

**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 OPPOSITION
TO MOTION TO EXCLUDE
REPORTS AND TESTIMONY OF
ALI SAAD, PH.D.**

REDACTED PURSUANT TO COURT ORDER

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I. INTRODUCTION

OFCCP's motion to exclude Dr. Saad's testimony "at trial" rests on a fundamental misunderstanding of the Agency's burden of proof. Mot. to Exclude Dr. Saad (Oct. 21, 2019) ("Mot.") at 3, 19. OFCCP is no longer operating as an agency conducting its own audit of a government contractor according to its own whims; it is the plaintiff in a legal proceeding, where it bears the burden of proving its allegations of rampant intentional pay discrimination with competent, admissible evidence. The "burden of persuading the trier of fact that the defendant intentionally discriminated ... remains at all times" with OFCCP. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Dr. Saad's opinions—which demonstrate the statistical evidence OFCCP's expert Dr. Janice Madden offers does not sustain that burden—are not merely relevant; they go to the core of the issues this Court must decide.

OFCCP's motion is not even a proper *Daubert* motion, once the burden of proof is corrected. OFCCP's criticisms of the merits of Dr. Saad's opinions and analyses—in addition to being legally irrelevant to the motion the Agency brought—have no basis. OFCCP's would-be "summaries" of Oracle's compensation system and Dr. Saad's reports (to which it devotes nearly half of its motion) are rife with misrepresentations. OFCCP's critiques in turn misrepresent both the opinions Dr. Saad offered and the applicable law. OFCCP claims Dr. Saad "failed to study" issues he manifestly did—for example, OFCCP's baseless "channeling" allegations. It relies on its own self-serving paraphrases of Dr. Saad's deposition rather than quotes that are true to his testimony. And it baldly presents purported quotes as would-be "admissions" by Oracle where the witnesses *never said things OFCCP attributes to them*. The actual documents, testimony, and evidence (rather than OFCCP's mischaracterizations of them)—coupled with Title VII case law placing the burden of proof squarely on OFCCP's (and, by extension, Dr. Madden's) shoulders—make clear that OFCCP's arguments against Dr. Saad lack all merit.

In a last-ditch effort, OFCCP's motion resorts to *ad hominem* attacks—accusing Dr. Saad of endorsing "the prejudiced notion that certain groups ... are simply inferior" (Mot. at 2-3) and "polluting scientific study with bias" (*id.* at 18)—that have no place in this litigation (much less a

Daubert motion).¹ This Court should view OFCCP’s baseless, vitriolic accusations for what they are: the latest in a series of improper attempts to deflect attention from the failures of its own evidence and expert by lobbing personal attacks on the integrity of those who dare to disagree with or question them – first Oracle, then its counsel, and now a well-established labor economist. *See* Order Denying Oracle’s Mot. to Compel OFCCP’s Further Resp. to Reqs. for Admission and Order Directing OFCCP to State Position with Respect to Oracle Managers (Aug. 8, 2019) at 8 (noting history of “strident[]” accusations “of wrongdoing” by OFCCP “both in respect to individuals at Oracle and Oracle’s attorneys”). For all of the reasons set forth herein, OFCCP’s motion directed at Dr. Saad should be denied in its entirety.

II. OFCCP CANNOT CREDIBLY CLAIM THAT CRITICISMS OF ITS EXPERT’S OPINIONS, THE WOULD-BE “CRUX” OF ITS CASE, ARE IRRELEVANT.

OFCCP’s play to bar Dr. Saad from testifying because he “did not conduct an independent study of compensation at Oracle” (Mot. at 1) is not only contrary to established law; it flies in the face of the Agency’s prior pronouncements that its case rises and falls on Dr. Madden’s statistics. As this Court has acknowledged, “OFCCP has made very serious allegations” against Oracle, and “[i]f those allegations cannot be substantiated, Oracle deserves to be able to clear its name and move on.” Order Granting Conditional Leave to File Second Am. Compl. (Mar. 6, 2019) at 16. OFCCP has repeatedly declared that it intends to prove the sweeping compensation discrimination claims in the Second Amended Complaint (“SAC”) not through “the testimony of any individual employees,” but instead through “*broad scale, statistical evidence.*” OFCCP’s Opp. to Oracle’s Mot. to Compel OFCCP to Produce Docs. and Further Respond to Interrogatories (May 17, 2019) at 4 (emphasis added). *See also id.* (emphasis added) (“*The crux of OFCCP’s case and the relief OFCCP seeks, [sic] is based on statistical evidence . . .*”); OFCCP’s Opp. to Oracle’s Mot. to Compel OFCCP to Designate and Produce

¹ As discussed in Section V.C *infra*, Dr. Saad’s report says precisely the *opposite* of what OFCCP claims; he makes clear his view that characteristics such as motivation and ability, while distributed in different ways across individuals, are *not* expected to differ across groups by race or gender and thus need not to be taken into account in a statistical analysis.

