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**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, TO STAY THE
PROCEEDINGS FOR FAILURE
TO CONCILIATE**

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Defendant Oracle America, Inc. (“Oracle”), by and through its undersigned counsel and pursuant to 41 C.F.R. § 60-30.23 and 29 C.F.R. § 18.33, respectfully submits the following Memorandum in Support of Its Motion for Summary Judgment or, in the Alternative, to Stay the Proceedings for Conciliation.

INTRODUCTION

This case is the consequence of the decision by Plaintiff (“OFCCP” or the “Agency”) to rush to file its complaint without first fulfilling its mandatory obligation to pursue conciliation. Where OFCCP alleges deficiencies in a contractor’s hiring and employment practices, the law is clear that “*reasonable efforts* shall be made to secure compliance through conciliation and persuasion” before any enforcement proceeding could be proper. 41 C.F.R. § 60-1.20(b) (emphasis added). But OFCCP has refused to engage Oracle in any such reasonable conciliation efforts.

OFCCP took a confrontational, adversarial approach to this compliance review from the start. Rather than conciliate as required, OFCCP engaged only in sham efforts, in which it steadfastly refused to provide Oracle with essential information about the nature of, and bases for, alleged violations. Presumably, this is because (as detailed in Oracle’s answer) the analysis underlying the supposed violations is fundamentally flawed. OFCCP also refused to provide Oracle with any proposed conciliation agreement or other specific demand for monetary and non-monetary relief, despite Oracle’s repeated requests. Rather, OFCCP’s purported efforts to conciliate amount to little more than its repeated demands that Oracle provide it a “rebuttal statistical analysis,” which Oracle had no obligation to do.

Furthermore, just as these nominal conciliation discussions were beginning, OFCCP abruptly called them off, apparently for political or other arbitrary reasons. Indeed, the timing of events strongly suggests OFCCP rushed to commence this litigation before the change in administrations. On January 17, 2017, OFCCP filed its eleventh-hour complaint, despite having failed to satisfy the conciliation mandate. Filed just three days before the end of the outgoing administration and departure of its senior officials, this case illustrates the Agency’s last-ditch

attempt to avoid the appearance that despite increased budgets and eight years of aggressive rhetoric, OFCCP failed to find discrimination in Silicon Valley.

Given the Agency's refusal to engage in reasonable pre-filing conciliation efforts, failure to abide by its obligations under the binding federal regulation, and inexcusable lack of transparency throughout the administrative process and leading up to the present litigation, Oracle is entitled to summary judgment. In the alternative, the case should be stayed pending reasonable conciliation efforts of the underlying claims, consistent with the Agency's pre-filing obligations.

FACTUAL BACKGROUND

I. OFCCP Initiated a Compliance Review in 2014, but Refused to Disclose to Oracle the "Indicators" of Discrimination It Claimed to Have Found Along the Way.

On September 24, 2014, OFCCP issued a Scheduling Letter to Oracle, indicating that its headquarters location (500 Oracle Parkway, Redwood Shores, CA 94065; hereinafter "HQCA") had been "selected ... for a compliance review under Executive Order 11246." ("Executive Order") Decl. of Shauna Holman-Harries ("Holman-Harries Decl.") ¶ 2, Ex. A.¹ That Scheduling Letter asked Oracle to provide OFCCP with a copy of its Executive Order Affirmative Action Program and the supporting data listed on the attached Itemized Listing. *See id.*² With regard to compensation data, the Itemized Listing requested only "annualized compensation data (wages, salaries, commissions, and bonuses) by either salary range, rate, grade, or level showing total number of employees by race and gender and total compensation by race and gender"—*i.e.*, annualized aggregate compensation data. *Id.*

OFCCP's my-way-or-the-highway approach to the compliance review began soon thereafter. In early March 2015, Brian Mikel of OFCCP contacted Shauna Holman-Harries,

¹ This tribunal may consider supporting affidavits for purposes of Oracle's motion for summary judgment. *See* 41 C.F.R. § 60-30.23(b); 29 C.F.R. § 18.33(c)(4).

² A new standard Scheduling Letter and Itemized Listing (OMB No. 1250-0003) were put into use by OFCCP on September 30, 2014. *See* Agency Information Collection Activities; Announcement of OMB Approval, 79 Fed. Reg. 58,807-01, 2014 WL 4804596 (Sept. 30, 2014). The Scheduling Letter and Itemized Listing for the compliance review at issue were the old versions, which had been approved for use back in 2008. *See id.*

Director of Diversity Compliance for Oracle, by telephone regarding certain “indicators” allegedly revealed in OFCCP’s desk audit of the data provided. *See* Holman-Harries Decl. ¶ 3. Oracle sought clarification on March 9, 2015 regarding “what, if any, indicators have you found in your initial analysis.” *Id.* at Ex. B. OFCCP replied on March 12, 2015, stating only that “[o]ur preliminary desk audit indicators are primarily in compensation and hiring based on gender and race/ethnicity” and that “the majority of the job titles are within the PT1, PT2 and PT3 job groups.” *Id.* When Oracle requested further details to address its concern with the techniques underlying OFCCP’s preliminary analysis, OFCCP responded flatly: “Your concerns regarding our aggregation techniques during the initial analysis have been noted,” but the Agency intended to proceed with an on-site evaluation without providing any further detail. *Id.*

OFCCP conducted an on-site evaluation at HQCA on March 24-27, 2015. *See* Holman-Harries Decl. ¶ 4. At the conclusion of that on-site, OFCCP conducted a perfunctory exit interview only, in which the Agency did not relay any findings (general or otherwise) from the investigation and made only vague reference to hiring and compensation information having “stood out.” *Id.*

OFCCP requested, and Oracle agreed to, a follow-up on-site visit that spanned June 22-25, 2015. *See* Holman-Harries Decl. ¶ 5. On July 2, 2015, Oracle emailed OFCCP, noting that “no one conducted any exit conference” at the conclusion of this second on-site review; Oracle therefore requested an exit conference “ASAP” so that it could “learn of any concerns or issues you and your team identified.” *Id.* at Ex. C. OFCCP responded that evening stating that it was “not prepared to conduct an exit conference at this time” but providing assurance that the Agency would “schedule an exit conference at the conclusion of [its] offsite analysis.” *Id.* ¶ 6, Ex. D. No exit conference ever occurred. *Id.* ¶ 7. The parties proceeded to exchange extensive additional correspondence, however. *Id.* Oracle also provided additional documents and data over the course of the following year. *Id.*

