



**Issue Date: 25 November 2019**

CASE NO.: 2017-OFC-00006

*In the Matter of*

OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS,  
U.S. DEPARTMENT OF LABOR,  
Plaintiff,

v.

ORACLE AMERICA, INC.,  
Defendant.

**ORDER DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT  
AND GRANTING IN PART DEFENDANT'S ALTERNATIVE MOTION  
FOR PARTIAL SUMMARY JUDGMENT  
AND  
ORDER FOR ADDITIONAL BRIEFING ON  
SHOW CAUSE NOTICE AND CONCILIATION**

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, ("EO 11246") and associated regulations at 41 C.F.R. Chapter 60. It has been pending at the Office of Administrative Law Judges ("OALJ") since January 17, 2017. Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") filed the operative Second Amended Complaint ("SAC") on March 13, 2019. Defendant Oracle America, Inc. ("Oracle") answered ("DA") on April 2, 2019. Hearing is set to begin on December 5, 2019. Currently pending are OFCCP's Motion for Summary Judgment and Oracle's Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment (collectively the "Cross Motions for Summary Judgment").

For the reasons set forth below, the Cross Motions for Summary Judgment are denied and Oracle's Alternative Motion for Partial Summary Judgment is granted in part. In addition, Oracle is ordered to show cause why OFCCP should not be granted summary judgment on Oracle's procedural defenses related to the Show Cause Notice and conciliation.

**I. LEGAL BACKGROUND**

Executive Order 11246, as amended, mandates that contractors with the federal government agree to certain non-discrimination and affirmative action requirements. Unless exempted, all federal contracts must contain the following provision:

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

EO 11246 § 202(1). Contractors are required to file various compliance reports, *id.* at § 203, and furnish information and provide access to various records, *id.* at § 202(1). The Secretary of Labor is responsible for securing compliance and is empowered to conduct investigations and hearings. *Id.* at §§ 201, 205-206, 208. Violations of the contractual provisions mandated in EO 11246 can result in the cancellation, termination, or suspension of federal contracts and debarment from future contracting. *Id.* at § 209(a)(5)-(6).

As authorized, the Secretary promulgated regulations, which set forth the contractual requirements in more detail. *See* 41 C.F.R. § 60-1.4(a). OFCCP is empowered to enforce these contractual provisions. The regulations provide for sequential process of investigation and enforcement. First, OFCCP engages in a compliance evaluation, which can include a compliance review (with desk audit or on-site review), off-site records review, a compliance check, and/or a focused review.<sup>1</sup> 41 C.F.R. § 60-1.20(a). “Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion.” *Id.* at § 60-1.20(b); *see also* EO 11246 § 209(b). If those fail, OFCCP may pursue enforcement proceedings, including administrative proceedings before OALJ. 41 C.F.R. § 60-1.26(a)-(b); *see also id.* at §§ 60-30.1 *et seq.*

At OALJ, enforcement proceedings for 11246 are governed by the “Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30.” 41 C.F.R. § 60-1.26(b)(2). Where the regulations in 41 C.F.R. §§ 60-30.1 *et seq.* do not provide a rule, the Federal Rules of Civil Procedure apply.<sup>2</sup> 41 C.F.R. § 60-30.1. The Office of Administrative Law Judges’ Rules of Evidence found in 29 C.F.R. part 18, subpart B apply to any evidentiary issues. 41 C.F.R. § 60-30.18. These rules generally follow the Federal Rules of Evidence. *See* 29 C.F.R. §§ 18.101 *et seq.* Enforcement proceedings at OALJ result in a recommended decision and order. 41 C.F.R. § 60-30.27. This is forwarded to the Administrative Review Board, which hears any exceptions and issues the final administrative order. 41 C.F.R. §§ 60-30.28-60-30.30.

The anti-discrimination provisions of EO 11246 are generally interpreted through the legal analyses that have been applied to Title VII of the Civil Rights Act. *See OFCCP v. Analogic Corp.*, No. 2017-OFC-00001, slip op. at 30 (ALJ Mar. 22, 2019) (Recommended Decision and Order) (citing *OFCCP v. Honeywell*, 1977-OFC-00003, PDF at 7-8 (Sec’y June 2, 1993); *OFCCP v. Honeywell*, 1977-OFC-00003, PDF at 4, 6 (Sec’y Mar. 2, 1994) (Remand Order)); *see also* 81 FR 39108, 39108. Both OFCCP and Oracle rely on Title VII frameworks and precedent to argue their case. Like EO 11246, Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any

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<sup>1</sup> OFCCP is also charged with processing and investigating complaints. *See* 41 C.F.R. §§ 60-1.21 – 60-1.24. No complaints are at issue in this matter.

<sup>2</sup> In this case, where a rule is needed and neither 41 C.F.R. Part 60-30.1 nor the Federal Rules supply one, the Rules of Practice and Procedure for Administrative Hearings Before OALJ in 29 C.F.R. Part 18, subpart A apply. *See* Pre-Hearing Order at 2 n.2.

individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

EO 11246 specific regulations address discrimination on the basis of sex in particular. *See* 41 C.F.R. § 60-20.1, *et seq.* "It is unlawful for a contractor to discriminate against any employee or applicant for employment because of sex." 41 C.F.R. § 60.20-2(a). "Unless sex is a *bona fide* occupational qualification reasonably necessary to the normal operation of a contractor's particular business or enterprise, the contractor may not make any distinction based on sex in recruitment, hiring, firing, promotion, compensation, hours, job assignments, training, benefits, or other terms, conditions, or privileges of employment." 41 C.F.R. § 60-20.2(b). Among the specifically enumerated forms of prohibited discrimination, contractors may not "[s]teer[] women into lower-paying or less desirable jobs on the basis of sex." 41 C.F.R. § 60-20.2(b)(6). Further "[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, violate Executive Order 11246, as amended, and this part." 41 C.F.R. § 60-20.2(c). Since the requirements of EO 11246 are interpreted to be consistent with Title VII law and these regulations represent OFCCP's statement of the applicable Title VII principles, they serve as a guide for the application of Title VII principles in the EO 11246 context generally. *See* 81 FR 39108, 39108.

## **II. PROCEDURAL BACKGROUND AND CROSS MOTIONS FOR SUMMARY JUDGMENT**

OFCCP alleges that Oracle engages in "widespread" discrimination at its headquarters facility against "women, Asians, and African Americas or Blacks in compensation." SAC at ¶ 11.

Since at least January 1, 2013, Oracle discriminated against qualified female employees in its Product Development, Information Technology, and Support Job Functions at HQCA based upon sex by paying them less than comparable males employed in similar roles. Since at least January 1, 2013, Oracle discriminated against qualified Asian and Black or African American employees in its Product Development job function at Oracle's headquarters based on race or ethnicity by paying them less than comparable White employees employed in similar roles.

*Id.* at ¶ 12; *see also id.* at ¶¶ 13-17. OFCCP contends that this is due to both to paying these employees less in the same or a comparable job and to hiring them for/assigning them to/keeping them in lower paying jobs or global career levels. *Id.* at ¶¶ 18, 22, 25, 29; *see also id.* at ¶¶ 19-21, 23-24, 26-28, 30-31. OFCCP also alleges that the "systematic underpayment of female, Black or African American and Asian employees may be due, in part, to Oracle's reliance on prior salary in setting compensation for employees upon hire." *Id.* at ¶ 32. In addition, OFCCP made complaints related to failure to produce relevant records and data during the compliance review. *Id.* at ¶¶ 44-45, 47, 50.

OFCCP asks for injunctive relief barring Oracle from violating EO 11246 and requiring it to correct its practices, an order cancelling all of Oracle's federal contracts or subcontracts, debarment of Oracle from holding federal contracts or subcontracts until OFCCP is satisfied that it has come into compliance, "complete relief to the affected classes, including lost compensation, interest, and all other benefits of employment resulting from Oracle's discrimination," and "any other relief as justice may require." *Id.* at 16-17. In the Joint Pre-Hearing Statement (pp. 6-8), however, OFCCP

no longer seeks cancellation and debarment in this action. Oracle denies OFCCP's allegations. *See generally* DA at 1-7. It also pleads 39 affirmative defenses.<sup>3</sup> *See id.* at 7-14. It asks that the complaint be dismissed with prejudice, that judgment be entered in its favor, that it be awarded attorneys' fees and costs, and that it be granted "such other and further relief as this Court may deem proper." *Id.* at 14. The Joint Pre-Hearing Statement (p. 8) indicates that Oracle seeks costs, but is no longer seeking fees.

This case has been pending at OALJ for almost three years. A lengthy compliance review preceded the litigation. After the initial complaint was filed, the case was assigned to Judge Christopher Larsen, who ruled on various discovery and other motions. On October 30, 2017, Judge Larsen granted a joint motion to stay the case so that the parties could pursue mediation. The stay was subsequently extended on several occasions. On October 12, 2018, OFCCP filed a motion for reassignment, renewing an earlier motion by Oracle, based on the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). The motion was granted and the case was reassigned to me. I extended the stay until additional Appointments Clause related challenges raised by Oracle could be addressed. The stay ended on January 23, 2019.

The SAC originally included compensation discrimination claims, hiring discrimination claims, and record-keeping/access-related claims.<sup>4</sup> However, the parties were able to settle the hiring discrimination claims and on April 30, 2019, I entered an Order Adopting Consent Findings Regarding College Recruiting Program. On May 23, 2019, I denied OFCCP's Motion for Partial Summary Decision on Oracle's Affirmative Defenses Re: Conciliation. Since the end of the stay, this case has been marked by repeated, voluminous, and acrimonious discovery disputes resulting in a long string of orders providing guidance to the parties. Fact discovery closed on July 3, 2019. Expert discovery closed on October 11, 2019. The time for filing and briefing summary judgment motions was set by the scheduling order in this case. Per the pre-hearing scheduling order currently in force, any dispositive motions were due on October 21, 2019, oppositions to dispositive motions were due on November 1, 2019, and any replies in support of a dispositive motion were due on November 8, 2019.

On October 21, 2019, OFCCP filed a Motion for Summary Judgment and Memorandum of Points and Authorities in Support of Summary Judgment ("PM").<sup>5</sup> OFCCP contends that it is entitled to summary judgment because

the undisputed evidence demonstrates Oracle violated its obligations as a federal contractor and engaged in compensation discrimination against female, Asian, and African American employees. Oracle employees working in the same job title with similar education and experience were similarly situated and, according to Oracle's written policies, should have received similar compensation but did not. The un rebutted statistical evidence standing alone demonstrates that Oracle engaged in compensation discrimination. The statistical analysis OFCCP's expert conducted demonstrates significant gender and racial discrimination in both salary and total compensation, and Oracle's expert failed to refute this evidence to create a triable

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<sup>3</sup> Affirmative defense #25 was struck in an October 8, 2019, order.

