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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 ORACLE'S  
OPPOSITION TO OFCCP'S  
MOTION FOR ORDER  
OVERRULING ORACLE'S  
OBJECTIONS REGARDING THE  
TEMPORAL SCOPE OF  
DISCOVERY**

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

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## I. INTRODUCTION

OFCCP's Motion puts the cart before the horse. The temporal scope of this litigation is a substantive legal issue that is being contested through Oracle's Motion for Judgment on the Pleadings ("MJOP"). Try as it might to reframe this as a discovery issue, OFCCP cannot get the discovery it seeks—information from January 2013 to the present—because its investigation was limited to the period from January 2013 to June 2014.

Under precedent from the U.S. Courts of Appeals and U.S. District Courts, an agency's complaint must be limited to only "unlawful conduct it has uncovered during the course of the investigation." *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012). OFCCP's litigation authority is thus tightly circumscribed by its pre-suit obligations in order to ensure that it investigates and finds reasonable cause to support its claims before launching expensive and potentially devastating litigation that impugns a federal contractor with allegations by the government of discrimination. Here, because the time periods covered by OFCCP's pre-suit investigation were limited, OFCCP cannot now pursue far broader claims in this litigation.

Those same decisions from the Courts of Appeals and District Courts also prevent OFCCP from using civil discovery to go fishing for supposed violations OFCCP did not investigate before filing suit. An agency required to investigate and find reasonable cause before suing can only "obtain relief for instances of discrimination that it discovers during an investigation of a timely charge"—not "through a process of discovery that follows a complaint based upon an insufficient charge of discrimination." *CRST*, 679 F.3d at 675 n.12 (quotation marks omitted). The law is clear, and is not disturbed in any way by the cases on which OFCCP relies—predominantly non-precedential and easily distinguished decisions by ALJs that do not squarely address the controlling issue of the scope of the agency's pre-suit investigation.

OFCCP's Motion should be denied and Oracle's MJOP granted.

## II. RELEVANT BACKGROUND

### A. OFCCP's Compliance Review Sought And Collected Information Limited To Expressly Identified Timeframes.

OFCCP's claims of discrimination at Oracle's headquarters ("HQCA") involve two

categories: (1) recruiting and hiring and (2) compensation. Both parties agree that OFCCP's investigation was based on applicant and hiring data from only January 2013 through June 2014 and compensation data for only the single year of 2014.

Specifically, OFCCP began its investigation by issuing its standard form Scheduling Letter with an attached Itemized Listing. Compl. ¶ 6; Scheduling Letter at 1. For applicant and hiring data, the Scheduling Letter requested only “[d]ata on your employment activity (applicants, hires, promotions, and terminations) for the preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, for the current AAP year”—i.e., January 1, 2013 through June 30, 2014 (the final quarter already completed). *Id.*, Itemized Listing at 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., annualized compensation data for 2014. *Id.* at 3.

Consistent with the Itemized Listing, Oracle produced applicant and hiring data from January 1, 2013 through June 30, 2014, *see* NOV at 2, and a snapshot of compensation data for people employed at Oracle's headquarters on January 1, 2014, *see* NOV, Attachment A, nn. 1-3.

**B. OFCCP's Notice Of Violation And Show Cause Notice Were Based On The Compliance Review Period.**

On March 11, 2016, OFCCP issued the Notice of Violation (“NOV”). Again, the parties agree that the period of time under investigation was expressly limited. With regard to claims that Oracle discriminated in recruiting and hiring practices, OFCCP's Motion concedes that the alleged violation was “[d]uring the review period from January 1, 2013 through June 30, 2014.” Mot. at 4 (discussing NOV at 1); *accord id.* at 3; *see also* NOV at 1-2 (“[D]uring 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.”). Further confirming the NOV's recruiting and hiring violations are limited to the 2013-2014 period is that the NOV's claim compares Oracle applicant and hiring data with United States “Census and/or 2013-2014

DOL, Bureau of Labor Statistics' Labor Force Statistics." *Id.* at 2 n.2.

As for the compensation findings, the NOV lists four categories of alleged compensation discrimination. NOV at 3-6. But OFCCP's actual analysis of these categories was based solely on that 2014 snapshot data. NOV at 3-6 & Attachment A, nn. 1-4. The NOV confirms that OFCCP's analysis was limited to 2014, *id.*, with each result reported in Attachment A expressly stating that it is for the year 2014, *id.* at Attachment A.

