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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

RECEIVED

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Office of Administrative Law Judges
San Francisco, Ca

ORACLE'S RESPONSE TO ORDER TO SHOW CAUSE

Defendant Oracle America, Inc. ("Oracle") submits this response to the Court's June 19, 2017 Order to Show Cause regarding the time-frame for the last date of Oracle's alleged "non-compliance with Executive Order 11246." The Court indicated that it seeks to fix the cut-off date for claims of noncompliance at January 17, 2017, the date OFCCP filed its Complaint. For the reasons set forth in its Motion for Judgment on the Pleadings and Opposition to OFCCP's Motion For Order Overruling Oracle's Objections Regarding The Temporal Scope Of Discovery, Oracle continues to believe the appropriate time frame for liability in this matter is the review period investigated by OFCCP (*i.e.*, January 1, 2013—June 30, 2014 for the recruiting and hiring discrimination claims, and January 1 – December 31, 2014 for the compensation discrimination claims).

In particular, both Executive Order 11246 and the OFCCP's own regulations require OFCCP to engage in reasonable efforts to conciliate administrative findings of discrimination prior to instigating enforcement proceedings. Setting aside the issue of whether OFCCP's efforts here were reasonable, there is no question that OFCCP engaged in *no conciliation efforts at all* with respect to any potential noncompliance by Oracle that took place *after* the compliance

evaluation and/or for which OFCCP had no underlying data, and were not encompassed within the Notice of Violation (“NOV”). Indeed, it is literally impossible for OFCCP to have conciliated events that had not yet taken place. Allowing OFCCP to nearly triple the scope of potential liability and discovery in this enforcement action not only runs afoul of the requirements contained in the Executive Order and its regulations, but it subjects Oracle to irreparable harm and extreme prejudice in the form of forcing Oracle to litigate this matter all the way through to hearing, only to have the issue reversed on appeal because OFCCP is not permitted to litigate matters outside the scope of its underlying compliance review, and for which it engaged in no conciliation at all.

In the event the Court does not limit the scope of the enforcement proceedings to the time frames covered by the underlying compliance review, Oracle submits, in the alternative, that the appropriate cut-off date for liability purposes should be March 11, 2016, which is the date OFCCP issued its Notice of Violation.¹

The NOV date constitutes a more appropriate liability cut-off date than the date upon which OFCCP filed its Complaint because it is more consistent with the governing regulations and allows for a more efficient and fair administration of this matter. OFCCP’s investigation concluded with the issuance of its findings in the NOV. The NOV framed the issues investigated during the compliance audit and the violations found, set forth the remedies OFCCP sought, and started the conciliation process. The Court has recognized that administrating this case would be unwieldy if information is changing up until the time of the hearing and that proper preparation will be necessary for the parties and the Court to conduct an efficient and fair hearing. Setting the cut-off date as the date of the NOV consistently aligns OFCCP’s completion of its investigation and arrival at *its own determination* of non-compliance with the matters to be heard and resolved in the instant enforcement action.

The allegations contained in OFCCP’s Complaint further support aligning the date of the

¹ To be clear, this date would not necessarily be the cut-off date for all discovery, if OFCCP could demonstrate that a particular discovery request warranted the production of data or documents dated *after* March 11, 2016 because the data or documents sought were relevant to alleged violations that took place *before* March 11, 2016.

NOV and the cut-off date for claims of alleged non-compliance. The allegations in the Complaint mirror those in the NOV. Fixing the cut-off date of non-compliance at the date of the NOV frames the claims and defenses in a more consistent manner. It also better comports with applicable regulations providing that administrative proceedings may be based on “the results of a compliance evaluation,” and that OFCCP may seek relief for victims “identified during a complaint investigation or compliance evaluation.”

Imposing reasonable limits on the scope of alleged claims of non-compliance and on discovery is also consistent with the notion of fundamental fairness. If the Court fixes the cut-off date in January 2017, OFCCP would be permitted to subject Oracle to discovery covering a nearly three-year period beyond the eighteen month review-period covered in its underlying investigation. Indeed, this extension of time beyond the review period nearly triples the scope of this litigation, as well as the burden and expense of discovery associated with it. As such, the NOV date is a more appropriate cutoff date than the date upon which OFCCP filed its Complaint, and would allow for a more efficient and fair adjudication of the case.

FACTUAL BACKGROUND

A. OFCCP’s Compliance Evaluation Ended with the NOV.

On September 24, 2014, OFCCP issued a Scheduling Letter to Oracle, stating that Oracle’s headquarters location in Redwood Shores, California (hereinafter “HQCA”) had been “selected . . . for a compliance review under Executive Order 11246.” Amended Complaint (“Complaint”) ¶ 6; Scheduling Letter p. 1. That Scheduling Letter asked Oracle to provide OFCCP with a copy of its Executive Order Affirmative Action Program (“AAP”) and the supporting data listed on the attached Itemized Listing. *Id.*

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

On March 11, 2016, OFCCP issued its NOV. As to recruiting and hiring, the NOV charged that “[d]uring the review period from January 1, 2013 through June 30, 2014, Oracle discriminated against qualified African American, Hispanic and White (hereinafter ‘non-Asians’) applicants in favor of Asian applicants, particularly Asian Indians based upon race in its recruiting and hiring practices for Professional Technical 1, Individual Contributor (‘PT1’) roles.” NOV at p. 1. The alleged hiring discrimination violation is limited to the time period of the compliance review in additional places: “Specifically, during the period of January 1, 2013 through June 30, 2014, ORACLE recruited approximately 6800 applicants to PT1 roles. . . . Additionally, during the period of January 1, 2013 through June 30, 2014, ORACLE hired approximately 670 applicants into PT1 roles.” *Id.* at p. 1–2. Based on these alleged numbers, the NOV concluded that Oracle had engaged in unlawful discrimination against non-Asian applicants based on race.

The NOV also states that OFCCP found that Oracle engaged in compensation discrimination against female employees in Information Technology and Support roles, and against female, African-American, and Asian employees in Product Development roles, based the Agency’s regression analysis of that data. NOV at pp. 3–4. A summary of the purported results of that regression analysis, which OFCCP contends illustrate statistically significant disparities, are contained in Attachment A to the NOV.

Further, the NOV alleges that Oracle refused to produce records and, accordingly, OFCCP claims it is entitled to an inference that the information allegedly withheld would have been in its favor.

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

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B. OFCCP's Enforcement Action Rests On The NOV's Claims.

The OFCCP filed its Complaint to initiate this enforcement proceeding on the afternoon of January 17, 2017. See Compl.² The Complaint contains almost identical factual allegations found in the NOV. It alleges compensation discrimination against women, Asians and African Americans, and recruiting and hiring discrimination against "non-Asians." Compl. ¶ 10. Like the NOV, the Complaint includes the same numbers of affected employees, the same groups of employees and the same summary of regression analysis findings. In addition, the Complaint alleges hiring discrimination based on Oracle's alleged utilization of a discriminatory hiring and recruiting process for PT1 positions that favored Asians and disfavored non-Asians. Like the NOV, the Complaint claims that Oracle hired 82% of Asian applicants exceeding the 75% of those that applied.

The Complaint also alleges that Oracle "refused to produce to the agency various records, including, but not limited to, prior year compensation data for all employees." Compl. ¶ 12. Additionally, the Complaint seeks to bolster the allegations of hiring and compensation discrimination by invoking a supposed negative inference based on missing information. See Compl. ¶ 15 ("Oracle's refusal to produce all data and records requested pertaining to its recruiting, hiring, and compensation practices further support OFCCP's findings in paragraphs 7-10.").

Although it could have done so, at no time before or after issuance of the NOV did OFCCP commence any proceeding to obtain information that it claims it requested and that Oracle refused to provide. Nonetheless, OFCCP's Complaint asserts claims for time periods that not only are outside the scope of the review period, the NOV, and the SCN, but for periods in which OFCCP has no supporting data. The Agency therefore could not have analyzed data to support violations during those time periods, conciliated violations for those time periods, or had

² On January 25, 2017, OFCCP filed its Amended Complaint, which altered only one paragraph of the original complaint by substituting "June 30, 2013" for the date "June 30, 2014" in describing the time frame during which the Agency alleges various recruiting and hiring discrimination occurred. In all other material respects, the texts of each of the Complaint and Amended Complaint are identical, and this motion refers exclusively to the text of the Amended Complaint.

cause—much less reasonable cause—to believe that there were any violations during those time periods. Nonetheless, skipping over these critical requirements, the Agency proceeded to file a Complaint asserting violations for those time periods.

LEGAL ARGUMENT

A. Pursuant To Ofccp's Regulations, The Enforcement Proceedings Should Be Limited To The Violations Found In The Compliance Evaluation.

The enforcement proceedings regulations provide that administrative proceedings may be based on “the results of a compliance evaluation.” 41 CFR §60-1.26(a)(1). Further, they provide that OFCCP may seek relief for victims “identified during a compliance investigation or compliance evaluation.” 41 CFR §60-1.26(a)(2). The regulations do not state that enforcement proceedings may be based on “information and belief.” Oracle recognizes that the Court has decided that *discovery* might extend beyond the time frames referenced in the NOV. The issue in this OSC, however, is not the appropriate scope of any particular discovery request, but the scope of the *liability* period for claims of alleged non-compliance with the Executive Order. As described above, the pertinent regulatory provisions, in two places, refer to the scope of the enforcement action in terms of the “compliance evaluation.” In other words, the power to bring matters to enforcement is limited to the temporal scope of the Agency’s compliance evaluation.

Moreover, both Section 209 of Executive Order 11246, as well as its implementing regulations, require OFCCP to engage in reasonable efforts to secure compliance through conciliation prior to instigating any enforcement proceeding. Executive Order 11246 § 209(b); 41 C.F.R. § 60-1.20(b). Setting aside the issue of whether OFCCP’s efforts here were reasonable, there is no question that OFCCP engaged in *no conciliation efforts at all* with respect to potential noncompliance by Oracle that was not uncovered during the compliance evaluation, and/or for which OFCCP had no underlying data, and that is not described within the NOV. Indeed, OFCCP could not possibly have conciliated as to events that had not yet occurred. Allowing OFCCP to nearly triple the scope of liability and discovery in this enforcement action is entirely contrary to the OFCCP’s own regulations and the Executive Order itself. It also subjects Oracle to irreparable harm and undue prejudice in the form of having to produce data

and documents and litigate claims that OFCCP has no right to pursue, only to have any ruling on such claims reversed on appeal because the scope of the enforcement action may not exceed the scope of the underlying compliance evaluation on which it is based.

B. In The Alternative, The Court Should Fix The Cut-Off Date At March 11, 2016.

1. Judicial Economy Is Promoted By Using The Nov Date As The Cut-Off Date Of Alleged Non-Compliance.

In the event the Court does not limit the scope of liability to the time frames *investigated* in the compliance evaluation itself, the Court—at a minimum—should limit the time period for claims of alleged non-compliance to the date the Agency *concluded* its compliance evaluation by issuing the NOV. Allowing the OFCCP to extend this enforcement proceedings all the way until the filing of its Complaint, which plainly goes beyond the end date of the compliance evaluation itself, would render the regulatory provisions cited above wholly superfluous. *See* 41 CFR §§60-1.26(a)(1) & 60-1.26(a)(2).

2. Judicial Economy Is Promoted By Using The NOV Date As The Cut-Off Date Of Alleged Non-Compliance.

The OALJ procedural regulations provide the Administrative Law Judge with “all powers necessary to conduct fair and impartial hearings” and to regulate the course of proceedings in accordance with applicable statute, regulation or executive order.” 29 CFR 18.12(b)(1). In addition, the ALJ “must limit the frequency or extent of discovery otherwise allowed by [the] rules when . . . the burden or expense of the proposed discovery outweighs its likely benefit . . .” 29 C.F.R. §18.51(b)(4)(iii). Also, the Court may limit discovery by issuing “an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . [f]orbid[ding] the disclosure or discovery.” 29 C.F.R. §18.52(a)(1). These procedural rules accord with Fed. R. Civ. P. 26(b)(1) which limits the scope of discovery to “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”

In its Order Granting in Part, and Denying in Part Motion For a Ruling Overruling Oracle’s Objections Regarding the Temporal Scope of Discovery, the Court observed that neither the court nor the parties “will be in any position to offer or analyze data that is changing

even as the hearing is going forward.” *See* Order at p. 2. Oracle agrees with this sentiment. Yet fixing the cut-off date for claims of alleged noncompliance at the NOV date, rather than the date upon which OFCCP filed its Complaint, allows this matter to proceed more efficiently and focuses the matter on the time period preceding the date upon which OFCCP made its finding of non-compliance.

In addition, the legal and factual allegations in OFCCP’s Complaint support fixing the date at the NOV stage. The Complaint’s allegations rely entirely on the allegations set forth in the NOV. In terms of substantive allegations, the Complaint and the NOV are identical in almost every respect.³ Both allege compensation findings comprised of identical affected groups, numbers of class members, and purported numbers of standard deviations. Further, both allege discrimination based on an allegedly biased recruiting practice that led, according to OFCCP, to hiring 82% of Asian applicants when compared to other racial groups. The identical nature of the claims make clear that OFCCP’s factual investigation and legal claims rest entirely on the allegations in the NOV.⁴

OFCCP cannot claim prejudice from a cut-off date earlier than its Complaint. The Agency has extensive authority to conduct the fullest investigation it believed it could conduct and the option of bringing an access action if it believed it needed additional facts. This greatly contrasts with nongovernmental actions where private plaintiffs do not have the broad legal authority granted by Presidential executive order to conduct investigations. While Oracle firmly believes that the Agency did not fulfill its pre-suit obligations nor analyze the facts properly, no doubt exists that OFCCP had the full opportunity to conduct the investigation it believed was appropriate. Any contention of unfairness in fixing the cut-off date as the date of the NOV

³ The sole substantive difference between the NOV and the Amended Complaint is OFCCP’s allegation in its NOV that Oracle discriminated against “Americans” on the basis of national origin. Perhaps realizing such a violation was legally and factually unsound, OFCCP did not assert the claim in its Amended Complaint.

⁴ As detailed in Oracle’s Motion for Judgment on the Pleadings, OFCCP’s allegations made on information and belief do not support fixing the date at the date of the filing of the Complaint. Despite the authority to conduct a broad investigation and the wide breath of its requests, OFCCP’s inability to support its claims with actual facts gathered during its investigation establishes that OFCCP does not have facts supporting its allegations. The Court should ignore these tacked on claims in order to ensure that this matter does not morph into a broad and inappropriate fishing expedition.

would be spurious in light of OFCCP's decision to issue an NOV with its findings of non-compliance on that date. OFCCP should not be permitted to expand the scope of alleged non-compliance beyond the date it concluded its investigation in this matter, and issued its finding of non-compliance.

CONCLUSION

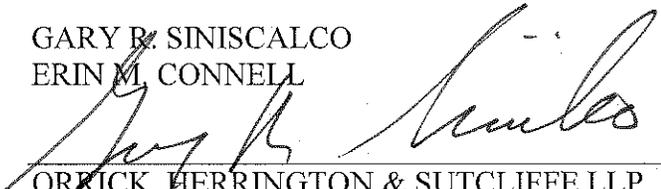
For the reasons set forth above, Oracle has shown cause why the Court should not fix the filing date of the Complaint in this matter, January 17, 2017, as the last date of Defendant's alleged non-compliance with Executive Order 11246 (as amended), and the associated regulations. Instead, the cut-off date for the recruiting and hiring discrimination claims should be June 30, 2014 (with a start date of January 1, 2013), and the cut-off date for the compensation discrimination claims should be December 1, 2014 (with a start date of January 1, 2014).

In the alternative, the Court should fix the cut-off date for claims of Oracle's alleged non-compliance with Executive Order 11246 (as amended), and the associated regulations, at March 11, 2016 (the date upon which OFCCP issued its NOV in this action), instead of January 17, 2017 (the date upon which OFCCP filed its Complaint).

Respectfully submitted,

June 30, 2017

GARY B. SINISCALCO
ERIN M. CONNELL



ORKICK, HERRINGTON & SUTCLIFFE LLP

The Orrick Building
405 Howard Street
San Francisco, Ca 94105-2669
Telephone: (415) 773-5700
Facsimile: (415) 773-5759
Email: gsiniscalco@orrick.com
econnell@orrick.com

Attorneys For Defendant
ORACLE AMERICA, INC.

PROOF OF SERVICE BY ELECTRONIC MAIL

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

On June 30, 2017, I served the interested parties in this action with the following document(s):

ORACLE'S RESPONSE TO ORDER TO SHOW CAUSE

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

Marc A. Pilotin (pilotin.marc.a@dol.gov)

Laura Bremer (Bremer.Laura@dol.gov)

Ian Eliasoph (eliasoph.ian@dol.gov)

Jeremiah Miller (miller.jeremiah@dol.gov)

U.S. Department of Labor, Office of the Solicitor, Region IX – San Francisco

90 Seventh Street, Suite 3-700

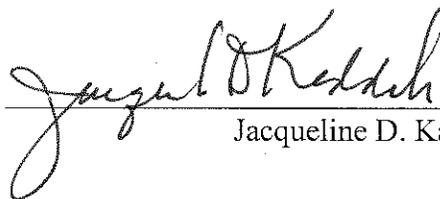
San Francisco, CA 94103

Telephone: (415) 625-7769

Fax: (415) 625-7772

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

Executed on June 30, 2017, at San Francisco, California.



Jacqueline D. Kaddah