<sup>4</sup> The hiring discrimination related claims are found in SAC ¶¶ 33-40, 44, 46, and 48.

<sup>5</sup> On October 25, 2019, Oracle gave notice that it would be filing a motion to seal parts of 39 of the exhibits submitted to support OFCCP's motion. The motion to seal was filed on November 1, 2019, and opposed on November 12, 2019. It will be addressed in a separate order.

issue of fact. The statistical evidence is consistent with uncontested evidence that Oracle departed from its written compensation policies and inequitably compensated similarly-situated employees. Finally, Oracle disregarded its affirmative action obligations and did not take meaningful steps to correct or ensure that it did not engage in prohibited compensation discrimination.

PM at 13.

Oracle also filed a Notice of Motion and Motion for Summary Judgment or, in the alternative, for Partial Summary Judgment (“DN”) along with a Memorandum of Points and Authorities (“DM”) on October 21, 2019.<sup>6</sup> Oracle seeks summary judgment or partial summary judgment on a number of points. It contends that OFCCP did not fulfill its pre-suit obligations of having “reasonable cause to issue a Show Cause Notice” and “engaging in reasonable conciliation efforts.” DN at 1. It maintains that “OFCCP’s disparate treatment claim fails as a matter of law because neither OFCCP nor its expert compare similarly situated employees as required by Title VII law and OFCCP’s own regulations. Consequently, OFCCP cannot establish that any of the pay decisions at issue were discriminatory.” *Id.* Oracle also alleges that OFCCP did not consider Oracle’s defense of establishing pay based on skill or performance and “cannot establish any practice of assigning employees into lower-paying roles.” *Id.* at 1-2. It asserts that any disparate impact theory must fail because OFCCP did not identify a specific policy or practice having the alleged disparate impact. *Id.* at 2. Oracle seeks dismissal of any continuing violation theory and summary judgment on the refusal to produce claim because OFCCP cannot show that it did not produce documents, all documents have now been provided, OFCCP violated its own regulations, and there is no basis for any remedy. *Id.*

On November 1, 2019, Oracle filed an Opposition to OFCCP’s Motion For Summary Judgment (“DO”)<sup>7</sup> and OFCCP filed an Opposition to Defendant Oracle’s Motion for Summary Judgment (“PO”).<sup>8</sup> On November 8, 2019, OFCCP filed a Reply to Opposition to OFCCP’s Motion for Summary Judgment (“PR”).<sup>9</sup> Oracle also filed a Reply in Support of Defendant Oracle America Inc.’s Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment (“DR”) on November 8, 2019.<sup>10</sup>

### **III. SUMMARY JUDGEMENT STANDARD**

The regulations provide that OFCCP, at any time after 20 days have passed since the commencement of the action, “may move with or without supporting affidavits for a summary judgment of all claims or any part.” 41 C.F.R. § 60-30.23(a). “The defendant may, at any time after commencement of the action, move [] for summary judgment in its favor as to all claims or any

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<sup>6</sup> Oracle concurrently filed a motion to seal various portions of the declaration and exhibits submitted in support of its motion for summary decision. OFCCP filed an opposition on October 31, 2019, and Oracle filed a reply on November 15, 2019. The motion to seal will be addressed in a separate order.

<sup>7</sup> Oracle also filed a motion to seal various parts of its submissions in the opposition, the opposition to OFCCP’s motion to exclude expert evidence, and OFCCP’s motion for summary decision and motion to exclude expert evidence. This was opposed on November 12, 2019, and will be addressed separately.

<sup>8</sup> On November 6, 2019, Oracle filed notice that it would be submitting a motion to seal portions of OFCCP’s opposition here and the opposition to Oracle’s motion to exclude expert testimony. The motion was submitted on November 18, 2019, and will be addressed separately.

<sup>9</sup> On November 14, 2019, Oracle filed notice that it would be filing a motion to seal parts of the submissions with OFCCP’s reply.

<sup>10</sup> With the reply, Oracle filed another motion to seal, which was opposed by OFCCP on November 18, 2019.

part.” 41 C.F.R. § 60.23(b). Motions for summary judgment must be accompanied by a “Statement of Uncontested Facts.” 41 C.F.R. § 60-30.23(d). Parties opposing summary judgment may file a “Statement of Disputed Facts.” Failure to do so is deemed as an admission of the “Statement of Uncontested Facts.” *Id.*

After receiving the motion and any opposition, “[t]he judgment sought shall be rendered forthwith if the complaint and answer, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” 41 C.F.R. § 60-30.23(e); *see also* Fed. R. Civ. P. 56(a). In a motion for summary judgment, the burden is on the moving party to present evidence that shows “an absence of evidence to support the non-moving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party presents such evidence, the non-moving party “may not rest upon mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

When considering a motion for summary decision, an ALJ does not assess credibility or weigh conflicting evidence, as all evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences made in its favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n.*, 809 F.2d 626, 630-31 (9th Cir. 1987). To prevent summary decision, however, the non-moving party must have more than a mere “scintilla” of evidence supporting its position. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). The non-moving party must designate certain facts in dispute, *Anderson*, 477 U.S. at 250, and “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In ruling on a motion for summary the decision, the ALJ does not weigh evidence or determine the truth of the matter, but evaluates “whether there is the need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson*, 477 U.S. at 249-50.

#### **IV. THE RECORD FOR SUMMARY JUDGMENT**

In addition to the briefs, the parties have made lengthy supporting submissions either for or against granting summary judgment.

##### ***A. Statements of Undisputed and Disputed Facts***

OFCCP’s motion was accompanied by a Statement of Uncontested Material Facts in Support of OFCCP’s Motion for Summary Judgment (“PS”). It lists 264 facts that OFCCP contends are undisputed in 13 categories: A) facts related to jurisdiction (1-36); B) facts regarding key decision makers at Oracle (37-49); C) facts related to Oracle’s compensation setting procedures (50-59); D) facts regarding how Oracle explains its compensation setting policies and practices to its managers and trainers (60-100); E) facts regarding the review of compensation decisions and the role of budget in compensation decisions (101-141); F) facts regarding performance evaluations (142-149); G) facts regarding flexibility in making initial assignments, setting initial pay, and the use of prior pay (150-171); H) facts regard how transferring impacts compensation (172-179); I) facts regarding how promotions impact compensation (180-188); J) facts regarding whether products impact compensation (189-192); K) facts regarding whether cost-centers impact compensation (193-194); L) facts regarding the Lisa Gordon Interview (195-206); M) facts regarding Oracle’s

compensation studies (207-234); and N) facts relevant to expert reports (235-264). Each asserted fact is supported by references to the submissions. PS at 2-57.

With its opposition, Oracle filed a 203-page Response to OFCCP's Statement of Uncontested Facts in Support of OFCCP's Motion for Summary Judgment ("DOS"). It contends the most of the facts stated by OFCCP are either immaterial or are not supported by the evidence cited, usually because they mischaracterize that evidence, and cites to various other portions of the submissions. Oracle avers that those facts that are material and undisputed tend to support Oracle's opposition and cross-motion. DOS at 2. The largely background facts in categories A and B are mostly undisputed, with some notable exceptions. *Id.* at 5-32. Matters become more tendentious in the compensation related categories—C, D, and E—with Oracle generally resisting characterizations that point to centralized control or general policy and providing more context or asserting that the evidence does not support the fact stated.<sup>11</sup> *Id.* at 32-124. The compensation related facts concerning the role of product or cost-centers in categories J and K are largely undisputed except that Oracle puts them in the context of other facts. *Id.* at 158-66. The facts in category G related to placement of individuals into positions and the role of prior pay are disputed by Oracle either on the grounds that the evidence does not support the fact or that additional context undermines the significance of the fact. *Id.* at 131-46. The facts stated related to transfers and promotions—categories H and I—are subject to somewhat less dispute, but largely deemed immaterial or out of context. *Id.* at 146-58. As to the compensation study/affirmative action facts, category M, Oracle claims that the point is immaterial or the fact is not supported by the evidence. *Id.* at 172-89. Alleged facts related to the expert reports, like the expert reports themselves, are generally disputed. *Id.* at 189-204.

Oracle's motion was accompanied by a Statement of Uncontested Material Facts ("DS"), asserting 135 facts in nine categories: I) Oracle's commitment to EEO and diversity (1-8); II) Oracle's organization (9-13); III) facts about the variety of products the employees relevant to the case work on and the array of skills, duties, and responsibilities that they possess (14-19); IV) facts related to job functions and system job titles (20-32); V) facts related to Oracle's compensation system, its decentralization, and its market-driven nature (33-56); VI) facts related to OFCCP's pre-suit obligations (57-71); VII) facts concerned with Oracle's argument that OFCCP's compensation discrimination claims fail as a matter of law (72-89); VIII) facts related to OFCCP's disparate impact claim (90-95); and IX) facts concerning OFCCP's failure to produce claims (96-135). Each allegedly undisputed fact is supported by citations to the record. DS at 4-24. Some of the categories have sub-categories—for instance, category VII is split into facts regarding the compensation discrimination theory and the assignment discrimination theory.<sup>12</sup> *Id.* at 15-17.

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<sup>11</sup> Some of the disputes make no sense. For example, Oracle will not agree that its use of "LJE" is shorthand for "Larry J. Ellison" because it won't agree that the source cited for this fact fully establishes it. DOS at 103. Oracle does not say what it contends "LJE" does stand for. Having reviewed the submissions, the proposition that in this context "LJE" stands for "Larry J. Ellison" is supported in the depositions of several Oracle employees. Oracle's dispute is grounded in OFCCP's incorrect citation to the record—not any dispute of the fact or even allegation that the submissions do not support the fact. Objecting for the sake of objecting should not continue at the hearing.

<sup>12</sup> OFCCP's opposition makes a brief procedural argument to the effect that since Oracle's motion didn't refer to its statement of uncontested facts, it has not complied with the regulations and its motion should be denied. PO at 2-3. While such an approach may have (or may not have) been helpful, as Oracle points out, DR at 13 n.8, it is not required by the text of the regulations. *See* 41 C.F.R. § 60-30.23(d). OFCCP refers to what the regulations "envison" but the point of an agency like OFCCP promulgating rules is that regulated parties know what to do without have to "envison" what the agency intends.

OFCCP's opposition included a 202-page Statement of Genuine Disputes of Material Fact ("POG"), generally contesting Oracle's asserted facts and providing additional citations to the record. OFCCP mostly agrees with the facts in category I, except that it disputes that training/instructions/consultation related to non-discrimination are provided to managers. POG at 1-10. It agrees with the basic organization structure provided in category II, except it disputes the specialization or organizations within lines of business. *Id.* at 11-13. Similarly, in category III, OFCCP agrees with the basic facts about products and employees but disputes the importance of acquisitions and the asserted fact that Oracle's products have different values and require different skills. *Id.* at 13-18. Disputes increase markedly in the next two categories, IV and V, which concern the level of standardization in the function, skills etc. within the classifications Oracle uses and the degree of standardization or centralization of Oracle's compensation system. *Id.* at 19-124.

The remainder of Oracle's facts relate more specifically to the claims at issue. OFCCP generally contests the characterization of events prior to this litigation (category VI). *Id.* at 125-43. OFCCP disputes all of the facts in category VII, concerning the claims of discriminatory compensation and assignment, though some of the disputes appear to focus more on the significance of, context of, or inference to be drawn from the fact stated. *Id.* at 144-69. The same holds of category VIII, facts related to a disparate impact claim. *Id.* at 170-79. Finally, in category IX, the document production related facts, OFCCP generally does not dispute the basic background/timeline, but disputes most characterizations of events. *Id.* at 179-202.

Oracle's reply, in turn, included a 279-page Response to Plaintiff OFCCP's Statement of Disputed Facts ("DRSD") that generally contests OFCCP's basis for disputing the facts stated in Oracle's statement and liberally incorporating its responses in the Response to OFCCP's Statement of Uncontested Facts. Much of this reply contends that OFCCP has not created a dispute about the fact stated and has fundamentally misunderstood Oracle's structure and the way its compensation systems work. As to the facts asserted as to the substantive claims, Oracle continues to argue with OFCCP over the meaning and context of various documents, and disputes (or lack of disputes) created by the cited evidence. *See generally* DRSD at 5-278.

With its opposition OFCCP filed a Statement of Additional Uncontested Material Facts ("POA"). OFCCP proposes 57 new undisputed facts in the following categories: A) additional facts related to Oracle's compensation policies (1-3); B) facts related to the issuance of the notice of violation (4-15); C) facts regarding conciliation (16-27), D) facts related to the production of documents (28-52), and E) more facts about the expert evidence (52-57). POA at 2-11. With its reply, Oracle filed Response to Plaintiff OFCCP's Statement of Additional Uncontested Facts ("DRSU"). Oracle asserts that these additional facts are either immaterial or not supported by the evidence, and do not create genuine disputes of material fact. DRSU at 1; *see also id.* at 2-47.

## ***B. The Submissions***

The record for summary decision is voluminous and repetitive. The submissions provided consume many thousands of pages. They are often redundant and sometimes both parties submit the same materials—sometimes multiple times.

When OFCCP filed its motion for summary decision, it included a Declaration of Norman E. Garcia ("NGD") attaching 108 exhibits ("PMX 1-108") in five volumes. On October 30, 2019—two days before oppositions were due—OFCCP filed a "Notice of Errata Re Exhibit 89" to the Garcia Declaration. Within PX 89, the "errata" attaches a new exhibit consisting of a declaration

from OFCCP's expert witness and its attached analyses. OFCCP's submissions generally fall in the following categories:

- OFCCP correspondence with Oracle (compliance review or litigation): PX 1; PX 61; PX 66; PX 67; PX 69; PX 70; PX 74; PX 75; PX 82; PX 85; PX 86; PX 87; PX 106.
- Other OFCCP/Oracle documents relating to events during the compliance review: PX 3; PX 68; PX 71.
- Discovery responses in this case of the *Jewett* state case: PX 2; PX 62.
- Depositions and declarations of OFCCP staff: PX 4; PX 17.
- Depositions or portions of depositions of Oracle employees, sometimes testifying on behalf of Oracle, in this case of the *Jewett* case in California state court: PX 5 (Holman-Harries); PX 6 (Carrelli); PX 7 (Waggoner), PX 19 (Cheruvu); PX 27 (Waggoner); PX 31 (Loaiza); PX 37 (Westerdahl); PX 43 (Holman-Harries); PX 65 (Baxter); PX 81 (Waggoner); PX 105 (Holman-Harries); PX 108 (Waggoner).<sup>13</sup>
- Documents relating to the Lisa Gordon interview: PX 41; PX 42; PX 44; PX 45; PX 72.
- What appear to be internal Oracle trainings or webinars: PX 8; PX 12; PX 13; PX 14; PX 16; PX 18; PX 21; PX 22; PX 24; PX 25; PS 26; PX 28; PX 38; PX 46; PX 51; PX 57; PX 58; PX 59; PX 60; PX 64; PX 76; PX 77.
- What appear to be other internal Oracle HR documents (e.g. compensation-related or job classification documents, internal communications): PX 9; PX 10; PX 15; PX 20; PX 23; PX 35; PX 36; PX 39; PX 40; PX 47; PX 56; PX 73; PX 78; PX 79; PX 80; PX 83; PX 84.
- What appears to be Oracle's U.S. Employee handbook: PX 11.
- What appears to be Oracle's 2014 Affirmative Action Plan: PX 63.
- What appear to be HR documentation or communications relating to specific employees or jobs: PX 29; PX 30; PX 32; PX 33; PX 34; PX 48; PX 49; PX 52; PX 53; PX 54; PX 55.
- OFCCP's communications with Oracle employees: PX 50.
- Expert reports, depositions, or related documents: PX 88; PX 89; PX 90; PX 91; PX 92; PX 93; PX 94; PX 95; PX 96.
- Declarations from current or former Oracle employees: PX 97; PX 98; PX 99; PX 100; PX 101; PX 102; PX 103.
- An IRS publication: PX 104.
- An excerpt from a data file: PX 107.

Oracle's motion for summary decision is supported by declarations from the following individuals: Farouk Abushaban ("FAD"), Kow Adjei ("KAD"), Carolyn Balkenhol ("CBD"), Balaji Bashyam ("BBD"), Suratna Budalakoti ("SBD"), Janet Chan ("JCD"), Leor Chechik ("LCD"), Kristin Desmond ("KDD"), Jon Tyler Eckard ("JED"), Barbara Fox ("BFD"), Suzette Galka ("SGD"), Amanda Gill ("AGD"), Shauna Holman-Harries ("SHD") with 25 exhibits ("DMHX A-Y"), Cindy Hsin ("CHD"), Christina Kite ("CK1D"), Chandrasekhar Kottaluru ("CK2D"), Steven Miranda ("SMD") with four exhibits ("DMMX A-D"), Brian Oden ("BOD"), Rita Ousterhout ("ROD"), Leslie Robertson ("LRD"), Richard Sarwal ("RSD"), Sachin Shah ("SSD"), Gary Siniscalco ("GSD") with three exhibits ("DSX A-C"), Harmohan Suri ("HSD"), Chandna Talluri ("CTD"), Vickie Thrasher ("VTD"), Kate Waggoner ("KWD") with five exhibits ("DMWX A-E"),

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<sup>13</sup> Mr. Edeli's declaration accompanying the response to Oracle's evidentiary objections in OFCCP's reply brief adds portions of depositions of Oracle employees that were referred to but omitted in the original submission: PEX A; (Cheruvu); PEX B (Waggoner); PEX C (Westerdahl).

Campbell Webb (“CWD”), Athena Wu (“AWD”), Nachiketa Yakkundi (“NYD”), and Erin Connell (“ECD”) with 21 exhibits (“DMCX A-U”) in three volumes. Oracle’s submissions fall into the following categories:

- Declarations from Oracle managers addressing their work, the different skills involved, the way compensation decisions are made, etc.: FAD; BBD; JCD ; KDD; JED; BFD; SGD; CHD; CK1D; SMD; BOD; ROD; LRD; RSD; SSD; HSD; CTD; CWD; NYD.
- Declarations from Oracle individual contributors address their work, the different skills involved, their experience at Oracle, etc.: KAD; SBD; LCD; CK2D; AWD.
- Declarations from Oracle HR personnel addressing the way that compensation, hiring, and other decisions are made: CBD; AGD; VTD; KWD.
- Material (declarations and documents) relating to the compliance review period of the case addressing the investigation, conciliation, and production of information: SHD; DMHX A; DMHX B; DMHX C; DMHX D; DMHX E; DMHX F; DMHX G; DMHX H; DMHX I; DMHX J; DMHX K; DMHX L; DMHX M; DMHX N; DMHX O; DMHX P; DMHX Q; DMHX R; DMHX S; DMHX T; DMHX U; DMHX V; DMHX W; DMHX X; DMHX Y; GSD; DSX A; DSX B; DSX C.
- Publically available information about Oracle’s products and business: DMMX A; DMMX B; DMMX C; DMMX D.
- Oracle training presentations related to compensation or other HR topics: DMWX A; DMWX B; DMWX C; DMWX D; DMWX E; DMCX I; DMCX L.
- Other internal Oracle HR related documents: DMCX J; DMCX K.
- Excerpts from depositions of Oracle employees in this case or the *Jewett* matter, sometimes testifying on behalf of Oracle: DMCX A (Waggoner); DMCX B (Holman-Harries; DMCX C (Waggoner); DMCX G (Westerdahl); DMCX H (Cheruvu).
- Excerpts of depositions of OFCCP employees, sometimes testifying on behalf of OFCCP: DMCX D (Suhr); DMCX D (Ratliff); DMCX F (Leu); DMCX S (Brunetti).
- Expert reports and excerpts of depositions: DMCX M; DMCX N; DMCX O; DMCX P; DMCX U.
- Discovery responses and pleadings by OFCCP: DMCX Q; DMCX R; DMCX T.

In addition, Oracle’s November 1, 2019, Opposition to OFCCP’s Motion For Summary Judgment is supported by another Declaration of Erin Connell with 10 attached exhibits (“DOCX A-J”). These additional exhibits fit into the following categories:

- OFCCP interview notes for employees who filed declarations for OFCCP and authenticating correspondent: DOCX A; DOCX B; DOCX I; DOCX J.
- Deposition excerpt of OFCCP’s expert: DOCX C.
- Deposition excerpts from Oracle employees, sometimes testifying on behalf of Oracle: DOCX D (Waggoner); DOCX E (Waggoner).
- Oracle job requisitions: DOCX F; DOCX G; DOCX H.

In support of its opposition to Oracle’s Motion for Summary Judgment submitted a Declaration of Hea Jung Atkins (“HJAD”) with 20 exhibits (“POAX A-T”), a Declaration of Jane

Suhr (“JSD”) attaching 25 exhibits (“POSX A-Y”), and a Declaration of Laura Bremer (“LBD”) with 47 exhibits (“POBX 1-47”).<sup>14</sup> These submissions fall into the following categories:

- Evidence concerning the compliance review and conciliation: JSD; POSX A; POSX B; POSX C; POSX D; POSX E; POSX F; POSX G; POSX H; POSX I; POSX J; POSX K; POSX L; POSX M; POSX N; POSX O; POSX P; POSX Q; POSX R; POSX S<sup>15</sup>; POSX T; POSX U; POSX V; POSX W; POSX X; POSX Y<sup>16</sup>; HJAD; POTX A; POTX T; LBD at ¶ 3; POBX 43; POBX 44; POBX 45.
- OFCCP’s interview summaries from the compliance review in this or other cases: POTX B; POTX C; POTX D; POTX E; POTX F; POTX G; POTX H; POTX I; POTX J; POTX K; POTX L; POTX M; POTX N; POTX O; POTX P; POTX Q; POTX R; POTX S; POBX 33; POBX 34.
- Entire depositions or excerpts from depositions of Oracle employees, sometimes testifying on behalf of Oracle: POBX 1 (Westerdahl); POBX 2 (Waggoner); POBX 4 (Cheruvu); POBX 5 (Holman-Harries); POBX 8 (Waggoner); POBX 11 (Loaiza); POBX 16 (Carrelli); POBX 17 (Waggoner); POBX 31 (Holman-Harries); POBX 35 (Holman-Harries corrections).
- Oracle HR-related training documents: POBX 3.
- What present as other internal Oracle documents or emails: POBX 18; POBX 22; POBX 23; POBX 24; POBX 25; POBX 26; POBX 27; POBX 28; POBX 29.
- Declarations from former or current Oracle employees: POBX 6; POBX 7; POBX 9; POBX 10; POBX 12; POBX 13; POBX 14; POBX 15; POBX 20; POBX 21; POBX 30; POBX 38; POBX 42.
- A New York Times article: POBX.
- Deposition excerpts of OFCCP employees: POBX 32 (Leu); POBX 46 (Suhr).
- Communications between Oracle and OFCCP in this litigation: POBX 36; POBX 37; POBX 39; POBX 40; POBX 41; POBX 47.

When OFCCP filed its reply brief on November 8, 2019, it included a declaration of David L. Edeli (“DEOD”) with three attached exhibits (“PEX A-C”) in support of its reply to Oracle’s evidentiary objections. The three exhibits add excerpts of deposition transcripts of Oracle employees: PEX A (Cheruvu); PEX B (Waggoner); PEX C (Westerdahl). Oracle’s November 8, 2019, reply brief is supported by another declaration from Erin Connell attaching two exhibits (“DCRX A-B”). DCRX A contains the errata sheet from the August 1, 2019, deposition of Ms. Homan-Harries testifying on behalf of Oracle. DCRX B contains additional excerpts of Mr. Loaiza’s deposition.

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<sup>14</sup> The record copy of the exhibit contains multiple deposition copies in individual exhibits on several occasions, with the second “extra” deposition already being included in another exhibit. I have considered the exhibits as they were described in the declaration, though since no new “extra” depositions were included, all submissions were reviewed. The same thing happens with the declarations in POBX 20 and POBX 21.

<sup>15</sup> Ms. Suhr’s declaration dates POSX S to 2019, *see* JSD at ¶ 30, but this is a scrivener’s error. The actual correspondence is from 2016, during the compliance review/conciliation period.

<sup>16</sup> In the record binder of exhibits, a “Consent Judgment & Order” to be filed in *Scalia v. K.L.A.S.S. Servs. Inc.*, an FLSA case in the U.S. District Court for the District of Arizona, is included after POSX Y. This is an obvious error in compiling the exhibits. This settlement has no bearing on the case here.

### ***C. Evidentiary Issues***

To support a factual position taken in a motion for summary decision, a party may either cite “to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;” or show “that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1). In response, a “party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Baines v. Walgreen Co.*, 863 F.3d 656, 662 (7th Cir. 2017); *Lee v. Offshore Logistical & Trasp., L.L.C.*, 859 F.3d 353, 355 (5th Cir. 2017).

When Oracle filed its opposition, it included Objections to Evidence in Support of Plaintiff’s Motion for Summary Decision containing 12 general objections and 256 pages of specific objections to almost every exhibit submitted by OFCCP (“DOO”). Oracle complains that OFCCP’s submissions have “numerous, significant evidentiary problems.” DOO at 1. These include lack of foundation, lack of personal knowledge, inadmissible speculation, inadmissible hearsay, ambiguity, relevance, incomplete exhibits, failure to properly authenticate documents, failure to comply with the best evidence rule, privilege (a document related to the mediation as well as urging negative inferences from a claim of privilege), inadmissible character evidence. *Id.* at 1-11. Oracle’s specific objections then make multiple objections along these lines to portions of all but one of OFCCP’s exhibits. *See generally id.* at 21-276. The only unproblematic exhibit, per Oracle, is PX 108, which contains a signature page from a deposition that was omitted in the earlier submission of the deposition. NGD at ¶ 110. OFCCP’s reply contains a Response to Oracle America Inc.’s Evidentiary Objections to Evidence in Support of OFCCP’s Motion for Summary Judgment (“PRO”). OFCCP deems Oracle’s objections “frivolous” and “overdone” and argues that they should be summarily rejected, pointing out, for instance, that documents Oracle now challenges on authenticity grounds were produced by Oracle in discovery and were acknowledged as authentic. PRO at 1-7; *see also* PX 2. It also submits additional excerpts of depositions that were omitted from the original submissions. *See* DEOD.

Based on the briefing, many of Oracle’s evidentiary objections are less about admissibility than credibility and function as another means to argue that the evidence submitted does not say what OFCCP contends or does not license the conclusions that OFCCP draws. The most frequent objection Oracle levels is that the materials cited do not support the factual proposition OFCCP asserts, sometimes at all and sometimes not strictly so. This is a factual argument about the evidence, not an objection to the submission of the evidence as part of the record for summary decision. The same points were made in Oracle’s response to OFCCP’s statement of undisputed facts.

Many of these objections serve no legitimate purpose. Oracle pursues a number of relevance objections. This achieves nothing except to potentially force OFCCP to expend resources responding and waste adjudicatory resources, including the tribunal’s, ruling on a long list of questionable objections. This is summary judgment. The question is whether there is a genuine dispute of material fact. If a submission is irrelevant, it isn’t going to help either party show that there is or isn’t genuine dispute over a material issue. There is no point to “excluding” the evidence; it will just be ignored. Similarly, Oracle makes objections contending that OFCCP failed to submit the portion of the deposition (or other material) that it is citing. If true, this is problematic. But it

isn't an evidentiary objection. It's a merits issue that Oracle could, and did, highlight in its response to OFCCP's statement of undisputed facts.

Oracle's scorched earth approach is either a cynical attempt to delay hearing and waste government resources or a form of economic assistance to its lawyers, who Oracle is paying to pour over OFCCP's submissions and compile this list of every conceivable objection. I decline the invitation to rule on every objection Oracle's lawyers could imagine. Some of these objections may well be genuine, but Oracle has buried them in an undifferentiated mass of what mostly appear to be meritless objections or arguments about the evidence. As will be seen below, the disposition of the cross-motions does not turn on narrow points drawn from particular exhibits. Rather, it is a function of a genuine dispute over the large questions in the case concerning how Oracle's compensation practices are best understood and analyzed, which expert has the better opinion, and what inferences should be drawn from the evidence. Hence, this plethora of particularized evidentiary quarrels is not material to the outcome and need not be considered further. For current purposes, they are summarily denied.

Oracle makes a more developed and considered objection to Dr. Madden's expert opinions. First, it argues that Dr. Madden's reports are irrelevant because of the various deficiencies it has identified. DOO at 11-13; *see also id.* at 16-20; ASD. OFCCP argues against any exclusion. PRO at 8-11; *see also* JMOD. These points echo Oracle's motion to exclude any evidence offered by Dr. Madden. In a contemporaneous order, that motion is denied. The objections here are denied as well. Second, Oracle seeks to exclude analyses that Dr. Madden completed and that OFCCP produced after the relevant deadline for expert discovery. DOO at 13-16; ASD; *see also* DO at 25. OFCCP argues that the additional material should be considered. PRO at 8, 12-16; *see also* JMOD. This is a genuine issue, also subject to a recently filed motion in limine. I find that there is no need to consider the point here because Dr. Madden's new analyses would not alter the outcome of the motions.

OFCCP did not file a distinct packet containing evidentiary objections, but its Statement of Genuine Disputes of Material Fact is interspersed with a large array of evidentiary objections based on lack of foundation or personal knowledge, the best evidence rule, improper summaries, etc. *E.g.* POG at 59, 64, 78. OFCCP also filed Evidentiary Objection to Declaration of Kate Waggoner and Evidentiary Objections to Declaration of Carolyn Balkenhol containing similar objections. Oracle's reply brief was accompanied by Responses to Plaintiff's Objections to Evidence in Support of Oracle's Motion for Summary Judgment, which replies to the various evidentiary objections contained within the papers included with OFCCP's opposition. OFCCP's evidentiary objections are similar in character to those mounted by Oracle, if somewhat less in volume. Most appear designed to sow confusion and increase burdens. Most also appear to lack merit. As above, I discern no purpose in providing an advisory set of rulings on strings of objections when they would not alter the outcome of the motion. The result here is driven by basic, fundamental disputed issues of material fact. For the current purposes, they are summarily denied.

When Oracle filed its reply, it also filed Objections to Evidence Submitted by OFCCP in Support of its Opposition to Defendant's Motions. Oracle again claims that OFCCP's submissions contain "numerous significant evidentiary problems," including lack of foundation, inadmissible hearsay, violations of the best evidence rule, speculation, inadmissible character evidence. On November 15, 2019, OFCCP filed a motion for leave to file a reply to these evidentiary objections, along with its proposed reply. Also on November 15, 2019, Oracle filed an opposition to OFCCP's motion for leave to reply. Regardless of whether or not I consider OFCCP's proposed reply to

Oracle's reply brief evidentiary objections to OFCCP's submissions with its opposition to Oracle's motion for summary decision, the result is the same. The points raised by Oracle often lack merit and appear to be part of a concerted attempt to make this litigation as difficult and time-consuming as possible. The points raised would have no bearing on the ultimate resolution of the cross motions, so I decline to engage in the pointless exercise requested. For current motions, these additional objections are also summarily denied.

#### ***D. Expert Opinions***<sup>17</sup>

Based on the submissions, this case is in large part a battle of the experts. OFCCP presents the opinions of Janice Fanning Madden, Ph.D. as to racial and gender disparities in the relevant work groups.<sup>18</sup> Oracle defends with the opinions of Ali Saad, Ph.D.<sup>19</sup> Since the resolution of this case will likely turn, at least in part, on the competing views of the experts, and what legal conclusions those views could support, an initial overview of their opinions is appropriate.

This litigation is based on the allegations in the SAC. Dr. Saad's expert report examined the analyses underlying those allegations. He concluded:

OFCCP ignored the complexity of work employees perform at Oracle and applied an overly simplistic model of compensation. They mis-measured variables—including the key outcome variable, total compensation—and omitted other important variables that would serve to similarly situate employees from a labor economics perspective. When additional variables readily available in the data were introduced even into their aggregated models—which I show mask considerable variation in outcomes—the results OFCCP claims to have found no longer exist. In addition, their statistical models of starting pay and “assignment” are also fundamentally mis-specified and contrary to the statements found in the SAC, do not lend support to OFCCP's claims regarding pay discrimination. OFCCP's results do not stand up under scientific scrutiny and are an unreliable basis for drawing conclusions about compensation at Oracle.

SER at 2-3.

Dr. Saad opines that OFCCP incorrectly used multiple regression analysis over groups of employees who are not similarly situated, producing misleading results because it groups employees in high-level job functions and then controls only for standard job title, part or full-time status, time in company, and prior experience. Dr. Saad determined that standard job title is an insufficient way to control for similarly situated employees because the actual work varies significantly within a job title. Dr. Saad further concluded that OFCCP's other controls were crude proxies and that it failed to control for other relevant variables. *Id.* at 5, 7-10; *see also, e.g., id.* at 46-49. Dr. Saad also stresses that OFCCP's own analysis revealed conflicting results, with OFCCP choosing to report only those that favored its hypothesis. *E.g. id.* at 15, 127-33. He argues against theories premised on the role of

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<sup>17</sup> OFCCP and Oracle both filed motions to exclude the evidence of the opposing expert for failure to meet the standard under Rule 702. In a contemporaneously issued order, both motions are denied.

<sup>18</sup> Dr. Madden issued a July 19, 2019, expert report (“MER”) and an August 16, 2019, rebuttal report (“MRR”). The reports have been submitted in a variety of places. Here the expert report is at PMX 91 and DCX N. The rebuttal report is located at PMX 92 and DCX P. Parts of Dr. Madden's deposition are contained in DCX U and PMX 90.

<sup>19</sup> Dr. Saad issued an expert report on July 19, 2019 (“SER”) and a rebuttal report on August 16, 2019 (“SRR”). The expert report is found here at DCX M and PMX 93. Dr. Saad's rebuttal is found at DCX O and PMX 94. Dr. Saad's deposition is, at least in parts, at PMX 89 and PMX 96.

prior pay, *id.* at 110-11, and assignment of job or career path, *id.* at 112-21. The report is lengthy—141 pages with multiple appendices. But the overall conclusion that would be drawn *if* this evidence is accepted is that OFCCP’s SAC analysis is a poor model that aggregates too many dissimilar employees, uses crude, misleading proxies, and omits analysis of important variables.

While the SAC continues to define the claims at issue, Dr. Madden’s expert report replaced the analyses in the SAC, rendering Dr. Saad’s initial report of limited value.<sup>20</sup> Dr. Madden was asked to evaluate gender differences in compensation in the Product Development, Information Technology, and Support job functions at Oracle’s headquarters, as well as racial differences in the Product Development job function. The relevant period was 2013-18. She also looked at job at time of hire and compensation at hire. She then estimated damages. MER at 1. Dr. Madden found statistically significant differentials in each category in terms of earnings, base pay and stock awards, controlling for age, education, and seniority. For those coming from other jobs, starting pay correlated with prior pay, with differentials carrying over. *Id.* at 3-4.

The details and quantitative results of Dr. Madden’s analysis are unnecessary to review for this motion. Her general approach is somewhat straightforward. The complaint defined the relevant groups for analysis. She applied “human capital theory,” presuming that differences in earnings vary with productivity and that productivity varies with education and experience, which is a result both of age and tenure at a company. Her analysis focused on groups, abstracting from any individual differences. Dr. Madden drew a sharp distinction between factors that are, at least in a sense, outside of Oracle’s control, or exogenous factors, and those that, in a sense, are in Oracle’s control, or endogenous factors.<sup>21</sup> Dr. Madden then performed regression analyses to control for various factors and determine if and how gender and race explained differentials in compensation. *Id.* at 5-11. The analysis proceeded on the assumption, which Dr. Madden believed was justified, that individual differences do not matter when at the group level those in different genders or races have the same qualifications at the group level: “Any characteristic that affect whether individual employees are paid more, but that are possessed by equivalent proportions, or at equal levels, by both races, or by both genders, do not matter in the analysis of whether race or gender affects compensation.” *Id.* at 46-48.

So to examine the role of gender, Dr. Madden started with raw differentials in Medicare compensation in the relevant job functions. She then added control factors to determine what might explain the disparities. She started with race/ethnicity, then age as a proxy for work experience, then education, and then tenure at Oracle as another proxy for experience. Education was measured by highest degree attained and was missing for roughly half of the set. The analysis was run using both the whole set and the proper sub-set of those with data. After conducting this analysis, Dr. Madden added endogenous factors: job descriptor, management status, and global career level. Dr. Madden produced statistically significant results with each of the controls, though controlling for global career level was associated with most of the overall differential in compensation, which Dr. Madden took to indicate that job assignment was the basis for most, but not all, of the differentials. *Id.* at 12-20. Dr. Madden conducted separate analysis of base pay and stock awards. *Id.* at 21-25. She then repeated for Asian/White and African-American/White compensation differentials (controlling for gender rather than race in the progressive analysis) with generally similar results. *Id.* at 25-45; *see also id.* at 60-76 (tables with results).

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<sup>20</sup> This is not to say that OFCCP replaced the SAC analyses because it acknowledged the same deficiencies alleged by Dr. Saad or that Dr. Saad’s original report is irrelevant.

<sup>21</sup> I add the “in a sense” because the line is not entirely clear—Oracle does control things like education, age, and tenure by controlling who it hires and retains.

Dr. Madden also studied the impact of base salary at hire, which for those with data available correlated with prior pay for the statistically significant differentials by race or gender. *Id.* at 49-50. In addition, Dr. Madden looked to whether “assignment” of job or global career level influenced the disparity. In line with the findings in the regress analysis, she concluded that it did. *Id.* at 50-52. Finally, Dr. Madden performed damage calculations/estimations. *Id.* at 52-57, 81-83. The details of these analyses are not relevant to the disposition of the pending motions.

Dr. Madden’s rebuttal report critiques Dr. Saad’s initial report, highlighting the differences in their approaches. MRR at 1-5, 41 (summary). Dr. Madden indicates that she and Dr. Saad are really studying different questions—she is studying gender or racial differences across job categories while he is studying gender and racial compensation differences within individual jobs. Hence, he narrows the comparator groups for similarly situated employees by controlling for more features. Dr. Madden, by contrast, is comparing in terms of age, tenure, education, and job descriptor. *Id.* at 8-9. Dr. Madden’s criticism centers on the difference between endogenous and exogenous characteristic. Her broad opinion is that it is improper to control for variables that Oracle may control, since that might mask discrimination. Dr. Saad’s analysis includes many such variables, so Dr. Madden finds it improper, accusing him of assuming that Oracle is not discriminating, for instance, in terms of job assignments. *See generally id.* at 9-30. At one point Dr. Madden opines that “Dr. Saad’s analyses ‘wash out’ gender and racial effects by taking the relatively small numbers of women, Asian, and African American employees, distributing them across the large number of irrelevant effects of attributes to be estimated, yielding too few left to measure gender and racial effects with precision.” *Id.* at 26. Dr. Madden further criticizes Dr. Saad for not adequately analyzing the role of initial assignments and potential discrimination in those assignments, which per her report constituted a major, but not the only, source of compensation disparity. *Id.* at 30-37.

Dr. Saad’s rebuttal report contains his examination and criticism of Dr. Madden’s report. SRR at 1. His overall conclusion is plainly stated:

The only way that Dr. Madden reaches a conclusion that Oracle pays women, Asians, and African-Americans less than it should is because she *assumes* with no empirical support that Oracle specific pay related factors like jobs held and the nature of the work employees are engaged in should be excluded from a pay analysis because of the possibility that they too are the outcome of biased decision making by Oracle managers. As a result, in her primary pay analyses, Dr. Madden only controls for differences in age, educational level and time since hire at Oracle. The exclusion of all Oracle related job and work area factors from the analysis of pay differences by gender and race is based only on an *assumption*, not on any analysis performed by Dr. Madden, an assumption which falls apart when subjected to empirical scrutiny.

*Id.* at 5-6 (emphasis in original).

In Dr. Saad’s view, variables that account for the sort of work an employee performs are critical to a study of compensation discrimination. *Id.* at 9-13; *see also id.* at 18-29. Per Dr. Saad, this inappropriate grouping renders the analysis unreliable because it does not track the common outcomes for the analyzed groups since it lacks necessary refinements to ensure that those analyzed share a common experience. *Id.* at 30. He challenges Dr. Madden’s assumption that legitimate pay-related attributes not studied are evenly distributed, noting that this could also license not studying any pay-related attributes. In his view, the assumption should be tested and when it is, it is found wanting. *Id.* at 29-35, 39-41. He adds that analysis of Dr. Madden’s models shows that, abstracted

from gender or race, they are poor predictors of pay, indicating that regardless of whether race or gender is impacting pay, Dr. Madden's models are inaccurate. *Id.* at 35-39, 41-42.

Dr. Saad also opines that Dr. Madden's analysis relies on inadequate proxies for education and experience and should have used better measures that looked to the type and relevance of prior work experience and education. The "crude" proxies are not reliable and the education component is missing for half of the individuals studied. The result, per Dr. Saad, is that Dr. Madden's analysis fails to compare similarly situated employees. *Id.* at 6, 13-15, 43-52. Dr. Saad notes that Dr. Madden's analysis fundamentally departs from prior OFCCP analyses by omitting job-related variables as tainted, with the result that, in his view at least, Dr. Madden is not even attempting to compare similarly situated employees. *Id.* at 7-8. He argues that Dr. Madden's later analyses building in some Oracle-related variables are inadequate because they still lump together individuals in vastly different jobs working in different areas of the company. *Id.* at 15-17, 52-54. He also challenges Dr. Madden's choices in measuring compensation with Medicare wages. *Id.* at 17-18, 68-69.

As to Dr. Madden's "assignment" discrimination opinion, Dr. Saad concludes that it is premised on unfounded assumptions about how individuals come to occupy jobs at Oracle and a presumption of bias whenever Oracle is involved in any decision-making. He deems this circular reasoning and avers that Dr. Madden did not test her premise regarding assignments. *Id.* at 6-8, 11. His study indicated that there is not discriminatory job assignment and that Dr. Madden's analysis showed no systematic under promotion of women, Asians, or African-Americans, belying the premise of Dr. Madden's theory. *Id.* at 11-12, 54-60, 62-65. Dr. Saad conducted a revision of Dr. Madden's analysis, which he found indicated no compensation discrimination. *Id.* at 69-71. He also determined that Dr. Madden's starting pay analysis was flawed and did not indicate adverse results for the protected groups. *Id.* at 71-73; *see also id.* at 77-81. Finally, Dr. Saad opines that Dr. Madden's damage calculations are flawed. *Id.* at 8-9, 73-74. As above, since the damages issue is not pertinent to the resolution of the pending motions, I do not discuss or consider this part of Dr. Saad's report.

#### ***E. OFCCP's Statement of Position***

On April 4, 2019, counsel for OFCCP dispatched a letter to a large group of current and former Oracle employees, including Oracle managers. This letter provided information regarding the case and solicited potential witnesses. Roughly one-third of the recipients were Oracle managers, though none were managers in the Human Resource job function or Oracle executives/board member. Oracle had a number of objections to the letter, most of which are not relevant here. One point remains significant to the merits litigation. In the letter, counsel wrote, in bold type, "We want to assure you that you have not been accused of any wrongdoing." This created difficulties, since it seemed to Oracle that OFCCP was accusing its managers of wrongdoing. Motion practice followed, culminating (in part) in an August 8, 2019, order. That order rejected OFCCP's claim that "accuse of wrongdoing" just meant being named as a defendant. It explained to OFCCP that discrimination is wrongdoing and since Oracle acts through its managers, accusing Oracle of discrimination would mean accusing at least some of its managers of discrimination, and thus wrongdoing.

OFCCP's briefing had suggested that the letter was not misleading on the point because it was only accusing *other* managers of wrongdoing. To determine what further steps might need to be taken as well as to make clear what OFCCP's position was, the August 8, 2019, order required

OFCCP to state a position, *see* 41 C.F.R. § 60-30.14(b), as to which managers it was and was not accusing of wrongdoing. The order also set out the implications of narrowing the scope of the complaint by not accusing the managers in question of wrongdoing. That would mean that OFCCP could not pursue theories of discrimination in which low-level managers in the job functions in question were the agents of discrimination. As an example, the order explained that it would mean that a disparate treatment theory that relied on a claim that a general culture at Oracle led managers to discriminate against women, Asians, and African Americans could not be pursued. It also noted that a disparate impact theory that relied on a policy that allowed lower-level managers to act in discriminatory ways could not be pursued. Both theories require a finding of low-level manager wrongdoing.

The alternative was an admission that the April 4, 2019, letter had contained a misstatement and was therefore misleading. That would have meant that some of OFCCP's counsels had engaged in wrongdoing, so to speak, and likely would have meant some remedial action. It *might* have meant the need for some sort of evidentiary sanction. But it would have preserved theories of discrimination that implicated lower-level management in discriminatory acts.

OFCCP filed its statement of position on August 22, 2019. It disavowed any theory in which low-level managers outside of human resources were responsible for any of the alleged discrimination. Instead, it limited its theories to the claim “that Oracle’s top management and Human Resources managers intentionally caused and are responsible for the widespread, systemic discrimination against women and minorities in technical positions who work at Oracle’s headquarters” and an alternative disparate impact theory “based on the policies and practices implemented by the same top leadership at Oracle.” *OFCCP’s Position Statement at 2; see also id.* at 8-9.

This position statement narrows the theories of discrimination in important ways. It not only eliminates potential theories whereby the low-level managers in the Product Development, Information Technology, and Support job functions are the agents of discrimination, rather than higher-level managers and those in other job functions—it eliminates any potential theories in which *both* low-level managers in those job functions and higher-up managers have engaged in wrongdoing. For instance, a theory might allege that low-level managers systematically make biased compensation decisions that high-level managers fail to correct. Another theory might allege that high-level managers impose policies that allow low-level managers to systematically make discriminatory compensation decisions, or that high-level managers impose constraints on compensation that then lead low-level managers to make discriminatory compensation decisions. A necessary part of each of these theories is that the low-level managers make discriminatory compensation decisions—but it is just this proposition that OFCCP has foresworn. If any theory *requires* a finding that low-level managers in the three job functions at issue engaged in any discriminatory compensation (or other) decisions, that theory must be rejected.

## V. DISCUSSION

### A. *Oracle’s Procedural Challenges*

Oracle seeks summary judgment based on two “procedural” issues regarding OFCCP’s pre-suit obligations: the show cause notice and OFCCP’s conciliation efforts.

## 1. Show Cause Notice

“When the Deputy Assistant Secretary has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted.” 41 C.F.R. § 60-1.28. Oracle contends that there was no reasonable cause to believe there was a violation when OFCCP issued a show cause notice during the compliance review. It argues that the statistical analysis that OFCCP had done at the time was based on instructions from OFCCP regional leadership, not expert judgment, and controlled only for time at Oracle, age, full or part time employment, and job title. It contends that these are insufficient to make out a violation and that OFCCP did not consider whether legitimate factors explained the disparities it believed it had found. DM at 10-11.

OFCCP counters that Oracle is estopped from raising any procedural challenges because it has unclean hands in that it did not produce information as requested. PO at 20-21. This is not convincing. OFCCP cannot assume that it has prevailed in showing “unclean hands” and then excuse any of its own shortcomings and alleged neglect to follow its own regulations. If Oracle’s failure to produce documents meant that OFCCP could not reach a conclusion in its review, OFCCP could have brought a claim seeking production of the documents. It did not do so. OFCCP’s better argument is that it had reasonable cause to issue a Notice to Show Cause based on the investigation that it did conduct. Further, the purpose of the procedural notices is to put a contractor on notice of the agency’s findings, and the notices issued served those purposes, allowing Oracle to mount a defense. It argues that the role of an ALJ is to conduct a *de novo* review, not to evaluate the sufficiency of an investigation. PO at 21-23. Oracle’s reply does not directly address the issue.

Oracle’s motion for summary decision on this point fails for (at least) two independent reasons. First, assuming that a show cause notice is required, “reasonable cause” is something that the Deputy Assistant Secretary is given the discretion to determine. This is not to say that there could be no evaluation—rather, any evaluation would not be a hearing on the merits, as OFCCP correctly points out. Based on the submissions, there are reasonable disputes over the events during the compliance review and what may have been reasonable when. Viewing the course of events and information available to OFCCP in the light most favorable to OFCCP and drawing inferences in its favor, I would conclude that there was reasonable cause to issue the notice. That is enough to defeat summary judgment.

Second, even if there was not reasonable cause, I fail to see what meaningful remedy Oracle can be provided at this point in the process. The presumption in its argument is that the whole matter would simply disappear, but at most the result would be a remand so that the reasonable cause letter could be issued based on the present evidence, followed by a resumption of this process except with further delays and increased costs. That would serve no purpose. So it would appear that if there was a violation, no remedy would come in this forum. At the least, Oracle has not clearly spelled out what remedy should follow and why, so summary judgment could not be granted.

## 2. Conciliation

OFCCP is subject to a conciliation requirement after it completes a compliance review: “[w]here deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion.” *Id.* at § 60-1.20(b); *see also* EO 11246 § 209(b). Enforcement proceedings are initiated after those efforts fail. 41 C.F.R. § 60-1.26(a)-(b). Oracle seeks summary

judgment on the grounds that OFCCP did not comply this conciliation requirement. It asserts that “the undisputed evidence shows that OFCCP did not provide Oracle with essential information about the nature of, and bases for, any alleged violations.” DM at 11. It complains that OFCCP did not answer requests for additional information about the alleged violations and did not provide a proposed conciliation agreement. Instead OFCCP only gave Oracle “cocktail-napkin estimates” but declined to provide any underlying information that would have permitted Oracle to make a reasonable assessment. *Id.* at 11-12; *see also* DCX D; DSX C.

OFCCP replies that it did make reasonable conciliation efforts and that based on the undisputed facts, it should be entitled to summary judgment on this point. It then re-tells the history of the compliance review and conciliation efforts as driven by Oracle’s refusal to meet and unreasonable efforts to delay the process. It maintains that because Oracle sought modes of analysis that OFCCP refused to engage in, OFCCP is entitled to summary judgment on conciliation. PO at 23-27. Oracle retorts that OFCCP cannot excuse itself from fulfilling its conciliation requirements by deeming conciliation to be futile. It contends that the underlying facts are undisputed and, relying on the May 23, 2019, order denying OFCCP summary judgment on the issue, argues that it should be granted summary judgment on the issue now. DR at 13-14.

The legal framework and basic factual background were discussed in the May 23, 2019, Order Denying OFCCP’s Motion for Partial Summary Decision on Oracle’s Affirmative Defenses Re: Conciliation. EEOC is also subject to a conciliation requirement<sup>22</sup>, which was the subject of the Supreme Court’s decision in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015). It held that the conciliation obligation was subject to judicial review since the language in the statute is “mandatory, not precatory.” *Id.* at 1651-52. EEOC has a great deal of discretion and flexibility, but does require an “endeavor” to conciliate. So courts properly examine the substance of whether there was conciliation but should not take a “deep dive” approach to policing conciliation. *Id.* at 1652-55. EEOC was required only to “inform the employer about the specific allegation” and then “try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice.” *Id.* at 1655-56. As elaborated in the May 23, 2019, order, OFCCP’s conciliation requirement is substantially similar *except* that it requires a “reasonable effort” rather than an “endeavor.” For that reason, some inquiry into whether the effort or endeavor was *reasonable* is a proper subject for review.

OFCCP’s primary argument is not persuasive. It has considerable flexibility in conciliation discussion, but not unfettered discretion. It may not unilaterally declare conciliation futile or impose impossible conditions on conciliation, or fail to provide the basic substance of the allegations. The May 23, 2019, order denied OFCCP’s motion for summary judgment on the issue because a reasonable fact-finder could reach the conclusion that OFCCP did not meet its conciliation obligations.

However, the order was very clear that it was not making findings and that based on the current submissions summary judgment was not appropriate for either party. Here Oracle’s argument is not persuasive. Nothing substantive has changed about the submissions.<sup>23</sup> A reasonable fact-finder could relate the history of the compliance review in a manner that cast Oracle in the role of unreasonable contractor refusing to provide information as requested and attempting

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<sup>22</sup> “If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” 42 U.S.C. § 2000e-5(b).

<sup>23</sup> Judge Larsen denied a similar motion from Oracle on the conciliation issue on June 19, 2017.

to unreasonably delay progress. That isn't a finding either—it's a reasonable perspective and read of the undisputed facts and that is enough to require denial of Oracle's motion for summary judgment on the point.

In addition, OFCCP argues that even if it did not conciliate as required, the remedy would not be dismissal but instead an order to conciliate, which would be mooted by the 16 month mediation that already occurred. PO at 27. I agree that in the current posture of the case, it is at best unclear whether any remedy could follow from a finding that OFCCP did not engage in reasonable conciliation efforts. Oracle seems to assume that the whole matter would be dismissed and go away, but does not adequately provide a basis for that result. The logical remedy would be an effective remand to OFCCP so that it could engage in reasonable conciliation efforts. If those failed, it could bring another enforcement action. But at this point in time, the parties have been pursuing the matter for years and any conciliation would be futile. The point appears to be further mooted because the parties, after the enforcement proceeding was initiated, mutually agreed to an extended stay to mediate the case. That appears to be functionally equivalent to any conciliation effort and would be the result of any finding that there OFCCP failed to engage in reasonable conciliation efforts.<sup>24</sup> So Oracle is not entitled to summary judgment on the facts and even if it were, its assumed result does not appear to follow.

### 3. Order to Show Cause

For both of these procedural issues, it appears that there is no appropriate remedy for Oracle given the subsequent events in this particular case. That would render the issues essentially moot, with no need to devote hearing time or adjudicatory resources to these historical disputes. OFCCP's earlier motion for summary judgment on conciliation was denied, since that motion was brought solely on the merits of the issue. OFCCP responded to Oracle's procedural affirmative defenses by arguing that no remedy was available, but it did not properly move for summary judgment on these issues.

Rule 56(f) of the Federal Rules of Civil Procedure provides that "After giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant . . ." Fed. R. Civ. P. 56(f); *see also, e.g., Albino v. Baca*, 747 F.3d 1162, 1176-77 (9th Cir. 2014). Oracle is thus given notice and is ordered to show cause why OFCCP should not be granted summary judgment on Oracle's affirmative defenses involving the Show Cause Notice and conciliation on the grounds that there is no appropriate remedy available to Oracle. If Oracle opposes summary judgment for OFCCP on these issues, it must file a responsive pleading by close of business on Monday, December 2, 2019. OFCCP may also file a responsive pleading, but must do so by close of business on Monday, December 2, 2019.

### ***B. The Substantive Discrimination Claims***

The substance of this case is about discrimination. A disparity alone is not discrimination. *E.g. Penk v. Or. State Bd. Of Higher Educ.*, 816 F.2d 458, 461 (9th Cir. 1987) ("historical disparity does not give rise to a successful Title VII claim"). If a disparity is the result of a factor that is not the employer's fault or within the employer's control, there is no actionable discrimination claim against

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<sup>24</sup> This reasoning is specific to the facts and history in this case. An argument that there is *never* a remedy for failure to conciliate since subsequent events change the posture would not be convincing. The particular history of this case—its length in litigation, the animus between the parties, and the fact that a long mediation was conducted—make it unlikely that any remedy would be available here.

the employer. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-52 (1989). Unlawful discrimination can be established in two ways: disparate treatment and disparate impact. *E.g. Figueroa v. Pompeo*, 923 F.3d 1078, 1083 (D.C. Cir. 2019). A disparate treatment case alleges that “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.” “Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (citing *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977)). Disparate impact claims “involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.” “Proof of discriminatory motive [] is not required under a disparate-impact theory.” *Teamsters*, 431 U.S. at 335 n.15; *see also Wards Cove*, 490 U.S. at 645 (in disparate impact case “a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer’s subjective intent to discriminate that is required in a ‘disparate treatment’ case.”); *Gay v. Waiters’ & Dairy Lunchmen’s Union*, 694 F.2d 531, 537 (9th Cir. 1982).

The SAC makes both disparate treatment and disparate impact claims. SAC at ¶¶ 12, 32; *see also id.* at ¶¶ 13-17. In the disparate treatment aspect of the claim, OFCCP alleged that this was due to both paying these employees less in the same or a comparable job and to hiring them for/assigning them to/keeping them in lower paying jobs. *Id.* at ¶¶ 18, 22, 25, 29; *see also id.* at ¶¶ 19-21, 23-24, 26-28, 30-31. OFCCP’s August 22, 2019, position statement made clear that it was pursuing a disparate treatment case with an alternative disparate impact theory—but both theories are limited to discrimination by top-level managers/executives/board members and HR managers. Though the parties sometimes discuss the disparate treatment claim as involving one allegation of compensation discrimination that is in part due to job assignment, this is not the clearest way to understand the claims at issue. Rather, OFCCP has really brought two sorts of disparate treatment claims: one based on straightforward compensation discrimination and another based on discriminatory steering of employees or applicants. Both claims result in under-compensation for the groups in question and they would share at least some remedies—increased compensation for those groups.<sup>25</sup>

This differentiation is consistent with how Dr. Madden presents her findings, at least at times. In the first five columns of her tables, where “exogenous” factors are added, Dr. Madden is analyzing disparities based on what she takes to be employees who are comparably situated absent the nature of their work at Oracle (except that they are in one of the job functions in question). Roughly, this could tell us about the combined effects of both steering and compensation discrimination. The remaining columns further analyze the disparities controlling for “endogenous” factors that involve where the employee fits in at Oracle. Once these are taken into account, theoretically we would see the effect of compensation discrimination, with the pay gap that was eliminated in the further analysis being the result of the steering discrimination.

Oracle disputes that either sort of analysis is at all proper and shows any sort of discrimination, but the query now is about how to best understand the claims being made. In the regulations, “steering” is a distinct sort of discrimination from compensation discrimination. *See* 41 C.F.R. §§ 60-20.2(b)(6), 60-20.4. For good reason. If a group is steered into a lower paying job, it will not be receiving lower pay for comparable work. If will be receiving lower pay for different,

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<sup>25</sup> Other remedies might differ. Importantly, the steps that *Oracle* would have to take to correct the discriminatory pattern or practice going forward would be different. In the compensation discrimination case it would need to ensure that it was paying similarly situated employees similar compensation. In the steering discrimination case it would need to ensure that it was steering similarly situated individuals into similar jobs.

lower paying work. The result is discrimination, but it isn't paying comparably situated employees less due to an impermissible factor. The employees aren't similarly situated for the purposes of compensation. Instead, the allegation is that the employees were similarly situated in terms of the jobs that they could perform and qualifications, but that they were not treated in a similar way because they were steered, funneled, or assigned to different jobs, resulting in less compensation.

In the SAC, OFCCP is alleging that Oracle engages in both compensation discrimination and steering discrimination. Oracle contends that it engages in no discrimination. But the two theories do not necessarily stand or fall together. In the pending motions, the parties are not always careful to distinguish these two theories, with the result that some of the arguments become confused. Here I analyze them separately to avoid unnecessary difficulties.<sup>26</sup> Both of these theories are disparate treatment claims—OFCCP contends that Oracle (by which it means high-level managers and HR managers) intentionally discriminated by steering women, Asians, and African-Americans to lower paying jobs and by paying similarly situated women, Asians, and African-Americans less than others. OFCCP also brings a separate disparate impact claim, alleging that a neutral policy or practice has disparate impact on women, Asians, and African Americans in the job functions. The SAC identified reliance on prior pay as a potential culprit and subsequent filings have floated other possibilities.

### 1. Disparate Treatment: Compensation Theory

The most prominent theory in this case is that Oracle intentionally discriminates against women, Asians, and African Americans in some of its job functions in terms of compensation. This is a disparate treatment claim. “Disparate-treatment cases present the most easily understood type of discrimination and occur where an employer has treated a particular person less favorably than others because of a protected trait. A disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job-related action.” *Ricci v. DeStafano*, 557 U.S. 557, 577 (2009) (internal citations and quotations omitted).

#### a. Legal Framework

“In order to prevail in a Title VII case, the plaintiff must establish a prima facie case of discrimination. If the plaintiff succeeds in doing so, then the burden shifts to the defendant to articulate legitimate, nondiscriminatory reasons for its allegedly discriminatory conduct. If the defendant provides such a reason, the burden shifts back to the plaintiff to show that the employee's reason is a pretext for discrimination.” *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). A prima facie case requires evidence giving rise to an inference of unlawful discrimination, which can be done with direct or circumstantial evidence of discriminatory intent or via a form of the *McDonnell-Douglas* framework, which requires showing that the plaintiff is in a protected class, suffered some sort of adverse action (i.e. lower compensation here), and that similarly situated individuals outside the protected class were treated more favorably. *Id.*; see also *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-76(1978).

“The burden of establishing a prima facie case of disparate treatment is not onerous.” The plaintiff must only raise an inference to discrimination. The burden on the defendant “is to rebut the presumption of discrimination by producing evidence” that the different treatment is the result of “a legitimate, nondiscriminatory reason.” “The defendant need not persuade the court that it was actually motivated by the proffered reasons.” “The explanation provided must be legally sufficient

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<sup>26</sup> This is particularly important because what it means to be similarly situated varies in the two theories.

to justify a judgment for the defendant. If the defendant carries the burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.” The plaintiff may challenge the reason offered as pretext, and this burden “merges with the ultimate burden of persuading the court that [the plaintiff/class] has been the victim of intentional discrimination.” “The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Tex Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981); *see also Furnco*, 438 U.S. at 577-78 (1978); *Gay*, 694 F.2d at 537-38. While the rebuttal burden is one of production, “[a]n employer cannot satisfy its burden of production with insufficiently substantiated assertions.” *Figueroa*, 923 F.3d at 1087. Rebuttal evidence must be evidence that is admissible at trial, if believed would lead to a finding that there was no discrimination, must be facially credible, and must present a clear and specific explanation. *Id.* at 1087-88; *see also Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1211 (9th Cir. 2008).

The applicable regulations on sex discrimination address compensation discrimination in more detail. “Compensation may not be based on sex. Contractors may not engage in any employment practice that discriminates in wages, benefits, or any other forms of compensation, or denies access to earnings opportunities, because of sex, on either an individual or systemic basis.” 41 C.F.R. § 60-20.4. As particularly relevant to this case,

Contractors may not pay different compensation to similarly situated employees on the basis of sex. For purposes of evaluating compensation differences, the determination of similarly situated employees is case-specific. Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.

41 C.F.R. § 60-20.4(a).

Disparate treatment may be individual, or it may involve a pattern or practice of discrimination against a group of people based on a protected characteristic. In a pattern or practice case, the plaintiff has the burden of proving “more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts.” Instead, the plaintiff must “establish by a preponderance of the evidence that [] discrimination was the company’s standard operating procedure—the regular rather than the unusual practice.” *Teamsters*, 431 U.S. at 335-36; *see also Penk*, 816 F.2d at 463; *Reynolds v. Barrett*, 685 F.3d 193, 202 (2d Cir. 2012). To prevail in a pattern or practice case the plaintiff must show both a disparity disadvantaging a protected group and discriminatory causation—i.e. that the disparity is the result of discriminatory animus rather than a legitimate, nondiscriminatory cause—but both can be done by statistical evidence. *See, e.g., Palmer v. Shultz*, 815 F.2d 84, 90-91 (D.C. Cir. 1987).