On June 8, 2016, OFCCP issued the Show Cause Notice ("SCN"), incorporating by reference the "list of violations" in the NOV upon which the Agency stated it would initiate enforcement proceedings. SCN at 3.

**C. OFCCP's Complaint Exceeds The Time Periods Investigated And Covered In The Required Notices.**

Although OFCCP concedes its investigation was based solely on specific data in 2013 and 2014, OFCCP now seeks to extend the compliance period to five years. The Complaint admits its findings are limited to specific points in time. Compl. ¶¶ 7-10 (alleging that OFCCP "found ... recruiting and hiring" discrimination "during the period January 1, 2013 through June 30, 2014"); *id.* ¶ 7 (alleging OFCCP "found" discrimination in pay "based on 2014 data"). And, it is for those "violations" that the Complaint claims that OFCCP conciliated. *Id.* ¶ 17. Yet OFCCP's Complaint goes far beyond its investigation. *See id.* ¶ 10 (alleging recruiting and hiring discrimination "from at least January 1, 2013[,] and on information and belief, going forward to the present" (emphasis added)); *id.* ¶¶ 7-9 (alleging discrimination compensation "from at least January 1, 2014, and on information and belief, from 2013 going forward to the present" (emphasis added)). In short, the lawsuit OFCCP actually filed far exceeds the time periods investigated and the data OFCCP collected and analyzed during its investigation.

**III. ARGUMENT**

OFCCP argues that the temporal scope of this litigation is a "threshold issue" that this Court must resolve as soon as possible. Mot. at 7. On that, Oracle agrees—which is why it moved for judgment on the pleadings against OFCCP's causes of action that exceed the scope of the pre-suit investigation. While Oracle agrees that this is a threshold issue, however, OFCCP

gets it backwards when it labels the matter a discovery dispute and then uses the supposed scope of discovery to try to hold Oracle “liab[le] for continuing discrimination.” *Id.* Discovery disputes do not impact the scope of liability, which is how this Court can be sure that this is not really a discovery dispute. Rather, the relevant time period for this litigation is a substantive legal issue and, as such, it has an impact on the scope of discovery.

**A. The Claims In OFCCP’s Complaint That Exceed The Time Period Covered By Its Pre-Suit Investigation Are Improper And Should Be Dismissed.**

As set forth in Oracle’s MJOP, OFCCP cannot allege claims outside of the review period it investigated—January 2013 through June 2014. Executive Order 11246 and its implementing regulations set forth the administrative process by which OFCCP must investigate and attempt to conciliate discrimination violations before initiating litigation. *See* 41 C.F.R. § 60-1.20(a) (explaining the steps OFCCP must take before initiating litigation); *id.* § 60-1.26(a)(2) (“OFCCP may seek back pay and other make whole relief for victims of discrimination identified during a complaint investigation or compliance evaluation.”); *id.* § 60.1.24(b) (“In conducting complaint investigations, OFCCP shall, as a minimum, conduct a thorough evaluation of the allegations of the complaint and shall be responsible for developing a complete case record.”); *id.* § 60-1.28 (requiring “reasonable cause that a contractor has violated the equal opportunity clause” before issuing a notice of violation); *id.* § 60-1.33 (describing the conciliation process for circumstances where “a compliance review, complaint investigation or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause”). OFCCP’s Federal Contract Compliance Manual further directs the preparation of an NOV “to initiate the conciliation and resolution process.” FCCM § 8F01. Here, the NOV limits the hiring claims to the period of January 1, 2013 through June 30, 2014 and admits the compensation claims are based on 2014 data only. *See* NOV at 1, 2, 8. Common sense dictates that an agency cannot conciliate on violations for which it has not obtained data or investigated. OFCCP therefore could not—and, concedes, did not, Compl. ¶ 17—conciliate as to any violations outside of those time periods.

There can be no reasonable dispute that the claims in an administrative complaint

initiating adversarial litigation must be within the scope of the agency's pre-suit investigation and must be supported by the information the agency obtained and analyzed during that investigation. Because OFCCP has similar (albeit more onerous) pre-suit obligations to investigate and conciliate than the EEOC, *see* Oracle MSJ re: Conciliation at 11-13, authorities from the U.S. Courts of Appeals and U.S. District Courts regarding the consequences of the EEOC failing to satisfy its pre-suit obligations are instructive here.

