U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 16 May 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 GRANTING IN PART AND DENYING IN PART OFCCP'S MOTION TO COMPEL HISTORICAL DATA OF COMPARATOR EMPLOYEES

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 has been pending at the Office of Administrative Law Judges ("OALJ") since January 17, 2017. The operative Second Amended Complaint ("SAC") was filed on March 13, 2019, and answered on April 2, 2019. On April 10, 2019, OFCCP filed a Motion to Compel Historical Data of Comparator Employees, along with a Memorandum of Points of Authorities in support of the motion ("PM"), a Declaration of Jeremiah Miller, and a Declaration of Laura C. Bremer accompanied by eight exhibits.[1] On April 24, 2019, Oracle filed an Opposition to OFCCP's Motion to Compel Historical Data of Comparator Employees ("DO"), along with a Declaration of Kathryn G. Mantoan with eight exhibits, and a Declaration of Kaushik Buddhadev with one exhibit.[2]

For the reasons set forth below, OFCCP's Motion to Compel Historical Data of Comparator Employees is granted in part and denied in part.

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[1] The Bremer declaration and accompanying exhibits provide relevant history, including the meet and confer correspondence. I consider the exhibits only as documentation of the history, not as additional argument. The Miller declaration explains the creation of a chart at PM 9. Oracle contends that the Miller declaration and accompanying chart should be given no weight because Mr. Miller is an attorney without relevant statistical expertise and the purported analysis is misleading. DO at 14-15. The declaration only purports to explain the chart, not offer additional statistical opinions. I do not find the chart useful in understanding the point OFCCP is making, so I do not reach the question of whether or not it is misleading or an improper analysis.

[2] The Buddhadev declaration and accompanying exhibit relate to the burden on Oracle of complying with the request in question. The Mantoan declaration and exhibits provide additional information about discovery in the case, exchanges between the parties, and the text of some of the articles cited by OFCCP. Again, I treat the exchanges between the parties as evidence that a dispute emerged and the parties met and conferred about it, not as additional source of argument.

Legal Standard

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 rules 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. This motion concerns production of documents, which is governed by 41 C.F.R. § 60-30.10:

> (a) After commencement of the action, any party may serve on any other party a request to produce and/or permit the party, or someone acting on his behalf, to inspect and copy any unprivileged documents, phonorecords, and other compilations, including computer tapes and printouts which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

41 C.F.R. § 60-30.10(a); *see also* Fed. R. Civ. P. 34. "Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time and place for making the inspection and performing the related acts." 41 C.F.R. § 60-30.10(c).

Rule 26 of the Federal Rules of Civil Procedure fills in the necessary background governing the scope of discovery:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). Further:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Fed. R. Civ. P. 26(b)(2)(C).

If a party believes that disclosure or discovery responses have been inadequate, it may, after conferring or attempting to confer in good faith, file a motion compelling discovery, including a motion to produce documents. 41 C.F.R. § 60-30.10(d); Fed R. Civ. P. 37(a)(1), (3)(B)(iv). If a motion to compel is denied or denied in part, the court may issue a protective order under Rule 26(c) limiting the requested discovery. Fed. R. Civ. P. 37(a)(5)(B)-(C). Under Rule 26(c), a court

"may for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, among other things, forbidding or limiting the discovery. Fed. R. Civ. P. 26(c)(1).

Discussion

Background

The regulations governing OFCCP envision a sequential enforcement process: first OFCCP investigates government contractors through compliance evaluations in sequential steps, *see* 41 C.F.R. § 60-1.20(a); next, if there is an indication of a violation, OFCCP engages in reasonable conciliation efforts, 41 C.F.R. § 60-1.20(b); last, if that fails OFCCP may pursue enforcement via litigation, 41 C.F.R. § 60-1.26. Discovery is permitted during litigation and can serve to refine the complaints identified in the investigation. *See generally* 41 C.F.R. §§ 60-30.09, 60-30.10, 60-30.11. Here, considerable refinement has been permitted and the parties have already engaged in extensive discovery. Nonetheless, discovery should not be a substitute for investigation and is appropriately limited to the issues specified in the complaint that serves as the basis for the litigation.

