For the reasons set forth herein, OFCCP has referred this matter for enforcement proceedings to the Solicitor's Office.

Sincerely,

Janette Wipper
Regional Director

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.

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EXHIBIT B

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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 Shores –
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.[2]

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

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[1] NY Times, 5/16/2015, "Obama Swipes at Trump, but Doesn't Name Him, in Speech at Rutgers," available at https://www.nytimes.com/2016/05/16/us/politics/obama-swipes-at-trump-but-doesnt-name-him-in-speech-at-rutgers.html.
[2] *Mach Mining LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1652-53 (2015).

Subject to Fed. R. Evid. 408

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.

Subject to Fed. R. Evid. 408

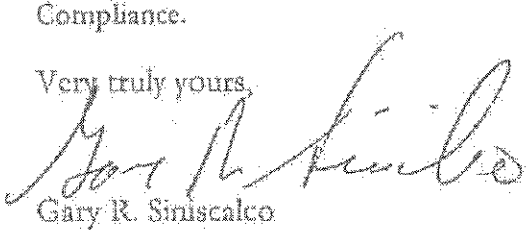
II. In more recent correspondence after issuance of the NOV, OFCCP cites to case law and contends that that the NOV shifts the burden to Oracle to rebut OFCCP's statistical results. OFCCP contends that it has properly used (relevant) statistics and has met its burden sufficient to require rebuttal. OFCCP's 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. Siniscalco

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

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.

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[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."

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 criminal accusations made at the entrance conference. None reference "indicators."

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. <u>The Agency Failed to Conduct an Exit Conference Yet Stated Falsely That It Had Done So.</u>

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 to 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 Doles 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 Harries 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 Harries 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.

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. <u>OFCCP Failed to Follow Its Required Procedures to Obtain Additional Documentation.</u>

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 § 2O (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

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.[5]

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 "[r]estate 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,

[5] Even the NOV's application of the adverse inference rule is defective and misapplied by Mr. Doles. 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.

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.

[6] Not 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.

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 Summ. 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.

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(k)(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 Cmtys. 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. <u>OFCCP Has Not Established Any Pattern and Practice of Disparate Treatment.</u>

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. <u>The Government's Burden of Proof in a Pattern and Practice is Demanding.</u>

"[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 458, 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 Bhd. 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. 792, 800 (1973).

initial burden of establishing 'that unlawful discrimination has been a regular procedure or policy followed by an employer ....'" *Serrano v. Cintas 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." *Raytheon 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. Waiters' & 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. Burdine*, 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 suggesting 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-OFC-16, ARB Apr. 21, 2016 (available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/OFC/13_099.OFCP.PDF) 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. Ameritech 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

… will likely not be sufficient in itself."); *OFCCP v. Bank of America*, ARB Case No. 13-099, ALJ Case No. 1997-OFC-16, ARB Apr. 21, 2016 (available at http://www.oalj.dol.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.

Gay, 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, "[n]ormally, 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." *Craik 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. <u>OFCCP's Case Law is Not to the Contrary.</u>

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

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[10] Here, OFCCP asserts bias at most, 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 (a degree or aptitude test requirement), but does not address the statistical proof required to establish a pattern-or-practice disparate treatment case. *Castaneda* was a case in which the plaintiff challenged his conviction on equal protection grounds due to alleged

drivers with basic, common skills showed a "glaring absence of minority line drivers" approaching "the inexorable zero." *Teamsters*, 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, *Teamsters* 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 plaintiff's

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discrimination against Mexican-American potential jurors; it does not discuss or even mention *Hazelwood*, *Teamsters*, 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 *Teamsters* 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 explanations 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 *Teamsters*, 431 U.S. at 368).

case." *Sears*, 839 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 Coser 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*, ARB 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. <u>OFCCP Has Not Established a *Prima Facie* Case of Recruiting or Hiring Discrimination.</u>

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." *Peightal v. Metro. Dade Cty.*, 26 F.3d 1545, 1554 (11th Cir. 1994) (citing *Teamsters*, 431 U.S. at 337-38). 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 Hazelwood*, 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 this claimed violation.