30(b)(6) Witness (June 12, 2019) (“OFCCP 30(b)(6) Opp.”) at 9. And OFCCP has announced—as part of its efforts to resist discovery into evidence supporting the allegations it lobbed in the SAC—that “[a]t trial, [the Agency] will rely on an entirely separate statistical analysis of its outside expert.” OFCCP 30(b)(6) Opp. at 9. OFCCP now seeks to meet its burden through the expert reports of Dr. Madden, a Professor of Sociology at the University of Pennsylvania.²

Oracle has offered two expert reports from Dr. Saad, an experienced labor economist who has provided expert analyses and testimony in dozens of cases, including those involving claims of systemic race and gender discrimination. In his initial July 16, 2019 report—exchanged simultaneously with OFCCP (per the Agency’s insistence), prior to Oracle knowing what trial expert OFCCP would disclose or what methodology she would employ—Dr. Saad “evaluate[d] the claims made by the OFCCP” and concluded that the statistical analyses on which the SAC was based “do not stand up under scientific scrutiny and are an unreliable basis for drawing conclusions about compensation at Oracle.” Decl. of Kathryn G. Mantoan in Supp. of Mot. to Exclude Dr. Madden (filed Oct. 21, 2019), Ex. A (“Madden Dep.”) at Ex. 23 (“Saad Rpt.”) ¶¶ 1, 4. As part of this report, Dr. Saad not only reviewed OFCCP’s statistical model and associated back-up, but also conducted independent analyses that showed OFCCP’s subsidiary allegations about biased “assignments” are contrary to the undisputed evidence. *See id.* ¶¶ 150-56.

Four weeks later, after having received and reviewed the analyses and back-up materials of OFCCP’s trial expert Dr. Janice Madden, Dr. Saad issued an August 19, 2019 rebuttal report to “respond[] to the analyses submitted by Dr. Madden.” Madden Dep., Ex. 5 (“Saad Rebuttal”) ¶ 1. In that rebuttal report, Dr. Saad sets forth in detail the bases on which he concludes that Dr. Madden’s analyses “rely on unsupported assumptions instead of empirical research, utilize mis-specified models, rely upon incorrectly measured variables, suffer from omitted variable bias, and have a number of other methodological flaws.” *Id.* ¶ 101. As a result, Dr. Saad concludes,

² OFCCP has also tendered—and references in parts of its Motion for Summary Judgment (though nowhere in this motion)—an untimely sur-rebuttal declaration from Dr. Madden, served on the last day of expert discovery in the middle of Dr. Saad’s deposition. Oracle’s objections to that sur-rebuttal appear in its Objections to Evidence Submitted in Support of OFCCP’s Motion for Summary Judgment, filed herewith.

Dr. Madden’s analyses (like the analysis underlying the SAC) “do not support inferences of pay discrimination at Oracle.” *Id.* One can always run a regression on a set of data (provided there are at least two variables to study; *see* Decl. of Kathryn G. Mantoan, filed herewith (“Mantoan Opp. Decl.”), Ex. A (“Saad Dep.”) 153:12-22) and report out coefficients and standard errors; Dr. Saad’s reports assess whether Dr. Madden’s regression analyses in this case were properly constructed and executed, such that the results they generate are meaningful.

OFCCP apparently now moves to exclude everything Dr. Saad has written and could say about Dr. Madden’s statistics, claiming that “his opinion [is] neither relevant nor helpful to the Court in resolving the issues before it.” Mot. at 1. But challenging the reliability, relevance, and soundness of the evidence that OFCCP touts as the “crux” of its case is inarguably a proper task for an opposing expert. Although OFCCP refuses to acknowledge this central point, the cases are clear: where a plaintiff relies on statistical evidence to sustain a pattern or practice claim, the defendant can defeat that claim by explaining the flaws in those statistics—*i.e.*, by showing that they do not prove what the Agency claims they prove. *See, e.g., E.E.O.C. v. Freeman*, 961 F. Supp. 2d 783, 799 (D. Md. 2013), *aff’d in part sub nom.*, 778 F.3d 463 (4th Cir. 2015) (“The EEOC bears the burden of establishing a *prima facie* case The burden is not on Defendant to conduct its own analysis to rebut the results produced by the EEOC’s flawed report. It is sufficient for Defendant to point out the numerous fallacies in [the EEOC expert’s] report, which raise the specter of unreliability.”).

OFCCP’s claim that “Oracle cannot rely on Dr. Saad’s testimony, as a matter of law, to defeat the inference of discrimination established through Dr. Madden’s analyses” (Mot. at 10) presumes that such an inference has been created—which is exactly what Dr. Saad’s reports show Dr. Madden has not done. OFCCP must prove, not simply presume, both a *prima facie* case and the ultimate merits of its pay discrimination claims. *See Burdine*, 450 U.S. at 253; *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 309 (7th Cir. 1988) (rejecting suggestion that employer “had the burden of persuasion” and finding “no support in the case law for [this] contention[]”); *OFCCP v. Bank of Am.*, ARB Case No. 13-099, ALJ Case No. 1997-OFC-16

(Apr. 21, 2016) at 13. Dr. Saad’s analyses are directly relevant to evaluating whether OFCCP’s statistics can sustain those burdens, and they are plainly admissible for that purpose.

III. OFCCP’S “SUMMARY” OF ORACLE’S COMPENSATION PRACTICES AND DATA IS WRONG.

Following the introduction, OFCCP’s motion pivots to what it calls a “Summary of Oracle’s Compensation Policies and Data.” Mot. at 3-5. But this is no “summary.” It instead mischaracterizes select Oracle documents (or portions of documents) and snippets of testimony, while ignoring the undisputed facts established by competent witnesses and evidence. *See generally* Oracle’s Opp. to OFCCP’s Mot. for Summ. J., filed herewith, § II.

A few particularly egregious examples warrant mention. OFCCP insists that “Oracle sets compensation pursuant to detailed written compensation policies maintained to comply with federal regulations,” citing to four pages of its Motion for Summary Judgment (“OFCCP’s MSJ”). Mot. at 3. But as Oracle’s Senior Director of Global Compensation has clearly explained, Oracle does not have compensation policies in the sense of “rule[s]” that dictate a formula for how each and every manager must pay each of their employees (with the exception of an October 2017 mandate barring inquiry into applicants’ prior pay). *See* Mantoan Opp. Decl., Ex. B at 25:14-26:22 (“Q: ... [A]re there any policies at Oracle about compensation? A: To my knowledge, no.”), 35:5-21, 140:14-19; Mantoan Opp. Decl., Ex. C (“Waggoner 7/19 PMK Dep.”), 40:6-20, 66:10-23. And none of the federal regulations to which OFCCP’s MSJ alludes mandate the creation of anything like the formulaic, one-size-fits-all compensation directives OFCCP wrongly claims Oracle was required to create. *See* OFCCP’s MSJ at 2-4 (discussing requirements to “monitor” and “evaluate” “compensation system(s)”; 41 C.F.R. § 60-2.17 (only reference to “policy” to “ensur[ing] the nondiscriminatory policy is carried out”); Garcia Decl., Ex. 11 at ORACLE_HQCA_0000000473 (Equal Employment Opportunity policy). Instead, Oracle has adopted a decentralized approach to compensation wherein individual managers assess factors including internal and external equity; each employee’s relevant knowledge, skills, abilities, and experience; performance; and the employees’ importance to the company. *See*

generally Oracle's Mot. for Summ. J. § II.F. OFCCP simply ignores the actual facts, instead building up a strawman more conducive to its broad-brush arguments and attacks.

Worse yet, OFCCP outright misquotes Oracle's employees to manufacture admissions the Agency appears to believe it needs. In an effort to brush aside the extensive testimony and documentary evidence demonstrating that different Oracle employees work on different products and services that require vastly different skills—which in turn may explain pay differences among them—OFCCP writes (as if it were fact) that “Oracle has expressly stated that product is not linked to compensation.” Mot. at 5. That is not true. The Agency's lone support for this sweeping claim is the following:

Oracle's Chief of Human Resources and Oracle's corporate designee regarding Oracle's compensation policies, *Kate Waggoner*, explained: “**while product used to be associated with pay for some job codes** not subject to this litigation, [t]he job codes in IT and development, in particular, have never been product-associated and **product is no longer associated with pay in other job codes.**”

Id. (emphasis added). OFCCP attributes this “quote” to Ms. Waggoner in her PMK deposition from another case (*Jewett v. Oracle*). Putting aside that Ms. Waggoner is not Oracle's “Chief of Human Resources,” OFCCP's blatant misrepresentation of her testimony cannot be dismissed as inadvertent. Quite simply, *Ms. Waggoner never said any such thing*. Her actual *Jewett* testimony was that Oracle “used to have certain job codes that were only used in association with people who worked on a certain product,” but no longer does. Garcia Decl., Ex. 81 at 102:14-103:9. She said nothing there (or anywhere) suggesting that “product used to be associated with pay” but is “no longer.”³ Rather than faithfully present the facts, OFCCP props up a fictionalized version of Oracle it has manufactured to suit its claims. The Court should disregard these machinations, look to the actual evidence, and deny OFCCP's motion in its entirety.

IV. OFCCP'S “SUMMARY” OF DR. SAAD'S METHODOLOGY IS WRONG.

OFCCP next recites what it labels a “Summary of Dr. Saad's Methodology and Study.”

³ In fact, she testified to the *opposite*: “Q: Okay. Does product factor into pay? ... Like the product that the employee works on? A. Absolutely.” Waggoner 7/19 PMK Dep. 178:19-183:2 (explaining how “the experience and the skills and the competencies that people bring is what makes them qualified to work on a certain product,” and “therefore, it can all be encompassed in what helps to make their decision on where to position their pay”).

Mot. at 5-8. But this section, too, consistently and demonstrably misrepresents both what Dr. Saad does in his reports and the reasons why he does it.

As Dr. Saad makes clear in both his reports and deposition, his role was to “respond to what the OFCCP and then later Dr. Madden proposed in terms of what they characterized as liability analysis.” Saad Dep. 49:11-50:2; *see also id.* 177:20-178:4. As part of that work he runs regression analyses that refine the models Dr. Madden had constructed, by incorporating additional readily-available variables from the data to better proxy employee productivity and type of work performed, while otherwise maintaining the aggregated, cross-functional structure Dr. Madden had created. *See, e.g.,* Saad Rebuttal ¶¶ 87-91. OFCCP acts as if these are the entirety of Dr. Saad’s opinions. *See* Mot. at 5-6. But they are not even the primary—much less the sole—opinions he offers or analyses he presents.

Dr. Saad argues at length in both reports “that a number of the empirical outcomes, both statistical as well as descriptive, suggest that aggregation of all employees into one regression model may be inappropriate,” and that “the use of standard job title does not capture the wide range of types of work that is covered by a single title.” Saad Rebuttal ¶ 92; *see also id.* ¶ 10 (noting that his modifications of Dr. Madden’s analyses are premised “on the assumption that the levels of aggregation are appropriate, an assumption I differed with in my initial report,” and that they incorporate Dr. Madden’s “Oracle variables as provided, again, in spite of previously expressed reservations I have about, for example, the usefulness of standard job title”), ¶ 101 (structure of Madden’s model and variables “[a]ssumed for argument’s sake”). OFCCP’s description of his “methodology” totally ignores the foundational criticisms Dr. Saad presents of the models OFCCP and Dr. Madden claim prove systemic, intentional pay discrimination across the board. *See* Saad Rpt. ¶¶ 35-103, 108-119; Saad Rebuttal ¶¶ 10-64.

OFCCP next attempts to shoehorn into this section a regurgitation of Dr. Madden’s analyses. *See* Mot. at 6. What Dr. Madden did, of course, has no bearing on whether Dr. Saad’s opinions clear the bar of admissibility (unless one believes that anyone whose opinions contradict Dr. Madden must, necessarily, be unfit to testify). And OFCCP does not fairly

characterize the work she did do. *Contrast* Mot. at 2, 6 (claiming Dr. Madden conducted a “detailed study of Oracle’s compensation of employees”) *with* Madden Dep. 93:25-95:16, 95:22-96:5, 96:19-25, 100:3-101:15, 110:15-18 (unable to recall reviewing any of the available promotion justifications, off-cycle pay justifications, performance appraisal narratives, employee self-appraisals, deposition testimony from this case, or declarations provided by Oracle employees that describe the work they and their teams perform and the reasons why particular pay decisions were made), *and id.* 111:9-17 (claiming “it was just too hard to think about using” employee- and position-specific information in her pay models).

OFCCP next laces its would-be discussion of Dr. Saad’s “methodology” with a self-serving (incorrect) description of how Organizations (also referred to as cost centers) operate at Oracle. Mot. at 6-7. OFCCP relies on two former employee declarations describing their own knowledge of and experience with this data element, dismissing out of hand the declaration of Oracle’s Executive Vice President of Oracle Applications Product Development that provides a more high-level description of how “Oracle organizes its businesses, teams, and employees” in part through Organizations that relate to Oracle’s vast portfolio of products and services. *Contrast* Mot. at 7 *with* Decl. of Steven Miranda (Oct. 21, 2019) (“Miranda Decl.”) ¶ 12.⁴ In order to brush aside Mr. Miranda, OFCCP once again attributes to an Oracle executive something he did not say; the (out-of-context) quote it attributes to Mr. Miranda in the body of its motion is in fact part of *Dr. Saad’s* deposition testimony, not (as OFCCP would have the Court believe) something Mr. Miranda “stated.” *See* Mot. at 7, n.31.

Aside from being wrong, OFCCP’s description of why Oracle created Organizations is entirely beside the point in determining whether Dr. Saad’s refinements of Dr. Madden’s model that include that variable are admissible under *Daubert*. The Agency zeroes in on Organization in an effort to distract from the fact that Dr. Madden’s analyses fail to account for the different skills required to work on different products across Oracle, and Dr. Saad’s introduction of Organization as a way to address Dr. Madden’s failure to study these differences. *See* Saad Dep.

⁴ Mr. Miranda’s declaration from the *Jewett* case, which made this same point, was available to OFCCP pre-filing.

224:6-20.⁵ OFCCP takes issue with this approach even though its own expert has conceded that employees within a job title may have different “skills,” that pay differences driven by differences in “skills ... within jobs” are “appropriate,” and that she cannot say if work on different products is “equally challenging” (*i.e.*, requires an equal level of skill). Madden Dep. 114:6-17, 116:20-117:19; Mantoan Opp. Decl., Ex. D at 126:14-127:6. OFCCP’s criticism flies in the face of testimony that work on different products often requires different skills which command different pay:

- Decl. of Balaji Bashyam (Oct. 21, 2019) ¶¶ 7, 11, 13: “Because of the differences in the customer base for certain products, and in the services we offer for those products, different products often require a different skill set, level of experience, and training. ... Whether it is a current employee or outside hire, a candidate with cloud-based experience may command a higher salary than another candidate who is lacking in that experience. ... When an employee rises to the manager level, product type and the location where the manager is based can influence compensation.”
- Decl. of Richard Sarwal (Oct. 21, 2019) ¶ 14: “Despite the fact that technical analysts all may have the same job title, the compensation they receive can differ for a number of reasons including external market forces. For example, technical analysts who specialize in supporting artificial intelligence products and services are currently in very high demand in California. As such, we make candidates with expertise in that technology more substantial offers than we make to those working on more established products and services.”).
- Decl. of Nachiketa Yakkundi (Oct. 21, 2019) ¶ 17: “In hiring for my team, I look for candidates with experience with access management products like OAM and will offer a pay premium if needed to hire a candidate with that specific background”

Accord Waggoner 7/19 PMK Dep. 178:19-183:2; Miranda Decl. ¶¶ 5, 11; Decl. of Brian Oden (Oct. 21, 2019) ¶ 8. Even OFCCP’s own interview memos of Oracle employees confirm this point. *See* Mantoan Opp. Decl., Ex. E at DOL000041530 (“She is happy with pay. Comparisons are difficult because people have different experience and product lines have different performance. If product is doing well, thinks that could affect pay because generating more

⁵ OFCCP also misrepresents Dr. Saad’s deposition testimony, claiming that “Dr. Saad said he ‘didn’t know’ if the Organization variable was connected to product.” Mot. at 7 n.29 (citing Saad Dep. 245:8-11). The actual question and answer was: “Q. How strongly do you believe organization is correlated to product? ... THE WITNESS: I don’t know.” Immediately prior to this exchange, Dr. Saad had explained that the “primary reason” why he sought to layer an Organization variable onto Dr. Madden’s pay models was due to its “correlation to product,” and identified the specific testimony on which his understanding was based. *See* Saad Dep. 242:15-245:6; *accord* Miranda Decl. ¶ 12.

revenue.”). In light of this and other extensive evidence, Dr. Saad plainly cannot be excluded for suggesting a refinement to Dr. Madden’s model that might better account for—rather than simply ignore—within-job skill differences.

OFCCP’s further attacks on Dr. Saad imbedded in its “summary” of his opinions likewise do not support exclusion. For example, OFCCP is correct that, in his modifications to Dr. Madden’s models, Dr. Saad revises her total compensation measure to include the amount of equity Oracle granted to a given employee in a given year. Mot. at 7. But he does so in a uniform way for all employees regardless of race or gender, and regardless of whether subsequent choices (*e.g.*, about whether to take grants as restricted stock units (RSUs) or options, and whether and when to exercise any options selected) led employees who received the same grants to realize different cash in hand. He explains in detail his reasons for doing so, as well as the competing (and in his view more significant) errors engendered by using Medicare wages to measure total compensation (as Dr. Madden did). *See* Saad Rpt. ¶¶ 10, 105-07; Saad Rebuttal ¶¶ 85-86.

As for Dr. Saad’s statistical cluster analysis, OFCCP’s observation that Dr. Saad did not incorporate the results of that analysis into his modifications of Dr. Madden’s models (*see* Mot. at 8) misses entirely the point of the exercise. The cluster analysis was not intended to generate variables to include in statistical modeling responsive to Dr. Madden’s report. Instead, as Dr. Saad explains in detail in six paragraphs and a 34-page attachment to his initial report (*see* Saad Rpt. ¶¶ 55-61, Attachment E), the clustering analysis and results provide further scientific support for Dr. Saad’s conclusion that “the content of work is not fully or accurately captured by standard job titles.” *Id.* ¶ 60. Although OFCCP laments it does not understand how the technique works—for example, why the algorithm sorted the job requisitions here into 24 distinct clusters—it cannot fault Dr. Saad for its failures or choice not to inquire of him at deposition.

In sum, OFCCP’s attacks on certain of Dr. Saad’s approaches and opinions (masquerading as a “summary” of his work) should be rejected. Dr. Saad’s reports and the opinions and bases he details therein—divorced from the disingenuous readings OFCCP seeks to foist on them—are the best evidence of his detailed, thoughtful, and case-specific methodology.

V. OFCCP’S “ARGUMENTS” REGARDING DR. SAAD’S METHODS AND CONCLUSIONS HAVE NO MERIT.

In order to exclude Dr. Saad’s testimony, OFCCP would need to prove that his opinions have no “valid ... connection to the pertinent inquiry.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993); *see also* Fed. R. Evid. 702. When faced with a motion to exclude, a court must assess “what basis” experts have for the opinions they seek to offer, and whether those opinions “logically advance[] a material aspect of the proposing party’s case.” *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315-16 (9th Cir. 1995) (internal citations omitted). Dr. Saad’s detailed reports—totaling over 400 pages that evaluate OFCCP’s and Dr. Madden’s statistical work and describe problems with the models they built and the variables they claim suffice to compare similarly-situated employees—plainly meet this standard. While OFCCP’s arguments fail to furnish any basis under *Daubert* to bar Dr. Saad from testifying, Oracle nonetheless addresses below why OFCCP’s critiques also badly miss the mark on the merits.

A. Dr. Saad Did Not “Fail [] to Study” the Relevant Issues.

1. Dr. Saad’s Criticism of Dr. Madden’s Statistical Approaches, Assumptions, and Modeling Address the Most Relevant Issue Here.

OFCCP first contends that, “[because] [Dr. Saad’s] report is confined to critiquing Dr. Madden’s study,” Oracle “cannot rely on Dr. Saad’s testimony, as a matter of law, to defeat the inference of discrimination established through Dr. Madden’s analysis.” Mot. at 10. But expert evidence is admissible if it “will help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. The “will help” requirement “goes primarily to relevance,” and “[w]hat is relevant depends on what must be proved.” *Primiano v. Cook*, 598 F.3d 558, 567 (9th Cir. 2010), as amended (Apr. 27, 2010) (quoting *Daubert*, 509 U.S. at 591). OFCCP appears to suggest that Dr. Saad’s testimony is inadmissible “as a matter of law” because it does not (in OFCCP’s view) suffice to sustain what the Agency believes to be Oracle’s burden. But OFCCP has the law (and thus this argument) entirely backwards.

As argued at length above, Oracle is entitled under the law to challenge OFCCP’s evidence as insufficient to sustain a *prima facie* case purely on the basis of critique. There is no

requirement—in Title VII, Executive Order 11246 or its implementing regulations, or otherwise—for a party charged with discrimination to develop its own, independent statistical models in an effort to prove a negative: that it did not engage in any pattern or practice of discrimination. That burden remains squarely on the plaintiff (OFCCP) at all times. Expert testimony (like Dr. Saad’s) that helps the Court evaluate whether OFCCP has met its burden is plainly relevant given “what must be proved.” *Primiano*, 598 F.3d at 567. *See* Section II, *supra*.

Even if OFCCP could make out a *prima facie* case of systemic intentional discrimination based solely on Dr. Madden’s statistics—which it cannot—Oracle would be entitled to cite to Dr. Saad’s reports and analyses as rebuttal evidence. Courts have consistently ruled that although alternative, ground-up statistics are a *permissible* form of rebuttal evidence, they are not *required*. *See, e.g., United States v. City of New York*, 717 F.3d 72, 85 (2d Cir. 2013) (“[I]t is always open to a defendant to meet its burden of production by presenting a direct attack on the statistics relied upon to constitute a *prima facie* case.”); *Freeman*, 961 F. Supp. 2d at 799. OFCCP should be well aware of this principle, given it was articulated over three decades ago in a case in which Dr. Madden was criticized for her work on behalf of the EEOC. *See Sears*, 839 F.2d at 313-14 (citations omitted) (“The cases cited by the EEOC to support its argument that Sears had the burden of rebutting its statistical analysis with more ‘refined, accurate and valid’ statistical evidence did not state that the defendant must produce such evidence to succeed in rebutting the plaintiffs’ case. ... [S]tatistical evidence is only one method of rebutting a statistical case.”). OFCCP’s suggestion that Oracle “cannot rely” on Dr. Saad’s report to attack the Agency’s evidence are plainly contrary to controlling case law.

2. Dr. Saad Did Study OFCCP’s “Channeling” Claim, and Found No Evidence of the Biased “Assignments” Dr. Madden Simply Assumes.

OFCCP decries that Dr. Saad “fail[ed] to study the possible impact of channeling” in either his initial or rebuttal report, which the Agency claims “speaks volumes.” Mot. at 10-11; *see id.* at 10 (claiming that “Dr. Saad ... [d]id not conduct any regression analysis testing OFCCP’s claim that pay disparities arise from Oracle channeling certain groups into lower

compensation discrimination, making that the relevant measure of pay to study. *Id.*; *see also* Saad Rpt. ¶ 105, n.71. Second, for many employees in the population, other components of compensation (bonus, equity) dwarf base salary in their take-home pay, making a narrow focus on base pay in isolation misleading. *See* Saad Rpt. ¶ 126. Further, Dr. Saad’s detailed criticisms of how Dr. Madden constructed her pay models apply whether she runs those models on base pay or her (errant) measure of total compensation. *See* Saad Rebuttal ¶¶ 10-64 (criticizing, *inter alia*, use of inadequate proxies (like age) to capture relevant skills and prior experience; ignoring all variables about work at Oracle in columns (1)-(5) (and using a demonstrably overbroad measure in column (6)); and only getting as granular as standard job title (effectively) in column (8), which does not similarly situate employees). Again, OFCCP is not entitled to insist that Dr. Saad’s response to its expert’s base pay analysis take the form of a competing base pay model. Pointing out the foundational flaws in Dr. Madden’s approach to studying pay, and the reasons why studying base pay misses the mark for this group of employees, is well within Dr. Saad’s expertise, plainly admissible, and highly relevant in light of OFCCP’s burden of proof.

4. Dr. Saad’s Studied the Measure of Total Compensation Relevant to Whether Oracle Discriminated in How It Paid Employees.

Finally, OFCCP objects to Dr. Saad’s opinion regarding the proper way to measure total compensation and, in particular, how to account for equity awards in calculating total compensation. As a result of this difference of opinion, OFCCP claims that what it calls “Dr. Saad’s analysis of promised compensation” renders his study “irrelevant to the questions at issue here.” Mot. at 12. Both the facts and common sense confirm OFCCP’s argument fails.

As detailed *supra*, Dr. Saad criticizes OFCCP’s and Dr. Madden’s use of Medicare wages (*i.e.*, take-home pay) as a measure of total compensation, because Medicare wages in a given year include the value of *prior* vested stock unit grants that are sold (or options that an employee exercises) in that year. *See* Saad Rpt. ¶¶ 10, 105-07; Saad Rebuttal ¶¶ 85-86. This can pose significant issues in accurately measuring what Oracle paid employees in a given year, particularly because non-base components make up a significant portion (and in some levels a

majority) of take-home pay. *See* Saad Rpt. ¶ 126. Dr. Saad instead measures total compensation by focusing on the value of equity at the time it is awarded, rather than when (or if) a given employee chooses to exercise or realize it. *See id.* Tellingly, Dr. Madden does not criticize this alternative method of valuing stock in her rebuttal report, even though Dr. Saad clearly describes his methodology in his initial report.⁸ OFCCP’s criticism of Dr. Saad’s method is thus untethered to any opposing expert opinion and should be dismissed for that reason.

Moreover, Dr. Saad’s treatment of equity compensation is plainly a permissible—and thus admissible—methodology. To see why, imagine that on a given date Oracle awards two employees (X and Y) the same equity award: 1000 restricted stock units (RSUs) or, if the employee chooses, four times that amount as stock options. Both awards have the same vesting schedule (four years). If employee X chooses 1000 RSUs and stays at Oracle the full four years, she will realize all that income (as determined by the share price of the RSU each time a portion vests). If employee Y chooses 4000 stock options on that same date and then leaves Oracle before any of them vest (or, alternatively, stays at Oracle but never chooses to exercise any options because the strike price is too high for her liking), she will not realize any of that income. But Oracle gave these employees the same equity award, on the same date, with the exact same election and exercise options. Differences in the amount in their pockets is not evidence of pay discrimination by Oracle; thus, a valuation method that treats them as having received the same award at the same time plainly makes sense. This is the approach Dr. Saad uses, and OFCCP’s insistence that it is unsound does not make it so. OFCCP has not articulated any basis to bar Dr. Saad from testifying based on the well-reasoned method he employed for valuing equity.⁹

⁸ Dr. Madden uses a footnote of her rebuttal report to defend her own approach, in which she simply decrees that it must not generate any errors. *See id.* at 1, n.1 (agreeing that Dr. Saad’s point about employee choice impacting the value of stock when exercised is “empirically accurate, and potentially an issue for measuring individual earnings,” but insisting by fiat that “it is not an issue for measuring group differences” because “the exercising of stock options would ‘average out’” for any group one might study). Dr. Madden did nothing to study whether her assumption of “averag[ing] out” holds the same way for the different groups of employees at issue. And in any event, Dr. Madden’s defense of her own method does not attack Dr. Saad’s contrary method as unreliable or improper.

⁹ Indeed, OFCCP seems laser-focused on undermining Dr. Saad’s plainly sensible approach to measuring total compensation, perhaps based on the erroneous belief that it will win the case by TKO if Dr. Saad’s modified versions of Dr. Madden’s analyses are stricken. But as explained *supra*, that hope rests on a fundamental

B. Dr. Saad—Unlike Dr. Madden—Does Not “Ignore[] the Facts of the Case.”

OFCCP next claims that Dr. Saad should be barred from presenting his opinions at trial because, OFCCP insists, they “are contrary ... Oracle’s compensation policies, which provide the complete universe of factors Oracle considers when setting compensation.” Mot. at 12-13. But this argument fails, both because OFCCP misrepresents the Oracle practices the Agency accuses Dr. Saad of misapplying, and because OFCCP appears to fundamentally misunderstand the reasons why Dr. Saad identifies and introduces additional variables in his refinements of Dr. Madden’s models.

As detailed in Section III *supra*, Oracle does not have compensation “policies” that dictate the factors that each and every manager must use, or any formula by which pay must be determined; it does not matter how many times OFCCP insists this must be so. OFCCP simply ignores all testimony and documentation to the contrary. Instead, it relies on select snippets from PowerPoints and training materials—which on their face are not policy prescriptions—in order to manufacture a profile of Oracle that OFCCP appears to believe is easier to attack. But it is OFCCP, not Dr. Saad, that fails (or refuses) to understand how pay works at Oracle.

For example, OFCCP declares that “Oracle’s compensation policies explicitly provide that employees sharing the *same salary grade* have the *same value* to Oracle.” Mot. at 13 (citing SUF 86, 87). The documents to which the cited “Undisputed Facts” refer of course do not discuss to the “value” of “employees,” but instead state that “[j]obs that have the same local market value are grouped in the same local grade level, and have the same salary range.” Garcia Decl., Ex. 13 at ORACLE_HQCA_0000056234-30. But each of these salary ranges can span [REDACTED], belying OFCCP’s implicit conclusion that every employee whose job is mapped to the same salary range is doing the same work at Oracle and should (absent discrimination) be paid exactly the same. *See* Madden Dep. 54:6-55:15 (opining that salary ranges are wide because “you have people with different degrees ... different experience ...

misunderstanding of the law and abdication of OFCCP’s responsibility to itself furnish evidence that proves a pattern or practice of intentional pay discrimination.

DEFENDANT ORACLE AMERICA INC.’S OPPOSITION TO MOTION TO EXCLUDE REPORTS AND TESTIMONY OF ALI SAAD, PH.D.

[and] different skill levels within a job code” mapped to a certain range). And later slides in the very Oracle documents on which OFCCP relies make clear that “[b]road ranges allow managers to account for differences in experience, skills, competencies and performance of candidates and incumbents,” that “[e]ach situation should be reviewed on a case-by-case basis,” and that managers setting pay should “[l]ook at the whole picture.” Garcia Decl., Ex. 13 at ORACLE_HQCA_0000056234-27, -69.

OFCCP also appears to misunderstand the reasons why Dr. Saad argues that Dr. Madden’s models would be improved (even with their foundational structural flaws) by introducing factors like Organization and patent activity. As Dr. Saad explains, these additional controls are intended to better proxy employee skills and expertise. *See* Saad Rpt. ¶¶ 115-19. Dr. Saad never suggests that Oracle has a different defined pay scale for each Organization; instead, he argues for adding an Organization control to Dr. Madden’s pay models to better “group employees with those in the same organizations whose specific skills are likely to be more similar than the skills of employees in different organizations.” Saad Rebuttal ¶ 78. He never suggests that obtaining a patent automatically translates into a base pay increase; rather, he argues for including patent activity since “[p]atent-level work ... will generally correlate with high levels of skill and innovative ability not otherwise captured by measures like age or years since hire at Oracle.” *Id.* ¶ 80. OFCCP’s attempt to exclude Dr. Saad because he argues for adding these proxy variables is particularly odd, given that its own expert uses variables nowhere listed in the documents OFCCP cites to try to proxy legitimate pay differentiators—a prime example being Dr. Madden’s use of age to proxy prior experience, despite the fact that no Oracle document ever endorses paying employees simply based on their age. If Dr. Saad’s proposed additions to Dr. Madden’s model are excludable because they are not found in OFCCP’s preferred documents, Dr. Madden’s underlying analyses (which rely on age) also fail.

C. **Dr. Saad’s Opinions That Discrimination Claims Should Be Studied Empirically, and Proven Rather Than Assumed, are Entirely Mainstream.**

OFCCP closes by arguing that Dr. Saad “failed to apply ‘reliable principles and methods’

of labor economics” (Mot. at 16)—by which it appears to mean the approach its own expert espouses—based on repeated misrepresentations. OFCCP’s arguments and attendant attacks on Dr. Saad’s character should be dismissed, if not sanctioned.¹⁰

It is here that OFCCP accuses Dr. Saad of espousing the “troubling and highly unscientific opinion that ‘unmeasured’ skill and ability differences are responsible for the striking pay disparities between similarly-skilled Asians and Whites, African Americans and Whites, and women and men at Oracle’s headquarters.” Mot. at 16. But Dr. Saad nowhere makes that claim. He instead criticizes Dr. Madden for *her* untested assumptions about the potential impact of “unmeasured” factors she omits from her pay models. *See, e.g.*, Saad Rebuttal ¶ 35 (“[A]ccording to Dr. Madden, if these measured variables are the same across protected groups, then Dr. Madden assumes that all other, unmeasured characteristics do not differ either. But this is merely an assumption; it is not a scientifically derived outcome.”).

Dr. Madden’s use of education and “experience” puts the lie to OFCCP’s feigned outrage. As Dr. Saad points out, Dr. Madden includes education level in her models in order to test whether differences in educational attainment explain any part of the raw, unadjusted pay gaps she reports. Saad Rebuttal ¶ 35, n.37. As Dr. Saad notes, when it comes to her own work, Dr. Madden does not characterize empirically testing these types of questions as implying that one group has “‘inferior’ education to the other – just that education might differ between the groups being studied and that may relate to pay differences at Oracle, such that any such differences should be taken into account when assessing whether there are gender- or race-based differences in pay.” *Id.* But when Dr. Saad identifies other important factors omitted from Dr. Madden’s model, OFCCP claims Dr. Saad must be suggesting—and must personally believe—that some groups are innately inferior to others along whatever dimension is being studied. This palpable hypocrisy further confirms OFCCP’s attacks on Dr. Saad lack any merit.

¹⁰ These attacks on Dr. Saad’s character and accusations of bias in a *Daubert* are particularly egregious, given “it is well-established that an expert’s bias is not a proper basis to bar testimony under *Daubert*.” *Cage v. City of Chicago*, 979 F. Supp. 2d 787, 827 (N.D. Ill. 2013) (collecting cases); *see also U.S. v. Abonce-Barrera*, 257 F.3d 959, 865 (9th Cir. 2001); *In re Unisys Savings Plan Litig.*, 173 F.3d 145, 166 n.11 (3d Cir. 1999). OFCCP thus cannot credibly have viewed these baseless attacks as a basis for exclusion under *Daubert*, yet resorted to them anyway.

Perhaps most egregiously, OFCCP claims Dr. Saad believes that women, Asian, and African-American employees don't exhibit "hard work," which "may explain why his data analysis at times shows men or White employees as earning more." Mot. at 16 (citing Saad Rebuttal ¶ 36). Dr. Saad said nothing like this offensive claim suggests. He instead acknowledges there always will be "idiosyncratic factors associated with each employee – for example, some employees may work harder, some less hard." Saad Rebuttal ¶ 36. In other words, he states that such characteristics are *not* assumed to differ between gender or race groups—the opposite of what OFCCP repeatedly averred. *Id.* He goes on to explain how Dr. Madden's methodology stretches that concept too far when she decrees that because individuals differ idiosyncratically, one can also always assume everything omitted from a pay model will vary in that same way and thus "wash out"—an assumption, Dr. Saad notes, that has the effect of turning her pay study into a foregone conclusion, because she "assumes" nothing one could do to refine her models would ever change the results with respect to gender or race. *Id.* Again, OFCCP recklessly (and perhaps willfully) attributes to Dr. Saad claims he has not made and does not endorse. The Court should disregard entirely these misattributions.¹¹

OFCCP's further efforts to cast Dr. Saad as outside the mainstream of labor economics likewise fail. Regarding the issue of leaves of absence, Dr. Saad and Dr. Madden *agree* that a pay discrimination study must "back out" or otherwise account for time that an employee spends on a leave of absence, irrespective of the employee's race or gender. *See* Saad Rebuttal ¶ 73, n.85 (explaining how the two expert's different approaches are "similar"). OFCCP's feigned outrage that Dr. Saad used a separate leave variable to accomplish this (while Dr. Madden simply erased all time spent on leave from the tenure an employee would otherwise be "credited" within the model), and the Agency's related suggestion that Dr. Saad (but not Dr. Madden)

¹¹ At deposition, counsel for OFCCP ham-handedly tried to goad Dr. Saad into an "admission" endorsing the unpalatable view the Agency seems committed to attribute to him, but to no avail. *See* Saad Dep. 309:2-315:9 ("[A.] ... Individuals, regardless of race or gender, who work harder are likely to earn more. People who work less hard are likely to earn less. It's unlikely that those sorts of factors have any connection to gender or race. And, therefore, omitting them or omitting any measure of them is not problematic ... Q. [D]o you believe there are unmeasured ability differences between groups? A. No. What I said was I don't think that those idiosyncratic personal characteristics -- I don't think the distributions of those differ across demographic groups.").

imposes a “motherhood control,” rings hollow. *See* Mot. at 17-18. The Court should likewise reject OFCCP’s claim that Dr. Saad’s inclusion of an Organization control in his refinements of Dr. Madden’s pay model is improper or a means to “escap[e] pay discrimination liability” simply because the highly differentiated workforce covered by the Agency’s sweeping claims has worked in over 800 Organizations over the course of their Oracle careers. *Id.* at 18-19.¹² OFCCP elected to bring a case alleging intentional pay discrimination against thousands of employees ranging from entry-level workers to Vice Presidents and working across teams, functions, and lines of business. It cannot be heard to complain that the available data on these employees is too rich to neatly fit into the one-size-fits-all model it prefers.

VI. CONCLUSION

For the foregoing reasons, this Court should reject OFCCP’s unfounded attacks on Dr. Saad and permit him to offer his expert opinions regarding OFCCP’s core statistical evidence.

Respectfully submitted,

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¹² OFCCP’s analogy to dividing baseball players by both team and position is inapposite. Mot. at 19. It relies on the implicit claim that pitchers do the same work regardless of team, such that controlling for both team and position would obscure comparisons that should be made (*i.e.*, among pitchers across teams). Absent proof by OFCCP establishing that all employees who share a “job descriptor” or standard job title at Oracle do the same work—which OFCCP does not have, because it does not exist—the analogy does not furnish any legitimate critique.