This is fully in keeping with discovery generally and Rule 26. In the context of Rule 26, "relevance" is "constructed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978). But in the current form of Rule 26, discovery must be relevant to the claims and defenses pled in the case—discovery is not a tool "to develop new claims or defenses that are not already identified in the pleadings." Fed. R. Civ. P. 26 Advisory Committee Note to the 2000 Amendment to Subdivision (b)(1). Hence, discovery in this case must be relevant to the claims and defenses at issue in the SAC. Development of new or alternative claims is not proper use of discovery—neither is a generalized governmental interest in the study of Oracle's total compensation program over a period of decades.

The operative SAC makes various allegations of discrimination post-dating January 1, 2013. *See, e.g.*, SAC ¶¶ 11-13. The crux of the complaint as it now stands[3] is OFCCP's allegation that, during the relevant period (January 1, 2013, and continuing), at its headquarters facility, and in the relevant job functions (Product Development, Information Technology, and Support), Oracle "discriminated against its employees by paying female, Asian, and Black employees less than comparable male of White employees." PM at 1 (citing SAC at ¶¶ 12-32). The SAC added a derivative or alternative claim that Oracle engaged in a sort of "job assignment" discrimination, resulting in the disparities in compensation. *See* SAC at ¶¶ 19-22. It also added an alleged "mechanism" causing the disparities: "reliance on prior salary in setting compensation for employees upon hire." *Id.* at ¶ 32. Although pre-2013 compensation information may be relevant to the case, it is only relevant insofar as it relates to instances of discrimination that occurred in 2013 or later. Pre-2013 discrimination would need to be the subject of different proceedings, perhaps in a different forum. And if OFCCP wishes to pursue such claims, it would need to follow its own regulations and procedures in doing so.

[3] The SAC also included various recruitment/hiring discrimination complaints and related record-keeping/compliance complaints. That aspect of this matter was resolved via consent findings adopted in an April 30, 2019, order.

Discovery in this case has been extensive. In addition to material procured in the compliance investigation, OFCCP has served seven sets of requests for the production of documents with over 230 distinct requests. In its compliance investigation and previous discovery, OFCCP has been provided with a great deal of compensation data about Oracle employees. The parties do not dispute that OFCCP has been given or will be given the complete compensation history going back to 1985 for every Oracle employee in the relevant job categories who was employed at any point between January 1, 2013, and January 18, 2019. PM at 1-2, 7, 10; DO at 1, 5-6.

So if Employee A was hired into one of the relevant job functions in 1992 and has remained with Oracle, OFCCP has compensation data for that employee not just for the class period, 2013 onwards, but going back through that employee's entire Oracle tenure, from 1992 onwards. If Employee B joined the company in a relevant job function in 1992 and then left at the start of 2014, OFCCP has all of the compensation data for that employee from 1992 to 2014. What OFCCP does not yet have is the compensation data for a hypothetical Employee C who joined the company in 1992 and left in 2012. Since that employee was never employed by Oracle in a relevant job function in the relevant period, Oracle has not provided compensation information about that employee to OFCCP. And it is precisely that information that OFCCP now wants.

Contentions of the Parties

OFCCP claims that this additional historical information is "necessary to analyze compensation claims for more than 70% of employees covered by this lawsuit" on the grounds that these other employees are required "comparators" of employees in the covered classes who joined Oracle prior to 2013, resulting in a "biased subset of the full sample affected." PM at 1, 7-8. As to why it needs this data, OFCCP points to its efforts to "identify and analyze the mechanisms through which discrimination is occurring." PM at 1. Of particular relevance is OFCCP's theory that the starting pay of the affected groups is lower than their peers and that this results in the suppression of pay over time. *Id.*

OFCCP contends that its current data is subject to selection bias because it only includes those employees who stayed at Oracle into the relevant review period. It claims that it is "necessary" to have all of the data in order to run an analysis of the effects of starting pay through a career and to analyze how pay changes through a career. *Id.* at 2-5, 8, 10-11. It represents that it is interested in both starting pay and in how tenure affects pay disparities. *Id.* at 8. While OFCCP acknowledges that the additional data will add no members to the subject classes, it asserts that the additional data is necessary to analyze the claims of the classes in the case. *Id.* at 11-12.