("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."); *Coser*, 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").[15]

OFCCP makes no effort in the NOV to compare the actual applicant pool to those hired into Oracle's technical PT1 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"); *Ste. 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. *Accord 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

[15] *Accord Hester v. S. 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"); *Mazus v. Dep't of Transp.*, 629 F.2d 870, 875 (3d 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.").

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 Coser*, 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]

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[16] Numerous other courts are in accord. *See, e.g., Knight v. Brown*, 797 F. Supp. 2d 1107, 1127 (W.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); *Ren v. Univ. of Cent. Florida Bd. of Trustees*, 390 F. Supp. 2d 1223, 1230-31 (M.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); *Nettles v. Daphne Utilb.*, No. 13-0605-WS-C, 2015 WL 4910983, at *6 (S.D. Ala. Aug. 17, 2015) (finding job duties of clerk handling accounts receivable "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"); *Sims-Fingers v. City of Indianapolis*, 493

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 assorted 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. *Segar*, 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,

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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.

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.

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 Aba), 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 (Yuri 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 Brumm (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

team in 2013 ("4") and 2014 ("5"). Neither Atif 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).

Had 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 ($185,000), 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, Weiran 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 Kothanda Umamageswaran; 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/index.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 fail 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.

EXHIBIT C

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October 31, 2016

Confidential Conciliation Communication – FRE 408

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:

Thank you again for sharing your concerns during our October 6 meeting. In the limited time we have had, we have compiled, and set forth below, information and documentation OFCCP asked Oracle to provide with regard to the recruiting and compensation issues referenced in the NOV.

I. Oracle's Recruiting Efforts for PT1 Positions Are Robust, And Demonstrate Oracle Has Met Both Its Affirmative Action Obligations And Overall EEO Compliance Requirements.

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 during the period January 2013 through June 2014. NOV at 1. In support of the alleged recruiting violation, OFCCP focuses not on Oracle's actual recruiting efforts or action-oriented programs, but instead on a summary statistical comparison of Oracle's applicant flow to one of two data sources ("2006-2010 Census Data and/or 2013-2014 DOL, Bureau of Labor Statistics' Labor Force Statistics"). NOV, p. 2, n. 2.[1]

[1] As a legal matter, we believe a finding of discrimination based on a comparison of purported availability statistics to applicant flow is contrary to OFCCP policy, applicable law, and the facts here. For example, in order to ensure that affirmative action compliance does not become an unconstitutional effort to fill quotas, OFCCP has long-acknowledged that a contractor's compliance is to be measured not by its performance against a numerical target, but instead by an assessment of its actual good faith efforts:

> A contractor's compliance is measured by whether it has made good faith efforts to meet its goals. Failure to meet goals is not a violation of the Executive Order. Therefore, a contractor that has not met its goals will be found in compliance if it has made good faith efforts.

A. Oracle's Recruiting Efforts for PT1 Positions Are Robust And Compliant.

A review of Oracle's actual recruiting practices for PT1 positions demonstrates that Oracle's recruiting efforts are robust, and further demonstrates Oracle has met its affirmative action obligations. For example, Oracle's jobs are open to *all* interested individuals, both internal Oracle employees and external individuals, worldwide. Any individual, from anywhere in the world, can access Oracle's website for jobs (and as described below, many Oracle applicants come from outside the U.S.). A simple Internet search, or by searching on Oracle.com, will allow any interested person to reach the website. Attached is a sample of a current website screen shot showing just some of the job postings for PT1 positions. *See* **Attachment A**. This form of website posting was also in place during the period covered by the NOV.

In addition to providing open access to all, Oracle undertakes substantial Good Faith Efforts (GFEs) in the U.S. to reach out to interested women and minorities for all positions, including PT1 positions. The PT1 job group includes more than one type of position. For example, several positions require a degree, but little or no prior work experience. These positions often are filled by applicants coming directly from colleges or graduate schools, and their paths to Oracle differ. Some apply to Oracle postings on their own, some are identified through school recruiting efforts, and some obtain Oracle internships. Other technical positions require both a degree and some level of relevant prior work experience. These positions more commonly are filled by applicants coming from internal and external postings, or through other communications and outreach. During the period in question, some examples of Oracle's GFEs relevant to the subject PT1 positions include:

* Partnering with the United Negro College Fund, Oracle provided internships and scholarships for students attending historically black colleges. Many of the interns who participated in this program have been hired by Oracle, mainly in technology positions.

* Partnering with Project Hire, Oracle provided internships for injured veterans of all races, including internships for roles in technology.

Directive 1996-01 at 4 (December 13, 1995); *see also Texas Dep't of Housing and Cmty. Affairs v. Inclusive Project, Inc.*, 135 S.Ct. 2507, 2523 (2015) (without adequate safeguards at the *prima facie* stage, Title VII liability "might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions could then arise").

- Oracle externally posted open PT1 positions on U.S. job sites, and disseminated information about such positions to organizations that target job seekers from diverse backgrounds, including Women for Hire, IMDiversity, Diversity Working.com, Minority.jobs, and The Black Perspective.

- Oracle provided recruiting tables at several Bay Area events and career fairs targeting job seekers from diverse backgrounds, including a Wounded Warriors Workforce event and an Out and Equal workplace summit.

- Oracle sponsored and provided presentations at several Bay Area events for organizations serving African-American and Hispanic students interested in STEM careers, including Cinnamon Girls and Green Scholars.

These are just a few examples of Oracle's many affirmative action-oriented outreach efforts to diverse potential applicants for jobs in the PT1 job group during the relevant time period. Attached to this response are several spreadsheets which set forth these and additional GFEs that Oracle engaged in during the relevant time period. *See* **Attachment B**.

Moreover, Agency COs interviewed both a senior general recruiter (white female) and a senior college-focused recruiter (African American female). Both of them shared the various ways that Oracle recruits and searches out potential applicants and the processes whereby any interested individual can apply.

These practices and GFEs demonstrate that Oracle has met its affirmative action compliance obligations of outreach to diverse candidates of all backgrounds. If the Agency has additional questions about Oracle outreach efforts, we would be happy to answer them.

B. Oracle's Recruiting Efforts for PT1 Positions Are Non-Discriminatory.

Not only were Oracle's recruiting efforts robust, they also were non-discriminatory. As courts recognize, there is an important distinction between insufficient outreach and discriminatory outreach. *See, e.g., Jarrells v. Select Pub., Inc.*, 2003 WL 23221278, at *6 (W.D. Wis. Feb. 19, 2003) (Title VII does not require employers to place advertisements only in forums that have an audience representing a mirror image of the general population; rather plaintiff must show that defendant's decision to recruit principally through a university job website for students was motivated by discriminatory intent and the mere fact that a forum attracts an audience that is disproportionately young is insufficient); *EEOC v. Consolidated Services Systems*, 777 F. Supp.

599, 607–08 (N.D. Ill. 1991) (employer's use of Korean newspapers and word-of-mouth to recruit employees did not show discriminatory intent against non-Koreans).

Here, the NOV alleges that Oracle discriminated in recruiting. Yet OFCCP's only basis for this allegation is a comparison of purported U.S. census availability statistics to applicant flow, without regard to Oracle's actual GFEs or action-oriented programs. As described above, Oracle did not engage in any process or practice that in any way operated, or tended to deter or limit, applicants of any race for PT1 jobs, nor has OFCCP identified any facts to suggest that it did. For this reason as well, the recruiting violation (as well as the hiring violation that depends on the recruiting violation) is legally and factually erroneous.

C. OFCCP's Reliance on U.S. Census Data for its Statistical Analysis is Misplaced.

OFCCP's recruiting violation is further flawed because it improperly relies on specific U.S. census data that does not accurately reflect the available pool of candidates for positions in Oracle's PT1 job group. First, as noted above, Oracle undertakes open and fair processes to affirmatively seek out potential candidates, and also allows any interested individual worldwide to apply via a job website open to all. In the context of affirmative action compliance, census occupation data is used solely for estimating availability for affirmative action plan purposes and possible goal setting. Yet even in the AAP context, OFCCP's regulations for assessing utilization and developing AAP goals are now decades old, predate the Internet, and do not contemplate worldwide access to electronic websites that allow anyone, anywhere, at no cost, to submit an application.

Moreover, relying on U.S. census data does not capture the global reach of Oracle's potential applicant pool. Not only do millions of software developers live in India, but Oracle presently employs more than 38,000 employees in India, primarily in software development and support roles. Indeed, a review of just a random sample of the actual applicants for Oracle's PT1 jobs confirms that applicants do not come from only within the United States. Many applicants come from outside the U.S., including from other Oracle locations worldwide. All of these international applicants were included in the applicant pools provided to OFCCP at the time of the desk audit. Additionally, much of that application data was provided in response to OFCCP's supplemental requests.

A quick review of random sets of the application data submitted to OFCCP illustrates the international scope of applicant interest in PT1 jobs at HQCA.[2] For example, the data for all of the 107 applicants we reviewed indicates that at least 34 (32% of the total applicants) were working or residing outside of the United States at the time of their application. Twenty-one of those applicants were internal applicants working at Oracle locations in India, Israel, the Philippines, China, Argentina, Mexico, Netherlands, or Egypt. The 13 external applicants who were working or residing outside the United States were located in Hungary, Italy, Taiwan, India, Russia, Canada, Germany, or Netherlands. Of the remaining 73 applicants whose applicant files did not indicate that they were working or residing outside the United States at the time of their application, 27 (25% of the total applicants) were non-United States citizens, including citizens of China, India, Taiwan, Korea, Hungary, Switzerland, or Canada. In other words, 57% of the applicants for those randomly selected positions were working or residing outside the United States and/or were citizens of countries other than the United States.

These examples confirm that OFCCP's reliance on U.S. census data as the basis for its finding of recruiting discrimination is misplaced, because even if a comparison of applicant flow to availability statistics was an appropriate basis for a finding of recruiting discrimination (which it is not), OFCCP is not using appropriate relevant source data.[3]

D. The NOV's Finding of Recruiting and Hiring Discrimination Is Contrary To Title VII Law.

Title VII case law confirms that a finding of unlawful bias, based solely on a comparison to misplaced census data, is unfounded. Rather, the 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 into the position – 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." *Peightal v. Metro. Dade Cty.*, 26 F.3d 1545, 1554 (11th Cir. 1994) (citing *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 337-38 (1977)). This is because "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,

[2] In total, we reviewed the documentation for 107 applicants who applied to seven randomly selected jobs (IRC numbers 1891524, 2009578, 2145764, 1727737, 1889827, 1987662, 2053925).
[3] A simple Internet search demonstrates that the number of software developers in Asia, especially India, is growing at a far more rapid pace than in the U.S., and soon the aggregate number of software developers in Asia is expected to surpass the number in the U.S.

501-02 (1989)). *See also Hester v. S. R.R. Co.*, 497 F.2d 1374, 1379 n. 6 (5th Cir. 1974) ("comparison with general population statistics is of questionable value when we are considering positions for which, as here, the general population is not presumptively qualified"); *Mazus v. Dep't of Transp.*, 629 F.2d 870, 875 (3d Cir. 1980) (citation omitted) ("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").

Here, OFCCP makes no effort in the NOV to compare the actual applicant pool to those hired into Oracle's PT1 positions during the relevant period. Instead, the NOV alleges that undisclosed discriminatory recruiting practices "skewed" the applicant pool. Yet because, as explained above, there is no evidence of discriminatory recruiting practices, OFCCP's statistics fail to provide a meaningful comparison and fail to support a *prima facie* case of any recruiting or hiring violation. *See, e.g., EEOC v.Sears, Roebuck & Co.*, 839 F.2d 302, 324, 328 (7th Cir. 1988) (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"); *Ste. Marie v. E. R.R. Ass'n*, 650 F.2d 395, 400 (2d Cir. 1981) ("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).

The fact that many qualified Asians, including Indians, both inside and outside the U.S., would like to work in California and apply to work for Oracle in what OFCCP regards as disproportionate numbers, has nothing to do with unlawful discrimination or bias. At best, the NOV issued by Mr. Doles identifies a relatively high number of interested and qualified Asian applicants in a single technical AAP Job Group. This does not, however, equate to recruiting and hiring discrimination against non-Asians.

II. The NOV's Compensation Discrimination Findings Do Not Compare Similarly Situated Employees.

At the conciliation meeting on October 6, Oracle explained to OFCCP its position that OFCCP's compensation discrimination findings fail because they do not compare individuals who are similarly situated. At one point, OFCCP observed that if the Agency accepted Oracle's position regarding wide differences in jobs, it would affect the Agency's ability to conduct a statistical analysis. Although the observation was apt, it does not change the reality of Oracle's workforce, or the legal standards that must be met. As we have stated previously, Oracle is a highly diverse technology company that develops, supports and sells a wide range of products (hardware and software) to a wide range of companies worldwide. Oracle is not a commodity operation, nor a

mass retailer or manufacturer. Oracle does not have hundreds, or even dozens, of employees who are fungible in their roles; and certainly not at any single location. To the contrary, Oracle is a highly diverse company in terms of people, skills, products, and customers. As a result, generalized statistics that might be probative in assessing employers with large numbers of teamsters, teachers, bank tellers, retail store clerks or cashiers, car assemblers, or other similar positions are not meaningful here. The discussion below offers both legal and documented factual support for Oracle's position.

A. Job Title Is Not Determinative Of Whether Employees Are Similarly Situated

OFCCP's findings of compensation discrimination depend on the premise that all employees at Oracle with the same job title (and in the same pay level) are similarly situated, and therefore presumably entitled to equal pay. Yet uncritically assuming that all, or even most, employees holding the same job title are "similarly situated" does not suffice. Instead, Directive 307 underscores an expectation that OFCCP will conduct a rigorous investigation into the actual job duties, responsibility levels, and skills and qualifications involved with the jobs:

> The determination of which employees are similarly situated is case specific. Relevant factors in determining similarity may include tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors.

Directive 307 at 3. The Directive goes on to explain that in every case, there are three key questions to answer, including:

(a) Is there a measureable difference in compensation on the basis of sex, race or ethnicity?

(b) **Is the difference in compensation between employees who are comparable under the contractor's wage or salary system?**

(c) Is there a legitimate (i.e. nondiscriminatory) explanation for the difference?

Id. at 7-8 (emphasis added). Uncritically assuming all employees in the same job title are similarly situated, without a deeper factual inquiry, omits the important second step outlined above.

Because Directive 307 is based on Title VII principles, it follows that Title VII case law is in accord. It specifically recognizes that job title alone is not determinative of whether employees are similarly situated for purposes of compensation analysis. *See, e.g., Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 772 (7th Cir. 2007) (rejecting Title VII and Equal Pay Act compensation claims 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."); *Horn v. Univ. of Minn.*, 362 F.3d 1042, 1045-46 (8th Cir. 2004) (university assistant coaching positions with identical contracts and job descriptions were not substantially equivalent for purposes of Title VII and the Equal Pay Act where the day-to-day responsibilities of one position involved recruiting and public-relations skills and experience but the other involved more "behind the scenes" work); *Davis v. S.C. Dep't of Health & Env't Control*, 2015 WL 5616237, *6, 8 (D.S.C. Sept. 24, 2015) (plaintiff failed to establish prima facie case of wage discrimination despite relaxed Title VII standard, noting that courts look to actual job duties performed and not job description or title); *Hooper v. Total Sys. Servs., Inc.*, 799 F. Supp. 2d 1350, 1361–62, 1364 (M.D. Ga. 2011) (under Title VII, courts must focus on the actual job duties of the employees and not job titles and job descriptions meant to be used across business units); *Wildi v. Alle-Kiski Med. Ctr.*, 659 F. Supp. 2d 640, 659-60 (W.D. Pa. 2009) (citations omitted) ("For the same reasons that job titles are not determinative, job descriptions are not determinative. The relevant inquiry focuses upon the content of the position … [and] evidence of the actual job duties performed").

Rather, an individualized, case specific inquiry, like that contemplated in Directive 307, is required. Indeed, "[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).

B. <u>The Duties, Responsibilities, Skill Sets and Expertise Vary Significantly Among Oracle Employees Holding The Same Job Title Within the PT1 Job Group.</u>

At Oracle, employees holding the same job title in IT, Product Development, and Support roles (*i.e.*, jobs within the PT1 job group) often have significantly different duties, responsibilities, and skill sets. For example, a comparison of employees who shared a common job title, as well as a common supervisor, and who showed the greatest differences in salary as of January 1, 2014 – *i.e.*, those individuals whom OFCCP's analysis would suggest suffered the most wage discrimination – confirms that the common job title alone does not mean the employees are

similarly situated. Rather, those employees, in fact, have materially different duties, responsibilities, and skill sets which prevent them from being comparators, and which explain the pay differentials.

Information Technology roles: By way of example in the IT role, in January 2014, Scott Campbell supervised two employees who held the title System Administrator 3: Mr. Scott Forten (white male) and Ms. Tatyana Yastreb (white female). Ms. Yastreb's base salary was nearly $40,000 less than Mr. Forten's. Although these employees shared the same job title, their duties and responsibilities differed significantly.

Mr. Forten was a highly skilled technical employee whose responsibilities include supporting several key services, including Network Information Systems (NIS) and Domain Name Service (DNS). He also served as a subject-matter expert for several products and spent at least 50-60% of his time each week working to solve challenging technical problems. Mr. Forten's 2012 performance review, for example, praised his work "managing the NIA to LDAP/DSEE conversion" (a "challenging project") as well as "showing leadership in the NTP service area." *See* **Attachment C.**[4] Ms. Yastreb, by contrast, spent 90-95% of her time doing data entry and clerical work. Of note, Mr. Campbell repeatedly offered Ms. Yastreb opportunities to develop her technical skills and take on more challenging work, but she declined. In her 2012 performance review, for example, Mr. Campell noted that she "could develop higher level skills in the area of networking, security or system administration" but that "[i]t is of course [her] decision if [she] wish[ed] to [do so]." *See* **Attachment D.** Mr. Forten's greater skill set and scope of responsibility and duties, which Ms. Yastreb did not perform, demonstrates that these two employees were not similarly situated, *even though* they held the same job title.

Product Development roles: By way of example in the Product Development role, in January 2014, Abhishek Jain supervised two employees holding the title of Software Developer 4: Mr. Mark Polivka (white male) and Mr. Michael Edwards (black male). Mr. Edwards' base salary was over $37,000 less than Mr. Polivka's. Again, however, their identical job title belies their very different duties and responsibilities, informed by their different skills and experience.

Mr. Polivka had previously worked as a Software Development Director at Oracle, but chose to transition back into a technical, non-managerial engineering role. He brought with him a host of

[4] While we provide sample performance reviews which show the differing duties and responsibilities of these example employees who hold the same job title, we also note that a contractor is not required to create documentation that demonstrates that employees' duties vary and certainly has no obligation to provide such documentation.

management and core technical expertise. Given that additional training and expertise, Mr. Polivka expanded the scope of his duties and responsibilities in the Software Developer 4 role. He "not only [did] an exceptional job" on his own work "but also pitche[d] in on other [projects] in the time of need" and "work[ed] very closely with" other departments in Oracle. *See* **Attachment E.** Mr. Polivka served as an architect of solutions and a go-to person for questions, and coordinated the efforts of others both within and outside of his the team.

Mr. Edwards, by contrast, was a strong performer on the individual projects to which he was assigned, but he did not have the level or breadth of expertise of Mr. Polivka and did not perform the additional coordination or cross-team collaboration that Mr. Polivka did. Mr. Edwards' scope of work more closely resembled the work of another Software Developer 4 (Sina Tarassoly, an Asian male), whose salary was, appropriately, comparable to Mr. Edwards'.

As another example in a **Product Development role**, in January 2014, Anand Subbaraman supervised two employees with the job title Product Manager/Strategy 5: Mr. Kautul Mehta (Asian male) and Ms. Alka Asthana (Asian female). Ms. Asthana's salary was over $60,000 less than Mr. Mehta's. While they held the same job title, Mr. Mehta had significantly more training and experience in product strategy and management than Ms. Asthana, who had only transitioned into that type of role in mid-2013, and therefore he performed far more complex tasks and also served in a lead role to other employees.

Mr. Mehta possesses a B.S. in computer engineering, an M.A. in computer science, and an M.B.A. Mr. Mehta had worked at Oracle as an engineer before completing his M.B.A. program, left Oracle to work in complex product management for a competitor in 2009, and returned to Oracle in 2011 in a product management and strategy role. Mr. Mehta's responsibilities as a Product Manager/Strategy 4 in 2014 involved the supervision of a complex piece of Oracle's portfolio – defining the vision and requirements for the video platform to support Oracle's next generation learning management system – and the direct management of two employees.

Ms. Asthana, by contrast, earned B.S. and M.S. degrees in physics rather than computer science or engineering, and did not have any business or marketing education. She asked to move into product strategy in July 2013, after spending fifteen years as a functional software architect. Her first year in the Product Manager/Strategy 5 position was spent primarily learning the new role and working on less complex projects (*e.g.*, writing white papers as opposed to driving strategy for products). She also was still learning about the marketing and selling aspects of product management, which were not a focus of either her degree programs or her prior engineering roles. She did not serve as a lead to manage work of other employees. Hence, despite their

common job title, in light of his training and expertise, Mr. Mehta had a far more expansive scope of duties and responsibilities than Ms. Asthana.

As yet another example in the **Product Development role**, in January 2014, Qian Jang supervised three employees with the job title Applications Developer: Ms. Kajal Upadhyay (Asian female, non-American, earning a salary of $113,499), Ms. Xiao Lu (Asian female, non-American, earning a salary of $107,099), and Mr. Jason Gage (white male, American, earning a salary of $78,000). At the outset, we note that under this supervisor and job title, two Asian females are earning more than a white male, which contradicts OFCCP's findings of discrimination in relation to alleged victim groups involving women and Asians. Still, while these individuals share the same job title, their job duties and responsibilities differed significantly, such that they are not in fact similarly situated comparators.

Mr. Gage initially operated solely in a linguistics development role at Oracle, which is an entirely different job category than applications development. Linguistics development analyzes data to determine how search results are influenced by the language used to craft a search—it does not involve coding to implement the changes. In contrast, an applications developer is responsible for data analysis, design, and implementation of design with java coding language. When Mr. Gage expressed an interest in applications development, he transferred into a hybrid role providing both linguistic and applications development. As reflected in Mr. Gage's performance evaluation, he performed strongly on a linguistics platform, but required additional coaching to perform the basic tasks for java coding and applications development. *See* **Attachment F.** Ms. Upadhyay and Ms. Lu, in contrast, had extensive expertise in coding broader web-based applications that focus on user interaction and required little or no supervision to complete their assigned projects.

Support Roles: By way of example in the Support role, in January 2014 Andrea Byrne supervised two employees with the job title Systems Analysist 4: Mr. Mehdi Ketiraei (male earning a salary of $131,040) and Ms. Avanti Bhat (female earning a salary of $97,760).

During the relevant time period, Ms. Bhat operated exclusively in a "service request support role," which is a "functional" position that involves working service requests from existing clients. For example, if a client experienced a malfunction in payroll software and submitted a service request, Ms. Bhat was responsible to remotely troubleshoot the issue. In contrast, Mr. Ketiraei was responsible for more "architectural" tasks, which involved on-site implementation of software and providing focused guidance and consultations directly to clients. Further, while Ms. Bhat was responsible for resolving service tickets after a product had been released to a client, Mr. Ketiraei primarily communicated with a client prior to production and his

responsibilities were to apply complex problem solving skills related to engineering the system to meet the client's needs.

