



Issue Date: 06 March 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 CONDITIONAL LEAVE TO FILE
SECOND AMENDED COMPLAINT**

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. The Office of Federal Contract Compliance Programs, U.S. Department of Labor (“OFCCP”) alleges that Oracle America, Inc. (“Oracle”) engaged in race and sex discrimination at its Redwood Shores, California, headquarters. The case is set for hearing to begin on December 5, 2019. Currently pending is OFCCP’s Motion for Leave to File a Second Amended Complaint.

For the reasons set forth below, this motion is granted on the condition that OFCCP make two technical adjustments or clarifications that will facilitate more orderly development of this case.

I. Procedural Background

On September 24, 2014, OFCCP initiated a compliance review of Oracle’s headquarters facility with a review period of January 1, 2013, through June 30, 2014. OFCCP issued a Notice of Violation on March 11, 2016. On January 17, 2017, OFFCP filed its Complaint in the Office of Administrative Law Judges (“OALJ”). It filed a First Amended Complaint (“FAC”) on January 26, 2017, which Oracle answered on February 8, 2017. The case was referred to the San Francisco District Office of OALJ and assigned to Judge Christopher Larsen.

Since that time the parties have engaged in extensive motion practice, only some of which is currently relevant. In the first stages of this case, the parties negotiated a protective order to apply to materials produced in discovery. They reached agreement on all but one provision. Judge Larsen issued the agreed Protective Order (“PO”) on May 26, 2017, excising the disputed provision.

On June 19, 2017, Judge Larsen issued orders denying Oracle’s motion for judgement on the pleadings, denying Oracle’s motion for summary judgment on the grounds that OFFCP had not engaged in reasonable conciliation efforts, allowing discovery into periods beyond the compliance review, and

directing the parties to show cause as to why the filing date of the original complaint, January 17, 2017, should not be fixed as the last date of Oracle's alleged non-compliance in this action. In an August 14, 2017, order, Judge Larsen permitted OFCCP to argue that Oracle was engaging in ongoing discrimination up through the time of the hearing, but limited it to doing so with evidence procured prior to the discovery cutoff in the case.

On October 30, 2017, Judge Larsen issued an order staying the proceedings while the parties pursued mediation, which he extended several times. On October 12, 2018, however, OFCCP filed a motion to reassign the case in light of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), on the grounds that DOL ALJs were subject to the Appointments Clause, which Judge Larsen granted on October 15, 2018, and the case was re-assigned to me.

On November 13, 2018, I issued an order staying the proceedings until Oracle's further challenges under *Lucia* could be briefed and addressed. On January 11, 2019, I issued an order denying Oracle's Appointments Clause and related challenges. I convened a conference call with the parties on January 22, 2019, to discuss hearing dates. During the call, OFCCP announced that it would be filing a second amended complaint. It had not met and conferred with Oracle. Although the parties had been in mediation and had recently discussed hearing dates for the case, this call was Oracle's first notice the OFCCP would be filing another amended complaint. Counsel for Oracle requested that OFCCP provide the complaint and then meet and confer prior to filing, but OFCCP categorically refused to do so. I observed that the refusal was out of line with ordinary practice, but that I would not and could not compel OFCCP to give Oracle notice of the amended complaint.

Later on January 22, 2019, OFCCP filed its Motion for Leave to File a Second Amended Complaint ("MLA") along with its proposed Second Amended Complaint ("SAC"). On January 30, 2019, OFCCP filed a Notice of Errata making corrections to the SAC. Oracle filed an Opposition to OFCCP's Motion for Leave to File a Second Amended Complaint ("OLA") on February 5, 2019, supported by eight exhibits. OFCCP filed a Reply in Support of OFCCP's Motion for Leave to File a Second Amended Complaint ("RLA") on February 12, 2019, supported by four exhibits.¹

II. Legal Background

Executive Order 11246, as amended, provides that, with exemptions not relevant here, all federal government contracts shall include a clause prohibiting discrimination "against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin." It also imposes an "affirmative action" requirement. And it requires compliance reports and record-keeping. OFCCP is charged with enforcing the Executive Order. This is accomplished, in part, through compliance evaluations of government contractors. *See* 41 C.F.R. § 60-1.20. If investigation indicates violations, OFCCP engages in reasonable conciliation efforts. 41 C.F.R. § 60-1.20(b). If conciliation fails, OFCCP may seek to enforce the Executive Order by either referring

¹ One of the disputes arising out of the SAC concerns the applicability and meaning of the PO entered by Judge Larsen on May 26, 2017, and/or the effect of the parties' agreement underlying the PO. On February 14, 2019, Oracle filed a Motion for Entry of Protective Order, or, in the Alternative, For Order that Protective Order is in Effect Pending Resolution of Issues Concerning Protective Order. In addition to disputes concerning the meaning of the protective order and whether it was violated in the SAC, Oracle expressed concern that while it had produced documents in discovery in reliance on the PO and its agreement with OFCCP, OFCCP was indicated that based on the circumstances of reassignment the PO had no effect and did not limit OFCCP's use of documents and information. On February 20, 2019, I issued an Order Granting Temporary Protective Order that imposed Judge Larsen's PO for the time being and instructed the parties to meet and confer about an ongoing protective order and then file a status update. That process is ongoing and will be addressed separately.

the matter to the Solicitor of Labor for administrative enforcement beginning at OALJ, or to the Department of Justice to pursue judicial enforcement.² 41 C.F.R. § 60-1.26.

Administrative enforcement is governed by the “Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30.”³ 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. Proceedings are instituted by the filing of a complaint. 41 C.F.R. § 60-30.5(a).

The Complaint shall contain a concise jurisdictional statement, and a clear and concise statement sufficient to put the defendant on notice of the acts or practices it is alleged to have committed in violation of the order, the regulations, or its contractual obligations. The complaint shall also contain a prayer regarding the relief being sought, a statement of whatever sanctions the Government will seek to impose and the name and address of the attorney who will represent the Government.

41 C.F.R. § 60-30.5(b).

Complaints may be amended once “as a matter of course before an answer is filed.” 41 C.F.R. § 60-30.5(c). “Other amendments of the complaint or of the answer to the complaint shall be made only by leave of the Administrative Law Judge or by written consent of the adverse party; and leave shall be freely given where justice so requires.” *Id.* This tracks the way Rule 15 of the Federal Rules of Civil Procedure treats pre-trial amendment of pleadings.⁴ Fed R. Civ. Proc. 15(a)(1)-(2).

Leave to amend is “freely given where justice so requires.” “This policy is to be applied with extreme liberality.” *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102 (9th Cir. 2018) (internal quotation marks omitted) (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003)); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962); *Nation v. DOI*, 876 F.3d 1144, 1173 (9th Cir. 2017); *C.F. v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985 (9th Cir. 2011); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). But “[t]he liberal amendment policy prescribed by Rule 15(a) does not mean that leave will be granted in all cases.” Wright and Miller, 6 Federal Practice & Procedure Civ. § 1487 (3d ed.). The Supreme Court gave the following guidance in *Foman*:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’

371 U.S. at 182.

² Conciliation is not a prerequisite for referral to the Department of Justice. 41 C.F.R. § 60-1.26(c).

³ OALJ’s Rules of Evidence in 29 C.F.R. part 18, subpart B apply to the proceedings. *See* 41 C.F.R. § 60-1.26(b)(2). These rules are similar, in many respects, to the Federal Rules of Evidence.

⁴ Both the rules anticipate amendment absent the need for judicial intervention. If the opposing party agrees to an amendment, there is no need to involve the court or procure leave to amend. *See Am. States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 888 (9th Cir. 2003). OFCCP opted not to pursue this opinion in this case.

Thus, “[i]n assessing whether leave to amend is proper, courts consider ‘the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment.’” *United States ex. Rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989)); *see also Caswell v. Calderon*, 363 F.3d 832, 837 (9th Cir. 2004) (relevant factors are bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the pleadings were previously amended).

“These factors however, are not given equal weight. ‘Futility of amendment can, by itself, justify the denial of a motion for leave to amend.’” *SmithKline*, 245 F.3d at 1052 (internal citation omitted) (citing and quoting *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)). In weighing factors, “it is the consideration of prejudice to the opposing party that carries the greatest weight.” *Eminence Capital*, 316 F.3d at 1052 (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185 (9th Cir. 1987)). “Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.” *Id.* (emphasis in original) (citing *Foman*, 371 U.S. at 182; *Loverly v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 245 (5th Cir. 1997)).

A plaintiff is the master of its own complaint, but “leave to amend is not an all-or-nothing proposition . . . courts can choose instead to impose reasonable conditions on the right to amend in lieu of a pure grant or denial.” *Mullin v. Balicki*, 875 F.3d 140, 150 (3d Cir. 2017); *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1271 (11th Cir. 2006); *Allied Indus. Workers v. Gen. Elec. Co.*, 471 F.2d 751, 756 (6th Cir.), *cert denied*, 414 U.S. 822 (1973). Reasonable conditions may be based on the factors considered in deciding whether to grant leave to amend. *International Asso. of Machinists & Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1391 (9th Cir. 1985).

III. Discussion

OFCCP contends that the SAC “narrows and clarifies the issues in this case, simplifying the matters in dispute and providing a more direct path to the hearing in this matter.” MLA at 1. It avers that the SAC “narrows the hiring claims” by focusing on college and university hiring practices. *Id.* at 2. And per OFCCP, the SAC gives “a more precise statement of the information that Oracle refused to provide” during the compliance review and “clarifies what data is missing.” *Id.* In support of leave to amend, OFCCP points to the liberal rules permitting amendment to complaints and argues that there will be no prejudice to Oracle because discovery is open and the SAC narrows some issues while giving more detail to others. It also represents that it has acted in good faith and did not unduly delay filing, given that this case has been stayed and no filing could be made. *Id.* at 3, 8-10.

Oracle has a rather different perspective. It points out that this litigation has been pending for two years and that a great deal of discovery has been completed in addition to the lengthy compliance review. Oracle asserts the “discriminatory job channeling and the use of prior pay” allegations are “entirely new.” OLA at 1. It represents that OFCCP may not simply amend its complaints like another litigant, but must engage in conciliation on new claims. *Id.* Oracle speculates that OFCCP is amending its complaints either because it realized that its original claims lacked merit or because it wishes “to try this case in the press as a means of exerting pressure on Oracle—perhaps in coordination with private plaintiffs’ counsel.” *Id.* at 1-2; *see also id.* at 5-7. Oracle contends that OFCCP violated the stipulated protective order in the amended complaint due to its focus on “making headlines.” *Id.* at 2. Further, Oracle believes that the SAC is deficient in relying on analyses outside the review period. *Id.* at 2. It asks that leave to amend be denied on the grounds that “OFCCP’s new claims are futile, were brought in bad faith, and are unduly prejudicial to Oracle.” *Id.*

In reply, OFCCP accuses Oracle of providing “no factual or legal basis for opposing OFCCP’s amendment,” which it contends raises the same claims. RLA at 1. OFCCP asserts that Oracle misconstrues the liberal standard for amendment and makes “a litany of false accusations against OFCCP” and “wholly meritless accusations.” *Id.* at 1-2. OFCCP avers that it is simply taking normal steps in litigation that happen to bring media attention. *Id.* at 3.

A. Comparison of the Two Complaints

I am newly assigned to this case, but I am fully aware of its long and sometimes tendentious history. This has become a complicated case that has already been pending for a significant amount of time. In the interests of facilitating case development and management, I begin with a discussion of *what* is being claimed in the FAC and the SAC. This will allow a better understanding of what is and is not changing in the SAC and helpfully define the issues moving forward.

The FAC states two “discrimination claims” simply summarized at the outset:

- I.A) OFCCP claimed that Oracle engaged in “systemic compensation discrimination against women and Asians and African Americans in three lines of business (including 80 job titles) at its headquarters in Redwood Shores, California.”
- I.B) OFCCP claimed that Oracle had a “pattern and practice of hiring discrimination against qualified White, Hispanic, and African American applicants in favor of Asian applicants, particularly Asian Indians, based on race in 69 job titles at its headquarters.”

FAC at 1-2.

Claim I.A was premised on the compliance review in September 2014 and alleged discrimination against each of the protected classes “from at least January 1, 2014, and on information and belief, from 2013 going forward to the present.” *Id.* at ¶¶ 6-10. No mechanism was pled.⁵ It can be divided into three sub-claims:

- I.A.1) Pay discrimination based upon sex “against qualified female employees in its Information Technology, Product Development, and Support lines of business or job functions.” *Id.* at ¶ 7.
- I.A.2) Pay discrimination based upon race “against qualified African Americans in Product Development roles.” *Id.* at ¶ 8.
- I.A.3) Pay discrimination based on race “against qualified Asians in Product Development job functions.” *Id.* at ¶ 9.

Claim I.B was a hiring discrimination, not pay discrimination claim. OFCCP contended that since January 1, 2013, Oracle “utilized” a recruitment and hiring process that favored “Asian” and particularly “Asian Indians” in the “Professional Technical I, Individual Contributor [] job group and Product Development line of business.” *Id.* at ¶ 10. No mechanism was pled, though OFCCP added alleged explanations for the composition of the applicant pool based on Oracle’s recruitment practices. Fairly read, however, this claim alleges hiring discrimination, not recruitment discrimination. *Id.*

⁵ I do not mean to imply that a mechanism was required—I merely include the point in order to understand and evaluate the proposed SAC.

The FAC also contains two “compliance claims” against Oracle:

- I.C: Oracle didn’t produce records including “prior year compensation data for all employees and complete hiring data for [Professional Technical 1, Individual Contributor] roles during the review period of January 1, 2013 through June 30, 2014.” *Id.* at ¶ 12.
- I.D: Oracle “refused to produce [] any material demonstrating whether or not it had performed an in-depth review of its compensation practices, the findings of any such review, and the reporting and corrective actions proposed as a result of such review” *and* “failed to provide any evidence that it conducted an adverse impact analyses” OR Oracle “did not conduct the underlying reviews and analyses” as required. *Id.* at ¶¶ 13-14.

Claim I.D is best understood as an alternative claim. OFCCP alleged that Oracle had an obligation to conduct the reviews and analysis *and* to turn them over to OFCCP, but either didn’t do them or did them and didn’t turn them over. *Id.*

OFCCP alleged that it had issued a Notice of Violation on March 11, 2016, a notice to Show Cause on June 8, 2016, and engaged in unsuccessful conciliation efforts. *Id.* at ¶¶ 17-18. Each of the claims was anchored in the review period, but OFCCP alleged continuing violations. *Id.* at ¶ 19. OFCCP sought injunctive relief and compensatory relief for the affected classes. *Id.* at 7.

The SAC is a somewhat different sort of document, prefaced with an extended introduction of questionable relevance. SAC at 1-3. In the proper complaint, OFCCP is clear that the claims flow out of the same compliance review starting on September 24, 2014, Notice of Violation on March 11, 2016, Notice to Show Cause on June 8, 2016, and unsuccessful conciliation efforts. *Id.* at ¶¶ 6-10. But it also incorporates “additional information” produced in discovery covering the years 2013 through 2016. *Id.* at ¶ 11.

As before, OFCCP alleges that “Oracle discriminated against women, Asians, and African Americans or Blacks in compensation, and discriminated in favor of Asians against non-Asians in hiring.” This fits with the basic allegations in claims I.A and I.B. The sub-claims within the “A” category of the complaint can be understood as follows:

- II.A.1) OFCCP alleges that Oracles engages in compensation discrimination based on sex against female employees at its headquarters in certain job categories. *Id.* at ¶¶ 12-14, 22-23.
- II.A.2) OFCCP alleges compensation discrimination based on race against “Black or African American employees” in one job function. *Id.* at ¶¶ 12-13, 16.
- II.A.3) OFCCP alleges compensation discrimination based on race against Asian employees in one job function. *Id.* at ¶¶ 12-13, 15, 22, 24.

These three claims are updated versions of Claims I.A.1, I.A.2, and I.A.3. The SAC provides more detail for those claims. In the lengthy introduction, OFCCP also provides an alleged mechanism for the disparity: “Oracle’s reliance on prior salaries in setting starting salaries.” *Id.* at 1. However, this is not exclusive, as OFCCP officially attributes the disparities to “many factors.” *Id.*

In this section, OFCCP also attributes the compensation disparity to Oracle’s “steering of those employees into lower paid jobs.” *Id.* This leads into a new facet of the claims in the SAC. As I understand OFCCP’s allegations, it originally contended that similarly situated employees were paid less based on impermissible factors. The SAC continues with this contention and offers reliance on prior salary as an explanation. But the SAC adds a contention that Oracle engages in discrimination by placing similarly situated hires or employees in job functions with different pay levels or global career levels, resulting in lower pay. *See id.* at ¶¶ 18-25. OFCCP’s statement of this new claim blends it with the original claims, but it is better understood distinctly. Both result in lower compensation, but the first is a compensation discrimination claim while the second is more properly an assignment discrimination claim that produces compensation disparities. The difference is important because the new claims involve different analyses and proof. They do not turn on a claim that similarly situated employees in reference to their particular job function are paid different amounts. Rather, they allege that Oracle has differently situated in particular job functions and career tracks otherwise similarly situated employees/hires based on impermissible factors.⁶

The three new claims can be summarized as follows:

- II.A.4) OFCCP alleges that Oracle engages in pay compensation based on sex by hiring/assigning women for lower-paid jobs or assigning them to lower global career levels than men. *Id.* at ¶¶ 18-19.
- II.A.5) OFCCP alleges that Oracle engages in pay compensation based on race by hiring/assigning Blacks or African Americans for lower-paid jobs than men. *Id.* at ¶¶ 18, 20.
- II.A.6) OFCCP alleges that Oracle engages in pay compensation based on race by hiring/assigning Asians for lower-paid jobs or assigning them to lower global career levels than Whites. *Id.* at ¶¶ 18, 21.

Again, OFCCP alleges both forms of discrimination—lower pay within comparable jobs and hiring in or assignment to lower paying jobs based on sex and race. *Id.* at ¶ 22; *see also id.* at ¶¶ 25-31.

