

**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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT ORACLE AMERICA,
INC.'S MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, FOR PARTIAL
SUMMARY JUDGMENT**

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CASE NO. 2017-OFC-00006

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I. INTRODUCTION

After a two-year compliance audit and three years of litigation, all OFCCP has to offer in support of its baseless allegations of compensation discrimination are misleading and inaccurate statistical analyses. One does not need to understand regression models or independent variables to intuit that OFCCP's case does not make sense. OFCCP's analyses do not compare similarly situated employees, let alone account for the legitimate factors explaining pay differences. Its expert's initial and rebuttal reports and deposition testimony present different (if not contradictory) opinions, and none prove discrimination. And while OFCCP contends that Oracle's "standard operating practice" is intentional, "pattern or practice" discrimination against women, Asians, and African-Americans, its admission that none of the managers who make the pay decisions at issue engaged in wrongdoing is fatal to this claim.

Reflecting this incoherence, OFCCP and its expert Dr. Janice Madden cannot even agree on how the alleged discrimination occurs. OFCCP contends that Oracle pays women, Asians, and African-Americans less than comparable white or male employees who perform similar work. Madden instead analyzes "differences in earnings for comparably qualified persons as they entered Oracle."¹ Thus, rather than comparing employees' pay based on their actual duties and responsibilities as required by Title VII, Madden's expert reports expressly disavow any effort to similarly situate the thousands of employees at issue with respect to the work they do at Oracle. She looks only at crude proxies for pre-Oracle education and experience. In an effort to justify this omission, Madden asserts that the jobs employees currently hold must be the result of discriminatory job assignments at hire, and therefore their jobs are irredeemably tainted by this earlier discrimination and should not be considered in any pay analysis.

But neither OFCCP nor Madden has evidence of discriminatory job assignments, and in fact the data demonstrates the opposite. Madden's analyses therefore assume the very conclusions they purport to prove, and fail to support OFCCP's claim that Oracle pays

¹ Connell Decl. Ex. U (Madden Dep. 14:18-15:6).

employees who perform similar work differently based on race or gender because this is not even an inquiry she attempts to answer. Without considering employees' actual skills and duties, OFCCP's statistics are just a collection of math problems.

Even if OFCCP's statistics did show unexplained compensation disparities, an inference of intentional, system-wide discrimination does not follow. The undisputed facts demonstrate that Oracle's decision-making with respect to pay is case-by-case and decentralized. Front-line managers are the individuals primarily responsible for making pay decisions for the groups they supervise, and OFCCP already has confirmed it is not accusing them of discriminatory bias. Moreover, to the extent OFCCP relies on Madden's assignment theory, not only does it lack any evidentiary support, but over half of those hiring decisions occurred prior to the 2013-2014 audit period at issue and therefore OFCCP lacks the jurisdiction to pursue relief for those decisions.

OFCCP's disparate impact claim also should be dismissed. As a threshold matter, OFCCP has never properly alleged such a claim. Neither OFCCP's Notice of Violation ("NOV") following its audit nor any of its complaints in litigation set forth the requisite facially-neutral practice that allegedly disfavored certain employees. To the extent OFCCP argues that considering employees' prior pay or assigning is the challenged practice, OFCCP is still two steps removed from proving a disparate impact: OFCCP lacks evidence that either alleged practice occurred, and cannot show these alleged practices caused the results at issue. OFCCP also cannot simply jumble together multiple alleged compensation practices, offer the bottom-line results, and claim disparate impact.

This Court should also dismiss OFCCP's "refusal to produce" claim. OFCCP (1) cannot show that Oracle refused to produce any documents that OFCCP requested; (2) has now received through litigation discovery the documents and information at issue; (3) violated its own procedures by failing to pursue the documents through a denial of access case; and (4) has no legal basis for the remedies it seeks (an adverse inference and a vague, open-ended injunction aimed at potential future conduct that has not yet occurred).

Finally, OFCCP's claims fail procedurally. OFCCP's "shoot first and find discrimination later" approach is evidenced by the fact OFCCP has not shown a violation during the 2013-2014 compliance audit, as it must. And after the audit, OFCCP did not undertake a reasonable conciliation effort and then issued the Show Cause Notice ("SCN") without reasonable cause.

For all the reasons set forth below, there are no disputed material facts and Oracle urges this Court to enter judgment in Oracle's favor on OFCCP's Second Amended Complaint.

II. STATEMENT OF FACTS

A. Oracle's History of Compliance and Commitment to EEO and Diversity

Oracle's commitment to equal employment opportunities ("EEO") and diversity and inclusion starts at the very top: Oracle's long-time President and current co-CEO, Safra Catz, is female. *See* Thrasher Decl., ¶¶ 1-4.² One-third of its Board of Directors is female or diverse, and its General Counsel, Lead Employment Counsel, Global Director of Compensation, Head of Human Resources for the Americas and Global Head of Human Resources are all women. *Id.*, ¶¶ 5-6. Although OFCCP alleges that Oracle discriminates against Asians in its Product Development job function, the individual who led Oracle's Product Development line of business for most of the relevant period is Asian. *Id.*, ¶ 6. And the hundreds of managers who made the hiring and pay decisions at issue represent a diverse group of men and women, as well as Asians, Whites, African-Americans, and Hispanics.

Oracle undertakes substantial efforts to reach out to interested women and minorities for all positions. Thrasher Decl., ¶¶ 3-4. Managers are required to take regular non-discrimination training, and they are expressly instructed that pay "[d]ifferences need to be based on fair, justifiable and non-discriminatory criteria." *See* Waggoner Decl., Ex. B (HQCA 364183 at 6); Ex. C (HQCA 364272 at 15).³ They are also instructed to consider pay equity when making compensation decisions, and can partner with HR business partners and compensation

² All declaration cites herein refer to the declarations filed with Oracle's Motion unless otherwise noted.

³ "HQCA" refers to documents stamped "ORACLE_HQCA." Cites have been condensed to remove leading zeros.

consultants to ensure compensation decisions are equitable. Waggoner Decl., Ex. B (HQCA 364183 at 2, 22); Connell Decl., Ex. L (HQCA 400403 at 446, 448-49).

B. This Action Is Founded on a Rushed and Insufficient Conciliation Process

On September 24, 2014, OFCCP initiated the audit of Oracle's Redwood Shores headquarters that led to this litigation. Holman-Harries Decl., ¶ 2. The history of interactions between OFCCP and Oracle during that audit are set forth in detail in the declarations of Shauna Holman-Harries and Gary Siniscalco. *See id.*, ¶¶ 2-24, Exs. A-U; Siniscalco Decl., ¶¶ 2-7, Exs. A-C. Without a Predetermination Notice, OFCCP issued the NOV on March 11, 2016. The NOV made sweeping claims of compensation discrimination but did not identify any "comparators," *i.e.*, the persons similarly situated to those who were allegedly disfavored, as required to articulate a *prima facie* case under Title VII. Holman-Harries Decl., Ex. B. The NOV provided only a high-level description of the statistical analyses that OFCCP claimed demonstrated such discrimination. *Id.* And it alleged discrimination in only three of the sixteen job functions at Oracle's headquarters. *See* Connell Decl., Ex. M (Saad Report at ¶¶ 94-97, Attachments C4-C5).

Oracle responded quickly to the NOV, requesting details on OFCCP's statistical analyses and allegations so the parties could meaningfully engage in a conciliation process. Holman-Harries Decl., ¶¶ 27-28, Exs. W, X. Without responding substantively to Oracle's requests or providing the information sought, OFCCP issued the SCN in June 2016. Holman-Harries Decl., ¶ 31, Ex. Y. Oracle responded to the SCN that same month, again requesting that OFCCP engage in a reasonable conciliation process. OFCCP did not respond **for over two months**. *See* Apr. 21, 2017 Siniscalco Decl. ISO Oracle's Motions re Failure to Conciliate, ¶¶ 6-7, Exs. M-N.

