

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

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**OPPOSITION TO OFCCP'S MOTION  
FOR SUMMARY JUDGMENT BY  
DEFENDANT ORACLE AMERICA,  
INC.**

**REDACTED PURSUANT TO COURT ORDER**

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

CASE NO. 2017-OFC-00006

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## I. INTRODUCTION

OFCCP's evidence comes nowhere close to proving its case at trial, let alone entitling it to summary judgment. Title VII and OFCCP's own regulations require OFCCP to compare similarly situated employees. This means employees must have "similar jobs and display similar conduct." *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). Under Title VII case law, the mere fact that people have the same type of job—whether by job title or by the high-level "job descriptor" OFCCP's expert Dr. Janice Madden uses—is insufficient to render them similarly situated. OFCCP and Madden rely on a series of obfuscations and mischaracterizations to create a Potemkin statistical model that ignores crucial factors affecting pay and proves only that OFCCP has no genuine evidence of intentional discrimination.

The first problem with Madden's statistical models is they aggregate *all* of the employees at issue into one set of analyses, notwithstanding the highly varied jobs they hold. For example, she compares managers to the employees they supervise, but does not account for whether an employee *is* a manager. This makes it impossible, as a matter of law and fact, to measure legitimate, race- and gender-neutral factors that drive pay differentials (such as an employee's experience and skills at managing others well). Indeed, numerous courts have stricken Madden's analyses (or found them unpersuasive) in cases using the same approach she uses here.

Second, even if one accepts Madden's premise that her "one size fits all" model is an appropriate method to study the thousands of diverse and highly-varied jobs at Oracle—which it is not—Madden still mis-measures, ignores, or chooses not to consider in her models numerous legitimate, non-discriminatory factors that affect pay. For example, Madden's measure of work experience is based solely on age, and does not account at all for an employee's actual or relevant prior work experience. She omits other variables entirely, such as an employee's career level (*e.g.*, Software Developer IC1 through IC6, or M2 through M6). Madden justifies this by asserting that Oracle may have discriminatorily assigned an employee an unduly low career level on hire. But Madden does not analyze applicant data to see whether this purported discriminatory assigning occurs. Instead, she assumes it. Oracle's expert Dr. Ali Saad, on the other hand,

analyzed Oracle's applicant data and definitively demonstrates that no such discriminatory assigning occurred.

Beyond the statistical failings, in a case spanning five years of data and thousands of employees, and despite a misleading letter campaign encouraging Oracle's employees to contact OFCCP with stories of discrimination to receive a cash award, OFCCP could find only seven ex-employees to submit declarations, none of whom say anything about a systemic pattern or practice of bias. OFCCP's abysmal showing on evidence of discrimination (other than assumptions made by its paid expert) simply highlights the unnavigable distance between its purpose-driven, cursory statistics and its burden of proving that Oracle intentionally discriminated against staggering numbers of its own employees.

In all other respects, OFCCP's motion fails. It previews OFCCP's case two months before trial and reflects the paucity of law and evidence. OFCCP's motion primarily relies on self-serving interpretations of its own regulations rather than Title VII case law. Where OFCCP does cite law, it misrepresents the holding or relies on inapplicable hiring cases that are not comparable to the complex pay discrimination claim at issue here.

Notably, OFCCP has abandoned entirely the analyses upon which it founded this litigation. *See* OFCCP's Mot. for Summ. J. ("Mot.") at 17 ("Dr. Madden's report did not rely in any manner on the statistical analyses OFCCP conducted previously in this matter."). In their place is a new theory of liability: "salary discrimination." In its operative Second Amended Complaint, OFCCP alleged that Oracle discriminated by paying women and minorities in certain job functions less in *total* compensation. Now, however, OFCCP moves for summary judgment on the peculiar claim that Oracle discriminates against women and (in certain job function) Asians and African-Americans by paying them less in *salary*. OFCCP does not explain how or why Oracle's bias extends to salary only, or how an alleged shortfall in salary is discriminatory while ignoring other compensation components such as equity and bonus.

In addition to its shifting disparate treatment allegations, OFCCP appears to have left the

other half of its case on the cutting room floor. OFCCP moves for summary “judgment” but its motion omits any mention of its failure-to-produce claim or a disparate impact claim (implicitly conceding it never alleged a disparate impact). Not only must these claims be dismissed for all the reasons set forth in Oracle’s concurrently-filed motion, but also because OFCCP seeks summary judgment of its entire case without any mention of them.

Finally, OFCCP attempts to portray Oracle’s compliance with 41 C.F.R. § 60-2.17 as evidence of discrimination. But the Court has already acknowledged that is not at issue in this case. And there is still no evidence of bias. OFCCP’s argument is thus perfectly circular: because Oracle allegedly failed to correct the nonexistent discrimination OFCCP alleges, Oracle’s purported inaction proves that discrimination. OFCCP’s motion must be denied.

## **II. OFCCP MISREPRESENTS THE EVIDENCE**

Before addressing OFCCP’s legal arguments, Oracle must set the record straight regarding OFCCP’s misrepresentations of the evidence. In both its motion for summary judgment and accompanying motion to exclude Saad, OFCCP portrays a demonstrably false version of Oracle’s jobs and compensation system, apparently because it is easier to attack that fictionalized version of Oracle than the real one. OFCCP will likely respond that these corrections demonstrate material disputes justifying denial of Oracle’s cross-motion for summary judgment. They do not. To the contrary, they demonstrate OFCCP contorting the evidence to make unsupported factual assertions in an attempt to mask the fatal deficiencies of its case. Below are just a few key examples.

### **A. Oracle Does Not Have “Written Compensation Policies” That Dictate How Managers Make Pay Decisions**

OFCCP takes great pains to portray Oracle as having strict compensation “policies,” and contends that Oracle’s purported deviation from these “policies” is evidence of bias. Mot. at 9, 25. No evidence supports this assertion. OFCCP saw the word “policies” in a four-year-old email cited in Oracle’s October 3, 2019 Position Statement and seized upon it to declare that “use of the word ‘policies’ is now uncontested.” Mot. at n.3. Not so.

In fact, as Oracle's Senior Director, Global Compensation has explained, Oracle has compensation guidelines and practices, but it does *not* have rigid compensation "policies" from which managers cannot deviate. *See* Decl. of Erin M. Connell in Supp. of Oracle's Opp. to OFCCP's Mot. for Summ. J. ("Connell Opp. Decl."), Ex. D (Waggoner 5/1 Dep. 25:14-26:22, 35:5-21, 140:14-19); Ex. E (Waggoner 7/19 PMK Dep. 66:10-23).<sup>1</sup> No matter what OFCCP wants to call Oracle's compensation documents, it does not change their nature. Nor does OFCCP cite any case law holding that the Court should only consider what one party considers a "policy." The documents that OFCCP cites confirm that managers are given guidelines and recommendations, but are ultimately responsible for making their own pay decisions, with the help of HR and Oracle's compensation team as needed. *See* Oracle's October 21, 2019 Statement of Uncontested Material Facts ("Oracle's SUF") at UFs 8, 33-38.<sup>2</sup> Rather than articulating a set of strict rules or dictating how pay should be calculated according to some formula, the documents repeatedly advise that managers should consider a set of general principles when making pay decisions, including considering employees' compensation compared to peers, their relevant knowledge, skills, abilities, experience, and performance, and an assessment of external and internal equity. *See* Oracle's SUF at UF 7. Indeed, OFCCP abandons the "policies" mantra when citing to the "compensation procedures and practices" contained in the abundance of compensation documents that Oracle produced during discovery. *See, e.g.*, OFCCP UF 54. There is simply no evidence that Oracle has inflexible "policies" of the sort that OFCCP would like.

**B. Oracle Did Not Implement Written Compensation Policies as Part of its Compliance with Section 2.17, Which Is Not at Issue**

OFCCP further contends that these purported "policies" were part of Oracle's compliance with Section 2.17. Mot. at 5, 23-24. Again, OFCCP makes this assertion based on the same June

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<sup>1</sup> The only potential "policy" would be Oracle's prohibition regarding asking about prior pay, which started in October 2017 due to the new California law. *See* Connell Opp. Decl., Ex. E (Waggoner 7/19 PMK Dep. 40:6-20).

