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**UNITED STATES DEPARTMENT OF LABOR
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OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

ORACLE AMERICA, INC.

Defendant.

Case No. 2017-OFC-00006

**REPLY IN SUPPORT OF OFCCP'S MOTION FOR LEAVE TO FILE A SECOND
AMENDED COMPLAINT**

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INTRODUCTION

Ignoring the liberal rules for amending complaints, Oracle America, Inc. (“Oracle”) opposes OFCCP’s motion with inflammatory accusations unsupported by evidence, and wide-ranging arguments that not only go far afield of the issues in this motion, but are contrary to OFCCP authority. Seeking to deflect attention from OFCCP’s serious allegations of discrimination at issue here, Oracle provides literally no factual or legal basis for opposing OFCCP’s amendment of the complaint to provide more detail regarding *its same claims* based on data it received immediately prior to the entry of the stay in this case. The amendment benefits the Court and the parties as it provides a more specific statement of OFCCP’s claims of race and compensation discrimination from 2013 to the present, supported by statistical analyses described in the SAC that incorporate all four years of data that Oracle has now produced.¹

Oracle undercuts its entire opposition to the motion for leave to amend by misconstruing the applicable standard. Oracle’s assertion that “[w]hile private litigants enjoy great latitude in their ability to amend their complaint, the same is not true for OFCCP”² is directly contrary to the Rules for Practice for Administrative Proceedings to Enforce Executive Order 11246, which explicitly state “amendments of the complaint . . . shall be freely given where justice so requires.” 41 C.F.R. § 60-30.5(c). Compounding its misstatement of the standard for amending a complaint, Oracle seeks to impose wholly new procedural hurdles for OFCCP’s claims that are nowhere described in the regulations, contrary to OFCCP case law, and entirely impractical. Specifically, Oracle suggests a two-step process, whereby OFCCP must “first prove a violation occurred during the Audit period” (2013-2014) before it can use evidence from discovery to establish a violation for the entire time frame alleged in the original complaint

¹ The fact that OFCCP did not provide these same details in its responses to Oracle’s interrogatories is unsurprising, given Oracle produced the four years of data that OFCCP analyzed and describes in its SAC *on the same day* that OFCCP served its supplemental responses to Oracle’s interrogatories, October 11, 2017. Connell Decl. ¶ 5, Bremer Decl. ¶ 13. While Oracle expresses disbelief that OFCCP “*only now*” includes these details, OFCCP seeks to amend its complaint at the very earliest opportunity – the first day after Oracle’s production of the data in 2017 that the stay has been lifted. Bremer Decl. ¶ 14. After a year in mediation, there is nothing in the SAC that should surprise Oracle: the parties made good use of their time in mediation discussing the full details of their disputes.

² Oracle’s Opposition to OFCCP’s Motion for Leave to File a Second Amended Complaint (“Opp.”), p. 1.

(2013 to the present) (Opp. 14). Oracle also insists that OFCCP must engage in separate conciliation processes every time discovery uncovers evidence that provides further support for the same original broad compensation discrimination claims, such as evidence supporting consideration of prior pay as the cause of compensation discrimination. (Opp. 8-13.) Oracle's goal seems to be to limit the evidence (and its liability) to whatever it voluntarily provided to OFCCP during the compliance review. The convoluted process advanced by Oracle distorts the conciliation regulations, undermines the OALJ's role in conducting a *de novo* review, and contradicts decades of precedent. Revealingly, Oracle only cites one OFCCP decision – as justification for the court to rely on EEOC cases.

In an apparent attempt to discredit the serious allegations of discrimination in the SAC, Oracle levels a litany of false accusations against OFCCP. Oracle repeatedly accuses OFCCP of violating a protective order by disclosing the pay gaps between men and women and Whites and minorities at its headquarters. Yet, Oracle acknowledges the protective order does *not* restrict OFCCP's disclosure of OFCCP's analysis of Oracle's compensation data (Opp. 17, n.14) – which is the only information OFCCP disclosed in the SAC: OFCCP's complaint details that *its analysis* reveals sweeping pay disparities between men and women, and White and Asians, resulting in lost wages, *according to OFCCP's analysis*, which exceed \$400 million through 2016. Absurdly, Oracle suggests someone could use the average pay gaps from OFCCP's analysis to “reverse engineer” the employees' actual compensation. Setting aside that this is not mathematically possible, Oracle ignores the fact that more specific compensation is more readily available from Oracle's filings in this case, as well as on numerous public websites.

