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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

**PLAINTIFF OFCCP'S OPPOSITION TO DEFENDANT ORACLE'S MOTIONS IN  
LIMINE**

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## INTRODUCTION

On November 15, 2019, Defendant Oracle America, Inc. filed 14 superfluous motions in *limine* (MIL).<sup>1</sup> Several themes quickly emerge in Oracle's motions, each of which are grounds for denial: First, many of Oracle's motions are simply recast motions that are either on file or on which Oracle previously received an adverse ruling. Second, Oracle makes no acknowledgement that this is a bench trial and, thus, its citations to authority involving jury trials have little relevance. Finally, Oracle makes no attempt to show that the documents it attempts to exclude are not admissible for any purpose. As such, the Motions must be denied.

Many of Oracle's motions seek to revisit issues fully briefed in the pending summary judgment motions and in prior motions, and as such are redundant and inappropriate. *See Bill Salter Advert., Inc. v. City of Brewton, Alabama*, 2008 WL 11426859, at \*1 (S.D. Ala. Feb, 14, 2008); *Dunn ex rel. Albery v. State Farm Mut. Auto. Ins. Co.*, 264 F.R.D. 266, 274 (E.D.Mich.2009) (“[M]otions in *limine* are meant to deal with discrete evidentiary issues related to trial, and are not another excuse to file dispositive motions disguised as motions in *limine*.”).<sup>2</sup> This Court should not permit Oracle to exceed its summary judgment briefing limit or to request reconsideration of prior decisions in the repackaged guise of a motion in *limine*:

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<sup>1</sup> For the convenience of the Court and to avoid redundancy OFCCP is filing a single consolidated Opposition. This Opposition is significantly under the total page limit allowed if OFCCP filed 14 separate Opposition briefs and OFCCP does not devote more than 10 pages to respond to any of Oracle's individual MILs.

<sup>2</sup> Oracle's MILs are similar to those at issue in *Bill Salter*:

[The] Motion [in *limine*] reads more like a rehash of the exhaustive (and exhausting) summary judgment briefing already undertaken herein than a mere pre-trial evidentiary motion. . . . Indeed, the practical effect of granting either the first or the third prongs of the City's Motion is or may be to foreclose entire causes of action to Salter at trial. To the extent that these issues were briefed on summary judgment, they are redundant. To the extent that they are being raised for the first time via Motion in *Limine*, they are an inappropriate second bite at the Rule 56 apple because these legal issues are grounded far more in the underlying viability of plaintiff's claims than in any niceties of the Federal Rules of Evidence.

*Id.*

In light of their limited purpose, motions in limine “should not be used to resolve factual disputes,” which remains the “function of a motion for summary judgment, with its accompanying and crucial procedural safeguards.” *C & E Servs., Inc. v. Ashland Inc.*, 539 F.Supp.2d 316, 323 (D.D.C. 2008)....In other words, “[f]actual questions should not be resolved through motions in limine,” *Goldman v. Healthcare Mgmt. Sys., Inc.*, 559 F.Supp.2d 853, 871 (W.D.Mich.2008) (citation omitted), nor is a motion in limine a “vehicle for a party to ask the Court to weigh the sufficiency of the evidence,” *Bowers v. Nat’l Collegiate Athletic Ass’n*, 563 F.Supp.2d 508, 532 (D.N.J.2008).

*Barnes v. D.C.*, 924 F. Supp. 2d 74, 78 (D.D.C. 2013) (quoting *Graves v. District of Columbia*, 850 F.Supp.2d 6, 10-11 (D.D.C. 2011)).

Next, because this is a bench trial, the motions also serve no meaningful purpose. Motions in *limine* generally serve two purposes, neither of which apply in bench trials. The first purpose of a motion in *limine* is to prevent a jury from hearing evidence not properly before it. *Wright v. Watkins and Shepard Trucking, Inc.*, 2016 WL 10749220, at \*3 (D. Nev. January 13, 2016): Such a consideration is not present in this case. See *United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009) (in a bench trial, the need for an advanced ruling on a motion in *limine* to exclude evidence is “generally superfluous”). The second purpose a motion in *limine* may serve is to save time at trial by ruling on evidentiary disputes in advance and reducing the need for side-bars and other disruptions to trial. However in a bench trial the minimal potential benefit is generally outweighed by the time used to litigate the motions and other considerations. See *Crane-Mcnab v. County of Merced*, 2011 WL 94424, at \*1 (E.D. Cal. January 11, 2011); see also *Wilkins v. Kmart Corp.*, 487 F.Supp.2d 1216, 1219 (D. Kan. 2007) (although rulings on motions in *limine* may save “time, costs, effort and preparation, a court is almost always better situated during the actual trial to assess the value and utility of evidence”).

Furthermore, as many courts have noted, in a bench trial the better practice is to allow the court to consider the probative value of the evidence in the context of the trial as a whole and to rule on specific questions of admissibility as they arise. See, e.g. *Crane-Mcnab.*, 2011 WL 94424, at \*1 (citing *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975)); *Wright*, 2016 WL 10749220, at \*3 (“the more prudent course in a bench trial... is to resolve evidentiary doubts in favor of admissibility”); *Jackson v. County of San Bernardino*, 194

F. Supp.3d 1004 (C.D. Cal. 2016). In a bench trial a court does not err in admitting disputed evidence subject to the ability later to exclude it or disregard it. *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2005).

Finally, to exclude evidence pursuant to a motion in *limine* the evidence must be “clearly inadmissible on all potential grounds.” *Indiana Ins. Co. v. General Elec. Co.*, 326 F. Supp. 2d 844, 845 (N.D. Ohio 2004). “Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context.” *Hawthorne Partners v. AT & T Tech., Inc.*, 831 F.Supp. 1398, 1400 (N.D.Ill. 1993). Because Oracle has not met this high standard, and for the reasons stated above, the Court should deny Oracle’s motions. *See Plair v. E.J. Brach & Sons, Inc.*, 864 F. Supp. 67, 68 (N.D. Ill. 1994) (party proposing motion to exclude evidence has the burden of establishing the evidence is “clearly inadmissible”).

## ARGUMENT

- 1) The Court should deny MIL No. 1 because Rule 26 does not prohibit an expert from supplementing or elaborating upon her opinions and Oracle would not be prejudiced by admission of the objected to responsive material.**

In MIL No. 1 Oracle seeks to revisit its earlier admissibility objections,<sup>3</sup> which are still pending before this Court, and exclude relevant, probative evidence of responsive materials created by Dr. Madden. Oracle seeks to exclude several of Dr. Madden’s responsive materials as “untimely.” In so doing, Oracle mischaracterizes the material and misreads Rule 26 of the Federal Rules of Civil Procedure.

Contrary to Oracle’s statements, the responsive materials and exhibits to which Oracle objects are not “new” analyses. They contain no shift in Dr. Madden’s bases or reasons for her conclusions regarding stark pay disparities at Oracle and some of the specific Oracle practices

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<sup>3</sup> Oracle acknowledges that there are two pending motions before this Court addressing its objections to the challenged reports. Oracle’s Motion in *Limine* No. 1, at p. 3, n. 3. As such raising the issue again in the context of a motion in *limine* is redundant.

responsible for such disparities such as channeling employees into lower career levels. They are merely elaborations and syntheses of her opinions—responsive to assertions made by the opposing expert—and as such would be helpful to the Court and are therefore admissible. *See Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 585 F. Supp. 2d 568, 581 (D. Del. 2008) (Allowing “testimony which is consistent with the report and is a reasonable synthesis and/or elaboration of the opinions contained in the expert's report.”).<sup>4</sup>

Oracle’s argument also misreads Rule 26 and the cases interpreting it. “The purpose of [Rule 26(a)(2)(B)] is to eliminate unfair surprise to the opposing party. But it does not limit an expert's testimony simply to reading his report[.] The rule contemplates that the expert will supplement, elaborate upon, and explain his report....” *Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007). An expert’s later supplementation is only excludable if it “differs substantially from the [original] report, offers a whole new theory, opinion, or methodology, or is outside of the scope or general scheme of the report.” *Massachusetts Mutual Life Insurance Company v. DB Structured Products, Inc.*, 2015 WL 12990692, at \*4 (D. Mass. March 31, 2015). Dr. Madden’s supplemental reports are not the type of fundamental change in theory, opinion, or methodology that warrant exclusion and Oracle’s motion should be denied.

In a second part of its MIL No. 1 Oracle asks the Court to prohibit OFCCP from introducing “lay testimony of statistical analyses.” This is the type of overly broad request that is meaningless as a motion in *limine* as it does not provide the court a sufficient bases for determining what specifically should be excluded. *See National Union v. L.E. Myers Co. Group*, 937 F.Supp. 276, 287 (S.D.N.Y.1996) (Court may deny a motion in *limine* that lacks the necessary specificity with respect to the evidence to be excluded.). To the extent that Oracle objects to a witness’s testimony as being improper expert testimony, or as improperly

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<sup>4</sup> The implication of Oracle’s argument here is that there can be no back and forth between the experts outside the one formal Rebuttal report. However, Oracle implicitly concedes that this is not so in its approach to trial sequestration. In the Joint Pre-Hearing Statement, Oracle did not object to OFCCP’s general sequestration proposal. However, it inserted a request that the experts could attend each other’s testimony. Such request would be unnecessary if the experts were locked into reading their prior reports like a straightjacket.

commenting on statistical evidence, that is an objection more properly raised at the trial as it will necessarily depend on the context in which it arises.<sup>5</sup> The Court should deny this part of MIL No. 1 as premature and too vague.

Furthermore, Oracle cannot show that it would be prejudiced by the Court's consideration of the challenged reports. Most were provided to Oracle prior to its deposition of Dr. Madden and thus Oracle had an opportunity to question her about their contents. And, as noted above, the reports contained no new theories or methodology that would be a "surprise" to Oracle. As Oracle cannot establish prejudice, its motion must be denied.

**2) The Court should deny MIL No. 2 because compensation discrimination is renewed with each paycheck.**

Oracle moves to exclude all evidence of job assignments before 2013, claiming that this evidence is "irrelevant" to the claims and defenses in this case. This is a repeat of the same "jurisdiction" argument Oracle made in its summary judgment motion. *See* MIL 2 at 1-2; Oracle MSJ at 21-22. As OFCCP explained in opposition to summary judgment, Oracle is wrong. OFCCP Opp. to MSJ at 16-18. This MIL should be denied as an impermissible attempt to take a

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<sup>5</sup> OFCCP witnesses, for example, should be afforded leeway to testify about their personal experiences related to their work duties.

[W]hen a witness testifies to institutional operations and practices based on personal knowledge that the witness has accrued over the course of several years of employment, the witness usually is providing lay testimony not subject to the rule governing admission of expert testimony. *Siebert v. Gene Sec. Network, Inc.*, 75 F.Supp.3d 1108, 1114 (N.D.Cal.2014) (citing Fed. R. Evid. 701 advisory committee note); *see In re Google AdWords Litig.*, No. 5:08-CV-3369-EJD, 2012 WL 28068, at \*5-7 (N.D.Cal. Jan. 5, 2012) (permitting two different Google employees to testify about how that company's AdWords and AdSense systems worked and how advertisers responded to them, based on the witnesses' personal experiences at the company); *Hynix Semiconductor, Inc. v. Rambus, Inc.*, No. CV-00-20905-RMW, 2008 WL 504098, at \*4 (N.D.Cal. Feb. 19, 2008) (noting that the rules of evidence have long permitted a person to testify to opinions about their own businesses based on their personal knowledge of their business).

*Cleveland v. Groceryworks.com, LLC*, 200 F. Supp. 3d 924, 949 (N.D. Cal. 2016).

second bite at the apple, and increase its briefing limit for summary judgment on this issue.

*Salter Advert., Inc.*, 2008 WL 11426859.

Oracle seems to recognize the indisputable fact that compensation claims are deemed continuous in nature and that a discriminatory compensation decision is re-affirmed with each paycheck, no matter how much time passes from the initial discriminatory wage-setting decision. See *Bazemore v. Friday*, 478 U.S. 385, 395-95 (1986) (“Each week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.”).<sup>6</sup> As such, to make its jurisdictional argument work, Oracle attempts to re-define OFCCP’s claims so as to not be compensation claims at all—analagizing them to hiring/selection cases or promotion cases. Notably, none of the cases that Oracle relies upon involved compensation discrimination claims, which are subject to the paycheck accrual rule. See 42 U.S.C. § 2000e-5(e)(3)(A); *Dolin v. ThyssenKrupp Elevator Corp.*, 2017 WL 1551990, at \*7 (D.N.M. Mar. 31, 2017 (collecting cases)).<sup>7</sup>

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<sup>6</sup> See also, e.g., *EEOC v. Penton Indus. Publ’g Co.*, 851 F.2d 835, 838 (6th 1988) (“The Supreme Court has recognized the existence of a ‘continuing violation’” in *Bazemore*, where “there was a *current* and *continuing* differential between the wages earned by black workers and those earned by white workers.”) (emphasis in original); *Shea v. Rice*, 409 F.3d 448,452 (D.C. Cir. 2005) (same)(citing *Bazemore*); *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009 (10th Cir. 2002) (“But [*Bazemore*] has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination - instead it is itself a continually recurring violation.”). Congress codified this principle in 2009, when it amended Title VII to clarify that in a compensation discrimination case, employees can seek relief for current disparities in their pay that are caused by past discriminatory “compensation decisions and other practices,” even if those past acts of discrimination are outside the charging period. See Lilly Ledbetter Fair Pay Act of 2009, 123 Stat 5 (2009). In doing so, Congress overturned the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which held that that discrete acts of compensation discrimination were not continuously actionable with each new pay check.

<sup>7</sup> For example, in *Holloway v. Best Buy*, the plaintiffs alleged that the employer discriminated against them by assigning them to particular jobs (such as cashier versus sales person). 2009 WL 1533668, at \*7 (N.D. Cal. May 28, 2009). Here, by contrast, OFCCP is arguing that Oracle paid class member less than similarly qualified and experienced employees *in the same jobs*, and that these disparities were driven at least in part by discrimination in initial salaries and assignment of

Oracle's attempt to redefine OFCCP's claims fails. OFCCP's claims here are *compensation* claims (which includes compensation disparities arising from career level assignment and the like—*see* 41 C.F.R. § 60-2.4(b)). In addition to or in the alternative to framing its claims as compensation claims, OFCCP could have chosen to bring additional claims related to hiring discrimination or promotion discrimination if OFCCP was seeking to remediate Oracle's hiring or promotion practices without regard to their effect on compensation. However, OFCCP did not. As Oracle's own MIL No. 11 argues, Oracle's hiring practices are only relevant to this matter to the extent they impact compensation. Similarly, Oracle's promotion practices are only relevant with respect to their impact on compensation. As such, Oracle's attempt to put this case in a non-compensation box that does not fit must be rejected.

While OFCCP's regulations make clear that job assignment discrimination is compensation discrimination,<sup>8</sup> to be clear, OFCCP in no way concedes that employees in different career levels, the type of assignment at issue here, have different job duties in actual practice. OFCCP has already proffered to this Court the sworn testimony of an employee who was hired into a different career level than she realized and *did not even know it*. *See* OFCCP Motion for Summary Judgment, Ex. 98 Decl. of Rachel Powers at ¶¶ 7-9 (stating that she negotiated to come in at the Senior Director level and that after operating in this role, she learned by happenstance—through Oracle's business-class ticket policies—that she was officially brought in as a Director).<sup>9</sup> OFCCP's primary contention is that Oracle departs from its own

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career levels. Likewise, the other cases Oracle cites are inapposite because they did not involve claims of compensation discrimination.

<sup>8</sup> To the extent Oracle asserts that pay differentials in different jobs cannot be treated as compensation discrimination, Oracle is simply incorrect. *See Washington Cty. v. Gunther*, 452 U.S. 161, 178–79 (1981) (rejecting contentions that compensation discrimination would not be actionable under Title VII where “an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male,” or where “an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men”).

<sup>9</sup> Oracle's response to this testimony is remarkable in its lack of sensitivity to the underhanded mis-assignment of this employee. Rather than dispute the facts, Oracle simply dismissed the

stated policies and instead of first assigning an employee to a career level, and then determining where on the salary range to place the employee based on the employee's skills, education and experience, in operation Oracle sets compensation in the opposite direction. As Dr. Madden's statistical analyses related to prior pay demonstrate, Oracle relies on prior pay or budget to set pay rates for employees, and then sets the salary range or career level accordingly.

Moreover, even if Oracle is successful in recasting OFCCP's claims as hiring or promotional in nature, as a legal matter, Oracle's argument rests on plainly inapplicable Title VII jurisdictional considerations. Oracle argues that job assignments are "discrete acts" that cannot form the basis for continuing violations, and that because any assignments before 2013 are outside the review period, they cannot be presented as evidence to prove liability in this case. The cases that Oracle relies upon address the issue of whether an employee has properly exhausted their administrative remedies under Title VII, which requires employees to lodge an administrative complaint within a certain number of days of the unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). As Oracle notes, some types of discrimination—such as refusal to hire and failure to promote—involve discrete actions, and an employee who fails to timely file an EEOC charge after those actions will not be able to seek to remedy them in later litigation. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Other types of discrimination, such as a hostile work environment, are considered "continuing violations" made up of pattern of discrete acts, and the employee need only file a timely charge after at least one of the actions that contribute to the hostile work environment. *See id.* at 117; *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1202 (9th Cir. 2016). Compensation discrimination, like a hostile work environment, is a continuing violation, and a claim is timely as long as the employee was paid wages affected by the discrimination during the charging period. 42 U.S.C. § 2000e-5(e)(3).

Here, there is no need for the Court to analyze whether job assignments are "discrete acts" rather than "continuing violations" because the exhaustion requirements of Title VII do not

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testimony as a gripe about plane tickets. *See Oracle Opposition to OFCCP's Motion for Summary Judgment \*22-23* ("In any event, these six declarants primarily complain they were not paid or promoted to their satisfaction, including one ex-employee whose experience with discrimination was not being able to take a business-class flight seven years ago.").

apply to OFCCP. *See* 42 U.S.C. § 2000e-5(e). The issue before the Court is whether Oracle engaged in compensation discrimination in violation of its obligations as a Federal contractor, and whether OFCCP is entitled to obtain relief for employees affected by that discrimination. To the extent that evidence from before the review period makes it more likely that Oracle engaged in compensation discrimination, then it is plainly relevant. Oracle cites no authority for its claim that no evidence from before the review period may be considered.<sup>10</sup> To the extent the disparities that OFCCP has identified can be traced to discrimination in—or disparate impact from—the way that Oracle assigns jobs, sets starting pay, and assigns career levels to employees, this evidence is highly relevant and probative of OFCCP’s claims.

For these reasons, this Court should deny MIL No. 2.

**3) The Court should deny MIL No. 3 because evidence of violations that occurred after the audit period is relevant to the question of whether Oracle has committed ongoing violations of its obligations under the Executive Order.**

In its third Motion in *Limine* Oracle apparently takes the position that the Court should conduct two separate trials on the same issues involving the same evidence and the same witnesses: one to determine whether Oracle violated the Executive Order during the audit period, and one to determine whether those violations were ongoing. Oracle made this same argument in its Opposition to OFCCP’s Motion for Leave to File Second Amended Complaint and OFCCP addressed this argument in its Reply Brief filed on February 12, 2019, along with OFCCP cases that support OFCCP’s position. This is another example of Oracle improperly using a motion in *limine* as an attempt to get another bite at the apple.

It seems Oracle would require OFCCP to present its case regarding violations during the audit period, request some kind of preliminary ruling on that case, and then, if the court found

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<sup>10</sup> Indeed, it bears noting that even in the context of Title VII exhaustion requirements, Oracle’s premise that discrete acts of discrimination that occurred before the charging period are irrelevant and inadmissible is directly contradicted by Supreme Court precedent. *See Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (observing that even though “discrete discriminatory acts” that occurred before the charging period may not be actionable, “the statute does not bar an employee from using the prior acts as background evidence in support of a timely claim.”)

violations, the parties would reconvene for a second trial with many or all of the same witnesses and evidence as in the first. Based on the impracticality alone of following such a procedure, the Court should deny Oracle's ill-conceived motion.

The Court should also deny this motion because there is no case law to support it. In its motion, Oracle cites no cases that stand for the principle that a Court should exclude from trial evidence relevant to a continuing violation allegation until such time as an underlying violation is proven. Instead, the cases Oracle cites all deal with either a trial court's grant of summary judgment,<sup>11</sup> or a trial court's decision on liability.<sup>12</sup> But in the summary judgment and liability context the question is whether a party has presented sufficient evidence of an underlying violation or anchoring act to justify considering an allegation that additional acts establish a continuing violation. *See e.g. Lockridge v. The Univ. of Maine Sys.*, 597 F.3d 464 (1st Cir. 2010) (continuing violation allegation fails because the purported retaliatory acts were not actionable as a matter of law). Thus, the rulings in the cited cases are not evidentiary rulings – they are rulings on the merits of the cases. They offer no support for the argument that the Court should exclude evidence relevant to OFCCP's continuing violation claim until such time as the Court determines OFCCP has proven an anchoring act.

As this Court previously noted: "Oracle's more likely concern is that evidence from later periods will be used to prove the continuing violation that OFCCP contends stretched back at least into the compliance review period. Although Oracle might not like this, it isn't improper..." Order Granting Conditional Leave to File Second Amended Complaint, at 10. Having lost its prior attempt to limit the scope of this case temporally, Oracle now tries to limit it through this motion.

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<sup>11</sup> *Foster v. State*, 23 F. App'x 731 (9th Cir. 2001); *Lockridge v. The Univ. of Maine Sys.*, 597 F.3d 464 (1st Cir. 2010); *Levine-Diaz v. Humana Health Care*, 990 F. Supp. 2d 133 (D.P.R. 2014); *Duckwall-Galvan v. Indiana Dept. of Env'tl. Mgmt.*, 1999 WL 166191 (S.D. Ind. 1999); *Statzer v. Town of Lebanon, Virginia*, 2001 WL 710103 (W.D. Va. 2001); and *Recometa v. Glaxo, Inc.*, 1996 WL 296644 (N.D. Ill. 1996), cited by Oracle on pp. 4-5 of its motion, are all summary judgment cases.

<sup>12</sup> *Woodard v. Lehman*, 717 F.2d 909 (4th Cir. 1983), cited by Oracle on p. 4 of its motion is a court decision on liability.

Moreover, Oracle's motion presumes that in an Executive Order case, this Court is precluded from finding liability after the compliance review if it does not find evidence occurring during the compliance review. There is no reason for this to be so. While it is unlikely that OFCCP will bring cases where liability is found after suit is filed but not before (which would only occur where a contractor does the opposite of mitigating in light of an OFCCP review and suit), if the evidence before this Court demonstrates a violation of the Executive Order, nothing in the OFCCP regulations requires an anchoring act in the review period for liability to attach.

To exclude evidence pursuant to a motion in *limine* the evidence must be "clearly inadmissible on all potential grounds." *Indiana Ins.*, 326 F. Supp. 2d, at 845. Because Oracle has not met that burden, the Court should deny Oracle's MIL No. 3.

**4) The Court should deny MIL No. 4 as an improper attempt to seek unwarranted evidentiary sanctions.**

In its fourth Motion in *Limine*, Oracle seeks to exclude any evidence or argument at hearing that Oracle's low-level managers "engaged in any wrongdoing, including but not limited to, any suggestion that a manager is biased against or has engaged in any discriminatory act against women, Asian-American or African-American individuals." Oracle MIL No. 4 at 1.

This motion in *limine* stems from an employee outreach letter that OFCCP sent only to members of the protected class, the content of which has already been litigated during discovery in which OFCCP indicated to the employee class witnesses (including managers) that OFCCP had not accused the class members of "wrongdoing." Oracle filed a motion claiming this statement was misleading with respect to manager witnesses. This Court agreed with Oracle that the statement raised concerns and ordered the parties to meet and confer over a corrective notice. Order at 27 (June 26, 2019).<sup>13</sup> After the Court's Order, OFCCP met and conferred and attempted

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<sup>13</sup> On June 17, 2019, Oracle filed another motion, again targeting the language identified above, that sought to compel OFCCP's further response to Oracle's requests for admission ("RFA") requesting OFCCP to admit that it does not accuse any Oracle manager of any wrongdoing with respect to the claims asserted in the SAC. *See* Oracle Mot. to Compel (June 17, 2019).

to come to agreement with Oracle on a corrective notice, but after several more filings, Oracle ultimately decided it no longer wanted to pursue a corrective notice and OFCCP filed a court-ordered Position Statement on the issue.<sup>14</sup>

In the Joint Status Report on August 22, 2019, in which Oracle indicated it was no longer pursuing a corrective notice, OFCCP stated:

It appears that Oracle is claiming timeliness issues as a tactical move to attempt to force an evidentiary sanction upon a cooperative party. . . . OFCCP is willing to remedy, in accordance with the Court's findings, the aspects of its prior notice that this Court found problematic by issuing a letter that is consistent with both Oracle's prior requests and the guidelines set forth by this Court. To the extent Oracle no longer seeks the remedy it first proposed, that should resolve the matter with finality.

*Id.* at 3. On August 26, the Court issued Order concluding the matter of the corrective notice, and requiring no further actions from either party. *See* Order Re Joint Status Report on Potential Corrective Notice (Aug. 26, 2019).<sup>15</sup>

Through its motion in *limine* 4, Oracle now employs the exact litigation tactic that OFCCP anticipated at the time of the August 22 Joint Status Report. OFCCP was willing to issue a corrective notice that addressed the concerns identified with regard to the original letter. Oracle

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<sup>14</sup> Pursuant to the Court's June 26 Order, OFCCP engaged with Oracle to develop a mutually agreeable corrective notice, dedicating many hours to meet and confer discussions and drafting proposed language. On July 10, 2019, the parties filed a joint status report advising the Court that "the parties anticipate they will be able to work out a mutually agreeable course of action consistent with the guidance of the Court's June 26 Order." Joint Status Report at 2 (July 10, 2019). On July 25, the parties filed a second joint status report advising the Court that the parties had reached agreement with all but three issues. Joint Status Report at 4 (July 25, 2019). On August 8, the Court denied Oracle's motion to compel OFCCP's further response to RFAs, but directed OFCCP to provide a position statement with respect to Oracle managers ("Position Statement") on August 22, 2019. Order at 9. OFCCP filed its Positions Statement in compliance with the Order. *See* Position Statement (Aug. 22, 2019).

<sup>15</sup> The Court in its August 26 Order assumed that OFCCP had an improper reason for a difference in the letterhead that Oracle had first filed with the Court. OFCCP had no opportunity explain the circumstances for the different letterheads as the issue was not raised by Oracle and this Court signaled that it treated the matter closed. However, if this Court is still entertaining sanctions, OFCCP requests the opportunity to explain the issue of the differing letterheads.

has made no showing that it was prejudiced or that sanctions which were not warranted during discovery are now warranted for the first time at trial. Moreover, as the only possible harm from this communication would be as to a manager who provided OFCCP information in reliance on OFCCP's letter, and who OFCCP then turns around and affirmatively accuses of wrongdoing, the relief Oracle seeks is far broader than the alleged harm. To the extent the sanctions issue were still under consideration, it would need to be limited to precluding OFCCP from affirmatively accusing its own management witnesses of wrongdoing.

Oracle also argues that any evidence on non-Executive manager "wrongdoing" at trial should be excluded because the evidence would be contrary to OFCCP's Position Statement.<sup>16</sup> This is not so. In its Position Statement, OFCCP explained the theory of its case, as it remains to date, which, as previously stated, OFCCP intends to prove through: (1) statistical evidence, which can alone establish discrimination; (2) policies and practices implemented by top Oracle leadership and Human Resources managers, their disregard for their compliance obligations, and their active disempowerment of low-level managers to ensure a fair workplace; and (3) anecdotal evidence, which will bring the cold statistical numbers to life, such as providing examples of the impact of policies and practices set by Oracle's top leadership in conjunction with Human Resources managers, on individual women, Asians, and Blacks. Position Statement at 2-3 (Aug. 22, 2019).

As OFCCP recognized in its Position Statement, while discriminatory acts of low-level managers are not the focus of OFCCP's allegations, or the harm it seeks to redress in this case, individual discriminatory acts are still *relevant* in that they "shed light on how Oracle's top leadership responded on a systemic basis, such as by not providing effective training to managers regarding discriminatory conduct or pay practices, not ensuring a fair process for complaints of discriminatory conduct or treatment to be received, investigated and remedied, or otherwise

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<sup>16</sup> Oracle appears to also attempt to advance the position that OFCCP has failed to obey an order. *See* Oracle MIL No. 4 at 3 (citing 41 C.F.R. § 60-30.15(j)). Contrary to this assertion, OFCCP has fully complied with all Court orders.

taking action in relation to an allegation of individual discrimination to implement its obligations under its AAP.” *Id.* at 8.<sup>17</sup>

Moreover, since the time the of OFCCP’s Position Statement, Oracle has consistently attempted to shift the blame for any disparities to Oracle’s front-line managers for causing disparities by claiming it has no centralized policies and compensation decisions are largely made at the discretion of front-line supervisors.<sup>18</sup> While it remains OFCCP’s position that, as a federal contractor with the obligations outlined above, this *Wal-Mart v. Dukes* defense is unavailable to Oracle in this context, Oracle has clearly put at issue whether its own front line managers engage in wrongdoing. Accordingly, Oracle has opened to the door for such evidence to come in.

Contrary to Oracle’s baseless assertion, as outlined above there will be no surprise at trial. As previously stated in its Position Statement, OFCCP intends to rely on statistics to prove its case, and manager conduct is relevant to shed light on Oracle’s high-level failing to address and remedy issues. Accordingly, the evidence Oracle now seeks to exclude is not contrary to OFCCP’s prior Position Statement or representations during discovery.

Finally, because this is a bench trial, the purported concern about confusion of the issues is inapplicable here for the same reasons identified above (*See supra* at 2). Thus, Oracle’s argument that this evidence is not probative, will confuse the issues, and mislead the Court is meritless.

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<sup>17</sup> OFCCP also stated in the Position Statement that “OFCCP contends that all managers were witnesses to and some had a role in implementing practices and policies that caused the discrimination...” *Id.* at 9.

<sup>18</sup> Oracle denies in its Motion for Summary Judgment Reply brief that this is its intent. Regardless, should this Court find discrimination, the effect of Oracle’s position is that its low-level managers are to blame in light of its continued insistence that its compensation practices are decentralized and are implement at the discretion of front-line managers.

**5) The Court should deny MIL No. 5 because Oracle has not met its burden of establishing that the evidence should be excluded and because Oracle has waived any privilege associated with its compensation analyses.**

In MIL No. 5 Oracle asks the Court to prohibit OFCCP from “introducing any evidence or arguments at hearing referencing Oracle’s” internal compensation analyses. In its attempt to persuade the Court to grant its motion, Oracle ignores the case law it cites and stretches the law beyond its intended purpose.

The cases Oracle cites in its motion all focus on a danger that is simply not present in this case - the danger that a jury will draw an improper inference from evidence that a party withheld evidence pursuant to an assertion of attorney/client privilege.<sup>19</sup> Indeed, the main case Oracle relies on, *McKesson Information Solutions, Inc. v. Bridge Medical, Inc.*, 434 F. Supp. 2d 810 (E.D. Cal. 2006) deals with the issue of whether it is improper to inform a jury that a party asserted attorney/client privilege over an opinion it received in a patent case. The court’s discussion focuses on whether a jury would speculate or draw improper inferences. *Id.*, at 811-12. But in a bench trial judges are presumed to “be able to exclude improper inferences from his or her own decisional analysis.” *Bic Corp. v. Far Eastern Source Corp.*, 23 Fed. Appx. 36, 2001 WL 1230706 (2nd Cir. Oct. 12, 2001). Because judges are presumed to be able to properly evaluate and consider evidence, there is no fear that the trier of fact will draw an improper legal inference, and therefore no basis for excluding otherwise relevant evidence.<sup>20</sup> To exclude evidence pursuant to a motion in *limine* the evidence must be “clearly inadmissible on all potential grounds.” *Indiana Ins.*, 326 F. Supp. 2d, at 845. Because Oracle has not met that burden, the Court should deny Oracle’s MIL No. 5.

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<sup>19</sup> *Crosby v. U.S. Dept. of Labor*, 53 F.3d 338 (9th Cir. 1995), is the one exception among the cases Oracle cites. In *Crosby*, the plaintiff specifically asked the judge to draw a negative inference from Defendant’s assertion of privilege as a basis for refusing to produce certain documents in discovery. Reviewing the ALJ’s decision denying that request, the Ninth Circuit concluded the ALJ did not err.

<sup>20</sup> *See also Ambrose v. Roeckeman*, 749 F.3d 615, 621 (7th Cir. 2014) (“When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information ... and will not rely on that information for any improper purpose.”).

Additionally, Oracle has waived any privilege associated with its compensation analyses.

As this Court previously warned:

[I]f Oracle made claims in the litigation explicitly premised on these compensation analyses, it could not simultaneously shield them from discovery. . . . Waiver becomes an issue when a party brings an otherwise privilege material into a litigation as the basis for a claim or defense. As long as it keeps the compensation analyses outside of the litigation, there hasn't been a waiver—it hasn't contended that a conclusion of some sort should be accepted because of analysis that it at the same time refuses to produce.

Order Granting in Part OFCCP Motion to Compel, \*9 (issued September 19, 2019). The Court further explained:

The purpose of the doctrine of waiver “is to protect against the unfairness that would result from a privilege holder selectively disclosing privileged communications to an adversary, revealing those that support the cause while claiming the shelter of the privilege to avoid disclosing those that are less favorable.” *Tennenbaum v. Deloitte & Toche*, 77 F.3d 337, 340-41 (9th Cir. 1996); *see also Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003); *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995); *Sedco Int'l S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982). Privileges cannot be used as both a sword and a shield—a litigant may not assert claims, defenses, and arguments that are founded on the communications, but then prevent an opposing party from litigating the issue by preventing anything more than selective, advantageous disclosures. *See Bittaker*, 331 F.3d at 719; *United States v. Amlani*, 169 F.3d 1189, 1194-95 (9th Cir. 1999); *Chevron*, 974 F.2d at 1162.

*Id.* In its Motion in *Limine*, OFCCP stated its concern over statements in Oracle's Summary Judgment Reply Brief which suggested that it may have made compensation corrections that were covered by privilege. While OFCCP continues to believe these statements are problematic (both because compensation adjustments cannot be privileged as Oracle's compensation decisions are at issue in this litigation and because Oracle appears to waive any privilege by attempting to mount a defense built on privileged documents not produced to OFCCP), Oracle's own Motion in *Limine* (No. 5) went further.

In its Motion in *Limine* No. 5, Oracle told the Court: “In its Motion, OFCCP *erroneously* argues that Oracle took no action in response to the privileged pay equity analyses.” Oracle MIL No. 5, at \*3 (emphasis added). In this statement, Oracle effectively advises the Court that (1) Oracle conducted privileged pay equity analyses, and (2) Oracle took action as a result of these analyses. OFCCP respectfully submits that this is exactly what this Court told Oracle it could not do by affirmatively asking that this Court make a conclusion of fact based on its privileged analyses. Oracle again has waived any privilege regarding any compensation analyses upon which it attempts to ground a defense to liability or damages in this action.<sup>21</sup>

**6) The Court should deny MIL No. 6 because testimony from Oracle’s other personnel is relevant and probative.**

To supplement the evidence of systemic discrimination that the Court will hear from Dr. Madden, OFCCP will put on compelling evidence directly relevant to the charges of sex and race discrimination alleged in the SAC. In MIL No. 6, Oracle is asking for an order excluding anecdotal evidence of employee experiences at Oracle—arguing before testimony is elicited, that OFCCP intends to offer evidence of complaints not relevant to the race and sex discrimination charged here.

First, testimony from persons outside the three functions at issue—such as testimony from human resources personnel—is highly relevant. One witness who will testify as a former employee of Oracle who is not a member of the class is Ms. Kristen Hansen Garcia. She was a Senior Director of Organization and Development at Oracle Headquarters in its Human Resources department and she will testify about her experience and observations working in human resources during the relevant time period. *See* Joint Witness List; OFCCP’s Motion for

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<sup>21</sup> In its recently produced witness list Oracle identified Vickie Thrasher as a witness who will testify about Oracle’s “diversity initiatives and OFCCP compliance.” If Oracle presents testimony concerning the company’s compliance with OFCCP regulations it may open the door to admissibility of the compensation analyses. At a minimum this establishes that a motion in *limine* excluding reference to those analyses is premature. As with many of Oracle’s motions in *limine*, the Court will be better able to make a decision during trial when it knows the context in which the evidentiary dispute arises.

Summary Judgment, Ex. 102. Oracle's bald statement that, because Ms. Hanson Garcia worked in the HR job function (and not in one of the three job functions at issue here) means that there is "no tie between whatever she attests [in her declaration] and the job functions at issue here" (MIL No. 6 at 1), is perplexing because, clearly, what the human resources personnel at Oracle were doing is relevant. In fact, Oracle itself has identified three witnesses who will testify about the human resources functions, generally at Oracle, because such evidence is relevant and bears on the compensation discrimination alleged by OFCCP.<sup>22</sup> Oracle has on numerous occasions admitted that HR plays a role with respect to the administration of Oracle's compensation practices.

Second, OFCCP will offer evidence of discrimination faced by women, Asians, and African-Americans at Oracle from appropriate witnesses. The worker witnesses identified in OFCCP's pretrial statement are all members of the class who will testify about their lived experience with Oracle's compensation system, Oracle's policies and practices regarding compensation and assignment, and their interactions with Oracle's HR department and managers regarding compensation issues. *See* Joint Witness List.

Evidence that Oracle discriminated against other classes of people or discriminated against some of its employees in other ways besides in compensation is relevant to show Oracle's propensity to discriminate as OFCCP has alleged. Fed. R. Evid. 404(b). This type of evidence is commonplace in pattern or practice cases, even where it might otherwise be inadmissible in a typical case of individual discrimination. *Obrey v. Johnson*, 400 F.3d 691, 698 (9th Cir. 2005) (finding district court abused discretion in excluding witness testimony of anecdotal evidence of discrimination). Complaints and how they were received by an employer can be proper evidence of motive or intent, and admissible as evidence of pretext, or of the

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<sup>22</sup> Oracle identifies as witnesses the following: (1) Senior Director of Compensation, Kris Edwards, who will testify about Oracle's policy of prohibiting the use of prior pay in making compensation decisions upon hire; (2) Vice President of Human Resources, Vickie Thrasher, who will testify about Oracle's employee handbook, diversity initiatives, and OFCCP compliance; and (3) Senior Director of Global Compensation, Kate Waggoner, who will testify about how compensation works at Oracle and the training they conducted regarding compensation.

structure of complaints and treatment of complaints by the company. Fed. R. Evid. 404(b); *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1286 (11th Cir. 2018).<sup>23</sup>

Oracle also has opened the door to evidence outside of the functions at issue by affirmatively arguing that the lack of findings with respect to these other functions, *see* Oracle's Motion for Summary Judgment at 18-19, (which OFCCP has explained, means nothing) somehow proves that Oracle is not engaged in a pattern and practice. Oracle here, as it often does, tries to have it both ways. It argues affirmatively that it has not engaged in discrimination in the other job functions while at the same time arguing that any evidence related to misconduct from those functions in per se irrelevant to these proceedings.<sup>24</sup>

Finally, to exclude evidence pursuant to a motion in *limine* the evidence must be "clearly inadmissible on all potential grounds." *Indiana Ins.*, 326 F. Supp. 2d, at 845. Oracle has not met this burden of showing that this evidence is "clearly inadmissible on all potential grounds" so the Court should deny Oracle's MIL No. 6. As with the majority of Oracle's requests, the Court will be in a position to rule on objections should the parties seek to introduce evidence for an improper purpose.

**7) The Court should deny MIL No. 7 because it is overly broad and does not provide the Court a basis for determining what evidence should be excluded.**

Oracle's seventh MIL speculates that OFCCP might offer evidence not produced in discovery and then generically asks the Court to exclude this unknown and unspecified evidence. However, the proponent of a motion in *limine* must provide the court a sufficient bases for determining what specifically should be excluded. *See National Union v. L.E. Myers Co. Group*, 937 F.Supp. 276, 287 (S.D.N.Y.1996) (Court may deny

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<sup>23</sup> Similarly, when Oracle offers evidence that one-third of its board is female or diverse or that one of Oracle's CEOs is female, evidence that the company is inclusive it must be offering it for some other purpose as it is not probative of whether or not it engages in systematic compensation discrimination in the three job classes at issue. Oracle Statement of Undisputed Facts at 2.

<sup>24</sup> Nonetheless, OFCCP has not attempted to offer any evidence wholly related to conduct unconnected to or not having an impact on the job functions at issue and Oracle has identified no such evidence.

a motion in *limine* that lacks the necessary specificity with respect to the evidence to be excluded.) Because Oracle has not provided a basis for the Court to make a decision on what is to be excluded, the Court should deny the motion.

Not surprisingly, none of the cases Oracle cites stand for the principle that a court can, through a motion in *limine*, exclude a broad range of unspecified evidence. In *Tacori Enterprises v. Beverly Jewellery Co. Ltd.*, 253 F.R.D. 577 (C.D. Cal. 2008) the proponent of the motion to exclude provided the court with a detailed list of the evidence it sought to exclude. *Id.*, at 582. Similarly, in *U.S. v. Sumitomo Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365 (9<sup>th</sup> Cir. 1980), the movant was quite specific as to the evidence it sought to exclude – a damages estimate and supporting evidence that was not produced until long after the discovery order required it. *Id.* at 1368-69. Unlike Oracle here, in those cases the court was presented with a specific list of evidence and knew exactly what it was being asked to exclude. The fact that those courts granted the motions to exclude specific evidence does not help Oracle, which seems to ignore the basic principle that to exclude evidence pursuant to a motion in *limine* the proponent of the motion must show that the evidence is “clearly inadmissible on all potential grounds.” *Indiana Ins.*, 326 F. Supp. 2d, at 845.

If Oracle cannot specify what evidence it seeks to exclude, how can it meet the burden of showing that evidence is clearly inadmissible on all potential grounds? Clearly it cannot. As such, the Court should deny MIL No. 7.

**8) The Court should deny MIL No. 8 because it is not a proper subject of a motion in *limine* and the evidence at issue is admissible.**

Oracle’s MIL No. 8 raises familiar hearsay objections to the admissibility of OFCCP’s interview memoranda of Oracle’s managers.<sup>25</sup> Oracle relies only on the hearsay rules to argue

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<sup>25</sup> Oracle does not include in its motion the memorandum of Lisa Gordon’s Interview, dated Jan. 9, 2015 (see fn. 1 to Oracle’s MIL No. 8).

that the Court should exclude these documents. But Oracle's hearsay objection is only relevant depending on the basis for offering the documents. As OFCCP has already explained in its responses to Oracle's same objections in the dispositive motion context, there are a number of ways in which these interviews could be admissible at trial. Manager interviews can be admissible as nonhearsay party admissions, 29 C.F.R. § 18.801(d)(2), or prior inconsistent statements, *id.* § 18.801(d)(1). They may also be admissible under exceptions to hearsay, most obviously as records of a regularly conducted activity. *Id.* § 18.803(a)(6). Finally, the manager interviews are admissible nonhearsay where they are submitted to demonstrate the breadth of OFCCP's compliance review—and not for the truth of the matters asserted in the statements themselves.<sup>26</sup> See OFCCP's Disputed Facts 59(F), listing interview notes; 29 C.F.R. § 18.801(c).

The Court should deny this motion as an inappropriate subject of motion in *limine*. *Berardi v. Village of Sauget*, 2007 WL 433542 (S.D. Ill. Feb. 6, 2007) (“If the Federal Rules of Evidence supply the answer for admissibility or non-admissibility of a particular piece of evidence, then a motion in *limine* regarding the same piece of evidence is redundant and unnecessary.”).

Furthermore, the circumstances in which the interviews were taken—OFCCP's onsite review, made clear that OFCCP was gathering evidence that it was intending to rely on to make a determination on Oracle's compliance. It is not plausible that Oracle or its counsel would take a lackadaisical attitude toward these statements as it was pending a determination.

**9) The Court should deny MIL No. 9 because information regarding finances and compensation is directly relevant to issues central to this case.**

As will be shown at trial, evidence of Oracle's finances and its executives' compensation is relevant and admissible. In fact, it is Oracle who has placed the subject of its financial resources squarely within this case: Oracle's defense argues that budgetary and other non-discriminatory factors account for the differences in compensation that employees are paid. See, e.g., Oracle's Motion for Summary Judgment, Memorandum of Points and Authorities (Oracle

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<sup>26</sup> *Cf.* Oracle's MSJ MPA at 10-11 (arguing that OFCCP lacked sufficient basis to proceed with issuing Show Cause Notice during review).

MSJ MPA), 7-8. Oracle also attempts to justify its actions by pointing to industry competition and market factors allegedly constraining Oracle's compensation practices. *Id.* at 9 ("Oracle faces substantial and continuous competition for highly-skilled and talented employees"). This Court should not deny OFCCP the right to present evidence to undercut or impeach those assertions.

Secondly, Oracle is a government contractor with obligations to ensure resources are put towards ensuring compliance. 41 C.F.R. § 60-2.17(a). The fact that Oracle has such resources, but did not deploy them, is directly relevant.

Moreover, this Court should not exclude evidence regarding compensation paid to Oracle's executives. In this case, Oracle has attempted to highlight these executives' "diversity" to intimate that such individuals – by dint of their demographics – lack motivation to discriminate or animus towards certain groups. *See, e.g.*, Oracle MSJ MPA 2-3. OFCCP should not be barred from exploring at trial these decision-makers' motivations and introducing evidence regarding the ways in which Oracle executives benefitted from the company's discriminatory decisions.

Oracle has not met its burden to prove that this evidence is "clearly inadmissible on all potential grounds." *See Indiana Ins.*, 326 F. Supp. 2d at 845. This Court should consider the probative value of the evidence in context of the trial as a whole and deny this motion *in limine*.

**10) The Court should deny Oracle's MIL No. 10 which is a dispositive motion in disguise that requires weighing the evidence in relation to disparate impact theory.**

In its tenth motion in *limine*, Oracle attempts to re-argue its summary judgment position seeking the dismissal of the availability of a disparate impact theory<sup>27</sup> in the repackaged form of an evidentiary ruling. Here, Oracle rehashes erroneous arguments from its summary judgment motion relating to whether OFCCP has sufficiently pled a disparate impact claim. For the same

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<sup>27</sup> *See* Oracle's October 21, 2019 Motion for Summary Judgment at pp. 22-24.

reasons OFCCP stated in its opposition to Oracle's summary judgment motion, the Court should deny Oracle's MIL No. 10.<sup>28</sup>

In a disparate treatment case, OFCCP has no obligation to pin point the precise source of the discrimination. A claim that the sum of an employer's practices results in less favorable treatment of members of the plaintiff class than of comparably qualified Whites or males may justify an inference that "discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977). This is because a statistically-significant disparity in treatment of the comparably qualified is "the expected result of a regularly followed discriminatory policy." *Id.* at 361 n. 46. OFCCP has presented compelling evidence of pay disparities that not only includes statistical evidence, but demonstrates that the company's stated policies indicate that similarly-situated employees may not receive the same compensation based on budget considerations and budget-driven directives. The statistics demonstrate that these budget considerations were used in a discriminatory manner.

Oracle's claim that OFCCP failed to adequately consider Oracle's neutral policies for setting pay and failed to set forth a disparate impact claim is inaccurate. OFCCP established its prima facie case, and it is Oracle's burden to explain the disparities. Here, because Oracle thus far has simply denied that its workforce is capable of objective study, it has not attempted to meet its burden by conventional means. However, should it attempt to provide actual explanations for the disparities at trial, OFCCP is entitled to test whether the "practices that have an adverse impact on the basis of sex" and race are "job-related and consistent with business necessity." 41 C.F.R. § 60-20.4(d). *See also Segar v. Smith*, 738 F.2d 1249, 1270 (D.C. Cir. 1984) ("when an employer defends a disparate treatment challenge by claiming that a specific employment practice causes the observed disparity, and this defense sufficiently rebuts the plaintiffs' initial case of disparate treatment, the defendant should at this point face a burden of proving the business necessity of the practice"); *Palmer v. Shultz*, 815 F.2d 84 n. 21 (D.C. Cir. 1987) ("[A] disparate treatment claim can turn into a disparate impact claim if a defendant rebuts

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<sup>28</sup> OFCCP's November 1, 2019 Opposition to Oracle's Summary Judgment Motion at pp. 14-16.

an allegation of discriminatory intent by claiming that a facially neutral selection criterion caused a disparity in selections.”). Oracle’s attempt to sidestep the strictures of *Segar* and *Palmer* with conclusory statements regarding OFCCP’s statistics fails for lack of any meaningful analysis. An employer cannot avoid its burden to rebut a prima facie case of unlawful pay disparities merely by attempting to poke holes in the plaintiff’s statistics,<sup>29</sup> and by extension, cannot seek to exclude the plaintiff’s available theories of liability based on a half-hearted, conclusory motion amounting to the same tactic.

While addressed in other motion practice, *e.g.*, OFCCP’s affirmative motion for summary judgment, *Daubert* motion, and in opposition briefs to Oracle’s summary judgment and *Daubert* motions, OFCCP disputes Oracle’s unsupported contentions regarding its own compensation policies and OFCCP’s statistical analyses. Oracle departed from its own policies by using an applicants’ prior pay to set their starting pay at hire according to Oracle’s own employees and documents. Oracle’s practice of using prior pay to set initial pay continued until the State of California enacted a law expressly prohibiting this practice. Dr. Madden’s statistical analysis in Table 4 of her July 19, 2019 shows that “there is no statistically significant difference by gender or race between starting pay and prior pay,” which is “consistent with Oracle setting starting pay based on prior pay and, as a result, ‘mimicking’ the racial and gender differentials in the wider labor market.”<sup>30</sup> Accordingly, Dr. Madden identified that “prior salary explains most (61%) of the variation in starting base pay rates at Oracle.”<sup>31</sup> Third, OFCCP has also presented statistical evidence of discriminatory job assignments resulting in unlawful gender and race based pay disparities.<sup>32</sup>

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<sup>29</sup> OFCCP’s Opp. to Oracle’s *Daubert* Motion at pp. 19 (citing *E.E.O.C. v. Gen. Tel. Co. of Nw.*, 885 F.2d 575, 581–82 (9th Cir. 1989)).

<sup>30</sup> Declaration of Norman E. Garcia ISO OFCCP’s Motion for Summary Judgment, Ex. 91, July 19, 2019 Expert Report of Janice F. Madden at p. 50.

<sup>31</sup> *Id.* at p. 49.

<sup>32</sup> OFCCP’s November 1, 2019 Opposition to Oracle’s *Daubert* Motion at pp. 11-15 (summarizing Dr. Madden’s assignment-based statistical analyses).

Oracle's cases do not support the legal position it seeks to advance. *Josey* is a single-plaintiff, out-of-circuit wrongful termination case that has no bearing on a pattern-or-practice case arising out of EO 11246's non-discrimination and affirmative action provisions.<sup>33</sup> *Armbruster*,<sup>34</sup> *Veryne*,<sup>35</sup> and *Lumsden*<sup>36</sup> are inapposite for the same reasons.

In sum, for the reasons provided above, and for the reasons stated in OFCCP's previous oppositions to Oracle's near-verbatim arguments in the last four weeks of motion practice, the Court should deny Oracle's unsupported request to exclude OFCCP's disparate impact evidence. Additionally, to exclude evidence pursuant to a motion in *limine* the evidence must be "clearly inadmissible on all potential grounds." *Indiana Ins.*, 326 F. Supp. 2d, at 845. Because Oracle has not met that burden, the Court should deny Oracle's MIL No. 10.

**11) The Court should deny MIL No. 11 because it is overly broad and does not provide the Court a basis for determining what evidence should be excluded.**

Oracle asks this Court to exclude a broad swath of evidence related to the resolved hiring claim. But motions in *limine* to exclude broad categories of evidence are disfavored and should rarely be granted. *Sperberg*, 519 F.2d, at 712; *Jackson*, 194 F. Supp.3d., at 1007. Instead, the proponent of a motion to exclude must identify the evidence at issue and state with specificity why such evidence is inadmissible. *U.S. v. Cline*, 188 F.Supp.2d 1287, 1292 (D.Kan.2002). Oracle has not identified the evidence it seeks to exclude with sufficient specificity to allow the Court to rule, and therefore the Court should deny MIL No. 11. Moreover, it is clear that issues related to hiring have direct bearing on this case. For example, through Dr. Saad's Reports and its positions, Oracle has made a live issue over its hiring requisition process as well as the

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<sup>33</sup> *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 635 (3d Cir. 1993).

<sup>34</sup> *Armbruster v. Unisys Corp.*, No. CIV. A. 91-5948, 1996 WL 55659, at \*1 (E.D. Pa. Feb. 7, 1996) (fourteen plaintiffs alleged wrongful termination as a result of a purported reduction in force in violation of the Age Discrimination in Employment Act (ADEA)).

<sup>35</sup> *Verney v. Dodaro*, 872 F. Supp. 188, 192 (M.D. Pa. 1995) (single-plaintiff failure-to-promote case).

<sup>36</sup> *Lumsden v. Campbell Taggart Baking Co.*, No. 95 C 4362, 1997 WL 610059, at \*3 (N.D. Ill. Sept. 26, 1997) (individual wrongful demotion and termination case alleging violation of the ADEA).

process in which candidates come to be placed in and change career levels.

Additionally, to exclude evidence pursuant to a motion in *limine* the evidence must be “clearly inadmissible on all potential grounds.” *Indiana Ins.*, 326 F. Supp. 2d, at 845. OFCCP asserts that Oracle discriminated in compensation decisions at hire, and therefore evidence concerning the hiring process is relevant. This is yet another example of Oracle’s misuse of the motion in *limine* process, since the Court will only be able to determine admissibility in the context in which the evidence is offered. At any rate, because Oracle cannot meet the burden of showing that such evidence is “clearly inadmissible on all potential grounds,” the Court should deny Oracle’s MIL No. 11.

**12) The Court should deny MIL No. 12 because Oracle cannot meet its burden of establishing that testimony of a Solicitor’s Office attorney would be clearly inadmissible on all potential grounds, and because it is not a proper subject for a motion in *limine*.**

OFCCP does not intend to call any Solicitor’s Office attorney as a witness. Nonetheless the Court should still deny the motion. Despite Oracle’s blanket assertions, there are circumstances under which an attorney may both testify as a fact witness and continue to represent the client. For example, an attorney might be allowed to testify as to an uncontested fact. *M.K.B. v. Eggleston*, 414 F.Supp.2d 469, 470 (S.D. New York 2006). Thus, Oracle cannot meet the burden of showing that such evidence is “clearly inadmissible on all potential grounds.”

To the extent that Oracle relies on the hearsay rules to argue that an attorney should not be allowed to testify,<sup>37</sup> that is not a proper subject of a motion in *limine*. *Berardi v. Village of Sauget*, 2007 WL 433542 (S.D. Ill. Feb. 6, 2007) (“If the Federal Rules of Evidence supply the answer for admissibility or non-admissibility of a particular piece of evidence, then a motion in *limine* regarding the same piece of evidence is redundant and unnecessary.”). In the unlikely event a situation arises at trial where a party offers one its attorneys as a fact witness, the proper time to determine whether that will be allowed is at trial where the judge can assess the offered evidence in the context in which it arises. The Court should deny MIL No. 12.

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<sup>37</sup> See Oracle’s Motion in Limine No. 12, at p. 2.

**13) The Court should deny MIL No. 13 because bifurcation is neither necessary nor required, and because Oracle is improperly asking the Court to weigh the evidence under the guise of a motion in *limine*.**

In MIL No. 13, Oracle takes what is at a minimum its fourth bite at the apple in attempting to bifurcate these proceedings. Oracle first proposed bifurcation in its February 24, 2017, Response to Notice of Docketing. Oracle Response to Notice of Docketing at 3. This proposal was not adopted in the first Notice of Hearing and Pre-Hearing Order on April 12, 2017. In a Joint Case Management statement submitted in this matter on May 2, 2017, Oracle again argued that these proceedings should be bifurcated, and OFCCP opposed this proposal. *See* Joint Case Management Statement of May 2, 2017 at 24-25. Again, the bifurcation approach was not adopted. *See* Order Following Case Management Conference of May 10, 2017. Oracle raised the issue again when the trial that will begin in less than two weeks was scheduled back in February. This Court made clear in its Notice of Hearing that the hearing is not bifurcated. *See* Notice of Hearing and Pre-Hearing Order issued February 6, 2019, \*1 (“The entire hearing on liability *and damages* will be completed within the timeframes set.”) (emphasis added). As such, Oracle’s eleventh hour attempt to again raise the issue—without even acknowledging the prior history—must fail. *Cf. Barnes*, 924 F. Supp. 2d 74, 81–82 (D.D.C. 2013) (“Another problem this Court has is that this motion in limine is essentially a motion for reconsideration of motion for reconsideration.”).

Substantively, Oracle premises its motion on the faulty argument that OFCCP cannot pursue relief based on a class-wide formula. This is not correct. Rather than calculating damages based on individual assessments of each victim’s loss, a class-wide formula may be used in calculating a back-pay award. *See McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 280-81 (5th Cir. 2008); *Segar*, 738 F. 2d at 1289-91; *Bank of Am.*, 2016 WL 2892921, 97-OFC-16, at \*20; *Greenwood Mills Inc.*, ARB Nos. 00-044. 01-089, 2002 WL 31932547 at \*56 (Dec. 20, 2002). As detailed in *Bank of America*, formula relief is necessary if “the case is complex, the class is large, or the illegal practices continued over an extended period of time.” *Id.* at 13 (citing *McClain*, 519 F. 3d at 280-81; *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261(5th Cir.

1974)). The present case meets all of these factors and thus, this Court should allow for formula relief. *Id.*

Indeed, formula relief without bifurcation is the normal practice in OFCCP cases alleging systemic discrimination under the Executive Order (both before and after *Wal-Mart v. Dukes*, 564 U.S. 338, 366-67 (2011), which dealt with commonality problems related to back pay in the context of Federal Rule of Civil Procedure 23(b), which is not at issue in this case). *See, e.g., Bank of Am.*, 2016 WL 2892921, 97-OFC-16, at \*20 (ARB decision approving of formula relief); *OFCCP v. Enterprise RAC Co. of Baltimore*, 2016-OFC-00006 (ALJ decision issued July 17, 2019, ordering formula relief). In its motion, Oracle fails to identify a single OFCCP matter that was bifurcated.

Because the Court can use a class-wide formula to award damages, it is not necessary to bifurcate the trial. And hearing all of the evidence, including damages, in one trial furthers the interest of judicial economy. Therefore the Court should deny MIL No. 13.

Oracle also improperly asks the Court, under the guise of a motion in *limine*, to weigh the evidence. Oracle bases its argument in part on contested assertions about the nature of OFCCP's evidence and the evidence's possible impact on damages.<sup>38</sup> But in arguing that Oracle's interpretation of OFCCP's evidence will result in a "windfall" for some class members, Oracle is necessarily asking the Court to weigh the evidence. This is improper in a motion in *limine*. *McConnell v. Wal-Mart Stores, Inc.* 995 F.Supp.2d 1164, 1167 (D. Nev.2014).

**14) Oracle's MIL No. 14, replete with false representations regarding the plain text of OFCCP's NOV, SCN, Complaints, and Expert Reports, should be denied.**

In MIL No. 14, Oracle seeks to exclude any evidence OFCCP sets forth regarding salary pay discrimination. In support of its motion, Oracle relies on the same misrepresentations of the Second Amended Complaint it made to the Court in its opposition to OFCCP's motion for summary judgment. As explained in OFCCP's reply in support of its motion for summary judgment, the plain text of OFCCP's Notice of Violation (NOV), Show Cause Order (SCO), and

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<sup>38</sup> Oracle's Motion In Limine No. 13 at 3.

the operative complaint allege discrimination both in base pay, i.e., “salary,” and in total compensation. In addition, Dr. Madden’s expert reports expressly discuss, analyze, and ultimately prove discrimination in base pay (in addition to total compensation), which Oracle failed to address.

*A. OFCCP Expressly Plead Salary Discrimination as a Component of Oracle’s Compensation Discrimination.*

Oracle’s claim that it was not on notice that OFCCP’s compensation claims include all components of compensation, including salary, is false. As explained in OFCCP’s reply in support of its motion for summary judgment – filed and served a full week before Oracle submitted MIL No. 14 – OFCCP’s Notice of Violations (NOV) and Show Cause Notice issued to Oracle during the investigation expressly relied on regression analyses that were based on salary. *See* OFCCP’s Reply at p. 11 (citing OFCCP MSJ Motion, Exhibit 66, Appendix A). Rather than being a “new” claim, notice that OFCCP’s allegations include salary discrimination literally goes back to the very beginning of the dispute at issue in this litigation.

Oracle’s claim that the Second Amended Complaint (SAC) abandons differentials in salary as a component of OFCCP’s claims for the compensation discrimination is similarly frivolous.<sup>39</sup> Paragraphs 11 and 12 of the SAC allege “compensation discrimination” in pay, which, according to OFCCP’s regulations, includes discrimination in “higher-paying wage rates” and “salaries.” 41 C.F.R. 60-20.1.4(a). The SAC then provides numerous examples of the types of analyses that support its contention of compensation discrimination (SAC ¶¶ 13-32).<sup>40</sup> Just as with the NOV, *twelve* of these paragraphs describe discriminatory pay practices that are expressly centered on base pay or salary or expressly rely on regressions of base pay or salary. *See* SAC 16, 22-32. Additionally, ¶¶ 18-21 relating to assignment discrimination in global career

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<sup>39</sup> This is not the first time Oracle has mischaracterized a claim as new. *See* Order Granting Motion to Amend, (March 6, 2019) (“I start with the addition of a reference to Oracle’s reliance on prior salary. Contrary to Oracle’s representations, this is not a new claim.”).

<sup>40</sup> In Paragraph 11, OFCCP explained that “OFCCP’s models, results, and theories of causation will continue to be refined as additional discovery is obtained, and expert(s) evaluate the data and evidence.” SAC at 11.

level—which is the key determinant of an employee’s salary range—directly relate to salary discrimination. As a matter of law, the SAC provides ample notice that OFCCP’s claims include discrimination based on differentials in salary.

B. *Dr. Madden Explicitly Studied Salary Disparities and Oracle Chose Not to Respond.*

Dr. Madden’s report put Oracle on clear notice that OFCCP was asserting disparities based on base pay or salary that it was required to rebut. The words “base pay” appear in Dr. Madden’s initial 58-page report and accompanying tables no less than 88 times, and salary is referenced 15 times. These numerous references to base pay and salary are not tucked in—they are repeatedly used in the introduction, section headers, and the headings of tables specifically devoted to regressions run exclusively on base pay. Oracle’s and Dr. Saad’s decision to simply not respond based on the false claim that OFCCP did not allege base pay violations is a risk Oracle knowingly took, leaving them in the position of conceding liability for base pay discrimination.

Oracle’s decision to focus solely on total compensation discrimination, which OFCCP also provided evidence of, does nothing to undermine OFCCP’s base pay discrimination allegations and evidence. The regulations prohibit discrimination in each component of pay as well as total pay, including “wage rates, salaries, . . . *or* other opportunities on the basis of sex.” 41 C.F.R. § 60-20.4(b) (emphasis added). *See also* 41 C.F.R. § 60-20.4(e) (“[a] contractor will be in violation of Executive Order 11246 and this part any time it pays wages, benefits, *or* other compensation that is the result in whole or *in part*” of discrimination) (emphasis added). The record evidence shows that Oracle was on notice of OFCCP’s claims related to base pay and simply chose not to respond.

C. *The Court can order OFCCP to produce damages calculations limited solely to base pay in the event OFCCP prevails solely on its unopposed base pay disparity theory of liability.*

Dr. Madden used “Medicare compensation” to estimate damages for each of the classes of employees at issue here.<sup>41</sup> This form of compensation includes base salary, bonuses, and actually realized stock awards but not fringe benefits such as medical insurance.<sup>42</sup> Notably, bonuses and stock awards do not make up a large portion of employee compensation in the three job functions at issue in this case.<sup>43</sup> Dr. Madden has confirmed that even applying Oracle’s expert’s model to Oracle employee base pay data in the relevant job functions demonstrates unexplained pay disparities which Oracle has failed to rebut with legitimate nondiscriminatory reasons.<sup>44</sup>

Oracle argues that OFCCP cannot present evidence of unlawful base pay disparities because Dr. Madden did not separately itemize the portion of her damages estimate in her June 19, 2019 report attributable to base pay disparities as opposed to base pay plus bonuses and realized stock awards (together, Medicare compensation). This is nonsensical.

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<sup>41</sup> Declaration of Norman E. Garcia ISO OFCCP’s Motion for Summary Judgment, Ex. 91, July 19, 2019 Expert Report of Janice F. Madden at pp. 52-53 (e.g., “Table 8 reports three estimates of the total damages [for women], from 2013 through 2018, **arising from differences in Medicare compensation**, not including lost fringe benefits or interest. These totals are reported in the last row of Table 8.”) (emph. added), pp. 54-55 (“In Table 9, I report the **additional pay due to Asian employees were they to have Medicare compensation equivalent to that of white employees** with the same characteristics or control variables.”) (emph. added), pp. 55-56 (“Table 3(a) **shows racial differences in Medicare compensation between African American and white employees** in Product Development at Oracle headquarters from January 1, 2013 through December 31, 2018.”) (emph. added).

<sup>42</sup> *Id.* at p. 11.

<sup>43</sup> *See, e.g., id.* at pp. 11 (“Between 2013 and 2018, Oracle awarded bonuses in 2014 and 2018. [M]any employees receive no stock awards or bonuses....”).

<sup>44</sup> *See, e.g.,* OFCCP’s MSJ at pp. 22-24.

In other EO 11246 cases in which formula-based relief was awarded, ALJs have modified OFCCP's damages calculations in recommending a decision in favor of the plaintiff class.<sup>45</sup> As established case law makes clear, "the judge in a pattern and practice discrimination case has broad discretion regarding remedies to be fashioned."<sup>46</sup> If the Court finds that OFCCP has proved base pay disparity claims but not its claims as to disparities in bonus and realized stock compensation, then the Court can order OFCCP to submit damages calculations without bonus and stock award data. OFCCP further submits that it would be appropriate for Dr. Madden to elaborate on her prior damage calculations at hearing, specifying the portion of damages she allocates for base pay.

Oracle has failed to cite any authority for the proposition that damages may not be awarded because the trier of fact finds partial liability in favor of the plaintiff in a pattern-or-practice discrimination case for which there is not a perfectly corresponding damages estimate, and for good reason: it does not exist. The cases Oracle does cite are readily distinguishable.

In *Metro. St. Louis Equal Hous. & Opportunity Council v. Jezewak*, the plaintiffs brought three claims under the Fair Housing Act, two of which were dismissed because they could not trace their harms to the defendants' conduct for purposes of Article III standing under the U.S. Constitution.<sup>47</sup> Article III standing under the U.S. Constitution has no bearing on these proceedings because, among many other reasons, the Office of Administrative Law Judges is an executive branch administrative trial court, not an Article III court. In *Milam v. Dominick's Finer Foods, Inc.* plaintiffs were African American produce clerks who alleged that they were denied certain working hours as compared to a white produce clerk, but failed to identify which hours

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<sup>45</sup> See, e.g., *OFCCP v. Greenwood Mills, Inc.*, ARB Case Nos. 00-044, 01-089, 2002 WL 31932547, at \*7 (ARB Dec. 20, 2002) (affirming ALJ's accounting for employee attrition rate by modifying parties' stipulated formula to calculate back pay, rejecting objections from each party regarding ALJ's methodology for calculating back pay based on the data presented).

<sup>46</sup> *Id.*

<sup>47</sup> 2016 WL 2594064, at \*6 (E.D. Mo. May 5, 2016)

they actually did not get to work on the basis of race.<sup>48</sup> The plaintiff in *Akouri v. State of Florida Dep't of Transp.* failed to testify to any “pain” resulting from his employer’s unlawful failure to promote him and, on that basis, the Eleventh Circuit affirmed the district court’s reversal of the jury’s finding of pain and suffering damages.<sup>49</sup> The *Thomas* case involved sex harassment and retaliation claims in which the court denied summary judgment on the retaliation claims but dismissed the sex harassment claims because he determined the conduct presented was not sufficiently severe or pervasive under Eleventh Circuit law.<sup>50</sup> However, contrary to Oracle’s representation to this Court, presentation of damages had nothing to do with the decision, and the plaintiffs later recovered tens of thousands of dollars based on their retaliation claims, which the Eleventh Circuit affirmed.<sup>51</sup> In *Lynam*, the plaintiff in a state law religious discrimination and retaliation case presented no monetary damages evidence<sup>52</sup> whatsoever to support his retaliation claim. None of these out-of-circuit, non-pattern-or-practice cases support Oracle’s request to exclude salary discrimination evidence nor to preclude a finding of class-wide damages on the basis of salary discrimination if the Court’s liability finding is limited solely to salary discrimination.

Accordingly, the Court should summarily deny Oracle’s MIL No. 14.

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<sup>48</sup> 588 F.3d 955, 958 (7th Cir. 2009). The *Milam* court noted myriad other merits-related issues with the claims at issue in that case which further underscore its irrelevance to a pattern-or-practice pay discrimination case arising under EO 11246.

<sup>49</sup> 408 F.3d 1338, 1345 (11th Cir. 2003)

<sup>50</sup> *Thomas v. Alabama Home Constr., Inc.*, 2004 WL 7338567, at \*11, \*21 (N.D. Ala. Oct. 28, 2004).

<sup>51</sup> *Thomas v. Alabama Home Const.*, 271 F. App'x 865, 867 (11th Cir. 2008).

<sup>52</sup> *Jackson & Coker, Inc. v. Lynam*, 840 F. Supp. 1040, 1052- 53 (E.D. Pa. 1993)

**CONCLUSION**

For the foregoing reasons, each and every one of Oracles 14 motions in *limine* should be denied.

November 25, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I am over 18 years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On November 25, 2019, I served the foregoing

**PLAINTIFF OFCCP'S OPPOSITION TO DEFENDANT ORACLE'S MOTIONS  
IN LIMINE**

on Defendant Oracle America, Inc. by serving its attorneys below via electronic mail, pursuant to the parties' agreement:

Erin Connell (econnell@orrick.com)

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

Date: November 25, 2019

*/s/ Llewlyn D. Robinson*

LLEWLYN ROBINSON