OFCCP thus asks that Oracle be ordered to immediately turn over the full data for all of its employees in the relevant job functions (Product Development, Information Technology, and Support) stretching back to the 1985 so that OFCCP may conduct additional analyses. *Id.* at 5, 7-8. In the alternative, OFCCP asks that Oracle be barred from "any challenge to OFCCP's statistical analysis on the basis that it includes only a subset of the pertinent data." *Id.* at 6.

Oracle has a rather different understanding. It contends that it has already produced or will produce "massive amounts of information." DO at 1. It avers that this request is "a broader fishing expedition at the eleventh hour." *Id.* at 2. Oracle also argues that there is no authority to support such an unbounded production of data and that compelling production would "eviscerate the

liability period" and lead to an untethered inquiry into the compensation of all employees at all times. *Id.* at 7-9. Oracle questions how OFCCP could bring the allegations it has if its data is as deficient as it now contends and why OFCCP has waited until now to make its request. *Id.* at 1, 7.

Oracle also argues that the compensation for the 12,000+ additional employees who left Oracle prior to the relevant period are not relevant to the case and that they do not function as "comparators" for the class members because they never worked in the relevant job functions during the class period. *Id.* at 1-2, 9-10. It asserts that OFCCP has failed to point to law justifying its request and that similar cases favor denying the request in this instance. *Id.* at 2. Further, Oracle disputes that there is any bias, selection or otherwise, in the data it has produced and contends that it was OFCCP, not Oracle, that set the parameters on which employees were relevant to the case and defined the relevant period and employees involved. *Id.* at 1, 3-4, 6, 9, 12-14.

In addition, Oracle argues that production of the requested additional data would be "incredibly burdensome." *Id.* at 2; *see also id.* at 5-7. It contends that the data in question is of very limited and only speculative benefit to the issues being litigated in the case and that the burdens of production outweigh any benefits. *Id.* at 15-18. Finally, Oracle contends that a pre-emptive evidentiary sanction is both unsupported by law and premature. *Id.* at 2-3, 18.

OFCCP's motion is somewhat confusing. It represents that the additional data is necessary and decries the biases and flaws that would result if the data is not provided. But if this is true, Oracle's question, *see* DO at 1, 7, is apt: why wasn't this data sought during the investigation or earlier discovery? OFCCP has been investigating Oracle since September 2014, over four and a half years. It has filed three complaints making sweeping allegations regarding discrimination at Oracle. It has publicized its findings. If it turns out that the entire investigation and the prior allegations against Oracle were based on a flawed analysis due to the absence of absolutely necessary information, wouldn't the natural course be to retract its allegations and return to its investigative phase to procure and analyze the relevant data, determine what conclusions follow, properly conciliate any allegations, and pursue litigation only if conciliation fails? Those may be questions for another day. The question now is whether the additional data is discoverable.

Is the Data Necessary?

Upon review, it becomes evident that OFCCP's claims of necessity are much overstated. To understand why the data is being requested, one must understand the claims at issue in the case and what OFCCP will need to establish. The SAC contains many allegations of disparities, but rather less on the explanation of the legal wrong that constitutes the violation. OFCCP's moving papers here repeatedly claim necessity, but do not thoroughly explicate what exactly the theory of the case is that might make the information necessary. Absent a clear explanation of exactly what OFCCP is contending and how this data fits in, I turn to general principles in these sorts of actions.[4]

EO 11246 uses the legal standards developed under Title VII, 42 U.S.C. § 2000e. *See, e.g., OFCCP v. Honeywell*, 1977-OFC-00003, slip op. at 7-8 (Sec'y June 2, 1993). Violations of Title VII

[4] In this discussion I do not mean to limit OFCCP's legal theories or make determination on the validity of any legal theory. The point, rather, is that in order to assess relevance I need to understand how the data would fit into the legal theories and claims being pursued. In the absence of explanation from OFCCP, I must resort to some gap-filling. If OFCCP has a legal theory that makes the requested data necessary or more relevant, it should have better articulated that theory in moving to compel the data's production.

can be based on either a disparate treatment or disparate impact theory. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). In a disparate treatment claim, the plaintiff asserts that the defendant is treating people differently because of an impermissible factor. 42 U.S.C. § 2000e-2(a)(1). A showing of discriminatory intent is required, "although it can in some situations be inferred from the mere fact of differences in treatment." *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15 (citing *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977)).

