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

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The parties have collectively filed and exchanged twelve significant briefs and hundreds of exhibits in the last three weeks. But, the key facts necessary to apply the legal framework of Executive Order 11246 are not materially in dispute. This matter is ripe for decision, particularly as to Oracle's liability for breaching its federal contract by engaging in prohibited pay discrimination to the detriment of women, Asians, and African Americans.

OFCCP has brought forth robust statistical analyses that demonstrate discrimination by Oracle as to salary and total compensation. OFCCP's statistical analyses apply the data Oracle maintained regarding its compensation decisions. The analyses include Oracle's data regarding managerial designations and global career levels, which OFCCP contends is tainted due to Oracle impermissibly channeling women, Asians and African Americans into lower paying jobs. Yet, even after including these tainted variables, OFCCP's statistical analyses show systemic gender pay gaps in total compensation and salary compensation with average standard deviations above 4 and 8, respectively. OFCCP's statistical analyses show racial pay gaps in total compensation and salary compensation for Asians with average standard deviations above 3 and 4.5, respectively. OFCCP's statistical analyses are consistent with Oracle's own internal admissions and Oracle does not contest the mathematical accuracy of OFCCP's analyses.

Oracle has not rebutted OFCCP's statistical analyses. As to OFCCP's evidence of salary discrimination, Oracle has conceded liability by choosing to present no rebuttal evidence to OFCCP's statistical evidence of base pay discrimination. As to OFCCP's evidence of total compensation discrimination, Oracle offers no competing independent statistical study of its compensation data. Instead, Oracle has confined its expert testimony to attempting to poke holes in OFCCP's statistical analyses, a strategy made riskier by its expert failing to study the correct questions and data at issue in this case.

Further, Oracle's defense that it is "too big" or its business is "too complex" to be studied or to maintain records of objective data relied upon in setting compensation has no merit. To accept Oracle's position, the Court must close its eyes to: Oracle's affirmative action program (AAP) obligations which require top management to study and approve its compensation practices to ensure no discrimination; the Department's regulations that require basing pay

differentials on “objective” factors; and, black letter case law holding that defendants cannot rebut a prima facie case of discrimination by relying on post-hoc rationalizations or without showing that the alleged missing factors in a regression analysis actually change the calculations.

OFCCP respectfully requests that this Court promptly rule in its favor on liability prior to the date trial is scheduled to commence. To the extent additional evidence is needed to resolve issues related to damages, the current trial dates can be used for that purpose.

I. OFCCP HAS APPROPRIATELY REPRESENTED THE EVIDENCE

OFCCP devoted seven-pages of its summary judgment brief to describing Oracle’s compensation system, which begins with placing an employee in the correct job code created by its centralized Compensation Team in Human Resources (HR), and ends with CEO-level approval for virtually each and every compensation decision. *See* OFCCP MSJ 5-12. Once initial compensation is set, employee pay becomes essentially frozen and pay increases are not typically given even when an employee transfers to another position. *Id.* Oracle’s instructions to management make clear which employees should be considered similarly situated for purposes of pay (*i.e.*, those entering the same job family with similar levels of experience and similar education), but also specifically recognizes that not all employees will receive the same pay based on budget (which is determined from the top of the corporate hierarchy). *Id.*

Oracle’s Opposition to OFCCP’s Motion for Summary Judgment (“Opp.”) notably does not challenge these facts, nor can it as they are laid out in Oracle’s own documents. Oracle’s Opposition to Summary Judgment (“Opp.”), 3-6. Rather, Oracle grasps at the fact that front-line managers have some discretion in making recommendations as demonstrating that the whole process is “decentralized” and not based on actual policies.¹ *Id.*

This narrative backfires as Oracle begins its Opposition brief by aggressively arguing against itself through admissions that confirm violations of its own equal employment

¹ Oracle primarily relies on affidavits vaguely characterizing Oracle’s practices in a manner that is inconsistent with Oracle’s contemporaneous documents, which is insufficient to create a material dispute. *Agelli v. Burwell*, 164 F. Supp. 3d 69, 76 (D.D.C. 2016) (citing *Johnson v. Wash. Metro. Area Trans. Auth.*, 883 F.2d 125, 128 (D.C. Cir. 1989)) (a party’s “self-serving affidavit cannot, without more, create a genuine dispute of material fact” when contradicted by that party’s own contemporaneous records).

opportunity requirements.² Oracle is required to implement an affirmative action program that includes *policies* to ensure that employees are receiving equal opportunity for every term of employment, including compensation. 41 C.F.R. § 2.10(a)(3). First, Oracle argues that despite the use of the word “policy” in its October 4, 2019, court-ordered Position Statement Re: Compliance with 41 C.F.R. § 60-2.17 (“Oracle Position Statement”), it did not mean to suggest it has *any* compensation policies. Opp., 3-4. Oracle then states that it did not “develop[] written compensation ‘policies’ as part of its 2.17 compliance.” Opp., 5. Finally, Oracle argues that OFCCP has not proven that it failed to take action in response to compensation analyses for which Defendants have claimed attorney-client privilege—rather, Oracle states that OFCCP only has presented evidence that Oracle’s *Director of Compensation* was not aware of any action taken to correct pay based on the company’s compensation analyses.³

Contrary to Oracle’s argument in the last section of its Opposition brief, these admissions are directly relevant to these proceedings. *E.E.O.C. v. Gen. Tel. Co. of Nw.*, 885 F.2d 575, 578 (9th Cir. 1989) (“It is clear that affirmative action or equal opportunity evidence is relevant to and probative of an employer’s intent not to discriminate.”); *see also* Order on Motion to Compel Compensation Analyses (Sept. 19, 2019) (“41 C.F.R. § 60-2.17 is relevant because it includes a component requiring compensation analyses of some sort. See 41 C.F.R. § 60-2.17(b)(3). This case is very much a case about alleged compensation discrimination.”).

² As OFCCP has explained, as a federal contractor, Oracle is required to implement “*policies, practices, and procedures . . . to ensure that . . . employees are receiving an equal opportunity for . . . every . . . term and privilege associated with employment.*” 41 C.F.R. 60-210(a)(3) (emphasis added). Oracle is required to “monitor[] and examine[] its . . . compensation systems to evaluate the impact of those systems on women and minorities” (41 C.F.R. 60-2.10(a)(2)) and is required to “maintain . . . documentation of” its compliance with the regulations. 41 C.F.R. 60-2.10(c). Under 41 C.F.R. 60-2.17, Oracle is further required to conduct in-depth studies of its compensation systems, perform internal audits, including monitoring “records of all personnel activity, including . . . compensation”; require “internal reporting” and ensure “top management of program effectiveness.”

³ Citing a life-insurance case, Oracle suggests that because this Court upheld the privilege it asserted over its compensation studies, all actions taken in response to such studies are also privileged. Oracle cites no authority that supports this extraordinary proposition. Oracle seems to want to have its cake and eat it too by protecting its internal discussion from disclosure but then implying that it may have taken privileged *actions* that shaped compensation outcomes. Black letter law is the opposite of what Oracle claims it is here. *See E.E.O.C. v. Gen. Tel. Co. of Nw.*, 885 F.2d 575, 578 (9th Cir. 1989) (“The district court exempted from discovery relevant self-critical materials thus leaving the EEOC ill-equipped to effectively cross-examine those of GenTel’s witnesses who testified concerning the implementation and efficacy of GenTel’s equal opportunity efforts. Thus, the district court erred in admitting GenTel’s equal opportunity evidence.”).

Oracle has tied itself in knots—it cannot have no policies and at the same time be in compliance with its equal employment opportunity obligations. Moreover, Oracle achieves nothing from sacrificing its AAP compliance by insisting it has no policies because its objection to the word “policy” places form over substance. Oracle admits that the “policies” OFCCP described in its summary judgment motion exist, it merely decries calling them policies, insisting that its own “training materials, guidelines, and recommended practices” do not set “policy” because they do not “dictat[e] a formula from which managers cannot deviate.”⁴ *Id.* at 5. This statement is belied not only by the evidence, but by Oracle’s own accompanying admissions in its Response to OFCCP Statement of Uncontested Facts (“ORSUF”). For example, Oracle admits that approvals for base salary increase and other compensation go all the way up to the CEO’s Office, and managers are warned—in bolded, red, mandatory language—that they may not communicate any changes in compensation without final approval from the CEO. ORSUF 117, 120, 121. Moreover, individual Oracle managers cannot invent job codes, cannot unilaterally change salary ranges, or make up new global career levels. ORSUF 65-69. While Oracle can quibble with the precise meaning of the word “policy”, the English language is not so elastic as to call their HR-created compensation system that requires CEO-level approval on virtually all compensation decisions “decentralized.”

