

JANET M. HEROLD  
Regional Solicitor  
IAN H. ELIASOPH  
Counsel  
LAURA C. BREMER  
Counsel  
NORMAN E. GARCIA  
Senior Trial Attorney  
Office of the Solicitor  
UNITED STATES DEPARTMENT OF LABOR  
90 7<sup>th</sup> Street, Suite 3-700  
San Francisco, CA 94103  
Tel: (415) 625-7757  
Fax: (415) 625-7772  
Email: [bremer.laura@dol.gov](mailto:bremer.laura@dol.gov)

Attorneys for OFCCP

**UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS, UNITED  
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

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

**TABLE OF CONTENTS**

**INTRODUCTION.....1**

**I. Oracle Misstates Governing Case Law .....1**

**II. Oracle Failed to Rebut OFCCP’s Statistical Evidence of Gender and Racial Pay Disparities Between and Among Employees in the Same System Job Title.....3**

**III. Oracle Failed to Rebut OFCCP’s Steering Case .....7**

**IV. Oracle’s Records Prove It Set Pay at Hire Based on Prior Pay, Leading to Gender and Racial Pay Disparities in Starting Pay .....9**

**V. Oracle Has Not Rebutted OFCCP’s Evidence Demonstrating Oracle’s Highly-Centralized Control of Compensation Decisions.....11**

**VI. Oracle Misrepresents the Anecdotal Evidence.....14**

**CONCLUSION ..... 15**

## TABLE OF AUTHORITIES

### Cases

<i>Bazemore v. Friday</i> , 478 U.S. 385 (1986) .....	10
<i>Beachy v. Boise Cascade Corp.</i> , 191 F.3d 1010 (9th Cir. 1999).....	14
<i>Bush v. Ruth’s Chris Steak House, Inc.</i> , 286 F.R.D. 1 (D.D.C. 2012).....	8
<i>Chen-Oster v. Goldman, Sachs &amp; Co.</i> , 114 F.Supp.3d 110 (S.D.N.Y. 2015).....	13
<i>Chen-Oster v. Goldman, Sachs &amp; Co.</i> , 325 F.R.D. 55 (S.D.N.Y. 2018).....	12
<i>Dindinger v. Allsteel, Inc.</i> , 853 F.3d 414 (8th Cir. 2017).....	14
<i>E.E.O.C. v. Gen. Tel. Co. of Nw.</i> , 885 F.2d 575 (9th Cir. 1989).....	2
<i>E.E.O.C. v. Maricopa Cty. Cmty. Coll. Dist.</i> , 736 F.2d 510 (9th Cir. 1984).....	10
<i>Ellis v. Costco Wholesale Corp.</i> , 285 F.R.D. 492 (N.D. Cal. 2012) .....	13
<i>Hemmings v. Tidyman’s Inc.</i> , 285 F.3d 1174 (9th Cir. 2002).....	2, 6, 13
<i>Int’l Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	1, 2, 13
<i>Jewett v. Oracle</i> , Case No. 17-civ-02669 (Cal. Super. Ct. Apr. 30, 2020) .....	4, 12
<i>Lanning v. Se. Pa. Transp. Auth. (SEPTA)</i> , 181 F.3d 478 (3d Cir. 1999).....	10
<i>Moussouris v. Microsoft Corp.</i> , 2018 WL 3328418 (W.D. Wash. June 25, 2018), <i>aff’d</i> , 799 F. App’x 459 (9th Cir. 2019).....	12

<i>OFCCP v. Greenwood Mills</i> , 1995 WL 1798933 (ARB Nov. 20 1995).....	13
<i>OFCCP v. Honeywell</i> , 1994 WL 68485 (Sec’y Mar. 2, 1994) .....	1, 2, 13
<i>OFCCP v. WMS Solutions, LLC</i> , 2015-OFC-00009, slip op. at 71 (ALJ May 12, 2020).....	2, 13
<i>Paige v. California</i> , 291 F.3d 1141 (9th Cir. 2002).....	5, 12
<i>Palmer v. Shultz</i> , 815 F.2d 84 (D.C. Cir. 1987) .....	2
<i>Rizo v. Yovino</i> , 950 F.3d 1217 (9th Cir. 2020).....	2, 10
<i>Segar v. Smith</i> , 738 F.2d 1249 (D.C. Cir. 1984) .....	7
<i>Sobel v. Yeshiva Univ.</i> , 839 F.2d 18 (2d Cir.1988).....	10
<i>Starbrite Waterproofing Co. v. Aim Constr. &amp; Contracting Corp.</i> , 164 F.R.D. 378 (S.D.N.Y. 1996) .....	3
<i>Texas Dep’t of Cmty. Affairs v. Burdine</i> , 450 U.S. 248 (1981).....	2
<i>United States v. City of New York</i> , 717 F.3d 72 (2d Cir. 2013).....	2

**Regulations**

41 C.F.R. § 60-20.4.....	7
41 C.F.R. § 60-20.4(a) .....	4
41 C.F.R. § 60-2.17(b)-(d).....	10
80 Fed. Reg. 54934 .....	14
81 Fed. Reg. 39108 .....	8

## INTRODUCTION

Oracle's Post-Hearing Brief ("Oracle's Brief") fails to rebut the overwhelming evidence of intentional pay discrimination proffered by OFCCP. Consistent with its pre-trial posture, Oracle focuses its closing arguments on misplaced characterizations of ancillary evidence, ignoring and failing to rebut OFCCP's statistical evidence proving systemic gender and racial pay discrimination. The U.S. Supreme Court settled decades ago that such characterizations are insufficient to rebut evidence of systemic discrimination, *see Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.24 (1977), but Oracle's defense repeatedly disregards governing case law. Indeed, Oracle's Brief focuses on *individual* discrimination cases that have no relevance to the pattern and practice claim at issue here.

Oracle has no answer to OFCCP's evidence that the robust and detailed job classification and compensation program Oracle centrally designed, controlled, and enforced, intentionally pays women, Asians, and African Americans systemically less than their similarly-qualified male and White colleagues. As illustrated by its deliberate breach of its AAP obligations, Oracle's core contention here is that it should not be required to comply with federal law or its contractual promises to taxpayers. Oracle is not above the law and must be held accountable to its obligations as a federal contractor. Oracle's systemic pay discrimination violates the express terms of its federal contract and requires a finding against Oracle on liability.

