UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. ORACLE AMERICA, INC., Defendant.	OALJ Case No. 2017-OFC-00006 OFCCP No. R00192699 **POST-HEARING BRIEF OF DEFENDANT ORACLE AMERICA, INC.**

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I. INTRODUCTION

After three years of litigation and a two-year compliance review, the only surprise at trial was the utter lack of evidence to support OFCCP's baseless allegations of compensation and job assignment discrimination by Oracle. Not one witness testified that he or she was the victim of discrimination, let alone did OFCCP present evidence of a corporate pattern or practice of paying employees less based on their race or gender. Tellingly, OFCCP's trial counsel did not even ask its own witnesses if Oracle discriminated against them. Instead, OFCCP asked witnesses if they thought their pay was "fair," or how their pay made them feel, which obviously has nothing to do with proving intentional discrimination by Oracle.

Instead, OFCCP's entire case rises and falls on the overly-aggregated and unreliable statistical analyses of Dr. Janice Madden. But as the evidence at trial confirmed, Dr. Madden's purpose-driven, one-size-fits-no one models assume the very conclusions they purport to prove, and are entirely divorced from the complex, technical, and highly varied Oracle jobs they purport to analyze. Dr. Madden admits her models do not even attempt to similarly situate employees based on the work they perform at Oracle, as Title VII case law and OFCCP's own regulations plainly require. Dr. Madden did not study the work of Oracle employees, and readily acknowledges she has no meaningful understanding of what it entails. Instead, Dr. Madden used her own radical version of "human capital theory," and opined that Oracle should pay employees equally based on three characteristics: their level of education (without regard to the subject matter of the degree), their age, and the amount of time they have spent at Oracle. According to Dr. Madden, any pay differences not explained by these three factors *must* be the result of discrimination by Oracle. Not only does this absurd assumption run contrary to Title VII, but it is not *evidence* that even remotely supports OFCCP's claims.

Apparently recognizing Dr. Madden's opinions do not comport with Title VII law, OFCCP urges this Court to disregard its own expert's views and instead compare the pay of employees based on broad labels such as job code and job title. But the evidence confirmed that employees who share these labels perform vastly different work and therefore are paid

differently based on a variety of important factors, including the specific high-tech product on which employees work; the specific skill set and expertise those products demand; and the competition that Oracle faces to attract and retain employees with those specific skill sets. OFCCP ignores these factors entirely. OFCCP also ignores performance, productivity, innovation, and strategic value, purportedly because Dr. Madden could not easily plug these attributes into a statistical model. But because these factors are vitally important when it comes to pay at Oracle, their omission renders the results of OFCCP's analyses meaningless.

With respect to job assignments, Dr. Madden did not even analyze them. She instead analyzed pay data, and assumed the disparities she purported to find *must* be the result of job assignment discrimination. Yet, again, the evidence did not support this assumption. Not a single witness claimed they were steered from a higher to a lower-paying job. To the contrary, witnesses consistently explained that applicants apply to specific jobs posted by Oracle, and are considered for those jobs. Even OFCCP's witnesses testified they chose the job to which they applied, and Oracle hired them into that job. The statistical data confirmed this: employees of all races and genders were generally hired into the jobs and career levels to which they applied. The fact that men and women and employees of different races applied to jobs at different career levels (with different pay) at different rates is not discrimination by Oracle.

OFCCP also failed to prove that Oracle had a policy or practice of basing starting pay on prior pay, or that any such practice had a discriminatory impact on the pay of women, Asians, or African-Americans. Not a single witness testified that such a practice existed, and several testified it did not. Dr. Madden merely identified a correlation between prior pay and starting pay, but both experts confirmed that correlation does not prove causation, and they would expect to see the correlation that exists even if Oracle had no idea what employees previously made.

The evidence at trial confirmed this case never should have been brought in the first place. OFCCP failed to prove any of its claims. Oracle is entitled to an administrative order in its favor and dismissal of this lawsuit once and for all.

II. OFCCP WAS REQUIRED TO PROVE A PATTERN OR PRACTICE OF INTENTIONAL COMPENSATION DISCRIMINATION BY ORACLE

A. OFCCP Must Demonstrate Discrimination Is Oracle's "Standard Operating Procedure"

To prevail in a disparate treatment case, OFCCP must demonstrate that Oracle "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). Moreover, in a pattern or practice case such as this, OFCCP must prove "more than the mere occurrence of isolated, or 'accidental' or sporadic discriminatory acts." *Id.* at 336. Instead, it must establish that discrimination was Oracle's "standard operating procedure—the regular rather than the unusual practice." *Id.; see also Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 463 (9th Cir. 1987) (pattern or practice plaintiff must establish "systematic intentional discrimination"); *Reynolds v. Barrett*, 685 F.3d 193, 203 (2d Cir. 2012) (same).

It follows that to establish an actual *pattern or practice* of discrimination, OFCCP must furnish cohesive, common evidence of discrimination. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 352 and n7 (2011) (proving the merits of a "pattern or practice" discrimination claim necessarily entails evidence of the "glue" that links together the many decisions at issue); *Penk*, 816 F.2d at 464 (proving a pattern or practice is a "heavy burden" that may fail where "a narrower case might have prevailed").

Teamsters sets forth the applicable legal framework (although the facts, and thus the import of the plaintiff's statistical proof, were very different there). 431 U.S. 324, 360 (1977). First, OFCCP must make a *prima facie* showing by demonstrating the employees at issue were victims of a pattern or practice common to them, *i.e.*, not isolated, sporadic, or idiosyncratic acts. In addition, because OFCCP has proceeded by way of statistical evidence, the Court also must consider whether OFCCP's statistical evidence is flawed or otherwise fails to establish discrimination. *See Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 552 (9th Cir. 1982) (where plaintiffs rely on statistics, they must show "a clear pattern, unexplainable on grounds other than race"). And, even if OFCCP makes its *prima facie* showing,

Oracle still may rebut it. *Teamsters*, 431 U.S. at 360; *Penk*, 816 F.2d at 464. Oracle's rebuttal burden, however, is "a burden of production only." *Id*. at 463 (quoting *Gay*, 694 F.2d at 537 n.4); *OFCCP v. Bank of Am*., 2016 WL 2892921, at *8 (Apr. 21, 2016). Ultimately, the Court must determine, "by a preponderance of the evidence, whether the employer engaged in a pattern or practice of intentional discrimination." *Reynolds*, 685 F.3d at 203.

B. <u>OFCCP's Statistics Must Compare Similarly Situated Employees</u>

As OFCCP's own regulations recognize, Title VII prohibits pay discrimination among employees who are "similarly situated." 41 C.F.R. § 60-20.4; *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (in pattern-and-practice case, Title VII violation occurs if African-American employees are compensated less than similarly situated white employees); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (statistical evidence in pattern-and-practice must be based on appropriate comparators); *Wall v. Nat'l R.R. Passenger Corp.*, 718 F.2d 906, 909 (9th Cir. 1983) (no pattern of discrimination where comparators were not similarly situated); *De Medina v. Reinhardt*, 686 F.2d 997, 1003 (D.C. Cir. 1982) (must show similarly situated comparators in pattern-or-practice case); *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (comparators must be similarly situated).

OFCCP recognizes this, as its case "*relies* on a comparison between" groups of employees of different races or genders. *Hawn v. Exec. Jet Mgmt., Inc*., 615 F.3d 1151, 1156-57 (9th Cir. 2010); *see also* Second Am. Compl. at ¶ 12 (describing alleged findings of discrimination for employees in "similar roles"). Accordingly, under both the governing law and OFCCP's explicit invocation of the "similarly situated" standard, the question is whether the comparisons made give "rise to an inference of discrimination." *Id*.

To properly compare employees, they must be similarly situated "in all material respects" – that is, they must have similar jobs that display similar conduct. *Weil v. Citizens Telecom Servs. Co.*, 922 F.3d 993, 1004 (9th Cir. 2019) (quoting *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006)); *Holbrook v. Reno*, 196 F.3d 255, 261 (D.C. Cir. 1999) (all relevant aspects of their

employment situations must be "nearly identical"). Employees who are not "similarly situated" are not proper comparators under Title VII. *Moran*, 447 F.3d at 755.

OFCCP's regulations describe the requisite "case-specific" comparison: "Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors." 41 C.F.R. § 60-20.4(a).[1] The Equal Employment Opportunity Commission ("EEOC") has similarly advised, "[t]he actual content of the jobs must be similar enough that one would expect those who hold thce jobs to be paid at the same rate or level. Job titles and formal job descriptions are helpful in making this determination, but because jobs involving similar work may have different titles and descriptions, these things are not controlling." *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL 10, EEOC DIRECTIVES TRANSMITTAL NO. 915.003, at § III.A.2 (Dec. 5, 2000) (hereinafter "EEOC COMPLIANCE MANUAL 10"), *available at* https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination .[2]

As case law establishes, this means more than comparing employees with the same job titles. *See, e.g., Perry v. Clinton*, 831 F. Supp. 2d 1, 17-18 (D.D.C. 2011) (employees not similarly situated where they had different supervisors and different duties but same job title); *Krause v. Nevada Mut. Ins. Co.*, 2015 WL 3903587, at *9 (D. Nev. June 24, 2015) (two "vice presidents" not similarly situated where they had different duties and therefore did not have similar jobs). Whether two jobs involve substantially similar work depends on "actual job content," and not "job titles, classifications, or divisions." *Kassman v. KPMG LLP*, 416 F. Supp. 3d 252, 289 (S.D.N.Y. 2018). In addition to actual job duties, courts consider actual education,

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[1] OFCCP further describes similarly situated comparators as "those who would be expected to be paid the same based on: (a) job similarity (e.g., tasks performed, skills required, effort, responsibility, working conditions and complexity); and (b) other objective factors such as minimum qualifications or certifications." U.S. DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DIR 2018-05, ANALYSIS OF CONTRACTOR COMPENSATION PRACTICES DURING A COMPLIANCE EVALUATION (2018) (hereinafter "Directive 2018-05"), *available at* https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_05.html

[2] Available at: https://www.eeoc.gov/policy/docs/compensation.html#b.%20Job%20Similarity

actual experience, actual job performance, and market demand for employees' services. *See, e.g.*, *White v. AKDHC, LLC*, 664 F. Supp. 2d 1054, 1068 (D. Ariz. 2009) (supervisory employees with more responsibility are not similarly situated to lower-level employees); *Hooper v. Total Sys. Servs. Inc.*, 799 F. Supp. 2d 1350, 1364 (M.D. Ga. 2011) (comparators not similarly situated under Title VII where plaintiff relied "merely on a comparison of generic job titles and [had] little or no evidence regarding the actual job functions or the skill and effort required to perform those functions"); *Johnson v. Lightfoot*, 273 F. Supp. 3d 278, 286 (D.D.C. 2017) (two employees who had similar job duties were not similarly situated due to a "significant difference in terms of their performance.").

This stands to reason, because statistical analyses do not explicitly demonstrate discriminatory bias. Rather, if properly structured, they can only give rise to an *inference* of discrimination. *Gay*, 694 F.2d at 538. Indeed, "a statistically significant result is not necessarily probative of discrimination just because it is statistically significant." *Penk*, 1985 WL 25631, at *34. Instead, statistics analyzing pay must be sufficiently refined and compare only similarly situated employees to be meaningful. *See Grant v. City of Blytheville, Ark.*, 841 F.3d 767, 775 (8th Cir. 2016) (citation omitted) ("[F]or statistical evidence to be probative ..., it must analyze the treatment of comparable employees."); *Harris v. City of Chicago*, 665 F. Supp. 2d 935, 956 (N.D. Ill. 2009) (citation omitted) ("Statistical evidence is only helpful when the plaintiff faithfully compares one apple to another."). In short, a proper analysis is essential to allow the Court to determine "whether differences in treatment between men and women are because of sex discrimination, because of differences in relevant job qualifications, or because of differences in the jobs actually performed." *Penk*, 1985 WL 25631, at *17.

C. <u>OFCCP Must Demonstrate Its Regression Analyses Include All The "Major Factors" Impacting Pay</u>

In addition to comparing similarly situated employees, any regression analyses purporting to show pay disparities must include all the "major factors" used to determine the pay. *OFCCP v. Analogic Corp.*, ALJ No.: 20l7-OFC-0000l at *37 (Mar. 22, 2019) ("[C]ourts have

determined regressions which do not include major factors [used to determine pay] cannot support a finding of discrimination."); *Bickerstaff v. Vassar College*, 196 F.3d 435, 449 (2d Cir. 1999) (affirming exclusion of regression analysis that omitted major factors impacting pay, citing *Bazemore*, 478 U.S. at 400 n.10); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676 (4th Cir. 1996) ("*Bazemore* and common sense require that any multiple regression analysis used to determine pay disparity must include all the major factors on which pay is determined"). The rationale for this requirement is the same as above: if OFCCP's regression analyses *do not* account for all the major factors impacting pay, there is no basis to conclude that any disparities they purport to show are based on discrimination rather than the excluded factors. *See id*. at 676-77.

D. <u>The Court Must Also Consider Oracle's Affirmative Defenses</u>

Under the Bennett Amendment to Title VII, in compensation discrimination cases such as this, Oracle may assert defenses from the Equal Pay Act. *Washington Cty. v. Gunther*, 452 U.S. 161, 167 (1981); *EEOC v. Kettler Bros.*, 846 F.2d 70 (4th Cir. 1988) (employer may rebut *prima facie* case with Equal Pay Act ("EPA") affirmative defenses). These defenses include "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex [or race]." 29 U.S.C. § 206(d)(1); *see* 42 U.S.C. § 2000e-2(h); *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910, 919 (3d Cir. 1983) (in racial discrimination case, "a showing that any other factor other than race" was determinative in employment decision weighs against finding of discrimination); *E.E.O.C. v. Maricopa Cty. Cmty. Coll. Dist*., 736 F.2d 510, 514 (9th Cir. 1984) ("factor other than sex" intended by Congress to be a "broad general exception").

This broad exception covers a "wide array" of legitimate business reasons for differentiating pay. EEOC COMPLIANCE MANUAL 10, at § IV.F.2. For example, employers may pay different salaries on the basis of "professional experience and education," *Stanley v. Univ. of S. Cal*., 13 F.3d 1313, 1322 (9th Cir.1994), gender-neutral job evaluation systems. *Maricopa Cty.*

Cmty. Coll. Dist., 736 F.2d at 514, ability, training, shift differentials, temporary reassignments, revenue production, EEOC COMPLIANCE MANUAL 10, at § IV.F.2, or any other factor that has a "manifest relationship" to the plaintiff's job. *Goicoechea v. Mountain States Tel. & Tel. Co.*, 700 F.2d 559, 560 (9th Cir. 1983). Additionally, job-related "skills which the employer deems useful" qualify, even if those skills are not strictly necessary to complete the job. *Mullenix v. Forsyth Dental Infirmary for Children*, 965 F. Supp. 120, 140 (D. Mass. 1996).

As such, employers may pay an employee more for contributing greater value to the company, including based on their capacity for "revenue generation." *See Stanley*, 13 F.3d at 1322-23; *accord* EEOC COMPLIANCE MANUAL 10, at § IV.F.2.f. A university, for example, may pay one professor more than another if the first demonstrates "outstanding service to the university" and handles additional responsibilities such as "supervision of doctoral students." *Schwartz v. Fla. Bd. of Regents*, 954 F.2d 620, 623 (11th Cir. 1991). "Market factors," EEOC COMPLIANCE MANUAL 10, at § IV.F.2.g, as well as an employee's salary expectations, *Horner v. Mary Inst*., 613 F.2d 706, 714 (8th Cir. 1980), are also valid reasons, as is working on a more valuable team than comparators. *See, e.g.*, *Stanley*, 13 F.3d at 1322-23. Employers may likewise differentiate pay based on their importance to the company and the effect on the company of replacing them. *See id.*; 3C Fed. Jury Prac. & Instr. § 174:20; *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 770 (7th Cir. 2007).

Employers may also pay employees differently based on their performance. *See Wood v. Tech. for Energy Corp.*, 2015 WL 2341084, at *5-6 (E.D. Tenn. May 14, 2015), *aff'd*, 654 F. App'x 821 (6th Cir. 2016); *Schwartz*, 954 F.2d at 623; *Seldon v. Total Sys. Servs., Inc.*, 653 F. Supp. 2d 1349, 1363 (M.D. Ga. 2009) (managers may factor performance into pay decisions even if not as "part of a formal merit pay system").

III. OFCCP'S CLAIMS FAIL BECAUSE OFCCP DID NOT ESTABLISH A VIOLATION DURING THE AUDIT PERIOD

As an initial matter, OFCCP's claims must be dismissed because OFCCP never proved a violation during the underlying time period at issue in the audit, as it was required to do. OFCCP

brought this case based on an alleged finding of discrimination during the 18-month audit period, from January 1, 2013 through June 30, 2014. Accordingly, OFCCP was required to prove this threshold violation to assert a continuing violation. *See* OFCCP Federal Contract Compliance Manual § 7B00 (2020) (continuing violation exists only where at least "one of [the actions] occurred within the liability period"); *Analogic*, ALJ No. 2017-OFC-00001, at *6 n.6 ("[F]or OFCCP to establish a continuing violation, it must demonstrate a violation during the audit period"); *W. Ctr. For Journalism v. Cederquist*, 235 F.3d 1153, 1157 (9th Cir. 2000) (requiring "series of related acts, one or more of which falls within the limitations period").[3] Dr. Madden never presented an analysis of that audit window, but instead aggregated data over the 2013-2018 time period (with year-by-year breakdowns). Accordingly, OFCCP did not event attempt – let alone succeed – at proving discrimination during the audit period. *See id.*

IV. OFCCP FAILS TO DEMONSTRATE A PATTERN OR PRACTICE OF INTENTIONAL COMPENSATION DISCRIMINATION BY ORACLE

At trial, OFCCP abandoned its own statistical analyses cited in the Notice of Violation, First Amended Complaint, and Second Amended Complaint, and instead relied entirely on Dr. Madden's statistical analyses. Tr. at 38:11-14. As explained below, Dr. Madden's analyses do not even attempt to meet the applicable legal standards, let alone sustain OFCCP's claims.

A. Dr. Madden Uses The Wrong Comparator Standard For Assessing Compensation Discrimination Under Title VII

Rather than attempt to compare similarly situated employees as required by Title VII, Dr. Madden took her own approach. Dr. Madden's "human capital theory" posits that employees' compensation should depend on their education and work experience, and assumes absent other

[3] *See also Foster v. State*, 23 F. App'x 731, 733 (9th Cir. 2001) (In order "to establish a continuing violation, one must [first] demonstrate an overt or discrete anchoring event of discrimination occurring within the limitations period."); *Lockridge v. The Univ. Of Maine Sys.*, 597 F.3d 464, 474 (1st Cir. 2010) (plaintiff "c[ould] []not avail herself of the continuing violation doctrine" where she failed to "establish that a discriminatory 'anchoring act' occurred within the limitations period"); *Woodard v. Lehman*, 717 F.2d 909, 915 (4th Cir. 1983) ("It is *only* where an actual violation has occurred within that requisite time period that under any possible circumstances the theory of continuing violation is sustainable." (emphasis in original))

evidence that any compensation difference not attributable to these two factors is the result of discrimination. P-1 at 7; Tr. 872:9-873:8 (Madden). Faithful to this misguided approach, Dr. Madden did not study whether employees who are "similarly situated in all material respects" are paid differently. Instead, she sought to determine whether employees who came to Oracle with "equivalent credentials" were then paid differently once Oracle hired them. Tr. 711:14-24 (Madden); *cf. Hawn*, 615 F.3d at 1156.

B. Dr. Madden's Compensation Analyses Fail To Demonstrate A Pattern Or Practice Of Compensation Discrimination

Even if Dr. Madden had used the right comparator standard, her statistical models fall well short of demonstrating a pattern or practice of systemic compensation discrimination, regardless of whether the Court considers the model on which Dr. Madden relies ("Column 5") or the model advocated for by OFCCP ("Column 8"). As Dr. Madden explained at trial, her primary models analyzing Oracle's pay data aggregate employees in all three job functions and all global career levels into a single analysis. Each column in the models[4] adds another variable (or "control") to her analysis, starting with Gender Only (Column 1) and ending with Column 8.

1. Columns 1-5 Do Not Similarly Situate Employees

Dr. Madden opines the Court should rely on Column 5 to determine whether Oracle discriminates. Tr. at 879:24-880:2, 884:16-24 (Madden). Column 5 considers only gender, race or ethnicity, age, education (measured only by highest degree obtained), and time since hire at Oracle. P-1 at 15-17; Tr. at 879:16-880:12, 882:1-8, 883:11-12 (Madden). Thus, Columns 1-5 omit entirely information about employees' actual work at Oracle, rendering them irrelevant to a Title VII pay discrimination claim because they do not compare similarly situated employees.

[4] As explained in Oracle's proposed Findings of Fact, Dr. Madden's primary total compensation models are Tables 1(a), 2(a), and 3(a) of her initial report, and her primary base pay models are Tables 1(d), 2(d) and 3(b). *See* Findings of Fact No. 34. The structure of these models mirror each other, except one set analyzes total compensation and one set analyzes base pay. *Id.* Accordingly, the arguments set forth by Oracle in this brief apply to *both* her total compensation and base pay models, as they suffer from the same fundamental flaws, and are based on the same inaccurate assumptions, rendering them incapable of proving OFCCP's claims.

Even the two variables that Dr. Madden uses for her so-called equivalent credentials standard – employees' "education" and age (a purported proxy for prior experience) – are far too simple to draw any meaningful conclusions about these complex and nuanced characteristics. Tr. at 875:6-9 (Madden). For education, Dr. Madden analyzes only the level of degree, *i.e.*, whether the employee has a college degree, a Master's, or a Ph.D. She does not consider the type or subject of the degree; where the employee went to school; or whether the degree has anything to do with the employee's work at Oracle. Tr. at 882:1-883:10 (Madden). The evidence, however, demonstrates that different educational specialties matter with respect to who Oracle hires and how much they are paid. Tr. at 1208:8-1209:3 (Waggoner); Tr. at 1475:8-13 (Loaiza); Tr. at 585:4-586:17 (Alexander); Tr. at 1512:21-1515:25 (Adjei). Indeed, OFCCP's own witnesses demonstrated the superficial nature of Dr. Madden's education measure. Nicole Alexander, a geographic information scientist, testified that her PhD in geography was uniquely valuable for Oracle's Geocoder product because a programmer without such a specialized degree would not "have the knowledge to ensure that the geography side, or the geographic side, is correctly handled." Tr. at 585:25-586:17 (Alexander). Yet Dr. Madden's analyses do not consider the subject matter of an employee's degree or whether it applies to her current work.

Moreover, Dr. Saad demonstrated that men, women, white employees, Asians, and African-Americans pursue degrees in different areas of education, long before they ever arrive at Oracle. J-104, ¶¶ 49-52, Attachment C; Tr. 1645:8-1647:4 (Saad). Oracle is not responsible for any racial or gender disparities that exist among employees prior to coming to Oracle, yet Dr. Madden ignores these preexisting distinctions and attributes them to discrimination *by Oracle*. Further, because Dr. Madden lacked education information for over **half** of the employees she studied, she lumped these individuals together and assumed they had the same educational background, contrary to the empirical data. Tr. at 729:8-17, 882:9-15 (Madden), 1644:5-15 (Saad).

With respect to "prior experience," Dr. Madden uses only employees' age. Tr. at 880:6-12 (Madden). But as Dr. Saad explained, an employee's age says nothing about whether, or to

what extent, prior experience is relevant to the individual's current work (or even whether she was working at all). Tr. at 1641:25-1643:15 (Saad). Dr. Madden's use of age as a proxy for experience therefore treats experience substitute teaching as equivalent to experience as a senior Google software engineer. In other words, according to Dr. Madden, an employee's birthdate conveys as much information about her prior work experience as her résumé. Particularly in a workforce as technical, varied, and complex as Oracle's, this premise not only defies common sense, it also contradicts the consistent testimony of Oracle's witnesses, who confirmed that the *type* and *relevance* of prior experience matters – not age. *See, e.g.*, Tr. at 1403:23-1404:19 (Webb) ("performance tuning of the database has a very, very unique set of skills that's in demand in the marketplace" whereas experience as a systems administrator likely could command less compensation because they are "readily available in the marketplace for hiring and recruiting"); Tr. at 1089:1-11 (Miranda) (different skills are of different value and someone with knowledge of certain coding languages might be harder to find); Tr. at 1088:14-25 (Miranda) (software developers are not all paid the same, as their salary depends on background, experience, and skills); Tr. at 1502:2-1507:15 (Adjei) (directly relevant prior experience key to performing well in position to which he applied and into which he was hired at Oracle); Tr. at 1474:24-1475:4 (Loaiza); Tr. at 1293:13-1294:1 (Balkenhol); 1435:18-1437:23 (Bashyam).

Put simply, Dr. Madden fails to effectively "control" for education or prior experience. Accordingly, her Column 5 analyses do not even compare employees who came to Oracle with "equivalent credentials," let alone compare "similarly situated" employees.

2. <u>The "Job Descriptor" In Column 6 Does Not Similarly Situate Employees</u>

In an attempt to identify how (but not whether) discrimination at Oracle occurred, Dr. Madden also introduced a handful of additional "endogenous" controls based on components of Oracle's job architecture system.[5] The first of such controls, which Dr. Madden calls a "job

[5] As explained in Oracle's proposed Findings of Fact, Dr. Madden draws a distinction between "exogenous" characteristics (which she contends employees control) and "endogenous" characteristics (which she contends employers control). P-1 at 10. Dr. Madden opines that "endogenous" characteristics

descriptor," appears in Column 6 of her models. Dr. Madden's "job descriptors" bucket similar-sounding job titles and remove career levels, so, for example, a low-level Hardware Developer 1 is grouped with a Hardware Development VP into one "Hardware Development" job descriptor. P-1 at 93; Tr. at 889:7-890:1, 894:3-6 (Madden). Column 6 also controls for whether an employee is exempt or non-exempt. P-1 at 18; Tr. at 889:7-10 (Madden).

Dr. Madden's initial report states that job descriptor is "endogenous" (*i.e.*, controlled by Oracle) and therefore "problematic" because it combines job titles "assigned" by Oracle, and is therefore tainted by bias. P-1 at 17-18. But in her rebuttal report and at trial, Madden stated that, actually, job descriptor is an "indicator of the qualitative area of [employees'] education and experience" and a "proxy for an exogenous characteristic." Tr. at 739:5-740:15 (Madden). After asserting this on direct, Dr. Madden conceded on cross-examination that a job descriptor does not provide information about an employee's field of study. Tr. at 893:16-894:2 (Madden). It is therefore a poor proxy for education. Further, Dr. Madden acknowledged that she never studied the work Oracle employees perform, and therefore has no basis to opine whether employees who share job descriptors perform similar work. Tr. at 863:10-864:4 (Madden).

To summarize: A variable Dr. Madden rejected in her first report, and that she did not study to understand whether it measures what she later claimed it purports to measure, nevertheless became a "proxy" for a type of characteristic she does not believe should be considered. But the Court need not burden itself untying Dr. Madden's knot. The Court should disregard the job descriptor variable entirely because *Dr. Madden herself* does not use it to similarly situate employees to compare their pay. Tr. at 923:1-924:4 (Madden). Only OFCCP argues the Court should consider Column 6, but OFCCP is not an expert in labor economics.

3. <u>Columns 7 And 8 Do Not Similarly Situate Employees</u>

Dr. Madden's remaining analyses, Columns 7 and 8, do not cure these defects. Column 7 considers whether an employee's career level begins with an "M" or "IC" ("Manager" or

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cannot be used to study whether discrimination has occurred because they are potentially biased by the alleged discrimination. Tr. at 724:18-24; 870:10-25 (Madden).

"Individual Contributor") but does not distinguish between entry-level and senior individual contributors, or between entry-level managers and vice presidents. P-1 at 18; Tr. at 897:12-23 (Madden). Dr. Madden's final analysis, Column 8, takes into account an employee's global career level, which, when combined with the preceding columns (including job descriptor), roughly approximates job code. Tr. at 738:2-15, 897:24-898:1 (Madden), 1596:2-8 (Saad).

As with Column 6, however, Dr. Madden believes that Columns 7-8 contain endogenous characteristics, and therefore "cannot be used in any analysis of whether discrimination has occurred." P-1 at 18; Tr. at 869:21-870:17 (Madden). Instead, according to Dr. Madden, Columns 7-8 can *only* be used to determine *how* discrimination by Oracle occurred. Tr. at 870:10-25 (Madden). To be clear: Dr. Madden does not include Columns 7-8 (or even Column 6) for the purpose of similarly situating employees. Accordingly, relying on these columns of Dr. Madden's models to determine if OFCCP has proven its claim of intentional compensation discrimination would directly contradict the views of OFCCP's own expert. For this reason alone, the Court should disregard Columns 7-8.

C. Job Codes At Oracle Do Not Similarly Situate Employees[6]

Even if one considers Columns 6-8 in Dr. Madden's models (against her expert opinion), the evidence confirms that Oracle employees with the same job code can perform vastly different work. This is often because they work on different products, teams, or areas of Oracle's business, which translates to different pay depending upon how the labor market (and therefore Oracle) values the particular skill set required. Consequently, the results of *any* statistical model – including Dr. Madden's Column 8 analyses – based on the contrary assumption that employees who share a job code are similarly situated are inherently inaccurate and misleading.

As Kate Waggoner, Oracle's Senior Director of Global Compensation Programs explained, an employee's job code and corresponding job title give Oracle "a very general sense of the duties that [a] person performs and the roles that exist [] at Oracle." Tr. at 1164:20-1165:1

[6] Each job code corresponds to a unique system job title (or "job title"). Tr. at 1164:4-1166:14 (Waggoner); J-123. Oracle uses "job code" and "job title" interchangeably in this brief.

(Waggoner). One cannot, however, determine any particular employee's job duties or responsibilities based on their job code or job title alone. Tr. at 1166:10-1167:13 (Waggoner). Instead, factors such as the product or team on which an employee works determine and differentiate job duties and responsibilities. Tr. at 1167:14-18 (Waggoner). Ms. Waggoner further explained that the wide variability of experience, skills, and duties within each job code is reflected in the broad salary ranges associated with each job code. Further, salary ranges increase in breadth as career level increases, because there often are bigger differences in experience and skills at higher levels. Findings of Fact No. 13; Tr. at 1187:9-1189:6 (Waggoner).

Steve Miranda, Oracle's Executive Vice President of Applications Development, testified consistently with Ms. Waggoner. Tr. at 1065:5-8 (Miranda). He explained that software developers with the same job code, but who work in different functional areas such as Database Infrastructure, Middleware, and Application Development, do not perform the same duties. Tr. at 1065:5-8; 1069:23-1070:17; 1071:13-1072:15; 1075:6-1076:1 (noting they have "different technical challenge[s]" and "different end user[s]."') (Miranda). They have proficiencies in different programming languages, and different technical focuses. Tr. at 1070:4-1072:15 (Miranda). For the same reasons, the Oracle product on which an employee works affects pay because different products require different skills, and certain cutting-edge skills (such as machine learning, artificial intelligence, and Cloud development) command more compensation in the market than do the skills required for older legacy products like PeopleSoft, Fusion, CRM. Tr. at 1188:2-16, 1197:14-25 (Waggoner); *see also*, Tr. at 1089:1-11 (Miranda); 1403:23-1404:19 (Webb); 1438:18-1439:12 (Bashyam); 1472:3-14 (Loaiza).

Similarly, Balaji Bashyam testified that employees with the same job code but who work on Database versus SaaS have different customer-facing duties, core competencies, and product or program requirements. 1435:13-1437:23 (Bashyam). Likewise, different Oracle Cloud products require different skills within the same job code. 1438:18-1439:12 (Bashyam). Juan Loaiza testified that employees who share a job code require different skills not only between different lines of business (such as Mission Critical Database and General Database), but also

within the same line of business due to products or product components that require different skills and expertise. Tr. at 1468:6-1472:14 (Loaiza). Nachiketa Yakkundi pointed to an employee with whom he shared a job code who was a specialist in job coding, whereas Mr. Yakkundi had only "very rudimentary" knowledge of Java. Tr. at 1902:14-23 (Yakkundi). Janet Chan explained the different responsibilities that Program Managers have, including release management, traditional program management, and quality assurance, and further explained these roles are not interchangeable. Tr. at 1538:22-1539:23; 1541:8-1543:5 (Chan). Ms. Chan also testified that she and another manager share the M5 Senior Director job code but have different duties and responsibilities. Tr. at 1543:6-1544:10 (Chan).

Take the Software Developer 4 job code as an example. Kow Adjei's work as a Software Developer 4 involves "writ[ing] code" and "designing new features" for a product focused on back-up storage. Tr. at 1503:24-1507:15, 1508:22-25, 1509:22-1511:3 (Adjei). By contrast, Leor Chechik initially did programming as a Software Developer 4, but transferred to Product Development HR and now promotes the technical development of women at Oracle while continuing to hold the Software Developer 4 job code. Tr. at 1925:22-1926:25, 1928:10-1929:9 (Chechik). Even OFCCP's witnesses demonstrated this fundamental point. Nicole Alexander, who develops software for an Oracle geographic product, testified that the work she performs draws on skills from her advanced degree in geography. Tr. at 557:17-558:5, 585:25-587:3 (Alexander). Compare Ms. Alexander's testimony with that of Vickie Hardman. Both worked as Software Developer 4s, but Ms. Hardman does not actually do software development. Tr. at 608:10-17, 617:1-15, 635:23-636:7, 641:23-642:3 (Hardman). Her role is vastly different than Ms. Alexander's (and Mr. Adjei's and Ms. Chechik's), because Ms. Hardman does not do any coding, does not have an advanced degree, and views her role as more program management than true development. *Id.*; Tr. at 629:25-630:8, 635:23-636:7 (Hardman). The same is true at higher career levels. Kristen Klagenberg's job code is Software Development VP, but unlike other Software Development VPs, she manages customer escalations and does not do any coding

or own any product groups. Tr. at 106:8-107:4; 109:4-110:3; 150:13-18; 150:24-151:14 (Klagenberg); Tr. at 1530:11-1531:7 (Chan).

Dr. Madden understood all this. She acknowledged that job codes are accompanied by broad salary bands, which reflect differing skills within those job codes. Tr. at 898:17-899:4 (Madden). She testified that employees would not accept pay differences within a job code if their work required similar skills. Tr. at 930:3-10, 931:7-932:13 (Madden). Dr. Madden admitted she saw no documentation or other evidence suggesting that employees with the same job code perform similar work. Tr. at 863:13-19. In fact, Dr. Madden confirmed that her analyses in no way account for employees' actual work, explaining "I didn't independently evaluate what people were doing. There's no way I could do that and I don't think I would if I had access to do that." Tr. at 863:20-864:4 (Madden).

These omissions from Dr. Madden's models are material. Dr. Madden agreed that simply because her models generate "statistically significant" results, that does not mean the models are correct. Tr. at 946:1-19 (Madden). "Significant" results, in other words, may be entirely inaccurate. Dr. Saad illustrated that by adding just a few additional variables to Dr. Madden's models (including Organization as a proxy for the product on which employees work, and patent activity as a proxy for innovation and productivity), her statistically significant findings in the majority of years disappeared. Tr. at 1680:1-15, 1708:1-24 (Saad). (This demonstration set aside for the moment the additional significant problem of aggregating such diverse employees into one model, discussed below in Section IV.D.) Dr. Saad further explained that the "R-squared" values of Dr. Madden's analyses, which measure how much variation in employees' pay is explained by the variables in the model, indicate that between 30-80 percent of the variation in pay remains unexplained by those models. Tr. at 1662:18-25, 1664:24-1665:22, 1670:24-1672:21 (Saad); Tr. at 899:5-900:2 (Madden). With Dr. Saad's modifications above, however, the R-squared values of Dr. Madden's models dramatically increase to 80-90 percent, further underscoring that Dr. Madden's models suffer from material omissions. Tr. at 1680:1-15; 1708:2-24 (Saad).

In short, OFCCP's reliance on Dr. Madden's flawed and oversimplified assumptions demonstrates precisely why mishandled or misinterpreted statistics can be dangerously misleading. Courts regularly caution against this sort of complacency. *Penk*, 1985 WL 25631, at *16 ("Because statistical evidence may both illuminate and distort reality, a court relying on such evidence must constantly look from the statistics to the factual realities in order to gauge the probative value of the statistics.").[7] Because there is no basis to assume that employees with the same job code perform similar work, and because in fact that assumption directly contradicts the overwhelming evidence, Dr. Madden's statistics fail to sustain OFCCP's claims.

D. Dr. Madden's Statistics Do Not Account For The "Major Factors" Impacting Pay, Nor Oracle's Affirmative Defenses

Not only do Dr. Madden's statistical models fail to compare employees who perform similar work, they do not – and as structured cannot – account for the major factors impacting pay. They also do not account for Oracle's affirmative defenses, *i.e.*, the non-discriminatory factors other than race or sex that explain the pay disparities that Dr. Madden's models purport to find. *See, e.g.*, *Gunther*, 452 U.S. at 167 (even if plaintiff shows a pay differential, defendant may assert affirmative defense that the pay differential was based on "any other factor other than sex"); *Analogic Corp.*, ALJ No. 2017-OFC-00001 at *37 ("[R]egressions which do not include major factors [used to determine pay] cannot support a finding of discrimination.").[8]

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[7] It is precisely for this reason that courts across the country have found Dr. Madden's "human capital theory" analyses unreliable or irrelevant to analyzing discrimination claims. *Cooper v. Southern Co.*, 390 F.3d 695, 717, 726 (11th Cir. 2004); *Cooper v. Southern Co.*, 205 F.R.D. 596, 613-14 (N.D. Ga. 2001); *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 462 (N.D. Ill. 2009), *aff'd*, 675 F.3d 709 (7th Cir. 2012); *Gosho v. U.S. Bancorp Piper Jaffray, Inc.*, 2002 WL 34209804 (N.D. Cal. Oct. 1, 2002); *E.E.O.C. v. Sears Roebuck & Co.*, 628 F. Supp. 1264, 1314 and nn. 60-61, 63 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); Tr. at 859:23-25, 871:5-22 (Madden).

[8] The requirement to account for the "major factors" impacting pay, and the requirement to account for Oracle's affirmative defenses pursuant to the Bennett Amendment to Title VII are similar, but distinct in important ways. First, as the plaintiff, OFCCP has the burden of demonstrating its regression models account for all the "major factors" impacting pay. *Analogic*, ALJ No. 2017-OFC-00001, at *37. By contrast, Oracle's obligation to justify pay disparities pursuant to one or more affirmative defenses arises only if OFCCP shifts the burden to Oracle by demonstrating a prima facie case of discrimination *and* only if Oracle does not rebut OFCCP's statistics. *Penk*, 816 F.2d at 464; *Gunther*, 452 U.S. at 167. Even then, Oracle's burden is one of production only. *Penk*, 816 F.2d at 463. Moreover, any potential affirmative

Indeed, the trial record, which includes witness testimony, pay justification forms, performance assessments and promotion templates, confirms that various factors (again, such as differences in performance, product-specific expertise, exceptional managerial skills, or success on a project of particular strategic value to Oracle) explain individual employees' pay, and therefore explain pay differences among employees. Tr. at 1476:17-1477:6, 1478:12-21 (Loaiza); Tr. at 1515:11-25 (Adjei); D-179; D-181; D-182. Other Oracle documentation regarding pay – including compensation training materials, Oracle's pay philosophy, Oracle's handbook, and its internal intranet – all reflect that pay at Oracle primarily is based on performance, but also on employees' experience, skills, and competencies. J-138 at 5, 19; J-127 at 4, 16; D-22; D-34 at 39; D-258 at 5, 13, 17; J-25 at 4, 16. *None* of this is accounted for in Dr. Madden's analyses.

Moreover, many of these factors, such as Mr. Adjei's expertise in storage area networks or Ms. Chechik's passion for developing technical programs for women, are not reducible to quantitative inputs for Dr. Madden's plug-and-play statistical analyses. Tr. at 1502:2-9 (Adjei); Tr. at 1928:10-1929:9 (Chechik). And undisputedly, Dr. Madden's primary pay models in no way account for performance, even though Oracle's compensation philosophy expressly states it "pays for performance." D-22; J-127 at 4. Dr. Madden's sweeping dismissal of any qualitative information, such as information from resumes, new hire justification forms, or performance assessments, confirms her analyses omit these major factors. Tr. 873:21-874:6, 881:5-25, 937:15-939:22 (Madden).

Dr. Saad's response to Dr. Madden's analyses underscore these concepts. He explained that because Dr. Madden's analyses do not account for important factors that impact pay at Oracle, they suffer from "omitted variable" bias, that is, if "you leave out a variable, it biases, potentially, other variables, and the impact you've measured for other variables in the model."

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defenses Oracle may raise are not limited to the "major factors" impacting pay, but may more broadly include "any factor other than [race or] sex." 29 U.S.C. § 206(d)(1) (incorporated into 42 U.S.C. § 2000e-2(h)). Oracle addresses both arguments here given there is some substantive overlap.

Tr. at 1600:6-1602:12, 1611:18-1614:5, 1649:11-1651:22 (Saad). Dr. Saad used the analogy of a study on the effect of a certain fertilizer on crop yields. He explained the study would be flawed if it failed to account for variations in the amount of rainfall. Tr. at 1600:6-1602:23. He concluded that Dr. Madden's analyses, which fail to account for, among other factors, variation in work, differences in education and prior experience, and variation in productivity and innovativeness, are unreliable because they attribute differences in pay to discrimination as opposed to the variables omitted from her models. Tr. at 1743:22-24.[9]

Not only are Dr. Madden's analyses missing important factors, but their overly-aggregated structure means there is no easy fix. *See* Tr. at 1614:6-1617:17 (Saad). With thousands of employees across more than 140 job titles, one would expect the explanations for pay differences among them to differ. Title VII recognizes this common-sense point and provides that factors differentiating pay can vary from job to job as long as they are job-related. *See, e.g.*, *Rizo v. Yovino*, 950 F.3d 1217, 1224 (9th Cir. 2020) (factors must be job-related); *McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 1, 8 (D.D.C. 2004) (factors need only explain the specific pay disparity established by plaintiff's statistical comparison of similarly-situated employees); *Clady v. Los Angeles Cty.*, 770 F.2d 1421, 1430 (9th Cir. 1985) (affirmative defenses allow employers to consider factors that are relevant to the specific job at issue); *Higgins v. Nw. Farm Credit Servs., ACA*, 2018 WL 2050132, at *13–15 (D. Idaho May 2, 2018) ("completely permissible" for employer to primarily value sales experience and set its employees' salaries based on that metric); *see also* EEOC COMPLIANCE MANUAL 10, at § IV.F.2 ("wide array of possible factors" can impact pay, but factor(s) should be "applied consistently" and "used reasonably in light of the employer's stated business purpose as well as its other practices.").

[9] Additionally, as explained in Section IV.C above, when Dr. Saad replicated Dr. Madden's analyses and added additional variables available in the data (and setting aside the inherent mis-specification problems due to over aggregation), Dr. Madden's statistically significant findings in the majority of years studied disappeared. Tr. at 1680:1-15; 1708:2-24 (Saad).

There is no requirement that the factors employers rely upon to determine pay or explain pay differences be applied uniformly across its entire workforce. Indeed, any such requirement would be patently *un*reasonable. *See, e.g.*, *Goicoechea*, 700 F.2d at 560 (considering whether a factor qualified as a legitimate defense in reference to plaintiff's particular job); *Bell v. VF Jeanswear LP*, 2016 WL 3548760, at *10–11 (D. Ariz. June 30, 2016) (characteristics used to award additional pay may vary by individual, including more sales experience, managing accounts with larger sales volume, or "exceptional" job performance ratings).

Contrary to the Title VII case law cited above, Dr. Madden's models combine all the employees at issue and give equal weight to factors that vary among them. As Dr. Saad explained, this level of aggregation "seriously compromise[s] the ability to draw inferences regarding relationships between gender and pay and race and pay." Tr. at 1596:9-1598:15 (Saad). Over-aggregation obscures differences in relationships that exist among more narrowly-defined groups. Tr. 1611:22-1612:20, 1614:6-1618:12, 1627:24-1629:4, 1695:23-1697:11 (Saad). For example, when the data for multiple jobs is combined into one data set, it can show a relationship between two variables, such as time in company as compared to annual earnings, that is different from the relationship between those variables when each job is analyzed separately. This can lead to inaccurate and misleading results. Tr. at 1611:23-1612:20 (Saad).

As a result of these omissions and mis-specifications, Dr. Madden's statistics are incapable of demonstrating that any pay differences are caused by discrimination, rather than legitimate factors that affect pay. Tr. at 1703:23-1704:20 (Saad); *Penk*, 816 F.2d at 465 (statistics regarding alleged discrimination against faculty omitted "such highly determinative quality and productivity factors as teaching quality, community and institutional service, and quality of research and scholarship," which "must have had a significant influence on salary and advancement decisions."). Their failure to account for the major factors that impact pay at Oracle and the legitimate explanations for the differences in pay among the employees at issue conclusively demonstrates OFCCP has failed to meet its burden under Title VII.

E. **By Aggregating Thousands Of Pay Decisions By Different Managers, Dr. Madden's Analyses Fail To Demonstrate A Common Mode Of Discrimination**

In order to prove a *pattern or practice* of discrimination, OFCCP has the additional burden of demonstrating some common mode of discrimination, *i.e.*, evidence of the "glue" that links together the many compensation decisions at issue. *Dukes*, 564 U.S. 338, 352 and n.7 ("proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination."); *see also Bank of America*, 2016 WL 2892921, at *27 and n.73 (DOL Admin. Rev. Bd. Apr. 21, 2016) (evidence must show widespread, repeated, and routine discrimination in order to attribute it to the entity itself).

Here, no such "glue" exists. As an initial matter, the notion that intentional compensation discrimination is Oracle's "standard operating procedure," yet exists *only* in three of the sixteen job functions that OFCCP studied at a single Oracle location makes no sense. *Teamsters*, 431 U.S. at 339. This is particularly so because Oracle does not manage employees, set compensation budgets, or make compensation decisions by job function. *See* Findings of Fact Nos. 15-16. Instead, those types of decisions are made according to lines of business (LOBs). *Id.* OFCCP offers no explanation as to how the alleged pattern or practice by job function could even occur, given job functions do not roll up to any particular leader, and employees in any given job function may work across multiple LOBs. *Id.*

Moreover, the evidence confirms that employees' pay, including starting pay, stock awards, bonuses, and raises are determined by lower- and first-level managers. *See* Findings of Fact Nos. 17-29. OFCCP is not accusing these managers of wrongdoing. Aug. 22, 2019 Position Statement at 2, 7-9. While there is an "office of approvers" for starting pay packages, it serves simply as a final "sanity check" before an offer is fully generated. Tr. at 1198:20-1201:13 (Waggoner). Similarly, higher-level managers like Mr. Miranda review offers to ensure they are within budget and there is nothing "egregious" about them. Tr. at 1085:21-1086:6 (Miranda); *see also* J-142. Even if an offer is "egregious," Mr. Miranda does not reject it, but instead submits a question to the hiring manager. Tr. at 1086:7-20. The scope of review for focal raises is simply to

ensure lower-level managers stay within budget (or as a "sanity check," as with starting pay packages). Tr. at 1230:3-16 (Waggoner); Tr. at 1408:2-21 (Webb); Tr. at 1443:1-1444:5 (Bashyam).[10]

Because there is no centralized decision making, OFCCP's statistics aggregate the pay decisions of many different managers. As a result, they do not prove that any Oracle managers engaged in intentional discrimination. *See, e.g.*, *Moussouris v. Microsoft Corp*., 2018 WL 3328418, at *24 (W.D. Wash. June 25, 2018) *aff'd*, 799 F. App'x 459 (9th Cir. 2019) ("courts generally find aggregated statistical evidence inadequate because it is 'derived from hundreds of employment decisions made by myriad decision makers, at different times … concerning employees at varying levels of experience, responsibilities, and education.'") (citation omitted); *accord Kassman*, 416 F. Supp. 3d at 282.

In *Moussouris*, a putative class action alleging disparate treatment and disparate impact claims against Microsoft, the court found that because "[t]he relevant level of decision-making for the challenged practices here remains at the individual manager, or at best, the team level," the plaintiffs' expert's statistical evidence, which was based on "aggregate figures, including all individuals in the Engineering or IT Operations Professions," suffered from "the same problem as the statistical evidence in [*Dukes*]: it begs the question." *Moussouris*, 2018 WL 3328418, at *24 (omitting citation). In other words, as in this case, any alleged disparities "may be attributable to only a small set of [Oracle managers]," and therefore the aggregated analyses

[10] The lack of centralized decision making in this case is further illustrated by comparing the facts here to those in *Ellis v. Costco Wholesale Corp*., 285 F.R.D. 492, 509 (N.D. Cal. 2012) ("*Ellis II*"), where class certification on a promotion discrimination claim was granted specifically because the plaintiffs *did* demonstrate centralized decision making. *Ellis II* highlights everything missing from OFCCP's case. First, the class included only 700 individuals (not 6,000+), making it more "plausible … that a class will be able to demonstrate a common mode of exercising discretion." *Id*. *Ellis II* also concerned "only two closely-related, management-level positions (AGM and GM) each of which shares a uniform job description, and the sole legal claim was the alleged failure to promote women into those positions." *Id*. In this case, hundreds of jobs are at issue, and there are no uniform job descriptions. Finally, "and most important," the *Ellis II* plaintiffs "specifically identified employment practices … implement[ed] companywide under the influence and control of top management." *Id.* Thus, unlike this case and *Dukes*, *Ellis II* had the requisite "glue" in the form of "'common direction' and the identification of specific practices (other than the mere general delegation of authority)[.]"

"cannot by [themselves] establish the uniform, [manager-by-manager] disparity upon which [OFCCP's] theory of commonality depends." *Id.* (citing *Dukes*, 564 U.S. at 357).

Absent evidence of a common policy or practice at issue, aggregated statistics cannot prove a "pattern or practice" or a "standard operating procedure" of intentional discrimination. *See Dukes*, 564 U.S. at 356–57 (aggregated "[i]nformation about disparities at the regional and national level does not . . . raise the inference that a company-wide policy of discrimination is implemented" because "[a] regional pay disparity, for example, may be attributable to only a small set of Wal–Mart stores, and cannot by itself establish . . . uniform, store-by-store disparity"); *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 896 (7th Cir. 2012) (rejecting aggregate data because it did not prove that "all 25 superintendents behaved similarly"); *Bennett v. Nucor Corp.*, 656 F.3d 802, 815–16 (8th Cir. 2011) (where practices vary between departments, "a bottom-line [aggregated statistical] analysis is insufficient to demonstrate that any [discrimination] present in one department was also common to all the others."); *Abram v. United Parcel Serv. of Am., Inc.*, 200 F.R.D. 424, 431 (E.D. Wis. 2001) (aggregate numbers mask differences from supervisor to supervisor that preclude a finding of "commonality"); *Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 320 (D.D.C. 2018) (rejecting statistical evidence that "examined employment decisions across four craft groups, each of which contain numerous positions with different responsibilities" and thus could not explain the potential causes of bottom-line disparity); *Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 471 n.8 (D. Md. 2002), *aff'd sub nom.*, 68 F. App'x 393 (4th Cir. 2003).[11]

F. <u>OFCCP Did Not Present Anecdotal Evidence Of Intentional Discrimination</u>

OFCCP's anecdotal evidence does not bridge the gap left by Dr. Madden's statistical analyses. Indeed, to even be relevant, anecdotal evidence must relate to the practices OFCCP is challenging and support its statistical evidence. *See, e.g., Kassman*, 416 F. Supp. 3d at 284-85("If

[11] Notably, Dr. Madden's analyses include individuals who were hired as college recruits or came to Oracle through acquisitions, and therefore were subject to different starting pay practices, further underscoring that Dr. Madden's analyses lack the requisite "glue" to demonstrate a pattern or practice. *See* Findings of Fact Nos. 17-23; Tr. at 1621:5-25, 1703:23-1704:20 (Saad).

Plaintiffs had presented strong statistical evidence of discriminatory treatment, then anecdotal evidence might bolster the inference that the discriminatory treatment was the result of discriminatory intent."). Anecdotal evidence should, as captured by the well-worn expression, "[bring] the cold numbers convincingly to life." *Teamsters*, 431 U.S. at 339. Additionally, where, as here, the statistical evidence "does not adequately account for the diverse and specialized qualifications" relevant to evaluating pay, "strong evidence of individual instances of discrimination becomes vital to the plaintiff's case." *Sears*, 839 F.2d at 311; *Bank of Am.*, 2016 WL 2892921, at *12 (reversing ALJ finding of pattern or practice based solely on statistical evidence, because "[w]ithout more evidence, one bottom line standard deviation of 4.0 for four years with minor shortfalls in two of those years is not enough").

1. Only Anecdotal Evidence Of Bias By Senior Executives Or Human Resources Representatives Is Relevant, And OFCCP Presented None

In its August 22, 2019 Position Statement, OFCCP confirmed it is not accusing women, Asians, or African-American managers in the three job functions at issue of wrongdoing. Position Statement at 7, 9 (Aug. 22, 2019). Instead, OFCCP explained, "the focus of [its] anecdotal evidence is wrongdoing by Oracle's top leadership and Human Resources team." *Id.* at 8. Accordingly, by OFCCP's own admission, anecdotal evidence of discrimination by lower-level managers is not relevant. *Id.* ("any hypothetical *individual* discriminatory acts (wrongdoing) by any low-level Oracle manager are not … the wrongdoing OFCCP seeks to redress."). Despite proclaiming this was its "focus," OFCCP had no examples of Oracle's top leadership and Human Resources team making or influencing the pay decisions at issue, let alone evidence of actual bias by top leadership or HR. Not a single witness testified there was universal, centralized decision making as to compensation decisions.[12] Two witnesses (Mr.

[12] OFCCP may point to the recent state court order granting class certification in *Jewett, et al. v. Oracle* as evidence of centralized decision making at Oracle. But that order is not relevant to the Court's decision here, including because it is a procedural ruling and not a ruling on the merits, and the primary claim at issue is a state law claim under California's Equal Pay Act and not a claim for pattern or practice discrimination under Title VII. Indeed, the state court expressly identified several "fact issues" still to be decided, unlike here where the evidentiary record is closed. Oracle also intends to seek immediate appellate review via a writ petition.

Pandey and Ms. Klagenberg) testified about a single instance each in which they allegedly received instructions on how to distribute their focal review raises. Tr. at 421:22-423:16 (Pandey); 129:17-130:8 (Klagenberg). Not only was this disputed by Mr. Miranda, but there was no evidence it was common or widespread. Tr. at 1092:9-16; 1098:18-23 (Miranda). Despite the many pay decisions for 6,000+ individuals at issue, OFCCP's best evidence was that only one or two were changed.

The only evidence in the entire trial of a potentially biased statement was former HR manager Kristen Hanson-Garcia asserting that in the "mid-2000s," she heard Joyce Westerdahl, Oracle's Executive Vice President, Human Resources, say "Well, if you hire a woman, she'll work harder for less money." Tr. at 79:1-4, 80:4-13 (Hanson Garcia). As an initial matter, Ms. Westerdahl denies making the statement. PX-26A (Westerdahl Depo. Tr. at 338:19-22). Moreover, the evidence confirms Ms. Westerdahl played no role with respect to the thousands of pay decisions at issue. *See* Tr. at 1240:18-1241:3. And, even if she did, this single stray comment from 15 years ago does not prove widespread, systemic bias.[13]

2. <u>OFCCP Presented No Anecdotal Evidence Of Bias By Lower-Level Managers Either</u>

In fact, OFCCP did not have any example of intentional bias, period. Only three witnesses (Ms. Alexander, Mr. Pandey, and Mr. Mensah) raised the possibility their race or gender played a role in their compensation decisions (although their complaints were not as to senior management or HR). P-118; P-505; Tr. at 448:16-20 (Pandey); 1014:8-18 (Mensah). And even then, they offered nothing more than subjective beliefs. OFCCP did not even ask its own witnesses if they believed they were victims of discrimination. Instead, they were asked if they thought their pay was "fair," or how their pay made them feel. *See, e.g.*, Tr. at 70:24-71:11 ("Did

[13] Tellingly, Dr. Hanson-Garcia never complained about or reported the alleged comment, undercutting any notion that as a senior HR Director at the time, she truly believed it constitute evidence of widespread bias at Oracle. Tr. at 96:7-9 (Hanson-Garcia). Moreover, her own experience was entirely inconsistent with discriminatory senior management. Tr. at 95:25-96:9 (Hanson-Garcia). She received a substantial raise after complaining about her pay, and of the employees who earned more money than her, several were women. Tr. at 92:18-93:17 (Hanson-Garcia).

you think that was fair?"), 136:5-6 ("Do you think Oracle's compensation system is fair?"), 173:8 ("How did that make you feel?"), 180:9-10 ("Were there any other reasons why you thought your pay wasn't fair?"), 216:17-19 ("When you heard that, how did it make you feel?"), 222:1-2 ("And when you saw the salary on the W-2, how did that make you feel?"). Other witnesses were simply dissatisfied with their individual experiences, such as receiving a promotion without an accompanying raise, or not being promoted in the first place. Tr. at 69:25-71:11 (Hanson-Garcia); Tr. at 154:2-8 (Klagenberg); Tr. at 173:5-11, 179:15-180:18 (Ng); Tr. at 236:2-21 (Shah); Tr. at 265:7-266:7, 266:14-267:10, 272:8-14 (Boross); Tr. at 321:18-322:9, 326:1-4 (Esteva); Tr. at 621:5-622:5 (Hardman).

This sort of anecdotal evidence is irrelevant. *See, e.g., Clayborne v. Omaha Pub. Power Dist.*, 211 F.R.D. 573, 592–94 (D. Neb. 2002) (where plaintiffs alleged African-Americans could not apply for promotions because positions were not posted and submitted twenty-seven affidavits in support, "[o]nly four of these affidavits mention … lost opportunities for promotion due to the failure to post openings," the "anecdotal evidence … does not support concluding that the requisite commonality" existed). Sensibly, the standard for proving intentional pattern or practice pay discrimination under Title VII is not based on individual employees' subjective feelings about fairness. *See, e.g., Barbour v. Browner*, 181 F.3d 1342, 1346 (D.C. Cir. 1999) ("Title VII, it bears repeating, does not authorize a federal court to become 'a super-personnel department that reexamines an entity's business decisions'") (quoting *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir.1986)).[14]

[14] OFCCP also elicited testimony regarding alleged wage compression at Oracle. Wage compression, however, absent discriminatory motive or impact, is not actionable. There was no evidence to suggest that wage compression is the result of intentional discrimination, or that it impacts only women, Asians, or African-Americans, or that it impacts their pay *more* than the pay of male or white comparators. In fact, the evidence was to the contrary. The only two witnesses who testified on the issue acknowledged that to the extent wage compression occurs at Oracle, it is *not* race or gender based. *See* Tr. at 1149:24-1150:5 (Miranda); Tr. at 1537:23-1538:7 (Chan). Indeed, Mr. Miranda testified that he takes salary compression into account when distributing budget to lower-level managers to allocate to their reports, and that neither race nor gender play any role in this process. Tr. at 1097:2-25, 1115:6-12 (Miranda).

Moreover, even assuming OFCCP's anecdotal evidence constituted actual evidence of discrimination and not the assorted grumblings of disgruntled employees, there was very little of it. To prove Oracle's standard operating procedure is discrimination, OFCCP needed "a significant amount of anecdotal evidence." *Moussouris*, 2018 WL 3328418, at *25 (collecting cases discussing ratio of anecdotal evidence to number of employees at issue). Although the Court limited each side to ten anecdotal witnesses, OFCCP presumably put on its best witnesses. Surprisingly, however, *none* of OFCCP's witnesses testified they experience pay discrimination pursuant to a pattern or practice dictated by Oracle's executives and HR managers.[15]

V. OFCCP FAILS TO DEMONSTRATE ORACLE ENGAGED IN DISCRIMINATORY JOB ASSIGNMENTS OR STEERING

OFCCP also alleges that Oracle engages in discriminatory assignments by steering women, Asians and African-Americans into lower-paying roles.[16] This claim fails because OFCCP did not establish any mechanism by which discriminatory job assignments *could* occur, let alone prove they took place.

As a threshold matter, the contours of OFCCP's assignments claim are unclear. The Second Amended Complaint limits all references to assignments to different career levels at hire. Second Am. Compl. at ¶¶ 18-21. In her reports and at trial, however, Dr. Madden discussed "assignments" both at hire *and* post-hire, the latter of which OFCCP conflates with promotions. No matter how OFCCP attempts to construe this claim, the evidence does not support it.

[15] Not only does OFCCP's anecdotal evidence fall woefully short of supporting its claims, but the anecdotal evidence presented by Oracle directly contradicts them, including the following: several witnesses testified they never experienced or witnessed discrimination at Oracle; Oracle's CEO, General Counsel, and Head of HR are all women; the former President of Product Development was Asian (Indian); Oracle has robust diversity and inclusion initiatives; Oracle provides mandatory non-discrimination training for its employees; Oracle provides a means and mechanism for addressing complaints about discrimination; and Oracle instructs managers that pay decisions must be based on fair, justifiable and non-discriminatory criteria, and to assess for internal pay equity among employees on their particular teams when making any pay decisions. *See* Proposed Findings of Fact at Nos. 59-62.

[16] Oracle uses the terms "assignments" and "steering" interchangeably in this brief.

A. <u>The "Pattern or Practice" Standard Governs OFCCP's Assignments Claim</u>

While OFCCP's compensation discrimination claim alleges that Oracle pays similarly situated employees differently due to their race or gender, its assignments claim, by contrast, alleges that Oracle differently situates employees who would otherwise be similarly situated (*e.g.*, by steering them to a lower career level) due to their race or gender. The legal standard, however, is the same for both claims: OFCCP must prove that discriminatory job assignments were Oracle's "standard operating procedure" and prove a common mode of discrimination. *Teamsters*, 431 U.S. at 336; *Dukes*, 564 U.S. 338, 352 and n.7; *see also* Section II.A., *supra*. And, importantly, to prove that applicants were improperly assigned to lower-paying roles, OFCCP must still compare similarly situated employees or applicants. *McReynolds*, 349 F. Supp. 2d at 7–8 ("plaintiffs' statistics must compare the promotion rates of class members with the rates of similarly situated whites within the company"). OFCCP also must demonstrate the alleged discriminatory assigning was not due to any wrongdoing by lower-level managers. Position Statement at 7.

Thus, OFCCP must answer two questions to establish its assigning theory: (1) is there even a mechanism at Oracle through which high-level management or HR managers could assign employees as alleged?; and (2) do Dr. Madden's analyses support an inference that Oracle's high-level managers or HR managers are discriminatorily assigning women, Asians, and African-Americans into lower-paying positions or career levels? *See* MSJ Order at 43 (Nov. 25, 2019). As explained below, the answer to both questions is "no."

B. <u>There Was No Evidence Of A "Steering" Mechanism</u>

OFCCP did not introduce any evidence, anecdotal or otherwise, demonstrating a mechanism by which Oracle's high-level managers could steer employees into lower-paying roles. To the contrary, when an Oracle manager posts a job requisition, it already contains a specific job code and career level. Findings of Fact Nos. 9; 19. Although managers may offer a position that is one career level lower or higher than posted to match a particular applicant's qualifications, there was no evidence of managers "steering" applicants to job requisitions with

lower-paying job codes, or discriminatorily "up-leveling" or "down-leveling" them, based on their race of gender – let alone evidence that this happened in a systematic way. Findings of Fact Nos. 19; 50-52. And there certainly was no evidence that Oracle's high-level managers or HR managers had any mechanism by which to steer women, Asians, and African-Americans into lower-paying positions or career levels, whether through initial hire or through later promotions or transfers. OFCCP's theory must be rejected for this reason alone.

C. Dr. Madden Failed To Conduct An Assignments Analysis, Let Alone Prove Discriminatory Assigning

Even if OFCCP did have evidence of a mechanism by which discriminatory assigning could take place, OFCCP's statistical evidence fails to support its claim. Dr. Madden did not even conduct an assignments analysis – that is, she did not study how employees came to hold the jobs they do. Instead, Dr. Madden looked only at the jobs that employees currently hold, and assumed that any pay disparities adverse to women, Asians, or African-Americans are the result of discrimination in job assignments. This is not sound science. When Dr. Madden says "a job was assigned by Oracle," she simply means "the person holds that job at Oracle." Tr. at 914:7-11 (Madden). Thus, OFCCP did not present any statistical evidence of *assignments* discrimination.

Dr. Madden views job code and career level as endogenous (and therefore controlled by Oracle and inherently biased) based on her view that "[p]eople don't walk into Oracle having a global career level." Tr. 870:6-9 (Madden). Dr. Madden also assumes that all employees automatically strive for (and are equally qualified for) the highest career level or highest-paid job. But people hold different jobs at different career levels for their own reasons, which have nothing to do with discrimination. Indeed, OFCCP's own witnesses testified that *they* chose the job requisitions to which they applied (and presumably for which they felt qualified), and were hired into the specific roles, job codes, and global career levels that were listed on those job requisitions. *See, e.g.*, J-135 (demonstrating Oracle job requisitions are for specific jobs with specific qualifications); *see also* Tr. at 167:19-24 (Ng); 213:8-15 (Shah); 288:25-289:2 (Boross)

(OFCCP witnesses testifying they were hired into the jobs to which they applied). Accordingly, the evidence does not support Dr. Madden's assumptions.

1. OFCCP Failed To Prove Discriminatory Job "Steering" At Hire

As explained by Dr. Saad, to properly evaluate the merits of a pattern or practice claim of discriminatory job assignments, the dependent variable to study is *job assignments*, not pay. *Jones v. GPU, Inc*., 234 F.R.D. 82, 91 (E.D. Pa. 2005) (analysis that shows "white employees are more likely to hold exempt positions (and presumably more likely to be paid more) than are African-American employees," did not "take into consideration any of the possible reasons for that difference" and thus was "not an analysis of promotion decision making"); Tr. at 1710:8-1711:10 (Saad). The analysis must account for the jobs to which employees *applied*, because differences in application rates to different teams or at different levels would show variations in starting jobs not attributable to Oracle's conduct. Tr. at 1710:8-19, 1712:1-1713:5 (Saad). Otherwise, the results simply reflect the job titles that individuals hold, without any insight into whether they applied or sought to be elsewhere. Yet Madden did not analyze how employees ended up at Oracle. She did not "directly look at the initial assignment, the process of initial assignment and the selection decisions involved." Tr. at 1711:11-25 (Saad). Instead, she simply assumed any pay or career level differences resulted from discrimination.

Dr. Saad, however, did conduct an analysis of selections at hire to test for discriminatory steering. His analysis proceeded in two parts. First, he analyzed "by level, the positions to which women, Asians and African-Americans applied." Tr. at 1712:1-13 (Saad); J-103 ¶¶ 147-149. Dr. Saad's results revealed "statistically significant differences in the application of women to IC jobs" and "in terms of what they are choosing to apply to." Tr. at 1712:14-1713:5 (Saad). The same was true for Asian and white applicants, for both individual contributor and manager roles. Tr. at 1714:2-10 (Saad). In other words, men and women, and white and Asian applicants, applied to jobs at different career levels at different rates. That is not discrimination by Oracle. *See, e.g., Am. Fed'n of State, Cty., and Mun. Emps. (AFSCME) v. Washington*, 770 F.2d 1401,

1407 (9th Cir. 1985) (perpetuating market disparities is not discrimination where the employer "did not create the market disparity and has not been shown to have been motivated by impermissible" considerations).

In the second part of Dr. Saad's analysis of selections at hire, he addressed whether women, Asians, or African-Americans were being "leveled up or leveled down." In other words, even if certain groups apply to different career levels at different rates, did Oracle managers move them up or down independently of the applicant? *See* Tr. at 1715:6-1716:4 (Saad).[17] Dr. Saad's analysis revealed that "the majority of people ended up in positions at the level they applied to." Tr. at 1716:5-1717:1 (Saad) (nearly 75% of women; 65% of Asian IC applicants and 81% of Asian M-level applicants; and 71% of African-American applicants hired into the global career level to which they applied); J-103 ¶¶ 150-156. Similarly, most employees of all races and genders were hired into the Organization to which they applied (Tr. at 1697:20-1699:8 (Saad); J-104 ¶¶ 78-79), directly contradicting Dr. Madden's assumption that employees come to work in different Organizations (*i.e.*, on different product teams) in a "totally endogenous" way that Oracle directs. Tr. at 746:15-18 (Madden).

When looking at those employees who were hired into career levels different than that listed on the job requisition, Dr. Saad found **no statistically significant disparities** demonstrating women, Asians, or African-Americans being "up-" or "down-leveled" at disparate rates. Tr. at 1717:2-1721:8 (Saad); J-103 ¶¶ 150-156. Thus, the data does "not support any inference that there's some sort of taint or bias in the way in which Oracle handles the initial assignments that individuals receive at Oracle" and there is no evidence of "any pattern of systemic imbalance in the proportions of women, Asians or African-Americans receiving different levels than those that they applied to." Tr. at 1721:22-1722:3, 1726:6-11 (Saad). Instead, the statistical evidence conclusively demonstrates that employees of all races and

[17] Even if evidence of disparate "up-leveling" or "down-leveling" by managers existed, of course, it would not be actionable given OFCCP's concession that it is not contending that any individual Oracle managers engaged in discrimination. But in any event, Dr. Saad demonstrated this did not occur.

genders were generally hired into the jobs to which they applied, without interference or manipulation by Oracle (and certainly not by Oracle's senior executives or HR leaders).

OFCCP attempts to rely on three "studies" Dr. Madden conducted to support a contrary conclusion. But none of these is persuasive.

First, in Tables 5, 6, and 7 of her initial report, Dr. Madden reported pay differences by race and gender after controlling for a handful of variables mirroring her primary pay analyses, as well as for job descriptor and career level at hire, and then current job descriptor and current career level. P-1 at 80-82; Tr. at 831:11-833:4, 914:23-915:22, 918:21-25 (Madden). Dr. Madden represented that these analyses "tell[] [us] how the current job assignment is effecting salary versus the original job assignment." Tr. at 829:23-830:23 (Madden). But as Dr. Madden conceded at trial, "nothing" in these tables "evaluates how it is that a given employee came to have" a particular job descriptor or global career level at the time of hire. Tr. at 916:14-917:2 (Madden). As Dr. Saad explained, these tables do not reflect a study of initial assignments because "they don't directly look at the initial assignment, the process of initial assignment [or] the selection decisions involved." Tr. at 1711:16-25 (Saad)

Second, in Charts R1 and R2 of her rebuttal report, Dr. Madden took Dr. Saad's analysis of selections at hire and presented results for "up-leveling" and "down-leveling" for three IC levels only. D-449 at 56-57; Tr. at 833:5-835:4 (Madden). But these charts reflect Dr. Madden cherry-picking a handful of career levels and analyzing them separately, while ignoring all other career levels. Tr. at 1724:1-1725:1 (Saad). Even among the three career levels she analyzed, she found no statistically significant differences in half of those levels. Tr. 1724:14-1726:5 (Saad). This does not suggest "a pattern, of any kind." *Id.*

Third, in Table R9 of her rebuttal report, Dr. Madden compares starting pay outcomes when controlling for a handful of her "human capital factors" as well as the job descriptor and career level of the position to which the individual applied. D-449 at 53. But the dependent variable here, too, is pay (Tr. at 940:8-21 (Madden)), and thus it once again does not constitute

an analysis of how or why individuals were hired into the specific positions that they were. It is not competent evidence of steering at hire.

2. OFCCP Failed To Prove Discriminatory Job "Steering" Post-Hire

Dr. Madden and OFCCP devote scant attention to allegedly discriminatory job "steering" post-hire, and conflate the concept with promotions (even though OFCCP did not bring any claim for discriminatory job promotions). Regardless, the analyses upon which OFCCP relies do not evidence any pattern or practice of discrimination. Dr. Madden testified "there is no promotion discrimination that [she] discovered against Asians in any of [her] analyses." Tr. at 945:17-25 (Madden). In Appendix B to her initial report, she reported results of her analysis of career level advancement (*i.e.*, promotion), which she claims show women were statistically significantly less likely to be promoted out of two career levels (IC3 or IC4). Tr. at 919:1-18 (Madden); P-1 at 53, 104-105. Hidden in her back-up files were the results for the other career levels (other IC levels and nearly all M levels) – none of which showed ***any*** statistically significant results adverse to women, and one of which (M5) showed statistically significant results in favor of women. Tr. at 919:19-920:24 (Madden); *see also* Tr. at 1726:12-1728:25 (Saad) (concluding Dr. Madden "does not show any pattern of disparities in promotions for women at Oracle"). And applying Dr. Madden's promotions model to Asians and African-Americans yields no statistically significant adverse results at all, in any global career levels. Tr. at 1729:1-1730:19 (Saad); J-104 (Saad Rebuttal) ¶¶ 68-72. Dr. Madden did not present any further analyses of promotions *or* job "assignments" post-hire. Tr. at 1730:20-1731:1 (Saad).

At trial, Dr. Madden testified that Tables 5-7 of her initial report – and in particular, the fact that introducing a control for current career level in Column 3 reduces the alleged pay disparities – demonstrates there "has to be" a difference in "the pace of moving to higher level career levels." Tr. at 917:17-918:20 (Madden). But again, this analysis of *pay* data only indicates differences in career levels generally, not differences in the rates at which qualified and interested employees advance to higher paying jobs. Because these analyses do not study job

advancement, they do not constitute evidence of discriminatory post-hire "steering" – and in any event, any indirect suggestion of post-hire job placement discrimination by Dr. Madden based on these analyses is directly contradicted by, and inconsistent with, the results of her approach for directly analyzing of promotion outcomes (reflected in Appendix B).

In addition to these statistical failings, OFCCP did not have any anecdotal evidence of discriminatory steering. There was no testimony from employees who applied to one job and were directed into a lower-paying job or were not advanced or promoted due to discrimination.

D. OFCCP Fails To Demonstrate That Employees Compared Were Similarly Situated When They Entered Oracle Or Post-Hire

OFCCP's assignment theory fails for an additional reason: OFCCP fails to demonstrate that the purported victims of Oracle's alleged assignments discrimination – whether at or after the time of hire – are similarly situated to the employees who hold higher paying jobs. *See McReynolds*, 349 F. Supp. 2d at 8. Assuming Madden intended her "comparably qualified" formulation to address the relevant "similarly situated" standard, her analyses come nowhere close. As explained above in Section IV.B.1, Dr. Madden relies on her deficient measures of "education" and "experience" to determine which employees "come to Oracle with the same characteristics." Tr. at 952:3-19 (Madden). Those measures are no better suited for similarly situating employees for an assignments claim than they are for proving pay discrimination. Dr. Madden also uses these same inadequate controls in her Appendix B promotions analysis, and fails to account for even the different job codes in which employees work (which may entail different advancement opportunities). P-1 at 105; Tr. at 919:9-920:4 (Madden). For this additional reason, OFCCP's assignment claim is not supported by competent evidence.

VI. OFCCP FAILS TO PROVE THAT ORACLE ENGAGED IN DISPARATE IMPACT COMPENSATION DISCRIMINATION

A. Proving Disparate Impact Discrimination Requires Specific Elements

To prove a disparate impact claim, OFCCP must show "a particular employment practice that causes a disparate impact [on the basis of race or sex]." 42 U.S.C. § 2000e-2(k)(l)(A)(i); *see*

also Teamsters, 431 U.S. at 349 (disparate impact involves "policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group"). Thus, OFCCP must first establish a specific practice by Oracle causing the alleged pay disparity. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) (plaintiff must identify "a specific or particular employment practice" causing the alleged disparate impact); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992, 994 (1988). Once such a practice has been identified, OFCCP must prove that the practice caused an adverse impact on a protected group. *Id*; *Analogic Corp.*, ALJ No.: 20l7-OFC-0000l at *32. Causation is crucial: a statistical disparity alone does not prove a disparate impact. *OFCCP v. Google*, 2017 WL 4125403, at *25 (July 14, 2017). If OFCCP establishes causation, Oracle may respond by demonstrating that the challenged practice is consistent with its business necessity. 42 U.S.C. § 2000e-2(k)(l)(A); *Watson*, 487 U.S. at 998. Finally, if the practice is consistent with Oracle's business necessity, OFCCP has to prove that other practices without an undesirable effect would serve Oracle's legitimate business needs. *Id.*; *see also* 41 C.F.R. § 60-20.2(c) (prohibiting "[e]mployment policies or practices that have an adverse impact on the basis of sex, and are not job-related and consistent with business necessity"); *Wards Cove*, 401 U.S. at 659.

B. OFCCP Fails To Demonstrate That Oracle Had A Policy Or Practice Of Basing Starting Pay On Prior Pay

OFCCP did not present evidence, anecdotal or otherwise, that Oracle had a policy or practice of asking about, let alone relying on, prior pay. To the contrary, the evidence demonstrated that prior to October 2017 (when Oracle implemented a policy expressly prohibiting reliance on prior pay) managers exercised discretion in determining starting pay, including whether, and the extent to which, to rely on prior pay information. Indeed, some managers did not consider prior pay at all, and others who did considered it only in combination with other factors. Tr. at 1412:6-11 (Webb) (testifying that he has never based a compensation decision on a candidate's prior pay); Tr. at 1116:12-19 (Miranda).

At most, a few witnesses testified they were *asked* about their prior pay. But none of them had personal knowledge regarding how their starting pay was actually determined. Tr. at 310:24-311:17, 323:4-12 (Esteva). For example, Ms. Boross assumed her hiring manager asked for her prior pay "to get an idea of what [her] expectation might be." Tr. at 264:11-14 (Boross). But her manager also raised her starting salary by $5,000 at her request. Tr. at 264:23-265:6 (Boross).

Other witnesses, including Ms. Waggoner and Mr. Miranda, testified there was never a policy at Oracle of relying on prior pay to determine starting salary. Tr. at 1089:12-19 (Miranda); Tr. at 1198:8-19 (Waggoner); Tr. at 1411:16-1412:11 (Webb); Tr. at 1893:24-1894:2 (Yakkundi). There also was no documentation of any practice or policy of basing starting pay on prior pay. Although prior to October 2017, Oracle did have an internal new hire justification form that contained a field for hiring managers to record "Candidate's Current Salary" for applicants they selected, there was no evidence that managers relied on any prior pay information they may have recorded to set starting pay in a consistent, uniform way. PX-24A at 55:8-57:5 (explaining that the iRecruitment form could be submitted without filling in current salary); PX-20A at 43:22-44:16, 59:15-60:1, 60:4-10.

The lack of a uniform – or even widely-applied – practice of basing starting pay on prior pay is fatal to OFCCP's claim. *Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) ("[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a . . . policy or policies causing that disparity."); *Wards Cove*, 490 U.S. at 657 ("[A] plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack."); *Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002) (plaintiffs must "identify the particular element or practice" that causes the alleged disparate impact).

C. **OFCCP Did Not Prove That Any Alleged Reliance On Prior Pay Caused Unlawful Pay Disparities**

OFCCP's statistical evidence likewise fails to establish any "causal relationship" between the alleged practice of relying on prior pay and the alleged pay disparities. *Stout*, 276 F.3d at 1122 (raising an inference of discrimination insufficient for a disparate impact claim, OFCCP "must actually prove the discriminatory impact at issue."); *accord Figueroa v. Pompeo*, 923 F.3d 1078, 1086 (D.C. Cir. 2019); *Kassman*, 416 F. Supp. 3d at 274-75.

The only evidence on which OFCCP purports to rely to prove a class-wide causal relationship is a correlation Dr. Madden observed between prior pay and starting pay. That observation is not remarkable. Indeed, both experts agree that a correlation between prior pay and starting pay is generally **expected** when an employee switches companies, given that the employee is presenting both the prior and current employer with the same package of skills and prior experience. Tr. at 913:8-17 (Madden); 1740:6-16 (Saad). Both experts also agree that correlation does not prove causation. Tr. at 912:3-913:7 (Madden); 1740:17-1741:9 (Saad); *see also* MSJ Order at 50 (Nov. 25, 2019). Accordingly, the existence of a correlation does not show that prior pay *caused* or *determined* starting pay for all (or any) of the employees at issue.

OFCCP tries to avoid this inevitable conclusion by misrepresenting Dr. Madden's analysis, claiming it showed something more. In its opening statement, OFCCP contended that Dr. Madden would show "between a 96 and 100 percent correlation and, specifically, a 99 to 100 percent correlation for women between the salary Oracle set at hire and an employee's prior pay." Tr. at 42:6-13. But Dr. Madden did no such thing. The correlation she identified was a 78 percent correlation – *not* a 96 to 100 percent correlation. Tr. at 1733:13-1736:5 (Saad). As Dr. Saad explained, this correlation is "really no different than what is found elsewhere in the economy," as reflected in the 75 percent correlation reported economy-wide by the National Longitudinal Survey. Tr. at 1739:10-1740:5 (Saad); J-103 ¶ 144. In other words, the relationship between prior and starting pay at Oracle looks like the relationship economy-wide.

Assuming that in opening, OFCCP was referring to Dr. Madden's Table 4, it does not purport to identify a correlation between prior pay and starting pay at Oracle. Instead, it compares the gender- and race-based differences in prior pay using Dr. Madden's general models to gender- and race-based differences in starting pay using those same models and finds that those differences "mirror each other." *See* P-1 at 79; Tr. at 846:25-849:25 (Madden). But as Dr. Saad explained, Table 4 does not demonstrate any causal relationship. Tr. at 1738:14-1739:6 (Saad). Indeed, Table 4 does not even compute the correlation between starting pay and prior pay. Tr. at 1739:7-9 (Saad). Moreover, because all of the Table 4 results are predicated on the same basic models as Dr. Madden's primary pay analyses, the relationships she does find are inherently unreliable because they do not compare employees who have similar skills and experience, nor individuals who are hired to do substantially similar work. Tr. at 1738:3-9 (Saad).

Finally, even if OFCCP had demonstrated that Oracle had a consistent practice of basing starting pay on prior pay, and even if Dr. Madden had demonstrated that practice *caused* employees to receive the starting pay amounts they did, OFCCP still fails to connect the dots. It does not go a step further to conclusively demonstrate that the amount of starting pay each employee at issue received is the *cause* of the pay disparities during the time frame relevant to this case. Accordingly, for each of these reasons, OFCCP's disparate impact claim fails.

VII. OFCCP CANNOT PREVAIL BASED ON ALLEGATIONS THAT ORACLE FAILED TO MEET ITS AFFIRMATIVE ACTION COMPLIANCE OBLIGATIONS

OFCCP also may contend that Oracle failed to meet its affirmative action compliance obligations, thereby demonstrating discrimination by Oracle. Any such contention fails. As explained in detail above, claims of disparate treatment (*i.e.*, pattern or practice) discrimination and disparate impact discrimination are governed by specific evidentiary burdens and require proof of specific elements. Failure to meet substantive affirmative action obligations is not one of them. If OFCCP otherwise had proven its claims, a showing that Oracle *also* failed to meet its

affirmative action obligations regarding compensation *might* help bolster such claims. But OFCCP has not done so here. And in any event, the evidence does not demonstrate Oracle failed to meet any substantive affirmative action obligations, which was simply not an issue to be adjudicated at trial. *See, e.g.*, Order Clarifying Issues for Hearing (Dec. 4, 2019).

VIII. CONCLUSION AND PROPOSED ORDER

For all of the reasons described above, OFCCP has failed to prove that Oracle engaged in unlawful compensation or job assignments discrimination against any of its female, Asian or African-American employees. Accordingly, Oracle respectfully requests a final administrative order be issued in its favor on all claims. Oracle further requests that OFCCP's Second Amended Complaint be dismissed with prejudice, and that Oracle be awarded its costs of suit.

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Respectfully submitted,

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