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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 AMERICA
INC.'S OPPOSITION TO OFCCP'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

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I. INTRODUCTION

Summary judgment cannot be granted on Oracle's affirmative defense regarding conciliation for a number of reasons. First, OFCCP's conciliation efforts were not reasonable, but even if they were, there is at least a dispute of fact as to their reasonableness. Second, even if the Court finds that OFCCP reasonably conciliated with respect to the original claims sufficient to grant partial summary judgment as to those claims, it cannot grant summary judgment as to the new allegations in OFCCP's Second Amended Complaint ("SAC") that Oracle "channels" female, Black and Asian employees into lower paying jobs, and discriminatorily relies on prior pay in setting starting pay. SAC ¶¶ 12, 18; *accord id.* ¶¶ 22, 25, 29. OFCCP indisputably failed to conciliate these at all. And third, OFCCP's argument that the "law of the case" entitles OFCCP to summary judgment on Oracle's conciliation defenses is wholly inapposite. The "law of the case" is not a doctrine that binds this court, and even if it were, granting a plaintiff leave to amend a complaint obviously is not the same thing as granting summary judgment, including because the legal standards at play confirm the issues to be decided are not identical.

OFCCP failed to satisfy its conciliation obligations with respect to both the original claims in the First Amended Complaint ("FAC") and, especially, with the new claims presented in the SAC. At the very least, a genuine issue of material fact exists regarding whether OFCCP's conciliation attempts were "reasonable." Executive Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 28, 1965) and its implementing regulations require OFCCP to engage in *reasonable efforts* to resolve any purported findings of discrimination identified in a Notice of Violation ("NOV") through conciliation. 41 C.F.R. § 60-1.20(b). Contrary to OFCCP's assertions, the scope of judicial review applicable here is unquestionably more exacting than in *Mach Mining, LLC v. E.E.O.C.*, 135 S.Ct. 1645, 1654 (2015). Title VII requires the EEOC only to "endeavor" to conciliate a claim. By contrast, Executive Order 11246 requires OFCCP to make "reasonable efforts" to conciliate a claim. Accordingly, the Title VII standard focuses solely on whether any efforts at all were made, while the standard under Executive Order 11246 focuses on the substance

and degree of the efforts – namely, whether they were reasonable. Executive Order 11246’s conciliation requirement is deliberate and backed by policy: it gives federal contractors – whom a government agency is empowered to investigate at will, even in the absence of any complaint – notice of the claims against them and encourages claim resolution before costly and lengthy litigation.¹

That OFCCP went through the motions of essentially notifying Oracle that it would be bringing claims is not conciliation, let alone reasonable conciliation. OFCCP took a confrontational, adversarial approach to this compliance review from the entrance conference. And rather than conciliate as required, OFCCP took a my-way-or-the-highway approach, in which it steadfastly refused to provide Oracle with essential information about the nature of, and bases for, alleged violations. Presumably, this is because (as Oracle has argued time and again) the analysis (which OFCCP refused to disclose during the conciliation process) underlying the supposed violations is fundamentally flawed. OFCCP also refused to provide Oracle with any proposed conciliation agreement or other specific demand for monetary and non-monetary relief, despite Oracle’s repeated requests. Rather, OFCCP’s purported efforts to conciliate amounted to little more than its repeated demands that Oracle respond to OFCCP’s allegations by providing a “rebuttal statistical analysis,” which Oracle had no obligation to do. Then, just as these nominal conciliation discussions were beginning, OFCCP abruptly called them off. Indeed, the timing of events strongly suggests OFCCP rushed to commence this litigation before the change in administrations. On January 17, 2017, OFCCP filed its eleventh-hour complaint, despite having failed to satisfy the

¹ Even OFCCP acknowledges that “reasonable” conciliation efforts should be robust. Indeed, on August 2, 2018, OFCCP published a Bill of Rights entitled “What Federal Contractors Can Expect” that emphasizes transparency and providing contractors with reasonable opportunities to discuss compliance evaluations. Similarly, on September 19, 2018, OFCCP issued Directive 2018-8, with the stated purpose of “ensur[ing] transparency at all stages of OFCCP compliance activities...” Section 7f of the Directive specifically addresses conciliation and confirms that OFCCP should “shar[e] information and essential source data in electronic format to assist the contractor in understanding and replicating OFCCP’s findings.” While not retroactive, these directives nevertheless emphasize that even OFCCP recognizes its conciliation efforts must entail more than what transpired here to be deemed “reasonable.”

conciliation mandate. Two years later, OFCCP continued to disregard its conciliation duties when it filed its SAC, which included several new claims and theories – none of which were included in the NOV or discussed in any of the conciliation meetings.

