

**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 AMERICA
INC.'S OPPOSITION TO OFCCP'S
MOTION TO COMPEL HISTORICAL
DATA OF COMPARATOR
EMPLOYEES**

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I. INTRODUCTION

To date, Oracle has produced (or has agreed to produce) *historical* compensation data going back to 1985 (*i.e.*, as far back as Oracle’s data systems of record reach) for a population of over 7,000 individuals, representing *every* current and former Oracle employee who worked at its headquarters location (HQCA) in the Product Development (PD), Information Technology (IT), and/or Support job functions at any time from January 1, 2013 through January 18, 2019. Considering only the data produced through 2017, it amounts to over 75 data export files, more than 1,000 data fields, and over 60,000 attachment files, totaling over 20 gigabytes, 290,000 pages, and millions of individual data points.

The massive amount of information produced by Oracle is not “biased,” as OFCCP argues. Oracle produced or has agreed to produce data consistent with the scope that OFCCP dictated Oracle must produce. OFCCP’s motion is about something entirely different. OFCCP wants historical compensation data for more than 12,000 former employees who worked at Oracle since 1985, but left prior to 2013—the beginning of the class period. These 12,000+ employees are *not* the subject of this case. To accurately explain what OFCCP seeks in its motion should suffice to demonstrate why Oracle opposes it.

OFCCP’s various attempts to persuade otherwise are meritless. First, apparently, OFCCP wishes this Court to believe that Oracle is a bad actor and that is justification enough to grant OFCCP’s motion. It is not. Nor is the claimed need of some unnamed expert reported by litigation counsel enough. OFCCP has brought claims without this additional data. The Agency does not claim that its allegations suffer due to the allegedly “biased” data set on which they are based. Moreover, as is discussed more in footnote 1 below, OFCCP is refusing to produce in discovery the statistical analysis it touts in its Second Amended Complaint (“SAC”). Thus, the unsupported assertion that some expert unknown to this Court and to Oracle needs this data is not compelling.

Furthermore, there is no law or article that supports OFCCP’s position. Individuals who never worked for Oracle during the class period (*e.g.*, after 2013), are not “comparators” to the class members, and therefore production of historical compensation data about them is simply not warranted. Similarly, OFCCP cites no case law supporting its wild allegations of selection bias, and the articles upon which it purports to rely in footnotes do not actually discuss the argument OFCCP makes here. Indeed, as described below, the case law supports Oracle’s position.

OFCCP also claims that Oracle should be precluded from criticizing its statistical analysis if this data is not provided. OFCCP cites no case law for this position. That stands to reason. OFCCP has alleged discrimination from 2013 forward. It says that it conducted statistical analyses establishing the purported discrimination. Those analyses—which OFCCP is refusing to produce despite relying upon them in its SAC and in its interrogatory responses as supporting the allegations of the SAC—either establish discrimination in the time period alleged or they do not. Oracle knows of no case that allows evidentiary sanctions based on arguments that additional information sought is irrelevant and burdensome. OFCCP provides none.

Finally, although OFCCP attempts to give short shrift to the massive scope of the data it seeks, it cannot deny that gathering and producing it—particularly at this late stage in the litigation—would be incredibly burdensome. OFCCP already has millions of fields of compensation data to analyze, and it fails to demonstrate its request for more data is warranted or proportional to the needs of the case. Oracle estimates that complying with OFCCP’s new and belated documents requests would take at least eight weeks, extending far beyond the agreed upon and court-approved deadline for data production in this case.

For all of these reasons, and as described in greater detail below, OFCCP’s motion should be denied. The parties previously negotiated and agreed to a scope of data production, and Oracle has complied fully with that agreement. OFCCP should not be permitted to embark on a broader fishing expedition at the eleventh hour, particularly given the undue burden of retrieving,

compiling, and producing historical compensation data for former Oracle employees covering nearly three decades' worth of time.¹ To accept OFCCP's position would eviscerate the relevant liability period and require employers to fork over boundless compensation data for former employees who were never employed during the class period. And finally, OFCCP's alternative request that the Court prophylactically bar Oracle from bringing any challenge to its expert report and statistical analysis—without having seen it—is patently absurd and must be rejected. Oracle respectfully requests that the Court deny OFCCP's motion in its entirety.

II. RELEVANT FACTUAL BACKGROUND

A. For The First Two Years Of This Litigation, OFCCP Consistently Argued That The "Relevant" Time Period For Discovery Purposes Is January 1, 2013, To The Present.

