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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

**PLAINTIFF OFCCP'S
POST-HEARING BRIEF**

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INTRODUCTION

OFCCP has proven that Oracle of America (“Oracle”) breached its obligations as a federal contractor by systematically engaging in gender and racial pay discrimination at its Redwood Shores headquarters. Exec. Ord. 11246, § 202, 30 Fed. Reg. 12319, 12320 (Sept. 24, 1965). The record evidence here dictates that judgment on liability be granted for OFCCP.

As a federal contractor, Oracle is required to implement and document compensation policies that ensure equal compensation opportunities for similarly-situated employees regardless of gender or race. 41 C.F.R. §§ 60-2.10, -2.17. Statistical analysis of Oracle’s compensation data shows that Oracle systemically pays less in salary and total compensation to women, Asians, and African Americans than to men or Whites assigned by Oracle to the same “system job title” (“SJT”), Oracle’s most granular job classification for compensation.¹ OFCCP has proven that Oracle’s gender and racial pay differentials are of such statistical significance that they can only be the consequence of intentional pay discrimination by Oracle. Oracle failed to rebut OFCCP’s statistical evidence as to racial and gender pay discrimination within Oracle’s SJTs, requiring judgment on liability for OFCCP.

OFCCP presented additional statistical evidence proving that Oracle engaged in further intentional pay discrimination by steering women and minorities into lower-paid career-levels (and, thus, lower-paid SJTs). OFCCP’s statistical study of such discriminatory steering identifies additional gender and racial pay disparities with statistical robustness. Further, OFCCP’s statistical evidence reveals that Oracle’s discriminatory steering at hire was driven by Oracle’s policy of setting starting pay and the employee’s career level (and, thus, SJT) based on the pay rate new hires received from prior employers for a different job. OFCCP’s statistical evidence details the disparate impact Oracle’s prior pay policy has on its female, Asian, and African American staff.

¹ OFCCP studied gender pay gaps among employees in Oracle’s Product Development, Information Technology (IT), and Support job functions and racial pay gaps among employees in Product Development at Oracle’s headquarters in Redwood Shores, California.

Although OFCCP's statistical evidence alone establishes Oracle's liability, the record here is replete with additional evidence, including direct evidence of discriminatory intent, corroborating the statistical evidence of Oracle's longstanding and ongoing discriminatory pay practices. As a bold proclamation of its animus toward equal employment opportunity, Oracle admitted at trial that it disregarded its regulatory and AAP obligations, including not performing any gender or racial pay equity analyses to comply with federal regulation or the express terms of its federal contracts. Indeed, despite being put on specific notice of racial and gender pay disparities, Oracle's chief executives breached contractual obligations by providing no budget to correct such prohibited pay disparities. Oracle's top management set ultra "lean" compensation budgets, engaged in gender and racial pay discrimination to achieve those budget objectives, and went to great lengths to conceal discriminatory compensation outcomes from OFCCP and its own employees.

In this brief, OFCCP first details controlling precedent and regulations dictating how to analyze whether Oracle complied with its contractual and regulatory obligations. OFCCP next outlines key facts critical to the required legal analysis, including delineating the job classification system Oracle used to set compensation. OFCCP then summarizes its statistical evidence proving Oracle engaged in intentional gender and racial pay discrimination as to employees Oracle classified into the same SJT and in additional intentional pay discrimination by steering women and racial minorities into lower-paid SJTs. OFCCP's statistical evidence reveals gender and racial pay gaps with standard deviations that can only be plausibly explained by intentional discrimination. OFCCP next summarizes its statistical evidence proving that Oracle's policy of using prior pay to set pay at hire disparately impacted women and racial minorities. Finally, OFCCP details the record evidence of actions taken by Oracle's executives which corroborate the discriminatory intent proven independently by OFCCP's statistical evidence.

On the basis of the full record, judgment on liability must issue in OFCCP's favor.

I. LEGAL STANDARDS

A. Executive Order 11246

This case arises under Executive Order 11246 (“Executive Order” or “E.O. 11246”) and implementing regulations at 41 C.F.R. §§ 60-1 through 60-50. As a condition of being awarded taxpayer-funded contracts, federal contractors are bound by the requirements of the Executive Order. Section 202 of the Executive Order, as amended, provides:

During the performance of this contract, the contractor agrees as follows:
The contractor will *not discriminate* against any employee or applicant for employment because of race, . . . [or] sex The contractor *will take affirmative action to ensure* . . . that employees are treated during employment, without regard to their race, . . . [or] sex. Such action shall include, but not be limited to the following: . . . *rates of pay or other forms of compensation.*

E.O. 11246, § 202 (emphasis added); *see also* 41 C.F.R. § 60-1.4(a)(1).²

As a federal contractor, Oracle agreed to ensure non-discrimination in rates of pay or other forms of compensation by taking affirmative action to ensure equal employment opportunity for its employees. Oracle agreed to ensure non-discrimination by “monitor[ing] and examin[ing] its employment decisions and compensation systems to evaluate the impact of those systems on women and minorities.” 41 C.F.R. § 60-2.10(a)(2)–(3). To meet these obligations, Oracle’s top management was required to provide the resources and support necessary to ensure compliance. 41 C.F.R. § 60-2.17(a). Specifically, Oracle was required to: conduct in-depth analyses of its compensation system to identify and correct disparities; monitor its compensation records at all levels to ensure non-discrimination; conduct internal reporting on a scheduled basis; and advise top management of program effectiveness. 41 C.F.R. § 60-2.17(b)–(d). These regular auditing and analysis requirements were not mere procedural requirements. Oracle was supposed to use these regular pay analyses to comply with its obligation to ensure it did not continue to utilize discriminatory practices. 41 C.F.R. § 60-2.17(c) (“[F]or these action-oriented

² OFCCP follows Title VII substantive standards in enforcing the non-discrimination provisions of the Executive Order. *See* 81 F.R. 39108 (updating regulation “to align the sex discrimination standards under E.O. 11246 with developments and interpretations of existing title VII principles and to clarify OFCCP’s corresponding interpretation of the Executive Order”).

programs to be effective, the *contractor must ensure that they consist of more than following the same procedures which have previously produced inadequate results.*") (emphasis added).

B. Disparate Treatment

Disparate treatment occurs where a plaintiff shows that the “employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“*Teamsters*”).

Specific racial or gender animus is not necessary. Courts have found intentional discrimination where employers or unions were motivated by well-intentioned paternalism,³ strategic business reasons,⁴ or acceding to discriminatory customer preferences.⁵ Paying groups of employees less than other groups of similarly-qualified employees because of their sex or race constitutes intentional pay discrimination. *Cf. Wash. Cty. v. Gunther*, 452 U.S. 161, 166 (1981). Intentional discrimination includes the failure to correct prior discrimination that continues to have an impact. *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 29 (2d Cir. 1988). Under the Executive Order, a contractor is liable for any pay disparity that “is the result in whole or in part of the application of any discriminatory compensation decision or other practice.” 41 C.F.R. § 60-20.4(e).

1. Proof of Intentional Discrimination by Statistical Evidence.

In a pattern and practice case like this, the plaintiff has the burden of establishing a prima facie case that “unlawful discrimination has been a regular procedure or policy followed by an employer” *Teamsters*, 431 U.S. at 360. To carry its burden, the plaintiff must present sufficient evidence to give rise to “an inference that employment decisions were based on a discriminatory criterion.” *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984) (quoting *id.* at 358) (internal quotation marks omitted).

³ See, e.g., *Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973, 988 (W.D. Wis. 2003), *aff’d as modified*, 383 F.3d 580 (7th Cir. 2004).

⁴ See, e.g., *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668–69 (1987), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No 102–166.

⁵ See, e.g., *Patterson v. UPMC S. Hills Health Sys. Home Health, L.P.*, No. CIV.A. 03-89, 2003 WL 26074479, at **4, 9 (W.D. Pa. 2003) (noting a defendant “who acts with no racial animus but makes job assignments on the basis of race can be held liable for intentional discrimination” under Title VII).

As this Court has acknowledged, “[t]his can be done by statistics alone, or with statistics brought to life with anecdotal evidence.” Order on Cross-Mot. For Summ. Js., at 24 (Nov. 25, 2019) (“MSJ Order”). See also *Segar*, 738 F.2d at 1277–79, 1286–87. As the D.C. Circuit has explained, the basic function “of statistical proof is to seek to eliminate non-discriminatory explanations for racial disparities; thus a statistically valid showing of a substantial disparity between expected and actual results may give rise to an inference of discriminatory intent.” *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1412–13 (D.C. Cir.), *on reh’g*, 852 F.2d 619 (D.C. Cir. 1988).

Discriminatory intent is inferred when the probability that an observed disparity occurring based on chance is under 5% (1.96 standard deviations) from the expected result. See, e.g., *Palmer v. Shultz*, 815 F.2d 84, 96 (D.C. Cir. 1987). The D.C. Circuit has “rejected the proposition that to establish intentional discrimination a showing of ‘gross disparities,’ rather than mere statistically significant disparities, is required.” *Berger*, 843 F.2d at 1413.

2. Defendant’s Heavy Rebuttal Burden in a Statistical Pattern and Practice Case.

Once the plaintiff successfully establishes a prima facie case, the presumption is that the defendant unlawfully discriminated, which the defendant must refute to avoid liability. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The defendant’s task is not a simple one: “A defendant’s rebuttal burden in a pattern or practice case . . . is significantly heavier than in an individual disparate treatment case.” *OFCCP v. Honeywell*, No. 77-OFCCP-3, 1994 WL 68485, at *5 (Sec’y Mar. 2, 1994). A “defendant cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff’s statistics.” *E.E.O.C. v. Gen. Tel. Co. of Nw.*, 885 F.2d 575, 581 (9th Cir. 1989). “[D]efendant must produce credible evidence that curing the alleged flaws would also cure the statistical disparity.” *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1188–89 (9th Cir. 2002); *OFCCP v. WMS Solutions, LLC*, 2015-OFC-00009, slip op. at 71 (ALJ May 12, 2020) (defendant cannot “rebut statistical evidence by mere conjecture or assertions, without introducing evidence to support the contention that the missing factor can explain the disparities as a product of legitimate, non-discretionary selection criteria”).

3. Plaintiff Meets Its Burden by Preponderance of the Evidence.

The plaintiff has the ultimate burden of persuasion, but the plaintiff meets his or her burden by proving that the defendant “more likely than not” engaged in discrimination:

[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. [A]s long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.

Bazemore v. Friday, 478 U.S. 385, 400–01 (1986) (internal citation omitted).

C. Disparate Impact

Paralleling the provisions for disparate impact liability under Title VII, OFCCP’s regulations provide: “Contractors may not implement compensation practices that have an adverse impact on the basis of sex and are not shown to be job-related and consistent with business necessity.” 41 C.F.R. § 60-20.4(d).

A disparate impact case does not require a showing of discriminatory intent. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *Teamsters*, 431 U.S. at 349. A disparate impact case may be established by exposing “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.” *Teamsters*, 431 U.S. at 335 n.15. A prima facie case of disparate impact is established by showing that an employer’s employment practice adversely impacted a protected group. *See Wards Cove Packing Co. v. Antonio, Inc.*, 490 U.S. 642, 656–57 (1989). To rebut a disparate impact claim, an employer must demonstrate that the disputed practice is job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

D. The “Similarly Situated” Standard

The Department’s regulations at 41 C.F.R. § 60-20.4⁶ and Title VII case law instruct how to analyze whether employees are similarly situated for purposes of pay:

⁶ Although Section 41 C.F.R. § 60-20.4 specifically applies to sex discrimination, it sets forth the Department’s interpretation of compensation discrimination under Title VII and thus equally applies to racial discrimination in compensation. *See* 81 Fed. Reg. 39108, 39108. Oracle has previously stated that 41 C.F.R. § 60-20.4 governs the analysis here. *See, e.g.*, Oracle’s MSJ, MPA at 14; Oracle’s Opp. to OFCCP’s MSJ at 17.

• **Only objective factors may be considered.** 41 C.F.R. § 60-20.4(a) provides: “Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other *objective* factors.” (emphasis added). *See also WMS Solutions, LLC*, 2015-OFC-00009, slip op. at 72 (“In employment discrimination claims, a plaintiff’s statistical analysis must only account for objective qualifications”); *cf.* 41 C.F.R. § 60-2.17 (AAP obligations require “measurable results” to address discrimination).