II. OFCCP Issued a Sweeping Notice of Violation, yet Refused to Disclose Its Basis.

Without any Predetermination Notice or other warning, on March 11, 2016, OFCCP issued a Notice of Violation (“NOV”). Holman-Harries Decl. ¶ 8, Ex. E. The NOV charged Oracle with discriminating against “qualified African American, Hispanic and White (hereinafter ‘non-Asians’) applicants in favor of Asian applicants, particularly Asian Indians based upon race in its recruiting and hiring practices for Professional Technical 1, Individual Contributor (‘PT1’) roles.” *Id.* OFCCP rested its recruiting and hiring claim on comparing (i) data from the “2006-2010 Census and/or 2013-2014 DOL, Bureau of Labor Statistics’ Labor Force Statistics” on the one hand, with (ii) actual applicants for and hires into PT1 roles at HQCA on the other hand. *Id.*

The NOV further made sweeping claims of compensation discrimination by Oracle against female employees in Information Technology and Support roles, and against female, African-American, and Asian employees in Product Development roles. *Id.* In each instance, OFCCP alleged that Oracle had discriminated “by paying [the protected group] less than *comparable* [males or Whites, as applicable] employed in similar roles.” *Id.* (emphasis added). But the NOV did not detail or identify the favored “comparators”—*i.e.*, specific persons allegedly similarly situated to those who were allegedly disfavored, as required to articulate a *prima facie* case under Title VII. *Id.* Attachment A to the NOV purported to report the “standard deviations” generated by the “regression analysis” that the Agency had run and to list the factors OFCCP had considered, but did not provide any of the models themselves. *Id.* The NOV and Attachment A were otherwise devoid of any specific facts or details. *Id.*³ OFCCP requested a response within five business days to “begin conciliation and resolution of the specified violations.” Holman-Harries Decl. ¶ 8, Ex. E.

Oracle timely responded four days later, on March 15, 2016, expressing its interest in “engaging with [OFCCP] to resolve this matter.” Holman-Harries Decl. ¶ 9, Ex. F. In a short

³ This dearth of detail stands in sharp contrast to OFCCP’s stated policy of following Title VII’s substantive proof standards, and provisions of OFCCP’s Federal Contract Compliance Manual (“FCCM”) that prescribe basic elements that must be included in an NOV. See OFCCP, Federal Contract Compliance Manual (Oct. 2014) at §§ 8F, 8F01, pp. 264-65, https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf.

email reply, OFCCP in turn asked when it “could expect to receive Oracle’s position statement and subsequently initiate conciliation discussion.” *Id.*

Oracle responded again on March 18, 2016, pointing out that there is no requirement for a contractor to provide a “position statement” in response to an NOV and that OFCCP had failed to provide notice of its intended compliance evaluation findings, which would have given Oracle the opportunity to address OFCCP’s concerns or, at least, warned Oracle of an impending NOV. Holman-Harries Decl. ¶ 10, Ex. G. Moreover, in the absence of any details in the NOV, Oracle requested, among other things, “the details of each data analysis referenced” in the NOV so that it could try to understand what OFCCP believed to be the supposed violations. *Id.*

Eleven days later, on March 29, 2016, OFCCP wrote back, ignored Oracle’s request for information and instead stated that it was “prepared to engage in a meaningful, good faith and timely conciliation process.” *Id.* The Agency’s letter requested a meeting “the week of April 18, 2016 to conciliate this matter” and stated that it would then “address any questions or concerns ... Oracle representatives may have about our findings.” *Id.* But despite this apparent openness, the Agency proceeded to dictate the form that further communications from Oracle must take, and rejected even the prospect of discussing cohort or other analyses focused on individuals who are truly comparators for Title VII purposes. *Id.* Instead, the Agency demanded that Oracle: “[P]rovide a representative who is prepared to discuss in detail Oracle’s rebuttal position and analysis to the Notice of Violations, which should clearly set forth, through evidence, how the Agency’s analysis is flawed or how the observed disparities are explained by legitimate, nondiscriminatory reasons or business necessity.” *Id.* OFCCP insisted that “[a]rgument of counsel, affirmations of good faith in making individual decisions, and cohort comparisons are insufficient to rebut statistical evidence of systemic discrimination.” *Id.*

III. Oracle Provided Specific Questions to OFCCP and Legal Authority Undermining the Agency’s Approach, but OFCCP Remained Uncooperative.

Less than two weeks later, on April 11, 2016, Oracle responded, stating that it was interested in engaging in a good faith conciliation process but noting again that the Agency had

failed to answer Oracle's questions or provide the detail previously requested. Decl. of Gary R. Siniscalco ("Siniscalco Decl.") ¶ 2, Ex. I. Oracle's counsel explained that these failures made it impossible for conciliation to proceed in any meaningful way. *Id.* Indeed, as Oracle emphasized, it had requested on multiple prior occasions that OFCCP explain its claim that it had found "indicators" of discrimination—all to no avail. *Id.* (citing string of prior letters); *accord* Holman-Harries Decl. ¶ 11, Ex. H. Oracle then provided a focused list of questions it sought to have answered to enable it to better understand the NOV. Siniscalco Decl. ¶ 2, Ex. I. Without the information necessary to understand OFCCP's allegations, Oracle declined "the invitation for a face-to-face meeting" as "premature," until such time as the parties had a shared understanding of what facts and analysis had led OFCCP to its conclusions. *Id.*

On April 21, 2016, OFCCP wrote falsely claiming that Oracle had "reject[ed] the Agency's request to meet and engage in good faith and timely conciliation discussion." Siniscalco Decl. ¶ 3, Ex. J. It again demanded, within two weeks, a written response constituting "a rebuttal to the NOV, through statistical evidence, which explains how OFCCP's statistical analyses are flawed, or why a nondiscriminatory reason or business necessity explains the observed systemic disparities." *Id.* It threatened to "initiate proceedings with the appropriate enforcement agency" if it did not receive Oracle's evidentiary rebuttal by the two-week cutoff. *Id.* OFCCP refused to answer the bulk of the questions Oracle had posed in an effort to understand the bases for the NOV, in many instances objecting that the mere fact of asking questions "raises concerns about Oracle's engagement in the conciliation process." *Id.*

Despite OFCCP's continued recalcitrance and lack of transparency, on May 25, 2016, Oracle sent OFCCP a 21-page letter. Siniscalco Decl. ¶ 4, Ex. K. The detailed submission explained Oracle's objections to the lack of transparency in the compliance evaluation and to OFCCP's facile statistical model, and provided rebuttal evidence in the form of detailed examples of similarly-situated employees that explained pay differences among them. *Id.*⁴

