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Issue Date: 02 December 2019

CASE NO.: 2017-OFC-00006

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

ORACLE AMERICA, INC.,
Defendant.

ORDER REGARDING MOTIONS IN LIMINE

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, (“EO 11246”) and associated regulations at 41 C.F.R. Chapter 60. It involves Plaintiff Office of Federal Contract Compliance Programs (“OFCCP”) and Defendant Oracle America, Inc. (“Oracle”) and has been pending at the Office of Administrative Law Judges (“OALJ”) since January 17, 2017. Hearing is set to begin on December 5, 2019. Currently pending are fourteen motions in limine from Oracle and one motion in limine from OFCCP.

For the reasons set forth below, OFCCP’s motion in limine is denied and Oracle’s motions in limine are granted in part and denied in part.

BACKGROUND

OFCCP alleges that Oracle engages in “widespread” discrimination at its headquarters facility against “women, Asians, and African Americans or Blacks in compensation.”¹ SAC at ¶ 11. Oracle denies these allegations. The case was initially filed on January 17, 2017. A lengthy compliance review preceded the litigation. After the initial complaint was filed, the case was assigned to Judge Christopher Larsen, who ruled on various discovery and other motions. On October 30, 2017, Judge Larsen granted a joint motion to stay the case so that the parties could pursue mediation. The stay was subsequently extended on several occasions and the case was reassigned to me. The stay ended on January 23, 2019. Since the end of the stay, this case has been marked by repeated, voluminous, and acrimonious discovery disputes. Fact discovery closed on July

¹ The SAC originally included compensation discrimination claims, hiring discrimination claims, and record-keeping/access-related claims. However, the parties were able to settle the hiring discrimination claims and on April 30, 2019, I entered an Order Adopting Consent Findings Regarding College Recruiting Program.

3, 2019. Expert discovery closed on October 11, 2019. The time for filing and briefing motions in limine was set by the scheduling order in this case: motions were due on November 15, 2019, with oppositions due by 1:00 p.m. on November 25, 2019.

On November 15, 2019, OFCCP file a Motion in Limine to Exclude Trial Evidence and Testimony Related to Subjects in Which Oracle Refused to Provide Discovery Based on Privilege or Relevance (“PM”), which is supported by a declaration from Laura C. Bremer (“LBD”) attaching three exhibits (“PMX A-C”). On the same day, Oracle filed fourteen individual motions in limine as follows:

1. Motion in Limine #1 to Exclude Expert Evidence Not Contained in the Timely Reports of Dr. Janice Fanning Madden, Ph.D. (“DM1”)
2. Motion in Limine #2 to Exclude Evidence of Pre-2014 Job Assignments (“DM2”)
3. Motion in Limine #3 to Exclude Evidence Related to Alleged Post-Audit Violations (“DM3”)
4. Motion in Limine #4 Re: OFCCP’s Position Statement on Oracle Managers (“DM4”)
5. Motion in Limine #5 Re Oracle’s Compensation Analyses (“DM5”)
6. Motion in Limine #6 to Exclude Evidence of Complaints and Anecdotal Evidence Unrelated to the Claims and Job Functions at Issue (“DM6”)
7. Motion in Limine #7 to Preclude OFCCP from Offering Evidence Not Produced During Discovery (“DM7”)
8. Motion in Limine #8 to Exclude Interview Notes and their Contents (“DM8”)
9. Motion in Limine #9 for an Order Excluding Evidence or Argument Regarding Oracle’s Net Worth, Income, Dividends, or Executive Compensation (“DM9”)
10. Motion in Limine #10 to Exclude Evidence of Disparate Impact (“DM10”)
11. Motion in Limine #11 to Exclude Evidence Related to the Resolved Hiring Claim (“DM11”)
12. Motion in Limine #12 to Exclude Testimony by Attorneys From the Office of the Solicitor (“DM12”)
13. Motion in Limine #13 for an Order Bifurcating the Hearing and Excluding Any Evidence or Argument of Damages from the First Phase Regarding Liability (“DM13”)
14. Motion in Limine #14 to Exclude Evidence of “Salary Discrimination” and any Damages Related Thereto (“DM14”)

Oracle’s motions in limine are supported by an omnibus declaration of Warrington S. Parker III (“WPD”) attaching ten exhibits (“DMX A-J”).²

On November 25, 2019, OFCCP filed an Opposition to Defendant Oracle’s Motions in Limine (“OFCCP’s Opposition” or “PO”), which responds to each of Oracle’s motions. Oracle filed an Opposition to OFCCP’s Motion in Limine to Exclude Trial Evidence and Testimony by Oracle America, Inc. (“DO”) on November 25, 2019, which is supported by a declaration from Warrington S. Parker III attaching two exhibits (“DOX 1-2”).

OFCCP and Oracle also both filed (and opposed) motions for summary judgment and motions to exclude expert evidence. On November 25, 2019, I denied the motions to exclude

² On November 18, 2019, Oracle filed a supplemental declaration from Mr. Parker, which adds information relevant to potential motions to seal.

expert evidence and denied the motions for summary judgment. However, I granted Oracle's alternative motion for partial summary judgment in part. Oracle was granted summary judgment as any disparate impact claim except for that based on an alleged practice of relying or prior pay and on OFCCP's remaining refusal of access claims. The November 25, 2019, also ordered Oracle to show cause why OFCCP should not be granted summary judgment on Oracle's defenses related to the Show Cause Notice and conciliation on the grounds that there was no effective, available remedy. That issue remains outstanding. Pre-hearing filings were made on November 21, 2019.³ Hearing will begin on December 5, 2019.

DISCUSSION

This proceeding is governed by the "Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30." 41 C.F.R. § 60-1.26(b)(2). Where the regulations in 41 C.F.R. §§ 60-30.1 *et seq.* do not provide a rule, the Federal Rules of Civil Procedure apply. 41 C.F.R. § 60-30.1. Where a rule is needed and neither 41 C.F.R. Part 60-30.1 nor the Federal Rules supply one, the Rules of Practice and Procedure for Administrative Hearings Before OALJ in 29 C.F.R. Part 18, subpart A apply. *See* Pre-Hearing Order at 2 n.2. ALJs are empowered to "Receive, rule on, exclude, or limit evidence and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious." 41 C.F.R. § 60-30.15(h). The Office of Administrative Law Judges' Rules of Evidence found in 29 C.F.R. part 18, subpart B apply to any evidentiary issues. 41 C.F.R. § 60-30.18. These rules generally follow the Federal Rules of Evidence. *See* 29 C.F.R. §§ 18.101 *et seq.*

"Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. U.S.*, 469 U.S. 38, 41 n.4 (1984). Motions in limine seek evidentiary and other rulings "at the threshold." *Id.* at 40 n.2. They are "a procedural mechanism to limit in advance testimony or evidence in a particular area." *U.S. v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009) (citing Black's Law Dictionary 1038-39 (8th ed. 2004)); *see also Wilson v. Williams*, 182 F.3d 562, 570 (7th Cir. 1999). Motions in limine can serve to better provide a fair trial and streamline the hearing process by setting evidentiary and other parameters prior to hearing, but since evidentiary rulings often turn on the particular factual context of the evidence, their merits are often difficult to fairly evaluate. *See* Wright and Miller, 6 Federal Practice & Procedure Civ. § 5037.10 (3d ed.); *see also Luce*, 469 U.S. at 41; *In re Gannett News Serv., Inc.*, 772 F.2d 113, 119 (5th Cir. 1985).

Judges have broad discretion in ruling on motions in limine, but may not resolve factual disputes or weigh evidence—for evidence to be excluded in limine, it must be inadmissible on all potential grounds. *Goodman v. Las Vegas Metro. Police Dept.*, 963 F. Supp. 2d 1036, 1047 (D. Nev. 2013), *rev'd in part on alternative grounds*, 613 Fed. Appx. 610 (9th Cir. 2015). In a bench trial, "logistical or other reasons" may make a ruling in limine appropriate, but since the central function of a motion in limine is to "give[] counsel advance notice of the scope of certain evidence so that admissibility is settled before attempted use of the evidence before the jury," bench trial motions in limine are "generally superfluous." *Heller*, 551 F.3d at 1111-12.

³ On November 26, 2019, Oracle filed an amended exhibit list and an amended joint exhibit list. On November 27, 2019, OFCCP filed an amended witness list.

A. OFCCP's Motion in Limine

OFCCP's motion in limine seeks to prevent Oracle from "offering any evidence, testimony, or argument regarding subject matters in which [it] failed entirely to respond to [OFCCP's] legitimate discovery requests or which [Oracle] failed to provide responsive information about relying on broad assertions of privilege." PM at 1. It contends that Fed. R. Civ. P. 37(c)(1) justifies preclusion of four categories of evidence in this case: 1) Oracle "took actions to ensure [its] compliance with [its] equal employment opportunity obligations or that these obligations were taken seriously by top official[s] tasked with ensuring Affirmative Action Program compliance"; 2) Oracle "made corrections to its compensation practices as a result of self-critical, privileged, analyses"; 3) Oracle "investigates internal equity complaints or problems and takes corrective action based on its process and findings"; and 4) Oracle "was cleared of discrimination, or has not discriminated, against employees in compensation outside of Product Development, Support, or Information Technology." *Id.* at 3-4.

OFCCP's argument as to the first three categories centers on Oracle's claims of privilege as to compensation analyses that it conducted and Oracle's argument, during summary judgment briefing, that the record was silent as to whether it took any corrective actions in response to pay equity analyses and the like. It argues that Oracle's claims of privilege should prevent it from presenting evidence of its diversity commitments or evidence that it takes its "equal employment obligations seriously." *Id.* at 4-7; *see also* PMX A (discovery responses); PMX B (same). OFCCP adds that Oracle should also be precluded from offering evidence of how it deals with employee complaints on the grounds that Oracle invoked attorney-client privilege to prevent discovery on this point. PM at 7-8; *see also* PMX C. As to the last category, the substance of the argument is that Oracle should not be permitted to argue that OFCCP found no evidence of discrimination in other job functions because it refused to respond to discovery requests to provide more information about employees in those job functions. The aim here is not to preclude evidence, but to forbid Oracle from engaging in a "tactic," or argument in future briefing. PM. at 9-10; *see also* LBD at ¶ 5.