After OFCCP finally responded to Oracle, the parties met on October 6, 2016. *Id.* at ¶ 8. OFCCP did not provide Oracle with a proposed conciliation agreement, a concrete monetary demand, proposed non-monetary settlement terms, or the details Oracle requested regarding the statistical analyses outlined in the NOV. *Id.* at ¶¶ 9-10. Following that meeting, on October 31, 2016 and in response to OFCCP's request, Oracle provided additional factual and legal

information. *Id.* at ¶ 12, Ex. Q. OFCCP did not respond for six weeks. *Id.* at ¶ 13, Ex. R.

On December 9, 2016, OFCCP abruptly informed Oracle that Oracle had failed to “rebut” the purported violations in the NOV and that it was referring this matter to the Solicitor of Labor for enforcement. *Id.* On December 12, 2016, Oracle contacted the Solicitor to protest that it never had a chance to properly conciliate this matter. *Id.* at ¶ 14, Ex. S. Only three days before the new administration assumed office, on January 17, 2017, the Solicitor filed OFCCP’s initial Complaint against Oracle.

C. The Employees at Issue in This Case Work on a Vast Array of Products Using a Diverse Set of Skills, Duties, and Responsibilities

Oracle is a global technology company that provides state-of-the-art software and hardware products and related services to customers worldwide. It currently markets more than 800 active products. *See* Waggoner Decl., ¶ 6; *see also* Miranda Decl., ¶¶ 4-5, Ex. A. These products include software, hardware, cloud computing services, 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. Waggoner Decl., ¶ 7. The thousands of employees who work on Oracle’s diverse suite of products and services have a correspondingly diverse set of skills, duties, and responsibilities used to develop, upgrade, and support those technologies. Miranda Decl., ¶¶ 3-5. Each product has a different value in the market, and the skills and duties associated with a product change over time. *Id.*, ¶ 11.

One catalyst to Oracle’s growth has been acquisitions. Waggoner Decl., ¶ 9. Acquisitions have added hundreds of new products to Oracle’s portfolio, further amplifying the diversity of technology products and services it offers. Waggoner Decl., ¶ 10; Miranda Decl., Exs. B- C.

D. Oracle Is Organized Into Lines of Business Structured Around the Products and Services It Delivers

To manage its sprawling business, Oracle is organized into **lines of business** (“LOBs”). Waggoner Decl., ¶ 12. LOBs are organizations within Oracle that are focused on a distinct part of Oracle’s business or operations. *Id.*, ¶ 13. LOBs are identified by the individual executives

who oversee the LOB and that LOB's products. Connell Decl., Ex. A (HQCA 400584 at 85:1-19; 86:4-12; 87:9-88:3).

LOBs are further divided into specialized organizations and teams that differ by strategic importance. Waggoner Decl., ¶ 13. Each LOB has a management hierarchy, with first-level (or direct) managers at the bottom directly supervising individual contributors. *Id.*, ¶ 14. Because Oracle's products and services are always evolving, this hierarchy is in near-constant flux. *Id.*, ¶ 14. Where a particular employee is located in an LOB can impact her compensation, as budgeting decisions and bonus or raise allocations are made within this LOB hierarchy. *Id.*, ¶ 15.

E. Oracle Employees Have "Job Functions" and "System Job Titles"

In addition to LOBs, Oracle categorizes employees by **job functions**. Connell Decl., Ex. C (7/19 Waggoner PMK Dep. 100:13-23). The job functions at issue in this action are **Product Development, IT, and Support**. Job functions describe "the general type of work" performed by employees within the function. Waggoner Decl., Ex. E (HQCA 56234 at 4). A job function provides virtually no information about an employee's day-to-day job duties. Waggoner Decl., ¶ 17. Employees in Product Development are responsible for developing the various components of the products and services described above. Waggoner Decl., ¶ 17. The duties range from writing software code for new products to product management, technical writing, and quality assurance. Connell Decl., Ex. I (HQCA 399991 at 999); Ex. J (HQCA 400010 at 010-11). Employees in the IT job function specialize in business implementation and planning, data center services, network services, and risk management. Waggoner Decl., ¶ 17. In the Support job function, employees work on everything from legacy on-premise solutions to cloud-based solutions and other emerging technologies. *Id.*

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**. Waggoner Decl., ¶ 20. System job titles reflect a progression of development within a job family (e.g., Applications Developer 1, Applications Developer 2, and so on). *Id.*; see Connell Decl.,

Ex. I (HQCA 399991 at 004-05). Job functions, specialty areas, job families, and system job titles are broad and describe the type of work that a person performs at a high level of abstraction. Waggoner Decl., ¶¶ 17, 22; *see, e.g.*, Connell Decl., Ex. I (HQCA 399991 at 999); Ex. J (HQCA 400010 at 010-11).

Each system job title associates a given employee with a particular **career level**. Waggoner Decl., ¶ 24. Career levels are broad steps that roughly reflect increased skill, knowledge, responsibility, and performance expectations. Sarwal Decl., ¶ 13; Connell Decl., Ex. I (HQCA 399991 at 997). Oracle's career level structure has two paths: **Management** for those who manage two or more employees (M1-M10), and **Individual Contributor** for all other roles (IC0-IC6). Waggoner Decl., ¶ 24; Connell Decl., Ex. I (HQCA 399991 at 002).

This job taxonomy is separate from the team or LOB in which that employee works. *See* Waggoner Decl., Ex. E (HQCA 56234 at 4). Thus, job functions are not tied to specific LOBs. Further, unlike LOBs, job functions do not have a leader, and individuals within a given job function (including Product Development, IT, and Support) work across different LOBs and report to many different leaders. Waggoner Decl., ¶ 19; Connell Decl., Ex. A (HQCA 400584 at 47:20-48:24, 51:9-21).

F. Oracle's Compensation Is Decentralized and Variable

1. Managers Determine Salaries and Bonuses for Their Employees

An employee's direct manager plays the most significant role in setting that employee's compensation. *See* Waggoner Decl., ¶ 28; Ex. E (HQCA 56234 at 16, 22); *id.*, Ex. C (HQCA 364272 at 15). Front-line managers, for example, are the primary decision-makers as to which applicant they select for jobs they post, and whether, on occasion, to adjust the level of the job based on the individual selected. Waggoner Decl., ¶¶ 25, 28. First-line managers also determine the starting pay for new hires. *Id.*, ¶ 28, Ex. E (HQCA 56234 at 36). Managers also determine salary increases. *Id.*, ¶ 28. Although individual compensation decisions are subject to an approval process by more senior management to ensure they are within budget or otherwise are not wholly

unreasonable, those senior managers generally defer to the decisions of the lower-level managers. *Id.*, ¶ 28; Balkenhol Decl., ¶¶ 6-7.

The majority of salary raises occur during a “focal” review, a company-wide review process undertaken periodically, as determined by Oracle’s financial performance. Waggoner Decl., ¶ 28; Connell Decl., Ex. K (HQCA 400313 at 313). During a focal review, LOB heads receive a budget for salary increases. Connell Decl., Ex. C (7/19 Waggoner PMK Dep. 252:15-253:19). The LOB heads can allocate that budget in their discretion to lower-level managers within their organizations. Waggoner Decl., ¶¶ 28-30. Lower-level managers within an LOB then make further decisions about if and how to “cascade” budget down through the organization. *Id.*, ¶¶ 16, 29-30, Ex. A (slide 6 notes). A manager who is the last recipient of an LOB’s allocation distributes that amount in her discretion as raises to individual employees. *Id.*, ¶¶ 29-30. In making these determinations, managers may exercise their own judgment or consult other managers (for example, if they do not directly supervise the employees at issue). *Id.*, ¶ 30. In the vast majority of cases, the senior management approval process acts as a check to review whether managers stay within allotted budgets. *Id.*

Bonuses, like salaries, are distributed from a budget within each LOB. *Id.*, ¶¶ 15, 29. First- and second-line managers usually play the primary role in making a bonus decision. *Id.*, ¶¶ 29-30. Bonuses at Oracle are discretionary and are designed to reward employees for achieving strategic company goals. Connell Decl., Ex. K (HQCA 400313 at 314). Equity awards are likewise determined by first- or second-line managers, to encourage retention and other long-term goals. Gill Decl., ¶ 6; Robertson Decl., ¶ 12

Managers are instructed to consider a set of general principles when making compensation decisions. Waggoner Decl., ¶¶ 31-32, Ex. B (HQCA 364183 at 5, 6), Ex. C (HQCA 364272 at 15), Connell Decl., Ex. K (HQCA 400313 at 313), Ex. L (HQCA 400403 at 425-26). Those principles include: (a) considering how an employee’s compensation compares to that of her peers (Waggoner Decl., ¶ 32, Ex. B (HQCA 364183 at 5)); (b) accounting for each

employee's relevant knowledge, skills, abilities, and experience (Waggoner Decl., ¶¶ 28, 31); (c) balancing external and internal equity considerations (Waggoner Decl., ¶ 32, Ex. B (HQCA 364183 at 6)); (d) differentiating rewards by performance (Connell Decl., Ex. K (HQCA 400313 at 313-14)); and (e) considering the employee's importance to the company. Waggoner Decl., Ex. C (HQCA 364272 at 15); Connell Decl., Ex. U (Madden Dep. 123:18-124:12). For example, pay increases are sometimes required to retain employees if a competitor attempts to poach them. Connell Decl., Ex. C (7/19 Waggoner PMK Dep. 286:15-287:7).

