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

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

**PLAINTIFF OFCCP'S OPPOSITION TO DEFENDANT ORACLE'S MOTION FOR
SUMMARY JUDGMENT**

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INTRODUCTION

Summary judgment for Oracle is inappropriate because material facts upon which it relies are disputed by its own record. In an attempt to argue that OFCCP cannot prove a pattern or practice of compensation discrimination, Oracle advances dual factual claims that (i) it delegated all decision-making authority regarding compensation to its front-line managers and (ii) these managers were essentially on their own in setting compensation. But Oracle's record negates both factual claims. Oracle admits that it utilizes a centralized compensation team in Human Resources that is charged with conducting research to develop salary ranges for each job and that it instructs its managers regarding setting compensation. Oracle further admits that all compensation decisions must be approved by Oracle's high-level executives, who impose budget limits on both the front and back end—effectively blessing compensation decisions recommended by its front-line managers. Yet Oracle's front-line managers dispute such a delegation of authority.

Similarly misleading, Oracle asserts that OFCCP has presented no evidence to show that Oracle's systemic compensation discrimination is driven by Oracle's channeling of women, Asians, and African-Americans into lower-paid assignments. This assertion is false. As detailed in OFCCP's opposition to Oracle's companion *Daubert* motion and OFCCP's Motion for Summary Judgment, OFCCP's expert, Dr. Janice Madden, presents detailed findings showing just that. Dr. Madden's report shows that significant gender and race pay differences are driven by Oracle assigning more women, Asians, and African-Americans to lower-paid global career levels in each job title (referred to as "job family" by Oracle) than their similarly-qualified male or White counterparts.

Oracle plays a similar game of misdirection regarding binding legal precedent. It is well settled that due to the heightened burden placed upon the plaintiff in pattern and practice discrimination cases—a burden OFCCP has easily met here—the burden placed on defendants is also considerably heightened once plaintiff has set forth its *prima facie* case. Oracle cannot simply avoid liability by merely pointing to factors OFCCP allegedly did not include in its

analysis. Oracle instead must show how the application of such factors explain the pay disparities, which thus far it has failed to do.

Oracle spends much of its brief citing to cases that focus on whether the dispersion or delegation of decision making is relevant to a class certification inquiry to satisfy “commonality” of class claims. Such analysis has no application to Oracle’s responsibilities and liabilities under its contract with the U.S. Government. Indeed, Oracle’s federal contract and Affirmative Action Plan (“AAP”) squarely place responsibility for any breach of such obligations (including prohibited compensation discrimination) on Oracle, not its low-level managers. If Oracle is engaged in prohibited compensation discrimination, as OFCCP’s statistical evidence shows, Oracle is liable for that discrimination regardless of the decision maker. Oracle’s leadership cannot sit idly on the sidelines and fail to correct race and sex discrimination in compensation decisions.

Oracle focuses the remainder of its motion on a baseless effort to avoid liability by grasping at procedural defenses. But Oracle’s own record provides uncontested facts that show that OFCCP diligently audited Oracle’s employment practices, provided Oracle notice of its investigative findings, and attempted to engage Oracle in conciliation. Indeed, these facts demonstrate that OFCCP met all procedural requirements despite Oracle’s repeated efforts to impede OFCCP’s investigation.

Because Oracle’s motion for summary judgment is replete with disputed material facts and irrelevant legal authority, its motion must be denied.

I. ORACLE MISCHARACTERIZES THE MATERIAL FACTS AT ISSUE IN THIS CASE

A. Oracle’s Memorandum of Points and Authorities in Support of its Motion for Summary Judgment Fails to Even Claim Reliance on Uncontested Facts.

Although Oracle submitted a Statement of Uncontested Facts as required by 41 C.F.R. § 60-30.23(d), Oracle’s actual motion does not rely on its Statement of Uncontested Facts. Rather, it cites directly to underlying evidence, particularly declarations, which combine disputed and undisputed facts. This approach deprives the Court of the purpose of the Statement of Disputed

Facts, as envisioned in 41 C.F.R. § 60- 30.23(d): to use the citations in the brief to compare against the Statement of Disputed Facts and see if the fact is disputed. This approach is inconsistent with 29 C.F.R. § 18.72(a), which requires the movant to show “there is no genuine dispute as to any material fact.” *See also* Fed. R. Civ. P. 56(a). Defendant’s failure to follow the procedural rules of this Court alone requires denial of Oracle’s Motion for Summary Judgment (Oracle’s MSJ).¹

B. Oracle’s Factual Statements Regarding Liability Are Irrelevant, Omit Important Details, Or Are Well Disputed by OFCCP.

Oracle’s MSJ must be denied because it relies on disputed facts. Rather than set out the key, operative facts in this case to lay a predicate for its later Argument, Oracle’s “Statement of Facts” contains legal argument,² characterizes as opposed to merely recites the evidence, and omits significant details. The facts Oracle does identify in its motion are similarly irrelevant, mischaracterized, or contested. In addition, Oracle omits significant amounts of relevant information necessary for this Court’s determination.

For example, one of Oracle’s first “facts” is that “[o]ne-third of its Board of Directors is female or diverse.” ORSUF 2.³ While this may be true, mathematically this also means that two-thirds of Oracle’s board is White or male, a fact that is hardly relevant or helpful to Oracle for purposes of this case. Similarly, the fact that one of Oracle’s CEOs is female is not relevant to this case. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–79, (1998) (“nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex”).

Along that same vein, Oracle’s repeated conclusory statements about its compensation practices (*e.g.*, “Oracle’s compensation philosophy reflect its business need to recognize

¹ *See Hollis v. High Desert State Prison*, No. 2:08-CV-2810 GEB KJN, 2011 WL 2681227, at *2 (E.D. Cal. July 8, 2011), report and recommendation adopted, No. 2:08-CV-2810 GEB, 2011 WL 3911072 (E.D. Cal. Sept. 6, 2011) (denying motion for summary judgment for failure to file a statement of undisputed facts) citing *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774-75 (9th Cir. 2002).

² *See, e.g.*, Oracle MPA at 3 (arguing in Fact section that case should be dismissed for various reasons).

³ Citations to Oracle’s Statement of Uncontested Facts are referred to as ORSUF. Citations to OFCCP’s original Statement of Uncontested Facts in support of Oracle’s MSJ are referred to as SUF. Citations to OFCCP’s Statement of Disputed Facts are referred to as DF.

individual skills and contributions”; “[Oracle’s] guiding principles ensure that compensation decisions are made on ‘a case-by-case’ basis” (Oracle MPA, 9)) are not the type of undisputed facts that assist in rebutting a statistical case of discrimination. *See Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.24 (1977) (internal citations omitted) (“The company’s evidence . . . consisted mainly of general statements that it hired only the best qualified applicants. But ‘affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.’”); *OFCCP v. Honeywell, No. 77-OFCCP-3*, 1994 WL 68485, *5 (Mar. 2, 1994) (same).

More substantively, Oracle’s recitation of the facts omits significant details to make it appear as though it has no pattern and practice of discrimination in compensation because it simply has no compensation policies at all. As set forth in detail in OFCCP’s accompanying Statement of Disputed Facts, OFCCP strongly contests Oracle’s claims that its compensation policies are not centralized or that its compensation policies provide managers with discretion as to what factors to consider in setting compensation. DF 33-38, 42-44, 46, 48-49, 56. Consistent with OFCCP’s own motion for summary judgment (“OFCCP’s MSJ”), Oracle admits that it assigns employees a system job title that corresponds to a job code, and that the system job titles reflect a progression of development within what Oracle calls a “job family” such as “Application Developer 1, Application Developer 2, and so on.” Oracle MPA at 6; OFCCP’s MSJ 6-7. As Oracle’s own expert explains, the system job title has two components: “job family” or, as Dr. Madden refers to the same idea, “job descriptor,” (aka “job title”) and Career Level.⁴ However, after setting forth its “job taxonomy,” instead of explaining how Oracle’s job taxonomy is used in setting compensation (*see* OFCCP’s MSJ at 6-9), Oracle jumps to claiming that compensation is decentralized and asserts that “employee’s direct manager plays the most significant role in setting . . . compensation.” Oracle MPA at 7. Oracle then suggests that so long as managers propose compensation within their allocated budgets, they have free reign in setting compensation. Oracle MPA at 7-10. Along the way, front-line managers are given some “general

⁴ Saad Rebuttal ¶77; *see also* SUF 237.

principles” to consider that “are not exclusive” and are vaguely encouraged to “assess internal pay equity among employees on their teams when making pay decisions.” Oracle MPA at 8-9.

For the reasons laid out in OFCCP’s affirmative motion for summary judgment, this picture is strongly disputed—not simply by witness testimony, but by Oracle’s own contemporaneous compensation policies, and its communications to managers and employees, to which this Court must accord more weight.⁵ OFCCP’s MSJ at 5-6, 9-12. The record-evidence demonstrates that Oracle has a highly centralized system for setting compensation. This system was predicated on assigning an employee the right job code and then determining how to place the employee within the salary range associated with that job code. *See* OFCCP’s MSJ at 5-6; SUF at 58, 65-69, 83-87. Managers are not permitted to make such placements arbitrarily, but instead are specifically directed, and enforced through the approval process required from top executives, to set compensation within the dictated salary ranges based on employees’ skills, experience and education. *See* OFCCP’s MSJ at 6, 15; SUF at 62, 93, 94, 97.

Furthermore, while front-line managers do have a role in *proposing* pay rates, they have no ability to do so without approval from upper management and ultimately, buy in from Oracle’s CEO and executives. SUF 112-125. OFCCP has attached declarations from various managers and employees that describes how tightly circumscribed front-line managers are in making compensation decisions.⁶ Consistent with Oracle’s own documents, these managers explain that Oracle controlled compensation at a high-level by controlling budget on both the

⁵ *See In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 576 (N.D. Cal. 2013) (“The Court is more persuaded by the internal, contemporaneous documents created by Defendants before and during the anti-solicitation agreements, such as CEO-to-CEO emails, powerpoint presentations regarding compensation and recruitment from the heads of Defendants’ human resources departments, and inter-office communications about internal equity concerns that corresponded to compensation decisions.”); *see also Fed. Trade Comm’n v. Qualcomm Inc.*, No. 17-CV-00220-LHK, 2019 WL 2206013, at *7 (N.D. Cal. May 21, 2019) (unpublished) (“The Court finds Qualcomm’s internal, contemporaneous documents more persuasive than Qualcomm’s trial testimony prepared specifically for this antitrust litigation.”).

⁶ *See* Decl. of Avinash Pandey (Pandey Decl.) ¶ 13; Decl. of Bhavana Sharma at ¶ 10; Decl. of Jill Arehart at ¶ 9, 12; Decl. of Christina Kolotouros (Kolotouros Decl.) ¶ 8; Decl. of Lynn Snyder (Snyder Decl.) ¶ 13-15; Decl. of Amit Sharma (Sharma Decl.) ¶ 8; Decl. of Kristin Hansen Garcia (Garcia Decl.) ¶ 6; Decl. of Wilbur A. Colin McGregor (McGregor Decl.) ¶ 9-13, 15; Dec. of Diane Boross (“Boross Decl.”) ¶ 9.

front end and the back end.⁷ First line managers were not given sufficient budget—or in some years, any budget at all—to fund pay adjustments to correct for inequities on the front end, SUF 110-111, 137-138; DF 33-43,⁸ and budget approvals cancelled recommended pay raises, which might have muted pay inequities, on the back end. SUF 113-117, 120-124; DF 33-43.⁹

Oracle's litigation story is that OFCCP cannot prove pattern and practice because it maintains no centralized compensation system. This story is at odds with Oracle's AAP obligations, which requires it to ensure that its leadership annually studies its compensation results to search for prohibited discrimination and take action-oriented steps, including providing all necessary resources, to change its policies and practices to eliminate prohibited discrimination and correct any violations. 41 CFR 60-2.17. Oracle's attempts to convince this Court that despite being a large, publicly-traded multinational corporation that has long been a federal government contractor with affirmative obligations (*see* OFCCP's SUF No. 2, 3, 6, 7), it has *no* policies for ensuring non-discriminatory compensation, and effectively admits that it is in significant violation of its affirmative action obligations. *Yatvin v. Madison Metro. School Dist.*, 840 F.2d 412, 415 (7th Cir.1988) ("just as the establishment of a bona fide affirmative action plan might help rebut a claim of sex discrimination ... so the violation of such a plan might help support such a claim" (citation omitted)).

Oracle's attempt to blame front-line managers for disparities provides *no defense* to Oracle's liability here for breaching explicit federal contract terms prohibiting Oracle from engaging in compensation discrimination. Regardless of whether Oracle's chief executives, who were specifically identified as supporting Oracle's AAP (AUF 1), or Oracle's lowest level managers, are accorded the discretion to make Oracle's compensation decisions, DF 33-38, 42-

⁷ Oracle managers also testify that they were required to rank all employees, even if all employees performed at the same level, and that they were told there would only be budget enough to give a raise to one or two of those employees. *See* Snyder Decl. ¶ 15; Sharma Decl. ¶ 8; Pandey Decl. ¶ 17-18 (discussing how his manager changed the rankings he assigned to employees without asking about those employees' work performance in the prior year).

⁸ Indeed, managers testify that they had inadequate authority and budget to redress either the pay inequities for their subordinates or for themselves. Pandey Decl. ¶ 19; Sharma Decl. ¶ 12; McGregor Decl. at ¶ 10-12.

⁹ *See* Pandey Decl. ¶ 14 (discussing how one year he decided to give all his employees a raise, but HR removed raises for two of his employees, informing him that the raises he gave violated HR's compensation policy).

44, 46, 48-49, 56, Oracle is liable, under the doctrine of *respondeat superior*, for breaching its federal contract prohibiting employment discrimination. *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (“It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment.”) (citations omitted).¹⁰ Oracle’s insistence that one group of managers rather than another makes Oracle’s calls on compensation is irrelevant to the question here, since Oracle is responsible for the compensation decisions made by any Oracle official to whom Oracle delegated decision-making authority.

Oracle’s theory of the case is not supported in light of Oracle’s well-documented refusal to change the compensation of employees who transfer across supervisors or teams. OFCCP’s MSJ at 8; SUF 172-178.¹¹ If supervisors have *carte blanche* to determine compensation, transferring supervisors should *almost* always result in different compensation. Likewise, if product assignment is a central determinant in setting pay, transferring assignments should *always* result in a change in compensation. The undisputed material facts here repeatedly negate and contradict Oracle’s litigation story.

II. ORACLE MISCHARACTERIZES DR. MADDEN’S FINDINGS.

Oracle misstates and misrepresents Dr. Madden’s Reports and testimony in its *Daubert* Motion.¹² As set forth in the Statement of Disputed Facts and OFCCP’s Motion for Summary Judgment, OFCCP disputes Oracle’s facts related to the expert analyses. Because Oracle levels the same attacks in more detail in its *Daubert* Motion, OFCCP refers to its concurrently filed *Daubert* Opposition for its responses to these claims.

¹⁰ *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998) (“[T]here is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like . . . compensation, and work assignment, have resulted in employer liability once the discrimination was shown.”).

¹¹ *See, e.g.*, Decl. of Dalia Sen ¶ 10; Decl. of Maura Joglekar ¶ 13, 16, 18 (discussing her transfers to new jobs within Oracle and how she received no salary raise, including after having been awarded a patent); Pandey Decl. ¶ 8-9 (front-line manager describing how he received no salary raise when transferring across management teams under new supervisors); Kolotouros Decl. ¶ 9.

¹² Oracle complains that Dr. Madden “invented” the job descriptor variable. Oracle MPA at 16. In fact, Dr. Madden simply uses different words to describe what Oracle calls “job families” in its own MPA. Oracle MPA at 6. Oracle is well-aware of this—its own expert acknowledges as much Court. *See* Saad Rebuttal ¶ 77.

OFCCP addresses in detail in its *Daubert* Opposition the scattershot criticism Oracle levels against Dr. Madden in its MPA. Of particular note is Oracle's attempt to rebut Dr. Madden's findings that demonstrate that Oracle engages in discriminatory assignment. Oracle argues that the "data conclusively demonstrates" that there is no statistically meaningful pattern of differences in placement. Oracle MPA at 17. As detailed in OFCCP's *Daubert* Opposition, Dr. Madden studied assignment using several different analyses, all of which underline that Oracle's discriminatory pay practices are driven by channeling of women, Asians, and African-Americans into lower-paid assignments. OFCCP's *Daubert* Opp. at 11-15. Oracle's contentions are built on misrepresentations regarding Dr. Madden's findings. Oracle also misrepresents Dr. Madden's exceptional record in providing useful testimony that courts consistently rely upon. *Id.* at 16-17.

Oracle also claims that OFCCP has not shown violations during the audit period. Oracle MPA at 25. This is simply not true. Dr. Madden's studies found violations during the review period for each of the victim classes. *See* OFCCP MSJ at 19-21.¹³

III. ORACLE MISCHARACTERIZES THE GOVERNING LAW RELEVANT TO THESE PROCEEDINGS

A. Oracle Misstates the Allocation of Burdens in Pattern and Practice Cases.

Oracle mischaracterizes the legal framework for this court's analysis of OFCCP's claims. Specifically, Oracle overstates OFCCP's initial burden of production and underplays Oracle's rebuttal burden.

1) Plaintiff's Prima Facie Case.

In a pattern and practice case, the plaintiff has the burden of establishing a prima facie case that "unlawful discrimination has been a regular procedure or policy followed by an employer." *Teamsters*, 431 at 325. The discrimination alleged must be the "standard operating procedure" as opposed to an "unusual practice." *Id.* at 336. To carry its burden, the plaintiff must present sufficient evidence to give rise to an "inference that employment decisions were based on an unlawful discriminatory criterion." *Segar v. Smith*, 738 F. 2d 1249, 1267 (D.C. Cir. 1984).

¹³ Moreover, OFCCP rejects the premise. As this is a *de novo* review of the proceedings, and Judge Larsen specifically overruled Oracle's objections to discovery outside the review period, June 19, 2017 Order at 1-2, OFCCP is entitled to conform the pleadings to the facts. Fed. R. Civ. P. 15(b).

While a plaintiff's burden in a pattern and practice case is higher than in an individual case because of the additional need to demonstrate that the alleged discrimination was a regular practice, this burden may be met with statistical proof. "[G]ross statistical disparities" in the treatment of members of a protected class "alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (citing *Teamsters*, 431 U.S. at 339); see also *Diaz v. Am. Tel. & Tel.*, 752 F.2d 1356, 1363 (9th Cir. 1985) ("In some cases, statistical evidence alone may be sufficient to establish a prima facie case."); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 866 (9th Cir. 1982) ("Statistical data is one way to establish a prima facie case"); *EEOC v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 876 (7th Cir. 1994) ("Statistical evidence can . . . be sufficient to establish a pattern and practice of discrimination"). As the United States Supreme Court stated, "[s]tatistics showing racial or [gender] imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination In many cases the only available avenue of proof is the use of racial statistics" *Teamsters*, 431 U.S. at 340 n.20 (citations and internal quotations omitted).

In the context of summary judgment, the proof necessary to establish a prima facie case of employment discrimination is "minimal." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000) (quoting *Wallis v. J.R Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)). Here, OFCCP has easily met its burden. Dr. Madden's analyses establish enormous disparities in the pay of similarly-situated employees on the bases of sex and race. OFCCP's MSJ at 17-21.

2) Defendant's Heightened Rebuttal Burden.

Once the plaintiff succeeds in establishing a prima facie case, there is a presumption that the defendant unlawfully discriminated against the plaintiff. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). That presumption shifts the burden of production to the defendant to rebut the prima facie case by producing evidence that the employment decision was made for legitimate, non-discriminatory reasons. *Id.*

Oracle argues that to rebut OFCCP's statistical evidence, it "is not required to submit its own analyses, but simply can explain why OFCCP's analyses do not demonstrate discrimination." Oracle MPA n.5. This is a misstatement of the case law.

As the Secretary of Labor¹⁴ held, "[a] defendant's rebuttal burden in a pattern or practice case . . . is significantly heavier than in an individual disparate treatment case. There, where the plaintiff's prima facie case is relatively easy to establish, defendant's rebuttal burden is light—to articulate a nondiscriminatory explanation for the employment action being challenged." *OFCCP v. Honeywell*, 1994 WL 68485, *5 (Mar. 2, 1994). Because a plaintiff has the burden of proving that the discrimination is the company's "regular rather than the unusual practice" through statistics or through other evidence, which is a heavier initial burden than an individual plaintiff is required to make, in a pattern or practice case, "Defendant's rebuttal burden will typically be much higher." *Id.* (citing *Segar*, 738 F.2d at 1268–69).

Courts have consistently held that when plaintiffs, as here, support a compensation discrimination case with multiple regression analyses, Defendants cannot meet this rebuttal burden by merely calling into question whether the analyses perfectly capture all variables that are used to set pay. In *Bazemore v. Friday*, 478 U.S. 385 (1986), the Supreme Court reversed a Circuit Court decision that held that plaintiff's statistical analysis was insufficient to prove liability based on the court's belief that "[a]n appropriate regression analysis of salary should . . . include all measurable variables thought to have an effect on salary level." *Id.* at 399. The appellate court agreed with a lower court finding that plaintiffs' analysis were inadequate because they failed to consider possible county-to-county differences in rates of salary increases. *Id.* The Supreme Court reversed: "The Court of Appeals erred in stating that petitioners' regression analyses were 'unacceptable as evidence of discrimination,' because they did not include 'all measurable variables thought to have an effect on salary level.'" *Id.* at 400. The Supreme Court explained that the lower court's "view of the evidentiary value of the regression

¹⁴ Before the Administrative Review Board was created in 1996, the Secretary of Labor issued final agency decisions in administrative enforcement cases brought under E.O. 11246. The Secretary's decisions remain binding precedent "until and unless the Board or other authority explicitly reverses such rules of decision or precedent." Authority and Responsibilities of the Administrative Review Board; Notice, 61 Fed. Reg. 19978, 19979 (May 3, 1996).

analyses was plainly incorrect” because “[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.” *Id.*

Similar to Oracle’s defense strategy, the defendant in *Bazemore* failed to rebut the employees’ claims because its trial strategy “was to declare simply that many factors go into making up an individual employee’s salary; they made no attempt that we are aware of—statistical or otherwise—to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites.” *Id.* n.14 (emphasis added). Thus, *Bazemore* “require[s] a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis.” *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 32 (2d Cir.1988); see also *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 604 (2d Cir.1986) (holding that trial court abused its discretion in rejecting plaintiffs’ statistical table “on the speculative basis that the table’s results might ‘possibly’ have been different” if an unaccounted-for factor had been included.)

In *E.E.O.C. v. Gen. Tel. Co. of Nw., Inc.*, 885 F.2d 575, 580 (9th Cir. 1989), the Ninth Circuit surveyed the case law of the other circuits on the question of the level of evidence Defendants were required to produce to rebut a statistical pattern or practice case. The court determined the other circuits that had considered the question, except one, correctly held a “defendant cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff’s statistics.” *Id.* at 581. Since *Gen. Tel.*, this holding has been consistently re-affirmed. *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1188–89 (9th Cir. 2002) (defendant must “produce credible evidence that curing the alleged flaws would also cure the statistical disparity.”); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 266 (N.D. Cal. 1992) (“A defendant may not rebut an inference of discrimination by merely pointing to flaws in the plaintiff’s statistics. Rather, the defendant must introduce evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate, nondiscriminatory selection criterion.”)

(internal citations omitted); *Buchanan v. Tata Consultancy Servs., Ltd.*, 2017 WL 6611653, at *9 (N.D. Cal. June 20, 2017).

Here, OFCCP has provided compelling statistical evidence, supported by the employer's policies and anecdotal evidence, to prove compensation discrimination. As laid out in OFCCP's MSJ, Oracle's expert has entirely failed to establish that any of the factors they criticize Dr. Madden for not studying would yield a different result. OFCCP's MSJ at 22-24. Thus, Oracle is not entitled to summary judgment.

B. Oracle Misstates the Applicable Law Regarding Comparing Similarly-Situated Employees.

Oracle sets forth the wrong set of standards in determining whether OFCCP's analysis properly compares similarly-situated employees. Oracle MPA at 14-15. For example, Oracle relies on Equal Pay Act cases, *id.*, to support its restrictive position that jobs need to be nearly identical before they can be compared. These cases are inapposite.¹⁵ The Supreme Court has expressly rejected the contention that "only those sex-based wage discrimination claims that satisfy the 'equal work' standard of the Equal Pay Act could be brought under Title VII." *Washington Cnty. v. Gunther*, 452 U.S. 161, 178 (1981).¹⁶

Oracle ignores the relevant pattern and practice statistical compensation discrimination cases, such as *Bazemore*, *Segar*, *Gen. Tel.*, and *Honeywell*—all of which validate the type of regression analyses Dr. Madden performed as an appropriate manner for the Plaintiff to meet its prima facie burden. Instead, Oracle cites stray individual Title VII cases to argue for an exceedingly narrow legal interpretation of similarly-situated. *See* Oracle MPA at 14-15. None of these cases consider statistical evidence of discrimination and thus provide no support for Oracle's contention that Dr. Madden's analyses do not compare similarly-situated employees and

¹⁵ *Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1414 (9th Cir. 1988) (Oracle MPA at 15); *EEOC v. Port Auth. of NY. & NJ.*, 768 F.3d 247, 255-58 (2d Cir. 2014) (Oracle MPA at 15).

