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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.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

RECEIVED

MAY 02 2017

**Office of Administrative Law Judges
San Francisco, Ca**

PARTIES' JOINT CASE MANAGEMENT STATEMENT

Pursuant to the Court's April 27, 2017 Order Setting Pre-Hearing Conference, Plaintiff Office of Federal Contract Compliance Programs, United States Department of Labor ("OFCCP") and Defendant Oracle America, Inc. ("Oracle") hereby file the foregoing joint case management statement.

I. STATEMENT OF THE CASE

A. OFCCP's Statement

This large and complicated case involves claims that implicate at least 12,000 individuals. OFCCP alleges Oracle engaged in systemic discrimination in hiring and compensation at its Redwood Shores headquarters. With respect to hiring discrimination, OFCCP alleges that, from at least 2013 to the present, Oracle has discriminated against African American, Hispanic, and white applicants. Am. Compl. ¶ 10. As for compensation discrimination, OFCCP alleges that, from at least 2013 to the present, Oracle has discriminated against female, African American, and Asian employees. *Id.* ¶¶ 7-9. Oracle's discriminatory

hiring practices occurred within a pool of at least 7,000 applicants (and potentially many more), and its discriminatory pay practices relate to a class of more than 5,000 employees. In addition to these discrimination claims, OFCCP has also asserted claims that Oracle violated regulations by failing to produce data and other documents during the compliance review. *Id.* ¶¶ 11-13. Because of Oracle's unlawful withholding of documents during the review, additional time and resources will be needed to obtain and analyze the information that Oracle impermissibly withheld, in addition to the discovery that OFCCP would otherwise be entitled to obtain.

While this case arises under Executive Order 11246, Title VII standards guide substantive decisions on the discrimination claims in this case. *See, e.g., OFCCP v. Greenwood Mills, Inc.*, Case No. 00-044, 2002 WL 31932547, at *4 (Admin. Rev. Bd. Dec. 20, 2002) ("The legal standards developed under Title VII of the Civil Rights Act of 1964 apply to cases brought under the Executive Order. "). D.C. Circuit and Ninth Circuit Title VII decisions are controlling as any appeal of the final agency action in this case would arise under the Administrative Procedure Act, which must be brought in a district court of either of those circuits (*i.e.*, Oracle resides in the Northern District of California and the Administrative Review Board sits in the District for the District of Columbia).¹

Rather than address the claims against it, Oracle seeks to focus this case on OFCCP's conduct, insisting the agency failed to fulfill its obligations and is on a politically-motivated prosecution. The company's complaints are baseless hyperbole. For instance, Oracle accuses OFCCP of failing to conciliate the pending claims. However, as OFCCP will explain further in

¹ *See* 5 U.S.C. § 703 (providing that, absent a statutory alternative, "action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer "); 28 U.S.C. § 1391(e)(1) (providing that civil actions against "an agency of the United States . . . may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action").

its forthcoming summary judgment opposition, OFCCP gave Oracle notice of the claims that are the subject of this litigation and provided the company an opportunity to discuss the matter; OFCCP thus conciliated. *See, e.g., Mach Mining, L.L.C. v. EEOC*, 135 S. Ct. 1645, 1652 (2015). As for Oracle's baseless claim that politics underlie this case, the timeline belies Oracle's story: as Oracle admits, OFCCP began its investigation in September 2014, issued its Notice of Violation in March 2016, and its Show Cause Notice in June 2016, all well before the November 2016 election. Oracle's attempts to distract the Court and waste OFCCP's resources on irrelevant matters must be curbed.

B. Oracle's Statement

This litigation began with an OFCCP compliance evaluation of Oracle's Redwood Shores headquarters location that took place beginning in September 2014.² OFCCP thereafter conducted an eighteen-month investigation, including the production by Oracle of extensive data and documentation regarding its recruiting, hiring, and compensation practices and nine days of onsite visits by OFCCP in March and June, 2015. On March 11, 2016, OFCCP issued a Notice of Violation ("NOV") articulating, among other things, purported findings of recruiting, hiring and compensation discrimination, as well as purported record-keeping violations by Oracle. Prior to issuing the NOV, OFCCP gave Oracle no indication that it had found discrimination, or concluded that Oracle had engaged in any wrongdoing. OFCCP subsequently issued a Show Cause Notice ("SCN") in June 2016.

² Since early 2013, OFCCP has selected Oracle for a compliance review more than 40 times. Indeed, on October 13, 2015, OFCCP notified Oracle that OFCCP had selected Oracle's Redwood Shores location for another compliance review, even though the compliance review at issue here was still underway. Although OFCCP claims it selects contractors for compliance review through a "neutral selection system" (*see* <https://www.dol.gov/ofccp/regs/compliance/faqs/fcssfaqs.htm>), it defies credulity that any neutral process would have selected the same Oracle establishment twice for a compliance review in such a short time frame, given the hundreds of thousands of other establishments OFCCP could have selected.

In early October 2016, the parties held a single conciliation meeting. But OFCCP abruptly ended the conciliation process shortly after the presidential election results were announced in November 2016. On January 17, 2017, just three days prior to the end of the outgoing administration and the departure of its senior officials, OFCCP instigated the present litigation.