⁴ These examples were provided consistent with the directives from both the FCCM and, more importantly, OFCCP's Directive 307 (DIR 2013-03) that in determining whether a compensation violation exists, "[i]n every

Oracle further stated that it “would be pleased to engage in further dialogue and discussion as may be appropriate.” *Id.*

IV. OFCCP Short-Circuited Discussion and Issued a Show Cause Notice.

Two weeks later, on June 8, 2016, without responding to Oracle’s detailed submission and without any further engagement with, or outreach to, Oracle, OFCCP issued a Notice to Show Cause (“SCN”). Siniscalco Decl. ¶ 5, Ex. L. OFCCP claimed that it had “attempted to engage Oracle in a good faith and timely conciliation process on March 16, March 29, and April 21”—*i.e.*, the three pieces of correspondence described above, the first of which was a one-sentence demand for a “position statement” and the latter two of which demanded that Oracle proceed in a dictated fashion without first being provided any factual explanation for the alleged violations. *Id.* Notably, not one of those referenced documents contained any form or content of a conciliation proposal. Nonetheless, OFCCP falsely decreed that Oracle had “dismissed the government’s conciliation efforts” and that “conciliation efforts have failed to resolve the violations.” *Id.*

Oracle responded to the SCN three weeks later, on June 29, 2016, rejecting OFCCP’s characterization of the compliance review and “urg[ing] OFCCP to undertake reasonable conciliation efforts.” Siniscalco Decl. ¶ 6, Ex. M. As Oracle noted, “[c]onciliation efforts haven’t failed; they haven’t occurred.” *Id.* (citing 41 C.F.R. § 60-1.20(b)). Oracle noted that OFCCP had failed to engage in any negotiation designed to reach resolution or to provide any conciliation proposal. *Id.* Oracle reiterated its willingness “to engage in transparent and interactive dialogue to resolve this evaluation” and requested that the Agency “undertake

case” the Agency must consider “three key questions”: “[a)] Is there a measurable difference in compensation on the basis of sex, race, or ethnicity? [(b)] Is the difference in compensation between employees who are comparable under the contractor’s wage or salary system? [(c)] Is there a legitimate (i.e. nondiscriminatory) explanation for the difference?” *See* Office of Fed. Contract Compliance Programs, Procedures for Reviewing Contractor Compensation Systems and Practices, DIR 2013-03 (Feb. 28, 2013), <https://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm>. At a minimum, OFCCP has never attempted to answer (b) or (c), and its specious statistical model does not suffice to answer (a).

reasonable conciliation as required” by, at a minimum, providing a specific proposal for monetary relief and a proposed conciliation agreement. *Id.*

V. OFCCP Engaged in Only Sham Conciliation Efforts, and Steadfastly Refused to Provide Oracle Essential Information About the Alleged Violations.

OFCCP did not respond in any way for over two months. Siniscalco Decl. ¶ 7. When the Agency did write again on September 9, 2016, without acknowledging that its SCN was unwarranted, it agreed to “engage in conciliation” per Oracle’s request. *Id.* at Ex. N. But it made clear its view that the Agency could unilaterally dictate “the conciliation process it will use in a particular case and when to end conciliation efforts.” *Id.* The parties exchanged several further emails, with Oracle consistently reiterating its interest in an open, transparent, and good faith conciliation process, and ultimately agreed to meet in person on October 6, 2016. *See id.* ¶ 8, Ex. O.

At the October 6, 2016 meeting, OFCCP again reiterated that it was not interested in any response to its NOV other than a competing statistical analysis, and was unwilling to even consider cohort or other analyses of individuals or comparator groups at issue, as required by Directive 307. Siniscalco Decl. ¶ 9. Oracle explained to OFCCP, in detail, that the statistical models on which OFCCP’s allegations were based—and solely based—were fundamentally flawed because they compare individuals who are not similarly situated, as required by the Executive Order and Title VII. *Id.* Oracle further explained that OFCCP had not made any factual inquiry during the underlying compliance evaluation to determine which employees are similarly situated. *Id.* OFCCP dismissed Oracle’s concerns and remained unwilling to reconsider the legitimacy of its statistical models or provide the models themselves for Oracle to review. *Id.*

As for remedy, the Agency stated that it was not prepared to discuss any remedy for the alleged recruiting violation. Siniscalco Decl. ¶ 10. The Agency then offered orally—never in writing—what it described as a “high level” proposal regarding monetary relief to address the alleged compensation violations. *Id.* As for the alleged hiring violations, OFCCP pointed to a

broad dollar range that the Agency *might* demand once it had reviewed mitigation evidence—though it conceded it currently lacked any such information. *Id.* No conciliation agreement was presented, proposed, or discussed. *Id.*

The meeting ended cordially, with OFCCP requesting additional information from Oracle and both sides agreeing that progress had been made. Siniscalco Decl. ¶ 11. In subsequent correspondence, OFCCP stated that it “share[d] [Oracle’s] interest in moving forward in a cooperative and productive manner” and that it would review the information to be provided by Oracle later that month. *Id.* at Ex. P. Oracle subsequently provided additional factual information and legal authority explaining why OFCCP’s findings of discrimination failed legally and factually on October 31, 2016. *Id.* ¶ 12, Ex. Q. A week later, the national election made clear that a change in administrations was forthcoming.

OFCCP did not respond for six weeks, until December 9, 2016. Siniscalco Decl. ¶ 13. Then, rather than engaging with Oracle’s latest submission or any of the points Oracle had raised on October 6, 2016, OFCCP’s Regional Director abruptly wrote that Oracle had “fail[ed] to rebut the violations in the NOV” and informed Oracle that she had referred the case to the Solicitor of Labor (“Solicitor”) to initiate enforcement proceedings. *Id.* at Ex. R. Absent from this letter was any statement that Oracle had refused to conciliate, any additional information from OFCCP designed to address concerns raised by Oracle at the October 6 meeting, or any conciliation demand or proposed conciliation agreement from OFCCP. *See id.*

VI. The Agency Rushed to File Its Complaint in the Waning Days of the Outgoing Administration.

Oracle reached out to the Solicitor just three days later, stressing (*inter alia*) that “OFCCP has failed to meet its legal requirement to engage in reasonable conciliation efforts” and accordingly requesting that the matter be returned to OFCCP so the required conciliation could take place. Siniscalco Decl. ¶ 14, Ex. S. Oracle provided legal authority establishing that the regulatory requirement that OFCCP engage in “reasonable efforts” to conciliate is a prerequisite to filing any complaint. *Id.* And it summarized OFCCP’s repeated refusal to be

forthcoming with the information necessary to ground any good faith conciliation. *Id.* Finally, that letter noted, OFCCP had never provided anything resembling a conciliation proposal: it “never detailed a backwage proposal, provided a draft form of conciliation agreement, explained how it would calculate or distribute backwages for alleged class members, or offered any terms regarding future reporting obligations.” *Id.*

