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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

**DEFENDANT'S MOTION FOR
JUDGMENT ON THE
PLEADINGS OF THE CLAIMS
OUTSIDE THE APPLICABLE
TIME PERIOD AND OF THE
CLAIM FOR ALLEGED
REFUSAL TO PRODUCE
RECORDS; MEMORANDUM OF
POINTS AND AUTHORITIES**

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Defendant Oracle America, Inc. (“Oracle”), by and through its undersigned counsel and pursuant to 29 C.F.R. § 18.33, respectfully submits the following Memorandum in Support of its Motion for Judgment on the Pleadings of Claims Outside the Applicable Time Period and of the Claim for Alleged Refusal to Produce Records. Although Oracle also currently has pending a Motion for Summary Judgment, or, in the alternative, to Stay Proceedings for Failure to Conciliate, which Oracle contends constitutes a basis to dismiss the litigation entirely, Oracle also brings the present motion for the Court’s consideration, given that the applicable time period governing this case is a threshold issues that frames the scope of the litigation (including discovery) and impacts scheduling, in the event Oracle’s pending Motion for Summary Judgment is denied.¹

I. INTRODUCTION

This case is the fruit of OFCCP’s rush to file a complaint in litigation prior to exhaustion of the required administrative process. OFCCP is not permitted to pursue claims beyond the scope of its investigation and beyond the scope of the Notice of Violations (“NOV”) and Show Cause Notice (“SCN”) that it issued. Additionally, the Complaint’s last purported claim for alleged refusal to produce data and records is not properly included in this enforcement action and it must also be dismissed.

First, as to the recruiting and hiring discrimination claims, this Court does not have jurisdiction over matters outside the time period at issue in the NOV and SCN, including OFCCP’s baseless allegation that the purported violations continue “to the present.” In the NOV, and the later SCN which incorporated it, OFCCP’s recruiting and hiring allegations are expressly limited to the time period of January 1, 2013 through June 30, 2014. Accordingly, the recruiting and hiring discrimination claims after June 30, 2014 were never investigated nor conciliated and they must be dismissed.

¹ On May 2, 2017, OFCCP filed a Motion for a Ruling Overruling Oracle’s Objections Regarding The Temporal Scope of Discovery. OFCCP argues that it should be allowed to obtain discovery beyond the applicable time frames. Oracle will respond to OFCCP’s discovery arguments in its forthcoming Opposition to OFCCP’s pending motion.

The compensation discrimination claims outside of calendar year 2014 must also be dismissed because OFCCP admits that it has no factual basis for such claims. Specifically, OFCCP acknowledges that it lacks any data regarding compensation beyond a snapshot of compensation from 2014. As OFCCP concedes in the NOV and Complaint, its compensation “analysis” is based solely on data from 2014. OFCCP has a regulatory obligation to investigate before bringing an enforcement action, and it must not be permitted to simply assume discrimination in compensation for years in which it has not analyzed compensation data simply because it analyzed compensation data for other years.

OFCCP’s overreach is transparent from the plain language of the Complaint. The Complaint’s many allegations based on mere “information and belief” reveal those allegations for which the Agency lacks actual facts or evidence to support its assertions. The law is clear that allegations based on mere “information and belief” are insufficient to state a claim in these circumstances and the claims so alleged must be dismissed.

Moreover, OFCCP’s request in Paragraph 15 on the Complaint that the Court make an adverse inference based on missing data that Oracle allegedly “refused” to produce is legally unsupportable. Even assuming for the sake of argument that Oracle had refused to produce the referenced data (which it did not), the adverse inference that OFCCP requests is available only where the contractor has either destroyed or failed to maintain required records, neither of which is alleged here.

Second, OFCCP’s last claim for alleged “refusal” to produce requested information must be dismissed. A cause of action for “refusal” is not appropriate in this enforcement action. If Oracle had refused to produce information it was required to produce in the course of the compliance review, the proper recourse for OFCCP was to bring an expedited denial of access case to enable OFCCP to obtain the data, so that the Agency would have that data to analyze before it completed its review and determined whether there was reasonable cause to find violations. *See* 41 C.F.R. §§ 60-30.31, 60-1.26(a)(vii). Indeed, that is precisely what the OFCCP is currently doing in its denial of access case against Google. *See OFCCP v. Google*,

Inc., 2017-OFC-08004 (OALJ, Dec. 29, 2016). But here, the Agency attempts to leapfrog the crucial step of obtaining and analyzing data *before* completing its review and commencing an enforcement action. OFCCP never brought a denial of access action and cannot now use this enforcement proceeding to assert unsupported allegations and seek an adverse inference as though it had brought and won an access claim.