Oracle generally agrees that material withheld in discovery cannot be used as evidence and states that it does not plan to do submit such evidence. It argues that the motion should be denied because OFCCP is seeking to exclude/forbid far more and includes overly general, unenforceable requests. DO at 1-3. Oracle concedes what it takes to be the "sole apparent basis" of OFCCP's motions, stating that it has no intention of presenting privileged material at trial. But it contends that it should be able to contest OFCCP's representations about what the privileged material might show and maintain that it is unknown what it might show. *Id.* at 3-4. In addition, Oracle contends that it should be permitted to offer other nonprivileged evidence of practice and initiatives evidencing nondiscriminatory intent without having to waive its attorney-client privilege as to studies and discussions that occurred as the compliance review. It adds that the relief sought is "undefined and unenforceable." *Id.* at 4-6.

In regards to its internal complaint investigatory practices, Oracle argues that it has not claimed privilege over its general procedures, policies, and processes and should not be barred from offering evidence of those procedures, policies, and processes. It notes that OFCCP has listed an Oracle witness who could only be meant to address those policies and so it makes no sense to bar evidence of this sort. Oracle contends that it only claimed privilege in regards to steps taken in particular investigations. *Id.* at 6-7; *see also* DOX 1; DOX 2. Finally, Oracle argues that it should be able to present evidence that OFCCP did not find discrimination in the job functions not at issue in

this case because it should be able to report the history of the compliance review and the allegations that followed. It avers that the cases OFCCP relies upon involve the use of agency findings in subsequent private litigation and thus present an entirely different situation than that here. DO at 7-10.

Rule 37(c)(1) provides that

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

- (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
- (B) may inform the jury of the party's failure; and
- (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)(vi).

Fed. R. Civ. P. 37(c)(1). Under Rule 37(c)(1), absent a “substantial justification” an adjudicator “may validly exclude, as a discovery sanction, evidence not produced in discovery.” *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1028 (9th Cir. 2003); *see also Harriman v. Hancock Cnty.*, 627 F.3d 22, 29-30 (1st Cir. 2010).

The main issue raised by OFCCP’s motion appears to be moot. Oracle may not present evidence it claimed was privileged, but it seems to have no intention of doing so and I see none of this evidence on its exhibit list. OFCCP is correct, for instance, that Oracle could not properly introduce the compensation analyses prepared at the request of counsel or the actions taken as a result of those compensation analyses. Since there is no indication that Oracle is doing or will do so, there is nothing to grant at this time. The evidence will not be part of the record, so neither party is in a position to make any affirmative claims about what it would show. OFCCP may make claims about what the evidence of record does and does not include. If OFCCP makes claims that encompass assertions about what is or is not contained in evidence that is not part of the record, Oracle may point out that the evidence is not part of the record. Put otherwise, both parties may point out that there are no internal compensation analyses in the record, neither party may validly make affirmative claims about what those studies would show, and if either party does make such claims, the other party may respond by pointing out that no one is in a position to make affirmative representations about this evidence.

As far as other evidence of Oracle’s diversity bona fides, Oracle may not present evidence or make argument that any of the compensation studies and resulting actions that it claimed privilege over in any way establishes its lack of discriminatory intent. OFCCP may argue that the fact that some potential actions were only taken as part of attorney consultations or in anticipation of litigation goes to intent—i.e. it may point out that Oracle did not conduct non-privileged pay analyses and that this is a conspicuous absence in Oracle’s equal opportunity efforts.⁴ Oracle may not argue that its privileged pay analysis in any way evidence non-discriminatory intent or in any way fit into is equal opportunity efforts. Oracle (and OFCCP) may present other evidence of intent.

⁴ I do not comment on the merits of such an argument—I only point out that it is one that OFCCP can make.

OFCCP's request is far too broad. It would have me adopt a rule whereby any claim of attorney-client privilege addressing issues in ongoing litigation that could go to intent requires the exclusion of all other evidence of intent, even where it is entirely distinct from the privileged material.⁵ The cases it relies on don't support that broad proposition.⁶ In any event, Oracle is right that the requested order is far too ambiguous to be granted or to provide any guidance at trial.

The third category, Oracle's internal procedures for handling complaints, can be dealt with in a straightforward way. Based on the submissions, Oracle has not claimed privilege over its policies, practices, or procedures, and OFCCP intends to present evidence on those topics. Oracle cannot be forbidden from offering evidence on these topics as well or from probing OFCCP's evidence. Oracle claimed privilege over actions taken in *particular* investigations. It may not present evidence of such actions or make claims about what it did in particular investigations. There is no indication that it is doing so now, so the motion is denied as moot in this regard. OFCCP may renew the point if Oracle begins to present evidence related to particular investigations in an effort to show that it did follow its internal procedures and processes.

Although I countenance OFCCP's point in its fourth category, I do not find that any evidence should be excluded or "tactic" forbidden. Oracle's line of argument earlier was simply to note that OFCCP did not charge any violations in 13/16 job functions at its headquarters facility. This is a true statement. OFCCP complains that if Oracle had responded to discovery requests seeking information about job functions not relevant in the case here, it might have found something, which makes Oracle's claims of exoneration misleading. This is speculative and somewhat misses the point. OFCCP had access to substantial information during the compliance review—which it concluded by bringing this matter into enforcement—and did not file charges. Oracle can point that out and make arguments on that basis. However, I acknowledge that OFCCP has a counter-argument here about the limited data provided. This is a point OFCCP can make to dampen whatever affect Oracle's line of argument may have. OFCCP did not reach adverse conclusions about those job functions, but also didn't get to review all of the potentially relevant evidence. That limits the weight to be assigned to Oracle's point. In short, OFCCP's argument is one it can make, but the import goes to the weight, if any, that Oracle's point will be given; it does not function to prevent Oracle from reporting the results of the compliance review.

The central target of OFCCP's motion appears to be the compensation analyses and resulting actions that Oracle successfully claimed were subject to attorney client privilege/work product protection. That aspect of the motion is moot, since Oracle is not offering that evidence. Other aspects of OFCCP's motion might have some merit in particular situations—Oracle may not, for instance, make arguments about what the privileged material shows or contend that it fills in what OFCCP deems a conspicuous absence in Oracle's equal employment opportunity efforts.

⁵ To draw a parallel, this would be equivalent to barring OFCCP from presenting any evidence that it had a reasonable basis to issue the show cause notice if it ever invoked deliberative process or attorney-client privilege to protect intra-agency discussions surrounding that decision—conversations that might show animus, political considerations, or other lack of proper motive..

⁶ *EEOC v. General Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 57879 (9th Cir. 1989), *cert denied*, 498 U.S. 950 (1990) stands for the proposition that "when an employer *voluntarily* uses evidence of its equal opportunity efforts to prove nondiscrimination, it 'opens the door' and waives whatever qualified privilege may have existed" over self-critical portions of those efforts. That is unremarkable. But it does not apply here: the material OFCCP is focused on was not part of Oracle's self-critical equal opportunity efforts. It made no such efforts. OFCCP may point that out and argue that the *failure* to engage in self-critical equal opportunity efforts of certain sorts is an indication of discriminatory intent.

They are, in a sense, nonexistent. But OFCCP's requests stretch too far, seeking to parlay narrow claims of privilege into broad prohibitions on evidence and argument. This is unwarranted and I cannot ascertain exactly what and what would not fall into the categories OFCCP wishes to forbid. The points raised are better made in terms of evidentiary argument, or as objections to particular pieces of evidence. An order here could provide no useful, meaningful guidance, so insofar as OFCCP's motion in limine is not moot, it is denied.

B. Oracle's Motion in Limine #1

Oracle's first motion in limine requests that I "exclude any expert evidence, reports, or testimony offered by OFCCP at trial to support its compensation discrimination claims that are not contained in timely disclosed expert reports." DM1 at 1. Oracle relates that OFCCP relied upon various statistical analyses through the course of the compliance review and litigation, but now proceeds based on the two timely reports produced by Dr. Madden on July 19, 2019, and August 16, 2019. Relying on Federal Rules of Civil Procedure 26 and 37, Oracle states that

OFCCP should be precluded from offering any other statistical analyses to support its compensation discrimination claims, including analyses not appearing in Dr. Madden's timely disclosed reports; those that appeared in Dr. Madden's untimely reports and declaration post-dating August 16, 2019; and any statistical evidence that relates to or appears in OFCCP's NOV, SCN, or SAC.

Id. Oracle points to prior indications from OFCCP that it would not be relying on statistical analyses predating those of Dr. Madden and then complains that Dr. Madden has issued a series of declarations/reports—October 3, October 9, October 11, and November 7, 2019—that are untimely pursuant to the pre-hearing schedule. *Id.* at 1-2. OFCCP's current exhibit list contains three declarations post-dating the rebuttal report: October 11, 2019, October 31, 2019, and November 7, 2019 (identified as PX4 – PX 6).

Oracle argues that Rule 26 requires the disclosure of expert reports and Rule 37(c)(1) creates an automatic preclusion of material not timely disclosed, unless the failure to disclose is substantially justified or harmless. Pointing to earlier motion practice, Oracle contends that the failure to make timely disclosure of these additional reports is unjustified and harmful, given the schedule agreed to by the parties for the production of expert evidence and OFCCP's failure to adhere to that schedule or seek relief from it. It contends that such late reports are "routinely" excluded because they are an attempt by a party to gain an unfair advantage and have the last word contrary to the production schedule. *Id.* at 2-4. In addition, Oracle argues that OFCCP should not be permitted to rely on lay testimony concerning statistical analyses, which is the province of experts. *Id.* at 4-5. This appears to be an argument designed to prevent OFCCP from putting on evidence of the now-discarded statistical analyses at hearing.

OFCCP responds that Oracle "mischaracterizes the material and misreads Rule 26." PO at 3. In its view, the material presented in Dr. Madden's various declarations do not represent new analyses because they "contain no shift in Dr. Madden's bases or reasons for her conclusions." Instead, 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 [sic] and are therefore admissible." *Id.* at 3-4. OFCCP points out that Rule 26 and Rule 37 operate to prevent unfair surprise, but do not limit an expert to simply reading a report into the record. Since Dr. Madden's

“supplemental reports” do not mark a “fundamental change in theory, opinion, or methodology” OFCCP asserts that preclusion is inappropriate. *Id.* at 4. Moreover, OFCCP argues that Oracle cannot show prejudice that would be caused by admission of the supplemental report since they were provided prior to Dr. Madden’s deposition, giving Oracle an opportunity to question her and do not contain new methodologies that would genuinely surprise Oracle. *Id.* at 5. As to Oracle’s motion to preclude lay testimony of statistical analyses, OFCCP contends that it is “overly broad” for a motion in limine and should be denied at this point and considered at hearing insofar as the issue arises in a concrete situation. *Id.* at 4-5.

There are two aspects of this motion in limine. The first, more important, aspect concerns the supplemental reports/declaration of Dr. Madden and any testimony related to those supplements. The second concerns *other* evidence, to include lay witness testimony about prior statistical analyses. I start with this second aspect. The issue here does not appear to be about disclosure, or at least Oracle has not argued as much. Oracle was afforded discovery on the prior statistical analyses. Indeed, Dr. Saad’s first report critiques that statistical analyses underlying the SAC. Instead the issue appears to be one of requiring an expert to testify about such analyses.

Though Oracle’s general worry may be sound, I find that the motion is essentially moot at this point. To begin with, Oracle’s framing is somewhat askew. Dr. Madden is an expert and may testify about properly disclosed statistical analyses, insofar as she is able to do so, including those that pre-date her analyses. Dr. Saad may do the same, and given the reports it appears that it is more likely that Dr. Saad will do so. More to the point, reviewing the witness and exhibit lists, there is no indication that OFCCP seeks to offer these prior analyses into evidence or to put on any lay witnesses who will testify about statistical analyses. Based on the pre-hearing filings, insofar as evidence is coming in regarding these prior analyses, it will be in Dr. Saad’s original report and in the depositions of OFCCP representatives that *Oracle* is submitting into the record. This aspect of Oracle’s motion is thus denied as moot, but can be renewed if matters change and such evidence is offered.

The more important aspect of the motion concerns Dr. Madden’s supplemental declarations/reports. There are several questions to consider. First, if the disclosures were new reports, were they timely disclosed? If not, are these additional declarations/reports the sort of material that Rule 26 required OFCCP to disclose? And if so, does Rule 37(c)(1) prescribe their exclusion? To be clear at the outset, this motion is not about whether or not either expert is limited to reading his or her report during testimony. Experts are not so limited and may explain their reports, expound on the findings, and respond to critiques. But this is not *carte blanche* to disregard the disclosure rules by having an expert offer new opinions after the disclosure deadlines. This motion is about the more particular question of whether the material in the supplemental declarations/reports fits into this sort of permissible elaboration or crosses into impermissible late disclosed proper reports that would warrant exclusion.

The procedural rules in 41 C.F.R. part 60-30 do not address expert reports, but do give an ALJ expansive powers to regulate the course of the hearing and exclude evidence. *See* 41 C.F.R. § 60-30.15. Federal Rule of Civil Procedure 26(a)(2) governs the disclosure of expert testimony. Parties must disclose the identity of any expert witness they intend to use at trial. Fed. R. Civ. P. 26(a)(2)(A). If the expert is one retained or specifically employed to provide expert testimony, the disclosure must be accompanied by a report that contains:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed R. Civ. P. 26(a)(2)(B).

Rule 26(a)(2)(D) governs the time for the required disclosures:

A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
- (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party [] within 30 days after the other party's disclosure.

Fed. R. Civ. P. 26(a)(2)(D). Rebuttal reports are limited to the same subject matter of the report being rebutted. *E.g. Scott v. Chipotle Mexican Grill, Inc.*, 314 F.R.D. 33, 44 (S.D.N.Y. 2016).

In this case the parties negotiated and agreed to deadlines for the disclosure of initial and rebuttal expert reports and those deadlines were adopted as part of the March 6, 2019, pre-hearing scheduling order. As relevant here, initial expert disclosures were due on July 19, 2019, rebuttal expert disclosures were due on August 16, 2019, and expert discovery closed on August 30, 2019. In an earlier motion for a protective order involving the same underlying question, Oracle produced correspondence showing that it had favored a staggered “Madden – Saad – Madden” schedule, but had acceded to OFCCP’s desire with simultaneous initial and rebuttal reports.

On August 8, 2019, I approved a change to the prehearing schedule that extended the close of expert discovery to September 13, 2019. Shortly before the planned depositions of the statistical experts, a medical issue arose concerning OFCCP’s expert and the depositions were cancelled. The parties agreed that the pre-hearing schedule needed to be modified, but disagreed about how the various deadlines would need to change. On September 24, 2019, after reviewing the submissions concerning OFCCP’s expert and the proposed schedules of OFCCP and Oracle, I agreed that the pre-hearing schedule needed to be modified, but declined to adopt the schedule proposed by either party. Instead I imposed a new schedule that extended each of the dates, while retaining the original hearing dates. As relevant here, under that schedule—the schedule currently in force—expert discovery closed on October 11, 2019. As has been the case since March 6, 2019, the deadline for initial expert disclosures was July 19, 2019, and the deadline for rebuttal expert disclosures was August 16, 2019.

Expert disclosures must be supplemented as ordered or “if the party learns that in some material respect the disclosure or response is incomplete or incorrect.” Fed. R. Civ. P. 26(e)(1); *see*

also Fed. R. Civ. P. 26(a)(2)(E). This “duty to supplement extends both to information included in the report and to information given during the expert’s deposition. Any additions or changes to this information must be disclosed by the time the party’s pretrial disclosures [] are due.” Fed. R. Civ. P. 26(e)(2). Supplements, however, may not be used as a means to extend the deadline for the disclosure of expert reports. *In re C.F. Bean L.L.C.*, 841 F.3d 365, 371 (5th Cir. 2016) (citing *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 571 (5th Cir. 1996)); see also *In re Bear Stearns Co.*, 263 F. Supp. 3d 446, 451 (S.D.N.Y. 2017).

All of Dr. Madden’s declarations identified as objectionable by Oracle and listed in the exhibit list by OFCCP were produced long after the agreed upon deadline. Of those listed on the exhibit list, one came on the last day of expert discovery and two came significantly later. Under Federal Rule of Civil Procedure 16(b), “[a] schedule may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). Good cause exists when the scheduling order “cannot reasonably be met despite the diligence of the party seeking the extension.” Fed. R. Civ. P. 16 Advisory Committee Note to the 1983 Amendment to Subdivision (b). OFCCP has never sought an extension. If it were to do so at this point, it could not show good cause. Rather than immediately moving for a modification when an extension of the expert report deadlines became desirable, OFCCP simply engaged in self-help, producing additional report/declarations as it saw fit. Therefore, if Dr. Madden’s declarations are new reports or rebuttal reports, they were not timely produced.

OFCCP’s argument here and in prior briefing on this issue is that Dr. Madden’s declarations are not new reports at all and did not need to be disclosed. It has contended that Dr. Madden’s declarations are simply extensions of her original opinion, or clarifications, that do not alter her ultimate opinion in this case. The rule provides what must be in a report, including “(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them...” Fed. R. Civ. P. 26(a)(2)(B). Dr. Madden’s declarations, as they have been presented in the record, involve new statistical analyses to support her opinion, so would appear to be the sort of material that must be included within a report.

However, the rule “does not limit an expert’s testimony to simply reading [her] report. No language in the rule would suggest such a limitation. The rule contemplates that the expert will supplement, elaborate upon, explain and subject [her]self to cross-examination upon [her] report.” *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006); see also *Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007). The question is whether the information added falls within the scope of the original report such that there would be no unfair surprise to the party-opponent. *Gay v. Stonebridge Life Ins. Co.*, 660 F.3d 58, 63 (1st Cir. 2011); see also *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995). So, for example, untimely supplementation of an expert opinion to add a new theory of liability a month before trial is a violation of the rule, since a new theory of liability goes beyond the original opinion. See *Macaulay v. Anas*, 321 F.3d at 45, 51-53 (1st Cir. 2003).

The rule allows for supplementations of reports, but this is for required corrections of inaccuracies or adding information that was not available—it is not a means to provide opinions and supporting material that could have been included originally simply because a party finds it desirable to expand the expert’s opinion. See, e.g., *Wells v. Lamplight Farms, Inc.*, 303 F.R.D. 530, 535-37 (N.D.

Iowa 2014); *Minebea Co., Ltd. v. Papst*, 231 F.R.D. 3, 6-8 (D.D.C. 2005); *Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont. 1998).

The interest served by requiring the disclosure of expert opinions is self evident. It is to prevent unfair surprise at trial and to permit the opposing party to prepare for the expert's cross examination. By "locking" the expert witness into what Fed. R. Civ. P. 26(a)(2)(B) calls "a complete statement of all opinions to be expressed and the basis and reasons therefor," the opposing party knows exactly what she is facing and can decide whether to take the deposition of the expert and how to prepare for cross examination and rebuttal. When the expert supplements her report by addressing a new matter after discovery has ended, the very purpose of the rule is nullified.

Coles v. Perry, 217 F.R.D. 1, 4 (D.D.C. 2003). "The Rule also prevents experts from 'lying in wait' to express new opinions at the last minute, thereby denying the opposing party the opportunity to depose the expert on the new information or closely examine the expert's new testimony." *Minebea Co.*, 231 F.R.D. at 6.

Dr. Madden's ultimate opinion does not change in the new declarations—she still concludes that Oracle is discriminating against its employees on the basis of sex and race. But that is not the only question—the rule does not allow any addition or change in opinion so long as the expert hired by one party does not switch sides. The rule requires "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed R. Civ. P. 26(a)(2)(B)(i). Dr. Madden's declarations do not simply clarify or correct inaccuracies. Instead, they conduct new statistical analyses controlling for different factors. This is akin to an expert conducting a new experiment with different controls, or a new accident reconstruction with different parameters. Dr. Madden altered the construction of her regression analyses to provide a new and different basis for her opinion, taking different factors into account. This goes beyond the scope of the original and rebuttal reports that were timely disclosed, and so represent new rebuttal reports subject to disclosure under Rule 26.

So Dr. Madden's declarations are rebuttal expert reports and they were not timely disclosed under the scheduling order. The question now is what remedy Oracle is entitled to. When a party fails to comply with the rules governing expert disclosure, "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Other appropriate sanctions may be imposed in addition to or in lieu of exclusion. *Id.* Exclusion is a self-executing, automatic sanction, unless the party opposing the sanction shows that the failure to disclose was substantially justified or harmless. *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir. 2008); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-07 (9th Cir. 2001). In deciding whether the failure to disclose was substantially justified or harmless, courts look to "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date." *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003); *see also Lanard Toys Ltd. v. Novelty, Inc.*, 375 Fed. Appx. 705, 713 (9th Cir. 2010) (applying factors from *David*).

OFCCP claims that the failure to disclose this material was harmless and substantially justified because "most" were provided before Dr. Madden's deposition and Oracle should not have been surprised by the additions, DO at 5, but it does not adequately explain its bases for this

conclusion. On this question, it has the burden. Moreover, the prejudice to Oracle is easy to see. When a new theory of liability is offered shortly before trial, the violation is not harmless. *See Macaulay*, 321 F.3d at 51-53. If the change is based on newly discovered evidence and supplementation is made with sufficient time for the party-opponent to prepare a defense, it is harmless. *See NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 787 (7th Cir. 2000). Here new analyses were produced after the discovery deadline and provide new, additional bases for the opinion and new statistical evidence that would be presented at the impending hearing, and that Oracle would have no opportunity to respond to.