The Solicitor *never* responded to this letter. Siniscalco Decl. ¶ 14. Instead, Ian Eliasoph, a trial attorney with the local San Francisco office, wrote on January 9, 2017, that he was “preparing to file a complaint.” *Id.* ¶ 15, Ex. T. That letter demanded that Oracle “make its best and final counteroffer” within three days, although the letter did not contain any “offer” or other concrete proposal for Oracle to consider, or that it could “counter.” *Id.* Oracle responded the following week, reiterating that “refusals by OFCCP to provide the information and predicate analyses” that the company had repeatedly requested had made meaningful conciliation impossible. *Id.* ¶ 16, Ex. U. Oracle’s letter also objected to the Agency’s “demand of some dollar amount, essentially in a vacuum of detail from the Agency,” lest Oracle face the alternative of “what clearly is a midnight complaint.” *Id.* Rather than engage with these concerns, Mr. Eliasoph acknowledged that the Agency lacked “the data [it] need[ed] to perform a more complete back pay analysis,” but declared that OFCCP had “no further calculations to discuss” given what he asserted was Oracle’s failure to be sufficiently forthcoming. *Id.* ¶ 17, Ex. V.

The Solicitor filed the complaint to initiate this enforcement proceeding that afternoon—just three days before the new administration assumed office. *See* Compl. (Jan. 17, 2017). At no time before or since then has OFCCP commenced any proceeding to obtain information that it claims it requested but that Oracle refused to provide. Curiously, OFCCP’s San Francisco office and the Solicitor took a different approach in another matter, on January 4, 2017, filing an “access” complaint against Google for its alleged “refusal” to provide requested information. But here, OFCCP’s hastily filed complaint makes claims that the Agency has already adduced

sufficient (still undisclosed) evidence of hiring and compensation violations, and seeks debarment and other draconian relief.

ARGUMENT

I. OFCCP Has a Mandatory Obligation to Make Reasonable Efforts to Secure Compliance Through Conciliation Prior to Suing a Contractor.

The Executive Order and its implementing regulations set forth a comprehensive scheme of administrative procedures that must be exhausted before any OFCCP enforcement action can be pursued. Such exhaustion requirements embody critical and widely acknowledged policy objectives. Among other things, the administrative process serves to limit the adjudication of non-meritorious lawsuits, promote judicial economy, and ensure that lawsuits do not “peremptorily substitute litigation for conciliation.” *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264, 273 (5th Cir. 2008).
Title VII CONTRACT 7964

Included among these pre-filing administrative procedures that must be exhausted is a properly issued NOV giving rise to conciliation efforts. Both the Executive Order and its implementing regulations mandate that OFCCP make “reasonable efforts” to conciliate before commencing enforcement proceedings: “Under rules and regulations prescribed by the Secretary of Labor, each contracting agency *shall make reasonable efforts* within a reasonable time limitation to secure compliance ... by methods of conference, conciliation, mediation and persuasion before proceedings shall be instituted.” Executive Order § 209(b) (emphasis added); accord 41 C.F.R. § 60-1.20(b) (“Where deficiencies are found to exist, *reasonable efforts shall be made* to secure compliance through conciliation and persuasion.” (emphasis added)). In settling Title VII discrimination findings, these efforts “serve[] as a necessary precondition to filing a lawsuit.” *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015).

Here, the regulatory language is mandatory: “reasonable efforts shall be made ... to ... conciliat[e].” See *Mach Mining*, 135 S. Ct. at 1651 (citation omitted) (emphasizing that “the word ‘shall’ admits of no discretion”). Accordingly, the agency “*must make reasonable efforts* to secure compliance” through conciliation. *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769

F.2d 1503, 1514 (11th Cir. 1985) (emphasis added); *accord Traylor v. Safeway Stores, Inc.*, 402 F. Supp. 871, 876 (N.D. Cal. 1975) (“[B]efore [enforcement proceedings] are initiated, the federal contracting agency *must* make *reasonable efforts* to secure compliance by means of conference, conciliation, mediation, and persuasion. ... [O]nly after exhausting administrative efforts to obtain compliance” can OFCCP “seek to secure compliance through the courts[.]” (emphasis added)). The burden lies with OFCCP to show that it engaged in “reasonable” conciliation efforts before it filed an enforcement action. *See Priester Construction Co.*, 78 O.F.C.C.P. 11, 1983 WL 411026 at *13 (1983).

“Reasonable efforts” have not been specifically defined in the context of OFCCP’s conciliation mandate, either by the regulations or the courts. But there is substantial authority on what are *not* “reasonable efforts.” Under these standards, an agency’s attempt to create the appearance of compliance with its obligations by invoking the term “conciliate,” while withholding all meaningful predicates to such conciliation, does not suffice.

For example, even the more deferential conciliation requirement imposed on the EEOC—which merely states that the agency must “endeavor” in some way to resolve allegations pre-filing—requires the agency to “inform the employer about the specific ... allegation” and describe “both what the employer has done and which employees (or what class of employees) have suffered as a result.” *Mach Mining*, 135 S. Ct. at 1655-56; *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 73 (1984) (EEOC has the duty to identify to accused employer “the groups of persons that [the EEOC] has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which [the EEOC] suspects the discrimination to have been practiced.”).

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Other Title VII cases are instructive as well. As these authorities recognize, parties cannot conciliate claims and issues about which the employer is not adequately informed. *See, e.g., EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003) (reasonable conciliation efforts “must, at a minimum, make clear to the employer the basis for the EEOC’s

charges against it.... Otherwise, it cannot be said that the Commission has provided a meaningful conciliation opportunity.”); *EEOC v. CollegeAmerica Denver, Inc.*, No. 14-CV-01232-LTB-MJW, 2015 WL 6437863, at * 3 (D. Colo. Oct. 23, 2015) (EEOC failed to conciliate claims arising from the employer’s Separation Agreement where there was no evidence that the EEOC notified the employer that its findings included the terms of that agreement, or that the agreement was addressed at the parties’ conciliation meeting); *EEOC v. GNLV Corp.*, No. 2:06-CV-01225-RCJ, 2015 WL 3467092, at * 5 (D. Nev. June 1, 2015) (where investigation and conciliation efforts were addressed to the position of table-games dealers, conciliation efforts may be insufficient for claims related to other positions); *EEOC v. Sensient Dehydrated Flavors Co.*, No. 1:15-cv-01431-DAD-BAM, 2016 WL 4399367, at *6 (E.D. Cal. Aug. 17, 2016) (courts can “consider[] whether the EEOC attempted to confer about a specific allegation in the first instance and thus met its conciliation requirements”). Courts thus acknowledge that an agency must be at least minimally transparent about its concerns, and the bases for them, before any meaningful conciliation can occur.