Oracle also levels wholly meritless accusations that appear to be an attempt to chill entirely proper communications between counsel for OFCCP and attorneys representing an overlapping class of Oracle women seeking relief in state court through a class-action compensation discrimination lawsuit. Based solely on a Common Interest Agreement between counsel, which Oracle falsely claims is “secret” (despite attaching a copy which was produced to them in June of 2018), Oracle engages in rank speculation about the nefarious reasons for such an agreement. In fact, as Oracle's counsel (Orrick) well knows, attorneys with shared interests,

including government attorneys, routinely enter common interest agreements to protect privileges when cooperating to provide more effective legal assistance for their clients. *See, e.g., Lazare Kaplan Int'l, Inc. v. KBC Bank N.V.*, 2016 WL 4154274 (2016) (Orrick asserted common legal interest of separately-represented banks to protect communications between banks' counsel); *Perez v. Clearwater Paper Corp.*, 2015 WL 685331, at *2 (D. Idaho 2015) (protecting communications between Department of Labor and whistleblower under common interest privilege); *Ex.rel Purcell v. MWI Corp.*, 209 F.R.D. 21, 27 (D.D.C. 2002) (finding joint prosecutorial privilege existed between government and a private citizen who brought a False Claim Act lawsuit). Communicating with attorneys prosecuting the same or similar claims for the benefit of overlapping workers promotes the Department's mission and government efficiency. Such agreements are routine and consistent with the "policy of the OFCCP to disclose information to the public and to cooperate with . . . private parties seeking to eliminate discrimination in employment." 41 C.F.R. § 60-40.1.

At end, Oracle's opposition has no legal or factual merit: it is nothing more than an angry reaction to the fact that the public and Oracle's own employees are watching the government's enforcement action here. As this Court well knows, it is not OFCCP's engaging in normal, routine steps in lawsuits – such as the filing of an amended complaint – which has brought media attention: gender and race discrimination in pay in the tech industry has been a topic of public concern for years now. Further, it cannot be forgotten that, despite Oracle's wishes to the contrary, OFCCP cannot agree to lock the public out of its enforcement litigation. All of its enforcement actions, by definition, are a matter of public concern since OFCCP's mission is to protect the interest of *taxpayers* in ensuring that public money is not being used to subsidize discrimination. OFCCP's motion to amend should be granted.

ARGUMENT

A. Oracle Misrepresents the Legal Standard Governing This Motion.

Oracle inaccurately claims that “[w]hile private litigants enjoy great latitude in their ability to amend their complaint, the same is not true for OFCCP.” (Opp. 1.) In fact, the OFCCP regulations governing amendments to complaints are identical to the federal rules. *See* 41 C.F.R.

§ 60-30.5(c) (“[L]eave shall be freely given where justice so requires.”); Fed. R. Civ. P. 15(a)(2) (“The court should freely give leave where justice so requires.”).³ Leave to amend is only denied where the opposing party proves undue delay, bad faith, undue prejudice, or futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Oracle fails to prove any of these grounds.

B. Alleging a Summary of OFCCP’s Analysis Is Not Bad Faith.

Oracle asks the Court to infer that OFCCP filed the SAC in bad faith, asserting that allegations of “compensation information” and “employee counts” violated the protective order previously entered in this case. Oracle’s reliance on the protective order entered by Judge Larsen is dubious, given its recent position that “any matter over which Judge Larsen did preside is rendered invalid.” Oracle’s Opp. to OFCCP Motion to Reassign, p. 4 (Oct. 23, 2018). However, none of the generalized information OFCCP included in the SAC—(1) the number of women, minorities, and employees included in OFCCP’s compensation analysis of three job functions, (2) the average pay differences between men and women and Whites and minorities in those groups, and (3) damages estimates—violates the protective order entered by Judge Larsen, or justifies denying the motion for leave to amend.

By way of background, Oracle produced 75 data export files with more than 1,000 data fields, which provided detailed compensation data for thousands of Oracle employees employed at Oracle’s headquarters between 2013 and 2016, including each individual’s starting salary, raises, bonuses, and other compensation. (Bremer Decl. iso Reply, Ex. 1.) Under the protective order signed by Judge Larsen, compensation data identifying a person, their job title, and their compensation is Protected Material. Connell Decl, Ex. G, §§ 2.2., 2.11.