For these reasons and as described in greater detail below, the Court should deny OFCCP’s motion for partial summary judgment. Alternatively, if the Court is not inclined to deny OFCCP’s motion outright, it should at least defer ruling on this motion until Oracle has had the chance to conduct relevant discovery.

II. FACTUAL, ADMINISTRATIVE, AND PROCEDURAL BACKGROUND

A. Administrative Framework

The regulations enacting Executive Order No. 11246 require that before OFCCP brings a lawsuit against a contractor, OFCCP first must complete a number of mandatory administrative prerequisites. Specifically, after conducting a compliance review, if OFCCP concludes that “deficiencies are found to exist,” OFCCP “shall” then make “reasonable efforts” to address those deficiencies and “secure compliance through conciliation and persuasion.” 41 C.F.R. § 60-1.20(b).

Consistent with that framework, OFCCP can initiate administrative enforcement proceedings when OFCCP finds “violations [that] have not been corrected in accordance with the conciliation procedures . . . or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate.” 41 C.F.R. § 60-1.26(b)(1); *accord id.* § 60-1.24(c)(3) (“Where any . . . compliance review indicates a violation of the equal opportunity clause and the matter has not been resolved by informal means, the Deputy Assistant Secretary shall proceed in accordance with § 60-1.26 [i.e., enforcement proceedings].”).

B. Factual and Procedural Background

The Notice of Violation. On September 24, 2014, OFCCP initiated a compliance review of Oracle’s headquarters that ultimately resulted in the March 11, 2016 NOV. SAC ¶ 6, Ex. A. The audit lasted 18 months. OFCCP came on site twice for approximately eight days to conduct interviews with at least 35 managers and human resources employees. Oracle also produced an

enormous volume of data and documents in response to more than 30 supplemental requests by OFCCP, several containing multiple sub-parts. The NOV issued by OFCCP following the audit contains the allegations upon which the present litigation was originally based. With regard to allegations of compensation discrimination, based on a purported² regression analysis of one year of compensation data for employees employed at Oracle’s Headquarters as of January 1, 2014, the NOV asserts discrimination against women in Information Technology and Support roles, and against women, Black, and Asian employees in Product Development roles. NOV at 3–5. Importantly, the NOV expressly bases its claims on OFCCP’s belief that Oracle was “paying them less than comparable [White and male employees] *in similar roles.*” *Id.* (emphasis added). In other words, the claim of compensation discrimination was for people OFCCP believed were performing similar jobs. There was no allegation of channeling certain groups of people into lower paying jobs; nor was there any allegation of a policy or practice of basing starting pay on employees’ pay at their prior place of employment.³ *See id.*

The Show Cause Notice & OFCCP’s Conciliation Attempts. On June 8, 2016, OFCCP issued a Show Cause Notice (“SCN”), incorporating the NOV as the “list of violations” upon which the Agency could initiate enforcement proceedings. Siniscalco Decl. ¶ 5, Ex. L. Over the next several months, the parties exchanged correspondence and participated in one purported “conciliation” meeting, but as Oracle has explained in detail previously, these communications did *not* constitute reasonable conciliation efforts by OFCCP.⁴ *See generally* Siniscalco Decl. And,

² The claimed results of which are in Attachment A to the NOV. OFCCP has obdurately refused to produce the “regression analysis” itself, despite OFCCP’s demands that Oracle provide its own statistical analysis rebutting it. Decl. of Gary Siniscalco ISO Oracle’s Mot. For Summ. Judgment ¶ 9 (filed Apr. 21, 2017) (“Siniscalco Decl.”).

³ The NOV also included other allegations, including an allegation related to recruiting and hiring, although some of those allegations never made their way into any operative complaint in this litigation, and the parties have agreed to resolve the asserted recruiting and hiring allegations pursuant to the Consent Judgment filed on April 25, 2019.

