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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

**OFCCP'S MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
SUMMARY JUDGMENT**

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INTRODUCTION

OFCCP is entitled to summary judgment because undisputed material facts establish that Oracle breached its obligations as a federal contractor by systematically engaging in pay discrimination to the detriment of women, Asians, and African Americans at Oracle's Redwood Shores headquarters. Executive Order 11246, Section 202; 41 C.F.R. § 60-1.4(a).

The bargain the federal government reaches with its contractors is straight-forward: in exchange for receiving money, contractors commit to not engage in employment discrimination. To ensure contractors realize that promise, federal regulations require them to develop systematic policies and to perform self-regulation to ensure equal employment opportunities. As a federal contractor, Oracle was required to implement and document compensation policies which ensured equal compensation opportunities for similarly-situated employees regardless of gender, race, or other protected status. Oracle was required to perform regular audits and in-depth analysis of its compensation practices to "determine whether and where impediments to equal opportunity" existed and to promptly take steps to rectify any problem areas.

Discovery is now closed and the undisputed record evidence makes plain that Oracle breached these contractual obligations. While Oracle developed and implemented extensive written compensation policies, Oracle failed to conduct the regular comprehensive compensation analyses required by federal regulations to identify "impediments" to equal opportunity in its compensation system. At bottom, OFCCP's in-depth analyses—the very ones Oracle was supposed to have conducted under its AAP—reveal pay discrimination against women, Asians, and African Americans at Oracle's headquarters.

This discrimination is detailed in OFCCP's expert report written by Dr. Janice Madden, a highly-credentialed labor economist with decades of experience studying gender and racial differentials in labor markets. This comprehensive analysis of the compensation of similarly-situated employees reveals that Oracle engaged in sweeping pay discrimination against women, Asians, and African Americans. Dr. Madden's analysis reveals that Oracle on average paid

women more than 9% less in salary¹ and 16% less in total compensation than their male counterparts. Her study reveals that Oracle on average paid Asians 9% less in salary and 11% less in total compensation, and African Americans 15% less in salary and 30% less in total compensation than their White comparators.

Oracle has not put forward evidence to rebut the statistical evidence presented by Dr. Madden of salary and total compensation discrimination. Oracle's expert, Dr. Saad, did not analyze, nor does his report address or dispute, OFCCP's claim or evidence regarding *salary* discrimination. Indeed, when the only regression Oracle's expert performed is run on Oracle's salary data, the results confirm Oracle's liability for salary discrimination.

Oracle's expert evidence regarding OFCCP's claims of discrimination in total compensation also fail to create a triable issue. As detailed in OFCCP's companion *Daubert* motion, Dr. Saad's analysis of total compensation is built on analyzing Oracle's compensation data according to a wide array of factors that are nowhere identified in, and are specifically contradicted by, Oracle's written compensation policies. Further, Dr. Saad fails to study Oracle's total compensation data—choosing instead to study unvested potential future compensation *promised* by Oracle—and thereby also fails to address OFCCP's claim or evidence of discrimination in total compensation.

On the basis of these undisputed material facts, OFCCP moves for summary judgment.

I. REGULATORY BACKGROUND

This matter is brought under Executive Order 11246 ("E.O. 11246") and the Department of Labor's ("DOL") implementing regulations under 41 C.F.R. Part 60.² Oracle is a federal

¹ In this brief, "salary" refers to base salary or base pay rates.

² OFCCP initiated an audit under its neutral selection system on September 24, 2016. OFCCP's Statement of Uncontested Facts ("SUF") Nos. 8-9. Based on the findings of the review, OFCCP notified Oracle that it identified violations in a Notice of Violation (NOV) and subsequent Show Cause Notice (SCN) that found compensation discrimination based on sex and race. SUF Nos. 11-12, 19. OFCCP instituted suit after it met with Oracle and its attorneys in person and exchanged several letters in an effort to conciliate. SUF Nos. 13-18, 20-36. The key areas of disagreement on which the parties reached impasse during conciliation remain in dispute now,

contractor covered by Executive Order 11246 (“E.O. 11246”). SUF Nos. 2, 7. Oracle receives more than \$100 million annually in taxpayer money pursuant to federal contracts. SUF Nos. 3, 6.

The “award of a Federal contract comes with a number of responsibilities.” 81 FR 39108-01, 39109. Covered contractors must “comply with all the provisions of the Executive Order and the rules, regulations, and relevant orders of the Secretary of Labor.” *Id.* When a contractor is in violation, the contractor “may be liable for make-whole and injunctive relief.” *Id.*

Pursuant to its contractual commitments with the federal government, Oracle is prohibited from engaging in compensation discrimination on the basis of race or sex. E.O. 11246, Section 202. 41 C.F.R. § 60-1.4. Among other requirements, Federal regulations require contractors to develop and maintain a written affirmative action program (“AAP”)—as “a management tool designed to ensure equal employment opportunity”—for each of its establishments and to provide the AAP upon request. 41 C.F.R. §§ 60-2.10(a), 1.12(b), 1.40. A federal contractor’s “affirmative action program is, thus, more than a paperwork exercise.” 41 C.F.R. § 60-2.10(a)(3).

An affirmative action program “ensures equal employment opportunity by institutionalizing the contractor’s commitment to equality in every aspect of the employment process. Therefore, as a part of its affirmative action program, a contractor monitors and examines its employment decisions and compensation decisions to evaluate the impact of those systems on women and minorities.” 41 C.F.R. § 60-2.10(a)(2). In particular, under Section 2.17, Oracle was required to:

perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate: . . . (3) Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities.

41 C.F.R. § 60-217(b).

In addition to assessing its employment process, Oracle was required to:

develop and execute action-oriented programs designed to correct any problem

three years later and after more than a year of mediation during the pendency of this litigation. SUF Nos. 11-36.

areas identified pursuant to § 60-2.17(b) and to attain established goals and objectives. In order for these action-oriented programs to be effective, the contractor must ensure that they consist of more than following the same procedures which have previously produced inadequate results. Furthermore, a contractor must demonstrate that it has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.

41 C.F.R. §60-2.17(c).

To ensure the effectiveness of its affirmative action program, Oracle was required to:

develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program. The actions listed below are key to a successful affirmative action program:

- (1) Monitor records of all personnel activity, including . . . compensation, at all levels to ensure the nondiscriminatory policy is carried out.
- (2) Require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are obtained;
- (3) Review report results with all levels of management;
- (4) Advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

41 C.F.R. § 60-2.17(d). Oracle was also required to document and maintain records of all actions taken to comply with the rigorous requirement of its AAP. 41 C.F.R. § 60-2.10(e) (“Contractors must maintain and make available to OFCCP documentation of their compliance with §§ 60-2.11 through 60-2.17”).

Finally, the regulations require contractors to designate and assign responsibility and accountability for “the implementation of equal employment opportunity and the affirmative action program” “to an official of the organization.” 41 C.F.R. § 60-217(a). Once someone is appointed for this purpose, he or she “must have the authority, resources, support of and access to top management to ensure the effective implementation of the affirmative action program.” *Id.*

II. SUMMARY OF UNCONTESTED FACTS

A) As Part of Its Compliance with Section 2.17, Oracle Implemented Detailed Compensation Policies, Administered Globally by Its HR Team and Required Approvals from Top Executives for All Compensation Decisions

Oracle stated in its Position Statement of October 3, 2019 (“Oracle Position Statement”): “during the compliance review and this litigation, Oracle has *produced* to OFCCP the data base and documents” upon which Oracle is relying to show its “compliance with Section 2.17.” Oracle Position Stmt. at 9 (emphasis in original). Further, Oracle stated that these productions included “the Company’s compensation policies and training materials.” *Id.*³

During the course of OFCCP’s audit in 2015, Oracle provided OFCCP with Oracle’s employee handbook, which gives an overview of Oracle’s compensation policies and three sets of compensation documents: “Oracle’s Global Compensation Training, Managing Pay Module;” Oracle’s “Compensation Guidelines,” which appears to be an overview of compensation policies that Oracle provided to its employees; and a compensation document that Oracle created for OFCCP’s audit, entitled “Compensation Review and Oversight.” SUF No. 51. In the course of discovery, Oracle provided OFCCP with thousands of additional pages documenting Oracle’s compensation policies and practices. SUF No. 54.

The documents provided by Oracle during the audit and during discovery establish Oracle’s consistent and well-documented compensation policies. SUF Nos. 51, 54. According to the written compensation policies Oracle provided during OFCCP’s 2015 audit, Oracle maintains a compensation team in its Human Resources function that sets uniform compensation policies and guidelines that Oracle implements globally. SUF Nos. 51; *see also* SUF Nos. 44-47, 55-59. This team maintains and updates a global job table and is responsible for setting salary ranges for all Oracle job codes. SUF Nos. 56-59.

Oracle’s chief executives and the heads of its lines of business (LOBs) monitor and

³ OFCCP acknowledges that during her deposition months ago, Oracle’s Senior Director of Global Compensation, Kate Waggoner, testified that “we don’t really have [compensation] policies.” SUF No. 53. As Oracle’s court-ordered Position Statement states otherwise and is more recent, OFCCP understands that the use of the word “policies” is now uncontested.

control the implementation of its compensation policies. SUF Nos. 113-123. Line managers have no authority to assign or increase compensation on their own. SUF Nos. 112, 120-121, 123-125. Managers may only make pay recommendations that are reviewed by each successive level of management until the office of Larry Ellison⁴ (or comparable high-ranking Executive) gives approval. SUF Nos. 114-118. Managers are instructed: “**Do not communicate** any changes [in compensation] until the ‘Last Approval Action’ shows ‘Larry Ellison.’” SUF Nos. 120-121, 123. Part of Oracle’s senior management’s review is “to ensure they are within budget.” Oracle Position Stmt. at 1. Similarly, high ranking executives must approve the starting pay of all new hires. SUF Nos. 116, 118, 150.

B) Oracle’s Written Compensation Policies Specify How Oracle Sets Compensation

The global job table created by Human Resources sets salary ranges for each job code. SUF Nos. 65, 67, 85. Oracle’s policies provide that salaries are “[l]inked to [an] employee’s skills and competencies in [the] current role, as well as the sustained performance and the local market.” SUF No. 62. Oracle’s global job table organizes salary ranges by “job code.” SUF No. 67. An employee’s job code is determined by the employee’s: Job Function (*e.g.*, Product Development); Specialty Area (*e.g.*, Software Engineer); Systems Job Title (*e.g.*, Software Developer 3); and Global Career Level (*e.g.*, Individual Contributor 3). SUF No. 65. Job title and Global Career Level (“Career Level”) (which together form what Oracle refers to as the “systems job title”) form a job hierarchy associated with different salary ranges. SUF Nos. 67.

Human Resources’ trainings explain that the Career Level is the “broad category that indicates increased skill, knowledge and responsibilities and performance expectations. The higher the Career Level, the higher the complexity of the job duties.”⁵ SUF Nos. 73-74. Thus, the

⁴ Larry Ellison was Oracle’s Chief Executive Officer and is currently Oracle’s Chairman of the Board and Chief Technology Officer. SUF No. 37.

⁵ Oracle’s instructions authorize the placement of an employee in a Career Level that is one level above or one level below the job for which the job candidate is being considered, placing the employee in a different salary range. SUF No. 156.

Career Level should reflect an employee’s level of responsibility, as exemplified by Oracle’s training slide regarding setting Career Levels:

Global Career Levels

Individual Contributor (IC) Career Levels

Career Level	Job Title	Discretionary Title	Responsibilities
IC1	Software Developer 1		
IC2	Software Developer 2		
IC3	Software Developer 3		
IC4	Software Developer 4		
IC5	Software Developer 5		
IC6	Software Developer 6		

SUF Nos. 78; *see also* SUF Nos. 74, 79.

The salary range for each job code is set according to the market value of an employee’s job. SUF Nos. 63-64, 88-90. The salary range is “the link between internal and external equity.” SUF No. 91. Oracle’s human resources staff provides training which states that salary ranges define the “value” of a position to Oracle: “All jobs that are considered equal in value to Oracle are grouped into the same local grade level, and have the same salary range.” SUF No. 86; *see also* SUF No. 76, 87.

Both Oracle’s compensation policies and its compensation data make plain that employees in different *job functions*—such as Information Technology, Product Development, Support—and different *job titles*—such as applications developer or database administrator—can have job codes assigned the *same salary grades and, thus, salary ranges*. SUF Nos. 82, 87. For example, the three job functions at issue in this litigation have the *same salary grade*, [REDACTED], assigned to the following job titles:

Information Technology:

Product Development:

Support:



SUF Nos. 82. Further, Oracle's compensation training states that a person's salary almost always should remain unchanged as part of a transfer.

Internal Transfers

- The starting point for transfers should be lateral – salary and career level
 - Internal transfers should not be used as means to increase salaries
 - However, if the new role has a change in pay mix or there is a change to job family, some adjustment may be appropriate

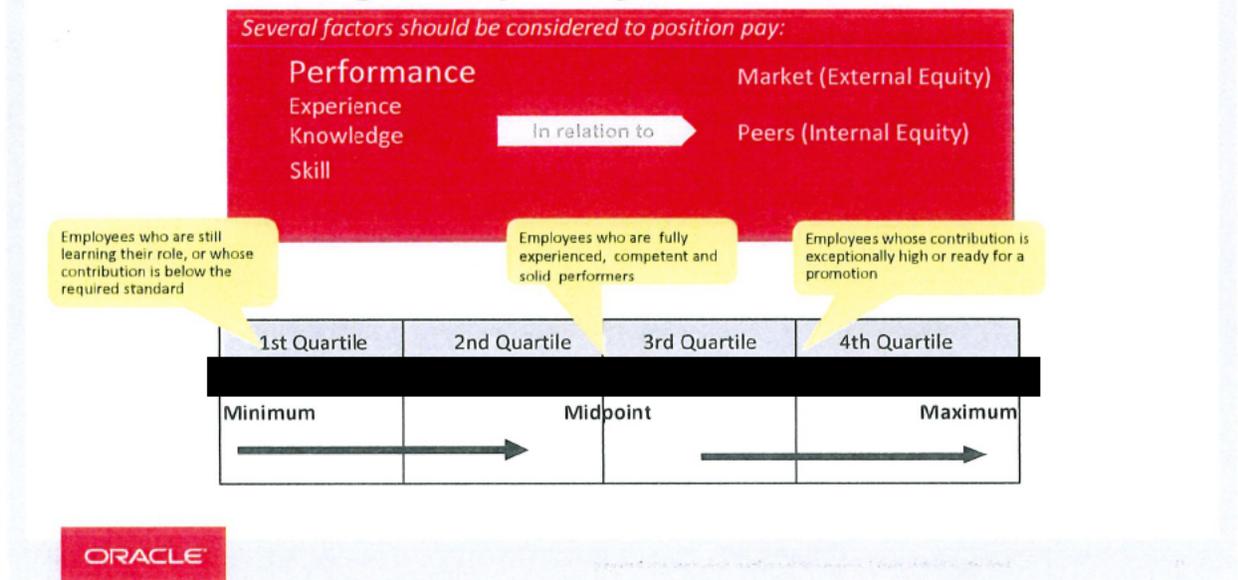
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SUF Nos. 173; *see also* SUF Nos. 172, 174-176. As explained by Oracle's Senior Director of Global Compensation, Oracle purposely discourages granting pay increases when staff transfer internally from one job or assignment to another because if employees were given raises with a transfer, the organization would be beset by infighting as managers would seek to poach staff from other products and projects with promises of increased compensation. SUF No. 177.

Oracle's training manual gives the managers the following instructions for setting employee compensation within the assigned salary range for their job code:

Understanding Salary Ranges



SUF Nos. 95-96.

C) Oracle Deviates From Its Stated Policies When Setting Initial Wages at Hire and By Not Increasing Wage Rates Over Time

Oracle advises managers that they might not be afforded the budget “to perfectly place all [of their] employees” where they should be in their salary range. SUF No. 104. Oracle warns managers that budgetary constraints may prevent an employee from receiving increases anticipated by Oracle’s compensation policies. SUF Nos. 105-106. Oracle management and employees refer to the situation faced by employees who did not receive the salary or pay increases contemplated by Oracle’s policies due to budgetary constraints as “salary compression.” SUF Nos. 134-135.

As a result of these constraints, once an employee’s salary at Oracle is established at hire, there are very limited opportunities to secure a raise. Because of budget pressures, only 40% of the employees may get a raise in a given year. SUF No. 127. Even though its compensation policies commit Oracle to setting the salary ranges for job codes at market rates, Oracle admits

that the budget available for salary increases is insufficient to keep up with market rates.⁶ Oracle does not make any cost of living adjustments. SUF No. 140.

Oracle's budgetary constraints explain why Oracle does not consistently increase salaries as employees improve their skills or perform well. SUF Nos. 104, 106, 128-131, 136. Oracle admits that performance review practices vary widely across the organization, with some managers conducting reviews annually and other managers rarely or never conducting reviews. SUF Nos. 142-147. When the reviews do take place, Oracle does not tie reviews to salary increases. SUF Nos. 148-149. In focal reviews—Oracle's chief method for readjusting salaries—Oracle does not require managers to consider an employee's performance rating or ranking in making compensation decisions.⁷ SUF No. 149.

Promotions do not routinely lead to pay raises, either. Oracle advises managers that they may promote employees without any corresponding pay increase. SUF Nos. 181, 184. Furthermore, while an employee's Career Level is intended to ensure that employees of similar skills are paid comparable salaries, in practice, prior to 2018, Oracle rarely approved a salary change as part of a promotion in Career Level. SUF Nos. 183, 185.

Prior to October 2017, Oracle also considered prior salary in setting initial pay, which resulted in further salary compression.⁸ SUF Nos. 157-170. Oracle told applicants that they would be subject to "salary verification" before they received an offer. SUF No. 167. Oracle's

⁶ SUF Nos. 128-130, 136. In answering a pay complaint, Oracle justified a person's low pay compared to her peers based on her "starting salary at Oracle, as well as budgetary constraints that impacted the ability to give annual adjustments to make larger adjustments to your salary during focal processes." SUF No. 131.

⁷ There are also no system links between Oracle's database containing performance evaluation rankings and the program Oracle uses to administer focal reviews. SUF No. 148.

⁸ In describing Oracle's practice of considering prior pay when setting pay at hire, OFCCP is not alleging that a contractor's compensation policy that considers prior pay in setting pay rates at hire is, per se, prohibited or facially violates a contractor's compliance obligations under its AAP. The Department does not set or alter policy in enforcement litigation. The touchstone for OFCCP is whether Oracle engaged in prohibited employment discrimination. OFCCP discusses prior pay only to describe how Oracle retained flexibility to deviate from its stated policies in setting compensation. It also is relevant in light of the fact that Oracle did not comply with its Affirmative Action obligations to perform an annual in-depth analysis of its compensation (discussed *infra*).

recruitment systems listed prior salary as a mandatory field for managers and hiring officials to complete prior to receiving Oracle senior management's approval for any compensation offer tendered to an applicant. SUF Nos. 163, 167.

D) Oracle Admits Not Taking Corrective Actions to Redress Pay Inequities Based on Compensation Analyses It Conducted

In its Position Statement, Oracle does not identify any in-depth analysis of its compensation systems that it conducted to determine whether there are systemic gender-, race- or ethnicity-based disparities. Further, Oracle denies that any of the correspondence and analyses of its compensation systems contained in its privilege log were done to comply with its regulatory obligations.⁹ Oracle's official charged with ensuring Oracle's compliance with its AAP, Shauna Holman Harris, testified that she performed no compensation analyses apart from the privileged analyses she carried out at the direction of counsel.¹⁰ SUF Nos. 207, 211. In a three-year period, Oracle's human resources personnel had over one thousand internal communications related to pay equity, as well as communications with counsel and dozens of documents.¹¹ Oracle stated that it took no action in response to the numerous privileged pay equity analyses it conducted. SUF No. 212.

E) Oracle Did Not Make Pay Adjustments to Redress Internal Pay Inequities

At Oracle, "the majority of salary increases occur during 'focal' reviews" of salaries, which are only "undertaken periodically."¹² Salary increases recommended by lower managers during this process are "subject to an approval process by more senior management" and restricted by budgets set by executives.¹³ During a focal review, front line managers have no compensation information other than for employees under their supervision and cannot compare the pay of their employees to employees outside of their supervision. SUF Nos. 219-220. The compensation

⁹ Oracle Position Stmt. at 11.

¹⁰ This testimony contradicts a statement in Oracle's 2014 AAP that provides: "Oracle develops and analyzes Internal Audit Reports to assess performance in . . . Compensation." SUF No. 208.

¹¹ See Revised Privilege Log Filed by Oracle with the Court on October 3, 2019.

¹² Oracle Position Stmt. at 9. See also SUF Nos. 137-138.

¹³ Oracle Position Stmt. at 9. See also SUF Nos. 102-103, 111-121.

program that these managers use to make the compensation analysis during the focal (salary increase) reviews does not have any race or gender fields. SUF No. 221.

Oracle neither dedicates nor allocates budget or resources to ensure pay equity or to correct pay disparities based on race or gender. SUF Nos. 104-106, 222-223. In response to internal complaints about pay equity or as part of an effort to comply with federal regulations, Oracle admits it conducted no statistical analysis to identify whether Oracle had engaged in race- or gender-based discrimination in setting employee compensation. SUF No. 224.

The main pathway Oracle makes available to managers for increasing salary for an employee within a job function—outside the focal review process—is through a salary adjustment process referred to as “dive and save.” SUF Nos. 99-100. In this process, Oracle agrees to raise an employee’s salary to prevent the individual from going to a competitor. SUF Nos. 99-100. By the terms of Oracle’s dive and save policy, Oracle changes compensation based on a comparison of an employee’s pay to the pay of an external competitor, usually in the form of a job offer. SUF Nos. 133, 136.

III. STANDARD OF DECISION

Summary judgment is appropriate when there is no genuine dispute of any material fact and the moving party is entitled to judgment as a matter of law. 41 C.F.R. § 60-30.23(e); *see also* Fed. R. Civ. P. 56(a). To survive summary judgment, the non-moving party must have more than a mere “scintilla” of evidence supporting its position. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). “Only disputes over fact that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where the record, when taken as a whole, could not lead a rational trier of fact to find for the non-moving party on a particular issue, there is no genuine dispute for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

IV. ARGUMENT

OFCCP is entitled to summary judgment because the undisputed evidence demonstrates Oracle violated its obligations as a federal contractor and engaged in compensation discrimination against female, Asian, and African American employees. Oracle employees working in the same job title with similar education and experience were similarly situated and, according to Oracle's written policies, should have received similar compensation but did not. The unrebutted statistical evidence standing alone demonstrates that Oracle engaged in compensation discrimination. The statistical analysis OFCCP's expert conducted demonstrates significant gender and racial discrimination in both salary and total compensation, and Oracle's expert failed to refute this evidence to create a triable issue of fact. The statistical evidence is consistent with uncontested evidence that Oracle departed from its written compensation policies and inequitably compensated similarly-situated employees. Finally, Oracle disregarded its affirmative action obligations and did not take meaningful steps to correct or ensure that it did not engage in prohibited compensation discrimination.

For these reasons, as set forth in detail below, OFCCP is entitled to summary judgment.

A) Undisputed Material Facts Establish that Employees Working in the Same Job Title ("Job Descriptor") With Similar Education and Experience Are Similarly-Situated for Purposes of Setting Pay

The record evidence establishes as a matter of law that employees within the same job title are similarly-situated with respect to compensation when such employees have similar levels of experience and education.

Specific regulations govern how discrimination on the basis of sex, including compensation discrimination, is analyzed under E.O. 11246.¹⁴ 41 C.F.R. Part 60-20. In particular, E.O. 11246 is violated "any time [contractors] pay[] wages, benefits, or other compensation that is the result in whole or in part of the application of any discriminatory compensation decision or other practice." 41 C.F.R. § 60-20.4(e).

¹⁴ These "regulations are to be read in conjunction with the other regulations implementing Executive order 11246, as amended," including the non-discrimination and affirmative action requirements in 60-1, and 60-2. 41 C.F.R. § 60-20.1.

Under 41 C.F.R. § 60-20.4, contractors are prohibited from engaging in compensation discrimination, which 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). 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). 81 F.R. 39108, 39128.

Contractors “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 that “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.” 81 F.R. 39108, 39127.¹⁵

During the OFCCP audit, Oracle identified the factors it takes into account in setting an employee’s total compensation package:

When determining the employee's total compensation package the following factors may be taken into account:

- the job's salary range which is based on the external market value for the job,
- the employee's global career level,
- the salaries of other Oracle employees in the same job and location,
- the individual employee's performance.

¹⁵ Although Section 41 C.F.R. § 20.4 specifically applies to sex discrimination, it sets forth the Department of Labor’s interpretation of compensation discrimination under Title VII case law, and thus, is equally applicable to racial discrimination in compensation. *See* 81 F.R. 39108, 39108 (updating regulation “to align the sex discrimination standards under E.O. 11246 with developments and interpretations of existing title VII principles and to clarify OFCCP’s corresponding interpretation of the Executive Order”).

SUF Nos. 51, 64. These factors are consistent with how Oracle describes compensation to its employees in its employee handbook. SUF No. 63.

As set forth in more detail in Part II, *supra*, these factors are also explained in more detail in numerous trainings Oracle provides to managers. *See* SUF No. 54. These trainings make clear that Oracle defines similarly-situated employees as employees who work in the same job title and have similar skills, experience, education, and expected level of responsibility. SUF Nos. 62, 93-94, 97. These factors are considered at two different points—first, when Oracle assigns an employee a Career Level, and, second, when Oracle assigns the employee to the proper place in the salary range associated with the employee’s Career Level and job title (known as the employee’s “job code”). SUF Nos. 73, 93.

As explained in the compensation training documents Oracle provided to OFCCP to evidence its compliance with federal regulations, each job title has a hierarchy of Career Levels. Employees are to be assigned a Career Level within the job title that corresponds to that employee’s “skill, knowledge and responsibilities and performance expectations.” SUF Nos. 65, 73, 83. Once an employee is assigned the correct Career Level for the job title, the employee’s salary should be set within the local salary range that is matched to that job title and career level. SUF No. 81, 85. This salary range is “the link between internal and external equity.” SUF No. 91. Oracle’s human resources team instructs managers that an individual employee’s compensation should be set within a salary range based on the “skills, knowledge, and experience and perhaps education (if a requirement for the job).” SUF No. 93.

B) Unrebutted Statistical Evidence Establishes that Oracle Engaged In Compensation Discrimination

The unrebutted statistical evidence establishes that Oracle pays women, Asians, and African Americans less than their male and White counterparts, respectively, who are similarly-situated according to the factors Oracle has identified in setting pay.

1) Statistical Evidence Alone is Sufficient to Establish Oracle's Liability

In discrimination cases, plaintiffs can rely on statistical evidence to prove discriminatory intent. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *see also Penk v. Or. State Bd. of Higher Ed.*, 816 F.2d 458, 463 (9th Cir. 1987); *OFCCP v. Honeywell*, Case No. 77-OFCCP-3, Secretary's Decision and Remand Order (March 2, 1994) at 9, 18. Specifically, courts have long held that discrimination can be inferred from statistical evidence when the probability that an observed gender- or race-based disparity occurring based on chance is 5% or less or, more technically speaking, 1.96 standard deviations from the expected result. *See, e.g., Palmer v. Shultz*, 815 F.2d 84, 96 (D.C. Cir. 1987); *Segar v. Smith*, 738 F.2d 1249, 1283 (D.C. Cir. 1984). Indeed, Supreme Court precedent holds that statistical results showing a disparity of two standard deviations establish an inference of unlawful discrimination. *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17 (1977); *Hazelwood School Dist. v. U.S.* 433 U.S. 299, 308-09 n. 14 (1977); *see also, Palmer v. Shultz*, 815 F.2d 84, 97 (D.C. Cir. 1987) (1.96 standard deviation sufficient to establish inference of unlawful discrimination); *Paige v. California*, 2007 WL 1454941 at *1 (9th Cir. May 16, 2007) (same).

Once a Plaintiff has met this burden, "the defendant cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff's statistics." *E.E.O.C. v. Gen. Tel. Co. of Nw.*, 885 F.2d 575, 581 (9th Cir. 1989). Rather, "in most cases a defendant cannot rebut statistical evidence ... without introducing evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate, nondiscriminatory [employment] criterion." *Id.* (quoting favorably *Palmer*, 815 F.2d at 101); *see also Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Here, the statistical evidence overwhelmingly demonstrates discrimination in compensation as to women, Asian, and African American employees at Oracle's Redwood Shores Headquarters. Even when taken in the light most favorable to Oracle, the statistical evidence Oracle provides in support of its defense is insufficient to create a triable issue of fact.

2) OFCCP Has Produced Robust Expert Evidence Demonstrating Significant Gender and Racial Discrimination by Oracle in All Aspects of Compensation Including Salary

On July 19, 2019, and August 16, 2019, OFCCP's expert, Dr. Madden,¹⁶ submitted her Expert Report ("Madden Report") and Expert Rebuttal Report ("Madden Rebuttal"), respectively, which described OFCCP's statistical analysis of Oracle's compensation data. Dr. Madden's report did not rely in any manner on the statistical analyses OFCCP conducted previously in this matter. SUF No. 235.

To evaluate whether Oracle discriminates based on gender or race, Dr. Madden conducts regression analyses of Oracle's data to compare similarly-situated employees working at the Redwood Shores location. Madden Rep. 7, 9-11; SUF Nos. 236, 243. Her Reports use regression analyses to evaluate "the difference in pay by gender or race, after adjusting for possible difference in characteristics by gender or race that could account for the pay differences." Madden Rep. at 9-10. Dr. Madden's regressions "adjust for any productivity differences that could explain compensation differences" by race or gender. Madden Rep. at 9. Her Reports achieve this by including variables that compare employees of similar education, experience, and skill, the very same factors Oracle's policies state should be used to set compensation. Madden Rep. 9-10; SUF Nos. 236, 243.

Dr. Madden's analyses utilize the human capital theory, a bedrock principle of Labor Economics. She compares employees who have the same degree level (bachelors, masters or doctorate)¹⁷ and similar experience, measured by tenure with prior employers and age. Madden Rep. at 5, 9. By controlling for education and experience, her analyses also control for skill.

¹⁶ Madden Report, 1-3 (The expert reports referred to herein are attached as Exhibits 91-94 of the accompanying Declaration of Norman Garcia). Dr. Madden has served as professor at the Wharton School of Business at the University of Pennsylvania since 1972, where she teaches economics, labor markets, and relevant statistical methodologies. *Id.* at 1-2. Dr. Madden has published numerous peer-reviewed articles dealing with the effects of age, race, gender, and urban location on labor market outcomes. *Id.* at 1-2. Dr. Madden has testified as a witness in 45 cases involving complex statistical analyses involving thousands of employees. *Id.* at 3. Dr. Madden has trained federal judges at the Federal Judicial Center on the use of statistics in discrimination litigation. *Id.* at 2.

¹⁷ Madden Rep. at 10.

Madden Rep. at 5. To further control for skill and ensure comparability, Dr. Madden’s analyses control for “job descriptor”—the job title¹⁸ (of which there are 35 distinct job titles) within Product Development, Information Technology, and Support. SUF No. 236-238, 243. Thus, Dr. Madden’s analyses compare the pay of employees with similar skills assigned by Oracle to the same job title.¹⁹

Dr. Madden’s regression analyses yield two key numerical values for each year studied: (1) a gender or race coefficient; and (2) the standard deviations from the expected value of a non-discriminatory process. The gender or race coefficient translates to the approximate percentage effect gender or race has on an employee’s compensation even after all other factors included in the analysis (*e.g.*, experience, education, etc.) are considered. Madden Rep. at 13. Labor economists use standard deviations as a statistical metric of the “likelihood that the estimated differences are the result of true differences, as opposed to random variation.” Madden Rep. at 10. As the number of standard deviations increase, the likelihood that the difference could have occurred purely by chance decreases. Madden Rep. at Appendix C. At 1.96 standard deviations, the likelihood of getting the result by random chance is only 5% (or a 1 in 20 chance), and any result of 1.96 or greater is considered statistically significant. Madden Rep. at 11.

When comparing the total compensation²⁰ Oracle paid annually to employees in Product Development, Support, and Information Technology, Dr. Madden finds that women of the same

¹⁸ As explained above, Oracle’s “Systems Job Title” is the job descriptor (job title) plus Career Level (*e.g.*, software developer 1, software developer 2, *etc.*). As the assignment of level may itself be discriminatory, Madden does not recommend including level in her analysis. *See, e.g.*, Madden Rep. at 3 (“The global career level and the pay set for their starting jobs at Oracle account for about half of the gender disparity in pay for women.”)

¹⁹ For example, within Product Development, the job descriptor variable ensures that the analysis only compares employees that are in the same job, whether that be Application Developer, Development Systems Administrator Hardware Development, Product Management/Strategy, Product Development, Program Management, Quality Assurance, Release Developer, Software Development, Technical Writing, User Assistance, or User Experience Developer. SUF Nos. 236, 243.

²⁰ Applying the same analysis to stock award compensation, Dr. Madden determined that in all years except 2018, women received 4.7% and 7.3% less than their male counterparts for restricted stock awards, with 4.7 to 7.9 standard deviations. Madden Rep. at Table 1(g) (Column 6).

experience, education level, and job descriptors are paid on average 16% less than their male counterparts and between approximately 9 and 10 standard deviations. Madden Rep., Table 1(a) (Column 6).

Similarly, Dr. Madden's analyses establishes that between 2013 and 2018, Asian employees in Product Development were paid approximately 12% less in total compensation than their White counterparts that had comparable experience, education and the same job descriptor and between 4 and 8.69 standard deviations. Madden Table 2(a) (Column 6).²¹ Dr. Madden's analyses also show that African American employees were paid around 30% less than their White comparators in total compensation between 2014 and 2017, which was statistically significant for most years with regard to total compensation. Madden Rep. Table 3(a).

Consistent with DOL regulations, Madden was careful not to include variables that might be tainted by discrimination. In Dr. Madden's opinion, exogenous characteristics that the employee, rather than Oracle, determines or brings to the job—such as education, age (a proxy for experience) and time at Oracle—affect compensation and are “appropriate to use as controls in the analysis of compensation discrimination.” Madden Rep. at 8. By contrast, endogenous characteristics, factors which Oracle controls, such as Oracle's assignment of Career Levels within a job title, are not properly included because if “Oracle were truly to discriminate, such discrimination would affect the values of these characteristics, as well as affecting compensation.” Madden Rebuttal (“Madden Reb.”) at 20. In other words, including tainted variables such as Career Level assumes the conclusion of the very question a compensation analysis is supposed to test by assuming from the start that such work assignments are nondiscriminatory. Madden Reb. at 11.

Dr. Madden likewise runs a number of analyses that include management designation and Career Level—variables squarely in Oracle's control—to learn if Oracle's assignment or “channeling” of employees to Career Levels and management designations contributed to the

²¹ Applying the same analysis to stock award compensation, between 2013 and 2016, Asian employees received between 1.7% to 4.1% less than their white comparators at statistically significant rate of between 2.14 and 3.85 standard deviations. Madden Rep., Table 2(g) (Column 6).

pay disparities. Madden Rep. at 11. Dr. Madden’s studies concluded that such channeling significantly contributes to pay differentials in statistically significant ways.²² These studies further show that even when employees are compared for experience, education, and skill, in addition to Oracle’s assigned Career Level and management designation, Oracle discriminates in pay against women, Asians, and African Americans in all or most components of compensation at statistically significant rates. *See* Madden Rep., Tables 1-3 (Columns 7-8).

Applying the same methodology described above, Dr. Madden conducted separate studies focused only on Oracle’s salary compensation. These salary analyses reveal that Oracle sets salaries for women in the Information Technology, Product Development, and Support job functions at Oracle’s headquarters that are 9.2% and 10.4% below that of men with the same level of experience and education and in the same job, with standard deviations above 12:

Year	Number of Workers	% Women	Gender Coefficient	Standard Deviation
2013	5198	27.3%	-0.102	-14.76
2014	5155	27.4%	-0.098	-13.75
2015	5169	26.8%	-0.096	-13.43
2016	5111	26.7%	-0.094	-13.01
2017	4969	27.0%	-0.092	-12.61
2018	4691	26.9%	-0.104	-13.04

Madden Rep., Table 1(d) (Column 6). As with her study of total compensation, Dr. Madden also finds that the statistical disparities in *salary* compensation remained robust even when endogenous variables, such as management or Career Level assignment, are considered in the analysis.²³

Dr. Madden found similar large disparities when applying her methodology to the salaries of Asian employees compared to White employees. Her analysis revealed a salary gap of between 4.7% and 7.3% between Whites and Asians in product development between 2013 and

²²Madden Rep. Tables 1-3 (providing pay differentials in Columns 6, 7, and 8 for comparison).

²³ Running her analysis and including the endogenous variables for management and Career Level assignments reveals that women are underpaid on average approximately 3.5% less than their male comparators with standard deviations ranging from 7.32 to 9.03. Madden Rep., Table 1(d) (Column 8).

Oracle assigned Career Levels because Oracle permitted managers to set an applicant's Career Level at one level up or down—thereby putting the employee into a salary range up or down—from that associated with the job requisition. SUF Nos. 156. This meant that similarly skilled and qualified applicants could have their compensation set within the wide span of three salary grades, all as dictated by prior pay, instead of in accordance with the applicant's job title, skills, qualifications, experience, or education.

Kirsten Hanson Garcia, a former Oracle Human Resources executive, recalls at least one Oracle top executive talking openly that a female applicant should be preferred because “she will work harder for less money.”³³ This statement is consistent with the statistical evidence in this case, and show that Oracle's insistence on setting compensation rates at hire based on prior pay was fueled by a mentality in which Oracle's interests and obligations as a federal contractor were subordinated to Oracle's interests in meeting caps it set on overall compensation. By denying its managers the resources necessary to ensure prohibited compensation discrimination was not occurring, including Oracle's top official charged with ensuring compliance with the AAP, Oracle paid similarly qualified women, Asians, and African Americans less for performing the same, if not more work, than their male and White counterparts.

The record is also clear that once Oracle set an employee's job code and initial salary, employees had very limited ability to change them. Even during focal reviews, Oracle had no processes in place to identify employees who were significantly underpaid according to the market rate or their value to Oracle.³⁴ Instead of dealing with all underpaid employees systematically during the focal review, Oracle utilized its ad hoc dive and save process and only addressed those underpaid employees who threatened to leave if Oracle did not immediately

³³ See Declaration of Kirsten Hanson Garcia, ¶7.

³⁴ For example, ██████████ was making almost ██████████ less than the minimum of the salary range and ██████████ less than what her direct reports were making. SUF Nos. 132-133. For her, Oracle sought a ██████████ or almost a ██████████ increase in base salary *pay* to prevent ██████████ from leaving Oracle after she was recruited by other companies. SUF No. 133. In contrast, Ms. Waggoner identified that a “██████████ percent [raise] for a focal is *huge*.” SUF No. 132 (emphasis added). Yet, this “huge” increase was still not enough for ██████████ such that his managers sought another ██████████ increase of almost ██████████ to prevent him from going to Microsoft since he was being paid in the first (lowest) Quartile of his salary range. SUF No. 136.

3) Oracle's Expert Reports Fail to Create a Triable Issue of Fact

a) Oracle's Expert Presents No Affirmative Pay Analyses

It is well settled law that once a Plaintiff provides a strong statistical showing of discrimination, Defendants cannot meet their burden of production in response simply by attempting to cast doubt on various aspects of the Plaintiff's regressions. *Bazemore*, 478 U.S. at 400; *Gen. Tel. Co. of Nw.*, 885 F.2d at 582. On July 19, 2019 and August 16, 2019, Oracle's expert filed his initial and supplemental reports. In these lengthy reports, Dr. Saad opines that Oracle did not engage in compensation discrimination, but he does not construct or run a regression analysis to support his opinions. Rather, he chiefly confines his opinions to trying to identify flaws in Dr. Madden's regression analyses, while also arguing that Oracle's headquarters operation is too large and complex to permit statistical analysis. SUF No. 239. In his Rebuttal Report, Dr. Saad runs regression analyses, not in an effort to support his own opinions, but to illustrate errors he opines exist in Dr. Madden's regression analysis. Saad Reb., ¶¶ 87-92, Tables 1-5; SUF No. 239.

b) Dr. Saad Conducted No Study of Salary Discrimination and His Studies Fail to Dispute OFCCP's Evidence of Discrimination as to Total Compensation

Dr. Saad admits he never studied nor applied any part of his methodology to Oracle's salary data and his report provides no opinions regarding OFCCP's claims and evidence of salary discrimination. SUF No. 240. In his Rebuttal report, Dr. Saad asserts that he did not study salary discrimination because OFCCP's "claims are about total compensation for women and Asians, and because non-base salary at Oracle *can* be a large part of annual income." Saad Reb., fn 87. (emphasis added).

The first basis for not studying salary discrimination is plainly incorrect. OFCCP's SAC specifically alleges salary discrimination. *See* SAC ¶¶ 13, 18-30. Dr. Saad's second basis for failing to study salary discrimination fares no better. As noted above, OFCCP's regulations make clear that "[c]ontractors may not grant or deny higher-paying *wage rates, salaries, positions, job classifications, work assignments, shifts, development opportunities, or other opportunities* on the basis of sex." 41 C.F.R. § 60-20.4(b) (emphasis added). As E.O. 11246 shares the same

language in prohibiting discrimination on the basis of race, this regulation applies with the same force to OFCCP's race claims.²⁵

To learn what, if anything, Dr. Saad's methodology would reveal about OFCCP's salary discrimination claim, Dr. Madden applied Dr. Saad's regression methodology to Oracle's salary data (duplicating the format of Dr. Saad's Tables 1-5, relating to total *promised* compensation). SUF No. 244-251. Applying Dr. Saad's regression analysis to Oracle's salary data reveals gender- and race-based salary discrimination: statistically significant gender salary disparities in all years but 2014 in Product Development and in half of all the years since 2013 for women assigned to Information Technology and Support. SUF Nos. 245-249. This application also reveals statistically significant pay disparities for Asians in 2013, 2016, and 2017, and close to statistically significant disparities in the other years.²⁶ SUF Nos. 250-251.

Most relevant, however, to the appropriateness of summary adjudication, Dr. Saad's opinions and regressions cannot, as a matter of law, provide any defense for Oracle because Dr. Saad's opinions contradict the written compensation policies Oracle implemented and relied upon to comply with its AAP.²⁷ In Oracle's detailed compensation policies, provided to OFCCP in 2015 and recently reaffirmed as constituting a key part of its compliance with Section 2.17, Oracle clearly defines which employee characteristics and information it considers when setting

²⁵ Moreover, as Oracle caps the number of employees who can be granted stock to 35% of its domestic workforce and distributed only very small corporate bonuses at HQCA for the three job functions at issue in 2014 and 2018, salary compensation for most of Oracle's headquarters is the only compensation at issue. SUF. No. 259.

²⁶ As set forth in detail in OFCCP's accompanying *Daubert* motion, OFCCP has strong disagreements with Dr. Saad's methodology, including his inclusion of a cost center variable. When Dr. Madden applies Dr. Saad's exact methodology in all respects except for its inclusion of the cost center class of variables to Oracle's salary data, the results revealed statistically significant race and pay salary pay disparities across all years for women and Asians, and since 2015 for African-Americans. These results are especially robust with regard to the pay disparities in Product Development, in which the findings are supported by standards deviations of 4 or 5 in all years.

²⁷ Dr. Saad testified that he formed his opinions on the understanding that Oracle has no compensation policies. SUF No. 242. It appears that Oracle failed to inform Dr. Saad that Oracle was required to implement and document compensation policies to comply with its AAP and that Oracle is relying upon the written policies it provided to OFCCP during the course of the 2015 audit and this litigation to prove its compliance with federal regulation.

compensation. Dr. Saad ignores all of Oracle's policies—testifying that he understands Oracle has “no compensation policies”— and builds his regression analysis on factors that Oracle's policies clearly state *Oracle does not consider in setting compensation*. SUF No. 242. For example, Dr. Saad's analysis assumes that employees who transfer from one position to another (and thus work on different products) will have a change in compensation when the undisputed facts demonstrate that Oracle's policies preclude such a change in most cases. SUF Nos. 174-175, 253. As detailed in OFCCP's companion *Daubert* motion, the regression analyses Dr. Saad ultimately ran do not, in fact, dispute the evidence presented by Dr. Madden because Dr. Saad constructed his methodology and applied it to data in a manner that studied different questions and facts than those actually present in this record or at issue in this litigation.

Employers may not escape liability for pay discrimination with such post-hoc rationalizations. *See Hein v. Oregon Coll. of Educ.*, 718 F.2d 910, 921 (9th Cir. 1983) (“Post-hoc rationalizations, of course, will not permit [the employer] to carry its burden of proving the legitimacy of its payment of unequal starting salaries”). Further, as a federal contractor, the pretextual nature of Oracle's claimed consideration of these other factors in setting compensation is underscored by the fact that Oracle was required to document the factors it considered in setting compensation to be in compliance with its AAP and federal regulations. 41 C.F.R. § 60-2.10, 2.17. These additional factors relied upon by Dr. Saad are wholly absent from the written compensation policies Oracle relied upon to demonstrate compliance with its AAP.

Oracle has presented no evidence to rebut OFCCP's overwhelming evidence of discrimination by Oracle in both salary and total compensation against its female, Asian, and African American employees at its headquarters.

C) Undisputed Material Facts Establish that Oracle Departed From Its Compensation Policies in Setting Compensation²⁸

Dr. Madden's unrebutted statistical evidence is consistent with the overwhelming evidence contained in Oracle's own policies and admissions that budget restrictions imposed by Oracle's executive compelled its managers to deviate from its written policies and to set compensation levels differently for similarly-situated employees. Dr. Madden's analyses show that these departures from assigning compensation based on job title, skill, experience, education, and responsibility, led to discrimination.²⁹

While Oracle's detailed compensation trainings are clear that Oracle defines similarly-situated employees as employees assigned to the same job title with similar skills, knowledge, experience, education, and responsibilities,³⁰ these same trainings admit that Oracle may not afford managers the financial resources to place employees where they ought to be in accordance with these criteria.³¹ The constraints Oracle put on the budgets available to managers led to salary compression.³²

Budget constraints also play a role in Oracle's common practice of deviating from the terms of its compensation policies when setting initial pay at hire. Prior to October 2017, Oracle dictated that prior pay be considered when setting pay rates at hire, which represented a deviation from its policies related to compensation. SUF Nos. 157-170. Further, prior pay influenced how

²⁸ OFCCP contends it is entitled to summary judgment based on the record evidence without supporting anecdotal evidence. However, in this section, OFCCP provides supporting declarations from persons impacted to bring Oracle's practices that undergird the statistical evidence "convincingly to life." *Teamsters v. United States*, 431 U.S. 324, 339 (1977).

²⁹ *C.f. Corning Glass Works v. Brennan*, 417 U.S. 188, 204-05 (1974) ("The differential ... reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 353-54 (4th Cir. 1994) (affirming Title VII liability where supervisor admitted paying plaintiff thousands of dollars less than male subordinate because plaintiff would accept less).

³⁰ See Decl. of Christina J. Kolotouros, ¶7.

³¹ See Decl. of: Rachel Powers, ¶11; Lynn Snyder ¶¶13-14; Donna Kit Yee Ng ¶9, 14; Donna Rosberg ¶6.

³² See Decl. of Nicole Alexander ¶¶9-17, Exhibits A-C.

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³³ See Declaration of Kirsten Hanson Garcia, ¶7.

³⁴ For example, Lauren Cohn was making almost \$9,000 less than the minimum of the salary range and 45-65% less than what her direct reports were making. SUF Nos. 132-133. For her, Oracle sought a \$50K or almost a 67% increase in base salary *pay* to prevent Ms. Cohen from leaving Oracle after she was recruited by other companies. SUF No. 133. In contrast, Ms. Waggoner identified that a “7 percent [raise] for a focal is *huge*.” SUF No. 132 (emphasis added). Yet, this “huge” increase was still not enough for Andrew Ioannou such that his managers sought another 22% increase of almost \$38K to prevent him from going to Microsoft since he was being paid in the first (lowest) Quartile of his salary range. SUF No. 136.

provide them with substantial increases in salary. The “dive and save” process was wholly unavailable for managers to use to address *internal* inequities (an employee’s salary relative to similarly-situated peers). The focus of Oracle’s “dive and save” process was solely on external pay inequities (an employee’s salary relative to salary offered by an external competitor). In fact, Oracle even restricted the budget of its “dive and save” budget so that managers did not have the resources to correct pay even for the subset of the “squeaky wheels” who issued ultimatums to Oracle about their depressed pay, relevant to external comparators.³⁵

In short, the undisputed facts establish that Oracle’s executives failed to provide the resources necessary to ensure compensation was set and maintained on a non-discriminatory basis. As a consequence, as revealed by OFCCP’s statistical evidence, similarly-situated employees were locked into very different compensation levels.

D) Undisputed Material Facts Demonstrate that Oracle Disregarded its Affirmative Action Obligations and Took No Meaningful Steps to Ensure It Did Not Engage in Prohibited Compensation Discrimination

In addition to the strong statistical evidence of systemic compensation discrimination that is sufficient to infer Oracle’s discriminatory intent, Oracle’s actions and admissions show its disregard for its affirmative action obligations. *See Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1044 (7th Cir. 1991) (finding evidence federal contractor “neglected to establish means by which it could monitor compliance” with its AAP objectives supported finding of intentional discrimination); *Anderson v. Boeing Co.*, 222 F.R.D. 521, 537 (N.D. Okla. 2004) (if contractor “failed to correct gender disparities in salary despite knowledge of their existence” from compensation analyses conducted as part of its OFCCP affirmative action program it could evince a discriminatory intent that could support a disparate treatment theory).

As a federal contractor that benefited from large contract awards each year, Oracle understood that it must take efforts to identify and redress any gender and racial pay inequities in compensating its employees. Contrary to those obligations—and despite having received the benefit of its bargain with the government and receiving hundreds of millions in taxpayer

³⁵ SUF Nos. 222-23.

money—Oracle failed to take *any* steps to ensure that its compensation practices were ensuring “equal opportunity,” including specifically failing to take steps or guarantee sufficient resources to identify and redress gender and racial pay inequities.

At the time of OFCCP’s audit, during conciliation, and in its Answer to OFCCP’s Second Amended Complaint, Oracle claimed that it regularly studied its compensation practices and data to identify pay inequities, as required by its AAP.³⁶ In light of OFCCP’s undisputed evidence of gross race and gender gaps in salary compensation, Oracle’s admission that it never took a single action as a result of its internal studies speaks volumes as to Oracle’s intentions regarding gender and race employment discrimination. What the record makes plain is that after years of Oracle performing confidential compensation analyses, the best Oracle can do is to provide an expert report that fails to address the glaring salary discrimination suffered upon its female, Asian, and African American employees at its headquarters. Indeed, it is hard to imagine that the trends in gender and racial salary disparities shown by the analyses of *both Oracle’s and OFCCP’s experts* were not obvious to Oracle in any pay equity studies it conducted, regardless of the reason for which it now claims it performed those studies. The inescapable conclusion is that Oracle knew long ago about the pay disparities for women, Asians, and African Americans across its organization and chose to do nothing to correct them.

While Oracle claims that it delegates its AAP obligations to its lowest-level managers, this approach, which is not supported by material evidence, would be in clear violation of 41 C.F.R. § 60-2.17 (requiring high-level managers to implement its management plan to ensure equal opportunity at “all phases of its employment processes”). Moreover, the undisputed evidence establishes that Oracle’s lower level managers did not, and *had no ability to*, perform the in-depth reviews required by the regulations. Oracle admits that its managers had no access

³⁶ Based on the Court’s Order of October 8, 2019, the Court has struck Oracle’s Affirmative Defenses regarding its claims of privilege and given Oracle the opportunity to reverse its admissions regarding whether it conducted or did not conduct the regular in depth compensation analyses required by its AAP. Based on its privilege log, however, it is clear that Oracle conducted some form of pay equity analyses, even if in connection with what it now claims to be an eternal state of anticipation of litigation.

to compensation data or information for any employees beyond those in their narrow reporting structures.³⁷ Managers at all levels could not see or compare the pay of their subordinates with that of their colleagues across the organization, even though employees clearly had the appropriate skills and experience to transfer between and among different projects, groups, and supervisors. Moreover, managers were not given unilateral authority to make salary corrections—all such changes were subject to review and approval, and limited by budget constraints set by Oracle’s high-level executives. SUF Nos. 112-125.

While Oracle’s 2014 AAP stated that Oracle “develops and analyzes Internal Audit Reports to assess performance in . . . Compensation,” Oracle’s Position Statement makes plain that Oracle did no such thing. Rather, it argues that it is simply too big and too complex to comply with the clear regulatory mandate to perform an in-depth analyses of its compensation systems. However, federal contractors cannot opt out of the requirements simply because they may be difficult. The regulations require that the person designated with oversight must have the “support of and access to top management to ensure the effective implementation of the affirmative action program.” 41 C.F.R. § 60-2.17(a). Oracle’s undocumented assertions that senior management delegated compliance obligations to hundreds of front line managers demonstrate Oracle’s cavalier disregard for the contractual obligations it agreed to take on in exchange for its large federal contracts.

Oracle’s failure to conduct the types of compensation analyses required by their affirmative obligations is consistent with OFCCP’s overwhelming statistical evidence of pay discrimination. Oracle’s disregard of its obligations demonstrates an unwillingness to ensure that its practices were non-discriminatory.

V. CONCLUSION

For the reasons detailed above, OFCCP moves this Court to grant OFCCP summary judgment on its claims that Oracle breached its obligations as a federal contractor by

³⁷ Even for their direct reports, the data available to Oracle’s managers did not have racial or gender data necessary to make pay comparisons for their small group of direct reports. SUF Nos. 219-221.

systemically engaging in pay discrimination to the detriment of women, Asians, and African Americans at Oracle's Redwood Shores headquarters.

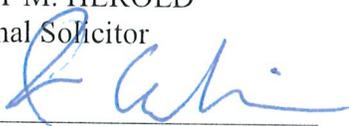
Respectfully submitted.

DATED: October 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am over 18 years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On October 21, 2019, I served the foregoing
OFCCP'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF SUMMARY JUDGMENT
STATEMENT OF UNCONTESTED MATERIAL FACTS IN SUPPORT OF OFCCP'S
MOTION FOR SUMMARY JUDGMENT

on Defendant Oracle America, Inc. by serving its attorneys below via electronic mail,
pursuant to the parties' agreement:

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I declare under penalty of perjury that the above is true and correct.

Date: October 21, 2019

/s/ Llewlyn D. Robinson

LLEWLYN ROBINSON