• **Defendants must identify the factors they claim to use and supply the data necessary for analysis.** *See Hemmings*, 285 F.3d at 1188–89 (“In this case, the plaintiffs’ expert ‘used the best available data, which [came] from the [defendant] itself.’ If the defendant believed information about the employees’ educational background, for example, would have explained the differences in promotions and compensation . . . , [defendants] should have provided information about educational level to the plaintiffs, or at a minimum, introduced testimony that education was a central factor in promotions.”) (internal citation omitted).

• **The factors the contractor uses must be documented and maintained.** *See* 41 C.F.R. §§ 60-2.10(a)(1) (requiring internal auditing and reporting systems to measure compliance), 60-2.10(a)(2) (requiring contractors to monitor and examine compensation systems for compliance), 60-2.17(b)(3) (requiring in-depth review of compensation systems), 60-2.10(c) (requiring documentation of AAP compliance); 60-1.12(a) (requiring record maintenance).

• **Factors must be actually used by the contractor in setting compensation.** *See* 81 Fed. Reg. 39108, 39126 (June 15, 2016) (Agency “treats employees as similarly situated only if they are comparable for purposes of the contractor’s pay practices on factors relevant to the compensation issues presented”); 81 Fed. Reg. at 39128 (Agency looks to “whether [a] factor is actually used by the contractor to determine compensation”); *see also Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 921 (9th Cir. 1983) (“Post-hoc rationalizations, of course, will not permit [the employer] to carry its burden of proving the legitimacy of its payment of unequal starting salaries.”); *Anderson v. Zubieta*, 180 F.3d 329, 341 (D.C. Cir. 1999) (“[Courts should not] assume that the very factor plaintiffs attack as pretext is a bona fide attribute of being situated

similarly. To adopt such a position would be to assume the very thing the *McDonnell Douglas* test is aimed at ferreting out—namely, whether that facially-neutral factor is indeed a pretext.”).

• **Factors must be consistently used for setting pay in a non-discriminatory manner.**

See 81 Fed. Reg. at 39128 (Agency looks to “whether the factor has been applied consistently without regard to sex or another protected basis”); see also *Birch v. Cuyahoga Cty. Prob. Court*, 392 F.3d 151, 167 (6th Cir. 2004) (using years of service as a factor in pay claim is inappropriate in light of evidence that “Defendants do not exclusively or consistently rely on years of service to set salaries”). Cf. *Jewett v. Oracle*, Case No. 17-civ-02669, Order Granting Representative Pls.’ Mot. for Class Certification, at 18 (Apr. 30, 2020) (“*Jewett* Class Cert. Order”) (“[I]t is not reasonable or consistent with the purposes of the EPA to permit an employer to pick and choose factors inconsistently and idiosyncratically to justify disparate pay decisions for employees performing substantially similar work.”).

• **Hypothetically plausible factors are not relevant—factors must be shown to make an actual difference in analysis.** *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 266 (N.D. Cal. 1992) (“[T]he defendant must introduce evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate, nondiscriminatory selection criterion.”) (internal citations and quotation marks omitted); *Buchanan v. Tata Consultancy Servs., Ltd.*, No. 15-CV-01696-YGR, 2017 WL 6611653, at *9 (N.D. Cal. Dec. 27, 2017); *WMS Solutions*, 2015-OFC-00009, slip op. at 73 (“A defendant must at least make a clear and reasonably specific showing based on admissible evidence that the alleged nondiscriminatory explanation explains the disparity.”).⁷

• **Job titles and an employer’s own compensation system are highly relevant to the similarly-situated analysis.** See *Coward v. ADT Sec. Sys., Inc.*, 140 F.3d 271, 275 (D.C. Cir. 1998) (“[J]ob titles usually serve as strong evidence of an employee’s actual skills and duties”); *Conn. State Employees Ass’n v. State of Conn.*, No. H-79-1977, 1983 WL 491, at *3 (D. Conn. Feb. 25, 1983) (“This Court will not engage in a subjective comparison of the intrinsic worth of various dissimilar jobs. . . . [I]f the defendants did in fact determine that

⁷ See also *Hemmings*, 285 F.3d at 1188; *Sobel*, 839 F.2d at 34; *Palmer*, 815 F.2d at 101.

dissimilar jobs were of equal value, but did not provide equal pay because of the sex of the employees, then this would be evidence of intentional discrimination.”).

• **This Court’s similarly-situated analysis is governed by 41 C.F.R. § 60-20.4 and Title VII, not the Equal Pay Act (“EPA”).** “Title VII incorporates a more relaxed standard of similarity between the male and female-occupied jobs [than the EPA].” *Miranda v. B&B Cash Grocery Store*, 975 F.2d 1518, 1526 n.15 (11th Cir. 1992); *see also Crockwell v. Blackmon-Mooring Steamatic, Inc.*, 627 F. Supp. 800, 806 (W.D. Tenn. 1985) (noting work performed by household cleaners and cleaning technicians was not “substantially equal” within the meaning of the EPA but for Title VII purposes “cleaning technicians were situated similarly to plaintiff. The jobs had many similarities and included similar requirements of effort and responsibility.”).⁸

II. MATERIAL FACTS⁹

A. Oracle’s Compensation System

1. *Oracle Maintains a Centralized Job Coding System that Identifies Which Employees Are Similarly Situated for Purposes of Pay.*

Oracle maintains a reticulated job coding system that sorts employees into similarly-situated groups, known as SJTs, for purposes of compensation.¹⁰ The SJT refers to and incorporates a specific job function, specialty area, job family/title, and career level.¹¹ JX144 at

⁸ Because OFCCP’s statistical analyses compare pay between and among employees working in the *same* job title and the *same* career level (which means the same SJTs), OFCCP would likely prevail here under the EPA standards. Indeed, the Superior Court of California, applying EPA standards in a pay case against Oracle paralleling this action, granted class certification under these facts. *Jewett Class Cert. Order*. The court expressly found that there was more than sufficient evidence to conclude that employees in the same job code were in substantially equal jobs for purposes of the EPA. *Id.* at 8–15. As the court explained, even under the much narrower EPA standard, job duties need not be exactly the same. *Id.* at 8–9, 14 (“Plaintiffs’ theory here is *not* that the class members within job codes [or SJT] at Oracle worked in identical jobs, or even jobs with the same duties, because the law does not require them to show that.”) (emphasis in original).

⁹ This Section focuses on facts that are not materially in dispute. The statistical evidence and disputed facts are addressed in the Argument (Sections IV) of this brief. In addition to the facts noted here, OFCCP further relies on and incorporates by this reference the facts set forth in its accompanying Proposed Findings of Fact.

¹⁰ Each “system job title” has a unique “job code” associated with it. JX144 at 5; PX22A at 173:9–17. To avoid confusion, OFCCP uses SJTs to refer to the lowest level of Oracle’s job compensation classification system, regardless of whether Oracle in the particular document or testimony referenced used the term “job code” or “system job title,” as they refer to the same, most granular level of Oracle’s job coding system.

¹¹ SJTs reflect “the general type of work an employee performs and her career level” and “generally reflect a progression of development within a job family (e.g., Applications Developer 1, Applications Developer 2, and so

5; JX114 at 4. Oracle indexes the salary range for each SJT to the job’s external market value in the appropriate locality.¹² Oracle funnels employees it perceives to have jobs with the same market value into the same SJT. JX114 at 10. Each SJT is assigned a salary grade and a corresponding salary range¹³ based on local pay rates. JX114 at 16. Oracle assigns numerous different SJTs to the same salary grade. PX171; JX140 at 10. “All jobs that are *considered equal in value to Oracle* are grouped into the same local grade level, and have the same salary range.” JX140 at 8 (emphasis added). The salary range connected with the SJT is expressly designed by Oracle to serve as “the link between internal and external equity.” *Id.*

Oracle is explicit that placing an employee in the correct SJT, which requires placing the employee in the correct job family and career level, is critical to ensuring employees are properly compensated. *See, e.g.*, JX114 at 15 (stating importance of correct SJT placement to salary range and bonus); JX144 at 4, 14 (emphasizing importance of placing employees in correct SJT); *see also* PX24A at 70:14–18 (Kate Waggoner: “we give guidelines . . . on the importance of determining the correct job code [or SJT]” before posting a job).

By differentiating employees based on their job family and career level, Oracle’s SJTs ensure employees are matched to a job that represents the type of work they do, their level of experience, and the complexity of work they are expected to perform. Oracle defines the distinct level of responsibility and the particular skills an employee must have at each career level. *See, e.g.*, JX114 at 6 (setting forth specific responsibilities for each career level within Software

on).” PX287 at 8 (emphasis added). JX144 at 9 (“A job family is a series of levels where the nature of the work is similar. The distinct levels represent Oracle’s requirements for increased skill, knowledge, and responsibilities. The higher the career level, the higher the complexity of the job duties.”).

¹² Oracle uses its job classification system to determine how closely employees are paid compared to market rate in their localities. JX140 at 9; JX144 at 13. Oracle explains:

A pay structure is built based on the local market data – starting with the lowest paid job and going through the highest paid job. Once the structure is built, the market data is reviewed for each individual position, and the salary grade chosen is the one with the midpoint that is closest to the market data.

JX140 at 9.

¹³ “Salary ranges assign a minimum and maximum to the amount that we are willing to pay for a specific job.” JX140 at 4.

Developer). For example, Oracle’s Product Development IC¹⁴ Promotion Template contains a table that lays out for each career level from level 3 through level 6: the expected education level and years of experience (e.g., level 3 has three to four years of related experience, level 4 has five to seven years, level 5 has ten or more years, and level 6 typically has fifteen or more years); the scope of expected supervisory involvement; a detailed description of the technical abilities expected; the external visibility expected; the ability to lead team work; and the type of achievements the employees should have reached. JX1 at 2–3.

Once an employee is placed in a SJT, the employee’s placement within the salary range for that SJT should depend on skill, performance, experience, and knowledge in relationship to the market and a person’s peers. JX114 at 17. Oracle explains:

- “Employees who are still learning their role, or employees whose contribution is below the standard should generally be positioned somewhere between the minimum and the 1st quartile.” JX114 at 17.
- “The midpoint typically reflects the external market rate for an experienced, fully competent and solid performing employee performing this job.” *Id.*
- “The 3rd and 4th quartiles should generally include employees who are our top performers, who are ready for promotion or for those who possess a ‘hot skill.’” *Id.*
- “The maximum is typically the highest salary that should be paid for a job.” *Id.*

This system is not discretionary as Oracle assigns all employees a SJT with applicable salary grade and range, including when HR “maps” new employees secured through corporate acquisitions to an Oracle SJT. Tr. 1238:4–18 (Waggoner describing process); *see, e.g.*, PX260.

2. Oracle’s Pay System Is Centralized, With All Pay Determinations Requiring Executive-level Approval.

Once an employee is hired at Oracle, all compensation decisions must be approved by Oracle’s top executives. Any delegation of authority to lower-level managers is subject to review and approval by many levels of management and HR, up to Oracle’s CEOs.¹⁵ Executive

¹⁴ IC refers to “individual contributor.” JX144 at 9. For non-managers, IC level is the same as the career level. *Id.*

¹⁵ Oracle’s Executive Vice President Steven Miranda and Senior Vice Presidents Campbell Webb, Balaji Bashyam, Juan Loaiza each testified that budgets are distributed through them and all pay decisions (hires, focals, bonuses, equity, dives and saves) require approval through the chain of command to the CEOs. Tr. 1084:8–24, 1088:2–1099:16, 1416:6–1422:5, 1445:14–1446:1, 1451:8–1458:19, 1492:9–1493:24; *see also* PX22A at 118:6–121:7 (JX16 in “Automated” tab at 1–2).

Vice President (“EVP”) Joyce Westerdahl, who has led Oracle’s Human Resources (“HR”) since 2000, implemented automated systems through which Oracle’s HR team ensures that managers comply with Oracle’s compensation policies, and that no compensation decisions are made without approval from its top executives. PX287 at 9–10, PX24A at 65:4–66:4, 68:23–63:9; PX16A at 253:4–254:1; Tr. 1114:16–21; JX11 in “Automated” tab at 1–2.