Moreover, Oracle’s attempt to redefine the word “policy” is misplaced. Liability attaches when an employer engages in a pattern and practice that is discriminatory, which has been shown by the statistical evidence presented by OFCCP. The legal claims at issue here do not hinge on the precise meaning of the word “policy.”

II. OFCCP HAS MET ITS PRIMA FACIE CASE.

Most of Oracle’s brief focuses on the assertion that OFCCP did not meet its *prima facie* case. Oracle knows that once OFCCP establishes its *prima facie* case, Oracle’s statistical reports are insufficient to mount a rebuttal. *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1188–89 (9th

⁴ Oracle here attempts to adopt the strictest possible definition of the word “policy” so it can shoot it down. In common usage, a policy simply refers to “a definite course or method of action selected from among alternatives and in light of given conditions to *guide* and determine present and future decisions.” Merriam-Webster (emphasis added), <https://www.merriam-webster.com/dictionary/policy>.

Cir. 2002) (holding that to succeed in rebutting a statistical pattern and practice case, defendant must “produce credible evidence that curing the alleged flaws would also cure the statistical disparity”).

A. Oracle Asserts the Wrong Legal Standards for Determining Similarly-Situated Employees and Tries to Squeeze the Facts Here into the Incorrect Test.

Oracle attempts to argue that the relevant legal standards require employees to be identical cogs on an assembly line before they can be compared for pay purposes. In its opening brief, OFCCP explained that the Department’s regulations at 41 C.F.R. § 60-20.4 govern the analysis in these proceedings (a fact that Oracle acknowledges) and laid out the tests set forth therein. Tellingly, Oracle again cites one line from 41 C.F.R. § 60-20.4(a) out of context and just pretends the rest of 41 C.F.R. § 60-20.4(a) and (b) *do not exist*. Oracle prefers the Court to focus on the second sentence in 41 C.F.R. § 60-20.4(a), but the full regulation, in context, makes clear that not all factors need be considered in all cases:

(a) Contractors may not pay different compensation to similarly situated employees on the basis of sex. For purposes of evaluating compensation differences, the determination of similarly situated employees is case-specific. Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other *objective* factors. *In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.*

(b) Contractors 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. Contractors may not grant or deny training, apprenticeships, *work assignments*, or other opportunities that *may lead to advancement to higher-paying positions* on the basis of sex.

41 C.F.R. § 60-20.4 (emphasis added). Despite OFCCP calling attention to these provisions in its initial motion, Oracle’s Opposition does not acknowledge them. Oracle also provides no response to the instructions in the preamble to the regulations (which this Court must consider⁵)

⁵ See, e.g., *Magers v. Seneca-Re-Ad-Industries, Inc.*, ARB Case Nos. 16-038, 16-054, 2017 WL 512658, *20 (ARB Jan. 12, 2017) (relying on preamble for regulatory interpretation); *Mohammed Rehan Puri v. Alabama Birmingham Huntsville*, 2014 WL 4966174 at *6 (ARB Sept. 17, 2014) (same); *Spinner v. David Landau and Associates, LLC*, 2012 WL 1999677 at *3 (ARB May 31, 2012) (same); *Raytheon Aerospace Dispute*, 2004 WL 1166284 at *7 n.6 (ARB May 21, 2004) (same).

that makes clear that at point of hire, applicants with similar qualifications and skills will be similarly situated for purpose of pay. 81 Fed. Reg. 39108, 39127. Oracle also fails to acknowledge that in accordance with the instructions laid out in the regulatory preamble, this Court must examine “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 Fed. Reg. 39108, 39128.

In addition to disregarding the governing regulations, Oracle ignores the broader Title VII case law, which establishes that the types of regression analyses Dr. Madden performed are exactly the type of regression analyses courts have found to establish a *prima facie* case.⁶ For the reasons set forth in OFCCP’s Opposition to Oracle’s MSJ (“OFCCP MSJ Opp.”), Oracle misplaces reliance on inapposite individual cases that involve a different burden shifting regime and modes of proof. *See* OFCCP Opposition to Oracle’s MSJ at 8-14.

B) Dr. Madden’s Tables 1-3, Column 6, Analyses, Compare Similarly-Situated Employees’ Compensation.⁷

Oracle’s main attack on OFCCP’s statistical evidence relates to the results of Dr. Madden’s analyses that are reported in Column 6 of Tables 1-3 of her Report (“Madden Rpt”).⁸ These analyses compare employees of the same age (which is a standard proxy for experience⁹), the same level of educational degree (a proxy for skill), that started at Oracle at the same time (another measure of experience), and who work in the same “job descriptor” (a proxy for

⁶ *See Segar v. Smith*, 738 F.2d 1249, 1261 (D.C. Cir. 1984) (“Typically the independent variables in Title VII cases will be race, age, education level, and experience levels.”) (citations omitted); *Bazemore v. Friday*, 478 U.S. 385, 398-99 (1986) (approving plaintiff’s regression analyses considering four factors such as “race, education, tenure, and job title”, or “race, sex, education and experience”).

⁷ Oracle’s almost exclusive focus on Column 6 is surprising given that Dr. Madden finds gross disparities in Columns 7 and 8 of her analyses. As set out *infra*, Dr. Madden’s Tables included these additional Columns, which are more granular and ultimately compare only the employees with the same level of education and experience within a single job code—Oracle’s unit for determining an employee’s salary range.

⁸ The expert reports referred to in this brief were filed as Exhibits 91-94 that were submitted with OFCCP’s Motion for Summary Judgment.

⁹ *See e.g., Reed v. Advocate Health Care*, 268 F.R.D. 573, 591 (N.D.Ill.2009); *Gutierrez v. Johnson & Johnson*, 2006 WL 3246605, at *5 n. 6, 2006 U.S. Dist. LEXIS 80834, at * 15 n. 6 (D.N.J. Nov. 6, 2006); *Wright v. Stern*, 450 F.Supp.2d 335, 361 (S.D.N.Y. 2006). *See also Bush v. Ruth’s Chris Steak House, Inc.* 286 F.R.D. 1, 6-7 (D.D.C. June 18, 2012)

specialized skills, education and experience). These analyses yield systemic disparities in pay that are highly statistically significant. Thus, to avoid liability, Oracle must create doubt as to why these analyses conclusively demonstrate that women, Asians, and African Americans are paid less than their comparators with effective statistical certainty.

Oracle focuses its fire on misrepresenting what “job descriptor” is. Oracle tries to make it sound like it is a random concept that Dr. Madden “made up” that is “found nowhere in Oracle’s pay data.” Opp., 10. In truth, Dr. Madden invented nothing—“job descriptor” simply means using the system job title without including the career level component, a concept that Oracle calls “job family.” Opp., 10.¹⁰

After misrepresenting the variable, Oracle then argues it is insufficiently granular to make the comparisons meaningful for pay purposes. Oracle argues that only detailed work studies are sufficient to determine who is comparable for purposes of pay. But if true, Oracle would have been required to conduct such studies as part of its AAP obligation to ensure pay equity, which it did not. However, the reason “job descriptor” provides the right level of analysis is based on *Oracle’s* own stated pay factors and conduct, not on anything Dr. Madden did or invented.

1) Under Oracle’s Own Policies, Non-Discriminatory Application of the Factors Included in Column 6 Should Result in Similarly Qualified Individuals Receiving Similar Pay

As described in detail in OFCCP’s affirmative motion, Oracle’s own pay policies dictate that employees be placed into a system job title that is appropriate for their educational level, their experience level, and their expected responsibilities (skill). Thus, if Oracle placed employees in accordance with these factors into the appropriate career levels, the study should not indicate disparities in pay between employees with similar levels of experience and education, regardless of whether career level is considered, as career level is supposed to represent skill and experience. The fact that there are robust, statistically significant disparities

¹⁰See also Saad Rebuttal ¶77; see also OFCCP’s SUF 237. Oracle pushes another false narrative that has Dr. Madden doing an “about face” at her deposition when she purportedly embraces “job descriptor” as an appropriate variable. Opp. at 14. This is simply not true. See Madden Reb. at 6 (“To the extent that this variable accurately (and only) reflects gender differences in areas of prior experience and education, it is an appropriate control.”).

when this comparison is made—a fact that Oracle does not attempt to oppose mathematically—at the very least, poses a question that requires an answer: why are women, Asians, and African Americans so consistently paid less than the other people of similar education level and experience in the same job? Oracle has identified no answer to this question, other than to vaguely suggest that some other factors may be at play.

2) *Career Level is a Tainted Variable*

One potential answer to the disparities is discrimination in job assignment (*i.e.*, career level). To the extent discriminatory assignment to career level explains the disparity, it represents a tainted variable that neither OFCCP nor this Court can consider in the analysis. *See* Preamble to 41 C.F.R. Part 60-20, at 81 Fed. Reg. 39108, 39128 (“Whether any particular factor that explains differences in pay is ‘tainted’ by discrimination, or should be included or excluded as a legitimate explanation for sex-based disparities, will depend on case-specific evidence.”).¹¹ As this Court has observed, OFCCP’s job assignment claims “do not turn on a claim that similarly situated employees in reference to their particular job function are paid different amounts. Rather, they allege that Oracle has differently situated in particular job functions and career tracks otherwise similarly situated employees/hires based on impermissible factors.” Order Granting Conditional Leave to File Second Amended Complaint, *7 (March 6, 2019).

Dr. Madden studied this issue and determined that there were significant disparities related to how Oracle set job assignment and starting pay for comparable employees. *See* Madden Rpt., 49-52; Tables 4, 5. In her Rebuttal Report, Dr. Madden further studied the issue in light of Dr. Saad’s claim that the disparity was explained simply because men and Whites applied to different jobs. Dr. Madden concluded:

[T]he statistical evidence on initial assignments shows disparities in the salary and the global career levels given to women, Asian, and African American hires. My July 19, 2019 report showed differences in starting salaries arising from differences in starting assignments of global career levels and from differences in starting salaries within the same job and global career level. Once I modify Dr. Saad’s analyses of the small subset of hires with job requisition data available to include exogenous

¹¹ *See, e.g., James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 332 (5th Cir. 1977) (finding job assignment to be a tainted variable).

characteristics, such as education, and to control for the global career level of the job applied for, the evidence is consistent with gender and racial disparities in initial assignments.

Madden Rebuttal at 37; *See also* Madden rebuttal at R1, R2, and R9.

3) *Oracle's Attempt to Undermine OFCCP's Statistical Case with A Cohort Comparison Backfires*

Oracle attempts to undermine Dr. Madden's Column 6 analyses by picking the two most dissimilar employees that might be compared in the same pool, claiming that if the genders were reversed, Dr. Madden would attribute the disparities to intentional gender discrimination. Opp., 16-18. This is plainly false—Dr. Madden does not attribute any specific one-on-one comparator to discrimination. Rather, Dr. Madden expressly studies what the statistics tell us about how groups (classified by sex and race) are treated: “An analysis of differences in group outcomes requires that we control for the characteristics by which the groups as a whole differ, but not those by which all individuals differ.” Madden Rpt. 46. Just as proof that someone flipped heads five times in a row would not disprove that the odds of flipping tails on the next toss is 50%, Oracle's attempt to find examples where the model does not appear to fit in isolation simply proves nothing. OFCCP could just as easily flip through the records and identify all instances where males are getting paid more—which, with sufficient observations, would simply confirm the statistical model that Oracle has never indicated is mathematically incorrect.

As it happens, Oracle's showcase female employee, ID 888762142, in 2014 exercised \$921,167 in non-qualified stock options which is included in the Medicare wages of \$1,335,331. Declaration of Janet M. Herold accompanying OFCCP's Daubert Reply ¶ 2. In other words, these high Medicare wages were the result of a one-time stock option sale. Oracle showcases payment of \$1,812,487 in stock to claim a \$2 million difference with a male comparator, but in reality employee 888762142 never received most of this money. The presentation in the table on pages of 16-18 of its Opposition relies on Dr. Saad's extremely flawed approach that treats promised stock grants as actual compensation. Because her employment was terminated on December 4, 2015, she forfeited 75% of \$1,812,487. *Id.*, ¶¶ 3-5. The only thing this comparison proves is that Dr. Saad's alleged study of “total compensation” fails to measure actual compensation.

C) Oracle Fails to Acknowledge that Columns 7 and 8 of Dr. Madden’s Analysis Prove Discrimination.

While Oracle strongly criticizes Dr. Madden’s Column 6 analyses for not taking into account management status or career level, Oracle fails to acknowledge the elephant that remains in the room: Dr. Madden *did* analyze whether the disparities disappear when management status (Column 7) and when career level (Column 8) are considered. These studies demonstrate that the disparities remain staggeringly high, between 4.7 to 5.2 standard deviations for women in total compensation (Table 1(a)) and between 2.6 and 5.28 for Asians (Table 2(a)).¹² Stated simply, a full \$300 million of the \$700 million in compensation discrimination for which OFCCP seeks redress here is based on gender and racial pay gaps in compensation Oracle paid to employees working in the *same global career level* within their job titles. Madden Rpt. Tables 8, 9. This means that even if this Court discards the channeling that Dr. Madden’s analyses show occurs at the point of job assignment, the disparities within a single job code at Oracle’s headquarters remain overwhelming. To be clear, Dr. Madden’s analysis in Column 8 does not look at all employees in the job code and treat them the same. It further compares employees to other employees in the same job code, at the same location (Redwood Shores), with the same experience (both in general and specific to the Company) and level of education.

At this point, Oracle runs out of explanations other than to assert broadly that it is too big and complicated to be studied, sentiments that are definitively at odds with Oracle’s obligations as a federal contractor and the requirement that Oracle must explain pay differentials based on “objective”—*i.e.*, measurable—factors. *See* 41 C.F.R. § 60-20.4(a). Oracle’s most consistent additional refrain is the need to consider the more granular variable “product” in the analysis. As OFCCP explained in its opening brief (and to which Oracle, to date, has *no* response), the product explanation is simply inconsistent with Oracle’s own handbook, trainings, and the testimony of Oracle’s Senior Director of Global Compensation, all of which instruct that an internal transfer within a career level, even to a different product line, will not result in an increase in compensation except in rare situations. *See* ORSUF Nos. 172-178. Oracle also does

¹² While the African American population is far smaller and thus, harder to establish statistical significance, even in this population the SDs are over 2 for the 2017-2018, more than sufficient to establish an inference of discrimination. Madden Table 3(b).

not contest that it has no database to keep track of product assignments and thus is unable to demonstrate how including “product” would alter Dr. Madden’s analysis. ORSUF Nos. 192. In short, the “product” explanation is not the silver bullet Oracle seeks. Instead, it is an undocumented, post-hoc rationale for pay differentials affirmatively at odds with Oracle’s pay trainings, its statements to its employees, its global job table system, and the lived experience of the people who actually work at Oracle.¹³

III. OFCCP’S SALARY DISCRIMINATION CLAIMS ARE UNREBUTTED

A. OFCCP Expressly Plead Salary Discrimination as a Component of Oracle’s Compensation Discrimination.

Oracle’s claim that it was not on notice that OFCCP’s compensation claims include all components of compensation, including salary, is not supportable as a matter of law. Far from being a “gotcha” claim OFCCP sprung on Oracle at the last minute (Opp. at 25), the Notice of Violations (NOV) and Show Cause Notice issued to Oracle during the investigation expressly relied on regression analyses that were based on salary. *See* OFCCP MSJ Motion, Exhibit 66, Appendix A. Rather than being a “new” claim, notice that OFCCP’s allegations include salary discrimination literally goes back to the very beginning of the dispute at issue in this litigation.

Oracle’s claim that the Second Amended Complaint (SAC) abandons differentials in salary as a component of OFCCP’s claims for the compensation discrimination is similarly frivolous.¹⁴ Paragraphs 11 and 12 of the SAC allege “compensation discrimination” in pay, which, according to OFCCP’s regulations, includes discrimination in “higher-paying wage rates” and “salaries.” 41 C.F.R. 60-20.4(a). The SAC then provides numerous examples of the types of analyses that support its contention of compensation discrimination (SAC ¶¶ 13-32).¹⁵ Just as with the NOV, *twelve* of these paragraphs describe discriminatory pay practices that are expressly centered on base pay or salary or expressly rely on regressions of base pay or salary.

¹³ OEx 7, Kolotouros Decl. ¶ 9; OEx 42 Sen Decl. ¶ 10; OEx 20 Powers Decl. ¶ 10.

¹⁴ This is not the first time Oracle has mischaracterized a claim as new. *See* Order Granting Motion to Amend, (March 6, 2019) (“I start with the addition of a reference to Oracle’s reliance on prior salary. Contrary to Oracle’s representations, this is not a new claim.”).

¹⁵ In Paragraph 11, OFCCP explained that “OFCCP’s models, results, and theories of causation will continue to be refined as additional discovery is obtained, and expert(s) evaluate the data and evidence.” SAC at 11.

See SAC 16, 22-32. Additionally, ¶¶ 18-21, relate to assignment discrimination in global career level—which is the key determinant of an employee’s salary range—directly relates to salary discrimination. As a matter of law, the SAC provides ample notice that OFCCP’s claims include discrimination based on differentials in salary.

B. Dr. Madden Explicitly Studied Salary Disparities and Oracle Chose Not to Respond.

Dr. Madden’s report put Oracle on clear notice that OFCCP was asserting disparities based on base pay or salary that it was required to rebut. The words “base pay” appear in Dr. Madden’s initial 58-page report and accompanying tables no less than **88** times, and salary is referenced 15 times. These numerous references to base pay and salary are not tucked in—they are repeatedly used in the introduction, section headers, and the headings of tables specifically devoted to regressions run exclusively on base pay. Oracle’s and Dr. Saad’s decision to simply not respond based on the false claim that OFCCP did not allege base pay violations is a risk Oracle knowingly took, leaving them in the position of conceding liability for base pay discrimination.

Oracle’s second explanation for not opposing OFCCP’s base pay findings—*i.e.*, some employees receive significant amounts of stock and bonus—is simply a non-sequitur. The regulations prohibit discrimination in each component of pay as well as total pay, including “wage rates, salaries, . . . *or* other opportunities on the basis of sex.” 41 C.F.R. § 60-20.4(b) (emphasis added). See also 41 C.F.R. § 60-20.4(e) (“[a] contractor will be in violation of Executive Order 11246 and this part any time it pays wages, benefits, *or* other compensation that is the result in whole or *in part*” of discrimination) (emphasis added). The record evidence shows that Oracle was on notice of OFCCP’s claims related to base pay and simply chose not to respond.

C. Oracle’s Attempt to Move the Goal Posts Regarding Base Pay Discrimination Must be Rejected.

Dr. Madden’s un rebutted findings of salary discrimination are extremely robust. Using the appropriate Column 6 of Dr. Madden’s analyses, the statistical evidence of salary discrimination is in the stratosphere, with standard deviations (SDs) for women between **12** and

15 (Madden Rpt, Table 1(d)), SDs between 6 to 8 for Asians (Madden Rpt, Table 2(d)) (except for 2018, where the SD is above 4), and above 3 for African Americans. Even if this Court were to conclude that the results of Column 8 (which includes global career level) is more appropriate for summary judgment, women are disadvantaged in base pay at incredibly robust statistical rates, with SDs ranging from between 7 and over 9 (Table 1(d)); Asians disadvantaged at between almost 4 to over 5 SDs (Table 2(d)), and African Americans disadvantaged at statistically significant rates in 2017 and 2018 (Table 3(b)).

The only piece of evidence Oracle points to in its reply brief to try to create a material dispute is a table that Dr. Madden produced showing that even under Dr. Saad’s approach—with which OFCCP vigorously disagrees—the findings corroborate rather than rebut OFCCP’s claim of salary discrimination.¹⁶ Trying to move the goal posts, Oracle changes its defense from stating there are no disparities *according to the analysis by its own expert*, to saying there are statistically significant disparities but they are not *that* bad. OFCCP is not arguing that extrapolating Dr. Saad’s flawed analysis to base pay is correct (as Oracle pretends is the case on page 26 of its Opposition). As OFCCP has said repeatedly in its Daubert motion and in other places, Dr. Saad’s approach is fundamentally unsound and has no basis in the factual record. What is remarkable is that even using the approach advocated by Oracle’s expert who has readily adopted all of Oracle’s litigation positions, Oracle *still* cannot erase the statistically significant disparities in base pay for most of the class in most of the years.

IV. OFCCP HAS ESTABLISHED ASSIGNMENT DISCRIMINATION

Oracle claims that OFCCP has not established assignment discrimination because Dr. Madden relies on statistics, and not Oracle’s actual practices, to prove the discrimination. Oracle is correct that Dr. Madden relies on statistical approaches of proof, but is wrong that OFCCP has relied on a “fictionalized version” of Oracle’s jobs and compensation system. In recounting the evidence, Oracle simply omits that Dr. Madden, as discussed above, has a very detailed rebuttal

¹⁶ As this Court knows, Oracle went so far as to file an emergency motion to strike this table and prevented its own expert from even looking at it. Oracle cannot simultaneously seek to exclude Dr. Madden’s table, while at the same time resting its entire defense regarding base pay on this same table.

to Dr. Saad's claim that the disparities can merely be attributable to relative application rates at different career levels. As set out in detail in OFCCP's Reply to Oracle's *Daubert* Opposition, the analyses Dr. Saad conducted and which Oracle relies upon here are erroneous for numerous reasons and should not be deemed admissible, let alone given weight.

V. OFCCP HAS NOT WAIVED ITS DISPARATE IMPACT CLAIMS OR FAILED TO SUPPORT ITS CLAIMS WITH ANECDOTAL EVIDENCE.

Oracle argues that because OFCCP has not asserted a disparate impact theory in its motion for summary judgment, Oracle argues that OFCCP's disparate impact claims should be dismissed. A party is not required to move for summary judgment on every possible issue or theory in the case, and *not* including a theory in a page-limited motion says nothing about whether the theory is viable. Oracle cannot reverse the purpose of a summary judgment motion from one in which a party seeks to prevail on an issue to a format where a party must file simply to preserve an issue. In any event, OFCCP has responded to Oracle's claim that OFCCP's disparate impact claims should be dismissed where it was more properly raised in Oracle's affirmative motion for summary judgment. OFCCP Opp. to MSJ, 15-16.

Similarly, Oracle faults OFCCP for not supporting its summary judgment claims with additional anecdotal evidence. While OFCCP certainly expects to support its case at trial with additional anecdotal evidence, OFCCP anticipated Oracle would simply respond to witness declarations with their own "happy camper" declarations in an attempt to create disputed facts. At this stage, OFCCP properly focused in its Motion for Summary Judgment on Oracle's own documents and the statistics that derive from Oracle's own data. This is an appropriate basis for summary judgment, and OFCCP has proven liability based on the undisputed facts revealed by Oracle's party admissions.¹⁷ Moreover, Oracle fundamentally misconstrues the nature of anecdotal evidence (which is not required where, as here, the statistics are robust) by suggesting

¹⁷ Oracle surprisingly cherry picks some items from OFCCP's attorney notes, which is not proper evidence, to try to land some points. Opp., 23. Obviously, should OFCCP attempt to use these notes for its own purposes, Oracle would object on strict evidentiary grounds, as it has made every conceivable (and novel) objection to the evidence possible in its 270 pages of evidentiary objections. This is yet another example of Oracle opportunistically trying to have it both ways—it sees no problem supporting its claims by cherry picking a few things it finds favorable from a vast catalogue of notes that are overwhelmingly supportive of OFCCP's case and which are clearly not admissible.

that witnesses must confirm “a systemic pattern or practice of pay discrimination.” Opp. at 22. The witness’s role is not to repeat the role of the statistics, but simply to bring the statistics “convincingly to life.” *Teamsters v. United States*, 431 U.S. 324, 339 (1977). In a compensation discrimination case, an individual employee would not know if they are the subject of a systemic practice. Indeed, witnesses testify that they were discouraged from talking about their pay with co-workers and reprimanded when they brought up pay issues.¹⁸ Here, OFCCP has provided ample support for its motion for summary judgment, including rigorous statistical analyses, Oracle’s own internal documents, and anecdotal evidence from the victims of Oracle’s discrimination.

CONCLUSION

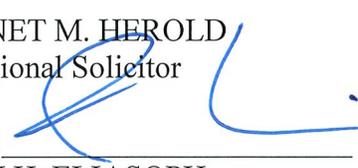
For the reasons explained in its initial Motion and in this Reply brief, OFCCP is entitled to summary judgment.

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Respectfully submitted,

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¹⁸ See Decl. Bhavana Sharma ¶ 13; Nicole Alexander ¶¶ 14-16, 18. As the Department acknowledged when implementing OFCCP’s pay transparency regulation under Executive Order 11246: “Underpaid employees, who may be paid less because of their gender or race, will remain unaware of the disparity if compensation remains hidden. . . . If a contractor’s employees are unaware of how their compensation compares to that of employees with similar jobs because the risk of punitive action inhibits discussions about compensation, employees will not have the information they need to assert their rights.” 80 Fed. Reg. 54934, 54937.