In *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012) (*discussed* by Oracle MJOP at 12), the Eighth Circuit affirmed the grant of summary judgment for CRST because the EEOC failed to investigate claims relating to 67 allegedly aggrieved persons until after filing its complaint. The agency's pre-suit obligations of initiating a review, conducting an investigation, notifying the defendant of violations supported by reasonable cause, and conciliating on those violations are "not unrelated activities, but sequential steps in a unified scheme for securing compliance with Title VII." *Id.* at 672 (quotation marks and brackets omitted). The Eighth Circuit emphasized that, like the regulatory scheme governing OFCCP, Title VII "plac[es] a strong emphasis on administrative, rather than judicial resolution of disputes." *Id.* at 674 (quotation marks omitted). Because violations must be "*subject to a conciliation proceeding*," the agency "must discover such ... wrongdoing *during the course of its investigation*"—not after the investigation has concluded and the complaint has been filed. *Id.* (quotation marks omitted; emphasis in original). "Absent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate." *Id.* at 676 (quoting *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 366 n.14 (4th Cir. 1976)). Thus, the Eighth Circuit held that an agency's complaint must be limited to the "unlawful conduct it has uncovered during the course of the investigation." *Id.* at 674 (quoting *EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996); *id.* at 674-75 ("The jurisdictional scope of an individual Title VII claimant's court action depends upon the scope of *both* the EEOC charge *and the EEOC investigation*." (brackets omitted; emphasis added) (quoting *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994))).

The Southern District of California came to a similar conclusion in *EEOC v. Dillard's Inc.*, No. 08-CV-1780-IEG (PCL), 2011 WL 2784516 (July 14, 2011) (*cited approvingly by CRST*, 679 F.3d at 674, 676). There, the court granted, in relevant part, the defendant's motion to preclude the EEOC from pursuing disability discrimination claims by alleged victims other than the two who the EEOC identified during the pre-suit proceedings. *Id.* at \*5-8. Echoing many of the statements repeated in *CRST*, the court found that an agency cannot "seek relief" beyond what is "identified during the investigation." *Id.* at 6 (quoting *EEOC v. United Parcel Serv.*, 94 F.3d 314, 318 (7th Cir. 1996)). Combining the agency's pre-suit obligations and the emphasis on dispute resolution, the court concluded: "The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is *necessary* to provide the defendant-employer *adequate notice* of the charges against it and a *genuine opportunity* to resolve *all charges through conciliation.*" *Id.* (emphasis added).

Lest there be any doubt, these cases—including the many cases they cite and rely upon—represent the prevailing law in the federal courts. They are not anomalous. *See, e.g., EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 810-16 (S.D.N.Y. 2013) (rejecting EEOC's attempt to "substitute its own investigation with the fruits of discovery to identify which members of the class, none of whom were discussed specifically during conciliation, might have legitimate individual claims"); *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1262-67 (D. Colo. 2007) (holding that "the EEOC ... failed to carry its burden of showing that its investigation put Defendants on notice of the national scope of the potential claims against Defendants"); *EEOC v. Am. Samoa Gov't*, Civ. No. 11-00525 JMS/RLP, 2012 U.S. Dist. LEXIS 144324, \*16-35 (Oct. 5, 2012) (rejecting EEOC's government-wide claims because its investigation was limited to discrimination in only one department); *EEOC v. Orig. Honeybaked Ham Co. of Ga., Inc.*, 918 F. Supp. 2d 1171, 1177-80 (D. Colo. 2013) (rejecting EEOC's attempt to extend allegations of harassment to additional managers because the investigation, reasonable cause letter, and conciliation efforts pointed to the unlawful conduct of only a single manager).