II. OFCCP Failed to Make the Required “Reasonable Efforts” to Conciliate with Oracle.

A. OFCCP Cannot Be Found to Have Conciliated When It Stonewalled Regarding Its Analysis and Refused to Even Engage with Oracle’s Concerns or Evidence.

The undisputed evidence shows that OFCCP’s efforts to conciliate were far from “reasonable.” Although the term “conciliation” is not defined in the operative regulation, the Supreme Court has observed that it “necessarily involve[s] communication between parties, including the exchange of information and views,” in “an attempt to ‘reconcile’ different positions.” *Mach Mining*, 135 S. Ct. at 1652 (quoting American Heritage Dictionary 382 (5th ed. 2011)). In this vein, when OFCCP announced its current approach to compensation analyses, the Agency specifically “commit[ed] to provide greater clarity for contractors” and “much greater transparency on questions of investigation practices and procedures”—necessary predicates to meaningful conciliation. Interpreting Nondiscrimination Requirements of

Executive Order 11246 With Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, 78 Fed. Reg. 13,508-01, 13,509, 2013 WL 704611 (Feb. 28, 2013).⁵

The regulation at issue imposes a requirement not only that OFCCP conciliate, but that its efforts to do so be “reasonable.” No such reasonable efforts took place here. As the chronology set forth above makes clear, OFCCP refused to “exchange [] information” despite Oracle’s repeated requests. *See* Holman-Harries Decl. ¶¶ 3-7, 10-11, Exs. B-D, G-H; Siniscalco Decl. ¶¶ 2, 4, 6, 9-10, 14, Exs. I, K, M, S. And far from attempting to “reconcile” the parties’ competing positions, the Agency repeatedly stated that it would not so much as consider entire categories of evidence and argument that Oracle sought to present. *Id.*

The Eleventh Circuit’s decision in *Asplundh Tree Expert Company* is instructive. There, the EEOC conducted an investigation for nearly three years. 340 F.3d at 1259. Then, “in a flurry of activity,” it issued a Letter of Determination, followed by a proposed Conciliation Agreement, and demanded that the employer promptly either accept the proposed agreement or submit a counterproposal. *Id.* at 1259-60. When the employer stated that it needed further information to understand the Agency’s basis for its determination, the EEOC responded with a letter terminating conciliation and announcing its intent to sue. *Id.* at 1260. The Eleventh Circuit concluded that such conduct by the agency “smacks more of coercion than of conciliation.” *Id.* Despite “the extended period of investigation,” the court found that “once the EEOC decided it was ready to move forward, it would tolerate no ‘dallying’ by Asplundh.” *Id.* The court concluded that “such an ‘all-or-nothing’ approach on the part of a government agency,

⁵ *See also id.* at 13510 (“The agency will be providing as much clarity as possible regarding its application and interpretation of important legal, factual and technical issues in assessing systemic compensation discrimination ...”), 13518 (“Going forward, OFCCP will provide as much transparency and public disclosure as possible about its procedures for investigating compensation discrimination.”).

one of whose most essential functions is to attempt conciliation with the private party, will not do.” *Id.* Accordingly, the appellate court affirmed dismissal of the case and an award of attorney’s fees against the EEOC. *Id.* at 1261.

As in *Asplundh*, the Agency’s conduct here “smacks more of coercion than of conciliation.” OFCCP’s rush to file was undertaken in violation of its obligation to sit down, in good faith, and attempt to reach consensus with Oracle on the basis of shared facts and information.

B. OFCCP Failed to Sufficiently Inform Oracle of the Remedies It Sought.

An agency does not engage in “reasonable efforts” to conciliate when it fails to set forth the remedies it seeks. In *EEOC v. OhioHealth Corp.*, 115 F. Supp. 3d 895 (S.D. Ohio 2015), though the EEOC presented a proposed conciliation agreement, neither that agreement nor anything else presented to the employer explained the calculations supporting the requested monetary relief. *Id.* at 899. The court held that the EEOC failed to satisfy its obligation to conciliate, even under the *de minimis* standard applicable to that agency: “Absent disclosure of this calculation to OhioHealth, the conciliation process could have been nothing but a sham. The calculation would necessarily inform if not outright shape the parties’ positions, and in the absence of such information the EEOC can hardly be said to have ‘given the employer an opportunity to remedy the allegedly discriminatory practice.’” *Id.* (quoting *Mach Mining*, 135 S. Ct. at 1656). Accordingly, the court administratively closed the case and ordered EEOC to engage in good faith conciliation lest the case be dismissed. *Id.* at 899-900.

Refusing to explain monetary demands, and offering nothing but take-it-or-leave demands, has also been held to be an inadequate effort at conciliation. For example, the Fifth Circuit held that the EEOC’s presentation of an unsupported “take-it-or-leave-it demand” was not an attempt to conciliate in good faith. *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (affirming summary judgment for employer). Similarly, in *EEOC v. IPS Industries, Inc.*, No. 2:10CV168-MPM-DAS, 2010 WL 5441993 (N.D. Miss. Dec. 28, 2010), the EEOC presented a monetary settlement demand to the employer but failed to respond to the

employer's "very specific requests" regarding the basis of that demand "that were both simple and reasonable." *Id.* at *2. The court held that "it is clear the EEOC did not make a good-faith attempt at conciliation." *Id.* The court explained that it was "utterly puzzled why the EEOC would not simply provide information to the defendant related to the damages sought." *Id.* "[E]ven assuming *arguendo* that the EEOC had a strong claim," the court reasoned, "surely it would not expect a defendant to pay anything without explanation." *Id.* Because the court found that "the EEOC did not respond in a reasonable and flexible manner to the reasonable attitudes of the employer," it granted the employer's request for a stay and ordered the EEOC to return the matter to conciliation and engage with the employer's requests in good faith. *Id.*

Here, OFCCP failed to provide *any* specific conciliation proposal, let alone information regarding how the proposal was calculated. Despite Oracle's repeated requests for a proposed conciliation agreement, OFCCP never provided one.⁶ OFCCP likewise failed to provide more than the barest of detail for any non-monetary corrective actions. At the one face-to-face meeting on October 6, 2016, OFCCP stated that it was not yet prepared to address any remedy for the alleged recruiting violation. *See* Siniscalco Decl. ¶ 10. As to monetary damages, it provided only what it characterized as preliminary numbers—some of which spanned a huge range. *Id.* And, when Oracle asked how OFCCP had determined the numbers it was using, OFCCP stated that it would not provide those calculations at that time (and it never did). *Id.* OFCCP's refusal to provide Oracle with a clear and definite settlement proposal, despite Oracle's repeated requests, cannot possibly constitute "reasonable efforts" to conciliate.⁷

⁶ It is telling that this failure ran afoul of the process contemplated by OFCCP's own internal guidance. The FCCM identifies the steps a compliance officer is obligated to take in the course of a compliance review. Section 8H00 states that a compliance officer must "normally use a [Conciliation Agreement] whenever he or she properly issues an SCN." *See* FCCM, *supra*, at p. 266. As such, a proposed Conciliation Agreement should be presented to the contractor in virtually every scenario that proceeds to the conciliation process. Appendix A-14 contains a sample internal memorandum for the conciliation process, detailing "what was offered, by whom, rationale for rejecting, and issues at impasse." *Id.* at p. 411. No such dialogue was engaged in here. Rather, OFCCP departed from its own protocol by halting conciliation before negotiations reached a genuine impasse.

⁷ To the extent that OFCCP blames its failure to provide a concrete conciliation proposal on an alleged failure of Oracle to provide information, that is a ruse. If OFCCP felt that Oracle was withholding information that

Furthermore, even after presenting Oracle the broad outlines of its potential demand, OFCCP failed to negotiate with Oracle about it. Instead, OFCCP insisted that Oracle accept that “demand” or present its best and final “counteroffer” to it, without further dialogue. Siniscalco Decl. ¶ 15, Ex. T. When Oracle responded that it needed a concrete demand before it could provide a counter, OFCCP abruptly and unilaterally declared an impasse and filed this action. *Id.* ¶¶ 16-17, Exs. U-V. Such conduct hardly demonstrates reasonable efforts to conciliate.

Rather than making reasonable efforts to engage in conciliation, OFCCP did exactly what the EEOC was criticized for doing in *OhioHealth*: “present[ing] its demand as a take-it-or-leave-it proposition, fail[ing] to provide information requested by [the employer], demand[ing] a counteroffer, and then declar[ing] conciliation efforts to have failed despite [the employer] having made it clear that it was ready and willing to negotiate.” 115 F. Supp. 3d at 898. The court in *OhioHealth* concluded that such a series of events not only failed to satisfy the EEOC’s conciliation obligation, but was a proceeding “for appearances only” that “never was a real attempt to engage in conciliation as the law requires.” *Id.* Those words could have been written for this case. Accordingly, just as the court in *OhioHealth* refused to allow the case to move forward, this tribunal should do so here.

OFCCP’s “conciliation” efforts never rose above a nominal attempt to present the appearance of conciliation. Rather than use the requirement for reasonable conciliation to try to resolve the matter, OFCCP subverted the conciliation process by using it instead in an effort to gain information for litigation (such as Oracle’s rebuttal to OFCCP’s unexplained statistical analysis) and coercion to reach a “settlement” to OFCCP’s unilateral satisfaction. Such actions do not satisfy even the basic standard of conciliation under the EEOC’s minimal obligations, much less the “reasonable efforts” standard required by OFCCP’s own regulations.

it needed to properly conduct its review, its remedy was to bring an access enforcement action for which it could request expedited proceedings. It never did so. OFCCP’s failure to avail itself of the enforcement remedy available to it does not relieve it of the duty to conciliate based on the information that it chose to obtain through the procedures provided.

III. This Court Has Authority to Review the Sufficiency of OFCCP's Conciliation Efforts Under the "Reasonable Efforts" Standard.⁸

A. Any Suggestion That OFCCP's Failure to Conciliate Is Unreviewable Must Be Rejected.

Oracle anticipates that the Agency will defend itself by arguing that this tribunal lacks the authority to conduct any meaningful review of its conciliation efforts (given that the Agency cannot credibly contend that it took reasonable steps to conciliate before filing). But that argument is foreclosed by the Supreme Court's recent decision in *Mach Mining*. There, the Supreme Court reversed the Seventh Circuit's determination that directives mandating pre-suit conciliation by administrative agencies are immune from judicial review. *See* 135 S. Ct. at 1651-53.

Mach Mining addressed the issue of whether the EEOC satisfied its pre-suit obligation to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion" before filing a lawsuit under Title VII. *See* 42 U.S.C. § 2000e-5(b). In finding judicial review of the EEOC's pre-suit obligations appropriate, the Supreme Court explained that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies" and that there was therefore "a 'strong presumption' favoring judicial review of administrative action." 135 S. Ct. at 1651. The Court explained that even within federal agencies, "legal lapses and violations occur, and especially so when they have no consequence" because of the absence of oversight. *Id.* at 1652-53. Therefore, the Court concluded that courts can and should review whether the EEOC satisfied its pre-suit obligation to "endeavor" to resolve the matter by conciliation. *Id.* at 1652.

Mach Mining rests on the principle that comprehensive review of an agency's pre-filing obligations is a critical and mandatory component of the administrative process. This review is a

⁸ Oracle makes this argument without prejudice to the possibility that the Department of Labor has not complied with the Appointments Clause in establishing the present forum, and expressly reserves its right to make any such argument in the future. *See, e.g., Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1170 (10th Cir. 2016) (holding that SEC administrative law judges are "inferior officers" within the meaning of the Constitution, whose appointments must therefore comport with the requirements of U.S. Const. art. II, § 2, cl. 2).

corollary of the statutory or regulatory language establishing an agency's obligations, and should seek to enforce those obligations as imposed by Congress. *Mach Mining* thus supports Oracle's position that the "reasonable[ness]" of the Agency's pre-filing activities is appropriate for review.

B. The Scope of Judicial Review Applicable Here Is Significantly Broader Than in *Mach Mining*.

Mach Mining established that the appropriate scope of review of the agency's pre-filing actions is determined by reference to the underlying statutory language governing the administrative process at issue. 135 S. Ct. at 1655 (as concerns the EEOC, "the proper scope of judicial review matches the terms of Title VII's conciliation provision"). Unlike the more stringent obligation OFCCP has to conciliate (*see* Argument Section I, *supra*), under the underlying statutory and regulatory framework for the EEOC at issue before the Supreme Court, *Mach Mining* held that the EEOC's conciliation obligations were minimal—far short of an obligation to make efforts to conciliate that were "reasonable." Specifically, the Supreme Court emphasized that under Title VII's conciliation provision, "the EEOC need only 'endeavor' to conciliate a claim." *Id.* at 1654. Given this statutory language, the Court concluded that Title VII gives the EEOC "expansive discretion" over the conciliation process and latitude that "smacks of flexibility." *Id.* at 1656, 1654. Additionally, the Court concluded that more exacting judicial review of the reasonableness of the EEOC's conciliation "endeavors" would contravene another of Title VII's provisions, which mandates maintaining the confidentiality of conciliation efforts. *Id.* at 1655. Judicial review beyond a limited review would necessitate the disclosure and use of such information, thereby undermining the confidentiality required under Title VII's administrative process.