The SAC retains a version of the I.B complaint, with an important adjustment:

- II.B) OFCCP alleges that “[s]ince at least January 1, 2013, Oracle utilized and continued to utilize a recruiting and hiring process that discriminates against qualified non-Asians—including African Americans or Blacks, Hispanics, and Whites—based on race and ethnicity for positions in the [low-level Product Development] job group at Oracle’s headquarters []. Oracle’s college hiring program strongly preferred hiring Asians over non-Asians, under-hiring African American or Black, Hispanic and White individuals relative to the available labor pool.” *Id.* at ¶ 35.

The earlier claim was that Oracle discriminated in hiring by disproportionately hiring Asian applicants. This has been replaced with a more general allegation that Oracle discriminates in its “recruiting and hiring process” by disproportionately hiring Asians in comparison with the available labor pool. OFCCP explains the change as driven by lack of reliability in Oracle’s applicant data. It thus

⁶ Originally, OFCCP claimed Oracle was treating different “apples” differently; Oracle responded that OFCCP was confused and was comparing “apples” and “oranges”; OFCCP now alleges both that different “apples” are being treated differently *and* that while there may be “apples” and “oranges,” Oracle sorted into/created the relevant, permissible difference based on impermissible factors.

used a proxy, labor market/pool availability, to compare to the race or ethnicity of hires. As a result, the complaint is broadened to include both hiring *and* recruitment practices. *Id.* at ¶¶ 32-37. OFCCP further alleges that Oracle prefers hiring Asian students in the United States on student Visas and recruits in India, increasing its number of Asian hires. *Id.* at ¶¶ 38-39.

As in the FAC, the SAC alleges that Oracle is engaged in continuing violations in its compensation and hiring practices. *Id.* at ¶ 41.

OFCCP also modifies its “compliance complaints.” Complaints I.C and I.D pertained to Oracle’s production of records and Oracle’s production/completion of analyses, respectively. Both types of complaints are maintained, and a third compliance complaint is added:

- II.C) OFCCP alleges that Oracle didn’t produce “compensation data for 2013,” “applicant and hiring data for 2012,” “data showing personnel actions providing job and salary information (such as starting job title, starting salary, and wage increases) for employees,” and “application materials for those who applied for jobs during the review period.” *Id.* at ¶ 43.
- II.D) OFCCP alleges that Oracle didn’t produce “analyses of Oracle’s total employment process” or “evidence that it complied with the other requirements [as to analysis of the total employment process] or conducted an adverse impact analyses [sic].” *Id.* at ¶¶ 43-44.
- II.E) OFCCP alleges that Oracle didn’t collect and maintain information, including resumes, of “persons who expressed interest in Oracle’s college recruiting program and met the basic qualifications for those positions,” and didn’t “solicit race, ethnicity, and gender information from the subset of college applicants it did input into its college recruiting database.” *Id.* at ¶¶ 45-46.

The addition of II.E, the collection and maintenance claim, is an outgrowth of the change from I.B to II.B: OFCCP generalized the “B” discrimination claim because it perceived deficiencies in the data; it then added a compliance complaint in II.E related to those perceived deficiencies.

Finally, OFCCP *might* be adding what appears to be a completely new and distinct claim related to the affirmative action requirements of Executive Order 11246:

- II.F) Oracle “failed to comply with its obligations to develop an Affirmative Action Program. *See* 41 C.F.R. §§ 60-1.12(a), and 41 C.F.R. Parts 60-2 and 60-3.” SAC at ¶ 46.

This addition is somewhat puzzling and is made as part of a subsidiary clause in a sentence about the alleged failure to collect and maintain information about internet applicants. 41 C.F.R. § 60-1.12(a) does not mention affirmative action. Rather, 41 C.F.R. § 60.12(b) requires contractors to *maintain* their current affirmative action program and documentation of good faith effort. Part 60-2 provides a long series of regulations on Affirmative Action Programs. Part 60-3 provides a series of regulations applying to selection procedures used in making employment decisions. Given OFCCP’s use of “develop” it would actually appear that it is alleging violation of 41 C.F.R. § 60-1.40, which requires certain contractors to “develop and maintain a written affirmative action program for each of its establishments.” I am not confident that OFCCP actually means to add this as a distinct claim, but I include it here as a potential addition.

As in the FAC, OFCCP seeks injunctive relief and compensatory relief for the affected classes in the SAC. SAC at 17-18.

B. Futility

“[L]eave to amend need not be granted when ‘any amendment would be an exercise in futility.’” *Hoang*, 910 F.3d at 1103 (quoting *Steckman v. Hart Brewing, Co.*, 143 F.3d 1293, 1298 (9th Cir. 1998)); *see also Newland v. Dalton*, 81 F.3d 904, 907 (9th Cir. 1996) (“While Fed. R. Civ. P. 15(a) encourages leave to amend, district courts need not accommodate futile amendments”). “[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.” *Sweeney v. Ada County*, 1119 F.3d 1385, 1393 (9th Cir. 1997) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)).

Oracle argues that the SAC contains three sort of claims that are entirely new: 1) channeling/assignment claims; 2) claims based on reliance on prior salary, and 3) claims arising outside the audit period. OLA at 8. It argues that OFCCP has an obligation to first issue a notice of violation and then conciliate any claims before litigation. *Id.* at 8-11. And it contends that OFCCP never conciliated the claims in the three new categories. *Id.* at 11-15. OFCCP responds that it is not required to conciliate its claims again every time new information is added “that supports its initial broad discrimination claims.” RLA at 8. It points to other cases at OALJ in which OFCCP has been allowed to amend its complaint to add new claims. *Id.* at 9. And it maintains that it may assert continuing violations without needing to re-conciliate as additional time passes. *Id.* at 9-10. In this regard, OFCCP argues that it is not bound by Oracle’s proposed “two-step” process of showing a violation in the compliance review period with evidence from that period alone. *Id.* at 10.