Throughout the case, OFCCP repeatedly identified the relevant time period as January 2013 to the present. OFCCP's Notice of Violation ("NOV")—a necessary administrative predicate for this suit—alleges that Oracle engaged in compensation discrimination from "January 1, 2013, and continuing thereafter." NOV at 3-6.² And, in each version of the three complaints it has filed in this litigation, OFCCP explicitly asserts that the challenged conduct began in 2013. *See* Compl. (Jan. 17, 2017) ¶¶ 7-10, 12 (alleging compensation violations, on

¹ OFCCP's insistence that Oracle produce additional massively burdensome compensation data is particularly ironic given the positions OFCCP is taking in response to Oracle's discovery requests, which Oracle anticipates will (unfortunately) be the subject of a forthcoming motion (or motions) to compel by Oracle. Indeed, because status of the SAC was unsettled for several weeks, Oracle was not able to serve its discovery requests on OFCCP until the Court confirmed which pleading was the operative pleading, meaning that Oracle is still in the meet and confer process regarding the discovery Oracle has served on OFCCP. Suffice it to say, however, OFCCP's insistence that Oracle produce the massive data sets it seeks here is inconsistent with the positions OFCCP is taking in response to Oracle's requests regarding the appropriate scope of discovery in this case.

² Oracle disputes OFCCP's ability to allege claims predicated on conduct occurring outside of the audit period, as set forth its motion for judgment on the pleadings (filed May 5, 2017) and other documents. Oracle does not waive any of its arguments with respect to the relevant time period by filing this opposition, and specifically reserves its right to make those arguments.

information and belief, occurring “from 2013 going forward to the present”); Am. Compl. (Jan. 25, 2017) ¶¶ 7-10, 12 (same); SAC ¶ 12 (alleging compensation violations from “January 1, 2013”). Indeed, over the 27 months this case has been pending, OFCCP has served over 230 requests for production of documents, contained within seven separate sets, as well as special interrogatories and requests for admissions. Decl. of Kathryn G. Mantoan, filed herewith (“Mantoan Decl.”) ¶ 2. In each and every one of these sets, OFCCP defined the “RELEVANT TIME PERIOD” as “January 1, 2013, to present.” *Id.*

B. OFCCP Has Argued In Prior Motion Practice That The Relevant Time Period For Discovery In This Case Is January 1, 2013 To The Present.

In 2017, OFCCP specifically moved to define the “temporal scope of discovery.” OFCCP’s Mot. for a Ruling on the Temporal Scope of Discovery (May 2, 2017) at 1. In its first sentence of that motion, OFCCP states that it “[brought] this motion to require [Oracle] to produce non-privileged responsive discovery *relevant to the time period of the violations alleged in the Amended Complaint, January 1, 2013 to the present.*” *Id.* at 1 (emphasis added). In response to OFCCP’s motion, and apparently convinced by OFCCP’s arguments, Judge Larsen ordered that “Oracle must respond to discovery in this case relevant to OFCCP’s claims asserting discrimination ... from 2013 through a date the court will ... fix.” Order Granting in Part, and Denying in Part, Mot. for a Ruling Overruling Oracle’s Objs. Regarding the Temporal Scope of Discovery (June 19, 2017) at 2.³ Neither OFCCP nor Judge Larsen suggested that conducting discovery only for individuals who worked at Oracle on or after January 1, 2013, somehow “biased” the data or rendered it incomplete. *See id.*

³ Oracle cites to this order by Judge Larsen to illustrate the history through the course of the case as to the scope of discovery, without waiving any arguments (including those previously articulated in its October 23, 2018 motion) regarding the validity of orders entered by Judge Larsen at a time when his appointment did not satisfy constitutional mandates.

C. Based On The Parameters Of OFCCP’s Requests Following Judge Larsen’s Order, Oracle Already Has Produced Extensive Historical Compensation Data For The Purported Class Members And Their Comparators.

Soon after the Court’s ruling, on June 30, 2017, OFCCP sent a letter to Oracle that included extensive compensation-related data requests. Mantoan Decl. ¶ 3, Ex. B (June 30, 2017 Letter). In that letter, OFCCP requested both a population of individuals and historical data for that population. Specifically, it asked for “compensation snapshots as of the beginning of calendar years 2013, 2014, 2015, 2016, and 2017.” *Id.* at 2. Compensation “snapshots” contain the compensation data for a group of employees employed by Oracle on a particular date in time; per OFCCP’s request, this included individuals employed by Oracle on January 1, 2013 (and on January 1 of each subsequent year) in the relevant functions and location. Additionally, in connection with each snapshot, OFCCP asked for “background and historical data for each individual appearing in the snapshots.” *Id.*

The parties extensively negotiated the scope and substance of Oracle’s data production (which tellingly included *no* discussion of any purported “selection bias” or need for data for individuals never employed by Oracle after 2013). Mantoan Decl. ¶¶ 3-5, Exs. B-C. Pursuant to those negotiations, a team of programmers at Oracle spent hundreds of hours over the next several months working on scripts to extract the varied data requested from the myriad locations in which it resides in order to pull compensation data. Decl. of Linda Zhao in Supp. of Opp. to OFCCP’s Mot. to Compel (Aug. 25, 2017) ¶ 3 (“Working on this project has caused major disruptions to the OAL team and caused them to shift their priority from working on other projects that are central to Oracle’s operations and business. To meet the urgent demand, Oracle has dedicated ten OAL team members, most of whom have worked on this project full time when needed and as a top priority because it is both complex and large in scope.”; “As of today [August 25, 2017] we have spent approximately 360 person hours on this project.”).

On October 11, 2017, Oracle delivered to OFCCP a hard-disk drive that included a compensation and hiring “database” containing over 75 data export files, more than 1,000 data fields, and over 60,000 attachment files, totaling over 20 gigabytes, 290,000 pages, and millions of data points. Mantoan Decl. ¶ 4, Ex. C. As Oracle made clear in the cover letter accompanying that production, it contained data exports for “individuals who were employed at HQCA in the PRODEV, INFTECH, and/or SUPP job function at any point from January 1, 2013, through January 17, 2017, inclusive.” *Id.* at ¶ 4.⁴ In other words, it included data for *the population of individuals OFCCP had requested*. For this population (which includes over 7,000 individuals), Oracle produced not only the “snapshots” originally requested, but full *historical* compensation data from its systems of record without *any* cut-off start date. OFCCP subsequently posed a series of clarifying questions about these data exports, but at no time in 2017 or 2018 did they ever question the population parameters or express concerns they were “biased” in Oracle’s favor. *Id.* at ¶ 5.

D. In January 2019—More Than Five Years Since The Compliance Review and Two Years After Initiating This Litigation—OFCCP Requests Additional Data For Individuals Who Never Worked At Oracle After January 1, 2013.

Following the extended stay in this matter, and after litigation had resumed, Oracle agreed to supplement the data for the compensation population to include individuals who worked in the PD, IT, or Support job functions at HQCA for two years post-dating its original data pull, *i.e.*, from January 18, 2017, through January 18, 2019, inclusive. Mantoan Decl. ¶ 8, Ex. E. Oracle further agreed to provide historical data for those in the updated compensation population, another considerable undertaking that also will take hundreds of hours. Buddhadev Decl. ¶ 5. In total, with this supplemental production, Oracle’s compensation database includes

⁴ Oracle’s production included data exports related to both OFCCP’s compensation claim and its hiring claim. Oracle understands that data exports related to hiring are not at issue in this motion to compel.

historical compensation data for approximately 8,500 current and former Oracle employees. Shockingly, however, OFCCP now claims (for the first time) its expert “requires” more.

In its January 30, 2019 Request for Production No. 178, OFCCP asked for “all COMPENSATION DOCUMENTS for every employee working in the [PD], [IT] AND Support Job Functions from January 1, 1985 through AND including December 31, 2012 ...” Mantoan Decl. ¶ 6. By way of a February 15, 2019 letter, OFCCP confirmed that it was asking Oracle to produce “compensation data for all employees who received compensation [going back to 1985], even if they left HQCA before 2013.” *Id.* at ¶ 7, Ex. D (Feb. 15, 2019 Letter).

III. ARGUMENT

Despite a rapidly approaching December 2019 hearing date, OFCCP now—for the first time in this years’-long litigation—seeks an additional massive data set for thousands of employees who are indisputably not class members and have never worked in the relevant roles at any point since OFCCP’s HQCA compliance review began. Indeed, OFCCP’s new requests are even greater in scope than its prior requests, given that the new requests seek historical compensation information for individuals who worked for Oracle during a period of *twenty-seven years*, whereas OFCCP’s prior requests sought historical information for individuals who worked for Oracle within a *six-year* time period. The sheer size and urgency of this data request is puzzling: if data for these individuals employed by Oracle *before* 2013 is so crucial, why didn’t OFFCP ask for it years ago? Because the belated data request is massively burdensome, disproportionate to the needs of the case, and untethered to any cognizable legal theory, OFCCP’s motion should be denied.

Mandating disclosure of the breathtaking additional scope OFCCP seeks would eviscerate the liability period and suggest that employers could be compelled to produce all employee compensation records, unbounded by time or the relevant population, based solely on a plaintiff’s suggestion that they might find something decades past that bears on actionable

claims.⁵ Indeed, OFCCP cites *no case* in which this type of massive, historical compensation data for individuals who never worked for the employer during the class period was produced, likely because no such case exists.⁶ Instead, courts repeatedly hold that when incredibly burdensome discovery is sought that is—at best—only marginally related to the claims at issue, the burden outweighs the benefit and the discovery requests are denied. *See, e.g., McDougal-Wilson v. Goodyear Tire & Rubber Co.*, 232 F.R.D. 246, 252 (E.D.N.C. 2005) (denying discovery of computer generated Employee Profiles for more than 1,000 Goodyear employees over a ten-year period because they were not similarly situated to the plaintiff, and because Goodyear already produced the profiles for all similarly situated employees); *Lillard v. Univ. of Louisville*, No. 3:11-CV-554-JGH, 2014 WL 12725816, at *10 (W.D. Ky. Apr. 7, 2014) (refusing to compel production of employment files for eight years’ worth of employees based on plaintiff’s claim that documents were needed to determine “the manner in which such individuals were treated ‘and the patterns that can be proven by tracing such employment-related actions,’” and agreeing with defendant that “the burden and expense of producing hundreds of employment and personnel files of medical professionals employed throughout the School of Medicine, files containing thousands of documents, would far outweigh any minimal benefit

⁵ In addition to the policy reasons underlying statute of limitations concerns about importing unlimited historical data into a present case, evaluation of decades’ worth of pay data would necessarily need to be accompanied by consideration of the specific facts and circumstances that informed pay decisions for all of the thousands of employees at issue for all of those decades. The unmanageability of such an inquiry further underscores why discovery in this (or any) case can and should be limited to evidence that is relevant and proportionate to the claims to be adjudicated.

⁶ In fact, as OFCCP likely is aware due to its “common interest agreement” with plaintiffs’ counsel in *Jewett v. Oracle*, the magnitude and scope of data OFCCP requests here for employees never employed by Oracle during the class period was not produced in *Jewett*. Mantoan Decl. ¶ 13. Nor was it produced in *Moussouris v. Microsoft*, the case cited by OFCCP in footnote 4 of its Motion. Moreover, in neither case did plaintiffs argue that failing to consider data for individuals who never worked for the defendant employer during the class period somehow constituted “selection bias,” further underscoring the novelty and baselessness of OFCCP’s arguments here.

[plaintiff] might obtain insofar as his Title VII and other remaining claims are concerned”); *Segar v. Holder*, 277 F.R.D. 9, 14 (D.D.C. 2011) (denying motion to compel six years’ worth of “documents ‘concerning discussions of promotions’” where that request “encompass[e]d promotions in which class members were not applicants” and thus it was “inconceivable” that such discussions “would have anything to do with this lawsuit”).

OFCCP’s attempt to construe the situation as one where Oracle “provided a biased subset of the full sample affected” such that OFCCP “cannot analyze the claims of the protected class members” [*see* Mot. 1] is belied by the facts, and OFCCP cites *no law* to support it. Indeed, as explained above, OFCCP dictated the scope of data Oracle has produced—not Oracle. Accordingly, OFCCP’s claim now that Oracle has somehow “biased” the data is ridiculous. More importantly, however, the data is not biased. OFCCP cites *no law* in support of its “selection bias” theory, and the articles it cites in footnotes are demonstrably inapposite. OFCCP’s motion should be denied accordingly.

A. OFCCP Is Not Entitled To Massive Amounts Of Irrelevant Data Untethered To The Claims And Limitations Period In The Case.

OFCCP has not met its burden to show that historical compensation data for individuals employed from 1985 to 2012—and thus indisputably outside of the would-be class in this case—is appropriate for discovery. *See* Fed. R. Civ. P. 26(b)(1)(scope of discovery is nonprivileged matter that is *relevant* to any party’s claim or defense and proportional to the needs of the case). To the extent that OFCCP alleges that a female, Asian or African American was discriminated against since 2013—and this is precisely what OFCCP’s complaints have alleged, and their discovery requests have conveyed—OFCCP already has (or will have) data for this employee and his or her comparators. When supplemented through January 2019, this detailed compensation data will cover over six years’ worth of employees. Moreover, for these thousands

of employees, Oracle has agreed to produce historical compensation data extending back to 1985, irrespective of when they were hired and in what capacity.

Data for employees employed over a 30-year period predating the relevant time period is well beyond what other cases have required. *See, e.g., Chen-Oster v. Goldman Sachs & Co.*, 285 F.R.D. 294, 308 (S.D.N.Y. 2012) (finding production of data for class period, and policy documents dating back to “two years prior to the beginning of the class period,” appropriate); *see also OFCCP v. Google, Inc.*, No. 2017-OFC-00004, at 40, 42 (July 14, 2017) (denying OFCCP’s request for 19 years of salary and job history data, even for individuals who did, in fact, work for Google during the time period at issue). Indeed, even the title of OFCCP’s motion (“Motion to Compel Historical Data of Comparator Employees”) is misleading for at least two reasons. First, people who never worked for Oracle during the class period are not “comparators” for purposes of OFCCP’s compensation discrimination claim; nor does OFCCP claim they are. Instead, OFCCP seeks historical pay data for these 12,000+ individuals because it wants to compare their starting pay to the starting pay of class members, and *assumes* and *speculates* that such comparisons will materially differ from comparisons made to the starting pay of individuals who were employed by Oracle during the class period. OFCCP has not demonstrated, however, that such would be the case.

Second, Oracle already *has* produced historical data for the true class comparators, and the massive size of the data set already produced illustrates OFCCP has more than enough data to analyze. Mantoan Decl. ¶ 4, Ex. C; Buddhadev Decl. ¶¶ 3-4. OFCCP cannot seriously be heard to argue the data set it already has is insufficient for analysis given the allegations in the SAC, which obviously repeatedly refer to a statistical analysis OFCCP already has conducted but now refuses to produce.

The cases on which OFCCP relies do not compel any contrary result and are readily distinguishable. *OFCCP v. Uniroyal, Inc.*, decided in the 1970s, was one of the early cases to address the new laws that prohibit discrimination on the basis of sex. No. OFCCP 1977-1, 1979

WL 199230, at *3, 8, n.1 (Sec’y June 28, 1979). There, the ALJ permitted discovery back to 1968, which was the effective date of the amendment to Executive Order 11246 that added “sex” as prohibited grounds for discrimination. Furthermore, Uniroyal did not base its objections on burden/proportionality grounds: instead, Uniroyal refused to cooperate with prehearing discovery, and argued that *all* prehearing discovery regulations were invalid. *Id.* at *1. Here, by contrast, Oracle has produced over 75 data export files, more than 1,000 data fields, over 60,000 attachment files, and millions of data points, and repeatedly has shown that the additional data sought is irrelevant and unduly burdensome. Mantoan Decl. ¶ 4, Ex. C; Buddhadev Decl. ¶¶ 3-13.

OFCCP v. Prudential Ins. Co. was decided in a distinct and entirely distinguishable procedural posture. No. 80-OFCCP-19, 1980 WL 275523, at *1, 7-8 (Sec’y July 27, 1980). In *Prudential*, the parties had entered into a conciliation agreement in 1976. *Id.* at *7. During a subsequent compliance review, OFCCP requested documents that pre-dated the conciliation agreement and Prudential objected, arguing that OFCCP waived any right to data that pre-dates the 1976 conciliation agreement. *Id.* at *7-8. The ALJ interpreted the conciliation agreement to limit the pre-1976 data, but the Secretary disagreed. *Id.*

And *U.S. Dep’t of Labor v. Harris Trust & Savings Bank* is not about a discovery dispute at all. 78-OFCCP-2, 1986 OFCCP LEXIS 17 (ALJ Dec. 22, 1986). Rather, the decision states that “[e]xtensive pretrial discovery was conducted by the parties” (*id.* at *3), and OFCCP’s citation to the opinion simply notes that the defendant there had produced “data including the initial salaries and promotions of employees outside to [sic] the review period” without asserting that the court considered the propriety of or ordered that production. Mot. 12. Thus, OFCCP fails to cite *any* persuasive authority that supports producing data on the extraordinary volume of

individuals who never worked for Oracle during the class period requested in its motion to compel.⁷

OFCCP further argues that there is a public policy interest in producing data on employees who worked at Oracle dating back to almost 30 years before the liability period began. Mot. 13. But the interests weigh in Oracle’s favor, not OFCCP’s. It is contrary to public policy to take a “boil the ocean” approach to discovery and demand decades’-worth of employee data in a case where the agreed-upon scope discovery already is massive, and undisputedly provides ample observations on which to conduct a statistical analysis. “Despite the generally held view that liberal discovery should be permitted in actions alleging unlawful discrimination, the scope of discovery is not without limits.” *Summy-Long v. Pa. State Univ.*, No. 1:06-cv-1117, 2015 WL 5924505, at *1-2 (M.D. Pa. Oct. 9, 2015) (citations omitted) (denying motion to enlarge temporal scope of discovery by twenty-four years as overly broad and unduly burdensome). Indeed, OFCCP’s failure to identify any case law compelling discovery on a similar temporal scope underscores the absurdity of its request.

B. OFCCP’s Purported “Selection Bias” Theory Does Not Support The Massive Production They Seek.

1. There Is No Selection Bias In The Data Produced By Oracle.

OFCCP claims that it must collect decades of irrelevant data in order to correct for “selection bias” in the data that Oracle has already provided. *See* Mot. 3-5, 10-11. Nonsense. While selection bias is a legitimate scientific principle, OFCCP has distorted its meaning and misapplied it to the facts of this case. Selection bias is “[s]ystematic error due to nonrandom selection of subjects for study”⁸ or where “the cases or the controls may be selected in a way that

⁷ For the same reason, OFCCP’s “compromise” that Oracle provide historical data for individuals who worked in the three relevant job functions at HQCA from 2002 through 2013 is also inappropriate. Mantoan Decl. ¶ 9, Ex. F (March 20, 2019 Letter).

⁸ Fed. Jud. Reference Manual on Scientific Evidence at 296.

makes them significantly different from the populations they are supposed to represent.”⁹ Some examples from the reference on which OFCCP relies illustrate the principle: selection bias may occur if a study chooses to survey constituents but only contacts those constituents who write to their representatives, rather than randomly selected constituents; or if an interest group collects information only from their members as opposed to the general public. Thus, selection bias occurs when the data purports to be representative of a sample, but non-random individuals are selected from the data to study in a way that can be shown to bias the findings of the study in a particular direction (by, for example, skewing survey results toward the unrepresentative attitudes of those to whom the survey was administered).

OFCCP suggests that by limiting its data production to individuals employed during the “RELEVANT TIME PERIOD” (as defined by OFCCP), Oracle has committed “selection bias” against those individuals who decided not to remain with the company. Not so. First, OFCCP fails to provide a shred of evidence of any *actual* bias, but rather speculates throughout its motion that bias will result. Such false and unsupported accusations are completely baseless. Contrary to OFCCP’s speculation, there is absolutely no reason to believe that any analysis based on data from the relevant time period skews the results in Oracle’s favor. Indeed, OFCCP attempts to rely on articles (but tellingly, no case law) to support its wild allegations that analyzing OFCCP’s claims without looking to irrelevant historical data for employees who never worked for Oracle during the class period is like focusing only on billionaires and ignoring impoverished college drop outs. *See* Mot. 11 n.9; Mantoan Decl. ¶¶ 10-11, Exs. G-H.¹⁰ Setting aside the absurdity of this strained analogy, the *Scientific American* and *The Atlantic* articles upon which OFCCP relies do not support its arguments. To the contrary, they discuss “Survivor Bias” which is a critique about how to predict the probability of an event happening in the future.

⁹ Michael O. Finkelstein, *Statistics For Lawyers* 309 (3d Ed. 2015).

¹⁰ Available at <https://www.scientificamerican.com/article/how-the-survivor-bias-distorts-reality/>; <https://www.theatlantic.com/business/archive/2013/03/the-myth-of-the-successful-college-dropout-why-it-could-make-millions-of-young-americans-poorer/273628/>.

Survivor Bias suggests that predictions about the probability of an event happening *in the future* cannot be based on looking at the number of successful outcomes *in the past*. Rather, in order to test future outcomes, the individuals should be selected objectively without regard to whether they were successful or not.

Here, Survivor Bias is inapplicable for several reasons. First, OFCCP has the burden of proving discrimination by Oracle in the past, not making predictions about Oracle's supposed future conduct. Second, OFCCP fails to demonstrate that employees who chose to stay at Oracle are "survivors." OFCCP's analogy assumes (wrongly so) that individuals who left Oracle prior to 2013 did so because they were underpaid and/or due to some nefarious conduct by Oracle, but there is absolutely no reason to believe that such is the case. Indeed, it is just as plausible that employees left because they were particularly successful and/or talented, and were recruited away to another employer who made them a better offer. Indeed, as explained above, the identity of the relevant employee population has been defined by OFCCP's pleadings, discovery requests, motion to limit the temporal scope of discovery, and meet and confer efforts. Nothing about the data production suggests selection (or survivor) bias. Rather, the employee population has been defined using objective criteria, including employment dates and job function.

Mantoan Decl. ¶ 4, Ex. C (Oct. 11, 2017 Letter).

2. The Declaration By OFCCP's Litigation Counsel Should Be Given No Weight, And Is Not A Substitute For Expert Testimony.

The declaration submitted by OFCCP attorney Jeremiah Miller is misleading at best, and does not warrant granting OFCCP's motion to compel. Setting aside the obvious fact that Mr. Miller is litigation counsel for OFCCP and not a retained expert with relevant expertise in the fields of compensation analysis, statistics, or selection bias, his purported "analysis" of the data Oracle has produced does not advance OFCCP's arguments. Even assuming Mr. Miller's mathematical calculations using Microsoft Excel are correct, OFCCP uses them in a misleading

way to give the inaccurate impression that something important is missing from the data Oracle already has produced. Not so. As explained above, Oracle already has produced extensive historical compensation data (including starting pay data) for all purported class members and their comparators. There is simply no reason to believe—much less evidence to show—that any analysis that included starting pay data for individuals who never worked for Oracle after 2013 would have different results from one that considers the starting pay data of individuals who continued to work for Oracle during the relevant time period. Moreover, if OFCCP’s expert truly “requires” this data to conduct his or her analysis, OFCCP could have submitted a declaration from this expert explaining that purported need. OFCCP’s choice not to do so speaks volumes, and Mr. Miller’s declaration is no substitute for an expert opinion. Accordingly, the declaration and purported “analysis” by Mr. Miller do not warrant granting OFCCP’s motion.

C. OFCCP’s Requests Are Disproportionate To The Needs Of The Case And The Undue Burden Of The Discovery Outweighs Any Alleged Benefit.

Even if OFCCP’s requests sought additional data that is relevant—and they do not—the demands are not “proportional to the needs of the case,” nor would “the burden or expense” outweigh any benefit. *See* Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering [1] the importance of the issues at stake in the action, [2] the amount in controversy, [3] the parties’ relative access to relevant information, [4] the parties’ resources, [5] the importance of the discovery in resolving the issues, and [6] whether the burden or expense of the proposed discovery outweighs its likely benefit.”); *accord* 29 C.F.R. § 18.51(b)(4); *Gilead Scis, Inc. v. Merck & Co., Inc.*, No. 5:13-cv-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) (“No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old [Rule 26] language to that

effect is gone. Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case.”).

Any aspects of the Rule 26(b)(1) proportionality calculus that might be understood to favor OFCCP’s request are vastly outweighed by the fact that yet more discovery would impose an unacceptable burden on Oracle without any corresponding benefit to adjudicating the issues. OFCCP does not seek data for any class members or comparators who worked at any point during the relevant period; they have all of that already. Rather, it seeks information for people outside of the class who never worked for Oracle within the relevant job functions during the relevant time frame. They appear to believe they are entitled to data on every decision that could impact pay that was ever made for anyone who worked in HQCA in any of the three sweeping job functions that frame their allegations. But this is not the law. Accepting OFCCP’s position would, in effect, eliminate the relevant liability period under Title VII and transmute any compensation discrimination claim (however limited) into a fishing expedition through the entire universe of the employer’s pay and personnel records, so long as the plaintiff alleged that its “expert” had an interest in studying employment decisions dating back decades. Such a result is neither required by nor consistent with the Federal Rules. *See Nicholas J. Murlas Living Tr. v. Mobil Oil Corp.*, No. 93 C 6956, 1995 WL 124186, at *5 (N.D. Ill. Mar. 20, 1995) (agreeing with defendant that it had already “produced the portions of the database that are relevant to this litigation,” and that producing the entire database would be “outrageous” and “unduly burdensome”).

The cases cited by OFCCP allegedly supporting the “proportionality” of its request are equally unavailing. OFCCP’s citation to *Chen-Oster v. Goldman Sachs & Co.* notes that the court compelled a data production “despite defendant’s purported burden,” but the production in *Chen-Oster* was limited to putative class members, and therefore is unlike the almost three decades of individuals outside the liability period OFCCP seeks here. *See* 285 F.R.D. at 308. Similarly, OFCCP cites *Finch v. Hercules, Inc.* for its reference to “liberal discovery” in

employment discrimination cases, but *Finch* supports Oracle's position: there, in a single-plaintiff case, the court limited discovery to two years before the reduction-in-force at issue. 149 F.R.D. 60, 64-65 (D. Del. 1993).

There is also minimal benefit to receiving the data sought. OFCCP's stated theory of discrimination is based on employees' starting pay; it complains that it needs starting pay data for those who departed from Oracle. Mot. 1-2. As explained above, however, Oracle has already produced starting pay data for individuals who began work on or after January 1, 2013, in the relevant job functions at HQCA, regardless of when those employees started to work at the company. Thus, by the time discovery is complete, Oracle will have produced historical compensation data for employees who worked for Oracle during a six-year period, including starting pay data, whether or not the employees still work for the company. Although OFCCP complains that it somehow does not have *enough* information in the millions of data fields available for analysis, it provides *no evidence* that it is insufficient.

Whereas the benefit is minor, the burden is overwhelming. As Mr. Buddhadev notes in his declaration, Oracle is already supplementing the data for the 7,000+ compensation population with two additional years' worth of information, as well as updating the population of individuals employed at HQCA to include those employed in PD, IT, or Support at any time from 2017 to 2019 and pulling their full historical compensation data. Buddhadev Decl. ¶ 5. OFCCP's additional data request for 12,000+ non-class members and pulling their historical data for thirty years from current and legacy systems would cause "major disruptions." *Id.* ¶¶ 6-13. Moreover, given the upcoming hearing in December 2019, adding more data requests would require critical Oracle employees to "shift their priorities" away from working on supplementing and updating the essential data for the compensation class. *Id.* ¶ 12. And even then, it might not be possible to meet the May 31, 2019 data production date to which the parties agreed prior to OFCCP issuing this monumentally burdensome further demand. *Id.* ¶ 13. The burdens of this eleventh-hour request outweigh any need of OFCCP to compel its production. That OFCCP at

no time prior to January of this year requested this information—and indeed previously and repeatedly argued that discovery should be limited to employees who worked at Oracle after January 1, 2013—decisively undermines their suggestion that such information is somehow essential to its case.

D. OFCCP’s Alternative Request That The Court Prophylactically Ban Oracle From Challenging OFCCP’s Statistical Analysis—Without Having Seen The Analysis Or Exchanged Expert Information—Is Premature And Inappropriate.

OFCCP argues that if Oracle does not provide compensation data for those employed at HQCA from 1985 to 2012 in the job functions at issue, then Oracle should be prohibited from making “any challenge to OFCCP’s statistical analysis based on any subset of data Oracle provides.” Mot. 13-14. This request is absurd. And, tellingly, OFCCP cites no authority to support it. The parameters of discovery, and what is reasonable to demand and produce, are often negotiated between the parties and determined by motion practice; there is no “gotcha” principle that countenances making monumental discovery demands, and insisting that an opposing party that does not accede to those demands is somehow estopped from challenging the evidence (expert or otherwise) that are introduced as proof. Here, despite multiple discovery requests and meet and confer discussions on the topic, OFCCP has not disclosed the statistical analysis underlying its operative complaint to Oracle (which unfortunately will likely be the subject of a forthcoming motion to compel by Oracle). Mantoan Decl. ¶ 12. Nor has it disclosed the identity of the “expert(s)” obliquely referenced in the instant motion, and whose desire for mountains of additional data are purportedly motivating the motion. Expert discovery has not even begun, and the parties’ disclosure deadlines do not arrive until July and August. Obviously, it would be premature and wholly inappropriate to prohibit Oracle from raising any challenge at all to OFCCP’s unknown expert report or statistical study that it has not yet seen.

IV. CONCLUSION

OFCCP is not entitled to data on the irrelevant 12,000+ individuals who worked at HQCA in the PD, IT, or Support job functions only prior to January 1, 2013. OFCCP's request for almost thirty years of data on thousands of individuals who are *not* subject to liability in this litigation, and never worked during what OFCCP has always contended is the relevant time period, should be rejected. For the reasons set forth above, Oracle respectfully requests that (1) the Court deny OFCCP's motion to compel "historical data of comparator employees," and (2) if needed, schedule a hearing with the Parties to resolve this dispute.

Respectfully submitted,

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GARY R. SINISCALCO
ERIN M. CONNELL
WARRINGTON S. PARKER



ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Telephone: (415) 773-5700
Facsimile: (415) 773-5759
Email: grsiniscalco@orrick.com
 econnell@orrick.com
 wparker@orrick.com
Attorneys for Defendant
ORACLE AMERICA, INC.