### **I. Oracle Misstates Governing Case Law.**

Oracle distorts the burden-shifting paradigm to gloss over its failure to proffer any testable explanation for the pay disparities uncovered by OFCCP's statistical analyses. Oracle argues that for plaintiffs to establish an inference of discrimination from a prima facie case, plaintiffs must systematically rule out every possible explanation for a pay disparity impacting every *individual* member of the class. This is not what the law requires. Because plaintiffs have the heightened burden in a pattern and practice discrimination case "to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers," *Teamsters*, 431 U.S. at 360,<sup>1</sup> defendants likewise have a heightened rebuttal burden

---

<sup>1</sup> *See also OFCCP v. Honeywell*, 1994 WL 68485, at \*5 (Sec'y Mar. 2, 1994). Plaintiff meets this burden with statistical evidence that gives rise to an inference of discrimination. *Teamsters*, 431 U.S. at 340-41, 360.

to identify legitimate non-discriminatory explanations for *systemic* pay disparities, and to show that those factors alter the outcome of the statistical analysis.<sup>2</sup>

The defendant bears this burden for practical and analytical reasons. First, both Title VII and Executive Order 11246 expect and acknowledge that a defendant is in the best position to explain differentials in employment conditions as to *their* own workforce.<sup>3</sup> Second, by shifting the burden to the defendant, defendant’s proffered explanations “*frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.*” *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (emphasis added).

Here, Oracle has failed to meet its burden. Oracle’s Brief contains an array of undocumented, hypothetical factors that it states *might* explain individual pay differences. Yet Oracle never presented evidence providing a non-discriminatory explanation of the systematic group pay disparities identified by OFCCP, let alone demonstrated that applying such a non-discriminatory factor alters the statistical findings.<sup>4</sup> Recognizing this weakness, Oracle’s Brief conflates the standards for comparators used in pattern and practice cases, applicable here, with those applied in individual Title VII cases.<sup>5</sup> Simply put, in a pattern and practice case, the

---

<sup>2</sup> *Honeywell*, 1994 WL 68485, at \*5 (“A defendant’s rebuttal burden in a pattern or practice case . . . is significantly heavier than in an individual disparate treatment case.”); *E.E.O.C. v. Gen. Tel. Co. of Nw.*, 885 F.2d 575, 581 (9th Cir. 1989); *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1188-89 (9th Cir. 2002) (“defendant must produce credible evidence that curing the alleged flaws would also cure the statistical disparity”); *Palmer v. Shultz*, 815 F.2d 84, 96 (D.C. Cir. 1987); *OFCCP v. WMS Solutions, LLC*, 2015-OF-00009, slip op. at 71 (ALJ May 12, 2020).

<sup>3</sup> *Teamsters*, 431 U.S. at 359 n.45 (“[T]he employer [i]s in the best position to show why any individual employee was denied an employment opportunity . . . the company’s records [are] the most relevant items of proof.”).

<sup>4</sup> Oracle’s contentions about the Bennett Amendment fail for the same reason: although Oracle insists this Court *must* consider its affirmative defenses under the Bennet Amendment, Oracle never identifies *what* those defenses are and certainly never meets its heavy burden of affirmative proof with respect to such defenses. See *Rizo v. Yovino*, 950 F.3d 1217, 1222 (9th Cir. 2020) (en banc) (to make out an affirmative defense under the EPA, “employer must prove . . . that the proffered reasons do in fact explain the wage disparity”) (internal quotation and citation omitted). Oracle’s expert admits he did *no* affirmative study of Oracle’s pay system. Tr. 1802:18-1803:2.

<sup>5</sup> Most cases cited by Oracle regarding the similarly situated analysis concern individual, not systemic, discrimination. See Oracle’s Br. at 4-6 (citing and relying upon nine separate cases that concerned individual rather than systemic pattern or practice discrimination). Unlike in an individual case, where a plaintiff must prove that his or her pay was the result of discrimination to prove liability, in a pattern or practice case the plaintiff need not prove that any one person’s specific pay differential was the result of discrimination. See, e.g., *Teamsters*, 431 U.S. at 360 (during the “‘liability’ stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer’s discriminatory policy”). See also *United States v. City of New York*, 717 F.3d 72, 103-05 (2d Cir. 2013) (describing differences in modes of proof between pattern and practice and individual cases).

question is not whether any difference in one person’s individual pay can be explained, but rather whether the *group pay differences* can be explained.

## **II. Oracle Failed to Rebut OFCCP’s Statistical Evidence of Gender and Racial Pay Disparities Between and Among Employees in the Same System Job Title.**

OFCCP’s statistical analyses demonstrate extremely robust statistical gender and racial salary and total compensation disparities between and among employees in the same system job title (“SJT”), the most granular unit of Oracle’s job table,<sup>6</sup> for all years from 2013 through 2018.<sup>7</sup> Thus, to assert a successful defense, Oracle must identify a factor *to explain the group pay disparities* that is either a flaw in the factors Professor Madden (“Madden”) considered in her analysis or an additional factor (a legitimate business explanation) she omitted from her analysis which eliminates the statistical significant disparity. Oracle cannot do so for two reasons.

First, Oracle cannot point to any omitted or additional factors because *all factors Oracle systematically used to make compensation decisions* are incorporated into Madden’s Column 8 statistical analyses, which compare similarly-situated employees within the same SJTs.<sup>8</sup> Thus, any factor Oracle points to now as allegedly missing from OFCCP’s statistical analysis, such as Oracle’s product assignment, is appropriately excluded because Oracle itself did not consider, nor even keep data on, these factors when making compensation decisions.<sup>9</sup> OFCCP’s Proposed

---

<sup>6</sup> OFCCP’s Br. at 9-11, 15-19. Oracle’s own internal analyses of compensation are structured around the comparisons that are calculated using SJT salary ranges. See JX114 at 18; JX70 at 9. Such analyses would be meaningless if SJTs did not group similarly-situated employees for purposes of compensation.

<sup>7</sup> Oracle argues that OFCCP has not established a violation during the audit period. Oracle’s Br. at 8-9. As anticipated in OFCCP’s Brief, at 16, n.25, Oracle makes no attempt to identify compensation practices that changed either before or after the review period. Thus, this Court need not reach this issue in this case, as the same body of evidence supports the violations during the review period and after.

<sup>8</sup> OFCCP’s Br. at 19; OFCCP’s PF 28. While Oracle relies on the E.E.O.C. Compliance Manual to assert that job titles are not necessarily determinative (Oracle’s Br. at 5), the quoted passage makes clear that this is because employees may have *different* job titles but still be similarly situated for purposes of pay. *Id.*; see also, *infra* at 7.

<sup>9</sup> By choosing not to comply with its AAP audit and correction obligations (see OFCCP’s Br. 33-35; OFCCP’s PFs 47-50), Oracle deprived both OFCCP and this Court of Oracle’s mandated internal analyses of its pay data (which is an analysis that Dr. Saad admits he also did *not* perform). As such, there is a large gap in the evidentiary record in that—six years after opening the compliance review—Oracle has still not identified or produced the factors it uses in setting compensation for purposes of compliance, its review on whether those factors lead to disparities, and the corrective actions it has taken. Oracle cannot be permitted to secure a litigation advantage from these *current and continuing* AAP violations by asserting that there are innocent but completely undocumented, systemic explanations for the wide pay disparities. Order Regarding Motions in Limine at 5 (Dec. 2, 2019) (party cannot make affirmative claims about what evidence that is not in the record “would show”); cf. *Starbrite Waterproofing Co. v. Aim Constr. & Contracting Corp.*, 164 F.R.D. 378, 381 (S.D.N.Y. 1996) (discovery sanctions “ensure that a party does not benefit from its failure to comply”) (citations and internal quotations omitted).

Fact (“PF”) 21-24. As Oracle acknowledges, under 41 C.F.R. § 60-20.4(a), the analysis of “similarly situated” for purposes of pay is based on case specific facts.<sup>10</sup> While a company could decide to set compensation on the basis of product line, objective performance evaluations,<sup>11</sup> or the number of patent bonuses secured,<sup>12</sup> the evidence shows that Oracle did not do so. Oracle’s central defenses instead defaults to a claim that its workforce is simply *too* complex for statistical analysis. *See, e.g.*, Oracle’s Br. at 19 (“[M]any of these factors . . . are not reducible to quantitative inputs for Dr. Madden’s plug-and-play statistical analysis”). This “too complex to be studied” defense has no purchase in discrimination law.<sup>13</sup>

Second, even if Oracle were able to show it considered additional factors beyond those identified in its own compensation and job classification policies, Oracle fails to meet its burden of production regarding these factors. The statistical analysis of gender or racial pay disparities required here is not an exploration of all differences existing between individuals that might explain *individual differences in pay*, but an analysis of *group pay differences*.<sup>14</sup> Thus, to meet its burden, Oracle must articulate a factor: (i) as to which there is a group difference (*e.g.*, racial or gender difference) (ii) that has an impact on compensation. *See supra* note 2, at 2.

All of the factors Oracle cites to critique Madden’s statistical analysis share one or both of these defects. Moving first to Oracle’s primary argument, that the gender and racial pay disparities of employees in the same SJT are a consequence of differing “product” assignment,

---

<sup>10</sup> Oracle’s Br. at 5.

<sup>11</sup> Although Oracle’s policies state performance is considered in determining pay, Oracle does not require its managers to conduct performance evaluations and, thus, has no objective basis for considering performance in pay decisions. OFCCP’s Br. at 22-23; OFCCP’s PF 26. Dr. Saad did not recommend adding a control for performance metrics to Madden’s analysis. JX103 at 77-89; JX104 at 62-74.

<sup>12</sup> As Madden testified, “[t]here’s no actual data on whether you actually got a patent.” Tr. 743:20-745:23.

<sup>13</sup> MSJ Order (Nov. 29, 2019) at 39; *see also Jewett v. Oracle*, Case No. 17-civ-02669, Order Granting Class Certification, \*19 (Cal. Super. Ct. Apr. 30, 2020) (“*Jewett* Class Cert. Order”) (Oracle either “can prove the impact on pay of [legitimate] factors through statistical analyses of average pay differentials without resorting to individualized proof—or it did not apply them consistently and lacks an affirmative defense”).

<sup>14</sup> PX1 at 46-48 (qualifications possessed in equivalent proportions by both racial or gender groups cannot affect the disparities); Tr. 826:14-828:8. For this reason, Oracle’s attempt to rely on R-squared measures, which measure the individual variation within a model (Tr. 827:17-828:8) is off point. As Madden explained, the surest way to obtain a high R-squared is to use a variable that is highly correlated with the dependent variable (*e.g.*, Dr. Saad’s proposed cumulative leave variable), but this makes the model less accurate. Tr. 956:7-957:13, 1786:21-1789:11 (Dr. Saad admits limited reliability of R-square and that an authority he relies on describes it as “not mean[ing] a thing”).

the record—including Oracle’s trainings and handbooks, and the experience of trial witnesses—demonstrates that product is *not* a factor in making pay decisions and that Oracle does not keep records regarding product assignment. OFCCP’s Br. at 20-22.<sup>15</sup> Ignoring these flaws, Oracle latches onto its expert’s use of Cost Center, a control with more than 500 variables, as a “rough proxy” for product and insists that Madden’s regressions should control for Cost Center.<sup>16</sup> Utilizing Cost Center, however, still does not support Oracle’s defense as Oracle presents no evidence that it considered Cost Center in any way, as a proxy or otherwise, in pay decisions.<sup>17</sup> Oracle also presented no evidence as to any *group difference* (e.g., racial or gender differences) as to Cost Center designations.<sup>18</sup> Further, Madden studied Oracle’s pay data as to Cost Center designation and found that changes in Cost Center designation did not impact pay.<sup>19</sup>

As explained by Madden at trial and in her reports, the only impact of adding the large Cost Center class of variables as recommended by Oracle is to skew or outright destroy the power of the statistical analysis. Tr. 750:2-751:11; DX449 at 8, 24-29. As demonstrated in Table R6, the number of Cost Center variables often exceeds the number of protected class members or their comparators in the job classifications being studied, which means that the pool is being divided into groups so small that they no longer have both protected and comparator members in them, sharply reducing the number of pay comparisons possible. DX449 at 50; Tr. 752:18-754:11. Thus, this variable only demonstrates that adding too many variables dilutes the power of *any* statistical analysis to provide meaningful results. For this reason, the Ninth Circuit has specifically cautioned against accepting such variables. *See Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002) (“[I]t is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data. Such use is particularly

---

<sup>15</sup> See also OFCCP’s PFs 21, 23-24. Oracle’s contention that pay varies based on product assignment cannot be squared with bedrock economic theory as to the demand and supply of labor. OFCCP’s Br. at 20 n.31.

<sup>16</sup> Oracle’s Br. at 17; JX103 at 112 (¶141).

<sup>17</sup> OFCCP’s Br. at 14-17, 19; OFCCP’s PF 24; PX211 at 8; JX103 at 85 n.93.

<sup>18</sup> DX449 at 25 (Madden noted the absence of evidence showing gender or racial differences as to Cost Center designation).

<sup>19</sup> Tr. 751:14-752:15 (Cost Center is a “fluid” characteristic, and “we don’t see any change in salary associated with those organization [Cost Center] name changes”); DX449 at 26.

appropriate where small sample size may distort the statistical analysis and may render any findings not statistically probative.”) (internal citation omitted).<sup>20</sup>

As to Oracle’s remaining critiques—that Madden did not include factors for cumulative leave of absence, education major,<sup>21</sup> and patent bonus<sup>22</sup>—Oracle fails both to meet these same production burdens and to show that including these variables alter the outcome of the statistical analyses.<sup>23</sup> Here, Madden’s testimony in undisputed: after adding controls for these disputed variables, the statistical analysis still shows statistically significant gender and racial pay gaps.<sup>24</sup>

Interestingly, the statistical evidence Oracle presented in support of its “cumulative leave of absence” variable actually demonstrates (rather than rebuts) systemic gender pay disparities. Unlike Oracle’s other proposed variables, applying Oracle’s cumulative leave variable reveals a clear group difference as to gender. Tr. 766:18-19 (“[W]ho takes cumulative leaves of absence? Mothers.”); DX449 at 18-21 and 48 (Table R4). Dr. Saad’s statistical analysis, however, found that job tenure is *negatively* correlated with pay, which means that when employees (mostly women) shorten their tenure by taking leave, they should receive *more* pay. Tr. 768:22-769:14

---

<sup>20</sup> See also *Hemmings*, 285 F.3d at 1186-87 (proper statistical analysis required including in analyses positions that individual plaintiffs were not qualified for but which were necessary to make proper group comparisons) (internal citation omitted). See also *infra* at 12-13 (aggregation is appropriate where there are common policies).

<sup>21</sup> Oracle provides no evidence that it relied on major in setting pay or that there are gender or racial differences as to education majors within SJTs. Tr. 800:13-23. Its college hiring documents show that pay is set at the same rate for degree regardless of major and that most Product Development hires had either Computer Science or Engineering degrees. PX147-PX149; PX167-PX170, PX178 at 6. Madden’s analysis, which applied the “job descriptor”/job title variable to capture both specialized education and experience, indicates there are *not* group differences as to specialized factors such as education major. See PX1 at 62, 65, 69, 72, 76-77 (Tables 1(a), 1(d), 2(a), 2(d), 3(a)-(b)) (comparison of race or gender differential between Columns 5 and 6 reveals a negligible impact on applying job descriptor); Tr. 890:23-891:21. Further, Madden’s studies show that any claims about the role of major are far-fetched since her control for level of education (*i.e.* Ph.D. v. masters v. bachelors) barely impacts the pay gaps. See, *e.g.*, PX1 at 62, 66, 69, 73, 76-77 (Tables 1(a), 1(e), 2(a), 2(e), 3(a), 3(b), Columns 3 and 4).

<sup>22</sup> Oracle’s compensation trainings do not mention securing patent bonuses (which were discretionary) as impactful to setting SJT or salary, and Oracle’s expert did not consider data regarding the patents secured by employees prior to joining Oracle. DX449 at 17-18; Tr. 743:9-745:20. The incomplete nature of Oracle’s data renders this variable inappropriate for inclusion. DX449 at 16-18; Tr. 925:11-926:15.

<sup>23</sup> DX449 at 16-21, 45-46, 49-50; Tr. 743:9-746:14, 766:3-776:10.

<sup>24</sup> OFCCP’s Br. at 23 n.40; OFCCP’s PFs 31-32. Rather than undermining OFCCP’s statistical evidence, Dr. Saad’s proposed undocumented and inappropriate variables demonstrate the extreme durability of the systemic disparities identified by Madden. Despite years of defensive study, Dr. Saad and Oracle acknowledge that even after including *all* of Dr. Saad’s unsupported proposed variables, including the over 500 Cost Centers, Dr. Saad cannot eliminate the statistically significant gender and race disparities in total compensation for all of the years in question. Oracle’s Br. at 17; Tr. 751:1-11, 773:21-774:11, 780:11-781:15; DX449 at 8, 24-29 and 46-47 (Tables R2, R3). Dr. Saad did not even attempt to rebut Madden’s studies as to base pay. Tr. 1680:16-18.

(A 1% salary drop “for every year of experience you have at Oracle”). As Dr. Saad reports a nearly 5% *reduction* in pay for every year of cumulative leave, this evidence underscores how severely Oracle’s compensation system discriminates against women.<sup>25</sup>

Because Oracle has *no* explanation for gender and racial pay disparities *within each SJT* (Column 8), it repeatedly argues that Madden has somehow disavowed *her own* Column 8 analyses because, as a social scientist, she would not rely on exogenous variables.<sup>26</sup> Oracle’s argument fundamentally misapprehends that Madden’s Column 8 findings are a *subpart of*, rather than at odds with, her total findings.<sup>27</sup> Column 8 maps the pay gaps *within SJTs*, which is part, but not all, of the gender and racial pay discrimination for which OFCCP seeks relief here.<sup>28</sup> Column 6 captures the pay disparities within *SJT and* the pay disparities within each job title/family due to discriminatory steering. Both are actionable here, together and independently. *Cf.* 41 C.F.R. § 60-20.4 (prohibiting both same job and steering discrimination).<sup>29</sup>

### **III. Oracle Failed to Rebut OFCCP’s Steering Case.**

Oracle also fails to refute OFCCP’s statistical and corroborating evidence proving Oracle engaged in additional pay discrimination by steering women, Asians, and African Americans into lower-paid global career levels (and, thus, SJTs).<sup>30</sup>

---

<sup>25</sup> Tr. 768:20-769:14 (Madden explains that Dr. Saad’s analysis shows a 4.8% drop in salary for every year of cumulative leave, even though employees with decreased tenure should have a *pay advantage*).

<sup>26</sup> Oracle’s Br. at 13-14. Oracle continues its assault on the merits of human capital theory, an economic doctrine which not only earned a Nobel Prize but also has been uniformly acknowledged and accepted by courts as a “widely accepted approach” that “builds on labor economists’ findings that the human capital an employee brings to a job—such as education and experience—in large measure determines the employee’s success.” *Segar v. Smith*, 738 F.2d 1249, 1261 (D.C. Cir. 1984); Tr. 712:17-25 (Human capital theory for which Gary Becker received the Nobel Prize for Economics is the “workhorse” standard approach, “a widely accepted analysis of the determinants of productivity differences and, therefore, of compensation differences across employees.”)