At the outset, I tend to agree with OFCCP that Oracle’s argument is more properly one on the merits, rather than one in opposition to a leave to amend. Ordinarily futility is relevant in considering a motion for leave to amend when amendment is sought in response to an adverse dispositive ruling. There the moving party seeks to amend the pleading to rectify the deficiency that led to the adverse ruling. Where the amendment could not prevent the same result, leave to amend is properly denied as futile. *See Wright and Miller*, 6 Federal Practice & Procedure Civ. § 1487 (3d ed.). That isn’t the posture of this case. The FAC has not been deemed deficient and the question is not whether the SAC can fix that deficiency. Rather, Oracle essentially asks that some aspects of the SAC be dismissed. Although that issue might properly be deferred, in the interests of efficiency I will consider Oracle’s arguments in more detail.

I start with the addition of a reference to Oracle’s reliance on prior salary. Contrary to Oracle’s representations, this is not a new claim. In the scheme above, Claims I.A.1, I.A.2, and I.A.3 simply became Claims II.A.1, II.A.2, and II.A.3. One of the additions was a reference to the use of prior salary in setting compensation as the policy or practice responsible for the disparate impact. This was new, but it was adding more detail and substance to the original claim in the complaint.

In the same way, both the FAC and SAC assert continuing violations. Oracle’s position appears to be that either OFCCP must conciliate the assertion that the violation continued or that before OFCCP can reference evidence from later periods, it must establish a violation in the time period of the compliance review. Both versions lack legal support. If, as Oracle concedes for this motion, OFCCP conciliated prior to the FAC, then it conciliated a continuing violation. The SAC adds no more than the assertion that the continuing violation, well, continued.

Oracle's more likely concern is that evidence from later periods will be used to prove the continuing violation that OFCCP contends stretched back at least into the compliance review period. Although Oracle might not like this, it isn't improper and certainly wouldn't merit denying leave to amend. Evidence of a disparity or of the impact of a policy or practice may be easier to see from a broader vantage. This is not a case where OFCCP is attempting to assert a violation premised entirely outside of the relevant review period that was conciliated. In part, Oracle argues against Claim II.B on the grounds that it is supported by only data from 2015 and 2016. OML at 14. But this omits that other parts of the complaint allege that Oracle failed to preserve data from the relevant periods. Moreover, this claim is a refinement of Claim I.B and contends a violation going back into the review period. Relying on the available data to see the impact of the policy in question *could* make out a showing that the policy had a discriminatory impact *whenever* it was applied, including during the review period. Thus, I see no merit to Oracle's argument.

As to the channeling/assigning complaint, Oracle is correct that the regulations in question differentiate between this sort of discrimination and discrimination based on compensation disparities between similarly situated employees. *See* 41 C.F.R. § 60-20.4(a)-(b). And Oracle is correct that these are a distinct sort of complaint from those originally pled. In the reconstruction above, complaints II.A.4, II.A.5, and II.A.6 from the SAC have no corollary in the FAC. Oracle contends that OFCCP must conciliate these complaints. It is undisputed that it did not do so. Thus, in Oracle's understanding, leave to amend should be denied or the new complaints should be dismissed.

Oracle's argument depends on conciliation requirements of EEOC. In *Mach Mining, LLC v. EEOC*, the Supreme Court held that EEOC's conciliation obligations require it to provide notice to the employer of the "specific allegation" and "try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice." 135 S. Ct. 1645, 1655-56 (2015). Oracle relies on several cases in which EEOC complaints were dismissed for lack of conciliation. OLA at 8-11. In *EEOC v. Dillard's, Inc.*, the Southern District of California granted a motion by the employer to restrict the scope of EEOC's complaint. EEOC sought to litigate on behalf of a nationwide class based on information procured in discovery, but it had only conciliated complaints in reference to one facility. The court limited EEOC to that facility. No. 08-CV-1780-IEG, 2011 U.S. Dist. LEXIS 76206, at *19-27 (S.D. Cal. July 14, 2011). *EEOC v. CRST Van Expedited* involved a case where the EEOC investigated and conciliated as to a limited group, but then sought to litigate on behalf of a much larger group of individuals with similar claims against the same employer. The Eighth Circuit held that it could not do so because it could not use discovery to expand the scope of its investigation, skipping the conciliation. 679 F.3d 657, 672-76 (8th Cir. 2012).

OFCCP points to several other cases in which ALJs have allowed it to amend its pleadings or have rejected parts of Oracle's line of argument here: *OFCCP v. JBS USA et al.*, No. 2017-OFC-00002, slip op. at 2-3 (ALJ Apr. 23, 2018); *OFCCP v. Analogic*, No. 2017-OFC-00001, slip op. at 19 (ALJ Aug. 16, 2017); *OFCCP v. Enterprise RAC Company of Baltimore LLC*, No. 2016-OFC-00006, slip op. at 5-6 (Mar. 27, 2017). These cases offer some persuasive authority. More persuasive is *OFCCP v. Honeywell, Inc.* There the employer objected that some of the complaints litigated had not been included in the Show Cause letter and thus were beyond the scope of the hearing. The Secretary rejected the rigid formality, instead holding that the regulatory purpose had been served as to all of the complaints because the employer was clearly on notice of the complaints at issue. No. 77-OFCCP-3, slip op. at 5-6 (Sec'y June 2, 1993). Oracle's argument concerns conciliation, not the Show Cause letter, and the two serve different purposes. But the underlying point carries over: the purpose of the conciliation provision is not compromised by allowing the proposed amendment in the present case. Forcing OFCCP to

“conduct” investigation that is already finished and engage in futile conciliation would serve no purpose except to further delay resolution of this matter.⁷