For all these reasons, if OFCCP is permitted to proceed with this litigation at all, the temporal scope of the claims must be limited to those time periods included in the NOV and SCN and encompassed by OFCCP's investigation: January 1, 2013 to June 30, 2014 for the recruiting and hiring discrimination claims, and calendar year 2014 for the compensation discrimination claims. In addition, the claim for alleged refusal to produce documents should be dismissed because it an improper claim in this proceeding.

II. FACTUAL BACKGROUND

A. OFCCP Initiated A Compliance Review In 2014, In Which It Sought And Collected Applicant And Hiring Data For January 2013 Through June 2014 Only And Compensation Data For 2014 Only.

On September 24, 2014, OFCCP issued a Scheduling Letter to Oracle, stating that Oracle's headquarters location in Redwood Shores, California (hereinafter "HQCA") had been "selected . . . for a compliance review under Executive Order 11246." Amended Complaint ("Complaint"), ¶ 6; Scheduling Letter p. 1.² That Scheduling Letter asked Oracle to provide OFCCP with a copy of its Executive Order Affirmative Action Program ("AAP") and the supporting data listed on the attached Itemized Listing. *Id.* With regard to applicant and hiring

² This tribunal may consider documents referenced and relied upon in the Complaint and documents subject to judicial notice in adjudicating a motion for judgment on the pleadings. *See, e.g., Munoz v. PHH Corp.*, No. 1:08-CV-00759, 2014 WL 3906484, at *2 (E.D. Cal. Aug. 11, 2014) ("Courts may . . . consider [on a Motion for Judgment on the Pleadings] matters not contained in the pleadings if the matters are documents incorporated by reference or matters of judicial notice."); *see also Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) ("[A] court may consider a writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned."); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (holding that a court ruling on a motion to dismiss may consider a document the authenticity of which is not contested, and upon which the plaintiff's complaint necessarily relies). The following documents referenced and relied upon in the Complaint, and the authenticity of which are unquestionable, are attached as Exhibits to the Declaration of Erin Connell filed herewith: Scheduling Letter (Exh. A); NOV (Exh. B); SCN (Exh. C). *See also* Request for Judicial Notice filed herewith.

data, the Itemized Listing requested only data for the preceding and current AAP year—i.e., January 1, 2013 through June 30, 2014 (the quarter completed before the Scheduling Letter). *Id.* at p. 2. With regard to compensation data, the Itemized Listing requested only “annualized compensation data (wages, salaries, commissions, and bonuses) by either salary range, rate, grade, or level showing total number of employees by race and gender and total compensation by race and gender”—i.e., snapshot 2014 annualized compensation data. *Id.* at p. 3.

Consistent with the Itemized Listing, Oracle produced, and OFCCP analyzed, applicant and hiring data for the period January 1, 2013 through June 30, 2014. *See* NOV, Violation 1. Also consistent with the Itemized Listing, Oracle produced, and OFCCP analyzed, compensation data from a snapshot based on current employees as of January 1, 2014. *See* NOV, Attachment A, footnotes 1–3.

B. OFCCP Issued A Notice Of Violation And Show Cause Notice Based On Its Compliance Review Period Ending June 2014.

Without any Predetermination Notice or other prior indication that OFCCP contended Oracle has engaged in wrongdoing, on March 11, 2016, OFCCP issued a Notice of Violation. As to recruiting and hiring, the NOV charged that “[d]uring the review period from January 1, 2013 through June 30, 2014, ORACLE discriminated against qualified African American, Hispanic and White (hereinafter ‘non-Asians’) applicants in favor of Asian applicants, particularly Asian Indians based upon race in its recruiting and hiring practices for Professional Technical 1, Individual Contributor (‘PT1’) roles.” NOV at p. 1. The alleged hiring discrimination violation is limited to the time period of the compliance review in additional places: “Specifically, during the period of January 1, 2013 through June 30, 2014, ORACLE recruited approximately 6800 applicants to PT1 roles. . . . Additionally, during the period of January 1, 2013 through June 30, 2014, ORACLE hired approximately 670 applicants into PT1 roles.” *Id.* at p. 1–2. Thus, the hiring violation encompassed by the NOV is clearly and expressly limited to the time period of January 1, 2013 through June 30, 2014.