The parties agreed to a disclosure schedule that allowed the experts to respond to the reports of the other but then brought the development of expert evidence to an end. Oracle proposed a schedule that would have allowed Dr. Madden a rebuttal after Dr. Saad's critique of her initial report. OFCCP rejected this alternative and the parties proceeded with case preparation based on the schedule that OFCCP desired. But after the deadline for the rebuttal reports, OFCCP, without seeking any change to the schedule, simply started producing further rebuttal reports in the form of declarations from Dr. Madden with attached new analyses. This practice frustrates the purpose of discovery and the search for truth, representing an attempt by a party to gain an unfair advantage by availing itself of additional opportunities for expert reports, leaving the other party without a chance to rebut the showing—a chance that was part of the schedule as agreed.

The claim that the supplemental reports were provided to Oracle at the time of the depositions is unavailing. One was provided immediately before Dr. Saad's deposition in an attempt to sandbag him with rebuttal evidence and new studies that he had never seen before. Several were produced later. Though some of the additional declarations were provided before Dr. Madden's deposition, those that OFCCP intends to offer at trial were not—the last was produced nearly a month after the deposition and a little less than a month before hearing. Oracle has not been able to prepare evidence to meet Dr. Madden's new statistical analyses and has not had the opportunity to cross-examine her about these new analyses. Rules regarding timely disclosure and proper production of evidence serve an important truth-seeking function. They permit both sides to a dispute a fair opportunity to develop and present evidence favoring their position, and to respond to that disfavoring their position. Those purposes are thwarted if one party can disregard the rules in order to present a lopsided expert record that the other has not had an opportunity to probe and rebut, unreasonably skewing the array of expert evidence to its benefit.

Oracle could not claim unreasonable surprise by Dr. Madden's retained opinion, but it was legitimately surprised by the disclosure of new statistical analyses that it had not had the opportunity to rebut. This altered the basis for Dr. Madden's opinion and did so in a manner leaving Oracle unprepared to subject the evidence to reasonable critique. This is considerable prejudice to Oracle. The ability of Oracle to cure any prejudice as of the supplemental disclosures is unknown. It may have been able to procure additional reports from Dr. Saad and might have been able to depose Dr. Madden again in regards to the new analyses. But OFCCP did not seek to alter the schedule or take steps to ensure that any prejudice could be cured. It did not agree to seek an additional report for Oracle or make Dr. Madden available at Oracle's convenience. These steps would have also imposed considerable cost and hardship on Oracle. Moreover, at this point hearing is only a few days away and no reasonable opportunity to cure any prejudice exists.

If Dr. Madden's additional analyses were to be admitted and considered, it would be necessary to take steps to cure any prejudice, for instance by allowing Oracle to submit an additional

report from Dr. Saad. But that would result in a very considerable disruption of the hearing and case schedule. It would require a last-minute continuance of a date that has been set since March 2019 and confirmed on multiple occasions, or keeping the record open to allow for additional reports, and perhaps a resumption of the hearing to consider additional expert testimony. I do not find bad faith by OFCCP, but I do find willfulness. It does not appear that OFCCP held back evidence in order to sandbag Oracle—rather, after reviewing the properly disclosed evidence, it determined that its case would be improved by additional expert statistical analyses. But importantly, this is a problem that was OFCCP’s own making and that it should have reasonably anticipated given the disclosure schedule it wanted and received. Dr. Madden’s additional analyses are not based on newly disclosed evidence. They respond to critiques from Dr. Saad, but they are based on data that was available to Dr. Madden at the outset. That is, nothing prevented Dr. Madden from conducting these new analyses at the time of her original report—she could have altered her regression analyses or offered further alternatives.

It may have been the case that additional reports would have served a salutary purpose. But this is something that OFCCP would have known by August 16, 2019, at the latest, when it received Dr. Saad’s report and would have clearly seen the desirability of a reply. At that point, OFCCP could have immediately negotiated a schedule that would have provided both parties with an opportunity to supplement or petitioned me to impose a modified schedule that would allow for further evidence but would have cured any prejudice. It did not do so. Instead it started preparing and producing new expert reports of its own accord, only to surprise Oracle with them well after the disclosure date it had agreed to earlier. The gambit seems to have been that I would be wary of exclusion and so allow the evidence despite the misconduct. But OFCCP misreads the rule. Though exclusion is harsh, under Rule 37(c)(1), it is the default sanction, applied in the ordinary course (as OFCCP argued in its own motion in limine). OFCCP does not explain an alternative sanction, and none is apparent. OFCCP’s continued production of expert declarations long after the discovery deadline has the effect of turning Dr. Madden’s opinion into a moving target, preventing effective preparation for a fair adjudication of the disputed issues. At some point things need to come to an end, and the issues must be presented at hearing. Adhering to the schedule agreed to by the parties and adopted in the scheduling order is appropriate in these circumstances.

In sum, Dr. Madden’s supplemental declarations are new reports, disclosure of the reports was not timely, there is no good cause for modification of the schedule, and the failure to make timely production is neither harmless nor substantially justified. Oracle’s Motion in Limine #1 is accordingly granted in part as to the supplemental declaration/reports of Dr. Madden. The untimely supplemental declaration/reports of Dr. Madden dated October 11, 2019, October 31, 2019, and November 7, 2019 (PX 4-6), are excluded. At the hearing, Dr. Madden may elaborate upon and explain her views, as well as respond to critiques from Dr. Saad, so long as doing so remains within the scope of her original report. But she may not produce or rely upon new, additional analyses that were not timely disclosed. And as stated above, the motion as to lay evidence of statistical analyses is denied as moot.

C. Oracle’s Motion in Limine #2

Oracle’s second motion in limine seeks to exclude “evidence of job assignments prior to January 1, 2013,” on the grounds that the evidence irrelevant. Oracle argues that OFCCP is limited to litigating discrimination that occurred in part during the 2013-14 audit period. DM2 at 1-2. Oracle contends that a job assignment is a single act, not a continuous violation, so there is no basis

for liability for assignments that occurred prior to 2013. *Id.* at 2-3. In addition, Oracle contends that even if the evidence is relevant, it should be excluded because it “would be an unnecessary and time-wasting detour to delve into the specifics of all of those assignments” and a series of mini-trials concerning each hiring decision. *Id.* at 3. OFCCP opposes the motion, arguing that Oracle is wrong to treat the claim as a “hiring/promotion” claim rather than “compensation” claim and that compensation discrimination claims are “subject to the paycheck accrual rule.” PO at 5-7. It also argues that the cases relied upon by Oracle involve exhaustion of administrative remedies in a Title VII context, an issue not relevant here. *Id.* at 8-9. In a note, OFCCP adds that even if the assignments from before the review period were not actionable, they would remain relevant insofar as they would support the claims that are actionable. *Id.* at 9 n.10.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” 29 C.F.R. § 18.401; *see also* Fed. R. Evid. 401. Relevant evidence is generally admissible, subject to the other rules of evidence; irrelevant evidence is inadmissible. 29 C.F.R. § 18.402; *see also* Fed. R. Evid. 402. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of issues, or misleading the judge as trier of fact, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” 29 C.F.R. § 18.403; *see also* Fed. R. Evid. 403; 41 C.F.R. § 60-30.15(h).

The parties spend most of their briefing on this motion disputing whether pre-2013 “assignments” are actionable. There is no need to engage these issues. Oracle’s motion in limine #2 is denied on alternative grounds. To prevail on the claim in question, OFCCP must establish a pattern or practice of discriminatory job assignments or steering. Regardless of what is actionable and what damages might be awarded, evidence prior to 2013 is relevant to a showing of a pattern or practice that was Oracle’s regular operating procedure. Discriminatory policies are unlikely to be made explicit in plain language, but might be observed in a series of actions over a sustained period of time. Evidence of a history of discriminatory steering and no indications of a change in practice could support a finding of discriminatory steering in the relevant time period. The evidence is thus relevant under Rule 401 and admissible under Rule 402. I reject Oracle’s alternative argument that the evidence should be excluded under Rule 403. Reviewing the list of witnesses, there does not appear to be a significant amount of this evidence and the need to explore the circumstances of prior “assignments” or “steering” will not devolve into a series of mini-trials.

D. Oracle’s Motion in Limine #3

Next, Oracle’s third motion in limine seeks to “preclude OFCCP from introducing any evidence or argument relating to alleged discrimination occurring after the 2013-2014 audit period, *unless* OFCCP *first* is able to prove a violation during the audit period.” DM3 at 1. Oracle contends that OFCCP is limited to claims arising out of the audit period and contends that evidence of a continuing violation outside of that period is irrelevant unless OFCCP can first show a violation from the relevant period. *Id.* at 3-5; *see also* DMX A at 293; DMX B at 17. Per Oracle, this should include Dr. Madden’s analysis of aggregated compensation data from 2013-2018. *Id.* at 5 n.1. In the alternative, Oracle argues that the evidence in question should be excluded because it would require “unnecessary and time-consuming detours into the specifics of that evidence,” will result in confusion of the issues, and will mislead me about the issues involved in the case. *Id.* at 5-6. OFCCP argues that this is impractical and would result in two trials. PO at 9-10. It maintains that the cases Oracle relies upon deal with different issues and do not support this sort of evidentiary

exclusion. *Id.* at 10. OFCCP further argues that the law does not require a showing that there was a violation in the relevant period and that I may issue a decision in its favor based on only later violations. *Id.* at 11.

I do not reach or make any findings related to this last argument. OFCCP's first arguments are convincing, and that is enough to decide the motion. Oracle is essentially asking for a bifurcated trial, after which some decision would have to be prepared about the compliance review period, with trial then resuming to determine if there was a continuing violation. This is inefficient and does not find support in the cases cited. OFCCP may have to establish a violation in the relevant period, but there is no sound reason to stagger the presentation of evidence in the manner Oracle suggests. The real purpose of this motion appears to be to have the evidence from Dr. Madden excluded from the first trial, which would result as a sort of default victory for Oracle. But the role of Dr. Madden's evidence highlights another reason why Oracle's motion lacks merit. She studied years of data, including the relevant time period. Her conclusions apply to the time period in the compliance review. That is so even though she considered other periods. This is a pattern or practice case that depends on statistical evidence on both sides. Larger samples may lead to better analysis and sounder conclusions. There is the potential that something importantly different occurred in the intervening years, but Oracle hasn't suggested what that might be. In any event, the issue is best taken on the merits and in reference to credibility.

