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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

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OCT 17 2019

Office of Administrative Law Judges
San Francisco, Ca

**OFCCP'S OPPOSITION TO ORACLE'S MOTION FOR PROTECTIVE ORDER,
AND IN THE ALTERNATIVE MOTION TO STRIKE RE: CHARTS PREPARED
BY OFCCP'S EXPERT**

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I. INTRODUCTION

On Friday, October 11, 2019, Oracle reneged on the parties' agreement to meet and confer on Monday morning and demanded that OFCCP's attorneys instead meet and confer before 2 p.m. that afternoon, despite knowing that they were participating in the deposition of Oracle's expert, Dr. Saad. When OFCCP did not agree to Oracle's schedule change for the meet and confer, Oracle filed its hyperbolic motion for a protective order that same afternoon, rife with legal and factual misrepresentations, contorting the facts and law regarding the parties' meet and confer, its need for expedited briefing and relief, and its grounds for a protective order.

Before OFCCP had an opportunity to object to Oracle's motion for its procedural deficiencies or identify the factual misrepresentations Oracle made to support its extraordinary request for an expedited protective order, the court issued an order before 9 a.m. the next business day, ordering OFCCP to file an opposition brief less than two days later. Despite being substantially prejudiced by Oracle's premature motion striking at the heart of OFCCP's case and the Court's order granting Oracle's request for expedited proceedings before OFCCP could object, OFCCP submits this opposition to ensure that the record on these issues is accurate.

OFCCP fully complied with the parties' expert discovery scheduling order. The parties simultaneously exchanged initial and rebuttal expert reports. In her initial report, Dr. Madden presented the multiple regression model she used to analyze compensation disparities at Oracle based on race and gender, and in her rebuttal report she addressed the attacks made by Dr. Saad on OFCCP's earlier analyses to the extent they related to her report.¹ She could not address, however, the critiques Dr. Saad made about her report in his rebuttal – including new issues that Oracle never raised in its initial report. The charts completed by Dr. Madden after she recovered from her disability and sent by OFCCP to Oracle the same day Dr. Madden provided to OFCCP are not new opinions by Dr. Madden, do not reflect any new methodologies to analyze the data, or rely on new data. They reflect Dr. Madden's rigorous application of her expertise to Dr. Saad's critiques of her analyses to reveal the areas of agreement and disagreement between the experts –

¹ Dr. Saad attacked the statistical model OFCCP's statistician, Dr. Brunetti, used to support the Second Amended Complaint, even though OFCCP repeatedly stated that Dr. Brunetti's model would not be presented at trial.

exactly what experts are supposed to do. Most of the tables merely illustrate the results of work Dr. Madden took to respond to claims made by Dr. Saad for the first time in Dr. Saad's Rebuttal Report. The remaining tables, prepared by Dr. Madden at the request of OFCCP, support fully appropriate hypothetical questions OFCCP wished to ask Dr. Saad at his deposition and trial. As OFCCP advised this Court more than a month ago and Oracle repeatedly, OFCCP intended also to submit a declaration from Dr. Madden (which attach tables reflecting the application of Dr. Saad's methodology to Oracle's salary data) in support of OFCCP's motion for summary judgment. OFCCP's effort to explore and flesh out both experts' opinions is entirely appropriate during expert discovery and trial.

Since Oracle knows it cannot win in a true battle of the experts², it asks the Court to grant an extraordinary protective order – depriving the Court from ever seeing the full scope of Dr. Madden's opinions, hearing her responses to Dr. Saad's critiques, or offering any critiques of Dr. Saad's approach – in other words, protecting Oracle's expert from rigorous examination of the shortcomings of his opinions. Oracle's motion is nothing less than an attempt to prevent the experts from examining and applying their expertise to the facts at issue. Both OFCCP and the Court are prejudiced by Oracle's improper demands.

Critically, assuming arguendo that the charts OFCCP provided could be characterized as a supplemental report or new opinions, OFCCP provided them prior to the close of expert discovery, in advance of the expert depositions, and as soon as they were finalized (given Dr. Madden's health issues). The Federal Rules of Civil Procedure provide clear and readily available procedural vehicles to object to the admissibility or consideration of these charts for purposes of summary adjudication or trial without filing a motion for a protective order seeking a ruling in the abstract. Rule 56 explicitly permits a party to file a written objection to evidence it believes is inadmissible or improperly considered. As to concerns about Dr. Madden testifying about these allegedly new opinions at trial, the Court set a date for filing a motion in limine. Oracle's motion provides no

² Dr. Madden is a leading and highly credentialed labor economist who has decades of experience studying gender and racial differentials in labor markets. Bremer Decl., Ex. A, Dr. Madden's Initial Expert Report ("Madden Initial Report") at pp. 1-3. She had been a professor at the Wharton School of Business at the University of Pennsylvania since 1972, has published numerous peer-reviewed articles dealing with the effects of age, race, and gender on labor market outcomes, and has trained federal judges on the use of statistics in discrimination litigation. *Id.*

justification for a protective order, let alone a protective order it demands to receive on an expedited basis. Running roughshod over the requirements of this Court's orders and the Federal Rules of Civil Procedure, Oracle's motion asks this Court to issue an order in advance without providing the material at issue and devoid of any context. Oracle's motion is wholly improper.

II. FACTUAL BACKGROUND

A. Oracle Filed Its Motion in Advance of the Parties' Scheduled Meet and Confer

In its push to bring its motion in advance of the parties' telephonic meet and confer, Oracle falsely represented in its motion that OFCCP "refused to telephonically meet and confer with Oracle."³ To the contrary, on Wednesday, October 9, 2019, attorneys for Oracle and OFCCP agreed to telephonically meet and confer at 9 a.m. on Monday, October 11, 2019.⁴ On Friday at 12:30 EST, while the OFCCP attorneys who had been discussing the issues participated in Dr. Saad's deposition in Philadelphia, Oracle demanded that OFCCP meet and confer before 2 p.m. PST/5 p.m. EST.⁵ OFCCP did not agree to move up the agreed-upon time for the call, citing their obvious unavailability in the window Oracle demanded. Reneging on its agreement to meet and confer, Oracle filed its motion that same afternoon.

B. The Schedule for Exchanging Expert Reports Does Not Prevent Dr. Madden from Defending Her Opinions or Critiquing Dr. Saad's Opinions

In negotiating the schedule after this Court instructed the parties at the scheduling conferences in January and February 2019 that the hearing *must* occur in 2019, the parties agreed to a hearing date in December with a simultaneous exchange of expert reports.⁶ Consistent with the Court's scheduling order, Dr. Madden explained her opinions in her initial and rebuttal reports. However, it was not until Dr. Saad filed his rebuttal report that he responded to Dr. Madden's report—including entirely new opinions not raised in his initial report.⁷ Thus, Dr. Madden could not respond to Dr. Saad's arguments that the opinions in Dr. Madden's "initial report were

³ Mot., p.1.

⁴ Connell Decl., Ex. E, pp. 3-4.

⁵ Connell Decl., Ex. E, pp. 1-2.

⁶ As OFCCP stated at the time, "[u]nder the compressed schedule contemplated by Judge Clark, there is no time for the sequenced disclosures you request." Connell Decl., Ex. A.

⁷ Mot. p. 3.

unfounded and incorrect” in her rebuttal report.⁸ By suggesting a simultaneous exchange of expert reports, OFCCP never agreed that OFCCP’s expert could not fully explain and elaborate on her opinions, critique the analyses and methodologies Dr. Saad includes in his report, and respond to his critiques of her analyses (including the new issues he raises for the first time in his rebuttal report), since such a result would be contrary to the purpose of expert discovery and examination of witnesses at trial.

C. OFCCP Produced Dr. Madden’s Charts and Related Documents Expediently and Before the Cut-off for Expert Discovery

Oracle falsely asserts that OFCCP “withheld” the charts and related documents. Anticipating using them during the expert depositions and upcoming motions⁹, Dr. Madden was in the process of preparing the charts at issue before September 5, 2019, when Dr. Madden had her first medical procedure.¹⁰ In early October, as soon as Dr. Madden’s vision began returning, she finalized the charts.¹¹ On October 3, 2019, she sent tables to OFCCP and that same day OFCCP sent the tables she had finalized to Oracle, providing advanced warning that OFCCP intended to use them in the upcoming depositions.¹² OFCCP wanted Oracle and its counsel to have time and opportunity to review the results of the analyses prior to the deposition, in order to make the most productive use of both parties’ deposition examinations of the experts. On October 9, 2019, after meeting with counsel for OFCCP in preparation for her deposition, Dr. Madden finalized two additional tables and provided them to Oracle.¹³ Thus, OFCCP provided all of the tables at issue in advance of the depositions -- most of them a full week before Dr. Madden’s deposition.¹⁴

Oracle responded by accusing OFCCP of offering “new opinions” from Dr. Madden.¹⁵

⁸ Mot. p. 3.

⁹ During the telephonic conference with the Court regarding modification of the schedule due to Dr. Madden’s condition, OFCCP stated its intention to file a declaration by Dr. Madden to support its summary judgment motion.

¹⁰ Bremer Decl., Ex. B, Deposition of Dr. Janice F. Madden (“Madden Dep.”) at 240:11-242:21. Due to complications, on September 14, 2019 Dr. Madden had emergency surgery, because she “was about to lose [her] vision.” Madden Dep. at 239:17-240:8. As a result of Dr. Madden’s temporary impairment of her eyesight, the Court found that good cause existed to modify the deadlines for the close of expert discovery, extending the deadline to October 11, 2019. Order Modifying Pre-Hearing Schedule and Denying Continuance Request, p. 3 (Sept. 24, 2019).

¹¹ Madden Dep. at 240:11-242:21.

¹² Connell Decl., Ex. D and E; Bremer Decl. at ¶ 2.

¹³ Connell Decl., Ex. E.

¹⁴ Mot. p. 4.

¹⁵ Connell Decl., Ex. F.

OFCCP immediately responded to Oracle's counsel, explaining that the charts did not represent new opinions, and that "gotcha" litigation tactics are a relic of the past: modern discovery, including expert discovery, encourages parties to fully disclose and air all facts and opinions during discovery.¹⁶ OFCCP also explained that any disputes about evidence should be raised in relation to motions attaching the evidence or in motions in limine prior to trial, and that there was no basis for an expedited protective order.¹⁷

Disregarding OFCCP's responses, Oracle sought to suppress the charts, refusing to convey them to their expert, Dr. Saad. During Dr. Madden's deposition on October 10, 2019, Oracle avoided asking about the tables OFCCP had sent to Oracle in advance of the deposition, told Dr. Madden that they did not want her to discuss them, and moved to strike answers by Dr. Madden that referenced the tables.¹⁸ Oracle's counsel refused to mark the tables that Dr. Madden referenced in her testimony as exhibits to the deposition and refused to permit OFCCP to conduct a redirect examination of Dr. Madden.¹⁹ When OFCCP's counsel asked Dr. Saad to review Dr. Madden's tables, Dr. Saad testified he had not seen them before the deposition.²⁰

Since Oracle had refused to mark the tables Dr. Madden mentioned in her deposition or permit her to testify about them, OFCCP asked Dr. Madden to prepare a short declaration describing the tables she had prepared, which she did during the deposition of Dr. Saad.²¹ In response to Oracle's complaints that it had not received the backup files for the charts (though it did have the data analyzed), OFCCP also produced them on October 11, 2019.²²

D. The Charts and Back-Up Files OFCCP Produced Before the Cut-Off for Expert Discovery Are Not New Opinions by Dr. Madden

Dr. Madden's charts, deposition testimony, and anticipated trial testimony do not alter in

¹⁶ Connell Decl., Ex. F, pp. 5-6.

¹⁷ *Id.* at 6, 8-9.

¹⁸ *See, e.g.*, Madden Dep. at 176:19-177:4.

¹⁹ Madden Dep. at 241:2-20, 254:16-256:17. OFCCP offered several choices for Dr. Madden's deposition between October 9 and 11. Oracle chose to take Dr. Madden's deposition on October 10, knowing that she needed to leave at 3 p.m., and refused offers to start the deposition earlier or continue it on either October 9 or 11 so that Oracle could depose her for 7 hours. Connell Decl., Exs. D at p. 1, E at p. 6, F at pp. 5-6. Then, claiming it was deprived of 7-hours of testimony, it refused to permit OFCCP to conduct any redirect or mark the tables Ms. Madden had referenced during her deposition.

²⁰ Bremer Decl., Ex. C, Deposition of Dr. Ali Saad ("Saad Dep.") at 216:13-218:13, 307:17-308:23, Ex. 9.

²¹ *See* Saad Dep., Ex. 9 (Madden Decl., signed Oct. 11, 2019)

²² Mot. p. 5; Connell Decl., Ex. H.

any way her opinion regarding pay disparities at Oracle nor the mechanisms by which such disparities arise, *e.g.*, assigning women into lower global career levels, causing women, Asian-Americans, and African-Americans to receive less pay than similarly situated White men. Nor do the charts employ new methodologies not previously used by the experts, or use new data.

In her initial report, Dr. Madden included educational degree and job descriptors (which she used to identify people likely to have similar majors and similar types of experiences) in her regression analysis.²³ Dr. Saad's rebuttal report criticized Dr. Madden's analysis for omitting college major and field of study (variables that Dr. Saad had not mentioned in his initial report).²⁴ In response, Dr. Madden tested the validity of Dr. Saad's critique by including Dr. Saad's classifications of majors in her analysis described in her initial report.²⁵ Her test showed that "adding college major has no substantial effect on the size or significance of the race and gender differences in compensation."²⁶ These tables do not depict new opinions of Dr. Madden; rather, they bolster her original opinions contained in her reports by impeaching Dr. Saad's criticisms of the educational factors included in her model.

During her deposition, Oracle prevented Dr. Madden from responding to Dr. Saad's critique of the education variable used in her initial report. For example, Oracle asked Dr. Madden to admit that her education control "does not capture the field of study, correct?"²⁷ Dr. Madden responded that she "did subsequent analyses to cover that," and that she analyzed "the effects of major [which Dr. Saad claimed she should use] versus job descriptor [which she used in her initial report for area studied in college and prior work experience] on pay. And actually found that they're pretty close."²⁸ If Dr. Madden cannot explain that using Dr. Saad's preferred education variable, rather than the one she used in the model described in her report, does not change the result, the Court will be left with the false impression that she left out a variable that could explain the pay differentials between men and women, when in fact, there is no difference in outcome

²³ Bremer Decl., Ex. A, Dr. Madden's July 19, 2019 Initial Expert Report; Madden Dep. at 175:2-176:18.

²⁴ See Saad Dep. Ex. 9, (Madden Decl.) at ¶ 3

²⁵ See Saad Dep. Ex. 9, (Madden Decl.) at ¶ 4.

²⁶ See Saad Dep. Ex. 9, (Madden Decl.) at ¶¶ 4-5, tables A-1 to A-5.

²⁷ Madden Dep. at 166:14-16.

²⁸ Madden Dep. at 166:17-18, 176:19-178:1

between the approach Dr. Madden used and the one suggested by Dr. Saad.

In his rebuttal, Dr. Saad ran regressions for the first time that attempt to show that there are no disparities when all of his preferred variables (many of which are contested between the parties) are considered in the analysis.²⁹ Notably, he only ran this regression to test for disparities in total compensation, not salary (basepay) compensation.³⁰ In preparation for his deposition and summary judgment, Dr. Madden ran an analysis using his exact same methodology but substituting salary data.³¹ This exercise revealed the Dr. Saad's own analyses confirm statistically significant pay disparities when applied to salaries, the results of which are recorded in the charts identified as D1-D5.³² This information is of obvious and critical importance and central to the issues in this case as OFCCP claims that Oracle engaged in both discrimination in base pay and in total compensation.³³ It is customary and entirely appropriate to pose hypothetical questions to expert witnesses; in fact, Oracle asked hypothetical questions to Dr. Madden.³⁴ Yet, in refusing to show charts D1 to D5 to Dr. Saad, Oracle prevented OFCCP from posing hypothetical questions asking Dr. Saad the result of his methodology when applied to salary data, a specific claim at issue in this case. This evidence also supports OFCCP's summary judgment argument that the evidence is undisputed that Oracle impermissibly engaged in salary discrimination. These tables are not new opinions by Dr. Madden, as she does not support Dr. Saad's methodology.

In response to Dr. Saad's rebuttal report, which opined that Oracle's assignments of hires to a global career level were race and gender neutral, Dr. Madden used *Dr. Saad's data* on requisitions to which applicants had applied to control for the global career level listed in the requisitions.³⁵ As she shows in Table B, Oracle systemically assigned Asians and Women to lower global career levels, contrary to Dr. Saad's position in his rebuttal report.³⁶ Dr. Madden attempted to explain this analysis in the deposition, explaining that when Dr. Saad's data is analyzed, it shows

²⁹ Bremer Decl., Exs. G, Dr. Saad's Rebuttal Report, E Madden Decl.

³⁰ Bremer Decl., Ex. G, Dr. Saad's Rebuttal Report.

³¹ Saad Dep. Ex. 9, (Madden Decl.) at ¶ 8.

³² Saad Dep. Ex. 9, (Madden Decl.) at ¶ 9, Exs. D-1 to D-5; Bremer Decl., Ex. H, Dr. Saad's Initial Report.

³³ Second Amended Complaint ("SAC") at ¶¶ 16, 22, 25, 29.

³⁴ Madden Dep. at 68:20-71:4.

³⁵ Saad Dep. Ex. 9, (Madden Decl.) at ¶ 6.

³⁶ Saad Dep. Ex. 9, (Madden Decl.) at ¶6, Table B

women are significantly disadvantaged.³⁷ Again, Oracle repeatedly sought to prevent Madden from providing complete answers to their questions at her deposition.³⁸

Finally, to respond to Dr. Saad's assumptions about salary ranges, Dr. Madden created Exhibit C to illustrate that there were differences in pay for Oracle women, Asian, and black employees compared to whites or male employees even within the salary ranges Dr. Saad identified for the job functions analyzed in this case.³⁹

III. ARGUMENT

The Court should deny Oracle's motion because: (1) Oracle failed to meet and confer as required by the Court; (2) there is no basis for an expedited ruling; (3) a protective order to protect Oracle's expert from rigorous examination of the opinions and methodology described in his reports is inappropriate; (4) Oracle cannot categorically and prospectively suppress expert evidence without specifically identifying the particular evidence it seeks to exclude; (5) even if Dr. Madden's analyses could be construed as "new" opinions (which they are not), they should be admitted because such disclosure is substantially justified, harmless, and serves the ends of justice.

A. An Expedited Ruling Is Unjustified

Oracle fails to demonstrate that expedited resolution of its motion is warranted or provide authority supporting expedited resolution of its motion. No harm will befall Oracle should it avail itself of the tried and true methods to exclude evidence it believes is inadmissible for purposes of summary judgment at trial. To the contrary, addressing Oracle's concerns after the Court has reviewed the parties' Daubert and summary judgment motions will allow the Court to understand these issues in the proper context of the merits of this litigation.

B. Oracle Provides No Support for Using a Motion for Protective Order to Exclude Expert Analyses and Testimony or Protect an Expert from Critique

As an initial matter, Oracle fails to cite any authority for the proposition that a motion for a protective order pursuant to Rule 26(c) or the corresponding OFCCP regulations is the proper

³⁷ Madden Dep. at 190:4-17

³⁸ See, e.g., Madden Dep. at 191:16-194:3 (explaining that the subsequent analysis puts the original backup files in the larger context; "if you're asking how to interpret this, I have to answer this way").

³⁹ Saad Dep. Ex. 9, (Madden Decl.) at ¶ 7, Ex. C.

procedural vehicle to request prospective exclusion of broad categories of expert discovery.⁴⁰

1. Rule 26 Does Not Prohibit Dr. Madden from Supplementing, Elaborating Upon, and Explaining Her Opinions, Her Critiques of Dr. Saad, or Responding to His Critiques of Her Analyses.

Oracle argues that disclosure of Dr. Madden's response to Dr. Saad's rebuttal report by way of a declaration and related charts violates Rule 26(a)(2)(B), which requires that an expert produce, in relevant part, a report which contains, "(i) a complete statement of all opinions the witness will express and the basis and reasons for them," and "(ii) the facts or data considered by the witness in forming them."⁴¹

Oracle misreads Rule 26(a)(2)(B) and the case law interpreting it. "The purpose of [Rule 26(a)(2)(B)] is to eliminate unfair surprise to the opposing party. But it does not limit an expert's testimony simply to reading his report[.] The rule contemplates that the expert will supplement, elaborate upon, and explain his report in his oral testimony."⁴²

Dr. Madden's charts, deposition testimony, and anticipated trial testimony do not alter in any way her opinion regarding pay disparities at Oracle nor the mechanisms by which such disparities arise, e.g., assigning women into lower global career levels,⁴³ causing women, Asian-Americans, and African-Americans to receive less pay than similarly situated White men. Oracle's attempt to limit Dr. Madden's testimony to a verbatim reading of her expert reports is improper

⁴⁰ OFCCP specifically requested counsel for Oracle to provide such authority during the parties' email exchanges regarding Dr. Madden's tables, but Oracle never provided such authority. Connell Decl., Ex. F at pp. 4-7.

⁴¹ Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii).

⁴² *Muldrow*, 493 F.3d at 167; *Roach v. Hughes*, 2015 WL 3970739, at *9 (W.D. Ky. June 30, 2015) (denying motion to exclude expert's testimony not expressly in his report because "while the opinion is not expressly stated in Dr. Shraberg's report, the Court finds that it is consistent with the report, is a reasonable elaboration of the opinions contained in the report, and was in response to questioning by Plaintiffs' counsel"); *Heller v. D.C.*, 952 F. Supp. 2d 133, 138-39 (D.D.C. 2013) ("The expert report, then, is not the end of the road, but a means of providing adequate notice to the other side to enable it to challenge the expert's opinions and prepare to put on expert testimony of its own. ... Where Defendants have provided adequate notice of the opinions they expect these experts to offer and Plaintiffs have had and continue to have opportunities to challenge these conclusions, the goals of Rule 26(a) are satisfied, and there is no basis for striking the reports and preventing these experts from testifying."); *Hall v. City of Fairfield*, 2012 WL 1155666, at *4 (E.D. Cal. Apr. 5, 2012).

⁴³ Bremer Decl., Ex. D, August 16, 2019 Expert Rebuttal Report of Dr. Janice F. Madden at p. 10 ("I found gender and racial disparities in initial assignments. I found that about half of current gender differences in compensation arise from gender differences in job assignments at hire for employees of similar experience and education. I found that differences in assignments after hire as well as current compensation differentials with similar job assignments account for the other half of current compensation differentials by gender. I found that current Asian-white differences in compensation arise almost entirely from differential job assignments by race for employees of similar experience and education.").

and belied by Oracle's own examination of Dr. Madden, during which Oracle posed hypotheticals eliciting testimony outside the four-corners of Dr. Madden's reports.⁴⁴

At bottom, Oracle takes inconsistent litigation positions to suit its tactical ends: eliciting Dr. Madden's responses to its hypothetical queries at deposition to prepare its expert for trial, but complaining when Dr. Madden similarly seeks to elaborate on the bases of her opinions and respond to hypotheticals that support of OFCCP's motion for summary judgment. Oracle's contradictory litigation positions further underscore that its goal is to protect Oracle from damaging testimony.

2. Oracle Provides No Basis for a Protective Order.

Oracle does not cite a single case permitting a party to obtain a protective order under Rule 26(c) or OFCCP regulations to prospectively exclude expert declarations, analyses, or testimony. The only protective order cases Oracle cites relate to sealing confidential settlement materials⁴⁵ and maintaining the confidentiality of members and funding sources of a particular organization.⁴⁶ Importantly, none of the authorities cited by Oracle justify the extraordinary relief it seeks, a protective order barring an expert from testifying about the full scope of her own opinions and responding, applying their expertise, to the opposing expert's critiques.

C. **Oracle May Not Prematurely Exclude Categories of Evidence and Testimony**

1. Oracle Fails to Show Good Cause for an Early Motion in Limine

Courts generally disfavor "exclud[ing] evidence on a motion in limine" unless the evidence is "inadmissible on all potential grounds."⁴⁷ This principle applies with particular force to bench trials.⁴⁸ Oracle fails to show why ordinary methods to challenge the admissibility of evidence

⁴⁴ Madden Dep. 68:20-69:3 ("Q: ... Dr. Madden ... I'm going to first ask you to assume something for the purposes of the question. **I'm going to asking you to assume that you're reviewing a hypothetical data set that contains no information what whatsoever with the type of educational attainment**, the level of educational attainment of employees. Do you understand the **assumption** I'm asking to you make? A. Yes.") (emph. added).

⁴⁵ *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1214 (9th Cir. 2002).

⁴⁶ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

⁴⁷ *Acad. of Motion Picture Arts & Scis. v. Godaddy.com, Inc.*, 2015 WL 12697750, at *2 (C.D. Cal. Apr. 10, 2015) (citations omitted).

⁴⁸ See *United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009) ("Because the judge rules on this evidentiary motion, in the case of a bench trial, a threshold ruling is generally superfluous. It would be, in effect, 'coals to Newcastle,' asking the judge to rule in advance on prejudicial evidence so that the judge would not hear the evidence."); see also *Crane-Mcnab v. Cty. of Merced*, 2011 WL 94424, at *1 (E.D. Cal. Jan. 11, 2011) ("The first purpose of a motion in limine, protecting the jury, is inapplicable in the context of a bench trial.") (citations omitted).

proffered by OFCCP – e.g., through evidentiary objections lodged with Oracle’s forthcoming opposition to OFCCP’s motion for summary judgment⁴⁹, regularly-noticed motions in limine, objections to Dr. Madden’s testimony at trial, and rigorous cross-examination of Dr. Madden at trial – are insufficient mechanisms to address its perceived concerns regarding Dr. Madden’s testimony. Indeed, courts frequently deny such garden-variety motions in limine without prejudice until the proper factual context to evaluate the challenged evidence is before the court, either via dispositive motion practice, motions in limine, or at trial.⁵⁰

Oracle’s litigation tactics flout this Court’s Scheduling Order, which set the motion in limine deadline for November 15, 2019. Oracle nevertheless brings this motion a month early, attacking the heart of OFCCP’s case on an expedited basis, while OFCCP is in the midst of preparing the major dispositive motions in this case.

2. Oracle Fails to Sufficiently Specify the Evidence It Seeks to Exclude.

Motions in limine must specifically identify the evidence sought to be excluded because to do otherwise would result in “amorphous motions” that “leave the court and the parties to guess what evidence during trial may be included within the scope of the ruling.”⁵¹ Yet Oracle requests precisely this type of ill-defined ruling⁵², which will materially prejudice OFCCP’s ability to

⁴⁹ Fed. R. Civ. P. 56(c)(2) (“A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.”).

⁵⁰ See, e.g., *Liberal v. Estrada*, 2011 WL 3956068, at *5 (N.D. Cal. Sept. 7, 2011) (denying defendant’s motion in limine without prejudice because “it is not clear what evidence or testimony the Plaintiff intends to elicit ... as Defendants have identified none. In any event, such evidence and/or testimony, and any objection thereto, must be considered in the context in which it is being presented and the purpose for which it is being offered.”); *350 W.A. LLC v. Chubb Grp. of Ins.*, 2007 WL 4365502, at *28 (S.D. Cal. Dec. 5, 2007) (denying motion in limine “to exclude Plaintiff’s experts from offering opinions which are beyond the scope of those experts’ previously disclosed reports” because the motion was “premature” and overbroad, and instead directed the defendant to raise “this objection at trial with respect to specific experts and opinions”); *Saiyed v. Council on Am.-Islamic Relations Action Network, Inc.*, 321 F.R.D. 455, 460 (D.D.C. 2017) (denying motion to strike expert report as “premature” and noting that such routine matters “are more aptly addressed by the filing of a motion in limine”).

⁵¹ *Acad. of Motion Picture Arts & Scis. v. Godaddy.com, Inc.*, 2015 WL 12697750, at *2 (C.D. Cal. Apr. 10, 2015) (citations omitted); *Hall v. City of Fairfield*, 2012 WL 1155666, at *4 (E.D. Cal. Apr. 5, 2012) (denying motion to exclude because moving party did not show “that the [expert] testimony sought to be excluded was not encompassed within his expert report.”); *Arrington v. City of Los Angeles*, 2017 WL 10543403, at *4 (C.D. Cal. June 30, 2017) (declining to rule on admissibility of testimony of treating physician as a lay witness because “Plaintiff does not identify these alleged treating physicians or discuss what testimony each will provide” and court declined to “rule in the hypothetical”).

⁵² Mot. at 12 (seeking exclusion, without qualification for, e.g., responses to hypotheticals, elaboration, or clarification, of “any expert analyses, opinions, or conclusions served after August 16, 2019”); *id.* (requesting, in the alternative, the Court to strike, sight unseen, “any expert analyses, opinions, or conclusions submitted by OFCCP and not contained in Madden’s first two reports”).

present overwhelming, incontrovertible statistical evidence showing that Oracle systematically underpays women, Asian-Americans, and African-Americans in the job functions at issue, even taking into account Dr. Saad's methodologies and data.⁵³

The Court should not allow Oracle to suppress critical expert testimony in this case, which both parties have poured considerable resources into after years of investigation, conciliation, and vigorous discovery motion practice, without at least personally reviewing the specific evidence at issue in the context of an objection to evidence submitted with the upcoming motions or a motion in limine filed pursuant to the Court's scheduling orders.⁵⁴

3. The Cases Oracle Cites Bear No Factual Resemblance to the This Case.

In support of its extraordinary motion, Oracle cherry-picks snippets from inapposite cases. In one case cited by Oracle, a party did not file any written expert report until three months after the expert designation cutoff.⁵⁵ In another case, an intervener (not a real party in interest) sought to introduce seven brand new opinions based on topics not mentioned in the original expert report after expert depositions and without producing the underlying backup data for these brand new analyses⁵⁶ nor even an explanation of why the new opinion were "of critical importance"⁵⁷ to the merits. The *Verizon Communications* case is an example of a disfavored "amorphous" motion in limine order and, to the extent it favors either party, it actually supports OFCCP's position because the court permitted the filing of an entirely new "supplemental report" the day before an expert's deposition so long as "it [was] a true sur-rebuttal, and only offer[ed] responses to Wessel's rebuttal report," because "it is hard to see how the defendants have been prejudiced by receiving the report."⁵⁸ To the contrary, the court noted that the supplemental report would have "help[ed]" the

⁵³ See Section II.D, *supra*, summarizing the contents of Dr. Madden's Declaration and exhibits; see also Bremer Decl., Ex. E, Declaration of Janice F. Madden.

⁵⁴ See *Acad. of Motion Picture Arts & Scis.* 2015 WL 12697750, at *3 ("The Court will not exclude Dr. Abramson's testimony sight unseen. Rather, it will entertain specific objections to specific opinions at the appropriate time.").

⁵⁵ See *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 324 (5th Cir. 1998).

⁵⁶ See Bremer Decl., Ex. F, *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, No. 15-cv-134, 2017 WL 9480314, at *1 (ECF No. 185, "Wal-Mart's Motion to Strike Intervenor TPSA's 'Supplemental' Expert Report and Exclude Any Testimony Based on It," filed Jan. 27, 2017) at pp. 4-8 (explaining each of the intervenor's new opinions and the lack of backup data provided as stated therein, noting that intervenor's new opinions relied on national poll data with problematic properties).

⁵⁷ *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 2017 WL 9480314, at *2 (W.D. Tex. May 22, 2017).

⁵⁸ *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 2012 WL 12885083, at *1 (N.D. Tex. Aug. 3, 2012).

moving party “by letting the [moving party] know before trial how the [non-moving party’s] expert witness will support the [non-moving party’s] case.”⁵⁹ The *Beller* case involved untimely disclosure of new analyses based on purportedly new information resulting in “opinions offered [which were] different than the opinions contained in the” initial report, unlike Dr. Madden’s Declaration and charts, which do not change her conclusions regarding pay disparities at Oracle nor the principle causes of such pay disparities such as channeling.⁶⁰ *Sandata Technologies* is a tale of repeated, inexplicable untimely disclosures of entirely new expert reports. Among the many blatant discovery violations described in that case, the non-moving party – after filing an inappropriate rebuttal report that largely opined outside the contours of the moving party’s opening expert report – introduced a supplemental “twenty-page report, including more than 100 pages of exhibits” by the offending party during the expert’s deposition and served another “382 pages of report and exhibits” afterward.⁶¹ These cases are all too far afield of the facts of the instant litigation to be of service to this Court.

D. Even If Dr. Madden’s Tables and Declaration Were “New Opinions,” They Are Substantially Justified, Harmless to Oracle, and Advance the Ends of Justice

Only if expert testimony “goes beyond ‘a reasonable synthesis and/or elaboration of the opinions contained in [his] report’” may a court then determine whether to permit such tardy testimony as substantially justified or harmless, or to exclude it under Rule 37.⁶²

⁵⁹ *Id.*

⁶⁰ *Beller v. United States*, 221 F.R.D. 689, 695 (D.N.M. 2003). Indeed, between the initial report and the supplemental report, the expert changed her opinion regarding the causal mechanism of fault from “policies did not exist” to “policies were not enforced.” *Id.* at 692. There is no such leap in Dr. Madden’s Declaration and charts.

⁶¹ *Sandata Techs., Inc. v. Infocrossing, Inc.*, 2007 WL 4157163, at **2-3 (S.D.N.Y. Nov. 16, 2007).

⁶² *Asia Vital Components Co. v. Asetek Danmark A/S*, 377 F. Supp. 3d 990, 1005 (N.D. Cal. 2019) (citations omitted); see *Fujifilm Corp. v. Motorola Mobility LLC*, 2015 WL 12622055, at *4 (N.D. Cal. Mar. 19, 2015) (citing *nCube Corp. v. SeaChange Int’l, Inc.*, 809 F. Supp. 2d 337, 347 (D. Del. 2011) (“When determining whether an expert’s testimony is beyond the scope of the expert’s written report, courts do not require verbatim consistency with the report, but allow testimony which is consistent with the report and is a reasonable synthesis and/or elaboration of the opinions contained in the expert’s report.”); *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 585 F. Supp. 2d 568, 581 (D. Del. 2008) (“In determining whether an expert’s testimony has exceeded the scope of his or her report, the Court has not required verbatim consistency with the report, but has allowed testimony which is consistent with the report and is a reasonable synthesis and/or elaboration of the opinions contained in the expert’s report.”); *Massachusetts Mut. Life Ins. Co. v. DB Structured Prod., Inc.*, 2015 WL 12990692, at **3-4 (D. Mass. Mar. 31, 2015) (“The practical reality is that experts often will not be in a position to predict every challenge or critique of their analysis at the time of the original report. ... [A] ‘late’ expert declaration submitted in response to criticisms of the expert’s opinion or methodology contained in a *Daubert* motion or motion for summary judgment is permissible as long as it is consistent with the overall opinion or methodology in the original report and merely provides additional

The touchstone of harm resulting from admission of untimely expert testimony is disturbing “the substantial rights” of a party.⁶³ Mere “surpris[e]” is insufficient.⁶⁴ Oracle generically claims prejudice will result from OFCCP’s submission of Dr. Madden’s October 11, 2019 Declaration and attached exhibits with its forthcoming motion for summary judgment next week,⁶⁵ but Oracle fails to explain with specificity this supposed anticipated harm.

Oracle does not identify any specific way in which Dr. Madden’s opinion changed regarding systemic pay disparities for employees working in the three Oracle job functions at issue in this litigation. For example, OFCCP’s second amended complaint plainly states that part of Oracle’s alleged liability in this litigation stems from both basepay and total compensation⁶⁶, and Dr. Madden similarly opined⁶⁷ regarding employee “Medicare compensation versus base pay versus restricted stock units.” It should come as no surprise that OFCCP would ask Dr. Saad to apply his methodology to base pay – and ask Dr. Madden to run Dr. Saad’s methodology on basepay – to identify the areas where the experts agreed and disagreed. It is not Oracle that has been prejudiced by Dr. Madden’s analyses depicted in her charts; OFCCP has been prejudiced by Oracle’s refusal to convey the charts to Dr. Saad and Oracle’s attempt, including by filing this motion, to suppress any testimony synthesizing the analyses to identify the areas of agreement and disagreement between the experts.⁶⁸ As the *Verizons Communications* court noted, “letting the [moving party] know before trial how the [non-moving party’s] expert witness will support the [non-moving party’s] case”⁶⁹ cuts against any showing of prejudice and exclusion of said evidence on that basis.

subsidiary details, support, or elaboration. ... On the other hand, if the declaration submitted after the close of expert discovery differs substantially from the report, offers a whole new theory, opinion, or methodology, or is outside of the scope or general scheme of the report, then it is an improper supplementation.”) (citations omitted).

⁶³ See *Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 168 (D.C. Cir. 2007) (citing Federal Rule of Civil Procedure 61).

⁶⁴ *Id.*

⁶⁵ See, e.g., Mot. at p. 10 (citing vague “prejudice[,],” “logistical burdens and expenses,” and the “complex[ity]” of the statistical analyses without explaining how Dr. Madden’s straightforward analyses of Dr. Saad’s own data and methods would cause such problems to manifest).

⁶⁶ Second Amended Complaint at ¶¶ 16, 22, 25, 29.

⁶⁷ Bremer Decl., Ex. D, Expert Rebuttal Report of Dr. Madden at pp. 6 (emph. added), 39 (opining re: Dr. Saad’s base pay growth model using appropriate controls), 50 (Table R8, re: Dr. Saad’s analysis by compensation type).

⁶⁸ Mot. p. 4; Connell Decl., Ex. D and E.

⁶⁹ *U.S. Bank Nat’l Ass’n v. Verizon Commc’ns Inc.*, 2012 WL 12885083, at *1 (N.D. Tex. Aug. 3, 2012).

Consequently, any harm Oracle now suffers for squandering its opportunity to depose Dr. Madden regarding the additional analyses she performed, consistent with and in elaboration of her written reports of pay discrimination at Oracle, is of its own making.

IV. CONCLUSION

For the foregoing reasons, OFCCP respectfully requests that Oracle's motion for protective order and premature motion to strike be denied.

DATED: October 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 17th day of October 2019, OFCCP's OPPOSITION TO ORACLE'S MOTION FOR PROTECTIVE ORDER, AND IN THE ALTERNATIVE MOTION TO STRIKE RE: CHARTS PREPARED BY OFCCP'S EXPERT and the Declaration of Laura C. Bremer in support thereof, were served upon the following individuals by email at the following addresses:

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