In a disparate impact claim, however, it is not necessary to prove intent. Rather, the plaintiff must show that the defendant uses a facially neutral employment practice that causes a disparate impact on a protected group. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988) ("the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination"); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *cf. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) ("a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity"). More formally put, "[i]n order to establish a prima facie case of disparate impact, the plaintiff must: (1) identify the specific employment practices or selection criteria being challenged; (2) show disparate impact; and (3) prove causation." *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990).

OFCCP's pleadings have thus far focused on disparities. Its showing of discrimination could proceed on either sort of theory and take a variety of forms. But to understand why the requested information might be necessary or relevant, it is only important to understand the broad lines of argument that might support the claims in the SAC. The violations at issue in this claim relate to the period after January 1, 2013, Oracle's headquarters, and the three specified job functions. OFCCP already has all of the data bearing on that period—it has or will soon have *full* compensation histories to 1985 for *all* employees who worked in one of the specified job functions at Oracle's headquarters at any point after January 1, 2013.

Any claim for compensation discrimination must be based on discrimination that occurred after January 1, 2013. In showing the disparity that is the basis for the claim, OFCCP must rely on compensation data for employees in the class as compared to other employees at Oracle's headquarters, in the relevant job functions, and at some point after January 1, 2013. These other employees represent the "true comparators." OFCCP already has the full information for the true comparators (and class members), which is why it has been able to make the allegations it has. It appears, then, that OFCCP has everything it needs to show any disparities actionable here. And since it has the compensation history of all class members and true comparators, it has what it needs to connect any disparity as to those employees to a past employment practice.

If OFCCP were tasked with determining whether Oracle ever discriminated in any manner whatsoever against anyone, then the data in question would be necessary. But that's not what OFCCP has alleged here. OFCCP has made a series of claims and this case is about whether OFCCP can prove *those* claims, not a search for new ones. So OFCCP's broad assertions of necessity are not compelling. Tellingly, OFCCP submitted no declaration or other evidence from a suitable expert that explained *why* the data was as necessary as its moving papers claimed.

Is the Data Relevant?[5]

Still, the test is relevance, not necessity. Proof of the legal wrong requires more than *just* a disparity. Since OFCCP's analyses have focused on disparities, it has focused on compensation information in the relevant class period. But in refining and fleshing out its claims, other aspects of OFCCP's case might render earlier periods of time relevant. It is unclear how the requested data could be relevant to a disparate treatment claim. But matters are different for a disparate impact claim. One of the theories asserted in OFCCP's SAC is that the cause of the disparities it contends exists in the relevant class period are the manner in which starting salaries are set, and in particular the use of prior compensation as a basis for starting salary. SAC at 32. On this theory, the cause of the disparity in the class period is a discriminatory practice in an earlier period.[6]

As discussed above, to make out its initial showings on such a claim, OFCCP would have to show a disparate impact disfavoring a protected class, that Oracle engages in a particular employment practice, and that the particular employment practice causes the disparate impact. The requested data is not relevant to the claim of a disparate impact—this is the same point discussed above: the class period at issue in this case started in 2013 and so if there is a disparate impact that is actionable here, it occurred in 2013 or later. The requested data also isn't relevant to the question of whether Oracle engaged in a particular employment practice or had a policy. However, the data in question could be relevant to the causal showing. The theory is that some practice in the past created a disparity in the present. Evidence about where the disparities come from historically, and how they develop (or dissipate) over time *could* assist in the showing. It could also undermine the theory.

The compensation data being requested is not for any individuals who are members of the class and not for any of the true comparators of the class members. It would allow OFCCP to look for past discrimination outside the class period, which theoretically could be relevant to show discrimination continuing into the class period. How relevant and important is that data? OFCCP already possesses a great deal of data that can be used to analyze historical compensation practices, including disparities in starting pay and the way compensation changes over time: it already has the historical compensation data for all actual class members and actual comparators. The additional data would be more important if there is some bias or deficiency in the data that OFCCP currently possesses.

