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**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,**

Plaintiff,

v.

ORACLE AMERICA, INC.

Defendant.

Case No. 2017-OFC-00006

**OFCCP'S MOTION FOR A RULING OVERRULING ORACLE'S OBJECTIONS
REGARDING THE TEMPORAL SCOPE OF DISCOVERY**

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I. INTRODUCTION

The Office of Contract Compliance Program's ("OFCCP") brings this motion to require Oracle America, Inc. ("Oracle") to produce non-privileged responsive discovery relevant to the time period of the violations alleged in the Amended Complaint, January 1, 2013 to the present. Oracle has steadfastly refused to produce documents or witness testimony outside a narrow time window that corresponds neither to the review period nor to the allegations in the complaint. Oracle makes the extraordinary claim that it gets to decide the temporal scope of this action and the compliance review by asserting that OFCCP is barred from obtaining discovery that does not correspond to the narrow window for which Oracle produced documentation during the compliance review (January 1, 2013 through June 30, 2014 for the hiring discrimination claims and 2014 for the compensation discrimination claims).

Arguments less extreme than Oracle's have been repeatedly rejected by the courts and it is long settled that the Executive Order "contains no time limits on the periods that the Government can engage in discovery, so long as the discovery is related to the contractor's compliance with the Executive Order." *OFCCP v. Uniroyal, Inc.*, 77-OFCCP 1 at *10 (Sec'y June 28, 1979).¹ Accordingly, OFCCP respectfully requests that this Court issue an order

¹ Oracle's unfounded positions with respect to the temporal scope of discovery are part of a larger pattern in which Oracle insists, regardless of precedent or context, that it unilaterally gets to control all aspects of this matter, including the temporal scope of discovery, the manner in which OFCCP maintains documents (*See* Oracle's Motion for Protective Order), and the manner in which conciliation was to be conducted (*See* Oracle's Summary Judgment Motion for Failure to Conciliate ("MSJ"), which does not contest that OFCCP made efforts to conciliate but dismisses those efforts as shams simply because OFCCP did not acquiesce to Oracle's numerous unreasonable demands). Indeed, Oracle even reserves the right to challenge the legitimacy of this Court should this Court issue rulings adverse to it. *See* Oracle's MSJ at *18, n. 8.

overruling Oracle's objections to the temporal scope of discovery, permitting OFCCP to obtain discovery on all claims relevant to the liability from January 1, 2013 to the present as set forth in the Amended Complaint.

II. BACKGROUND

Since at least 1965, the federal government has prohibited using taxpayer dollars to fund employers that unlawfully discriminate. *See* Executive Order 11246 § 202, 30 Fed. Reg. 12319 (Sept. 24, 1965). To promote this important policy, in exchange for the privilege of obtaining federal business, federal contractors must agree contractually to non-discrimination obligations similar to those set forth in Title VII and the Rehabilitation Act, which apply to most private employers, and additional requirements that apply only to federal contractors. *See id.*; *see also E.E.O.C. v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1292 (N.D. Ill. 1986) (noting that, in becoming federal contractor, company "submit[ed] itself to the stringent affirmative action and recordkeeping requirements of the Office of Federal Contract Compliance Programs").

OFCCP "is charged with conducting periodic reviews of entities that have contracted with the government to ensure that the contractors have complied with their non-discrimination and affirmative action obligations." *Bd. of Governors of Univ. of N. Carolina v. U.S. Dep't of Labor*, 917 F.2d 812, 815 (4th Cir. 1990). To ensure compliance, OFCCP conducts compliance evaluations, in which it conducts a "comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor." 41 C.F.R. § 60-1.20(a)(1).

Pursuant to Executive Order 11246, on or about September 24, 2014, OFCCP initiated a compliance review at Oracle's headquarters. Amended Complaint at ¶ 6. Oracle, one of the

world's largest providers of software for enterprises, including software for managing human resources, receives millions of dollars each year from its contracts with the federal government. See Oracle Form 10-K for the period ending March 31, 2014, p. 7, 9, Bremer Decl.², Ex. 1; Answer to Amended Complaint, p. 11, at ¶ 4.

Prior to litigation, OFCCP typically reviews "contractors' compliance with the Executive Order and regulations cover[ing] a two-year period . . . preceding the initiation of the review." Government Contractors, Affirmative Action Requirements, 62 Fed. Reg. 44174, 44178 (Aug. 19, 1997). Accordingly, regulations require a contractor like Oracle to maintain "[a]ny personnel or employment record made or kept by the contractor" for two years, to preserve such records "until OFCCP makes a final disposition" with respect to a compliance review, and to "supply" this information to OFCCP "upon request," 41 C.F.R. § 60-1.12(a), (c); see also Government Contractors, Affirmative Action Requirements, 62 Fed. Reg. 44174, 44178 (Aug. 19, 1997). Despite these obligations, during the compliance review Oracle failed to supply many personnel and employment records to OFCCP, including compensation data for 2013, that OFCCP repeatedly requested.

Notwithstanding Oracle's withholding of critical documents, OFCCP obtained sufficient information to determine *inter alia* that Oracle discriminated against qualified African American, Hispanic and White applicants in favor of Asian applicants during the review period of January 1, 2013 through June 30, 2014 in recruiting and hiring, that Oracle discriminated against women, Asians, and African Americans in compensation starting in at least 2013, and

² "Bremer Decl." refers to the Declaration of Laura C. Bremer in support of OFCCP's Motion for a Ruling on the Temporal Scope of Discovery.

that Oracle denied OFCCP access to records. On March 11, 2016, OFCCP issued an NOV to Oracle with its findings. NOV, Bremer Decl., Ex. 2. The NOV notified Oracle that OFCCP had determined that OFCCP found that Oracle had engaged in discrimination in compensation “[b]eginning no later than January 1, 2013, and continuing thereafter” against Women, African Americans, and Asians, and “[d]uring the review period from January 1, 2013 through June 30, 2014” had discriminated against qualified African American, Hispanic and White applicants in favor of Asian applicants in its recruiting and hiring practices. In addition, the NOV notified Oracle of OFCCP’s findings of Oracle’s affirmative action, record-keeping, and access violations, including that “ORACLE denied OFCCP access to records, including prior year compensation data for all employees and complete hiring data for PT1 roles during the review period of January 1, 2013 through June 30, 2014.” *Id.* at pp. 8-9.

Following the issuance of the NOV, OFCCP engaged in months of unsuccessful efforts to conciliate with Oracle. *See* September 9, 2016 Letter from Hea Jung Atkins to Gary Siniscalco, Bremer Decl., Ex. 3, and December 6, 2016 Letter from Janette Wipper to Erin Connell, Bremer Decl., Ex. 4. During that time, Oracle never agreed to come into compliance and never indicated that it changed any of its employment practices regarding compensation, recruiting or hiring. *Id.* Nor did it attempt to cure its violations for failure to provide documents to OFCCP during the investigation. *Id.* OFCCP filed its complaint on January 17, 2017. The Amended Complaint alleges, among other things, ongoing compensation discrimination against women, Asians, and African Americans in three lines of business (including 80 job titles) at Oracle’s headquarters, from at least January 1, 2014, and on information and belief, from 2013 going forward to the present. Amended Complaint, pp. 1, 3-4, at ¶¶ 7-9. It also alleges use (in the past

and presently) of a recruiting and hiring process that discriminates against qualified White, Hispanic, and African American applicants in favor of Asian applicants, particularly Asian Indians, based on race in 69 job titles at its headquarters, from at least January 1, 2013 and, on information and belief, going forward to the present. Amended Complaint, pp. 1, 4, at ¶ 10. In addition, it alleges that Oracle refused to produce records to OFCCP, such as 2013 compensation data, complete hiring data for the review period, material demonstrating it had performed an in-depth review of its compensation practices, and evidence it conducted adverse impact analyses, in violation of 41 C.F.R. §§ 60-1.12, 60-1.20, 60-1.43, 60-2.32, 60-3.4, 60-2.17(b)-(d), and 60-3.15A. (See Amended Complaint ¶¶ 12-13.)

On February 10, 2017 and February 21, 2017, OFCCP propounded its first and second sets of requests for production of documents, respectively, requesting documents from January 2013 to the present relating to its claims and Oracle's defenses. See OFCCP's First Set of Request for Production of Documents, Bremer Decl., Ex. 5; see OFCCP's Second Set of Request for Production of Documents, Bremer Decl., Ex. 6. In addition, anticipating that Oracle would continue to contend Oracle was incapable of producing certain data or it would be burdensome to produce other data³, on March 2, 2017, OFCCP noticed the deposition of the person(s) most knowledgeable to testify about Oracle's human resources databases and

³ For example, despite marketing software for maintaining human resources information and trumpeting its ability to run compliance reports, during the compliance evaluation Oracle had claimed that certain data (such as name of school attended, educational degree earned, prior salary, and years of experience) were not in Oracle's electronic databases, that it could only produce certain data in pdf format, and that it would be burdensome to do so. (See https://docs.oracle.com/cd/E18727_01/doc.121/e13511/T6652T6654.htm (Introduction to Oracle Human Resources Management Systems); Letter dated April 11, 2016 from Gary Siniscalco to Robert Doles letter, Bremer Decl., Ex. 15, pp.3-4.)

computer systems during the relevant time period (2013 to the present). *See* Notice of Deposition, Bremer Decl., Ex. 7.

In response to OFCCP's discovery requests, Oracle objected to and stated its refusal to produce documents outside the period of January 1, 2013 through June 30, 2014 for the hiring discrimination claim and outside 2014 for the compensation discrimination claims.⁴ Moreover, when OFCCP sought to meet and confer on this issue, Oracle refused to allow any deposition to take place until the temporal scope of the deposition is resolved.⁵ Oracle took an uncompromising stance: "...before any depositions in this matter can go forward, the parties must either come to an agreement regarding the protective order and the relevant time frame, or an ALJ must resolve these disputes." Bremer Decl., Ex. 12.⁶

As a result of this and other obstacles raised by Oracle, more than two months into discovery, Oracle has completely blocked OFCCP's discovery efforts, steadfastly refusing to

⁴ *See* Oracle's Responses and Objections to OFCCP's First and Second Sets of Requests for Production of Documents, p. 2, Bremer Decl., Exs. 8 and 9; *see* Oracle's response to OFCCP's Notice of Deposition, at pp. 5, 6, and 8, Bremer Decl., Ex. 10; *see also*, March 27, 2017 Letter from Norman Garcia to Gary Siniscalco, Bremer Decl., Ex. 13, and April 5, 2017 Letter from J.R. Riddell to Norman Garcia, Bremer Decl., Ex. 14.

⁵ *See* March 22, 2017 Letter from Bremer to Connell, Bremer Decl., Ex. 11, and March 23, 2017 Letter from Connell to Bremer, Bremer Decl., Ex. 12 (unless OFCCP adopted its view of the relevant time period, and agreed to the entry of a protective order--an issue of a separate motion--"it ma[de] no sense to move forward with depositions...").

⁶ Oracle has also made numerous other objections to the production of documents and deposition notice. OFCCP has begun the meet and confer process regarding these objections. Given that the number of objections Oracle has made to each request, and Oracle's request to meet and confer separately regarding each discovery request, OFCCP anticipates that this process will be time-consuming. It also anticipates that Oracle's resistance to providing information and documents will necessitate OFCCP bringing additional motions, including motions to compel.

produce *any* documents, or even answer preliminary questions about its computer systems that would allow OFCCP to illuminate Oracle's capacity to produce the compensation and hiring data relevant to OFCCP's claims. Should Oracle ever decide to cooperate in discovery, its position with respect to the temporal scope ensures any document production and witness testimony would fail to reveal information highly pertinent to the allegations set forth in the Amended Complaint. More egregiously, if permitted, Oracle's position would allow Oracle to avoid liability for continuing discrimination. Accordingly, OFCCP asks the Court to resolve this threshold issue, making it clear that discovery relevant to OFCCP's claims that Oracle discriminated from 2013 through the present is permitted.

III. ARGUMENT

Oracle's objections to the temporal scope of discovery must be rejected. The Secretary, the Administrative Review Board ("ARB"), and Administrative Law Judges have consistently permitted discovery beyond the compliance review period to encompass a period before and after the review period, especially with respect to pattern and practice claims that may be continuous.⁷ These authorities recognize that information during the compliance review period and earlier is necessary to provide a historical context for alleged discrimination, determine its origins, and the effects which continue into the period for which a remedy is sought. Moreover, information from the start of the compliance review period to the present is obviously critical to

⁷ An inference of continuing discrimination can be made in the absence of changed employment practices. "Proof that an employer engaged in racial discrimination [at an earlier date] might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decision-making process had undergone little change." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 310 n.15 (1977) (citing Federal Rule of Evidence 406 and Evidence treatises, as well as case law); *Bazemore v. Friday*, 478 U.S. 385, 402 (1986) (same).

the allegations of continuing unlawful discrimination alleged in the Amended Complaint, and OFCCP's ability to seek redress for continuing discrimination. Oracle's unilateral and arbitrary temporal limitation is meritless, and is a blatant attempt to prevent OFCCP from obtaining information necessary to establish the discrimination alleged in the Amended Complaint.

A. Binding Authority Establishes that OFCCP is Entitled to Discovery Relevant to Its Claims of Discrimination from January 1, 2013 to the Present.

In the context of EO 11246, the Secretary of Labor has recognized that there is no temporal limit on discovery. For example, in an enforcement action following OFCCP's compliance review of Uniroyal's facility in February 1976, Uniroyal refused to provide information prior to 1975, contending that discovery should be limited to one year prior to the compliance review. *OFCCP v. Uniroyal, Inc.*, 77-OFCCP 1 at *3, *9 (Sec'y June 28, 1979). The Secretary of Labor adopted the ALJ's findings, including orders permitting discovery from 1968 through the present, which included information predating an earlier 1972 compliance review. *Id.* at *8-9. The Secretary recognized that discovery of past conduct is "necessary and appropriate" to show present effects of past discrimination.⁸ *Id.* at *9. Noting that "the correct test for the scope of discovery is relevancy to subject matter," the Secretary of Labor held that the Executive Order "contains no time limits on the periods that the Government can engage in discovery, so long as the discovery is related to the contractor's compliance with the Executive Order." *Id.* at *9-10.

⁸ Although discovery of historical information is clearly permitted in enforcement proceedings, to date most of OFCCP's requests have been limited to the "RELEVANT TIME PERIOD," OFCCP defined as 2013 through the present. In addition, OFCCP explicitly requested some information, such as salary history of the employees from 2013 to the present that would pre-date the compliance review period, but is highly relevant to the claims. *See* OFCCP's Second Set of Requests for Production of Documents, No. 73, Bremer Decl., Ex. 6

The U.S. District Court for the District of Columbia affirmed the Secretary's discovery orders, recognizing that "[t]here can be no serious question about the authority of the Administrative Law Judge under the Executive Order and the regulations to require Uniroyal both to permit the inspection of pertinent documents and records and to require it to participate in depositions and other discovery." *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 367 (D.D.C. 1979) *appeal dismissed* 22 Empl. Prac. Dec. P 30,889 (D.C. Cir. 1980). The Court stressed that access to contractors' personnel and other employment records is essential and the only means by which OFCCP can establish a pattern and practice of discrimination. *Id.* at 372-73. Further, the Court upheld debarment as a sanction on the ground that "Uniroyal, through its obdurate refusal to permit adequate inspection and discovery and thus the conduct of full and fair hearings into charges that it is guilty of discrimination, has stalemated the government's effort to seek to verify whether it is or is not dealing with a company which engages in fair employment practices." *Id.* at 375.

During the meet and confer process, Oracle sought to distinguish *Uniroyal*, claiming the court's focus was on Uniroyal's "'wholesale refusal' to cooperate with prehearing discovery where Uniroyal unilaterally determined that the prehearing discovery regulations were invalid." See, March 27, 2017 Letter from OFCCP to Oracle, Bremer Decl., Ex. 13 (*citing Uniroyal* and other authorities), and April 5, 2017 Letter from Oracle to OFCCP, Bremer Decl., Ex. 14 (responding). To the contrary, the Secretary's ruling specifically rejected Uniroyal's contention that the Judge erred by "fail[ing] . . . to confine the scope of discovery to the period after January 1, 1975." 77-OFCCP 1 at *9. Indeed, Uniroyal is squarely on point here. As in that case, Oracle has categorically refused to supply compensation data for the year prior to the initiation

of the compliance review in violation of 41 C.F.R. § 60-1.12 – personnel records that the court in *Uniroyal* described as “necessary to any determination of” discrimination -- and has so far blocked all discovery in this enforcement action. *Id.* at 373. Oracle cannot be permitted to thwart the purposes of the Executive Order, and thwart OFCCP’s ability to redress continuing discrimination (from the start of the compliance review period through the present), by confining the scope of this case to the narrow period of time for which it agreed to provide data during the compliance review.

B. Following Uniroyal, ALJs Have Routinely Rejected Attempts by Contractors to Limit the Temporal Scope of Discovery.

Consistent with *Uniroyal*, general discovery principles, and the purposes of the Executive Order, ALJs routinely reject contractors’ arguments that OFCCP is limited to discovery covering the review period.⁹

For example, in *U.S. Department of Labor v. Jacksonville Shipyards Inc.*, 89-OFC-1 (March 10, 1989), the contractor refused to produce discovery after the end of OFCCP’s review period, despite the complaint’s allegation of ongoing discrimination. In granting OFCCP’s motion to compel, the ALJ reasoned that (1) separate conciliation efforts for each additional period of time would be impractical and inefficient; (2) since the case was already in litigation, additional conciliation efforts regarding continuing unlawful conduct would be futile; and (3) evidence of post-[review period] conduct was relevant to the case because it was challenged in the complaint. *See id.* at 2.

⁹ Oracle goes beyond the often rejected argument that discovery is limited to the review period by arguing that OFCCP is temporarily limited to a period that is less than the review period and entirely dictated by the information Oracle decided to provide during the review.

Similarly, in *OFCCP v. Volvo GM Heavy Truck Corp.*, 1996-OFC-2, 1998 WL 34373222 (ALJ, April 27, 1998), the ALJ rejected the defendant's argument that OFCCP was not entitled to discovery after the review period because the agency had "made no investigations or findings and did not conciliate for periods after [the review period]." *Id.* at *3. The court granted OFCCP's motion to compel, holding that because the agency alleged discrimination to the present, evidence of the defendant's conduct after the review period was relevant. The court further held that OFCCP's lack of evidence covering the post-review period did not "prevent it from seeking such evidence to show continuing unlawful conduct through discovery, particularly in light of the broad discovery allowed in employment discrimination cases." *Id.* at *3-4.

The issue arose again more recently in *OFCCP v. JBS USA Holdings, Inc.*, ALJ No. 2015-OFC-1 (Apr. 22, 2016). There, the ALJ rejected the contractor's argument that information and documents falling outside of OFCCP's compliance review period were not discoverable. In granting OFCCP's motion to compel, the ALJ held that "the scope of discovery is only limited by relevance and a consideration of [FRCP Rule 26(b)'s proportionality] factors." *Id.* at 5. Relying on OFCCP's complaint, which alleged violations of Executive Order 11246 "from at least August 6, 2005 to at least September 30, 2006," the ALJ concluded that the documents OFCCP had requested outside of the review period were relevant to OFCCP's claim of ongoing discrimination. *Id.* at 7-8 (emphasis added).

A month ago, an ALJ in *OFCCP v. Enterprise RAC Company of Baltimore LLC*, 2016-OFC-0006 (March 27, 2017), denied a contractor's motion for a protective order to limit OFCCP's discovery to the review period. The contractor asserted that OFCCP could not pursue and obtain discovery based on a continuing violation claim because it did not conduct an onsite

review, issue a notice of violation, attempt to conciliate and issue a show cause notice prior to filing a complaint for the post-review period.¹⁰ *Id.* at 2-3. Noting that OFCCP “is only attempting to determine if the alleged violation continues or has been abated,” and that “Administrative law judges have allowed complaints to allege continuing violations,” the ALJ held that “evidence of post-[review period] conduct is relevant to whether Defendant has complied with the Executive Order.” *Id.* at 5-6 (citations omitted). *Id.* at 5-6.¹¹

Other courts have come to the same conclusions. *See also OFCCP v. Harris Trust & Savings Bank*, 78-OFC-2, 1988 WL 1109173 (Sept. 23, 1988) (“Since the subject matter of the pending action involves, in part, whether a pattern or practice of discrimination has continued at [defendant’s worksite], there can be little question that salary information regarding recent hires is relevant to any continuing discrimination.”); *E.E.O.C. v. Hickey-Mitchell Co.*, 372 F. Supp. 1117, 1121 (E.D. Mo. 1973) (“The Court can find no authority . . . for the proposition that the scope of discovery properly sought by the plaintiff after commencement of a Title VII action is limited to the scope of the administrative discovery conducted before commencement of the action. Rather, it is limited in scope by the provisions of the federal civil discovery rules, especially Federal Rule of Civil Procedure 26(b)”).

¹⁰ Oracle made the same arguments during the meet and confer process that were rejected by the ALJ in *Enterprise RAC* and other cases. Oracle’s arguments must be rejected for the same reasons. (See April 5, 2017 Letter (contending failing to comply with pre-suit prerequisites precluded discovery “beyond the scope of its pre-suit investigation”). *See*, Bremer Decl., Ex. 14.

¹¹ Notably, the time between the end of review period and the complaint in *Enterprise RAC* spanned nearly eight years, which is significantly longer than the three years post-review period at issue in this case.

The Amended Complaint alleges that Oracle's discriminatory practices began in at least 2013 and have continued to the present. At no time has Oracle indicated to OFCCP that it remedied the discrimination OFCCP found. Nevertheless, Oracle attempts to circumscribe discovery to 2014 for the compensation claims and an 18-month period for the hiring claim, thereby preventing OFCCP from establishing discrimination for the entire time frame alleged in the Amended Complaint, and preventing it from redressing continuing discrimination. As the above authorities recognize, the information OFCCP seeks is relevant to the continuing violations alleged in the Amended Complaint. Blocking discovery into the period between the compliance review and a judgment in this case would thwart the purposes of the Executive Order, prevent OFCCP from seeking redress for individuals subject to discrimination since 2014, and could lead to repetitive lawsuits raising the same claims for later periods of time. In light of the overwhelming authority on this point, Oracle's attempts to block OFCCP's discovery of information relevant to its claims of discrimination extending from at least 2013 to the present must be rejected.¹²

¹² During the meet and confer process, Oracle cited some cases they claimed support their position that discovery must be limited "to the bounds of the agency's pre-suit investigation." (See, Bremer Decl., Ex. 14 p. 2.). However, the cases entirely fail to support their position. For example, *E.E.O.C. v. Ford Motor Credit Company*, 26 F.3d 44 (6th Cir. 1994), involved an administrative subpoena in an EEOC investigation of an individual complaint. Nevertheless, even in this substantially different context, the court allowed discovery for all employees for 3 years and 300 days prior to an employee's complaint, and 12 ½ years prior to the complaint regarding the complainant. This case supports the relevance of information prior to the investigative period, and certainly provides no support for Oracle's attempts to circumscribe discovery to one year for the compensation claims and 18 months for the hiring claim. Similarly, *OFCCP v. Prudential Ins. Co. of Amer.*, Case No. 1980-OFCCP-19, 1980 WL 275523 (June 13, 1980), authorized OFCCP's request for pre-1976 information in a 1979 compliance review, as history relevant to present violations. It is unclear how the language Oracle cites from *OFCCP v. City Public Serv. of San Antonio*, Case No. 1989-OFC-5 (Jan. 18, 1995), discussing how

C. *The ARB's Recent Bank of America Decision Confirms that OFCCP is Entitled to Discovery without Temporal Restraints with Respect to Continuing Violations.*

In addition to the overwhelming authority described above, the recent ARB opinion *OFCCP v. Bank of America*, ARB Case No. 13-099, 2016 WL 2892921 (Apr. 16, 2016), makes clear that all three Board members on the panel support the propriety of granting discovery outside the review period with respect to continuing violations. In that matter, OFCCP initiated a compliance review in 1993 and filed an administration complaint in 1997. *Id.* at *2. “Extensive judicial and administrative litigation followed” the 1997 complaint. In 2005, a discovery dispute arose as to whether OFCCP was permitted to obtain discovery up to the present. Judge Royce of the ARB summarized the ALJ’s order, which granted OFCCP discovery to the present, approvingly:

As the ALJ stated in her ... Order ... OFCCP’s 1997 Administrative Complaint alleged “that the Defendant violated Executive Order 11246 *since at least January 1, 1993* by failing to hire minority applicants ... based on their race” The OFCCP’s discovery requests in 2004 requested documents relevant to those allegations which the ALJ found reasonable because they were “narrowly tailored to the allegations in the Administrative Complaint.” *Id.* at *25 (emphasis added).

Further praising the ALJ’s ruling, Judge Royce quoted the language from ALJ’s order:

In the Administrative Complaint, the Plaintiff [OFCCP] alleges that the Defendant [BOA] discriminated against minorities in filling certain positions in three job groups ..., from at least January 1, 1993. The Plaintiff’s discovery requests are specifically directed to the Defendant’s hiring practices in these three job groups, seeking information such as the identity of persons interviewed for the positions, the persons hired, the reasons for non-selection, and the selection criteria. The Plaintiff’s document requests seek

complaint investigations are more narrow than compliance reviews, helps it here. Importantly, OFCCP alleges that Oracle engaged in systemic discrimination, so obviously the scope of discovery will be broader in this case than a case involving an individual claim of discrimination. Oracle cited no authority that supports Oracle’s attempts to drastically restrict the temporal scope of discovery in this enforcement action.

information and documents containing personnel information. I find that these requests are narrowly tailored to the allegations in the Administrative Complaint, and are relevant, or may lead to relevant information. *Id.*

Finally, in affirming the ALJ's decision, Judge Royce held that OFCCP need not conduct additional investigation outside the review period to allege ongoing discrimination to the present:

The ALJ reasoned that because the Administrative Complaint alleged violations "since at least January 1993," the Complaint contained "an allegation of ongoing violations. [Thus,] it was not necessary for the OFCCP to separately investigate, make findings, and attempt to conciliate each additional violation by BOA because it would be impractical and inefficient since the case was already in litigation. *Id.* (emphasis added).

On appeal, Bank of America argued that "the ALJ erred in permitting OFCCP to expand the allegations of discrimination beyond 1993." A majority of the panel rejected this view, with Judge Corchado ruling that there was insufficient evidence on the merits to support the ALJ's findings with respect to the 2002-2005 period, and Judge Royce expressly rejecting Bank of America's arguments with respect to the 2002-2005 period both on the merits and procedurally. Judge Brown alone agreed with Bank of America procedural argument because the 2002-2005 claims did not involve continuous violations of the original claims in the administrative complaint.¹³ However, he ensured his opinion would not be over-read in discovery disputes such

¹³ Judge Brown relied heavily on the fact that "the violations charged against BOA for the 2002-05 period did not involve the same job categories in all respects as those identified for the 1993 period, but identified new job categories for which BOA had not previously been charged with violations." 2016 WL 2892921, at *23. As noted by Judge Royce, Judge Brown's minority opinion is inconsistent with the Secretary's decision in *Honeywell I*, 1977-OFC-003, 1993 WL 1506966, slip op. at 7, which remains binding authority on this court. While Judge Brown's concerns do not govern these proceedings, we note that OFCCP's discovery requests in this matter don't implicate the procedural issues raised by Judge Brown because OFCCP only seeks

as this by stating in unambiguous terms: “I do not mean to suggest that the OFCCP was not entitled to pursue discovery beyond the 1993 period as part of the enforcement action filed charging violations for the identified period. Given the overall purposes of EO 11246, *such post-violation discovery would be warranted in order to determine, for example, if the charged violations are continuing or have been remedied.*” 2016 WL 2892921, at *24 (emphasis added). In short, the divided Bank of America was unified on only one thing with respect to the 2002-2005 claims: that OFCCP had the right to learn of those claims through discovery seeking information from more than ten years after the initiation of the compliance review and five years after suit was filed.

While Oracle will likely attempt to argue that Judge Brown’s minority opinion in *Bank of America* supports denial of discovery in this matter, that opinion is not controlling and on its face says the exact opposite. Consistent with *Uniroyal* and the numerous ALJ decisions cited above, the *Bank of America* decision further establishes OFCCP’s right to obtain discovery outside the review period in support of its claims.

D. OFCCP’s Pleadings and Discovery Requests are Consistent with Case Law.

OFCCP has properly pleaded claims of past and ongoing discrimination in its Amended Complaint. As the case law makes overwhelmingly clear, OFCCP is entitled to obtain discovery from 2013 to the present to prove those claims. *See* Amended Complaint, at ¶¶ 7-9, 10. As in the cases cited above, this case involves whether Oracle’s compensation and hiring practices did and continue to deny equal employment opportunity to applicants on the basis of gender, race,

information relevant to determining the violations identified during the review period and alleged in the complaint.

and ethnicity. Thus, information and documents related to Oracle's compensation and hiring practices prior to the initiation of the compliance review (including the year prior to the initiation of the compliance review for compensation, which was part of the compliance review period), and after the review period for all claims are clearly relevant. This discovery is also relevant to the remedies that OFCCP may seek, including back pay on behalf of the affected applicants and injunctive relief to enjoin Oracle from continuing to engage in compensation and hiring practices that discriminate against various minority groups and women.

III. CONCLUSION

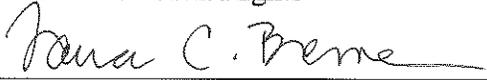
For the reasons described above, the Court should issue an order overruling Oracle's objections to the temporal scope of discovery, and permitting OFCCP to obtain discovery relevant to its allegations of liability from January 1, 2013 to the present.

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