

**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

**DEFENDANT ORACLE  
AMERICA, INC.'S MOTION IN  
LIMINE NO. 1 TO EXCLUDE  
EXPERT EVIDENCE NOT  
CONTAINED IN THE TIMELY  
REPORTS OF DR. JANICE  
FANNING MADDEN, PH.D.**

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**Office of Administrative Law Judges  
San Francisco, Ca**

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THE TIMELY REPORTS OF DR. MADDEN**

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## I. INTRODUCTION

Defendant Oracle America, Inc. (“Oracle”) hereby moves for an order *in limine* to exclude any expert evidence, reports, or testimony offered by OFCCP at trial to support its compensation discrimination claims that are not contained in timely disclosed expert reports. This motion is made pursuant to Federal Rules of Civil Procedure 26 and 37.<sup>1</sup>

Over the course of this litigation, OFCCP offered varying statistical analyses in its Notice of Violation (“NOV”), Show Cause Notice (“SCN”), and Second Amended Complaint (“SAC”).<sup>2</sup> Following those analyses, OFCCP disclosed as its expert witness Dr. Janice Fanning Madden, Ph.D., who offered timely expert opinions in her July 19, 2019 initial report and in her August 16, 2019 rebuttal report. The only statistical analyses on which OFCCP can rely are those of Dr. Madden as they appear in those two reports. OFCCP should be precluded from offering any other statistical analyses to support its compensation discrimination claims, including analyses not appearing in Dr. Madden’s timely disclosed reports; those that appeared in Dr. Madden’s untimely reports and declarations post-dating August 16, 2019; and any statistical evidence that relates to or appears in OFCCP’s NOV, SCN, or SAC.

## II. RELEVANT BACKGROUND

OFCCP’s NOV, SCN, and SAC depend on and reference statistical analyses. *See, e.g.*, NOV at 3-5; SAC ¶ 12 (OFCCP has previously purported to evaluate “*comparable*” employees in “*similar roles*”). Subsequently, OFCCP identified Dr. Madden as its expert and Dr. Madden disclosed two timely reports—her initial report on July 19, 2019 and a rebuttal report on August

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<sup>1</sup> All subsequent references to the “Rules” are to the Federal Rules of Civil Procedure unless otherwise noted.

<sup>2</sup> The NOV’s statistical analyses were incorporated into and formed the basis of the allegations in both the SCN (previously filed as Ex. 66 to the Declaration of Norman Garcia in support of OFCCP’s Motion for Summary Judgment (“MSJ”), filed October 21, 2019) and in OFCCP’s First Amended Complaint (filed January 25, 2017).

16, 2019—pursuant to the schedule agreed upon by the parties and memorialized in the Court’s March 6, 2019 Order Approving Prehearing Schedule.

OFCCP has represented to this Court on multiple occasions that the statistical analyses contained in the NOV, SCN, and SAC would *not* form the basis of any part of its proof of alleged discrimination on dispositive motions or at the hearing. *See, e.g.*, OFCCP’s Opp. to Oracle’s Mot. to Compel OFCCP to Designate and Produce 30(b)(6) Witness (June 12, 2019) at 4 (“OFCCP will not rely on the econometric model in the SAC to prove liability or damages at trial. Rather, OFCCP will rely on an entirely separate analysis, produced by an outside testifying expert or experts, which will be based on the information Oracle produced in discovery.”). OFCCP reaffirmed its position as recently as its MSJ filed October 21, 2019. *See* OFCCP’s MSJ at 17 (asserting that “Madden’s report did not rely in any manner on the statistical analyses OFCCP conducted previously in this matter”).

Relevant to this motion, following the August 16, 2019 disclosure of Dr. Madden’s rebuttal report, OFCCP issued a series of additional reports and declarations from Dr. Madden—on October 3, October 9, October 11, and November 7, 2019. These facts (setting aside the disclosure on November 7, which had not yet occurred) are detailed in Oracle’s Motion for Protective Order dated October 11, 2019, which this Court addressed in an October 18, 2019 order denying that motion without prejudice.

### III. ARGUMENT

#### A. OFCCP May Not Introduce Statistical Analyses Not Timely Disclosed Pursuant to Rule 26

By law, OFCCP is limited to the opinions expressed in the two timely disclosed reports of Dr. Madden—the reports of July 19 and August 16. Rule 37(c)(1) automatically precludes use of “*any witness or information*” at trial that was not disclosed as required by Rule 26(a) or

26(e)(1), unless such failure is substantially justified or harmless. *Cooper v. Southern Co.*, 390 F.3d 695, 728 (11th Cir. 2004), *overruled in part on other grounds*, 546 U.S. 454 (2006)) (emphasis added). “Because the expert witness discovery rules are designed to allow both sides in a case to prepare their cases adequately and to prevent surprise ... compliance with the requirements of Rule 26 is not merely aspirational.” *Id.* “Federal courts apply this rule strictly and *require* exclusion of the undisclosed evidence absent harmless error or substantial justification.” *Friedman v. Medjet Assistance, LLC*, 2010 WL 9081271, at \*5 (C.D. Cal. Nov. 8, 2010) (emphasis in original); *see also Rembrandt Vision Tech., L.P. v. Johnson & Johnson*, 725 F.3d 1377, 1381 (Fed. Cir. 2013) (“The purpose of the expert disclosure rule is to provide opposing parties reasonable opportunity to prepare for effective cross examination” and as such, “[a]n expert witness may not testify to subject matter beyond the scope of the witness’s expert report unless the failure to include that information in the report was substantially justified or harmless.” (internal citations omitted)).

Additionally, any information contained in Madden’s untimely reports and analyses (provided to Oracle on October 3, October 9, October 11, and November 7, 2019) are untimely and should be excluded. These late reports and opinions are not justified, and OFCCP has not demonstrated that its delay is harmless.<sup>3</sup> *See* Oct. 11, 2019 Mot. for Protective Order. As such, they should be excluded. *See also Sandata Techs., Inc. v. Infocrossing, Inc.*, 2007 WL 4157163, at \*8 (S.D.N.Y. Nov. 16, 2007) (excluding expert reports where one party sought “to gain unfair

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<sup>3</sup> This Court has already concluded Dr. Madden’s inability to respond to Dr. Saad’s criticism of her tables in rebuttal is not an excuse for including new material after the deadline for expert disclosures has passed. *See* October 18, 2019 Order at 5 (“The predicament of not having an opportunity to produce a rebuttal to Oracle’s rebuttal report should have been apparent to OFCCP when it negotiated the schedule. It would certainly have been obvious as soon as it received Oracle’s rebuttal report. Yet no relief was sought.”). Oracle has further objected to Dr. Madden’s untimely disclosures in its Motion to Exclude the Expert Report and Testimony of Dr. Madden at p. 3 n.1 (filed October 21, 2019) and its Objections to Evidence in Support of OFCCP’s MSJ at p. 13 (filed November 11, 2019).

advantage by submitting two replies, when none were permitted, and by having the last word when [other party] did not have the same with respect to the issues on which it bears the burden of proof.”). Courts routinely exclude such improper attempts to supplement the expert record. *See, e.g., Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 324 (5th Cir. 1998) (a supplemental report is “not intended to provide an extension of the expert designation and report production deadline”); *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm’n*, 2017 WL 9480314, at \*2 (W.D. Tex. May 22, 2017) (“[Rule 26] contains no provision allowing a party to amend its original disclosure for the purpose of refuting arguments made in rebuttal.”); *U.S. Bank Nat’l Ass’n v. Verizon Commc’ns Inc.*, 2012 WL 12885083, at \*1 (N.D. Tex. Aug. 3, 2012) (report was not “a true supplemental report” but a sur-rebuttal when its purpose was to respond to the opposing expert’s rebuttal report).

**B. OFCCP May Not Introduce Lay Testimony of Statistical Analyses**

Courts have uniformly held that statistical analyses and testimony regarding such analyses are the province of experts. Such evidence is based on scientific, technical and other specialized knowledge falling within the ambit of Federal Rule of Evidence 702. *See* 29 C.F.R. § 18.702; *E.E.O.C. v. Republic Servs., Inc.*, 2008 WL 11388658, at \*3 (D. Nev. Nov. 26, 2008) (statistical analyses are not basic math and require expert testimony); *Shea v. Kerry*, 961 F. Supp. 2d 17, 49-50 (D.D.C. 2013), *aff’d*, 796 F.3d 42 (D.C. Cir. 2015) (preventing lay testimony about statistical evidence that needs “an expert to opine on the statistical significance” of the comparator groups); *Boyd v. Ill. State Police*, 2002 WL 126099, at \*1 (N.D. Ill. Jan. 31, 2002) (excluding lay testimony comparing “in summary form the starting salaries of minority and ‘majority’ hires throughout Illinois for a period of time and [drawing] certain inferences of discriminatory impact therefrom”); *Albritton v. CVS Caremark Corp.*, 2015 WL 4598982, at \*9

(W.D. Ky. July 30, 2015) (limiting lay testimony to non-specialized topics and explaining that “most lay jurors will not understand regression analysis”). As such, OFCCP cannot attempt to introduce lay testimony of statistical analyses.

**IV. CONCLUSION**

For the foregoing reasons, Oracle respectfully requests that the Court preclude OFCCP from introducing evidence of statistical analyses—in the form of testimony or expert report—to support its claims of compensation discrimination not included in the timely report and rebuttal of Dr. Madden because such evidence is untimely, not justified, and unduly prejudicial to Oracle. Therefore, such evidence should be automatically excluded.

Respectfully submitted,

November 15, 2019

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