

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES 2017 FEB -8 PM 2:09

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

ANSWER TO AMENDED COMPLAINT

Oracle America, Inc. ("Oracle") hereby answers the Amended Complaint ("Complaint") filed by the Office of Federal Contract Compliance Programs ("OFCCP") as follows:

Preliminary Statement

Before addressing the specific allegations in the Complaint, Oracle provides the Court with this Preliminary Statement setting forth (1) the key ways in which the Complaint's allegations fail substantively, (2) the key procedural failings leading up to the defective Complaint, and (3) the key ways in which the Complaint is improperly motivated. These shortcomings demonstrate the Complaint should not have been filed in the first place, and further underscore the baseless nature of the allegations it contains.

OFCCP's Compensation Discrimination Claim Relies on Flawed Statistics.

Oracle denies entirely the allegations of discrimination made in the Complaint. Rather than presenting any factual detail demonstrating actual discrimination by Oracle, OFCCP instead bases its discrimination claims on inaccurate statistical analyses that fail even the most basic scrutiny. These faulty statistics ignore how Oracle pays its workers and makes its hiring

decisions. As OFCCP is well-aware, the law considers pay disparities on the basis of sex or race among employees who are “similarly situated.” Yet OFCCP’s compensation analysis does not even purport to compare the pay of employees who perform similar work. The Agency lumps together in the same analyses hundreds—and sometimes thousands—of employees, in dozens of dissimilar jobs. For example, the broad job functions at issue include technical roles ranging from Senior Vice Presidents to entry-level Software Developers; Senior Directors to Database Administrators; and Program Managers to entry-level Quality Assurance (“QA”) Analysts. In addition, OFCCP ignores that many of Oracle’s technical employees with the same job title perform significantly different work because they work on different software or hardware products which require different skills, knowledge, and abilities, or because they have different managerial or other experience and responsibilities.

OFCCP claims that its analysis appropriately “controls” for factors such as job title and job specialty, but this claim is inaccurate. At no time in the course of its compliance evaluation did OFCCP undertake any factual review or assessment of the relevant skills, duties and responsibilities needed to perform Oracle’s jobs. Instead of comparing the pay of employees who are similarly situated because they truly perform similar work with similar responsibilities, OFCCP instead grouped together employees who perform different work at different levels, and then purported to use a statistical regression model as a mechanism for artificially making those employees “similar” for purposes of comparing compensation. But an analysis of the vast number of highly technical jobs at issue here—including executives, architects, engineers, and analysts who are responsible for developing, designing, improving, and testing a broad array of Oracle’s software and hardware products—undisputedly requires factual assessment of the sophisticated, unique, technical and diverse skills and expertise that these jobs individually

require. No statistical model can obviate this requirement through the oversimplified use of regression tools.

The Agency's compensation "analysis" is further flawed because it ignores key factors that make a legitimate difference when it comes to pay at Oracle. For example, OFCCP does not consider either job performance or relevant prior experience in its superficial statistical model. Although OFCCP claims it controls for "estimated prior work experience," this presumably means either age as a proxy for prior work experience, or a general calculation of time worked elsewhere prior to joining Oracle, with no consideration of what that prior work entailed. Neither factor is a meaningful gauge of relevant prior experience, which is key with respect to the technical jobs at issue here.

OFCCP's Claim of Recruiting and Hiring Discrimination Is Equally Meritless.

The statistical "analysis" on which OFCCP bases its claim of recruiting and hiring discrimination is equally flawed and contrary to applicable law. It suggests that Oracle should implement an unlawful quota system, which OFCCP's own regulations expressly prohibit. Indeed, even though applicants are considered for specific jobs, OFCCP did not analyze whether Oracle chose the most qualified individual for each of the hiring decisions at issue. Instead OFCCP aggregates multiple applicant pools for entirely different jobs over an 18-month time period. For example, OFCCP's statistical model combines the applicant pools for everything from Senior Product Managers to entry-level Software Developers—and all jobs in between. Moreover, the "analysis" ignores entirely the applicants' qualifications, and instead assumes that all applicants were equally or similarly qualified for the hundreds of dissimilar jobs at issue in the Complaint.

OFCCP's claim of recruiting and hiring discrimination further fails because it rests on the faulty premise that Oracle engaged in race discrimination against "Non-Asians." But "Non-Asian" is not a "race" as defined by applicable law, or as used in common parlance, demonstrating that once again OFCCP's oversimplified and aggregated statistical model cannot sustain its meritless allegations.

With respect to recruiting, there is simply no basis for OFCCP's bald assertion that Oracle "targets" Asians, particularly Asian Indians, to work at Oracle, or that it encourages its Asian employees to recruit other Asians in order to receive a referral bonus. To be sure, Oracle values its Asian employees, including those from India. Yet Oracle engages in substantial good faith outreach efforts specifically targeted at non-Asian candidates, including African Americans and Hispanics. And, although Oracle does offer and pay a bonus to all employees who refer applicants that Oracle ultimately hires, the bonus is not limited to Asian candidates, nor is the bonus higher for Asians than others with respect to the jobs at issue.

The "statistics" underlying OFCCP's claim that Oracle engaged in recruiting discrimination are even more problematic than the statistics underlying the Agency's compensation and hiring claims. As an initial matter, OFCCP has admitted that one of the ways it identified purportedly Asian Indian applicants was by looking at their surnames. Plainly, such a method is wholly unreliable and based on stereotypical assumptions. Further, OFCCP bases its recruiting allegation on the inaccurate notion that because the racial composition of the applicant pools for the jobs at issue (*i.e.*, jobs in Oracle's Professional Technical 1, Individual Contributor ("PT1") job group) appears more heavily Asian than the racial composition of available applicants in "national labor data," Oracle must have discriminated against non-Asians when recruiting for these jobs. To state the proposition demonstrates its absurdity. Not only does

OFCCP's reliance on "national labor data" ignore the reality that many of the applicants for the jobs at issue apply from outside the U.S. (including from India and other Asian countries), it further ignores the fact that the jobs at issue require highly technical, unique skills and knowledge and, in many cases, specialized fields of study. Accordingly, even if it were appropriate to compare actual applicant flow data to some external metric purporting to represent the pool of available qualified candidates (and Oracle denies it is), "national labor data" is the wrong metric.

OFCCP's Complaint Fails Procedurally, As OFCCP Has Failed to Follow Its Own Rules.

Not only are OFCCP's allegations meritless, but the Agency repeatedly has failed to follow its own procedural rules and guidelines, both during and after the compliance investigation leading up to the current complaint. These procedural failings have materially prejudiced Oracle, who repeatedly has expressed its desire and willingness to address OFCCP's concerns consistent with applicable legal standards. They also raise considerable due process concerns, rendering OFCCP's evaluation process, the resulting Notice of Violation ("NOV"), and the present Complaint fatally deficient and defective. Indeed, had OFCCP followed its procedures, the Agency would never have issued the NOV, nor filed the present Complaint.

For example, the Federal Contract Compliance Manual ("FCCM") directs that before issuing an NOV, the Agency's compliance officers must advise the contractor of its findings. It further provides that upon completion of the onsite portion of a compliance review, OFCCP must discuss the Agency's tentative findings at an exit conference. These requirements are not optional. Nevertheless, in this compliance review, OFCCP gave Oracle no advance notice of its findings. OFCCP determined, for unknown reasons, not to provide Oracle a Predetermination Notice, which is a procedural step specifically designed to afford a contractor an opportunity to

convince OFCCP that potential findings of a violation are not warranted before the Agency reaches a formal conclusion in an NOV. OFCCP also failed to conduct the required exit conference. Even worse, when Oracle raised concerns about a lack of notice, OFCCP's former District Director Robert Doles falsely claimed that the Agency had conducted the required exit conference, even though OFCCP's own contemporaneous emails confirm no exit conference occurred. Nor did Director Doles or his OFCCP superiors ever attempt to correct this procedural failure or acknowledge his false statement.

Rather, the NOV was the first time Oracle learned that OFCCP had concluded that Oracle had engaged in any compliance violations. The Agency's choice to keep Oracle in the dark not only constitutes a violation of the Agency's own procedures, it also denied Oracle the ability to respond in a timely and meaningful way to OFCCP's concerns prior to any formal finding of discrimination, undermining any realistic opportunity for the parties to engage in conciliation discussions, and resulting in undue prejudice to Oracle.

Oracle Did Not Refuse to Produce Records to Which OFCCP Was Entitled.

Similarly, the Complaint falsely alleges that Oracle "refused to produce" relevant records and data during OFCCP's compliance evaluation. Not so. During the course of the compliance evaluation, OFCCP employees came on-site twice, for a total of eight days. OFCCP also subjected Oracle to a barrage of burdensome and overly broad information requests. These requests, typically accompanied by unreasonably short and arbitrary deadlines, were particularly burdensome because Oracle simultaneously was responding to similar requests in the multiple other ongoing OFCCP audits. In response to more than 30 follow-up requests for information, several containing multiple sub-parts, Oracle produced an enormous volume of data and documents, and facilitated interviews with at least thirty-five (35) managers and members of

Oracle's human resources department. In some cases, Oracle responded that the information OFCCP requested was not readily available or compiled in any existing database. As OFCCP is aware, Oracle is not required to create documents, or manually undertake the burdensome compilation of information, to respond to Agency requests. In other instances, Oracle asked OFCCP to provide further clarification as to the data being requested, and/or asked OFCCP how such data was relevant to the investigation given the incredible burden associated with gathering and producing it. At various times, Oracle also suggested narrowing the scope of OFCCP's requests to allow for less burdensome compilation. Oracle further identified for OFCCP that some of their burdensome requests were duplicative of prior requests to which Oracle already had responded, suggesting that OFCCP either had not reviewed the information already submitted, or did not understand it. OFCCP refused to respond to Oracle's legitimate questions and concerns. At no point, however, did Oracle refuse entirely to provide OFCCP access to any data or documents in Oracle's possession and requested by OFCCP.

Importantly, if OFCCP truly believed that Oracle was denying the Agency access to records to which the Agency was entitled, the appropriate course of action was to bring an expedited denial of access suit to quickly obtain the data. OFCCP knows this, as illustrated by the denial of access complaint it recently filed against Google, which specifically involves (among other things) prior year compensation data. That OFCCP failed to bring any access claim here is further evidence that Oracle never denied access to any records to which OFCCP was entitled.

Oracle further denies that it refused to produce material demonstrating it met its obligations to review its compensation practices. To the contrary, Oracle produced voluminous data and documents, as well as verbal explanations in the form of manager interviews,

illustrating that it met its obligations as articulated in OFCCP's regulations. With respect to certain pay audits to assess legal compliance with Oracle's non-discrimination obligations, Oracle explained to OFCCP that they were conducted by outside legal counsel, and therefore are privileged. OFCCP never inquired further, nor do OFCCP regulations require Oracle to waive privilege.

Not only are OFCCP's access allegations false, but OFCCP appears to be wrongfully using this purported "refusal to produce" as the basis for an adverse inference against Oracle. Specifically, the Agency alleges compensation discrimination during the calendar year 2013, even though the Agency admits it has not obtained or analyzed any compensation data from Oracle for that year. OFCCP further states that Oracle's purported failure to produce records "supports" its allegations of recruiting and hiring discrimination. But OFCCP's regulations make clear that the Agency "may" be entitled to an adverse presumption only when a contractor "has destroyed or failed to preserve" required records. 41 C.F.R § 60-1.12(e). OFCCP makes no such allegation here, and therefore is not entitled to any adverse inference. And, to the extent OFCCP claims that it is not relying on the adverse inference in its Complaint, OFCCP has no basis at all on which to allege compensation discrimination for the 2013 calendar year, and its claim that Oracle refused to produce records is wholly irrelevant and superfluous.