¹⁶ Authority Oracle cites in its Motion recognizes the standard under the two Acts is not the same. *Hooper v. Total Sys. Servs., Inc.*, 799 F. Supp. 2d 1350, 1364 (M.D. Ga. 2011) (acknowledging the standard for similarity between jobs in Title VII disparate treatment cases is relaxed compared to the Equal Pay Act standard).

therefore OFCCP's claim "does not get past stage one."¹⁷

Similarly, although Oracle acknowledges that 41 C.F.R. § 60. 20.4 "dictates" the operative analysis for this case (Oracle MPA, 14), Oracle's proposed narrow similarly-situated test is plainly inconsistent with the regulation.¹⁸ As set forth in detail in OFCCP's MSJ, under 41 C.F.R. § 60-20.4, contractors also "may not pay different compensation to similarly-situated employees on the basis of sex." 41 C.F.R. § 60-20.4(a). While factors may include "objective factors" related to "tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty" and "minimum qualifications", the regulations underscore that employees may be similarly situated even though they are only similar "on some of these factors." *Id.* The preamble to this regulation explains: "a specific job or position may not be the only relevant consideration, particularly in a systemic case. For example, ". . . in an assessment of pay practices at hire, a key point of comparison may be qualification at entry." Discrimination on the Basis of Sex, 81 Fed. Reg. 39108, 39127 (June 15, 2016).

Along these same lines, the strict definition for similarly-situated employees, advanced by Oracle here, leaves no room to include discriminatory job assignment as a basis for a compensation discrimination claim. This position cannot be squared with the plain text of the Department's regulations, which provide that compensation discrimination includes denying, on the basis of sex, "higher-paying wage rates, salaries, *positions, work assignments . . . or other opportunities.*" 41 C.F.R. § 60-20.4(b) (emphasis added).¹⁹ In determining whether illegal steering into positions occurs, OFCCP examines "whether the factor" that the contractor claims

¹⁷ In the only case that touches on statistical analysis at all, *Hooper*, the court threw out the expert's statistical analysis prior to ruling on summary judgment because, like Dr. Saad, the expert failed to consider the factors used by the employer to set compensation as stated in their written compensation policies. *Hooper*, 799 F. Supp. 2d at 1357.

¹⁸ While 41 C.F.R. § 60-20.4 specifically sets forth standards for sex discrimination, these standards apply with equal force to racial disparities in pay. *Cf. Sobel v. Yeshiva Univ.*, 839 F.2d 18, 31 (2d Cir. 1988) ("There is no reason that logic [of *Bazemore*] should not apply with equal force to gender discrimination."); *City of Los Angeles v. Manhart*, 435 U.S. 702, 709 (1978) (equating claims of racial and gender discrimination).

¹⁹ In determining whether illegal steering into dissimilar positions occurs, OFCCP examines "whether the factor" that the contractor claims explains the differential "is actually used by the contractor to determine compensation and whether the factor has been applied consistently without regard to sex or another protected basis" (such as race). Discrimination on the Basis of Sex, 81 Fed. Reg. at 39128.

explain the differential “is actually used by the contractor to determine compensation and whether the factor has been applied consistently without regard to sex or another protected basis” (such as race). Discrimination on the Basis of Sex, 81 Fed. Reg. at 39128. “Whether any particular factor” such as job assignment “explains differences in pay is ‘tainted’ by discrimination, or should be included or excluded as a legitimate explanation for sex-based disparities, will depend on case-specific evidence.” *Id.*

The case specific evidence here, based on Dr. Madden’s detailed statistical disparities and supporting anecdotal evidence, is that Oracle discriminates in setting an employee’s global career level within a job title. OFCCP’s Daubert Opp. at 11-15. As this fact renders Oracle’s Global Career Level tainted (column 8 in Madden’s Tables 1-3), it cannot be used as a legitimate, non-discriminatory explanatory variable. *Id.*

C. OFCCP Need Not Pinpoint the Source of Discrimination in a Disparate Treatment Case, But Oracle Is Required to Explain the Disparities.

In a disparate treatment case, OFCCP has no obligation to pin point the precise source of the discrimination. A claim that the sum of an employer's practices results in less favorable treatment of members of the plaintiff class than of comparably qualified Whites or males may justify an inference that “discrimination was the company's standard operating procedure—the regular rather than the unusual practice.” *Teamsters*, 431 U.S. at 336. This is because a statistically-significant disparity in treatment of the comparably qualified is “the expected result of a regularly followed discriminatory policy.” *Id.* at 361 n. 46. OFCCP has presented compelling evidence of pay disparities that not only includes statistical evidence, but demonstrates that the Company’s stated policies indicate that similarly-situated employees may not receive the same compensation based on budget considerations and budget-driven directives. The statistics demonstrate that these budget considerations were used in a discriminatory manner.²⁰

²⁰ Oracle argues that because OFCCP did not cite violations for every function in Redwood Shores, OFCCP “did not find evidence of discrimination.” See Oracle MPA at 19 n.7. Oracle further argues that there is no pattern and practice because OFCCP has not alleged discrimination workforce-wide. *Id.* at 18-19. Failure to cite a violation does not indicate one way or the other whether a violation exists. As OFCCP explains herein, Oracle refused to provide OFCCP with significant amount of relevant evidence during the compliance review. See *Beachy v. Boise Cascade*

Oracle's claim that OFCCP failed to adequately consider Oracle's neutral policies for setting pay (Oracle MPA at 21) and failed to set forth a disparate impact claim is inaccurate. OFCCP established its prima facie case, and it is Oracle's burden to explain the disparities. Here, because Oracle thus far has simply denied that its workforce is capable of objective study, it has not attempted to meet its burden by conventional means. However, should it attempt to provide actual explanations for the disparities, OFCCP is entitled to test whether the "practices that have an adverse impact on the basis of sex" and race are "job-related and consistent with business necessity." 41 C.F.R. § 60-20.4(d). *See also Segar*, 738 F.2d at 1270 ("when an employer defends a disparate treatment challenge by claiming that a specific employment practice causes the observed disparity, and this defense sufficiently rebuts the plaintiffs' initial case of disparate treatment, the defendant should at this point face a burden of proving the business necessity of the practice"); *Palmer v. Shultz*, 815 F.2d 84 n. 21 (D.C. Cir. 1987) ("[A] disparate treatment claim can turn into a disparate impact claim if a defendant rebuts an allegation of discriminatory intent by claiming that a facially neutral selection criterion caused a disparity in selections.").²¹

Corp., 191 F.3d 1010, 1015 (9th Cir. 1999) (explaining that "an agency's determination that insufficient facts exist to continue an investigation is not per se admissible in the same manner as an agency's determination of probable cause [that discrimination occurred]"); *Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 427 (8th Cir. 2017) (affirming verdict that female employees had been subjected to discrimination in case where employer had been audited by OFCCP and the agency did not cite violations). Binding case law also makes clear that a pattern and practice may be found against a portion of a contractor's workforce. *OFCCP v. Greenwood Mills*, 89-OFC-39, ARB Decision and Remand Order, *5 (Nov. 20, 1995) ("[A]n employer's nondiscriminatory treatment of some minorities or women does not immunize or exonerate that employer from findings of discrimination against other minorities or women.") Moreover, the functions cited by OFCCP at the time of the NOV were among the largest groups at Oracle's headquarters, and thereby most suitable for statistical analysis. Based on the information OFCCP had at the time it issued the NOV, Product Development (4,315 employees), Support (248 employees), and Information Technology (484 employees), represented over two-thirds of the 7,419 employees at Redwood Shores. The remaining 2,372 were split between 13 other functions, most of which had much smaller populations, making statistical analyses less precise. The biggest exception was the Sales function (827 employees), which relies on commissions, a different structure than at issue here. Dec. of Hea Jung Atkins, attached hereto, ¶25. OFCCP further notes that Oracle staunchly resisted any attempts at discovery regarding persons outside the classes identified in the NOV. AUF 52.

²¹ Nonetheless, OFCCP has identified practices that drive the pay disparities in this matter. *See* OFCCP's MSJ at 25-27. As OFCCP demonstrates throughout its cross-motion for summary judgment, Oracle deviates from its own compensation policies by creating budget-driven exceptions to the rule that similarly-situated employees should be compensated at the same rate. Oracle compounds this problem by having no mechanism to ensure or correct disparities. Further, OFCCP statistical evidence demonstrates that Oracle relies on prior pay to set pay in a manner that is inconsistent with Oracle's own policies and discriminates in initial job level assignment. *See Honeywell*, 1994 WL 68485, at *6 (Mar. 2, 1994) (rejecting defense to discriminatory job assignment based on alleged preference for experienced hires in certain assignments because "Defendant presented no statistical studies or other evidence, . . . to

D. Failure to Correct Prior Discriminatory Pay Decisions Represents a Continuing Violation.

Oracle argues that this Court has no jurisdiction to the extent OFCCP alleges that Oracle's discriminatory pay practices are driven by starting pay and OFCCP is simply trying to correct the present effects of past discrimination. Oracle MPA at 21-22. This view is plainly wrong, and has been rejected by the Supreme Court in *Bazemore*. "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries *did not have to be eliminated.*" *Bazemore*, 478 U.S. at 395–96 (emphasis added).²²

That Oracle asserted this defense reveals Oracle's more significant ignorance regarding its duties in relationship to compensation discrimination. The failure to correct practices that result in compensation discrimination, is evidence of intentional discrimination. As the Second Circuit has explained:

While it is true that in a disparate treatment case a plaintiff ordinarily must show discriminatory motive, a showing unnecessary in a disparate impact case, . . . this distinction is not relevant to a *Bazemore* claim. While [plaintiff] probably could not show that [the employer's] adherence to the guideline system was done with discriminatory motive, that adherence was, as we have noted, only the manner in which the disparities were perpetuated; the violation was [the employer's] failure to remedy the disparities. The failure to bring women's salaries up to par with those of men the day Title VII applied to [the employer] is the sort of pattern and practice that would sustain a disparate treatment claim, even absent explicit proof of discriminatory motive.

show that applicants for entry level unskilled positions who have prior training and experience become more productive sooner, are easier to train, and have lower turnover.").

²² See also *Wedow v. City of Kansas City*, 442 F.3d 661, 671 (8th Cir. 2006) (interpreting *Bazemore* as establishing that "each week's paycheck that delivers less on a discriminatory basis is a separate Title VII violation"); *Forsyth v. Fed'n Emp't & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005) ("[E]very paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act."); *Shea v. Rice*, 409 F.3d 448, 452 (D.C. Cir. 2005) (same)(citing *Bazemore*); *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009 (10th Cir. 2002) ("But [*Bazemore*] has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination – instead it is itself a continually recurring violation."); *Anderson v. Zubieta*, 180 F.3d 329, 335 (D.C. Cir. 1999) ("The plaintiffs respond that their complaints allege continuing violations of Title VII, actionable upon receipt of each paycheck. We agree.") (citing *Bazemore* and collecting court of appeals cases).

Sobel, 839 F.2d at 29 (citations omitted). *Cf. EEOC v. Maricopa Cnty. Cmty. Coll. Dist.*, 736 F.2d 510, 515 (9th Cir. 1984) (in affirming district court granting summary judgment in favor of plaintiff for EPA claim, Ninth Circuit noted that “[o]nce [employer] became aware that [plaintiff] was performing work equivalent to the male financial aid assistants, but with lower pay, it was required to act within a reasonable time” to reclassify plaintiff to a higher paying position) (citations omitted).

As set forth in OFCCP’s MSJ, a federal contractor is differently positioned from a typical private-sector employer. Oracle is prohibited from engaging in compensation discrimination on the basis of race or sex as an explicit condition of receiving federal money. Exec. Order No.11246, Section 202; 41 C.F.R. § 60-1.4. Oracle, as a federal contractor, may not sit on the sidelines and permit race- and sex-based compensation discrimination to continue. Every day and year that passes as Oracle continues to receive federal money and takes no steps to alter its compensation practices to eliminate ongoing discrimination underlines Oracle’s discriminatory intent because, as a federal contractor, Oracle is failing to comply with its contractual obligation to ensure it is not engaged in employment discrimination.

Moreover, Oracle admits it has extensively studied its compensation policies for defensive purposes. OFCCP’s MSJ at 11; AUF 15; DF 133. It also had very clear AAP obligations that required implementing and studying its compensation systems systemically to ensure fair pay practices (SUF 263), which Oracle admits it, and particularly its leadership charged with ensuring its compliance with its AAP, did not perform. AUF 2, 3. Oracle’s admitted failure to take corrective action, SUF 212—in the face of an affirmative federal regulation obligation to annually conduct in-depth studies to identify discrimination and take immediate steps to redress it—constitutes intentional discrimination. *Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1051 (7th Cir. 1991) (failure to comply with AAP constitutes evidence of intentional discrimination), *opinion supplemented on other grounds denial of reh’g*, 963 F.2d 929 (7th Cir. 1992); *see also OFCCP v. Enterprise RAC Company of Baltimore LLC*, 2016-OFC-00006, ALJ Recommended Decision and Order, at 107 (July 17, 2019 (appeal pending))(in finding federal contractor liable for hiring discrimination, noting “[t]he experts’

statistical calculations should come as no surprise to Enterprise. Annual impact ratio analyses (“IRAs”) repeatedly warned Enterprise that African-Americans were being hired at rates that were significantly less than white applicants, yet . . . year after year those warnings led to some internal discussions, but no changes to their processes”).

E. The Few Pattern and Practice Cases Oracle Relies Upon are Easily Distinguishable.

In arguing that OFCCP cannot rely on Dr. Madden’s analyses to make its prima facie case, the pattern and practice cases Oracle cites are procedurally and factually distinguishable.

First, many of the cases Oracle cites are decided in the context of Rule 23 class certification litigation and are thus procedurally very different. The issue of whether a court should authorize an individual to represent and bind absent parties to an adjudication of their legal rights in conformity with the due process rights of those absent parties is entirely inapplicable and irrelevant here.²³ OFCCP highlighted this important procedural distinction in promulgating 41 C.F.R. Part 60-20. As OFCCP explained specifically in response to comments regarding *Wal-Mart v. Dukes*:

The Supreme Court’s decision in *Wal-Mart* was based on the private plaintiffs’ failure to satisfy procedural requirements under the Federal Rules of Civil Procedure (FRCP) regarding class-action lawsuits. Unlike private plaintiffs, who must prevail on class-certification motions to bring suit on behalf of others, OFCCP is a governmental agency that is authorized to act in the public’s interest to remedy discrimination. It is not subject to the limitations and requirements of class certification under the FRCP.

81 Fed. Reg. 39108, 39126. Accordingly, each of the Rule 23 cases Oracle cites (*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Moussouris v. Microsoft Corp.*, 2018 WL 3328418 (W.D. Wash. June 25, 2018);²⁴ *Cooper v. S. Co.*, 390 F.3d 695 (11th Cir. 2004) *overruled in*

²³ See *Taylor v. Sturgell*, 553 U.S. 880, 892, 900-01 (2008) (“In the class-action context, these limitations [on representation of nonparties] are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23.”).

²⁴ In addition to the facts that *Microsoft* is a class certification case and is currently before the Ninth Circuit on appeal, it is factually distinct, as OFCCP is not asserting that unfettered discretion caused the pay disparities at Oracle. Significantly, the *Microsoft* court specifically distinguished the case from *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110 (S.D.N.Y. 2015), *magistrate’s recommend decision adopted in part*, 325 F.R.D. 55 (S.D.N.Y. 2018) on facts much more analogous to this case, stating:

part, *Ash v. Tyson Foods, Inc.*, 126 S.Ct. 1195 (2006); *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450 (N.D. Ill. 2009), *aff'd*, 675 F.3d 709 (7th Cir. 2012); and *Gosho v. U.S. Bancorp Piper Jaffray, Inc.*, 2002 WL 34216845 at *4 (N.D. Cal. Oct. 1, 2002) is largely inapplicable here.²⁵

Second, the cases on which Oracle relies are factually distinct and depict Oracle's misconception of the issues in this case. One of the major consistencies in many of the cases Oracle cites is that they are broad, multi-state class actions premised on a theory of liability where "subjective decision making ... unites the entire proposed class," and that such discrimination is "driven by the biases of individual managers." *Abram v. United Parcel Serv. of Am., Inc.*, 200 F.R.D. 424, 429-30 (E.D. Wis. 2001); *Wal-Mart; Microsoft*. These are not the facts of this case. This is not a broad, multi-site class action involving managers with unfettered discretion. This case involves a single job site, a narrow set of job functions, and most importantly, a set of centralized, written policies that Oracle implemented and was required to study as part of its affirmative action obligations.

The cases upon which Oracle relies have no bearing on the issues involved in the current litigation. Oracle is a federal contractor required to implement and document its policies and ensure that these do not result in discrimination. The cases cited by OFCCP provide a roadmap for this court to assess whether discrimination is occurring. Oracle's contention that it delegated

Chen-Oster featured more involvement by upper-management, such as setting the budget that determined compensation, developing a list of candidates for promotion with ranking to emphasize priority candidates, and personally selecting and training the people who evaluated the promotion candidates. Ultimately, the upper management "decide[d] who is promoted." There is no such evidence of upper management involvement here.

Microsoft Corp., 2018 WL 3328418, at *22 n.17. The facts here are analogous to *Chen-Oster*, and, for the reasons highlighted by the court in *Microsoft*, distinct from the facts of both *Microsoft* and *Wal-Mart*.

²⁵ *Fuller v. Seagate Tech.* (Oracle MPA at 17) is an individual age discrimination termination case, not a pattern-or-practice pay/promotion discrimination Title VII case, and on this basis alone is irrelevant to the merits issues in this case. Moreover, the plaintiff in *Fuller* compared truly incomparable data sets: "e.g., comparing data regarding Defendant's median aged employees from fiscal year 2006 to data regarding the median age of employees placed on a PIP from fiscal year 2003." *Fuller v. Seagate Tech., LLC*, 651 F. Supp. 2d 1233, 1247 (D. Colo. 2009). Dr. Madden carefully controlled her regression model via several variables, including the year in which Oracle employees earned their pay, unlike Dr. Saad, who relied on promised future pay. Furthermore, the *Fuller* plaintiff sought to use data from a study conducted during a time period *after* his individual claim arose. *Id.* at 1248.

decision making to its front-line managers, even if it were not clearly negated by Oracle's admissions and clear compensation policies, does not provide a defense to Oracle for breaching its federal contract prohibiting Oracle from engaging in employment discrimination.²⁶

IV. ORACLE'S PROCEDURAL CHALLENGES ARE MERITLESS

In an attempt to avoid the consequences of its unambiguous failure to meet its contractual obligation to ensure it was not engaging in employment discrimination, Oracle raises an array of procedural challenges both to OFCCP's investigation and to OFCCP's claims in this lawsuit brought to seek redress for Oracle's interference with OFCCP's audit and conciliation efforts. Each of Oracle's procedural challenges is meritless.

As a preliminary matter, Oracle's unclean hands render it estopped from asserting any procedural challenge to OFCCP's audit, conciliation, or the scope of this enforcement litigation. *Brother Records, Inc. v. Jardine*, 318 F.3d 900, 909 (9th Cir.2003). Oracle made a concerted effort to impede and interfere with OFCCP's audit and conciliation efforts by failing to provide OFCCP critical information Oracle requested.

Oracle *admits* that it failed to provide information and data requested by OFCCP which was indisputably central to the issues OFCCP audited in its compliance review.²⁷ AUF 34, 40, 49, 51; DF 106-107. Oracle admits it had, but did not provide OFCCP with a full year of the two years of compensation snapshots OFCCP requested: Oracle did not provide the 2013 snapshot

²⁶Oracle also cites *OFCCP v. Analogic Corp.*, ALJ No.: 2017-OFC-00001 (Mar. 22, 2019) to support its argument that Dr. Madden's analyses are insufficient to support a prima facie case. First, the *Analogic* court found OFCCP's expert's analysis insufficient largely because the expert failed to build a model based upon the factors that, per the evidence, were actually used in setting pay at Analogic. Oracle highlights that "courts have determined regressions which do not include major factors [used to determine pay] cannot support a finding of discrimination." (Oracle MPA at 18). Here, it is Dr. Saad—not Dr. Madden—who applies variables in his analysis inconsistent with stated compensation policies. In addition, OFCCP's expert in *Analogic* used the "Oaxaca" method of statistical analysis. The court noted that the method used by Analogic's expert, the multiple regression method, is the statistical model frequently seen in discrimination cases. *Analogic Corp.*, ALJ No.: 2017-OFC-00001 at 36. Dr. Madden, like Analogic's expert, relies on a multiple regression statistical analysis in this case. AUF 53.

²⁷ Oracle attempts to dodge liability for its admitted failure to provide the documents OFCCP requested, by asserting that it did not "refuse" to provide the documents – it allegedly intended to provide the documents eventually. Oracle MPA at 25. Oracle's focus on the term "refusal" to supply documents, and its related attempts to narrowly interpret "refusal" are misplaced, since OFCCP need not establish "refusal" to provide documents to establish the violations claimed. OFCCP can enforce any violation of the regulations, including section § 60-1.12(a), (c)(2) for failure to supply employment records. 41 C.F.R. § 60-1.26 (violations of any of the regulations can result in enforcement proceedings, not simply the "violations, *inter alia*," specifically listed in sub-section (a)(i)).

despite having *six months* between the time it promised to provide it and OFCCP's issuance of its NOV, and another *ten months* between the NOV and OFCCP's filing of this enforcement action. ORSUF 96-97, DF 106-107, AUF 50-51. As to the single year of compensation data Oracle provided, OFCCP requested but Oracle did not produce educational data (names of school attended and degree earned) (DF 107, AUF 28-35), and employees' prior salary information (among other personnel actions) (DF 107, AUF 38-41), although it is now clear that Oracle's representations to OFCCP at the time that these documents were inaccessible were *false*. AUF 36-38, 42-43; DF 106. Educational and prior pay data was critical to the analysis, given Oracle's practice of relying on this data to set salaries (SUF 93, 157-170; DF 92) and both parties' experts use of this data in their respective compensation studies, DF 79-80, AUF 54-57. Finally, Oracle had and failed to provide OFCCP with internal complaints it received regarding discrimination which obviously would have aided OFCCP in identifying witnesses who could provide views on Oracle's compensation. AUF 44-49.

Oracle cannot be rewarded for its improper interference with OFCCP's investigation and conciliation. The procedural challenges Oracle raises here, at bottom, are nothing more than a complaint that OFCCP initiated an enforcement action based on information that Oracle did everything in its power to shield from OFCCP's view.

A. Despite Oracle's Failure to Provide Documents OFCCP Requested, OFCCP Uncovered Ample "Reasonable Cause" in its Compliance Review to Support OFCCP's Issuance of a Notice to Show Cause to Oracle Regarding Prohibited Compensation Discrimination.

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. SUF 10. Although Oracle did not supply important data and documents to OFCCP during the compliance review, OFCCP continued with its compliance review based on the limited 2014 compensation data Oracle produced along with some of its compensation policies, and the evidence OFCCP uncovered in its interviews with management, Human Resources, and non-management employees. *See* DF 59; AUF; Ex. 61 (NOV) at 3 (describing evidence gathered during the compliance review).

Despite Oracle failing to provide data and documents OFCCP requested, OFCCP found statistically significant pay disparities based on gender and race by conducting a regression analysis using the 2014 data Oracle provided, even after controlling for job title. DF 60; AUF 8. 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 – well above the 2 standard deviations from which discrimination can be inferred. AUF 9. Based on its review of the evidence, including its regression analysis, OFCCP had a strong basis to issue a Show Cause Notice to Oracle. When OFCCP “has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be initiated.”²⁸ 41 CFR § 60-1.28.

As the Secretary held in a 1993 decision in *Honeywell*, the “basic purpose of the show cause procedure in the regulations . . . is, to assure due process in Executive Order enforcement proceedings by putting a defendant on notice of the charges.” *OFCCP v. Honeywell*, No. 77-OFCCP-3, 1993 WL 1506966 at 5 (June 2, 1993). Both the NOV and SCN provided Oracle with notice that OFCCP charged Oracle with hiring and compensation discrimination, the time periods during which it occurred, the job positions involved, and that OFCCP’s findings were supported by statistical and other evidence. DF 59, 66; AUF 10-11. In addition, the NOV described the data points Oracle produced that OFCCP included its regression analyses, and the results of those analyses. DF 59; AUF 4, 10 (NOV Attachment A). As in *Honeywell*, Oracle’s “vigorous defense” makes clear that the purpose of the Show Cause Notice “has been fully served.” *Honeywell*, No. 77-OFCCP-3, 1993 WL 1506966 at 5.

Oracle’s assertion that the Court must engage in a two-step process is meritless. Oracle cites no case law supporting its contention that the Court should first analyze the sufficiency of the evidence acquired during the compliance review to determine if it meets a substantive

²⁸ OFCCP also issued an NOV, as is its practice, which is not required by the regulations. The regulations do not mention a “predetermination notice,” another procedural hurdle Oracle implies is required. DF 58.

threshold requirement, and then analyze the evidence OFCCP presents at trial to prove its claims. The only case it cites in support of its argument, *Gilchrist v. Jim Slemons Imps., Inc.*, 803 F.2d 1488, 1500 (9th Cir. 1986), involved a discussion of an EEOC “letter of violation” and “probable cause determination.”²⁹ Nothing in *Gilchrist* indicates that the holding is transferrable to OFCCP’s issuance of Show Cause Notices (nor does it make any reference to fishing expeditions). Fundamentally, the two-step process advocated by Oracle misconceives the role of the Court, which is to conduct a *de novo* analysis of OFCCP’s allegations, not to evaluate the sufficiency of OFCCP’s investigation. *See* OALJ OFCCP Deskbook, Section IV(A) (“review by the ALJ is *de novo*”). Thus, there is no legal basis for Oracle’s claim. Further, OFCCP strongly disputes the facts underlying Oracle’s argument, which alone refutes Oracle’s motion for summary judgment. *See* DF 59-66.

B. OFCCP Made Reasonable Efforts to Conciliate with Oracle.

OFCCP disputes the facts Oracle relies on in seeking summary judgment on conciliation, dooming Oracle’s motion. DF 67-68. Indeed, contrary to Oracle’s motion, the undisputed facts (SUF Nos. 10-36) require summary decision for OFCCP.

First, OFCCP disputes Oracle’s contention that “the only information Oracle had received about the alleged violations OFCCP found were from the NOV itself and one subsequent email, from an OFCCP employee, which provided no more information than what was already in the NOV.” DF 68. The NOV provided Oracle with notice of the claims, including the job functions at issue, the specific data fields from Oracle’s 2014 compensation data that OFCCP included in its standard regression analysis, and the classes of employees who suffered discrimination. *Id.*; AUF 10; SUF 23. OFCCP considered the compensation of employees in “similar roles,” and the results of the regression model. SUF 11; AUF 10, 12, (NOV at 3-6 & Attachment A). Oracle’s compliance attorney, who represents that he is “extremely well-versed”

²⁹ Moreover, Oracle mischaracterized the EEOC standard, by omitting the language in bold: “A finding of probable cause does not suggest to the jury that the EEOC has already determined that there has been a violation. Rather, it suggests that preliminarily there is reason to believe that a violation has taken place.” *Gilchrist*, 803 F.2d at 1500 (emphasis added).

in “OFCCP’s regulations” and “OFCCP’s audit practices,” AUF 13, confirmed in his written correspondence that he knew which data fields from Oracle’s data OFCCP included in its standard regression model, AUF 14.³⁰ This combination of factors belies Oracle’s contention that it had insufficient information in the allegations in the NOV.

After months of refusing OFCCP’s request to meet, Oracle finally agreed to meet in person with OFCCP on October 6, 2016. AUF 16. OFCCP provided additional information about the violations during an approximately 3-hour conciliation meeting. SUF 26-32. OFCCP described the variables used in its analysis during that meeting. SUF 27. The parties discussed Oracle’s assertion that the products employees worked on impacted their compensation, and Oracle’s admitted failure to maintain any data showing such product assignments. SUF 30. OFCCP specifically advised Oracle during the meeting that to the extent Oracle was asserting job assignment was an explanation for the pay disparities, OFCCP was prepared to assert that job assignment was a tainted variable, as such a defense would mean that Oracle’s compensation discrimination was driven by channeling into lower-paying job assignments.³¹ AUF 22.

Following the meeting, Oracle admitted that the exchange of information was useful. As Mr. Siniscalco wrote to Ms. Wipper: “We all feel the conciliation meeting was very productive, and moved both sides in a positive direction.” AUF 24.

Second, OFCCP disputes that “OFCCP understood that Oracle was requesting additional information in order to respond substantively to the NOV” or that Oracle sought to “meaningfully engage” in the conciliation process. Mot. 4, DF 67. For six months after issuing the NOV, Oracle declined OFCCP’s offers to meet in person to discuss the NOV. AUF 16. Starting in the compliance review, Oracle asked questions in an apparent attempt to delay the compliance review and conciliation. AUF 18, 50; Oracle MPA at 25; DF 99. Oracle continued

³⁰ OFCCP used the 2014 compensation snapshot data for its statistical analysis. Decl. of Jane Suhr (Suhr Decl.) ¶10, attached hereto. OFCCP identified the data fields it included in its model by using the same titles Oracle used for the data fields in the snapshot. AUF 6. Oracle’s counsel confirmed he understood that the meaning of the only two variables OFCCP used in the model that were not defined in Oracle’s snapshot: “work experience at Oracle” and “work experience prior to Oracle.” SUF No. 23; AUF 14 (Ex. 70 at 15 n. 17-18).

³¹ OFCCP notes that there is nothing inconsistent with the phrasing of the NOV and SCN with a job assignment violation. OFCCP put Oracle on notice that the violation related to compensation in “similar roles.” *Id.* This is consistent with the theory of the case today.

this tactic when it responded to the NOV by conditioning any meeting with OFCCP on OFCCP's response to 57 detailed questions, many of which invaded the Agency's deliberative process and other privileges, or sought premature, broad discovery. AUF 18. Nevertheless, as Oracle admits, OFCCP still provided written responses to many of its questions on April 21, 2016. AUF 19.

From Oracle's conduct during the compliance review and communications after OFCCP issued the NOV, OFCCP understood Oracle's requests for additional information to be Oracle's tactic to delay conciliation and manufacture a basis for asserting that conciliation had not occurred. Suhr Decl. ¶13, attached hereto. OFCCP communicated its understanding of Oracle's improper tactics: "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." AUF 20.

OFCCP, not Oracle, is entitled to summary judgment regarding conciliation. OFCCP's efforts to conciliate were reasonable given the undisputed facts that Oracle attempted to interfere with the audit and conciliation by failing to provide information Oracle knew would be critical to the discussions and that Oracle refused to have any discussions regarding any statistical analysis of Oracle's compensation data. At the conciliation meeting, Oracle's counsel continued to advocate for comparisons of "cohorts," indicating that Oracle's workforce "defies statistical analysis." AUF 23; SUF 28. As reflected in Oracle's notes of that meeting, OFCCP clearly stated that it was not going to engage in a cohort analysis. SUF 29. OFCCP's Regional Director explained that Oracle's position would effectively exempt Oracle from its affirmative action obligations to ensure equal employment opportunity in compensation, and prevent OFCCP from ever auditing Oracle's compensation systems. Suhr Decl. ¶25. Although OFCCP was hopeful after the October 6, 2016 meeting that Oracle would finally engage substantively and make an offer to resolve the violations, Oracle responded after the meeting by continuing to advocate for

a cohort analysis, providing narrative descriptions of 11 individuals³², and including no offer to resolve the violations. Suhr Decl. ¶¶28, 31 & Ex. T; SUF 33-36; AUF 24-25.

Also, as OFCCP repeatedly stated during conciliation, Oracle advocated for application of incorrect legal standards. AUF 19, 21, 26. This is the reason that much of the conciliation correspondence centered on legal arguments, with OFCCP providing legal authority and explaining that providing information about individuals in response to findings of systemic discrimination is nonresponsive and fails to rebut the strong statistical disparities OFCCP found. *Id.* In accordance with the Title VII burden-shifting framework, detailed above, OFCCP repeatedly requested either an alternative statistical analysis or an explanation of a legitimate factor that could be tested that would explain the gender and race-based compensation disparities identified in OFCCP's statistical analyses. *Id.*; *see also* AUF 17.

As the Court has recognized, OFCCP has “a wide range of discretion about the pacing, extent, and substance of its conciliation efforts.”³³ Order of May 23, 2019 at 9. There is no one-size fits all checklist of items that must occur to satisfy reasonable conciliation. This case exemplifies the reason that is so.

Oracle alleges that OFCCP did not provide backup files for its statistical analysis, a firm settlement number, and draft conciliation agreement. DF 69-70. Providing backup files for the statistical analysis would have been a useless exercise, given that Oracle asserted that no statistical analysis of its workforce should be done. Oracle never indicated that if only OFCCP provided more information about its statistical model, it would engage meaningfully in a discussion about an appropriate statistical model.

Providing more than a “rough estimate” of damages or the details about the calculations likewise would have been a waste of time given that the damages flowed from a statistical model

³² In supposed response to OFCCP's model, which included over 3,000 Asian employees in the Product Development job function alone (controlling for various factors that could explain that disparities in pay by gender and race, including job title and global career level), Oracle provided narrative descriptions comparing individuals it had chosen: two individuals in the Information Technology job function, seven individuals in the Product Development job function, and two individuals in the Support job function. AUF 25.

³³ OFCCP believes that the *Mach Mining* standard applies here, reserving those arguments for appeal. *See Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (2015). In this motion, it focuses on this Court's interpretation of OFCCP's conciliation requirements, and argues that it satisfied this more stringent standard.

that Oracle rejected. In any event, Oracle knew which data OFCCP had utilized in running its regression analysis, DF 59, AUF 14, and OFCCP would have engaged happily regarding that topic if Oracle had not made it so clear that Oracle would not entertain any discussion of statistical analysis of its compensation data, Suhr Decl. at ¶¶11, 28, 31, Further, given the parties' fundamental differences, circulating a draft conciliation agreement would have served no purpose. Oracle MPA at 4, 12. In this case, OFCCP satisfied its conciliation requirements.

Further, it cannot be overlooked that even had OFCCP not engaged in reasonable conciliation, the remedy is not dismissal, as Oracle suggests. The only remedy would be an order to conciliate, which in this case is mooted by the parties' active participation in mediation for 16 months after OFCCP filed this action. AUF 27. *See Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1656 (2015).

C. OFCCP Had Discretion to Enforce Oracle's Non-compliance With Its Duty to Maintain and Supply Documents to OFCCP through a Denial of Access Action or Discrimination Action

Oracle also seeks to impose wholly new procedural hurdles that are nowhere described in regulation or case law by asserting that OFCCP cannot in one complaint seek redress for both a contractor's refusal to provide documents and substantive discrimination violations. Oracle MPA at 26. Notably, again, Oracle advances this argument although it admits it did not provide highly relevant and germane information OFCCP requested at any point in the nearly 18-months in which OFCCP audited and conciliated its claims with Oracle.

The convoluted process advanced by Oracle is contrary to the interests of victims, contractors, OFCCP, and this court alike. All parties have an interest in securing the swiftest resolution possible of any OFCCP investigation, rather than stretching such investigations into years or even decades of enforcement proceedings. Oracle has no basis for asserting that OFCCP, facing an uncooperative federal contractor must choose between bringing an access or an enforcement case on the merits (separate and apart from the contractor's breach of its contractual obligations by failure to provide access upon request by OFCCP). The regulations are not structured as Oracle suggests and no precedent supports Oracle's arguments.

Oracle cites no authority supporting its assertion that OFCCP may only pursue violations

of contractors' obligations to provide documents to OFCCP during the compliance review through "a direct right of access case." Oracle MPA at 26. The language of the regulation suggests otherwise: "Expedited Hearings *may* be used . . . when a contractor . . . has refused to give access to or to supply records or other information as required by the equal opportunity clause." 41 C.F.R. § 60-30.31 (emphasis added). The plain meaning of the term "may" indicates that the expedited procedure is an option for OFCCP, but not the exclusive tool available for seeking documents from contractors. *See, e.g. In the Matter of the Heavy Constructors Assoc. of the Greater Kansas City Area*, 1996 WL 376828, *5 (ARB July 2, 1996) (the use of "may" in a regulation is "clearly permissive").³⁴

Contrary to Oracle's position, the regulations explicitly permit OFCCP to seek enforcement before the OALJ for multiple types of violations together, including "the results of a compliance evaluation," a "contractor's refusal to provide data for off-site review or analysis," or a contractor's "refusal to establish, maintain and supply records or other information as required by the regulations in this chapter. . . ." 41 C.F.R. § 60-1.26(b)(1) (ii), (vii), (viii). In addition, the regulations authorizing remedies in enforcement actions do not distinguish between substantive and access violations. 41 C.F.R. § 60-1.26(b)(1) (enforcement actions may be brought "to enjoin violations, to seek appropriate relief, and to impose appropriate sanctions"). The regulations themselves indicate that these violations can be handled in the same type of enforcement proceeding.

Longstanding authority contradicts Oracle's assertion that OFCCP cannot allege claims for Oracle's failure to supply documents during the compliance review, because OFCCP "has now received through litigation discovery the documents and information at issue," and there is no other remedy for these violations. Oracle MPA at 2. The regulations authorize the Court to order "appropriate relief" in enforcement actions. 41 C.F.R. § 60-1.26(b)(1). In *Uniroyal, Inc. v.*

³⁴ The only cases Oracle cites for its contention that OFCCP does not have discretion to bring enforcement actions or denial of access proceedings when a contractor fails to supply documents, are cases in which OFCCP *chose* to bring denial of access cases. *OFCCP v. Google, Inc.*, 2017 WL 4125403, at *n.14 (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). Logically, these cases provide no support for Oracle's position. OFCCP's use of the denial of access procedure in one situation does not suggest that this is the exclusive procedure at OFCCP's disposal when a contractor refuses to produce documents during the compliance review.

Marshall, 482 F. Supp. 364, 372 (D.D.C. 1979), the District of Columbia upheld the Secretary's debarment sanction (in an enforcement proceeding) against a contractor for refusing to produce documents. The court explained that the contractor's failure to produce documents violated both the Executive Order provision requiring contractors to permit access to information during compliance evaluations and the provision granting the Secretary authority to hold hearings (with the "concomitant power to compel the production of evidence"). *Id.* at 367-68. In ordering debarment as a sanction, the court rejected the contractor's argument that debarment was only authorized for noncompliance with substantive violations, as distinguished from violations of discovery or inspection orders. *Id.* at 371-72. In other words, *Uniroyal* confirms OFCCP's authority to seek a variety of remedies, including "enjoining Oracle from failing to correct its recordkeeping practices and procedures to maintain and supply to OFCCP employment records as required by the Executive Order" (SAC, Prayer for Relief (a)).

Moreover, Oracle is incorrect that the Court "can only enjoin ongoing violations." Mot. 28. In *Marshall v. Chala Enterprises, Inc.*, 645 F.2d 799, 804 (9th Cir. 1981), the Ninth Circuit reiterated that "[p]resent compliance is only one of the factors relevant to the exercise of an informed judicial discretion to determine whether an injunction against future violations is appropriate." In addition, the Court should consider whether the injunction is to vindicate a public right, and discourage future violations. *Id.* (holding district court erred in denying prospective injunction).

The fact that Oracle produced some of the information that OFCCP requested in compliance review years later, during discovery in this case, does not wash away the violations. Oracle's conduct violated the regulations by providing false information to OFCCP about the information it had and never providing other information (including the 2013 compensation snapshot) that it admitted it had. AUF 36-38, 42-43; DF 106. Its failure to provide information interfered with OFCCP's audit and delayed this enforcement action and relief for Oracle's employees as OFCCP sought information it should have received long ago during the compliance review. Suhr Decl. ¶¶7, 13.

It is contrary to the policy of the Executive Order to force OFCCP to make the Hobson's choice Oracle seeks: either (1) bringing a separate expedited proceeding to obtain documents a contractor refuses to provide, thereby delaying an enforcement proceeding, or (2) losing the ability seek a remedy for this violation (or to obtain the documents through normal discovery procedures) in an enforcement action. Requiring OFCCP to pursue a separate denial of access case in every case where a contractor refuses to provide documents would greatly hobble the agency's ability to act efficiently and bring cases to an expedient close that benefits victims, the contractors, OFCCP, and this court alike. *See OFCCP v. Bank of America*, ARB Case No. 13-099, at 4 (Apr. 21, 2016) (2016 substantive decision of case filed in 1997, following appeal of procedural arguments); *OFCCP v. Convergys*, 2015-OFC-2 to 2015-OFC-8, Order Lifting Stay and Remanding the Case (Jan. 31, 2019) (denial of access cases filed on December 15, 2014, remanded to ALJ in 2019 and remains pending).

CONCLUSION

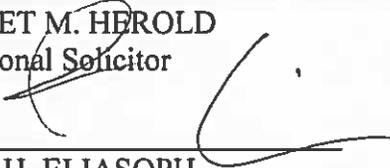
For the foregoing, OFCCP asks the Court to deny Oracle's motion for summary judgment.

DATED: November 1, 2019

Respectfully submitted,

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