By contrast here, given the pertinent regulatory language and OFCCP's administrative process, this tribunal is vested with the authority to review the Agency's pre-suit efforts to determine if they were "reasonable." Executive Order § 209(b); 41 C.F.R. § 60-1.20(b). "Reasonable efforts" clearly means more than simply endeavoring to conciliate (as was the

requirement in *Mach Mining*).⁹ Contrary to Title VII and the EEOC's administrative process, the Executive Order and its implementing regulations do not provide OFCCP with "extensive discretion" over conciliation; rather, they expressly require that OFCCP not just endeavor to conciliate but make "reasonable" efforts to do so. *Mach Mining*'s holding thus requires this tribunal to adopt a more searching analysis than the Supreme Court performed in *Mach Mining* itself.

Post-*Mach Mining* cases confirm that the scope of judicial review of an agency's actions depend on the underlying statutory or regulatory language. For example, in *Hyatt v. U.S. Patent & Trademark Office*, 797 F.3d 1374 (Fed. Cir. 2015), the Federal Circuit held that an administrative decision of the U.S. Patent and Trademark Office ("PTO") is subject to a more comprehensive judicial review than the narrow scope for EEOC conciliation efforts set forth in *Mach Mining*. In the *Hyatt* case, the statute provided that patent applications shall be kept confidential except in "such special circumstances as may be determined by the Director." *Id.* at 1380. The court noted that "*Mach Mining* stands for the proposition that, when a statute provides an agency with 'wide latitude' in an action, the scope of review over that action may be narrower." *Id.* at 1383. But because the statute imposing obligations on the PTO did not "exude" discretion, the PTO's determination of whether "special circumstances" justifying disclosure were present was subject to a more probing judicial review. *Id.*¹⁰ See also *Rhode*

⁹ This accords with the canon that every word be given meaning in interpreting a statute or regulation. *McDonald v. Thompson*, 305 U.S. 263, 266 (1938) (The statutory term "bona fide operation" as a common carrier must mean something more than simply physical operation as a common carrier; "To limit the meaning to mere physical operation would be to eliminate 'bona fide.' That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent."); *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) (while statutes providing benefits to veterans for service-connected disabilities should be construed in a pro-claimant fashion, court cannot ignore the plain language in the statute providing that Agency need only request reexamination when there has been "a material change;" "we attempt to give full effect to all words contained within that statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible.").

¹⁰ The *Hyatt* court also rejected the PTO's argument that the determination whether there are "special circumstances" is not reviewable because "it contains no meaningful standard for reviewing the Director's determination that particular circumstances qualify as special." *Id.* at 1382. As the court explained, while "it is true that [the statute] does not lay out a specific process or outline specific considerations for determining the existence

Island Comm'n for Human Rights v. Graul, 120 F. Supp. 3d 110, 120 (D.R.I. 2015) (the *Mach Mining* decision “relies heavily on the specific conciliation language of Title VII;” since “[t]he language related to conciliation in the [Fair Housing Act] is very different,” the scope of review is different as well); *CollegeAmerica Denver*, 2015 WL 6437863, at *3 (holding that “the Supreme Court’s analysis in *Mach Mining* is limited to Title VII’s requirement of conciliation” and does not apply to the conciliation requirements of the ADEA).

C. Because OFCCP’s Conciliation Process Is Not Confidential, a Narrower Scope of Judicial Review Is Not Required.

In *Mach Mining*, the Court found that reviewing the content of the EEOC’s conciliation efforts would necessarily flout Title VII’s guarantee of confidentiality with respect to the conciliation process. *See* 135 S. Ct. at 1655. Here, however, OFCCP’s regulations concerning conciliation contain no promise of confidentiality. *See* 41 C.F.R. § 60-1.20(f), (g) (limiting discussion of confidentiality to information provided by contractor during compliance evaluation). Accordingly, because there is no confidentiality provision governing the conciliation process with OFCCP, there is no cause for any such concern. *See Hyatt*, 797 F.3d at 1383 (rejecting argument that scope of review of PTO action was limited to *Mach Mining* standard, because “unlike in *Mach Mining*, further review does not conflict with or contradict other statutory requirements”). Nor is judicial review of OFCCP’s “reasonable efforts” to conciliate in conflict with any other aspect of the applicable regulations. Accordingly, judicial review of whether the Agency made “reasonable efforts” as required does not implicate any contrary or limiting policies.

D. Because No Private Right of Action Is Available Under Executive Order 11246, a More Probing Scope of Judicial Review Is Appropriate.

Yet a third factor distinguishes the OFCCP administrative process from the Title VII administrative process, and supports a more probing scope of judicial review. There are two alternative avenues for the pursuit of Title VII claims: (i) an action by the EEOC; and (ii) an

of ‘special circumstances,’ ... [w]e reject the PTO’s argument that the lack of enumerated factors means that the statute is unreviewable.” *Id.*

action by a private litigant, for which there is no requirement of conciliation prior to filing suit. *See Access Living v. Prewitt*, 111 F. Supp. 3d 890, 896 (N.D. Ill. 2015). By contrast, the Executive Order does not provide alternative avenues for the pursuit of claims. The Executive Order does not create a private cause of action for aggrieved employees to enforce the equal employment opportunity clause in their employer's government contracts. *Eatmon*, 769 F.2d at 1515. Furthermore, courts consistently refuse to imply a private cause of action because "to imply a private cause of action under Executive Order 11246 would be disruptive of the administrative scheme established by the order and its implementing regulations, since the scheme requires conciliatory attempts by OFCC[P] before going to court. A private cause of action under the executive order would disrupt this by permitting court action prior to any conciliatory attempts." *Id.* at 1515, n.12; *see also Traylor*, 402 F. Supp. at 876 ("[B]efore these various actions are initiated, the federal contracting agency must make reasonable efforts to secure compliance by means of conference, conciliation, mediation and persuasion... It would be obviously destructive of the administrative scheme to allow it to be short-circuited by implying a private right of action..."). Compared to Title VII claims, the pre-filing conciliation process for claims under the Executive Order is more integral to the enforcement scheme contemplated by Congress, since it is the *only* route through which claims under the Executive Order can be brought to court.