<sup>27</sup> Madden was clear that she analyzed Oracle’s data in multiple ways in recognition that the courts and the legal system may describe discrimination in terms that differ from economists. Tr. 713:1-7, 852:10-15, 870:18-871:4.

<sup>28</sup> *See, e.g.*, Tr. 741:13-743:8 (explaining that Column 8 shows group pay disparities within *SJT*, which is only a component of total group pay disparities reflected in Column 6).

<sup>29</sup> For purposes of deciding Oracle’s liability here, the Court need not look beyond Column 8 as Madden’s analysis shows systemic gender and racial discrimination within *SJTs* for women and Asians. As the Court bifurcated the proceedings, the Court will adjudicate the scope of make-whole relief in the next phase of trial.

<sup>30</sup> Madden’s steering studies reveal that the additional *racial* pay gap created by this discriminatory steering is attributable almost wholly to the setting of *SJT* and pay within that *SJT* at hire, while the *gender* pay gap arises from Oracle steering women into lower-pay and *SJTs* both at hire and over the course of women’s careers at Oracle. PX1 at 5-6; 52-53 (explaining the specific studies Madden conducted regarding job assignment, which found that “Oracle was less likely to award women than men, in global career levels IC3 and IC4, higher career levels,” underlining that Oracle’s discriminatory steering of women continued after hire); Tr. 707:20-708:25, 918:2-18 (explaining that

To attack OFCCP’s statistical evidence of discriminatory steering, Oracle contends that employees cannot be compared on the basis of their qualifications at hire. Yet, the Agency instructs: “in an assessment of pay practices at hire, a key point of comparison may be qualification at entry.” 81 Fed. Reg. 39108, 39127. That is precisely what Madden did, using well-established methods for isolating similar educational and experience qualifications.<sup>31</sup> Further, to the extent that Oracle believes other data would more accurately measure qualifications, Oracle fails to meet its burdens to bring forward alternative qualification data and show that including such alternative data would eliminate the gender and racial pay disparities.<sup>32</sup>

In addition, Oracle unsuccessfully attempts to craft a defense from its claim that employees “choose” their own job level by applying for requisitions for that job level. Oracle’s Br. at 30. But the record reveals several mechanisms through which Oracle steered applicants and acquired employees into specific SJTs.<sup>33</sup> For example, Oracle tasked its recruiters to locate and route candidates to specific requisitions, a fact corroborated by trial witnesses who explained that Oracle directed them to file their applications for specific requisitions.<sup>34</sup> For employees who came to Oracle through acquisitions (PX81), Oracle did not use the requisition process at all.

---

the gender pay gaps after hire, given the continued differences in SJT, can only be logically explained by “a different pace of moving to higher career levels” for women at Oracle).

<sup>31</sup> Oracle challenges Madden’s use of age as a proxy for experience. However, as explained in *Bush v. Ruth’s Chris Steak House, Inc.*, 286 F.R.D. 1, 7 (D.D.C. 2012), courts routinely accept the use of age as a proxy for experience. The only exception is where defendants make a specific showing *through record evidence* that age is not an appropriate proxy for experience based on case-specific factors. *Id.* Oracle has made no showing that age is an inappropriate proxy for experience, as it has not suggested, let alone proven, a reason why there would be group differences between the age individuals from different genders or race gain relevant experience. PX1 at 16-17.

<sup>32</sup> JX103 at 78-106 (Dr. Saad’s recommended additional factors do not include improved educational factor or data); JX104 at 62-76 (same).

<sup>33</sup> OFCCP’s Br. at 15, 30 n.45; OFCCP’s PFs19, 29-30.

<sup>34</sup> OFCCP’s PF 29; Tr. 210:17-213:7, 985:3-987:2. The data Oracle produced only includes filled requisitions, which means Oracle did not disclose when applicants applied to multiple requisitions and were only hired into one. PX211 at 3 (¶7); PX221 at 3-4. For example, through the approval history data, OFCCP can see that Oracle’s trial witness, Kow Adjei, was initially offered a position in a requisition that was rejected for failing to meet prevailing wage requirements. JX133 in “OFFER APPROVAL COMM HISTORY” Tab in Column H at Row 10188. To comply with these requirements, Oracle required him to apply to a different requisition that allowed for a 37% increase in starting pay above current pay. *Id.* at Rows 10187-10188. Oracle did not produce data for his initial requisition. See JX133; cf. *Gen. Tel.*, 885 F.2d at 583 (holding that an analysis of all applicants, not just those that were hired, is “central” to a defense that “women lacked interest”).

See Oracle's PF 23. Similarly, recent graduates did not apply to specific positions but instead were later matched to jobs (sometimes after hire through its "MAP" program).<sup>35</sup>

As a statistical matter, Madden tested Dr. Saad's contention that female, Asian, and African American applicants systematically "chose" to apply to requisitions with lower career levels. As demonstrated in Table R9, even though Madden *controlled for the SJT identified in the requisition* in her analysis of starting pay, her analysis still revealed systemic gender and racial pay disparities. DX449 at 39, 53. Logically, these continuing pay disparities can only be explained by: 1) Oracle systemically setting starting pay for women, Asians, and African Americans lower than that of Whites and men in the same SJT; or 2) Oracle steering women and minorities into lower-paying SJTs. Tr. 758:7-21, 788:14-789:3. Either option is unlawful.<sup>36</sup>

With respect to steering *after* hire, which accounts for more than half of the additional steering pay gap experience by women, the anecdotal record confirms Madden's statistical findings: despite Oracle's clearly articulated job progression for employees as they accumulate experience and responsibility (*see, e.g.,* JX1 at 2-3; JX114 at 6-7), Oracle refused to advance women for years at a time with no explanation.<sup>37</sup>

#### **IV. Oracle's Records Prove It Set Pay at Hire Based on Prior Pay, Leading to Gender and Racial Pay Disparities in Starting Pay.**

Oracle confuses both the settled factual record as to Oracle's prior practice and the meaning and purpose of OFCCP's statistical evidence. First, Oracle's records alone prove that it required consideration of prior pay in setting compensation. In bolded red-lettered instructions, Oracle directed its managers to make starting pay recommendations on the basis of prior pay—recommendations that Oracle's executives approved only if they were in line with prior pay (verified via background checks). OFCCP's Br. at 13 n.17, 25-26; OFCCP's PFs 13-14, 35.

OFCCP relies on statistical evidence to prove that this practice has a disparate impact on women, Asians, and African Americans. To identify the impact of Oracle's prior pay practice, Madden compared the gender and racial pay disparities that existed in Oracle's prior pay data to

---

<sup>35</sup> *See, e.g.,* Oracle's PF 22; PX337 at 10; PX189 at 10; PX185.