Like the EEOC in the above-cited cases, OFCCP seeks to litigate claims beyond those on

which it investigated and conciliated. This is evident from the Complaint itself as well as from OFCCP's motion. The Complaint, as discussed above (at § II.C), is clear that OFCCP investigated alleged hiring and recruiting discrimination only for 2013 and part of 2014, that OFCCP investigated compensation discrimination only for 2014; and that OFCCP sought (at most) to conciliate only as to those violations. Compl. ¶¶ 7-10, 17. These concessions are echoed throughout OFCCP's Motion. For example, the Motion contends that "OFCCP obtained sufficient information to determine *inter alia* that Oracle discriminated ... in favor of Asian applicants *during the review period of January 1, 2013 through June 30, 2014* in recruiting and hiring." Mot. at 3 (emphasis added). In stark contrast, the Motion couches its other claims as based "on information and belief," not on actual data and evidence. *See, e.g., id.* at 4 ("on information and belief ...."); *id.* at 5 ("on information and belief ...."); *cf.* Oracle MJOP at 13-14 ("information and belief" allegations effectively concede that the pleading party is speculating).

As set forth in Oracle's MJOP, OFCCP failed to investigate alleged discrimination outside specified time periods. The hiring claims outside the period of January 1, 2013 through June 30, 2014 and the compensation claims outside 2014 must therefore be dismissed.

**B. OFCCP Is Impermissibly Fishing For Information To Substantiate The Claims It Has Already Pleaded In Its Complaint.**

Even if this Court construes this "threshold issue" as a discovery issue, as OFCCP urges, the motion should be denied because OFCCP cannot use discovery to support violations it did not investigate pre-suit. As discussed above (at § II.A), during its pre-suit investigation, OFCCP sought and obtained compensation and hiring/recruiting data for only specific windows of time. OFCCP's pre-suit investigation was limited—and intentionally so by OFCCP. But, OFCCP pleaded a complaint far broader than the time periods reviewed in its investigation.

Without any data from its investigation to support its broad "information and belief" allegations, OFCCP turns to civil discovery to try to substantiate those allegations. In OFCCP's own words: "Blocking discovery into the period between the compliance review and a judgment in this case would ... prevent OFCCP from seeking redress for individuals subject to discrimination since 2014." Mot. at 13; *accord id.* ("Oracle attempts to circumscribe discovery

to 2014 for the compensation claims and an 18-month period for the hiring claim, thereby preventing OFCCP from establishing discrimination for the entire time frame alleged in the Amended Complaint.”); *id.* at 8 (limiting discovery would “prevent OFCCP from obtaining information necessary to establish the discrimination alleged in the Amended Complaint”).

But it is improper for OFCCP to try to use civil discovery to fulfill its pre-suit investigative obligations and substantiate claims for which it has no proof. Courts have repeatedly found “a clear and important distinction between facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit.” *CRST*, 679 F.3d at 675 (quoting *Dillard’s*, 2011 WL 2784516, at \*7). “Where the scope of its pre-litigation efforts are limited,” as it was here, agencies such as EEOC and OFCCP “may not use discovery in the resulting lawsuit as a *fishing expedition* to uncover more violations.” *Id.* (emphasis added) (quoting *Dillard’s*, 2011 WL 2784516, at \*7); accord *Harvey L. Walner & Assocs.*, 91 F.3d at 971-72; *Am. Samoa Gov’t*, 2012 U.S. Dist. LEXIS 144324, at \*20-21. Rather, an agency can only “obtain relief for instances of discrimination that it discovers during an investigation of a timely charge”—not “through a process of discovery that follows a complaint based upon an insufficient charge of discrimination.” *CRST*, 679 F.3d at 675 n.12 (quotation marks omitted); accord *Bloomberg*, 967 F. Supp. 2d at 814 (“The Court is not aware of any binding legal authority ... that allows the EEOC to do what it is attempting to do here—namely ... substitute its own investigation with the fruits of discovery ....”); see also *EEOC v. Sentient Dehydrated Flavors*, No. 1:15-cv-01431-DAD-BAM, 2016 U.S. Dist. LEXIS 109479, \*13 (E.D. Cal. Aug. 17, 2016) (denying EEOC’s motion to compel because “[its] discovery requests seek information unrelated to the charges that would have been conciliated”).

Such a rule follows directly the “strong emphasis” that the administrative scheme puts on resolving claims prior to litigation. See *CRST*, 679 F.3d at 674 (quotation marks omitted); see also Executive Order 11246 § 209(b) (requiring that “agency shall make reasonable efforts ... to secure compliance ... by ... conciliation ... before proceedings [may] be instituted); 41 C.F.R. § 60-1.20(b) (“reasonable efforts shall be made to secure compliance through conciliation and

persuasion”); *see generally* Oracle MSJ re: Conciliation at 11-13 (collecting authorities) (establishing the emphasis placed on informal resolution through conciliation under the Executive Order prior to the initiation of litigation by the government).<sup>1</sup>

With respect to OFCCP’s claims of recruiting and hiring discrimination, the NOV expressly admits OFCCP’s “findings” of discrimination are limited only to the time period of January 1, 2013 to June 30, 2014. NOV at 1. As to the compensation discrimination claim, it is no answer for OFCCP to say that the NOV (and the SCN, which incorporates the NOV by reference) contains broad allegations of discrimination “[b]eginning no later than January 1, 2013, and continuing thereafter.” NOV at 3-6 & nn.4-7; *accord* SCN at 3; *see* Mot. at 4 (quoting NOV). As discussed above, the critical inquiry is the scope of the investigation. OFCCP never investigated beyond the limited review period nor analyzed data from outside the 2013-2014 timeframe. In fact, the NOV essentially concedes that its broader claims of discrimination are not based on investigation and analysis when the NOV avers that Oracle must have discriminated in 2013 and must have continued discriminating because Oracle supposedly refused to provide OFCCP further data and so OFCCP “presumes such data would be unfavorable to ORACLE.” NOV at 3-6 nn.4-7. That is not investigation, but the absence of investigation. Moreover, as discussed in Oracle’s MJOP (at 16-18), there is no legal basis for OFCCP to employ an adverse inference under the circumstances. The applicable regulations permit OFCCP to make adverse inferences only “[w]here the contractor has destroyed or failed to preserve records required by this section.” 41 C.F.R. § 60-1.12(e). To be clear, there has never been any suggestion that Oracle destroyed or failed to preserve any required records.

Even worse is the SCN. Again relying on the specious claim that “ORACLE withheld evidence from OFCCP ... during the compliance evaluation,” the SCN purports to keep the door open for “additional violations [that] could be uncovered in future enforcement proceedings.”

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<sup>1</sup> To show the breadth of OFCCP’s allegations: OFCCP seeks redress on behalf of people who may not have even been employed by Oracle at the time of the investigation. Tellingly, OFCCP does not explain how such a suit can possibly comport with its administrative obligations to investigate, find reasonable cause for any violation, and conciliate before bringing an administrative suit.

SCN at 2 n.2. As the case law discussed above demonstrates, an agency that is required to perform a pre-suit investigation cannot rely on civil discovery from the “future enforcement proceeding[]” to “uncover[]” reasonable cause for the claimed violation. In addition, if OFCCP believed that Oracle was not producing requested data and somehow impeding the progress of OFCCP’s investigation, OFCCP’s recourse was to file an “access” complaint. 41 C.F.R. § 60-30.31; *see* Oracle’s MJOP at 16-17. That OFCCP filed no such complaint speaks volumes.

OFCCP did not investigate outside its review window prior to bringing this suit, and it cannot evade its pre-suit obligations by resort to expansive post-suit discovery. Even construed as a discovery motion, this Court should sustain Oracle’s objections and deny OFCCP’s Motion.

**C. OFCCP’s Reliance On Non-Binding Cases Arising Under Significantly Different Factual Circumstances Does Not Change The Analysis.**

OFCCP spends the majority of its motion touting cases that it contends support its position that it is entitled to discovery through to the present. But those cases do not go as far as OFCCP contends. Before separately addressing each case, there are several overarching flaws with all of them. *First*, the cases are principally decisions of ALJs that are not binding on this Court. *Second*, none of them address or refute the legion of authorities from U.S. Courts of Appeals and District Courts cited above, which hold that an agency that is required to investigate and find reasonable cause before filing suit cannot use post-suit civil discovery to satisfy its pre-suit obligation to investigate. *Third*, many of the cases OFCCP relies upon are quite old—10, 20, even 30 years. Importantly, this means they predate the Supreme Court’s decision in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2016), which rejected a line of cases holding that an agency’s pre-suit conciliation efforts were “not subject to judicial review,” *id.* at 1650 (quotation marks omitted), and thus not properly considered when assessing, say, the scope of discovery. *Finally*, and perhaps most importantly, none of the cases are applicable to a situation where (as here) the defendant has raised a significant challenge to the scope of the agency’s complaint. Rather, OFCCP’s cases stand for the unremarkable proposition that the scope of permissible discovery is determined by the settled pleadings in the case. Here, the pleadings are not settled. This is significant because, as discussed below, the cases OFCCP cites permit discovery based

on the scope of the claims. If the claims are narrowed, so too must be discovery (even independent of the separate arguments raised by Oracle above in §§ III.A. and III.B).

While OFCCP started its analysis with the *Uniroyal* case, the more appropriate starting point is *U.S. Dep't of Labor v. Jacksonville Shipyards Inc.*, 89-OFC-1 (March 10, 1989), which interprets and applies *OFCCP v. Uniroyal, Inc.*, 77-OFCCP 1 (Sec'y, June 28, 1979). *Jacksonville Shipyards* (like OFCCP's motion) quotes *Uniroyal* to emphasize that the Secretary of Labor held that Executive Order 11246 "contains no limits on the periods that the Government can engage in discovery, so long as the discovery is related to the contractor's compliance with the Executive Order." *Jacksonville Shipyards*, 89-OFC-1, at 2; see Mot. at 8. The key in *Jacksonville Shipyards*, though, is what conduct "is related to the contractor's compliance with the Executive Order"—i.e., what conduct was appropriately "challenged in the complaint," to use OFCCP's formulation, Mot. at 10. In *Jacksonville Shipyards*, the ALJ emphasized that the post-review "evidence ... is relevant to this case because it is challenged in the complaint" and, *critically*, "[n]o motion to strike or dismiss that part of the complaint ... has been made." 89-OFC-1 at 2. That is the opposite of this case, where just such a motion was filed and is pending.

OFCCP's other cases all suffer from the same problem. In *OFCCP v. Volvo GM Heavy Truck Corp.*, 1996-OFC-2 (ALJ, April 27, 1998), like in *Jacksonville Shipyards*, there did not appear to be any pending motion aimed at the pleadings and OFCCP had "alleged in its administrative complaint" broad claims of discrimination "to the present," which the ALJ found made "evidence of post-1988 conduct ... relevant." *Id.* at 2. Importantly, the ALJ emphasized that the defendant had "*not* sought to distinguish *Jacksonville Shipyards* ... *nor* ... offered case law to the contrary." *Id.* (emphasis added). Oracle has, of course, done both here.<sup>2</sup>

So too *OFCCP v. Enterprise RAC Company of Baltimore LLC*, 2016-OFC-0006, at 5-6 (Mar. 27, 2017), which expressly relies upon *Volvo* and *Jacksonville Shipyards* and thus fails for

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<sup>2</sup> Part of the defendant's argument in *Volvo* was that OFCCP failed to investigate or conciliate on claims after 1988. The ALJ overruled that objection in favor of "constru[ing] liberally" "broad discovery" in "employment discrimination cases." *Id.* In reaching that conclusion, however, the ALJ did not address the reasoning in any of the Article III decisional authorities that Oracle has cited. That is not entirely surprising since nearly every one of those authorities—especially, *CRST*—was decided well after the ALJ's decision in *Volvo* in 1998.

the same reason: Oracle has moved to dismiss the overly broad timewise claims asserted against it, and without those claims there is no basis for the discovery OFCCP seeks. And, like *Volvo* and *Jacksonville Shipyards*, *Enterprise* does not address the settled precedents Oracle cites above that OFCCP does not have the authority to bring claims it did not investigate before filing suit. In any event, despite OFCCP trying to characterize its overly broad claims as “only attempting to determine if alleged violation continues,” Mot. at 12, the SCN reveals that OFCCP is actually using this lawsuit to improperly look for “additional violations.” SCN at 2 n.2.<sup>3</sup>

*OFCCP v. JBS US Holdings, Inc.*, 2015-OFC-1 (ALJ Apr. 22, 2016), includes a lengthy analysis of whether the discovery sought was discoverable under Rule 26. But that analysis, which focuses on relevance as it relates to the claims and defenses at issue, has no probative value here where Oracle’s objections do not turn solely on relevance and proportionality under the Federal Rules of Civil Procedure. In any event, *JBS* confirms that courts evaluating discovery disputes “must look upon the pleadings,” *id.* at \*7, and Oracle has challenged the scope of the pleadings in its own motion. *See also* Mot. at 12 (citing *OFCCP v. Harris Trust & Savings Bank*, 78-OFC-2 (Sep. 23, 1988) (holding that scope of permissible discovery is governed by Rule 26 without discussing the status of the pleadings); *EEOC v. Hickey-Mitchell Co.*, 372 F. Supp. 1117, 1121 (E.D. Mo. 1973) (citing Rule 26 and overruling discovery objection “insofar as a said request is directed toward those matters properly discoverable ... with regard to Count I of the complaint”)). Again, each of these cases goes no further than stating that the permissible scope of discovery is determined by looking to the operative pleadings, which this Court cannot do until it first rules on Oracle’s pending Motion for Judgment on the Pleadings.

We said that *Jacksonville Shipyards* is the right starting point. That is because *Uniroyal* addresses an entirely separate issue and is in no way “squarely on point,” *contra* Mot. at 9. The

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<sup>3</sup> OFCCP relies on a passage in *Enterprise* discussing whether it violates constitutional due process for OFCCP to pursue a claim not in the NOV or SCN. That discussion is inapplicable here; Oracle has not asserted its due process as grounds for barring OFCCP’s discovery. Rather, Oracle’s argument is that OFCCP does not have the authority to aver and pursue claims in civil litigation that it did not investigate before filing suit. *Supra* § III.A. & III.B.

issue in *Uniroyal* was that the defendant declared that “the prehearing discovery regulations were invalid” and thus the defendant “would no longer cooperate with prehearing discovery,” period. 77-OFCCP 1 at 2 (citation omitted). As to the specific portions of the opinion that OFCCP points to, Uniroyal argued in the alternative that the administrative proceedings arose out of a particular compliance review in 1976 and thus, Uniroyal “unilaterally” asserted without basis, that the proceedings must be “limited to one year prior to the compliance review.” *Id.* at 9. The next two sentences of the opinion explain the reasons why Uniroyal’s argument failed:

However, the Company’s position is inaccurate and ignores the fact that affected class violations were first outlined to the Company during a compliance review at Uniroyal’s Mishawaka facility in September, [sic] 1972. These violations, in addition to those alleged as a result of the 1976 compliance review, were contained in the notice of Intent to Debar which is the basis of the Instant proceeding.

*Id.* OFCCP ignores that principal holding on this point, relying instead on *dicta* in the following paragraph, which begins “In any event, ....” *Id.* That paragraph, however, is based on views of the law that are no longer operative. Specifically, that paragraph permits broad discovery on the theory “that discovery is *not limited* to the issues raised by the pleadings [but] that the correct test for the scope of discovery is *relevancy to [the] subject matter of the suit.*” *Id.* The 2015 Amendments to Rule 26 removed the phrase “relevant to the subject matter involved in the pending action” and changed the language to “relevant to any party’s claims or defenses.” Fed. R. Civ. P. 26, Advisory Committee Notes (2015).<sup>4</sup>

OFCCP then quotes the decision in the APA appeal of *Uniroyal* in the D.C. District Court: “There can be no serious question about the authority of the Administrative Law Judge

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<sup>4</sup> Neither of the specific quotes that OFCCP relies upon from *Uniroyal* actually supports its argument. First, referring to its impermissibly broad reading of the scope of discovery, the Secretary states: “Thus, the Judge correctly recognized that discovery addressing past conduct which may have created an affected class is necessary and appropriate in order to show any present effects of past discrimination.” *Uniroyal*, 1977-1 at 9. OFCCP’s discovery requests are not limited to conduct immediately prior to the review period (i.e., “past conduct”), which *Uniroyal* says could be useful in proving the “present effects of [that] past discrimination.” *Id.* (emphasis added). Rather, OFCCP is seeking discovery into alleged *present* discrimination to prove *ongoing* discrimination. Second, *Uniroyal* states that the order governing discovery in that case “contain[ed] no time limits on the periods that the Government can engage in discovery” and thus there were no time limits on the government’s discovery “so long as the discovery is related to the contractor’s compliance with the Executive Order.” *Id.* at 10. That is the language that *Jacksonville Shipyards* interpreted to mean the permissible scope of the allegations in the administrative complaint. Oracle has moved against those allegations in its motion for judgment on the pleadings.

under the Executive Order and the regulations to require Uniroyal both to permit the inspection of pertinent documents and records and to require it to participate in depositions and other discovery.” Mot. at 9 (quoting *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 367 (D.D.C. 1979)). Knowing that Uniroyal’s principal position was that “the prehearing discovery regulations were invalid” and thus it did not have to “cooperate with prehearing discovery,” 77-OFCCP 1 at 2 (citation omitted), it is apparent that the quote from the D.C. court is a reference to the Executive Order and regulations creating authority for ALJs to order and administer discovery—it does not hold that “there can be no serious doubt” that OFCCP is entitled to broad discovery beyond the scope of its investigation. *Contra* Mot. at 9.

Lastly, OFCCP goes to great lengths to describe a recent, but irrelevant, order of the Administrative Review Board. *See OFCCP v. Bank of Am.*, ARB Case No. 13-099, 2016 WL 2892921 (Apr. 16, 2016). OFCCP heavily relies on Judge Royce’s dissenting opinion, which has no precedential effect and which itself relies heavily via block quotes on the underlying opinion of the ALJ. *See* Mot. at 14-15. More to the point, each of these block quotes make clear that the allegations of ongoing violations remained in the “Administrative Complaint.” *Id.* Here, again, Oracle has challenged those allegations in OFCCP’s complaint.

In short, the cases relied on by OFCCP are not binding, do not address the binding authorities or the propositions of law cited by Oracle in this brief, and are easily distinguished in light of the procedural posture of this case.

**D. OFCCP’s Discovery Requests Are Disproportionate And Burdensome.**

Finally, it is noteworthy that OFCCP’s Motion does not address one of Oracle’s principal objections: that OFCCP’s discovery requests (including 92 requests for production) are unduly burdensome and grossly disproportionate to the needs of the case. The proportionality requirement of Rule 26 limits what is discoverable, even if otherwise relevant, based on the importance of the issues at stake, the amount in controversy, the parties’ relative access and resources, the importance of the discovery, and whether the burden or expense of the discovery outweighs its benefit. While OFCCP’s requests likely fail under Rule 26 on its face, the scope of

the discovery the government can obtain here should be even more circumspect because of the agency's pre-suit abilities and obligations to investigate. *See CRST*, 679 F.3d at 675 n.12 (agency can only "obtain relief for instances of discrimination that it discovers during [its] investigation," not "through a process of discovery that follows a complaint").

Despite purporting to have found discrimination during its investigation, *see* NOV Attachment A, OFCCP has served a tremendous number of discovery requests seeking, among other things, many millions of documents, including emails, regarding every facet of Oracle's recruiting, hiring, and compensation practices since January 1, 2013. *See* Bremer Decl., Exhs. 5-6. On their face, these requests are hugely burdensome and grossly disproportionate to OFCCP's needs—as is evidenced by the much smaller amount of materials OFCCP found sufficient to accuse Oracle of discrimination in the NOV. *See* NOV Attachment A (statistical analysis). If OFCCP is allowed to effectively reopen this investigation through civil litigation, responses to these nearly 100 document requests will drown the information OFCCP already thought was adequate to accuse Oracle of discrimination.

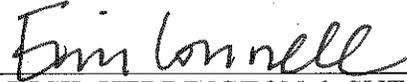
#### IV. CONCLUSION

For the foregoing reasons, this Court should deny OFCCP's Motion and grant Oracle's Motion for Judgment on the Pleadings.

May 19, 2017

Respectfully submitted,

GARY R. SINISCALCO  
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I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. My electronic service address is [jkaddah@orrick.com](mailto:jkaddah@orrick.com).

On May 19, 2017, I served the interested parties in this action with the following document(s):

**DEFENDANT ORACLE'S OPPOSITION TO OFCCP'S MOTION FOR ORDER  
OVERRULING ORACLE'S OBJECTIONS REGARDING THE TEMPORAL SCOPE OF  
DISCOVERY**

by serving true copies of these documents via electronic mail in Adobe PDF format the documents listed above to the electronic addresses set forth below:

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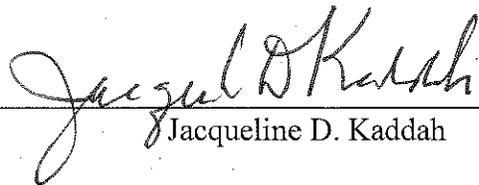
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 19, 2017, at San Francisco, California.

  
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Jacqueline D. Kaddah