The SAC discloses no Oracle data. The only employee count and compensation figures OFCCP includes in the SAC are those Oracle admits can be disclosed. (Opp. 17, n. 14.) OFCCP’s analysis of the compensation data forms the basis for its SAC, and therefore, OFCCP

³ These regulations also provide two equally acceptable procedures for amending the complaint, by stipulation or motion to the Court. The regulations do not suggest that one method is preferable, and Oracle provides no evidence for its repeated assertion that it is standard to provide a proposed amended complaint to opposing counsel when a party is not requesting a stipulation. That OFCCP chose to request leave from the Court provides no grounds to discredit counsel or accuse them of unprofessionalism. Indeed, Oracle’s reaction to the proposed amendment only confirms that providing an advance copy to Oracle would have not have resulted in a stipulation.

included general information about its analysis in the SAC. SAC ¶ 13 (describing methodology). The wage gaps, number of impacted employees included in OFCCP's analysis, and damages resulting from Oracle's analysis are highly relevant in this compensation discrimination case and it does not violate the protective order to disclose them. *See, e.g., Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1183 (9th Cir. 2002) (expert witness provided mean wages for men and women and asserted women in management earned \$12,000 less than men; the case docket has a protective order); *see also, Missouri v. Microsoft*, 311 F. Supp. 3d 1223, 1232-33 (W.D. Wash. 2018) (expert witnesses testified in detail about the differentials in earnings between men and women; the docket has a protective order). Oracle attempts to shoehorn the salary gap, damages calculation, and employee counts into the scope of the protective order by characterizing them as "copies, excerpts, summaries, compilations of, or written materials containing Protected Material." (Opp. 17). However, these figures are summaries *of OFCCP's analysis*, not summaries of the data.

Oracle's complaints about the headcounts and salary gaps included in OFCCP's SAC are particularly disingenuous given that Oracle has publicly filed much more detailed compensation information in this case, including the salaries and performance ratings of employees identified by name, as well as employee counts for specific job titles. *See, e.g., Declaration of Gary Siniscalco re Oracle's motion for summary judgment for failure to conciliate*, Exs. K, pp. 17-18 (listing salary of female Software Developer Senior Manager identified by name; listing salary and performance ratings of Software Developer 4 employees identified by name; identifying 334 employees in the Software Developer Senior Manager job and 258 employees in the Software Development Director job title at Oracle's headquarters as of January 1, 2014), O, Q, p. 9 (identifying \$37,000 wage gap between black male and white male identified by name and title), p. 21 (attaching unredacted performance ratings of individuals showing employee, name, performance rating, job title, and comments) (Apr. 21, 2017). Moreover, Oracle salary information more specific than the average salary gaps in the SAC is readily available to the public online, including average salary for particular job titles at Oracle. *See*

<https://www.glassdoor.com/Salary/Oracle-Salaries-E1737.htm#> (showing average salary for a Software Engineer III at Oracle based on approximately 700 salaries).⁴

From Oracle's nonchalant disclosure of the salaries of individuals identified by name and job title and the number of employees in specific job titles, it is obvious that Oracle is not really concerned that the generalized pay gap information might somehow be reverse engineered⁵ to reveal Oracle's "actual compensation" data. Clearly, Oracle objects to disclosure of OFCCP's analyses themselves, namely the large pay gaps revealed between men and women and racial groups at its headquarters, as well as the damage calculations. While keeping unlawful pay gaps secret may give Oracle an advantage over competitors that increased the pay of protected groups in an effort to achieve pay equity and may prevent employees from asserting their rights, this information is not a "trade secret." *Cf. Roman Catholic Archbishop of Portland v. Various Tort Claimants*, 661 F.3d 417, 432 (9th Cir 2011) (a mere desire to be protected from scandal did not justify sealing the personnel files of priests accused of sexual misconduct).

Contrary to the cases Oracle cites, it presents no evidence of an improper motive. *See Anderson v. Davis Polk & Wardwell LLP*, 850 F. Supp. 2d 392, 415–16 (S.D.N.Y. 2012) (finding proposed amended complaint, which included allegations about its employees sexual promiscuity, dishonesty, and health, was intended to "harass and embarrass" the defendant); *GSS Properties, Inc. v. Kendale Shopping Ctr., Inc.*, 119 F.R.D. 379, 380 (M.D.N.C. 1988) (finding bad faith where plaintiff knew facts forming basis of new fraud allegations at time of original complaint and admitted he seeking leave to amend to coerce settlement). Bad faith simply cannot be inferred from allegations of salary gaps that provide part of the statistical basis for this compensation discrimination case. Courts find no bad faith where, as here, "the record

⁴ *See also*, <https://www.linkedin.com/salary/software-engineer-salaries-in-san-francisco-bay-area-at-oracle>; https://www.payscale.com/research/US/Employer=Oracle_Corp./Salary.

⁵ Oracle's suggestion that disclosure of the salary gaps and employee counts for job functions could be used to "reverse engineer" average salaries at Oracle is absurd. Given that the job functions contain dozens of job titles in different specialties and experience levels, even if average compensation for Oracle's broad job functions could be calculated, this information would be useless to Oracle's competitors. It is not the type of "trade secret, confidential commercial or financial information" protected from disclosure. *See FTC v. Qualcomm Inc.*, 2019 WL 95922 (N.D. Cal 2019), *citing Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972) ("a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it").

demonstrates that plaintiffs' allegations were not frivolous and that they were endeavoring in good faith to meet the pleading requirements." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1053 (9th Cir. 2003).

C. Oracle's Claims of Prejudice and Futility Are Meritless.

To overcome the liberal standard for amending a complaint "on the basis of undue prejudice, the showing of prejudice must be substantial." *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1094 (S.D. Cal. 2002). Oracle claims prejudice, speculating that managers "undoubtedly have experienced faded memories, and several have now left Oracle." (Opp. 19.) Oracle's unsupported concern about managers' memory loss rings particularly hollow in this systemic discrimination case, which focuses in large part on statistical analyses of data and expert testimony, not the recollection by witnesses of an incident in the past. "Bald assertions of prejudice cannot overcome the strong policy" in favor of granting leave "to facilitate a proper disposition on the merits." *Hurn v. Ret. Fund Tr. of Plumbing, Heating & Piping Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981). Indeed, courts reject broad claims of prejudice based on faded memories. *See Cavness v. Winch*, 2018 WL 2138555, at *5 (N.D. Cal. Mar. 2, 2018) (rejecting the passage of time as creating prejudice sufficient to deny amendment)

Oracle's only other claim of prejudice, to which it bootstraps its ill-conceived claim of futility, stems from the inaccurate premise that the claims are "entirely new." (Opp. 19.) Yet, the SAC makes the same claims as before, hiring discrimination based on race in the PT1 job group, and compensation discrimination based on gender and race in the Product Development, Info Tech, and Support Job Functions at Oracle's headquarters from at least 2013 through the present. *See OFCCP v. JPMorgan Chase & Co.*, 2017-OFC-00007, p.6 (Apr. 5, 2017) (Order Denying Motion to Dismiss) (OFCCP pleading rules only require notice of the kind of discrimination, when and where it occurred, the job position involved, and that the discrimination is supported by statistical evidence). Although the SAC also articulates potential theories for the causes of compensation discrimination (assigning women and minorities into low-level jobs and using prior pay to set starting pay), these theories do not "greatly alter[] the

nature of the litigation” requiring “at this late hour, an entirely new course of defense,” that might justify denying leave to amend. *See Morongo Band of Mission Indians*, 893 F.2d at 1079. To the contrary, the additional detail in the SAC, and narrowing of the claims for hiring discrimination and refusal to supply documents, will help to both focus and streamline the remaining discovery in this case. And, even had the SAC alleged new claims, there is no prejudice since discovery is open and trial is ten months away. *See JBS USA Lux S.A.*, 2017-OFC-00002, at 2 (defendant would not suffer undue prejudice from addition of new discrimination claim because parties were still in discovery and hearing was year away).

D. The SAC, Which Details the Same Claims, Is Not Futile.

Courts rarely deny requests to amend on futility grounds, instead deferring challenges to the merits until after leave to amend is granted. *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 538–39 (N.D. Cal. 2003). If the Court entertains Oracle’s futility arguments, they should be rejected, since they rest on the flawed premise that the SAC alleges new claims.⁶

1. OFCCP misconstrues the requirements for conciliation.

Relying on the flawed premise that the SAC contains new claims, Oracle refashions a conciliation argument that OFCCP cases repeatedly reject. As the Supreme Court held in *Mach Mining, LLC v. E.E.O.C.*, an enforcement agency’s obligation to conciliate before filing a complaint is satisfied by providing the defendant with notice of the violations and an opportunity to remedy them. 135 S. Ct. 1645, 1654 (2015). Oracle’s opposition does not dispute OFCCP’s conciliation efforts prior to filing this lawsuit. Rather, Oracle argues that OFCCP’s proposed amendments concerning Oracle’s discriminatory job channeling and reliance on prior pay are futile because OFCCP did not separately conciliate these issues with Oracle. Even if the parties had not recently emerged from a year-long mediation regarding OFCCP’s analyses and legal theories, the regulations and controlling authority reject Oracle’s position that repeated conciliations are necessary as OFCCP acquires additional information through discovery that supports its initial broad discrimination claims.

⁶ While Oracle is free to re-litigate the same conciliation and temporal scope arguments it lost before Judge Larsen, OFCCP’s claims have only strengthened since it obtained four years of data and other discovery from Oracle.

Indeed, an ALJ recently granted leave to add *new claims* of gender discrimination allegations not covered by the compliance audit, but learned during discovery. *OFCCP v. JBS USA et al.*, Case No. 2017-OFC-00002, p.3 (ALJ, Apr. 23, 2018). The ALJ rejected the argument that the claims were futile because they were not conciliated. While the parties did not conciliate the gender discrimination claim, the new allegations related to the same job group, facility, and employer during the same time frame. The court also granted the amendment on judicial economy grounds, since “[i]f the claims were not included here, OFCCP could simply file a separate action based upon its discovery in November 2017 that, allegedly, statistical data indicates gender disparities.” *Id.* at 2. The court further found that “staying the action for conciliation efforts would itself be futile, as other conciliation efforts herein were unsuccessful.” *Id.*; *see also*, *OFCCP v. Bank of America*, ARB Case No. 13-099, 2016 WL 2892921, *25 (Apr. 16, 2016) (“it was not necessary for the OFCCP to separately investigate, make findings, and attempt to conciliate each additional violation by BOA because it would be impractical and inefficient since the case was already in litigation”).

2. OFCCP can assert continuing violations.

As with its futility and prejudice arguments, Oracle’s temporal-scope argument incorrectly asserts that the proposed SAC alleges new claims. However, OFCCP continues to allege, as it did in its original complaint, that the violations identified by OFCCP during its compliance review continued unabated since 2013.

OFCCP precedents – including an order in *Analogic* rendered after the out-of-context transcript from the case Oracle cited (Opp. 14-15)—hold that there is no requirement to conciliate continuing violations. *OFCCP v. Analogic*, 2017-OFC-00001, Order Granting OFCCP Motion for Partial Summary Decision and Denying Analogic Motion for Summary Decision, p. 19 (Aug. 16, 2017) (“[t]here is nothing requiring OFCCP to conciliate continuing violations”);⁷ *see also* *OFCCP v. Enterprise RAC Company of Baltimore LLC*, 2016-OFC-0006

⁷ The ALJ in *Analogic* also rejected the EEOC authorities Oracle cites, including *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), as “inapposite.” *Id.* at 19, n. 30 (Aug. 16, 2017).

(Mar. 27, 2017) (holding OFCCP could pursue claims of continuing violations without conducting additional conciliation).

Nevertheless, Oracle makes the nonsensical argument that OFCCP must engage in a two-step process of proving a violation during the compliance review period before it can claim damages going forward. (Opp. 14.) As in *Analogic*, OFCCP will likely rely on expert analysis of Oracle's data for the entire period at issue (2013 to the present) to prove violations for the entire time frame. *OFCCP v. Analogic*, 2017-OFC-00001, Plaintiff's Opp. to Def. Mot. Summ. J., p. 11, 15-16. Fundamentally, the two-step process advocated by Oracle misconceives the role of the Court, which is to conduct a *de novo* analysis of OFCCP's allegations, not to evaluate the sufficiency of OFCCP's investigation. *OFCCP v. Florida Hospital of Orlando*, 2013 WL 3981196, at *6, ARB Case No. 11-011 (ARB 2013); see OALJ OFCCP Deskbook, Section IV(A) ("review by the ALJ is *de novo*"). Ultimately, the court will determine whether OFCCP can prove the discrimination alleged for the entire period alleged in both the original complaint and the SAC, 2013 to the present.

CONCLUSION

OFCCP requests that the Court grant OFCCP's motion for leave to file the SAC.

Dated: February 12, 2019

Respectfully submitted,

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