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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 RESPONSE TO ORACLE AMERICA INC.'S EVIDENTIARY
OBJECTIONS TO EVIDENCE IN SUPPORT OF OFCCP'S MOTION FOR SUMMARY
JUDGMENT**

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III. INTRODUCTION

The Court should disregard the 287-page evidentiary objections document (“Obj.”) that Defendant Oracle America, Inc. (“Oracle”) included with its Opposition to Summary Judgment. Oracle’s filing is replete with bad-faith objections to the authenticity of *its own business records*, to documents Oracle itself admitted were genuine in discovery, and hypocritically, to documents Oracle itself relies on in support of its own motion for summary judgment. Oracle moreover ignores the governing evidentiary standards, and also includes hundreds of arguments masquerading as “objections” that merely convey Oracle’s perception of the weight or relevance of the evidence—arguments that belong, if anywhere, in Oracle’s already maximum-length Summary Judgment opposition brief. Likewise, Oracle’s objections regarding Dr. Madden’s expert testimony, in addition to being meritless, are a bald attempt to circumvent the briefing limits and schedule for *Daubert* motions. For these reasons, and for all of the reasons stated below, OFCCP respectfully requests the Court disregard or overrule Oracle’s objections in full.¹

IV. ORACLE’S OVERDONE EVIDENTIARY OBJECTIONS LACK MERIT, AND SHOULD BE OVERRULED.

A. The Court Should Overrule Oracle’s Frivolous Objections to OFCCP’s Declarations, Deposition Testimony, and the Records Oracle Produced in Discovery

The Court should disregard the frivolous and bad-faith specific evidentiary objections for which Oracle could have no possible proper purpose. Oracle’s objections seem to have been authored by a poorly-tuned computer program intent on burying OFCCP (and this Court) with the largest possible number of individual objections, without any regard for whether Oracle itself relies on the exhibits in its own briefing or elsewhere, whether Oracle has already admitted to the authenticity of the documents, or whether the parties even have any relevant dispute regarding the fact for which the evidence is offered. Indeed, many if not most of the objections have to do with facts that Oracle does *not* dispute—even facts which Oracle itself has asserted as undisputed

¹ To the extent OFCCP, in attempting to sort through the enormity of this document in the one-week permitted for Reply, has missed anything, OFCCP reserves all arguments as to any objections that Oracle raises to the introduction of these documents at trial.

in its own motion for summary judgment.

Most fundamentally, Oracle ignores the applicable standards. It ignores the basic summary judgment standard for admissibility of evidence, which is not whether the evidence is currently in a form that would be admissible at trial, but rather that the material “*cannot be presented* in a form that would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2) (emphasis added); 41 C.F.R. § 60-30.1.² Then, when considering basic evidentiary questions such as authentication and hearsay, Oracle cites relevant OALJ standards, but wholly ignores the text and interpretation of those standards, up to and including *basic* concepts like the fundamental rule that out-of-court party admissions are not, in fact, hearsay at all. The effect is an overwhelming document, overflowing with irrelevant, misleading, and legally deficient objections that should be overruled in full.³

1. Oracle’s Objections as to Foundation, Personal Knowledge, and/or Speculation (#1) and Authentication (#7) are Frivolous and Should be Overruled

Oracle’s objections as to the authenticity of its own documents is consistent with its litigation practice through this case and they can only be intended to waste time. As OFCCP has explained in its Opposition to Oracle’s Motion for Summary Judgment (OFCCP MSJ Opp’n), Oracle obstructed OFCCP’s investigation by refusing to provide basic corporate documents and making false representations as to the feasibility of production of other key documents. OFCCP MSJ Opp’n at 20–21. Oracle then refused to provide these and other relevant documents in discovery until forced by rulings on OFCCP’s Motions to Compel. *See* Orders of June 19, 2017; Sept. 11, 2017, and May 16, 2019.

Now, in full keeping with this obstructive pattern, Oracle attacks the authenticity of the

² *See also Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003) (overruling objections and considering hearsay evidence at summary judgment because “depending on the circumstances, [it] could be admitted into evidence at trial in a variety of ways”); *Maurer v. Indep. Town*, 870 F.3d 380, 384 (5th Cir. 2017) (“After a 2010 revision to Rule 56, materials cited to support or dispute a fact need only be *capable* of being presented in a form that would be admissible in evidence.”) (citation and quotation marks omitted, emphasis in original).

³ In the very short time available, counsel has endeavored to address all of the arguments that Oracle has made. However, to the extent the Court entertains objections as to exhibits that the court believes to be material to OFCCP’s opposition to *Oracle’s* motion for summary judgment, OFCCP respectfully requests the opportunity to address any questions the Court may have about the admissibility of specific exhibits. *See* Fed. R. Civ. P. 56(e)(1).

very business records it provided in discovery, many of which Oracle has previously admitted are genuine or Oracle even relies on itself in its current briefing. Out of the 108 exhibits that OFCCP submitted, 16 are deposition transcripts, 10 are sworn declarations, 5 are expert reports or underlying documents that both parties have copies of, 13 are communications *between* the parties, and almost all of the final 64 documents are business records that Oracle itself produced in discovery. Oracle *knows* that all of these documents are authentic, and as such its objections are in bad faith and should be overruled. *See Fenje v. Feld*, 301 F. Supp. 2d 781, 789 (N.D. Ill. 2003) (“Even if a party fails to authenticate a document properly or to lay a proper foundation, the opposing party is not acting in good faith in raising such an objection if the party nevertheless knows that the document is authentic.”).

As an example, Oracle objects to the admissibility of its own training document “Global Compensation Training: Salary Ranges at Oracle” (Ex. 16), *see* Obj. at 97, stating that Mr. Garcia “does not offer any evidence to establish that he has personal knowledge of this document or is competent to testify about it,” and that “OFCCP offers no deposition testimony or other means to establish that this document is what OFCCP claims it is.” Obj. at 98-99. But Oracle admits that Mr. Garcia’s declaration “purports to establish only that this document was produced in discovery by Oracle.” *Id.* This knowledge is exactly the relevant information for the purpose of OFCCP’s motion that this Court requires. In Oracle’s responses to Requests for Admission, Oracle admits that this document, as bates numbered in discovery, was a “true cop[y]” of a “genuine original document.” OFCCP MSJ, Garcia Decl., Ex. 2 at 31 (response to RFA No. 40). By attesting to its receipt in discovery, Mr. Garcia’s declaration closes the loop on Oracle’s frivolous objection.⁴

Abandoning any pretext that its objections are in good faith, Oracle objects to the admissibility of documents that Oracle itself relies on in its own motion for summary judgment.

⁴ The same is true and responds to Oracle’s objections to its own Employee Handbook (Ex. 11), its Global Approval Matrices from 2012-2017 (Ex. 20), the “Global Compensation: Total Compensation” document (Ex. 10), the “Manager Training: Compensation Process for Global Corporate Bonus & Fusion Workforce Compensation” (Ex. 25), Oracle College Recruiting document (Ex. 40), Oracle’s Global Job Table (Ex. 15), the “Oracle Recruiting Program Manager (RPM) Training Manual” (Ex. 39), and the “Global Compensation Training: Compensation Processes” (Ex. 22).

This includes the documents like the “Global Compensation Training: Salary Ranges at Oracle” (Ex. 16) and Oracle’s “Managing Compensation” document (Ex. 13). *See supra*; Oracle MSJ, Waggoner Decl., Exs. C, E. It includes communications between the parties in March and April of 2016 (OFCCP’s Exs. 67 and 69). *See* Oracle MSJ, Siniscalco Decl., Ex. C & Holman-Harries Decl., Ex. X.⁵ It also includes a host of documents that Oracle’s own expert relied on and that formed the basis of *Oracle’s own expert’s report*.⁶

In any case, 29 C.F.R. § 18.901(a), like Federal Rule of Evidence 901(a), permits authentication “by evidence sufficient to support a finding that the matter in question is what the proponent claims.” These documents produced *by Oracle* during discovery, bearing Oracle’s own corporate logo, copyright, and bates numbers, are undoubtedly authentic for the purposes of Rule 901. *See* 29 C.F.R. § 18.901(b)(4) (stating that the authentication requirement can be satisfied by “[t]he appearance, contents, substance, . . . or other distinctive characteristics of the item, taken together with all the circumstances”); *Ellen Liznick v. Nektar Therapeutics, Inc.*, OALJ No. 2006-SOX-00093, 2007 WL 5596626 (Nov. 16, 2007) (overruling authentication objections as to materials obtained in discovery from objecting party).⁷ Mr. Garcia’s declaration under penalty of perjury attesting that these documents are the same documents that Oracle produced in discovery relieves any possible measure of doubt about authenticity.

Oracle’s authenticity and foundation objections are frivolous and designed only for the improper purpose of delaying and distracting the Court from determining the merits of this case.

⁵ In any case, it is nonsensical for Oracle to object to any communications between the parties, such as Shauna Holman-Harries’s February 10, 2015 e-mail to OFCCP (OFCCP’s Exhibit 42), which can easily be authenticated by the sender or recipient at trial. *Fraser*, 342 F.3d at 1037.

⁶ Among these are Oracle’s “Global Compensation Training: Managing Pay Module” (Ex. 18), its Employee Handbook (Ex. 11), the “Global Compensation Training: Salary Ranges at Oracle” (Ex. 16), Oracle’s “New Manager Training: Compensation Processes/Compensation Workbench” (Ex. 26), Oracle’s “Memorandum: Investigation Results” (Ex. 32), Oracle’s Request for Dive-and-Save Salary Adjustment (Ex. 33), “Oracle’s Eligibility: FY14 Focal Stock Grant” (Ex. 79), and Oracle’s “Stock Options/Restricted Stock Units (RSUs) FAQ-June 2016” (Ex. 83). *See* Oracle MSJ, Decl. of Erin Connell, Ex. M (Expert Report of Dr. Saad) at nn.20, 22-23 & Attachment B.

⁷ *See also Las Vegas Sands, LLC, v. Nehme*, 632 F.3d 526, 533-534 (9th Cir. 2011) (finding letter potentially authenticated by review of contents and distinctive characteristics under Rule 901(b)(4)); *Anand v. BP W. Coast Prod. LLC*, 484 F. Supp. 2d 1086, 1092 n.11 (C.D. Cal. 2007) (finding documents produced in discovery self-authenticating for the purpose of summary judgment); *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 781 (C.D. Cal. 2004) (citing *Orr v. Bank of America*, 285 F.3d 764, 777 n.20 (9th Cir. 2002)); *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 46-47 (2d Cir. 2015); *Law Co. v. Mohawk Const. & Supply Co.*, 577 F.3d 1164, 1170 (10th Cir. 2009).

2. Oracle's Hearsay (#2) and Best Evidence (#8) Objections are Frivolous and Should be Overruled

Despite Oracle's recitation of the definition of Hearsay, it conveniently ignores that party admissions are not hearsay. Fed. R. Evid. 801(d)(2). This approach allows it to wrongly attack the declarations from Oracle employees or former employees that reference statements made by the employees' managers. Obj. at 225, 228, 239, 243–245; *see* Fed. R. Evid. 801(d)(2)(D); *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 498 (9th Cir. 2015). Likewise, the entirety of Lisa Gordon's signed statement as Oracle's Director of Compensation is a party admission and therefore nonhearsay. Obj. at 155-156; *see Weil v. Citizens Telecom Servs. Co., LLC*, 922 F.3d 993, 1000 (9th Cir. 2019). The same is true for Kristen Hanson Garcia's recounting of the statement—**that Oracle should hire a woman because she will work harder for less money**—by Joyce Westerdahl, Oracle's Executive Vice President for Human Resources. *See* Obj. at 236 (Ex. 102, Decl. of Hanson Garcia ¶7); OFCCP's SUF No. 42.

Oracle's other hearsay objections are also frivolous. A number of the objections are to deposition transcript excerpts in which various documents were used to prompt deponents to discuss their personal knowledge about the same matters the documents describe. The testimony in such cases is simply not about the documents, but about the deponents' personal knowledge. *See* Obj. at 50-53 (Holman-Harries PMK 213:3-10). Oracle's objection software again fails. *Cf. Fraser*, 342 F.3d 1037 (noting “even inadmissible evidence may be used to refresh a witness's recollection”); *Stonefire Grill, Inc. v. FGF Brands, Inc.*, 987 F. Supp. 2d 1023, 1039 (C.D. Cal. 2013) (noting that although expert rebuttal report was hearsay, expert to could testify to portions of report from personal knowledge).

While levying these improper hearsay objections, Oracle conversely and improperly objects that the documents being used to prompt the testimony at issue are themselves the “best evidence.” *E.g.*, Obj. at 51. But, as with the hearsay objections, such objections ignore that the deposition testimony being offered is based on the deponent's personal knowledge separate and apart from the documents used to prompt them. *See Kiva Kitchen & Bath, Inc. v. Capital Distrib., Inc.*, 681 F. Supp. 2d 807, 812 (S.D. Tex. 2010) (“[B]est evidence rule is entirely

inapplicable because the Court allowed the documents' use only to refresh the witness's recollection and not for purposes of proving the documents' content.”). Oracle's other best-evidence objections are all entirely unnecessary, as they attack basic testimony with regard to facts that Oracle admits are undisputed. And these facts are undisputed for obvious reasons—supported by the very “best evidence” documents themselves—all of which are also submitted into the record. *See e.g.*, Obj. at 23-24 (objecting to Shauna Holman-Harries testimony that Oracle had received a Show Cause Notice).

3. Oracle's Objections as to Relevance (#5), Vagueness (#4), and Lack of Support for Fact (#3) are Improper

Finally, Oracle makes countless unnecessary and improper relevance objections that—if they had any merit at all—would belong in Oracle's underlying opposition briefs. *See Bischoff v. Brittain*, 183 F. Supp. 3d 1080, 1084 (E.D. Cal. 2016). An example of this wasteful exercise includes 25 pages of relevance objections to *individual paragraphs* within OFCCP's witness declarations. Obj. at 220–245. Nor should Oracle have burdened the Court with hundreds of objections claiming that the “evidence does not stand for the proposition it is cited to support.” What is that objection? Such an objection is not an objection to the admissibility of the evidence, but rather an argument about whether there is a genuine dispute of fact, and it does not belong in a separate objections brief. Courts are fully justified in disregarding such misplaced “objections.” *Bischoff*, 183 F. Supp. 3d at 1084 (citing *Becker v. Wells Fargo Bank NA, Inc.*, No. 10–2799, 2014 WL 3891933, at *2 (E.D. Cal. Aug. 7, 2014)).⁸

Oracle's vagueness objections are similar attempts to litigate whether a fact is disputed.

⁸ In various places, Oracle has objected where it alleges OFCCP omitted excerpts from the deposition exhibits attached to the motion. Some of these objections are incorrect. *See* Obj. at 152 (incorrectly alleging page 321 of the Westerdahl deposition was not filed). Others are moot, such as the objections regarding Holman-Harries depositions, *see* Obj. at 158-60, 268, because the full transcripts for both of Ms. Holman-Harries's depositions were filed with OFCCP's opposition to MSJ and thus are in the record, *see* OFCCP Opp'n to MSJ, Bremer Decl., OEx. 5 (May) & OEx. 31 (Aug. PMK). To cure the few remaining inadvertent omissions, OFCCP provides the missing excerpts here as exhibits to the attached Declaration of David Edeli. *See* Fed. R. Civ. P. 56(e)(1); *Californians for Alternatives to Toxics v. Schneider Dock & Intermodal Facility, Inc.*, 374 F. Supp. 3d 897, 907 (N.D. Cal. 2019) (overruling objection where missing deposition certification provided later). Finally, Oracle's objection to the Saad Report ¶141 citation in SUF 192, *see* Obj. at 216, catches a typo in the page number. The paragraph number is correct, and the correct page number is indeed page 108.

In one particularly telling example, OFCCP supports a fact that Oracle managers are not required to perform formal performance evaluations with the following deposition testimony from Kate Waggoner's 30(b)(6) deposition:

Q. (By Mr. Song) Okay. So performance reviews are not required –

A. They are not.

Q. – At Oracle?

Ex. 27, Waggoner PMK Dep. 228:6-9. This statement is not vague, as Oracle objects. *See* Obj. at 122. It simply is a statement that Oracle does not like.

The voluminous objections in this 287-page document are made in bad faith and for an improper purpose. Even if they were not, the repetitive and unnecessarily overwhelming document “defeat[s] the objectives of modern summary judgment practice—namely, promoting judicial efficiency and avoiding costly litigation.” *Burch v. Regents of Univ. of California*, 433 F. Supp. 2d 1110, 1122 (E.D. Cal. 2006). In sum, and for all of the above reasons, OFCCP respectfully requests the Court overrule Oracle's hundreds of pages of specific objections to evidence.

B. The Court Should Admit Dr. Madden's Testimony Cited by OFCCP in its Summary Judgment Motion, and Reserve Ruling on all Other Admissibility Issues.

Dr. Madden's October 11, 2019 declaration and the attached Tables are not new opinions for purposes of Federal Rule of Civil Procedure 26(a)(2)(B) because they are not additional bases or reasons for Dr. Madden's conclusions in her timely disclosed reports. They are elaborations of her opinions, or provide a synthesis of her opinions and Dr. Saad's opinions, showing the overlap. The Tables are highly relevant and helpful to the fact-finder. As described in OFCCP's reply to Oracle's summary judgment motion, Oracle uses its expert in an attempt to poke holes in Dr. Madden's analysis without providing evidence that his criticisms make a difference to Dr. Madden's analysis (as is required under Title VII case law). The tables at issue show that Dr.

Saad's critiques do not make a difference.

Moreover, Oracle is not harmed by Dr. Madden's elaboration of her opinions or efforts to synthesize the experts' opinions, which are extremely useful to the fact-finder. Indeed, it will be misleading if Dr. Madden is unable to answer critiques of her models, leading to the false impression that such critiques are valid. Furthermore, any theoretical harm Oracle may now suffer—which OFCCP strongly disputes—is entirely of Oracle's own making.⁹

4. Oracle may not use evidentiary objections to OFCCP's motion for summary judgment as an untimely, second Daubert motion

Oracle refashions its *Daubert* motion into an objection, arguing that Dr. Madden's Reports, and the tables attached to her October 11, 2019 declaration are irrelevant and unreliable for the same reasons it asserted in its *Daubert* motion (primarily the faulty argument that Dr. Madden does not compare similarly situated employees). Obj. at 11-12, 16. A second round of *Daubert* briefing is not permitted under the Court's Scheduling Order. Oracle's regurgitation of the same arguments it already made in its first *Daubert* motion highlights the fact that Dr. Madden's methodology and approach shown in Tables A through D are not new. Appropriately, OFCCP's responses to Oracle's attacks on Dr. Madden and her methodology are addressed in OFCCP's Opposition to Oracle America, Inc.'s Motion to Exclude the Expert Report and Testimony of Janice Fanning Madden, Ph.D,

5. Dr. Madden's Declaration and Attached Tables Are Relevant

a) Oracle's Reliance on Exhibit D to Dr. Madden's October 11th Declaration in Its Opposition to OFCCP's Motion for Summary Judgment Undercuts Its Argument that It Is Unreliable and Irrelevant.

Exhibit D to Dr. Madden's Declaration does not reflect a new opinion by Dr. Madden. As Oracle explained in its Objection, Dr. Saad "has not presented an independent from the ground up model." Obj. 16, n.6. Instead, he merely "critique[d] OFCCP's statistical evidence." Obj. at 16, n.6. Not until Dr. Saad's rebuttal report did he critique Dr. Madden.¹⁰ Oracle claims that

⁹ Indeed, Oracle has submitted its own Declaration of Dr. Saad in support of its Evidentiary Objections here—clearly negating Oracle's claim that experts may not provide supplemental testimony in response to each other.

¹⁰ Dr. Saad's first report critiqued the statistical model OFCCP used to support its Second Amended Complaint,

Tables 1-5 in Dr. Saad's rebuttal report "modif[y] Dr. Madden's models" in her initial report so as to "correctly" measure "total compensation," by disaggregating Dr. Madden's model by job function and adding "additional variables." Obj. at 16, n.6. In preparation for OFCCP's cross-examination of Dr. Saad, Dr. Madden re-ran Dr. Saad's Tables 1-5, using base pay¹¹ instead of total compensation. Madden Decl. ¶ 8. Column 6 of Tables D-1 through D-5 show that even using Dr. Saad's approach of disaggregating job function and adding variables (which Dr. Madden opined were inappropriate in her rebuttal report), statistical disparities remain between men and women and minorities in many years. In fact, Oracle relies on these tables in opposing OFCCP's summary judgment motion, tacitly admitting they are neither irrelevant nor unreliable. *See* Oracle's MSJ Opp. at 25-27. To the contrary, Oracle's reliance on these tables constitutes an admission that Dr. Madden's extrapolation as presented in Tables D-1 to D-5 was mathematically correct and relevant to these proceedings.

Oracle seeks to exclude these tables not because they are unreliable and irrelevant, but because they are so damaging to Oracle. Column 7 of Tables D-1 through D-5 shows that if Oracle's Organization variable is removed (as Dr. Madden has consistently opined should be done), even disaggregating job function and using other variables that Dr. Saad did in Tables 1-5 of his rebuttal report, there are large statistically significant disparities in the base pay based on race and gender in every year. *See* Tables D-1 to D-5. In other words, applying the approach Dr. Saad claimed should be used with one modification (removing the Organization variable) results in statistical evidence of compensation discrimination in base pay.

b) Table A-1 through A-5, Responding to Dr. Saad's Critique that She Did Not Consider Majors, Are Highly Relevant and Reliable

The relevance of Tables A-1 through A-5 are demonstrated by Oracle's summary

which OFCCP has repeatedly stated would be superseded by the expert report its expert would present at trial. Given that defendants in systemic discrimination cases rarely prevail by merely poking holes in plaintiffs' expert reports, OFCCP did expect that Dr. Saad's opinions would be presented in his initial report, and that its expert would have the opportunity to rebut them in her rebuttal report.

¹¹ Dr. Madden did not "shift to base pay." Obj. at 17. She analyzed base pay in her original report. Dr. Saad did not respond to this portion of her report, perhaps because he could not make the disparities disappear, even when he added variables. (Moreover, OFCCP's NOV and Second Amended Complaint both included analyses of base pay.) OFCCP's Reply to Oracle's Opposition to Motion for Summary Judgment at 11-13.

judgment brief, which claims that Dr. Madden’s methodology of using job descriptor as a proxy for education was “deeply flawed,” and that she should have instead used data for educational major. (Oracle MSJ at 16.) In her initial report, Dr. Madden included educational degree and job descriptors (which she used to identify people likely to have similar majors and similar types of experiences) in her regression analysis.¹² After Dr. Saad’s rebuttal report criticized Dr. Madden’s analysis for omitting college major and field of study (variables that Dr. Saad had not mentioned in his initial report),¹³ Dr. Madden tested the validity of Dr. Saad’s critique by including Dr. Saad’s classifications of majors (as listed in his rebuttal report) in her analysis described in her initial report.¹⁴ Her test showed that “adding college major has no substantial effect on the size or significance of the race and gender differences in compensation.”¹⁵ Dr. Madden’s tables bolster her original opinions contained in her reports by impeaching Dr. Saad’s criticisms of the educational factors included in her model. They are highly relevant, since they directly respond to Dr. Saad’s critiques. (OFCCP discusses the educational variable of Dr. Madden’s models further in its opposition to Oracle’s motion to exclude Dr. Madden, pp. 10-11.) Again, it is clear that Oracle seeks to suppress Tables A-1 to A-5 precisely because they provide a response to Dr. Saad’s critiques of Dr. Madden, rather than leaving them unanswered.

If Dr. Madden cannot explain that using Dr. Saad’s preferred education variable, rather than the one she used in the model described in her report, does not change the result, the Court will be left with the false impression that she left out a variable that could explain the pay differentials between men and women, when in fact, there is no significant difference in outcome between the approach Dr. Madden used and the one suggested by Dr. Saad.

c) Table B, Responding to Dr. Saad’s Arguments About Requisitions, Are Relevant and Reliable

As she explains in her November 7, 2019 declaration, Dr. Madden responded to Dr. Saad’s opinion that Oracle’s assignments of hires to a global career level were race and gender

¹² Garcia Decl., Ex. 91, Dr. Madden’s July 19, 2019 Initial Expert Report & Ex. 90, Madden Dep. at 175:2-176:18.

¹³ See Saad Dep. Ex. 9, (Madden Decl.) at ¶ 3

¹⁴ See Saad Dep. Ex. 9, (Madden Decl.) at ¶ 4.

¹⁵ See Saad Dep. Ex. 9, (Madden Decl.) at ¶¶ 4-5, tables A-1 to A-5.

neutral, by using *Dr. Saad's data* on requisitions to which applicants had applied to control for the global career level listed in the requisitions.¹⁶ She provided these results in her Rebuttal Report. When Dr. Saad complained that Dr. Madden had only looked at the two largest pools of requisitions, she used the same methodology as described in her rebuttal report (and the same data Dr. Saad had used), simply applying it to each global career level and year combination. Madden Nov. 7, 2019 Decl. (filed with OFCCP's Reply to Oracle's Opp'n to Mot. to Exclude Dr. Saad), ¶¶ 3-6. Her results, shown in Table B, show that Oracle systemically assigned Asians and Women to lower global career levels, contrary to Dr. Saad's position in his rebuttal report.¹⁷ See OFCCP's Opp'n to Oracle's Mot. to Exclude Dr. Madden pp. 14-15 (describing Tables in Dr. Madden's rebuttal report, and Table B).

Dr. Madden attempted to discuss this analysis in the deposition, explaining that when Dr. Saad's data is analyzed, it shows women are significantly disadvantaged.¹⁸ Again, Oracle repeatedly sought to prevent Madden from providing complete answers to their questions at her deposition.¹⁹ Ignoring Table B, Oracle relies on Dr. Saad's reports to argue that it did not discriminatorily assign employees to lower paying positions, because "applicants were hired into the positions for which they applied." Oracle's MSJ at 17. Table B provides the response that Oracle seeks to suppress.

d) Table C, Responding to Dr. Saad's Arguments About Salary Ranges Is Relevant and Reliable.

Finally, to respond to Dr. Saad's assumptions about salary ranges, Dr. Madden created Exhibit C to illustrate that there were differences in pay for Oracle women, Asian, and black employees compared to whites or male employees even within the salary ranges Dr. Saad identified for the job functions analyzed in this case.²⁰ Oracle bases its efforts to exclude Table C on its attorneys' characterization of Table C, without support by an expert declaration (as it

¹⁶ Saad Dep. Ex. 9, (Madden Decl.) at ¶ 6.

¹⁷ Saad Dep. Ex. 9, (Madden Decl.) at ¶6, Table B.

¹⁸ Madden Dep. at 190:4-17.

¹⁹ See, e.g., Madden Dep. at 191:16-194:3 (explaining that the subsequent analysis puts the original backup files in the larger context; "if you're asking how to interpret this, I have to answer this way").

²⁰ Saad Dep. Ex. 9, (Madden Decl.) at ¶ 7, Ex. C.

submitted regarding Exhibit B).

6. Dr. Madden’s Declaration and Attached Tables Are Not Untimely, and Even If They Were, Any Prejudice to Oracle Has Been Cured

Oracle contends that Dr. Madden’s October 11, 2019 declaration²¹ should be excluded as untimely. OFCCP maintains that Dr. Madden’s October 11th declaration and exhibits attached thereto are not “new” analyses and contain no shift in Dr. Madden’s bases or reasons for her conclusions regarding stark pay disparities at Oracle and some of the specific Oracle practices responsible for such disparities such as channeling employees into lower career levels.²² Indeed, while the parties’ vigorously dispute the probative value and reliability of the other’s respective expert, Oracle appears to concede that Dr. Madden’s October 11th declaration and exhibits thereto are not the type of “fundamental” change in methodology, data, or reasons underlying her conclusions that warrant exclusion under Federal Rule of Civil Procedure 37.²³ Dr. Madden’s tables provide elaboration of her opinions and synthesis of the experts’ opinions and approaches, as is typical and helpful to the Court.

b) Rule 26 Does Not Prohibit Dr. Madden from Supplementing or Elaborating Upon Her Opinions, or Synthesizing the Opinions.

²¹ Corrected Declaration of Norman E. Garcia (Oct. 30, 2019), Ex. 89 at Ex. 9 (“Madden Oct. 11th Decl.”).

²² OFCCP’s MSJ at pp. 19-20.

²³ Obj. at 16 (“None of Dr. Madden’s new analyses correct the fundamental failures of her approach described *supra*...); see *Asia Vital Components Co. v. Asetek Danmark A/S*, 377 F. Supp. 3d 990, 1005 (N.D. Cal. 2019) (citations omitted); see *Fujifilm Corp. v. Motorola Mobility LLC*, 2015 WL 12622055, at *4 (N.D. Cal. Mar. 19, 2015) (citing *nCube Corp. v. SeaChange Int’l, Inc.*, 809 F. Supp. 2d 337, 347 (D. Del. 2011) (“When determining whether an expert’s testimony is beyond the scope of the expert’s written report, courts do not require verbatim consistency with the report, but allow testimony which is consistent with the report and is a reasonable synthesis and/or elaboration of the opinions contained in the expert’s report.”); *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 585 F. Supp. 2d 568, 581 (D. Del. 2008) (“In determining whether an expert’s testimony has exceeded the scope of his or her report, the Court has not required verbatim consistency with the report, but has allowed testimony which is consistent with the report and is a reasonable synthesis and/or elaboration of the opinions contained in the expert’s report.”); *Massachusetts Mut. Life Ins. Co. v. DB Structured Prod., Inc.*, 2015 WL 12990692, at **3-4 (D. Mass. Mar. 31, 2015) (“The practical reality is that experts often will not be in a position to predict every challenge or critique of their analysis at the time of the original report. ... [A] ‘late’ expert declaration submitted in response to criticisms of the expert’s opinion or methodology contained in a *Daubert* motion or motion for summary judgment is permissible as long as it is consistent with the overall opinion or methodology in the original report and merely provides additional subsidiary details, support, or elaboration. ... On the other hand, if the declaration submitted after the close of expert discovery differs substantially from the report, offers a whole new theory, opinion, or methodology, or is outside of the scope or general scheme of the report, then it is an improper supplementation.”) (citations omitted).

Oracle argues that disclosure of Dr. Madden’s response to Dr. Saad’s rebuttal report by way of a declaration and related charts violates Rule 26(a)(2)(B), which requires that an expert produce, in relevant part, a report which contains, “(i) a complete statement of all opinions the witness will express and the basis and reasons for them,” and “(ii) the facts or data considered by the witness in forming them.”²⁴ Oracle misreads Rule 26(a)(2)(B) and the case law interpreting it. “The purpose of [Rule 26(a)(2)(B)] is to eliminate unfair surprise to the opposing party. But it does not limit an expert’s testimony simply to reading his report[.] The rule contemplates that the expert will supplement, elaborate upon, and explain his report in his oral testimony.”²⁵

Exhibits A-D to Dr. Madden’s Oct. 11th Decl. do not alter in any way her opinion regarding pay disparities at Oracle nor the mechanisms by which such disparities arise. Oracle’s attempt to limit Dr. Madden’s testimony to a verbatim reading of her expert reports is improper and belied by Oracle’s own examination of Dr. Madden, during which Oracle posed hypotheticals eliciting testimony outside the four-corners of Dr. Madden’s reports.²⁶ At bottom, Oracle takes inconsistent litigation positions to suit its tactical ends: eliciting Dr. Madden’s responses to its hypothetical queries at deposition to prepare its expert for trial, but complaining when Dr. Madden similarly seeks to elaborate on the bases of her opinions and respond to hypotheticals that support of OFCCP’s motion for summary judgment. Oracle’s contradictory litigation positions further underscore that its goal is to protect Oracle from damaging testimony.

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

²⁴ Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii).

²⁵ *Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007); *Roach v. Hughes*, 2015 WL 3970739, at *9 (W.D. Ky. June 30, 2015) (denying motion to exclude expert’s testimony not expressly in his report because “while the opinion is not expressly stated in Dr. Shraberg’s report, the Court finds that it is consistent with the report, is a reasonable elaboration of the opinions contained in the report, and was in response to questioning by Plaintiffs’ counsel”); *Heller v. D.C.*, 952 F. Supp. 2d 133, 138–39 (D.D.C. 2013) (“The expert report, then, is not the end of the road, but a means of providing adequate notice to the other side to enable it to challenge the expert’s opinions and prepare to put on expert testimony of its own. ... Where Defendants have provided adequate notice of the opinions they expect these experts to offer and Plaintiffs have had and continue to have opportunities to challenge these conclusions, the goals of Rule 26(a) are satisfied, and there is no basis for striking the reports and preventing these experts from testifying.”); *Hall v. City of Fairfield*, 2012 WL 1155666, at *4 (E.D. Cal. Apr. 5, 2012).

²⁶ Garcia Decl., Ex. 90, Deposition of Dr. Janice F. Madden (“Madden Dep.”) at 68:20-69:3 (“Q: ... Dr. Madden ... I’m going to first ask you to assume something for the purposes of the question. I’m going to asking you to assume that you’re reviewing a hypothetical data set that contains no information what whatsoever with the type of educational attainment, the level of educational attainment of employees. Do you understand the assumption I’m asking to you make? A. Yes.”).

Only if expert testimony “goes beyond ‘a reasonable synthesis and/or elaboration of the opinions contained in [his] report’” does a Court consider whether to permit such tardy testimony as substantially justified or harmless, or to exclude it under Rule 37.²⁷

Ignoring Dr. Madden’s health issues, Oracle claims that OFCCP cannot justify a six-week delay in providing the Tables to Oracle. The delay of approximately two weeks past the 30 day-period during which OFCCP could have submitted a supplemental report as of right to respond to Dr. Saad’s rebuttal report was justified by Dr. Madden’s temporary disability. Fed. R. Civ. P. 26(a)(2)(D)(ii). As OFCCP explained in opposition to Oracle’s motion for a protective order, Dr. Madden was in the process of preparing the charts at issue before September 5, 2019, when Dr. Madden had her first medical procedure.²⁸ In early October, as soon as Dr. Madden’s vision began returning, she finalized the charts.²⁹ On October 3, 2019, she finalized Tables A-1 to A-5 and D and sent them to OFCCP, who forwarded them to Oracle that same day, providing advanced warning that OFCCP intended to use them in the upcoming depositions.³⁰ OFCCP wanted Oracle and its counsel to have time and opportunity to review the results of the analyses prior to the deposition, in order to make the most productive use of both parties’ deposition examinations of the experts. On October 9, 2019, after meeting with counsel for OFCCP in preparation for her deposition, Dr. Madden finalized two additional tables (Tables B and C) and

²⁷ *Asia Vital Components Co. v. Asetek Danmark A/S*, 377 F. Supp. 3d 990, 1005 (N.D. Cal. 2019) (citations omitted); see *Fujifilm Corp. v. Motorola Mobility LLC*, 2015 WL 12622055, at *4 (N.D. Cal. Mar. 19, 2015) (citing *nCube Corp. v. SeaChange Int’l, Inc.*, 809 F. Supp. 2d 337, 347 (D. Del. 2011) (“When determining whether an expert’s testimony is beyond the scope of the expert’s written report, courts do not require verbatim consistency with the report, but allow testimony which is consistent with the report and is a reasonable synthesis and/or elaboration of the opinions contained in the expert’s report.”); *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 585 F. Supp. 2d 568, 581 (D. Del. 2008) (“In determining whether an expert’s testimony has exceeded the scope of his or her report, the Court has not required verbatim consistency with the report, but has allowed testimony which is consistent with the report and is a reasonable synthesis and/or elaboration of the opinions contained in the expert’s report.”); *Massachusetts Mut. Life Ins. Co. v. DB Structured Prod., Inc.*, 2015 WL 12990692, at **3-4 (D. Mass. Mar. 31, 2015) (“The practical reality is that experts often will not be in a position to predict every challenge or critique of their analysis at the time of the original report. ... [A] ‘late’ expert declaration submitted in response to criticisms of the expert’s opinion or methodology contained in a *Daubert* motion or motion for summary judgment is permissible as long as it is consistent with the overall opinion or methodology in the original report and merely provides additional subsidiary details, support, or elaboration. ... On the other hand, if the declaration submitted after the close of expert discovery differs substantially from the report, offers a whole new theory, opinion, or methodology, or is outside of the scope or general scheme of the report, then it is an improper supplementation.”) (citations omitted).

²⁸ Bremer Decl., Ex. B, Deposition of Dr. Janice F. Madden (“Madden Dep.”) at 240:11-242:21.

²⁹ Madden Dep. at 240:11-242:21.

³⁰ Connell Decl., Ex. D and E; Bremer Decl. at ¶ 2.

OFCCP provided them to Oracle.³¹ Thus, OFCCP provided all of the tables at issue in advance of the depositions—most of them a full week before Dr. Madden’s deposition.³²

Further, to the extent the Tables were untimely, admission does not disturb “the substantial rights” of Oracle.³³ Mere “surpris[e]” is insufficient.³⁴ Dr. Madden’s fundamental opinions remained the same. Applying Dr. Saad’s methodology to base pay (Table D), adding major as a variable to her tables as Dr. Saad said she should have done (Table A), applying the same methodology in her rebuttal to additional pools of employees as Dr. Saad said she should do (Table B), and comparing employees with the same salary ranges to respond to Dr. Saad’s opinions about salary ranges (Table C) does not deprive Oracle of substantial rights. Contrary to Oracle’s previous representations³⁵ that addressing Dr. Madden’s October 11th declaration would cause “logistical burdens and expenses” due to the “complex[ity]” of the statistical analyses at issue, Oracle was able to procure a declaration³⁶ from Dr. Saad substantively attacking Exhibit B.³⁷ Dr. Saad undoubtedly could have addressed the other Tables, if it had a response. Oracle’s reliance on Table D in its opposition to summary judgment motion demonstrates that it has no response to Table D (other than whether the Organization variable should be included in the analysis – a variable that Dr. Madden opined is inappropriate to include in her rebuttal report).

As Courts have noted, “exclusion of expert testimony is a drastic remedy.” *S.W. v. City of New York*, No. CV 2009-1777 ENV MDG, 2011 WL 3038776, at *4 (E.D.N.Y. July 25, 2011) (citations omitted). “[L]etting the [moving party] know before trial how the [non-moving

³¹ Connell Decl, Ex. E.

³² Mot. p. 4.

³³ See *Muldrow*, 493 F.3d at 168 (citing Federal Rule of Civil Procedure 61).

³⁴ *Id.*

³⁵ Oracle’s October 11, 2019 Motion for Protective Order at p. 10.

³⁶ Declaration of Dr. Ali Saad in Support of Oracle’s Objections to Evidence in Support of OFCCP’s Motion for Summary Judgment, dated October 30, 2019.

³⁷ Although Oracle acknowledges that OFCCP only cites to Exhibit D to Dr. Madden’s Oct. 11th Decl. in support of its motion for summary judgment, Oracle inexplicably directed Dr. Saad to address Exhibit B to the same declaration instead of curing any supposed harm by addressing any perceived flaws in Exhibit D. Dr. Saad’s silence as to Exhibit D, particularly given the hundreds of pages of overdone objections lodged by Oracle in this motion practice, underscores that any harm Oracle experiences from the Court’s consideration of Exhibit D is entirely of its own making.

party's] expert witness will support the [non-moving party's] case"³⁸ cuts against any showing of prejudice and exclusion of said evidence on that basis. Here, OFCCP provided the Tables during expert discovery and in advance of expert depositions. Courts typically find that any prejudice is curable when the non-movant produced the report before the expert's deposition.³⁹ As explained in OFCCP's previous opposition to Oracle's motion for a protective order, any prejudice resulting from Oracle's decision to withhold the Tables from Dr. Saad in advance of his deposition and decision not to question Dr. Madden about them, is entirely self-inflicted.⁴⁰

Finally, admitting the Tables will serve the ends of justice.⁴¹ Here, as in *Reg'l Multiple Listing Serv. of Minnesota, Inc. Am. Home Realty Network, Inc. v. Edina Realty, Inc.*, No. CV 12-0965 (JRT/FLN), 2014 WL 12616728, at *1–2 (D. Minn. Apr. 16, 2014), "admission of the report will help ensure all issues in this case are fully addressed on the merits."

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³⁸ *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 2012 WL 12885083, at *1 (N.D. Tex. Aug. 3, 2012). As stated above, OFCCP does not rely on Exhibit B to Dr. Madden's October 11th declaration in support of its motion for summary judgment, and thus, the Court need not consider this material at this juncture.

³⁹ *Novartis Pharm. Corp. v. Actavis, Inc.*, No. CV 12-366-RGA-CJB, 2013 WL 7045056, at *10 (D. Del. Dec. 23, 2013) (citing *Invista N. Am. S.A.R.L.*, 2013 WL 3216109, at *2 (finding that even if there were some prejudice with respect to expert's supplemental report, any such prejudice was curable by plaintiff, as the report was served about two weeks before the expert's deposition); *MobileMedia Ideas, LLC v. Apple Inc.*, 907 F.Supp.2d 570, 610 n. 22 (D.Del.2012) (denying motion to strike supplemental report where defendant marked the report as an exhibit at expert's deposition and questioned him about it); *see also Woodson v. Rodriguez*, No. C 07–04925 CW (LB), 2011 WL 1654663, at *3 (N.D.Cal. Apr. 28, 2011) (finding that untimely reply report did not cause defendants to suffer any harm where it was served ten days before expert's deposition and thus actually helped defendants by allowing them to prepare for that deposition and by "more specifically articulating [expert's] previously expressed opinions").

⁴⁰ OFCCP, on the other hand, has been prejudiced by Oracle's refusal to convey the charts to Dr. Saad and Oracle's attempt to suppress any testimony synthesizing the analyses to identify the areas of agreement and disagreement between the experts.

⁴¹ 29 C.F.R. § 18.10(c) ("Upon notice to all parties, the presiding judge may waive, modify, or suspend any rule under this subpart when doing so will not prejudice a party and will serve the ends of justice.").

CONCLUSION

For the foregoing reasons, Oracle's Evidentiary Objections should be overruled.

DATED: November 8, 2019

Respectfully submitted,

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