Further demonstrating the limited time scope of OFCCP's investigation, the NOV rested its recruiting and hiring claim on comparing data from the United States "Census and/or 2013-2014 DOL, Bureau of Labor Statistics' Labor Force Statistics" with actual applicants for and hires into PT1 roles at HQCA. *Id.* at p. 2, n. 2.

The NOV also made claims of compensation discrimination by Oracle against female employees in Information Technology and Support roles, and against female, African-American, and Asian employees in Product Development roles, "based on 2014 data" and the Agency's regression analysis of that data. NOV at pp. 3-4. The results of that regression analysis are contained in Attachment A to the NOV. Attachment A states that the regression analysis is based on the one-year of compensation data that Oracle had provided for the employees employed at the HQCA location on January 1, 2014. *Id.* at nn. 1-4 of Attachment A. Each regression analysis result contained in Attachment A expressly states that it is for the year 2014. *Id.* at Attachment A. The NOV did not detail or identify the favored "comparators"—*i.e.*, specific persons allegedly similarly situated to those who were allegedly disfavored.

On June 8, 2016, OFCCP issued a Show Cause Notice. The SCN purports to be based on findings from the Agency's compliance evaluation, which are, like the investigation, limited in time. Indeed, the SCN attaches and incorporates the NOV as the "list of violations" upon which the Agency stated it would initiate enforcement proceedings. SCN at p. 3.

C. **Immediately Prior To Change In Administrations, The Agency Filed A Complaint Asserting Claims Beyond The Scope Of Its Investigation And Beyond The Scope Of The Required Notice Of Violation And Show Cause Notice.**

The OFCCP filed its complaint to initiate this enforcement proceeding on the afternoon of January 17, 2017—just three days before the new administration assumed office. *See* Compl.³ Although the Complaint alleges that OFCCP attempted to conciliate with Oracle regarding the

³ On January 25, 2017, OFCCP filed its Amended Complaint, which altered only one paragraph of the original complaint by substituting "June 30, 2013" for the date "June 30, 2014" in describing the time frame during which the Agency alleges various recruiting and hiring discrimination occurred. In all other material respects, the texts of each of the Complaint and Amended Complaint are identical, and this motion refers exclusively to the text of the Amended Complaint.

violations it found,⁴ it admits those conciliation efforts were limited to the violations *identified in the NOV*. Compl. ¶ 17. The Complaint alleges that OFCCP “found” compensation discrimination against women, Asians and African Americans, and that it “found” recruiting and hiring discrimination against “non-Asians.” Compl. ¶ 10. But the Complaint includes alleged violations for time periods outside the scope of the review period, the data reviewed, and the scope of the NOV/SCN. As to the alleged recruiting and hiring violation, the Complaint alleges that “OFCCP found that beginning from at least January 1, 2013 and on information and belief, going forward to the present, Oracle utilized and on information and belief, continues to utilize a recruiting and hiring process that discriminated against qualified . . . non-Asians.” *Id.* As to the alleged compensation violations, the Complaint alleges, “[a]s a result of the compliance review, OFCCP found that from at least January 1, 2014, and on information and belief, from 2013 going forward to the present,” Oracle discriminated against women, African Americans, and Asians in certain roles. *Id.* at ¶¶ 7–9.

OFCCP expressly bases its allegations of hiring and recruiting violations “going forward to the present” on supposed information and belief. OFCCP also bases its claims of compensation violations for periods other than 2014 on allegations supported by nothing but “information and belief,” rather than actual facts or evidence discovered and analyzed during its compliance review. And, the Complaint expressly acknowledges that the allegations of compensation discrimination are based solely on data for 2014 and no other years. *See id.* ¶ 7 (“OFCCP’s analyses showed the following **based on 2014 data** controlling for job title . . .”); *id.* ¶ 8 (“Specifically, **based on 2014 data** controlling for job title . . .”); *id.* ¶ 9 (“Specifically, **based on 2014 data** controlling for job title . . .”).

