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June 29, 2016

VIA E-MAIL AND FEDERAL EXPRESS

Janette Wipper
Regional Director, Pacific Region
U.S. Department of Labor
Office of Federal Contract Compliance Programs
90 7th Street, Suite 18-300
San Francisco, CA 94103

Re: Oracle America, Inc.; Redwood Shores, California (OFCCP No. R00192699)

Dear Ms. Wipper:

We have received your June 8, 2016, letter which you describe on page 3 as a Notice to Show Cause ("SCN"). Your letter states that you are issuing the SCN because "OFCCP's findings remain un rebutted at this point and conciliation efforts have failed to resolve the violations." For the reasons set forth below we disagree that you have proper grounds, or any grounds, for issuance of an SCN at this time, and urge OFCCP to undertake reasonable conciliation efforts.

First, even if the assertion that Oracle has failed to rebut the violations were true, that is not a proper grounds to issue an SCN "at this point."¹ In short, rebuttal has nothing to do with

¹ Indeed, it remains undisputed that at no time prior to the issuance of the NOV did OFCCP provide Oracle with any reasonable opportunity to address or rebut any of OFCCP's purported concerns or preliminary findings of pay bias. There was no exit conference and no Predetermination Notice; recall, for example, the facts we presented to demonstrate OFCCP's false claim of an exit conference by your staff. Only after issuing the NOV did your staff first ask for a rebuttal. A rebuttal, of course, is not part of the conciliation process itself. And as we made clear in correspondence, we needed factual information before we could offer a meaningful rebuttal. Instead, you simply ignored our requests and have now jumped imprudently and prematurely to your SCN. While we also noted in our correspondence that the Agency failed to follow its own procedures in myriad ways, we never asserted that the FCCM establishes "substantive agency policy" as suggested in footnote 3 of your SCN. We are not even clear on what that phrase means. Rather, as described in detail in our May 25 submission your staff failed in numerous respects to follow Agency procedures as specified in the FCCM. Many of the FCCM sections we cited specify that COs "must" or "shall" do certain things in the course of conducting a compliance review, in the content and form of an NOV, and in developing conciliation proposals and drafting conciliation language. Failure by the Agency to follow mandated procedures, as with a failure to follow applicable law or regulations, can and does frequently operate to prejudice contractor rights. Simply stated, we believe the FCCM provides guidance, directions, and where specified, mandated processes for OFCCP compliance staff to follow.



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conciliation efforts.² Once again the SCN suggests greater interest by OFCCP in bullying, threatening, and misstating the documented record rather than complying with OFCCP's rules, practices, and mandatory regulations. Therefore, to the extent that OFCCP suggests that a perceived failure by a contractor to offer a rebuttal of which OFCCP approves supports the issuance of an SCN, the SCN is not consistent with OFCCP's own regulatory procedures.

Second, whether or not Oracle had any meaningful opportunity to provide rebuttal or provided satisfactory (or even unsatisfactory) rebuttal, that has nothing to do with your bald assertion that "conciliation efforts have failed." Quite simply, and as the record will reflect, there were scant "conciliation efforts" at all—and certainly no good faith, reasonable conciliation efforts by OFCCP. Conciliation efforts haven't failed; they haven't occurred. OFCCP regulations require OFCCP to undertake reasonable conciliation efforts. *See* 41 C.F.R. § 60-1.20(b).

Notably, OFCCP has not made any monetary proposal for each of the employees it claims are aggrieved, and indeed has presented no conciliation proposal of any kind. Nor has it engaged in any meaningful negotiation process to achieve a resolution. OFCCP asked to meet in person; in response, we explained why we believed such a meeting would be premature and inappropriate, proposed the alternative of written communications as expressly contemplated by the FCCM, and expressed our continued interest in resolution. *See* Letter to Robert Doles, April 11, 2016. We set forth explicitly our reasons for suggesting written communication, but received no response from OFCCP. Oracle has not in any way, manner, or form refused to engage in conciliation efforts.

We note further that after issuing the NOV, and after Oracle acknowledged willingness to conciliate, only then did Mr. Doles finally ask for a "position statement" regarding OFCCP's findings. The position statement and questions we raised may not satisfy you, but instead of any meaningful response, your June 8 letter is a bald rejection of and refusal to engage in reasonable, good faith efforts at resolution. This is simply more abuse of process and more violations of OFCCP's regulatory obligations, this time regarding conciliation. We believe, therefore, that OFCCP should—indeed must—withdraw the SCN and engage in reasonable conciliation efforts.

Separate and apart from the foregoing, we are concerned that much of OFCCP's rush to issue an SCN is a result of its misapplication of the standards governing rebuttal evidence, and misapprehension of the alternative means by which an employer can respond to statistical evidence purporting to show an impermissible pay disparity.

² Conceivably and hypothetically, a contractor could offer no rebuttal, even concede that NOV findings are 100% correct, and still that would not affect the requirement for reasonable conciliation efforts.



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In its recent correspondence, OFCCP has repeatedly taken the position that Oracle has failed to provide any “substantive rebuttal analysis” because it did not provide its own contrary “statistical evidence.” Indeed, your June 8 letter states categorically that what OFCCP characterizes as “procedural arguments raised by Oracle *are not a rebuttal*” (emphasis added), and are “neither a relevant nor appropriate response to the statistical evidence of systemic discrimination uncovered in the compliance evaluation and disclosed in the Notice.”

This is simply not a correct statement of the law. There is no requirement—in Title VII, Executive Order 11246 or its implementing regulations, or otherwise—for a party charged with discrimination to develop its own independent statistical models in an effort to prove a negative: that it *did not* engage in any pattern or practice of discrimination. The leading employment law treatises are all in accord on this point:

- “If the defendant chooses to challenge the plaintiff’s statistics, the defendant is not obligated to conduct his or her own statistical analysis, but may simply address the flaws in the plaintiff’s data.” Walter B. Connolly, Jr., David W. Peterson & Michael J. Connolly, *Use of Statistics in Equal Employment Opportunity Litigation* § 3.01 (2015).
- “The employer may attempt to rebut the plaintiff’s prima facie case in a variety of ways. With respect to a plaintiff’s statistical evidence, the two most commonly used approaches are to (1) explain away any statistical disparity by, for example, demonstrating that the plaintiff’s statistical calculations are based on faulty data, flawed computations, or improper methodologies; or (2) introduce alternative statistical evidence.” Barbara T. Lindemann, Paul Grossman & C. Geoffrey Weirich, *Employment Discrimination Law* § 2.III, p. 2-117 (2015).
- “If the plaintiff succeeds in proving a *prima facie* case of a pattern or practice of discrimination, [t]he defendant can present its own statistical evidence ... Alternatively, the defendant can present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination” or target “[t]ypical flaws in the plaintiff’s evidence ... includ[ing] statistics that compare the defendant’s work force to an inappropriate general population, include irrelevant job categories in the work force statistics, utilize the improper geographical area for the relevant labor market, otherwise fail adequately to tailor the comparison to the qualifications demanded by the position in question, fail to present adequate data on both sides of the comparison, fail to eliminate pre-Title VII discrimination from consideration, simply fail to demonstrate disparity of treatment to be statistically significant due to small



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sample size or otherwise, or contain various other flaws.” 1-9 *Larson on Employment Discrimination* § 9.03[2] (2015).

So, too, is the case law. *Int'l Bhd. of Teamsters v. United States* directs that if a plaintiff makes out a *prima facie* case, “[t]he burden then shifts to the employer to defeat the *prima facie* showing of a pattern or practice by demonstrating that the Government’s proof is either inaccurate or insignificant.” 431 U.S. 324, 360 (1977). The examples the Supreme Court offered of how an employer might effectively rebut did not involve any complicated competing statistical models, but instead noted that “[a]n employer might show . . . that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.” *Id.* Indeed, the Court was express that while “[t]he employer’s defense must . . . be designed to meet the *prima facie* case of the Government, we do not . . . suggest that there are any particular limits on the type of evidence an employer may use.” *Id.* at 360 n.46. The Court thus has clearly held that statistical models can be challenged on their own merits, and that there is no need for an employer to offer competing statistical proof in rebuttal.

Courts applying this *Teamsters* directive have consistently ruled that although competing statistics are a *permissible* form of rebuttal evidence, they are not *required*.

- “The cases cited by the EEOC to support its argument that Sears had the burden of rebutting its statistical analysis with more ‘refined, accurate and valid’ statistical evidence did not state that the defendant must produce such evidence to succeed in rebutting the plaintiffs’ case. Instead, those cases indicated that a defendant could or ‘was entitled to’ use such a means of rebuttal. . . . These cases suggest, and the cases we have cited above confirm, that statistical evidence is only one method of rebutting a statistical case.” *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 313-14 (7th Cir. 1988) (citations omitted).
- “A central issue in the pending case is what showing an employer must make to satisfy its burden of production in a pattern-or-practice case. In *Teamsters* the Supreme Court stated that the employer’s burden was ‘to defeat the *prima facie* showing of a pattern or practice by demonstrating that *the Government’s proof is either inaccurate or insignificant.*’ 431 U.S. at 360, 97 S.Ct. 1843 (emphasis added). The emphasized words raise a question as to whether the Supreme Court thought the employer’s rebuttal evidence must be directed at the statistics that often constitute the *prima facie* case of discrimination or simply at the rebuttable presumption of discrimination that arises from those statistics. . . . We think the Court meant



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that the employer must produce evidence that is relevant to rebutting the inference of discrimination. No plaintiff can limit the type of evidence that a defendant must produce to rebut a *prima facie* case by its selection of particular evidence to support that case. ... [I]t is always open to a defendant to meet its burden of production by presenting a direct attack on the statistics relied upon to constitute a *prima facie* case. A defendant might endeavor to show that the plaintiff's statistics are inaccurate, for example, infected with arithmetic errors, or lacking in statistical significance, for example, based on too small a sample." *United States v. City of New York*, 717 F.3d 72, 85 (2d Cir. 2013).

- "The EEOC bears the burden of establishing a *prima facie* case, through use of statistics or other evidence, of disparate impact because of a prohibited factor. The burden is not on Defendant to conduct its own analysis to rebut the results produced by the EEOC's flawed report. It is sufficient for Defendant to point out the numerous fallacies in [the EEOC expert's] report, which raise the specter of unreliability." *EEOC v. Freeman*, 961 F. Supp. 2d 783, 799 (D. Md. 2013), *aff'd in part sub nom.*, 778 F.3d 463 (4th Cir. 2015) (granting summary judgment to employer).

Oracle's approach to this evaluation is entirely consistent with these authorities. In response to the NOV, Oracle sought additional detail about the particular statistical analyses that OFCCP ran, in order to enable a meaningful assessment of those analyses. Oracle also pointed to various legitimate job-related factors—including skills, performance, type of project, supervisory responsibilities, *etc.*—that explained pay differences between particular individuals whose experiences OFCCP's models appear to conflate. Challenging OFCCP's statistical models is a permissible, appropriate method of responding in rebuttal. Any contrary suggestion that Oracle was not engaging in the process in good faith simply rests on a misunderstanding of what the law requires of employers, and the burden that the Government maintains throughout that process to tender probative evidence establishing a pattern or practice of discrimination. We hope that you will dispense with this erroneous view of the law, and engage appropriately with Oracle's efforts to understand the models on which you seek to base a non-compliance case.

Finally, as evidence of OFCCP's continued bad faith in mischaracterizing Oracle's position on conciliation, I refer you to our email correspondence with District Director Atkins on April 25, where I had to again correct the Agency's blatant misstatements and mischaracterization regarding Oracle's intent to conciliate and the method it proposed to follow. Since you have omitted and may not have seen that relevant correspondence, I have attached it here. *See* E-mail to Hea Jung Atkins, April 25, 2016, 5:51 p.m. Attachment A.

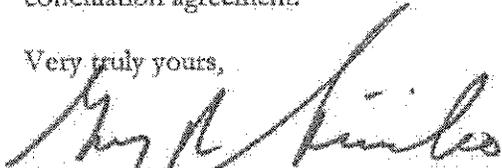


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In sum, we believe the SCN should be withdrawn and OFCCP should undertake reasonable conciliation as required. Oracle, for its part, continues to remain compliant and stands ready and willing to engage in transparent and interactive dialogue to resolve this evaluation. Any such dialogue should include, at a minimum and as a starting point, a specific proposal by OFCCP regarding the monetary relief it believes is due to particular identified individuals, and a proposed conciliation agreement.

Very truly yours,



Gary R. Siniscalco

Attachment

Siniscalco, Gary R.

From: Siniscalco, Gary R.
Sent: Monday, April 25, 2016 3:45 PM
To: Atkins, Hea Jung K - OFCCP
Subject: HQCA/April 21 letter

Hi Hea Jung,

I'm back in the office for a few days between my house move these past several days and leaving for Hong Kong. I did read your April 21 letter and find myself immediately dismayed by the very first substantive sentence of your letter (i.e. the second sentence of the letter) and feel compelled to address an immediate concern regarding the conciliation process.

The April 21 letter, referring to me and my letter of April 11, states, in part, as follows:

You reject the Agency's request to meet and engage in a good faith and timely conciliation discussion..."

Misstating and mischaracterizing my words is neither useful nor appropriate. "Good faith" includes, and is not limited to, accurate representations of what each party has spoken or written.

I repeat again what I wrote in the last paragraph of my April 11 letter:

For the reasons stated above, we believe the invitation for a face-to-face meeting would likely be premature. We are also concerned about engaging in a face-to-face dialogue given that the region has misstated and mischaracterized other in-person interactions going all the way back to the entrance conference. Until we have reason to believe there would be a more accurate and forthright exchange, we believe it best to have written communication". (emphasis added)

Unfortunately, the foregoing simply underscores my belief that until the Agency shows it can communicate accurately and stops its mischaracterizations, it is best to have all communications regarding the conciliation process documented.

ATTACHMENT A

Moreover, the Agency's own FCCM expressly contemplates such various written methods. See FCCM, Section 8GO1.

As I mentioned in my earlier email during my move, I will get back to you upon my return from Hong Kong with an expected date for a response.



GARY R. SINISCALCO
Attorney-at-Law

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September 9, 2016

Via Electronic Mail and U.S. Certified Mail, Return Receipt Requested

Gary R. Siniscalco
Orrick, Herrington & Sutcliffe LLP
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405 Howard Street
San Francisco, CA 94105-2669

**RE: COMPLIANCE EVALUATION OF ORACLE AMERICA, INC.,
REDWOOD SHORES, CALIFORNIA; OFCCP NO. R00192699**

Dear Mr. Siniscalco:

The United States Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) received your letter dated June 29, 2016, requesting that it withdraw the Show Cause Notice and undertake "reasonable conciliation." While OFCCP declines to withdraw the Show Cause Notice, it again offers Oracle the opportunity to engage in conciliation – though it will not accede to Oracle's attempts to dictate the terms of the conciliation process.

Contrary to Oracle's contentions in its letters, OFCCP retains discretion regarding the conciliation process it will use in a particular case and when to end conciliation efforts. OFCCP has provided information to Oracle regarding the deficiencies found, including the violations found, the class impacted, and information about the statistical analyses supporting OFCCP's findings. The Notice of Violation identified gross disparities on the basis of sex and race in compensation and hiring, well beyond the -2 standard deviations accepted as evidence of systemic discrimination.

OFCCP has repeatedly given Oracle the opportunity to conciliate, offering to meet, and, when Oracle declined to meet in person and requested additional time to respond in writing, provided additional time for Oracle to respond to OFCCP's findings in the NOV. While Oracle declares its desire to engage in conciliation, its stated desire rings hollow, given that it has refused to meet in person, it continues to emphasize and complain about the audit process and other procedural matters, its demand that OFCCP provide answers to approximately 60 questions, and its failure to make a meaningful, substantive response to OFCCP's findings. Although not required to do so, OFCCP responded to Oracle's demand

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for information, providing further information to Oracle in its April 21, 2016 letter, and gave Oracle an additional opportunity to respond. Despite this opportunity, rather than providing any evidence rebutting the findings of discrimination, or making any effort to cure the deficiencies, Oracle again attacked OFCCP's process and findings. However, simply attacking OFCCP's statistical findings, without indicating how the purported errors affect the results, is insufficient.

Oracle's continued focus on procedures, as opposed to the substance of the allegations is perplexing. OFCCP responded to Oracle's allegations that OFCCP had not followed the procedures described in the FCCM by not "advis[ing] Oracle of any findings in advance of issuing the Notice of Violation" in March. As OFCCP has repeatedly reminded Oracle, it did discuss preliminary indicators and areas of concern in late March 2015, and indicated that it would conduct further analyses and provide Agency findings in a formal notice.

However, even assuming arguendo that OFCCP did not follow procedures described in the FCCM, that is no defense to the Notice of Violation or Show Cause Notice. As OFCCP explained in its June 8, 2016 letter and as explicitly stated in the FCCM, the FCCM does not create legal rights for contractors. Contrary to Oracle's assertion, the procedures are not "mandated," and cannot be used to limit the OFCCP's enforcement powers. And, in any event, Oracle has certainly known about OFCCP's findings since the issuance of the Notice of Violation letter on March 11, 2016, and has had the opportunity since that time to discuss the merits of OFCCP's findings. Oracle's continued misplaced reliance on the FCCM is simply an attempt to divert the subject away from OFCCP's findings.

Also, Oracle's call for transparency and further information runs counter to its own actions during the audit and conciliation process. Oracle still has not provided relevant information requested over a year ago, including resumes, applications, requisitions, job postings, and hiring manager information for any positions other than Software Developers 1-5 and student interns, 2013 compensation data and LCAs, as well as starting salary, prior salary, and salary history for 2013 or 2014.

OFCCP has provided reasonable opportunities for Oracle to address or rebut OFCCP's claims. If your client wishes to engage in conciliation, including providing appropriate monetary and non-monetary remedies to resolve all outstanding violations, please contact me at (415) 625-7829 by September 16, 2016, to provide further information for OFCCP to consider or to schedule a conciliation meeting. Otherwise, we will conclude that the parties have reached an impasse in conciliation and the matter is ready for enforcement proceedings.

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Thank you for your attention and we look forward to your response.

Sincerely,



Hea Jung Atkins

cc: Shauna Holman-Harries (*via* email: shauna.holman.harries@oracle.com)
Director Diversity Compliance, Oracle America, Inc.

Juana Schurman (*via* email: juana.schurman@oracle.com)
Vice President and Associate General Counsel, Oracle America, Inc.

CONFIDENTIAL SETTLEMENT COMMUNICATION



September 16, 2016

Via E-Mail and U.S. Mail

Hea Jung Atkins
U.S. Department of Labor
Office of Federal Contract Compliance Programs
Pacific Regional Office
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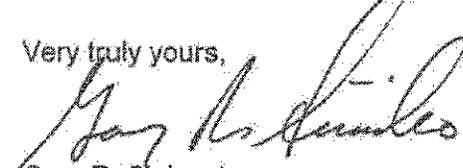
Re: Compliance Evaluation of Oracle, America, Inc.,
Redwood Shores, California: OFCCP No. R00192699

Dear Ms. Atkins:

Thank you for your September 9, 2016, Confidential Settlement Communication. We are pleased that OFCCP recognizes that conciliation efforts should continue.

As suggested in the last paragraph of your letter, Oracle will be happy to engage further with OFCCP in efforts to resolve this compliance evaluation. We also will be happy to accept your offer to explore in depth further information that might be helpful for OFCCP's consideration. We look forward to the opportunity to engage with OFCCP. Since Oracle representatives will be attending an OFCCP on-site all next week and have other compliance review matters to address upon their return the week of September 26, we suggest meeting on Thursday, October 6. Please let us know if that day will work.

Very truly yours,


Gary R. Siniscalco

cc: Juana Schurman
Shauna Holman-Harries

OHSUSA:765828568.]

U.S. Department of Labor

Office of Federal Contract Compliance Programs
Pacific Regional Office
90 Seventh Street, Suite 18-300
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September 16, 2016

Via Electronic Mail

Gary R. Siniscalco
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**RE: COMPLIANCE EVALUATION OF ORACLE AMERICA, INC.,
REDWOOD SHORES, CALIFORNIA; OFCCP NO. R00192699**

Dear Mr. Siniscalco:

We received your letter dated September 16, 2016 expressing your desire to meet with OFCCP to engage in conciliation. In order to engage in a good faith, mutual conciliation process and a productive meeting, we again request that Oracle provide a substantive rebuttal analysis by September 21, 2016. The Agency has requested such rebuttal analysis since March 2016. Provided that we receive Oracle's rebuttal analysis by the requested date and an Oracle representative with settlement authority to resolve all outstanding violations is available for the meeting, we are available to meet with you and your client on September 27, 28 or 29. We look forward to your response.

Sincerely,


Hea Jung Atkins

From: Swirky, Maria on behalf of Siniscalco, Gary R.
Sent: Wednesday, September 21, 2016 12:39 PM
To: 'Atkins.HeaJung@dol.gov'
Cc: Siniscalco, Gary R.
Subject: Compliance Review of Oracle America, Inc., Redwood Shores; CA OFCCP No. R00192699
Attachments: [HQCA] May 25, 2016.pdf; [HQCA] April 11, 2016.pdf; [HQCA] June 29, 2016.pdf

Via Email and U.S. Mail

Hello Ms. Atkins,

I am Mr. Siniscalco's Assistant. He is in Montana this week. He asks that I send you the attached in response to your September 16 email.

Thank you.

Dear Hea Jung,

This letter responds to your September 16 letter, which we received by email at 2:45 pm. In that letter, which responded to mine earlier on September 16, you take the position that any conciliation in this matter is now conditioned upon Oracle providing a "substantive rebuttal analysis" within three business days. As you know, this is an abrupt change in position by OFCCP. Just one week earlier, on September 9, 2016, you sent another letter in which you invited Oracle to engage in conciliation, and asked that I contact you by September 16 to initiate that process. Your September 9 invitation to conciliate did not condition OFCCP's offer to conciliate on Oracle providing any further analyses. On September 16, 2016, Oracle accepted OFCCP's conciliation invitation and suggested October 6, 2016 for an in person meeting. Given this sequence of events, you can imagine Oracle's surprise when it received a letter from you just a few short hours later, suddenly demanding a "substantive rebuttal analysis" as a condition of conciliation, and accelerating the date of any potential conciliation meeting to September 27, 28 or 29.

Not only does OFCCP's action contradict its stated desire to "engage in a good faith, mutual conciliation process and a productive meeting," but Oracle already has provided a substantive rebuttal analysis to the Agency's March 11, 2016. Moreover, Oracle has met its burden to show cause as to why enforcement proceedings should not be initiated.

On April 11, 2016, we advised the Agency that the March 11 letter failed to provide information allowing Oracle to understand the Agency's factual and statistical findings. As such, we requested that the Agency detail its findings and provide additional information. On April 21, the agency provided some cursory information. Despite the lack of detail and substantive evidence or analysis, Oracle, on May 25, 2016, provided a position statement that address numerous procedural and substantive failings that have plagued this evaluation process, leading to a procedurally and substantively defective NOV.

Copies of the April 11 and May 25 letters are attached. Among other things, the May 25 response set forth Oracle's positions including (1) OFCCP's failure to follow its own procedures during the investigation; (2) the NOV's procedural deficiencies; (3) OFCCP's substantive failure to establish disparate impact discrimination; (4) clear evidence of OFCCP's substantive failure to establish under Title VII and Directive 307 that employees were similarly situated for purposes of compensation discrimination; and (5) OFCCP's substantive failure to

take into account legitimate business related reasons for the alleged disparities. Indeed, the May 25 response is accompanied by a cover letter giving a road map to the 18-page rebuttal analysis. As explained in that letter, Part I of the analysis details the Agency's procedural failures, but Parts II and III (e.g., the majority of the response) detail the Agency's substantive failings. Accordingly, there is no question that Oracle has rebutted the Agency's findings, both procedurally and substantively.

Moreover, the cover letter to the position statement ended with this express offer "[w]e would be pleased to engage in further dialogue and discussion as may be appropriate." OFCCP responded in a peremptory manner by completely ignoring Oracle's substantive response and issuing a Show Cause Notice on June 8, 2016, that purported to assert that Oracle had offered no rebuttal and that conciliation "efforts" had failed.

In response to the Show Cause Notice, in a June 29, 2016 letter, Oracle again detailed its position, and met its burden to show cause as to why enforcement proceedings should not be initiated. Oracle's June 29 response explained that the Agency had not met its legal burden regarding its statistical model and requested again that the Agency provide supporting evidence and data. We also pointed out, inter alia, that OFCCP's assertion of a failure of conciliation efforts was demonstrably false. To date, the Agency has provided little further evidence related to the findings in the March 11 letter, has insisted on an additional "substantive rebuttal analysis", and has not provided any proposed remedies, monetary or otherwise for each of the alleged violations set forth in the NOV.

Oracle's concerns about whether it will be afforded a reasonable opportunity to engage in an transparent, reasonable and good faith conciliation process are further heightened by this most recent exchange as OFCCP has suddenly shifted the conditions for conciliation as stated in your September 16 afternoon email. On September 9, based on Oracle's detailed response to the SCN, you acknowledged a willingness to again engage in conciliation, and you concluded that letter by requesting that Oracle "... provide further information for OFCCP to consider or . . . schedule a conciliation meeting." Oracle responded, as requested, by agreeing to schedule a conciliation and proposed October 6. We also explained why that was the best and most feasible early date to meet. Then, just hours after we responded on the 16th, in your 2:45 p.m. reply, OFCCP changed its position and now insists on both a rebuttal statement by September 21, 2016 and a meeting on September 27, 28 or 29. This inconsistency does not comport with a desire to engage in a "good faith, mutual conciliation process."

Not only does the Agency's shifting positions on the terms of a meeting indicate a lack of willingness to engage in an evenhanded process, but also the proposed timing of the meeting shows unreasonable agency conduct. Oracle's offer to meet on October 6 was a good faith attempt to agree to a date that ensured that all appropriate Oracle personnel would be able to attend and ensure a productive initial conciliation meeting. In order to arrange that date, we coordinated the schedules of appropriate persons from Oracle and Orrick who would and could attend a conciliation meeting. Coordinating dates have been a significant challenge not only based on schedules but also the Agency's concurrent onsite reviews which have NOW totaled five during the summer months, including the current onsite in Bozeman, Montana. Oracle offered the earliest meeting date available to all required parties to ensure that the meeting would be productive. OFCCP has completely ignored that date without any explanation and suggests the September dates mentioned above.

Nonetheless, if you wish to meet sooner without all of the Oracle representatives present, we will accede to your meeting preference and will do so on September 28 at 10:00 a.m. PDT.

However, Oracle is not open to OFCCP now conditioning a conciliation meeting on providing any further "substantive rebuttal analysis" by September 21, 2016. As explained above, Oracle has responded as fully as possible given the defective nature of the agency's process and the resulting NOV. In particular, Oracle's May 25, 2016 response includes both a procedural and substantive rebuttal analysis. To the extent that any further rebuttal is warranted, we would anticipate presenting such positions to you at the appropriate time.

Please confirm the September 28 meeting date and time.

Maria L. Swirky
Legal Secretary

Orrick

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April 11, 2016

Gary R. Siniiscalco
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gsiniiscalco@orrck.com

Mr. Robert Doles
District Director
U.S. Department of Labor
Office of Federal Contract Compliance Programs
Greater San Francisco/Bay District Office
90 7th Street, Suite 11-100
San Francisco, CA 94103

Re: Oracle Corporation, Redwood Shores, California; OFCCP No. R00192699

Dear Mr. Doles:

Oracle has asked me to respond to your March 29 letter and represent the Company in future proceedings on this matter. Please direct all future communications to me.

I.

OFCCP has offered that it "is prepared to engage in a meaningful, good faith and timely conciliation process in order to attempt to reach an acceptable resolution of the Notice of Violations." As we have advised, so is Oracle. However, we are dismayed by OFCCP's misrepresentations in its March 29 letter, which make it more difficult for both sides to have a productive conversation about next steps.

II.

We are particularly concerned with OFCCP's suggestion that it advised Oracle of any of the compliance evaluation findings before it issued the NOV on March 11. The NOV states that the Agency found compensation discrimination in relation to (1) Non-Asians in the Professional Technical 1 role, (2) women in the Information Technology, Product Development, and Support roles, (3) African Americans in the Product Development role, (4) Asians in the Product Development role and (5) "Americans" in the Product Development role. At no point prior to the NOV did the Agency advise Oracle of those compliance evaluation findings; identify any specific employees or purported comparators; inquire about any potential comparators; or otherwise identify any concerns or issues related to any specific employees in those areas. Nor was Oracle provided any indication or information regarding any of the other NOV findings. As the March 29 letter acknowledges, at best, OFCCP told Oracle that it would be reviewing the information collected and conducting further analysis to determine its findings.



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III.

Oracle asked OFCCP on at least nine occasions to explain what indicators it found, including on December 31, 2014, February 17, 2015, March 9, 2015, March 11, 2015, March 12, 2015, March 13, 2015, June 3, 2015, July 2, 2015, and December 17, 2015. OFCCP never responded, and even now, it has not explained why it failed or refused to do so. Finally, the description of the entrance conference and of any exit conference (there was none) is simply wrong. To the extent that OFCCP believes that it made those specific representations to Oracle and complied with the FCCM, please advise us by specific reference to the compliance evaluation record.

IV.

The NOV also fails to provide Oracle with a sufficient explanation of OFCCP's findings to allow for meaningful, good faith, and timely conciliation. For instance, with regard to the alleged hiring violation, the Agency has alleged that Oracle discriminated against several groups "in favor of Asians, particularly Asian Indians." Oracle does not collect information regarding "Asian Indians" and is at a loss to determine how the Agency defined this group. As such, Oracle requests that the Agency explain how it defined this group and describe how it arrived at its findings related to this group with regard to recruitment, applicant consideration, and hiring.

V.

As to the compensation violations, the Agency should explain how it met its obligation under Directive 307, which provides that once the Agency finds a measurable difference, it should consider and answer: (a) whether the difference in compensation is between employees who are comparable under the contractor's wage or salary system; and (b) whether there is a legitimate (i.e. non-discriminatory) explanation for the difference. To date, the Agency has failed (and refused despite requests) to provide Oracle with any specific information detailing or otherwise describing which employees (now identified by OFCCP in the above groups) are comparable. Nor has the Agency ever explained whether, and if so how, it considered (and apparently rejected) any of the legitimate pay factors Oracle provided throughout the investigation. Moreover, even if the Agency's position is that somehow Directive 307 does not mandate these steps, we believe applicable Title VII law does require OFCCP to properly establish and show who are actual comparators.

VI.

More broadly, Oracle has no information from OFCCP allowing it to understand, let alone recreate, the Agency's statistical analysis set forth in Attachment A to the NOV. Any position statement or rebuttal would be premature absent this crucial information about a measurable difference.



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VII.

With regard to the data requests listed in the attachment to the March 29 letter, OFCCP's assertions are inaccurate and incorrect. We believe the record is clear and will show that Oracle has done its best to comply with extraordinarily broad and burdensome requests, and that OFCCP failed to respond to questions Oracle raised.

One of the best examples of this is OFCCP's failure to acknowledge Oracle's 29-part email response dated October 29, 2015 that addresses most of the requests listed in the attachment. On November 2, four days after Oracle submitted this significant production, Ms. Holman-Harries received a letter from you dated November 2 (emailed to her by Hoan Luong that same day) inquiring about when Oracle would be producing the documents. She then followed up with Mr. Luong that very same day (November 2) to confirm OFCCP's receipt of the responses. Notwithstanding these efforts, it appears that these responses were ignored in your March 29 letter.

For instance, with regard to the request for internal pay equity analysis¹, we explained that this request was part of a larger request that we initially responded to on December 11, 2014. In her telephonic interview with Brian Mikel and Jennifer Yeh on January 13, 2015, our compensation director, Lisa Gordon, talked about the process followed to evaluate compensation at Oracle. We sent the final version of the notes of that interview to Mr. Mikel and Ms. Yeh on February 10, 2015. We again addressed our pay equity analysis in an email sent to Hea Jung Atkins on June 2, 2015.

We also have explained that OFCCP's requests for additional data points, such as name of school attended, educational degree earned, prior salary, and years of experience, are not in any electronic database. Any such information, we explained, if available in an individual employee's file, would be extremely burdensome and time consuming to compile. Notably, at no time did any Compliance Officer request to remain on-site and review files.

With regard to resume files, we similarly explained that there is no other format we can use to submit resumes and applications and that we would have to rely on screen shots pasted into a Word or pdf document. We also explained that we completed a lengthy time motion study carefully outlining why it would take six months to a year to complete this request. We explained how onerous this process is on June 7, 2015 and sent the process workflow on June 10, 2015. Again, no Compliance Officer requested to go through the files on-site.

These are just some of the examples of the responses that Oracle provided to OFCCP inquiries that OFCCP never acknowledged or attempted to answer or resolve. We encourage the Agency to read through the voluminous record of responses sent by Oracle throughout the review process to better

¹ OFCCP seems to be of the view that a contractor is required to conduct some form of statistical pay analysis. If that is your position, please provide the basis for your position including reference to the appropriate OFCCP regulation.



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understand the significant efforts made by Oracle to respond to OFCCP's requests and comply in good faith with its obligations.

Oracle has never improperly refused to provide requested information. The references to such refusals in the NOV are simply wrong, without merit and contrary to the compliance review record. In every instance, Oracle has either provided the requested information or explained why it could not do so.

Furthermore, we note that requests such as the resumes "in a usable format" are improper as Oracle has no obligation to create or format documents beyond their native formats. Nor was Oracle required to compile possibly relevant and legitimate information manually for use by OFCCP in creating its data fields, such as information on relevant prior experience or education. Similarly, Oracle employees have no obligation to sign summary interview statements created by OFCCP compliance officers and sent months after the interviews took place. We do not know why the Agency delayed in providing the statements for review and approval by Oracle managers. However, we believe that the Agency may have recognized that its compliance officers failed to ask meaningful and relevant questions regarding comparators and information on other legitimate bases for alleged pay differences. As such, we suspect it had no option but to offer cursory statements for management approval that left out the questions posed to interviewees.

VIII.

Overall, the Agency's lack of evidence to support its findings has led it to allege that Oracle has failed to provide documentation and, accordingly, the Agency is due an adverse inference presumption in its favor. Such a presumption would not be appropriate here. Moreover, even if there were the purported "refusals," the presumption, per OFCCP's regulation, relates solely to a contractor's "destruction" of relevant records or a failure of a contractor to maintain required records. The Agency has no evidence that either of these occurred.

IX.

To move this along, we had hoped that OFCCP would be forthcoming on our few initial questions as set forth in the letter. We now ask the Agency to address all the questions listed in Appendix A to this letter. In addition, with specific reference to the alleged "refusals" by Oracle, we ask that OFCCP answer the questions in Appendix B to this letter. Once the Agency provides these answers, we hopefully will be better able to understand its allegations and findings.

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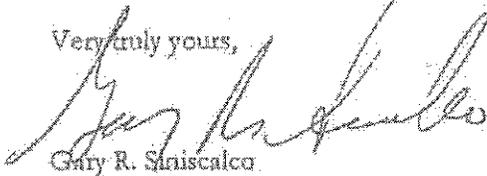
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For the reasons stated above, we believe the invitation for a face-to-face meeting at this stage would likely be premature. We are also concerned about engaging in a face-to-face dialogue given that the region has mischaracterized and misstated other in-person interactions going all the way back to the entrance conference. Until we have reason to believe there would be a more accurate and forthright exchange, we believe it best to have written communication.

Very truly yours,



Gary R. Siniscalco

Attachments: Appendices A and B



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APPENDIX A

Questions arising from OFCCP's letter dated March 11, 2016 (NOV)

With regard to violation #1:

1. Please state how OFCCP determined that Asian Indians, and Asians generally, were favored in recruiting.
2. Please identify who OFCCP determined were "qualified" African-Americans, Hispanic and White ... applicants" who were discriminated against in recruiting.
3. For those identified in #2 above, please identify all those OFCCP identified as qualified persons discriminated against in hiring.
4. Please describe with specificity the recruiting actions that OFCCP determined were discriminatory.
5. Please provide the underlying statistical data and actual computations used by OFCCP to determine the standard deviations in violation #1.
6. Please describe with specificity what facts OFCCP relied upon in finding that Oracle "disfavored non-Asian applicants in hiring."
7. Please describe specifically what facts OFCCP "gathered during compliance evaluation (to demonstrate) that Oracle's discriminatory recruiting and hiring practices showed the racial composition of the applicant flow data to favor Asians, particularly Asian Indians."
8. Please describe with specificity how OFCCP identified any individuals referenced in violation #1 as Asian Indians.
9. Please identify the multiple requests made by OFCCP for "copies of all application materials, etc."
10. Please explain why OFCCP compliance staff made no request to review application materials on site.
11. Please identify the non Asian counterparts who were equally or more qualified for the PT roles filled by Individual Contributors.

The following questions relate to the alleged NOV violations 2-5:

12. Did OFCCP (or its statistician) look only at the factors referenced in the statistical summary in Attachment A to the NOV?
13. Were other factors considered? If so, which ones?
14. Were other factors rejected? If so, why?
15. How many different models, iterations, and computations did the statistician run besides the three listed in Attachment A?



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16. What were the statistical results of all the other models and computations conducted by the statistician?
17. Oracle was unable to replicate the analysis, methodology and results in Attachment A. Please provide it with all the necessary information, data, descriptions of methodology, etc., sufficient to allow Oracle to replicate the results in Attachment A.
18. Please describe with specificity the data used in Attachment A with regard to "work experience at Oracle" and "work experience prior to Oracle." If these simply mean "time at Oracle" and "time working prior to Oracle," please explain the reason for use of these timeframes.
19. Because of the relatively small groups of employees, did OFCCP or its statistician do any statistical tests to ensure that practical significance was not at play?
20. If other factors were considered and rejected by OFCCP, what did the results show using the factors that were rejected? In other words, did OFCCP consider a factor that explained or reduced the disparity and then reject it?
21. For just the model used in Attachment A, OFCCP made computations for each role and for each protected group. How many roles and how many analyses were done using the Attachment A model?
22. Directive 307 allows OFCCP to use different groupings of jobs, roles, job titles, etc., to develop PAGs. How many different PAGs did OFCCP develop and consider as part of its statistical analysis? What facts were considered to determine if the roles or job titles in the PAGs comprised only comparators?
23. Directive 307 states that in every case there are three key questions to answer. Once a measurable difference is found, questions b and c are as follows: b) is the difference in compensation between employees who are comparable under the contractor's wage or salary system and c) Is there a legitimate (i.e. non-discriminatory) explanation for the difference?
24. What did OFCCP do to answer questions b and c and what actual facts and information did it obtain?
25. If OFCCP did identify comparators, who are they as referenced in the NOV where it states variously that respective protected class members (Females, Blacks, Hispanics non-Americans) were paid less than similarly situated (males, Asians, whites)?
26. Why did OFCCP never give Oracle an opportunity to provide legitimate explanations under question c?
27. What did OFCCP do to answer question c?
28. Did OFCCP consider performance in assessing pay differences? If not, why not?
29. Did OFCCP consider relevant job experience, business lines (for example, work on Peoplesoft products v. cloud v. fusion), criticality of the role or product to Oracle, or market factors? If not, why not?
30. For each finding in the NOV, state whether the finding constitutes unlawful disparate treatment or disparate impact?



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31. The NOV refers variously, and in summary fashion, to evidence in personnel records, interviews, complaints, anecdotes but is lacking in any details or specific information of any kind. Please identify or explain what facts or information was found that supports each of the alleged violations 2-5.

With regard to alleged violations 6-10 under the heading of "Affirmative Action Violations," please answer the following:

32. For alleged violation #6, please describe the "in depth analysis" OFCCP believes is required and how Oracle "failed" to identify problem areas.
33. Please identify with specificity the "problem areas in its compensation system" that Oracle failed to identify.
34. For alleged violation #7, please describe with specificity the type of pay equity analysis Oracle failed to conduct in accordance with 41CFR 60-2.17(e).
35. For alleged violation # 8, please describe with specificity the nature and type of monitoring OFCCP contends (1) was not done and (2) must be done in accordance with 41 CFR 60-2.17(d).
36. For alleged violation #9, please identify which records Oracle failed to maintain and collect.
37. For alleged violation #9, please identify the adverse impact analysis not done as required by 41 CFR 60.1.12(a).
38. For alleged violation #10, please identify with specificity when and how OFCCP requested access to records.
39. For alleged violation #10, please identify with specificity each and every instance in which Oracle denied OFCCP access.
40. For all of the alleged violations 6-10, please specify what technical assistance OFCCP has available to provide to contractors.
41. For all of the alleged violations, please identify the person or persons in the SF region knowledgeable and experienced in providing technical assistance to contractors.
42. Please specify when and what technical assistance, if any, was ever offered to Oracle in connection with 6-10.



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APPENDIX B

1. What facts support OFCCP's determination that Oracle refused OFCCP access to prior year compensation data for all employees for PT1 role during the review period of January 1, 2013 through June 30, 2014?
2. What facts support OFCCP's determination that Oracle refused OFCCP access to complete hiring data for PT1 roles during the review period of January 1, 2013 through June 30, 2014?
3. What facts support OFCCP's determination that Oracle refused to provide data on April 27, 2015?
4. What facts support OFCCP's determination that Oracle refused to provide data on May 11, 2015?
5. What facts support OFCCP's determination that Oracle refused to provide data on May 28, 2015?
6. What facts support OFCCP's determination that Oracle refused to provide data on July 30, 2015?
7. What facts support OFCCP's determination that Oracle refused to provide data on October 1, 2015.
8. What facts support OFCCP's determination that Oracle refused to provide data on October 14, 2015?
9. What facts support OFCCP's determination that Oracle refused to provide data on November 2, 2015?
10. What facts support OFCCP's determination that Oracle refused to provide data on December 15, 2015?
11. For each refusal noted above, state all efforts made by OFCCP to arrange to review the documents on site.
12. What facts support OFCCP's determination that Oracle refused to provide complete compensation data for all relevant employees in the Information Technology, Product Development and Support roles for "the full review period" as noted in footnote 4.
13. What, if anything, did OFCCP do to review on-site the items referenced in footnote 4 that Oracle allegedly refused to provide?
14. What, if anything, did OFCCP say or do in response to seek access to information on site to the extent such effort is not described in response to questions 1 - 13 above?
15. Please identify the legal and regulatory basis for presuming data would be unfavorable (i.e. applying an adverse inference) in the NOV with regard to the refusal referenced in footnote 4.



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May 25, 2016

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VIA EMAIL AND U.S. MAIL

Hea Jung Atkins
District Director
U.S. Department of Labor
Office of Federal Contract Compliance Programs
Greater San Francisco/Bay District Office
90 7th Street, Suite 11-100
San Francisco, CA 94103

Re: Oracle/Redwood Shares -
Submitted in Furtherance of Conciliation and Resolution
Subject to Federal Rules of Evidence 408 Related to Negotiation and Settlement

Dear Ms. Atkins:

Addressing the Rutgers University class of 2016, President Barack Obama noted:

[F]acts, evidence, reason and logic ... these are good things. These are qualities you want in people making policy.¹

Justice Elena Kagan, writing for a unanimous Supreme Court, warned in explaining the need to review EEOC conduct in conciliation:

About such review, the Commission's compliance with the law would rest in the Commission's hands alone. We need not doubt the EEOC's trustworthiness, or its fidelity to the law, to shy away from the result. We need only know -- and know that Congress knows that legal lapses and violations occur, and especially so when they have no consequences. That is why this court has so long applied a strong presumption favoring judicial review of administrative action.

These words and warnings ring true in addressing OFCCP's findings.

¹ NY Times, 5/16/2015, "Obama Swipes at Trump, but Doesn't Name Him, in Speech at Rutgers," available at <http://www.nytimes.com/2015/05/16/us/politics/obama-swipes-at-trump-but-doesnt-name-him-in-speech-at-rutgers.html>

² *Maech Mzung LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1652 (5/1/2015)



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Background

On March 11, 2016, Robert Doles, the former San Francisco Director (we understand he has left the Agency), sent a letter to Oracle that he characterized as a Notice of Violations (hereinafter "NOV"). The NOV set forth ten (10) numbered violations including five (5) that alleged unlawful discrimination: one discrete Job Group (PT1) with alleged hiring discrimination, and four (4) discrete areas of alleged compensation discrimination. The remaining five (5) violations alleged technical violations.

Mr. Doles' letter requested that Oracle respond within five (5) days stating whether Oracle was willing to engage in a conciliation and resolution process. Oracle timely indicated that it was so willing. Mr. Doles thereafter requested a position statement with regard to the NOV's findings.

In subsequent correspondence, Oracle raised a series of questions and sought additional facts and information with regard to the NOV findings. The Agency responded for the most part by declining to provide any additional facts or information; and instead insisted that Oracle had the burden of providing a substantive response that would rebut the NOV's 10 findings. We disagree that OFCCP has met its burden, but nonetheless set forth Oracle's position statement as requested by Mr. Doles.

Overview

In reaching its findings 1 – 5 of alleged unlawful discrimination in discrete areas for a discrete group of Oracle's Redwood Shores applicants and discrete segments of its employees, OFCCP has committed an extraordinary number of errors and omissions. These include, but are not limited to, reliance upon a large number of false assumptions; reference to and use of irrelevant census and labor force data; erroneous reliance upon, or otherwise misstating, its own regulations; failure and refusal to follow its own mandated processes and procedures; and making patently false statements, including in its NOV and follow-on correspondence. The NOV's summary findings and statistical data presented are so defective procedurally, as well as substantively (both as to facts and legal standards), that the NOV must be withdrawn in its entirety.

The accompanying Sections I – III of this response address in further detail the reasons why a withdrawal of the NOV is mandated:

- I. OFCCP's compliance review process on which the NOV is purportedly based was so procedurally deficient that the NOV should not have been, and could not properly be, issued.



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- II. In more recent correspondence after issuance of the NOV, OFCCP cites to case law and contends that that the NOV shifts the burden to Oracle to rebut OFCCP's statistical results. OFCCP contends that it has properly used (relevant) statistics and has met its burden sufficient to require rebuttal. OFCCP's position is factually, procedurally and legally in error. Simply stated, OFCCP has not met its burden of establishing a prima facie case consistent with Title VII or Directive 307, nor has it presented facts and evidence sufficient to make even a minimal showing that any unlawful hiring or compensation discrimination exists.
- III. The requirement that employees be similarly situated is a fundamental element of any Title VII-based analysis. Not only did OFCCP ignore this factual requirement, it chose to rely on a statistical model that has no factual or legal basis under Title VII law and its own Directive 307 (which requires application of Title VII standards). We show illustrations of the kind of assessment of similarly situated persons that OFCCP failed and refused to do, thereby failing to meet its burden to establish that there were actual relevant comparators to persons allegedly denied equal pay.
- IV. OFCCP's statistical model is defective and no counter-statistical model is warranted. Oracle is a technology company that develops, supports and sells hundreds of products. It has a highly diversified and skilled work force, especially among its myriad technical jobs and roles in development, support and sales. Most jobs and most employees are not fungible or homogeneous. Their skills, their work, and the nature and criticality of the specific products on which they work are wide-ranging. In many cases no two employees at HQCA have the same or similar job, and thus they have no or possibly just one or two comparators. OFCCP has ignored entirely this key factual circumstance.

We would be pleased to engage in further dialogue and discussion as may be appropriate. However, for each and all of these reasons set forth herein, we believe resolution of the OFCCP HQCA evaluation requires OFCCP to withdraw its March 11, 2016 letter and findings and issue a Letter of Compliance.

Very truly yours,

Gary R. Simiscalco

cc: Patricia Shu, Director, OFCCP
Juana Schurman
Shauna Holman Harties

Re: *Oracle/Redwood Shores*
Submitted in Furtherance of Conciliation and Resolution
Subject to Federal Rules of Evidence 408 Related to Negotiation and Settlement

I. OFCCP REPEATEDLY AND FLAGRANTLY VIOLATED GOVERNING FCCM PROVISIONS IN THE LEAD-UP TO THE NOV ISSUANCE.

The Agency's actions have substantially violated its own procedures. These procedural violations are sufficiently significant and prejudicial that the Agency must withdraw the NOV.

The Introduction to the Federal Contract Compliance Manual ("FCCM") establishes that it should control the Agency's actions absent an inconsistency with "other OFCCP policies and its implementing regulations." FCCM at 1 (Introduction).¹ The Introduction further states that the FCCM is intended to provide "contractors ... more transparency and clarity about basic OFCCP procedures and processes." *Id.* We are not aware of any conflicting policies or regulations that would suggest that the Agency is not subject to the FCCM procedures. If the Agency believes that other policies or procedures set forth its obligations in conducting compliance reviews, please advise us how the appropriate procedures and policies override the FCCM, how those policies apply to the compliance audit at issue, and how the Agency complied with those policies and procedures.

The following sections detail OFCCP's failures and deficiencies in its process, actions and communications with Oracle staff, and show that OFCCP's evaluation process and the resulting NOV are fatally deficient, defective and prejudicial to Oracle. Considered individually—and certainly when considered together—these failures undermine the fairness of the process, the procedural standards required by OFCCP, and any confidence that could be had in the outcome. Therefore, the NOV must be withdrawn.

A. The Compliance Evaluation Was Defective, Non-Transparent and Prejudicial to Oracle.

The FCCM directs that before issuing an NOV, the Agency advise the contractor of its findings. "After advising the contractor of its compliance evaluation findings, the CO must provide formal notification through a Predetermination Notice or Notice of Violation." FCCM § 2P00. At no point prior to issuing the NOV did the Agency advise Oracle what groups showed initial indicators, what violations the Agency was investigating, what comparator groups the Agency was forming, the results of any analysis the Agency was conducting, whether it was investigating disparate treatment or disparate impact discrimination, or any other facts regarding the findings of the compliance evaluation.² Rather, the Agency rushed to judgment and issued an NOV.

¹ During the course of the compliance evaluation, Deputy S.F. Regional Director Jane Suhr has acknowledged that "if there is inconsistency in the Manual and other OFCCP policies and its implementing regulations, the latter are controlling." Letter from Jane Suhr, May 11, 2015. There is nothing inconsistent with the Manual sections we cite.

² This complete lack of transparency and gross failure and refusal to engage in any interactive conversation permeated the S.F. District and Regional Office approach to this review. The failure and refusal to engage in such process is not only contrary to the FCCM, but appears contrary to OFCCP's national office expectations. Bloomberg BNA, 5/09/16, 89 DLR A-4, "OFCCP Audits Should be 'Interactive and Conversational,' Official Says."

Re: *Oracle/Redwood Shores*
Submitted in Furtherance of Conciliation and Resolution
Subject to Federal Rules of Evidence 408 Related to Negotiation and Settlement

Following receipt of the NOV, Oracle advised the Agency on March 18, 2016 that OFCCP had failed to comply with its obligations. The Agency, through its District Director Robert Doles, falsely responded as follows:

During the entrance conference held on March 24, 2015, OFCCP discussed with you and other Oracle representatives the preliminary indicators and areas of concern at issue in the compliance evaluation, including Oracle's compensation and hiring practices. At the exit conference held on March 27, 2015, OFCCP informed you and Neil Bourque that the Agency would conduct further analysis and any Agency findings would be issued in a formal notice. Upon conclusion of the follow-up onsite review on June 25, 2015, OFCCP informed you and Oracle representatives Neil Bourque, Charles Nyakundi, and outside counsel Gary Siniscalco that the Agency would review the information collected and conduct further analysis to determine its findings. On December 22, 2015, OFCCP also indicated to you that additional information was needed to further investigate potential violations. Throughout the compliance evaluation process, OFCCP also requested that Oracle comply with all outstanding data requests (see attachment), some of which had been pending since November 19, 2014 and also indicated the Agency's preliminary indicators and areas of concern.

Letter from Robert Doles, March 29, 2016, to Shauna Holman-Harries. This response makes no credible claim that the Agency advised Oracle of its compliance evaluation findings. First, to the extent that the Agency advised Oracle of preliminary indicators or actual evidence at the entrance conference (a representation we deny),³ this has no bearing on the indicators or actual evidence underpinning the compliance evaluation findings *postdating* the entrance conference. Second, advising Oracle that the Agency needed additional information to conduct further investigation has no bearing on the compliance evaluation findings, and does not ameliorate the opportunity denied Oracle to understand the findings and provide further relevant evidence per the Manual, FCCM § 2P00.

The Agency cannot have it both ways by arguing on the one hand that it fulfilled its obligation to advise Oracle of its compliance evaluation findings before issuing an NOV, while at the same time claiming that it needed additional information, all the while denying Oracle a fair and transparent opportunity to discuss or address OFCCP's intended evaluation findings. Indeed, had the Agency ever advised Oracle that its compliance evaluation found evidence of compensation discrimination of comparators in relation to non-Asians in the Professional Technical 1 role, women in the Information Technology, Product Development and Support roles, African Americans in the Product Development role, Asians in the Product Development role or "Americans" in the Product Development role, Oracle would have, and could have, made it very clear that those findings were based on artificial groupings filled with employees who were not similarly situated for Title VII

³ We have contemporaneous communications from Oracle employees present at the entrance conference documenting the false concerns and erroneous accusations made at the entrance conference. None reference "indicators."

Re: *Oracle/Redwood Shares*
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purposes, or even comparable under Oracle's compensation system as required by Directive 307.⁴ Nonetheless, in a rush to judgment, the Agency issued an NOV laden with unjustifiable groupings and other stark deficiencies, including unjustified adverse inferences, without following its own guidance.

Particularly notable is the Agency's failure to respond to Oracle's numerous requests to explain the indicators. As we noted in our April 11, 2016 letter, Oracle asked OFCCP on at least nine occasions to explain what indicators it found, including on December 31, 2014, February 17, 2015, March 9, 2015, March 11, 2015, March 12, 2015, March 13, 2015, June 3, 2015, July 2, 2015, and December 17, 2015. OFCCP never responded or provided any specific information. Independently, and contrary to the Agency's Manual, the Compliance Officers ("COs") and the S.F. District Office chose to keep Oracle in the dark. For example, without appropriately attempting to identify possible comparators for purposes of an equal pay analysis, at no time during more than nineteen (19) months of the extensive compliance evaluation did any of the Agency's COs request information or seek to assess which of Oracle's employees were, in fact, similarly situated. Nor did the Agency ever identify any comparator concerns to Oracle's representatives.

B. The Agency Failed to Conduct an Exit Conference Yet Stated Falsely That It Had Done So.

The FCCM provides that "upon completion of the necessary onsite review and evaluation of all information obtained, COs will discuss the tentative findings of the compliance evaluation with the contractor at the onsite exit conference." FCCM § 2N. During the conference, "the CO must be prepared to describe the aspects of the investigation and re-discuss the tentative findings of the compliance evaluation in general terms." *Id.* Also, the CO "will advise ... of the possibility that a PDN or NOV could be issued." *Id.* § 2N00. The Supreme Court, in interpreting the word "must" (under Title VII), has made clear that agencies cannot skirt their mandatory obligations where law requires fidelity to its rules and policies. *See Mach Mining v. E.E.O.C.*, 527 S. Ct. 1645, 1656 (2015). The Agency failed to follow this mandatory provision in the Manual, and its failure to do so has plainly prejudiced Oracle by undermining its ability to understand and be informed of the CO's finding and proffer appropriate response to the Agency's asserted *evidence*.

Instead, OFCCP failed to conduct a proper exit conference or advise Oracle regarding the tentative findings of the compliance evaluation, then claimed falsely that an exit conference occurred. This assertion by OFCCP's former Director Dolis is belied by contemporaneous correspondence in response to Oracle's request for an exit conference. First, the Agency's claim that an exit conference occurred on March 27, 2015 is completely false. On June 25, 2015, Shauna Holman Harnes asked the Agency for a status conversation related to the investigation and requested that the Agency "let me know when we can talk early next week for an exit conference ...?" On July 2, 2016, Hea Jung Atkins responded by email to Ms. Holman Harnes by recounting OFCCP's perspectives on various issues and confrontations (which Oracle disputed). In that email, Ms. Atkins refused to schedule an

⁴ See *infra*, listing efforts by Oracle's staff requesting information from OFCCP on "indicators." Instead, OFCCP chose consistently to keep Oracle in the dark.

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exit conference, stating that the Agency "was not prepared to conduct an exit conference" based on the need to conduct additional employee interviews. The email went on to state: "We will schedule an exit conference at the conclusion of our offsite analysis." This e-mail puts the lie to the Agency's claim that an exit conference had already occurred some two months earlier. Moreover, no later exit conference ever occurred.

Notwithstanding the false claim that the March 27 meeting was an exit conference, the Agency's own version of the events leave unchallenged Oracle's position that the Agency failed to provide any information regarding its tentative findings. OFCCP repeatedly stated an intent to conduct further analyses and provide notice of findings at some future point, as Mr. Doles' March 29, 2016 letter concedes. Tellingly, the Agency fails to state that it advised Oracle of any tentative findings. Even if an exit conference occurred, therefore, the Agency did not satisfy its obligation to conduct a proper exit interview as required by the FCCM. Instead, the Agency rushed to issue its fatally flawed NOV.

C. OFCCP Failed to Follow Its Required Procedures to Obtain Additional Documentation.

The FCCM provides that "if the contractor refuses to provide the requested data or information or does not allow a follow up onsite visit, the CO *will prepare an SCN [Show Cause Notice] for denial of access.*" FCCM § 20 (emphasis added). A Show Cause Notice is required when a contractor fails to submit an Affirmative Action Program ("AAP"), submits a deficient AAP, fails to submit employment activity or compensation data or submits deficient employment or compensation data. In addition, a Show Cause Notice must also be issued when a "contractor refuses to provide access to its premises for an onsite review." *Id.* § 8D01. Although Oracle denies that it ever refused a request, if OFCCP truly believed Oracle had denied access or failed or refused to submit relevant and required data, OFCCP was required to issue an SCN. Notably, OFCCP never pointed to any evidence of such a refusal. At most, Oracle on occasion raised legitimate concerns, asked questions, or articulated legitimate objections. Oracle sought transparency and interactive conversation. OFCCP chose silence and kept Oracle in the dark.

During the course of the compliance evaluation, OFCCP launched a barrage of burdensome information requests. Oracle produced in hardcopy and electronically a huge volume of documents, at least thirty-five (35) managers and HR Staff were interviewed, and electronic databases were provided to OFCCP on at least 8 occasions. Oracle believes it fully complied with its obligations under the regulations to provide information during the compliance evaluation. To the extent that OFCCP believed that Oracle had not provided information to which OFCCP was entitled and which it believed was necessary and relevant, the FCCM unequivocally requires that the CO prepare an SCN. During the course of the review, the Agency made no attempt to take this required step to obtain records or other materials it believed were necessary to complete its investigation. Nor did the Agency ever ask for access to review records.

This perhaps represents the most striking example of the Agency's misstatements of the facts and deliberate disregard of its own policies and procedures in its rush to judgment in issuing an NOV. Not only did the Agency fail to avail itself of the internal SCN process, but it also failed to take

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advantage of the expedited ALJ process under the regulations which could have led to a quick resolution of any outstanding document disputes. Adherence to this important procedural step makes sense; it avoids the exact situation here, where good faith disputes regarding the scope of requests are left unresolved and the Agency reaches unsubstantiated findings with little or no factual basis. Rather than seek to resolve those purported disputes, the Agency chose the course of disregarding its internal processes and improperly relied on adverse inferences in reaching the conclusions in the NOV.³

D. OFCCP Failed to Issue an NOV Compliant with FCCM § 8E01.

The FCCM lays out the necessary contents of an NOV. It provides that the NOV must "[s]tate the problem, with any modification from the contractor's response (to the PDN), include specific facts, and where applicable, the results of the analyses that support the violations." FCCM § 8E01. The NOV is wholly inadequate in this regard. The NOV merely recites the affected groups; asserts that hiring, compensation or recordkeeping violations exist; and attaches summary results of irrelevant standard deviation calculations. The NOV fails to consider Oracle's response (since no opportunity was given), and fails to include any specific facts regarding the bases of the violations, how the alleged discriminatory practices led to violations, what analyses the Agency conducted, or any other relevant facts specifically informing Oracle how it allegedly violated the law.

The FCCM also delineates the circumstances in which the Agency may issue an NOV. NOVs may be issued for pattern and practice violations or "other" violations. FCCM § 8F00. "Other" violations can include "individual discrimination, lack of recordkeeping and lack of outreach and recruitment." *Id.* Violation 10 of the NOV alleges that Oracle violated the regulations because it failed to produce records. Yet OFCCP provides no facts supporting that conclusion. Other purported technical violations also cited (in similar summary fashion) alleged failures to produce records as bases for triggering the adverse presumption under 41 C.F.R. § 60-1.12. But failure to produce documents is not a proper violation under the FCCM. Rather, as noted above, the FCCM plainly requires that document production issues be addressed through Show Cause Notices.

E. OFCCP Failed to Follow Its Interview Process.

The FCCM states that "after a formal interview, the CO must ask each person to read, sign and date the CO's interview notes." FCCM § 2M00(f). It also provides that the "CO will promptly type the handwritten interview notes using MS Word in order to provide the interviewee with a hard copy to sign as soon as possible after the interview." *Id.* OFCCP conducted over 35 manager and HR interviews during its two onsite visits, and yet followed neither required procedure.

After the interviews, the CO did not ask the interviewees to acknowledge the notes. Oracle's compliance staff, on several occasions, asked about the status of the interview documents. Then,

³ Even the NOV's application of the adverse inference rule is defective and misapplied by Mr. Dulon. The Agency's regulation on use of an adverse inference is limited to specific circumstances "[w]here a contractor has destroyed or failed to preserve records..." 41 C.F.R. § 60-1.12(e). There are no facts suggesting that Oracle engaged in any such conduct.

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many months after the interviews, the Agency sent interview "statements" to Oracle and asked the Company to have managers sign them. Not only were the statements dilatorily sent, they also failed to provide an accurate depiction of the interview (*i.e.*, questions asked by the respective COs and responses to those questions by the respective interviewee). This failure is particularly notable. During interviews different Oracle managers, in response to specific questions, addressed hiring and compensation practices, multiple factors related to how Oracle hired and paid its employees, various efforts Oracle took to evaluate its pay system and ensure pay equity, and other facts and circumstances related to differences in skills, expertise, responsibility, job content, performance, *etc.* that bear on compensation at Oracle. Equally noteworthy are topics and questions not covered in interviews, especially regarding job similarity and the actual duties and skill, effort, and responsibilities of possible comparators.⁶ In response to questions, managers variously described a range of factors (not OFCCP's simplistic time-at-Oracle and total work experience) relevant to assessing actual pay comparators at Oracle. Despite these responses provided in the interviews and elsewhere, the Agency issued an NOV that failed to take into account how Oracle structures its workforce and pays its employees, notwithstanding Directive 307's mandate that OFCCP evaluate "employees who are comparable under the contractor's wage or salary system." Directive 307 at § 8.B.3. At best, the interviews wasted Oracle's managers' time. At worst, the Agency ignored critical facts provided in the interviews because it had made up its mind—regardless of relevant facts about Oracle's actual practices, pay system and criteria used—that Oracle discriminates against a few selected slices of its Redwood Shores workers.

F. OFCCP Made Numerous Inappropriate Requests Beyond the Scope of Existing Documents.

OFCCP's regulations require contractors to provide access to existing documents and records upon request. Specifically, the regulations allow access to "books and accounts and records, including computerized records . . ." 41 C.F.R. § 60-1.43. The FCCM provides that COs may review various records during evaluations including but not limited to payroll records, employee activity records, Collective Bargaining Agreements, personnel policies and discrimination and harassment policies. *See* FCCM § 3H. Nothing in the regulations requires that contractors create records or provide records in anything other than their native format.

Despite the lack of authority, the Agency on numerous occasions asked that Oracle compile and provide documents in Excel spreadsheets and in "usable formats." In the spirit of cooperation, Oracle compiled and provided compensation spreadsheets to the Agency on at least 8 occasions (October 28, 2014, December 11, 2014, December 15, 2014, February 26, 2015, March 17, 2015, May 14, 2015, June 16, 2015 and October 29, 2015). Notwithstanding this cooperation, the Agency has cited Oracle for failing to provide documents and faulted Oracle for not providing documents "in a usable format." The Agency's actions clearly overreach and lack authority, as Oracle had no obligation to create documents.

⁶Not one interview involved questions about the actual work performed by them, whether others did the same or similar work, or the "relevant factors in determining similarity" set forth in OFCCP's Directive 307 at § 8.B.6.

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In another instance of overreaching, the Agency directed Oracle to provide a list of EEOC, or state civil rights charges from Oracle (though the FCCM directs OFCCP to the respective agencies to obtain this information). OFCCP also requested different variations on and timeframes for collections of internal complaints. Oracle objected and exercised its right to question whether the Agency was entitled to collect such information. In response, the Agency engaged in retaliatory and abusive conduct in changing and then dramatically expanding its request for internal complaints. Finally, at the March 24, 2015 entrance conference, Agency COs, in the presence of the S.F. Regional Director, claimed Oracle had lied and threatened Oracle's Director of Diversity Compliance with criminal sanctions because the Agency located a pending "federal court complaint." Despite these offensive and untrue accusations, Oracle explained that OFCCP had only requested a list of "employee complaints," and that Oracle had never claimed that it did not have any pending discrimination complaints (lawsuits) from former employees.⁷ On May 11, 2015, after some lengthy and contentious correspondence, and recognizing that it did not have the authority to demand the information, the Agency dropped its request.

II. OFCCP HAS NOT MET ITS BURDEN UNDER THE LAW TO ESTABLISH ANY SYSTEMIC DISCRIMINATION.

In addition to the grave procedural deficiencies identified above, the NOV suffers from a substantive failure to adequately establish any violation. OFCCP claims that it has identified "systemic discrimination" at Oracle, and that "[b]ecause OFCCP has met its burden, Oracle now bears one." Apr. 21, 2016 Letter at 1-2. OFCCP is incorrect on both counts, and its insistence that Oracle is obliged to present a "statistical rebuttal" is erroneous.

Despite having investigated Oracle's Redwood Shores facility for over nineteen (19) months, OFCCP did not adduce a single first-hand account suggesting intentional discrimination in recruiting, hiring, or compensation. Nor did OFCCP present any *facts* suggesting such discrimination, as required by its own manual. *See* FCCM § 8F01. The NOV rests solely on the results of a superficial and irrelevant statistical analysis it performed using, *inter alia*, some Oracle data and general labor force statistics. Directive 307 defines systemic discrimination as either (1) "[a] pattern and practice of discrimination" or (2) "an identified employment practice with disparate impact." Directive 307 at § 7. But OFCCP has not made an adequate *prima facie* showing under either theory.

A. OFCCP Has Not Established Any Disparate Impact Violation.

It is clear that OFCCP has not articulated even a *prima facie* case of disparate impact. In order to state such a violation, OFCCP must first "isolat[e] and identify[] the specific employment practices that are allegedly responsible for any" alleged disparate impact on a protected group. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-

⁷ Oracle was granted summary judgment by the federal court on the complaint in question. *See* Order Granting Mot. for Summary J., *Spandow v. Oracle America, Inc.*, Case No. 4:14-cv-00095-SBA (N.D. Cal. Aug 19, 2015). Furthermore, Spandow was not employed by Oracle during the relevant review period.

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2(k) (quoting *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988)); see also *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) (quoting *Wards Cove Packing*, 490 U.S. at 657) (“[The] failure to identify the specific practice being challenged is the sort of omission that could result in employers being potentially liable for the myriad of innocent causes that may lead to statistical imbalances . . .”). Then, OFCCP would be required to “demonstrate that each particular challenged employment practice causes a disparate impact . . .” 42 U.S.C. § 2000e-2(f)(1)(B)(i). “A disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity,” and courts must enforce this “robust causality requirement” in order to “protect[] defendants from being held liable for [] disparities they did not create.” *Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) (citation and internal quotation marks omitted).⁸ OFCCP has neither identified a specific facially neutral practice, nor demonstrated that any such practice causes the alleged disparities. Thus, it has not stated any disparate impact violation.

B. OFCCP Has Not Established Any Pattern and Practice of Disparate Treatment.

Given its failure to establish any predicate for disparate impact liability, OFCCP is required to establish a “pattern or practice of discrimination” on a disparate treatment theory. But the OFCCP has not met its burden to establish even a *prima facie* case on this theory, either. Perhaps this is because OFCCP misapprehends and underestimates the weight of its burden—or else, despite many months of “investigation,” it rushed to judgment.

1. The Government’s Burden of Proof in a Pattern and Practice is Demanding.

“[T]he burden of establishing a pattern or practice of discrimination is not an easy one to carry.” *E.E.O.C. v. Bloomberg L.P.*, 778 F. Supp. 2d 438, 468 (S.D.N.Y. 2011) (citation omitted). As OFCCP’s own authority acknowledges, where the Government “allege[s] a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights,” it must “establish by the preponderance of the evidence that [] discrimination [is] the company’s standard operating procedure—the regular rather than the unusual practice.” *Int’l Bd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977); accord *Morgan v. United Parcel Serv. of Am., Inc.*, 380 F.3d 459, 463-64 (8th Cir. 2004) (citations and internal quotation marks omitted) (“In a pattern-or-practice class action, the class must prove that the defendant regularly and purposefully treated members of the protected group less favorably and that unlawful discrimination was the employer’s regular procedure or policy.”). As compared to the *McDonnell Douglas* burden-shifting framework applicable in private, non-class cases,⁹ the *Teamsters* pattern and practice framework “charges the plaintiff with the higher

⁸ See also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (“[T]he mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once” unless “[t]heir claims . . . depend upon a common contention— for example, the assertion of discriminatory bias on the part of the same supervisor . . .”).

⁹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 793, 800 (1973).

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initial burden of establishing "that unlawful discrimination has been a regular procedure or policy followed by an employer . . ." *Serrano v. Centex Corp.*, 699 F.3d 884, 893 (6th Cir. 2012) (quoting *Teamsters*, 431 U.S. at 360); see also *id.* at 896 (describing initial *Teamsters* burden as "heightened" and "more arduous"); *E.E.O.C. v. Bass Pro Outdoor World, LLC*, 36 F. Supp. 3d 836, 846 (S.D. Tex. 2014) (citation omitted) (describing *Teamsters* burden as "more demanding than what *McDonnell Douglas* requires"). The *Teamsters* case, of course, was brought by the U.S. Department of Justice; try as it might, the U.S. Department of Labor is subject to no lesser standard of evidence or proof.

Moreover, the Government must present evidence that the "standard operating procedure" of discrimination was *intentional* in order to establish a pattern or practice of disparate treatment—*i.e.*, the Government must show that "the protected trait . . . actually motivated the employer's decision." *Royalton Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). OFCCP must thus "prove[] by a preponderance of evidence facts from which the court *must infer*, absent rebuttal, that the defendant was more likely than not motivated by a discriminatory animus." *Gay v. Writers' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 538 (9th Cir. 1982) (emphasis added). The "burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times" with the Government. *Texas Dep't of Community Affairs v. Burdick*, 450 U.S. 248, 253 (1981). See also *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 309 (7th Cir. 1988) (rejecting suggestion that employer "had the burden of persuasion" and finding "no support in the case law for [this] contention[]"); *OFCCP v. Bank of America*, ARB Case No. 13-099, ALJ Case No. 1997-OF-16, ARB Apr. 21, 2016 (available at [http://www.e-eeo.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/OF-C/13-099-01-C.D. \(P.D.\)](http://www.e-eeo.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/OF-C/13-099-01-C.D. (P.D.))) at 13 (rejecting OFCCP's claim that, "after its presentation of evidence, [the employer] had the specific burden of showing that the OFCCP's statistical proof was unsound or to prove that the disparity occurred as a result of legitimate, nondiscriminatory reasons" because "the burden of proof always remains with the OFCCP"). OFCCP must come forward with proof that suggests deliberate discrimination by Oracle against all of the individuals it identifies—but it has not and cannot do so.

2. Statistics Alone Rarely, if Ever, Suffice to Meet this Burden.

OFCCP attempts to build a case against Oracle founded solely on its own (opaque) statistical analysis. In doing so, it asserts a brightline rule that any statistical evidence indicating a disparity of two or more standard deviations "is acceptable as evidence of discrimination" and, without anything further, constitutes "compelling proof." Apr. 21, 2016 Letter at 2 n.5, n.6. The weight of authority is to the contrary. Indeed, "[i]n most cases, . . . more than statistical evidence has been required to satisfy the plaintiff's ultimate burden of proving intentional discrimination." B. Lindemann, *et al.*, *EMPLOYMENT DISCRIMINATION LAW* 2-116 (5th ed. 2014).

Particularly where the Government alleges a pattern and practice of disparate treatment—*i.e.*, intentional discrimination directed and perpetuated by the company itself—bare statistical evidence is unlikely to suffice. "Without significant individual testimony to support statistical evidence, courts have refused to find a pattern or practice of discrimination." *King v. Gen. Elec. Co.*, 960 F.2d 617, 624 (7th Cir. 1992); accord *Adams v. Amertech Servs., Inc.*, 231 F.3d 414, 423 (7th Cir. 2000) (holding that "statistical evidence . . . in a case alleging disparate treatment or a discriminatory pattern or practice

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... will likely not be sufficient in itself."); *OFCCP v. Bank of America*, ARB Case No. 13-099, ALI Case No. 1997-OFC-16, ARB Apr. 21, 2016 (available at http://www.eeic.doh.gov/PUBLIC/ARB/DECISIONS_ARB_DECISIONS/OFC/13-099/OFC.PDF) at 14 (even in straightforward case challenging only hiring practices for entry-level positions, noting that only "[v]ery extreme cases of statistical disparity" could "permit the trier of fact to conclude intentional [] discrimination occurred without needing additional evidence"). As the Ninth Circuit has explained:

In order to establish a prima facie case of disparate treatment based solely on statistical evidence, the plaintiff must produce statistics showing a clear pattern, unexplainable on grounds other than race. But such cases are rare. Absent a stark pattern, impact alone is not determinative, and the Court must look to other evidence. ... Simply put, statistics demonstrating that chance is not the more likely explanation are not by themselves sufficient to demonstrate that race is the more likely explanation for an employer's conduct.

Cay, 694 F.2d at 552-53 (citations and internal quotation marks omitted) (finding bare statistical evidence insufficient to establish *prima facie* case).

Given these concerns, "[i]nformally, the plaintiff will produce statistical evidence showing disparities between similarly situated protected and unprotected employees with respect to hiring, job assignments, promotions, and salary, *supplemented with other evidence*, such as testimony about specific incidents of discrimination." *Craig v. Minnesota State Univ. Bd.*, 731 F.2d 465, 469-70 (8th Cir. 1984) (emphasis added).¹⁰ Though OFCCP is correct that examples of individual discrimination are not always required, courts are clear that "the lack of such proof reinforces [any] doubt arising from the questions about the validity of the statistical evidence." *Sears*, 839 F.2d at 311 (citation omitted); *accord Morgan*, 380 F.3d at 471 ("One of the most important flaws in Plaintiffs' case is that they adduced no individual testimony regarding intentional discrimination."). Although OFCCP acknowledges it interviewed *dozens* of Oracle managers and HR staff members, as well as individual employees, and despite the FCCM mandate to present *facts*, OFCCP has not presented any such proof or facts—either in the NOV, or at any time.

3. OFCCP's Case Law is Not to the Contrary.

The cases OFCCP cites similarly hold that statistics alone rarely (if ever) permit an inference of intentional discrimination.¹¹ In *Tymberly*, for example, the statistical evidence involving hiring of

¹⁰ Here, OFCCP asserts bias at mid-level in just a few slices of the organization, and for just a few slices of the protected classes (*i.e.*, for women in three "roles," and just one each for African-Americans, "Asians," and "Americans"). OFCCP's statistical methodology purports to identify these respective cuts, and the few respective classes of purported victims covered, out of the entire Redwood Shores establishment of over 7,000 employees.

¹¹ Much of the authority OFCCP cites is irrelevant. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Castaneda v. Partida*, 430 U.S. 482 (1977), both cited by OFCCP, are not germane to the issues at hand. *Griggs* established the viability of disparate impact law and cited some statistics relevant to the specific employment practice (in degree or aptitude test requirement), but does not address the statistical proof required to establish a past-to-or-present disparate treatment case. *Castaneda* was a case in which the plaintiff challenged his conviction on equal protection grounds due to alleged

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drivers with basic, common skills showed a "glaring absence of minority line drivers" approaching "the inexorable zero." *Transtek*, 431 U.S. at 342 n.23. And even then, the Government "bolstered" its overwhelming statistical evidence "with the testimony of individuals who recounted over 40 specific instances of discrimination." *Id.* at 339. Thus, *Transtek* was "not a case in which the Government relied on 'statistics alone' [because] [t]he individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life." *Id.* Likewise in *Hazelwood School District v. United States*, the Government did not rely solely on statistics, but also "adduced evidence of (1) a history of alleged racially discriminatory practices, (2) statistical disparities in hiring, (3) the standardless and largely subjective hiring procedures, and (4) specific instances of alleged discrimination against 55 unsuccessful [African-American] applicants for teaching jobs." 433 U.S. 299, 303 (1977).¹²

Even in *Segar v. Smith*, on which the OFCCP heavily relies, the plaintiffs "introduced anecdotal testimony of discrimination" from several class members "[t]o buttress the statistical proof" they offered, "including testimony of several agents about disparate treatment in disciplinary procedures and supervisory evaluations, and about black agents' general perceptions that DEA was a discriminatory environment." 738 F.2d 1249, 1263, 1279 (D.C. Cir. 1984). *Segar* thus underscores that something more than a bare statistical analysis is needed to sustain an inference of intentional systemic discrimination.¹³ To the extent that *Segar* can be read to have held (arguably in dicta) that bare statistics can sustain a pattern and practice disparate treatment claim (*see id.* at 1278), the OFCCP's other authority makes clear that *Segar* is an outlier; the weight of federal authority recognizes "that statistical evidence supported by no, or very little, anecdotal evidence is insufficient to establish a prima facie case of discrimination." 3-55 Labor & Employment Law § 55.03 (Matthew Bender 2016) (citing cases).

When the statistical evidence is not overwhelming and unassailable—for example, when it "does not adequately account for the diverse and specialized qualifications necessary for" the position(s) in question—strong evidence of individual instances of discrimination becomes vital to the plaintiffs'

discrimination against Mexican-American potential jurors, it does not discuss or even mention *Hazelwood*, *Transtek*, or any of the Title VII cases; and the cited footnote serves simply to explain how a standard deviation can be determined for a given binomial distribution. 29 U.S.C. §§ 621-34 is the Age Discrimination in Employment Act, totally irrelevant given that OFCCP does not raise specter of any age discrimination.

¹² Moreover, the statistics offered in these cases relied on actual evidence of clear uniform qualifications (driver's license in *Transtek* and teaching credentials in *Hazelwood*). No such evidence of the actual, varied qualifications for Oracle jobs are presented here.

¹³ Moreover, the facts of *Segar* materially differ from the facts here. The *Segar* court's finding of discrimination addressed Federal Drug Enforcement Agency practices that openly used race as a factor to assign African-American agents "disproportionately large amount of undercover work ... on the assumption that black agents [would] be more readily able to infiltrate organizations consisting primarily of blacks," which "injure[d] [their] promotion opportunities because [they were] unable to obtain the breadth of experience needed for promotions." *Id.* at 1260. Plaintiffs used compensation statistics to demonstrate the effect of this and other allegedly discriminatory practices. *Id.* at 1261. And the Court emphasized that to be "legally sufficient," those statistics needed to "show a disparity of treatment, eliminate the most common nondiscriminatory explanation of the disparity, and thus permit the inference that, absent other explanation, the disparity more likely than not resulted from illegal discrimination." *Id.* at 1274 (citing *Transtek*, 431 U.S. at 368).

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case.” *Sears*, 639 F.2d at 311 (quoting *Valentino v. U.S. Postal Serv.*, 674 F.2d 56, 69 (D.C. Cir. 1982)). In *Sears*, for example, the EEOC commissioner alleged that Sears engaged in a pattern and practice of discrimination against women by failing to hire, promote, and compensate them appropriately. *Id.* at 307. Yet in the course of a ten-month trial, the EEOC “fail[ed] to present testimony of any witnesses who claimed that they had been victims of discrimination by Sears.” *Id.* at 310. The “lack of anecdotal evidence,” coupled with “major problems with the EEOC’s labor pool” and statistical evidence that was “severely flawed,” dictated judgment for Sears on all counts. *Id.* at 311; see also *Corn v. Moore*, 739 F.2d 746, 754 (2d Cir. 1984) (where women faculty allegedly discriminated against were “a very small group, and easily identified individually” yet “no direct evidence of discrimination as to them other than the statistical study was produced[.] . . . the failure to produce such direct evidence [was] significant”); *Bank of America*, ARJ Apr. 21, 2016 at 18 (reversing ALJ finding of pattern and practice discrimination based solely on statistical evidence, because “[w]ithout more evidence, one bottom line standard deviation of 4.0 for four years with minor shortfalls in two of those years is not enough in this particular case to prove a pattern or practice of intentional racial discrimination”). The same lack of corroboration plagues the NOV in this case.

4. OFCCP Has Not Established a *Prima Facie* Case of Recruiting or Hiring Discrimination.

OFCCP charges Oracle with a violation for allegedly favoring “Asian applicants, particularly Asian Indians, based upon race in its recruiting and hiring practices” for PT1 roles. NOV at 1. OFCCP appears to base its recruiting charge on a comparison of the percentage of Asian Indians in the U.S. population generally to the applicants for PT1 positions at Oracle’s Redwood Shores facility (see NOV at 2 n.1), and its hiring charge on a comparison of the racial makeup of one of two data sources (“2006-2010 Census Data and/or 2013-2014 DOL, Bureau of Labor Statistics’ Labor Force Statistics”)—depending on which source best serves OFCCP’s objectives—to the individuals hired into the PT1 role at Oracle.¹⁴ Neither of these statistical findings comes close to supporting an inference that Oracle intentionally discriminated against all “non-Asian Indians” in its recruiting or hiring practices. Nor does OFCCP provide any specific facts with regard to allegedly biased recruiting.

It is well-established that the most probative statistics to examine when assessing a company’s hiring practices involve a comparison of the actual, qualified applicants for a given position to those hired—particularly where the position at issue requires specialized knowledge, skills or experience. “[I]n order to determine discriminatory exclusion, unskilled positions are compared to a different statistical pool than are jobs requiring special skills.” *Priglight v. Metro. Dade Cty.*, 26 F.3d 1545, 1554 (11th Cir. 1994) (citing *Transier*, 431 U.S. at 357-58). This is because “for positions requiring minimal training or for certain entry level positions, statistical comparison to the racial composition of the relevant population suffices, whereas positions requiring special skills necessitate a determination of the number of minorities qualified to undertake the particular task.” *Id.* (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-02 (1989)). See also *Harshbarger*, 433 U.S. at 308 n.13

¹⁴ Tellingly, the NOV does not include even a summary table in Appendix A setting forth OFCCP’s methodology for the claimed violation.

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("When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."); *Cover*, 739 F.2d at 750 (citation and internal quotation marks omitted) (finding that "generalized statistical data may be less persuasive evidence of discrimination where an employer hires highly educated, specially qualified people on a decentralized basis").¹³

OFCCP makes no effort in the NOV to compare the actual applicant pool to those hired into Oracle's technical PTI positions during the relevant period—presumably because that comparison would not support OFCCP's desired conclusion. Although recourse to relevant labor pool statistics could conceivably be appropriate if there were independent evidence that the applicant pool itself had been skewed by a company's overt discriminatory preferences, OFCCP offers absolutely *no facts* to suggest any such conduct by Oracle. As such, there is no reason to think that the OFCCP's statistics present any meaningful comparison, and they cannot support a *prima facie* case of any recruiting/hiring violation. *See, e.g., Sears*, 839 F.2d at 324, 328 (rejecting statistical analysis that used overinclusive data pool and did not "account for differences in interests or qualifications among [actual] applicants," as "the EEOC did not analyze the hiring situations actually confronted by Sears managers"); *See, Marie v. E. R.R. Ass'n*, 650 F.2d 395, 400 (2d Cir. 1981) (finding "plaintiff's statistical evidence and the EEOC reports on which it was based were totally wanting in probative value" because they failed to isolate pool of candidates with requisite skills and experience). We are confident that a judge would reject OFCCP's efforts to manufacture a violation by recourse to inapposite labor pool statistics in this case. *Acord Lopez v. Laborers Int'l Union Local No. 18*, 987 F.2d 1210, 1214-15 (5th Cir. 1993) (no *prima facie* case established where plaintiffs " concocted numbers to create the requisite standard deviations").

5. OFCCP Has Not Established a *Prima Facie* Case of Compensation Discrimination.

The burden of showing that any affected pay class is comparable to a more favored class falls on the Government. No rush to judgment can short circuit its obligation. Absent evidence that the purported classes in the NOV are actually, in fact, similarly situated to relevant comparators, OFCCP's statistics and conclusions have no basis in fact or law.

As OFCCP's Directive 307 acknowledges, "[i]nvestigation of potential compensation discrimination presents complex and nuanced issues" and requires a "case-by-case approach." *Id.* at 7. OFCCP's directive dictates that compensation analysis must employ "statistical controls to ensure that workers are similarly situated," and counsels consideration of a host of different factors including "tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum

¹³ *Acord Lopez v. E. R.R. Co.*, 497 F.2d 1374, 1379 n.6 (5th Cir. 1974) (holding that "comparison with general population statistics is of questionable value when we are considering positions for which ... the general population is not presumptively qualified," and that often "recourse [will] still have to be had to the statistics concerning the applicant pool and its racial composition before meaningful comparison with the percentage of blacks actually employed could be made"); *Alarín v. Dep't of Transp.*, 629 F.2d 870, 875 (1st Cir. 1980) (citation omitted) (holding that "statistical source [which] did not accurately reflect the percentage of females interested in the work force in question ... did not establish a *prima facie* case.").

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qualifications, and other objective factors" in determining who is "similarly situated." *Id.* at 3; *see also* *Id.* at 12-13 ("For purposes of evaluating compensation differences, employees are similarly situated where it is reasonable to expect they should be receiving equivalent compensation absent discrimination."); OFCCP must look to "contractor's wage and salary system"—not its own external, superficial judgment—to determine which individuals are "comparable" for purposes of a pay equity analysis. *Id.* at 7. Even then, because of the complex factors that can inform how companies compensate individuals, "[t]he mere fact that there are pay differences between comparators, without any other evidence of pretext or other indicia of possible discrimination, generally is not sufficient to find a violation of E.O. 11246." *Id.* at 12.

OFCCP plainly failed to comply with its own directive in this case, as well as ignoring applicable Title VII principles. The NOV alleges four separate compensation violations (against females, African-Americans, Asians, and "Americans" (whatever that may mean) in varying combinations of IT, Product Development, and/or Support roles). All of these conclusions suffer from the same fatal flaw: the assumptions that all professionals at Oracle who may share a role are similarly situated, fungible employees, and that the primary factors affecting pay are time at Oracle and work experience. Again, OFCCP provides no facts suggesting or supporting the crucial assumptions at the foundation of its findings.

The case law makes clear that compensation statistics "must address the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated." *Chavez v. Illinois State Police*, 251 F.3d 612, 638 (7th Cir. 2001). "[S]tatistics [that] fail[] to account for obvious variables . . . that would have affected the results of the analysis" are "insufficient to raise a question of intentional discrimination." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283 (9th Cir. 2000). Uncritically assuming that everyone in the same job category (or role) is similarly situated—as OFCCP did here—does not suffice. This is because "[e]mployers are permitted to compensate employees differently based on skills that are not specifically required in a given job description so long as the employer considers those skills when making the compensation decision." *Warren v. Solo Cup Co.*, 516 F.3d 627, 630-31 (7th Cir. 2008) (rejecting Title VII compensation claim where plaintiff could not show she was similarly situated to more highly skilled co-worker); *see also* *Cassir*, 739 F.2d at 753 (in rejecting compensation discrimination claim by female non-tenured professors [NTPs], finding that "[t]he NTP rank itself merely establishes outside parameters for salary and does not reflect the tasks or responsibilities of a particular job except in a highly general fashion," and thus data that failed to account for "crucial variables" within that broad job category (including differing duties) were "not probative of discrimination").¹⁶

¹⁶ Numerous other courts are in accord. *See, e.g., Knight v. Brown*, 797 F. Supp. 2d 1167, 1127 (N.D. Wash. 2011), *aff'd*, 485 Fed. App'x 183 (9th Cir. 2012) (employee not "similarly situated" to other individuals with same job title (security sergeant) in same county agency (King County's Facilities Management Division) due to differences in seniority/tenure in that job and shift worked); *Rae v. Univ. of Cent. Florida Bd. of Trustees*, 390 F. Supp. 2d 1223, 1230-31 (S.D. Fla. 2005), *aff'd sub nom.*, 179 F. App'x 680 (11th Cir. 2006) (rejecting discrimination claim of individual who did not "share[] the same supervisor or evaluators" and "held position[] in different department[] than proposed comparator, and thus was subject to different evaluation process impacting prospects of promotion); *Nutts v. Daphn Utah*, No. 13-0605-WS-C, 2015 WL 4910983, at *6 (S.D. Ala. Aug. 17, 2013) (finding job duties of clerk handling accounts payable, and thus "fundamentally different" than those of clerk handling accounts payable, as latter job "was more difficult, more complex, more time-consuming, and required more skill, effort and responsibility"); *Suss-Fingers v. City of Indianapolis*, 493

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OFCCP has made no effort to show that all Oracle employees who work anywhere in "Information Technology" (or "Product Development," or "Support") have the same responsibilities, performance, or skills; or that the products or projects on which they work have the same importance to the company; or that the broader labor market has the same demand for their services elsewhere, such that Oracle faces the exact same competitive pressure to retain them all. To the contrary, it is implausible to treat all employees in a company like Oracle that requires specialized, trained professionals as fungible, or any compensation distinctions among them as *per se* suspect. Once again, the OFCCP has set forth a conclusory finding unsupported by the requisite facts. As set forth here and in Section III, OFCCP's asserted compensation statistics are simply not "legally sufficient," as they do not make any effort to "eliminate the most common nondiscriminatory explanations of the disparity"—namely, genuine differences in the skills, performance, and other features of different Oracle employees—and thus do not "permit the inference that" Oracle discriminated. *See*, 738 F.2d at 1274 (citing *Teamsters*, 431 U.S. at 368). Accordingly, the NOV fails to state even a *prima facie* case on these counts as well, and should be withdrawn.

III. OFCCP'S SUMMARY STATISTICAL ANALYSES IN ATTACHMENT A TO ITS NOV ARE LEGALLY IRRELEVANT AND FAIL TO ESTABLISH A PRIMA FACIE INFERENCE OR PROOF OF UNLAWFUL DISCRIMINATION

NOV violations #2-5 rely on OFCCP's contention that it has identified "statistically significant pay disparities ... after controlling for legitimate explanatory factors." NOV, Attachment A. Each of the regression models states simply that the model "involved the natural log of annual salary as a dependent variable and accounted for differences in employees' gender (race, etc.), work experience at Oracle,¹⁷ work experience prior to Oracle,¹⁸ fulltime/part time status, exempt status, global career level, job specialty and job title." *Id.*

OFCCP makes its conclusory findings of statistically significant disparities as to the specific classes based solely on the above factors. The NOV then offers one line of numbers for each such finding. Why or how OFCCP and its statisticians adopted, as the supposed legitimate explanatory factors,

F.3d 768, 772 (7th Cir. 2007) (rejecting Equal Pay Act compensation claim because "[t]he jobs of the managers of the different parks in the sprawling Indianapolis park system are nonstandard, mainly because the parks are so different from one another," and finding that evidence insufficient to establish Title VII violation as well).

¹⁷ While OFCCP offers no facts or details (and rejected Oracle's request for more detail), we presume "work experience at Oracle" means simply length of time at Oracle since hire or acquisition. Length of time has little to nothing to do with actual relevant work experience, skills, responsibilities, performance, etc. that individual employees may have had at Oracle.

¹⁸ As with the preceding footnote (due to OFCCP's failure to provide more detail), we presume "experience prior to Oracle" calculates some amount of time worked elsewhere before joining Oracle (via hire or acquisition), without regard to the type and/or relevance of the actual prior work experience, skills, responsibilities, performance, etc. individual employees may have had in their work lives prior to Oracle.

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only those included in its model is nowhere explained.¹⁹ However, none of the variables the OFCCP considered addresses the specific types of work performed by individual employees. The lack of any other factors, and lack of any further explanation from the Agency, comes as no surprise given that its position as to the model used simply cannot be defended.

Oracle is a high technology company in a highly competitive field. Most of its jobs, and certainly the jobs at issue, require people with specialized or unique skills. Many are in cutting edge new areas of technology. Required skills and expertise at Oracle are not basic for most roles, and jobs at Oracle are not fungible or homogeneous, in contrast to jobs in large retail or manufacturing operations or municipal services such as bus drivers or police officers. While the latter types of jobs require a range of significant and unique skills across jobs, the particular jobs *within* those categories each generally involve a similar set of skills. In such cases, the roles of drivers or line (beat) police officers may well be sufficiently similarly situated that all drivers or all line officers may be included in a given analysis.

But at Oracle, product developers working on cloud products, on fusion products, or on PeopleSoft products require different skills and skill levels, and can have very different roles and responsibilities. This is why grouping employees together based on the overbroad "job function" designation is not an appropriate or accurate way to analyze or understand pay at Oracle. Grouping employees by supervisor provides some insight into which employees may be working on similar products or projects in the same line of business. But even in the same job and line of business, employees may not only have different skill sets but different levels of expertise and responsibilities. As a result, even for employees working in the same department, for the same supervisor, and with the same job title, they may not be doing the same level or type of work. Oracle is organized into many small entrepreneurial groups and each group works on different products or may support different types of industries, business sectors and/or lines of business. Frequently, the product worked on, or the business sector for whom the work is being done, can itself be an important indicator of pay.

Performance at Oracle also matters. Not only does the employee's individual performance matter; the performance of the product (value and criticality to the company's business) also matters. These and numerous other legitimate factors described during the compliance evaluation have all been ignored by Mr. Doles and OFCCP's statisticians in an apparent effort to squeeze out some statistical model in order to engineer a disparity finding. But simply producing some model, however irrelevant, is not sufficient to shift OFCCP's legal burden.

Neither Mr. Doles in the NOV, nor the statisticians in their models, offer any facts to establish that their conclusions concern appropriate employee comparators. OFCCP has an obligation to use relevant facts and apply applicable legal standards in developing a statistical model. It has failed to meet its obligations in all respects. Simply stated, in many instances employees at Oracle are not, in fact, similarly situated. And, even where employees are comparators (*i.e.*, similarly situated), pay

¹⁹ In response to follow-up questions to OFCCP seeking to understand the rationale for use of these factors and no others, Oracle was met with a series of legal objections from the Agency and was provided zero additional information.

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differences can be, and are, based on legitimate non-discriminatory explanatory factors consistent with Oracle's pay system and applicable law.

Had OFCCP evaluated pay consistent with the relevant facts and applicable legal standards, it would have found valid explanations for the disparities it identified. Consider, for example, Ping (Shelley) Feng, a female who was working as a Software Developer Senior Manager making \$131,000 as of January 1, 2014. Although there were 334 total employees in that same job title at HQCA at that time, only two others worked with Ms. Feng in her group under the same supervisor: Byung-Hyun Chung and Mandar Chintaman. And, although they worked for the same supervisor, each of them had different roles and responsibilities within the group. According to their supervisor (a female, Ayse Abu), both Mr. Chung and Mr. Chintaman had larger areas of responsibility and larger teams than Ms. Feng. Mr. Chung is the lead Development Manager for product and responsible for the entire engineering effort. He is also conversant in all technology areas used and manages a team of nine, including two Senior Managers. Mr. Chintaman also managed a larger team than Ms. Feng before his departure from Oracle (team of 8 with two managers reporting to him), and he was also a lead Development Manager for product. Mr. Chintaman was an expert in the newer technology areas. Both Mr. Chung and Mr. Chintaman held the discretionary title of Group Manager. Ms. Feng's area of responsibility was narrower. She managed a smaller team of just three individual contributors and was responsible for only some areas of product. Her technical expertise is also narrower and she is not as knowledgeable as Mr. Chung or Mr. Chintaman in newer technologies. Her discretionary title is Senior Manager. These facts—none of which were considered by OFCCP—explain why Mr. Chung and Mr. Chintaman had higher salaries (\$147,000 and \$146,000, respectively) than Ms. Feng in 2014.

The Software Developer 4 employees under Wilson Chan present another good example. In January 2014, the two Asian employees in the group (Xiaoli Qi and Norman Lee) had lower salaries than the two white employees (Yun Sharonin and Tolga Yurek) because of their relative technical expertise and level of productivity. Mr. Sharonin (paid \$157,000 in 2014) has a strong knowledge of Cluster and Parallel Storage technology, RAC, O.S. and file systems including CFS. He is also experienced in multi-threaded programming. Mr. Yurek (paid \$140,000) is considered to have the strongest technical skills out of this group. This was reflected in his 2013 and 2014 performance review scores—both "4s"—which, combined, were better than both Mr. Qi ("3s" in both years) and Mr. Lee ("4" in 2014 and "3" in 2014). He understands the internal code of RAC, Parallel Storage, and Distributed Systems. Mr. Qi has more limited technical expertise (in High Availability and RAC only), and he has the lowest productivity in the group. Likewise, Mr. Lee's expertise in Distributed Systems, Parallel Storage and RAC is more limited than Mr. Yurek's and Mr. Sharonin's, and he also works at a slower pace.

Similar facts explain pay differences among the two white and two Asian Software Developer 5 employees under supervisor Andrew Witkowski. The top earning employee, Allen Brumlin (white), making \$220,000, had the strongest technical skills on the team and worked on very high visibility projects. He designed and owned the architecture for Data Manipulation Language (DML). He also defined and designed XML tables for Hadoop. In addition, he was the most productive out of this group of three. Because of his high performance, he had the best performance review scores on the

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team in 2013 ("4") and 2014 ("5"). Neither Aif Chaudhry (making \$193,000) nor Srikanth Bellamkonda (earning \$192,000) were as technically strong or productive as Brumm. This was reflected in their performance reviews: Mr. Chaudhry received "3s" in both 2013 and 2014, and Mr. Bellamkonda received a "4" in 2013 and a "3" in 2014. And, while one white developer had the highest salary on the team, the other white developer, Valery Soloviev, had the lowest salary of all four (\$156,000).

If OFCCP evaluated similarly situated employees and relevant factors that impact pay, it also would have seen instances where the purported disadvantaged employees were—for legitimate reasons—making the highest salaries on their teams.

Consider the four M5-level IT Senior Directors working under Renzo Zagni. Female Eve Halwani was the highest paid in 2014 (\$183,000), and for good reason. Ms. Halwani was the most senior IT Director of the group. She has an MBA and led high-visibility, critical project teams, including helping to build the team to provide operational support for Fusion Customer Relationship Management ("CRM"). Although Edwin Scully (\$184,486) made more than the two other females in the group, Weimin Zhao (\$181,900) and Joyce Chow (\$172,260), the difference was also justified. Mr. Scully is considered the strongest leader out of this group and has 7 direct reports. His technical strengths include Business Intelligence and Value Chain Planning. He is rated as Top Talent and has received regular salary raises based on his high level of productivity.

Consider also Jia Shi (a female), who was the top paid Software Development Director in her group under supervisor Kothandi Umarnageswaran; in fact, she was the highest paid out of all 258 total employees in that job title at HQCA as of January 1, 2014. Ms. Shi manages the state of the art availability feature and performance for Exadata (<https://www.oracle.com/engineered-systems/exadata-mxex.html>), which are key areas of focus for Oracle. According to those who know her work, she is not only strong technically with great educational background (a master's degree from Stanford), but she is clever and brings innovative ideas to complex problems. She is flawless at executive projects. She drives all the software as well as hardware features. She is a great mentor for her team and is her supervisor's go-to person and right hand. Indeed, she is considered to be her supervisor's potential successor. Ms. Shi is highest paid because she manages the largest team of 14 employees and has the largest scope. She is respected as the go-to person and is her manager's most dependable employee for technical skills as well as leadership abilities.

As these examples illustrate, OFCCP's model is not in any way reflective of Oracle's world or its pay system, and some of the most important legitimate factors used at Oracle are ignored. Accordingly, the NOV fails entirely to measure real demographic group differences in the rates paid to similarly situated Oracle employees. In sum, the Attachment A statistical models fall under both Title VII standards and OFCCP's Directive 307 mandate to assess measurable pay differences between comparator groups under Oracle's pay system, and thus do not support any finding adverse to Oracle.



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June 29, 2016

VIA E-MAIL AND FEDERAL EXPRESS

Janette Wipper
 Regional Director, Pacific Region
 U.S. Department of Labor
 Office of Federal Contract Compliance Programs
 90 7th Street, Suite 18-300
 San Francisco, CA 94103

Re: Oracle America, Inc., Redwood Shores, California (OFCCP No. F00192699)

Dear Ms. Wipper:

We have received your June 8, 2016, letter which you describe on page 3 as a Notice to Show Cause ("SCN"). Your letter states that you are issuing the SCN because "OFCCP's findings remain un rebutted at this point and conciliation efforts have failed to resolve the violations." For the reasons set forth below we disagree that you have proper grounds, or any grounds, for issuance of an SCN at this time, and urge OFCCP to undertake reasonable conciliation efforts.

First, even if the assertion that Oracle has failed to rebut the violations were true, that is not a proper grounds to issue an SCN "at this point."¹ In short, rebuttal has nothing to do with

¹ Indeed, it remains undisputed that at no time prior to the issuance of the NOV did OFCCP provide Oracle with any reasonable opportunity to address or rebut any of OFCCP's purported concerns or preliminary findings of pay bias. There was no exit conference and no Predetermination Notice; recall, for example, the facts we presented to demonstrate OFCCP's false claim of an exit conference by your staff. Only after issuing the NOV did your staff first ask for a rebuttal. A rebuttal, of course, is not part of the conciliation process itself. And as we made clear in correspondence, we needed factual information before we could offer a meaningful rebuttal. Instead, you simply ignored our requests and have now jumped impudently and prematurely to your SCN. While we also noted in our correspondence that the Agency failed to follow its own procedures in myriad ways, we never asserted that the FCCM establishes "substantive agency policy" as suggested in footnote 3 of your SCN. We are not even clear on what that phrase means. Rather, as described in detail in our May 25 submission your staff failed in numerous respects to follow Agency procedures as specified in the FCCM. Many of the FCCM sections we cited specify that COs "must" or "shall" do certain things in the course of conducting a compliance review, in the content and form of an NOV, and in developing conciliation proposals and drafting conciliation language. Failure by the Agency to follow mandated procedures, as with a failure to follow applicable law or regulations, can and does frequently operate to prejudice contractor rights. Simply stated, we believe the FCCM provides guidance, directions, and where specified, mandated processes for OFCCP compliance staff to follow.

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conciliation efforts.³ Once again the SCN suggests greater interest by OFCCP in bullying, threatening, and misstating the documented record rather than complying with OFCCP's rules, practices, and mandatory regulations. Therefore, to the extent that OFCCP suggests that a perceived failure by a contractor to offer a rebuttal of which OFCCP approves supports the issuance of an SCN, the SCN is not consistent with OFCCP's own regulatory procedures.

Second, whether or not Oracle had any meaningful opportunity to provide rebuttal or provided satisfactory (or even unsatisfactory) rebuttal, that has nothing to do with your bald assertion that "conciliation efforts have failed." Quite simply, and as the record will reflect, there were scant "conciliation efforts" at all—and certainly no good faith, reasonable conciliation efforts by OFCCP. Conciliation efforts haven't failed; they haven't occurred. OFCCP regulations require OFCCP to undertake reasonable conciliation efforts. See 41 C.F.R. § 60-1.20(b).

Notably, OFCCP has not made any monetary proposal for each of the employees it claims are aggrieved, and indeed has presented no conciliation proposal of any kind. Nor has it engaged in any meaningful negotiation process to achieve a resolution. OFCCP asked to meet in person; in response, we explained why we believed such a meeting would be premature and inappropriate, proposed the alternative of written communications as expressly contemplated by the FCCM, and expressed our continued interest in resolution. See Letter to Robert Doles, April 11, 2016. We set forth explicitly our reasons for suggesting written communication, but received no response from OFCCP. Oracle has not in any way, manner, or form refused to engage in conciliation efforts.

We note further that after issuing the NOV, and after Oracle acknowledged willingness to conciliate, only then did Mr. Doles finally ask for a "position statement" regarding OFCCP's findings. The position statement and questions we raised may not satisfy you, but instead of any meaningful response, your June 8 letter is a bald rejection of and refusal to engage in reasonable, good faith efforts at resolution. This is simply more abuse of process and more violations of OFCCP's regulatory obligations, this time regarding conciliation. We believe, therefore, that OFCCP should—indeed must—withdraw the SCN and engage in reasonable conciliation efforts.

Separate and apart from the foregoing, we are concerned that much of OFCCP's rush to issue an SCN is a result of its misapplication of the standards governing rebuttal evidence, and misapprehension of the alternative means by which an employer can respond to statistical evidence purporting to show an impermissible pay disparity.

³ Conceivably and hypothetically, a contractor could offer no rebuttal, even concede that NOV findings are 100% correct, and still that would not affect the requirement for reasonable conciliation efforts.



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In its recent correspondence, OFCCP has repeatedly taken the position that Oracle has failed to provide any "substantive rebuttal analysis" because it did not provide its own contrary "statistical evidence." Indeed, your June 8 letter states categorically that what OFCCP characterizes as "procedural arguments raised by Oracle *are not a rebuttal*" (emphasis added), and are "neither a relevant nor appropriate response to the statistical evidence of systemic discrimination uncovered in the compliance evaluation and disclosed in the Notice."

This is simply not a correct statement of the law. There is no requirement—in Title VII, Executive Order 11246 or its implementing regulations, or otherwise—for a party charged with discrimination to develop its own independent statistical models in an effort to prove a negative: that it *did not* engage in any pattern or practice of discrimination. The leading employment law treatises are all in accord on this point:

- "If the defendant chooses to challenge the plaintiff's statistics, the defendant is not obligated to conduct his or her own statistical analysis, but may simply address the flaws in the plaintiff's data." Walter B. Connolly, Jr., David W. Peterson & Michael J. Connolly, *Use of Statistics in Equal Employment Opportunity Litigation* § 3.01 (2015).
- "The employer may attempt to rebut the plaintiff's prima facie case in a variety of ways. With respect to a plaintiff's statistical evidence, the two most commonly used approaches are to (1) explain away any statistical disparity by, for example, demonstrating that the plaintiff's statistical calculations are based on faulty data, flawed computations, or improper methodologies; or (2) introduce alternative statistical evidence." Barbara T. Lindemann, Paul Grossman & C. Geoffrey Weirich, *Employment Discrimination Law* § 2.III, p. 2-117 (2015).
- "If the plaintiff succeeds in proving a *prima facie* case of a pattern or practice of discrimination, [t]he defendant can present its own statistical evidence ... Alternatively, the defendant can present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination" or target "[t]ypical flaws in the plaintiff's evidence ... includ[ing] statistics that compare the defendant's work force to an inappropriate general population, include irrelevant job categories in the work force statistics, utilize the improper geographical area for the relevant labor market, otherwise fail adequately to tailor the comparison to the qualifications demanded by the position in question, fail to present adequate data on both sides of the comparison, fail to eliminate pre-Title VII discrimination from consideration, simply fail to demonstrate disparity of treatment to be statistically significant due to small



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sample size or otherwise, or contain various other flaws.” 1-9 *Larson on Employment Discrimination* § 9.03[2] (2015).

So, too, is the case law. *Int'l Bhd. of Teamsters v. United States* directs that if a plaintiff makes out a *prima facie* case, “[t]he burden then shifts to the employer to defeat the *prima facie* showing of a pattern or practice by demonstrating that the Government’s proof is either inaccurate or insignificant.” 431 U.S. 324, 360 (1977). The examples the Supreme Court offered of how an employer might effectively rebut did not involve any complicated competing statistical models, but instead noted that “[a]n employer might show . . . that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.” *Id.* Indeed, the Court was express that while “[t]he employer’s defense must . . . be designed to meet the *prima facie* case of the Government[,], we do not . . . suggest that there are any particular limits on the type of evidence an employer may use.” *Id.* at 360 n.46. The Court thus has clearly held that statistical models can be challenged on their own merits, and that there is no need for an employer to offer competing statistical proof in rebuttal.

Courts applying this *Teamsters* directive have consistently ruled that although competing statistics are a *permissible* form of rebuttal evidence, they are not *required*.

- “The cases cited by the EEOC to support its argument that Sears had the burden of rebutting its statistical analysis with more ‘refined, accurate and valid’ statistical evidence did not state that the defendant must produce such evidence to succeed in rebutting the plaintiffs’ case. Instead, those cases indicated that a defendant could or ‘was entitled to’ use such a means of rebuttal. . . . These cases suggest, and the cases we have cited above confirm, that statistical evidence is only one method of rebutting a statistical case.” *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 313-14 (7th Cir. 1988) (citations omitted).
- “A central issue in the pending case is what showing an employer must make to satisfy its burden of production in a pattern-or-practice case. In *Teamsters*, the Supreme Court stated that the employer’s burden was ‘to defeat the *prima facie* showing of a pattern or practice by demonstrating that *the Government’s proof is either inaccurate or insignificant.*’ 431 U.S. at 360, 97 S.Ct. 1843 (emphasis added). The emphasized words raise a question as to whether the Supreme Court thought the employer’s rebuttal evidence must be directed at the statistics that often constitute the *prima facie* case of discrimination or simply at the rebuttable presumption of discrimination that arises from those statistics. . . . We think the Court meant



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that the employer must produce evidence that is relevant to rebutting the inference of discrimination. No plaintiff can limit the type of evidence that a defendant must produce to rebut a prima facie case by its selection of particular evidence to support that case. . . . [I]t is always open to a defendant to meet its burden of production by presenting a direct attack on the statistics relied upon to constitute a prima facie case. A defendant might endeavor to show that the plaintiff's statistics are inaccurate, for example, infected with arithmetic errors, or lacking in statistical significance, for example, based on too small a sample." *United States v. City of New York*, 717 F.3d 72, 85 (2d Cir. 2013).

- "The EEOC bears the burden of establishing a prima facie case, through use of statistics or other evidence, of disparate impact because of a prohibited factor. The burden is not on Defendant to conduct its own analysis to rebut the results produced by the EEOC's flawed report. It is sufficient for Defendant to point out the numerous fallacies in [the EEOC expert's] report, which raise the specter of unreliability." *EEOC v. Freeman*, 961 F. Supp. 2d 783, 799 (D. Md. 2013), *aff'd in part sub nom.*, 778 F.3d 463 (4th Cir. 2015) (granting summary judgment to employer).

Oracle's approach to this evaluation is entirely consistent with these authorities. In response to the NOV, Oracle sought additional detail about the particular statistical analyses that OFCCP ran, in order to enable a meaningful assessment of those analyses. Oracle also pointed to various legitimate job-related factors—including skills, performance, type of project, supervisory responsibilities, etc.—that explained pay differences between particular individuals whose experiences OFCCP's models appear to conflate. Challenging OFCCP's statistical models is a permissible, appropriate method of responding in rebuttal. Any contrary suggestion that Oracle was not engaging in the process in good faith simply rests on a misunderstanding of what the law requires of employers, and the burden that the Government maintains throughout that process to tender probative evidence establishing a pattern or practice of discrimination. We hope that you will dispense with this erroneous view of the law, and engage appropriately with Oracle's efforts to understand the models on which you seek to base a non-compliance case.

Finally, as evidence of OFCCP's continued bad faith in mischaracterizing Oracle's position on conciliation, I refer you to our email correspondence with District Director Atkins on April 25, where I had to again correct the Agency's blatant misstatements and mischaracterization regarding Oracle's intent to conciliate and the method it proposed to follow. Since you have omitted and may not have seen that relevant correspondence, I have attached it here. See E-mail to Hea Jung Atkins, April 25, 2016, 5:51 p.m. Attachment A.

OHSUSA:765461740 1

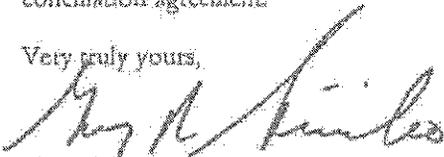


ORRICK

Janette Wipper
June 29, 2016
Page 6

In sum, we believe the SCN should be withdrawn and OFCCP should undertake reasonable conciliation as required. Oracle, for its part, continues to remain compliant and stands ready and willing to engage in transparent and interactive dialogue to resolve this evaluation. Any such dialogue should include, at a minimum and as a starting point, a specific proposal by OFCCP regarding the monetary relief it believes is due to particular identified individuals, and a proposed conciliation agreement.

Very truly yours,



Gary R. Siniscalco

Attachment

Siniscalco, Gary R.

From: Siniscalco, Gary R.
Sent: Monday, April 25, 2016 3:45 PM
To: Atkins, Hea Jung K - OFCCP
Subject: HQCA/April 21 letter

Hi Hea Jung,

I'm back in the office for a few days between my house move these past several days and leaving for Hong Kong. I did read your April 21 letter and find myself immediately dismayed by the very first substantive sentence of your letter (i.e. the second sentence of the letter) and feel compelled to address an immediate concern regarding the conciliation process.

The April 21 letter, referring to me and my letter of April 11, states, in part, as follows:

You reject the Agency's request to meet and engage in a good faith and timely conciliation discussion..."

Misstating and mischaracterizing my words is neither useful nor appropriate. "Good faith" includes, and is not limited to, accurate representations of what each party has spoken or written.

I repeat again what I wrote in the last paragraph of my April 11 letter:

For the reasons stated above, we believe the invitation for a face-to-face meeting would likely be premature. We are also concerned about engaging in a face-to-face dialogue given that the region has misstated and mischaracterized other in-person interactions going all the way back to the entrance conference. Until we have reason to believe there would be a more accurate and forthright exchange, we believe it best to have written communication". (emphasis added)

Unfortunately, the foregoing simply underscores my belief that until the Agency shows it can communicate accurately and stops its mischaracterizations, it is best to have all communications regarding the conciliation process documented.

ATTACHMENT A

Moreover, the Agency's own FCCM expressly contemplates such various written methods. See FCCM, Section 8GO1.

As I mentioned in my earlier email during my move, I will get back to you upon my return from Hong Kong with an expected date for a response.



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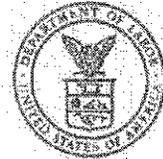
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September 23, 2016

Sent via Electronic Mail

Gary R. Siniscalco
Orrick, Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105-2669

Dear Mr. Siniscalco:

Thank you for your September 21 response.

As an initial matter, you continue to misstate the facts and the law relevant to this compliance evaluation.¹ For over six months, the Agency has repeatedly requested a "substantive rebuttal analysis" based upon statistical evidence from Oracle. It is far from a "shifting position." (See OFCCP correspondence dated April 21, 2016, and Show Cause Notice issued on June 8, 2016)

Such a rebuttal analysis is required and routinely provided by other contractors, without objection, in response to systemic discrimination violations issued by the Agency. Indeed, without rebuttal evidence, the Agency may conclude that none exists, and the violations stand.²

Even a cursory review of the record here severely undercuts your claim that -- "...there is *no question that Oracle has rebutted the Agency's findings...*" No rebuttal evidence exists in the record from Oracle. You cite your April 11 correspondence in your recent September 21 correspondence, but that five-page letter offered no evidence. It included only two paragraphs related to the substantive discrimination violations at issue, which merely demanded additional information from the Agency. You accompanied that letter with an additional 57 questions for the Agency (which sought predominantly irrelevant, privileged, or premature information). Nonetheless, the Agency responded to many of your questions within a two-week period. In response to such cooperation, Oracle has continued to withhold any substantive rebuttal analysis or evidence, for over six months, from the Agency.

Similarly, your May 25 correspondence offers no rebuttal evidence. On page 2 of the letter, you state that: "Oracle ... *could make it very clear* that those findings were based on artificial groupings filled with employees who were not similarly situated for Title VII purposes, or even comparable under Oracle's compensation system as required by Directive 307." However, you provided no evidence to support the statement.

¹ Transparent attempts to manufacture procedural deficiencies where none exist lack good faith. Moreover, as explained in OFCCP's June 8, 2016 correspondence and explicitly in the FCCM, the FCCM does not create legal rights for contractors. Accordingly, the Agency will continue to redirect all parties' communications to the systemic discrimination violations at issue.

² See, e.g., *Segar v. Smith*, 738 F.2d 1249, 1288 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985) (When an employer "...introduced no evidence to support its purported nondiscriminatory explanation, this rebuttal fails as a matter of law.").

Moreover, on page 6 of the same letter, you state: "managers variously described a *range of factors* (not OFCCP's simplistic time-at-Oracle and total work experience) relevant to assessing actual pay comparators at Oracle." However, you did not provide any evidence demonstrating whether any factor in the "range of factors" would actually change the statistical results in favor of Oracle.³

Finally, on page 17 of the same letter, you provide a few cohort comparisons, without supporting evidence. You do the same in your June 29 correspondence. However, cohort comparisons and arguments of counsel do not rebut evidence of systemic discrimination affecting thousands of employees.⁴

Again, the Agency requests that Oracle either (i) concede the violations, (ii) concede no rebuttal evidence exists (particularly as only Oracle has access to all employment records potentially relevant to this review at this stage), or (iii) provide a substantive analysis *based upon statistical evidence* from Oracle's records responding to the Notice of Violations and accompanying attachment (NOV).⁵

Like the evidence offered in the NOV, Oracle's rebuttal analysis should describe its statistical model, analysis and results based upon Oracle's employment records and other evidence.⁶ It should also describe all variables included and excluded from the regression analyses, allowing OFCCP to replicate them.⁷

³ See, e.g., *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 653-654 (5th Cir. 1983), cert. denied, 466 U.S. 927(1984) ("defendant must do more than raise theoretical objections to the data or statistical approach taken; instead, the defendant should demonstrate how the errors affect the results"); *EEOC v. Gen. Tel. Co.*, 885 F.2d 575, 579-582 (9th Cir. 1989), cert. denied, 498 U.S. 950 (1990) ("[T]he defendant cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff's statistics."); *Bazemore v. Friday*, 478 U.S. 385, 399-400, 403-404 n. 14 (1986).

⁴ See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (In the liability phase of a pattern and practice case, "the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking." ... The Government is not required to offer evidence "that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy.")

⁵ As a reminder, the NOV provides the results of OFCCP's statistical analyses, which are well-above the two standard deviations accepted as evidence of systemic discrimination, including:

- gross disparities against non-Asian applicants, particularly African American, Hispanic and White applicants, at *-8, -10, and -30 standard deviations*, respectively, in recruiting practices;
- gross disparities against non-Asian applicants, particularly African American, Hispanic and White applicants, at *-4, -3, and -28 standard deviations*, respectively, in hiring practices; and
- gross disparities against African American, Asian American, American and female employees, at *-2, -6.6, -7.1, and -8.4 standard deviations*, respectively, in compensation practices.

⁶ See, e.g., NOV at p. 2 (OFCCP conducted an "... analysis of ORACLE's applicant data and appropriate workforce availability statistics" [which is later defined as] "... Software Developers, Applications & Systems Software Occupation in the United States is based upon 2006-2010 Census and/or 2013-2014 DOL, Bureau of Labor Statistics' Labor Force Statistics."); and Attachment A at p. 1-3 ("OFCCP conducted statistical analysis of the employment records Oracle America, Inc. ("Oracle") provided to OFCCP during its equal employment opportunity investigation of Oracle's facility in Redwood Shores, California... Oracle provided OFCCP with one year of compensation data that included Oracle employees who were employed at the relevant facility on January 1, 2014.").

⁷ See, e.g., Attachment A at p. 1-3 ("OFCCP analyzed Oracle employees' compensation data by Oracle job function using a model that included the natural log of annual salary as a dependent variable, and

We again request this rebuttal analysis at least four business days before any conciliation meeting to ensure the meeting is evenhanded, as you have stated repeatedly is so important to this process.

With respect to the conciliation meeting, the Agency has changed its schedule to accommodate your proposed date of October 6. We are available between 9:00 AM – 11:30 AM on that date.

We look forward to the meeting.

Sincerely,



Doc Hea Jung Atkins

accounted for differences in employees' gender, work experience at Oracle, work experience prior to Oracle, full-time/part-time status, exempt status, global career level, job specialty, and job title.")

From: [Siniscalco, Gary R.](#)
To: [Atkins, Hea Jung K - OFCCP](#)
Cc: juana.schurman@oracle.com; [Shauna Holman Harries](#)
Subject: Oracle/HQCA - Reply to OFCCP's September 23, 2016 correspondence
Date: Monday, October 03, 2016 12:24:29 PM
Attachments: [image004.png](#)
[image006.png](#)

Dear Hea Jung, this replies to your September 23 letter, emailed to me by Ms Sara Hadsell, Executive Secretary to the Regional Director, late Friday, September 23 at 5:10 p.m. As you know, I was not in the office at all that week. I did respond to your September 28 email where I confirmed the October 6 date at 10:00 a.m. I still owe you names of attendees. I will get them to you later today or early Tuesday.

Your September 23 letter raises many of the same issues and assertions, and cites case law, which I believe we have addressed previously. However, there are two new items of note that I do want to address.

The first is referenced in the 2d paragraph of your letter. You state "...a rebuttal analysis is required..." *after* an NOV is issued and presumably *prior* to any conciliation meeting. We are aware of such a process that is typically offered by OFCCP at the PDN stage (which OFCCP skipped), and during or after an on-site (as described variously in OFCCP pronouncements, including FAQs, e.g. "The contractor will be given an opportunity to timely provide additional information to be considered."). We are unaware of any such requirement post-NOV; please provide the cite. Oracle, of course, reserves the right to provide responses or "rebuttal" as may be warranted and appropriate during conciliation discussions. If, however, OFCCP wishes to revert to a PDN stage, or even an exit conference stage, we would be happy to appropriately address issues or concerns identified by OFCCP's evidence in response to a PDN or an Exit conference.

Second, in addition to what we have already stated regarding our view of the FCCM, and Oracle's expectations and concerns about the Agency's failure to follow a fair and reasonable process, I refer you to the just completed report of the United States Government Accountability Office (GAO, September 2016). The Report states at page 22, as follows:

"In 2014, OFCCP issued a revised Federal Contract Compliance Manual to provide both new and experienced compliance officers with the procedural framework for executing quality...compliance evaluations."

It is evident that the national office of OFCCP, in representations to the GAO and to Congress, believes that the FCCM requires its field staff to utilize process and procedures that will result in quality reviews and any resulting NOV's. Oracle, and all contractors, have a reasonable expectation and may reasonably rely on the field compliance staff's knowledge and use of the FCCM specified procedures and processes in the course of a compliance evaluation. We believe that the unfortunate lack of quality that we have documented has operated to prejudice and deny Oracle its due process rights; its ability to adequately and timely address Agency concerns; and to engage in a reasonable interactive process *during* the compliance evaluation and *before* issuance of the NOV by Mr Doles.

Oracle and I look forward to meeting with you on the 6th to commence conciliation discussions.

Gary R. Siniscalco
Attorney-at-Law

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Employment Blog

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From: [Wipper, Janette - OFCCP](#)
To: [Siniscalco, Gary R.](#)
Cc: [juana.schurman@oracle.com](#); [Shauna Holman Harries](#); [Connell, Erin M.](#); [Charles Nyakundi](#); [Eliason, Ian - SOL](#); [Bremer, Laura - SOL](#)
Subject: RE: ORACLE/HQCA - CONCILIATION MEETING
Date: Friday, October 07, 2016 4:57:27 PM
Attachments: [image003.png](#)
[image004.png](#)

Dear Mr. Siniscalco,

Thank you for your message and your time yesterday. We share your interest in moving forward in a cooperative and productive manner. We look forward to your response by October 27.

Regards,
Janette Wipper

From: Siniscalco, Gary R. [<mailto:grsiniscalco@orrick.com>]
Sent: Friday, October 07, 2016 8:41 AM
To: Wipper, Janette - OFCCP
Cc: [juana.schurman@oracle.com](#); [Shauna Holman Harries](#); [Connell, Erin M.](#); [Charles Nyakundi](#)
Subject: ORACLE/HQCA - CONCILIATION MEETING

Dear Ms Wipper, thanks again to you and your team for the meeting yesterday.

While we do believe that Oracle has been prejudiced in numerous ways as we have described over time; Ian's observations about putting aside and moving beyond the contentious history were well-taken.

We all feel the conciliation meeting was very productive, and moved both sides in a positive direction. We're hopeful that we can continue to move forward positively and cooperatively.

Gary R. Siniscalco

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