These guiding principles ensure that compensation decisions are made “on a case-by-case basis.” Connell Decl., Ex. L (HQCA 400403 at 438); Waggoner Decl., Ex. B (HQCA 364183 at 21), Ex. E (HQCA 56234 at 37). These factors are not exclusive. Connell Decl., Ex. C (7/19 Waggoner PMK Dep. 86:1-19); Waggoner Decl., Ex. B (HQCA 364183 at 21). Managers may award greater compensation—particularly bonuses—to employees working on products that are particularly complex or for which the labor market is particularly competitive. Waggoner Decl., ¶ 31. Oracle also encourages managers to assess internal pay equity among employees on their teams when making pay decisions, including awarding bonuses and increases through the focal review process. Waggoner Decl., ¶ 32, Ex. B (HQCA 364183 at 21).

2. Oracle Managers Make Compensation Decisions Based on Employees' Individual Skills and Contributions

Oracle faces substantial and continuous competition for highly-skilled and talented employees. *See* Gill Decl., ¶¶ 4-5. To compete against other tech giants such as Amazon and Microsoft, Oracle's compensation tools include base salary, bonuses, restricted stock awards, and performance stock and stock options. *Id.*, ¶ 6. Particular teams or projects at Oracle often require highly specialized, rare, and valuable technical skills, and to stay competitive Oracle must actively recruit and retain employees with those specialized skills. Gill Decl., ¶ 5.

Oracle's compensation philosophy reflects its business need to recognize individual skills and contributions. Waggoner Decl., ¶¶ 27-28, Ex. B (HQCA 364183 at 5), Ex. E (HQCA 56234 at 17, 37), Ex. C (HQCA 364272 at 15). Its compensation framework strives for equitable pay

within teams while recognizing employees' different knowledge, skills, abilities, performance, experience, and contributions. *Id.*, Ex. B (HQCA 364183 at 5), Ex. C (HQCA 364272 at 15). Thus, Oracle empowers its managers, who are familiar with an individual employee's work and how it compares to others to drive the decision-making in Oracle's highly decentralized process. Waggoner Decl., ¶ 28, Ex. B (HQCA 364183 at 21).

III. OFCCP'S CASE MUST BE DISMISSED BECAUSE OFCCP FAILED TO MEET ITS MANDATORY PRESUIT OBLIGATIONS

A. OFCCP Did Not Have Reasonable Cause to Issue a Show Cause Notice

Before issuing the SCN, OFCCP must have had "reasonable cause" to believe Oracle discriminated. *See* 41 C.F.R. § 60-1.28; Exec. Order No. 11246, 30 FR 12319 (1965).

"Reasonable cause" means "reason to believe that a violation has taken place." *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1500 (9th Cir. 1986). Fishing expeditions are prohibited. *Id.* As this Court has recognized, "[n]either the Executive Order nor the regulations give OFCCP or the Solicitor's office the authority to initiate enforcement proceedings based on nothing more than 'largely irrelevant' evidence and then go in search of a claim and evidence to support it." June 10, 2019 Order at n.6.

Here, the only explanation and evidence OFCCP has provided of an alleged audit period violation are the statistical analyses underlying the NOV, none of which establish reasonable cause to believe discrimination occurred. OFCCP confirmed that the statistician responsible for the NOV's analyses exercised none of his own independent professional judgment, but instead merely followed instructions from OFCCP's then-Regional Director Janette Wipper (an attorney, not a statistician). Wipper provided the data, the factors to use in the regression model, the instructions on calculating work experience, and the employee groupings. Connell Decl., Ex. F (7/1 Leu Dep. 79:18-80:6; 97:12-24; 102:10-18; 108:25-109:12; 139:9-23). OFCCP's statistician testified he spent only an estimated **five to ten hours total** on the "analyses." *Id.* at 154:5-20. The only four factors used were (1) time at Oracle; (2) age; (3) full-time/part-time; and (4) job

title.⁴ Holman-Harries Decl., Ex. B; Connell Decl., Ex. M (Saad Report at ¶ 94). As described in detail below, as well as in Oracle's initial expert report, those factors are entirely insufficient to similarly situate employees, as required by Title VII. *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (employees similarly situated when they "have similar jobs and display similar conduct"). This "analysis requires a micro-level—rather than a macro-level—approach to comparing job responsibilities, skills and requirements." *Kassman v. KPMG LLP*, 2018 WL 6264835, at *27 (S.D.N.Y. Nov. 30, 2018). Additionally, OFCCP did not consider whether there were legitimate factors explaining pay differences, also a requirement under Title VII pursuant to the Bennett Amendment. *See* Section IV.B.5., *infra*; Connell Decl., Ex. F (7/1 Leu Dep. 127:19-128:3; 142:20-143:11; 210:15-211:5; 211:7-212:4). Accordingly, OFCCP lacked the requisite "reasonable cause" to believe that discrimination occurred.

B. OFCCP Did Not Engage in Reasonable Conciliation Efforts

Where OFCCP alleges deficiencies in a contractor's employment practices, "reasonable efforts shall be made to secure compliance through conciliation and persuasion" before beginning enforcement proceedings. 41 C.F.R. § 60-1.20(b). OFCCP was required to inform Oracle about the specific violation it purportedly found, including what employees (or what class of employees) suffered as a result. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 73 (1984). Parties cannot conciliate claims and issues about which the employer is not adequately informed. *See, e.g., EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003).

Here, the undisputed evidence shows that OFCCP did not provide Oracle with essential information about the nature of, and bases for, any alleged violations. For example, OFCCP understood that Oracle was requesting additional information during conciliation in order to respond substantively to the NOV. Connell Decl., Ex. D (6/26 Suhr Dep. 41:20-42:6). OFCCP admits that despite issuing the NOV on March 11, 2016 and the SCN on June 8, 2016, as of

⁴ Because each standard job title or job code is associated with a single exempt status, global career level, and job specialty, the other factors listed on the NOV are redundant.

October 29, 2016, the *only* information Oracle had received about the alleged violations were from the NOV and one subsequent email from an OFCCP employee that provided no more information than what was already in the NOV. *Id.* at 41:20-42:6; Siniscalco Decl., Ex. C (4/21/16 Atkins Letter). OFCCP never provided a proposed conciliation agreement to Oracle, or explained what non-monetary actions Oracle could take to resolve the alleged violations. Connell Decl., Ex. D at 35:14-21; 50:5-22; 65:7-66:8. OFCCP gave Oracle cocktail-napkin estimates of claimed back pay monetary damages, but never provided any backup that would allow Oracle to understand whether the numbers were reasonable. *Id.* at 68:23-69:13. As a result, Oracle was never given a meaningful opportunity to conciliate the NOV.

IV. OFCCP'S DISPARATE TREATMENT CLAIM FAILS AS A MATTER OF LAW

A. "Pattern or Practice" Legal Standard

OFCCP alleges that Oracle engaged in a pattern or practice of intentional discrimination against women in its Product Development, Support, and IT job functions, and against Asians and African-Americans in its Product Development job function. SAC, ¶¶ 11-42. *International Brotherhood of Teamsters v. United States* established the two-stage process for "pattern or practice" claims. In Stage I, OFCCP must show that "unlawful discrimination has been a regular procedure or policy followed by an employer." 431 U.S. 324, 360 (1977). OFCCP intends to prove this primarily with its statistical analyses. In Stage II (not addressed in this motion), assuming OFCCP proves a pattern or practice of discrimination, there is a presumption of discrimination that Oracle must rebut by showing its actions were lawful with regard to particular employees. *Id.* at 362.

Within Stage I, disparate treatment claims are analyzed under a three-step burden-shifting framework. *OFCCP v. TNT Crust*, 2007 WL 5309232, at *14 (Sept. 10, 2007). OFCCP's burden at the first step is high. It must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It ha[s] to establish by a preponderance of the evidence that racial [or gender] discrimination was the company's **standard operating procedure**—the

regular rather than the unusual practice.” *Teamsters*, 431 U.S. at 336 (emphasis added). OFCCP must present evidence that Oracle “acted with the deliberate purpose and intent of discrimination against an entire class.” *United States v. City of New York*, 717 F.3d 72, 87 (2d Cir. 2013); *OFCCP v. Honeywell*, No. 77-OFCCP-3, 1994 WL 68485 (Mar. 2, 1994). This requires “proof of commonality,” *i.e.*, “some glue holding the alleged reasons for all those decisions together[.]” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 and n.7 (2011).

At the second step, the burden “shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating the Government’s proof is either inaccurate or insignificant.” *Teamsters*, 431 U.S. at 360. This is a “a burden of production only; the burden of persuasion remains with the plaintiff at all times.” *Gay v. Waiters’ & Dairy Lunchmen’s Union, Local No. 30*, 694 F.2d 531, 537 n.4 (9th Cir. 1982).⁵ In the third step, “[t]he trier of fact must then determine, by a preponderance of [all] the evidence, whether the employer engaged in a pattern or practice of intentional discrimination.” *Reynolds v. Barrett*, 685 F.3d 193, 203 (2d Cir. 2012).

Because OFCCP relies principally on its statistical analyses, it must “produce statistics showing a clear pattern, unexplainable on grounds other than race [or gender]. But such cases are rare.” *Gay*, 694 F.2d at 552 (omitting citation and internal quotation marks). OFCCP’s analyses do not come close to demonstrating this. The undisputed evidence demonstrates that compensation decisions at Oracle are made on a decentralized and case-by-case basis. There is therefore no “discrimination throughout all or a significant part of its system,” as required for a pattern or practice case. *Teamsters*, 431 U.S. at 336 n.16.

⁵ Oracle is not required to submit its own analyses, but simply can explain why OFCCP’s analyses do not demonstrate discrimination. *See, e.g., Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 464 (9th Cir. 1987) (rebuttal evidence can be limited to showing that the plaintiffs’ statistics are flawed or that any disparities are not statistically significant or actionable); *EEOC v. Gen. Tel. Co. of Nw., Inc.*, 885 F.2d 575, 582 (9th Cir. 1989) (where statistical omissions are “central” to challenged compensation decisions, defendant can defeat inference of discrimination merely pointing out such omissions); *OFCCP v. Bank of Am.*, 2016 WL 2892921, at *8 (Apr. 21, 2016). Nevertheless, Oracle’s expert has demonstrated that taking into account even a handful of readily-available variables, such as how long an employee has held their current role, makes OFCCP’s purported discrimination findings disappear. Connell Decl., Ex. M (Saad Rpt., ¶¶ 121-34), Ex. O (Saad Rebuttal ¶¶ 87-92).

The Court also must consider Oracle's affirmative defenses. Under the Bennett Amendment, Oracle is entitled to raise defenses from the Equal Pay Act in Title VII cases alleging compensation discrimination, including as relevant here, differentiating pay based on factors other than gender or race, such as an employee's skills or performance. *See* 42 U.S.C. § 2000e-2(h); *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910, 919 (3d Cir. 1983) (in racial discrimination case, "a showing that any other factor other than race" was determinative in employment decision weighs against finding of discrimination). Adjudicating these defenses is part of the Court's Stage I analysis. *See, e.g., Teamsters*, 431 U.S. at 360-61, n.46 (employer may raise legitimate, nondiscriminatory explanation for pay disparities during Stage I); *Washington Cty. v. Gunther*, 452 U.S. 161, 167 (1981); *EEOC v. Kettler Bros.*, 846 F.2d 70 (4th Cir. 1988) (employer may rebut *prima facie* case with EPA affirmative defenses).

B. OFCCP's Disparate Treatment Claim Does Not Get Past Stage One

OFCCP does not make it out of the starting block. Because its analyses do not compare similarly situated employees as required by law, it cannot establish that any pay decisions were discriminatory. Additionally, OFCCP simply assumes that Oracle engaged in discriminatory job assignments when the evidence establishes otherwise. Finally, there is no anecdotal evidence that saves these deficiencies, and OFCCP's admission it is not accusing individual managers of bias would render any such evidence irrelevant and insufficient. *See* Aug. 22, 2019 Position Statement at 8-9.

I. OFCCP's Analyses Must Compare "Similarly Situated" Employees

Title VII case law, as well as OFCCP's own regulations, dictate that OFCCP's statistics must compare "similarly situated employees." *See* 41 C.F.R. § 60-20.4(a); *Vasquez*, 349 F.3d at 641; *White v. AKDHC, LLC*, 664 F. Supp. 2d 1054, 1068-69 (D. Ariz. 2009) (employees must be similarly situated "in all material respects"). Case law explains what this means. It is not passing similarity or facile comparisons. *Mansfield v. Billington*, 574 F. Supp. 2d 69, 82-83 (D.D.C. 2008) (employees are similarly situated when all of the relevant aspects of their employment

situations are “nearly identical”). In *Jinadasa v. Brigham Young University-Hawaii*, the court compared a Portal Administrator and a Web Architect by examining their education, past experience, job duties, and the market demand for their services. 2016 WL 6645767, at *4-5 (D. Haw. Nov. 9, 2016). The court concluded that because they “had different jobs with different responsibilities . . . they cannot be said to have been similarly situated [in all material respects].” *Id.*; see also *Perry v. Clinton*, 831 F. Supp. 2d 1, 17-18 (D.D.C. 2011) (two website managers not similarly situated where they had different supervisors and different duties); *Krause v. Nevada Mut. Ins. Co.*, 2015 WL 3903587, at *9 (D. Nev. June 24, 2015) (granting summary judgment for employer where two employees had “vice president” in their title but different duties and therefore did not have similar jobs). Here, Oracle uses broad job titles across business units and thus “the Court must focus on the actual job duties of the employees.” *Hooper v. Total Sys. Servs., Inc.*, 799 F. Supp. 2d 1350, 1362 (M.D. Ga. 2011) (comparators not similarly situated where plaintiff relied merely on comparison of generic job titles and had little or no evidence regarding actual job functions or the skill and effort required to perform those functions); *Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1414 (9th Cir. 1988) (“a court should rely on actual job performance and content rather than job descriptions, titles, or classifications”); *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 255-58 (2d Cir. 2014) (dismissing complaint alleging substantial similarity based on job code, explaining that job codes “say nothing of the actual job duties and are thus peripheral to an EPA claim”).

2. OFCCP’s Analyses Do Not Compare Similarly Situated Employees

The fundamental problem with OFCCP’s statistics is that they do not compare similarly situated employees. For that reason alone, even if the Court considers them, they cannot prove discrimination. OFCCP’s expert Dr. Madden intentionally chose not to study employees’ duties, skills, and experience. Connell Decl., Ex. N (Madden Rpt. at 8). Instead, she looks at inadequate measures of “experience” and “education,” and assumes that characteristics such as job title, organization, or career level are “determined by Oracle’s policies or decisions” and therefore so

tainted by discrimination that they should not be considered. *Id.* None of this is right.

Madden's method of measuring experience and education is deeply flawed. For experience, Madden treats all prior work as equivalent, regardless of whether it relates to the employee's current work at Oracle. *See* Connell Decl., Ex. M (Saad Rpt., ¶ 111). For education, Madden's initial report simply looked at the degree of education attained (*e.g.*, college, Masters, or Ph.D.), without considering the school attended, the subject matter of the degree, or the job that the employee is applying for or holds. Connell Decl., Ex. N (Madden Rpt. at 15) & Ex. P (Madden Rebuttal at Table R1). Further diluting the significance of her results, Madden coded as "unknown" the education level of **over 50% of the employees she analyzed**. Connell Decl., Ex. O (Saad Rebuttal, ¶¶ 19, 28 n.21). In other words, Madden's initial expert opinion was based on only two measures of pre-Oracle qualifications, and she is missing over half the data for one.

In her rebuttal report and at deposition, Madden impermissibly attempted to offer new opinions, purportedly to address critiques that her measures of education and experience were simplistic. In rebuttal, she suggested (though apparently does not conclude) that the "job descriptor" variable she invented by aggregating Oracle's job titles also might measure employees' "area of education and prior experience." *Id.*, Ex. P (Madden Rebuttal at 11 n.3, 13). Of course, this flatly contradicts her original report, where she opined "job descriptor" was a characteristic assigned by Oracle and therefore unworthy of consideration. *Id.*, Ex. N (Madden Rpt. at 15-16). At deposition, Madden tried a third approach, contending that the final column of her original pay discrimination tables actually *does* compare employees "performing similar work" under what she calls "Oracle's definition" (*i.e.*, she puts words in Oracle's mouth and assumes that Oracle has concluded employees in the same job code perform similar work). *Id.*, Ex. U (Madden Dep. 43:4-44:17), Ex. N (Madden Rpt. at Table 1(a) at Col. 8). But Madden "did not look at" which employees perform similar work to others and therefore has not "formed an independent view of that." Ex. U (Madden Dep. 84:14-85:22). And she never studied the various skills required to perform different work, even within a single job code. *Id.* Consequently, her

untimely attempt to modify her opinions still fails to prove OFCCP's claims because the undisputed evidence demonstrates that Oracle's job codes are broad and do not account for employees' particular skills, experience, or performance. *See* Section II.E., *supra*.

3. OFCCP's Expert Does Not Prove Discriminatory "Assigning"

Madden compounds her errors above by assuming that women, Asians, and African-Americans are assigned to lower-paying roles at the time of hire. In her rebuttal, Madden attempts to establish that assigning occurs. *Id.*, Ex. P (Madden Rebuttal at 32-37). In fact, however, the data conclusively demonstrates that the majority of applicants are hired into the jobs for which they applied, and that there is no statistically meaningful pattern of differences in "up-levelling" or "down-levelling" between men, women, Asians, or African-Americans. *See* Connell Decl., Ex. M (Saad Rpt. ¶¶ 147-56), Ex. O (Saad Rebuttal, ¶¶ 57, 65-66). Moreover, Madden agrees that determining whether any particular employee was the victim of an alleged discriminatory assignment would require an "individual-by-individual analysis." Connell Decl., Ex. U (Madden Dep. 58:11-61:1). Madden admits she did not engage in that analysis. *Id.*

Accordingly, the reasons Madden gives for ignoring the highly differentiated skills, duties, and responsibilities of employees when analyzing their compensation are specious and unfounded. And by ignoring, or mis-measuring through overbroad job categories, the work Oracle employees actually perform, **Madden does not compare similarly situated employees as required by Title VII.** *See* Section IV.B.1, *supra*.

4. Many Courts Have Rejected Madden's Analyses For These Reasons

The only factors for which Madden purports to control—experience, education and (maybe) "job descriptor"—are not the only factors Oracle considers when making pay decisions, and these three data points do not capture the nuances and import of these factors across the diverse group of employees, roles, and levels at issue. Accordingly, Madden's analyses fail legally. *See, e.g., Fuller v. Seagate Tech., LLC*, 651 F. Supp. 2d 1233, 1247-48 (D. Colo. 2009) (where plaintiff's analysis was not broken down by job responsibilities, seniority, performance,

or supervisors, plaintiff's "citation to a random smattering of statistics, even if it shows numerical disparities, does not raise a jury question"); *OFCCP v. Analogic Corp.*, ALJ No.: 2017-OFC-00001 at 37 (Mar. 22, 2019) ("[C]ourts have determined regressions which do not include major factors [used to determine pay] cannot support a finding of discrimination."). Even Madden knows this, because multiple courts have rejected her analyses on this basis. *See, e.g., Cooper v. S. Co.*, 390 F.3d 695, 726 (11th Cir. 2004) (summary judgment for employer where Madden's statistics "failed to effectively measure job-related skills, education, experience, and job performance, using only broad, imprecise measurements as proxies for work experience."⁶)

But the Court does not need to exclude or ignore OFCCP's statistical analyses to grant this motion. They are so flawed that even if the Court considers them, as a matter of law they cannot prove discrimination. OFCCP draws on *Teamsters* and *Hazelwood* as the basis for its pattern and practice claim. But those cases involved allegations of hiring discrimination against an entire workforce, or all applicants. *Teamsters*, 431 U.S. at 329; *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 302 (1977). Here, OFCCP alleges compensation discrimination in only three of sixteen job functions at Oracle's headquarters. Establishing that a subset of job functions might be impacted by pay discrimination is a far cry from establishing systemic

⁶ *See also Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 465-66 (N.D. Ill. 2009), *aff'd*, 675 F.3d 709 (7th Cir. 2012) ("[I]n both her original and revised analyses, Dr. Madden failed to consider ... whether the putative class members were qualified for the positions in which women were underrepresented, because she did not factor into her analyses the employees' performance evaluations, or the quantity and quality of their work. ... Dr. Madden's analysis is only minimally probative of commonality without these important variables."); *Williams v. Boeing Co.*, 2006 WL 126440, at *3 (W.D. Wash. Jan. 17, 2006) (Madden "not persuasive" because her "multiple pools and regression analyses also do not necessarily compare promotions for similarly situated employees"); *Gosho v. U.S. Bancorp Piper Jaffray, Inc.*, N.D. Cal. No. C-00-1611-PJH, slip op. at *4 (Oct. 1, 2002) (excluding Madden's report which "[did] not incorporate the effect of production on compensation of brokers in Piper Jaffray's production-based system of compensation, and [did] not analyze statistically whether any discriminatory policy or practice affects production or commonly occurs within specific branch offices or across the board"); *Frazier v. Se. a. Transp. Auth.*, 1990 WL 223051, at *14 (E.D. Pa. Dec. 21, 1990) ("Dr. Madden's study was unreliable due to her reliance on groupings that did not take into account important factors, such as ability. Therefore, the plaintiffs have failed to carry their prima facie burden of showing statistical disparities [and] may not go forward with their case under Title VII."); *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1314 n.63, 1315 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988) ("EEOC's statistical analyses are dependent upon the crucial arbitrary assumption that men and women are equally interested in commission sales jobs at Sears. As is evident from the above discussion, EEOC has provided nothing more than unsupported generalizations by expert witnesses with no knowledge of Sears to support that assumption" which "fatally undermines its entire statistical analysis.").

discrimination against an *entire workforce, or all applicants*. In fact, OFCCP's analyses affirmatively prove there is *not* a pattern or practice of compensation discrimination. When its statistical models are applied to other employee groupings, no pay disparities are found.⁷ Further, a job function such as Product Development cuts across multiple organizations and LOBs and does not have a leader overseeing it. These analyses make horizontal slices across Oracle's workforce at a single location (HQCA), and as a result rather than demonstrating a company-wide pattern or practice of intentional discrimination (or even discrimination attributable to one executive or chain of command), demonstrate instead the unremarkable fact that when one cherry-picks certain groups of employees and ignores important and common-sense variables affecting compensation, pay disparities may emerge.

Indeed, Oracle's decentralized, case-by-case decisionmaking system is necessarily incompatible with a company-wide practice of intentional discrimination. *Dukes*, 564 U.S. at 352 & n.7. And OFCCP's aggregate regressions, which compare employees whose pay was determined by many different managers, cannot reasonably demonstrate discriminatory intent of any manager because the comparisons include thousands of employees for whom each manager did *not* make the pay decisions. *Dukes*, 564 U.S. at 356-57; *Abram v. United Parcel Serv. of Am., Inc.*, 200 F.R.D. 424, 431 (E.D. Wis. 2001) (aggregate numbers mask differences from supervisor to supervisor that preclude a finding of "commonality"). OFCCP has not shown the requisite discriminatory intent or motive in adopting any challenged compensation practices. *See, e.g., Am. Fed'n of State, Cty., & Mun. Emps., AFL-CIO (AFSCME) v. State of Wash.*, 770 F.2d 1401, 1405 (9th Cir. 1985) ("an employer's intent or motive in adopting a challenged policy is an essential element of liability for a violation of Title VII").

At best, Madden's analyses show that certain groups at Oracle are paid more than others

⁷ OFCCP did not find evidence of discrimination in the vast majority of the job functions it analyzed. Yet OFCCP "did not report these statistically insignificant results[.]" Connell Decl., Ex. M (Saad Rpt., ¶ 23). "These findings undermine any inference that Oracle's managers consistently and systemically discriminate against women and minorities when it comes to pay, and instead are consistent with the OFCCP having a poorly specified model that does not generate reliable or meaningful conclusions." *Id.*

when considered on average and in the aggregate. That does not establish that discrimination is the reason for any pay disparity. *See Abram*, 200 F.R.D. at 431 (“[If] Bill Gates and nine monks are together in a room, it is accurate to say that on average the people in the room are extremely well-to-do, but this kind of aggregate analysis obscures the fact that 90% of the people in the room have taken a vow of poverty.”); *Moussouris v. Microsoft Corp.*, 2018 WL 3328418, at *24 (W.D. Wash. June 25, 2018).

5. Anecdotal Evidence Does Not Cure the Statistical Defects

As described above, OFCCP’s statistical analyses fail to compare similarly situated employees and therefore cannot support its discrimination allegations. Because of OFCCP’s poor statistical evidence, “strong evidence of individual instances of discrimination becomes vital[.]” *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988); *Segar v. Smith*, 738 F.2d 1249, 1278 (D.C. Cir. 1984). But OFCCP has no such evidence.

First, it already conceded that the managers in the three job functions at issue here (who determined the compensation OFCCP contends is discriminatory) did not engage in any wrongdoing. *See* Aug. 22, 2019 Position Statement at 8-9. Second, OFCCP has no anecdotal evidence of bias by the only four senior executives it has identified as potential discriminators (Safra Catz, Larry Ellison, Mark Hurd, or Thomas Kurian), let alone evidence these executives exhibited bias in the thousands of pay decisions at issue here. OFCCP seeks to hold Oracle’s senior leadership responsible for discrimination despite admitting the lack of discrimination at any level beneath them. Likewise, any alleged inaction by Oracle executives to “correct” purported pay disparities cannot be discriminatory because OFCCP admits none of the decisions that led to the alleged disparities were discriminatory. The sum total of zero discrimination is zero discrimination, and discriminatory animus is not some nebulous emergent property that exists at the organizational level despite being found nowhere in its constituent parts.⁸

⁸ In its Position Statement, OFCCP contends that “[p]roof of discriminatory intent in a disparate treatment case can be circumstantial and may be proven entirely through statistical analyses.” Position Statement at n.5. The cases

6. **Oracle's Affirmative Defenses of Pay Differentials Based on Neutral Factors Must Be Considered**

As explained above, Oracle is entitled to assert its Bennett Amendment affirmative defenses, including differentiating pay based on factors other than gender or race, such as skills and job performance. Any regression analyses purportedly showing a pay disparity must include all the “major factors” actually used in determining pay, or they are not probative of discrimination. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). Madden’s analyses do no such thing. Moreover, even if OFCCP could establish a *prima facie* case that Oracle paid women, Asians, or African-Americans less than similarly situated men or white employees, Oracle is entitled to defend every such wage differential with neutral factors justifying the pay differences. *Teamsters*, 431 U.S. at 360-61, n.46. Oracle’s defenses require engaging in the type of individualized inquiries that render Madden’s “one size fits nobody” statistical analyses incapable of demonstrating a company-wide intent to discriminate.

C. **OFCCP Lacks Jurisdiction Under Its Assignment Theory for Over Half of the Employees at Issue**

As already noted, Madden’s assignment opinion fails on the facts, but there is also a procedural barrier. OFCCP can only challenge alleged discrimination that occurred at least in part during the 2013-2014 pre-suit audit period. *See, e.g., Analogic Corp.*, at n.6; *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012) (agency’s complaint must be limited to unlawful conduct uncovered during the investigation); *see also EEOC v. Dillard’s Inc.*, 2011 WL 2784516, at *6 (S.D. Cal. July 14, 2011) (agency may not seek relief beyond what is identified during the investigation). Here, over half of the allegedly discriminatory initial assignments occurred **before the 2013 audit window**. *See Connell Decl.*, Ex. M (Saad Rpt., ¶¶ 159-160,

OFCCP cites do not say that. Rather, they make clear that the Court should consider *all* of the evidence (statistical, anecdotal, or otherwise), as well as Oracle’s arguments (including all of the problems with OFCCP’s statistics, including that they do not compare similarly situated employees, nor consider Oracle’s affirmative defenses of neutral factors justifying pay differences) and decide whether OFCCP has carried its high burden of proving intentional discrimination. *See Penk*, 816 F.2d at 465 (“important decision-making variables were either missing or inadequately represented”); *Honeywell*, Case No. 77-OFCCP-3 at 9, 18 (OFCCP did not rely exclusively on statistics, and defendant did not challenge statistics based on employees not being similarly situated).

Attachment C1).⁹

Thus, OFCCP lacks jurisdiction to seek relief for these allegedly discriminatory employment actions because, as a matter of law, they *could not* have occurred during the audit period. *See, e.g., Johnson v. Austal, U.S.A., L.L.C.*, 805 F. Supp. 2d 1299, 1308 (S.D. Ala. 2011) (under Title VII the denial of a promotion is one-time violation, the consequences of which are felt at the time of the denial); *Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370, 375 (D.C. Cir. 2010) (an alleged failure to promote is a discrete act and does not permit a derivative continuing compensation discrimination claim); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002) (refusal to hire is a discrete act). OFCCP is also limited to claims arising in the two-year period before the date of the scheduling notice. 62 Fed. Reg. 160, 44,178 (Aug. 19, 1997); *see also* OFCCP Federal Contract Compliance Manual at 33, 234. Title VII similarly imposes a two-year limitation on recovery of back pay. 42 U.S.C. §2000e-5(g)(1).

V. OFCCP'S DISPARATE IMPACT CLAIM FAILS BECAUSE IT DOES NOT IDENTIFY THE ADVERSE POLICIES OR PROVE CAUSATION

OFCCP also claims to be proceeding on a disparate impact theory. But OFCCP did not give sufficient notice of a disparate impact compensation claim in its NOV, SCN, Complaint, First Amended Complaint, or Second Amended Complaint ("SAC"). *See* 41 C.F.R. §§ 60-4.8, 60-2.2(c)(1). None of these documents reference or imply a disparate impact claim, let alone identify the required specific, facially-neutral policy or practice that had a disparate impact on women, Asians, or African-Americans. *See AFSCME*, 770 F.2d at 1405-06. Thus, this claim should be dismissed.

To prove a disparate impact claim, OFCCP must show "a particular employment practice that causes a disparate impact [on the basis of race or sex.]" 42 U.S.C. § 2000e-2(k)(1)(A)(i). Once such a practice has been identified, OFCCP must produce evidence sufficient to show the identified practice caused a disparate impact on a protected group. *Watson v. Fort Worth Bank &*

⁹ C1 shows there are 6,035 women, Asian, or African-American employees implicated by OFCCP's claims. Paragraphs 159-160 demonstrate that far fewer than half of that number were hired between 2013-2018.

Trust, 487 U.S. 977, 994 (1988). If OFCCP meets this burden, Oracle then has the opportunity to show the practice is consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A); *Watson*, 487 U.S. at 998. Lastly, if Oracle makes its showing, OFCCP must show other practices without an undesirable effect would serve Oracle’s legitimate business needs. *Id.*

OFCCP’s disparate impact claim fails for at least three reasons in addition to being insufficiently pled. **First**, OFCCP has not identified the “particular element or practice” that causes the alleged adverse impact. *Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002). Instead, OFCCP lists hundreds of purported “policies.” *See, e.g.*, Connell Decl., Exs. Q, R (Interrogatory Nos. 25, 50). This fails because the law prohibits OFCCP from pointing to Oracle’s bottom-line compensation and demographic data to prove a disparate impact theory. *Analogic Corp.*, at 32-35; *Bennett v. Nucor Corp.*, 656 F.3d 802, 818 (8th Cir. 2011) (“a bare assertion of racial imbalances in the workforce is not enough to establish a Title VII disparate impact claim”).

Second, OFCCP cannot prove the existence of the policies or practices it alleges, nor can it show causation. To the extent OFCCP attempts to rely on a purported practice of basing starting pay on prior pay, this fails because Oracle has never had any such practice. *See, e.g.*, Robertson Decl., ¶ 11; Yakkundi Decl., ¶ 17; Shah Decl., ¶ 13; Gill Decl., ¶ 9; Ousterhout Decl., ¶ 16; Talluri Decl., ¶ 14; Abushaban Decl., ¶ 16. In addition, OFCCP has proffered no evidence that consideration of prior pay caused the statistical results it contends show discrimination. If OFCCP instead argues that discriminatory job assignments are the practice at issue, this also fails because OFCCP has not presented sufficient evidence that such assigning occurred, let alone that it was a consistent practice for purposes of sustaining a disparate impact claim. *See, e.g., Prince v. Rice*, 453 F. Supp. 2d 14, 27 (D.D.C. 2006) (challenged practice must be “generally applicable”). Nor could it, because as noted above the data demonstrates that the majority of applicants were hired into the jobs to which they applied. Connell Decl., Ex. M (Saad Rpt., ¶¶ 150-156), Ex. O (Saad Rebuttal, ¶¶ 57, 65-66). OFCCP’s lack of explanation as to which employees were allegedly assigned, and its lack of a nexus between the alleged assigning and its

purported discriminatory impact, is fatal to this theory. *Wards Cove Packing v. Atonio*, 490 U.S. 642, 657 (1989) (“[A] plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.”); *Figueroa v. Pompeo*, 923 F.3d 1078, 1086 (D.C. Cir. 2019).

Third, OFCCP cannot mix together policies and practices. OFCCP cannot combine an alleged objective practice (prior pay) with an alleged subjective practice (assigning) and purport to measure the effect of both. *See Watson*, 487 U.S. at 994 (where employer evaluates employees using subjective and objective criteria, plaintiff must isolate and identify the specific practice(s) allegedly responsible for statistical disparities); *Nucor*, 656 F.3d at 815. Here, these variables are capable of separation. *Analogic Corp.* at 35 (dismissing disparate impact claim where OFCCP “made no effort to demonstrate specific elements of the compensation system were not capable of separation for analysis”); *Stout*, 276 F.3d at 1124.

OFCCP’s failure to prove causation is further evidenced by the fact it cannot explain why 13 out of 16 job functions, or Asian or African-Americans in the Support and IT functions, were not adversely impacted by any purported policies or practices. SAC, ¶¶ 11-42. Additionally, even if OFCCP’s disparate impact claim properly identified a policy or practice, the claim would *still* fail because OFCCP’s statistical analyses are so flawed they cannot prove causation for this hypothetical policy or practice for all the reasons discussed above.

Alternatively, if the Court agrees with OFCCP that there are hundreds of policies that impact the pay of Oracle employees, then this galactic multitude of policies and their butterfly-effects on the thousands of employees at issue here are “too multifaceted to be appropriate for disparate impact analysis.” *AFSCME*, 770 F.2d at 1406; *accord Spaulding v. Univ. of Wash.*, 740 F.2d 686, 706 (9th Cir. 1984). Further, even if OFCCP could demonstrate Oracle’s compensation practices have an adverse impact on women, African-Americans, or Asians, Oracle has shown its practices are job-related and consistent with business necessity to recruit and retain top talent. *See* 41 C.F.R. § 60-20.2(c); 42 U.S.C. § 2000e-2(k)(1)(A)(i). Lastly, OFCCP has failed to

demonstrate other practices without the purported undesirable effect that would effectively serve Oracle's legitimate business needs. *Watson*, 487 U.S. at 998.

VI. OFCCP HAS NOT SHOWN A VIOLATION DURING THE AUDIT PERIOD TO JUSTIFY ITS "CONTINUING VIOLATION" THEORY

OFCCP's claims should also be dismissed for the separate and independent reason that, for all the reasons above, it has not identified discrimination occurring during the 2013-2014 audit period. *See, e.g., Analogic Corp.*, at n.6 ("In order for OFCCP to establish a continuing violation, it must demonstrate a violation during the audit period 2011-2012."); June 10, 2019 Order at n. 6. And because OFCCP has not proven discrimination during that time, it is not permitted to lump in conduct from subsequent years to inflate its purported damages numbers.

VII. OFCCP'S "REFUSAL TO PRODUCE" CLAIM SHOULD BE DISMISSED

OFCCP's claim that Oracle refused to produce certain documents during the audit should be dismissed because it is factually meritless and seeks remedies that are not legally available.

A. Oracle Did Not Refuse to Produce Anything

OFCCP alleges that Oracle "refused to produce" (1) compensation data for 2013; (2) data of personnel actions and compensation history for employees; (3) "analyses" purportedly "required" or done "pursuant to" specified regulations; and (4) documentation of its Affirmative Action Program. SAC, ¶¶ 44-45, 47. That is all false. As set forth in the declarations of Shauna Holman-Harries and Gary Siniscalco, OFCCP made requests for documents and Oracle either fulfilled or attempted to fulfill those requests. At times, Oracle asked why information was sought, asked for clarification, or explained that the information OFCCP appeared to be seeking is privileged. OFCCP ignored these inquiries or would simply issue another set of requests for information. Then, without warning, OFCCP issued the NOV. OFCCP explained in litigation that it considers merely asking questions to be a "refusal." Connell Decl., Ex. E (6/26 Ratliff PMK Dep. 77:20-78:14). But Oracle never "refused" to produce anything as that word is commonly understood. *See* Holman-Harries Decl., ¶¶ 2-29; Siniscalco Decl., ¶¶ 2-7, Exs. A-C.

B. OFCCP Should Have Brought a Denial of Access Proceeding

If OFCCP truly believed Oracle was refusing to provide the requested information, OFCCP's own manual states it should have brought a denial of access claim. *See* FCCM § 8B02(a); *see also, e.g., OFCCP v. Google*, 2017 WL 4125403, at *4 (July 14, 2017); *OFCCP v. O'Melveny & Myers LLP*, 2013 WL 4715032, at *4 (Aug. 30, 2013); *OFCCP v. O'Melveny & Myers LLP*, 2011 WL 5668757, at *1 (Oct. 31, 2011).

When a government contractor refuses to produce documents, the remedy is to compel production through a direct right of access case. Allowing OFCCP to proceed with its refusal claim here would contravene an extensive body of case law holding that agencies must “adhere to their own rules.” *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 536 (D.C. Cir. 1988); *Mass. Fair Share v. Law Enf't Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985) (“[A] federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated.”). For this reason, OFCCP's opportunistic attempt to strong-arm Oracle into an unfair “remedy” must be dismissed. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971).¹⁰ That OFCCP did not bring such a claim against Oracle simply points to the fact that not even OFCCP considered Oracle to be refusing to provide requested information. But it also points to the fact that OFCCP cannot seek that remedy in these proceedings.

C. OFCCP Seeks Remedies That Are Unavailable as a Matter of Law

OFCCP's “refusal” claim also fails legally because the remedies it seeks (an adverse inference and an injunction) are not available.

First, an adverse inference is available **only** where there is evidence a contractor “**destroyed or failed to preserve**” required records. 41 C.F.R. § 60-1.12(e) (emphasis added);

¹⁰ Indeed, OFCCP brought at least one such proceeding recently against Google, which *did* refuse to produce information. *See Google*, 2017 WL 4125403, at **n.14. There, Google objected to producing certain data and asked OFCCP why it was relevant to its investigation. OFCCP offered no explanation but instead initiated its denial of access litigation. *Id.* at **19. The *Google* court rejected certain requests as beyond OFCCP's authority. *Id.* at **56 n.74. As to others, the court ordered further conciliation between the parties. *Id.* at **43-49, 103. Thus, the *Google* court did not consider the contractor's objections to be independently actionable. *Id.* at **4. Oracle's objections here—including regulatory construction and privilege objections—merited the same respectful, deliberative resolution as OFCCP pursued there, and the same regard for constitutional rights as the Court required there.

Chin v. Port Auth. of New York & New Jersey, 685 F.3d 135, 162 (2d Cir. 2012); *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 553 (6th Cir. 2010); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004). OFCCP has never alleged such conduct, nor does it have evidence for such an allegation. By contrast, in *OFCCP v. Bank of America*, an adverse inference was appropriate where a contractor failed to preserve records for nine years after an audit, and the contractor had no explanation other than its belief that it had no obligation to retain the records, even though it knew OFCCP had charged ongoing violations and thus it was required to retain all personnel records until OFCCP made a final disposition of the compliance evaluation. 2010 WL 10838227, at **58-60 (Jan. 21, 2010). That is nothing like the case here.

Second, OFCCP precedent requires a litigant seeking an adverse inference based on a failure to produce requested documents to first seek a court order for the production. In *Google*, OFCCP sought no penalties, with the Court observing, “[p]enalties could become appropriate—after another complaint and hearing—if Google were to fail to comply with any final order requiring it to produce further materials or information.” 2017 WL 4125403, at *14. That decision is echoed in this Court’s ruling on Oracle’s Second Motion to Compel OFCCP to Produce Documents and Further Respond to Interrogatories, which contemplates sanctions only upon violation of the Court’s order adjudicating discovery disputes. *See* June 10, 2019 Second Motion to Compel Order at 14, 26. OFCCP chose not to use the required process to obtain the information it claimed Oracle “refused” to produce, barring its present claim here.¹¹

Third, relatedly, the requirement of a hearing and determination of discovery disputes before imposing sanctions is rooted in Fifth Amendment due process considerations. “[B]ecause

¹¹ The scheme of enforcement followed in OFCCP cases is consistent with federal discovery procedure. An adverse inference is not appropriate unless a party defies an order to produce documents. *Skeete v. McKinsey & Co.*, 1993 WL 256659, at *3 & n.2 (S.D.N.Y. Jul. 7, 1993); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991). No such order, and therefore no such violation, exists here. A court also has the inherent power to issue an adverse inference, but only as a sanction for spoliation. *See Chin*, 685 F.3d at 161-62; *Skeete*, 1993 WL 256659, at **1-3. “In general, the adverse inference instruction is an extreme sanction and should not be imposed lightly.” *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008). Non-production itself is not evidence that a party’s unproduced discovery would be unfavorable to that party. *Id.* at 122; *Turner*, 142 F.R.D. at 77 (“Where ... there is no extrinsic evidence whatever tending to show that the destroyed evidence would have been unfavorable to the spoliator, no adverse inference is appropriate”).

the expedited procedures provide contractors with the rights to counsel, to a neutral arbitrator, to present evidence and witnesses, and to rebut and cross-examine the evidence and witnesses put forward by the government, they satisfy the requirements of due process.” *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 95-96 (D. D.C. 2011). Imposing a presumptive adverse inference, particularly the free-ranging one sought here, without the prerequisite timely determination of Oracle’s objections and obligations would unconstitutionally deprive Oracle of its procedural due process rights.¹²

Fourth, OFCCP contends it seeks an injunction prohibiting Oracle from refusing to produce information in future audits. Assuming the Court has authority to issue injunctive relief at all in this context, it can only enjoin ongoing violations of Exec Order No. 11246, and any injunction must comport with Rule 65. *See* 41 C.F.R. § 60-1.26(b)(1); 29 C.F.R. § 18.10(a).

Here, the injunction OFCCP purports to seek does neither. The audit is over. There are no OFCCP requests for information pending. This is not a situation where the purported violation is ongoing. And any requests for information that OFCCP may make in future audits (and Oracle’s responses) have not yet occurred and must be assessed on their own merit. OFCCP is not entitled to an open-ended, vague, and redundant injunction that “Oracle must comply with the law.” *See* 41 C.F.R. § 60-1.26 (injunctive authority limited to “enjoin[ing] violations”); Fed. R. Civ. P. 65(d); *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (“[Rule 65(d)] was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.”); *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 444 (1974) (“[T]hose against whom an injunction is issued should receive fair and

¹² These same arguments apply to materials over which Oracle asserted the attorney-client privilege and work product doctrine. Furthermore, courts have barred any effort to obtain an adverse inference based on a good-faith and appropriate assertion of privilege. “[W]e know of no precedent supporting such an inference based on the invocation of the attorney-client privilege. . . . Such a penalty for invocation of the privilege would have seriously harmful consequences.” *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999); *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F. 3d 1337, 1345 (Fed. Cir. 2004) (“the courts have declined to impose adverse inferences on invocation of the attorney-client privilege”); *Parker v. Prudential Ins. Co.*, 900 F.2d 772, 775 (4th Cir. 1990) (same).

precisely drawn notice of what the injunction actually prohibits.”); *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1148 (9th Cir. 2011) (“[T]he general prohibition against operating ‘by means of illegal, unlicensed and false practices’ is too vague to stand.”). For the same reasons, the injunction OFCCP appears to seek violates the Fourth Amendment. *Google*, 2017 WL 4125403, at *64 (OFCCP’s “authority to access contractors’ records is akin to an administrative subpoena,” which must meet Fourth Amendment standards in order to be enforceable); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984).

D. OFCCP Has Obtained the Information It Claims Oracle Refused to Provide

Even if Oracle did “refuse to produce” data and documents to OFCCP during the audit, OFCCP has now obtained the data and documents at issue through discovery in this litigation. For example, OFCCP now has the 2013 compensation data at issue because it was produced during this litigation. Siniscalco Decl., ¶¶ 3-5 & Connell Decl., Ex. E (6/26 Ratliff PMK Dep. 77:6-15, Ex. 14). The Court has recognized this is a closed issue. *See* May 16, 2019 Order Granting in Part and Denying in Part OFCCP’s Motion to Compel Historical Data at 6-10. With respect to Affirmative Action Program documents, Oracle has produced everything that exists. Holman-Harries Decl., ¶ 4 & Ex. C; Siniscalco Decl., ¶ 6. With respect to the “analyses,” Oracle has produced documents reflecting the actions, evaluations, and justifications it undertakes pursuant to 41 C.F.R. § 60-2.17 to ensure fair and equitable decision-making. Siniscalco Decl., ¶ 6. And this Court has ruled that the analyses over which Oracle asserted privilege are, in fact, privileged (rendering them outside the scope of OFCCP’s failure to produce claim). *See* Sept. 19, 2019 Order Granting in Part and Denying in Part OFCCP’s Motion to Compel; SAC ¶¶ 43-45. Oracle also has now produced the purportedly missing data on personnel actions and job and salary history of employees. Siniscalco Decl., ¶ 6; Historical Data Order at 6-10.

Consequently, no adverse inference is appropriate. The purpose of allowing an adverse inference is to cure prejudice. *Skeete*, 1993 WL 256659, at *7. “[W]here [the party has] not demonstrated a nexus between the content of the materials and the inference the defendants wish

to have drawn, an adverse inference is unwarranted.” *Id.* at *7; *Turner*, 142 F.R.D. at 76 (same).

Here, there is no prejudice. Oracle has produced to OFCCP more than enough information for purposes of this litigation, including the information OFCCP claims Oracle “refused” to produce during the audit. There is no purpose served by an adverse inference.

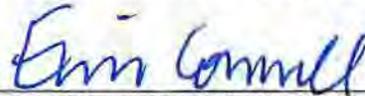
VIII. CONCLUSION

For all the foregoing reasons, Oracle respectfully requests that the Court grant its motion for summary judgment, or, in the alternative, partial summary judgment.

October 21, 2019

Respectfully submitted,

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