Oracle’s chief executives set the overall compensation budget, which includes setting budgets for each line of business (“LOB”) for compensation offers at hire, focal increases, off-cycle salary increases (such as “dive and saves”), equity, and bonuses. *See supra* note 15. While lower-level managers could make recommendations for compensation offers within the compensation budgets set by Oracle’s chief executives, Oracle requires all manager recommendations to be approved by HR and through all levels of the LOB hierarchy above the recommending manager, including the CEO’s office. *Id.* The approval process requires submission and review of detailed documents and information by HR and approving managers and executives and is structured to permit high-level managers, HR, LOB heads, and the CEO’s office to: choose *to not* delegate the compensation decision to lower management at all (thus just making the compensation decision at the higher level); modify the pay recommendation entirely; or, withhold approval and return the recommendation to the manager for modification. *Id.* Oracle’s top leaders, including the CEO’s office, exercised their authority to make compensation decisions directly as well as modifying and rejecting compensation recommendations from lower-level managers. *Id.* Oracle instructs its managers that no pay decision may be communicated until it is approved by the CEO’s office. PX37 at 35; JX102A at 112:20–113:12.

B. Oracle Relied on Prior Pay in Setting Pay at Hire.

Oracle’s approval process for compensation offers to new hires emphasized that managers could not recommend compensation for new employees above that of the prospective hire’s prior pay without substantial justification. Until California prohibited consideration of prior pay in October 2017,¹⁶ the compensation approval form managers were required to send to

¹⁶ Cal. Lab. Code § 432.3.

Oracle's chief executives and HR to secure authority to make a new hire compensation offer contained a mandatory term requiring managers to report a prospective hire's prior pay. PX176 at 24; PX188 at 12; PX24A at 56:15–57:2.¹⁷ For acquisition hires, Oracle advised its managers that recommendations to pay a different amount from current pay were “non-standard,” requiring “strong justification” and would be “closely scrutinize[d]” by the CEO's office. PX268 at 4, 7; PX22A at 167:2–168:11, 360:18–365:2.

Consistent with the trainings, prior pay was considered at the CEO level in approving pay.¹⁸ Trial witnesses confirmed that prior pay was the critical factor Oracle used to set pay, even when the prior jobs concerned different skills, responsibilities, or duties from the jobs the new staff was hired to perform for Oracle.¹⁹

C. Oracle Admits It Did Not Perform Pay Equity Analyses to Comply with Its AAP and Did Not Implement Its AAP with Respect to Compensation.

Oracle's AAP, which Oracle executed as a condition of securing federal contracts, specifies that Oracle must take steps to identify and correct discriminatory pay practices. Oracle's 2014 AAP specifies that Oracle would comply with its regulatory requirements and use the AAP as a “management tool.” PX195 at 1. Oracle CEO Safra Catz signed Oracle's 2014

¹⁷ Oracle made explicit to management in red bold letters that hiring managers were “required” to include the applicants' “current base salary” (or for rehires, “final salary”) when submitting offer letters for approval to the executive office. PX176 at 22. The same training explained: “It is important to note that all offers get approved by the Oracle executive office. On this slide you will find all of the required information for your offer to get approved. Information such as job details, salary details and other pertinent information is required for all offers. It is important to include any, and all information that you have, so that your offer does not get sent back and so that you do not have to unnecessarily resubmit your offer for approval.” PX176 at 23. Moreover, if a manager wished to propose a “[h]igh increase in comp compared to current comp” for a new employee, the manager was required to check a box alerting executives that this type of “[n]on-standard offer request could require further justification.” PX176 at 32; *see also* PX176 at 34 (sample offer memo including detailed justifications and prior pay information). Oracle stated that prior salaries would be verified in background checks. PX71 at 2, PX72 at 3; PX74 at 4.

¹⁸ For example, Balkenhol requested prior-pay information and then communicated on behalf of the CEOs that the recommended offers were too high to go forward. Tr. 1316:20–1323:2 & DX310 in columns B, D–E, H at rows 1239–1251; Tr. 1324:24–1326:9 & DX309 in columns B, D–E, H at rows 742–744; Tr. 1326:10–1329:7 & DX309 in columns B, D–E, H at rows 1250–1252; Tr. 1329:8–24 & DX309 in columns B, D–E, H at rows 955–964.

¹⁹ Tr. 263:21–265:20 (Boross was offered salary based on her lowest paying of three former jobs despite recently earning more money, receiving a master's degree, and switching industries in the interim); Tr. 309:17–311:17 (Oracle asked for Patricia Esteva's current salary and then made an offer that was essentially the same pay rate). For acquired employees, Oracle admits that until October 2017, such employees came into Oracle at their prior employers' pay rate. *See* Tr. 1239:10–20; PX22A at 167:2–168:3.

AAP, which identifies Catz and Shauna Holman-Harries (Oracle's Director of Diversity Compliance) as "Responsible for Plan Implementation" and represents that Larry Ellison, Catz, and Mark Hurd had given "senior management support" to Holman-Harries. PX195 at 2, 6–7, 15, Tr. 339:5–18. The AAP identifies Holman-Harries as "responsible for implementing an effective auditing and reporting system" and represents that she analyzes the results of Oracle's employment actions to determine their impact on Oracle's AAP objectives, "reviews problem areas," "makes recommendations," and "communicates with management." PX195 at 12. Oracle's 2014 AAP explicitly represents that "Oracle develops and analyzes Internal Audit Reports to assess performance in . . . compensation." *Id.*; Tr. 345:1–346:8.

Holman-Harries testified that her team developed no internal audit report to assess performance and compensation as part of Oracle's regulatory compliance. Tr. 346:25–348:7. Holman-Harries testified that she and her team had no tracking system for identifying when managers had found problem areas in Oracle's compensation systems based on gender or race and took no steps to ensure individual managers conducted such analyses. Tr. 352:22–353:7. Holman-Harries further testified that it was not her responsibility to oversee Oracle's OFCCP compliance efforts with respect to compensation, and she "never studied Oracle's compensation system as part of [Oracle's] AAP regulatory compliance." Tr. 353:19–354:10.

III. SUMMARY OF ARGUMENT

OFCCP's statistical evidence proves that Oracle engaged in intentional pay discrimination against women, Asians, and African Americans. Using Oracle's own job classification system, OFCCP's statistical analysis of Oracle's compensation data reveals that Oracle pays similarly-qualified women, Asians, and African Americans less than men and Whites assigned to the same SJT. With standard deviations above 1.96, the only plausible explanation of the gender and racial pay disparities in Oracle's compensation data is intentional gender and racial pay discrimination. This evidence alone requires judgment against Oracle for breaching its AAP and regulatory obligations by engaging in prohibited pay discrimination. *Segar*, 738 F.2d at 1277–79, 1286–87; *Berger*, 843 F.2d at 1413.

OFCCP presented additional statistical evidence proving that Oracle engaged in further intentional pay discrimination by steering women and racial minorities into lower-paying career levels within a job family, revealing that Oracle's gender and racial pay discrimination extends well beyond employees in the same SJTs. OFCCP's statistical evidence further proves that Oracle utilized a practice of setting compensation at hire on the basis of prior pay and that this practice disparately impacted its female, Asian, and African American employees.

Although OFCCP's statistical evidence here is sufficient alone to establish that Oracle violated the Executive Order, the record provides other evidence corroborating OFCCP's statistical evidence. Oracle's executives set ultra-lean compensation budgets, which they achieved only by engaging in prohibited pay discrimination. Oracle's executives were on notice of gender and racial pay disparities created by their compensation budgets and practices but never provided a budget to correct them. Further, Oracle chose to abandon its AAP and regulatory obligations, underling both its animus for equal employment opportunity and its dedication to concealing its discriminatory conduct so that it could continue such prohibited employment practices in perpetuity.

IV. ARGUMENT

A. Oracle Intentionally Pays Women, Asians, and African American Less Than Similarly-Situated White or Male Comparators.

1. Professor Madden's Studies Found Robust Racial and Gender Pay Disparities for Employees Oracle Classifies as Similarly Situated.

OFCCP presented statistical evidence at the hearing showing broad pay disparities for similarly-qualified employees Oracle places into the same SJTs.²⁰ These analyses were performed by Professor Janice Madden, "a labor economist 'with extensive experience in the

²⁰ PX1 at 14–17, 27–31, 40–43, 62, 65, 69, 72, 76–77 (Tables 1(a), 1(d), 2(a), 2(d), 3(a), 3(b)). *See also* Tr. at 738:9–13 (explaining that her column 8 analyses compare wages only for employees in the same SJT: "once I take that job descriptor which is Oracle job title, and add career level, I have the job code [or SJT]").

analysis of labor markets and, in particular, gender and racial differentials in labor markets.”

Greater Phila. Chamber of Commerce v. City of Phila., 949 F.3d 116, 128 n.60 (3d Cir. 2020).²¹

Madden conducted specific regression analyses to identify racial or gender pay disparities **within** Oracle’s SJs,²² accounting for *all* factors Oracle uses to determine that employees are similarly situated for compensation purposes.²³ Madden reported her findings regarding gender and racial pay disparities *within Oracle’s individual SJs* in column 8 of the relevant tables in her report. PX1 at 62, 65, 69, 72, 76–77 (Tables 1(a), 1(d), 2(a), 2(d), 3(a) and 3(b)).

Summary of Key Column 8 Findings

(SD = standard deviation; Coeff. = gender/race coefficient²⁴)

Year ²⁵	Table 1(d) Gender Base Pay (Salary) SD	Table 1(d) Gender Base Pay (Salary) Coeff	Table 1(a) Gender Total Comp. SD	Table 1(a) Gender Total Comp. Coeff	Table 2(d) Asian Base Pay (Salary) SD	Table 2(d) Asian Base Pay (Salary) Coeff	Table 2(a) Asian Total Comp. SD	Table 2(a) Asian Total Comp. Coeff
2013	9.03	.039	4.96	.055	5.16	.027	3.03	.041
2014	8.17	.036	5.21	.063	4.67	.025	5.28	.079
2015	8.23	.035	4.27	.046	5.24	.028	5.29	.071

²¹ Madden has significant credentials relevant to this matter. PX1 at 3–5; Tr. 686–701. She earned a Ph.D. in economics from Duke University in 1972 and served as professor at the University of Pennsylvania, Wharton School of Business since 1972, where she also served as Dean of Graduate Education. Tr. 688:22–25; 689:13–25; PX1 at 3. Over the course of her 47-year career, her focus has always been on “how labor market institutions affect opportunities by people” based on “their demographic characteristics.” Tr. 690:21–25. Madden has published numerous peer-reviewed articles dealing with the effects of age, race, gender, and urban location on labor market outcomes. PX1 at 3–4. Madden has testified as a witness in more than 45 cases involving complex statistical analyses for thousands of employees, *id.* at 5, and has been retained by the Federal Judicial Center to train federal judges on the use of statistics in discrimination litigation. *Id.* at 4.

²² Madden controlled for gender, race, age (as a proxy for experience), education level, time at Oracle, exempt/non-exempt status, job descriptor (Oracle job title, also called “job family” by Oracle), managerial status, and career level. Tr. 728–729, 38:3–11. *See also* n. 20, *supra*.

²³ Tr. 723:1–9 (explaining that the controls she used in her analyses are “what Oracle uses to set compensation and what they use to set job placement”).

²⁴ “In general, the regression coefficient for a particular explanatory variable measures the effect of that variable (*i.e.*, race or gender) on the dependent variable (compensation) after adjusting (or controlling) for the effect of the other independent variables (*i.e.*, experience and education) included in the regression equation.” PX1 at 12. When multiplied by 100, the race or gender coefficient approximates the percentage difference in pay between groups. PX1 at 15, n.7; Tr. 727:3–6 (Race coefficient of negative .237 “can be interpreted approximately as a salary disparity for Asians relative to Whites with no other controls of 23.7 percent.”).

²⁵ Oracle has argued that OFCCP must first show liability during the review period before the Court can consider a continuous violation. *See, e.g.*, Oracle’s Mot. in Limine No. 3. The Court need not reach that issue in this case, as Oracle has made no attempt to show that its practices changed immediately before or after the review period and the statistical results after the review period are consistent with the results during the review period.

2016	8.30	.036	4.74	.052	4.40	.024	2.76	.038
2017	7.32	.032	4.71	.058	5.16	.028	2.99	.046
2018	7.52	.036	4.71	.058	3.92	.024	2.67	.042

For women and Asians, these analyses show consistent, statistically significant results comparing employees with the same level of education and years of experience, who Oracle classified into the same SJT. Indeed, the very factors that Madden utilizes as controls, education and experience, are the same factors Oracle’s compensation policies dictate should determine how wages are set within a single salary range (which is dictated by the SJT). Madden’s analysis is on all fours with Oracle’s compensation system. Tr. 723:7–19, 738:9–13.