E. The Contractual Nature of OFCCP Jurisdiction Further Dictates a More Exacting Judicial Review of the Agency's Adherence to Its Regulatory Pre-Filing Obligations.

Finally, a more exacting review of OFCCP's adherence to its regulatory obligation to engage in "reasonable efforts" to conciliate pre-filing also is appropriate given the contractual nature of OFCCP's jurisdiction over Oracle. Unlike the EEOC, which has jurisdiction to enforce Title VII against *all* employers with more than 15 employees by virtue of statute (*see* 42 U.S.C. §§ 2000e, *et seq.*), OFCCP's jurisdiction to enforce the Executive Order through compliance evaluations such as the one at issue here extends only to those employers with more than 50 employees who voluntarily choose to enter into contracts with the federal government of \$50,000

or more (*see* 41 C.F.R. §§ 60-1.1, 1.3). Government contractors accept oversight by OFCCP as part of that bargain, but frame that acceptance in terms of their expectations that OFCCP will confine those audits within the governing regulations.

The ultimate sanction for non-compliance by a contractor is debarment from future government contracts, further underscoring the contractual nature of the parties' relationship. *See* 41 C.F.R. § 60-1.27(b). And all contracts, including government contracts, are governed by the covenant of good faith and fair dealing, further underscoring that contractors have a reasonable expectation that OFCCP will abide by the regulations governing its actions. *See, e.g., Metcalf Const. Co. v. United States*, 742 F.3d 984, 993 (Fed. Cir. 2014) (holding that the "general standard" for establishing a breach of the implied duty of good faith and fair dealing applies in the context of government contracts). Given the contractual nature of OFCCP's jurisdiction, combined with policy reasons of not wanting to deter companies from doing business with the federal government for fear of premature litigation by OFCCP, a more exacting review of whether OFCCP met its regulatory obligation to engage in "reasonable efforts" to conciliate is appropriate.

In short, this court has both the authority and the obligation to review whether OFCCP satisfied its regulatory requirement to engage in "reasonable efforts" to conciliate prior to commencing this action. The "reasonable efforts" mandated by the Executive Order and its implementing regulations require a higher standard of agency conduct and imply greater judicial scrutiny of the conciliation process than under the Title VII administrative process. OFCCP here plainly failed to satisfy its obligations under this heightened standard, and cannot meet its burden to prove otherwise.

IV. This Court Should Dismiss This Action for Failure Of OFCCP to Conciliate or, in the Alternative, Stay the Proceeding Pending Reasonable Conciliation Efforts.

The conciliation mandate in 41 C.F.R. § 60-1.20(b) does not provide a specific remedy when OFCCP fails to fulfill its obligations. Thus, this court has the discretion to either dismiss or to stay the action pending completion of conciliation. Dismissal is appropriate here.

The timing of events in the period from October 2016 through January 2017 strongly suggests that OFCCP was influenced by improper motivations. After the parties participated in one brief conciliation meeting in early October—which both parties indicated was a productive initial, but certainly not final, step—OFCCP did not respond to Oracle’s follow-up factual submission until December 9, 2016, *i.e.*, after the election. At that time, OFCCP abruptly announced that it had referred the matter to the Solicitor for enforcement proceedings. When Oracle immediately reached out to the Solicitor to inform her that the conciliation process had not yet been completed (*see* Siniscalco Decl. ¶ 14, Ex. S), the local San Francisco office responded solely with a demand that Oracle provide its “best and final counteroffer” within three days, followed by a promise to file an administrative complaint without further dialogue if the “counteroffer” were deemed inadequate (*id.* ¶ 15, Ex. T). When Oracle unsurprisingly responded it could not provide a “counteroffer” when no demand had yet been presented (*id.* ¶ 16, Ex. U), the Solicitor’s office filed this enforcement action—just three days before the change in administrations.¹¹ To the extent that the timing here was motivated even in part to beat the buzzer before a change in administrations and political philosophies, such motivations would plainly be inappropriate.

Oracle should not be prejudiced by OFCCP’s political gamesmanship, and this court should not turn a blind eye to such inappropriate motivations. Several cases hold that dismissal, rather than a stay, is appropriate where the agency may have been influenced by improper motives or otherwise acted in bad faith. *See, e.g., Asplundh Tree Expert Co.*, 340 F.3d at 1261, n.3 (EEOC’s failure to conciliate past an arbitrary deadline warranted dismissal where “chronology of events” suggested that the EEOC’s “haste to file the instant lawsuit” with its “newsworthy” allegations may have been “motivated, at least in part” by the newsworthiness of a litigated resolution); *Agro Distribution*, 555 F.3d at 468-69 (dismissal “an appropriate sanction” where “EEOC did not attempt conciliation in good faith”). OFCCP should not be

¹¹ The complaint in this action was not the only “midnight” complaint that OFCCP filed on the eve of the inauguration. *See, e.g., OFCCP v. JP Morgan Chase* (Compl. Jan. 17, 2017).

allowed to rush to court for its own purposes and then be provided an opportunity to belatedly do what it was obligated to do before suing. Otherwise, there would be no disincentive for the agency to take similar actions in the future.

Notably, courts do not hesitate to dismiss a contractor's claim against OFCCP when the contractor did not exhaust administrative remedies. *See, e.g., Nationsbank Corp. v. Herman et al.*, 174 F.3d 424, 429-31 (4th Cir. 1999) (defendant OFCCP entitled to summary judgment on contractor's action because contractor failed to exhaust administrative remedies before filing complaint); *Volvo GM Heavy Truck Corp. v. U.S. Dept. of Lab.*, 118 F.3d 205, 215 (4th Cir. 1997) (same). If contractors do not get an opportunity for a "redo" when they rush to court before exhausting the administrative process, neither should OFCCP.

Should the court find that dismissal is not warranted, it must at the very least impose a stay and order OFCCP to undertake reasonable efforts to obtain voluntary compliance through conciliation. *See, e.g., Woodward Governor Co.*, 89 O.A.L.J. 12, at ¶ 5 (1992). Such a stay would ensure that the administrative precursors to litigation are satisfied and is consistent with the minimum requirements articulated by the Supreme Court.

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CONCLUSION

For the reasons set forth above, Oracle respectfully requests that the Court grant its motion for summary judgment or, in the alternative, stay the proceedings so that OFCCP can fulfill its obligation to make reasonable efforts at conciliation.

Dated: April 21, 2017

Respectfully submitted,

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