<sup>36</sup> Madden demonstrated that in the data set used by Dr. Saad, Oracle used its discretion to depart from the career level in the requisition posted in a manner that disadvantaged women and Asian employees. DX449 at 56-57.

<sup>37</sup> Tr. 557:11-23 (12 years); 165:24-166:2, 172:10-19 & 174:2-5 (11 years); 261:5-7 & 271:24-272:1 (10 years).

the gender and racial pay disparities in Oracle's corresponding starting pay data and found *those gender and racial pay disparities to be virtually identical*. PX1 at 51-52 and 79 (Table 4); Tr. 847:1-848:24. This nearly perfect mirroring reinforces the discriminatory impact of Oracle's prior pay policy: it skews Oracle's starting-pay decisions to replicate the same gender and racial pay disparities existing in the prior pay data—a discriminatory pattern Oracle should have detected and corrected when it performed the pay equity analyses required under its AAP.<sup>38</sup>

Attempting to change or confuse the subject, Oracle emphasizes that output data from Madden's study shows a 78% correlation between prior pay and starting pay.<sup>39</sup> Yet, this strikingly high correlation—which means that 78% of an employee's starting pay is explained not by education, experience, job title, or SJT, but by his or her *prior pay*—only underscores that Oracle's prior pay policy *is* a mechanism through which discriminatory pay gaps are embedded in its starting pay rates, disparately impacting women, Asians, and African Americans.

**V. Oracle Has Not Rebutted OFCCP's Evidence Demonstrating Oracle's Highly-Centralized Control of Compensation Decisions.**

Oracle argues that this Court should not infer discrimination from the large, systematic, and unexplained wage disparities because OFCCP has not demonstrated that these disparities

---

<sup>38</sup> 41 C.F.R. § 60-2.17(b)-(d). Indeed, much of Oracle's argument regarding the correlation between its starting pay rates and prior pay suggests that Oracle misapprehends the specific obligations it owes as a federal contractor to be ever vigilant in detecting and redressing employment discrimination, even if disparities exist and originate from other employers or from companies acquired. *See Lanning v. Se. Pa. Transp. Auth. (SEPTA)*, 181 F.3d 478, 489-90 (3d Cir. 1999) (disparate impact liability intended to redress societal standards that are based “upon historical, discriminatory biases”); *Rizo*, 950 F.3d at 1228-29 (“the history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex”). Federal contractors also are required by their AAP obligations to mindfully and regularly consider how their employment decisions treat and impact employees by gender and race; business decisions to flout their obligations reflect the employer's intent. *See Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (duty to correct known discriminatory pay disparities); *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 29 (2d Cir. 1988) (same); *see also E.E.O.C. v. Maricopa Cty. Cmty. Coll. Dist.*, 736 F.2d 510, 515 (9th Cir. 1984) (“[o]nce [employer] became aware that [plaintiff] was performing work equivalent to the male financial aid assistants, but with lower pay, it was required to act within a reasonable time” to reclassify plaintiff to a higher paying position under EPA). Here, Oracle's wholesale abandonment of its AAP obligations underlines its executives' affirmative decision to set and continue compensation practices without regard to discriminatory application or impact.

<sup>39</sup> Oracle's Br. at 38. Because Oracle mistakenly understands that OFCCP is using its statistical evidence to prove the existence of Oracle's prior pay policy, Oracle's extensive arguments comparing its starting pay and hiring pay correlation with that allegedly in the general economy have no relevance to the disputed issues here. *See* Tr. 1833:5-1834:14 (Dr. Saad admits he lacked knowledge of how and whether the NLS dataset he used to provide a comparison for Oracle's starting pay and prior pay correlation reflected wages in the economy as a whole).

arise from a common mode of proof.<sup>40</sup> Oracle’s Br. at 22-24. Specifically, Oracle argues that this case is analogous to cases where class actions were not certified *because* of the highly decentralized nature of the decision-making at the defendant employers. Oracle’s Br. at 22-24. Trying to fit itself within those class certification decisions, Oracle rests its argument on factual assertions—disproven at trial—that the pay decisions at issue here are the product of the unfettered discretion afforded individual managers.

As explained in OFCCP’s Brief, OFCCP demonstrated that Oracle’s executives maintain *and exercise* plenary control over all compensation decisions, knowingly set budgets and compensation as low as possible, and use the system intentionally to pay women less than men for the same or better work. OFCCP’s PFs 9-20, 28-60. Oracle’s head of Human Resources (“HR”) implemented the automated compensation systems for Oracle (applicable to all of Oracle’s compensation decisions), which ensure that no compensation decision is made without the specific approval of HR, the line of business (“LOB”) hierarchy, and Oracle’s chief executives. OFCCP’s PFs 10, 13-14. At trial, managers and non-managers alike explained that due to the control exercised by Oracle’s chief executives and LOB heads both on the front end (in setting the budget and explicitly instructing how to distribute the budget) and on the back end (through the approval process), Oracle’s line managers lacked the authority to set starting pay or increase the salaries of their subordinates. Consistent with Oracle’s own training statement (which advises managers that they might not be able to provide the salaries employees should earn under Oracle’s compensation system due to “budget,” JX114 at 17), VP Klagenberg and Director Pandey testified that HR and high level executives even constrained *them* in setting compensation, including supplanting and overruling their pay recommendations.<sup>41</sup>

---

<sup>40</sup> As this Court correctly held, there is no requirement that OFCCP identify the specific mechanism of discrimination to prove its disparate treatment claims; rather, OFCCP only needs to prove “it was possible for it to be done.” MSJ Order (Nov. 29, 2019) at 35.

<sup>41</sup> Tr. 129:4-135:18, 141:25-144:3 (Klagenberg), 421:1-424:94 (Pandey). Furthermore, Miranda testified that he expected his reports to follow such guidelines. Tr. 1114:19-21. Other witnesses not in direct contact with Oracle’s executives testified that their managers informed them that they would not receive pay increases or promotions due to the limited budgets set by Oracle’s chief executives. Tr. 219:12-220:4 (Shah), 305:12-23 (Esteva), 410:10-20 (Pandey), 272:8-274:10 (Boross).

Oracle’s executives’ decision to breach Oracle’s AAP obligations and then to conceal those breaches further demonstrates the highly centralized nature of the violations at issue.<sup>42</sup> See OFCCP’s Br. at 33-37; OFCCP’s PFs 47-54. Prior to trial, Oracle represented that its AAP obligations were delegated to, and met by, its line managers.<sup>43</sup> At trial, this was proven untrue.<sup>44</sup> High level and low level managers alike had no knowledge of the AAP requirements and no ability or authority to conduct the systemic studies of its compensation practices or to direct and provide budget to redress gender and racial pay disparities. OFCCP’s Br. at 34; OFCCP’s PF 54.

In light of these facts, Oracle misplaces its reliance on cases where class certification was denied because of the allegedly decentralized nature of its decision-making.<sup>45</sup> Indeed, just a month ago in the state class action pay discrimination case pending against Oracle, the Court rejected the exact claims Oracle is making here and granted class certification based on the substantial evidence that Oracle maintains a “top-down, centralized system” for compensation. *Jewett Class Cert.* Order at 12.

Oracle’s centralized compensation system also renders inapposite the cases Oracle cites to suggest that its statistical data must be disaggregated. See Oracle’s Br. at 24.<sup>46</sup> The Ninth Circuit has made clear that aggregation is appropriate where, as here, there are common practices applicable to all the job categories in question. *Paige*, 291 F.3d at 1148 (“[T]he plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which

---

<sup>42</sup> As Oracle itself acknowledges, the decision to violate its AAP obligations “might help bolster” OFCCP’s claims of intentional discrimination. Oracle’s Br. at 40; see also Order Regarding Motions in Limine at 5 (Dec. 2, 2019); OFCCP’s Br. at 35 n.65. Contrary to Oracle’s suggestion (Oracle’s Br. at 40), the fact that OFCCP did not assert a separate violation against Oracle for this conduct does not nullify the evidence presented at trial on this point.

<sup>43</sup> PX287 at 1.

<sup>44</sup> Tellingly, Oracle fully dropped this argument from Oracle’s Brief.

<sup>45</sup> For example, Oracle relies heavily on *Moussouris v. Microsoft Corp.*, 2018 WL 3328418 (W.D. Wash. June 25, 2018), *aff’d*, 799 F. App’x 459 (9th Cir. 2019), where plaintiffs “unequivocally predicate[d] their challenge on the discretion allowed under Microsoft’s [pay policy]—precisely the argument that *Dukes* rejected as ‘just the opposite of a uniform employment practice that would provide the commonality needed for a class action.’” *Id.* at \*18. Indeed, the *Moussouris* court specifically distinguished its holding from the facts in another case, *Chen-Oster v. Goldman, Sachs & Co.*, 325 F.R.D. 55 (S.D.N.Y. 2018), which like this case, “featured more involvement by upper-management, such as setting the budget that determined compensation . . . .” *Id.* at \*22 n.17 (emphasis added).

<sup>46</sup> Despite Madden’s specific trial testimony explaining that her gender pay analyses *did not aggregate across job function* because the control for job descriptor (Column 6) controls for job function, Oracle continues to argue erroneously in Oracle’s Brief that Madden’s statistical analyses aggregate across job function. Tr. 952:20-953:15.

may be presumed to have been similarly situated and affected by common policies . . . .”).<sup>47</sup>

Indeed, Oracle does not contest that all the job titles covered by OFCCP’s claims used the same compensation systems, were subject to the same trainings, and, most importantly, were subject to the same CEO-level budget and approval processes.<sup>48</sup>

Turning from claiming the data should be disaggregated to arguing it is not aggregated enough, Oracle’s novel contention that OFCCP cannot demonstrate a pattern and practice without showing violations with respect to *all* jobs at a location has no support in law (or logic).<sup>49</sup> Pattern and practice cases routinely relate to a specific subset of jobs or areas of a business.<sup>50</sup> Moreover, as with all law enforcement, OFCCP maintains prosecutorial discretion as to the scope of enforcement proceedings, and OFCCP’s decision to proceed with suit where the limited investigatory evidence (pre-discovery) is most robust cannot be equated, as Oracle wishes, with an affirmative finding that Oracle did not engage in discrimination with respect to

---

<sup>47</sup> See also *Chen-Oster v. Goldman, Sachs & Co.*, 114 F.Supp.3d 110, 120 (S.D.N.Y. 2015) (Whether aggregation is appropriate necessarily depends on “the structure of the entity being studied in light of the questions sought to be answered.”); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 522 (N.D. Cal. 2012) (finding “good reason” to rely on aggregated statistics because it yields “more reliable and more meaningful statistical results” when the company’s promotion practices are “uniform across the company”) (emphasis removed).

<sup>48</sup> Oracle also implies that Madden should have analyzed the compensation data by LOB. See Oracle’s Br. at 15. Such an analysis would be inconsistent with how Oracle sets salary grades or pay ranges. OFCCP’s Br. at 9-11. Oracle does not set pay in this manner for good reason, as it would require grouping the pay of truly disparate employees, such as an HR manager who oversees recruiting for Product Development (and thus is in the Product Development LOB for budgetary reasons) with Product Development supervisors overseeing actual product development. See PX260 (2014 compensation snapshot) at Row 6380; PX223 at 3; PX374 at Row 76676 (“TPP” is Oracle’s code for Product Development); PX219 at Rows 3059-3060 (University Recruiting is under Product Development LOB); see also JX114 at 7. Further, by Oracle’s own admission, an LOB analysis is not possible, as the data Oracle produced showing employees’ LOB assignments was not “historically accurate” and was incomplete. PX211 at 8-9 (Cost Center data, which follow LOBs, was not accurate); PX221 at 3 (Oracle produced data for only 3 job functions). Further, as the violations here are the result of uniform processes and policies, there is no factual basis for asserting that LOBs should be analyzed separately because of different LOB-specific processes and policies. See *Paige*, 291 F.3d at 1148. Finally, Oracle once again does not show this approach makes any difference. *Gen. Tel.*, 885 F.2d at 581.

<sup>49</sup> See, e.g., *OFCCP v. Greenwood Mills*, 1995 WL 1798953, \*4 (ARB Nov. 20, 1995) (“[A]n employer’s nondiscriminatory treatment of some minorities or women does not immunize or exonerate that employer from findings of discrimination against other minorities or women.”).

<sup>50</sup> See, e.g., *Teamsters*, 431 U.S. at 329 (pattern and practice related to “line driver” positions); *Hemmings*, 285 F.3d at 1174 (pattern and practice involving only promotions to upper level management); *Honeywell*, 1994 WL 68485, at \*4 (pattern and practice “focused on the unskilled jobs in nine seniority groups”); see also *OFCCP v. Enterprise RAC of Baltimore*, 2016 OFC-06 (ALJ Recommended Decision and Order, July 17, 2019); *OFCCP v. WMS Solutions, LLC*, 2015-OFC-09 (ALJ Recommended Decision and Order, May 12, 2020).

workers not encompassed in the three job functions at issue in this litigation (which encompass more than two thirds of the employees at Oracle’s headquarters).<sup>51</sup> PX260 at Row 7422; PX171.

## **VI. Oracle Misrepresents the Anecdotal Evidence.**

Attempting to ignore OFCCP’s statistical evidence of systemic pay discrimination, Oracle attacks the testimony of OFCCP’s anecdotal witnesses, suggesting that OFCCP must prove its case wholly from employee testimony directly attesting to Oracle’s intentional and systemic compensation practices. In its pre-trial order, the Court already dismissed this argument, correctly observing when it limited the number of anecdotal witnesses the parties could present at trial: “The finding of discrimination does not depend on the testimony from these witnesses, but instead will rely upon the findings of OFCCP’s expert.” Pre-Trial Order at 5. Further, the purpose of anecdotal testimony is not to provide direct evidence of systemic compensation discrimination, nor could it be, as both the Department and Congress has recognized: a pernicious aspect of compensation discrimination is that victims often have no way to detect or confirm that such discrimination is happening.<sup>52</sup>

---

<sup>51</sup> See *Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1015 (9th Cir. 1999) (explaining that “an agency’s determination that insufficient facts exist to continue an investigation is not per se admissible in the same manner as an agency’s determination of probable cause [that discrimination occurred]”); *Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 427 (8th Cir. 2017) (affirming verdict that female employees had been subjected to discrimination in case where employer had been audited by OFCCP and the agency did not cite violations).

<sup>52</sup> 80 Fed. Reg. 54934, 54937 (Preamble to OFCCP Transparency Regulations) (“Underpaid employees, who may be paid less because of their gender or race, will remain unaware of the disparity if compensation remains hidden. . . . If a contractor’s employees are unaware of how their compensation compares to that of employees with similar jobs because the risk of punitive action inhibits discussions about compensation, employees will not have the information they need to assert their rights.”); Lilly Ledbetter Fair Pay Act of 2009, 123 Stat 5 (2009) (superseding Supreme Court decision that ignored the reality that in compensation discrimination employees may only learn of the discrimination long after pay is set). The testimony of witnesses for both parties confirmed that employees did not know how their pay compared with the pay of others. Tr. 1559:2-8 (Chan did not know her pay was below the salary range minimum); see also Tr. 1950:23-1952:19 (Chechik did not know where she was in terms of salary range, despite working for Oracle for at least 12 years and touted as an industry leader by Oracle), 1523:7-24, see *supra* note 3, at 2 (Adjei did not know that when Oracle first hired him, Oracle increased his original starting pay offer to the minimum rate required by his visa.). Given the suppression of information about peers’ pay, it is surprising that OFCCP nevertheless offered testimony from witnesses who had managed to uncover information that led them to believe that Oracle paid them less for their work compared to male and White colleagues. See, e.g., Tr. 219:12-225:11 (after Shah learned Oracle paid a male with a lower IC level doing less important work more than it paid her from the W-2 he left in the copier, she left Oracle for a higher salary and told HR at an exit interview that she was leaving Oracle for this reason), 172:16-180:11, 184:11-185:15 (Donna Ng testified that a male working for the same supervisor with the same duties as her was assigned a higher career level, yet she did not receive a raise until January 2019 and her IC level was not changed, despite receiving performance ratings of exceeding expectations), 568:4-569:22 (Alexander asked HR to review her pay after learning of a pay discrimination lawsuit against Oracle and that Oracle paid her \$50,000 less than the average Oracle employee in her job).

The highly-qualified women, Asians, and African Americans who testified about their inability to obtain equitable pay from Oracle, including testimony from many of Oracle’s trial witnesses, voiced their lived experiences of Oracle’s discriminatory practices.<sup>53</sup> Oracle asks the Court to dismiss this testimony from Oracle’s former and current employees, many of whom risked their careers to lend their voices to a lawsuit alleging Oracle intentionally discriminated against women and minorities in compensation, as the “assorted grumblings of disgruntled employees.” Oracle’s Br. at 28. These employees’ moving testimony revealed that they volunteered to testify in support of higher principles. Tr. 324:20-325:2 (Esteva) (“I wanted to make a difference. I -- the last couple of years at Oracle, I think I finally realized how much I was worth, and when I received the letter I finally decided to be someone that was going to do something that could make a difference, instead of someone that just kind of sat there and talked about it. I was going to stand up and say something. So, here I am.”); Tr. 81:7-21 (Hanson Garcia) (“I really feel it’s a sense of doing it [testifying] out of responsibility . . . giving a voice to those who maybe don’t have a voice that’s always going to be heard.”); Tr. 1020:18-24 (Mensah) (“I chose to testify because . . . I don’t want my children to experience the same situation I’ve been through.”). Dismissing these witnesses for sharing their experiences of the impact of Oracle’s discriminatory practices entirely misses the point of anecdotal testimony.

### CONCLUSION

Oracle has failed to rebut OFCCP’s substantial evidence of intentional gender and racial pay discrimination. As such, OFCCP is entitled to a judgment in its favor on liability.

DATED: June 12, 2020

Respectfully submitted,

KATE O’SANNLAIN  
Solicitor of Labor

JANET M. HEROLD  
Regional Solicitor

BY: /s/ Ian H. Eliasoph  
IAN H. ELIASOPH  
Counsel

LAURA C. BREMER  
Counsel

NORMAN E. GARCIA  
Senior Trial Attorney

*Attorneys for Plaintiff OFCCP*

---

<sup>53</sup> See, e.g., OFCCP’s PFs 12-14, 21-27, 35, 38-43, 45-46, 54-58.

**CERTIFICATE OF SERVICE**

I am over 18 years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On June 12, 2020, I served the foregoing

**PLAINTIFF OFCCP'S POST-TRIAL REPLY BRIEF**

on Defendant Oracle America, Inc. by serving its attorneys below via electronic mail, pursuant to the parties' agreement:

Erin Connell (econnell@orrick.com)

Gary Siniscalco (grsiniscalco@orrick.com)

Warrington Parker (wparker@orrick.com)

John Giansello (jgiansello@orrick.com)

Kayla Grundy (kgrundy@orrick.com)

Jacqueline Kaddah (jkaddah@orrick.com)

I declare under penalty of perjury that the above is true and correct.

*/s/ Llewlyn D. Robinson*

Date: June 12, 2020

LLEWLYN D. ROBINSON

Paralegal Specialist