We note that Agency COs were on site and interviewed managers. They could have inquired about the "relevant factors in determining similarity" (*see* FCCM, Section 2L03), such as the factors discussed above.[5] This type of inquiry would have allowed the COs to assess "similarity" as set forth in Section 2L03 and Directive 307, and consistent with Title VII law.[6]

For these and other reasons addressed in our prior correspondence, the Agency's compensation analysis is flawed and does not support a *prima facie* case of discrimination.

III. Conclusion.

As both sides recognized at the end of our conciliation meeting on October 6, the exchange of information in person was productive and useful. We appreciate your request to provide meaningful information and we believe the materials set forth herein allow us to move in that direction. We hope the Agency similarly finds productive and useful the information provided herein, which (as requested) articulates Oracle's response to the Agency's recruiting violation, and provides further explanation and documentation for Oracle's position that the compensation findings do not take into account any assessment of who are similarly situated employees.

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[5] While we do not presume to suggest or formulate questions that could have been asked to determine "similarity," some questions COs might consider include the following: (a) Do employees on your team do the same work? If yes, which ones; if no, how is their work different? (b) Do the employees on your team have basically the same duties and responsibilities and the same level of skills and expertise? If different, can you describe those differences? (c) Are employees different, or similar, in other aspects of the work?

[6] Furthermore, while job title is not determinative in assessing which employees are similarly situated, we note that over 1,000 job titles in the roles noted in the NOV had only a single incumbent, and therefore no "job title comparator."

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Oracle would be happy to address additional questions or issues of concern. We appreciate OFCCP's desire and willingness to hear from us at this stage in the process. We look forward to the Agency's response.

Very truly yours,

Erin Connell

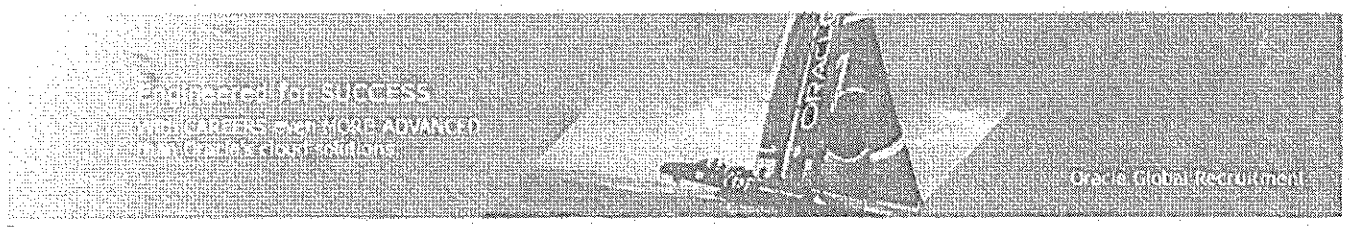
Erin M. Connell

cc: Shauna Holman-Harries
Gary R. Siniscalco

Exhibit A

ORACLE

Oracle Home Careers Job Search



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Oracle's Affirmative Action Plan is available for review by contacting +1 888 404 2494, Option 3

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Requisition Number

Keywords
"Software Developer"

Job Category

Job Category
Product Development

Add Job Category

Location

Location
United States
California
Redwood City

Add Location

Posting Date
Not Specified
Today
Yesterday
Last 7 Days
Last 14 Days
Last 31 Days
Last 90 Days

Job Type
✓ Regular Employee Hire
Temporary Employee Hire
Student Intern Hire
Contingent Hire

Travel (Up to...)
No
Yes, 25 % of the Time
Yes, 50 % of the Time
Yes, 75 % of the Time
Yes, 100 % of the Time

Search Tips
You can search jobs by selecting relevant criteria in the drop-down menus. You can also use a keyword or Job Number.

Saving searches
You can save an active search for reuse by clicking "Save this Search" at the top of the page. Your searches will be saved in the "My Saved Searches" section under the "My Jobpage" tab.

Reset job search
To reset a job search using your search criteria, click the "Clear Search" link and select the relevant criteria.

Search for Jobs | Clear

Search Results (33 jobs found)

Results per page
10

Sort by

Candidate Profile
Take a few minutes to create or update your employment profile and to modify your skills/keywords