OFCCP's Complaint Is Improperly Motivated.

The timing of OFCCP's action also is highly suspicious. Filed just three days before the end of the outgoing administration and departure of its senior officials, it illustrates the Agency's desire to avoid the appearance that after eight years of increased budgets and aggressive rhetoric, OFCCP failed to find discrimination in Silicon Valley. Even though OFCCP is required by law to engage in reasonable efforts to resolve this matter through conciliation prior to initiating

litigation, the Agency has been anything but reasonable. To the contrary, OFCCP took a confrontational, adversarial approach to this compliance review from the start, including overt misrepresentations of the factual record, intimidating tactics with Oracle employees, and an unwarranted threat of criminal prosecution of an employee in Oracle's human resources department. Moreover, just as the parties were beginning to conciliate towards the end of the 2016 calendar year, yet prior to the Presidential election, OFCCP abruptly ended the process after the election results, and instead filed the rushed Complaint in this action. Politics clearly played a role in OFCCP's otherwise inexplicable actions, thereby raising troubling concerns about the Agency's impartiality.

Notwithstanding OFCCP's baseless allegations, Oracle will continue with its employment philosophy of non-discrimination and equal opportunity for all. And, although Oracle had hoped to resolve OFCCP's allegations through a good faith, reasonable conciliation process, Oracle is prepared to defend its recruiting, hiring and compensation practices through the litigation process.

AMENDED COMPLAINT

For the reasons set forth above in Oracle's preliminary statement, as well as for the reasons set forth below in response to OFCCP's specific allegations, Oracle denies or lacks sufficient information upon which to admit or deny, and on that basis denies, the allegations set forth in the introductory paragraphs at the beginning of the Amended Complaint.

JURISDICTION

1. The Court has jurisdiction of this action under sections 208 and 209 of Executive Order 11246, and 41 C.F.R. § 60-1.26 and part 60-30.

RESPONSE: Oracle denies the Court has jurisdiction over this matter under Executive Order 11246 or its implementing regulations. First, OFCCP failed to engage in reasonable

efforts to resolve this dispute through the conciliation process, as it is required to do. Executive Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), sec. 209(b), as amended; 41 C.F.R. § 60-1.20(b). Second, throughout the compliance review and leading up the filing of the Complaint, OFCCP repeatedly violated its own procedural rules and manual, including by failing to give Oracle any advance notice that the Agency believed Oracle had engaged in any violations prior to issuing the NOV, thereby causing Oracle undue prejudice and denying Oracle due process. *See* FCCM §§ 2N & 2P00. Third, OFCCP's hiring and compensation discrimination allegations, including but not limited to its allegation of compensation discrimination for the calendar year 2013, appear to rely in whole or in part on the improper application of an adverse presumption, to which OFCCP is not entitled given that OFCCP does not even allege—much less is there evidence to show—that Oracle destroyed or failed to maintain any of the relevant records at issue. *See* 41 C.F.R. § 60-1.12(e). Fourth, OFCCP's allegations that Oracle “refused to produce” data and documents are wholly improper here, as the appropriate course of action if OFCCP truly believed Oracle denied the Agency access to records to which it was entitled would have been to bring an expedited denial of access case, as the Agency recently did against Google. *See* 41 C.F.R. §§ 60-30.31, 60-1.26(a)(vii). Finally, even if the Court had jurisdiction over some of OFCCP's allegations, which it does not, it does not have jurisdiction over matters outside the time period at issue in the NOV, including OFCCP's baseless allegation that the purported violations continue “to the present.” In the NOV, OFCCP's hiring allegations focus solely on the time period of January 1, 2013 – June 30, 2014, and OFCCP admits in Attachment A to the NOV that its compensation “analysis” is based solely on data from 2014. Simply stating in the Complaint that “on information and belief” the violations have continued to the present is insufficient. Accordingly, the Court has no jurisdiction over any of OFCCP's allegations, and

certainly has no jurisdiction over claims outside the time period covered by this compliance review.

DEFENDANT AND ITS STATUS AS A GOVERNMENT CONTRACTOR

2. Defendant Oracle America, Inc., designs, manufactures, and sells software and hardware products, as well as offers services related to its products. It is headquartered at Redwood Shores, California ("Oracle Redwood Shores"), and has 74 locations throughout the United States.

RESPONSE: Oracle admits the allegations in Paragraph 2 of the Complaint, with the exception of the statement that Oracle has 74 locations throughout the United States, which Oracle denies. Oracle has more than 74 locations throughout the United States.

3. At all times relevant hereto, Oracle has had 50 or more employees. During the relevant time frame, Oracle employed approximately 45,000 full-time employees in the United States, and over 7,000 employees at Oracle Redwood Shores.

RESPONSE: Oracle admits the allegations in Paragraph 3 of the Complaint, although Oracle lacks sufficient knowledge to admit or deny, and on that basis denies, the time period that OFCCP deems "relevant." Additionally, Oracle notes that at the time of the compliance evaluation leading up to the current Complaint, Oracle employed more than 45,000 employees.

4. At all times relevant hereto, Oracle has had at least one contract with the federal government of \$50,000 or more. Indeed, during the relevant time frame, Oracle had multiple contracts with the federal government totaling millions of dollars a year.

RESPONSE: Oracle lacks sufficient knowledge to admit or deny, and on that basis denies, the time period that OFCCP deems "relevant." Oracle admits, however, that during the time period that Oracle deems relevant, Oracle had multiple contracts with the federal government totaling millions of dollars a year.

5. Based on the foregoing, Oracle has been a contractor within the meaning of the Executive Order, and has been subject to the obligations imposed on contractors by the Executive Order and its implementing regulations. These laws require, among other things, that Oracle not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin and to take affirmative action to ensure that applicants and employees are afforded employment opportunities without regard to their race, color, religion, sex, or national origin.

RESPONSE: The allegations contained in Paragraph 5 of the Complaint are purely legal contentions, for which no admission or denial is appropriate. Nevertheless, Oracle agrees that at the times Oracle deems relevant to this litigation, Oracle was a contractor within the meaning of the Executive Order, and has been subject to the obligations imposed on contractors by the Executive Order and its implementing regulations. Oracle further agrees that these laws require, among other things, that Oracle not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin and to take affirmative action to ensure that applicants and employees are afforded employment opportunities without regard to their race, color, religion, sex, or national origin. Oracle has met its obligations under the Executive Order and its implementing regulations, and thus denies the allegations in this Complaint that it did not.

COMPLIANCE EVALUATION OF ORACLE AND FINDINGS OF DISCRIMINATION

6. On or about September 24, 2014, pursuant to its neutral selection process, OFCCP initiated a compliance review under the Executive Order of Oracle's headquarters in Redwood Shores, California.

RESPONSE: Oracle admits that on or about September 24, 2014, OFCCP initiated a compliance review of Oracle's headquarters in Redwood Shores, California. Oracle lacks sufficient knowledge to admit or deny, and on that basis denies, that it was selected for review

pursuant to a “neutral selection process.” Indeed, since the beginning of 2013, Oracle has been selected for audit by OFCCP more than 40 times.¹ Despite requests by Oracle, OFCCP has refused to disclose to Oracle the “neutral” criteria purportedly used by the Agency to select Oracle for so many audits. To the extent OFCCP is targeting Oracle for compliance reviews, Oracle asserts this is a violation of Oracle’s First, Fourth and Fifth Amendment rights under the United States Constitution, as well as OFCCP rules and regulations.

7. As a result of the compliance review, OFCCP found that from at least January 1, 2014, and on information and belief, from 2013 going forward to the present, Oracle discriminated against qualified female employees in its Information Technology, Product Development, and Support lines of business or job functions at Oracle Redwood Shores based upon sex by paying them less than comparable males employed in similar roles. Specifically, OFCCP’s analyses showed the following based on 2014 data controlling for job title, full-time status, exempt status, global career level, job specialty, estimated prior work experience, and company tenure:

<u>Class</u>	<u>Number of Female Class Members</u>	<u>Standard Deviations</u>
Female Information Technology Employees	133	-2.71
Female Product Development Employees	1,207	-8.41
Female Support Employees	47	-3.67

RESPONSE: Oracle denies that it discriminated against any qualified female employees in its Information Technology, Product Development, or Support lines of business or job functions at Oracle Redwood Shores based on sex. With respect to the years 2013 and 2015 to

¹ In fact, on October 13, 2015, OFCCP notified Oracle that OFCCP had selected Oracle’s Redwood Shores location for another compliance review, even though the compliance review at issue here was still underway. It defies credulity that any “neutral selection process” would have selected the same Oracle establishment twice for a compliance review in such a short time frame, given the hundreds of thousands of other establishments OFCCP could have selected.

present, OFCCP concedes that it has not analyzed any compensation information from Oracle for any of those years. OFCCP further admits in Attachment A to the NOV that OFCCP's compensation "analysis" is based on "one year of compensation data that included Oracle employees who were employed at the relevant facility [Oracle's Redwood Shores headquarters location] on January 1, 2014." NOV, Attachment A, footnotes 1-4. Nevertheless, OFCCP alleges "on information and belief" that Oracle engaged in discrimination, both in 2013 and "going forward to the present." Oracle denies these allegations, and denies that OFCCP has any reasonable basis on which to form any such belief or make any such allegations.

OFCCP appears to rest its allegations of discrimination for 2013 entirely on Oracle's purported refusal to produce compensation data for that year. Yet as explained above, Oracle did not refuse to produce prior year compensation data. Moreover, even if Oracle had refused to produce prior year compensation data, the appropriate course of action for OFCCP would have been an expedited denial of access case to enable OFCCP to quickly obtain the data, as the Agency recently did with Google. *See* 41 C.F.R. §§ 60-30.31, 60-1.26(a)(vii). Oracle's purported refusal to produce 2013 compensation data would not entitle OFCCP to any adverse presumption of discrimination. To the contrary, OFCCP's regulations plainly state that an adverse inference may be available only when a contractor "has destroyed or failed to preserve records" it was required to maintain. 41 C.F.R. § 60-1.12(e). OFCCP makes no such allegation here.

For the years 2015 forward, OFCCP does not allege, and has at no time presented to Oracle, any basis for inferring discrimination. Oracle denies OFCCP's conclusory and wholly unsupported allegation that Oracle has engaged in any discrimination "going forward to the present."

With respect to the year 2014, Oracle denies that OFCCP's analysis of compensation data for that year revealed any evidence of compensation discrimination under the relevant legal standards. Tellingly, OFCCP consistently has refused to provide Oracle with any of the statistical work that it allegedly did to generate the standard deviations set forth in the NOV and repeated again in the Complaint. OFCCP's refusal to share its statistical model prevented the parties from engaging in reasonable, good faith conciliation, as OFCCP's regulations mandate. *See* Executive Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), sec. 209(b), as amended; 41 CFR § 60-1.20(b). In any event, Oracle denies OFCCP's alleged analysis results establish any compensation discrimination, or show that any women were paid less "than comparable males employed in similar roles."

OFCCP alleges that its analysis "controlled" for "job title" and "job specialty" in its undisclosed analyses. Yet statistics are not a tool for lumping together dissimilar employees and artificially making them similar in order to generate a model that purports to show disparities. Further, the Agency's reliance on workforce labels is inadequate to raise even an inference of discrimination. Oracle's workforce is sophisticated, diverse, and highly technically adept; job title and job specialty are not proxies for similar work, skill, or level of responsibility, as Oracle repeatedly demonstrated throughout the compliance evaluation. OFCCP cannot jettison the proper legal standards—which require evaluation of truly similar employees—simply because application of those standards to employees in Oracle's highly technical Product Development, Information Technology, and Support job functions might not yield OFCCP's desired results.

8. Further, from at least January 1, 2014 and, on information and belief, from 2013 going forward to the present, Oracle discriminated against qualified African Americans in Product Development roles at Oracle Redwood Shores based upon race by paying them less than comparable Whites employed in similar roles. Specifically, based on 2014 data controlling for

job title, full-time status, exempt status, global career level, job specialty, estimated prior work experience, and company tenure, OFCCP's analysis showed a standard deviation of -2.10.

RESPONSE: Oracle denies that it discriminated against any qualified African Americans in Product Development roles at Oracle Redwood Shores based on race. For the reasons set forth in response to Paragraph 7, *supra*—which Oracle incorporates fully herein by reference—Oracle denies the allegation that it discriminated against any African American employees in compensation in 2013 or any year from 2015 to present, denies that OFCCP has any reasonable basis on which to form any such belief or make any such allegations, and denies that OFCCP is entitled to any adverse presumption that would permit the Agency to simply infer (rather than establish) discrimination.

With respect to the year 2014—the only year for which OFCCP analyzed any compensation data—Oracle denies that OFCCP's analysis of that data revealed any evidence of compensation discrimination under the relevant legal standards, for the reasons set forth in response to Paragraph 7, *supra*. The data on which OFCCP's analysis is based demonstrates that in 2014, Oracle's Product Development job function included more than 60 job titles, ranging from senior managers and executives all the way to entry-level developers and analysts. That tremendous swath of positions includes individuals who work on a broad range of Oracle products and services, requiring wholly different knowledge, skills and abilities. Simply stated, they are not similarly situated, as the law requires for purposes of demonstrating compensation discrimination. OFCCP claims its analysis "controlled" for "job title, full-time status, exempt status, global career level, job specialty, estimated prior work experience, and company tenure." But as explained above, while statistics may be useful in controlling for factors that impact compensation levels and explaining disparities among similarly situated employees, they are not a tool for lumping together wholly different jobs and making them similar, as the law requires.

Moreover, OFCCP's analysis admittedly ignores legitimate factors explaining pay differentials, including but not limited to job performance and relevant prior experience. OFCCP's refusal to share with Oracle the statistical model on which its allegation of compensation discrimination rests underscores that OFCCP's allegations wholly lack merit.

9. From at least January 1, 2014, and, on information and belief, from 2013 going forward to the present, Oracle discriminated against qualified Asians in Product Development job functions at Oracle Redwood Shores based upon race by paying them less than comparable Whites employed in similar roles. Specifically, based on 2014 data controlling for job title, full-time status, exempt status, global career level, job specialty, estimated prior work experience, and company tenure, OFCCP's analysis showed a standard deviation of -6.55.

RESPONSE: Oracle denies that it discriminated against any qualified Asians in Product Development job functions at Oracle Redwood Shores based on race. For the reasons set forth in Oracle's responses to Paragraphs 7 and 8, *supra*—which Oracle incorporates fully herein by reference—Oracle denies the allegation that it discriminated against any Asian employees in compensation in 2013 or any year from 2015 to present, denies that OFCCP has any reasonable basis on which to form any such belief or make any such allegations, and denies that OFCCP is entitled to any adverse presumption that would permit the Agency to simply infer (rather than establish) discrimination.

With respect to the year 2014—the only year for which OFCCP analyzed any compensation data—Oracle denies OFCCP's analysis revealed any evidence of discrimination under the relevant legal standards, for the reasons set forth in response to Paragraphs 7 and 8, *supra*. Oracle further denies that OFCCP's alleged analysis results establish any compensation discrimination, or show that any Asians were paid less “than comparable Whites employed in similar roles.” Simply stated, OFCCP has made no showing that it found unexplained disparities when comparing employees who are truly similarly situated.

10. In addition, OFCCP found that beginning from at least January 1, 2013 and on information and belief, going forward to the present, Oracle utilized and, on information and belief, continues to utilize a recruiting and hiring process that discriminates against qualified African American, Hispanic and White (hereinafter “non-Asians”) applicants in favor of Asian applicants, particularly Asian Indians, based upon race for positions in the Professional Technical 1, Individual Contributor (“PT1”) job group and Product Development line of business (or job function) at Oracle Redwood Shores. Specifically, Oracle hired 82% Asians into the PT1 job group during the period January 1, 2013 through June 30, 2014, exceeding the approximately 75% of Asians who applied and resulting in statistically significant adverse impact against non-Asian applicants. Moreover, comparisons between available applicants from national labor data and Oracle’s hires show gross and statistically significant disparities in the hiring of Asians versus non-Asians into PT1 and Product Development positions at Oracle Redwood Shores. These comparisons are particularly relevant because Oracle’s applicant pool was heavily over represented by Asian applicants as the result of Oracle’s recruiting and hiring practices (including its over-selection of Asian applicants, particularly Asian Indians, from its actual applicant pool, its hiring strategies such as targeted recruitment, and referral bonuses that encouraged its heavily Asian workforce to recruit other Asians, and its reputation for favoring Asians).

RESPONSE: Oracle denies the allegations in Paragraph 10 of the Complaint, which fail to meet the requisite legal or factual standards for asserting a discrimination claim. They are devoid of any facts reflecting intentional discriminatory conduct, and further fail to allege a specific policy, practice or action causing a disparate impact. Indeed, they do not even include any anecdotal evidence demonstrating discriminatory conduct. Moreover, the allegations depend on illusory “Asian Indian” and “non-Asian” categories of employees that fail to meet the standards to allege discrimination in violation of the Executive Order 11246 or Title VII of the Civil Rights Act of 1964. Even though OFCCP’s claim of recruiting and hiring discrimination rests on the allegation that Oracle discriminated against “Non-Asians” on the basis of race, “Non-Asian” is not a recognized “race” under Executive Order 11246, its implementing

regulations, applicable case law, or use in common parlance. Rather, it is an aggregation of races, demonstrating that once again, OFCCP's over-simplified statistical model fails to sustain its claim. Further, OFCCP has admitted that its allegations regarding Asian Indians depend in part on assumptions based on surnames of applicants, which amounts to wholly inappropriate and unreliable stereotyping, particularly for a federal government agency tasked with enforcing anti-discrimination laws.

OFCCP's allegations also rely on a misapprehension of Oracle's hiring process. Oracle does not employ a hiring system that "targets" Asians, let alone one that is discriminatory against non-Asians. Rather, Oracle's hiring process is open and inclusive, and hiring decisions are based on the unique qualifications of applicants compared to the specific job for which each applicant is considered. In addition, Oracle engages in good faith outreach efforts to find and attract African Americans, Hispanics, and other groups such as veterans and people with disabilities, and publicizes its open positions to organizations serving these groups. OFCCP's allegations fail to recognize this open hiring process and diversity outreach, and instead rely on irrelevant U.S. Census data that is not an appropriate gauge of qualified applicants (let alone which applicants are best qualified), while ignoring the reality that many of Oracle's applicants apply to the technical jobs at issue from outside of the United States, from the local Bay Area job market, or from highly regarded college or university programs.

Oracle also denies OFCCP's vague allegation that Oracle has a "reputation for favoring Asians." Whatever that means, it certainly is no basis for an assertion of discrimination brought by the federal government. Further, because OFCCP's allegation of hiring discrimination appears to rest on its baseless allegation of recruiting discrimination, the hiring claim fails for this reason as well. Even if it were appropriate to base a claim of discrimination on statistics

alone (and Oracle denies it is), there is no reason to rely upon irrelevant U.S. Census data instead of Oracle's actual applicant flow. Indeed, if OFCCP's requested relief were granted, Oracle would be forced to set illegal employment quotas without regard to its specific hiring needs or the skills, abilities, and qualifications of applicants, in contravention of federal law.

**REFUSAL TO PRODUCE RELEVANT DATA AND RECORDS DURING
COMPLIANCE EVALUATION**

11. As part of the compliance evaluation, OFCCP requested several items from Oracle relevant to the agency's determination of whether Oracle had complied with the Executive Order. Pursuant to its government contracts, Oracle had agreed to produce these items to OFCCP.

RESPONSE: Oracle admits in part the allegations in Paragraph 11, although they are incomplete, and Oracle can neither admit nor deny the allegation's vague and ambiguous use of the phrase "several items." As part of the compliance evaluation, OFCCP not only requested relevant items, it also served Oracle with incredibly overbroad and burdensome follow-up data requests. Many of these follow-up requests went far beyond the information to which OFCCP was entitled, and Oracle did not agree to respond to them pursuant to its government contracts. Nevertheless, at no point in time did Oracle refuse to provide OFCCP access to any documents in its possession and requested by OFCCP.

12. Oracle refused to produce to the agency various records, including, but not limited to, prior year compensation data for all employees and complete hiring data for PT1 roles during the review period of January 1, 2013 through June 30, 2014, which are relevant to the matter under investigation and pertinent to Oracle's compliance with Executive Order 11246, as amended, and the regulatory requirements at 41 C.F.R. §§ 60-1.12, 60-1.20, 60-1.43, 60-2.32 and 60-3.4.

RESPONSE: Oracle denies the allegations in Paragraph 12 of the Complaint. Oracle did not refuse to produce to the Agency any records the Agency requested that were in Oracle's

possession, nor did Oracle fail to meet its regulatory obligations under 41 C.F.R. §§ 60-1.12, 60-1.20, 60-1.43, 60-2.32 and/or 60-3.4. With respect to certain requests from OFCCP, Oracle simply asked OFCCP to provide Oracle with rationales for its requests, or otherwise asked OFCCP to more narrowly tailor its requests. OFCCP's regulations require contractors to respond only to requests that seek material "relevant to the matter under investigation and pertinent to compliance with [Executive Order 11246]." 41 C.F.R. § 60-1.43. Additionally, the Fourth Amendment of the U.S. Constitution dictates that OFCCP's requests be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. *See United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011). And, OFCCP successfully has argued that contractors waive their Fourth Amendment rights if they provide materials in response to agency requests. *See id.* at 93-94. Nevertheless, OFCCP did not respond to Oracle's requests and concerns. Accordingly, OFCCP cannot constitutionally base its claims of discrimination on Oracle's refusal to waive its Fourth Amendment rights.

Moreover, the appropriate course of action if OFCCP truly believed Oracle had denied the Agency access to records to which it was entitled is to bring an expedited denial of access case to allow the Agency to quickly obtain the data, as the Agency recently did against Google. *See* 41 C.F.R. §§ 60-30.31, 60-1.26(a)(vii).

Additionally, although OFCCP alleges that Oracle "refused to produce" relevant records (an allegation Oracle denies), OFCCP includes among the regulations to which it cites the regulation governing a contractor's obligation to maintain relevant records. *See* 41 C.F.R. § 60-1.12. To the extent OFCCP is alleging Oracle failed to maintain relevant records, there is no evidence to support such an allegation, and Oracle denies it. To the extent OFCCP's allegation

is limited to an access violation, its reliance on this irrelevant record keeping regulation should be stricken from the Complaint.

13. Oracle also refused to produce to the agency 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, all of which is required by 41 C.F.R. § 60-2.17(b)-(d). Moreover, Oracle failed to provide any evidence that it conducted an adverse impact analyses required by 41 C.F.R. §§ 60-3.15A and 60-3.4.

RESPONSE: Oracle denies the allegations in Paragraph 13 of the Complaint. To the contrary, the record reflects that Oracle did provide the Agency material, including documents, data, and verbal explanations in the form of manager interviews, demonstrating it met its obligations under 41 C.F.R. § 60-2.17(b)-(d). Further, in the course of the compliance review leading up to the defective NOV, OFCCP never asked Oracle to produce any adverse impact analyses under 41 C.F.R. §§ 60-3.15A and/or 60-3.4, and Oracle denies the data it did produce was insufficient to demonstrate such analyses had taken place.

14. Insofar as Oracle failed to produce the material identified in paragraph 13 because it did not conduct the underlying reviews and analyses, Oracle defaulted on its obligations under 41 C.F.R. § 60-2.17(b)-(d), 41 C.F.R. §§ 60-3.15A, and 41 C.F.R. § 60-3.4 to conduct such reviews and analyses.

RESPONSE: Oracle denies the allegations in Paragraph 14. As explained in response to Paragraph 13, Oracle did not refuse to produce any material requested by OFCCP. Accordingly, there is no basis for OFCCP's bald assertion that Oracle failed to conduct any required analyses, or otherwise failed to meet its regulatory obligations.

15. Oracle's refusal to produce all data and records requested pertaining to its recruiting, hiring, and compensation practices further support OFCCP's findings in paragraphs 7-10.

RESPONSE: Oracle denies the allegations in Paragraph 15 of the Complaint. As explained in response to Paragraphs 11-14, which Oracle incorporates here by reference, Oracle did not refuse to produce any data or records requested pertaining to its recruiting, hiring and compensation practices. Moreover, Oracle denies that OFCCP's "refusal to produce" allegations "support" its purported findings of discrimination. OFCCP's regulations make clear that the Agency "may" be entitled to an adverse inference only when a contractor has destroyed or failed to retain required records. 41 C.F.R. § 60-1.12(e). OFCCP is not entitled to an adverse presumption in the case of an alleged denial of access. Rather, as explained above, the appropriate course in cases where OFCCP believes a contractor is denying it access to relevant records is the type of action OFCCP currently is pursuing against Google. The Agency's failure to bring such an action against Oracle merely underscores the baseless nature of OFCCP's allegations.

Further, as explained in response to Paragraph 12, OFCCP cannot constitutionally base its claims of discrimination on Oracle's refusal to waive its Fourth Amendment rights. And, as explained in Oracle's Preliminary Statement above, to the extent OFCCP claims that it is not relying on the adverse inference in its Complaint, OFCCP has no basis at all on which to allege compensation discrimination for the 2013 calendar year, further demonstrating that Paragraphs 11-15 are wholly irrelevant, superfluous and unduly prejudicial to Oracle, and should be stricken from the Complaint.

VIOLATIONS

16. The conduct described above in paragraphs 7-10, 12, and 13 (or, alternatively, 14) violate Executive Order 11246, its implementing regulations, and Oracle's contractual obligations to the federal government.

RESPONSE: As described in Oracle's response to Paragraphs 7-10, 12, 13, and 14, as well as in Oracle's Preliminary Statement—all of which are incorporated herein by reference—Oracle denies OFCCP's allegations regarding Oracle's "conduct," and further denies that it violated Executive Order 11246, its implementing regulations, or Oracle's contractual obligations to the federal government.

17. On March 11, 2016, OFCCP issued a Notice of Violation identifying the violations noted above. Thereafter, the agency attempted to conciliate with Oracle to resolve the violations.

RESPONSE: Oracle admits that on March 11, 2016, OFCCP issued an NOV, but otherwise denies the allegations in Paragraph 17. Oracle further denies that the NOV complied with OFCCP's rules and regulations. Indeed, OFCCP's failure to provide Oracle with notice of OFCCP's purported findings of discrimination prior to issuing the NOV, and reliance in the NOV on a wholly inappropriate adverse presumption and meaningless statistical model, not only violate OFCCP's own rules and regulations, but also violate Oracle's due process rights. Proceeding with the instant litigation notwithstanding those failures constitutes an unlawful attempt to interfere with Oracle's federal contracts.

With respect to conciliation, the regulations implementing Executive Order 11246 expressly state that "[w]here deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion." 41 C.F.R. § 60-1.20(b); *see also* Executive Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), sec. 209(b), as amended (requiring OFCCP to "make reasonable efforts, within a reasonable time limitation, to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion ..."). Here, the Agency did not engage in reasonable efforts to secure compliance through conciliation. Moreover, just as the parties were beginning to conciliate towards the end

of the 2016 calendar year, yet before the Presidential election, OFCCP abruptly ended the process shortly after the election results, and instead rushed to file this Complaint just three days prior to the departure of senior political leaders from the Department of Labor.

18. On June 8, 2016, OFCCP sent Oracle a Notice to Show Cause why OFCCP should not initiate enforcement proceedings against Oracle based on OFCCP's findings that the company violated Executive Order 11246. Before and after issuing the Notice to Show Cause, OFCCP attempted to secure Oracle's voluntary compliance through conciliation. These efforts were unsuccessful.

RESPONSE: Oracle admits that on June 8, 2016, OFCCP sent Oracle a Show Cause Notice ("SCN"), but otherwise denies the allegations in Paragraph 18. As described in response to Paragraph 17, OFCCP did not attempt to secure Oracle's voluntary compliance through conciliation. Further, when Oracle responded to the SCN on June 29, 2016 and OFCCP thereafter finally agreed to undertake conciliation, OFCCP later unilaterally and abruptly cut short the conciliation process before it even got off the ground, as described in response to Paragraph 17.

19. Unless restrained by an administrative order, Oracle will continue to violate its obligations under the Executive Order and the regulations issued pursuant thereto.

RESPONSE: Oracle denies that it has violated Executive Order 11246 or the regulations issued pursuant thereto, and further denies it will do so in the future. Accordingly, Oracle denies the allegations in Paragraph 19.

20. Except as specifically admitted herein, Oracle denies the allegations in Paragraphs 1-19 of the Complaint.

AFFIRMATIVE DEFENSES

1. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that the Complaint, and each purported cause of action therein, fails to state a claim upon which relief may be granted.

2. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that the Complaint, and each purported cause of action therein, is barred by the applicable statutes of limitations.

3. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that the Complaint, and each purported cause of action therein, is barred by the equitable doctrines of laches, unclean hands, waiver, and/or estoppel.

4. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that no conduct by or attributable to Oracle was the cause in fact or legal cause of the damages, if any, suffered by OFCCP and the purported affected class members.

5. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that OFCCP has failed to comply with its internal policies and procedures and accordingly has not afforded Oracle substantive or procedural due process. OFCCP's compliance manual sets forth the Agency's goal to provide contractors with "transparency and clarity" regarding its investigative procedures and processes. FCCM, Introduction. OFCCP's actions throughout the investigation clearly violated the Agency's procedures and were conducted with complete disregard for transparency and clarity. Among other deficiencies, the Agency failed to:

- a. conduct an exit conference in which it advised Oracle of the Agency's findings;
- b. correct its false statements that it had conducted an exit conference;

- c. follow its interview procedures requiring it to promptly provide interview statements to witnesses;
 - d. follow its procedures to obtain relevant documents or admit that any failure by the Agency to obtain documents it sought was its own fault;
 - e. advise Oracle of the Agency's findings prior to issuing its NOV;
 - f. issue an NOV that provided the facts allegedly in support of OFCCP's position;
- or
- g. issue an NOV compliant with applicable legal standards.

6. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that OFCCP has failed to meet its obligation to engage in reasonable conciliation efforts and, on that basis, has violated its own regulations, and denied Oracle substantive and procedural due process.

7. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that OFCCP's analysis and conclusion would require Oracle to set illegal quotas and violate Executive Order 11246 and its implementing regulations, as well as Title VII of the Civil Rights Act of 1964.

8. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that OFCCP lacks legal authority to suspend or cancel contracts or debar a federal contract.

9. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that it did not destroy or fail to preserve records, and thus OFCCP cannot establish any adverse presumption allowing it to infer (rather than prove) unlawful conduct.

10. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges OFCCP failed to exhaust its administrative remedies and prerequisites to suit as to all claims in its Complaint.

11. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that, to the extent that OFCCP alleges a hiring claim on behalf of any purported victim in any job function and area other than "Professional Technical 1, Individual Contributor," OFCCP failed to exhaust its administrative remedies and prerequisites to suit as to that purported class member.

12. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that OFCCP cannot recover on behalf of any purported affected class member because it would result in unjust enrichment.

13. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that it acted at all times in good faith.

14. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that to the extent the Complaint asserts or attempts to assert any allegations, claims, damages or requests for relief other than those contained in the NOV and SCN served on Oracle, such claims are barred for failing to fulfill conditions precedent to maintaining such claims.

15. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that the recovery sought by OFCCP (either for itself or on behalf of purported class members) is barred in whole or in part by their failure to exercise reasonable care and diligence to mitigate any damages allegedly accruing to them.

16. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that, to the extent that OFCCP intends to rely on statistical data, its reliance fails

because OFCCP's analysis is not based on similarly situated employee groups as required by law.

17. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that OFCCP has no legal authority to recover for alleged violations outside of its review period.

18. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that the alleged actions complained of by OFCCP were not based upon any discriminatory reasons, but were based upon legitimate, non-discriminatory, job-related reasons.

19. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that OFCCP is barred from any recovery in this action because Oracle's conduct was a just and proper exercise of managerial discretion and business judgment.

20. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that the Complaint fails to allege facts sufficient to justify equitable relief.

21. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that OFCCP lacks legal authority to bring any substantive claims alleging discrimination in hiring and compensation because the Agency's denial of access claims, by their nature, establish that it has failed to exhaust its administrative remedies and prerequisites to suit alleging any underlying discrimination.

22. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that OFCCP's allegations regarding alleged refusals to provide documents or records are contrary to law (including the U.S. Constitution), its regulations, and its policies to the extent they allege any duty to provide anything other than existing records.

23. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that OFCCP's allegations regarding alleged refusals to provide documents or records are contrary to law (including the U.S. Constitution), its regulations, and its policies to the extent they allege any duty to provide any documents other than those sufficient to evaluate Oracle's personnel activity or compensation system(s) to determine whether there are disparities based on gender, race, or ethnicity.

24. As a separate defense to the Amended Complaint and to each claim for relief therein, Oracle alleges that if OFCCP targeted Oracle for the underlying compliance review, and Oracle was not selected pursuant to a "neutral selection process," OFCCP prosecution of this action against Oracle violates Oracle's rights under the First, Fourth and Fifth Amendments of the U.S. Constitution.

25. As a separate defense to the Amended Complaint and to each claim for relief therein, Oracle alleges that OFCCP's prosecution of this action against Oracle, given the facts and underlying circumstances, is politically motivated and therefore brought and prosecuted in violation of Oracle's constitutional rights under the First, Fourth, and Fifth Amendments of the U.S. Constitution, as well as in violation of the government's policies and practices forbidding the government and its officials from affording (or attempting to afford) any advantage or disadvantage to anyone because of their political speech, viewpoint, or ideology.

26. As a separate defense to the Complaint and to each claim for relief therein, Oracle alleges that the OFCCP's prosecution of the Complaint against Oracle, given the facts and underlying circumstances, constitutes malicious and/or selective prosecution, abuse of process, selective enforcement, and/or unlawful retaliation by a federal agency.

Oracle has insufficient knowledge or information on which to form a belief as to whether it has any additional, as yet unstated, defenses available. Oracle reserves the right to assert additional defenses in the event discovery indicates it would be appropriate.

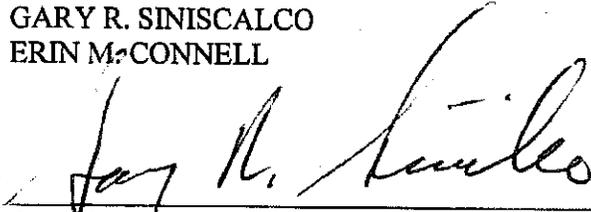
Oracle prays that the Administrative Law Judge grant the following relief:

1. That the Complaint be dismissed with prejudice and that Plaintiff and the purported affected class take nothing thereby;
2. That judgment be entered in favor of Oracle on all claims;
3. That Oracle be awarded its attorneys' fees and costs of suit; and
4. For such other and further relief as this Court may deem proper.

Respectfully submitted,

Date: February 8, 2017

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