<sup>2</sup> Senior Oracle executives also do not "monitor and control" compensation decisions, nor are they dictated by rigid, centralized policies from which managers cannot deviate. Mot. at 5-6. Rather, compensation decisions are subject to an approval process for staying within budget or as a "sanity check" for "errors or outliers." Senior managers defer to and rarely change the lower-level managers' decisions. Waggoner Decl., ¶¶ 28, 30; Balkenhol Decl., ¶¶ 6-7, 9.

2, 2015 email from Shauna Holman-Harries, which plainly does not say what OFCCP says it does. *See* Decl. of Shauna Holman-Harries in Supp. of Oracle’s Mot. for Summ. J. (Oct. 21, 2019), Ex. M. And Oracle’s Position Statement that OFCCP frequently cites also does not say that Oracle developed written compensation “policies” as part of its 2.17 compliance. Once again, the documents speak for themselves. A simple review confirms they are not rigid, centralized “policies” dictating a formula from which managers cannot deviate, but instead consist of training materials, guidelines, and recommended practices. Oracle’s SUF at UFs 7-8. OFCCP’s attempt to rebrand these training documents “policies” and mischaracterize Oracle’s compliance with Section 2.17 fails.

**C. Oracle Did Not “Admit That It Took No Corrective Actions” In Response to Pay Analyses**

OFCCP mispresents the evidence to conjure discriminatory animus from thin air, asserting that Oracle has admitted it “took no action in response to the numerous privileged pay equity analyses it conducted.” Mot. at 11. OFCCP cites two pieces of evidence: (1) the testimony of Oracle’s senior vice president of mission-critical databases, who merely testified that he was not personally aware of any pay analyses that were conducted, nor was he aware of what actions were taken in response to those analyses. *See* Garcia Decl., Ex. 31 (Loaiza Dep. 321:20-325:4); and (2) OFCCP’s notes from an interview with Oracle’s Director of Compensation Lisa Gordon. Ms. Gordon was asked, “Has the company ever adjusted any employee’s compensation based on its compensation analysis **for its AAP?**” Garcia Decl., Ex. 41, p. 17 q. 29 (emphasis added). In response to this specific, qualified question, Ms. Gordon stated she was “not aware of any specific action” taken.<sup>3</sup> OFCCP misstates this evidence to assert that “Oracle admits that it took

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<sup>3</sup> The document OFCCP cites is not a transcript, but merely OFCCP’s notes from its interview with Lisa Gordon. Even assuming the notes are accurate, Ms. Gordon explains elsewhere that Oracle has “No formula” for factoring an individual’s experience, knowledge, skills, and performance into his or her compensation and that it “depends on the job.” Garcia Decl., Ex. 41, Ex. A at 16. Similarly, Ms. Gordon explains that when someone is promoted, their compensation “Depends on what the job is” and “What they are being promoted to.” *Id.* Ms. Gordon repeated that there is “No defined formula” and “Everyone is going to be looked at differently.” *Id.* This is consistent with Ms. Waggoner’s testimony cited above. *See* Oracle’s Response to OFCCP UF 52. The Court can review the documents themselves for what they are. It really does not matter what OFCCP wants to call them, and its mischaracterizations cannot create any dispute of material fact where the documents speak for themselves.

no corrective actions in response to **any** pay analysis conducted.” OFCCP UF 212 (emphasis added). Later, OFCCP contends (without citing any additional evidence) that Oracle “chose to do nothing” in response to its privileged compensation analyses. Mot. at 28.

These aspersions are pure speculation. OFCCP has no idea what privileged actions Oracle has taken in response to its privileged pay analyses. Indeed, the Court confirmed OFCCP is not entitled to this information when it denied (in relevant part) OFCCP’s motion to compel Oracle’s privileged pay analyses, which included a document request for all actions taken “in response to” such analyses. *See* Decl. of Laura Bremer (June 19, 2019), Exs. 25, 26 at RFP Nos. 152-155; Order Granting in Part and Denying in Part Pl.’s Mot. to Compel Oracle’s Compensation Analyses (Sept. 19, 2019) at 4-5, 18.

It is black-letter law that OFCCP cannot use Oracle’s assertion of privilege against it, and the Court should reject outright OFCCP’s reliance upon “if you have nothing to hide” atmospherics that do not – and legally cannot – evidence bias. *Parker v. Prudential Ins. Co. of Am.*, 900 F.2d 772, 775 (4th Cir. 1990) (a party “asserting the privilege should not face a negative inference about the substance of the information sought.”).

### **III. OFCCP HAS NOT ESTABLISHED A “PATTERN OR PRACTICE” OF INTENTIONAL COMPENSATION DISCRIMINATION**

As explained below, OFCCP’s statistics cannot prove discrimination because they fail to compare similarly situated employees in violation of Title VII law and fail to account for legitimate, non-discriminatory factors that explain pay differences.

#### **A. OFCCP Has the Burden of Proof but Tries to Make It Oracle’s**

As explained in Oracle’s motion for summary judgment, there is a three-step burden-shifting framework that applies here. At the first step, OFCCP must establish a *prima facie* showing of a “pattern or practice” of intentional discrimination. OFCCP must “prove more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts. It ha[s] to establish by a preponderance of the evidence that racial [or gender] discrimination was the company’s **standard operating procedure**—the regular rather than the unusual practice.” *Int’l*

*Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (emphasis added); *Serrano v. Cintas Corp.*, 699 F.3d 884, 893 (6th Cir. 2012) (describing initial *Teamsters* burden as “heightened” and “more arduous”). At the second step, Oracle has the burden of production to rebut OFCCP’s statistics by showing they are “inaccurate or insignificant.” *Teamsters*, 431 U.S. at 360. At the third step, the Court must “determine, by a preponderance of [all] the evidence, whether the employer engaged in a pattern or practice of intentional discrimination.” *Reynolds v. Barrett*, 685 F.3d 193, 203 (2d Cir. 2012).

Here, OFCCP never gets past the first step. Neither OFCCP’s statistical analyses nor its paltry anecdotal evidence establish an inference of a “standard operating procedure” of intentional discrimination at Oracle. And, as a practical matter, even if the Court concludes OFCCP has established a *prima facie* case, Oracle’s arguments and the evidence confirm Oracle more than meets its burden of production rebutting OFCCP’s statistics (to the point that OFCCP cannot be entitled to summary judgment). Accordingly, the Court’s analysis proceeds to the third step of determining whether OFCCP has proven its case. Importantly, “the burden of persuasion remains with the plaintiff at all times.” *Gay v. Waiters’ & Dairy Lunchmen’s Union, Local No. 30*, 694 F.2d 531, 537 n.4 (9th Cir. 1982).

OFCCP suggests it should automatically prevail because Oracle did not prepare its own statistical model from the ground up. Mot. at 22. But as explained more fully below, Oracle does not have that obligation – a defendant does not need to prove a negative, *i.e.*, that it did not discriminate. Instead of preparing his own model, Saad demonstrates the many ways in which Madden’s analyses are divorced from the jobs and compensation system they purport to study. *See, e.g.*, Saad Rebuttal ¶¶ 31 (“The differences among employees created by their diverse attributes and a spectrum of types of work can be addressed through more refined groupings or pay factors, which in turn provide more reliable measurements of pay outcomes and differences.”), 100 (even when Madden presents results that incorporate career level, her model “continues to be scientifically unsound, relies upon badly mis-measured variables, and compares

employees who are not similar in terms of either their relevant skills and experience or the work they actually perform at Oracle”); *accord* Saad Rpt. ¶ 7.<sup>4</sup>

Although Saad disagrees as a foundational matter that a single aggregated regression model like Madden’s is a meaningful way to study a workforce as complex and diverse as Oracle’s (*see* Saad Rebuttal ¶ 10), he demonstrates that by adding just a few more readily-available variables that do a better job of similarly situating employees and controlling for legitimate factors differentiating pay, the large pay disparities Madden’s model generates (and upon which OFCCP’s entire case hinges) vanish. Saad Rebuttal at Tables 1-5. That is more than sufficient to demonstrate Madden’s analyses do not sustain OFCCP’s *prima facie* case of intentional “pattern or practice” discrimination.

**B. OFCCP’s Statistics Do Not Raise an Inference of Discrimination Because They Do Not Compare Similarly Situated Employees**

To establish a pattern and practice claim using statistics under Title VII, OFCCP is required to compare employees that are “similarly situated ... in all material respects.” *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006). This necessitates a “case-specific” comparison of “similarly situated employees.” 41 C.F.R. § 60-20.4(a). “Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors.” *Id.*

In the most general terms, employees are “similarly situated when they have similar jobs and display similar conduct.” *Vasquez*, 349 F.3d at 641. However, under Title VII case law, the mere fact that people have the same type of job is insufficient to render them similarly situated. Rather, courts have dictated that the “analysis requires a micro-level—rather than a macro-level—approach to comparing job responsibilities, skills and requirements.” *Kassman v. KPMG LLP*, 2018 WL 6264835, at \*27 (S.D.N.Y. Nov. 30, 2018).

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<sup>4</sup> Although this critique was part of Saad’s initial report—which responded to the statistical analyses in the Second Amended Complaint before OFCCP cast them aside in favor of Madden’s approach—it applies to Madden’s models as well because they suffer from many of the same foundational flaws (*e.g.*, using age alone as an inadequate measure of relevant prior work experience).

For example, two website managers, despite having similar titles, are not similarly situated when they have different supervisors and different duties. *Perry v. Clinton*, 831 F. Supp. 2d 1, 17-18 (D.D.C. 2011). Likewise, a supervisor cannot be said to be similarly situated to a non-supervisor employee even if the title of the job is identical. *Vasquez* 349 F.3d at 641. Rather, what is important to understand and take into account are factors like education, past experience, job duties, and the market demand for their services. *See, e.g., Jinadasa v. Brigham Young Univ.-Hawaii*, 2016 WL 6645767, at \*5 (D. Haw. Nov. 9, 2016) (concluding that two employees were not similarly situated because they “had different jobs with different responsibilities” and thus “cannot be said to have been similarly situated”).

These cases are relevant here because the evidence confirms that sharing a standard job title (or “job code”) at Oracle does *not* mean employees perform similar work – instead, they often perform very different work. *See, e.g.,* Oracle’s SUF at UFs 14-30; Miranda Decl., ¶¶ 3-9, 11; Saad Rpt. ¶¶ 35-61 (studying evidence of differences in work performed within standard job title). Oracle uses broad standard job titles across business units that have correspondingly broad salary bands to reflect the variability of skills, duties, and responsibilities among employees who share a standard job title. *See* Waggoner Decl., ¶ 23, Ex. C at 4 (“[Salary ranges] reflect the market in the area and allow for much variation in knowledge, skills & abilities that each individual brings to the company.”); Ex. C at 5 (“Broad ranges allow managers to account for differences in experience, skills, competencies and performance of candidates and incumbents.”); “Oracle’s ranges are intentionally broad to allow managers to differentiate between employees who are new to their roles and still learning, and those who are fully qualified, very experienced, and top performers.”); Ex. C at 12 (“Employees in the same job do not necessarily earn the same amount.”); Ex. E at 16; Miranda Decl., ¶ 9. Oracle provides its managers with guidelines and recommendations, but ultimately managers have discretion, within budget, to set appropriate compensation to match the employee’s particular skills, duties, and responsibilities, consistent with Oracle’s business needs. Waggoner Decl., ¶¶ 23, 27-32; Oracle’s SUF at UFs 7, 33-56; *see*

also Oracle's Mot. for Summ. J. § II.C.

Accordingly, as a matter of law, “the Court must focus on the actual job duties of the employees.” *Hooper v. Total Sys. Servs., Inc.*, 799 F. Supp. 2d 1350, 1362 (M.D. Ga. 2011) (comparators not similarly situated based on generic job titles with little evidence regarding actual job functions or skill required); *Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1414 (9th Cir. 1988) (“a court should rely on actual job performance and content rather than job descriptions, titles, or classifications”); *Boumehti v. Plastag Holdings, LLC*, 489 F.3d 781, 791 (7th Cir. 2007) (“job title alone is not dispositive”); *Krause v. Nevada Mut. Ins. Co.*, 2015 WL 3903587, at \*9 (D. Nev. June 24, 2015) (two employees who both had “vice president” in their titles did not have similar jobs); *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 255-58 (2d Cir. 2014) (dismissing complaint alleging substantial similarity based on job code because they “say nothing of the actual job duties”). The proper focus must be on skills, experience, responsibilities, and performance, and the fact that two employees may share a job title at Oracle such as “Software Developer 2” or “Applications Developer 3” does not determine whether the work they do is sufficiently similar such that any pay difference is the result of discrimination.

Even though comparisons at the job title level are insufficient for Title VII purposes, OFCCP and its expert do not even attempt that. Instead, Madden buckets employees into categories that she made up, called “job descriptors.” Job descriptors are found nowhere in Oracle's pay data. To create them, Madden collapses hundreds of Oracle system job titles into thirty-five broad categories akin to job families. *See* Madden Rpt. at App'x A; Madden Dep. 47:22-48:9.<sup>5</sup> By doing this, Madden further eliminates differentiation among employees; namely, their career levels. But even OFCCP acknowledges that a career level (*i.e.*, whether an employee is an entry-level individual contributor or a seasoned vice president) is correlated to actual experience (not “experience” as Madden defines it, see *infra* at Section III.D.). Mot. at 15;

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<sup>5</sup> For example, an entry-level individual contributor with the job title Software Developer 1 (career level IC1) and a vice president with the job title Software Development VP (career level M6) are both bucketed into the “SOFTWARE DEVELOPMENT” job descriptor. *See* Madden Rpt. at App'x A at 90.

OFCCP UFs 73-74. The so-called job descriptor is far from that. Failing to consider something as basic to a salary determination as one's career level means Madden is not comparing similarly situated employees. *See, e.g., Boumehdi*, 489 F.3d at 791 (similarly situated employees have “comparable experience”). Likewise, because “job descriptor” combines but fails to differentiate between supervisors and non-supervisors, it violates the law. *Vasquez*, 349 F.3d at 641; *White v. AKDHC, LLC*, 664 F. Supp. 2d 1054, 1068 (D. Ariz. 2009) (“[E]mployees in supervisory positions with more responsibility are not similarly situated to lower-level employees.”).

OFCCP seeks to confuse the issues by defining “job descriptor” as equivalent to “job title.” Mot. at 18. Of course, if that was true Madden would not have needed to invent “job descriptor.” Madden's analyses should be understood for what they are: comparisons that treat all employees who are the same age, have the same level of educational degree, started at Oracle at the same time (regardless of where or in what role), and work in the same broad area of the company that “job descriptor” reflects (*e.g.*, “Customer Service—Support,” “Software Development,” “Solutions”) as similarly situated comparators for pay purposes.

In fact, in her initial report Madden opined that even “job descriptor” was “problematic” to consider because it was supposedly determined by Oracle and therefore necessarily biased. Madden Rpt. at 15. That opinion did not last long, and Madden changed it at deposition to state that “job descriptor” was now acceptable. Connell Opp. Decl., Ex. C (Madden Dep. 43:19-47:11). But even when using job descriptor, Madden does not consider other variables considered essential by courts, such as employees' career levels, their particular experience or skills, whether they have a management or individual contributor role, how long they have held their current job title at Oracle, their job performance, their actual job duties or responsibilities, or even their job title (which, as noted above, still paints with too broad a brush). Madden Rpt. at 8; Section III.B., *supra*.

OFCCP and its expert ignore the structure of Oracle's diverse and complex workforce and contend that an employee's “job descriptor” is the most granular variable needed to similarly

situate employees. Mot. at 15. This is false. Indeed, Madden admits she did not analyze which employees at Oracle are performing similar work. Connell Opp. Decl., Ex. C (Madden Dep. 43:4-18 (Madden “did not look at” which employees at Oracle are performing similar work, and therefore has not “formed an independent view”), 81:1-82:4 (“job descriptors” do not differentiate employees based on what product they are working on), 170:11-171:22 (admitting employees in the same “job descriptor” may have significantly different prior experience but that she did not study that), 174:1-179:11). This alone violates OFCCP’s governing regulations. 41 C.F.R. § 60-20.4(a).

Madden’s failure to develop a model (or set of models) that accurately accounts for important differences in the work performed by the vastly diverse sets of employees she purports to study—which Title VII requires—is the primary reason her statistics do not prove discrimination. As a matter of law, she is not comparing similarly situated persons. This is also why Madden’s methodology here has been rejected by multiple courts. *See* Section III.E.

**C. OFCCP’s Excuses for Ignoring Title VII’s Similarly Situated Comparator Standard Are Meritless**

OFCCP contends that using only “job descriptor” to similarly situate employees is appropriate because (1) Oracle allegedly says that every employee who shares a job title at Oracle is “similarly situated”; (2) the other characteristics that go into determining pay cannot be taken into account because they are “tainted by discrimination” (*e.g.*, because Oracle allegedly discriminates when assigning career level); or (3) Oracle’s documents purportedly do not reflect that other factors matter when determining pay (such as the product on which an employee works). Mot. at 19; OFCCP’s Motion to Exclude Dr. Ali Saad at 5, 7, 13. Each contention fails.

As to the first reason, not only do Oracle’s compensation documents not support this assertion for all the reasons explained above, but OFCCP cites no case allowing an expert to skirt the similarly situated requirement by asserting that some other standard should govern. *See, e.g.*, Madden Rebuttal at 1 (stating that the “question [she] analyze[s]” centers on “employees who come to Oracle with equivalent credentials,” not those who perform similar work).

As to the second reason, neither Madden nor OFCCP proves that any variable she ignores is “tainted.” They simply assume it. For example, OFCCP never offers evidence that establishes any purported discriminatory assigning of career levels (and as explained below, the data demonstrates the opposite). And even if Madden and OFCCP *had* proven career level is “tainted,” without controlling for career level Madden undisputedly is not comparing “apples to apples” and her analyses cannot support an inference of pay discrimination among and between similarly situated employees.

As to the third reason, OFCCP’s explanation that Oracle does not take, for example, product into account when setting pay is false. OFCCP’s motion to exclude Saad contends that “Oracle never identifies anywhere in its compensation policies, or in its compensation training provided to managers, that product assignment has any weight or should even be considered when setting compensation.” *Id.* at 13. This is an extraordinarily self-serving and narrow-minded reading of Oracle’s compensation documents. Undisputedly, Oracle’s compensation training documents repeatedly instruct managers to consider factors such as skill, relevant experience, and expertise when making pay decisions. Oracle’s SUF at UFs 7, 50, 54-56. It is undisputed that certain products require certain skills. *See, e.g.*, Miranda Decl., ¶¶ 4-9; Abushaban Decl., ¶¶ 10-13; Adjei Decl. ¶¶ 6-8; Budalakoti Decl. ¶ 8; Chechik Decl. ¶¶ 6, 8; Eckard Decl. ¶ 9; Suri Decl., ¶¶ 10-13. Cutting-edge or in-demand products may require cutting-edge or in-demand skills, which makes employees with these skills rarer and more valuable. *Id.* When managers consider employees’ skills and experience in determining compensation, they are considering how important those skills and experiences are for the product for which they are hiring. Abushaban Decl., ¶ 15; Gill Decl. ¶ 10; Hsin Decl. ¶ 10; Ousterhout Decl., ¶ 15; Shah Decl. ¶¶ 11-12; *see also* Connell Opp. Decl., Ex. E (Waggoner 7/19 PMK Dep. 178:19-183:2) (product “absolutely” factors into pay). In fact, OFCCP’s own interview notes with Oracle employees also confirm this, demonstrating it is simply misrepresenting the evidence. *Id.*, Ex. I (“If product is doing well, [this individual] thinks that could affect pay because [the product is] generating more revenue.”).

In addition, managers hire for only their group, which is typically based on one product or a limited set of products. Managers are therefore looking for skills and experience that support that product.<sup>6</sup> *See, e.g.,* Abushaban Decl., ¶ 15 (“I participated in hiring... Typically, I looked for expertise in Oracle products... The closer a candidate’s experience aligned with my team’s daily work, the more likely that candidate became a finalist.”). Oracle expressly and repeatedly advising its managers to consider product when setting pay would be like telling them they should “consider the job they are hiring for.” Summary judgment is not appropriate where OFCCP’s sole evidence ignores important job-related factors that matter for pay at Oracle, based solely on OFCCP’s unsupported assertions.

**D. Even if OFCCP Did Compare Similarly Situated Employees, OFCCP’s Statistics Do Not Raise an Inference of Discrimination Because They Ignore Legitimate Factors Explaining Pay Differentials**

Even were the Court to dismiss Oracle’s similarly situated argument, Madden’s analyses still are not valid. Not only must a plaintiff compare similarly situated persons, it must also do an analysis of all the “major factors” that go into determining pay. *Bazemore v. Friday*, 478 U.S. 385, 400 n.10 (1986) (statistical analysis that fails to control for important variables can be “so incomplete as to be inadmissible as irrelevant”).

Madden’s analyses control for only four factors. They are what Madden calls (1) years above age 18 (as a proxy for “work experience prior to Oracle”); (2) years at Oracle (as a proxy for “work experience at Oracle”); (3) level of education; and—as of her about-face at deposition—(4) “job descriptor.” Madden treats these as the only four factors that legitimately influence an employee’s pay at Oracle, and assumes they influence pay in the same way for *all* of the vastly diverse Oracle employees she has lumped together in a single, aggregated model.

There are at least three problems with Madden’s approach. First, as noted above and explained by Saad, Madden’s use of highly aggregated models are not an appropriate or

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<sup>6</sup> The very documents upon which OFCCP relies confirm that hiring managers base starting pay decisions on employees’ specific skills, expertise and experience with relevant technologies that allow them to work on the specific Oracle product or products the hiring managers oversee. *See* Oracle’s response to OFCCP UF 165 & Garcia Decl., Ex. 29.

meaningful way to study compensation at Oracle. *See* Saad Rebuttal ¶¶ 10-64; *accord* Saad Rpt. ¶¶ 35-103, 108-119 (detailing same issues that undermined relevance and reliability of OFCCP’s SAC approach). Second, the factors used are so simplistic that they do not accurately measure what they purport to measure. Third, they are demonstrably not the only factors that matter.

***The Factors Used Are Not Valid.*** What Madden calls “experience” is simply the number of years the employee has lived beyond age 18 and how long they have worked at Oracle. Madden does not consider how long the employee has held their current job, what the employee’s prior work experience was, or whether that prior experience is relevant to the employee’s current job. Thus, for example, for an Oracle employee hired as a User Experience Developer 3, Madden’s method for calculating prior work experience treats the employee’s year working at Walt Disney World as a cast member at Epcot the same as her years of work at Microsoft as a Program Manager in the Office User Experience Team. Saad Rpt. ¶ 111.

For education, Madden only looks at the degree of education attained (*e.g.*, college, Masters, or Ph.D.), without considering the school attended, the subject matter of the degree, or the job that the employee is applying for or holds. Madden Rpt. at 15; Madden Rebuttal at Table R1. Thus, a programmer who obtained a Ph.D. in Egyptology is considered entitled to higher compensation than a programmer with a master’s in software engineering, even when the latter’s education is far more applicable and relevant to her work. In addition, Madden is missing the education level for over half of the employees she analyzed, which means the attribute on which they are most closely similarly situated is Madden’s lack of data on them.<sup>7</sup> Courts have held that it is not appropriate to find a potentially relevant variable, such as education, and then not use it in the appropriate manner. *See, e.g., OFCCP v. Analogic Corp.*, ALJ No. 2017-OFC-00001 at \*37-38 (Mar. 22, 2019) (“These issues surrounding the tenure variable ... weakens the reliability of [OFCCP’s expert’s] statistical analysis and the conclusions that can fairly be drawn.”).

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<sup>7</sup> OFCCP’s brief makes an important point about accurate educational data when it asserts that Madden has been a professor at the Wharton School of Business since 1972, teaching “economics, labor markets, and relevant statistical methodologies.” Mot. at n.16. According to Madden’s CV, she is a Professor of Sociology at the University of Pennsylvania and was at Wharton from 1990 to 2016, in the Department of Real Estate. Ex. 91 at 109.

And Madden certainly does not measure “skill,” despite what OFCCP says. Mot. at 17-18, 20. According to OFCCP, an employee’s skill is determined by “controlling for education and experience[.]” Mot. at 5 (citing Madden Rpt. at 5). But as explained above, Madden’s experience control does not do this because it does not account at all for *relevant* skills. See Connell Opp. Decl., Ex. C (Madden Dep. 116:2-117:19 (differences in skills or discrimination are “competing explanations” even under her models), 120:5-10 (if work in different LOBs requires different “skill,” that justifies differences in pay), 126:14-127:6 (market-based pay adjustments are “appropriate” even if they create differences in pay by race or gender), 249:11-251:14 (conceding that some employees at Oracle have unusual or high-demand skills but that she did not study that because “skills” are not reducible to a database field)).

***Madden Does Not Consider Other Relevant Factors.*** Madden also does not consider numerous other relevant pay factors. To illustrate the factors that Madden ignores and why they render her statistics irrelevant, the following chart adapted from Saad’s rebuttal report shows two employees who Madden’s models say should make the same money. If their genders were reversed (*i.e.*, the male was the higher-earning employee), Madden would attribute this \$2+ million compensation disparity entirely to intentional gender discrimination by Oracle:

<b>Employees Madden’s Model Considers Similar</b>		
<b>Employee</b>	Person ID: 888762142	Person ID: 10334044
<b>Pay Information</b>		
<b>Base Pay</b>	[REDACTED]	[REDACTED]
<b>Bonus</b>	[REDACTED]	[REDACTED]
<b>Stock</b>	[REDACTED]	[REDACTED]
<b>Medicare Wages</b>	[REDACTED]	[REDACTED]
<b>Total Compensation (Base Pay + Bonus + Stock)</b>	[REDACTED]	[REDACTED]

<b>Variables Madden's Model Considers</b>		
<b>Gender</b>	Female	Male
<b>Ethnicity</b>	Asian	Asian
<b>Age</b>	█	█
<b>Highest Education</b>	Masters	Masters
<b>Oracle Tenure (years)</b>	6.2	6.7
<b>FLSA Status</b>	Exempt	Exempt
<b>Job Descriptor</b>	SOFTWARE DEVELOPMENT	SOFTWARE DEVELOPMENT
<b>Other Factors Bearing on Pay Madden's Model Ignores</b>		
<b>Job Title</b>	Software Development VP	Software Developer 5
<b>Global Career Level</b>	Manager 6 ("M6")	Individual Contributor 5 ("IC5")
<b>Organization Name</b>	█	█
<b>Patent Bonus</b>	Yes	No
<b>Total Oracle Years</b>	15.1	6.7
<b>Time in Job Title (in years)</b>	6.2	4.0
<b>Discretionary Job Title</b>	█	█
<b>Previous Roles</b>	<p>█: Director of eCommerce Business Intelligence Hyperion Solutions (Acquired by Oracle in 2007)</p> <p>█ Server Development,</p> <p>█: Senior Software Engineer █, San Jose: Student Researcher</p> <p>█, Portland: Summer Intern</p>	<p>█: R&amp;D Manager, Staff R&amp;D Engineer</p> <p>█ Corporation: Senior Software Engineer</p> <p>█, Inc.: Senior Software Engineer</p> <p>Sun Microsystems, Inc.: Member of Technical Staff</p> <p>█, Inc. (Acquired by █): Software Engineer</p>

<p style="text-align: center;"><b>IREC Job Posting Description (emphasis added)</b></p>	<p>As a <i>Vice President of the software engineering division</i>, you will apply your extensive knowledge of software architecture to manage software development tasks associated with developing, debugging or designing software applications, operating systems and databases according to current and future design specifications. Build enhancements within an existing software architecture and envision improvements to the architecture. <i>Assists in the creation of division strategy and consults with senior management in providing direction to ensure growth and financial success.</i> Ensures a consistent approach of organizational policies and procedures. <i>Demonstrated leadership and people management skills.</i> Strong communication skills, analytical skills, thorough understanding of product development.</p>	<p>As a member of the software engineering division, you will <i>take an active role in the definition and evolution of standard practices and procedures.</i> Define specifications for significant new projects and specify, design and develop software according to those specifications. You will <i>perform professional software development tasks</i> associated with the developing, designing and debugging of software applications or operating systems. Provide leadership and expertise in the development of new products/services/processes, frequently operating at the leading edge of technology. Recommends and justifies major changes to existing products/services/processes.</p>
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See Saad Rebuttal ¶¶ 28-30.<sup>8</sup> Madden draws an arbitrary line at “job descriptor” and contends that anything beneath it should not be considered. But it is patently unreasonable to assert that factors such as an employee’s past job experience or the detailed duties of her particular role are irrelevant to a pay analysis. It is likewise fantastical to believe that a factor such as how long someone has held their current title at Oracle is so tainted by Oracle’s bias that it should be ignored (particularly given OFCCP’s concession it is not accusing individual Oracle managers of bias). In addition, this demonstrates why looking only at “base pay” is misleading – the overwhelming bulk of the first employee’s pay here is stock, not salary.

Saad critiqued Madden’s analyses in his rebuttal report by opining they failed to measure certain important variables such as those above, and that these “unmeasured” differences could explain Madden’s otherwise-inexplicable pay disparities. Saad Rebuttal ¶¶ 35, 36, 60. In

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<sup>8</sup> This chart has been modified slightly to reflect Madden’s new opinion at her deposition that she now considers Column 6 from Table 1(a) of her initial report appropriate to consider, rather than stopping at Column 5.

response, OFCCP calls Saad's opinions "troubling" because they are "grounded in the prejudiced notion that certain groups—women, Asians, and African-Americans—are simply inferior to others—men and Whites." OFCCP's Mot. to Exclude Dr. Saad at 2-3, 16-17. In fact, Saad said the opposite (Saad Rebuttal ¶¶ 35, 36, 60), and pointed out that OFCCP's analyses are missing important data, which is an entirely logical critique. OFCCP's moralizing and substance-free retort falls particularly flat given it lacks any evidence to sustain it.

**E. Because OFCCP's Statistics Do Not Compare Similarly Situated Employees and Ignore Legitimate Factors Differentiating Pay, They Do Not Establish a Prima Facie Case**

Courts routinely hold that statistical models that reflect pay differences between groups who are not alike in skills, qualifications, responsibilities, or performance are "not probative of discrimination." *Coser v. Moore*, 739 F.2d 746, 753 (2d Cir. 1984) (rejecting plaintiffs' regression where class spanned "a wide variety of discrete jobs which require[d] different qualifications and experience" and "var[ied] widely as to responsibilities"); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283 (9th Cir. 2000) (statistics that fail to "account for obvious variables" are "insufficient to raise a question of intentional discrimination."); *Harris v. City of Chicago*, 665 F. Supp. 2d 935, 956 (N.D. Ill. 2009) ("Statistical evidence is only helpful when the plaintiff faithfully compares one apple to another.") (citation omitted).

Sometimes the plaintiffs' statistical expert reports are stricken as wholly irrelevant, and sometimes courts admit them but give *de minimis* weight to the report. Both have happened to Madden based on the same or similar problems contained in her analyses here.<sup>9</sup>

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<sup>9</sup> See *Cooper v. S. Co.*, 260 F. Supp. 2d 1305, 1314, 1317 (N.D. Ga. 2003), *aff'd*, 390 F.3d 695 (11th Cir. 2004) (striking Madden's report and finding its probative value "highly questionable" and "significantly diminish[ed]" where she "fail[ed] to compare similarly situated individuals" because she did not "account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation" and did not "compar[e] employees with equivalent work experience in specific job categories or job progressions"); *Williams v. Boeing Co.*, 2006 WL 126440, at \*3 (W.D. Wash. Jan. 17, 2006) (declaring Madden's analysis "not ... to be persuasive" where the "job aggregation groups utilized ... tend[ed] to group together employees with dissimilar circumstances who would not have been candidates for similar promotions"); *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 465-66 (N.D. Ill. 2009), *aff'd*, 675 F.3d 709 (7th Cir. 2012) (finding Madden's statistical analysis "only minimally probative" where it omitted "important non-gender related variables that may have contributed to the observed salary differentials" and did not account for "employees' major job responsibilities, individual performance goals, ... or any other actual measure of the quantity or quality of an employee's performance").

Even the cases OFCCP cites make clear that where the statistics offered are missing key components, no counter-statistical showing is needed to defeat the plaintiff's case. *See, e.g., Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 464 (9th Cir. 1987) (rebuttal evidence can be limited to showing that the plaintiffs' statistics are flawed); *EEOC v. Gen. Tel. Co. of Nw., Inc.*, 885 F.2d 575, 582 (9th Cir. 1989) (where statistical omissions are "central" to compensation decisions, defendant can defeat inference of discrimination merely pointing out such omissions); *Bazemore*, 478 U.S. at 400 n.10.

OFCCP also cites *Palmer v. Shultz*, a disparate impact hiring case, not a disparate treatment compensation case like this action. But setting aside that important factual distinction, the *Palmer* court emphasized that statistics "premised on a faulty calculation" of the relevant attributes of applicants or employees would "lose much of their probative force." 815 F.2d 84, 91 & n.6 (D.C. Cir. 1987). Here, because OFCCP's statistics fail to account for meaningful, legitimate factors that influence pay at Oracle, they likewise lack "probative force." *Id.*

Another case cited by OFCCP, *Segar v. Smith*, included compensation discrimination claims, but was really a promotions case. 738 F.2d 1249, 1274 (D.C. Cir. 1984). And *Segar* holds that "[a]n employer will face the justificatory burden only after a plaintiff class has shown a disparity in the positions of members of the class and the majority group who appear to be comparably qualified; if plaintiffs fail to make their *prima facie* case, the employer never faces this justificatory burden." *Id.* at 1271.

OFCCP's conclusions from this case law, and its resulting confidence in the sufficiency of its evidence, are badly misplaced. Because OFCCP cannot establish that any employees were paid less than other **similarly situated** employees, Oracle does not need to do anything further. *See, e.g., OFCCP v. Bank of Am.*, ARB Case No. 13-099, ALJ Case No. 1997-OFC-16 (Apr. 21, 2016) at 13 (rejecting OFCCP's claim that Bank of America "had the specific burden of showing that the OFCCP's statistical proof was unsound or to prove that the disparity occurred as a result of legitimate, non-discriminatory reasons" because "the burden of proof always remains with the

OFCCP”). Nevertheless, as explained above, Saad demonstrates that, setting aside the monumental problem of using a single, aggregated regression model for the highly diverse jobs at issue, by taking into account even a handful of readily-available variables such as how long an employee has held their current job title, and proxies to capture relevant skills and expertise and the product on which the employee is working, Madden’s purported discrimination findings disappear. Saad Rebuttal ¶¶ 87-92, Tables 1-5; *see also* Saad Rpt. ¶¶ 121-33 (same outcome when corrections are made to OFCCP’s SAC models).

To “establish a prima facie case of disparate treatment based solely on statistical evidence, [OFCCP] must produce statistics showing a clear pattern, unexplainable on grounds other than race [or gender.]” *Gay*, 694 F.2d at 552-53. In *Gay*, the Ninth Circuit found bare statistical evidence insufficient, holding that “statistics demonstrating that chance is *not* the more likely explanation are not by themselves sufficient to demonstrate that race *is* the more likely explanation for an employer’s conduct.” *Id.* at 553 (emphasis in original). That is because under *Teamsters*, OFCCP has a “high bar” to meet: evidence that Oracle acted with the “**deliberate purpose and intent** of discrimination against **an entire class.**” *United States v. City of N.Y.*, 717 F.3d 72, 87 (2d Cir. 2013) (emphasis added). This standard requires “commonality,” that is, “some glue holding the alleged reasons for all those decisions together[.]” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 and n.7 (2011). To rely on statistics alone, OFCCP must prove “facts from which the court **must infer**, absent rebuttal, that the defendant was more likely than not **motivated by a discriminatory animus.**” *Gay*, 694 F.2d at 538 (emphasis added). In a pay discrimination case, this burden is particularly difficult to meet given that comparing pay across groups of employees necessarily entails more complicated inquiries than (for example) analyzing patterns of hiring decisions.<sup>10</sup> OFCCP has not met its burden here.

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<sup>10</sup> In a hiring case, the employment decision is binary (hire vs. do not hire), and applicants typically are differentiated only by written materials or information obtained through interviews, or are subject to a specific, identifiable, classwide policy they contend impedes them. In that context, a statistical analysis looking at applicants for each position, the qualifications of those applicants, and the race and gender of those who received offers could

**F. OFCCP Fails to Submit Any Anecdotal Evidence of Systemic Compensation Discrimination**

OFCCP submitted with its motion declarations from seven ex-Oracle employees. *See* Garcia Decl., Exs. 97-103. These declarations should give the Court great comfort that it is not missing some discriminatory policy or practice hidden in OFCCP’s otherwise-inadmissible statistics. After three years of litigation, including a letter blast to Oracle’s employees imploring them to contact OFCCP in order to collect large sums of money, this is apparently the only non-statistical evidence that OFCCP has in support of its claims.

But one declarant’s interview notes with OFCCP confirm that her Oracle “experience was **not** that gender came into play” in determining salary. *See* Connell Opp. Decl., Ex. A (DOL 41682 at 12) (interview notes of Christina Kolotouros) (emphasis added). Indeed, “a lot of men struggled with the same thing that women were – *e.g.* some men took a career break[.]” *Id.* Ms. Kolotouros further confirmed that she “doesn’t think” that anyone “ever degraded [her] work because [she was] a woman[.]” *Id.*

Another declarant worked in Human Resources and is not even a member of the three job functions against whom Oracle allegedly discriminated. *See* Garcia Decl., Ex. 102 (K. Garcia Decl.), ¶¶ 2, 4. Yet Ms. Garcia is the **only declarant** who says anything about alleged bias at Oracle. *Id.*, ¶ 7. And her one statement says nothing about a systemic pattern or practice of pay discrimination – it is an undated, one-line, anonymous anecdote. The remaining six declarants all worked in Product Development, but four were managed by Product Development managers at Oracle’s headquarters, and OFCCP has confirmed it is not accusing those managers of discrimination. *See* Connell Decl., ¶ 3; OFCCP’s Aug. 22, 2019 Position Statement at 9. In any event, these six declarants primarily complain they were not paid or promoted to their satisfaction, including one ex-employee whose experience with discrimination was not being

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be informative, particularly where the jobs are interchangeable and involve low-level, uniform skills. This is how pattern or practice cases arose. *See, e.g., Teamsters*, 431 U.S. at 340 n.20 (1977) (hiring case regarding line drivers); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (hiring case regarding public school teachers). Pay cases are significantly more complex because they require thoughtful consideration of an employee’s skills, level of responsibility, job difficulty, tasks performed, experience, and qualifications, and further require an assessment of both similarly situated as well as legitimate factors that can explain pay differentials.

**ORACLE’S OPPOSITION TO OFCCP’S MOTION FOR SUMMARY JUDGMENT**

able to take a business-class flight seven years ago. *See* Garcia Decl., Ex. 98 (Powers Decl.), ¶ 9.

Even the employee interview notes that Oracle finally extracted from OFCCP after multiple motions to compel contain “anecdotal” evidence that helps Oracle (not OFCCP). For example, one employee called OFCCP to state that she “[h]as not experienced any [discrimination] herself”; that she “really think[s] raises are based on merit and profitability” and that “[o]nly since the DOL lawsuit has she heard people discussing [discrimination.]” Connell Opp. Decl., Ex. J.

Further rebutting this meager ex-employee evidence, the Court also must consider Oracle’s non-statistical evidence, such as the diversity of Oracle’s senior leadership, declaration testimony from employees and managers confirming they do not or have not experienced discrimination, and Oracle’s inclusion and diversity initiatives that are “probative of the absence of an employer’s intent to discriminate.” *City of N.Y.*, 717 F.3d at 86; *see* Oracle’s Mot. for Summ. J. § II.A; Oracle’s SUF at UFs 1-6; Oracle’s employee declarations.<sup>11</sup> An employer charged with the “serious accusation” that it has intentionally discriminated against an entire class of its employees “must have a broad opportunity to present in rebuttal any relevant evidence that shows that it lacked such an intent.” *City of N.Y.*, 717 F.3d at 87.

#### **IV. OFCCP’S NEW CLAIM FOR SALARY DISCRIMINATION FAILS**

OFCCP’s motion introduces a twist: a salary discrimination claim. Mot. at 2, 22-23. But salary discrimination for most of the groups and years at issue was not pled in the SAC. Substantively, the claim fails because OFCCP’s statistics fail to establish salary discrimination.

##### **A. OFCCP Has Not Asserted a Claim for Salary Discrimination**

OFCCP insists the SAC “specifically alleges” salary discrimination, but it plainly does not. Mot. at 22; *see* SAC, ¶¶ 13, 18-30. In fact, the SAC overwhelmingly alleges “total compensation” discrimination (*id.*, ¶¶ 13-17), and makes only a single allegation regarding salary

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<sup>11</sup> Abushaban Decl. ¶ 20; Adjei Decl. ¶ 10; Budalakoti Decl. ¶¶ 9-13; Chan Decl. ¶¶ 14-15; Checik Decl. ¶ 14; Desmond Decl. ¶ 14; Eckard Decl. ¶ 14; Fox Decl. ¶¶ 17-18; Galka Decl. ¶¶ 11, 13; Hsin Decl. ¶¶ 13-15; Kite Decl. ¶ 12; Oden Decl. ¶ 17; Ousterhout Decl. ¶ 18; Suri Decl. ¶¶ 23-24; Talluri Decl. ¶ 17; Wu Decl. ¶ 14; Yakkundi Decl. ¶ 20.

discrimination: That Oracle allegedly discriminated against African-Americans in *only* 2015 and 2016 (*i.e.*, not during the 2013-2014 audit window), resulting in \$1.3 million in lost wages out of \$401 million claimed total lost compensation. SAC, ¶ 16. As Saad noted in his initial report, had OFCCP used the same measure of pay for African-Americans as it did for women and Asians, its own models would have shown no statistically significant disparities (*see* Saad Rpt. ¶ 33), which is why it made that specific allegation for this group only. Based on this, OFCCP has the gall to criticize Saad for purportedly “not studying” a claim worth .3% of the total alleged damages. In fact, as explained below, Saad’s critiques of Madden’s total compensation analyses apply with equal force to her base pay analyses.

Any other references in the SAC to salary or base pay are hypothetical explanations for the alleged pay disparities (based on analyses OFCCP has now abandoned), such as Oracle allegedly discriminating through starting base pay. *See, e.g.*, SAC, ¶ 29. All of the headline-grabbing dollar figures touted in the SAC are total compensation numbers, demonstrating OFCCP uses total compensation when it serves its purposes, but when Oracle points out the flaws with those analyses, OFCCP reverts to a made-up claim of “salary discrimination.”

**B. OFCCP’s New Claim for Salary Discrimination Fails on the Merits**

Even if the Court accepts that OFCCP adequately pled salary discrimination as to Asians, women *and* African-Americans, Madden’s analyses still do not prove a pattern or practice of systemic discrimination. OFCCP contends that Madden’s analyses from her initial expert report reveal Oracle paid women, Asians, and African-Americans “less in salary” on average than “comparators.” Mot. 2, 20-21; Madden Rpt. at Tables 1(d), column 6 (base salary differences for women), 2(d) (Asians in Product Development), 3(b) (African-Americans in Product Development). OFCCP complains that Saad did not prepare modified versions of Madden’s specific base pay analyses in his rebuttal report, as he did for total compensation (*i.e.*, tables in which Saad added patent bonus, organization as a proxy for product, etc., as additional controls to demonstrate how Madden’s findings evaporate). Saad Rebuttal at ¶¶ 87-92, Tables 1-5. Based

on this, OFCCP asserts Madden’s initial base pay tables are “unrebutted.” Mot. at 13, 15, 25. But this is wrong for at least two reasons.

First, Madden’s base pay analyses fail because every deficiency identified above – including the overly-aggregated overall design of the models, using only age as a proxy for experience, the utter failure to similarly situate employees, and the omission of important, legitimate factors differentiating pay – all apply equally to her base pay analyses, and are fatal for the same reasons discussed above regarding Madden’s statistical analyses generally. Accordingly, OFCCP’s attempt to win based on a “gotcha” argument that Saad did not “rebut” these analyses is both false and meritless.

Second, there is a very good reason Saad’s critiques addressed Madden’s total compensation analyses and not her base pay models: OFCCP’s operative complaint alleges “compensation discrimination,” not “salary discrimination.” Saad explained in his rebuttal report that Madden’s base pay analyses are irrelevant “because the 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 compensation.” Saad Rebuttal, ¶ 73, n. 87; Saad Rpt. ¶¶ 38 (“a large part of compensation at Oracle—particularly for high-level individual contributor (IC) and management employees—is comprised of bonus and equity awards.”), 126.

From the start of this case, OFCCP’s strategy has been to hunt through the data to cherry pick outcome-driven allegations untethered to evidence of actual bias. That is why OFCCP is left alleging “salary discrimination” as a last-ditch attempt to save its baseless case.

**C. Madden’s Untimely Analyses Regarding Salary Discrimination Are Inadmissible and Irrelevant**

OFCCP relies on Madden’s untimely sur-rebuttal declaration when it contends that “Dr. Madden applied Dr. Saad’s regression methodology to Oracle’s salary data[.]” Mot. at 23 (citing OFCCP UFs 244-251). Oracle has objected to these new analyses procedurally and substantively. But even if the Court considers them, OFCCP merely contends that when using the additional variables Saad layered on Madden’s total compensation models from her initial

report, there are statistically significant base pay differences (viewed in isolation) for women in the IT job function in 2014, 2017, 2018, the Product Development job function in 2013, 2014, 2016, 2017, 2018, and the Support job function for 2013, 2014, 2017, as well as for Asians in the Product Development job function in 2013, 2016, and 2017 and African-Americans in the Product Development job function in 2018 only. Garcia Decl., Ex. 89 at Ex. 9 (Madden Decl.), Exs. D1- to D-5 (column 6).<sup>12</sup>

Pause there for a moment: OFCCP’s claim is that in some but not all years, Oracle *intentionally* chose to discriminate on salary—not total compensation—in some job functions but not others. This is not a pattern or practice. Even accepting the framework of OFCCP’s argument, it does not prove that Oracle “regularly and purposefully” engaged in intentional discrimination against these groups. *Morgan v. U.P.S. of Am. Inc.*, 380 F.3d 459, 463-64 (8th Cir. 2004); *see also Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (“isolated or sporadic discriminatory acts” are “insufficient” as a matter of law) (citing *Teamsters*, 431 U.S. at 336). Indeed, this variability is the antithesis of a “pattern” of pay discrimination impacting the thousands of employees at issue. *Robinson v. Univ. of Wash.*, 2016 WL 4218399, at \*4 (W.D. Wash. Aug. 9, 2016), *aff’d*, 691 F. App’x 882 (9th Cir. 2017) (plaintiff’s statistical analysis “makes much ado about nothing” where it “[did] not show a clear pattern of anything, much less discriminatory intent akin to [] systematic exclusion”). Using the additional variables Saad identified applied to Madden’s aggregated models, OFCCP is left admitting that in many years and many job functions, there is not even statistical evidence of discrimination, let alone actual evidence of bias. And OFCCP has provided no explanation as to why or what sort of managers would intentionally discriminate solely on salary, but find their conscience when awarding total compensation. The Court is charged with deciding whether Oracle has intentionally discriminated, not acting as a “super-personnel department that reexamines” the pay decisions of Oracle’s thousands of managers. *Hernandez v. Metro. Transit*

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<sup>12</sup> Column 7 of these analyses change Saad’s Tables 1-5 by removing the Organization control without basis, and are thus not on all fours with what Saad presented.

*Auth. of Harris Cty.*, 673 F. App'x. 414, 419 n.5 (5th Cir. 2016).

Even if the Court considers Madden's late, aggregated "salary discrimination" analyses, at best they show statistical disparities in some but not all years. They do not reflect gross disparities that raise an inference of discrimination. *See, e.g., Analogic Corp.*, ALJ No. 2017-OFC-00001 at 42 (holding that "2.84 standard deviations is not a 'gross disparity' sufficient for OFCCP to establish a case of intentional discrimination absent anecdotal evidence."); *Bank of America*, ARB Case No. 13-099, ALJ Case No. 1997-OFC-16, at 18 (reversing ALJ finding of discrimination based solely on statistical evidence, because "[w]ithout more evidence, one bottom line standard deviation of 4.0 for four years with minor shortfalls in two of those years is not enough" to establish pattern and practice). None of Madden's new analyses show standard deviations higher than 2.84, and OFCCP has no anecdotal evidence of bias (and has conceded it is not even accusing the managers making the pay decisions at issue of wrongdoing. *See* OFCCP's Aug. 22, 2019 Position Statement at 9. OFCCP's purported claim of "salary discrimination" fails.

**V. OFCCP HAS NOT PROVEN ITS CLAIM FOR ASSIGNMENTS DISCRIMINATION**

OFCCP brought a pay discrimination case against Oracle. When Oracle pointed out that OFCCP was not comparing similarly situated employees for all the reasons discussed above, OFCCP pivoted to an alternative claim that Oracle assigns or "channels" women, Asians, or African-Americans into lower-paying roles at hire. *See* Mot. 19-20. OFCCP uses this alleged assigning to justify its refusal to consider many of the factors identified above, such as an employee's career level or cost center/organization (as a proxy for product). But **Madden did not conduct a proper assignments analysis**. All of her opinions about discriminatory assigning are based on Oracle's pay data. In other words, Madden looked at Oracle's pay data, found purported pay disparities between dissimilar employees while ignoring important factors affecting pay, and in anticipation of obvious critiques (made before by many other employers defending against claims based on similar analyses by Madden), asserted that the same set of pay

data also now proves certain groups are being discriminatorily assigned into lower roles. As Saad explained, “this is not a test of whether the [would-be ‘assignment’] decisions of any Oracle manager, or all of them, are biased.” Saad Rebuttal ¶ 64.

This is another example of OFCCP depicting a fictionalized version of Oracle’s jobs and compensation systems. OFCCP would have this Court believe that individuals join Oracle by applying to be software developers generally, and are then “assigned” by Oracle into some role within that job family (or “job descriptor,” in Madden’s parlance) from IC1 to M6 based on the whims of the hiring manager. That is not the case. Unlike Madden, Saad analyzed Oracle’s actual applicant data and found that over 75% of employees at Oracle’s headquarters joined through posted requisitions for specific jobs. On average, men versus women, Asians versus whites, and African-Americans versus whites **applied for** jobs at different career levels, to a statistically significant degree. *See* Saad Rpt. ¶ 149. Oracle’s alleged bias is certainly not affecting the jobs for which third-party applicants apply.

Saad also analyzed the job levels to which employees applied and into which they were ultimately hired. He found no statistically significant disparities. Saad Rpt. ¶¶ 150-156. Saad further addressed Madden’s purported evidence that Oracle discriminates in “the assignment of global career levels” post-hire (Madden Rpt. at 51, App’x B) and revealed how Madden’s own analyses—including results she had hidden in her back-up materials—showed no pattern of under-promotion. Saad Rebuttal ¶¶ 64, 68-72. There is simply no evidence that Oracle engaged in assignments discrimination, yet OFCCP is still pursuing this canard.

Moreover, to the extent OFCCP is attempting to prove compensation discrimination based on these alleged discriminatory assignments, such a theory fails because most of the assignments that would be at issue occurred before 2013 and are therefore irrelevant because they are time barred and outside OFCCP’s jurisdiction. *See* May 16, 2019 Order re Historical Data at 6 (“Any claim for compensation discrimination must be based on discrimination that occurred after January 1, 2013.”); *Analogic Corp.*, at n.6; *EEOC v. CRST Van Expedited, Inc.*,

679 F.3d 657,674 (8th Cir. 2012) (agency’s complaint must be limited to unlawful conduct uncovered during the investigation); *Johnson v. Austal, U.S.A., L.L.C.*, 805 F. Supp. 2d 1299, 1308 (S.D. Ala. 2011) (under Title VII the denial of a promotion is one-time violation, the consequences of which are felt at the time of the denial); *Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370, 375 (D.C. Cir. 2010) (an alleged failure to promote is a discrete act and does not permit a derivative continuing compensation discrimination claim).

**VI. OFCCP FAILS TO ADDRESS ITS REFUSAL TO PRODUCE OR PURPORTED DISPARATE IMPACT CLAIMS, WHICH SHOULD BE DISMISSED**

OFCCP’s operative SAC alleges that Oracle failed to produce certain documents during the compliance audit. SAC, ¶¶ 43-51. Yet OFCCP has moved for summary judgment as to its entire case without any mention of this claim. Further, although the SAC failed to properly allege a disparate impact claim, OFCCP stated its intent to pursue “a disparate impact theory in the alternative, based on the policies and practices implemented by the [] top leadership at Oracle.” See OFCCP’s Aug. 22, 2019 Position Statement at 2. Again, OFCCP has moved for summary judgment without any mention of a disparate impact. These claims should be dismissed for all the reasons in Oracle’s motion for summary judgment, and because OFCCP appears to believe they are immaterial to its case or whether judgment can or should be entered.

**VII. ORACLE’S SECTION 2.17 COMPLIANCE IS NOT AT ISSUE, AND OFCCP FAILS TO DEMONSTRATE ANY NONCOMPLIANCE**

It is apparent from the first page of its motion that OFCCP seeks to portray Oracle’s compliance with 41 C.F.R. § 60-2.17(b)(3) as part of OFCCP’s evidence of discrimination. This attempt to conflate Oracle’s obligations as a federal contractor to “evaluate” its “[c]ompensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities” with OFCCP’s burden of proving that Oracle engaged in intentional pay discrimination fails. 41 C.F.R. § 60-2.17(b)(3). If OFCCP wanted to test Oracle’s compliance with Section 2.17, it should have brought a claim for such a violation. “Whether or not, and how, Oracle complied with its legal [obligations] in 41 C.F.R. §§ 60-2.11 through 60- 2.17 is not an issue in this case.”

See June 19, 2019 Order at 13. Plainly, the parties disagree as to what Section 2.17 requires. But the issue is a total sideshow. Even if Oracle had failed to engage in the evaluations required by the regulation, it would do nothing to advance OFCCP's compensation discrimination claims.

#### **VIII. CONCLUSION**

On July 1, 2019, this Court observed when granting one of Oracle's motions to compel that "the briefing and declarations here suggest that no one at OFCCP has much knowledge of the case, and that its attorneys are acting as attorneys, investigators, and statistics experts." Little has changed in the last four months. OFCCP's statistics still do not meet the applicable Title VII standards, and OFCCP has never identified any bias or practices that cause the wide-ranging discrimination it alleges. OFCCP has taken the complicated question of evaluating pay across thousands of varied jobs and reduced it to a series of facile aggregated statistical analyses that are more notable for what they ignore than what they measure. As a matter of law, these sterile equations cannot establish the intentional discrimination that OFCCP set out to prove. For all the foregoing reasons, the Court should deny OFCCP's motion for summary judgment.

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Respectfully submitted,

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