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AUG 22 2019

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

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

**OFCCP'S POSITION STATEMENT IN RESPONSE TO ORDER DIRECTING
OFCCP TO STATE POSITION WITH RESPECT TO ORACLE MANAGERS**

At the Court's request, OFCCP provides its position regarding the pay discrimination it alleges in this case, and specifically, the categories of managers it accuses of discrimination. In requesting OFCCP's position, the Court noted that the importance of low-level managers with respect to OFCCP's claims depends on the type of claims OFCCP intends to assert, with low-level managers playing a more important role if OFCCP's claim is that Oracle fosters "a culture

of discrimination such that its managers, generally speaking, discriminate against female, Black, and Asian employees in setting compensation” or if OFCCP’s claim is that Oracle gives low-level managers “unfettered discretion” that results in discrimination. *Order Directing OFCCP to State Position with Respect to Oracle Managers* (Order) at 7. OFCCP is not pursuing either of these theories. Rather, OFCCP will prove that Oracle’s top management¹ and Human Resources managers² intentionally caused and are responsible for the widespread, systemic discrimination against women and minorities in technical positions who work at Oracle’s headquarters in Redwood Shores, California. OFCCP relies on a disparate impact theory in the alternative, based on the policies and practices implemented by the same top leadership at Oracle.

Evidence of Discrimination

OFCCP intends to present three general categories of evidence to prove compensation discrimination: (1) statistical evidence (both of the wide disparities in pay between comparable women and men, and Whites and Asians, and Whites and Blacks, and showing systemic disparities in pay related to assignment and prior pay), which can alone establish discrimination; (2) policies and practices implemented by top Oracle leadership and Human Resources managers, their disregard for their compliance obligations, and their active disempowerment of

¹ Oracle’s workforce is organized into 16 job functions that describe the jobs performed. Oracle also divides its workforce into global career levels, identifying “Individual Contributors” and “Managers,” by level of experience, with M1 being the lowest-level of managers. Oracle’s top leadership is in its Business Practice job function. In 2014, for example, Oracle’s Business Practice job function included the following individuals: Larry Ellison (Oracle’s CEO), Safra Catz (who signed Oracle’s AAP and was a President with a global career level M9), Mark Hurd (who was also a President with global career level of M9), and Thomas Kurian (an Executive Vice President at the global career level of M8 who oversaw a large part of the Product Development employees at Oracle’s headquarters). Some of the individuals in the Business Practice job function are also members of Oracle’s Board of Directors, such as Larry Ellison. Managers in Legal advise top leadership and Human Resources on issues related to discrimination and OFCCP compliance.

² Managers in Oracle’s Human Resources job function included its compliance group overseeing OFCCP compliance and Oracle’s Affirmative Action Program, Oracle’s Compensation Group, HR Business Partners who advised managers and worked with Oracle leadership regarding compensation issues, and handled discrimination complaints.

low-level managers to ensure a fair workplace; and (3) anecdotal evidence, which will bring the cold statistical numbers to life, such as providing examples of the impact of policies and practices set by Oracle's top leadership in conjunction with Human Resources managers, on individual women, Asians, and Blacks.³

Statistical Evidence

First, and chiefly, OFCCP will present a statistical analysis of Oracle's compensation for its employees in the Product Development, Information Technology, and Support job functions at Oracle's headquarters. OFCCP already has provided both the initial and rebuttal report of its statistical expert, Dr. Janice Madden, which reveals yawning gaps in the pay of women and men in the Product Development, Information Technology, and Support job functions, and large gaps in the pay between Whites and Asians and Whites and Blacks in the Product Development job function.⁴ This statistical evidence is a sufficient basis *alone* to support OFCCP's claims of intentional pay discrimination against women, Asians, and Blacks at Oracle's headquarters.⁵ Importantly, this statistical evidence does not require identifying any specific act of wrongdoing by any specific managers—rather, statistical evidence showing systemic disparities between members of the protected groups and comparable employees outside the protected categories, constitutes circumstantial evidence of intentional discrimination.⁶ Similarly, statistical evidence

³ OFCCP notes that while fact discovery has closed, OFCCP's case continues to develop. For example, expert discovery remains open and expert depositions have not yet occurred. Moreover, OFCCP's motion to compel some of the most vital information central to the allegations in this case remains outstanding. Furthermore, Oracle waited late into the discovery period to produce tens of thousands of pages of documents. This information is still under review. As such, OFCCP makes this statement to the best of its ability based on the current state of the evidence.

⁴ Expert reports were exchanged by the parties on July 19, 2019, and August 16, 2019, consistent with this Court's scheduling order.

⁵ Proof of discriminatory intent in a disparate treatment case can be circumstantial and may be proven entirely through statistical analyses. *See, e.g., Penk v. Or. State Bd. of Higher Ed.*, 816 F.2d 458, 463 (9th Cir. 1987); *OFCCP v. Honeywell*, Case No. 77-OFCCP-3, Secretary's Decision and Remand Order (March 2, 1994) at 9, 18.

⁶ As explained in a recent ALJ decision, which relied on OFCCP's expert Dr. Madden in determining that a contractor had unlawfully discriminated against African Americans: "A statistical disparity in the treatment of minorities may have one of three explanations: (1) it is

alone can establish that a facially neutral employment practice caused a disparate impact on a protected group of employees and does not require proof of intent or discriminatory animus by individual managers.

OFCCP's independent expert analysis of Oracle's own pay data shows striking, statistically significant pay gaps throughout its workforce. When OFCCP's independent expert examines similarly situated employees at Oracle, even including some metrics set by Oracle, she finds pay disparities as high as 19% between men and women; a result that is statistically significant at more than *eight standard deviations*.⁷ At the "low" end, women are underpaid 13% relative to their male peers and that underpayment is statistically significant at nearly *six standard deviations*. OFCCP's expert finds similar results with respect to Asians, whom are paid between more than 12% and more than 17% less than their White peers, with statistical significance between more than seven and more than *nine standard deviations*. The expert's analysis also shows that Black employees are paid between more than 20% and 25% less than their White peers, with statistical significance above two standard deviations. This result is particularly remarkable in light of the truly tiny number of Black employees at Oracle, which makes discrimination using statistical analysis more difficult to detect.

OFCCP's expert controlled for all reasonably available non-tainted characteristics including employee experience and education.⁸ OFCCP's independent expert also included a

the product of unlawful discriminatory animus; (2) there is a legitimate nondiscriminatory cause; and (3) it may be the product of chance. *Palmer*, 815 F.2d at 91. If the disparity is significant enough – which shows that the probability it resulted from chance is negligible – it may be inferred that the disparity is the result of unlawful animus.” *OFCCP v. Enterprise RAC Co. of Baltimore, LLC*, 2016-OFC-00006, Recommended Decision and Order (ALJ July 17, 2019), citing *Hazelwood School District v. United States*, 433 U.S. 299, 307 (1977); *see also, Bazemore v. Friday*, 478 U.S. 385 (1986).

⁷ For decades, the courts have held that discrimination can be inferred from statistical evidence when the probability that an observed gender- or race-based disparity occurring based on chance is 5% or less or, more technically speaking, 1.96 standard deviations from the expected result. *See, e.g., Palmer*, 815 F.2d at 96; *Segar v. Smith*, 738 F.2d 1249, 1283 (D.C. Cir. 1984).

⁸ Even when OFCCP's expert includes tainted or improper factors urged by Oracle, Dr. Madden's analyses reveal that widespread, statistically significant pay discrimination against

control for the employees' field of expertise by using Oracle's own job families as a control. This statistical model shows that the systemic underpayment of women and minorities at Oracle is both widespread and highly improbable to occur by random chance (generally less than a one in many hundreds of millions probability of occurring by chance).⁹

Under these circumstances, to avoid liability, Oracle's burden will be to show that OFCCP's expert's statistical analysis was inaccurate or the disparities are explained by inclusion of legitimate, non-discriminatory factors in the regression. *See, e.g., Palmer v. Shultz*, 815 F.2d 84, 101 (D.C. Cir. 1987). In other words, OFCCP will rely largely on statistical evidence from which Oracle's intent to discriminate can be inferred, as well as expert testimony explaining the statistics and responding to attacks on OFCCP's expert by Oracle's expert. Given the gross, unexplained disparities presented by the statistical evidence, OFCCP need not identify the specific person or persons who caused the discrimination. Rather, the law places the burden on Oracle to provide legitimate, non-discriminatory explanations for the significant disparities in pay observed in its workforce.

Evidence of Oracle's Policies and Practices Implemented by Top Leadership

Second, OFCCP intends to present compelling evidence of discriminatory intent by Oracle's top leadership and its Human Resource managers based on the policies and practices they created and caused to be implemented,¹⁰ their disregard for their compliance obligations, and their active disempowerment of low-level managers to ensure a fair workplace.

OFCCP expects the compensation analyses conducted between 2013 and the present, which Oracle has refused to produce to date, to provide important evidence regarding these

women and minorities at Oracle still occurs.

⁹ The independent statistical analyses also revealed that Oracle's differential job assignments for comparable employees and its practices in setting starting pay for comparable employees contribute significantly to pay disparities by gender and race. Oracle's policies, such as its policies related to setting starting pay based on prior pay, had an adverse impact on women, Asians, and Blacks.

¹⁰ Alternatively, OFCCP will argue that policies and practices implemented by Oracle's Human Resources managers and top leadership had an adverse impact on women and minorities.

topics. As discussed in OFCCP's pending Motion to Compel Oracle's Compensation Analyses (and acknowledged by Oracle in its opposition), evidence of a federal contractor's noncompliance with its affirmative action program (AAP) also can establish discriminatory intent.¹¹ An important part of Oracle's AAP is evaluating its compensation systems to identify disparities based on race and gender, and correcting disparities identified.¹² As the Court is well aware, OFCCP's motion to compel both these analyses and testimony by Oracle's Senior Director of Diversity Compliance,¹³ who oversaw Oracle's OFCCP compliance, is still pending. Oracle's Human Resources managers testified in depositions that Oracle set no goals and took no actions under Oracle's AAP to correct compensation disparities. This evidence will shed additional light on *what* Oracle knew about pay disparities between women and men and between Whites and Asians and Blacks, *when* Oracle knew about these pay disparities, and *what* Oracle did to correct disparities revealed by the analyses. Failure of Oracle's Human Resources managers and top leadership to correct disparities based on gender and race presumably identified in the compensation analyses it conducted – which were required by Oracle's contracts and regulation – would provide additional significant evidence of Oracle's discriminatory intent.

Other actions taken by Oracle's top leadership and Human Resources managers also provide circumstantial evidence of intentional discrimination, including their: implementing policies and procedures that required managers to rely on prior pay in making compensation offers, and that resulted in women, Asians, and Blacks receiving job offers with lower starting pay; implementing policies and procedures that resulted in Women, Asians, and Blacks being

¹¹ See *Moze*, 940 F.2d at 1044 (finding evidence federal contractor “neglected to establish means by which it could monitor compliance” with its AAP objectives supported finding of intentional discrimination); *Anderson v. Boeing Co.*, 222 F.R.D. 521, 537 (N.D. Okla. 2004) (if “Boeing failed to correct gender disparities in salary despite knowledge of their existence” from compensation analyses conducted as part of its OFCCP affirmative action program it could evince a discriminatory intent that could support a disparate treatment theory).

¹² “An acceptable affirmative action program must include . . . in-depth analyses [that evaluates its compensation systems]. . . to determine whether and where impediments to equal opportunity exist.” Contractors must both evaluate their compensation systems to determine if race and sex-based disparities exist, and correct disparities identified. 41 C.F.R. § 60-2.17.

¹³ This position is within Oracle's Human Resources job function.

assigned to lower-paid positions or projects; implementing policies or procedures that prevented managers making compensation recommendations from possessing information necessary to assess and redress pay disparities; failure to prioritize or fund corrections of pay disparities based on race and gender in setting the budget for pay increases; failing to implement policies to adequately investigate or rectify complaints of sex-based or race-based discrimination related to compensation or retaliation; and blocking shareholder resolutions requesting that Oracle prepare a report identifying whether a gender pay gap exists among its employees, and if so, to outline the steps begin taken to reduce the gap. In addition to managers in Human Resources and Business Practices, OFCCP may present Oracle managers in the Product Development, Information Technology, and Support job functions as witnesses to policies and practices that they did not devise and that negatively impact the compensation of Women, Asians, and Blacks, without accusing the latter group of managers of wrongdoing. This case is not about unfettered discretion by low-level managers in the Product Development, Support, and Information Technology job functions for setting pay. It is about the centralized decision-making by Oracle's top leadership and Human Resources managers that constrained their discretion.

Anecdotal Evidence

Third, OFCCP intends to present anecdotal evidence supporting the intentional pay discrimination proven by OFCCP's statistical analysis of Oracle's compensation data.¹⁴ Similarly, OFCCP plans to present anecdotal evidence supporting its claim that Oracle's policies and practices adversely impact women and minorities. While Oracle, like every corporate entity, acts through its managers, OFCCP's complaint and its evidence relates to the actions taken by Oracle at the highest levels and implemented through its Human Resources policies and practices and personnel.

Contrary to Oracle's repeated assertions to this Court, the actions of Oracle do not occur because of thousands of daily acts by Oracle's low-level managers acting with unfettered

¹⁴ Although not necessary, anecdotal evidence brings "the cold numbers convincingly to life." See *International Broth. of Teamsters v. U.S.*, 431 U.S. 324, 339 (1977).

discretion. Rather, the reality of Oracle's operation is that Oracle's top leadership and Human Resources team took actions, gave directions, and caused to be implemented policies and practices that both directly supported discriminatory pay practices and failed to take any steps to redress and correct this systemic discrimination as required by its federal contract. Indeed, to make OFCCP's position as clear and granular as possible, any hypothetical *individual* discriminatory acts (wrongdoing) by any low-level Oracle manager are not the focus of OFCCP's allegations or the wrongdoing OFCCP seeks to redress. Allegations of individual discriminatory acts are relevant here only as they shed light on how Oracle's top leadership responded on a systemic basis, such as by not providing effective training to managers regarding discriminatory conduct or pay practices, not ensuring a fair process for complaints of discriminatory conduct or treatment to be received, investigated and remedied, or otherwise taking action in relation to an allegation of individual discrimination to implement its obligations under its AAP.

Put most simply, OFCCP's allegations concern wrongdoing by Oracle at the top of its management structure, not at the bottom. As examples of the types of anecdotal evidence OFCCP has obtained and may present at trial, OFCCP could present testimony from a manager in the Product Development, Information Technology, or Support job functions that their pay recommendations were constrained by high-level management, or how the testifying manager's own pay had been impacted by the policies and practices implemented by Oracle's leadership. However, OFCCP will not be relying on a series of managers to testify about how wrongful exercise of discretion resulted in lower pay for the women and minorities that report to them. Again, what is central to OFCCP's claims are the actions Oracle, at its highest levels, took that fostered disparities in pay based on gender and race, and its intentional failure to correct these disparities or ensure and promote pay equity on a systemic basis. The wrongdoing that is the focus of OFCCP's anecdotal evidence is wrongdoing by Oracle's top leadership and Human Resources team.

Managers Responsible

Oracle organizes its workforce into 16 job functions, which describe the work performed: Administrative, All Roles (students/interns), Business Practices, Consulting, Facilities, Finance, Human Resources, Information Technology, Legal, Manufacture Distribution, Marketing, Presales, Product Development, Sales, Support, and Training.

OFCCP seeks redress for Oracle employees in three of these job functions: Asians and Blacks in the Product Development job function, and Women in the Product Development, Information Technology, and Support job functions at Oracle's headquarters. Approximately two-thirds of the employees for whom OFCCP seeks redress are individual contributors. The other third are former and current managers, most low-level managers.¹⁵ As explained above, OFCCP contends that all managers were witnesses to and some had a role in implementing practices and policies that caused the discrimination, but it was Oracle's leadership in the Business Practices, Human Resources, and Legal¹⁶ job functions that were the architects of the policies and practices, and the ultimate decision-makers. The "wrongdoers" that are the focus of OFCCP's action are managers in the following job functions: Business Practices, Human Resources, and Legal. Oracle's Board of Directors also bears responsibility.

¹⁵ In the Product Development, Support, and Information Technology job functions at Oracle's headquarters, the global career levels assigned to managers range from M1 to M7.

¹⁶ Legal provided advice regarding Oracle's compliance with its obligations under Executive Order 11246, handling of discrimination complaints, and other issues relevant to this case.

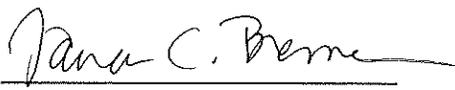
DATED: August 22, 2019

Respectfully submitted,

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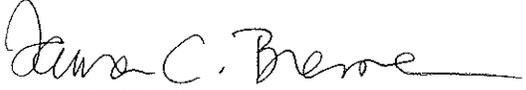
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CERTIFICATE OF SERVICE

I certify that on this 22nd day of August 2019, the foregoing **OFCCP'S POSITION STATEMENT IN RESPONSE TO ORDER DIRECTING OFCCP TO STATE POSITION WITH RESPECT TO ORACLE MANAGERS** was served upon the following individuals by email at the following addresses:

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