The core difficulty with Oracle’s line of argument is that EEOC and OFCCP are different agencies subject to different regulatory schemes. Both are subject to conciliation requirements and Oracle is correct that Title VII is often used to interpret proceedings under Executive Order 11246. OLA at 10 n.5. But as OFCCP points out, RLA at 3-4, the regulations governing OFCCP contain a liberal amendment provision, 41 C.F.R. § 60-30.5(c), that mimics the liberal FRCP 15(a). This provision is part of the regulatory structure governing hearings before OALJ. If I were to accept Oracle’s construction such that every time OFCCP wishes to add a new theory or claim arising out of the same compliance review and same groups of employees at the same facility, it had to initiate a new investigation and conciliation, this would render the amendment provision superfluous. This is not to say that 41 C.F.R. § 60-30.5(c) licenses *any* amendment. At some point an “amendment” is an entirely different claim. But here it is not difficult to understand what OFCCP proposes as an amendment: the same groups are involved, the same facility is involved, and the alleged discrimination comes out of the same compliance review and review period. It even involves the same alleged damages. There are important differences in that it is a new mode of discrimination that may turn on some different evidence and follow a different legal analysis. But this alone is well short of the sort of total reconstruction of a complaint that would fall outside of 41 C.F.R. § 60-30.5(c) and require renewed investigation and conciliation.⁸

In the SAC, OFCCP has both refined some of its old complaints and added derivative complaints based on the same core factual basis. Since the proposed amendment comes within the general scope of the original complaint, I find that additional conciliation requirements do not render the proposed additions defective. Thus, the proposed amendment is not futile.

C. *Bad Faith*

Oracle takes issue with much of OFCCP’s conduct in this case. It accuses OFCCP of attempting to litigate this case in the press and disregarding norms of professional courtesy. OLA at 1-2, 7. It argues that OFCCP unreasonably resisted discovery and displayed a lack of transparency that required a 134 page order from Judge Larsen forcing OFCCP to reveal its theories and evidence. *Id.* at 5. It contends that OFCCP has used misleading statistics to make headlines. *Id.* Oracle complains that OFCCP has entered into secret common interest agreements with the plaintiffs’ bar. *Id.* at 2. It avers that in the SAC, OFCCP violated the stipulated protective order. *Id.* It accuses OFCCP of using discovery as a “fishing expedition” and substitute for investigation followed by conciliation. *E.g. id.* at 15.

Oracle argues that OFCCP’s conduct amounts to bad faith meriting denial of leave to amend:

OFCCP’s proposed SAC and, even more so, its motion for leave, contain unnecessary vitriol plainly calculated to receive widespread media attention—which is exactly what

⁷ The cases relied upon by Oracle are also distinguishable. In *Dillard’s* the analysis began with the point that at EEOC the investigation is complaint driven. 2011 U.S. Dist. LEXIS 76205 at *20-21. That is not so here—the investigation began as a compliance review of the entire facility. Moreover, *Dillard’s* involved an attempt to greatly broaden the scope of the charge, not, as here, an attempt to assert a new complaint based on a new theory as an outgrowth of the original allegation. *Van Expedited* also involved an expanded scope of the allegations, not the addition of a new sort of discrimination for the same groups at the same facility.

⁸ I do agree with Oracle that discovery is not to be used as a substitute for investigation. That might be grounds for denying leave to amend, but it would turn on prejudice to Oracle, not a failure to conciliate.

happened. Moreover, both OFCCP's motion and proposed SAC reveal confidential compensation information produced under the terms of a stipulated protective order [], which OFCCP impermissibly, and without Oracle's authorization, disclosed publicly. This easily could have been avoided if OFCCP had followed standard practice and professional courtesy by providing Oracle a copy of the proposed SAC before filing.

Id. OFCCP asserts that there is no evidence of an improper motive, in contrast to the cases relied upon by Oracle. RLA at 6-7.

In its bad faith argument, Oracle stresses that the parties agreed to a protective order that contained a process for challenging confidential designations, but that rather than employing that mechanism or even informing Oracle of its pending SAC, OFCCP simply included information that was designated confidential in the SAC, in particular employee counts and actual compensation figures, which would enable third-parties to calculate average salaries for positions. Oracle points out that the protective order covered summaries and compilations of materials otherwise covered. So while it allows that OFCCP could produce its own analyses of Oracle's data, it challenges including summaries of Oracle's data underlying those analyses. OLA at 16-17. Oracle avers that this was done to "try this case in the press" and asserts that "[p]ublicly filing a proposed SAC containing futile claims replete with 'CONFIDENTIAL' material (and without notice to the opposing party) constitutes an improper use of a Rule 15 amendment and warrants denial here." *Id.* at 18.

Initially OFCCP suggests that Oracle cannot rely on the protective order since it recently took the position that Judge Larsen's orders were infirm due to the Appointments Clause violation. RLA at 4. Oracle rejects the argument that re-assignment post-*Lucia* permits OFCCP to disregard the protective order, pointing out it was a stipulation reached with the parties meant to extend beyond the course of litigation and required each party to inform the other if some change in law altered the effectiveness of the protective order. OLA at 18.

Since I am not being asked to enforce the protective order, determination of its validity in light of *Lucia* is not necessary. It is, however, very concerning that OFCCP seems unwilling to take a straightforward position on the question. Even in its briefing here, OFCCP only states that *Oracle* may have been committed to the invalidity of the protective order. That doesn't tell me if *OFCCP* believes that it is bound by the stipulated protective order or whether OFCCP intends to disregard it. There is no good reason to hide the ball on this point. If OFCCP intends to disregard its stipulated protective order, it should say so, and say so very plainly. Regardless of the status of Judge Larsen's order, the parties reached an agreement on the relevant portions of the protective order and acted in reliance on that agreement in producing documents. So even if the *order* was no longer binding, unilateral and unannounced disregard for the previous mutual agreement could be troubling.

OFCCP has not disputed Oracle's assertion that Oracle did mark materials containing employee counts and compensation figures confidential. If it did so improperly, OFCCP agreed to a manner of resolving that dispute—one that *began* with a meet and confer. In filing the SAC, OFCCP *refused* to conduct a meet and confer beyond announcing the surprise filing in a conference call that was supposed to be about scheduling. So even if OFCCP is correct that Oracle shouldn't have designated the material as confidential and has released similar information, the point would remain that OFCCP may have disregarded a mutual agreement in order to gain tactical advantage, which could be problematic. Nor would Oracle's independent decision to release particular information change the calculus. Oracle did not make an agreement with itself as to the release of information. OFCCP made such an agreement with Oracle, and agreed to a way to challenge what it believed were improper designations. It is fair to expect OFCCP and its counsel to live up to that agreement.