Oracle's concern preventing my confusion is appreciated, but the probative value of the evidence far outweighs the hypothetical dangers Oracle suggests. If Oracle continues to be worried about my confusion about the evidence, it can use its post-hearing brief to dispel any misperceptions and provide clarity. Oracle's motion in limine #3 is denied.

E. Oracle's Motion in Limine #4

In Motion in Limine #4, Oracle asks that I exclude "any evidence or arguments at hearing that Oracle managers, except 'top leadership' and 'Human Resources managers,' have engaged in any wrongdoing, including, but not to, any suggestion that a manager is biased against or has engaged in any discriminatory act against women, Asian-American, or African American individuals." DM4 at 1. It contends that such evidence would be contrary to OFCCP's representations in a letter to various Oracle employees, including managers, and OFCCP's August 22, 2019, position statement, and OFCCP should be barred from reversing itself now. *Id.* at 1, 3-4. Oracle also contends that given the position statement, this evidence is irrelevant. *Id.* at 1, 4-5. Even if the evidence is relevant, Oracle argues that its value is outweighed by the waste of time that will result from the detours required by this evidence. *Id.* at 5.

OFCCP objects that Oracle is seeking an improper evidentiary sanction for the letter in question, arguing that it was willing to issue a corrective notice but that it was ultimately Oracle who withdrew from the process. PO at 11-13. As to the position statement, OFCCP argues that evidence of wrongdoing by low-level managers may still be presented as "impact of the policies and practices set by Oracle's top leadership in conjunction with Human Resource managers" and to "shed light" on how those who are accused of wrongdoing responded. *Id.* at 13-14. OFCCP also complains that Oracle has now opened the door to this evidence because it has attempted to shift blame for any discriminatory acts onto low-level managers. *Id.* at 14.

While I do not accept OFCCP's reconstruction of the relevant history, I agree that no evidentiary sanction is warranted. Oracle may explore the role of the solicitation on cross-examination, and it may be a credibility factor for OFCCP's witnesses. As to the specific statement that the recipients are not being accused of any wrongdoing, OFCCP voluntarily agreed to limit its theories of liability to exclude those that involve wrongdoing by low-level managers.

The real issue in this motion is relevance. OFCCP is bound to its position statement. As discussed more fully in the recent order denying the cross-motions for summary judgment, OFCCP may not prevail on any theory of the case that *requires* a finding that any of the low-level managers engaged in wrongdoing, to include any discriminatory acts. It is not necessarily committed to the position that there were no such acts—but it cannot hinge liability on this point. Derivatively, OFCCP's claim that Oracle has opened the door to this evidence by shifting blame to such managers is misguided. OFCCP definitely shut that door in the position statement.

Oracle's contentions on relevance have some merit. Evidence of discrimination by low-level managers is not relevant, unless it goes to the discriminatory intent of high-level or HR managers in a manner that would support a theory of liability that does not require a finding of wrongdoing by the low-level managers. OFCCP's argument contends that there is evidence in this category and it should be permitted to present it. I find that the issue is not proper for disposition in a motion in limine. Some of this evidence may be relevant, but it will need to be addressed as the point arises during the hearing. A total exclusion is not warranted at this time. OFCCP is advised that the evidence presented must link up with the theories of the case that are still being pursued, i.e., those involving wrongdoing by high-level and HR-managers but not low-level managers. Since OFCCP is not accusing any low-level managers outside of HR of wrongdoing, there is no need for the hearing to include mini-trials of allegations of wrongdoing levied against those managers. That sort of evidence belongs in a different case. Oracle's motion in limine #4 is denied without prejudice to raising the issue through appropriate objection to testimony at hearing.

F. Oracle's Motion in Limine #5

Fifth, Oracle asks for an order “precluding OFCCP from introducing any evidence or arguments at hearing referencing Oracle's privileged compensation analyses.” DM5 at 1. It claims that the September 19, 2019, order in this case sustained the claim of privilege as to these analyses but that OFCCP has “inappropriately referenced” the analyses and actions taken/not taken in response to them. *Id.* It argues that the invocation of privilege cannot be used as evidence against the party invoking it defensively and contends that a preclusive order is appropriate since otherwise the fact-finder might infer that the privileged material is unfavorable. *Id.* at 1-2. Oracle complains that OFCCP's briefing on the cross motions for summary judgment made inappropriate use and reference to the invocation of privilege, and that it should be forbidden at hearing. *Id.* at 3. In the alternative, Oracle argues that the probative value of the evidence is outweighed by the confusion and time-wasting it would cause. *Id.* at 3-4.

OFCCP responds that the authority Oracle relies upon concerns the dangers posed in jury trials, where improper inferences about privilege may be made. PO at 15. In addition, OFCCP argues that Oracle has now waived the privilege as to the compensation analyses because in the briefing on the cross-motions for summary judgment Oracle “suggested that it may have made compensation corrections that were covered by privilege” and in the motion in limine stated that OFCCP's representations about the actions taken in response to the reports was “erroneous.”

The issues raised here are related to those raised in OFCCP's motion in limine. Oracle has not waived the privilege. It has not affirmatively argued that it did take actions as a result of the compensation analyses or that the compensation analyses show something in particular. Oracle may not do so, as discussed further below. What I understand Oracle to have done is to argue that OFCCP cannot make representations about what the analyses show or what Oracle did in response to them. So the claim that Oracle took no actions as a result of any compensation analyses is "erroneous" because the record is silent on what Oracle did in response to these analyses, not because Oracle did take action in response to them.

That is an argument Oracle can make without waiving the privilege—it does no more than reiterate the privilege and resist OFCCP's effort to suggest what the privileged material would show. The compensation analyses are a non-entity. They cannot support or refute any argument. Oracle may not argue that they fulfill any requirement or that they support any finding. They cannot assist OFCCP in making any showing, outside the point that Oracle did not do compensation analyses as part of its equal opportunity efforts. Insofar as Oracle is only moving to prevent OFCCP from making affirmative representations about these compensation studies or arguing from the assertion of privilege, this motion has merit. But this does nothing to change the terrain of the case. They don't help Oracle and they don't help OFCCP.

I am confused by the request that "evidence" be barred concerning these analyses. As I understand matters, there is no such evidence to present because the claim of privilege was sustained. The motion seems to be stated in an overly broad fashion, but I see no need for any order concerning "evidence" to be offered. As to "argument," Oracle may be seeking to exclude more than the types of argument referenced above. In that guise, this motion does not have merit. OFCCP may not properly argue that because Oracle asserted privilege, I should conclude that the compensation studies were adverse to Oracle or that it took no action in response to any findings of troubling disparities (and Oracle cannot argue the converse). But OFCCP may argue that Oracle undertook no self-critical compensation analyses or pay equity studies as part of its Affirmative Action obligations or its commitment to equal employment opportunity and that Oracle took no actions in response to such studies. So long as OFCCP includes the reference to the purpose of the analyses/studies, the argument is fair game. It is no more than repetition of Oracle's position statement.

Though I find some merit in this motion, I conclude that it should be denied. OFCCP is correct that jury confusion is not something that needs to be considered here. Moreover, I do not see a clear way to craft an appropriately limited order that will provide guidance but will not require re-litigation of whether the order was violated. A bar on reference to compensation analyses would be too broad—OFCCP should be able to argue that the only compensation analyses Oracle conducted were requested by their attorneys and were for the purposes of potential (and actual) litigation. The above has clarified what sorts of arguments may or may not be pursued. That is enough relief for the meritorious aspect of the motion.

G. Oracle's Motion in Limine #6

In its sixth motion in limine, Oracle asks that I "exclude evidence of anecdotal evidence, lawsuits, and administrative or internal complaints unrelated to the subject matter of OFCCP's claims." DM6 at 1. Oracle points in particular to evidence like that offered in the declaration of Kristen Hanson Garcia, since Ms. Garcia worked in the human resources job function. *Id.* Oracle

argues that only three job functions are at issue and evidence from other job functions and “classes” cannot support or refute a pattern or practice claim as to the relevant job functions and “class” relevant to that job function. It asserts that Oracle should not be permitted to “bring in evidence of complaints relating to everything under the sun.” *Id.* at 2-4. Oracle also seeks to exclude this sort of anecdotal evidence of discriminatory statements or attitudes on the grounds that this is impermissible character evidence, since it would be proffered to show that Oracle, in general, is a bad actor rather than to show that Oracle has engaged in the acts alleged in the complaint. *Id.* at 1-2; *see also* DMX C. In the alternative, Oracle seeks to exclude the evidence because its probative value is substantially outweighed by the danger of confusion and wasted time. DM6 at 5-6.

OFCCP opposes any exclusion. It contends that testimony of HR personnel is “highly relevant” even though they are not part of the “class”. It represents that Ms. Garcia will testify about compensation practices at Oracle based on her personal experience and that this sort of testimony should not be excluded, since it goes to important parts of the claims at issue. PO at 17-18. OFCCP states that its other witnesses will all come from the three job functions at issue, but that in any case it should be able to offer evidence that Oracle discriminated against other groups or discriminated in ways not connected to compensation, since this goes to the showing of intent. *Id.* at 18-19. Further, OFCCP contends that Oracle is offering this sort of evidence when it submits proof of its diversity bona fides, *id.* at 19 n.23, and that Oracle has opened the door to evidence outside of the job functions at issue by making claims about the absence of charges of discrimination in those job functions. *Id.* at 19.

There are two aspects to the motion, relevance and character evidence.⁷ This motion turns primarily on relevance. This is a discrimination case, so “character” evidence about discrimination is directly at issue. The real dispute is the scope of such evidence that is relevant, with Oracle seeking to narrow the admissible evidence to the job functions at issue and the sort of discrimination at issue. Oracle’s motion, however, is deceptive. Portions might have some merit in a different context, but as presented in this context it is clearly meritless. There have yet to be indications that OFCCP intends to present any substantial anecdotal evidence pertaining to other job functions. It does intend to present the evidence of Ms. Garcia. This is the real target of the motion, and Oracle singles her out by name. Ms. Garcia is presented to provide evidence about attitudes in Oracle’s HR department towards women employees, attitudes that might reflect an intent to discriminate. Though the HR job function is not at issue, Oracle’s top-managers and HR managers are the alleged wrongdoers. So evidence going to their intentions is highly relevant to the case.

Oracle describes a problem that doesn’t exist—a parade of witnesses testifying about working conditions in other job functions—in order to exclude relevant, probative evidence going to an element of the claim—potential discriminatory intentions by Oracle’s HR managers and

⁷ Subject to certain exceptions, “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” 29 C.F.R. § 18.404(a)-(b); *see also* Fed. R. Evid. 404. However, “Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.” 29 C.F.R. § 18.406; *see also* Fed. R. Evid. 406. Evidence of character for truthfulness or untruthfulness or untruthfulness and specific instances of conduct relating to truthfulness or untruthfulness may presented, subject to certain limitations. 29 C.F.R. § 18.608(a)-(b); *see also* Fed. R. Evid. 608.

leadership. Indeed, in other motions Oracle seeks to exclude the evidence of discrimination in the job functions on the grounds that the alleged wrongdoers are top managers and HR managers, but here would exclude testimony related to the alleged wrongdoers on the grounds that they aren't in the subject job functions. Oracle can't have it both ways. A categorical exclusion order is inappropriate.

Part of the motion concerns other sorts of discriminatory conduct, even within the job functions at issue. DM6 at 4-5. OFCCP responds that this sort of evidence is "commonplace" in these sorts of cases. PO at 18. OFCCP points to *Obrey v. Johnson*, 400 F.3d 691 (9th Cir. 2005) as support for this proposition, but it over-reads the case. *Obrey* holds that anecdotal evidence of discrimination from employees is admissible in a pattern or practice case brought by a different employee, even when it may not be admissible in a "typical case of individual discrimination." *Id.* at 698. But in *Obrey*, the proffered anecdotal evidence of discrimination was of the same type of discrimination that was alleged in the pattern or practice case—promotion discrimination on the basis of race. *Id.* That is not a license for the introduction of any sort of discrimination, even if it is untethered to the allegations in a particular case.

Nonetheless, I find that no exclusion is appropriate in limine. The admissibility of anecdotal evidence of discrimination will be very context dependent and turn in part on how tethered the evidence is to the claims at issue. I am not in a good position to set parameters now, so Oracle's motion in limine is denied.

H. Oracle's Motion in Limine #7

Oracle requests an order "precluding OFCCP from offering documents, testimony or evidence not provided or produced by OFCCP in discovery, including the introduction of testimony or evidence relating to matters that OFCCP's 30(b)(6) witnesses refused to disclose during depositions." DM7 at 1. Oracle complains that OFCCP has made claims of privilege to frustrate discovery, including at a 30(b)(6) deposition, and thus under Rule 37(c)(1) should not be permitted to offer this evidence at hearing and "should be held to its response and disclosures" during discovery. *Id.* at 1-3; *see also* DMX E (deposition). OFCCP responds that the motion should be denied because it targets "unknown and unspecified" evidence and is insufficiently described to warrant an order of exclusion in limine. PO at 19-20. It asserts that the cases relied upon by Oracle all concern exclusion of specific evidence, an important difference from the motion here, which seeks a general ruling excluding an insufficiently defined category of evidence. *Id.* at 20.

This motion is similar to OFCCP's motion in limine, which was opposed by Oracle. The parties appear to agree that under Rule 37(c)(1), evidence not produced in discovery should be excluded, or at least that the evidence not produced by the *other* party during discovery should be excluded. The resolution here mirrors the determination above. I am not in a position at this time to make determinations about particular evidence and granting either motion would do little more than articulate a general principle that is already stated in Rule 37(c)(1). Oracle's Motion in Limine #7 is thus denied, but Oracle (and OFCCP) may raise the issue at hearing if appropriate.

I. Oracle's Motion in Limine #8

Eighth, Oracle moves "to preclude OFCCP from introducing interview memos or their content." DM8 at 1. The memos in question concern notes/write-ups that OFCCP personnel

created during the compliance review after meeting with particular Oracle employees, but were not adopted by Oracle employees and were not provided to the individuals until months later, contrary to OFCCP's normal practice. *Id.* at 1-2; *see also* DMX F. The motion does not concern the memo for the interview with Lisa Gordon, which Oracle will address later as necessary. DM8 at 1 n.1. Oracle avers that the memos are not accurate, pointing to a deposition of an Oracle employee in which the employee testified that the notes OFCCP prepared did not reflect what she said in the interview. *Id.* at 2; *see also* DMX D. As a basis for exclusion, Oracle argues that the memos are inadmissible double hearsay—they are out of court statements by OFCCP personnel purporting to record out of court statements by an Oracle employee. *Id.* at 3. Oracle adds that “the unsigned interview notes are particularly unreliable” in that they do not even pretend to record what was actually said and were never adopted by the interviewees, who were being questioned at a time that the parties “had a less than amicable relationship.” *Id.* at 3-4. In the alternative, Oracle asks that the notes be excluded because their minimal probative value is outweighed by the likelihood that “they would confuse the issues, waste a significant amount of time, and mislead the Court [sic].” *Id.* at 4.

OFCCP argues that the motion should be denied because it is premature to determine whether or not the documents are offered for a purpose that would render them hearsay or to determine whether any of the hearsay exceptions apply. PO at 20-21. OFCCP suggests that they “may” be admissible as party admissions, inconsistent statements, and as records of regularly conducted activity. It also contends that the memos should be admitted to show the breadth of the compliance review, which is relevant to Oracle's affirmative defense challenging the show cause notice. *Id.* at 21. Last, OFCCP adds that the circumstances of the interviews “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.” *Id.*

This last statement is somewhat confused. Oracle isn't challenging the accuracy of the notes on the grounds that the interviewees (or counsel) took a “lackadaisical” attitude to the interviews, rendering what they said inaccurate. It is arguing that OFCCP personnel created inaccurate, deceptive accounts of what Oracle personnel actually said, perhaps due to confusion and perhaps in an attempted to foist damaging admissions onto Oracle to support OFCCP's budding allegations. On its own, this is a point that would go to weight, and might render these notes subject to exclusion under Rule 403, as Oracle's alternative argument requests. That particular determination is premature, since it requires findings weighing evidence and accepting Oracle's factual claims about the inaccuracy of the memos. This is an issue that will go to weight.

The main thrust of Oracle's motion concerns hearsay. “Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted.” 29 C.F.R. § 18.801(c); *see also* Fed. R. Evid. 801(c). Hearsay is generally not admissible. 29 C.F.R. § 18.802; *see also* Fed. R. Evid. 802. Two sorts of statements, however, are excluded from the definition of hearsay: prior statements by a testifying witness in certain circumstances and admissions by a party opponent, including one by an agent of the party that is within that agent's scope of agency. 29 C.F.R. § 18.801(d); *see also* Fed. R. Evid. 801(d). In addition, if a statement is offered into evidence for another purpose beyond establishing the truth of the matter asserted, it is not hearsay and may be taken as evidence for that other purpose, if it is otherwise proper. Finally, even where a statement is hearsay, there are 30 exceptions to the rule along with an additional 5 exceptions when the witness is unavailable. 29 C.F.R. §§ 18.803-18.804; *see also* Fed. R. Evid. 803-804. When there are multiple levels of hearsay, an exclusion or exception

must apply to each level for the statement to be admissible. 29 C.F.R. § 18.805; *see also* Fed. R. Evid. 805.

The evidence in question involves interview notes prepared by OFCCP investigators. The hearsay rule is particularly apt in this context, since it is designed to ensure that evidence produced at hearing has a modicum of reliability, was made under oath, allows the fact-finder to observe demeanor, and can be tested through cross-examination. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 298 (1973). There could be two levels of hearsay. First, the notes themselves are hearsay—out of court statements presented to establish the truth of the matter asserted, that an individual said or related certain things. Second, the contents of the notes are hearsay—out of court statements of Oracle employees offered to establish the truth of the content of those statements about Oracle.

Depending on the circumstances, this second level of potential hearsay could be subject to the exclusion for admissions by a party opponent, in particular a “statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.” 29 C.F.R. § 18.801(d)(2)(iv). The first level is more difficult, but I find exclusion now is inappropriate. OFCCP points to a hearsay exception for records of regularly conducted business. *See* 29 C.F.R. § 18.803(a)(6). It is unclear at this stage and given the briefing presented that these particular notes would qualify, but there is enough uncertainty in the briefing now to caution against exclusion at this point. In addition, the admissibility of the notes would turn in part on what they are offered to show and it is possible that they might be considered in one respect but disregarded in another. OFCCP is correct that they would be admissible merely to reflect that OFCCP gathered notes during a compliance review, which is relevant to some of Oracle’s affirmative defenses.⁸ Therefore, Oracle’s Motion in Limine #8 is denied.

J. Oracle’s Motion in Limine #9

Next, “Oracle seeks an order precluding OFCCP at the hearing from asking about, or introducing any evidence regarding, the net worth, income, or dividends of Oracle America, Inc. or its parent company, Oracle Corporation, as well as any evidence or argument regarding earnings of Oracle executives.” DM9 at 1. Oracle points out that in the summary judgment briefing and in the proposed stipulations, OFCCP has focused on Oracle’s financial situation and the compensation of its executives. *Id.* at 1-2; *see also* WPD at ¶ 2. Oracle argues that this evidence is irrelevant since the issue in the case is compensation discrimination and whether the resources available to Oracle are allocated to compensation in a discriminatory manner—not how large or small those resources are. It apprehends that OFCCP intends to argue that Oracle had the financial resources to pay higher compensation, but asserts that this sort of argument does not go to the discrimination claim which turns on how whatever it pays in compensation to the groups of employees in question, whether that amount is large or small and regardless of the reason for the business decisions behind total compensation allocation, is divided and whether this is done in a discriminatory manner. DM9 at 2. It adds that whatever probative evidence this evidence might have, its value is outweighed by the waste of time and confusion of the issues that it would cause. *Id.* at 2-3.

⁸ In addition, based on the latest exhibit lists, only two such interview notes (in addition to that of Lisa Gordon) are being offered, Madhawi Cheruvu (PX 88) and Juan Loaiza (PX 93), and both of these individuals are listed as witnesses. Both can be questioned on the notes and they might be admissible as prior inconsistent statements. *See* 29 C.F.R. § 18.801(d)(1).

As to executive compensation, Oracle contends that there is no relevance because the total compensation packages of its executives have no bearing on the question of whether or not it intentionally discriminated against employees. It contends that “top-line” budgeting decisions are irrelevant to the claims at issue and that this evidence appears to be an attempt to “smear Oracle’s executives or to portray them as receiving unjustified compensation in light of alleged complaints about employee pay.” It deems this improper and irrelevant, because the claim at issue “does not entitle [OFCCP] to be an Oracle board member or to second-guess Oracle’s business decisions.” *Id.* at 3. Moreover, it argues that even if there is some probative value, this is outweighed by the waste of time and confusion that would result from the detour into executive pay practices. *Id.* at 3.

OFCCP deems this evidence “relevant and admissible” and contends that Oracle has put its financial condition at issue by arguing that budgetary and other factors account for differences in compensation and by justifying its actions “by pointing to industry competition and market factors allegedly constraining Oracle’s compensation practices.” PO at 21-22. OFCCP also declares that “Oracle is a government contractor with obligations to ensure resources are put toward insuring compliance. [] The fact that Oracle has such resources, but did not deploy them, is directly relevant.” *Id.* at 22. As to executive compensation, OFCCP argues that Oracle has highlighted the diversity of its executives as evidence of lack of discriminatory intent and it should be permitted to explore their “motivations and introduc[e] evidence regarding the ways in which Oracle executives benefitted from the company’s discriminatory decisions.” *Id.*

If there are discriminatory disparities that warranted correction, Oracle had an obligation to correct those disparities, insofar as it knew about them. That is true whether or not Oracle had or has the resources to correct the disparities. There is no “hardship” exemption from anti-discrimination laws. To put the point starkly, if I find that Oracle discriminated and award backpay, Oracle will not thwart or reduce any award by showing that it would bankrupt the company. The financial impact is not a consideration and cannot be a defense. The flip-side of this point is that Oracle’s financial condition has very unclear relevance to the case. In the theory OFCCP sketches, it must show that there were illegitimate disparities, that Oracle knew about it, and that Oracle intentionally did not rectify the discrimination. It does not need to show that Oracle has the resources to do so and its showing of intent is not enhanced by a showing that Oracle could have made the corrections but didn’t—there are no punitive damages in this case. OFCCP needs to show intent. It does not need to show bad faith.

So financial information about Oracle and executive compensation is of dubious relevance. However, evidence of Oracle’s *general* financial situation has some relevance as simple background evidence in the case that frames what Oracle is, what it does, and its role as a government contractor. Some very basic background information about Oracle may be presented, but OFCCP has no need to present any details. I grant Oracle’s motion as to executive compensation. OFCCP seems to find this important in some way, but I fail to grasp how it will impact any of the material issues. OFCCP needs to show intentional discrimination. The “ways in which Oracle executives benefitted from the company’s discriminatory decisions” has no relevance here and would be a waste of time to consider. In this case, no one should care whether or not Oracle executives benefitted from discriminatory decisions—the inquiry ends at the question of whether there *were* discriminatory decisions. The parties ought to be focused on that point, not on inflammatory sideshows into the irrelevancies of executive compensation.

Oracle's Motion in Limine #9 is granted as to executive compensation but denied as to basic information about Oracle.

K. Oracle's Motion in Limine #10

Oracle next asks that all evidence and argument in support of a disparate impact claim be excluded. DM10 at 1. It contends that a disparate impact claim was not properly pled, *id.* at 1-2, that OFCCP did not specify a practice causing a disparate impact and thus evidence going to such a claim should be excluded, *id.* at 2-3, that OFCCP has not established practices of relying on prior pay or making job assignments, *id.* at 4-5, and that it would be prejudicial to allow OFCCP to introduce evidence of disparate impact now, *id.* at 5; *see also* DMX H. Moreover, Oracle avers that evidence of disparate impact is not relevant to disparate treatment, because the latter involves intent, and that OFCCP should be prohibited from converting a disparate treatment claim into a disparate impact claim during the hearing. *Id.* at 5-6. OFCCP responds that this motion in limine is an attempt to re-argue the motion for summary judgment and that it repeats the same erroneous arguments. PO at 22-23. It then reiterates some of its opposing arguments. *Id.* at 23-25.

The issues raised here were dealt with in the November 25, 2019, order on the cross-motions for summary judgment.⁹ That order denied Oracle's motion for summary judgment on a disparate impact claim premised on reliance on prior pay, finding that there was a genuine dispute over whether Oracle had such a policy or practice and, if so, whether this policy or practice caused a disparate impact. However, the order granted summary judgment to Oracle on any other disparate impact claim, finding that any such claims had not been properly articulated and that OFCCP had not produced evidence that could support a finding of causation.

The ruling here echoes the ruling before. Oracle's Motion in Limine #10 is granted in part and denied in part. It is denied as to evidence supporting a disparate impact theory premised on reliance on prior pay in setting compensation. It is granted as to evidence and argument meant to establish another disparate impact theory, though evidence that could go to a disparate impact theory is still admissible insofar as it is relevant to OFCCP's disparate treatment claim.

L. Oracle's Motion in Limine #11

In its eleventh motion in limine, Oracle requests an order "excluding evidence related to the resolved hiring claim." DM11 at 1. The Second Amended Complaint original including a hiring discrimination claim focused on Oracle's college recruitment program. The parties, however, settled this claim and an order approving the consent findings was entered, resolving this aspect of the suit. Oracle now argues that evidence that would go to the hiring claim is irrelevant to the remaining disputes and should not be admitted here. It points out that the hiring discrimination focused on individuals who were not hired by Oracle while the remaining claims focus on Oracle employees. In addition, Oracle points out that the allegedly discriminated against groups differed between the claims. *Id.* at 1-2. Insofar as this evidence meets the minimal relevance bar, Oracle argues that it

⁹ "A motion in limine is not the proper vehicle for seeking a dispositive ruling on a claim, particularly after the deadline for filing such motions has passed." *Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1162 n.4 (9th Cir. 2013) (citing *Bubner v. City Cnty. of S.F.*, 266 F.3d 959, 968 (9th Cir. 2001)). Oracle timely sought summary judgment on this point. The arguments here overlap, but are framed in evidentiary terms—seeking an order to prevent the introduction of evidence on claims it believed it was entitled to summary judgment upon, insofar as that evidence would be offered on remaining claims.

should still be excluded because the danger of confusion and waste of time outweighs whatever probative value it might have, since it would shift focus to a different sort of unproven claim. *Id.* at 2-3.

In opposition, OFCCP contends that the motion would exclude “a broad swath” of evidence in a way inconsistent with the proper purpose of a motion in limine. It also asserts that “issues related to hiring have direct bearing on this case” in that the hiring process is relevant to some of the claims and contentions within the compensation discrimination claim as to steering or job assignment. PO at 25-26.

Oracle’s Motion in Limine #11 has some potential merit, but I conclude that it should be denied at this stage. OFCCP is correct that evidence surrounding Oracle’s hiring practices remain relevant to the claims in litigation insofar as they touch on whether or not, and how, Oracle could be steering certain groups of people into particular job areas and career paths. Indeed, not too long ago, Oracle was arguing that OFCCP could not redact information related to hiring as irrelevant (or “non-responsive”) based on the settled hiring claims because that information was relevant to the steering/assignment theory. I accepted Oracle’s argument then, and I will accept OFCCP’s argument now. Evidence related to hiring remains relevant to the case.

This may not be what Oracle means to target in Motion in Limine #11. It may be arguing that evidence that is *only* relevant to the hiring claim that was settled should be excluded. That would be a meritorious motion, but at this stage would not advance the case or simplify litigation, because it would leave open which evidence is relevant *only* to the hiring claim and which evidence might be relevant to *both* the hiring claim and another, still-live claim. Hence, Motion in Limine #11 is denied without prejudice to renewing the objection to particular evidence related to the hiring claim.

M. Oracle’s Motion in Limine #12

Oracle Motion in Limine #12 seeks exclusion of “testimony by lawyers from the Office of the Solicitor” regarding “any statistical analysis performed,” “the facts that underlie the Section Amended Complaint’s claims of discrimination,” or “what an Oracle employee said to them.” DM12 at 1. Oracle argues that statistical analysis are the province of experts, that any testimony about what an attorney was told would be hearsay, and that attorney testimony would be cumulative. *Id.* at 1-2. Oracle adds that the witness-advocate rule should bar any attorney from remaining a representative and testifying as a witness. *Id.* at 2. OFCCP opposes the motion, but begins by stating that it “does not intend to call any Solicitor’s Office attorney as a witness.” PO at 26. It argues that the motion should still be denied because there are situations in which an attorney can testify as a witness and continue to represent a party. In OFCCP’s view, any specific determination of whether its attorneys can testify and whether hearsay, for instance, prevents that testimony (or parts thereof) should be left to trial. *Id.*

I do not reach the merits of this motion or entertain OFCCP’s hypothetical suggestions. OFCCP represents that none of its attorneys will testify, which is confirmed by the joint witness list filed on November 21, 2019. Since there will no attorney witnesses, there is no need for an order barring attorney witnesses. Oracle’s Motion in Limine #12 is denied as moot.

N. Oracle's Motion in Limine #13

Next Oracle requests that the hearing be bifurcated into a liability and, if necessary, damages phase and that during the first phase “any evidence or argument regarding damages should be excluded.” DM12 at 1. Oracle avers that OFCCP intends to pursue a pattern or practice case under *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) and argues that *Teamsters* generally requires separating cases into liability and damages phase, with individual relief being determined in the damages phase, a practice that has become commonplace in such cases. DM12 at 1-2. Further, Oracle contends that as a matter of law it is entitled to individual determinations of damages, pointing to the rejection of “Trial by Formula” in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366-67 (2011), and the provision for individualized determinations of backpay damages. DM12 at 2-3. In addition, Oracle argues that in this case some individualized determinations are necessary to prevent windfalls to some “class” members and under-compensation to others, given that Dr. Madden broadly aggregated across groups. Oracle rejects the idea that a lump sum might be paid to OFCCP, which it then allocates individually, arguing that it “would usurp the Court’s [sic] role as factfinder and eliminate Oracle’s due process right to an individualized determination of each employee’s eligibility for backpay. *Id.* at 3-4; *see also* DMX I.

OFCCP opposes the motion, contending that this is Oracle’s fourth attempt to bifurcate the case, with the first three coming in 2017. PO at 27. OFCCP argues that class-wide formula relief, rather than damages based on individualized determinations of loss, is available in OFCCP cases, pointing to a number of cases where this approach was taken, including some after the Supreme Court’s *Dukes* decision. In OFCCP’s view, since formula damages can be awarded in cases under EO 11246, there is no need to bifurcate the hearing. *Id.* at 27-28. OFCCP adds that Oracle is attempting to have evidence weighed at this stage by contending that a formula will result in a windfall to some employees and under-compensation to others.¹⁰ *Id.* at 28.

I do not reach the parties arguments about the proper way of calculating damages. The motion to bifurcate the hearing is granted on pragmatic grounds. Attempting to prove and decide damages at this stage would introduce unnecessary complexity and confusion into already difficult proceedings. I have reviewed the expert reports, and the extant evidence of damages is very general and presented in broad outline. As OFCCP acknowledged in the Joint Pre-Hearing Statement and in response to Oracle’s last motion in limine, it may be necessary to require recalculation and determinations based on the findings as to liability. But if OFCCP acknowledges this point and wants an opportunity later to supplement the record on damages based on the liability finding, if the evidence presented doesn’t establish the proper award, it should not oppose Oracle’s motion for bifurcation.

Bifurcating hearing causes some inefficiencies in that a second hearing may be necessary. But it reduces inefficiencies in that if there is no liability, resources were not expended on showing damages. It also streamlines the first proceeding, simplifying the issues in play and eliminating any need for the parties to present and argue evidence related to damages. Moreover, even if liability is found, it may be possible to streamline the process for making a damages determination given the

¹⁰ I do not reach this particular argument now, but I do not quite follow OFCCP’s point. Oracle pointed only to a statement from Dr. Madden. More importantly, the point seems obvious—any formula relief will result in better than expected outcomes for some and worse than expected outcomes for others. That’s just what happens in formula relief. This might be an acceptable deficiency, given impracticalities of other ways of computing damages.

liability findings. The arguments of the parties about the form that damages should take will be considered at that time, if necessary.

In its opposition, OFCCP contends “formula relief without bifurcation is the normal practice in OFCCP cases alleging systemic discrimination under the Executive Order.” PO at 28. At the pre-hearing conference, counsel for OFCCP represented that EO 11246 cases have never been bifurcated. But this is incorrect. In *OFCCP v. Bank of America*, No. 1997-OFC-16, a case that OFCCP relies upon in its briefing here, the ALJ bifurcated liability and damages. *See* No. 1997-OFC-16, slip op. at 3 (ALJ Sept. 17, 2013) (Recommended Decision and Order Awarding Damages). Although OFCCP properly relies on *Bank of America*, for use of formula relief, it improperly equates this point as a conclusive reason not to bifurcate the hearing.

Though I grant the motion as to the bifurcation of the hearing, I do not grant the motion as to a blanket order excluding all evidence of damages. Consideration of damages is part of the expert reports and I will not excise portions of reports that are better understood and evaluated as a coherent whole. Part of showing discrimination is showing harm, and testimony going to damages is a component of this liability showing, even if it is unnecessary to delve into particularities.¹¹ Considerations of damages can also provide context to other opinions and the methodologies in use. Indeed, evidence related to damages could be something that the parties wish to pursue with the experts on credibility lines. In short, a blanket exclusion is improper. However, the parties do not need to prove or contest damages at this stage and testimony about damages should be narrow and brief, to provide the necessary context only. I do not intend to permit extended testimony on the subject, since the details of the calculations and results will be considered, if necessary at a later date.

O. Oracle’s Motion in Limine #14

Last, Oracle moves to exclude “argument or evidence in support of a salary discrimination claim and any damages related thereto by OFCCP.” DM14 at 1. Oracle argues that OFCCP did not plead a salary discrimination claim and should not be permitted to pursue one at hearing. In Oracle’s understanding, OFCCP pled a total compensation discrimination claim and the damage calculations of its expert are based on total compensation. It accuses OFCCP of raising a distinct salary discrimination claim for the first time during the summary judgment briefing. Since Oracle contends there is no salary discrimination claim in the case, it asserts that no evidence of salary discrimination is relevant. *Id.* at 1-3. It adds that there is currently no salary discrimination damages evidence, which it asserts means that OFCCP is now barred from offering additional evidence of damages under Rule 37(c)(1). *Id.* at 3-4. Finally, Oracle argues that the evidence should be excluded on the grounds that it will be a waste of time, arguing that a claim for discrimination must be supported by a showing of harm or damages, and since there is no evidence of salary discrimination damages, there can be no successful claim. *Id.* at 4.

In response, OFCCP contends that Oracle is misrepresenting the SAC. OFCCP asserts that the operative complaint included a salary discrimination claim and prior analyses were based on salary, putting Oracle on notice of a salary discrimination claim from the outset. OFCCP explains that in its view, alleging “compensation discrimination” includes claims for salary discrimination, along with other forms of compensation discrimination. It maintains that the Second Amended

¹¹ Oracle’s last motion in limine presses the point that if there is no evidence of damages, there can be no finding of liability since there is no proof of harm. *See* DM14 at 4. I do not follow, then, its shift here from a motion to bifurcate liability and damages to a motion to exclude *all* evidence of damages.

Complaint proceeded on this basis. PO at 28-30. Next, OFCCP argues that Dr. Madden's report did include discussion of base pay or salary discrimination, something it asserts Oracle did not respond to.¹² *Id.* at 30. OFCCP allows that Dr. Madden's damage calculations depended on Medicare compensation, which is a measure of total compensation, but deems Oracle's position "nonsensical." OFCCP argues that damage calculations can be modified by an ALJ and OFCCP could be ordered in the future to submit additional evidence of salary discrimination. *Id.* at 31-32.

OFCCP's last position renders its opposition to bifurcation somewhat curious. It wants the opportunity to be able to present additional evidence and calculations of damages if the current record is insufficient, but does not want to bifurcate liability and damages. This doesn't add up—I am not going to adopt a "bifurcation if and only if it helps OFCCP" approach. In any case, Oracle's motion for bifurcation has been granted, and its argument here that the lack of damage calculations as to salary discrimination does not square with its earlier advocacy of bifurcation. If the hearing is bifurcated, damages, if any are awarded, would be a matter for later litigation and both parties could proffer additional evidence based on the liability findings.

The substance of this motion is resolved by the discussion of an allegedly independent salary discrimination claim in the order on the cross-motions for summary judgment. To put it roughly, OFCCP pursued an argument that there was a distinct salary discrimination claim, that Oracle did not rebut it because its expert focused on total compensation, and that therefore it should prevail. In this motion, Oracle returns the favor, arguing that the claim must fail as a distinct claim because OFCCP's expert at times focused solely on total compensation. In the order on summary judgment, I rejected the premise that a salary discrimination claim is a distinct sort of claim from total compensation discrimination. The claim is for compensation discrimination, which can be looked at in different vantages using different metrics. The parties have lost sight of the real issue. Ultimately the question is whether the finder of fact draws an inference that a protected group has been harmed and that harm is due to intentional discrimination by the employer. It would be peculiar to draw that inference in terms of salary but not in terms of total compensation, insofar as both are sensible measures for an employee (some employees don't have salaries; for some total compensation just *is* salary). Salary is a component of compensation and one way to look at compensation.

At the summary judgment stage, this meant not following OFCCP's line of argument. The same result follows for Oracle's argument here. Evidence of "salary discrimination" is just a form of evidence of compensation discrimination, which is squarely at issue. Insofar as there are significant departures in the evidence for total compensation and salary, this is something that both parties could explore. But the issues are interrelated and the findings will be interrelated. The evidence thus remains relevant and Oracle's Motion in Limine #14 is denied.

ORDER

For the reasons stated above:

¹² This is a little bit difficult to follow. OFCCP's response to the shifting language in the SAC is to point out that salary discrimination is a more particular type of the more general compensation discrimination, or at least this is how I understand the argument. But if this is so, Oracle should not be held to a different, more particular standard for rebuttal.

1. OFCCP's Motion in Limine to Exclude Trial Evidence and Testimony Related to Subjects in Which Oracle Refused to Provide Discovery Based on Privilege or Relevance is denied in part as moot and otherwise denied.
2. Oracle's Motion in Limine #1 to Exclude Expert Evidence Not Contained in the Timely Reports of Dr. Janice Fanning Madden, Ph.D. is granted in part and denied in part. The motion is denied as moot insofar as it seeks to exclude lay evidence of statistical analyses. The motion is granted as to the late declaration/reports of Dr. Madden dated October 11, 2019, October 31, 2019, and November 7, 2019, containing new statistical analyses not contained in the timely reports. Insofar as the motion sought to exclude more than these additional analyses, it is denied on the grounds that the issues are not properly presented for in limine determination.
3. Oracle's Motion in Limine #2 to Exclude Evidence of Pre-2014 Job Assignments is denied.
4. Oracle's Motion in Limine #3 to Exclude Evidence Related to Alleged Post-Audit Violations is denied.
5. Oracle's Motion in Limine #4 Re: OFCCP's Position Statement on Oracle Managers is denied without prejudice to raising the issue at hearing if such evidence is presented.
6. Oracle's Motion in Limine #5 Re Oracle's Compensation Analyses is denied, though the parties should take care to make appropriately limited arguments on the subject, as discussed above.
7. Oracle's Motion in Limine #6 to Exclude Evidence of Complaints and Anecdotal Evidence Unrelated to the Claims and Job Functions at Issue is denied without prejudice to renewing the objection to specific testimony and evidence.
8. Oracle's Motion in Limine #7 to Preclude OFCCP from Offering Evidence Not Produced During Discovery is denied.
9. Oracle's Motion in Limine #8 to Exclude Interview Notes and their Contents is denied.
10. Oracle's Motion in Limine #9 for an Order Excluding Evidence or Argument Regarding Oracle's Net Worth, Income, Dividends, or Executive Compensation is granted as to executive compensation and denied as to basic background information about Oracle.
11. Oracle's Motion in Limine #10 to Exclude Evidence of Disparate Impact is granted in part and denied in part. It is denied as to evidence going to a disparate impact theory based on the alleged policy or practice of relying on prior pay. It is otherwise granted, except that evidence relevant disparate treatment theories remains admissible.
12. Oracle's Motion in Limine #11 to Exclude Evidence Related to the Resolved Hiring Claim is denied without prejudice to renewing the objection to particular evidence related to the hiring claim.

13. Oracle's Motion in Limine #12 to Exclude Testimony by Attorneys From the Office of the Solicitor is denied as moot.
14. Oracle's Motion in Limine #13 for an Order Bifurcating the Hearing and Excluding Any Evidence or Argument of Damages from the First Phase Regarding Liability is granted in part and denied in part. The motion is granted as to the bifurcation of the hearing. The hearing beginning December 5, 2019, will concern liability. If liability is found, damages will be decided at a later date, with the parties being given an opportunity to brief the manner of determining damages, submit evidence, and make arguments. The motion is denied as to the exclusion of all evidence related to damages. The expert reports will be admitted in full and some evidence of damages may be offered insofar as it provides context, explicates methodology, or probes credibility. Detailed, extensive evidence of damages will not be permitted.
15. Oracle's Motion in Limine #14 to Exclude Evidence of "Salary Discrimination" and any Damages Related Thereto is denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge