deposition and argues that the cut-off for document production, January 18, 2019, should not apply to depositions since OFCCP is alleging continuing violations. PM at 15. Oracle opposes this request and contends that the temporal limit of the 30(b)(6) depositions should be the mutually agreed document discovery cutoff date. DO at 2-3, 13. Oracle explains that it believes a later date would create difficulties because witnesses would be required to review and be prepared to testify about documents post-dating the cut-off date, creating a back-door to discovery beyond the agreed scope of discovery and leading OFCCP to seek to re-open document discovery. DO at 13. Oracle avers that it had proposed a compromise and believes that the parties could have resolved the issue, but that OFCCP went ahead with its motion. Oracle thus asks that the temporal scope be limited to January 18, 2019, and that I "make clear that OFCCP cannot use its depositions to reopen discovery to seek documents beyond the Parties' agreed-upon cutoff date." *Id.* at 13-14; *see also* DX L.

This case involves allegations of ongoing violations, but at some point discovery has to be cut off so that the issues can be framed for trial. In this briefing, both OFCCP and Oracle agree that January 18, 2019, is the agreed cut-off point "for the purposes of document production" or "mutually agreed-upon document and data discovery cutoff date." PM at 15; DO at 13. This is somewhat puzzling. On June 10, 2019, I issued an order that addressed, in large part, Oracle's motion to compel further document production. A cutoff date for document production was not referenced in that briefing and was not included in the resulting order. The agreement Oracle points to from the correspondence actually discusses the cut-off date for *data* production. *See* DX L. Data production and document production are not equivalent. The agreed cut-off date for data production makes sound sense—at some point both parties need to have a stable, defined basis for statistical analysis. An end-date for document production is needed as well, but that appears to be reflected in the parties' other agreements about discovery.

I agree that some temporal limit is needed for the 30(b)(6) depositions. Since the witnesses will be testifying on behalf of Oracle and not necessarily based on personal knowledge, Oracle will need to prepare the designated witnesses for the deposition by educating them about the collective knowledge of the organization. *See, e.g., Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) ("The deponent [organization] must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources"). To make the preparation workable here, Oracle shall have the duty of designating and preparing a witness or witnesses to testify on its behalf with information and documents available through the date of this order. The designated witnesses may be asked to testify beyond that limit based on their personal knowledge.

F. Ancillary Issues

In the introductory sections of its motion, OFCCP raised two ancillary points: 1) a request that I order the parties to specify a time to meet and confer within three days of any request; and 2) a request that I implement a procedure whereby I will be on call during depositions to "expeditiously resolve any disputes, objections or instructions to avoid further delays and discovery motion practice." PM at 5-6. These points are not discussed further by OFCCP. In a note, Oracle contends that OFCCP's meet and confer request is "vague and unclear" and "ignores the realities of litigation" in which counsel may not be available to meet on demand due to other commitments. DO at 7 n.3. It also represents that OFCCP has not adhered to its proposed timelines. *Id.* Oracle does not address the passing request by OFCCP that I arrange to be available during the parties' depositions.

OFCCP's proposal of a more definite timeline for meeting and conferring is worth considering, but is not properly developed and presented as an issue ripe for decision. This is a matter that is better addressed between the parties in any event, since this is a process that they need to make work. The request that I be on call for the parties while they are taking depositions so that any objections can be presented immediately is not well taken. "A discovery motion is a last resort, to be used only if a discovery dispute cannot be resolved by the parties themselves." *Morgan Hill Concerned Parents Ass'n v. Cal. Dep't of Educ.*, No. 2:11-cv-3471 KJM AC, 2016 U.S. Dist. Lexis 109451, at *7 (E.D. Cal. Aug. 17, 2016). There are established rules and protocols for dealing with objections during depositions. The lawyers involved in this case are highly-accomplished professionals and I am confident that they will be able to complete the depositions without judicial micromanaging.

ORDER

1. Plaintiff's Motion to Compel Deposition of Oracle America, Inc. Pursuant to 41 C.F.R. § 60-30.11 and Federal Rule of Civil Procedure 30(b)(6) is granted in part and denied in part.

2. The motion is granted as to topics 11, 12, and 30. Within 7 days of the scheduled depositions, OFCCP shall tell Oracle which topics will be narrowed based on the *Jewett* depositions or why no narrowing is possible.

3. The motion is granted as to topic 18 limited to 41 C.F.R. §§ 60-1.12(b), 60-1.40(a)(l), and 60-2.10(c) and topic 19 limited to the OFCCP recordkeeping regulations specifically at issue in the SAC.

4. The motion is denied as to other aspects of topics 18 and 19 and as to topics 9, 26, and 27.

5. The temporal limit of the depositions in relation to Oracle's preparation of witnesses capable of testifying on Oracle's behalf is the date of this order.

6. The parties shall meet and confer to schedule deposition dates, which shall be taken in a reasonable time but not later than 30 days after the date of this order.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge