STEPHEN P. BERZON
ERIC P. BROWN
HAMILTON CANDEE
EVE H. CERVANTEZ
BARBARA J. CHISHOLM
JEFFREY B. DEMAIN
JAMES M. FINBERG
KRISTIN M. GARCÍA
EILEEN B. GOLDSMITH
MEREDITH A. JOHNSON
SCOTT A. KRONLAND
ANDREW KUSHNER
REBECCA C. LEE
DANIELLE E. LEONARD
STACEY M. LEYTON
TONY LOPRESTI
MATTHEW J. MURRAY
ZOE PALITZ
P. CASEY PITTS
DANIEL T. PURTELL
MICHAEL RUBIN
PEDER J. THOREEN
MEGAN WACHSPRESS

ALTSHULER BERZON LLP
ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 421-7151
FAX (415) 362-8064
www.altshulerberzon.com

FRED H. ALTSHULER
FOUNDING PARTNER EMERITUS

PETER D. NUSSBAUM
PARTNER EMERITUS

CORINNE JOHNSON
FELLOW

July 19, 2018

Via E-Mail
Erin M. Connell
Orrick, Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105-2669
econnell@orrick.com

Re: *Jewett et al. v. Oracle America, Inc.*, Case No. 17-CIV-02699 (San Mateo Super. Ct.)

Dear Erin:

This letter is a response to your June 22, 2018 letter regarding communications between Plaintiffs in this case and their counsel and DOL/OFCCP.

I. OFCCP and the *Jewett* plaintiffs have common interests in the same factual allegations and in obtaining relief for some of the same parties, and sharing privileged information was reasonably necessary to advance those shared interests.

In your June 22, 2018, letter, you argue that we have not shown a common interest with DOL/OFCCP, and, separately, that any disclosures were not "reasonably necessary" for our representation of our clients. But those questions are part of the same analysis.

You appear to argue that we cannot have a common interest with OFCCP unless OFCCP "represent[s] the *Jewett* plaintiffs" or the actions "have the same claims or causes of action." But matters of common interest to both parties do not require the same causes of action, and can include parties resolving "distinct" rights in "separate lawsuits" when they have "some common interests in obtaining legal advice." *Seahaus La Jolla Owners Association v. Sup. Ct.*, 169 Cal. Rptr. 3d 390, 406 (Cal. Ct. App. 2014). Our clients' litigation and OFCCP's certainly address common matters: the *Jewett* plaintiffs and DOL/OFCCP both claim that Oracle is discriminating on the basis of sex by paying female employees in specific job functions in the Redwood Shores

headquarters less than similarly situated males, *see* Amended Complaint ¶ 7, *OFCCP v. Oracle America, Inc.*, OALJ No. 2017-OFC-00006; Second Amended Class Action Complaint ¶ 11, *Jewett v. Oracle America, Inc.*, No. 17-CIV-02669; and OFCCP's complaint seeks "an order requiring Oracle to provide complete relief to the affected classes," which would include some of the *Jewett* plaintiffs, *see* Amended Complaint, *supra*, Prayer for Relief para. (d).

You have cited no authority to show that joint representation or common causes of action are required for the common interest doctrine to attach. In fact, "there is no talismanic method by which parties must prove that a common interest exists" under California law. *Roush v. Seagate Technology, LLC*, 150 Cal. App. 4th 210, 225 (2007) (contrasting a "talismanic method" with the required showing that "sharing . . . confidential information with [a third party] was reasonably necessary to advance [plaintiff's] case"); *see also STI Outdoor v. Superior Court*, 191 Cal. App. 4th 334, 341 (2001) (noting that litigation is not required for the common interest doctrine to apply, as "Evidence Code section[s] 912 and 952 do not use the terms 'litigation' or 'legal communications' . . . but specifically refer to 'the accomplishment of the purpose' for which the lawyer was consulted"). We have made such a showing of reasonable necessity here. The purpose for which we have been retained includes the representation of the *Jewett* plaintiffs in their equal pay action against Oracle, as well as advising them on legal options to address their claims, for which OFCCP's action is relevant. OFCCP's litigation against Oracle includes allegations that Oracle paid women, including our clients and putative clients, less than it paid similarly situated men. Sharing information with DOL/OFCCP is therefore reasonably necessary in this case to "advance . . . shared interests in securing advice on similar legal and factual issues." *Seahaus*, 169 Cal. Rptr. 3d at 406.

California courts have found that disclosures furthered the interests of clients when the information is shared with "attorneys for the [client] in other matters" and "agents of the party or his attorneys on matters of joint concern." *Insurance Co. of N. Am. v. Sup. Ct.*, 108 Cal. App. 3d 758, 766 (1980) (emphasis omitted) (citing *Cooke v. Sup. Ct.*, 83 Cal. App. 3d 582, 558 (1978)). OFCCP is seeking relief for our clients on "matters of joint concern," and as in *Insurance Co.* and *Cooke*, disclosures in this case do not waive any privileges.

You again analogize this case to *McKesson HBOC, Inc. v. Superior Court*, but the comparison is inapposite. *McKesson* found that the *target* of a government investigation waived privilege when sharing information with the government, but accepted that the common interest doctrine could apply between "parties aligned on the same side in an investigation or litigation." 115 Cal. App. 4th 1229, 1238 (2004). Both the Complaint in this action and OFCCP's Complaint against Oracle seek relief for some of the same class of workers, and make several identical factual allegations. That demonstrates both common interest and the reasonable necessity of sharing information about those plaintiffs and allegations.

II. We have an expectation of confidentiality in communications with OFCCP.

Your letter relies solely on FOIA to challenge our expectation of the confidentiality of any information shared with OFCCP. FOIA only applies to agency records, so to the extent that Interrogatory No. 13 requests descriptions of any conversations, FOIA cannot remove the expectation of confidentiality for any information that is not preserved in available records by OFCCP. In addition, we have demonstrated a "reasonable expectation that information disclosed will remain confidential" sufficient to apply the common interest doctrine to all shared materials. *OXY Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, 891 (2004).

Your primary argument about FOIA appears to turn on the fact that *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272 (4th Cir. 2010), was, in your view, "wrongly decided" under *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). But *Hunton* relies on *Klamanth* significantly and holds that exempting communications between the government and third parties with common interests from FOIA is consistent with the Supreme Court's holding in *Klamanth*. *See Hunton*, 590 F.3d 272, 279–80. *Hunton* is sufficient to provide us with a reasonable expectation that information shared with OFCCP will be kept confidential. Your letters of May 28 and June 22 cite no authority holding that FOIA "obliterates" the expectation of privacy under California's common interest doctrine, let alone showing that a "reasonable expectation of confidentiality" would require a trial court judges to decide a Circuit split about FOIA to resolve a discovery question. Instead, the test for reasonable expectation of confidentiality in *McKesson* allows that "there is an interest in confidentiality when the parties' individual cases might be damaged if work product were to be disclosed." 115 Cal. App. 4th at 1240. That is certainly the case here, where both parties litigating against Oracle could damage their cases by disclosing work product.

Additionally, while the fact patterns in *Hunton* and this case are not identical, nothing in *Hunton* indicates that the public interest driving the government's involvement must be to "prevent a loss for the government," as your letter claims. OFCCP's mission is to "protect workers, promote diversity and enforce the law," *About OFCCP*, U.S. Dep't of Labor, https://www.dol.gov/ofccp/aboutof.html, and it can further those interests by investigating our clients' experiences and sharing information to "advance its legal interest in connection with litigation relating to possible violations of . . . Executive Order 11246," Common Interest Agreement at 2. We have a reasonable expectation that OFCCP can therefore show sufficient public interest behind their involvement should a FOIA request be made and result in litigation. Beyond that, you have shown no authority that requires us to defend a still-hypothetical FOIA claim on the government's behalf in initial proceedings between our clients and Oracle. In fact, such a requirement would violate the purposes under which FOIA was enacted. *See Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982) ("The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery."); *Kirk v. U.S. Dept. of Justice*, 704

F. Supp. 288, 291 (D.D.C. 1989) ("[W]hen plaintiffs seek information that they could at least attempt to get through traditional discovery means, the court hearing the FOIA action should be wary of using FOIA to circumvent reasonable restrictions on discovery, absent a strong public interest . . . *outside* of the private suit.").

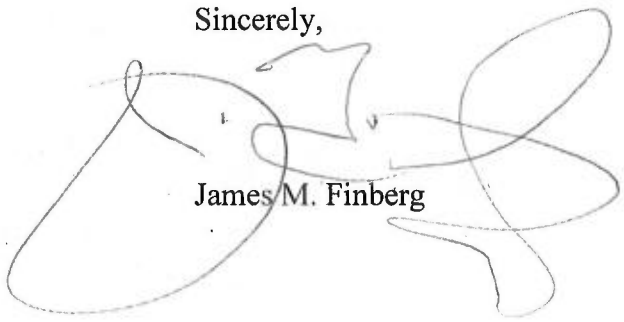
III. The Written Common Interest Agreement with DOL was preceded by an Oral Agreement

The Oral Agreement between Plaintiffs in this case and their counsel was formed on Friday August 25, 2017 in a conversation between me an attorney from the DOL.

IV. The Materials Sought Are Not Relevant To Any Dispute In This Lawsuit.

To the extent there have been any communications between Plaintiffs or their Counsel and OFCCP attorneys that are not otherwise work product or privileged, such communications are also not relevant to any claim or defense in this action. While underlying facts about Oracle's compensation system and unequal payment of women employees would be relevant and discoverable (and obtainable through other discovery), the fact of a communication between OFCCP and Plaintiffs or their Counsel is not itself relevant. Rather, these discovery requests appear to be an improper attempt to gain insight into the legal strategies of OFCCP and Plaintiffs' Counsel, all of which is protected work product.

Sincerely,



James M. Finberg