At times OFCCP charges that Oracle has in some way selected or biased the data set. *E.g.* PM at 5, 8. As Oracle persuasively argues, *e.g.* DO at 12-14, this is a meritless claim. OFCCP, not Oracle, specified the data set in question because it defined the actual class and has pursued its investigation and prior discovery on that basis. Oracle gave OFCCP *decades* of data for *every*

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[5] Part of OFCCP's argument relies on a claim that the data is relevant to the "subject matter" of the suit and so subject to discovery. It relies on cases from 1979 and 1980 for this point. *See* PM at 12. The argument misses the mark, however, because the relevant federal rules have changed in at least two important ways from the time of those cases. First, relevance is assessed as to the claims and defenses in a suit, not the general subject matter in the suit. The subject matter here is "discrimination" but the claims and defenses are more narrowly confined. Second, the scope of discovery now explicitly incorporates judgments of proportionality.

[6] Oracle disputes the legal theory behind this claim and, broadly, whether claims based on conduct occurring outside the relevant period are actionable in this matter. DO at 3 n.2. Nonetheless, this is discovery and OFCCP is entitled to discovery on the "live" claims made in its complaint. The theory in question as at least legally cognizable. *See* 42 U.S.C. § 2000e-5(e)(3)(A). I do not understand Oracle to be opposing discovery on these grounds; rather, it is noting its objection and preserving the argument for later adjudication.

employee in the relevant categories. The only limitation on selection was the one that OFCCP started with—employees who were employed in the class period. The insinuation that Oracle has somehow sullied the data is wholly inappropriate. OFCCP cannot seriously argue that Oracle biased its sampling by providing information for all of the employees OFCCP requested until the fifth year of the investigation/litigation.

The real question is whether there is a bias, not who would be to blame for it. Oracle argues that there has been no showing, or even evidence, that there is any bias in the data that OFCCP already possesses. It contends there is no reason to think that the compensation histories for these employees somehow skews the analysis in Oracle's favor. DO at 13-14. OFCCP suggests that there is some sort of selection bias in looking at only the employees who remained at Oracle, speculating that women and minorities may have left in disproportional numbers or that employees who stayed may represent exceptions. PM at 4, 10-11. This somewhat misses the mark. If, as OFCCP speculates, female or minority employees who were discriminated against in terms of starting salary (or changes over time) left due to Oracle's discrimination, that would potentially be an actionable case. But it's not one that OFCCP can bring in this litigation. In *this* litigation OFCCP has alleged that Oracle discriminated against women and minorities in the three job categories from January 1, 2013, and continuing.

OFCCP's sounder worry is that departures from the relevant workforce could bias the present dataset. But as Oracle points out, it is just as likely that the employees left because they were more successful or talented or received a better offer. DO at 14. It is equally plausible that the employees left because they moved or retired—OFCCP is demanding access to employee data covering a period of over 30 years. More importantly, OFCCP has provided no basis to conclude that any of these potential factors would skew the data in a way relevant to this case—the factors seem to bear equally on employees regardless of sex or race. At the least, OFCCP should be able to explain more concretely the basis for its claims of data bias. Here it is purely speculative. OFCCP produced no declarations or other evidence that would substantiate the speculations in its brief. It produced no expert evidence or declaration that explains the dire need for the data.

Nonetheless, the data requested by OFCCP remains in some sense relevant—it could bear on the claims at issue in this case because it would provide more information about how class-period disparate impacts could be the result of past discriminatory practices. It would at least provide more information that could make out and trace the relevant connections. This relevance is limited and dissipates with time. The further away we get from the class-period and consider the pay history of individuals who left Oracle well before the period directly relevant to this case, the less bearing the information is likely to have on the relevant legal questions. It would continue to assist in a broad based analysis of Oracle's entire compensation practices over the last 34 years, but that isn't what this case is about.

Is the Discovery Proportional?

Rule 26 does not end with a determination of relevance. The scope of discovery must also be

> proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the

> issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed R. Civ. P. 26(b)(1).

OFCCP asserts that it is "unclear" why production of the data would be burdensome to Oracle but that it "is entitled to this information despite any burden Oracle might incur." PM at 12. It also asserts that there can be "no credible assertion" that the requested discovery is disproportionate to the scope of the case and damages at issue, pointing to the public policies served by EO 11246, the large amount of damages asserted, and the number of employees involved. *Id.* at 13.