The Complaint tacitly acknowledges that its allegations are overly broad as to time in other ways as well. The Complaint alleges (inaccurately) that Oracle “refused to produce to the agency various records, including, but not limited to, prior year compensation data for all

⁴ Oracle’s motion for summary judgment challenging the sufficiency of those purported efforts is currently pending for adjudication.

employees.” Compl. ¶ 12. Setting aside the significant inaccuracy, that allegation impliedly concedes that OFCCP *lacks* compensation data to support the alleged violations for any period other than 2014. Additionally, the Complaint seeks to bolster the allegations of hiring and compensation discrimination by invoking a supposed negative inference based on missing information. *See* Compl. ¶ 15 (“Oracle’s refusal to produce all data and records requested pertaining to its recruiting, hiring, and compensation practices further support OFCCP’s findings in paragraphs 7-10.”).

At no time before or after issuance of the NOV did OFCCP commence any proceeding to obtain information that it claims it requested and that Oracle refused to provide. Nonetheless, OFCCP’s hastily filed Complaint asserts claims for time periods that not only are outside the scope of the review period, the NOV, and the SCN, but for periods in which OFCCP has no supporting data. The Agency therefore could not have analyzed data to support violations during those time periods, conciliated on violations for those time periods, or had cause—much less reasonable cause—to believe that there were any violations during those time periods. Nonetheless, skipping over these critical requirements, the Agency proceeded to file a Complaint asserting violations for those time periods.

III. ARGUMENT

A. Legal Standards

Pursuant to 41 C.F.R. § 60-30.8, a party may make a request for an order by motion in writing. “In the absence of a specific provision, procedures shall be in accordance with the Federal Rules of Civil Procedure.” 41 C.F.R. § 60-30.1.

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings after the pleadings are closed, but early enough not to delay trial. “Analysis under Rule 12(c) is ‘substantially identical’ to analysis under Rule 12(b)(6) because, under both rules, ‘a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.’” *Chavez v. United States*, 683 F.3d 1102, 1108–09 (9th Cir. 2012) (quoting *Brooks v. Dunlop Mfg. Inc.*, No. C 10–04341 CRB, 2011 WL 6140912, at *3 (N.D. Cal.

Dec. 9, 2011)). “On a motion to dismiss under Rule 12(b)(6), a court must assess whether the complaint ‘contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Conclusory statements or a “formulaic recitation[s] of the elements of a cause of action” are insufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007). “Thus, a court discounts conclusory statements, which are not entitled to the presumption of truth, before determining whether a claim is plausible.” *Chavez*, 683 F.3d at 1108.

B. The Recruiting And Hiring Discrimination Claims Outside The Compliance Review Period Must Be Dismissed.

1. OFCCP Cannot Pursue Claims Not Encompassed By The Notice Of Violation Or Show Cause Notice.

As explained above, OFCCP’s NOV charged that “[d]uring the review period from *January 1, 2013 through June 30, 2014*, ORACLE discriminated against qualified African American, Hispanic and White (hereinafter ‘non-Asians’) applicants in favor of Asian applicants, particularly Asian Indians based upon race in its recruiting and hiring practices for Professional Technical 1, Individual Contributor (‘PT1’) roles.” NOV at p. 1 (emphasis added). This is not a single, stray, accidental reference; rather this time-based limitation appears throughout the NOV. *See id.* at pp. 1–2 (alleging that “during the period of January 1, 2013 through June 30, 2014, ORACLE recruited approximately 6800 applicants to PT1 roles”); p. 2 (“Additionally, during the period of January 1, 2013 through June 30, 2014, ORACLE hired approximately 670 applicants into PT1 roles”); p. 8 (alleging that Oracle denied OFCCP access to “complete hiring data for PT1 roles during the review period of January 1, 2013 through June 30, 2014”).

Pursuant to the Agency’s own Federal Contract Compliance Manual (“FCCM”), “[t]he [compliance officers] *must include all violations requiring corrective action*, including violations of technical requirements, along with the recommended corrective actions” in the NOV. FCCM § 8F (Notice of Violations); *see also Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“[I]t is incumbent upon agencies to follow their own procedures. This is so even where the

internal procedures are possibly more rigorous than otherwise would be required.”). It is imperative that an NOV include notice of all alleged violations requiring corrective action because the NOV is used to “initiate the conciliation and resolution process.” FCCM § 8F01. It goes without saying that the contractor must be informed of what the alleged violations are before it can engage in any conciliation and resolution process.

The recruiting and hiring violations are also beyond the scope of the SCN. An enforcement proceeding “must be preceded by the service of a notice giving the contractor 30 days to show cause why the enforcement proceeding should not be instituted.” *Bank of Am. II*, 1997-OFC-016, 2016 WL 2892921, at *23 (Dept. of Labor Apr. 21, 2016) (Brown, J. concurring); *see also* FCCM §§ 8D01, 8D02 (“COs must issue an SCN whenever a contractor violates EO 11246” and “COs issue SCNs in all cases after conciliation fails”). Under the regulations, OFCCP may forego the issuance of a SCN only in limited circumstances not present here—for example, where there is a violation of a prior conciliation agreement. 41 C.F.R. § 60-1.26(b); 41 C.F.R. § 60-1.34. It is undisputed in this case that a SCN was never issued beyond the scope of the NOV, which alleged recruiting and hiring discrimination claims only as to January 1, 2013 through June 30, 2014. *See* NOV, SCN. The recruiting and hiring discrimination claims beyond that time period must be dismissed.

2. **Recruiting And Hiring Discrimination Claims After June 30, 2014 Are Beyond The Scope Of OFCCP’s Investigation And Were Never Conciliated.**

In addition, the recruiting and hiring allegations for the time period after June 30, 2014 are beyond the scope of the compliance review. The Executive Order and its implementing regulations set forth a comprehensive scheme of administrative procedures that must be exhausted before any OFCCP enforcement action can be pursued. Such exhaustion requirements embody critical and widely acknowledged policy objectives. Among other things, the administrative process serves to limit the need to adjudicate non-meritorious lawsuits, promotes judicial economy, and ensures that lawsuits do not “peremptorily substitute litigation for conciliation.” *McClain v. Lufkin Indust., Inc.*, 519 F.3d 264, 273 (5th Cir. 2008). An important

part of the administrative process is the requirement that OFCCP investigate and attempt to conciliate discrimination violations before it seeks judicial or administrative enforcement. *See generally* 41 C.F.R. § 60-1.20(a) (explaining the steps OFCCP must take before initiating litigation).

OFCCP's September 2014 Scheduling Letter in this case requested data for applicants and hires "for the preceding AAP year [2013] and, if you are six months or more into your current AAP year when you receive this listing, for the current AAP year." Scheduling Letter, enclosed Itemized Listing number 10. The Agency's investigation focused exclusively on this review period, as demonstrated by the NOV's and SCN's allegations of recruiting and hiring violations, which were expressly limited to the time period January 1, 2013 through June 30, 2014. Yet, the Complaint, without any supporting investigation or review of information or attempt to conciliate in order to avoid litigation, makes the wholly speculative allegation that recruiting and hiring discrimination violations occurred "going forward to the present."

The Agency did not investigate recruiting and hiring discrimination claims for periods after June 30, 2014. Because OFCCP asserted alleged violations only for the time period January 1, 2013 to June 30, 2014 before filing the Complaint, allegations for the two-and-a-half-year period from June 30, 2014 through 2016 could not have been encompassed in any pre-filing conciliation discussions between the parties. Indeed, Oracle was not even informed of those allegations until reading them for the first time in the Complaint. And, of course, OFCCP did not conciliate these claims *at all*. It flouts the entire purpose of the pre-suit administrative scheme for OFCCP to be able to seek to pursue these far broader claims now through litigation, rather than first investigating and conciliating in advance of litigation. Accordingly, OFCCP should not be permitted to proceed on any recruiting or hiring claims outside the January 1, 2013 through June 30, 2014 timeframe and those claims should instead be dismissed.

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C. The Pre- And Post-2014 Compensation Claims Must Be Dismissed.

Likewise, the compensation claims for any time period other than 2014 are beyond the scope of the compliance review and must be dismissed. As explained above, the OFCCP's pre-complaint investigation is a prerequisite to filing suit. That requirement exists so before an Agency can conclude that a contractor discriminated and initiate an enforcement action, the Agency must first have some facts on which to base its conclusion. Indeed, OFCCP's regulations require it to conduct a thorough factual investigation, which may include several "investigative procedures," such as "comprehensive analysis and evaluation of the hiring and employment practices of the contractor"; "[a] desk audit of the written AAP and supporting documentation to determine whether all elements required by the regulations . . . are included"; "on-site review, conducted at the contractor's establishment to investigate unresolved problem areas"; "inspection and copying of documents related to employment actions"; and "an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review." 41 C.F.R. § 60-1.20(a).

Here, during the course of its compliance review, OFCCP received and analyzed compensation data from a snapshot based on current employees as of January 1, 2014 only. With respect to the years 2013 and 2015 to present, OFCCP concedes that it has not analyzed any compensation information for any of those years. *See* Compl. ¶¶ 7–9 (allegations based on 2014 data); ¶ 12 (alleging—inaccurately—that Oracle refused to produce 2013 compensation data). OFCCP further admits in Attachment A to the NOV that OFCCP's compensation "analysis" is based on "one year of compensation data that included Oracle employees who were employed at the relevant facility [Oracle's HQCA location] on January 1, 2014." NOV, Attachment A, footnotes 1–4. But, the Complaint alleges compensation discrimination violations for the time period January 1, 2013 to present. Compl. ¶ 10. Not only does OFCCP lack the compensation information to make any such allegation (other than possibly for the year 2014), OFCCP cannot possibly identify individuals who were allegedly discriminated against based on compensation in 2013, 2015, and beyond.

OFCCP's allegations "on information and belief" that Oracle engaged in discrimination in 2013 and "going forward to the present" demonstrate the inadequacy of OFCCP's investigation of such claims. Cases in the context of EEOC investigations are instructive. As with OFCCP's claims, dismissal of an EEOC claim is appropriate where the agency neglects its pre-filing obligations. In *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 677 (8th Cir. 2012), the Eighth Circuit affirmed the grant of summary judgment for CRST in light of the EEOC's failure to investigate claims relating to 67 allegedly aggrieved persons until after filing its complaint. The court stated that the drastic remedy was warranted by the agency's glaring abdication of its role within the administrative process and by its attempt to improperly substitute pre-suit investigation for post-complaint discovery. *Id.* at 676-77. Such a litigation strategy is "untenable" because it needlessly frustrates the litigation process by introducing a "continuously moving target of allegedly aggrieved persons." *Id.* at 676.

The rationale in *CRST* is applicable here, where OFCCP has no factual basis whatsoever for claims outside the time scope of its investigation. OFCCP may not proceed to litigation on a lark, based on its suspicion of what violations might come to light in discovery. Like the EEOC in *CRST*, OFCCP has done no investigation whatsoever with respect to Oracle's pre or post-2014 compensation data. Consequently, the Agency has not plausibly alleged and thus cannot litigate any compensation claims arising out of that time period. The Agency cannot and should not be permitted to use litigation as a fishing expedition to perform the investigation it was required to have completed before bringing suit. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 73 (1984) (the EEOC has the duty to identify to the accused employer "the groups of persons that it has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which [the EEOC] suspects the discrimination to have been practiced."); *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 814 (S.D.N.Y. 2013) (granting summary

judgment against government where EEOC failed to investigate claims before filing suit and later improperly attempted to bootstrap its investigation through civil discovery).⁵

Additionally, OFCCP's failure to investigate the compensation discrimination claims outside of 2014 makes the SCN that OFCCP issued all the more invalid. By its incorporation of the NOV, the Agency's SCN purported to encompass compensation discrimination claims from "January 1, 2013, and continuing thereafter," NOV at pp. 3-6, but it was impossible for OFCCP to legitimately aver violations in time periods other than 2014. By regulation, OFCCP has no authority to issue a SCN except upon "reasonable cause." See 41 C.F.R. § 60-1.28 ("When the Deputy Assistant Secretary *has reasonable cause to believe* that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted."). Here the Agency could not have had reasonable cause to believe there was compensation discrimination violations in any time period other than 2014 because OFCCP admittedly collected only 2014 compensation data. The required "reasonable cause" cannot exist for claims about which OFCCP had *no* information.

In short, OFCCP failed in its pre-filing duty to investigate alleged compensation discrimination for any time other than 2014, since it had no data and could not have analyzed compensation data other than 2014 data. Therefore, the compensation discrimination claims based on times periods other than 2014 must be dismissed.

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⁵ An even more exacting review of OFCCP's adherence to its regulatory obligations prior to instigating litigation is appropriate given the contractual nature of OFCCP's jurisdiction over Oracle coupled with the important policy consequence of potentially deterring companies from doing business with the federal government out of fear that OFCCP (and other federal agencies) might prematurely instigate enormously costly and time-consuming litigation for charges that were never investigated. This tribunal has both the authority and the duty to review whether OFCCP satisfied its regulatory requirement to investigate all the allegations it has alleged in the Complaint and to enforce that requirement by dismissing this action, just as courts have done when the EEOC has failed to meet its administrative investigation obligations.

D. “Information And Belief” Allegations Are Insufficient Where An Agency Has Pre-Filing Authority And Obligations To Obtain Supporting Information.

Even under the Federal Rules of Civil Procedure, “information and belief” allegations, though “[t]olera[ted],” do “not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances” nor give “a license to . . . make claims . . . without any factual basis or justification.” *See* Fed. R. Civ. P. 11 (1993 Advisory Committee Notes); *see also* *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374, at *4 (N.D. Cal. Sept. 14, 2009) (dismissing claim based on “information and belief” because “[s]imply guessing or speculating that there may be a claim is not enough”). “Information and belief” pleading is particularly inappropriate where, as here, “the circumstances,” Fed. R. Civ. P. 11 (1993 Advisory Committee Note), involve a government agency that has the authority and obligation to obtain and analyze supporting information *before filing suit*.

Use of the “information and belief” phrase in this context serves no purpose other than to highlight that the OFCCP failed to fulfill its obligation to perform a pre-suit investigation and thus lacks sufficient facts and knowledge. As one court has observed, use of the phrase “information and belief” actually creates the inference that the pleading party is engaging in speculation, making *dismissal* appropriate:

The shortcoming in [the plaintiff]’s position is that it has chosen to cabin that particular allegation as being made “on information and belief.” Despite the common appearance of that phrase in practice, it is not a recognized pleading device under the rules. Rather, Rule 11(b) of the Federal Rules of Civil Procedure provides that by submitting a pleading to the court, the signatory is always certifying that, “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”

Thus, the phrase “on information and belief” at best would constitute surplusage. *Where, as here, some of the allegations are qualified with the phrase and others are not, a reasonable inference arises that it is intended as caveat*, to provide additional protection should plaintiff be unable to prove any of the factual allegations. *It thus creates a further inference that plaintiff likely lacks*

knowledge of underlying facts to support the assertion, and is instead engaging in speculation to an undue degree. As such, even though the phrase is technically surplusage that could simply be disregarded in an appropriate case, here it undermines [the plaintiff]’s argument that the facts it has pleaded are sufficient to support a plausible inference of [a required element].

Delphix Corp. v. Actifo, Inc., No. C 13-4613 RS, 2014 WL 4628490, at *1–2 (N.D. Cal. Mar. 19, 2014) (emphasis added). As in *Delphix*, the Complaint here caveats only some allegations with the “information and belief” disclaimer—those which OFCCP must concede it did not investigate and has no facts to support.

But, unlike a private litigant, OFCCP has substantial regulatory and Executive authority to conduct an extensive investigation *before* filing charges. There is no excuse or reason for OFCCP to rely on mere “information and belief” allegations when it has pre-filing investigative authority at its disposal far beyond that available to any private litigant.

In a fraud case—which has no required administrative pre-filing process like the claims here—the claims must be pleaded with particularity “[b]ecause a public accusation of fraud can do great damage to a firm before the firm is (if the accusation proves baseless) exonerated in litigation.” *U.S. ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1105 (7th Cir. 2014). The same can be said about the great damage a Federal government agency such as the OFCCP can do by bringing public claims of discriminatory practices before adequately investigating those allegations. For that reason, allegations made on “information and belief” are as inappropriate and insufficient here as they are in fraud cases. *Id.* at 1108 (holding that “information and belief” formula is insufficient because it can mean as little as “on rumor”). Surely, OFCCP must be required to base its governmental enforcement authority on more than “rumor.”

In short, the Complaint’s reliance on the Agency’s “information and belief” does not redeem allegations that are unduly speculative and without factual basis or support.

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E. OFCCP's Request For, And Reliance Upon, A Negative Inference To Support Allegations Of Discrimination Is Improper.

In an effective concession that its investigation was incomplete before it filed this action, OFCCP asks for a negative inference against Oracle with regard to what unreviewed data might possibly have shown. Specifically, OFCCP alleges that Oracle refused to produce relevant information and that this tribunal should therefore draw a negative inference that the information that Oracle would have reported supports OFCCP's allegations of discrimination. *See* Compl. ¶¶ 11–15. But such an inference is improper as a matter of law, and should therefore be stricken from the Complaint.

Even assuming hypothetically that Oracle “refused” some of OFCCP’s requests (it did not), the negative inference OFCCP asks for is not supported by law. The regulations are clear that the unfavorable presumption applies only where a contractor “destroyed” or “failed to preserve” records that it was required to maintain. *See* 41 C.F.R. § 60-1.12(e) (“Where the contractor has *destroyed or failed to preserve* records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: Provided, That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from the circumstances that are outside of the contractor’s control.” (emphasis added)). Such an inference is clearly unwarranted here because OFCCP has not—and cannot—allege that Oracle has destroyed or failed to preserve any required records.⁶

Moreover, any contention that Oracle “refused” to provide required information should have been addressed by filing an “access” complaint. *See* 41 CFR § 60-30.31 (“Expedited

⁶ For that reason alone, Paragraph 15 of the Complaint which requests a negative inference by its assertion that the alleged “refusal” supports a finding of discrimination must be stricken. It is immaterial, impertinent, and contrary to the law. Under Federal Rule of Civil Procedure 12(f), a court may strike from a pleading “any redundant, immaterial, impertinent, or scandalous matter.” Unwarranted inferences are one example where portions of pleadings are properly stricken. *See Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002) (“The possibility that issues will be unnecessarily complicated or that superfluous pleadings will cause the trier of fact to draw ‘unwarranted’ inferences at trial is the type of prejudice that is sufficient to support the granting of a motion to strike.”).

hearings may be used . . . when a contractor . . . has refused to give access to or supply records or other information as required by the equal opportunity clause.”). But, rather than following procedure and filing an access claim to obtain data that OFCCP claims to have been denied, OFCCP instead rushed to file the present poorly investigated and unsubstantiated complaint. If OFCCP had complied with its regulatory mandate to conduct an adequate investigation prior to initiating litigation—including, if necessary, pursuing a right of access action to obtain information before completing its investigation—it would not be in the position of arguing based on evidence it admittedly does *not possess*. That inadequacy in OFCCP’s pre-suit investigation must not be excused—and then rewarded—by permitting OFCCP to obtain through the back door of an adverse presumption that which OFCCP was required to investigate and discover before bringing suit. OFCCP cannot and will not be able to prove its claims of discrimination because there has been no discrimination, and OFCCP cannot escape that simple factual truth by requesting an improper adverse inference in order to shift the burden to Oracle.

OFCCP is not entitled to a presumption that information it does not have would be unfavorable to Oracle. The compensation claims for periods other than 2014, which were never adequately investigated, must be dismissed.

F. The Claim For Relief For Refusal To Produce Relevant Data And Records Is Legally Improper And Must Be Dismissed And Stricken.

The Complaint’s last purported claim for “refusal to produce data and records during compliance evaluation” must be dismissed because it is not an appropriate claim in this post-compliance review enforcement action. The regulations are clear that the proper procedure if OFCCP seeks to gain access to information that a contractor must provide during a compliance review (which never actually occurred here) is an expedited access action. *See* 41 C.F.R. § 60-30.31 (“Expedited Hearings may be used . . . when a contractor . . . has refused to give access to or to supply records or other information as required by the equal opportunity clause.”). Indeed, this is exactly what OFCCP did in its ongoing case against Google. *See OFCCP v. Google, Inc.*, 2017-OFC-08004 (OALJ, Dec. 29, 2016).

Moreover, the Complaint does not even seek production of the records which Oracle allegedly refused to produce. The only appropriate remedy for a “refusal” claim is an order compelling the contractor to produce the information (so that the Agency can complete its investigation and determine whether it has reasonable cause to conclude that a violation has occurred). But the Complaint nowhere seeks that remedy.

OFCCP’s only purpose in including its “refusal” allegations in paragraphs 11 through 15 of the Complaint is to support its request for a negative inference supporting discrimination, but the law is clear that a negative inference is only proper where there is a destruction of records or a failure to maintain required records. *See* 41 C.F.R. § 60-1.12(e) (“Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: Provided, that this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from the circumstances that are outside of the contractor’s control.”). OFCCP does not and cannot allege that Oracle ever destroyed records or failed to maintain required records.

In short, OFCCP’s purported claim for “refusal” to produce information is another example of blatant overreaching by OFCCP in a hurriedly filed complaint based on a deficient pre-filing administrative process. OFCCP cannot simply jump to a conclusion of violations based on information it admittedly does not have and then hope to uncover information to support its claim in discovery.

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IV. CONCLUSION

For the reasons set forth above, Oracle respectfully requests that the Court grant its motion for judgment on the pleadings, and dismiss the allegations of the Amended Complaint that fall outside of the applicable time periods. The claim for refusal to produce data and records should also be dismissed.

May 5, 2017

Respectfully submitted,

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