In its Amended Complaint, OFCCP brings three causes of action against Oracle (all relating to its Redwood Shores location) for (1) recruiting and hiring discrimination on the basis of race, (2) compensation discrimination on the basis of race and gender, and (3) refusal to produce relevant data and records during the OFCCP's underlying compliance evaluation. More specifically, OFCCP claims that its statistical analysis demonstrates Oracle engaged in recruiting and hiring discrimination against "non-Asians" in favor of Asians (particularly Asian Indians) in the PT 1 job group and Product Development job function; that Oracle engaged in compensation discrimination against African-Americans and Asians in favor of Whites in the Product Development job function³; and that Oracle engaged in compensation discrimination against women in the Product Development, Information Technology, and Support job functions.

Oracle denies OFCCP's allegations of discrimination, which appear to rest entirely on a flawed statistical analysis that does not compare employees and applicants who are similarly situated or similarly qualified. Oracle further denies that it refused to produce relevant data and records during the underlying compliance evaluation. Oracle further takes the position that not only do OFCCP's claims fail on the merits, but its complaint—as well as the underlying

³ OFCCP nowhere attempts to reconcile its accusation that Oracle discriminates *in favor of* Asians in its hiring practices in the Product Development job function with its claim that Oracle discriminates *against* Asians in compensation in that same job function.

compliance evaluation and administrative process leading up to it—are so procedurally flawed that this litigation should be dismissed on procedural grounds alone.

Oracle has filed a preliminary motion for summary judgment (or, in the alternative, for a stay of these proceedings) due to OFCCP's failure to engage in the reasonable conciliation efforts that are a prerequisite to filing suit.

As for other procedural and substantive matters in the case, the principal disputed factual issues include:

- Whether OFCCP complied with applicable law, governing regulations, and its own compliance manual when conducting its underlying compliance evaluation;
- Whether Oracle “refused to produce” relevant data and documents during the underlying compliance evaluation;
- Whether OFCCP had any facts or other evidence to support its NOV prior to issuing it;
- Whether OFCCP’s statistical analyses, on which its claims of discrimination are based, compares employees who are similarly situated, applicants who are similarly qualified, and—with respect to OFCCP’s compensation discrimination claim—otherwise controls for all applicable non-discriminatory factors impacting compensation at Oracle;
- Whether OFCCP has any evidence demonstrating that the applicants and employees it compares to one another are, in fact, similarly situated; and
- Whether OFCCP afforded Oracle the opportunity to show that any purported class member was paid less than a similarly situated “favored” employee based on legitimate nondiscriminatory factors.

The principal disputed legal issues include:

- Whether OFCCP violated Oracle’s constitutional or contractual rights by targeting Oracle for compliance reviews and/or pursuing a politically motivated enforcement proceeding;
- Whether OFCCP had “reasonable cause” to issue the SCN when it did;
- Whether OFCCP complied with its obligation to engage in mandatory administrative prerequisites prior to filing its complaint;
- The applicable time frame governing this litigation (OFCCP claims January 1, 2013 to the present, and Oracle claims January 1, 2013 to June 30, 2014 for the recruiting and

hiring discrimination claim, and January 1 to December 31, 2014 for the compensation discrimination claim);

- Whether Oracle engaged in compensation discrimination, as alleged by OFCCP;
- Whether Oracle engaged in recruiting and hiring discrimination, as alleged by OFCCP;
- Whether OFCCP's third cause of action (for Oracle's supposed refusal to produce relevant data and records during the compliance evaluation, which Oracle denies) is a viable cause of action as a matter of law, as opposed to simply grounds for a separate action for denial of access; and
- If OFCCP can establish liability on one or more of its discrimination claims, the scope and nature of damages to any affected class member.

II. DISCOVERY

A. OFCCP's Statement

1. OFCCP is Entitled to Full Discovery in this Enforcement Proceeding.

As in many cases involving government law enforcement, the current case began with a pre-filing investigation. Similar to those cases, OFCCP is not limited to proving its claims based on evidence obtained through its investigation. Rather, like its sister law enforcement agencies, OFCCP is entitled to full discovery in this case and to meet its burden of proof relying on evidence obtained through that discovery.

In shaping this case, the Court should look to federal court cases involving Title VII and the Equal Employment Opportunity Commission ("EEOC"), which the Secretary has recognized are instructive in understanding litigation under the Executive Order. This is because the laws enforced by OFCCP and the EEOC envision nearly identical roles for the two agencies. *See, e.g., OFCCP v. Nat'l City Bank of Cleveland*, Case No. 80-OFC-31, 1982 WL 532110, at *2-4 (Sec'y Sept. 9, 1982) (recognizing that OFCCP and EEOC act in the public interest in bringing suit to enforce their laws); *OFCCP v. Honeywell, Inc.*, Case No. 77-OFCCP-3, 1993 WL 1506966 at *7 (Sec'y June 2, 1993) (analogizing to "comparable situations under Title VII" in

which EEOC would be litigant). Moreover, the agencies enforce their respective laws in similar fashions.⁴

As with EEOC cases, OFCCP's investigation and conciliation efforts do not frame the issues during litigation. Where, as here, the law intends for an agency to conduct a pre-litigation investigation and informal resolution process, "the nature and extent of an [agency's] investigation" is not an issue a court considers when adjudicating a discrimination complaint against an employer. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984) (citing *EEOC v. St. Anne's Hosp.*, 664 F.2d 128 (7th Cir. 1981)). Moreover, OFCCP's compliance-review findings "do not adjudicate rights and liabilities; [they] merely place[] the defendant on notice of the charges against him. If the charge is not meritorious, procedures are available to secure relief, i.e. a *de novo* trial" *Id.* (citing *EEOC v. E.I. Dupont de Nemours & Co.*, 373 F. Supp. 1321, 1338 (D. Del. 1974)); *see also EEOC v. Sterling Jewelers Inc.*, 801 F.3d 96, 101 (2d Cir. 2015) ("courts may not review the sufficiency of an investigation—only whether an investigation occurred"). Courts recognize that any other rule would create an unnecessary distraction about the adequacy or efficacy of the agency's investigation, rather than keeping the focus on the actual question to be resolved: whether the employer violated the law. *Keco Indus., Inc.*, 748 F.2d at 1100 (citing *Miniature Lamp Works*, 526 F. Supp. at 975).

⁴ For instance, where OFCCP "has reasonable cause to believe that a contractor has violated the equal opportunity clause" it may issue a show cause notice putting the contractor on notice that enforcement proceedings may be instituted. 41 C.F.R. § 60-1.28. In order to enforce the contractor's obligations before the OALJ, OFCCP must refer the matter to the Office of the Solicitor "when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate . . ." *Id.* § 60-1.26(b). Similarly, the EEOC's "procedure begins when a charge is filed . . . alleging that an employer has engaged in an unlawful employment practice." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977). As OFCCP does by issuing a notice of violation, the EEOC is required to notify the employer of the charge. *Id.* "The EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true." *Id.* As with OFCCP, if the EEOC finds reasonable cause "it 'shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.'" *Id.* (quoting 42 U.S.C. § 2000e-5). If conciliation is ineffective, the EEOC, like OFCCP, may then file suit. *Id.*; *see Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649 (2015) (summarizing the process).

Based on these considerations, courts “have no business limiting the suit [brought by the agency] to claims that the court finds to be supported by the evidence obtained in the [agency’s] investigation.” *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) (citing, *inter alia*, *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242-43 (1980)); *EEOC v. Hickey-Mitchell Co.*, 372 F. Supp. 1117, 1121 (E.D. Mo. 1973) (holding discovery not “limited to the scope of the administrative discovery conducted before commencement of the action”). Here, OFCCP’s complaint alleges that Oracle discriminated in hiring and compensation. These allegations require no inquiry into OFCCP’s investigation, nor are they limited by the scope of OFCCP’s investigation. Rather, OFCCP must prove its claims through admissible evidence obtained during discovery.

2. Scope of Discovery

As noted above, OFCCP alleges discrimination spanning at least a four-year period, from 2013 through the present. Also, OFCCP’s allegations encompass over 12,000 individuals, a significant portion of Oracle’s staff at its headquarters in Redwood Shores, CA. Given the systemic nature of OFCCP’s allegations, the number of individuals implicated, and the four-year period over which the discriminatory has occurred (and continues to occur), discovery in this case is expected to be substantial.

Document and Data Discovery. With respect to systemic compensation discrimination, discovery into salary, stock and bonus information, as well as historical salary and job information will be necessary. *See, e.g., Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 116 (S.D.N.Y. 2015) (statistical analysis of a claim of gender discrimination in compensation “included the year, the division in which the employee worked, geographic office, education, prior related work experience, experience at Goldman Sachs, lateral or direct hiring status, and job group”). As for OFCCP’s claims regarding hiring discrimination, OFCCP will

require detailed information about applicants including job history, education, experience and the like. *See, e.g., E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 324–25 (7th Cir. 1988) (EEOC’s expert conducted a statistical analysis of Sears’ hiring including the following factors “(1) job applied for; (2) age; (3) education; (4) job type experience; (5) product line experience; and (6) commission product sales experience”).

Moreover, Oracle has already alleged to OFCCP that certain categories of information that OFCCP has sought are not available in a database, and would only be available by manual review of hard copies of employment materials. For example, during the compliance review, Oracle produced thousands of pages of hard copy application materials of applicants for five job titles (of the approximately 70 job titles in the PT1 job group), rather than producing data fields with applicants’ degrees, schools attended, and experience. Further, as of the date of this brief, Oracle has not produced any documents in response to OFCCP’s requests for information. It may ultimately require motion practice to ensure that the record is complete.

Deposition Discovery. Apart from the data needed to prepare the case for hearing, OFCCP will also need to conduct multiple depositions of Oracle personnel to fully understand its hiring and compensation system. These individuals are likely to be managers or executives within Oracle, many of whom may not be located in the Bay Area, and OFCCP anticipates that Oracle will make objections regarding the witnesses’ and lawyers’ scheduling conflicts. OFCCP will also notice 30(b)(6) depositions. In response to an initial 30(b)(6) deposition that OFCCP noticed on March 2, 2017 to obtain threshold information about Oracle’s databases and systems, so that OFCCP can respond to Oracle’s objections about its inability or the burden to produce certain information, Oracle has indicated that the deposition will require multiple witnesses (and it has identified 15 potential witnesses). As a corollary, it is likely that the precise scope and

nature of information needed for OFCCP to present its case will change as a result of initial documents produced, depositions, and the work done by experts to prepare this case for litigation.

Expert Discovery. As noted above, the parties have acknowledged that expert witnesses will be necessary in this case. To reach well-founded conclusions, experts can take up to six months to compile the databases necessary to run their analyses, depending on the form of the data produced in this litigation. Here, for instance, much of the hiring data may need to be manually compiled from source documents (*e.g.*, resumes and interview notes), making it likely that a longer timeframe may be necessary. And, to finalize any required reports, fact discovery will need to be effectively complete. Moreover, the parties have agreed on producing reply expert reports, which will entail each party's expert(s) responding to the other side's opinions. Such reply expert reports will require the experts to conduct additional analyses, which will entail additional time.

Once expert reports are complete, the parties must have the opportunity to depose those experts to test the opinions the experts present. *See* 29 C.F.R. § 18.51(d)(1).

3. Status of Discovery

Promptly after Oracle answered OFCCP's complaint on February 8, 2017, the parties served written discovery. The parties' discovery requests to date are identified below:

<u>Date Served</u>	<u>Discovery Type</u>	<u># of Requests</u>
2/8/2017	Oracle's First Set of Requests for Production	86 requests
2/8/2017	Oracle's First Set of Interrogatories	88 interrogatories
2/10/2017	OFCCP's First Set of Requests for Production	29 requests
2/21/2017	OFCCP's Second Set of Requests for Production	72 requests

<u>Date Served</u>	<u>Discovery Type</u>	<u># of Requests</u>
3/2/2017	OFCCP's Notice of 30(b)(6) Deposition Regarding Human Resources Databases and Other Records	5 topics

Since serving their requests, however, various disputes have arisen between the parties that have prevented discovery from moving forward. To date, no documents have been produced and no depositions have been taken. Oracle has raised two roadblocks to OFCCP obtaining any discovery from the company and has threatened yet a third.

First, Oracle demands a protective order prior to participating in discovery. As will be explained further in OFCCP's opposition to Oracle's motion for a protective order, separate from waiving its ability to seek a protective order altogether, the protective order Oracle proposes violates OFCCP's obligations under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Federal Records Disposal Act, 44 U.S.C. §§ 3301, *et seq.* OFCCP cannot agree to a protective order that violates federal law.

Second, Oracle refuses to participate in discovery until the parties' dispute over the relevant period for discovery is resolved. For instance, OFCCP sought a 30(b)(6) deposition of Oracle regarding its human resources databases and other records so that the agency could, among other things, efficiently and knowledgably engage with Oracle regarding the agency's data requests. Oracle, however, has made the blanket decision that "before any depositions in this matter can go forward, the parties must either come to an agreement regarding a protective order and the relevant time frame, or an ALJ must resolve these disputes." Mar. 23, 2017 Connell Ltr. to Bremer at 2.

Finally, Oracle has not made a firm commitment to participating in discovery. Oracle has represented it reserves the right to refuse to participate in discovery pending its summary judgment motion and depending on the case management schedule the Court sets. *See* Apr. 28,

2017 Connell to Pilotin email (noting “that holding off on discovery would be consistent with the position we take in the [pending summary judgment] motion” and stating that “[i]f the ALJ changes or vacates [Pre-Hearing] order, we may revisit” position that Oracle does not “need a ruling on our motion for summary judgment before engaging in discovery”).

In light of Oracle’s positions, while OFCCP is prepared to produce documents responsive to Oracle’s first set of requests for production, it will not do so until Oracle commits to participating in discovery. OFCCP does not want to be in the lop-sided, prejudicial position of participating in discovery in good faith, with Oracle later taking the position that it will produce nothing until its summary judgment motion is decided.

B. Oracle’s Statement

1. OFCCP’s Discovery Requests to Oracle

Unlike in private litigation where discovery commences after a case is filed, here, OFCCP already has obtained extensive one-sided discovery from Oracle through its eighteen-month investigation that preceded its March 2016 NOV and June 2016 SCN. Indeed, not only did Oracle produce documents and data in response to OFCCP’s OMB-approved “Itemized Listing” (the standard document and data request that begins all compliance evaluations), Oracle also produced an enormous volume of data and documents in response to more than thirty follow-up requests for information, many containing several subparts. Oracle also facilitated interviews with at least thirty-five (35) managers and members of Oracle’s human resources department.

Despite the extensive amount of data and documents OFCCP already has obtained from Oracle, it nevertheless has propounded incredibly overbroad and burdensome requests since filing its Amended Complaint in January 2017. Specifically, on February 10 and 21, 2017, OFCCP served on Oracle two requests for production of documents containing a total of 92

separate requests. Oracle timely served responses and objections on March 7 and 20, 2017. At present, Oracle is actively engaged in the process of collecting, processing and reviewing documents for responsiveness, privilege and production. OFCCP also served Oracle with a multi-part FRCP 30(b)(6) deposition notice on March 2, 2017, to which Oracle timely objected on March 9, 2017. Since that time, the parties have engaged in numerous meet and confer efforts, including telephone calls, emails, and letters. Most recently, Oracle served meet and confer letters to OFCCP on March 27, April 7, and April 14; OFCCP has not responded to any of these letters. Instead, OFCCP confirms in this Joint Case Management statement that it will not participate in discovery at this time.

Because of the confidential nature of the documents and data requested by OFCCP, and because OFCCP will not stipulate to *any* protective order governing confidential information, Oracle filed a motion for a protective order on April 21, 2017.⁵ Once that motion is decided, Oracle is ready to commence production of documents and deposition witnesses.⁶ Given the massive overbreadth of OFCCP's requests, however, Oracle anticipates additional motion practice will ensue.

⁵ Although OFCCP takes the position in this Joint Case Management Statement that it opposes "the protective order Oracle proposes," counsel for OFCCP has made clear during the meet and confer process that OFCCP will not agree to *any* protective order in this case. Additionally, rather than meet and confer with Oracle regarding proposed revisions to the Protective Order submitted by Oracle, in correspondence dated April 17, 2017, OFCCP took the position that if Oracle did not file its motion for a protective order by the date upon which Oracle did so (April 21, 2017), OFCCP would move to compel responses to its outstanding discovery requests.

⁶ OFCCP asserts in this Joint Case Management Statement that Oracle "has not made a firm commitment to participating in discovery," and that Oracle has "reserve[d] the right to refuse to participate in discovery pending its summary judgment motion and depending on the case management schedule the Court sets." These statements are demonstrably untrue, as the parties' written meet and confer record makes clear. To the contrary, counsel for Oracle has twice confirmed in writing that "we are *not* taking the position that we will not participate in discovery while our MSJ is pending." April 28, 2017 Connell email to Pilotin (emphasis in original). In that same correspondence, counsel for Oracle further confirmed that OFCCP was grossly mischaracterizing Oracle's position (apparently with this Joint Case Management Statement in mind), and explained that although Oracle is taking the position that given the confidential nature of the discovery requested by OFCCP, the motion for protective order must be heard before Oracle produces documents and deposition witnesses, OFCCP does not have those confidentiality concerns. Accordingly, "there is no reason why OFCCP cannot move forward with producing its documents now." *Id.* OFCCP has not responded to this correspondence.

Moreover, as referenced above, the parties disagree over the applicable time frame governing this case. Determining the applicable time frame is a threshold issue that is critical to framing the appropriate scope of discovery, as Oracle contends the relevant liability period spans no more than eighteen months for any claim, while OFCCP contends it spans more than four years.

2. Oracle's Discovery Requests to OFCCP

On February 8, 2017, Oracle served OFCCP with its first set of document requests and interrogatories. As noted above, although OFCCP already had the opportunity to obtain (and did obtain) extensive discovery from Oracle prior to commencing this litigation, these discovery requests were Oracle's first opportunity to seek discovery from OFCCP. OFCCP served objections and responses to Oracle's document requests and interrogatories on March 6, 2017. OFCCP objected to all of the document requests, refuses to fulfill its obligation of searching for all responsive documents in its possession, custody or control, and instead offered to produce only non-privileged documents from its "investigative file." Nevertheless, no documents have been produced to date. On March 27, 2017, Oracle sent a meet and confer letter to OFCCP, to which OFCCP responded on April 18, 2017. Oracle intends to respond shortly to OFCCP's correspondence. With respect to interrogatories, Oracle and OFCCP have met and conferred, although based on OFCCP's objections and refusal to respond, Oracle intends to bring a motion to compel.

Notably, even though the allegations in OFCCP's complaint appear to rest entirely on statistics, OFCCP has refused to produce the statistical analyses underlying its allegations of discrimination, and instead takes the position that any such analysis is privileged. OFCCP also refuses to disclose any facts purportedly supporting its claims—again, claiming these underlying facts are somehow privileged. Oracle anticipates that OFCCP's over-reliance on purported

governmental privileges in response to Oracle's discovery requests may require additional motion practice.

In addition to the above, Oracle intends to serve a FRCP 30(b)(6) deposition notice and depose individual witnesses. Oracle will formulate the list of individual fact witnesses to be deposed once OFCCP at least produces the documents that it already has agreed to produce from its investigative file. At the appropriate time, Oracle also intends to engage in expert discovery. Finally, Oracle anticipates serving requests for admission and may serve additional document requests, as the case progresses.

III. MOTIONS

A. OFCCP's Statement

Currently pending before the Court are Oracle's (1) Motion for Summary Judgment or, in the Alternative, to Stay the Proceedings for Failure to Conciliate, and a (2) Motion for Protective Order re: Confidential Information. OFCCP's opposition to Oracle's summary judgment motion is due May 12, 2017, with its opposition to Oracle's protective order motion due May 5. Oracle's summary judgment motion is scheduled to be heard on June 16, 2017 at 9:00 a.m. OFCCP is filing a motion imminently addressing Oracle's objections with respect to the temporal scope of discovery.

In addition to the above, OFCCP anticipates several categories of potential pretrial motions:

- **Discovery-Related Motions:** Given the parties' disputes concerning discovery, as noted above, OFCCP anticipates filing various discovery-related motions, including potentially several motions to compel.
- **Daubert Motions:** The parties have acknowledged that expert witnesses will be used in this case. Any expert Oracle proposes may be subject to a challenge under Federal Rule of Evidence 702 and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny.

- **Dispositive Motion:** OFCCP may file a dispositive motion to dispose of Oracle's purported affirmative defenses or on any other issue that can be resolved as a matter of law.
- **Motions *in Limine*:** To streamline a hearing, OFCCP may file motions *in limine* that, among other things, seek to limit presentation of argument or evidence.

Below, Oracle proposes filing a fusillade of motions, which would burden the Court and likely stall resolution of this case. At a minimum, without a prior showing of good cause, the Court should limit the parties to one dispositive motion going forward (*i.e.*, not including the matter Oracle raises in its pending summary judgment motion), which is consistent with federal court practice.⁷ As another court has explained, “[a]llowing multiple motions for summary judgment prevents a timely and efficient disposition of the litigation.” *Valdez v. JDR LLC*, No. CV 04-1620-PHX-JAT, 2006 WL 2038456, at *1 (D. Ariz. July 20, 2006).

Moreover, the Court should impose page limits on the parties' motions. Absent leave of Court, the parties should be limited to submitting 25 pages for any brief supporting a motion; 25 pages for any opposition; and 15 pages for any reply brief, if permitted.

B. Oracle's Statement

As noted above, Oracle already has filed a motion for summary judgment (or, in the alternative, to stay this litigation) based on OFCCP's failure to engage in reasonable conciliation prior to filing its complaint, and a motion for a protective order guarding against unauthorized

⁷ See, e.g., *Travelers Cas. & Sur. Co. of Am. v. K.O.O. Constr., Inc.*, No. 16-CV-00518-JCS, 2016 WL 7324988, at *7 (N.D. Cal. Dec. 16, 2016) (“No party may file more than one (1) summary judgment motion without leave of Court.”); *Modern Telecom Sys. LLC v. Lenovo (United States) Inc.*, No. SACV141266DOCJEMX, 2015 WL 7776873, at *1 (C.D. Cal. Dec. 2, 2015) (“Typically, for the purposes of judicial economy, the Court hears only one summary judgment motion from each party, and only after discovery in a matter has closed.”); *Wade v. Chao*, No. C 08-00001 JSW, 2008 WL 1743483, at *1 (N.D. Cal. Apr. 15, 2008) (“Court notes that although it normally permits one summary judgment motion per party.”); Standing Order for Summary Judgment, Partial Summary Judgment or Summary Adjudication may be filed by each party.”) (Davila, J.), *available at* <http://www.cand.uscourts.gov/filelibrary/625/EJD.CivilStandingOrder-Final.2017.pdf>; Civil Standing Order – General at 2 (“Each party or side is limited to filing one summary judgment motion.”) (Chen, J.), *available at* <http://www.cand.uscourts.gov/filelibrary/715/Standing%20Order%20-%20Civil%20-%20General.pdf>.

disclosure of sensitive and confidential information about Oracle. In the event Oracle's pending motion for summary judgment is denied, Oracle anticipates motion practice on at least the following issues may be necessary:

- Whether OFCCP's conduct during the compliance review, and/or its selection of Oracle's Redwood Shores location for a compliance review (twice in just over one year), violated Oracle's rights under the Fourth Amendment and/or its contract with the federal government;
- Whether OFCCP can properly refuse to produce the statistical models on which the NOV, SCN, and amended complaint were based;
- The time frame for which OFCCP can bring recruiting or hiring claims, given that the NOV and SCN were both expressly limited to the period from January 1, 2013 to June 30, 2014;
- The time frame for which OFCCP can bring compensation claims, given that OFCCP obtained and analyzed data from only 2014 in the course of its compliance evaluation;
- Whether OFCCP can properly bring a "failure to produce" claim (as it purports to do in Cause of Action No. 3) given that it opted to proceed with a complaint alleging substantive discrimination rather than denial of access claims; and
- (If the case is not disposed of by early motion) The order in which discovery should proceed, including but not limited to whether OFCCP should be required to provide the facts supporting its allegations regarding "similar roles" (*see* Am. Compl. ¶¶ 7-9) early on in the case to frame discovery regarding OFCCP's claims under the Title VII "similarly situated" standard.

Additionally, as noted above, Oracle anticipates further motion practice regarding discovery issues, including potential motions regarding expert discovery. Oracle also anticipates an additional motion for summary judgment addressing both the procedural and substantive failings of OFCCP's litigation, once OFCCP produces its documents and Oracle has taken appropriate depositions.

Finally, Oracle requests the opportunity to brief the question of whether adjudication of this action by an Administrative Law Judge from the Department of Labor's Office of Administrative Law Judges (OALJ) violates the Appointments Clause of the United States

Constitution. *See* U.S. Const. art. II, § 2, cl. 2. Because Administrative Law Judges in that office exercise “significant authority pursuant to the laws of the United States,” *Freytag v. C.I.R.*, 501 U.S. 868, 881 (1991) (quotation marks omitted), they are at a minimum so-called “inferior officers” and must therefore be appointed consistent with the Appointments Clause (*i.e.*, by the President with advice and consent of the Senate *or*, if Congress has so authorized, by the President, Courts of Law, or a Head of Department). *See also Bandimere v. SEC*, 844 F.3d 1168, 1181-82 (10th Cir. 2016). Moreover, the limitations on the President’s ability to remove these inferior officers, who can be removed only for cause, *see* 5 U.S.C. § 7521 (ALJs), *see also* 5 U.S.C. § 1202(d) (MSPB), violate constitutional separation of powers principles, *see Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492, 497 (2010). To the extent such a Constitutional challenge to the structure of administrative review within the Department of Labor is not proper before an Administrative Law Judge (or the Administrative Review Board), Oracle hereby preserves this issue for further review in an Article III court. *See OFCCP v. Coldwell, Banker & Co.*, Decision and Final Administrative Order, No. 78-OFCCP-12 (Dep’t of Labor Aug. 14, 1987), 1987 WL 967411, at *7.

IV. SCHEDULING

A. OFCCP’s Statement

As shown above, discovery and pretrial motion practice is expected to be time consuming in this case. In sum, to prepare this matter for trial, the parties will need to complete the following tasks:

- multiple rounds of written discovery, inevitably followed by motion practice;
- review and process thousands of pages of internal documents and prepare detailed privilege logs;
- review potentially thousands of documents produced by the other party;

- depositions of multiple fact witnesses;
- depositions of two or more expert witnesses;
- dispositive motions;
- motions *in limine*; and
- other written pretrial materials, including trial briefs, stipulated facts, exhibit and witness lists, and demonstratives.

In light of the complexity of this case, including the number of affected employees; the various threshold disputes the parties have that have stalled discovery; and the practice in other OFCCP cases involving systemic discrimination, OFCCP proposes the two-year case schedule below, which anticipates a hearing in early 2019.⁸

<u>Event</u>	<u>Proposed Date</u>
Close of Fact Discovery	28 } Friday, June 22, 2018
Initial Expert Disclosures	28 } Friday, July 20, 2018
Rebuttal Expert Disclosures, if any	21 } Friday, August 10, 2018
Close of Expert Discovery	9/5 } Friday, September 14, 2018
Deadline to File All Pretrial, Discovery, and Dispositive Motions (non-MIL)	7 } Friday, September 21, 2018
Deadline to Oppose Dispositive Motions, if any	21 } Friday, October 12, 2018
Deadline to File Reply ISO Dispositive Motion	14 } Friday, October 26, 2018
Deadline to Meet and Confer re Prehearing Statement and Exhibits (Pre-Hearing Order § 4.c)	25 } Friday, November 30, 2018

1-26-18
28
2-23-18
2
3-16-18
35
4-20-18
3
4-27-18
2
5-18-18
14
6-1-18
35
7-6-18

⁸ OFCCP met and conferred with Oracle to reach an agreement on a case schedule, but the parties could not agree. OFCCP had proposed a schedule with a hearing date in November 2018. However, among other things, counsel for Oracle represented they are not available for a hearing in fall 2018, accounting for the holidays, their litigation schedules, and Oracle's proposed length for the hearing.

<u>Event</u>	<u>Proposed Date</u>
Pretrial Filings, Including MILs, Prehearing Statement, Exhibit List, and Witness List (Pre-Hearing Order § 4.d)	21 Friday, December 21, 2018
Pretrial Conference	24 Monday, January 14, 2019
Hearing	21 Monday, February 04, 2019

2-16-18
21
7-27-18
04
8-20-18
21
9-10-16

The two-year schedule OFCCP proposes comports with this case’s needs. Oracle has produced nothing in this litigation, pending obtaining a protective order and, potentially, a decision on its summary judgment motion. Thus, assuming optimistically that Oracle produces documents beginning in June 2017, OFCCP will have—at most—approximately one year to conduct fact discovery in this case. Indeed, it is unlikely to be a full year of fact discovery given Oracle’s expressed threat of “additional motion practice” regarding discovery. *See, supra*, p.13. And discovery will be a far cry from the three-year discovery period that Oracle histrionically posits below by erroneously counting the compliance evaluation as part of litigation discovery.⁹

Moreover, OFCCP’s proposed schedule comports with the practice in other OFCCP cases, as the table below shows. OFCCP cases that have had full merits hearings are almost always heard at least two years after the case is filed. Moreover, the schedule is also consistent with OFCCP cases currently in litigation, which have adopted a similar timeline. Notably, the schedule OFCCP proposes here is swifter than in the cases shown below considering that this case encompasses hiring and compensation discrimination and involves skilled workers¹⁰,

⁹ Oracle asserts it does not need “another year to complete discovery.” *See, supra*, p.23. This makes sense for Oracle: the claims in this case do not require any discovery of OFCCP. On the other hand, this case concerns Oracle’s employment practices, imposing on OFCCP the greater need to conduct discovery.

¹⁰ Discrimination cases involving skilled workers are often more complicated than those involving lower skilled positions as there may be more factors involved in hiring and compensation decisions and there may be more components with respect to recruiting practices and forms of compensation and benefits.

making it more complex. In addition, OFCCP requires additional time in this matter due to Oracle's refusal to supply information during the compliance review.

Contractor (Case Number)¹¹	Complaint Filed	Hearing Date	Approx. Amt. of Time	Nature of Case
Jacksonville Shipyards, Inc. (89-OFC-1)	9/30/1988	3/18/1991	2 years, 6 months	Systemic hiring discrimination against women and minorities in entry-level positions
United Airlines (94-OFC-1)	10/8/1993	9/11/1995	1 year, 11 months	Individual complaint of disability discrimination
Interstate Brands Corp. (1997-OFC-00006)	1997	3/6/2000	~ 3 years	Systemic hiring discrimination against African-Americans in positions at bakery
TNT Crust (2004-OFC-00003)	9/30/2004	11/14/2006	2 years, 1.5 months	Systemic hiring discrimination based on national origin involving unskilled factory worker position
JBS USA Holdings, Inc. (2015-OFC-00001)	12/9/2014	8/14/2017	2 years, 8 months	Systemic hiring discrimination based on gender, race, and national origin involving unskilled meat processing positions
JBS USA LUX S.A. (2017-OFC-00002)	12/9/2016	7/24/2019	2 years, 7 months	Systemic hiring discrimination based on race / national origin involving unskilled meat processing position

Separate from not affording sufficient time to conduct fact discovery, Oracle's proposed schedule was not agreeable to OFCCP because of the availability of the agency's trial team in September 2018.

¹¹ Copies of the orders providing the dates below are contained in OFCCP Attachment A.

B. Oracle's Statement

Although the parties have met and conferred over a proposed trial schedule, they have not reached agreement. Shockingly, OFCCP takes the position that it needs more than another year of fact discovery, and suggests a hearing date in February 2019. Given that OFCCP already conducted an eighteen-month investigation prior to filing suit, and given that OFCCP filed its Amended Complaint in January, 2017, OFCCP's proposed schedule entails *three years* of fact discovery – eighteen months of which was wholly one-sided, as Oracle was afforded no opportunity to seek discovery from OFCCP prior to the initiation of litigation. Moreover, with respect to OFCCP's position that it needs additional time for discovery in light of Oracle's purported "refusal to produce" relevant documents and data (an allegation Oracle denies), Oracle has asked OFCCP on multiple occasions to identify specifically which documents and data it contends Oracle refused to produce. For unknown reasons, OFCCP has not done so. In any event, OFCCP offers no explanation as to why its "refusal to produce" claim justifies *three years* of fact discovery.

Finally, OFCCP's assertion that this case "involves claims that implicate at least 12,000 individuals" is wildly inflated, and does not justify the extended trial schedule OFCCP proposes. With respect to hiring, OFCCP states in its NOV that the relevant applicant pool includes 6,800 individuals. Yet OFCCP makes no showing that all of these applicants were qualified, and OFCCP further alleges that 76 percent of the applicants were Asian, making them the allegedly "favored" group. OFCCP further alleges that Oracle hired 670 of these individuals. Similarly, OFCCP's assertion that the compensation discrimination class includes 5,000 individuals ignores that nearly 1,000 of them are double counted (for example, women in the relevant job functions who also are Asian or African-American). In any event, *OFCCP already has data on all of these individuals, and does not need to obtain it through discovery.* Rather, OFCCP's inflated

numbers are drawn from a faulty statistical analysis that makes no attempt to compare similarly situated employees or similarly qualified applicants. A close scrutiny of OFCCP's case reveals the Agency did not possess facts and evidence supporting its allegations of discrimination at the NOV stage, and OFCCP is attempting to gain such evidence now through discovery.

Oracle does not believe the parties need more than another year to complete discovery.

In fact, Oracle believes the case can be ready for hearing earlier in 2018, although Oracle proposes a September 2018 hearing date in light scheduling conflicts earlier in the year.¹²

Event	Oracle's Proposed Deadline
Close of Fact Discovery	Friday, January 26, 2018
Initial Expert Disclosures	Friday, February 23, 2018
Rebuttal Expert Disclosures, if any	Friday, March 16, 2018
Close of Expert Discovery	Friday, April 20, 2018
Deadline to File All Pretrial, Discovery, and Dispositive Motions (non-MIL)	Friday, April 27, 2018
Deadline to Oppose Dispositive Motions, if any	Friday, May 18, 2018
Deadline to File Reply ISO Dispositive Motion	Friday, June 01, 2018
Deadline to Meet and Confer re Prehearing Statement and Exhibits (Pre-Hearing Order § 4.c)	Friday, July 06, 2018
Pretrial Filings, Including MILs, Prehearing Statement, Exhibit List, and Witness List (Pre-Hearing Order § 4.d)	Friday, July 27, 2018
Pretrial Conference	Monday, August 20, 2018

¹² In this Joint Case Management Statement, OFCCP cites cases it contends justify the prolonged trial schedule it proposes. Those cases do nothing of the sort. In two of the cases, *JBS USA Holdings, Inc.* and *JBS USA LUX S.A.*, the parties stipulated to the scheduling order. Here, Oracle has not so stipulated, and therefore these cases do not support OFCCP's unilateral request for additional time. The other cases cited say nothing about the rationale for the court's adoption of the trial schedules implemented. Accordingly, these cases stand merely for the unremarkable proposition that cases are scheduled in a manner tailored to the needs of a case. Here, given the OFCCP's extensive underlying eighteen-month investigation, no such lengthy trial schedule is warranted.

V. HEARING**A. OFCCP's Statement**

Based on the current status of the case, OFCCP estimates that the hearing should take 14 days, divided equally between the parties.

OFCCP opposes Oracle's request to bifurcate trial in this case. Bifurcation is the exception, not the rule. *See, e.g., Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (noting "decision to decline to bifurcate the trial comported with normal trial procedure"); *Clark v. Internal Revenue Serv.*, Civil No. 06-00544 SPK-LEK, 772 F. Supp. 2d 1265, 1269 (D. Haw. 2009) (same); *GEM Acquisitionco LLC v. Soreson Group Holdings, LLC*, No. C 09-01484 SI, 2010 WL 1729400, at *3 (N.D. Cal. Apr. 27, 2010) (same). Oracle, as the proponent of bifurcation, has made no showing regarding as to how bifurcation would serve judicial economy in this case, let alone show that "the damages issues in this case are so complex as to warrant bifurcation." *GEM*, 2010 WL 1729400, at *3. On the contrary, because OFCCP's damages calculation will be intertwined with evidence concerning Oracle's liability, bifurcation will likely result in the redundant presentation of evidence, which would waste the Court's time and resources. *See, e.g., Clark*, 772 F. Supp. 2d at 1269 ("Bifurcation is inappropriate where the issues are so intertwined that separating them would tend to create confusion and uncertainty.") (citation omitted).

B. Oracle's Statement

Oracle anticipates a 20-day trial for Phase 1 liability. Because OFCCP purports to bring pattern or practice discrimination claim, it first must establish that discrimination is Oracle's standard operating procedure—the regular rather than the unusual practice. *Int'l Brotherhood of*

Teamsters v. U.S., 431 U.S. 324, 336 (1977). Oracle suggests first holding a hearing on liability issues at the Phase 1 stage. Only if OFCCP is successful would a second hearing on Phase 2 damages be needed. This is consistent with how the Office of Administrative Law Judges handled the litigation in the *OFCCP v. Bank of America* (1997-OFC-16) matter. Notably, none of the cases cited above by OFCCP in opposition to Oracle's suggestion of first holding Phase 1 hearing on liability before determining if a Phase 2 hearing on damages is necessary are employment cases—let alone pattern or practice discrimination cases like OFCCP's case here.

VI. OTHER ISSUES

A. OFCCP's Statement

OFCCP does not have any other issues to identify at this time.

B. Oracle's Statement

Oracle does not have any other issues to identify at this time.

Respectfully submitted,

Date: May 2, 2017

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