Oracle disagrees, stating that the production data would be "incredibly burdensome" and take at least eight weeks to complete. *Id.* at 2. It represents that prior compliance with OFCCP's demands have diverted its resources from operations and involved hundreds of hours of work, ongoing agreed production has also required hundreds hours of work, and expanded production would add a substantial burden. *Id.* at 5-7. Oracle contends that the data in question is of very limited and speculative benefit to the issues being litigated in the case and that any benefits are outweighed by the extensive burdens in making this case into an unbounded inquiry into all employment decisions stretching back decades. *Id.* at 5-7, 15-18. Oracle's claims are supported by the declaration of Ms. Buddadev and its accompanying exhibit, which indicate complying with OFCCP requests has already interfered with Oracle's operations and that retrieving legacy data for more than 12,000 former employees would be very burdensome, requiring the creation, testing, refinement, and application of new scripts to pull the relevant data from its sources. As to the policy interests, Oracle counters that there are other policy interests at stake as well—such as not exposing the complete salary histories for thousands or employees who were never employed by Oracle in the class period. DO at 12.

Rule 26(b)(1) requires considering several factors, starting with the importance of the issues in the case and the amount in controversy. These factors slightly favor OFCCP. There are no doubt important public policy interests at stake, numerous affected parties, and assertions of large amounts of damages. *See* Fed. R. Civ. P. 26 Advisory Committee Note to the 2015 Amendment; *see also Oxbow v. Cardon & Minerals LLC v. Union Pac. R.R.*, 322 F.R.D. 1, 7-8 (D.D.C. 2017). But the scope of discovery has already been extensive, involving complete (to 1985) compensation histories for all class members and all true comparators. Oracle has not been meagre in its productions. There are other policy interests at stake: preventing the use of discovery as a substitute to the proper investigatory scheme, worries about unbounded discovery by a government agency resulting in unending investigation, and the privacy interests of the thousands of former employees who stand to have their entire Oracle salary histories divulged to the government. Moreover, providing the expanded total company compensation history only appears proportionate to the scope of the case if the scope of the case involves the total company compensation history. But *this* case is much more limited in scope: particular classes of employees employed in a particular slice of time. Hence while the amount in controversy and the importance of the issues in the case favor OFCCP, they do so only slightly.

The parties' relative access to the relevant information favors discovery in this instance. Oracle, not OFCCP, has access to the compensation data regarding its employees producing the sort of "information asymmetry" that weighs in favor of discovery. *See* Fed. R. Civ. P. 26 Advisory

Committee Note to the 2015 Amendment; *see also Oxbow*, 322 F.R.D. at 8. The parties' resources also in some sense favor discovery. Oracle *could* comply with the request. That said, Rule 26 does not license unlimited discovery against wealthy parties just because they can afford it. *See* Fed. R. Civ. P. 26 Advisory Committee Note to the 2015 Amendment. While OFCCP speculated about the minimal burden on Oracle and expressed indifference to any burden it might impose,[7] Oracle submitted uncontested evidence indicating that the burden for this large of project would be substantial, expensive, and disruptive of Oracle's ordinary operations.

The importance of the discovery in resolving the issues in dispute favors Oracle. The question in this factor is whether the issues at stake in the discovery go to the heart of the litigation or a side issue. *See Oxbow*, 322 F.R.D. at 8; *see also Arrow Enter. Computing Solutions, Inc. v. BlueAlly, LLC*, 2017 U.S. Dist. LEXIS 30558, at *12 (E.D.N.C. March 3, 2017). While OFCCP has repeatedly said that the information in question is necessary, that claim has not been borne out. Since the actionable discrimination must occur in the class period, OFCCP already has all relevant comparators for an analysis of disparity. Compensation information for historical alternative-class-comparators only appears to go a showing that a particular employment practice is responsible for the disparate impact—but since OFCCP already has a great deal of information and can only speculate as to its potential deficiency, the discovery at issue appears to be of only peripheral, minor importance. "A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them." Fed. R. Civ. P. 26 Advisory Committee Note to the 2015 Amendment. Here, that party is OFCCP and while it offered repeated assertions, its explanation was insufficient.

The last consideration in the proportionality facet of Rule 26 is the overarching question of "whether the burden or expense of the proposed discovery outweighs its likely benefit." *See* Fed. R. Civ. P. 26(b)(1). This demands a difficult balancing: ascertaining this sort of proportionality demands "great familiarity with the case at hand" and "it can be quite difficult for a judge to determine whether discovery is disproportionate because a confident conclusion about what the case warrants depends on a fairly intimate familiarity with the particulars of the case and the parties' strategy." Wright and Miller, 8 Fed. Prac. & Proc. Civ. § 2008.1 (3d ed.). Here the balancing must be done based on what the parties have opted to provide about their theories of the case and the explanations of the importance of the requested additional information.

The importance of the case and public policy implications generally favor allowing extensive discovery, but not universally so. I am also cognizant that the public policy related importance of this case has already been matched with rather extraordinary discovery: compensation information for thousands of employees for their entire Oracle career back through 1985. The amount in controversy is very high, favoring compelling the discovery, though this factor is subject to the same limitations as the first factor. The relative access to the information favors compelling discovery. The parties' resources does as well, except that Oracle has shown that the extraordinary breadth of the request places it under a considerable burden even with its resources. The importance of *this* discovery in resolving the dispute is tenuous. From a detached perspective, the additional discovery could produce relevant evidence, but on a limited issue where OFCCP has already been provided

[7] OFCCP's attitude on this point is puzzling. There should be no question that pulling data from multiple databases to compile what OFCCP demands for over 12,000 employees on a tight, "immediate," timeline creates a substantial burden for any party, even a large corporation (or the government). OFCCP's seeming indifference to the massive costs imposed by its broad demands is contrary to the spirit of the rule (and the rules generally), which directs parties to consider and minimize the costs of litigation. *Cf.* Fed R. Civ. P. 1; 29 C.F.R. § 18.10(a).

ample evidence. Since OFCCP has not justified its claim that its data is somehow biased in an important way, at least in terms of its probative value relative to the particular claims at issue here, the discovery appears duplicative, lowering its benefit.

The burdens imposed by the proposed discovery are substantial. I am also mindful that OFCCP has pointed me to no case that orders production of data approaching the levels it is demanding, encompassing not just the complete compensation history of all class members and all true comparators, but compensation history for alternative class members and alternative comparators. The implications of this position are extraordinary—it would seem that any action alleging discrimination in a particular time frame would license unbounded discovery into all earlier timeframes on the potentiality that somewhere in the past some proof of discrimination perpetuating into the present may be found. That would be a large step to take, a step OFCCP is demanding without providing supporting justification or persuasive legal authority.

Considering all of the factors together and weighing the burdens and benefits of the proposed discovery, I find that discovery of compensation data for any individual who ever worked for Oracle in one of the job functions, without respect of when that person worked in that category, cannot be justified in this case. However, I also find that the factors weighing in favor of discovery justify allowing some additional discovery into a much shorter timeframe involving the three years prior to the class period. I will therefore compel Oracle to provide compensation histories for all Oracle employees at its headquarters in the relevant job functions who were employed in those areas at some point between January 1, 2010, and January 1, 2013. This is in addition to the information Oracle has already provided or agreed to provide.

The time period immediately preceding the class period is more likely to contain or lead to relevant evidence because it is more likely to be provide a useful comparison as to Oracle's compensation practices in reference to the class members. Employees in the relevant job categories who departed shortly before the class period are most similarly situated to those who were employed during the class period. In addition, the burden of discovery is substantially lessened by narrowing its scope and looking at more recent employees. The class period in this case was originally three years, though it has been expanded as this case has lingered. Any particular number of years is arbitrary. But adding three years immediately before the original three year class period allows OFCCP to explore its speculation that its data is somehow biased and would likely ameliorate any bias because those added are the closest alternative class/comparators to the actual class/comparators.

Alternative Request

OFCCP requested in the alternative that Oracle be barred from making various arguments contesting the accuracy its data. Oracle contends that this is premature and unwarranted. I agree that it is premature and will not pre-judge what arguments a party may or may not make—especially when I am not privy to what OFCCP's statistical analysis looks like or purports to show.

ORDER

1. OFCCP's Motion to Compel Historical Data of Comparator Employees is granted in part and denied in part.

2. Oracle is ordered to produce historical data for employees in the Product Development, Information Technology, and Support job functions at its headquarters for the period between January 1, 2010, and December 31, 2012. This is in addition to the production Oracle has already agreed to.
3. OFCCP's request for historical data for employees in the Product Development, Information Technology, and Support job functions at its headquarters prior to January 1, 2010, is denied.
4. Oracle shall produce the information as soon as practicable but within 25 days of the date of this order. *See* 41 C.F.R. § 60-30.10(d).

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge