ORRICK

ORRICK, HERRINGTON & SUTCLIFFE LLP
THE ORRICK BUILDING
405 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105-2669
tel +1-415-773-5700
fax +1-415-773-5759
WWW.ORRICK.COM

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Gary R. Siniscalco
(415) 773-5833
grsiniscalco@orrick.com

June 29, 2016

VIA E-MAIL AND FEDERAL EXPRESS

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

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

Dear Ms. Wipper:

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

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

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

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

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

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

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

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

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

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

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

- "If the defendant chooses to challenge the plaintiff's statistics, the defendant is not obligated to conduct his or her own statistical analysis, but may simply address the flaws in the plaintiff's data." Walter B. Connolly, Jr., David W. Peterson & Michael J. Connolly, *Use of Statistics in Equal Employment Opportunity Litigation* § 3.01 (2015).

- "The employer may attempt to rebut the plaintiff's prima facie case in a variety of ways. With respect to a plaintiff's statistical evidence, the two most commonly used approaches are to (1) explain away any statistical disparity by, for example, demonstrating that the plaintiff's statistical calculations are based on faulty data, flawed computations, or improper methodologies; or (2) introduce alternative statistical evidence." Barbara T. Lindemann, Paul Grossman & C. Geoffrey Weirich, *Employment Discrimination Law* § 2.III, p. 2-117 (2015).

- "If the plaintiff succeeds in proving a *prima facie* case of a pattern or practice of discrimination, [t]he defendant can present its own statistical evidence ... Alternatively, the defendant can present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination" or target "[t]ypical flaws in the plaintiff's evidence ... includ[ing] statistics that compare the defendant's work force to an inappropriate general population, include irrelevant job categories in the work force statistics, utilize the improper geographical area for the relevant labor market, otherwise fail adequately to tailor the comparison to the qualifications demanded by the position in question, fail to present adequate data on both sides of the comparison, fail to eliminate pre-Title VII discrimination from consideration, simply fail to demonstrate disparity of treatment to be statistically significant due to small

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

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

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

- "The cases cited by the EEOC to support its argument that Sears had the burden of rebutting its statistical analysis with more 'refined, accurate and valid' statistical evidence did not state that the defendant must produce such evidence to succeed in rebutting the plaintiffs' case. Instead, those cases indicated that a defendant could or 'was entitled to' use such a means of rebuttal. ... These cases suggest, and the cases we have cited above confirm, that statistical evidence is only one method of rebutting a statistical case." *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 313-14 (7th Cir. 1988) (citations omitted).

- "A central issue in the pending case is what showing an employer must make to satisfy its burden of production in a pattern-or-practice case. In *Teamsters* the Supreme Court stated that the employer's burden was 'to defeat the prima facie showing of a pattern or practice by demonstrating that *the Government's proof is either inaccurate or insignificant*.' 431 U.S. at 360, 97 S.Ct. 1843 (emphasis added). The emphasized words raise a question as to whether the Supreme Court thought the employer's rebuttal evidence must be directed at the statistics that often constitute the prima facie case of discrimination or simply at the rebuttable presumption of discrimination that arises from those statistics. ... We think the Court meant

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

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

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

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

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

Very truly yours,

Gary R. Siniscalco

Attachment