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includes but is not limited to, DOCUMENTS that RELATE to the "other analysis" (e.g., final version(s), work papers) and DOCUMENTS RELATED to any controls YOU employed to account for "legitimate explanatory factors."

"Work papers" are defined as "statistical analysis or analyses that gave rise to the calculations in the NOV"; "control" is defined as how OFCCP uses the term in the NOV; "employ" means used; and "account" is its ordinary definition to take into account. "Factors" is quoted from the NOV and thus has the same definition in the RFPs as OFCCP defines it in the NOV. Without waiving our right to seek these draft documents should the issue be presented to the ALJ at some later point in time, Oracle is not seeking drafts at this time.

Likewise, RFP No. 78 is changed to read: All DOCUMENTS RELATED to the allegation in Attachment A of the NOV that the "OFCCP analyzed Oracle's employees' compensation data by Oracle job function using a model that included the natural log of annual salary as a dependent variable, and accounted for differences in employees' gender, work experience at Oracle, work experience prior to Oracle, full-time/part-time status, exempt status, global career level, job specialty, and job title" including but not limited to this analysis and all other models conducted as well as different models and computations, whether or not referred to in the NOV.

Without waiving our right to seek all of the documents encompassed within these requests should the issue be presented to the ALJ at some later point in time, Oracle is not seeking drafts of how the underlying data was used and is willing to eliminate the word "considered," "rejected," and "iterations" in RFP No. 78. Oracle is seeking both the underlying data as well as the final form of how the underlying data was used in request No. 78.

XXXVI. Oracle's RFP Nos. 75 and 76 contain inadvertent misquotations to the NOV; OFCCP can accept Oracle's clarifications or Oracle will propound new RFPs

RFP No. 75 seeks: All DOCUMENTS RELATED to the allegation in Violation 3 of the NOV that YOU "analyzed Oracle's compensation system and, through regression and other analysis, found statistically significant pay disparities based upon sex after controlling for legitimate explanatory factors." This request includes but is not limited to, DOCUMENTS that RELATE to the "other analysis" (e.g., final versions, work papers and drafts) and DOCUMENTS RELATED to any controls YOU employed to account for "legitimate explanatory factors." (emphasis added). Oracle clarifies that RFP No. 75 should track the NOV and should read: All DOCUMENTS RELATED to the allegation in Violation 3 of the NOV that YOU "*evaluated and* analyzed ORACLE's compensation system and, through regression and other analysis, found statistically significant pay disparities based upon *race* after controlling for legitimate explanatory factors." This request includes but is not limited to, DOCUMENTS that RELATE to the "other



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analysis" (e.g., final version(s), work papers) and DOCUMENTS RELATED to any controls YOU employed to account for "legitimate explanatory factors." (emphasis added).

Similarly, RFP No. 76 is changed to read: All DOCUMENTS RELATED to the allegation in Violation 4 of the NOV that YOU "*evaluated and* analyzed Oracle's compensation system and, through regression and other analysis, found statistically significant pay disparities based upon *race* after controlling for legitimate explanatory factors." This request includes but is not limited to, DOCUMENTS that RELATE to the "other analysis" (e.g., final version(s), work papers) and DOCUMENTS that RELATED to any controls YOU employed to account for "legitimate explanatory factors."

"Work papers" are defined as "statistical analysis or analyses that gave rise to the calculations in the NOV"; "control" is defined as OFCCP uses the term in the NOV; "employ" means used; and "account" is its ordinary definition to take into account. "Factors" is quoted from the NOV and thus has the same definition in the RFPs as OFCCP defines it in the NOV. Without waiving our right to seek these draft documents should the issue be presented to the ALJ at some later point in time, Oracle is not seeking drafts at this time.

XXXVII. Reserving its rights, Oracle clarifies RFP No. 77 is not seeking drafts at this time

RFP No. 77 requests: All DOCUMENTS RELATED to the allegation at page 2 of the NOV that YOU conducted an "analysis of Oracle's applicant data and appropriate workforce availability statistics," including but not limited to, all analysis, COMMUNICATIONS, factors, data, and statistics, whether or not referred to in the NOV.

Without waiving our right to seek all of the documents encompassed within these requests should the issue be presented to the ALJ at some later point in time, Oracle is not seeking drafts of how the underlying was data used and is willing to eliminate the words "draft," "considerations" and "considered" in RFP No. 77. As I mentioned during our meet and confer call on July 25, 2017, RFP No. 77 is seeking both the underlying data as well as the final form of how the underlying data was used.

XXXVIII. RFP No. 80 is clear but Oracle clarifies that "pay analysis group" and "similarly situated" are the same as used in Directive 307

OFCCP requested clarification for RFP No. 80, however, Oracle contends that the request is clear as it stands particularly in light of the fact that the OFCCP is an agency of the Department of Labor. However, in effort to meet and confer without intervention by the ALJ, Oracle clarifies that "pay analysis group" in



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the RFP and "similarly situated" are defined as it is used in Directive 307. This information is available on OFCCP's website. <https://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm>.⁸

Without waiving our right to seek these draft documents should the issue be presented to the ALJ at some later point in time, Oracle is not seeking drafts at this time.

XXXIX. RFP No. 81 is clear but Oracle clarifies

OFCCP's request for a definition of "explanatory pay factors" in RFP No. 81 is not well taken given its role as an agency in the Department of Labor. Oracle contends that the request is clear. Nonetheless, Oracle defines "explanatory pay factors" as "explanatory factors" as OFCCP uses that term in its NOV and in Directive 307 on OFCCP's website

<https://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm> ("Factors – Elements which are proposed to explain differences in employee compensation under a contractor's compensation system and practices.").

Without waiving our right to seek all documents encompassed within this request should the issue be presented to the ALJ at some later point in time, Oracle is not seeking internal deliberations among employees with respect to any drafts. With the same reservation of rights, Oracle is not at this time seeking communications with respect to trial preparation, including communications with testifying experts or consulting experts) retained for the purpose of preparing for hearing in this matter.

OFCCP's stated concern with respect time and scope is not well taken. OFCCP did not object to RFP No. 1 on this ground. Furthermore, this RFP is sufficiently tethered to only those documents related to the "violations alleged in the NOV or Amended Complaint." Please confirm that you will produce documents in response to this request.

XL. Oracle cannot clarify RFP No. 82 without additional information from OFCCP

⁸ OFCCP's website reads: "Pay Analysis Group – A group of employees (potentially from multiple job titles, units, categories and/or job groups) who are comparable for purposes of the contractor's pay practices. Regression analysis may be performed on different types of pay analysis groups. A pay analysis group may be limited to a single job or title, or may include multiple distinct units or categories of workers. A pay analysis group may combine employees in different jobs or groups, with statistical controls to ensure that workers are similarly situated." It also provides: "Similarly Situated Employees – 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. Employees are similarly situated where they are comparable on the factors relevant to the investigation, even if they are not comparable on others (see Sections 5 and 6 below)."



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During meet and confer you asked for clarification of any "onsite inspection" referenced in RFP No. 82. The plain language of the request seeks "ALL DOCUMENTS RELATED to *any* onsite inspection of the HQCA worksite in connection with your compliance review" (emphasis added). Oracle clarifies that, at this time, this RFP encompasses documents related to the scheduling of interviews. Oracle is willing to reconsider its position if (1) OFCCP will stipulate in writing that it will not rely on evidence with respect to scheduling of interviews in support of its claims and (2) OFCCP will agree to produce unredacted interview summaries and notes of those individuals with whom Oracle facilitated the scheduling. Without those two stipulations, Oracle will need evidence of interview scheduling to defend itself against OFCCP's claims and to argue that the some interviewee identities were known to Oracle to undermine any claim of privilege by OFCCP. See *infra*.

OFCCP raised a time and scope concern with respect to this RFP. Oracle is willing to consider further narrowing RFP No. 82 if OFCCP can confirm that the scope of the evidence it will rely upon is similarly narrowed to just the compliance review at HQCA in September 2014. If OFCCP intends to rely on evidence outside of the compliance review period, then Oracle cannot further narrow this request at this time.

OFCCP indicated to Oracle that it could not respond as to what evidence it intends to rely on without actually reviewing all of the evidence potentially responsive to this request. That may be true. It is a position all parties are in when responding to discovery. To the extent that OFCCP intends to rely on documents from other HQCA compliance reviews to support its claims in this action, Oracle is entitled to the same information through discovery.

OFCCP's request for clarification of "memorializing" is not well taken. Oracle adopts OFCCP's definition of "memorializing" as used on page 4, paragraph 19 of OFCCP's first set of requests for the production of documents to Oracle. Nor is OFCCP's request for clarification of "compliance review" well taken. OFCCP did not formally object to the term "compliance review" and OFCCP has used the term "compliance review" in its amended complaint and throughout its responses to Oracle's Amended Interrogatories. Nonetheless, Oracle defines "compliance review" as an "analysis by OFCCP of the hiring and employment practices of the contractor, the written affirmative action program (AAP), and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages: desk audit, onsite review and offsite analysis." This information is available on OFCCP's website. https://www.dol.gov/ofccp/regs/compliance/faqs/ACE_faqs.htm#Q12. OFCCP also used "compliance review" throughout its own requests for production of documents.

XLI. RFP No. 84 is clear, but Oracle will redraft as set forth in this letter in order to meet and confer



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Although Oracle contends that the RFP is intelligible as written, in an effort to meet and confer, Oracle redrafts RFP No. 84 to request:

All DOCUMENTS RELATED to any statements made to YOU by any THIRD PARTY, including but not limited to applicants, or employees, regarding any of the allegations in Paragraphs 7 through 10 of the Amended Complaint. For purposes of RFP No. 84 only, "DEFENDANT" is defined to mean Oracle America, Inc. and its investigators, attorneys, officers, executives, directors, agents, and all other PERSONS and entities representing it or acting on its behalf. All other terms are defined the same.

Please confirm whether you will accept RFP No. 84 as redrafted.

XLII. OFCCP's sought clarifications to RFP No. 85 are not well taken

During meet and confer, OFCCP asked Oracle to explain the difference between "statement" in RFP No. 84 and "COMMUNICATION" in RFP No. 85. This objection is not well taken. OFCCP did not object to "statement" in its written responses and "COMMUNICATION" is defined in Oracle's requests for documents. Nonetheless, in effort to meet and confer, Oracle refers OFCCP to the dictionary definitions of "statement." <https://www.merriam-webster.com/dictionary/statement> (including "a report of facts or opinions" and "the act or process of stating or presenting orally or on paper"). See *Miller v. Akanno*, No. 1:12-CV-01013-LJO-SK, 2015 WL 566304, at *2 (E.D. Cal. Jan. 16, 2015) ("In determining the 'plain meaning' of a word, we may consult dictionary definitions, which we trust to capture the common contemporary understandings of the word.") (internal citations omitted).

XLIII. RFP No. 86 is clear but Oracle clarifies

OFCCP sought clarification of RFP No. 86 claiming that would encompass everything in the case. Again, this objection is not well taken. The request is limited by its reference to "anecdotal evidence," a term of art, referenced in Directive 307 and on OFCCP's website. <https://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm>; https://www.dol.gov/ofccp/regs/compliance/faqs/ACE_faqs.htm.

XLIV. OFCCP must produce attachments with emails

Please confirm that OFCCP has produced attachments to emails. See Fed. R. Civ. P. 34 (b)(2)(E); *In re Denture Cream Prod. Liab. Litig.*, 292 F.R.D. 120, 126, 128 (D.D.C. 2013) (holding that emails should be produced with attachments). Alternatively, please confirm that the emails have been produced in a manner that allows them to be matched to their attachments. *Id.* at 128.

XLV. Oracle's position is sound and not inconsistent



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Throughout our meet and confer discussions you have suggested that Oracle's positions in its discovery requests are somehow inconsistent with respect to Oracle's own discovery responses. This is untrue. Oracle's conduct has been sound.

For example, you have suggested that OFCCP is not obligated to produce documents in response to RFP No. 65 which seeks "All DOCUMENTS RELATED to the allegation in Paragraph 12 of the Amended Complaint that YOU requested 'various records' that ORACLE 'refused to produce,' including but not limited to all requests YOU contend YOU made and all responses or explanations provided by ORACLE." As I explained in our meet and confer, the goal of the request is to determine the scope of what OFCCP contends constitutes "record" of Oracle's alleged "refusal" to produce documents in the audit. If OFCCP produces a document that Oracle does not have that requests information that Oracle never received, or if OFCCP fails to produce a document that Oracle has that shows Oracle provided information, that information would directly affect OFCCP's claim and bear on this case.

Thus, OFCCP's objection on the ground that "this request is unduly burdensome, duplicative, and unnecessary, as Oracle is asking OFCCP to produce back to it responses or explanations previously provided by Oracle itself and equally within Oracle's possession or control," is not well taken with respect to this request. The point of the RFP is to obtain a methodical accounting of the documents on which OFCCP relies for its claim that Oracle refused to provide information in order to determine if something is missing, among other things. It does not matter that Oracle may already have some of these documents.

During meet and confer, however, you stated that Oracle's insistence that OFCCP produce documents already in Oracle's custody was inconsistent with Oracle's responses to discovery. Specifically, you claimed that Oracle refused to provide documents on the grounds that they were equally available to OFCCP. This is a false equivalency. As explained in the letter dated July 26, 2017, from James E. Stanley, OFCCP has requested that Oracle produce "All GOVERNMENT CONTRACTS to which YOU have been a party during the RELEVANT TIME PERIOD, including any addenda, modifications, affirmations, and/or novations." OFCCP RFP No. 70. During meet and confer, to satisfy what it understood the purpose of this request to be, Oracle offered to stipulate that it is a government contractor. However, OFCCP declined to clarify its request or accept Oracle's stipulation. Moreover, Oracle has withdrawn its objections to OFCCP's RFP No. 70 on the ground that it encompasses information already available to make clear that---unlike OFCCP---Oracle is not refusing to produce documents on the ground that they are equally available to the other party.

The above is just one example of the several instances that you have failed to provide the context for the parties' disputes. Instead, you raise false equivalencies between your positions and ones taken by Oracle in its responses to OFCCP's Requests for Production. With regard to many of the responses that you claim are inconsistent, Oracle has provided fulsome explanation in its meet and confer

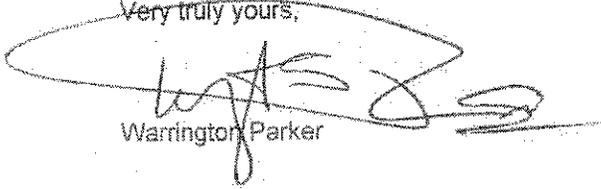


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correspondence dated June 9, 2017, and July 11, 2017, as to why those responses and objections are appropriate and based on specific flaws in OFCCP's requests.

Oracle asks that OFCCP responds by August 1, 2017 indicating those issues on which there is agreement and those issues on which there is not agreement. This is so that any outstanding issues can be raised with Court on August 4, 2017.

Very truly yours,



Warrington Parker

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August 3, 2017

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Re: *OFCCP v. Oracle, Inc.*, Case No. 2017-OFC-00006
Meet and Confer Letter for Oracle's Requests for Production of Documents

Dear Mr. Warrington:

This meet and confer letter is written in response to your July 27, 2017, letter. Your letter has many inaccuracies and fails to adequately address the issues we discussed. I was surprised that your single spaced 25-page letter addressed in detail numerous issues that you claimed Oracle was still considering less than 24 hours before in meet and confer teleconferences. Similarly, even though we addressed issues over a month ago, I was surprised you chose to wait until the end of the meet and confer process to address them in a letter and then demanded that OFCCP give a response to a 45-point letter within three business days. Moreover, in addition to this considerable delay in trying to resolve this matter is the 49 days that Oracle took from April 18 to June 6, 2017, to resume the meet and confer process for its RFPs. Thus, it is Oracle who delayed the process, not OFCCP.

To move this process forward, this letter will focus upon the substantive issues raised by Oracle's July 27, 2017, letter and the positions that Oracle took during the meet and confer process as opposed to the manner that Oracle took to express them.

1. *OFCCP will produce all of its non-privileged, non-public, relevant, non-Oracle produced documents during this litigation.*¹

In contrast to Oracle's extremely limited document production of less than 23,100 pages, OFCCP has already produced almost all of its non-privileged, non-public, relevant, non-Oracle produced responsive documents within this Region. As discussed during the meet and confer teleconferences, Oracle's document production requests of "[a]ll documents related to" various subjects were so broad as to include every public document on the issue that OFCCP could access (e.g., documents on OFCCP's website, case law, documents published in the Federal Register such as those related to rule making, documents on Pacer or some

¹ The relevancy aspect of the documents not produced is addressed in Section 2.

other public website, documents on Oracle's website, news stories about Oracle on the internet, etc.), documents between OFCCP and its vendors (copying, Bates stamping, court reporting, etc.), and documents that Oracle produced in this litigation. Furthermore, Oracle's "[a]ll documents related to" requests were so broad as to require OFCCP to search every OFCCP and Solicitor's Office across the entire United States to see it had any document (interviews, policies, procedures, statements, etc.) that could relate to the subject matter of Oracle's document production requests.² When OFCCP inquired whether Oracle intended for this search to be so broad, Oracle stated that OFCCP did not have to produce public documents, does not know if OFCCP needs to search offices across the country, and would have to think about whether it wants OFCCP to reproduce to Oracle the documents that Oracle produced to OFCCP in this litigation.³ For Oracle to take weeks to decide whether it wanted OFCCP to reproduce documents it produced during the litigation demonstrates its unwillingness to make decisions during the meet and confer teleconferences and the breadth and depth of the documents it sought.

The non-privileged, non-public, relevant, non-Oracle produced documents during this litigation that OFCCP has already identified that it still needs to produce are documents identified during the meet and confer process such as correspondence between Oracle and OFCCP after the Notice of Violation ("NOV") issue date in March 2016. While OFCCP is not currently aware of any other of these non-privileged, non-public, relevant non-Oracle produced documents, it will use the new definitions and information Oracle provided to conduct another diligent search.

2. *OFCCP's relevancy and privileged objections are clear.*

Contrary to Oracle's claims, there is a difference between the relevance and privileged objections as Oracle previously acknowledged through its counsel. As OFCCP repeatedly stated during the teleconferences, documents after the NOV issuance or documents of other Oracle investigations by OFCCP that do not involve this case are not relevant and thus will not be produced. To the extent these documents are relevant, like the correspondence between the parties after the NOV issuance or Lisa Gordon's interview statement, these documents will be produced. As Oracle repeatedly acknowledged during this litigation, a party is not required to produce documents that are not relevant and is not required to list these documents in a privilege log. Additionally, to the extent that the NOV related documents are later found to be relevant, they are privileged under the work-product doctrine, attorney-client privilege and the deliberate process privilege since Oracle is seeking the internal deliberations of the agency, its communications with its counsel and its counsel's work product.⁴

² In addition to these more direct connections, Oracle's July 27, 2017, letter also suggested that OFCCP would need to search all other DOL agency offices nationwide to include "VETS."

³ Oracle's July 27, 2017, letter did not address the nation-wide search despite it being repeatedly raised in the teleconferences.

⁴ Oracle's July 27, 2017, letter failed to state the position that OFCCP stated above in this paragraph.

3. *Oracle's proposition in Point IX is significantly less than what it previously committed to exclude during the teleconferences related to publicly available documents and documents to OFCCP's third party vendors.*

The terms in Oracle's Point IX are notably less than what Oracle repeatedly committed to OFCCP during the teleconferences. As stated previously, OFCCP identified that Oracle's requests were so broad as to include every public document on the issue that OFCCP could access (e.g., documents on OFCCP's website, case law, documents published in the Federal Register such as those related to rule making, documents on Pacer or some other public website, documents on Oracle's website, news stories about Oracle on the internet, etc.), documents between OFCCP and its vendors (copying, Bates stamping, court reporting, etc.), documents that Oracle produced in this litigation. As such, Oracle did not just confine its production limitation to just excluding the Federal Contractor Compliance Manual ("FCCM"), Directive 307, publically available case law, and photocopies. Instead it repeatedly stated that OFCCP did not have to produce publically available documents and documents involving third party vendors. In fact, you stated on June 23, 2017: "to be clear, we are not asking for public documents." The same logic that would not require OFCCP to produce the FCCM and Directive 307 from its website would also apply to other publically available documents on its website or documents contained on Oracle's website. The same logic that would not require OFCCP to produce case law would be the same logic that would not require OFCCP to produce documents in the Federal Register or documents on Pacer. The same logic that would not require OFCCP to produce documents to its photocopying vendor would also apply to its other administrative vendors like a court reporter. Based on Oracle's commitment not to require OFCCP to produce these categories of documents and for this commitment to apply to all of its document production requests, OFCCP stopped raising this issue. Please advise if Oracle is willing to exclude from all of its document requests publically available documents and documents involving OFCCP's third party administrative vendors.

4. *OFCCP is not required to provide a privilege affidavit at the time it makes a governmental privileged objection.*

OFCCP previously provided Oracle case law during the meet and confer process that it does not have to produce an affidavit from the agency head invoking the privileges at the time it makes a governmental privileged objection. OFCCP identified in its April 18, 2017, meet and confer letter that it can provide a formal invocation of the privileges *to the court* when those privileges are challenged in a motion to compel. See *Perez v. El Tequila, LLC*, 2014 WL 5341766, at *4 (N.D. Okla. 2014) (slip copy) (finding the privilege properly invoked where Plaintiff filed a declaration in response to a motion to compel); cf. *Kerr v. U.S. Dist. Court for N. Dist. of California*, 511 F.2d 192, 198 (9th Cir. 1975) aff'd, 426 U.S. 394 (1976) (finding error where no formal invocation of a government privilege was made "in the district court"). Furthermore, the *Kerr* Court relied on Supreme Court precedent wherein the Supreme Court found a document to be protected under a governmental

privilege when the Air Force Agency head made a formal privilege claim through an affidavit after the district court had preliminarily ruled upon the matter. *U.S. v. Russell*, 345 U.S. 1, 11 (1953).

OFCCP again raised this issue during the teleconferences. In response, Oracle committed therein that it would reexamine its position. However, Oracle admitted on July 28, 2017, that it did not do so. Instead, against this weight of authority, Oracle's cites to dicta in its July 27, 2017, letter that misconstrues the *Kerr* holding. Oracle's quote is dicta because the *Miller* court later stated: "On the basis of the papers submitted by plaintiff and by defendant in connection with his assertion of privilege, the Court will determine whether defendant's submissions are sufficient to meet the threshold burden." *Miller v. Pancucci*, 141 F.R.D. 292, 301 (C.D. Cal. 1992). The *Miller* court also misconstrues the *Kerr* holding, because the *Kerr* court never stated that the agency head affidavit was required to be provided at the time of the discovery responses. Instead, it stated that an affidavit was never provided by the agency in district court. *Kerr*, 511 F.2d at 198. Furthermore, Oracle provides no legal authority for its position that OFCCP's invocation of governmental privileges are waived if it produces an affidavit from the agency head invoking the privileges to the Court in response to a motion to compel. OFCCP requested this authority during the teleconferences and Oracle did not identify this issue in its July 27, 2017, letter nor did it provide any authority to support this position. To the extent that Oracle pursues governmental privileges through motion practice, OFCCP will produce an affidavit from the agency head at that time.

5. *Oracle title heading and discussion in Point X about OFCCP's position is inaccurate.*

Contrary to the statements made at Point X, OFCCP modified its initial position regarding producing documents after the NOV issue date of March 11, 2017. As stated repeatedly during the teleconferences (literally six times), OFCCP will produce correspondence between Oracle and OFCCP after the NOV issue date. Moreover, after committing to produce this correspondence, OFCCP inquired whether Oracle wanted the parties to exchange correspondence between their counsel after the NOV issue date and Oracle stated its standard response that it had to think about it. Oracle's July 27, 2017, letter did not address this request. Please advise if Oracle wants OFCCP to include in this correspondence production, correspondence between counsel.

6. *OFCCP proposes the March 11, 2016, NOV Issue Date as the privilege log cutoff date.*

The March 11, 2016, issue date is a more appropriate date for the privilege log cutoff since OFCCP anticipated litigation at that time. Please advise if Oracle will accept this date.

7. *Oracle only redefines one of its Third Party requests containing problematic definitions.*

Oracle only fixed one of its Third Party requests leaving the remainder nonsensical. In numerous requests, Oracle excluded employees with its definitions of "Third Party" and "Defendant" at the beginning of the request, but then sought documents from employees/class

members later in the request: RFPs 18, 32, 46, 63 and 84. Despite OFCCP bringing this matter to Oracle's attention, Oracle only chose to change its definition for RFP 84. Therefore, Oracle's requests for RFPs 18, 32, 46 and 63 continues to remain nonsensical for the "CLASS MEMBERS" part of the requests since Oracle defined this term to include employees.

8. *OFCCP's pre-filing statistical analyses and their supporting data are not relevant and both are privileged.*⁵

OFCCP's prior statistical analyses and their underlying data are not relevant and are protected by the deliberate process privilege. OFCCP's prior statistical analyses are simply not relevant to this case because they will not be used to prove Oracle's discrimination violations. As Oracle well knows, the Court authorized discovery that will afford data on far more years of data than was provided by Oracle during the review. Thus, these prior analyses and their supporting data are no longer in play.

Furthermore, OFCCP's investigatory analysis and its underlying data are protected by the deliberate process privilege. Courts have repeatedly held that statistical analysis provided to a governmental decision maker as input for a decision regarding whether to file a complaint are protected by this privilege. *E.E.O.C. v. FAPS, Inc.*, 2012 WL 1656738, at *31 (D. N.J. 2012) ("Based on the above and EEOC's statement that '[t]he discovery at issue ... relates to documents [data, statistical analyses and reports] gathered, produced, and analyzed by EEOC personnel as part of the ... EEOC's decision regarding whether to file a Commissioner's Charge against any number of employers operating in Port Newark' [citation omitted], the Court finds that EEOC has 'demonstrate[d] that the subject materials meet ... [the] threshold requirements' for the deliberative process privilege."). In making this finding, this court found that the data, statistical analyses and their reports met the two requirements of this privilege – they were both "pre-decisional" and "deliberative in nature." *Id.* This holding is applicable to the current case. OFCCP's statistical was pre-decisional in that it was performed prior to the issuance of the NOV and the filing of the Amended Complaint. It was also deliberative in nature because "[t]hese documents were gathered, reviewed, and analyzed by [OFCCP] personnel as part of [OFCCP]'s process of deciding whether to file a[n]" Amended Complaint and issue a NOV. *Id.*

9. *Oracle also violates Procedural Rule 34's particularity requirements because many of its requests are so broad that they include numerous other requests and / or are compound.*⁶

⁵ OFCCP makes a distinction between the underlying facts such as those in the 2014 compensation snapshot and the data sets pulled from the facts used in the statistical analysis. The underlying facts are producible while the data sets are not relevant and are protected by the deliberate process privilege. *E.E.O.C. v. FAPS, Inc.*, 2012 WL 1656738, at *31 (D. N.J. May 10, 2012).

⁶ Oracle did not address Rule 34's particularity requirement in its July 27, 2017, letter and incorrectly described this objection as just pertaining to subsets at Point XXII.