An inference of discrimination is established at 1.96 standard deviations, which means there is a 5% percent probability of the result happening by chance. Tr. 730:17–731:3; PX1 at 13. Here, the standard deviations calculated by Madden’s studies, shown above, are well above 1.96, providing determinative evidence that Oracle intentionally discriminated against Asians and women in setting compensation.²⁶ These findings, particularly as to base pay, reflect probabilities even more remote than the odds of winning the Powerball jackpot with a single ticket. Tr. 735:21–736:16 (explaining that standard deviations above 5 reflect probabilities even smaller than winning Powerball). Madden testified that, given the systemic gender and racial pay disparities between similarly-situated employees as defined by Oracle’s own compensation and classification system, Oracle either has decided that women and Asians have *systematically inferior* work abilities for which Oracle has no measures or records to document that distinction, or Oracle has decided to pay women and Asians less than their similarly-qualified male or White colleagues. Tr. 758:8–21, 780:22–781:16, 788:16–789:3; *see also* DX449 at 6, 13, 33. Either answer means that Oracle has breached its Executive Order obligations.

²⁶ Madden explained that the standard deviations for African Americans do not always reach statistical significance because of the very few African Americans employed by Oracle in Product Development. PX1 at 38; Tr. 782:8–12 (“[S]o basically we’ve got about 30 African-Americans that we’re estimating all the racial differentials here”); 784:8–12 (because of the low counts, “we simply can’t have much power in statistical analysis”). Nevertheless, as Madden explained, the fact that the standard deviations approach statistical significance points to the consistency of the discriminatory pay practices experienced by African-Americans at Oracle. Tr. 786:10–787:14. The “measured race coefficients here are much larger than we saw for any of the other groups,” and “this difference is virtually experienced by all of the African Americans versus all of the [W]hites.” Tr. 786:13–15, 787:10–14.

Oracle’s claim that SJTs are not appropriate for determining which employees are similarly situated for purposes of pay is belied by its own pay classification system. Oracle designed its job classification system (sorting staff into SJT compensation groups as described in Section II.A above) to group similarly-situated staff for the purpose of setting compensation.

Moreover, by sorting employees by job function, specialty area, job title/family, and career level, Oracle groups into SJTs employees with the same types of duties and same experience at a very granular level.²⁷ Oracle maintains over 1,300 unique job codes or SJTs. JX114 at 4. Just within the three job functions at Oracle’s headquarters that are the subject of this case, there are 139 unique SJTs. PX171. Unsurprisingly, Oracle—a technology company that develops applications and software products—has a large concentration of employees engaged in similar types of work for compensation purposes in SJTs such as Software Developer 4 or Software Developer 5. While there are large numbers of employees in each of these SJTs, that is not the case with most SJTs. PX171 (rows 39 & 67, column f). As shown in the following table, most SJTs have an extremely small number of employees:²⁸

No. of EEs	1–5	6–25	26–75	76–150	151–300	Over 301
No. of SJT with above number of EEs	61	43	18	6	7	4

The few SJTs with a large number of employees are exactly the type of job categories where one would expect a technology company, like Oracle, to have many employees doing similar work at a similar skill level for purposes of compensation.

Furthermore, although Oracle retains some flexibility to differentiate the pay of employees in the same SJT within a given salary range, Oracle expressly spells out that experience is a major factor for placement within a range and that experienced, fully competent, and solid-performing employees should be at the midpoint of the range. JX114 at 17. Madden’s

²⁷ In granting class certification in *Jewett*, the state court credited the finding of an Industrial Organizational (IO) Psychologist, who (on the basis of the same facts regarding Oracle’s job classification system at issue here) concluded Oracle’s job codes describe “similar jobs in terms of the abilities, the skills, the effort, [and] the responsibility that’s required to perform those jobs.” *Jewett* Class Cert. Order at 12.

²⁸ The table summarizes the data presented in PX171. Thirty four (34) SJTs have only 1 or 2 employees. PX171.

column 8 analyses only compare employees in the same SJT that have similar degree levels, and similar years of experience inside and outside of Oracle.

Here, the Court need not develop its own approach to determine which employees are similarly situated for purposes of pay because Oracle already developed and uses a job classification system that sorts its staff into such groups: Oracle's SJTs. *Coward*, 140 F.3d at 274 (“[J]ob titles usually serve as strong evidence of an employee’s actual skills and duties”); *Conn. State Employees Ass’n*, 1983 WL 491, at *3 (holding plaintiffs may rely on defendant’s own classification system).²⁹ ***OFCCP’s statistical evidence compares the pay of employees grouped by Oracle’s job classification system into the same SJTs*** and reveals racial and gender pay gaps (Madden’s column 8 findings) of employees in the same SJT that are only plausibly explained by intentional pay discrimination. This evidence alone requires a finding of liability against Oracle. *Segar*, 738 F.2d at 1277–79, 1286–87.

2. Oracle Failed to Rebut OFCCP’s Statistical Analyses.

Oracle claims that employees in the same SJT are not similarly situated for purposes of pay, even when also controlling for education level and experience. Yet, to rebut OFCCP’s analysis, Oracle must identify explanatory, nondiscriminatory factors that Oracle ***actually used*** to set pay. Here, Oracle’s expert admitted he made *no* attempt to conduct an independent evaluation of gender or racial pay equity at Oracle. Tr. 1802:19–1803:2. Without an alternative statistical analysis or analyses showing that factors Oracle contends are explanatory actually make a difference, Oracle cannot establish that the factor is a bona fide explanation. As this Court noted, to rebut a regression analysis without providing an alternative explanatory analysis,³⁰ a defendant must show that the regression ignores factors that are central to the employment decisions at issue. Flaws that are “merely hypothetical,” while possibly rendering

²⁹ Moreover, as Oracle’s pay setting system is directly tied to its SJT/job coding system—which differentiates levels based on skill, type of job, location, and responsibility level—this case is distinguishable from cases where employers maintain broad job titles that have little relationship to employer pay practices.

³⁰ *Cf. Jewett Class Cert. Order* at 19 (“This legal requirement—that the job-related factors be bona fide and reasonably and therefore consistently applied, eliminates Oracle’s argument that its defenses are necessarily *individualized*: either Oracle applied its bona fide factors consistently within its job codes [or SJTs]—and it can prove the impact on pay of these factors through statistical analyses of average pay differentials without resorting to individualized proof—or it did not apply them consistently and lacks an affirmative defense.”).

the analysis “less precise,” without more, will not “defeat a showing of intentional discrimination established by the regression analysis.” MSJ Order at 29 (internal quotation marks omitted).

a. *Oracle Keeps No Records of Product Assignment and Does Not Use Product Assignment to Set Pay.*

Oracle’s main criticism of Madden’s analyses is that they do not account for employees in the same SJT being assigned to work on different products.³¹ This defense fails in light of Oracle’s admission that it does not keep records of product assignment, as Oracle would have created and maintained product assignment data had it actually used product assignment to set pay. PX270 at 7–9 (no centralized data repository or source for matching employees to product).³² Further, evidence from Oracle’s own trial witnesses reveals that Oracle does not, in fact, set pay based on product. Product has never been a part of Oracle’s job classification system. PX22A at 102:25–103:9 (Waggoner: “The job codes [or SJTs] in IT and development, in particular, have never been product associated. . . . [P]eople in IT and product development were never coded based on particular products”). Product is not mentioned in the Employee Handbook or in any of the detailed training materials that Oracle developed and used to train managers how to set compensation. JX155 at 42 (Nov. 2018); PX50 at 39 (2014); PX31 at 1. *See also* JXs 24–25, 106, 113–114, 126–127, 138, and 140–144.

These omissions are not a mistake. Oracle admits that it does not consider (and, in fact, generally prohibits) making compensation changes when employees are moved to work on different products. JX114 at 31.³³ If product is a central explanatory factor in pay differentials, changing products should impact compensation. Yet, Oracle’s managers repeatedly confirmed at trial that a transfer or a change in product assignment does not result in a change of

³¹ As explained by Madden both in her report and at trial, “economic theory expects that product line would not affect compensation” as the compensation is determined by both the supply *and* the demand curves, and an employee is “not going to be willing to accept lower wages simply because your product’s less profitable.” Tr. 747:2–4, 19–210; DX449 at 5–6.

³² Oracle did not track any association with a given product in their hiring data for at least 74% of hires, despite having a data field for this purpose. *See* JX131, “Emp Assignment Information” tab, column AU. *See, supra*, Section I.D. (describing regulatory obligations to maintain records regarding compensation practices).

³³ *See also* PX176 at 42 (internal transfer is at equal career level and salary).

compensation absent unusual circumstances.³⁴ Moreover, Oracle’s workforce is not organized to silo employees to uniformly work on one product. Numerous witnesses testified³⁵ that they worked on multiple products simultaneously or they consistently changed products over time.³⁶

Oracle’s compensation classification system, its training documents, and the testimony of all witnesses are in accord: Oracle sorts its staff into SJTs of similarly-qualified personnel for compensation purposes, but product assignment is simply not a factor used to sort employees in order to set compensation. The post-hoc attempt by Oracle’s expert to interpose hundreds of controls allegedly as a proxy for product³⁷ misrepresents something basic and essential about Oracle’s business and its success: as a large technology company, Oracle recruits, hires, and retains highly educated engineers who possess skills and creativity to develop, contribute to, and provide customer support to a vast and *ever-changing* array of products. Tr. 1145:3–14, 1156:15–17, 1168:24–1169:8. Naturally, then, specific product knowledge is *not* the skill that is

³⁴ Tr. 1089:24–1090:8 (EVP Miranda admitting that it was policy not to give a raise during a lateral transfer); Tr. 1489:4–6 (EVP Loaiza stating that a person’s salary is almost always unchanged when he or she transfers); Tr. 122:8–10 (Vice President (VP) Kirsten Klagenberg stating it was “company policy” not to give an employee a raise upon transfer); Tr. 419:22–420:2 (Director Avinash Pandey stating Oracle has a policy of not changing compensation for internal transfers).

³⁵ In this Section, and throughout this brief, OFCCP provides various anecdotal examples that buttress and bring to life the lived experience of the employees that were subject to Oracle’s discriminatory policies and practices.

³⁶ See Tr. 122:17–23 (Klagenberg estimated she worked on about 600 products during her career); Tr. 610:13–16; 611:10–24 (Vicky Hardman worked on 12 to 40 products at a time, half on the cloud); Tr. 1017:5–16 (Kuassi Mensah worked on 10 products over 18 years, many simultaneously, and his pay never changed because of product); Tr. 281:16–282:8 (Diane Boross’s pay did not change when she worked on different products); Tr. 408:12–16, 428:11–17 (Director Avinash Pandey’s supervisees worked on different products, but this did not result in a change in compensation); Tr. 1919:14–1927:21, 1940:10–1942:17 (Leor Chechik’s compensation did not change when she transferred between positions that required different skills and work on different products). Madden observed the same lack of pay change when employees changed “Cost Centers.” Tr. at 748:12–14.

³⁷ Acknowledging that “product data is not available,” Saad applied a class of 500+ controls based on an employee’s “Cost Center” as a “rough proxy” for product, even though he conceded that Cost Center “is not entirely well suited to group employees doing similar work, due to its dual business and accounting function.” JX103 at 112 (¶141), 222 (¶1). Indeed, Saad admits that he does not know how strong the association between Cost Center and product is because he did not study this association at all. Tr. 1813:7–22. As noted by Madden, the record here is clear that Cost Center does not indicate product assignment. DX449 at 5–6; Tr. 746:24–25; see, e.g., Tr. 984:25–987:5, 1016:15–1017:13 (Cost Center never changed despite Kuassi Mensah working over 18 years on 10 different products). Further, as Madden explained, the real effect of Saad’s application of these 500+ controls is to try to prevent the statistical analysis from comparing the racial and gender pay disparities at issue (which is “sometimes called slicing and dicing the data”): by using the Cost Center class of controls, which “does not indicate product line which I understand is why Dr. Saad wanted to include it,” Saad’s application of the Cost Center controls is “basically tossing people out of the race comparisons.” Tr. 746:24–25, 751:7–11, 753:19–23.

key to Oracle. The skills critical to Oracle are education and experience—which allow its employees to contribute to *many* and *changing* products over time.³⁸

b. *Oracle Does Not Base Compensation on Job Performance.*

Unlike product, Oracle’s compensation trainings explicitly refer to performance, but Oracle makes no attempt to show that differences in employee performance ratings statistically explain the pay differentials. This is no accident. Witnesses put on by both parties included strong performers, who unbeknownst to them, were paid far below the midpoints of their salary ranges.³⁹ The record here shows that Oracle lacks a systematic or objective approach to applying its performance system to compensation. Oracle admits that it does not require managers to conduct evaluations or to consider evaluations in decisions about raises, promotions, or focal reviews. Tr. 1103:9–11 (Miranda), 1488:19–25; PX14A at 140:14–18, 195:19–196:9, 134:23–135:16, 155:9–17 (Dodson); PX24A at 226:16–21 (Waggoner: “Some organizations do them and some don’t.”); JX102A at 125:6–11, 126:3–8; JX112 at 3 (Ellison: 35% completed); Tr. 1488:19–25; PX21A at 113:17–25, 114:19–25. Thus, even if performance appraisals were objective and used for pay, Oracle’s data on performance are incomplete and cannot provide a basis for analysis.