⁴ OFCCP’s purported conciliation efforts are described in detail in the declarations of Gary Siniscalco and Shauna Holman-Harries filed by Oracle on April 21, 2017 (and relied upon by OFCCP in the present motion), as well as in Oracle’s motion for summary judgment filed on the same day. Oracle can provide courtesy copies if requested by the Court. Further details regarding

setting aside the issue of reasonableness, OFCCP admits – as it must – the conciliation efforts that did take place were limited to the alleged violations identified in the NOV. FAC ¶ 17.

The First Amended Complaint & Initial Litigation Before Judge Larsen. On January 17, 2017, OFCCP filed its Complaint and, eight days later, the FAC correcting typos. Like the NOV, the FAC contained no allegations of supposed channeling of certain groups to lower paying jobs or lower starting salaries based on previous salaries from other employers. Rather, the FAC mirrored the NOV’s compensation allegations based on a comparison of certain groups supposedly performing “similar roles.” FAC ¶¶ 7-9. Likewise, the recruiting and hiring claim was based on alleged preferential hiring treatment for Asians over non-Asians. *Id.* ¶ 10.

On April 21, 2017, Oracle moved for summary judgment based on OFCCP’s failure to conciliate. OFCCP not only opposed Oracle’s motion, but also asked the Court to hold that “as a matter of law OFCCP satisfied its obligations to conciliate.” OFCCP’s Oppo. to Oracle’s Mot. for Summ. Judgment (filed May 12, 2017) at 3. In the June 19, 2017 order addressing both requests for summary judgment, Judge Larsen cited differing declarations from Gary Siniscalco and Jane Suhr, and found that the “record [did] not clearly show that either position was reasonable or unreasonable.” Order Denying Oracle’s Mot. for Summ. Judgment (filed June 19, 2017) at 6. According to Judge Larsen, the declarations showed some attempts at conciliation, but they did not “demonstrate that either [party], as a matter of law, was being reasonable or unreasonable.” *Id.* at 4. The Court thus denied Oracle’s summary judgment motion based on unreasonable conciliation: “Without detailed knowledge of the factual context in which any given statement is made, it is almost impossible for the court to evaluate that statement for reasonableness. And if reasonable minds might differ on the inferences arising from undisputed facts, the court should deny summary judgment.” *Id.* The Court also denied OFCCP’s request for judgment as a matter of law on this

the conciliation process also are provided in the additional declaration of Gary Siniscalco filed with this Opposition.

issue: “Specifically, the court does not decide that OFCCP’s conciliation efforts were ‘reasonable’ ...” *Id.* at 6 n.2.

OFCCP Files its Second Amended Complaint Adding Several New Claims and Legal Theories. In January 2019, OFCCP sought leave to amend its complaint and file a Second Amended Complaint (“SAC”), which the Court granted. In the SAC – for the first time – OFCCP added unfounded alternative theories that Oracle “channels” female, Black and Asian employees into lower paying jobs, and discriminatorily relies on prior pay in setting starting pay. SAC ¶¶ 12, 18; *accord id.* ¶¶ 22, 25, 29. The SAC also added a new and distinct claim alleging violations regarding Oracle’s Affirmative Action Plan. OFCCP never conciliated with Oracle on any of these new claims. Decl. of Gary Siniscalco ISO Opp. to OFCCP’s Partial Summ. Judgment Mot., filed concurrently herewith (“Siniscalco Decl. ISO Opp.”), at ¶ 2.

In the Court’s Order granting OFCCP leave to amend and file its SAC, it found that any “additional conciliation requirements” did not render the proposed amendments defective, so the Court could not deny leave to amend because Oracle’s conciliation arguments failed to clear the high “futility” bar. Order Granting Conditional Leave to Amend (Mar. 6, 2019) (“SAC Order”) at 9-11. The Court’s analysis, however, was in the context of the need to prove futility in order to preclude the proposed amendment, which the Court recognized was governed by a relaxed standard. The Court recognized nevertheless that Oracle’s argument that proper conciliation was a pre-requisite to stating a cause of action was an argument on the merits more suitably addressed on a motion to dismiss (or on summary judgment if material facts are claimed to be in dispute, as they clearly are here). *Id.* at 9.

OFCCP Files its Motion for Partial Summary Judgment. On April 17, 2019, OFCCP moved for partial summary judgment on Oracle’s Sixth and Thirtieth Affirmative Defenses that OFCCP failed to meet its conciliation obligation under 41 C.F.R. § 60-1.20(b).

III. ARGUMENT

In deciding summary judgment motions, the Court must determine, after viewing the evidence in the light most favorable to the non-moving party – here Oracle – whether there are any genuine issues of material fact and whether the moving party is entitled to summary judgment as a matter of law. *O’Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 61 (2d Cir. 2002); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990). Further, the Court must look at the record as a whole and determine whether a fact-finder could possibly rule in the non-moving party’s favor. *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In light of this exacting standard, the Court should pay no heed to OFCCP’s throwaway argument that partial summary judgment must be granted here in the interest of judicial efficiency. Mot. at 10-11. No matter how much a party wishes to “streamline” discovery and remaining issues, even partial summary judgment cannot be granted where there are genuine issues of material fact and where a fact-finder could find in the non-moving party’s favor.

1. OFCCP Cannot Show That Its Conciliation Efforts Were Reasonable As A Matter of Law.

Executive Order No. 11246 and its implementing regulations set forth a comprehensive scheme of administrative procedures the OFCCP must exhaust before it can pursue an enforcement action. These requirements embody critical and widely acknowledged policy objectives. Among other things, the administrative process serves to limit the adjudication of non-meritorious lawsuits, promote judicial economy, and ensure that lawsuits do not “peremptorily substitute litigation for conciliation.” *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 273 (5th Cir. 2008).

OFCCP’s first obligation following an investigation is to issue an NOV, alerting the contractor to the violations OFCCP claims to have uncovered. This first step is essential for putting contractors on notice of the allegations and providing an opportunity to resolve them. After serving an NOV on the contractor, both the Executive Order and its implementing regulations mandate that

OFCCP make reasonable efforts to conciliate the alleged violations contained in the NOV. “Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance . . . by methods of *conference, conciliation, mediation and persuasion before proceedings shall be instituted.*” Exec. Order No. 11246, 30 Fed. Reg. 12319, § 209(b) (emphasis added); *accord* 41 C.F.R. § 60-1.20(b) (“Where deficiencies are found to exist, reasonable efforts shall be made *to secure compliance through conciliation and persuasion.*” (emphasis added)). OFCCP likewise recognizes in its own Federal Contract Compliance Manual that it must conciliate before filing a lawsuit. OFCCP, Federal Contract Compliance Manual, § 8G01, at 265 (“After a [Compliance Officer] issues a [Notice of Violation], he or she will attempt to reach an acceptable resolution of the violation findings through voluntary conciliation efforts with the contractor.”).

Contrary to OFCCP’s assertions, the scope of judicial review applicable here is unquestionably more exacting than in *Mach Mining*, 135 S.Ct. at 1654 . Unlike the more stringent obligation OFCCP has to conciliate, the Supreme Court in *Mach Mining* held that under the underlying statutory and regulatory framework at issue, the EEOC’s conciliation obligations were minimal – far short of an obligation to make efforts to conciliate that were “reasonable.” Specifically, the Supreme Court emphasized that under Title VII’s conciliation provision, “the EEOC need only ‘endeavor’ to conciliate a claim.” *Id.* at 1654. Given this statutory language, the Court concluded that Title VII gives the EEOC “expansive discretion” over the conciliation process and latitude that “smacks of flexibility.” *Id.* at 1654, 1656. Additionally, the Court concluded that more exacting judicial review of the reasonableness of the EEOC’s conciliation “endeavors” would contravene another of Title VII’s provisions, which mandates maintaining the confidentiality of conciliation efforts. *Id.* at 1655. Judicial review beyond a limited review would necessitate the disclosure and use of such information, thereby undermining the confidentiality required under Title VII’s administrative process.

