



September 23, 2016

Sent via Electronic Mail

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

Dear Mr. Siniscalco:

Thank you for your September 21 response.

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

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

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

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

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

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

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

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

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

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

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

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

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

- gross disparities against non-Asian applicants, particularly African American, Hispanic and White applicants, at **-8, -10, and -80 standard deviations**, respectively, in recruiting practices;
- gross disparities against non-Asian applicants, particularly African American, Hispanic and White applicants, at **-4, -3, and -28 standard deviations**, respectively, in hiring practices; and
- gross disparities against African American, Asian American, American and female employees, at **-2, -6.6, -7.1, and -8.4 standard deviations**, respectively, in compensation practices.

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

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

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

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

We look forward to the meeting.

Sincerely,



for Hea Jung Atkins

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