Indeed, performance and pay are so disconnected that even when employees are promoted by Oracle (presumably based on performance), they often receive no pay increase associated with the promotion. Tr. 266:20–23 (Diane Boross promoted without pay raise); Tr. 304:8–23 (Patricia Esteva promoted without pay increase); Tr. 172:16–173:7 (Donna Ng promoted with no change in pay). Indeed, in Product Development, it was a policy *not* to give pay raises with promotions. PX21A at 219:1–9; *see also* P21A at 218:17–218:9 (EVP Loaiza:

³⁸ *See, e.g.*, Tr. 1102:4–16 (Miranda’s work with Cloud Applications began about 10 years ago, and he started his career as a database developer); Tr. 399:10–400:18 (Pandey was in Product Development but transitioned to IT after his team was offshored); Tr. 1919:14–1926:25, 1933:13–1935:2, 1939:19–1940:5 (Chechik often changed jobs where she performed very different work. She used her previous skill and experience for this new work).

³⁹ Nachiketa Yakkundi testified that he was unaware that for five years he was below the midpoint of his prior salary grade. Tr. 1899:10–22. This was despite receiving performance ratings of exceeds expectations or outstanding during that time. Tr. 1899:6–9; *see also* Tr. 1558:15–1559:23 (Janet Chan was underpaid despite positive performance ratings); Tr. 172:16–174:25 (Donna Ng received exceeds expectations ratings and a promotion, but she did not get a corresponding raise).

“It’s very rare to get a salary change as part of a promotion prior to 2018.”). Madden confirmed in her analysis that performance evaluations were unrelated to stock compensation (as reflected in the limited evaluation data available as many organizations did not conduct evaluations). PX1 at 68, 75, 78 (Tables 1(g), 2(g), 3(c)).

Oracle has failed to rebut OFCCP’s evidence of significant disparities by pointing to a variable missing from Madden’s analyses that was so central as to cast doubt on her results.⁴⁰ Oracle’s post-hoc explanations fail to explain the robust gender and racial pay disparities among employees Oracle assigned to the same SJT for purpose of compensation.

B. Oracle Intentionally Steers Women, Asians, and African Americans Into Lower Paying Starting Pay and Career Levels.

In addition to paying women, Asians, and African Americans less than similarly-situated comparators in the same system job titles, OFCCP’s statistical evidence proves that Oracle steers similarly-qualified women, Asians, and African Americans into lower-paying career levels within a job family.⁴¹ This discriminatory steering violates the Executive Order. *See, e.g., Gunther*, 452 U.S. at 166; 41 C.F.R. § 60-20.4(b). “[I]n an assessment of pay practices at hire, a key point of comparison may be qualification at entry.” 81 Fed. Reg. 39108, 39127. “Whether any particular factor,” such as job assignment, “explains differences in pay is ‘tainted’ by discrimination, or should be included or excluded as a legitimate explanation for sex-based disparities, will depend on case-specific evidence.” *Id.* at 39128.

⁴⁰ In her reports and testimony, Madden explained that Oracle has failed to show and actually cannot show that Saad’s remaining critiques of her analyses—that she should have added controls for education major, receipt of patent bonuses, and cumulative leave taken—alter her analyses’ findings of systemic gender and pay disparities. Tr. at 765:8–12 (proposed patent control “has very little effect”); 772:23–775:11 (applying Saad’s cumulative leave variable but correcting his erroneous tenure calculation shows consistent 3-4% gender pay gap with 3 to 4 standard deviations); 737:14–738:8 (explaining that her job descriptor variable is a broad, conservative variable that already captures both specialized experienced and specialized education, such as education “majors”); 800:21–24 (“for [Saad] to be able to make this case that somehow [majors] matters he has to analyze the effects it has the way I have on how adding that changes the disparity and he has not done that”); DX449 at 11 n.3, 15, 18, 20–21, 46–48 (Tables R2–R4). *See Hemmings*, 285 F.3d at 1188 (employer must show factor actually makes a difference); *WMS Solutions*, 2015-OFC-00009, slip op. at 73 (same).

⁴¹ Madden uses the term “job descriptor” to refer to job title or job family. *See supra* notes 20 & 22.

Oracle expressly maintains discretion to place employees at hire at one career level above or below the career level listed in a requisition. Tr. at 1197:5–13; DX449 at 35–39. Madden’s expert report and testimony demonstrates that Oracle uses this discretion to steer women, Asians, and African Americans into lower-paying career levels at time of hire, which widens the overall discriminatory gender and racial pay gaps beyond those which exist *within* SJTs. In contrast to the racial and gender pay gaps between similarly-qualified personnel Oracle assigned to the same SJT, Madden’s analyses regarding steering compared the pay of Oracle employees with same objective education and skills who Oracle classified into the same job family but different career-level (which dictated the SJT).⁴² Madden identified employees of similar levels of productivity as identified by exogenous characteristics, or proxies for such characteristics in light of Oracle’s incomplete records, including: degree level (education), age (a proxy for experience), time at Oracle (a proxy for skill and experience), and job descriptor/job title/job family (a proxy for specialized education, skill, or experience not fully captured by other controls). PX1 at 7–10, 17–18; Tr. 722:11–737:11, 799:1–10. The results of these steering analyses reveal much wider gender and racial pay gaps than those found within SJTs: Oracle pays women between 9.2% and 10.4% in salary below that of similarly-situated men, with standard deviations above 12 and, it pays between 4.7% and 7.3% less in salary to Asians, with standard deviations from 4.6 to 8.3. PX1 at 65, 72 (Table 1(d) at column 6, Table 2(d) at column 6). Madden’s statistical analysis reveals that the increased gender and racial pay gaps between similarly-qualified Oracle employees within the same job family (but not within the same SJT) bear standard deviations of such magnitude that these pay gaps can only be the product of intentional compensation discrimination by Oracle. Tr. 733:8–18, 735:20–736:14.

Madden further opined regarding *when* this steering into lower career levels occurred. For Asians, the steering chiefly occurred when Oracle set career levels at hire. PX1 at 81 (Table 6); Tr. 831:14–833:4. For women, half of the pay gap occurred when Oracle steered women into lower career levels (and thus SJTs) at hire while the other half occurred over time, through

⁴² PX1 at 3–4 (summarizing conclusions) 19, 24 (describing gender pay differences attributable to job assignment by comparing columns 6 and 8 in relevant Tables 1–3), 31, 37 (same for Asian pay differences), 43, 46 (African-American pay differences), 62, 65, 69, 72, 74–75 (Tables 1(a), 1(d), 2(a), 2(d), 3(a) and 3(b)).

Oracle promoting women into higher career levels (and thus SJTs) at a lower rate than similarly-situated men. PX1 at 80 (Table 5); Tr. 840:5–9.

C. Oracle’s Reliance on Prior Pay Disparately Impacts Women, Asians, and African Americans, Resulting in Gender and Racial Disparities in Starting Pay.

The gap in base pay attributable to Oracle’s steering of Asians and women into lower-paying career levels and compensation rates *at hire*, as Madden found, is roughly 3.4% for Asians, 6% for women, and 5.2% for African Americans.⁴³ This pay gap is the disparate impact that arises from Oracle’s practice of setting pay at hire based on prior pay rather than the factors Oracle’s compensation program directed its managers to consider.

Prior to October 2017, Oracle explicitly required managers to set pay based on prior pay and enforced this rule through its approval process. *See supra* Section II.B. This method of setting initial compensation has lasting consequences. Numerous witnesses provided anecdotal testimony regarding being trapped by Oracle into lower salaries, perhaps most vividly related by Diane Boross, who was told by an Oracle senior executive that she was essentially locked into the low pay Oracle set for her at hire, which was based on the lowest paying of three former jobs she had disclosed at the offer stage. Tr. 262:9–268:13. Even one of Oracle’s EVPs of Product Development admitted to the lasting impacts of starting pay.⁴⁴

Oracle’s reliance on prior pay violates the Department’s regulations prohibiting the implementation of “compensation practices that have an adverse impact on the basis of sex [and race] and are not shown to be job-related and consistent with business necessity.” 41 C.F.R. § 60-20.4(d). Oracle’s reliance on prior pay has a clear adverse impact on women and Asians. The uniformity revealed in Madden’s study comparing Oracle’s prior pay and starting pay demonstrates that prior pay effectively dictated starting pay. PX1 at 51–52, 79 (Table 4); Tr. 847:1–849:25. As a practical matter, Oracle’s practice of using prior pay to set compensation stood its established compensation classification system on its head. Instead of using the employee’s education, qualifications, and experience to set the employee’s career level (and,

⁴³ This result is reflected in the second set of analyses reported in PX1 at 79 (Table 4), in which Madden studies the differentials in starting pay, controlling for gender, race, age, education, hire year, and job descriptor.

⁴⁴ *See, e.g.*, Tr. 1129:9–19 (Miranda describing salary compression starts with initial pay rate).

thus SJT) within a job family, Oracle used an employee’s prior pay—for work at a different job for a different company—to set an employee’s starting pay. Oracle then used that starting pay to identify the career level (and SJT) that would be consistent with the starting pay.⁴⁵

OFCCP has shown that Oracle’s practices of setting initial pay based on prior pay resulted in statistically significant racial and gender disparities in initial pay. In addition, OFCCP has shown that the disparities observed in starting pay were almost identical to group disparities in prior pay. PX1 at 79 (Table 4). OFCCP has demonstrated that Oracle relies on prior pay in setting pay, and this practice causes statistically significant gender and racial pay differences for those similarly qualified at hire.⁴⁶

Under Title VII, Oracle has the burden to prove that a practice with a disparate impact is job related and consistent with business necessity.⁴⁷ 42 U.S.C. § 2000e-2(k)(1)(A)(i). Oracle has not met this burden. As reliance on prior pay has been outlawed by California, it cannot be a business necessity. More importantly, Oracle never mentions prior pay as a factor to consider when setting a person’s job classification and compensation. *See supra* Section II.A(1). Finally,

⁴⁵ Using the limited data from Saad’s requisition study, Madden demonstrated that Oracle systematically favored male and White applicants in departing up or down from the grade level listed in requisitions. *See* DX449 at 37–39, 56–57 (Charts R1–R2); Tr. 833:19–837:16, 841:11–843:2. In addition, applicants do not necessarily decide which requisitions they apply for, as Oracle’s HR recruiters steer applicants into applying for specific positions—sometimes after a conditional offer is already made. *See, e.g.*, PX180 at 7, 16–18; PX179 at 7, 13; PX180 at 8–9, 17; PX181 at 6–10, 17–18; Tr. 211:12–213:15, 985:16–987:2. For example, when Klagenberg hired a transfer from Support, HR enforced Oracle’s policy not to provide a raise with the transfer and required that the offer reduce the woman’s career level from an IC5 to an IC4, since the pay range for IC5 Support jobs was less than the pay range for IC5 Product Development jobs. Tr. at 117:3–122:12; PX171 (the Customer Service Account Management Consultant has a N13 salary grade (row 133), IC5 developers in Product Development have E.11 salary grade (rows 66–67)); DX 117, rows 11, 22, and 152 show an E11 salary grade paying more than a N13 salary grade.

⁴⁶ *Cf. Butler v. Home Depot, Inc.*, No. C-94-4335 SI, 1997 WL 605754, at **66–67 (N.D. Cal. Aug. 29, 1997) (finding plaintiffs established prima facie case of adverse impact despite expert evidence by Dr. Saad that contended plaintiffs lacked requisite showing of similar skills); *McReynolds v. Sodexo Marriott Servs., Inc.*, 349 F. Supp. 2d 1, 27 (D.D.C. 2004) (finding defendant’s regression analyses insufficient to defeat plaintiffs’ prima facie case where “each side may well have valid criticisms of how the opposing expert executed various methodologies”).

⁴⁷ This test is not met just because a practice reflects “societal standards.” *Lanning v. Se. Pa. Transp. Auth. (SEPTA)*, 181 F.3d 478, 489–90 (3d Cir. 1999) (“The disparate impact theory of discrimination combats not intentional, obvious discriminatory policies, but a type of covert discrimination in which facially neutral practices are employed to exclude, unnecessarily and disparately, protected groups from employment opportunities. Inherent in the adoption of this theory of discrimination is the recognition that an employer’s job requirements may incorporate societal standards based not upon necessity but rather upon historical, discriminatory biases. A business necessity standard that wholly defers to an employer’s judgment as to what is desirable in an employee therefore is completely inadequate in combating covert discrimination based upon societal prejudices.”).

to the extent Oracle asserts defenses under the Bennet Amendment, which extends EPA defenses to Title VII pay claims, the Ninth Circuit has explicitly ruled that prior pay is not a defense to wage differentials under the EPA precisely because it is not job related. *Rizo v. Yovino*, 950 F.3d 1217, 1228–31 (9th Cir. 2020).⁴⁸

Oracle does not deny the close correlation between prior pay and starting pay at Oracle. Oracle’s only response is that prior pay is a proxy for job-related skill. The Ninth Circuit in *Rizo* rejected a similar argument; when analyzing whether reliance on prior pay is “job related:”

We acknowledge that prior pay could be viewed as a *proxy* for job-related factors such as education, skills, or experience related to an employee’s prior job, and that prior pay can be a *function* of factors related to an employee’s prior job. But prior pay itself is not a factor related to the work an employee is currently performing, nor is it probative of whether sex played any role in establish an employee’s pay. Here, the County has not explained why or how prior pay is indicative of Rizo’s ability to perform the job she was hired to do.

Rizo, 950 F.3d at 1228 (emphasis in the original).

As described above, Oracle has not identified a job-related explanation for the systemic differences in pay. Moreover, Oracle’s use of prior pay was inconsistent with its own job classification system. The evidence establishes, as detailed further below, that the use of prior pay was a deliberate, budget-driven choice that upended Oracle’s own system of internal equity. Thus, Oracle’s use of prior pay not only establishes disparate-impact liability in this matter, it corroborates OFCCP’s statistical and anecdotal evidence of intentional discrimination.

⁴⁸ The Ninth Circuit’s reasoning, while turning on a statutory analysis of the EPA’s catchall affirmative defense, is also persuasive here. *Rizo* expressly limited the available EPA defenses to those that are “job related,” the same test used in a Title VII disparate impact cases. Moreover, although the burdens of persuasion are allocated differently, the Title VII disparate impact analysis and the analysis of the EPA, with its catchall affirmative defense, closely parallel each other. In the Ninth Circuit, the tests have been described as “similar” in that both involve the identification of a specific employment practice that is discriminatory-in-effect but where liability can be overcome by an employer’s showing of a “legitimate” or “acceptable” business reason. *E.E.O.C. v. Fremont Christian Sch.*, 609 F. Supp. 344, 351–52 (N.D. Cal. 1984), *aff’d*, 781 F.2d 1362 (9th Cir. 1986) (citing *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982)).

D. Substantial Evidence Corroborates OFCCP’s Statistical Evidence of Oracle’s Intentional Gender and Racial Compensation Discrimination.

The record here corroborates the discriminatory motives already proven by OFCCP’s statistical evidence. As set out in this Section, the record here shows that Oracle’s gender and racial pay discrimination was a choice made by Oracle’s chief executives.

The motive in any pay discrimination case is simple: paying less in compensation improves a business’s bottom line. Courts have long noted that while intentionally taking advantage of a job market in which an employer *could* pay women less than men for the same work “may be understandable as a matter of economics,” it has been illegal for decades. *Corning Glass Works v. Brennan*, 417 U.S. 188, 204–05 (1974) (noting illegality of these pay practices once Congress enacted the principle of equal pay for equal work); *see also Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 353–54 (4th Cir. 1994) (affirming Title VII liability where supervisor admitted paying plaintiff thousands of dollars less than male subordinate because plaintiff would accept less).

Here, the record makes clear that Oracle’s chief executives made a budget-driven decision to pay less to women, Asians, and African-Americans for the same or better work than to their male and White colleagues. Oracle openly acknowledges its chief executives were budget-driven, kept its compensation budgets ultra-lean, and knew that these practices resulted in employees receiving less compensation than they should under Oracle’s own compensation program or based on market rates in the industry. The record shows that Oracle’s chief executives: knew that its compensation budgets caused pay disparities throughout Oracle for female, Asian, and African American employees; put at risk hundreds of millions of dollars in federal contracts annually⁴⁹ by choosing to perform *none* of the steps required by federal regulation and its AAP to ensure equal employment opportunity in compensation; prohibited and prevented its managers from analyzing or considering racial or gender pay equity in making compensation decisions; and made no budget available to correct sex or race-based inequalities.

⁴⁹ PX267 at 6 (Oracle’s response to OFCCP’s Statement of Undisputed Facts, No. 3).

The record here also shows that Oracle’s executives took active steps to conceal (rather than uncover and correct as required by its AAP) the race and gender effects of Oracle’s pay system.⁵⁰ Oracle’s 2014 AAP specifically represented that it performed compensation audits that it now admits it never conducted. PX195 at 12; Tr. 345:18–348:7. Oracle further organized the investigation and processing of internal complaints to ensure that reports of gender and racial pay discrimination were never tracked, let alone appropriately investigated and redressed either individually or systematically, as required by Oracle’s AAP. PX246 at 6.

This evidence fully corroborates the hard numbers in the statistics. Oracle’s executives **chose** to prioritize meeting lean budgetary goals over all other priorities and to embrace discriminatory practices as a means to achieve its budgetary goals. In simple terms, Oracle’s own admissions are consistent with placing budget before internal equity. As demonstrated by Madden’s studies, discussed above, the internal pay inequities wrought by the ultra-lean budgets set by Oracle’s executives were not experienced by Oracle’s workforce equally or uniformly: Oracle chose its female and racial minority staff to bear the discriminatory brunt of its fiscal decisions. Nothing short of a decision by Oracle to pay less to women and racial minorities explains Oracle’s sharp racial and gender compensation disparities.

1. Oracle’s Executives Knowingly Set Lean Budgets That Caused Deviations in Internal Pay Equity.

Oracle’s top leadership dictated and determined Oracle’s pay practices. As Oracle admits, its senior executives set Oracle’s budgets. PX24A at 251:12–24 (the budget “start[s] at the very, very, very top level”); PX26A at 77:8–20, 108:3–12 (Ellison, Catz, and Hurd approved the budgets for focal reviews, stocks, and bonuses); Tr. 1226:15–1227:2, 1307:23–1308:6, 1316:1–10 (after Hurd’s death in 2019, Ellison and Catz determine the focal budgets). Oracle admits that between 2013 and 2018, Ellison, Catz, and Hurd set budgets that were lean or gave

⁵⁰ Organizationally, Oracle placed its AAP team below Westerdahl, who designed Oracle’s compensation system. Tr. 331:25–332:12. Holman-Harries reported directly to Vicky Thrasher, who reported to Westerdahl. *Id.* Notably, Oracle puts Thrasher publicly forward as the lead of its diversity program, but Thrasher admitted at trial that she and her team had no involvement in compensation decisions (Tr. 1375:21–1376:7), the formulation of compensation guidelines (Tr. 1376:8–10), and made no systematic effort to study pay equity issues at Oracle (Tr. 1385:25–1386:6).

no budgets at all for focal reviews, bonuses, and stock grants (RSUs). PX24A at 192:19–23, 247:25–248:17, 328:5–12 (Waggoner: “[W]hat I mean by lean years is little to no focal budget.”), 263:12–21, 276:14–15 (Waggoner: “[B]onus budgets have been very rare and very small.”).

Oracle knew that its compensation budgets were insufficient to ensure pay rates consistent with the requirements of its own compensation program⁵¹ and were causing Oracle to pay many in its workforce below-market rates. JX70.⁵² Oracle regularly advised its managers that the lean budgets set by its executives meant that the managers lacked the authority to correct pay inequities and instead had to reserve their limited budgets only for raises for “top performers.”⁵³ Oracle’s top executives further constrained the discretion of managers to allocate even the limited budgets made available by issuing “guidelines and instructions”⁵⁴ to Oracle’s managers that limited who could receive pay adjustments and by granting and denying approvals through the rigorous mandated approval process, which ended in the Office of Oracle’s CEO. *See* Tr. 421:11–18, 1091:9–21 (instructions capping how many people in North America could receive salary increases during focals); PX24A at 247:4–13 (because of budget pressures, when Oracle does give a raise, only 40% of its employees may get a salary increase in a focal); PX35

⁵¹ Tr. 133:14–16 (there is insufficient budget to keep all employees within their salary band).

⁵² The compa-ratios in JX70 show that Oracle knew it was paying US-based employees with more than two years of experience in Product Development, Information Technology, and Support an average of 4.6%, 9%, and 7.8% under market, respectively. JX70 at 9. Oracle knew that this increased the risk that employees would leave due to low pay. *Id.* at 8.

⁵³ Tr. 1484:3–6; PX141 at 85; PX21A at 285:12–286:5 (instructing managers to prioritize paying their stars); PX198 (2013 email from Catz to Thomas Kurian, then President of Product Development, stating, “Larry approved” Kurian’s request to increase Product Development’s focal budget to retain top performers in exchange for reducing the budget for low performers and eliminating hiring expenses).

⁵⁴ Oracle admits its chief executives issue guidelines putting caps on the percentage of people who could receive pay raises (*e.g.*, salary increases only for 40–60%, equity only for 35–55 %) and on the amount each staff member could receive (*e.g.*, equity 500 shares for IC4). PX24A at 247:6–11; Tr. 129:17–130:4, 421:1–425:8, 1091:9–21, 1461:1–9, 1567:6–1569:5; PX146 at 2. EVP Miranda “expected” the guidelines to be followed (Tr. 1114:16–21), and HR overturned and changed manager recommendations when the “guidelines” were not followed. *See e.g.*, Tr. 422:25–425:8 (Director Pandey’s recommendations were reversed when he went outside guidelines even though he had budget); Tr. 1001:24–1006:8 (HR stood in way of promotion supported by Kuassi’s VP). Higher-level executives, from EVPs to VPs, gave specific instructions to lower-level managers dictating the dollar amounts that they should allocate to their employees to ensure the “guidelines” were implemented. Tr. 129:12–130:14, 135:2–18, 422:4–24, 1315:20–1323:2 (DX310, rows 1244–1251), 1326:10–1328:20 (DX309, rows 1249–52).

at 1–2, 10–11 (describing approval process); JX153 at 28–39 (same).⁵⁵ For example, Director Pandey and VP Klagenberg both testified that Oracle did not issue the raises they recommended for their subordinates due to changes made by executives above them in the approval process. Tr. 422:25–425:6, 131:21–135:8. Similarly, Director Pandey and Mythily Shah each testified that when they appealed to their managers to raise their pay to address glaring under compensation, their managers responded that they did not have the authority or the budget to adjust their pay. Tr. 410:11–20, 216:1–16, 219:12–220:4; *see also* Tr. 273:4–25.

2. Oracle’s Chief Executives Disregarded and Concealed Information Regarding the Gender and Racial Pay Inequities They Caused.

a. Oracle’s Executives Were Required to Review Dive and Save Justifications, Which Provided Them with Detailed Accounts of Gender and Racial Pay Inequities.

Oracle’s executives repeatedly were put on notice of the pay inequities wrought by their lean budgets through the approval process by which their office reviewed each and every compensation decision. This approval process included detailed justifications made through Oracle’s “dive and save” program that Oracle’s executives were sent and required to review to approve any changes. *See* JXs: 2–6, 44–45, 82–83 (global approval matrixes); Tr. 1237:4–8 (off-cycle dives and saves submitted into Workflow software for approval); Tr. 1254:23–1255:4, 1258:24–1259:3, 1290:2–21 (Balkenhol and her team in the CEO’s office approve dives and saves on behalf of CEO Ellison). For example:

- A 2014 dive and save justification stated that a female’s “salary is astonishingly low. At \$^{Redacted}, her salary falls far below the job grade range of \$^{Redacted}. Her direct reports in the U.S. are earning 45% to 65% more than she is. PX103 at 1. The supervisor sought “a \$^{Redacted} increase” for this dive and save. *Id.*
- Oracle instituted a 25.9%, or approximately \$36,000, dive-and-save increase for a female Asian hearing witness for Oracle, Janet Chan, who was rated 4 or an exceeds expectations and was ^{Redacted} because her “salary [was] compressed for several years, even though she was “hands down

⁵⁵ *Cf. Jewett Class Cert. Order* at 12 (finding substantial evidence supported finding that Oracle had a “top-down, centralized system” with respect to compensation). Moreover, top business leaders and HR managers enforced the pay guidelines and instructions. Tr. 131:21–132:5 (HR will question manager about recommendation that does not “come into alignment” with HR’s distribution instructions); PX22A 80:4–81:3 (HR enforce compensation guidelines); Tr. 1118:18–21 (Miranda did not always approve the compensation requests).

the best and only person in my organization who can properly release and program manage the Fusion Service initiative.” PX105 at 1–2, 4.

- A 2014 dive-and-save proposal sought a 30%, or approximately \$^{Redacted}, dive-and-save increase for a female Asian employee who was rated outstanding (5) once and exceeds expectations (4) twice for the last three years, was listed as “one of the key contributors.” had “domain expertise in ^{Redacted},” and was “instrumental” in her team’s work on **Redacted** because she was only in the ^{Redacted}. PX316.

As exemplified by Oracle’s “dive and save” program rules (which Oracle executives chose to fund) and the hundreds of justifications for pay changes made under that program, Oracle’s executives repeatedly telegraphed to management that gender or racial pay inequity was *not a reason* that Oracle’s executives approved a pay change.⁵⁶ Absent unusual circumstances, the only reason Oracle’s executives approved an “off-cycle” pay adjustment is because the employee has received (or was expected to receive) a higher-paid offer from a competitor. As such, the “dive and save” program underlines Oracle’s overriding compensation objective: pay the minimum amount necessary to secure and retain staff without regard to pay equity.

Indeed, at trial, OFCCP provided direct evidence⁵⁷ of the intention by Oracle’s executives to engage in prohibited pay discrimination to achieve Oracle’s “lean” budgetary objectives. A former Senior Director of Global Organization and Talent Development in HR, Dr. Kirsten Hanson-Garcia, testified that she attended an off-site meeting in the mid-2000s with Oracle’s then Senior VP of HR, Joyce Westerdahl. Westerdahl is now the HR EVP and has been Oracle’s head of HR for years, reporting directly to Oracle CEO Safra Catz. PX26A at 12:14–14:3; 17:5–9; Tr. 331:25–332:16; PX81. Westerdahl is the architect of Oracle’s compensation system, as she personally transformed Oracle’s HR group into its current form after becoming its head. PX26A at 17:10–18:13. This transformation involved “revamping [Oracle’s] job code [or

⁵⁶ See, e.g., Tr. 1127:2–6 (Miranda does not “consider the gender [or race] of an employee in deciding whether to approve a ‘Dive and Save.’”).

⁵⁷ As this Court recognized, in most cases there is “no ‘smoking gun,’ direct evidence of discriminatory animus or motive.” MSJ Order at 31. “[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.” *Greater Phila.*, 949 F.3d at 153 (relying on affidavit of Madden in upholding constitutionality of ordinance prohibiting employers from inquiring about or relying on prior pay in setting compensation) (citations omitted). The Ninth Circuit has noted and explained that “[p]articularly because employers now know better, direct evidence of employment discrimination is rare,” and direct evidence includes both sexist and racist comments. *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 662–63 (9th Cir. 2002), *as amended* (July 18, 2002) (compiling cases).

SJT] systems, all of [its] guidelines, all of [its] practices within every country, how [it] hired people, how [it] recruited them, and put it into a system.” *Id.* Westerdahl implemented the software systems Oracle uses to manage hires; focal, bonus, and stock processing; and performance management. PX26A at 17:5–22:4.

As Dr. Hanson-Garcia testified, at the meeting she attended with Westerdahl and Oracle’s CFO, Greg Maffei, a discussion arose regarding interviewing and hiring. In response to a request for advice by Maffei, Westerdahl advised Maffei to hire a woman, remarking: “Well, if you hire a woman, she’ll work harder for less money.” Tr. 79:1–80:13. The discriminatory comment, voiced out loud between Oracle’s highest executives right in front of a junior female executive, was made by the person at Oracle who best understood Oracle’s motivations in making compensation decisions. Westerdahl’s comment succinctly gives voice to the strong inference that the statistical evidence compels—Oracle intentionally pays women, Asians, and African Americans less money for the same (or better) work than their male or White colleagues.⁵⁸

b. *Oracle’s Breach of its Regulatory Obligation to Analyze, Identify, and Immediately Redress Discriminatory Pay Disparities Evidences Oracle’s Discriminatory Intent to Engage in Prohibited Pay Discrimination.*

In addition to taking no action to correct the disparities that were in plain view through the approvals and dive and saves that crossed their desks, Oracle’s executives chose to ignore the AAP obligations that were designed to root out discrimination. AAPs are “designed to ensure equal employment opportunity.” 41 C.F.R. § 60-2.10(a)(1). “[A]s part of its [AAP], a contractor monitors and examines its employment decisions and compensation systems to evaluate the

⁵⁸ Westerdahl, who remains head of HR for Oracle, did not testify at trial to rebut Dr. Hanson-Garcia’s testimony despite OFCCP providing a declaration from Dr. Hanson-Garcia in support of its motion for summary judgment stating that Westerdahl had made this statement. Norman Garcia Decl. in Support of OFCCP’s MSJ, Ex. 102 at ¶7. Instead, Oracle seeks to rebut Dr. Hanson-Garcia’s testimony with a broad, out-of-context answer to a question in a deposition transcript (that was proffered after the deadline for such testimony had long passed) that Westerdahl would not make a statement of that kind. *See* PX26A at 338:19–25. By failing to put Westerdahl on the stand to specifically deny the trial testimony of Dr. Hanson-Garcia, OFCCP was deprived any opportunity to cross-examine Westerdahl. For this reason, this Court’s rules prohibit Oracle from relying on Westerdahl’s deposition testimony to rebut Dr. Hanson-Garcia, as none of the elements in 41 C.F.R. § 60-30.11(e)(1)–(3) allow for using deposition testimony for this purpose. Westerdahl is not an adverse witness to Oracle, and Oracle made no showing she was unavailable. Notably, Oracle did not offer the full number of witnesses or hearing time that this Court permitted.

impact of those systems on women and minorities.” 41 C.F.R. § 60-2.10(a)(2). This is “more than a paperwork exercise. An [AAP] includes those policies, practices, and procedures that the contractor implements to ensure that all . . . employees are receiving an equal opportunity for . . . every [] term and privilege associated with employment.” 41 C.F.R. § 60-2.10(a)(3). To comply, contractors must designate responsibility for compliance, conduct in-depth analyses of its compensation programs, conduct internal audits of the effectiveness of the program, monitor compensation records, advise “top management of program effectiveness,” and submit recommendations to improve unsatisfactory performance. 41 C.F.R. § 60-2.17.⁵⁹

As set forth in Section II.C. above, Oracle’s Director of Diversity, who was charged with implementing compliance, admits that she took none of the steps required by 41 C.F.R. § 60-2.17 with respect to compensation. Severely undermining its own credibility,⁶⁰ Oracle has argued that it outsourced to its line managers its regulatory obligation to perform analyses required by 41 C.F.R. § 60-2.17 (*see, e.g.*, PX287 at 11–13), allegedly including performing “in-depth” studies of “[c]ompensation system(s) to determine whether there [we]re gender-, race- or ethnicity-based disparities.” 41 C.F.R. § 60-2.17(b)(3). The trial record demonstrates that this claim is not just false, but that Oracle’s managers were advised and understood that they could not look at compensation decisions or outcomes by gender or race—a necessary first step to detect pay discrimination as Oracle’s AAP required.⁶¹ Oracle’s own witnesses demonstrated that Oracle’s managers did not: understand what Oracle’s AAP plan required, including the requirement to perform racial and gender pay equity analyses;⁶² or have the information

⁵⁹ “Without this self-evaluation, neither the contractor, nor OFCCP as the compliance agency, knows, . . . whether women are excluded from non-traditional jobs” *OFCCP v. Disposable Safety Wear, Inc.*, No. 92-OFC-11, slip op. at 13 (ALJ Aug. 20, 1992), *rev’d on other grounds* (Sec’y Sept. 29, 1992) (citation omitted).

⁶⁰ *Cf. Fuentes v. Perskie*, 32 F.3d 759, 764 n.7 (3d Cir. 1994) (“[T]he factfinder’s rejection of some of the defendant’s proffered reasons may impede the employer’s credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available.”).

⁶¹ Dr. Saad admitted that race and gender information was necessary to perform race or gender pay equity analyses. Tr. 1791:10–1792:1.

⁶² *See, e.g.*, Tr. 1111:21–112:5, 1113:8–1114:15, (EVP Miranda testified he was not aware of affirmative action requirements regarding compensation or training on non-discrimination in compensation); PX21A at 321:20–324:23 & Tr. 1484:25–1485:11 (EVP Loaiza had no knowledge that Oracle, from 2013 to 2019, analyzed, reviewed, or

necessary to conduct such analyses because Oracle blocked their access to gender and race information.⁶³ Oracle managers testified that Oracle prohibited them from considering gender or race in any way in making compensation decisions to ensure pay equity.⁶⁴

To the extent Oracle's contends that its failure to study its compensation practices proves only an indifference to EEO issues, the case law correctly holds the opposite.⁶⁵ As this Court has recognized, a "failure to engage in self-critical equal opportunity efforts," as required by the regulations and as it represented it did in its AAP, "is an indication of discriminatory intent." Order Regarding Mot. In Limine, at 6 n.6, Dec. 2, 2019.

Similarly, Oracle was required to provide resources to correct gender or race-based disparities that it would have identified had it complied with its AAP obligation. *See* 41 C.F.R. § 60-2.17(c); *see also Chang v. Univ. of R.I.*, 606 F. Supp. 1161, 1183 (D.R.I. 1985) (failing to budget for affirmative action plan "amounted to a sort of affirmative inaction, indicating a begrudging acceptance of the congressional mandate and a resistance to change"). However,

audited the pay of employees by race or gender and does not consider race or gender in any compensation decision); PX12A at 11:8–17, 60:12–19, 208:17–209:25, 217:12–219:4, 240:23–241:11, 245:2–7, 245:15–25, 246:2–6, 250:12–251:10, 264:5–265:9 (HR VP Madhavi Cheruvu, who ran reports for Kurian's Product Development organization and allocated the budget on his behalf, was unaware of Oracle's affirmative action obligations); Tr. 69:1–20 (Oracle's Senior HR Director of Organization Management was not aware of Oracle's AAP).

⁶³ For example, before he approved allocations for pay increases, Kurian, then President of Product Development, received reports showing employees that had a high performance rating and no recommended increase, but these reports did not include race and gender data. PX12A at 208:17–209:17, 217:12–219:4, 227:21–228:18. The automated systems Westerdahl implemented: do not permit a manager involved in compensation decisions to see the compensation of similarly-situated employees reporting to other managers (PX21A at 161:22–162:11); prevent managers from seeing the entire budget (JX108 at 46); and do not include race and gender data (PX21A at 209:22–25, 145:9–22).

⁶⁴ In his trial testimony, EVP Miranda, who manages 17,000 employees for Oracle (Tr. 1069:10–13) and is reportedly under consideration to be named a CEO (Tr. 1147:14–21), made clear that not only did he not do any racial or gender pay equity analyses but that he believes that consideration of race or gender to correct pay disparities is unlawful. Tr. 1111:19–1112:6.

⁶⁵ *See Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1044 (7th Cir. 1991) ("noncompliance with its various affirmative-action plans probative of discriminatory intent" supporting ruling that employer engaged in a pattern and practice of discrimination); *Gonzalez v. Police Dep't, City of San Jose*, 901 F.2d 758, 761 (9th Cir. 1990) (reversing court decision for failure to consider evidence that the employer violated its own affirmative action plan, which "may be relevant to the question of discriminatory intent"); *Chang*, 606 F. Supp. at 1183 (reinforcing court's conclusion that the institution's "studied indifference" towards affirmative action fostered a pattern and practice of sex discrimination for assignment); *Hardy v. N.Y.C. News, Inc.*, 114 F.R.D. 633, 641–43 (S.D.N.Y. 1987) (whether defendant "repeatedly failed to implement an affirmative action plan despite promises to do so . . . is clearly relevant on the issue of discriminatory intent."); *cf. Gen. Tel. Co. of Nw.*, 885 F.2d at 578 (finding reversible error when district court credited employer's EEO program but precluding discovery of self-critical analyses).

Oracle's chief executives provided *no budget* for making pay equity adjustments to close pay gaps between men and women or between Whites and minorities.⁶⁶

c. *Oracle's Active Concealment of Information and Reports of Gender and Racial Pay Disparities Underlines Its Intent to Engage in Prohibited Pay Discrimination.*

The record further demonstrates that Oracle's executives attempted to conceal known gender and racial disparities in pay.

Given the approval process, Oracle's regulatory obligations to study compensation, the dive-and-save approvals, and the internal complaints that were made within Oracle regarding pay discrimination, it strains credulity to accept that Oracle's executives were unaware of the significant gender and racial pay gaps⁶⁷ between and among employees Oracle classified into the same SJT—the most granular level of Oracle's job classifications. As a large, sophisticated federal contractor engaged in the business of database creation and analytics, Oracle could have performed precisely the same pay analysis Madden conducted and secured the same results.⁶⁸ Moreover, Oracle's decision to not conduct the racial and gender pay equity studies required by the regulations shows that Oracle intentionally limited who studied compensation and for what purposes. Thus, Oracle's decision to not perform the required compensation studies for regulatory purposes, and thereby breach its AAP, shows that Oracle was concealing its knowledge of its systemic racial and gender pay disparities.

Oracle's intent is further underlined by its attempt to cover up its lack of AAP compliance. Oracle directly and specifically misrepresented to OFCCP and its own employees that it complied with its AAP obligations. Oracle's 2014 AAP represented that Catz had been

⁶⁶ Tr. 357:12–23 (Oracle does not have a specific budget for making pay corrections Oracle identifies as part of its AAP compliance); Tr. 128:9–12 (VP Kirsten Klagenberg testified that she was unaware of a budget to adjust pay where two employees do similar work, but are paid differently); *see also* Tr. 1484:1–1485:11 (“There’s nothing in our approval process that talks about race. . . . We don’t look at race [or gender] when doing any kind of compensation.”).

⁶⁷ Oracle's executives also repeatedly blocked shareholder inquiries about systemic gender pay inequities. Annually, Oracle's executives, led by founder and long-time CEO Larry Ellison, rebuffed shareholder requests to address gender pay gaps by conducting and releasing the results of gender and racial pay analyses like those called for in the AAP. PX264 at 124–126 (2017); PX450 at 63–64 (2018); PX451 at 91–92 (2019).

⁶⁸ Oracle does not dispute the basic mathematical accuracy of Madden's main findings. *See, e.g.*, JX104.

designated as one of two people responsible for implementing the plan, indicating that the plan was supported and carried out at the highest levels. PX195 at 2. The AAP further assured that as part of Oracle’s AAP compliance, Oracle audited and analyzed Internal Audit Reports related to compensation. *Id.* at 12. These statements were not true. Catz did not perform her oversight functions as a responsible party. Tr. 342:16–343:16, 368:20–369:7. Moreover, Oracle did not implement *any* auditing and reporting of its compensation practices, nor had it analyzed Internal Audit Reports to assess AAP performance in compensation, as its 2014 AAP claimed. Indeed, Holman-Harries fully disclaimed the “responsibility and accountability” explicitly delegated to her. Tr. 345:1–353:24; PX16A at 106:20–107:14.

Further, the record shows that Oracle set up its AAP compliance group, led by Holman-Harries, to fail. Although this group was responsible for Oracle’s AAP compliance for more than 74 locations nationwide involving 45,000 employees, this group had only two employees to carry out all regulatory compliance tasks during the compliance review period. Tr. 389:5–12; PX16A at 33:15–34:5; Second Amended Complaint (“SAC”) ¶¶ 2–3; Answer to SAC, ¶¶ 2–3. Critically, Oracle’s top management ensured that the AAP compliance group would succeed in neither detecting nor correcting pay discrimination by siloing it off from personnel with critical pay and complaint information. Oracle admits that the AAP compliance group did not coordinate with *anyone* in Oracle outside the group to assess, detect, or ensure Oracle’s compensation practices complied with its AAP.⁶⁹

Oracle’s HR procedures for handling internal complaints further underlines the active steps Oracle took to conceal, rather than to identify and redress, compensation discrimination.⁷⁰

⁶⁹ For example, Oracle’s AAP compliance group never tracked internal complaints related to discrimination, and the group never received copies of either the complaints or the internal investigation results of such complaints. Tr. 363:11–15; PX246 at 6 (“Oracle does not ‘track’ or have a central repository of all complaints made to its HR department,” except for complaints through the ethics helpline). Similarly, Holman-Harries admitted her group never worked in any way with Oracle’s compensation or HR teams to ensure that Oracle’s pay classification system was not discriminatory and never tracked, trained, or worked with front line managers to ensure gender or racial pay equity in pay decisions. PX16A at 241:20–246:4, 249:11–18, 250:10–254:23, 256:2–258:16, 259:2–263:5, 106:20–109:4; Tr. 345:1–353:19, 363:11–15.

⁷⁰ See *Barrett v. Forest Labs., Inc.*, 39 F. Supp. 3d 407, 435–36 (S.D.N.Y. 2014) (noting that failure to investigate discrimination complaints was circumstantial evidence of intentional discrimination); *Davis v. Nat’l R.R. Passenger Corp.*, 733 F. Supp. 2d 474, 491 (D. Del. 2010) (denying SJ in an individual discrimination and retaliation case

Oracle internal complaint investigation unit did not receive all complaints⁷¹ and denied employees access to information about how their compensation fit within the salary range for their SJT.⁷² Oracle instituted procedures for narrow HR investigations of employee complaints,⁷³ under the cloak of privilege,⁷⁴ which provided limited information to employees and, most troublingly, concluded universally with findings denying discrimination had occurred.⁷⁵ See *Bouman v. Block*, 940 F.2d 1211, 1224 (9th Cir. 1991) (affirming finding that attempts to suppress information that would have allowed discovery of discriminatory act supported inference of sex discrimination). Notably, consistent with the statistical evidence and other evidence, the few explanations Oracle’s investigation unit provided employees effectively admit that Oracle prioritized budget over pay equity. See, e.g., PX116 (claiming “bona fide business factors” including “your position when you started with Oracle, your starting salary at Oracle, as well as budgetary constraints that impacted the ability to give annual adjustments”

because, in part, failure to investigate discriminatory acts is sufficient circumstantial evidence of intentional discrimination to create an issue for trial).

⁷¹ Tr. 485:23–487:18; PX10A at 75:2–76:12, 88:24–90:8.

⁷² Tr. 1559:2–8 (Senior Director Janet Chan did not know that she was below the salary range minimum before she got her dive-and-save raise because she had no access to the salary range data as it was “confidential”); Tr. 220:5–221:11 (Mythily Shah learned by finding a W-2 that she was paid “far less compared to within my own org.” because a male with a lower IC level was earning more than her even though she was working on complex core cloud products, and he was not); PX24A at 133:1–22 (“salary ranges are not publicly published,” and employees can only learn this information if their managers decide to tell them when asked); Tr. 265:21–266:7 (Diane Boross was not informed of her IC level at hire and learned afterwards that she was “low-balled” when hired because her IC level peers had 5 years of experience while she had 25); Tr. 558:8–20, 563:21–23 (Dr. Nicole Alexander never knew her job function, career level, or what individual contributor meant while employed at Oracle). This is consistent with Dr. Hanson-Garcia’s testimony that “in HR there wasn’t a lot of transparency.” Tr. 72:24–74:21.

⁷³ Oracle admitted that it conducts only very narrow investigations of complaints that raise concerns of unequal pay due to gender and race, focusing on the individual complainant or a small group of others. PX10A at 143:17–144:4 (statistical analyses of compensation are not conducted); PX123 (finding no evidence “your gender played a role in decisions that were made with respect to your compensation” and contending that “the nature and scope of your role” is “different than that of your peers” even though she was paid \$50,000 below her salary band).

⁷⁴ PX10A at 89:3–20, 112:5–113:6 (“whatever we do in any given investigation is at the direction of counsel”).

⁷⁵ No evidence shows that Oracle ever found that a woman, Asian, or African American’s low pay resulted from discrimination. Tr. 517:5–14; PX10A at 216:17–218:11 (Oracle’s 30(b)(6) designee regarding complaints could not identify results of an investigation that had found pay discrimination). Oracle’s justifications for its nondiscrimination findings were conclusory. See PX128 (responding that “there are legitimate and non-discriminatory reasons for those differences” without identifying them); see also PX113 (discounting statements of Indian female and concluding the investigation “revealed no evidence that your manager has a bias toward Indian employees or that he made inappropriate comments about women”). Also, Oracle’s top leadership provided no budget for Oracle’s HR investigators to adjust anyone’s pay after an investigation. Tr. 515:20–516:8.

justified paying woman less than the minimum salary for her position); PX125 (explaining “because the budget was very limited, management was not able to award you an increase”); PX121 (justifying higher pay of male report of the woman involved in hiring him, stating “you were the decision maker for his offer and you based the offer, in part, on the market conditions at that time and what it would take to get him to accept the offer”).

Dr. Nicole Alexander, an African American woman, provided powerful testimony exemplifying how Oracle’s HR investigation procedures were not aimed at correcting compensation discrimination. After reading an article describing a pay discrimination lawsuit, Dr. Alexander looked at the Glassdoor website and estimated she was paid \$50,000 less than the average pay for her job at Oracle in the Bay Area. Tr. 568:4–569:22. Dr. Alexander’s pay at the time was 21% less than her position’s salary range midpoint (despite her receiving consistent praise and a patent). Tr. 559:8–25, 572:7–22; JX134 (Salary History Window tab at row 24209 in columns B, F, K–L, N, P, R). She was aware of a white male who was doing the same work she did, had not secured a patent, and was promoted before her. Tr. 565:13–567:14.

Dr. Alexander emailed the article to HR, asking that her salary be discreetly reviewed, since she had recently requested a promotion. Tr. 568:17–569:5; PX118. Oracle’s HR investigators found “no evidence gender, race or anything else inappropriate factored into the compensation decisions” and cryptically advised Dr. Alexander that the variations in pay were “due to legitimate business reasons, such as performance levels, job scope, and responsibilities and overall contribution to the business.” Tr. 577:9–578:17; PX119. Soon thereafter, Dr. Alexander received a “really angry” call from her manager complaining about her persistence in following up about her promotion and then received her first negative feedback from her supervisor and was advised she would not be promoted. Tr. 572:23–575:3; PX291 at 4. She notified HR immediately of the retaliation, explaining that: “[W]ith regard to no reprisal or retaliation, I got my first bad performance review in 17 years after my manager was contacted regarding this matter. My status went from application submitted for CMTS promotion to

ineligible for CMTS promotion. My direct questions were not answered in this inquiry and my salary remains the same.” PX291 at 4; Tr. 579:11–580:4.⁷⁶

Dr. Alexander’s experience is consistent with all the evidence of Oracle’s intentional discrimination in this case. It is consistent with the statistical evidence proving that Oracle intentionally and systematically paid women and minorities less than their co-workers. It is consistent with Oracle’s executives choosing to breach its Oracle’s AAP obligations by refusing to audit, identify, and redress racial and gender pay disparities. And her experience exemplifies Oracle’s overall approach to discrimination complaints, putting all information about pay discrimination on a road to nowhere. Oracle’s attempts to conceal its pay discrimination underlines Oracle’s knowledge of its discriminatory conduct and its ongoing commitment to denying equal employment opportunity, as squarely prohibited by federal regulation.

CONCLUSION

For the reasons explained above, OFCCP is entitled to a judgment on liability.

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⁷⁶ An Asian woman also concluded Oracle’s HR would not resolve her discrimination concerns and said she was resigning “because of the extreme harassment, discrimination, intimidation and abuse” that continued despite her reports to HR. PX129 at 1, 3.