By contrast here, given the pertinent regulatory language and OFCCP’s administrative process, the question is whether OFCCP’s pre-suit efforts were “reasonable.” Exec. Order No. 11246, 30 Fed. Reg. 12319, § 209(b); 41 C.F.R. § 60-1.20(b). “Reasonable efforts” clearly means more than simply endeavoring to conciliate (as was the requirement in *Mach Mining*). Contrary to Title VII and the EEOC’s administrative process, the Executive Order and its implementing regulations do not provide OFCCP with “extensive discretion” over conciliation; rather, they expressly require that OFCCP not just endeavor to conciliate but make “reasonable” efforts to do so. *Mach Mining*’s holding thus requires the Court to adopt a more searching analysis than the Supreme Court performed in *Mach Mining*.⁵

Post-*Mach Mining* cases confirm that the scope of judicial review of an agency’s actions depends on the underlying statutory or regulatory language. For example, in *Hyatt v. U.S. Patent & Trademark Office*, 797 F.3d 1374 (Fed. Cir. 2015), the Federal Circuit held that an administrative decision of the U.S. Patent and Trademark Office (“PTO”) is subject to a more comprehensive judicial review than the narrow scope for EEOC conciliation efforts set forth in *Mach Mining*. In *Hyatt*, the statute provided that patent applications shall be kept confidential except in “such special circumstances as may be determined by the Director.” *Id.* at 1380. The court noted that “*Mach Mining* stands for the proposition that, when a statute provides an agency with ‘wide latitude’ in an action, the scope of review over that action may be narrower.” *Id.* at 1383. But because the statute imposing obligations on the PTO did not “exude” discretion, the PTO’s determination of whether “special circumstances” justifying disclosure were present was subject to a more probing judicial review. *Id.*; see *Rhode Island Comm’n for Human Rights v. Graul*, 120 F. Supp. 3d 110, 120 (D.R.I. 2015) (the *Mach Mining* decision “relies heavily on the specific conciliation language of Title VII[;]” since “[t]he language related to conciliation in the [Fair Housing Act] is very different,” the scope of review is different as well); *E.E.O.C. v. CollegeAmerica Denver, Inc.*, No.

⁵ The Court itself has acknowledged that “EEOC and OFCCP are different agencies subject to different regulatory schemes.” SAC Order at 11.

14-cv-01232-LTB-MJW, 2015 WL 6437863, at *3 (D. Colo.2015) (holding that “the Supreme Court’s analysis in *Mach Mining* is limited to Title VII’s requirement of conciliation” and does not apply to the conciliation requirements of the ADEA). OFCCP’s reliance on the *Mach Mining* standard is thus misplaced.

The cases on which OFCCP relies in attempting to bolster its *Mach Mining* theory are distinguishable and, ultimately, unhelpful on this issue. For example, in *OFCCP v. Analogic Corp.*, 2017-OFC-00001 (Aug. 16, 2017), Analogic made a similar conciliation argument. The Court held that OFCCP’s conciliation was sufficient, but recognized the plethora of conciliation attempts that occurred before OFCCP issued its NOV against Analogic, including: e-mails and telephone conferences over several months, a settlement offer, and all necessary information about OFCCP’s regression analysis (results, variables, a phone call for experts from both parties to discuss the regression model, and an offer to review Analogic’s database to run a comparison between the two). *Id.* at 10, 12. Here, however, OFCCP did not provide any detailed information about its regression model to Oracle. Rather, each time Oracle requested more information on the regression analysis, OFCCP pointedly refused to provide it. Siniscalco Decl. ISO Opp. at 3. Furthermore, to the extent the *Analogic* court found no conciliation violation for “continuing” claims occurring after the audit period, *Analogic* is distinguishable because that decision discussed only “continuing violations” of the same claims alleged in the NOV and complaint, whereas here, Oracle argues that OFCCP has failed to conciliate several *new* and expanded claims that OFCCP added in its SAC.⁶ *Analogic* did not address this added wrinkle of how to handle conciliation requirements for continuing violations of new claims which were not included in the NOV or the original complaint and is thus distinguishable on this basis as well.

⁶ Oracle notes that all the orders and/or decisions OFCCP uses to support its claim that *Mach Mining* provides the correct standard in this context are pre-*Lucia v. SEC*, 138 S.Ct. 2044 (2018), which means they were all decided by ALJs who were unconstitutionally appointed. Because they have no binding precedential value, their persuasive value instead may be evaluated based only on the inherent strength of their own reasoning. As explained in this Opposition, they are not persuasive here.

OFCCP cites *In the Matter of OFCCP v. Central Power & Light Co.*, 82-OFC-5 (Mar. 30, 1987) for its holding that a 15-minute meeting was sufficient conciliation, but conveniently fails to mention how that meeting differs from every attempt to conciliate with Oracle: in that meeting, OFCCP made clear demands to Central Power, and Central Power refused to consider meeting those demands. *Id.* at 2. OFCCP insisted that Central Power employ and provide back pay to each individual affected by the alleged violations; Central Power was willing to consider employing some of the individuals but refused outright to consider back pay for any of the individuals. *Id.* In the present case, OFCCP never even got to that point. Not once in the entire conciliation process did OFCCP make specific demands of Oracle to resolve the issues alleged in the NOV, so Oracle was never given the opportunity to refuse any of OFCCP's conditions or demands. Siniscalco Decl. ISO Opp. at 4. Had any such demands been discussed and rejected by Oracle, only then would the impasse situation in *Central Power* have arisen. Instead, OFCCP put the cart before the horse and rushed to file a complaint against Oracle in January 2017, cutting off conciliation well-before any substantive discussion or exchange of terms could occur. *Id.*⁷

Additionally, Oracle notes that OFCCP now moves for summary judgment on the exact same issue on which Oracle moved for summary judgment (and on which OFFCP asked for judgment as a matter of law) in 2017. In denying both parties' requests for judgment as a matter of law on the conciliation issue, Judge Larsen repeatedly remarked that the record could not support a conclusion that OFCCP failed to take reasonable efforts to conciliate nor could it support a conclusion that OFCCP had engaged in reasonable efforts. Judge Larsen recognized that while the parties' declarations showed some attempts at conciliation, they did not "demonstrate that either

⁷ The other cases on which OFCCP relies are wholly distinguishable and not persuasive. *OFCCP v. Wash. Metro. Area Transit Auth.*, 84-OFC-8 (Mar. 30, 1989) (noting only that some of the "same considerations" apply in both the EEOC and the OFCCP proceedings, without affirmatively finding that the same standards apply in both contexts); *In the Matter of OFCCP v. East Kentucky Power Cooperative, Inc.*, 85-OFC-7 (Mar. 17, 1988) (dismissively finding that OFCCP made sufficient "conciliation efforts," though "minimal," without engaging in any analysis as to how those conciliation attempts met the reasonableness standard); *OFCCP v. Nat'l City Bank of Cleveland*, 80-OFC-31 (Sept. 9, 1982) (analyzing whether a conciliation agreement was "fair, reasonable and adequate," not whether the overall attempts to conciliate were sufficiently reasonable).

[party], as a matter of law, was being reasonable or unreasonable.” Order Denying Oracle’s Mot. for Summ. Judgment (filed June 19, 2017) at 4. The Court thus could not grant Oracle’s summary judgment motion based on unreasonable conciliation: “Without detailed knowledge of the factual context in which any given statement is made, it is almost impossible for the court to evaluate that statement for reasonableness. And if reasonable minds might differ on the inferences arising from undisputed facts, the court should deny summary judgment.” *Id.* Oracle grants that Judge Larsen was unlawfully appointed in the first place and his decisions thus have no dispositive effect; nevertheless, his order communicates a key message: a neutral arbiter reviewed this exact record on this very issue and found genuine disputes of material fact. That OFCCP does not even mention Judge Larsen’s decision in Motion speaks volumes.

2. **Even If The Court Finds That OFCCP’s Conciliation Efforts Were Reasonable For The Original Claims, Summary Judgment Cannot Be Granted As To The New Claims Where No Conciliation Occurred.**

For OFCCP’s conciliation efforts to be deemed “reasonable” as a matter of law according to the analysis above, surely there must be some evidence that some level of conciliation on all claims asserted took place. With respect to the various new claims in the SAC, OFCCP cannot argue that it conciliated them because it had not asserted them until filing the SAC.

The SAC includes the following new claims: (1) a claim that Oracle channels or assigns female, Asian, and Black employees to lower paying positions; (2) a claim that Oracle discriminated against female, Asian, and Black employees by relying on their prior salaries; (3) claims arising outside the audit period; (4) a claim that Oracle discriminated against Asian female employees in assessing total compensation; and (5) a claim alleging violations regarding Oracle’s Affirmative Action Plan. SAC ¶¶ 11, 13, 22, 32, 47; SAC Order at 6-8. None of these claims were included in OFCCP’s NOV, nor were they asserted in any conciliation meetings or discussions. Siniscalco Decl. ISO Opp. at 2.

OFCCP repeatedly has insisted that the SAC did not allege any new claims, and Oracle has consistently countered that the claims listed above are new and distinct from the original claims in

the NOV and FAC. And while the Court granted OFCCP leave to add these new claims despite not having conciliated them, it did so pursuant to the liberal standard governing pleading amendments (as discussed in Section 3, *infra*), which obviously is not at issue here. Indeed, OFCCP’s original pay discrimination claim is an allegation that people who are similarly situated (*i.e.*, alike in all material respects and do the same job) are paid differently based on race or gender. *See* NOV at 3–5; FAC ¶¶ 7–9. By contrast, OFCCP’s new claim for job channeling and assignments is an allegation that Oracle steers employees into different, lower-paying jobs based on their race or gender. The SAC highlights this difference, stating that OFCCP is asserting a new “alternative theory” to its existing claim: *i.e.*, that certain groups of people are paid less for “the same or comparable job” or that such persons are hired into different “lower-paid jobs.” *See* SAC ¶¶ 12, 18, 22, 25, 29. Additionally, OFCCP never alleged any hint of disparate impact, and certainly never alleged disparate impact based on prior pay as the SAC alleges. SAC ¶ 32.

Surely zero conciliation of these entirely new claims cannot constitute “reasonable efforts” to conciliate under Executive Order No. 11246, 30 Fed. Reg. 12,319, § 209(b), and 41 C.F.R. § 60-1.20(b). Therefore, even if the Court determines that OFCCP undertook “reasonable efforts” as a matter of law to conciliate its original claims – which OFCCP did not – this Court should deny OFCCP’s motion with respect to claims appearing for the first time in the SAC and acknowledge that, as far as those claims are concerned, OFCCP failed to conciliate.

3. Oracle’s Conciliation Affirmative Defense Is Not Barred By OFCCP’s Creative But Ultimately Flawed “Law Of The Case” Theory.

Finally, OFCCP’s “law of the case” argument misses the mark for several reasons. First, no case has held that a decision on a motion for leave to amend compels a court to grant a later filed summary judgment motion. Such a rule would dictate that any time a plaintiff successfully wins on a motion for leave to amend, the case is bound for summary judgment on any issues raised at the pleadings stage. *Juliana v. United States*, 339 F.Supp.3d 1062, 1085 (D. Or. 2018), cited by

OFCCP, certainly does not stand for that proposition. It was a case involving defendants filing what were essentially consecutive motions to dismiss.

Second, for decades Ninth Circuit precedent on this question has held that a district court's prior decision does *not* bind that district court as to all other decisions in the same case because a court's decisions on "interlocutory" motions can "be renewed and reconsidered at any time before final judgment." *Pearson v. Dennison*, 353 F.2d 24, 28 (9th Cir. 1965) (citing cases); *Andrews Farms v. Calcot, Ltd.*, 693 F.Supp.2d 1154, 1164 (E.D. Cal. 2010) ("Simply put, the 'law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings of the same case.'" (quoting *Herrington v. Cty. of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993); *Beedy v. Wash. Water Power Co.*, 238 F.2d 123, 127 (9th Cir. 1956) (noting that for a time, the law of the case doctrine applied to cases where a prior judge made a ruling which should not be upset by a subsequently assigned district judge, but noting that even that limited use of the law of the case has been overruled). OFCCP cites *Juliana* to argue that the law of the case applies here, but OFCCP fails to mention that the Ninth Circuit case on which *Juliana* relies, *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002), was discussing how the doctrine applies to courts of appeal. In *Old Person v. Brown*, the Ninth Circuit held that pursuant to the "discretionary" law of the case doctrine, it was bound by a prior panel's decision in the same case because an "appellate court cannot efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal." *Id.* That rationale obviously does not apply here, nor should it have applied in *Juliana*. The *Juliana* court took this discretionary doctrine and improperly applied it in the district court context, and this Court should refrain from following the *Juliana* court's bad example. Moreover, in *Juliana*, the claims barred by the law of the case argument were in fact identical to the prior claims, unlike the claims at issue in the present case. *Juliana*, 339 F. Supp. 3d at 1085.

Third, OFCCP’s theory tries to equate the Court’s prior judgment on the pleadings with the instant summary judgment issue, and in doing so, compares apples to oranges. Even if the “law of the case” did govern here (and it does not), it does not apply when the issues involved are not identical. *C.f.*, *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (applying the law of the case doctrine to bar claims that were “essentially identical” to the previously decided claims); *Bouchet v. Nat’l Urban League, Inc.*, 730 F.2d 799, 803 (D.C. Cir. 1984) (reversing a trial judge’s application of the law of the case doctrine because the prior and past issues were not identical).

OFCCP cites this Court’s order granting OFCCP leave to file its SAC as its basis for arguing that the Court already has affirmatively decided the conciliation question. But all the Court determined in that Order was that any lack of conciliation on OFCCP’s part did not meet the extremely “liberal amendment provision” for amending pleadings. SAC Order at 11. The Court recognized that leave to amend is “freely give... when justice so requires,” and that the amendment policy should be applied with “extreme liberality.” *Id.* at 3 (citing *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102 (9th Cir. 2018)). It further noted that in assessing leave to amend, courts must weigh several factors including undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the opposing party, and futility of the opposed amendment; and further acknowledged that of these factors, prejudice carries the greatest weight. *Id.* at 4. The Court’s decision to allow OFCCP to file its SAC is based on the extremely liberal pleading standard. Indeed, the Court specifically held that in light of the “liberal amendment provision” contained in the OFCCP regulations, 41 C.F.R. § 60-30.5(c) – which mimics the federal liberal amendment provision, FRCP 15(a) – barring leave to amend based on lack of conciliation, “would render the amendment provision superfluous.” *Id.* at 11. But allowing leave to amend under the liberal amendment standard, does not equate to a decision that there is no dispute of material fact regarding conciliation.

Moving for partial summary judgment initiates a completely different process than moving for leave to amend a pleading. To find for OFCCP on this partial summary judgment motion, the

Court would need to conclude that (1) no genuine issues of material fact exist; (2) OFCCP is entitled to judgment because it engaged in “reasonable efforts” to conciliate as a matter of law; and (3) in considering the entire record in the light most favorable to Oracle, the non-moving party, a fact-finder could not reasonably find in Oracle’s favor. *O’Hara*, 294 F.3d at 61; *Matsushita Elec.*, 475 U.S. at 587. While the former liberal amendment standard leaned heavily against Oracle, the latter leans heavily in Oracle’s favor: The Court would need to find that OFCCP’s conciliation efforts were reasonable as a matter of law based on the indisputable material facts. Because the standard for permitting leave to amend clearly differs from the summary judgment standard, OFCCP’s law of the case theory is inapplicable.⁸

4. Alternatively, This Court Should Defer Ruling On This Motion To Allow Oracle Time To Conduct Relevant Discovery.

OFCCP’s partial summary judgment motion is premature because Oracle has not yet had a chance to depose OFCCP officials regarding the conciliation issue. Oracle is doubtless entitled to obtain discovery on the reasonableness of OFCCP’s conciliation efforts. If the Court is not inclined to deny OFCCP’s motion for partial summary judgment, it should at least defer deciding on the motion to allow time for additional discovery on this issue according to Federal Rule of Civil Procedure 56(d)(1)-(2), including but not limited to the pending deposition of Jane Suhr, who was at the conciliation meeting and signed a declaration in opposition to Oracle’s 2017 motion for summary judgment on the same conciliation issue. Siniscalco Decl. ISO Opp. at 5.

⁸ Even in its Order Filing Revised Second Amended Complaint, entered by the Court on March 13, 2019, the Court recognizes that Oracle’s futility arguments “turn on the scope and meaning of the conciliation requirement *and the scope of the amendment provisions in the regulations*,” further confirming that the issue the Court previously decided is not the same issue posed by OFCCP’s current motion because the prior issue necessarily entailed an assessment of the liberal standard governing requests to amend a pleading. Order Filing Revised Second Amended Complaint (filed Mar. 13, 2019) at 2 (emphasis added).

IV. CONCLUSION

For the reasons set forth above, Oracle respectfully requests that the Court deny OFCCP's motion for partial summary judgment, or alternatively, defer ruling on this motion until Oracle has had the chance to conduct relevant discovery.

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Respectfully submitted,

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