Oracle's argument on "bad faith" is more general, touching not just on a narrow dispute about the protective order but on the conduct of OFCCP generally. Oracle is clearly frustrated with what it perceives as an unfair and opaque process. Though OFCCP has been very forthcoming about issuing its broadly stated conclusions, it has been somewhat reticent about disclosing its particular theories and evidence. Given the requests for extensive amount of time for discovery and the need to modify its complaint in some basic ways, it appears that this case was pushed into litigation in January 2017 at a point when OFCCP's investigation remained in some ways incomplete. OFCCP's explanation has been that it is only now receiving necessary data to refine its complaint. But this rings somewhat hollow. OFCCP is not a private litigant that must rely on the discovery process to gather information. It has significant powers to procure information as part of its investigation, which is followed by conciliation, and then litigation, if necessary.

The manner in which OFCCP submitted its SAC is also troubling, but not sufficient to find bad faith justifying denial of the present motion. OFCCP avers that it was perfectly permissible to seek leave to amend rather than stipulation of the opposing party and this is not grounds to accuse counsel of unprofessionalism. RLA at 4 n.3. But this is an attempt to change the question and obscure what was actually troubling. OFCCP didn't simply decide to seek leave to amend rather than seek a stipulation. It engaged in mediation for nearly a year while it was concurrently sharpening and revising its claims. It met and conferred about scheduling the hearing, knowing full well that it was on the verge of filing an amended complaint, without mentioning this to opposing counsel. Since the claims at issue in the operative complaint affect discovery, hearing preparation, etc., concealing an impending amendment to the operative complaint rendered the meet and confer disingenuous. Only during a conference call that was supposed to be about scheduling did OFCCP announce that the SAC was on the way. The stay in the case is no excuse on this point—that may have prevented OFCCP from filing the SAC, it didn't prevent OFCCP from being transparent about its intentions and telling Oracle directly about what it was alleged to have been doing wrong. When I queried counsel for OFCCP about why this simple, normal courtesy was not being extended, I did not get a plain, non-evasive response. OFCCP was not *required* to conduct itself in a more straightforward and transparent manner. But neither can those who engage in "sharp" litigation tactics reasonably object when accused of lack of a transparency and professional courtesy.

OFCCP is very correct that the media attention the SAC received is not an indication of bad faith. It is correct that this is a matter of public concern and has generated public interest. Oracle could not fairly ask that the allegations be kept private and sealed—and it hasn't. But again, OFCCP's response to this criticism is to attempt to change the topic. It was perfectly proper to file a SAC, make serious, unflattering allegations in good-faith, and answer press inquiries, etc. The concern, however, is the tone of the SAC and the way it was filed. The first three pages of the SAC do not read like a court filing that one would expect from a government agency. It is not a simple, plain introductory statement like that contained in the FAC. Moreover, the introductory portion contains allegations that are not included in the numbered paragraphs of the proper complaint—in particular the allegation that reliance on prior salary is one of the factors that produces the alleged pay disparity. I find no bad faith in this omission—it appears to be a simple drafting error. But as one of the technical fixes I will require before the SAC is deemed filed, OFCCP must add this allegation to the body of the complaint so that it may be properly answered and serve as the basis for further litigation in this case.

None of these concerns warrants denial of the motion for leave to amend. Oracle would prefer that OFCCP comport itself and fulfill its administrative mandate in a different way. But regardless of what Oracle thinks, or what I think, these are matters of OFCCP and Department policy, not issues that are relevant to this forum. OFCCP gets to decide its own policy and to pursue its mandate as it best decides. As an ALJ, I am not asked to sit as an arbiter of the policy decisions of DOL agencies. In this

forum, DOL agencies are simply another party in a pending dispute. They get no special treatment, and I exercise no special control or authority over them.

But the behavior of the parties and all counsel *in* this forum does touch on my authority and responsibility. I expect all parties and attorneys who practice before me to behave in a professional, courteous manner and avoid unnecessary and contentious litigation strategies that are often mistaken for zealous advocacy. I remind the government particularly that, “Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation.” *Reid v. U.S. INS*, 949 F.2d 287, 288 (9th Cir. 1991). Going forward, I caution all counsel to be cognizant of the tone and manner in which they pursue their arguments.

The narrow question now is only whether to permit the filing of the SAC, and I find no bad faith in the SAC itself. In its substance, it is a development of the FAC that provides more detail and adds claims that have become more apparent to OFCCP as this case has progressed. This is evident from the discussion of the two complaints above. In substance, OFCCP seeks to sharpen its allegations in light of developments in its investigation. That is a good faith use of amendment. Although I understand Oracle’s frustration, I do not conclude that the SAC evinces bad faith.

D. Undue Prejudice

Amendment should generally be permitted where it is “based on facts similar to those comprising the original complaint.” “The inclusion of a claim based on facts already known or available to both sides does not prejudice the non-moving party.” *Popp Telecom v. American Sharecom, Inc.*, 210 F.3d 928, 943 (8th Cir. 2000). But a “liberal amendment policy” is not “an absolute right to amend.” Where an amendment would likely result in the burdens of additional discovery and delay to the proceedings, a court usually does not abuse its discretion in denying leave to amend.” *Id.*

In order to reach a decision on whether prejudice will occur that should preclude granting an amendment, the court will consider the position of both parties and the effect the request will have on them. This entails an inquiry into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material to be added in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.

Wright and Miller, 6 Federal Practice & Procedure Civ. § 1487 (3d ed.). Prejudice may be found where “the amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation,” or “the proposed amendment would result in defendant being put to added expense and the burden of a more complicated and lengthy trial” or “the issues raised by the amendment are remote from the other issues in the case.” *Id.*

Oracle argues that amendment would prejudice it “at this late stage” because adding new claims will “further complicate the already burdensome amount of discovery involved in this proceeding.” Moreover, it believes that amendment would unfairly disadvantage it in making out a defense because the managers who made hiring decisions in 2013 and 2014 may have left Oracle and will have faded memories. OLA at 19-20. In particular, it notes that while it now has a policy prohibiting inquiry into prior pay, before October 2017 it had no policy on the subject at all so any inquiry into practice would rely on individual hiring managers. *Id.* at 20. OFCCP replies that the case will turn on “statistical analyses” rather than fact witnesses and that, in any event, broad claims of faded memories are insufficient prejudice in this context. RLA at 7. Further, OFCCP maintains that its claims have not

changed and the new aspects are theories of causation that do not fundamentally alter the litigation. *Id.* at 7-8. It adds that the SAC focuses and streamlines the litigation by adding new details and that, in any case, trial is still ten months away. *Id.* at 8.

Oracle significantly overstates the novelty of the claims in the SAC. In the reconstruction above, Claims II.A.1, II.A.2, and II.A.3 are substantially similar to I.A.1, I.A.2, and I.A.3. OFCCP is correct that in this regard it has added more detail, and with the reference to prior pay, a more particular causal mechanism. The change between I.B and II.B is more substantial. Claim II.B is broader in that it relates to recruitment and/or hiring discrimination rather than just hiring discrimination, but narrower in that it focuses on the college/university hiring. And OFCCP has filled in more details in its complaint. Its explanation for the shift is also quite reasonable—in its view the data provided by Oracle is deficient in certain respects, requiring the broadening in question. Further, Claims II.C and II.D are properly refinements of I.C and I.D, not entirely new claims.

OFCCP does understate the novelty of II.A.4, II.A.5, and II.A.6, the discriminatory channeling/assignment claims. Though they are an outgrowth of the discriminatory compensation claims in A.1, A.2, and A.3 as present in both complaints, they present new issues. They involve a different sort of discrimination that will be evaluated using different legal analyses and will be established by different sorts of evidence. In addition, Claim II.E is new, though it is similar to Claims I.C/II.C and I.D/II.D and is a natural outgrowth of the transition from Claim I.B to Claim II.B.

Regarding Claim II.F, which introduced the possibility that OFCCP is seeking to litigate Oracle's Affirmative Action Plan in some manner, this claim is not part of the FAC and *might* present undue prejudice, even at this stage. As explained above, II.F is abstracted from an add-on clause to a sentence that relates more particularly to II.E and cites to a broad swathe of regulations that may, or may not, be at issue. OFCCP has not made it clear in the SAC whether it intends II.F to be an independent claim and, if so, what exactly that claim is intended to be. OFCCP must clarify what exactly it intends to claim in ¶ 46 of the SAC. Is OFCCP bringing an Affirmative Action Plan claim? If so, what exactly is it? In the interests of directing the litigation, OFCCP must 1) remove the reference to a potential Affirmative Action Plan violation; 2) revise ¶ 46 to make clear that there is not an independent Affirmative Action Plan complaint; or 3) state the independent Affirmative Action Plan complaint in a separate paragraph, giving fair notice of the particular allegation it is making. If OFCCP pursues this third option, I will reconsider whether the proposed addition would cause undue prejudice.

As to the other changes and additions, while all things considered it might have been preferable if OFCCP had completed more of its investigation prior to filing and presented a more complete version of its claims initially, I find no undue prejudice in this case. Delay alone is insufficient to justify denying leave to amend. *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1184 (9th Cir. 2016); *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). The SAC adds certain claims but it also refines and details certain claims in light of discovery. The hearing is 10 months away and, while the discovery pursued by the parties may now differ in some respects, this is not a case where the hearing must be delayed and a whole new variety of discovery must begin. Where there is no delay in the proceedings and no need for additional discovery, prejudice does not merit denying leave to amend. *Owens*, 244 F.3d at 712. In addition, the potential prejudice mentioned by Oracle, faded memories and departure of employees, is both too generally stated and likely to affect both parties. In gathering its evidence, OFCCP faces the same potential problem as Oracle.

Both parties have been complicit in the long duration of this case and both are responsible for the fact that even now we are in the earlier stages. Most of the delay in this case has been due to the extended stay for mediation and then the motions by OFCCP and Oracle in turn concerning the

Appointments Clause. Both Oracle and OFCCP are responsible for those delays. Indeed, if Oracle had prevailed in its Appointments Clause motion, this case would have been placed on an indefinite stay. Even though the hearing is a full ten months away, OFCCP and Oracle *both* sought an even more extended timeline pushing the hearing into 2020. With ample time to conduct discovery and prepare a defense, I find no prejudice to Oracle in allowing the SAC with its additions of II.A.4, II.A.5, II.A.6, and II.E.

However, to be clear to both parties: this case has been pending at OALJ for an extended period of time and I will not be sympathetic to renewed efforts to amend the complaint and add new claims and theories as this case gets closer to hearing. The SAC contains indications that OFCCP is still investigating and may add new complaints. *See* SAC at 1 (reference to “many factors”); SAC at ¶45 n.3 (suggesting future amendments). OFCCP has made very serious allegations that, if true, merit very serious remedies. If those allegations cannot be substantiated, Oracle deserves to be able to clear its name and move on. If those allegations can be substantiated, the individuals harmed by the violations deserve relief. It is time to move this case forward to resolution, one way or the other. I expect both parties to cooperate in discovery and to disclose their claims, contentions, and evidentiary basis for them.

ORDER

OFCCP’s Motion for Leave to File a Second Amended Complaint is granted on the following conditions:

1. OFCCP must include the allegation of reliance on prior salary as a potential basis for compensation discrimination to the proper complaint. This allegation was included in the introduction, but was omitted from the body. To facilitate a proper answer and the progression of this litigation, the allegation should also be included as part of the body of the complaint.
2. OFCCP must clarify its reference to a violation related to the Affirmative Action Plan in ¶ 46 of the complaint. Presently, it is unclear to me whether this constitutes a new claim. In the interests of ensuring that everyone understands what is at issue, some alteration or clarification is needed.
3. OFCCP is ordered to submit a revised Second Amended Complaint by March 18, 2019. The revised SAC should exclude any introductory pages, and focus only upon the actual allegations. If the technical defects are remedied, the complaint will be filed and I will issue an order informing the parties that it has been filed and is the operative complaint.
4. Oracle’s time to answer under 41 C.F.R. § 60-30.6 will run from the date of the order informing the parties the SAC has been filed.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge