

**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 No. R00192699

**JOINT PRE-HEARING
STATEMENT**

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JOINT PRE-HEARING STATEMENT

CASE NO. 2017-OFC-00006

Pursuant to the Court’s Notice of Hearing and Pre-Hearing Order dated February 6, 2019, Plaintiff Office of Federal Contract Compliance Programs (“OFCCP”) and Defendant Oracle America, Inc. (“Oracle”) hereby submit the following Joint Pre-Hearing Statement. The parties met and conferred prior to filing this statement as required by 29 C.F.R. § 18.80(b).

I. ISSUES OF LAW

A. OFCCP’s Issues of Law¹

1. Whether Oracle breached its federal contracts by engaging in sex and racial discrimination in violation Section 202 of Executive Order and 41 C.F.R. § 60-1.4(a).

2. Whether Oracle violated Section 202 of Executive Order and 41 C.F.R. § 60-1.4(a) by engaging in compensation discrimination against female, Asian and African American employees at its Redwood Shores headquarters, including as follows:

a. Whether Oracle engaged in assignment discrimination at its headquarters during the relevant time period against females, Asians, and African American employees in Product Support, Information Technology or Support impacting compensation in violation of the standards set forth in 41 C.F.R. § 60-20.4(b).

b. Whether Oracle engaged in wage-rate discrimination at its headquarters during the relevant time period against females, Asians, and African American employees in Product Support, Information Technology or Support in violation of the standards set forth in 41 C.F.R. § 60-20.4(b).

c. Whether Oracle engaged in salary discrimination at its headquarters during the relevant time period against females, Asians, and African American employees in Product Support, Information Technology or Support in violation of the standards set forth in 41 C.F.R. § 60-20.4(b).

¹ In a footnote below, Oracle suggests that the Department’s regulations do not govern these proceedings. There is no inconsistency between the Department’s general position that Title VII principles apply, and that the OFCCP’s specific regulations govern these proceedings. In fact, when it has served its purposes, Oracle has relied on slight distinctions between Title VII and OFCCP’s regulations to argue that Title VII case law (*e.g. Mach Mining v. E.E.O.C.*, 135 S.Ct. 1645 (2015)) does not apply to these proceedings.

d. Whether Oracle engaged in position discrimination at its headquarters during the relevant time period against females, Asians, and African American employees in Product Support, Information Technology or Support in violation of the standards set forth in 41 C.F.R. § 60-20.4(b).

e. Whether Oracle engaged in job classification discrimination at its headquarters during the relevant time period against females, Asians, and African American employees in Product Support, Information Technology or Support in violation of the standards set forth in 41 C.F.R. § 60-20.4(b).

f. Whether Oracle engaged in total compensation discrimination at its headquarters during the relevant time period against females, Asians, and African American employees in Product Support, Information Technology or Support in violation of the standards set forth in 41 C.F.R. § 60-20.4(b).

g. Whether Oracle discriminates by not paying similarly-situated employees the same total compensation based on race or sex in violation of the standards set forth in 41 C.F.R. § 60-20.4(a).

h. Whether Oracle discriminates by not paying similarly-situated employees the same salary on race or sex in violation of the standards set forth in 41 C.F.R. § 60-20.4(a).

i. Whether Oracle can rely on subjective determinations unsupported by data or measured skill or qualification differences as part of its claim that OFCCP's approach does not compare similarly-situated employees as set forth in 41 C.F.R. § 60-20.4(a).

j. Whether Oracle can rebut OFCCP's prima facie case without demonstrating that the purported failures in OFCCP's statistical studies actually make a difference or provide an explanatory non-discriminatory justification for the pay differentials proven in this case.

k. Whether Oracle can rebut OFCCP's prima facie case by relying on purported factors that it has no available measurements to track and does not track itself.

l. Whether Oracle has conceded base pay discrimination by providing no counter statistical analysis to rebut this discrimination.

m. Whether Oracle's failure to correct discriminatory job assignments results in continued liability for pay disparities resulting from its pattern and practice of discriminatory job assignment.

n. Whether Oracle's failure to correct discriminatory pay patterns that occurred prior to 2013 and continue after 2013 results in ongoing liability.

o. Whether any of Oracle's compensation practices (including its reliance on prior pay in salary setting until October 2017, its career level assignment process, its failure to correct prior discrimination, its ad hoc dive and save process, etc.) have an adverse impact on the basis of sex or race and are not shown to be job-related and consistent with business necessity. See 41 C.F.R. § 60-20.4(d).

p. Whether any part of differentials in wages, benefits, or other compensation Oracle pays to the women, Asians and African American as compared to their similarly situated male or White colleagues are in whole or in part the result of the application of any discriminatory compensation decision or other practice. See 41 C.F.R. § 60-20.4(e).

3. Whether Oracle violated 41 C.F.R. § 60-1.43 by not providing access to records that OFCCP requested access to during the compliance review.

4. Whether Oracle violated 41 C.F.R. § 60-1.12 and 2.32 by not making available records maintained pursuant to 60-1.12 and 60-2.10 during the compliance review.

B. Oracle's Issues of Law²

1. Whether OFCCP issued its Show Cause Notice ("SCN") without "reasonable

² Oracle disagrees that OFCCP's issues of law are the relevant legal issues that the Court must decide. For example, Issue No. 1 makes reference to whether Oracle breached its federal contracts, yet OFCCP has not brought a breach of contract claim. Additionally, Oracle notes that OFCCP repeatedly cites to its own regulations but nowhere

cause” to believe Oracle discriminated against women in its Product Development, IT or Support job functions, or Asians or African Americans in its Product Development job function, contrary to 41 C.F.R. § 60-1.28.

2. Whether OFCCP failed to engage in “reasonable efforts” to conciliate as required by 41 C.F.R. § 60-1.20(b). *See also* E.O. 11246; *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015).
3. Whether OFCCP violated Oracle’s due process rights by expanding the scope of this case beyond the violations alleged in the Notice of Violation (“NOV”) and SCN.
4. Whether OFCCP must establish a violation during the 2013-2014 audit period as a prerequisite for attempting to prove a continuing violation.
5. Whether a statistical analysis offered to establish compensation discrimination must compare similarly situated employees. 41 C.F.R. § 60-20.4(a); *Grant v. City of Blytheville*, 841 F.3d 767, 775 (8th Cir. 2016); *Harris v. City of Chicago*, 665 F. Supp. 2d 935, 956 (N.D. Ill. 2009); *E.E.O.C. v. Bloomberg, L.P.*, 778 F. Supp. 2d 458, 483 (S.D.N.Y. 2011).
6. Whether OFCCP can establish that employees are “similarly situated” for purposes of Title VII without accounting for the actual work the employees perform.
7. Whether for purposes of establishing which employees are “similarly situated” for purposes of OFCCP’s compensation discrimination claims, it is proper to compare employees who are claimed to be “similarly qualified” at the time of hire instead of comparing employees who are similarly situated in terms of the work

references Title VII or its interpretative case law. To the extent OFCCP is disputing that the legal standards developed under Title VII govern, this Court has already ruled that Title VII standards apply. *See* May 16, 2019 Order at 5 (citing *OFCCP v. Honeywell*, 1977-OFC-00003, slip op. at 7-8 (Sec’y June 2, 1993)) (“EO 11246 uses the legal standards developed under Title VII, 42 U.S.C. § 2000e.”). Any such argument would also run contrary to statements OFCCP already has made in court filings in this action (including in its recent summary judgment briefing), and also would run contrary to OFCCP’s own policy guidance governing compensation discrimination. *See* OFCCP DIR 2018-05, *available at*: https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_05.html.

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they perform at Oracle and the skills, duties, and responsibilities that that work requires.

8. Whether OFCCP can rely on job “assignments” that occurred prior to January 1, 2013 (the start of the audit period) to prove its claim of intentional compensation discrimination.
9. Whether OFCCP’s evidence, including but not limited to its statistical evidence, is sufficient to prove a pattern or practice of intentional gender- or race-based compensation discrimination in the circumstances of this case.
10. Whether OFCCP has established by a preponderance of the evidence that intentional gender and/or racial discrimination was the company’s standard operating procedure—the regular rather than the unusual practice. *Teamsters v. U.S.*, 431 U.S. 324, 336 (1977).
11. Whether OFCCP has established a common purpose or intent to discriminate in Oracle’s compensation decisions that could serve as the “glue holding the alleged reasons for all of [Oracle’s] decisions together.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 and n.7 (2011).
12. Whether OFCCP has properly pled a disparate impact claim.
13. If the ALJ finds OFCCP has properly pled a disparate impact claim, whether OFCCP has shown “a particular employment practice that causes a disparate impact” in compensation for women in its Product Development, IT, or Support job functions, or Asians or African Americans in its Product Development job function. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Wards Cove Packing v. Atonio*, 490 U.S. 642, 657 (1989).
14. If the ALJ finds OFCCP has properly pled a disparate impact claim, whether that claim must be dismissed because disparate impact claims concerning compensation are barred by Section 703(h) of Title VII (42 U.S.C. §2000e-2(h)), which incorporates the Equal Pay Act justifications for pay differences into Title

VII, including that differences in compensation between protected groups may be justified by “a differential based on any other factor other than sex [or race.]” 29 U.S.C. § 206(d)(1).

15. If the ALJ finds OFCCP has properly pled a disparate impact claim, whether OFCCP has proven liability for such a claim by a preponderance of the evidence.
16. If OFCCP succeeds in demonstrating Oracle has engaged in compensation discrimination, whether Oracle is entitled to present evidence and argument that individual employees are nevertheless not entitled to damages (or are not entitled to the damages OFCCP claims pursuant to any purported formula for determining damages) during a Stage II proceeding.
17. Whether OFCCP is entitled to an adverse inference based on its allegations that Oracle “refused to produce” certain documents and data during the audit.
18. Whether the ALJ has authority to issue the injunctive relief requested by OFCCP in connection with OFCCP’s “refusal to produce” claim. Fed. R. Civ. P. 65.
19. Whether the injunctive relief requested by OFCCP in connection with OFCCP’s “refusal to produce” claim would violate Oracle’s due process rights.
20. Whether the injunctive relief requested by OFCCP in connection with OFCCP’s “refusal to produce” claim would violate Fed. R. Civ. P. 65.
21. Whether the injunctive relief requested by OFCCP in connection with OFCCP’s “refusal to produce” claim would violate Oracle’s Fourth Amendment rights.

II. PRECISE STATEMENT OF THE RELIEF SOUGHT

A. OFCCP’s Request for Relief

OFCCP seeks for Oracle to come into compliance by providing make-whole formula back wage relief for victims of Oracle’s discriminatory conduct from 2013 to the present date and implementing immediate pay equity adjustments and alterations of its compensation policies to ensure that Oracle ceases engaging in gender and racial

compensation discrimination prospectively. Should Oracle fail or refuse to come into compliance, the appropriate remedy is debarment in accordance with 41 C.F.R. 60-1.27.

Back Pay: Oracle's calculation of back wages due through the end of 2018 is provided and detailed in Tables 8 through 10 of Dr. Madden's report, which provides the Court with different calculations of back wages due based on the scope of discriminatory conduct found by the Court. Of course, the Court also may instruct OFCCP's expert or the parties generally to calculate back wages pursuant to the Court's instructions and order, should the Court request different calculations of the back wages owed or request a calculation of back wages owed as result of different components of the pay discrimination at issue, such as salary discrimination (as Tables 9 and 10 in Dr. Madden's report provide back wage calculations relating to Dr. Madden's findings regarding total compensation). The back wages may be distributed subject to formula relief, *OFCCP Bank of Am.*, 97-OFC-16, 2016 WL 2941106, ARBs Final Decision and Order, at *19-20 (Dep't of Labor Apr. 21, 2016); *Greenwood Mills Inc.*, ARB Nos. 00-044. 01-089, 2002 WL 31932547, at *56 (Dec. 20, 2002), and there is no need for burdensome additional hearings on individualized relief, as Oracle has suggested.

Prospective Relief: OFCCP requests that Oracle be ordered to make corrective prospective relief. Oracle must be ordered to make necessary pay adjustments and career level adjustment for all members of the victim class. Oracle must prove, through objective evidence, that it has made corrections that eliminate the compensation disparities identified through Dr. Madden's analyses. Oracle should also be ordered to revise its compensation policies and practices to the satisfaction of this Court to ensure there is no re-occurrence of systemic racial and gender disparities in setting compensation.

Injunctive Relief: Oracle should be enjoined against further violations of the Executive Order. Oracle should be ordered to provide and certify that it provided training to all persons at its Redwood Shores headquarters regarding compensation discrimination. OFCCP must approve the training in advance. In addition, Oracle should be required to post information about compensation discrimination and notify all

employees annually that they have the right to contact OFCCP should they be concerned that they are the victim of compensation discrimination.

Recordkeeping: Oracle should be ordered to keep all records and timely provide specific records to OFCCP upon OFCCP's request.

Reporting: Oracle should be ordered to report on its progress and all aspects of the relief requires for a period of at two years from the date it first comes into compliance by implementing the pay equity adjustments, changes to its compensation policies, and paying the back wages due.

B. Oracle's Request for Relief

Oracle requests that the ALJ issue recommended findings, conclusions, and a decision in Oracle's favor under 41 C.F.R. Part 60-30, and that:

- A final administrative order be issued in Oracle's favor on all claims;
- OFCCP's Second Amended Complaint be dismissed with prejudice; and
- Oracle be awarded its costs of suit.

In the event the Court finds any relief is warranted, any such relief must be limited to the remedies sought by OFCCP in its Second Amended Complaint. Additionally, any potential remedies awarded must comport with applicable law. Moreover, as set forth in Oracle's pending Motion in Limine No. 13, OFCCP is incorrect that it would be appropriate to award any back wages pursuant to formula relief, as the U.S. Supreme Court has made explicitly clear (and as due process requires). *See Wal-Mart v. Dukes*, 564 U.S. 338, 366 (2011).

III. STIPULATED FACTS THAT REQUIRE NO PROOF

A. The Parties have agreed to the following stipulations of fact:

1. Oracle is headquartered in Redwood Shores, California (at its "HQCA" location).
2. Oracle is a government contractor as defined by Executive Order 11246.
3. At all relevant times, Oracle had 50 or more employees.
4. OFCCP conducted a compliance review of Oracle's HQCA location that it initiated on September 24, 2014.

5. The audit period for the compliance review of Oracle's HQCA location was January 1, 2013 through June 30, 2014.
6. OFCCP issued an NOV to Oracle on March 11, 2016 in relation to the compliance review of HQCA.
7. OFCCP issued an SCN to Oracle on June 8, 2016 in relation to the compliance review of HQCA.
8. OFCCP and Oracle participated in a single in-person meeting following the issuance of the SCN, which took place on October 6, 2016.

B. OFCCP

Through the Parties' Required Submissions of Statements of Undisputed Material Facts As Part of the Cross Motions for Summary Judgment, the Parties Identified 230 Undisputed Facts Which Are Judicial Admissions by the Parties.

As part of the required filings in support of each party's motion for summary judgment, each party filed Statements of Undisputed Facts. In response and opposition to each party's dispositive motion, each party was required to identify whether it disputed each of the facts the moving party identified as undisputed in support of its dispositive motion. A review of each party's response to the competing Statements of Undisputed Facts reveals that the parties agreed that 230 of the facts identified by the parties in their dispositive motions are "undisputed."³

These undisputed facts operate in the same manner as stipulations because they are judicial admissions by the parties. A statement made in a motion for summary judgment can serve as a judicial admission. *See, e.g., Stallard v. United States*, 12 F.3d 489, 495–96 (5th Cir.1994) (government was bound by judicial admissions it made in memorandum supporting its request for summary judgment and opposing taxpayer's motion.); *Doyle v. White Metal Rolling and Stamping Corp.*, 249 Ill. App. 3d 370, 188

³ Oracle claims below that the undisputed facts are misleading, lack evidentiary support, or are not material. But Oracle had an opportunity to dispute the facts, and it did not. Oracle seems to believe that a fact is not a fact and an admission is not an admission simply because Oracle does not like it or thinks it is of little probative value. This is not the case and this Court should exercise its undeniable authority to rely on party admissions in limiting the issues that require proof at trial.

Ill. Dec. 339, 618 N.E.2d 909, 921 (1st Dist. 1993) (“Moreover, we disagree with defendants' contention that the trial court improperly limited their ability to cross-examine Lobodzinski. A judicial admission is a deliberate, clear, unequivocal statement by a party regarding a concrete fact within that party's peculiar knowledge.”)

Judicial estoppel operates to bar either party from seeking to deny facts it has admitted are “undisputed” in filings with this Court, including the 230 facts the parties agreed were undisputed in their respective briefs filed as part of the cross motions for summary judgment. As the Court is well aware, the Court acts within its authorities to spare the Court and the parties the time and expense of presenting unnecessary evidence related to facts admitted by the parties. *See* 29 C.F.R. 18.44(d). (“At the [pre-hearing] conference, the judge may consider and take appropriate actions on the following matters: . . . (3) Obtaining admissions and stipulations about facts and documents to avoid unnecessary proof...”).

Each of the following facts both parties agreed were undisputed in the Summary Judgment filings and thus do not require further proof or evidence at the hearing:

1. Oracle is a global technology company that provides more than 800 software and hardware products and related services to customers worldwide. (OFCCP’s Statement of Genuine Disputed Facts submitted with OFCCP’s Opposition to Oracle’s Motion for Summary Judgment (“OFCCP GDF”) 14)
2. Oracle’s products include cloud computing services, software, hardware, and business analytics, as well as solutions for managing enterprise resources, human resources, customer relationships, and supply chains, and for assessing governance, risk, and compliance. (OFCCP GDF 15)
3. Oracle offers product-related services, such as security assessments, software upgrades, and customer support and education services. (OFCCP GDF 16)
4. Some of Oracle’s products involve cutting-edge technology in high demand, and some constitute legacy products with infrequent updates or enhancements. (OFCCP GDF 18)

5. Oracle has been a federal contractor covered by the Executive Order 11246 for over 20 years. (Oracle's Response to OFCCP's Statement of Uncontested Facts filed with Oracle's Opposition to OFCCP's Motion For Summary Judgment ("RSUF") 2)
6. From at least 2013, Oracle has been a contractor within the meaning of the Executive Order. (RSUF 7)
7. The total amount of Oracle's government contracts has exceeded \$100 million each year since 2013. (RSUF 3)
8. Oracle HQCA has had 50 or more employees from at least 2013 to the present. (RSUF 4)
9. Larry Ellison was the CEO during part of the litigation period and the Executive Chairman and CTO (Chief Technology Officer) of Oracle during the litigation period. (RSUF 37)
10. Safra Catz and Mark Hurd were Co-CEOs on September 19, 2016.(RSUF 38)
11. Thomas Kurian was the president of Oracle's "Product Development" Line of Business (LOB) until at least December 2016. He left Oracle in September 2018. (RSUF 39)
12. Juan Loaiza is an Executive Vice President at Oracle of mission critical databases and worked for Thomas Kurian in the Product Development LOB. (RSUF 40)
13. Joyce Westerdahl is Oracle's Executive Vice President for Human Resources (RSUF 42)
14. Lisa Gordon was a Compensation Director in and around 2015. (RSUF 44)
15. Lynne Carrelli, a Compensation Analyst, worked for Lisa Gordon in Oracle's "Corporate Compensation" for approximately three years. (RSUF 45)
16. Kate Waggoner is currently a Senior Director of Global Compensation for Oracle. (RSUF 46)
17. Kate Waggoner worked with Lisa Gordon in "Corporate Compensation" before she assumed leadership of Oracle's "Global Compensation" team. (RSUF 47)
18. Shauna Holman-Harries is the Senior Director of Diversity Compliance for Oracle. She started at Oracle as a Director of Diversity Compliance in 2011. (RSUF 43)

19. Oracle is organized into lines of business (“LOBs”), which are organizations within Oracle that are focused on a distinct part of Oracle’s business or operations. (OFCCP GDF 9)
20. Each LOB has an executive who oversees it, and who is responsible for the products within that LOB. (OFCCP GDF 10)
21. Oracle has three components to its compensation: (1) cash, (2) stock, and (3) benefits.) (RSUF 60)
22. Oracle faces substantial and continuous competition for highly-skilled and talented employees. (OFCCP GDF 51)
23. To compete against other companies for employees, Oracle’s compensation tools include base salary, bonuses, restricted stock awards, and performance stock and stock options (i.e., equity grants). (OFCCP GDF 52)
24. Bonuses are discretionary at Oracle. (RSUF 255)
25. Bonuses are not awarded to all employees at Oracle. (RSUF 256)
26. Stock grants are discretionary at Oracle. (RSUF 257)
27. Stock grants are not awarded to all employees. (RSUF 258)
28. Oracle uses recruiters to identify and recruit potential employees. (RSUF 151)
29. Oracle’s recruitment training materials instruct the recruiters to initiate initial contact with potential candidates. (RSUF 152)
30. Oracle’s recruitment training materials also instruct the recruiters to search the internet, resume books, LinkedIn, Facebook, Twitter, Google, social networking sites, to contact alumni, etc., for leads to determine who they should initiate contact with for job opportunities at Oracle. (RSUF 153)
31. Oracle instructs managers to actively encourage their team-members to recommend people they know for hire through the Employee Referral Program. (RSUF 155)
32. Oracle’s Global Compensation Team was led by Senior Director of Global Compensation, Kate Waggoner. (Part of RSUF 47, undisputed by Oracle).

33. Oracle's Global Compensation Team provides the instructions and training for how to administer Oracle's compensation programs, which includes focal reviews, corporate bonus plans and equity (stock and options). Oracle's Global Compensation Team also ensures that the software is in place to implement these compensation programs. (RSUF 56)
34. During her deposition, Oracle's Senior Director of Global Compensation, Kate Waggoner, testified that "we don't really have policies" about compensation. (RSUF 53)
35. Oracle uses external third-party market surveys to assist it in setting salary ranges. (RSUF 88)
36. Oracle's Global Job Table identifies salary ranges by job code through the linkage of job codes to salary grades that have salary ranges. (RSUF 67 modified to replace the word "organizes" with "identifies" which is the only word Oracle disputed)
37. Each job code in the global table is assigned to a salary grade that refers to a salary range. (RSUF 85)
38. Multiple job codes can be assigned to the same salary grade, and therefore have the same salary range. (RSUF 87)
39. Oracle states the salary range is "the link between internal and external equity." (RSUF 91)
40. Managers are instructed to consider how an employee's compensation compares to the employee's peers balancing external and internal equity. (RSUF 92)
41. In determining where a specific employee is to fall within an assigned salary range, Oracle instructs its managers to consider the employee's "skills, knowledge, and experience and perhaps education (if a requirement for the job)." (RSUF 93)
42. Oracle instructs its managers that new employees still learning their role or employees whose contribution are below the required standard should generally be given a salary that is within the first quartile of the salary range. (RSUF 95)

43. Employees at the midpoint of the salary range should be experienced, fully competent and solid performing, and those in the 3rd and 4th quartiles of the salary range should include only top performers. (RSUF 96)
44. Oracle warns managers that the business climate and focal budgets play the biggest role in how managers are able to position employees within their salary range. (RSUF 105)
45. Oracle's training materials state that while it is perfectly appropriate for a newly promoted employee to fall in the first quartile of the new salary range, the compensation team discourages dry promotions where new employees would fall below the range, because eventually getting the employee appropriately positioned in the range following a promotion without an increase can be quite difficult. (RSUF 187)
46. In the course of discovery, Oracle provided OFCCP with thousands of additional pages documenting Oracle's compensation procedures and practices. (RSUF 54)
47. Oracle's compensation framework considers an employee's particular knowledge, skills, abilities, performance, experience, and contributions. (RSUF 94)
48. Oracle advises managers that base salary should be "[l]inked to [an] employee's skills and competencies in [the] current role, as well as the sustained performance and the local market." (RSUF 62)
49. Oracle advises employees that "to determine your salary and total cash compensation package, we take into account market research, your Career Level and your individual performance." (RSUF 63)
50. When making compensation decisions, managers are instructed to:
 - i. consider how an employee's compensation compares to her peers;
 - ii. account for each employee's relevant knowledge, skills, abilities, and experience;
 - iii. balance external and internal equity considerations;
 - iv. differentiate rewards by performance; and
 - v. consider the employee's importance to the company. (OFCCP GDF 7)

51. In response to a question about whether Oracle's employees can ask a candidate about current or prior salary history, Oracle answered by affirming that its employees can "no longer" ask a candidate about his/her current or prior salary. (RSUF 161)
52. In a document titled "HR Learning Session US Pay Equity Laws and Salary History Bans" under a sub-heading of "What is changing" Oracle stated that the change is not to ask candidate about current or prior salary. (RSUF 158)
53. In an e-mail dated October 25, 2017, Oracle announced that managers and others acting as agents of Oracle during the hiring process can no longer request salary history details from external candidates who are interviewing for work in a US location. (RSUF 169)
54. Oracle instituted a new policy in October 2017 that Oracle employees may no longer request salary history details from external candidates who are interviewing for work in a US location. (RSUF 168)
55. In or around March 2013, Oracle listed a candidate's compensation (e.g., "70K base salary + stock options" and "\$138K plus bonus") in the "Current Compensation" field in its "Candidate Profile Summary." (RSUF 166)
56. Jobs at Oracle are grouped into a "global job table" which is a table made up of unique job codes that are the specific combination of the four other elements of the global job table: job function (such as Product Development), specialty area (such as Software Engineer), systems job title (such as software developer 3), and a Global Career Level (such as individual contributor 3). (RSUF 65)
57. Oracle uses the term "System job title" interchangeably with "Global Job Title." (RSUF 70)
58. This job title is distinct from other titles Oracle's employees can use called "discretionary titles." Oracle's training materials explain that in general the global job title is not the title the employee might use to describe his job to colleagues or clients or use for business cards. (RSUF 70)
59. Various IC and M levels have discretionary titles that are used to describe them. (RSUF 77)

60. “Function,” as used in the context of Oracle’s Job Codes, describes the general type of work the employee performs. (RSUF 71)
61. Oracle categorizes the jobs in which its employees work by job functions. (OFCCP GDF 20)
62. Within each job function, employees are further divided into job families (e.g., Applications Developers) and then into system job titles with a corresponding numeric job code. (OFCCP GDF 25)
63. “Specialty Area,” as used in the context of Oracle’s Job Codes, is a “subset of the function and is intended to further identify the work performed.” (RSUF 72)
64. “Career Level” or “Global Career Level” is a “broad category that indicates increased skill, knowledge, and responsibilities and performance expectations. The higher the career level, the higher the complexity of the job duties.” (RSUF 73)
65. There are two Career Level paths: Management (M1-M10) and Individual Contributor (IC0 to IC6). There is no direct mapping between M-levels and IC-levels. (RSUF 75)
66. Responsibilities, contribution and job complexity should increase from one job level to the next in the Career Level hierarchy. (RSUF 74)
67. If an employee’s Global Career Level changes, then the employee’s job code necessarily changes because each unique job code is tied to a specific Global Career Level. (RSUF 80)
68. Oracle’s instructions permit placing an employee in a Global Career Level that is one level above or one level below the job for which the job candidate is being considered, placing the employee in a different salary range. (RSUF 155)
69. Each system job title associates a given employee with a particular career level. (OFCCP GDF 29)
70. The “focal review process” also known as “focal reviews,” “salary review process,” and “on-cycle salary increase process” is a periodic review process at Oracle wherein individual Oracle managers review all eligible employees’ salaries at one point in time. (RSUF 98)

71. During a focal review, LOB heads receive a budget for salary increases from Oracle's highest level executives, which they can allocate in their discretion to lower-level managers within their organizations. (OFCCP GDF 40, RSUF 103)
72. The majority of salary increases at Oracle occur during focal reviews. Off-cycle salary increases are not common. (RSUF 139, OFCCP GDF 39)
73. In some years, Oracle does not conduct any focal reviews and thus does not give any focal based salary increases. For example, Oracle conducted a focal review in late 2017 and again in 2019, but not in 2018 such that base salary increases for 2017 and 2019 occurred on January 1, 2018, and June 1, 2019, respectively. (RSUF 137)
74. During focal reviews, managers are not required to rank employees they supervise when making pay increase proposals. (RSUF 126)
75. Oracle repeatedly advised managers that: "As a manager, you may not always have the budget to perfectly place all your employees." (RSUF 104, incorporating caveat described in Oracle's response)
76. Oracle warns managers that "the business climate and focal budgets play the biggest role in how managers are able to position employees within their salary range." (RSUF 105, incorporating caveat described in Oracle's response).
77. Budgets for salary increases during the focal review processes between 2013 and 2019 have been "fairly lean." (RSUF 111)
78. Kate Waggoner, Oracle's Senior Director of Global Compensation, testified at a deposition that a "7 percent [raise] for a focal [process raise for an employee] is huge." (RSUF 132)
79. Oracle told an employee who asked about possible pay discrimination that there were several business factors contributing to the level of this employee's salary, including budgetary constraints that impacted the ability to give annual adjustments to make larger adjustments to the employee's salary during focal processes. (RSUF 131)
80. In or around May 2014, Oracle justified a 65.49% off-cycle "dive and save" increase of \$50,000 to prevent someone from going to a competitor when their salary was \$9,539.46

below the minimum dollar amount of the salary range and her direct reports were earning 45% to 65% more than she was. (RSUF 133)

81. In or around 2015, Oracle justified a 25% off-cycle base salary increase of \$43,634 for a Vice President who was \$14,412 below the minimum dollar amount of the salary range because this vice president did not receive a salary increase when promoted and his managers were unable to rectify this problem over four years of focal reviews. His manager stated that he had tried to pull the employee's salary up to within the band, but that this is difficult to do with such significant salary compression. He said that he faced a "rob Peter to reward Paul for a promotion" situation and noted that he has additional employees who also face significant salary compression. (RSUF 134)
82. In or around July 2014, Oracle justified a 22% off-cycle "dive and save" increase of \$37,985 to prevent an employee from going to a competitor who was in the first quartile of the salary range even though he received outstanding performance evaluations at Oracle for the last five years. As justification, the requesting e-mail stated that, in summary, the employee had been on their radar for correction for the past few years; the employee had been very dedicated, professional and real team player and has been patiently waiting for a meaningful correction to get him close to the market rate. (RSUF 136)
83. Oracle awards bonuses to employees on a discretionary basis through a Global Corporate Bonus that Kate Waggoner's Global Compensation Team provides the instructions and training for how to administer. (RSUF 107)
84. When Oracle's CEOs allocate a bonus budget in a given year, Oracle's Line of Business (LOB) heads further allocate this budget. The LOB Heads and Executive Management have complete discretion when further allocating budgets and awarding bonuses to individuals within their organization. (RSUF 108, modified to incorporate caveat described in Oracle's response)

85. Bonuses at Oracle are discretionary and are not entitlements; instead, they are designed to reward employees for achieving strategic company goals, such as profitability. (OFCCP GDF 47)
86. Since 2013, Oracle has had lean corporate bonus budgets. (RSUF 110)
87. Oracle warns managers that while rewards should be differentiated by performance, managers' limited bonus budget make this goal difficult to attain. (RSUF 109)
88. Oracle's compensation training states that the starting point for transfers should be lateral (targeting the same base salary compa-ratio in the employee's old and new roles). (RSUF 173)
89. Oracle's instructions for addressing "Internal Transfers" states that transfer should be at "equal career level and salary." (RSUF 174)
90. Oracle's compensation training to managers instructs them that internal transfers should not be used as a means to increase salaries. (RSUF 175)
91. Oracle purposely discourages granting pay increases when its employees laterally transfer from one position to another because if employees were given raises with a transfer, the organization would be beset by infighting as managers sought to poach staff from other organizations with promises of increased compensation. (RSUF 177)
92. A transfer within Oracle can occur with no increase in salary or other compensation unless an employee's current salary places him or her below the minimum range for the new job. (RSUF 178)
93. Oracle's Employee Handbook and training materials define a promotion as a move from a job in one Career Level to a job in a higher Career Level with greater responsibility and impact on the Company's business. (RSUF 180)
94. Promotions at Oracle may be made without a salary increase. (RSUF 181)
95. An Oracle training instructed managers that a promotion does not necessarily require a simultaneous salary increase, and that the salary increase would normally be taken care of during the salary increase process. (RSUF 184)

96. In the Product Development LOB, there are situations where off-cycle promotions did not include raises and managers told employees that they would get them a raise on the next focal cycle. (RSUF 185)
97. Oracle's training materials state that if an employee is positioned very low in their current salary range, or has a salary that is not in line with the peer group in the new role, a promotion without a salary increase could cause internal equity issues, and may even cause the employee to fall below the minimum of the new salary range. (RSUF 186)
98. The Employee Handbook has sections that pertain to affirmative action, compensation, career development, promotions, transfers, and internal training and development. (RSUF 189)
99. At no place in the compensation section of the Employee Handbook does it indicate that compensation is based on or will be adjusted by product. (RSUF 190)
100. At no place do the following compensation trainings produced by Oracle during the underlying investigation and this litigation indicate that Product should be considered in setting compensation:
1. Q4FY15 HR Webinar Oracle Compensation" dated March 2015;
 2. "Oracle Compensation Guidelines," undated;
 3. "Global Compensation," dated 12/18/17;
 4. Untitled, PPT presentation, copyright 2012;
 5. "Managing Compensation," dated July 2016;
 6. "Managing Compensation at Oracle," undated;
 7. "Global Compensation Training: Salary Ranges at Oracle," copyright 2011;
 8. Global Compensation Training: Managing Pay Module, copyright 2011;
 9. "Managing Compensation," dated April 2016;
 10. "Global Compensation Training: Compensation Processes," dated 2011;

11. “Annual Bonus Program and Workforce Compensation: Manager Training,” copyright 2018;
12. “Manager Training: Compensation Process for Global Corporate Bonus & Fusion Workforce Compensation,” dated June 2014;
13. “New Manager Training: Compensation Processes/Compensation Workbench,” dated May 2011;
14. “Recruit & Hire at Oracle: Module 6: How to Create an Offer in iRecruitment,” copyright 2017;
15. Global Compensation Guidelines Training North America: US,” dated May 2013. (RSUF 191)

101. The U.S. Employee Handbook that Oracle provided to OFCCP in the underlying investigation of this litigation did not identify “Organization” name or “Cost Center” as a factor that affected compensation under the heading of “Focal Salary Review.” (RSUF 193)

102. At no place do the following compensation trainings produced by Oracle during the underlying investigation and this litigation indicate that “Organization” or “Cost Center” should be considered in setting compensation:

1. Q4FY15 HR Webinar Oracle Compensation” dated March 2015;
2. “Oracle Compensation Guidelines,” undated;
3. “Global Compensation,” dated 12/18/17;
4. Untitled, PPT presentation, copyright 2012;
5. “Managing Compensation,” dated July 2016;
6. “Managing Compensation at Oracle,” undated;
7. “Global Compensation Training: Salary Ranges at Oracle,” copyright 2011;
8. Global Compensation Training: Managing Pay Module, copyright 2011;
9. “Managing Compensation,” dated April 2016;

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10. "Global Compensation Training: Compensation Processes," dated 2011;
 11. "Annual Bonus Program and Workforce Compensation: Manager Training," copyright 2018;
 12. "Manager Training: Compensation Process for Global Corporate Bonus & Fusion Workforce Compensation," dated June 2014;
 13. New Manager Training: Compensation Processes/Compensation Workbench," dated May 2011;
 14. "Recruit & Hire at Oracle: Module 6: How to Create an Offer in iRecruitment," copyright 2017;
 15. "Global Compensation Guidelines Training North America: US," dated May 2013. (RSUF 194)
103. Oracle has Global Approval Matrices that identify the management approvals required for various human resource functions like hiring, assignment, changes in base salary, awarding of bonuses and allocation of equity (aka stock). (RSUF 112)
104. Oracle's Global Approval Matrices state that approvals for base salary increases, bonuses, and stock or stock options allocations have to be made at the level of "CEO(s) & Executive Chairman and CTO," "Office of the CEO," the Board of Directors, or Thomas Kurian. (RSUF 113)
105. All increases in pay need to be approved all the way to the top of an employee's management chain of command. (RSUF 114)
106. The approvals for base salary increases goes all the way up through the CEO's office. (RSUF 117)
107. In a 2014 compensation training, managers were instructed: "Do not communicate any changes [in compensation] until the 'Last Approval Action' shows 'Larry Ellison.'" (RSUF 120)
108. In a 2011 compensation training, managers were instructed: "You should not communicate any changes until we obtain final approval from LJE." (RSUF 121)

109. All employment offers are approved by the Oracle executive office. (RSUF 150)
110. Oracle’s managerial training provides that there will generally be no change in base salary and job level for U.S. domestic transfers unless Larry Ellison gives his approval. (RSUF 172)
111. Appropriate levels of management must approve any compensation adjustment associated with a transfer. (RSUF 179)
112. In a document titled “HR Learning Session US Pay Equity Laws and Salary History Bans” under a sub-heading of “What is changing” Oracle stated that it is removing the “current salary field” from the offer form in iRecruitment. (RSUF 159)
113. Prior to October 2017, Oracle’s iRecruitment “Offer Template” had a field for “Candidate’s Current Salary/ATV” and Oracle’s instructions for using this field in this template was to enter numerals only. (RSUF 164)
114. In or around February 2014, Oracle put an employee’s current compensation information (e.g., \$110,000.00 plus an annual bonus of 20%) in the “Comments” column for line 1 of the “Approval History” section of its iRecruitment “Candidate Details” form, such that subsequent reviewers like Thomas Kurian and Lawrence Ellison could review the prior compensation information before approving. (RSUF 165)
115. Some organizations at Oracle do performance reviews and some don’t. (RSUF 143)
116. Madhavi Cheruvu, a human resources Vice President, could not remember in June 2019 when she last did an employee performance evaluations, but knows that she did not do any in the last two years. (RSUF 145)
117. Oracle’s performance review system is separate from its compensation programs. (RSUF 148)
118. Oracle’s Affirmative Action Plan (AAP) states that Oracle’s affirmative action policy and program are “supported by Oracle’s executives, Larry Ellison, Safra Catz, and Mark Hurd.” (Oracle’s Response to OFCCP’s Statement of Additional Uncontested Facts)

submitted with Oracle's Reply brief to Oracle's Motion for Summary Judgment ("RAUF") 1)

119. Oracle's written AAP for January 1, 2014, to December 31, 2014 (2014 AAP, signed by Safra Catz, President) designated Shauna Holman-Harries, Director Diversity Compliance, as the "Individual Responsible for Plan Implementation." (RSUF 207)
120. Oracle's Affirmative Action Plan states that Oracle's Director of Diversity Compliance has the responsibility to implement an effective auditing and reporting system that includes developing and analyzing internal audit for various areas including compensation. (RSUF 263)
121. Shauna Holman-Harris testified that she performed no compensation analyses apart from the privileged analyses she carried out at the direction of counsel. (RSUF 211)
122. Oracle admits that its upper level managers and Human Resources department did not carry out any centralized compensation audits to comply with the Affirmative Action internal audit requirement of 41 CFR § 60-2.17. (RAUF 2)
123. Oracle does not maintain a centralized database identifying the products on which its employees performed work. (RSUF 192)
124. Joyce Westerdahl is not aware of anyone at Oracle who has been trained to carry out internal pay equity assessments by gender or race. (RSUF 217)
125. The 2014 AAP states that Oracle develops and analyzes Internal Audit Reports to assess performance in areas, including compensation. (RSUF 208)
126. At no point in Oracle's Position Statement does it identify Internal Audit Reports or any other centralized compensation analysis it performed to comply with its federal regulatory obligations under its AAP. (RSUF 209)
127. The U.S. Employee Handbook that Oracle provided to OFCCP in the underlying investigation contains a section titled "Internal Training and Development" with subsections titled "Required Training" and "Online Training" that do not list any training for affirmative action. (RSUF 225)

128. The Affirmative Action Section of the U.S. Employee Handbook that Oracle provided to OFCCP in the underlying investigation did not address compensation. (RSUF 226)
129. Oracle first made affirmative action training mandatory for all US managers and HR personnel in October 2015. (RSUF 228)
130. In December 2017, Oracle told an employee who asked about possible pay discrimination that there were several business factors contributing to the level of the employee's salary, including the employee's starting salary at Oracle. (RSUF 170)
131. In manager trainings, Oracle instructs managers to beware of recruiting at an artificially low salary, particularly where a candidate comes from a lower paid sector, as this may give rise to equity issues in the future. (RSUF 171)
132. Oracle has three components to its compensation: (1) cash, (2) stock, and (3) benefits.) (RSUF 60)
133. Oracle's cash component consists of two parts: base salary and short term incentives like commissions, other incentives and bonuses. (RSUF 61)
134. Dr. Madden's expert report relies on a multiple regression statistical analysis. (RAUF 53)
135. Neither of Dr. Janice Madden's reports relied on OFCCP's statistical analyses that supported the NOV or the SAC. (RSUF 235)
136. Dr. Saad never analyzed the base pay of Oracle employees (other than for Oracle (except for starting pay of new hires). (RSUF 240)
137. Dr. Saad never ran an analysis on Medicare wages (other than replicating what OFCCP and Dr. Madden did). (RSUF 241)
138. Dr. Saad understands that Oracle does not have compensation policies (other than a 2017 policy regarding prior pay). (RSUF 242)
139. Dr. Saad testified that he used an Organization variable as a "proxy for the nature of the products that employees are involved with." (RSUF 253)

140. On or about September 24, 2014, OFCCP initiated a compliance review under the Executive Order of Oracle's headquarters in Redwood Shores, California (Redwood Shores Compliance Review) (RSUF 8)
141. On September 24, 2014, OFCCP initiated the audit of Oracle's Redwood Shores headquarters that led to this litigation. (OFCCP GDF 57)
142. In its Scheduling Letter and attached Itemized Listing dated September 24, 2014, OFCCP asked Oracle to provide its "Executive Order Affirmative Action Program ("AAP")." (OFCCP GDF 122)
143. Ms. Holman-Harries sent OFCCP Oracle's AAP and related documents on October 28, 2014, in response to OFCCP's initial request for documents at the beginning of the compliance review. (OFCCP GDF 123)
144. OFCCP first requested educational data in a letter on November 19, 2014 and another email on February 10, 2015. (RAUF 28)
145. In an email dated December 11, 2014, Oracle told OFCCP that "we do not maintain education or work experience in our database." (RAUF 29)
146. OFCCP specifically requested the school attended and educational degree for the 2014 snapshot in a letter on April 27, 2015. (RAUF 30)
147. OFCCP sent a letter in which it requested "Name of school attended" and "Educational degree earned" on July 30, 2015. (RAUF 31)
148. In her October 29, 2015 email responding to outstanding document requests, Shauna Holman-Harries responded to OFCCP's request for data on "Names of school attended" and "Education degree earned" for the 2014 snapshot by stating: "We don't have this data in any database and if it is available in any individual employee's file it would be extremely burdensome and time consuming to compile." In that email, Ms. Holman Harries Oracle did not indicate that Oracle would attempt to compile this information. (RAUF 32)
149. Robert Doles sent a November 2, 2015 letter to Shauna Holman-Harries requesting "Name of school attended" and "Educational degree earned." (RAUF 33)

150. Oracle admits that it did not produce the requested educational data prior to the issuance of the NOV on March 11, 2016. (RAUF 34)
151. Oracle did not produce the requested educational data between the filing of the NOV and the filing of the complaint on January 17, 2017. (RAUF 35)
152. Shauna Holman-Harris testified that at least some of the education data as to which Oracle had advised OFCCP during the audit that Oracle did not maintain education data in their database was in Oracle's database.) (RAUF 36)
153. After litigation commenced, in 2018 and 2019, Oracle produced some educational data in database form. (RAUF 37)
154. OFCCP sent Oracle a request for data showing personnel actions providing job and salary information on or around February 11, 2015. (OFCCP GDF 108)
155. Subsequent requests from OFCCP, including on April 27, 2015, also sought data showing personnel actions providing job and salary information. (OFCCP GDF 109)
156. On June 16, 2015, Oracle produced a compensation spreadsheet containing some of the job and salary information OFCCP had requested, and informed OFCCP of continuing difficulties in complying with certain aspects of OFCCP's requests. (OFCCP GDF 110)
157. On August 28, 2015, OFCCP added a request that the 1/1/2013 compensation snapshot include 16 additional fields. (OFCCP GDF 97)
158. Shauna Holman-Harries, Oracle's Senior Director Diversity Compliance, responded to the August 28 request the same day, noting the request was enormous and that Oracle would provide the information as soon as it reasonably could, given OFCCP's other outstanding requests. (OFCCP GDF 98)
159. In her October 29, 2015 email responding to outstanding document requests, Shauna Holman-Harries responded to OFCCP's request for data on "Prior salary immediately before joining Oracle" by referring to language stating: "We don't have this data in any database and if it is available in any individual employee's file it would be extremely burdensome and time consuming to compile." In that email, Ms. Holman

Harries Oracle did not indicate that Oracle would attempt to compile this information.
(RAUF 38)

160. On October 29, 2015, Ms. Holman-Harries sent 29 emails providing information sought by OFCCP, explaining that certain information had already been provided, and asking OFCCP why it sought certain information. (OFCCP GDF 99)

161. OFCCP did not respond to the question posed by Oracle on October 29, 2015.
(OFCCP GDF 112)

162. On November 2, 2015, OFCCP's Acting District Director Robert Doles identified data and documents that OFCCP claimed were not provided. (OFCCP GDF 100)

163. Robert Doles sent a November 2, 2015 letter to Shauna Holman-Harries requesting "Prior salary immediately before joining Oracle.") (RAUF 39)

164. OFCCP admits that the November 2, 2015 letter identifies all of the data and documents that form the basis of its claims that Oracle failed or refused to produce documents as alleged in Paragraphs 44 and 45 of the Second Amended Complaint.
(OFCCP GDF 101)

165. On November 2, 2015, Ms. Holman-Harries sent an email responding to Mr. Doles' letter noting the October 29 production as responsive to his letter. (OFCCP GDF 102)

166. On November 2, 2015, OFCCP responded stating that Oracle's October 29 production was not complete. (OFCCP GDF 103)

167. On November 6, 2015, Ms. Holman-Harries asked OFCCP to review the materials produced on October 29 and to "let [her] know" if OFCCP "still [had] concerns." (OFCCP GDF 104)

168. Oracle did not produce the requested prior salary information between the filing of the NOV and the filing of the complaint on January 17, 2017. (RAUF 41)

169. After litigation commenced, in 2018 and 2019, Oracle produced some prior salary data in database form. (RAUF 43)

170. On March 4, 2015, OFCCP requested a listing of Oracle employees who have made discrimination, harassment or retaliation complaints. (RAUF 44)
171. On March 19, 2015, OFCCP requested from Oracle all information related to internal complaints of workplace discrimination. (RAUF 45)
172. On March 20, 2015, OFCCP received a response from OFCCP, stating “None” in response to the request for the listing of employees who had made discrimination complaints. (RAUF 46)
173. On April 15, 2015, OFCCP sent a letter to Gary Siniscalco recounting that it had found several EEOC charges filed by Oracle employees at the Redwood Shores facility, and expressing concern about Oracle’s lack of candor about the existence of the complaints. (RAUF 47)
174. OFCCP then requested “all internal and external complaints of discrimination, harassment or retaliation filed at Oracle headquarters within the past three years.” (RAUF 48)
175. Oracle admits that during the compliance review, Oracle did not provide the full requested information regarding internal and external discrimination complaints. (RAUF 49)
176. In an August 26, 2015 email, OFCCP asked Oracle to “please provide wage information for snapshot date 1/1/13, containing all fields already submitted for snapshot date 1/1/14?” (OFCCP GDF 96)
177. Oracle admits that it did not produce the 2013 snapshot of its compensation data prior to the issuance of the NOV on March 11, 2016. (RAUF 51)
178. To the extent relevant to OFCCP’s remaining claim for compensation discrimination, Oracle has now produced in the litigation, in response to discovery requests from OFCCP, the data regarding job and salary history that OFCCP claims Oracle refused to produce during the audit. (OFCCP GDF 132)
179. On November 19, 2014, OFCCP requested from Oracle “[a]ll self-audits/pay equity studies.” (OFCCP GDF 115)

180. Oracle did not respond to OFCCP's November 19, 2014 request because it deems its internal pay equity analyses to be privileged. (OFCCP GDF 115)
181. On April 27, 2015, OFCCP asked Oracle to provide the "[d]ates of any internal pay equity analysis conducted during the past three years, as required under 60-2.17," and further asked Oracle to provide the "[d]ataset used for that analysis" and "[a]ctions taken, if any, as a result of the analysis." (OFCCP GDF 117)
182. On June 2, 2015, Ms. Holman-Harries also explained to OFCCP that "[w]ith regard to pay audits to assess legal compliance with Oracle's non-discrimination obligations and to further ensure Oracle's compensation policies and practices are carried out, those are conducted by our outside EEO compliance counsel at Orrick." (OFCCP GDF 119)
183. OFCCP admits that Oracle asserted attorney-client privilege over its pay equity analyses from an early date in the compliance evaluation. (OFCCP GDF 120)
184. As it did during the audit, Oracle has continued in this litigation to assert the attorney client privilege and work product protection over certain of its pay equity analyses conducted by or at the direction of legal counsel. (OFCCP GDF 133)
185. During the Redwood Shores Compliance Review, OFCCP came on site twice for approximately eight days to conduct interviews with at least 35 managers and human resources employees. (RSUF 10)
186. Brian Mikel conducted a telephonic interview of Lisa Gordon as part of OFCCP's audit of Oracle's Pleasanton facility.) (RSUF 195)
187. Shauna Holman-Harries attended OFCCP's telephonic interview of Lisa Gordon.) (RSUF 196)
188. After this interview, OFCCP sent Oracle an interview summary for Lisa Gordon's review and signature. (RSUF 197)
189. Shauna Holman Harries' declaration of October 2, 2018, which states that the notes attached as Exhibit A are "a true and correct copy of the OFCCP's interview of Lisa Gordon." (RSUF 199)

190. On February 10, 2015, Shauna Holman-Harries sent OFCCP Lisa Gordon's interview statement with revisions. (RSUF 203)
191. On March 11, 2016, OFCCP issued a Notice of Violation (NOV) pertaining to the Redwood Shores Compliance Review. (RSUF 11)
192. The NOV provided Oracle with a list of the variables, including job title, that had been included in the regression analyses and the results of those analyses. (RAUF 4)
193. The NOV described the data fields (from the compensation data Oracle provided to OFCCP during the compliance review) that OFCCP included in its compensation analysis. (RSUF 23)
194. OFCCP identified data fields it purported to use in the NOV model by using the same title as Oracle data fields (RAUF 6)
195. OFCCP used factors in its NOV model with the same title as the data fields Oracle provided to OFCCP (RAUF 10)
196. OFCCP used factors in its NOV model with the same title as the data fields Oracle provided to OFCCP (RAUF 11)
197. The NOV alleges finding significant compensation disparities for women in Product Development, Information Technology, and Support Roles, and for Asians and African-Americans in Product Development roles. (RAUF 8)
198. OFCCP's NOV stated that OFCCP found 8.41 standard deviations in pay between Men and Women in the Product Development job function, and 6.55 standard deviations in pay between Whites and Asians in Product Development (RAUF 9)
199. The NOV alleges OFCCP found pay disparities among employees in "similar roles) (RAUF 12)
200. On March 29, 2016, OFCCP sent an email inviting Oracle to participate in a face-to-face meeting for conciliation, and requesting a rebuttal position from Oracle detailing how the observed disparities can be explained by legitimate, nondiscriminatory reasons or business necessity. (RAUF 17)

201. OFCCP emailed Oracle on March 29, 2016, proposing a meeting during April 2016. (RSUF 15)
202. Oracle declined OFCCP's offer to meet in person to discuss the NOV until October 6, 2016. (RAUF 16)
203. Oracle sent OFCCP a letter on April 11, 2016. (RAUF 18)
204. In Oracle's letter of April 11, 2016, Oracle stated that it preferred written communication at that time and attaching 57 questions for OFCCP about its findings. (RSUF 14)
205. Oracle's compliance attorney represents that he is "extremely well-versed" in "OFCCP's regulations" and "OFCCP's audit practices." (RAUF 13)
206. OFCCP replied on April 21, 2016, responding to 40 of Oracle's questions, but refusing to answer the others. (RSUF 16 & RAUF 19)
207. OFCCP asserted that the questions it was not answering in its April 21, 2016, correspondence invaded the Agency's deliberative process and other privileges. (RSUF 17)
208. Oracle submitted a position statement on May 25, 2016. (RSUF 18)
209. On June 8, 2016, OFCCP issued a Notice to Show Cause (SCN) why enforcement proceedings should not be initiated. (RSUF 12 and 19)
210. Oracle objected to this notice on June 29, 2016, arguing, in part, that the parties had not yet conciliated. (RSUF 20)
211. OFCCP responded to this letter on September 9, 2016. In that response, OFCCP offered to meet to conciliate the violations. (RSUF 21)
212. On September 9, 2016, OFCCP sent a letter to Oracle. In that letter, OFCCP wrote: "While Oracle declares its desire to engage in conciliation, its stated desire rings hollow, given that it has refused to meet in person, it continues to emphasize and complain about the audit process and other procedural matters, its demand that OFCCP provide answers to approximately 60 questions, and its failure to make a meaningful, substantive response to OFCCP's findings." (RAUF 20)

213. Further communications were exchanged, culminating in a September 23, 2016, letter from OFCCP explaining why it found Oracle's responses and objections insufficient. (RSUF 22)
214. OFCCP sent a letter dated September 23, 2016 and this letter states "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." (RAUF 21)
215. OFCCP and Oracle met in person and by letter regarding the allegations in the NOV and the SCN. (RSUF 13)
216. The parties met in person on October 6, 2016. (RSUF 26)
217. At the October 6, 2016, meeting, Janette Wipper, OFCCP's Regional Director at the time, described the variables used in OFCCP's compensation analysis. (RSUF 27)
218. At the October 6, 2016, meeting, Oracle took the position that OFCCP should be looking at individuals or cohorts. (RSUF 28)
219. At the October 6, 2016, meeting, Janette Wipper told Oracle that it was not going to engage in a cohort analysis. (RSUF 29)
220. At the October 6, 2016, meeting, OFCCP and Oracle discussed the fact that Oracle did not have data showing the products its employees worked on. (RSUF 30)
221. At the October 6, 2016, meeting, Janette Wipper indicated to Oracle that steering women into lower paying jobs could be tainting Oracle's compensation system. (RSUF 31)
222. On October 7, 2016, Mr. Siniscalco wrote to Ms. Wipper: "We all feel the conciliation meeting was very productive, and moved both sides in a positive direction." (RAUF 24)
223. On October 31, 2016, Oracle sent OFCCP a letter that did not make a counteroffer or provide a counter-statistical analysis. Oracle instead presented narrative information about individuals. (RAUF 25)

224. In a letter following the October 6, 2016, meeting, Oracle continued to take the position that OFCCP should analyze the compensation of Oracle’s workforce using a cohort analysis. (RSUF 33)
225. In a letter following the October 6, 2016, meeting, Oracle did not make any monetary offer to resolve violations OFCCP asserted in the NOV. (RSUF 34)
226. On December 9, 2016, OFCCP wrote to Oracle, noting that “Oracle still has not provided a competing statistical analysis to rebut OFCCP’s regressions,” and providing case law on the requirements for comparators under Title VII law. (RAUF 26)
227. Between March 11, 2016, and January 2017, Oracle never offered any variable that OFCCP should consider in its statistical model that would explain the compensation disparities described in the NOV.(RSUF 35)
228. Between March 11, 2016, and January 2017, Oracle never presented any competing statistical model to OFCCP. (RSUF 36)
229. Neither prior to the issuance of the NOV, nor later, during the parties’ conciliation efforts, did Oracle ever suggest any alternative variable to better account for “all the skills, duties, or experience associated with a particular position” in a regression analysis. (RAUF 5)
230. The case was stayed from October 30, 2017 to January 23, 2019 to facilitate mediation.) (RAUF 27)

C. Oracle

Oracle did not interpret the Court’s order to invite argument regarding stipulations. Instead, Oracle interpreted the Court’s order as merely asking the parties to list the facts to which they had stipulated (which are listed above in Section III(A)). Nevertheless, in light of OFCCP’s lengthy insert included in Section III(B) above, Oracle responds as follows:

OFCCP’s assertion that the Parties identified 230 undisputed facts which are judicial admissions by the Parties is wrong both legally and factually. As a legal matter, the cases OFCCP cites do not concern separate statements or responses thereto. Moreover, and notwithstanding that the summary judgment “facts” are not stipulations for the purposes of trial,

OFCCP's characterizations of this evidence are inaccurate. To offer just some examples, OFCCP repeatedly mischaracterizes the purported undisputed nature of these facts. *See, e.g.*, Fact Nos. 36 (RSUF 67); 71 (GDF 40, RSUF 103); 75 (RSUF 104); 76 (RSUF 105); 84 (RSUF 108). At other times, OFCCP ignores that its "fact" mischaracterizes the evidence in a misleading way. *See, e.g.*, 39 (RSUF 91); 42 (RSUF 95); 43 (RSUF 96); 44 (RSUF 105); 87 (RSUF 109); 92 (RSUF 178); 100 (RSUF 191); 101 (RSUF 193); 102 (RSUF 194); 103 (RSUF 112); 104 (RSUF 113); 105 (RSUF 114); 106 (RSUF 117); 123 (RSUF 192); 152 (RAUF 36). OFCCP also ignores instances in which its purported facts were not supported by evidence. *See, e.g.*, 35 (RSUF 88); 40 (RSUF 92); 47 (RSUF 94); 67 (RSUF 80). Lastly, many of OFCCP's facts are simply not material to the issues this Court must decide. *See, e.g.*, 5 (RSUF 2); 7 (RSUF 3); 9 (RSUF 37); 10 (RSUF 38); 21 (RSUF 60); 28 (RSUF 151); 29 (RSUF 152); 30 (RSUF 153); 31 (RSUF 155).

IV. DISPUTED FACTS

A. OFCCP

As OFCCP's list of undisputed facts from the dispositive motions above makes apparent, the parties were able to identify a large number of facts that are not in dispute through the dispositive motion briefing process. OFCCP strongly suspects that the parties are in agreement about a large number of additional facts. However, Oracle agreed to only one of OFCCP's 151 proposed stipulations, even though the vast majority of OFCCP's proposed stipulations were built on Oracle's own documents and admissions.

In the disputed facts enumerated below, OFCCP indicates the source of support for a fact where OFCCP believes Oracle has no basis for not stipulating in light of its responses to requests for admission, clear declaration or deposition testimony from Oracle's executives or 30(b)(6) designees or similar evidence. Given the large number of issues *not* in dispute, the list of

disputed facts below must be read in conjunction with the undisputed facts as many of the disputed facts are small aspects of larger facts as to which the parties agree.⁴

Oracle Developed Its Compensation Policies and Program, Trained Its Managers, and Expected and Enforced its Managers' Compliance with Its Policies

1) “Oracle has made significant efforts, at considerable time and cost, to develop organization, hiring, promotion, and compensation policies, practices, strategy, processes, and procedures to attract and retain top talent in an industry where competition for employees is robust.” (Declaration of Oracle’s Senior Vice President of Human Resources, Victoria Thrasher, April 20, 2017 (in support of the protective order over the documents at issue in this case))

2) In 2011, Oracle dedicated significant effort to developing compensation policies and procedures, including nine modules of global compensation training, all of which went through legal review, and these policies and training have not changed much since 2011. (Waggoner PMK depo at 74:20-79:1, 90:15-93:22; Waggoner May 2019 Depo at 45:22-49:9)

3) Oracle testified that the Compensation 101 training developed prior to 2013 is still current. (Waggoner PMK depo at 90:15-93:22; Waggoner May 2019 depo at 45:22-49:9)

4) Oracle rolls out its compensation training to its managers and expects its managers to follow this training. (Waggoner PMK Depo at 53:11054:3, 65:2-66:4).

5) Employees in Oracle’s Human Resources and Compensation, also known as compensation consultants, are assigned to each line of business to work with and support managers to ensure compliance with Oracle’s compensation policies. (Waggoner PMK depo at 66:10-69:9)

6) Oracle’s compensation approval process delineated in its Oracle’s global approval matrices *require* that its human resources staff review and approve recommended compensation

⁴ After listing its Disputed Facts, Oracle misstates OFCCP’s prefatory comments here. OFCCP acknowledges that Oracle may have actual disputes with some of these facts. However, Oracle has failed to meaningfully engage with OFCCP to stipulate to facts that are not seriously in dispute and derive from its own documents or admissions.

decisions (ORACLE_HQCA_0000062710-32), allowing human resources to ensure compliance with Oracle's compensation policies.

7) In 2016, Oracle rolled out written guidelines regarding how much equity should be granted to different career levels and locations. (Waggoner May 2019 Depo at 45:22-49:9).

8) Oracle reserves equity compensation to high level, critical or "key to retain" employees, "generally M-4 and above," and only about 20% of global population gets equity. (Waggoner PMK Depo. at 271:20-272:19)

9) To inform the setting of salary ranges for each job code in each locality, Oracle conducts a market study annually to set wages. (Waggoner PMK Depo. at 126:10-127:9)

10) The midpoint for each Oracle's salary grade "is supposed to be reflective of the external market" for any job code Oracle links to a particular salary grade. (Waggoner *Jewett* Dep. at 246:23-6)

11) Oracle's conducts "periodic salary reviews" and "salary benchmarking of peers in role" using what it calls a "compa ratio," which is "the ratio of an employee's salary to the midpoint of their job's salary range." (Quoted directly from Oracle's compensation training power point slide ORACLE_HQCA_0000056234)

12) Oracle never ran compa ratios by gender or race to identify the relative salary benchmarking of women and men, or staff of different races, in the same role. (Waggoner PMK Depo at 147:7-153:3).

Oracle Set Compensation At Hire Based on the Applicant's Prior Pay Until November 2017.

13) Prior to October 2017, Oracle hiring managers regularly considered employees' compensation from their previous employer in setting compensation.

14) Prior to October 2017, Oracle requested that potential hires provide information regarding their compensation by their prior employer, frequently in the form of tax forms or pay stubs.

15) Prior to 2017, Oracle's standard notifications regarding job positions available at its Redwood Shores location, of the type exemplified by ORACLE_HQCA_0000031652, stated, "As part of Oracle's employment process candidates will be required to complete a pre-employment screening process, prior to an offer being made. This will involve identity and employment verification, **salary verification**, professional references, education verification, and verification of professional qualifications and memberships (if applicable)." (Admitted in part, RFA No. 28) (emph. added).

16) A comparison of employee salary compensation at hire to an employee's prior pay (for those employees for whom Oracle retained data of prior pay) reveals nearly a 100% correlation between the salary Oracle set for employees at hire and the employee's prior pay.

Many Employees Are Not Hired Through the Requisition Process.

17) The job title, function, specialty, career level, and salary level of acquired employees is not set through the procedures Oracle uses for hires, but instead is set by Oracle's mapping process: "Mapping is the process of determining where it appears that an employee's role at an acquired company best fits within one of Oracle's job families, and at what level. . . . At times, we may need to create a new job family in the event that acquired employees will continue to perform unique jobs without a sufficiently close equivalent at Oracle." (Decl of Oracle's Director, M & A Human Resources, Michael Leftwich iso Oracle's opp. to motion for class cert., *Jewett* (filed March 6, 2019) at ¶ 6; Waggoner May Dep. 18:10-19:11, 22:3-25)

18) "Historically, acquired employees generally - but not always - transitioned to Oracle at their pre-acquisition base salary." (Decl of Oracle's Director, M & A Human Resources, Michael Leftwich iso Oracle's opp. to motion for class cert., *Jewett* (filed March 6, 2019) at ¶ 7; Waggoner May Dep. 20:1-21:11)

19) In the time period from 2013 to 2017, 1178 of Oracle's employees in the three job functions at issue in this litigation came to Oracle through Oracle's acquisitions of other companies. Of those 1178 employees, 386 employees were acquired through the acquisition of

Siebel Systems, Inc., 127 employees were acquired through the acquisition of PeopleSoft and 238 employees were acquired through Oracle's acquisition of Sun Microsystems.

20) Employees Oracle acquires through Oracle's acquisitions of other companies are not hired through Oracle's requisition process.

21) Employees Oracle hires through its employee referral program typically do not begin the application process through submitting an application to an Oracle job requisition, but instead are encouraged to interview informally with Oracle managers so that these employee referrals can be encouraged to apply for specific Oracle requisitions or newly created requisitions created for the referred applicant.

22) Oracle utilizes a staff of recruiters to recruit personnel to apply for Oracle, a process that involves the recruiters matching potential applicants with requisitions and these recruiters directing applicants to submit applications to specific requisitions.

Oracle's Executive Team Controlled All Compensation Decisions Through the Approval Process and Budget Restrictions and Oracle Never Considered Racial or Gender Pay Equity in the Approval Process.

23) Oracle requires all managers to secure approval of any compensation recommendations from Oracle's highest-level of executives prior to communicating any compensation offer to a potential hire or current employee. (Oracle Executive Vice President Loiaza Depo. at 118:6-119:5; 119:19-22)

24) In this approval process, the recommending manager would need review and approval by Oracle's HR compensation consultant assigned to that line of business, a "substantive" review by a level of management above the recommending manager, and ultimately a review at the executive level to ensure the recommended compensation was within budget and in consideration of the information listed on the approval form. (Waggoner PMK at 117:12-122:13)

25) In the relevant time period, Oracle's upper level management exercised its authorizing authority to reject altogether and/or alter pay recommendations of lower level managers.

26) At the meeting at Redwood Shores, Joyce Westerdahl, Oracle's head of Human Resources, advised a high-level executive that he should hire a woman because she will work harder for less money.

27) Oracle's upper level managers, e.g., CEOs, executive chairman, and CTO, review a summary of pay increases resulting from focal reviews to ensure front line managers did not exceed their allocated compensation budget for a particular focal review. (Waggoner 30b6 Dep. at 196:8-18)

28) The summary Oracle's upper level managers receive regarding company-wide focal reviews does not contain any information regarding pay disparities or actions taken to correct pay disparities. (Waggoner PMK Depo. at 196:8-18)

29) In Oracle's approval process, Oracle never considered race or gender when evaluating whether to approve a compensation offer. (Waggoner PMK Depo at 121:19-122:13; 147:7-153:3)

Oracle's Executive Team's Budget Decisions Deprived Front-Line Managers of Resources to Address Pay Inequities

30) At Oracle, "salary compression," occurs when a "person is underpaid relative to the market" because of the overly narrow budget Oracle allocated for salary increases. (Oracle's Exec. VP Loaiza Depo. at 283:6-285:11)

31) Oracle's top executive leadership sets Oracle's budget, including setting budgets annually for all aspects of employee compensation. (Waggoner PMK 269:16-270:8 (approval of equity); Waggoner PMK 192:19-193:4, 193:17-194:5, 250:9-252:14 (focal review compensation);

Waggoner PMK 265:9-266:19 (bonus budgets); Waggoner PMK 250:9-253:19 (describing cascading of budget after it is set by executive team).

32) Oracle's highest level executives allocate budget for compensation to each LOB (lines of business), and "[f]rom the perspective of the Compensation team, each of these LOBs is defined by its particular leader or head, who in turn reports directly to one of Oracle's CEOs (Safra Catz or Mark Hurd) or its CTO (Larry Ellison)." (Waggoner Decl., *Jewett* (1/16/19) at ¶ 11)

33) Oracle's executive team never provided a budget, annually or otherwise, to guarantee funding for its Director of Diversity Compliance or any member of its management team to implement pay adjustments to ensure gender or racial pay equity.

34) Pay adjustments recommended by any manager approved by Oracle's executive management had to be funded from the budgets Oracle's executive team made available to its managers, if any, annually.

35) Oracle's highest-level executives, its CEOs, decide whether to allocate budget to conduct a focal review in a given year. (Waggoner 30b6 Dep. at 192:19-193:4).

36) Not all Oracle employees receive a raise during a focal review year. The percentage of Oracle employees eligible for a focal review raise ranges from 40% to 80%, depending on the year. (Waggoner PMK at 246:6-248:17)

37) Between 2013 and 2019 have been 'fairly lean' for salary increases, meaning managers had "little to no focal budget, which, by definition, is not keeping up with the way the market has grown." (Waggoner PMK at 328:5-16; Oracle's Exec. VP Loaiza at 16:3-12, 283:6-284:22, 305:7-306:3 (describing that 40-50% of the employees in his organization are paid below the market rate because not enough money is provided for them in the budget)

38) In the last decade, if an employee receives a salary increase from a focal review, it tends to be around 2.5% to 3%. (Waggoner 30b6 Dep. at 308:1-16)

39) In making choices based on the limited budget Oracle's executive team provided its managers, managers were not required to prioritize redressing pay inequities, but instead, as explained by EVP Loaiza, gave "top priority" to "satisfy star performers," not "compa-ratio or anything else." (Loaiza Dep. At 285:12-288:4)

40) The bonus budget approved in 2017 was "tiny." (Waggoner 30b6 Dep. at 263:21)

Oracle Utilized its Compensation Computer Programs to Limit or Prevent Subordinate Managers from Recommending Compensation Adjustments

41) Oracle admits that "Oracle's Global Compensation Team also ensures that the software is in place to implement these compensation programs." (SUF 56)

42) Oracle's utilized two computer programs in the relevant period, Workforce Compensation and Workbench Compensation, to implement its compensation program.

43) The computer programs Oracle required its managers to utilize when recommending and securing approval for compensation decisions: does not have fields that identify the race or gender of each employee; does not permit a manager to view the compensation of employees who are not under that manager's chain of supervision; permits higher level managers to limit how lower level managers may allocate budgets for raises, including limiting raises to employees in certain jobs or in certain global career levels.

Dr. Madden's Statistical Analysis of Oracle's Compensation Data Accurately Finds Gender and Racial Pay Gaps With Statistical Significance Explicable Only by Intentional Discrimination, and Correctly Calculates the Back Wages Due to Redress Such Compensation Discrimination.

44) Dr. Madden conducted a study utilizing statistical regressions of Oracle's compensation data.

45) Dr. Madden's report demonstrate gross disparities based on race and gender in compensation Oracle pays between employees with similar skills, experience and education.

46) Oracle maintains data of "Medicare wages" ("Medicare wages data) which reveals the amount of compensation Oracle reported to the IRS annually as total compensation realized by each employee annually from Oracle (which must be reported to the IRS in the Medicare wages box on the W-2).

47) Oracle maintains data ("base pay data") which reveals the base pay (commonly known as salary) for each employee at hire and throughout the course of each employee's employment by Oracle.

48) Dr. Madden utilized correctly all Oracle's available data, including the education level data Oracle retained along with Oracle's job titles (called job descriptors by Dr. Madden and "job family" and "system job title" by Oracle), age data, and job tenure data, to identify similarly situated employees assigned by Oracle to the same system job title for purposes of statistical compensation analysis.

49) Dr. Madden correctly applied Oracle's data regarding managerial status as a control to conduct a statistical compensation analysis of similarly situated employees working in the same job title assigned by Oracle to the same managerial or non-managerial job assignment.

50) Dr. Madden correctly applied Oracle's data regarding career level as a control to conduct a statistical compensation analysis of similarly situated employees assigned by Oracle to the same job title and global career level, in addition to the same managerial or non-managerial job assignment.

51) Dr. Madden's statistical analyses correctly identify the gender pay disparities among similarly situated employees in the three job functions at issue at Oracle headquarters and correctly identify the level of statistical significance for her findings of pay disparities.

52) Dr. Madden's statistical analyses correctly identify the racial pay disparities among similarly situated employees in product development at Oracle headquarters and correctly identify the level of statistical significance for her findings of pay disparities.

53) Dr. Madden's statistical analyses correctly identify the contributing role Oracle's assignment of global career level play in the gender and racial pay disparities identified by her statistical analysis and correctly identify the level of statistical significance for her findings regarding the contributing role played by global career level assignment.

54) Dr. Madden's statistical analyses correctly identify the correlation between employees' starting salary with Oracle at hire and the employee's prior pay, for all employees in the three job functions at issue for whom Oracle has retained data regarding prior pay.

55) Dr. Madden calculations of back wages correctly identify the back wages due to correct the gender and racial pay disparities identified by her statistical analyses.

Oracle's Organization is Not Organized by Product.

56) Oracle advised its investors in 2019 in regards to concerns about its compensation practices: "Hiring and promotion pay decisions are based on a variety of non-discriminatory factors, including consideration of the job itself and the pay range associated with it, as well as the skills, experience, education and expertise the individual brings to Oracle—not race or gender." Product was not mentioned as a factor.

57) None of Oracle's training modules advises managers that they should consider product line assignment or cost center assignment in making compensation decisions.

58) Oracle is organized so that employees often provide services to different product or service lines or an entire group of product or services lines simultaneously or employees work and provide services such that they can shift to different product or service lines seamlessly over time.

59) “At a very high level, many of Oracle's products and services can be thought of in four broad categories, each layered on top of one another: (1) Applications, (2) Middleware, (3) Database, and (4) Infrastructure.” (Decl. of Oracle’s Executive Vice President Steven Miranda filed iso Oracle’s MSJ)

a) “Applications is responsible for developing, enhancing and servicing products and services for outside, third-party users (typically employers) such as accountants, human resource departments, payroll departments and sales departments.” (Decl. of Oracle’s Executive Vice President Steven Miranda).

b) “Database encompasses everything from Oracle's on premise database management platforms to new, cutting-edge, autonomous, and cloud-based data management systems.” (Decl. of Oracle’s Executive Vice President Steven Miranda)

c) “Middleware refers to the operating systems that allow Oracle's Applications and Database systems to function.” (Decl. of Oracle’s Executive Vice President Steven Miranda)

d) “Infrastructure refers to the physical hardware that interfaces with the Infrastructure.” (Decl. of Oracle’s Executive Vice President Steven Miranda)

60) In recruiting, hiring and retaining staff, Oracle typically is *not* seeking staff with product-line specific skills, but instead is seeking employees with the ability to address and solve the type of problems that will arise in creating, contributing to, or providing support to a particular class

or type of products (e.g. database design services or database products, cloud-based products, design and programming of interfaces used in many types of products).

61) Oracle's staff in the three job functions at issue at its headquarters regularly are routinely assigned to work on multiple products simultaneously.

62) Oracle's staff in the three job functions at issue are routinely assigned duties and tasks not tied to a specific product or are linked to an entire class of products.

63) Oracle's staff may transfer over their time at Oracle between and among work on different product lines without any change in compensation.

64) Oracle's executive and management structure is organized into "lines of business" ("LOB"), with the head of each line of business -- and the managerial hierarchy within each line of business -- supervising employees working on myriad and changing product lines and services within each LOB.

Oracle Maintains No Database or Record of any Factors Beyond Those Specified in Oracle's Compensation Policies

65) "Oracle's centralized data systems . . . are kept in Oracle's regular course of business and contain our system of record regarding the employment records of Oracle employees."

(Waggoner Decl., Jewett (1/16/19) ¶ 10)

66) Oracle's centralized data systems contain no fields and maintain no records regarding: years of experience; level of complexity of what they're working on (complexity of the products, duties, decision-making authority); the scope of what they're working on; years; the influence of the role; who they interact with; and if they interact with C suites levels or most of their interaction is lower levels.

67) Oracle's centralized data systems contains incomplete records regarding its employee's education (for the three job functions at issue), retaining records of only approximately 40% of

its employees' educational levels and a limited percentage of its employees' educational data regarding major.

68) Oracle's centralized data systems contain no fields and maintain no records regarding specific experience or skills for each employee (outside of those incorporated into the specialty area, systems job title, job function and global career level designations for which Oracle maintained records).

69) Oracle's centralized data systems contain no fields and maintain no records regarding specific programming language(s) which each employee in the job functions at issue knows or has experience using.

70) Oracle's centralized data systems contain no fields and maintain no records which identify the complexity of the product to which each employee in the three job functions at issue has been assigned (outside of the experience or knowledge level incorporated into the specialty area, job title, job function, and global career level designations for which Oracle maintained records).

71) Oracle's centralized data systems contain no fields and maintain no records which identify the trainings each employee in the job functions at issue attended and was expected to attend and master.

72) For all relevant time periods, Oracle did not require its managers when setting compensation at or after hire, including salary level or any other component of compensation, to identify and record all factors considered when setting compensation within the salary ranges specified by Oracle's Global Compensation Team for each job code.

73) Oracle did not maintain data or records regarding what specific skills, experience, or achievements (including securing patents), if anything, each Oracle manager considered when

setting compensation, including salary level or any other component of compensation, at or after hire.

74) Oracle managers do not consider employees' Cost Center/Organization designations when making compensation decisions.

75) From 2013 to the present day, Oracle does and did not require its managers to conduct formal performance evaluations of each employee. (Waggoner 30(b)(6) Depo. at 226:16:-227:1).

Oracle Did Not Comply with the Requirements of Its Federal Contracts, Its AAP and Federal Regulations.

76) Oracle's AAP states that Oracle's Director of Diversity Compliance is responsible for implementing an effective auditing and reporting system. . . . The Director of Diversity compliance reviews problem areas and progress, communicates with management and legal as appropriate, and makes recommendations regarding annual goals. Oracle develops and analyzes Internal Audit Reports to assess performance in . . . Compensation." (AAP (Ex. 21 to SHH Dep.) p. 11)

77) Oracle's Director of Diversity Compliance has testified that with respect to its compensation systems, she was not aware of anything done to comply with 41 CFR 60-2.17(d)(4), which requires the contractor to advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance. (Holman-Harries May Dep. 265:10-267:5)

78) Oracle's Director of Diversity Compliance testified that she is not aware of any compensation-related AAP goals. (Holman-Harries May Dep. 120:18-121:1, 255:19-256)

79) Oracle does not provide its Diversity Compliance Group with a budget to fund pay adjustments to address or redress gender or racial pay inequities.

80) Oracle's Diversity Compliance group does not conduct any compensation analyses for executive vice presidents or senior vice presidents who set company-wide compensation budgets. (Holman-Harries May 8, 2019 Dep. 185:24-186:3).

81) Oracle admits that its upper level managers and Human Resources department did not carry out any centralized compensation audits to comply with the Affirmative Action internal audit requirement of 41 CFR § 60-2.17. (AUF 2)

82) Oracle's Director of Diversity Compliance (including Oracle's Diversity Compliance Group) conducted no compensation studies of any kind to comply with its AAP, as Oracle is aware it was required to produce any such studies, regardless of claims of privilege, to OFCCP upon OFCCP's request during the audit and/or in response to OFCCP's discovery requests in this litigation (and enforced by this Court's order granting OFCCP's motion to compel such responses), and Oracle has produced no studies either during OFCCP's audit or during the course of this litigation.

83) Oracle maintained data electronically for each employee regarding the employee's job code history that provides a record of each employee's job function, specialty area, systems job title, and global career level at all periods from the employee's hiring date onward.

84) "Oracle also maintains personnel information including private information relating to current or former Oracle employees who are not parties to this lawsuit. Among other things, this information includes Oracle employees' self-reported racial, ethnic and gender characteristics; employees' compensation data; and information relating to circumstances of employment actions, such as hiring, promotions, and terminations." Declaration of Victoria Thrasher at Paragraph 6 (April 20, 2017) (in support of Oracle's protective order).

85) Oracle's Diversity Compliance Group never studied or analyzed Oracle's compa ratios by gender or race to identify whether there were gender or racial pay differences in the salaries of female, African-American or Asian employees for employees "in that role" at Oracle.

86) Oracle has not conducted any in-depth analyses of Oracle's compensation systems in relation to the regulation to determine whether there are gender- or race-based disparities among employees at Oracle within the same job title(Holman Harries- Depo 244), even though Oracle maintained the data necessary to conduct such an analysis.

87) Oracle conducted no studies to compare the pay of similarly qualified employees working in different job codes or in the same job code but for different Oracle front line managers, even though Oracle maintained the data necessary to conduct such studies.

88) Oracle's Diversity Compliance group does not conduct any compensation analyses for direct managers responsible for allocating pay based on the compensation budget received from upper level Oracle managers. (Holman-Harries May 8, 2019 Dep. 186:4-7).

89) Oracle's Diversity Compliance group "delegated out" Oracle's responsibility to ensure pay equity "to the [front line] managers." (Holman-Harries May 8, 2019 Dep. 126:5-17)

90) Director Holman-Harries did not receive the results of analyses, if any, conducted by managers to comply with 60-2.17(b)(3), did not track managers' pay decisions to determine whether there were gender-, race-, or ethnicity-based disparities in compensation, and didn't identify whether managers had found problem areas in Oracle's compensation systems based on gender or race or ethnicity. (Holman-Harries May Dep. 249:11-18, 255:2-256:2, 257:25-262:11, 268:20-267:6)

91) Oracle's front line managers did not have access to company-wide information necessary to conduct an internal audit of "compensation...at all levels" of the company to comply with the Affirmative Action internal audit requirement of 41 CFR § 60-2.17(d)(1).

92) Oracle did not maintain records nor did it produce to OFCCP at any point during OFCCP's audit or during the course of this litigation compensation studies conducted, if any, by Oracle managers regarding internal pay equities for the employees each manager supervised.

93) Pay equity adjustments were not effectuated through Oracle's "dive and save" program. (Oracle's Response to OFCCP's Statement of Uncontested Facts iso SJ at p. 182 ("dive and saves are not the same thing as pay equity adjustments"))

94) Oracle's Diversity Compliance Group is not involved, included, or informed regarding the investigation, findings, or results taken in response to any discrimination complaints.

95) Prior to March 2015, Oracle did not have dedicated HR investigators to handle discrimination complaints. HR business partners handled discrimination complaints at Oracle's headquarters. (Oracle 30(b)(6) designee for Oracle's handling of discrimination complaints, Tamerlane Baxter at 20:5-22:18).

96) In March 2015, Oracle hired HR professionals who were dedicated full time to workplace investigations. After March 2015, both HR business partners and these HR investigators handled investigations of complaints. (Baxter PMK 20:5-24; 23; 74:10-19).

97) Discrimination complaints come to the HR investigators' attention through referrals from the Integrity Helpline, employees directly, managers, HR business partners, the legal department, or external notification of a complaint. (Baxter PMK 44:2-20).

98) Oracle's dedicated HR investigators do not necessarily receive notice of complaints or investigations by HR business partners. (Baxter PMK 75:2-25)

99) If a complaint of discrimination is made, HR investigators or HR business partners conduct an intake interview with the complainant or reporter. (Baxter PMK 88:24-90:8)

100) Oracle's HR investigators have received no training specific to compensation-related cases. (Baxter PMK 139:20-140:10)

101) Oracle's head of HR investigations has not attended any training on conducting statistical analyses of compensation (Baxter PMK 140:11-143:16)

102) Oracle has never conducted statistical analysis of compensation data as part of any investigation of discrimination complaints. (Baxter PMK 143:17-144:4)

103) Oracle's Director of Diversity Compliance does not receive the results of any investigation of discrimination complaints. (Baxter PMK 161: 9-18)

104) The head of Oracle's HR investigations does not interact with Shauna Holman-Harries on investigations at all. (Baxter PMK 163:5-8)

105) Oracle's HR business partners do not have a budget to remedy discrimination complaints. (Baxter PMK 179:4-22)

106) Oracle has provided no evidence that they took steps to correct pay inequities in accordance with Oracle's AAP.

107) Oracle has provided no evidence to OFCCP that it has a program to self-correct systemic gender or racial pay inequities.

108) Oracle's Diversity Compliance group did not provide any training to managers on how to ensure that their decisions were fair, justifiable, and nondiscriminatory, nor was she aware of any additional training they received on this issue. (Holman-Harries May Dep. 250:8-254:23, 269:7-270:12 (SHH Ex. 29))

109) In an internal training, Oracle stated that it began requiring affirmative action training in October and November 2015 “due to the Obama Administration’s focus on hiring, selection, promotional opportunities, pay, and other terms and conditions of employment in a highly changing regulatory environment.” (Quoted directly from Oracle’s training slide ORACLE_HQCA_0000416488 at slide 3.)

110) The affirmative action training Oracle provided to US managers and HR personnel beginning on October and November 2015 does not and did not address compensation discrimination.

111) Oracle never provided any anti-discrimination training as to compensation. (Waggoner May Dep. At 70:3-23)

112) Oracle's Director of Diversity Compliance testified that she did not coordinate with anyone with respect to Oracle's compliance with OFCCP regulations relating to compensation. (Holman-Harries May Dep. 262:17-263:16)

113) Oracle's Director of Diversity Compliance testified that with respect to its compensation systems, she was not aware of anything done to comply with 41 CFR 60-2.17(d)(4), which requires the contractor to advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance. (Holman-Harries May Dep. 265:10-267:5)

114) Oracle does nothing centrally to ensure equity or fairness in distributing bonuses. (Waggoner PMK Depo. at 268:7-18)

115) Oracle maintained policies and practices which denied employees information necessary to understand their level of compensation or how their pay related to their similarly qualified colleagues, including not advising employees of: the employee’s current system job

title (as opposed to discretionary job title); the employee's job code and salary range set by Oracle's Global Compensation Team for that job code; the employee's compa ratio; the salary or compensation paid by Oracle to the employee's colleagues in the same job title or same job code; and any criteria used by Oracle to set and adjust compensation.

OFCCP Scheduled Oracle's Compliance Audit in Accordance with OFCCP's Neutral Selection Plan and Provided Notice and Appropriate Conciliation of Oracle's Violations Identified in OFCCP's Audit.

116) The Oracle Redwood Shores Compliance Review was scheduled in accordance with OFCCP's neutral selection plan.

117) During the compliance review, Oracle did not provide to OFCCP, despite OFCCP's request, the dates of any compensation analyses required by 41 CFR 60-2.17.

118) During the compliance review, Oracle did not provide any information to OFCCP, despite OFCCP's request, about the actions taken as a result of compensation analyses conducted under 41 CFR 60-2.17.

119) During the compliance review, Oracle did not provide to OFCCP, despite OFCCP's requests, any compensation analyses conducted by Oracle or any of its managers under 41 CFR 60-2.17.

120) At the October 6, 2016, Janette Wipper described remedies for the compensation violations. (Holman-Harries 30b6 Dep. 205:22-208:01, 209:18-25, 222:17-223:19, 231:6-233:16, 235:9-236:19); OFCCP MSJ Ex. 71, (Consolidated Notes).

Oracle Had Sufficient Financial Resources to Permit Oracle to Comply With Its Federal Contract and AAP Obligations Requiring Oracle Not to Engage in Compensation Discrimination and Identify, Detect, and Immediately Redress Gender or Racial Pay Discrimination.

121) Between and including FY 2013 to FY 2018, Oracle America, Inc.'s parent company, Oracle Corp. earned an average annual net income between \$8 billion and \$11 billion.

122) Between and including FY 2013 to FY2019, Oracle America, Inc.'s parent company, Oracle Corp. paid between \$1.389 billion in cash dividends to over \$3 billion in cash dividends to shareholders.

B. Oracle

Oracle Proffers the Following Facts, Which OFCCP Disputes⁵

1. Oracle is organized into lines of business structured around the products and services it delivers.
2. Oracle's job functions and lines of business do not align, such that employees who work in a particular job function may also work in numerous lines of business, and vice versa.
3. Each of Oracle's lines of business has a specific leader, but Oracle's job functions (including its Product Development, IT, and Support job functions) do not.
4. Oracle's budgets for base salary increases, bonuses, and equity awards are distributed by line of business, not by job function.
5. The employees at issue in this case work on a vast array of products and services using a diverse set of skills, duties, and responsibilities.
6. Oracle develops a vast array of products that require different knowledge, skills, and expertise.
7. Oracle offers a vast array of services that require different knowledge, skills, and expertise.
8. Oracle's "system job titles" and corresponding job codes and standard job descriptions are broad, such that employees who share a system job title (or corresponding job code)

⁵ As set forth in Oracle's pending motion for summary judgment and supporting papers, Oracle's position is OFCCP has not put forth evidence demonstrating these facts actually are in dispute. Oracle's position is the evidence confirms they are undisputed. Nevertheless, Oracle sets forth these facts based on its understanding of the ALJ's requirements for this joint statement, and in the event the Court denies Oracle's pending motion.

may and do perform work requiring different skills, duties and/or responsibilities, depending on the specific product, service, technology, and/or team on which a particular employee works.

9. The salary bands that accompany Oracle's job codes also are broad, in recognition of the fact that it may be appropriate to pay employees who share a system job title or job code differently depending upon a variety of factors, including differences in skills, duties, and/or responsibilities.
10. Pay at Oracle can vary based on a variety of job-related, non-discriminatory factors, including but not limited to market demand for employees with a particular skill set, expertise, or prior experience as relevant to a particular position at Oracle.
11. Oracle's front-line managers are the primary decision makers when it comes to setting new hire salaries, salary raises, and bonuses for their direct reports.
12. Oracle's managers are trained to make compensation decisions based on neutral, job-related, and non-discriminatory factors such as an employee's individual skills and contributions.
13. Oracle's managers make compensation decisions based on neutral, job-related, and non-discriminatory factors such as an employee's individual skills and contributions.
14. The approval process for compensation decisions made pursuant to global programs such as annual focal reviews, annual bonus programs, or annual equity grants (in years when Oracle has such programs) is a high-level review, the focus of which is ensuring adherence to the allocated budget.
15. The approval process for starting pay decisions and "off-cycle" compensation awards is a high-level review, the focus of which is a general review for reasonableness.
16. Oracle does not "assign" employees to jobs at hire; on the contrary, the majority of employees who joined HQCA during the relevant period applied for specific jobs through posted requisitions, and the majority of these employees were in turn hired into a position at the same career level to which they applied.

17. Oracle does not have centralized policies that reflect rigid mandates on how compensation decisions are made.
18. Oracle never had a policy of basing starting salary on prior salary.
19. Oracle did not refuse to produce any data sought by OFCCP during the audit.
20. OFCCP has received, during the course of this litigation, all non-privileged data that it claims Oracle refused to produce during the audit and that is relevant to OFCCP's claims in litigation.

With respect to OFCCP's disputed facts listed above, once again, Oracle did not interpret the Court to be inviting argument. Nevertheless, in light of the statements made by OFCCP above, Oracle briefly responds:

As Oracle explained to OFCCP during the meet and confer process, the reason Oracle declined to stipulate to 150 of OFCCP's proposed 151 stipulations is because Oracle believed they were argumentative, immaterial, inaccurate, and/or ambiguous. Although some of the disputed facts listed above were stipulations proposed by OFCCP, most were not, including for example disputed fact numbers 48-55 involving Dr. Janice Madden, which are not "facts." With respect to those disputed facts above that were presented to Oracle as proposed stipulations, they confirm Oracle's assessment described above. To offer just one example, with respect to OFCCP's disputed fact number 15, the evidence confirms this purported factual assertion is inaccurate. Indeed, OFCCP provides no testimonial evidence in support of this "fact" because it is not true. The "notification" OFCCP points to was added by some recruiters, but was not standard practice, nor was it included in the vast majority of requisitions produced in this case. Indeed, of the 4,966 job requisitions Oracle produced in this case, only 24 of them contain this language. *See* 11/1/19 Oracle's Resp. to OFCCP's Sep. Statement of MSJ, Fact No. 76. Oracle also notes that several of OFCCP's proposed facts above contradict each other on their face. *Compare* Fact No. 67 *with* Fact No. 87.

V. **WITNESS LIST**

The Parties are submitting a joint witness list concurrently with this Joint Pre-Hearing

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Statement.

VI. EXHIBITS

The Parties are submitting a joint exhibit list, OFCCP's exhibit list, and Oracle's exhibit list concurrently with this Joint Pre-Hearing Statement.

VII. ESTIMATE OF TIME FOR CASE-IN-CHIEF

A. OFCCP's Position

OFCCP agrees with Oracle that the 10-day, 6.5 hours court-hours per day allotted time for trial is insufficient to present the testimony necessary to have this case decided on the merits. OFCCP respectfully requests that, if possible, that the hearing days be extended to commence at 8:30 and adjourn at 5:00pm with no more than a 45 minute break taken for lunch. In addition, OFCCP would be prepared to and supports adding December 9 and December 20 to the hearing schedule so that the trial can be completed within the time window specified by the Court. OFCCP does not believe any time needs to be allotted for closing argument (the Court has already provided that there will be a post-hearing briefing opportunity) and 20 minutes per side should be sufficient for Opening Statements. OFCCP asks the Court to address any procedural or administrative issues during its pre-hearing conference or in administrative hearings conducted prior to 8:30 a.m., when the Court will begin each day to hear the parties' presentation of witnesses and evidence.

As set forth in more detail in OFCCP's witness list, attached hereto, OFCCP intends to call approximately 20 employee witnesses, Dr. Madden, two Agency witnesses, and several adverse witnesses as part of its case in chief.

To ensure that OFCCP can prioritize the presentation of live testimony from Oracle current and former employees directly impacted by Oracle's compensation policies at issue, OFCCP has identified, consistent with the Court's instructions, the deposition testimony from Oracle's executives and corporate designees upon which it intends to rely, but OFCCP would prefer not to spend the parties' limited hearing time playing these segments of the videotaped depositions or reading such depositions into evidence, unless required as part of a live witness'

examination or cross-examination. As the Court will be required to make credibility assessments of these witnesses, some of which may only be testifying via their deposition testimony, OFCCP will designate and provide the Court, where available, the relevant segments of the deposition in video format, so that the Court may better assess the credibility of those witnesses. OFCCP notes that in Oracle's witness list, it allocates hearing time to playing the videotape of witnesses it identifies it is providing only via deposition. In the interest of making the best use of the parties' limited hearing time, OFCCP asks the Court to instruct the parties, consistent with the applicable rules, that deposition testimony of the parties' executives and 30(b)(6) designees is admissible for all purposes (subject to objections as to form) and the parties may submit and rely on this evidence without playing tapes of such videotaped deposition testimony or reading such testimony into evidence.

OFCCP also notes that Oracle's contentions regarding the amount of trial time it requires to put on evidence are in tension with its refusal to engage in good faith with OFCCP regarding stipulations. In the context of Oracle's numerous motions to seal and in the attorney conferences regarding exhibits and stipulation, Oracle's refusal to engage in meaningful discussions *regarding stipulations as to the admissibility of evidence, issues, and testimony not truly in dispute* is increasing the burden on the parties and the Court to present unnecessary evidence and testimony, as well as confer and prepare redacted versions of evidence and briefing relating to documents which Oracle easily could obviate having admitted into a public record if it simply stipulated as to the material issues which OFCCP contends the documents prove. OFCCP is increasingly concerned that it is and will be prejudiced by the time it has spent already gathering and preparing unnecessary evidence and witness testimony, and the time OFCCP will need to spend during the limited hearing time putting on testimony and evidence that Oracle cannot and does not actually dispute. Oracle, for example, is demanding that OFCCP put on a sponsoring witness for every exhibit even though Oracle stipulates that the exhibits are authentic.

Given the time restrictions of the hearing, OFCCP already has restricted the number of Oracle current and former employee witnesses who it will put on. Weighty public interests

dictate that the time given for these employees to have their voices heard not be limited further by the need to present evidence and testimony regarding facts and issues as to which the parties could easily reach stipulations, if Oracle would engage meaningfully in the process.

Given the large number of employee witnesses OFCCP anticipates offering in support of its claims here, OFCCP anticipates that it will require two to three full Court days for the direct examination of employee witnesses. OFCCP anticipates that Dr. Madden will require at least a half day of direct testimony and OFCCP anticipates another day will be necessary for the direct examinations of adverse witnesses and its Agency witnesses. As such, not including opening argument and any time reserved for motions, or the time OFCCP requires to conduct cross examination, OFCCP requires at least 5 full Court days to put on its case in chief.

While OFCCP believes the employee witness testimony may become cumulative and unnecessary, OFCCP is reluctant to limit the testimony of any of the employee witnesses as Oracle at the summary judgment phase indicated that it would aggressively argue that almost any testimony was insufficient anecdotal evidence supporting OFCCP's strong statistical evidence of Oracle's intentional compensation discrimination. *See* Oracle's Opposition to OFCCP's Motion for Summary Judgment at 22 (stating that Court should take "great comfort" from seven declaration of former employees confirming OFCCP's factual evidence in their own words). As a time saving device, however, OFCCP is willing, upon the Court's finding that additional employee testimony will be cumulative or unnecessary, to offer an employee's testimony into evidence by moving the additional employee's sworn declarations, if available, into evidence.

B. Oracle's Position

Respectfully, Oracle believes the parties need more than ten court days to try this matter. Nevertheless, Oracle recognizes the Court has allotted ten days, and will comply with the Court's order. As a matter of fairness and due process, Oracle believes it is entitled to half of the time allotted to present its case. Assuming each day of hearing runs from 9:00 a.m. to 4:30 p.m. with an hour for lunch, the parties have a total of 6.5 hours each day (or 65 hours total) to try the case. Oracle respectfully suggests the Court allot each side one hour for opening statements, and 90

minutes for closing arguments (for a total of 5 hours). Assuming some time will need to be spent on administrative matters (1.5 hours in total throughout the trial), Oracle proposes that the parties divide the remaining 9 court days in half, such that each is allocated 4.5 days on the issue of liability (or approximately 29 hours each). Oracle submits that each party's direct and cross examination time should be counted against its respective time allocation. Oracle excludes from this estimation any time spent on the issue of individual damages, which it believes will require a separate Phase II proceeding, involving separate evidence and analysis as detailed in Oracle's MIL No. 13, filed November 15, 2019. Oracle also notes that despite the Parties' agreement that hearing time for testimony should be split evenly between the Parties, OFCCP's proposed times for testimony, including both direct and cross examinations, total approximately 43 hours. By contrast, Oracle made difficult choices and limited its time estimates appropriately to ensure the total time is approximately 29 hours, consistent with the Parties' agreement and Oracle's understanding of the Court's Order.

VIII. ADDITIONAL INFORMATION

A. OFCCP

1. OFCCP Should Be Permitted Leave to File a Motion to Amend the Complaint⁶

This Court's rules make clear under 29 C.F.R. 18.44, encaptioned "Prehearing Conferences," that at the Pre-Hearing Conference this Court "may consider and take appropriate actions" with respect to "[a]mending the papers that had framed the issues before the matter was referred for hearing." 29 C.F.R. § 18.44(d)(2). While OFCCP is reluctant to ask to amend the Second Amended Complaint at this stage, Oracle has repeatedly admitted to this Court violations of its affirmative action program obligations in its misguided bids to avoid production of its compensation analyses and deny its centralized decision making regarding compensation. OFCCP thereby requests the opportunity to orally move at the pre-hearing conference to amend the Complaint, or to be permitted another opportunity to brief the Court before trial.

⁶ OFCCP met and conferred with Oracle about this expected motion on November 19, 2019.

As this Court acknowledged, in OFCCP’s First Amended Complaint, “OFCCP alleged that Oracle had an obligation to conduct the reviews and analysis and to turn them over to OFCCP, but either didn’t do them or did them and didn’t turn them over.” Order Granting OFCCP Conditional Leave to File Second Amended Complaint at 6.⁷ OFCCP’s Second Amended Complaint (SAC) simply focused on Oracle’s failure to disclose the compensation analyses. As this Court acknowledged, at the time of the Second Amendment Complaint, OFCCP had received in litigation an RFP response in which Oracle claimed analyses performed for a regulatory purpose were protected on the grounds of attorney client privilege. As this Court noted “[c]ommunications that were never made are not protected by attorney-client privilege and work product protections do not extend to work that was never done.” *Id.* at 16. Moreover, at the time, OFCCP further relied upon a statement Oracle made during the investigation (that this Court later found to be “ambiguous,” *Id.* at 14-15) which indicated that Oracle had conducted pay equity studies for a regulatory purpose. In September 2019, this Court found as a factual matter that the analyses in question were not performed for Oracle’s affirmative action compliance, *Id.* at 14-15, even though during the course of OFCCP’s audit, Oracle contended that it had conducted these pay analysis as part of its compliance efforts but simply refused to produce them to OFCCP because they were privileged. As this Court noted at that time, “Oracle ha[d] been rather less helpful in stating what it contends is sufficient to comply with the requirement and what it did do to comply with the requirement.” Indeed, on the basis of this assertion of privilege over studies Oracle undertook as part of its AAP compliance, Oracle affirmatively plead in the Second Amended Complaint the “attorney client privilege” as an affirmative defense in its Answer. Further, in its September 2019 order, the Court specifically permitted Oracle to rescind its affirmative defense plead in its Answer to save Oracle from the consequences of its waiver of the attorney client privilege as to these pay equity analyses.

⁷ The NOV and SCN also explicitly cited Oracle in Violation 6 for failing “to perform an in-depth analysis of its total employment processes to determine whether and where impediments to equal employment opportunity exist as required by 41 C.F.R. 60-2.17(b)(3). In Violation 8, OFCCP also cited violation of 60-2.17(d). *See* OFCCP Motion for Summary Judgment, Ex. 61. As such, Oracle has long been on notice of this claim and these claims were subject to conciliation.

Beginning with its October 7, 2019, Position Statement and continuing through the dispositive motion filings, Oracle has made repeated factual claims *in Court-filed documents* that compel the conclusion—without any additional discovery—that Oracle flatly failed to comply with its Affirmative Action Obligations, while, at the same time, dismissing OFCCP’s concerns about this lack of compliance as “a sideshow” and suggesting that OFCCP “should have brought a claim for such a violation.” Oracle’s Opposition to Summary Judgment at 29-30.⁸ Oracle has repeatedly stated it has no compensation policies whatsoever (except to follow one specific state law on prior pay that was implemented in September 2017) and has admitted that it conducted no centralized compensation analyses whatsoever—let alone in depths analyses— and that it has *no documentation* of the analyses Oracle now alleges its front line managers conducted and were intended to meet Oracle’s regulatory requirements of 2.17.

There is no dispute that even after trial allegations can conform to the evidence of the case and amendment is proper. FRCP Rule 15(b). Here, Oracle has voluntarily, and repeatedly, filed in this Court statements that demonstrate violations of the AAP regulations. The Court’s September 2019 Order and Oracle’s subsequent filings make plain that Oracle has altered its position dramatically regarding its noncompliance with its AAP obligations not just years after OFCCP’s audits but after the close of discovery.⁹ Oracle cannot be permitted to benefit from its late retraction of its specifically plead affirmative defense and OFCCP suffers extreme prejudice if it is not permitted to amend its complaint to conform to the admissions and evidence presented by Oracle after the close of discovery, up to and including in its briefing related to the parties’ dispositive motions. In light of these facts, OFCCP requests leave to amend the operative complaint to conform to the facts of this case.

⁸ Oracle’s comments below suggest that Oracle misapprehends OFCCP’s position. OFCCP is not suggesting that amending the complaint is necessary as a result of this Court’s Order. Rather, this Court provided Oracle a choice in light of Oracle’s ambiguity on the topic. Starting with Oracle’s October 7 Position Statement and withdrawal of its Affirmative Defense, Oracle for the first time made clear that the only thing it could point to for compliance was the day to day compensation recommendations that Oracle managers have to conduct regardless. Oracle doubled-down on this position in its Summary Judgment Opposition filed on November 1, 2019.

⁹ Oracle’s claims that it would have taken discovery ring hollow. This Court can interpret for itself whether the evidence that Oracle has proffered met the regulatory requirements. Deposing OFCCP as to its interpretations on regulations is not fact discovery.

2. Sequestration of Witnesses

OFCCP requests that all witnesses submitted on the witness list be excluded from the hearing room except for when such witnesses are called to testify. OFCCP further requests that witnesses be prohibited from discussing the matter with other witnesses in the case pending the close of the hearing. Save for Jane Suhr, OFCCP's Regional Director, OFCCP requests that attorneys for the parties be prohibited from describing the testimony of other witnesses in the case to witnesses pending the close of the hearing. This sequestration would not apply to deposition only witnesses and rebuttal-only witnesses.

OFCCP agrees to Oracle's proposal below that the experts—Dr. Madden and Dr. Saad—may be exempted from the sequestration order, but only with respect to the testimony of each other.

3. Courtroom Technology

OFCCP intends to bring electronics in the Courtroom to use as projectors and possibly a television monitor to present exhibits.

4. Remote Witnesses

OFCCP intends to have all witnesses attend the hearing in person. However, some witnesses are not local and depending on the trial schedule may not be able to appear in person. In such event, OFCCP requests the opportunity to have the witness appear telephonically.¹⁰

5. Issues Pertaining to Outstanding Motions to Seal and this Court's Order of November 12, 2019

Below, Oracle raises that it anticipates raising issues relating to protecting the confidentiality of information. OFCCP has not been advised by Oracle regarding how it seeks to shield allegedly confidential information from public view, but federal regulation and established precedent dictate that this hearing be open and accessible to the public. Along with the Office of the Administrative Law Judges, OFCCP is compelled by regulation and its missions to ensure

¹⁰ Oracle objects on the grounds that this pre-hearing statement is the first time OFCCP has raised the issue. OFCCP submits that this is the time to raise this issue, as this Court's scheduling order indicated that this should be raised on the date the pre-hearing statement was initially due.

transparency to the public, taxpayers, and impacted employees of its enforcement activities.¹¹

Oracle's numerous motions to seal have generated significant (and OFCCP believes often unnecessary) workload that hinders OFCCP's ability to prepare its case. OFCCP advised this Court in a September 19, 2019, Joint Statement that in light of the changes necessitated by OFCCP's expert hearing, it believed the schedule would be too compressed and "materially prejudice OFCCP, preventing a fair hearing on the merits of this case." *See* Joint Statement file September 19, 2019, at 6; *see also Id.* at 6-7 ("a December hearing date cannot be maintained in this case without severely prejudicing OFCCP's ability to present its case to the Court. . .").

Since Oracle filed its motion to seal on October 21, 2019, OFCCP attorneys have spent approximately 200 hours going over documents contained in five and soon to be six motions to seal and preparing oppositions. The motions to date have covered close to 100 exhibits several involving hundreds of pages and hundreds of redactions. The briefing included charts, some seventy pages long, describing OFCCP's position on each proposed redaction within each document. Since the Court's November 12 order, we have engaged in 3 meet and confers with Oracle, two in person and one over the telephone, totaling approximately seven hours to meet and confer over the approximately 100 exhibits.

OFCCP is working diligently to comply with this Court's Order of November 12, 2019. However, despite dedicating significant resources to this matter, OFCCP has serious concerns

¹¹ As OFCCP has stated in briefing the multiple Motions brought by Oracle on this topic, The Supreme Court and Ninth Circuit have overwhelmingly recognized a "general right to inspect and copy public records and documents, including judicial records and documents" and that a "strong presumption in favor of access' is the starting point" of any analysis. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (*quoting Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 & n.7, 98 S.Ct. 1306 (1978); *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). "Documents that affect the disposition of federal litigation are presumptively open to public view[.]" *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010). "The reason for this right of public access to the judicial record is to enable interested members of the public, including lawyers, journalists, and government officials, to know who's using the courts, to understand judicial decisions, and to monitor the judiciary's performance of its duties." *Goesel v. Boley Intern. (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (citations omitted). It is also well settled that evidence relating to issues going to the heart of a case should be public. *See Schedin v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, Civil No. 08-5743 (JRT), 2011 WL 1831597, at *2 (D. Minn. May 12, 2011) (granting plaintiff's request to make evidence introduced at trial publicly available because, in relevant part, such evidence "goes to the heart of the case") (citation and internal quotation marks omitted); *see also Doe v. Exxon Mobile Corp.*, 570 F. Supp. 2d 49, 52 (D.D.C. 2008) (granting plaintiffs' motion to unseal judicial opinion and finding in relevant part that "the public's right to access judicial opinions is very high and . . . Defendants' proposed redactions go to the heart of the analysis in the opinion.").

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that it simply will not be able to meet the time deadlines set forth in the Order, particularly with respect to the obligation the Court placed on OFCCP with respect to proposing alternative redactions. The protective order in place did not contain this obligation and OFCCP maintains that the redactions that this Court deem suitable are the obligation of Oracle, as the moving party. OFCCP also notes that it has included voluminous exhibits in this matter because of Oracle's blanket refusal to stipulate to even the most basic information. OFCCP would consider withdrawing many exhibits, resolving issues to seal, should Oracle simply stipulate to the facts in this case which are not seriously at issue.

OFCCP respectfully submits that if this Court issues general guidance or issues rulings on the outstanding motions to seal, this may significantly aid the parties in streamlining the process for determining what this Court finds an appropriate area for sealing.

6. Trial Technology (Response to Oracle's Section B. Below)

OFCCP does not oppose Oracle's use of technology to present evidence, but requests that OFCCP be present in any pre-hearing meetings Oracle has with the Court staff and/or IT staff.

B. Oracle

1. OFCCP Should Not Be Permitted To File A Motion To Amend.

Two weeks before trial, OFCCP seeks to add a new cause of action to its Second Amended Complaint: that Oracle allegedly failed to comply with its affirmative action obligations (namely, 41 C.F.R. 60-2.17). Despite that OFCCP has aggressively litigated this case as one of widespread intentional discrimination against thousands of current and former employees and claimed entitlement to hundreds of millions of dollars in damages, on the eve of trial OFCCP wants to morph this into a case about Oracle's affirmative action compliance. There is no excuse for OFCCP's multi-year delay in seeking to bring such an amendment, which would unduly prejudice Oracle. Moreover, discovery is closed, summary judgment briefing is over, and Oracle has prepared its defense against the claims OFCCP brought – not a compliance claim it did not bring. For these reasons as well, OFCCP's belated and prejudicial request to seek leave to amend its complaint (again) must be denied.

OFCCP attempts to portray itself as diligent, and claims it was only *after* the Court's September 19, 2019 order denying its request for Oracle's privileged compensation analyses that it became aware of this potential claim. This contrived and demonstrably false timeline¹² conceals the fact OFCCP has known about the potential for this claim *since the audit itself*, and certainly has known throughout the duration of this litigation. Indeed, for the last six months OFCCP has explicitly been on notice that Oracle's Section 2.17 compliance was expressly *not* at issue in this case. *See* June 19, 2019 Order Granting in Part Mot. to Compel at 13. And in any event, OFCCP offers no excuse for waiting more than two months since September 19 to raise its belated request now.

As a preliminary matter, the fact OFCCP is attempting to amend its complaint at all, "reluctantly" or not, should be viewed skeptically. The Court made very clear when granting leave to file the Second Amended Complaint on March 6, 2019 that additional amendments would be disfavored: "[T]o be clear to both parties: this case has been pending at OALJ for an extended period of time and I will not be sympathetic to renewed efforts to amend the complaint and add new claims and theories as this case gets closer to hearing." That was over eight months ago. OFCCP's arguments about the privileged nature of Oracle's internal pay equity analyses not only have already been addressed by the Court in denying OFCCP's motion to compel these analyses, but OFCCP's arguments make no sense. Oracle's assertion of privilege has nothing to do with whether OFCCP may amend its complaint a third time just two weeks before trial.

Moreover, OFCCP's attempt to claim ignorance about the existence of this potential claim until September 2019 fails. First, during a **2015** interview with OFCCP prior to the NOV,

¹² In an attempt to support this claim of post-September 19 awareness, OFCCP asserts the following "facts": that (1) Oracle has admitted to affirmative action violations to avoid producing compensation analyses, (2) Oracle's 25th affirmative defense constituted a waiver of privilege, (3) Oracle admitted to affirmative action violations in papers it filed with the Court, (4) Oracle produced no documentation of its 2.17 compliance, and (5) Oracle altered its position regarding what it does to comply with 2.17, as well as the privileged nature of its separate pay equity analyses conducted for a different purpose. None of this is correct. Also, these are not newly discovered issues. OFCCP made these arguments in its June 19, 2019 motion to compel Oracle's privileged pay analyses. The Court already addressed them, in denying OFCCP's motion. *See* 9/19/19 Order. OFCCP's misguided attempt to raise these arguments again – purportedly as a basis to seek leave to amend its complaint – not only constitutes a tremendous waste of resources on the eve of trial, but fails to justify allowing OFCCP to belatedly and prejudicially amend its pleading a third time.

OFCCP acknowledges that according to its own notes, Shauna Holman-Harries, Oracle's Senior Director-Diversity Compliance, stated in response to the question of whether Oracle conducts "self-audits of its compensation" that "Compliance does under attorney-client privilege." *See* June 19, 2019 Motion to Compel Compensation Analyses, Bremer Decl., Ex. 13 at 14. Ms. Holman-Harries again explained to OFCCP in writing during the audit the distinction between Oracle's pay equity analyses conducted under privilege and its non-privileged actions taken to comply with Section 2.17. *See id.*, Ex. 9 (**June 2, 2015** email from S. Holman-Harries).

Additionally, during the litigation at the May 8, 2019 deposition of Ms. Holman-Harries, she expressly distinguished between Oracle's Section 2.17 compliance and its privileged compensation analyses, and Oracle reiterated this distinction its opposition to OFCCP's motion to compel: "The only analyses that have been done outside of this regulation have been those done at the request of our attorneys." Decl. of Laura C. Bremer ISO OFCCP's Motion to Compel Oracle's Compensation Analyses, Ex. 2 (May 8, 2019 Holman-Harries Dep. 243:19-244:4). Thus, OFCCP plainly understood as of at least May 2019 that Oracle was asserting privilege over certain compensation analyses, and that these analyses did not constitute its Section 2.17 compliance. And, only one month later, on June 19, 2019 (while fact and expert discovery were still open) the Court stated that "Whether or not, and how, Oracle complied with, its legal objections in 41 C.F.R. §§ 60-2.11 through 60-2.17 is not an issue in this case. ... OFCCP may not shoehorn a substantive probe of Oracle's AAP into a recordkeeping allegation." *See* June 19, 2019 Order Granting in Part Mot. to Compel at 13.

Thus, OFCCP has been notice since the underlying audit itself – and certainly in this litigation, since at least May 2019 – of both (a) the distinction Oracle draws between its Section 2.17 compliance and its privileged compensation analyses; and (b) the fact that privileged documents do not furnish Oracle's basis for Section 2.17 compliance. The Court's September 19, 2019 order did not change anything; it merely confirmed what Oracle had been telling OFCCP all along. Yet OFCCP took no action, allowed fact and expert discovery to close, and engaged in summary judgment briefing without ever raising this issue.

OFCCP's assertion that it is merely seeking to conform its allegations to the evidence in this case is simply not true. To the contrary, OFCCP is seeking to add a new substantive claim that plainly has never been part of this multi-year litigation. OFCCP's statement that this cause of action could be added "without any additional discovery" also is false. Oracle would be severely prejudiced. Not only would Oracle be entitled to assert appropriate affirmative defenses to it in its Answer, but Oracle has not conducted any discovery on this claim. The regulation in question is broad and contractors are given significant discretion to interpret it, as Oracle noted in its October 3, 2019 Position Statement regarding its Section 2.17 Compliance. Had Oracle known OFCCP intended to assert this claim, it would have deposed OFCCP regarding its interpretation of this regulation, and to understand what forms of compliance OFCCP claims would be acceptable. It would have sought discovery on OFCCP's efforts to ensure other contractors' compliance. And once this discovery was complete, Oracle would have moved for summary judgment on this claim.

Particularly given Oracle's reliance on the Court's explicit statement in June 2019 that this claim was not at issue, combined with OFCCP's silence until just now, it would be unjust to allow OFCCP to add this last-minute claim. It would require new witnesses and exhibits at hearing. If this case proceeds to trial in two weeks, it should be on the claims and defenses brought, and which the parties have litigated for the last three years.

2. Sequestration of Witnesses

Oracle does not believe OFCCP's request with respect to sequestration of witnesses is appropriate with respect to experts. Dr. Saad is an expert witness who must opine on Dr. Madden's analyses and opinions, which necessarily include her testimony at the hearing. The Ninth Circuit has confirmed in similar circumstances that sequestration of expert witnesses is not appropriate. *U.S. v. Seschillie*, 310 F.3d 1208, 1212-14 (9th Cir. 2002) (abuse of discretion to exclude expert); *see also Kennis v. Metropolitan West Asset Management, LLC*, 2018 WL 9440483, at *4-5 (C.D. Cal. Nov. 29, 2018).

3. Telephonic Testimony

Oracle objects to OFCCP's request for telephonic testimony. This pre-hearing statement is the first time OFCCP has raised the issue of potential telephonic testimony, and the Parties have not met and conferred on this issue. The Court's prior orders expressly required such a meet and confer. *See* Feb. 6, 2019 Notice of Hearing and Pre-Hearing Order at 3 (Section I.F). Additionally, Oracle believes telephonic testimony by witnesses will hinder meaningful cross examination, and will prevent the Court and Parties from assessing the witness' demeanor in testifying.

4. Trial Technology

For the convenience of the Court and the witnesses, Oracle intends to use technology at the hearing to present documents and information. Accordingly, Oracle requests permission to bring and install four monitors for use at trial: one for the Court, one for the witness, and one for each counsel table so that everyone can simultaneously view the documents and information shown. Additionally, Oracle requests permission for its trial technology specialist(s) to be present throughout the hearing to facilitate the presentation of evidence. If the Court approves these requests, Oracle requests a pre-hearing meeting with Court staff and/or IT staff so that its counsel and trial technology specialist can review the facilities and install equipment prior to the hearing. Oracle proposes such an appointment take place as soon as is practically feasible for the Court following the pre-hearing conference on November 26, 2019.

5. Protecting Private, Personal, Confidential and Trade Secret Information

Oracle anticipates that confidential and proprietary information will be discussed at certain points during the hearing. Oracle will meet and confer with OFCCP regarding the best way to maintain the confidentiality of Oracle's confidential and proprietary information, and will make its proposal to the Court in short order.

November 21, 2019

Respectfully submitted,

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