In a pattern or practice case, the plaintiff has the burden of making a prima facie case of a policy, pattern, or practice of discrimination. This can be done by statistics alone, or with statistics brought to life with anecdotal evidence. “Once the plaintiffs make out a prima facie case of discrimination in a pattern-or-practice case, the burden of production shifts to the employer to show that the statistical evidence proffered by the plaintiffs is insignificant or inaccurate.” This can be done “by challenging the source, accuracy, or probative force of the plaintiffs’ statistics.” If this is done, “the trier of fact must then 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 (internal quotations omitted) (citing and quoting *Teamsters*, U.S. at 339, 360; *Robinson v. Metro-North Commuter R.R. Co.* 267 F.3d 147, 158-59 (2d Cir. 2001)).

b. OFCCP’s Argument and Oracle’s Opposition

Both parties move for summary judgment on the disparate treatment compensation discrimination claim. I begin with OFCCP’s motion. OFCCP contends that the “unrebutted statistical evidence establishes that Oracle pays women, Asians, and African Americans less than their male and White counterparts, respectively, who are similarly-situated according to the factors Oracle has identified in setting pay.” PM at 15. It argues that as a matter of law, statistical evidence alone can establish discrimination, and that the evidence of record in this case does so. *Id.* at 16.

To substantiate this claim, OFCCP relies on Dr. Madden’s reports. It states that her regression analyses control for education (measured by degree level) and experience (measured by age and tenure) and thus derivatively control for skill as well. Skill is also measured by job title. On this basis, Dr. Madden conducted analyses that produce “gender or race coefficient(s)” and “standard deviations from the expected value of a non-discriminatory process.” Statistical significance is measured at 1.96 standard deviations, which represents a 5% probability that the result could be due to random chance. Dr. Madden found statistically significant disparities in total compensation in terms of sex in the Product Development, Support, and Information Technology functions and race in the Product Development functions. When Dr. Madden included career level and management designation in her analysis, she found that statistically significant disparities still existed, indicating that part of the discrimination was due to “channeling” (to be discussed below) and part was due to straightforward compensation discrimination within comparative jobs. PM at 17-21.

OFCCP argues that Oracle’s evidence does not create a genuine dispute of material fact because Oracle did not produce any of its own pay analyses and it is legally insufficient for a defendant to meet its “burden of production” by casting doubts on a plaintiff’s regressions. PM at 22; *see also* PS at 239. It also points to analyses completed by Dr. Madden using Dr. Saad’s methodology, which it contends shows that there are still significant disparities in some categories in some years. PM at 23; *see also* PS at 244-51. Further, OFCCP contends that Dr. Saad’s opinion must be rejected because they contradict Oracle’s written compensation policies. PM at 23-24; *see also* PS at 174-75, 253.

Oracle’s opposition contends that OFCCP has fundamentally misconstrued Oracle’s compensation policies and that it does not have strict policies at all. Rather, at most Oracle has guidelines that managers are told to follow, but they make their own determinations based on a variety of factors. DO at 3-5. Oracle contends that OFCCP has misstated the law in an attempt to shift the burden. In its view, OFCCP must first establish that Oracle engages in a pattern or practice of discrimination and has not done so because the statistical and anecdotal evidence cannot support an inference to a pattern or practice of intentional discrimination. Even if it does, Oracle contends that it has produced evidence to rebut the statistics and OFCCP cannot prove its case. Oracle argues that it has no obligation to prove that it did not discriminate via a different statistical model and that it can instead prevail based on Dr. Saad’s evidence criticizing Dr. Madden’s analyses as foundationally misguided and inaccurate once better variables are included. *Id.* at 6-8.

Oracle argues at length that OFCCP’s statistical evidence cannot support an inference of intentional discrimination because Dr. Madden failed to compare Oracle employees who are

similarly situated. In its view, Dr. Madden aggregated employees by job code when in fact employees in the same job code do very different sorts of work and have variable levels of skill, duties, and responsibilities. It adds that the invented “job descriptor” category also fails to aggregate similarly situated employees because it includes employees at different career levels. Oracle characterizes Dr. Madden’s analyses as “comparisons that treat all employees who are the same age, have the same level of education degree, started at Oracle at the same time (regardless of where or in what role), and work in the same broad area of the company that ‘job descriptor’ reflects [] as similarly situated for pay purposes.” But Oracle maintains that this is insufficient because its workforce is diverse and complex and includes employees doing very different sorts of work, difference that Oracle asserts render the analysis not probative. DO at 8-12; *see also id.* at 12-14.

Moreover, Oracle argues that even if the employees are similarly situated, Dr. Madden’s analyses do not control for all of the major factors that influence compensation and that the factors used are not valid measures of what they purport to represent. It points to alleged insufficiencies in Dr. Madden’s “experience” category, which it states is based solely on time at Oracle and age, omitting the tenure in the current position or the relevance of prior work. It argues that the “education” factor fails because it does not consider the relevance of the degree to the job. *Id.* at 14-19. As a result of these deficiencies, Oracle contends that OFCCP cannot establish a prima facie case of a pattern or practice of discrimination, and that thus its motion for summary judgment should be denied (and Oracle’s granted).<sup>27</sup> *Id.* at 19-21.

As summarized in its reply, OFCCP’s central argument is that it has presented robust evidence of statistically significant disparities, even if Oracle-related controls are used, and that Oracle has failed to rebut this statistical evidence because it has only attempted to “poke holes” in the findings, which is insufficient to rebut the inference suggested by the evidence. OFCCP characterizes Oracle’s defense as maintaining that it is too large and complex to be analyzed, but argues that this is incorrect and inconsistent with Oracle’s affirmative action obligations. PR at 1-2. OFCCP also argues that Oracle’s documents establish centralized policies related to compensation and rejects Oracle’s claims of decentralization as inconsistent with the affirmative action obligations. *Id.* at 2-4. It maintains that Dr. Madden appropriately compared similarly situated employees and in so doing found significant disparities. Even controlling the Oracle-tainted variables, the analysis still shows discrimination. *Id.* at 6-9. It contends that Oracle’s attempted rebuttal relies on misleading cherry-picked comparisons that highlight how misleading reliance on promised compensation can be. *Id.* at 9.

### c. Burdens and the Role of Statistical Evidence

Some of the issues raised here are better discussed with reference to Oracle’s motion and will be deferred. OFCCP’s motion can be decided on the basis of the proper role of statistical evidence in a pattern or practice case. Both individual and pattern or practice cases are analyzed using a burden-shifting framework that requires the plaintiff to make out a prima facie case, which then must be rebutted. As the Second Circuit explains,

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<sup>27</sup> Oracle adds that OFCCP has not produced anecdotal evidence of systemic compensation discrimination, while its own non-statistical evidence shows its anti-discrimination and diversity bona fides. DO at 22-23. As to this anecdotal evidence, OFCCP indicates that it chose not to rely on it for the purposes of summary decision, but will do so at trial, if necessary. It further argues that anecdotal evidence is not required to establish discrimination. PR at 14-15. There is no real dispute here. OFCCP is correct that anecdotal evidence is not necessary and so summary judgment *could* be proper. Oracle is correct that absent anecdotal evidence, the case for a finding of intentional discrimination is weaker, making summary judgment less likely. Regardless of the anecdotal evidence, I find that OFCCP’s motion must be denied.

In a pattern-or-practice case, the plaintiff's initial burden is heavier in one respect and lighter in another respect than the burden in an individual case. It is heavier in that the plaintiff must make a prima facie showing of a pervasive policy of intentional discrimination rather than a single instance of discriminatory treatment. It is lighter in that the plaintiff need not initially show discrimination against any particular present or prospective employee. Although instances of discrimination against particular employees are relevant to show a policy of intentional discrimination, they are not required; a statistical showing of disparate impact might suffice. With both types of cases, the plaintiff's initial burden is only to present a prima facie case that will support a rebuttable presumption of the ultimate fact in issue.

*United States v. City of New York*, 717 F.3d 72, 83-84 (2d Cir. 2013) (internal citations omitted).

In both sorts of cases, the defendant then has a burden of production to rebut the prima facie case. *Id.* at 84-85. This can be done with “any evidence that is relevant to rebutting the inference of discrimination.” *Id.* at 85.

[I]t is always open to a defendant to meet its burden of production by presenting a direct attack on the statistics relied upon to constitute a prima facie case. A defendant might endeavor to show that the plaintiff's statistics are inaccurate, for example, infected with arithmetic errors, or lacking in statistical significance, for example, based on too small a sample. But the rebuttal need not be so limited. A defendant may rebut the inference of a discriminatory intent by accepting a plaintiff's statistics and producing non-atistical [sic] evidence to show that it lacked such an intent . . . such an explanation rebuts the inference from a plaintiff's statistics, even though it does not directly challenge the statistics themselves.

*Id.* Credibility is not assessed at this stage. *Id.* at 87, 89. If the defendant cannot satisfy this burden, the plaintiff is entitled to judgment as to liability and the case proceeds to a consideration of the appropriate relief. “[I]f the defendant satisfies its burden of production, the presumption arising from the plaintiff's prima facie case ‘drops out’ and the trier of fact must then determine, after a full trial, whether the plaintiff has sustained its burden of proving by a preponderance of the evidence the ultimate fact at issue.” *Id.* at 87. The “ultimate fact at issue” is whether the employer had a pattern or practice of intentional discrimination.

Pattern or practice claims can rely on statistical evidence, especially where anecdotal evidence brings “the cold numbers convincingly to life.” *Teamsters*, 431 U.S. at 339; *see also Penk*, 816 F.2d at 463 (discriminatory intent may be shown through “statistical, nonstatistical, and anecdotal evidence”); *Segar v. Smith*, 738 F.2d 1249, 1265-66 (D.C. Cir. 1984), *cert. denied sub nom.*, *Meese v. Segar*, 471 U.S. 1115 (1985). In large samples, “if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [result] was random would be suspect to a social scientist.” *Castenda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (Equal Protection Clause case); *see also Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.14 (1977) (same point in Title VII case). “Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.” *Hazelwood*, 433 U.S. at 307-08; *see also Palmer*, 815 F.2d at 91-92; *Segar*, 738 F.2d at 1278. A plaintiff alleging discrimination “need not prove discrimination with scientific certainty;

rather, his or her burden is to prove discrimination by a preponderance of the evidence.” *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

But “statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.” *Teamsters*, 431 U.S. at 340; *see also Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991). “[O]mission of variables from a regression analysis may render the analysis less probative than it otherwise might be,” but without “some other infirmity,” an analysis that “accounts for the major factors” can establish discrimination. “Normally, failure to include variables will affect the analysis’ probativeness, not its admissibility.” *Bazemore* at 400; *see also Hemmings v. Tidyman’s, Inc.*, 285 F.3d 1174, 1184-89 (9th Cir. 2001). Statistical evidence that is admissible may be found not credible and unpersuasive due to infirmities. *Penk*, 816 F.2d at 464.

The role of statistical evidence is to support an inference of discriminatory intent. *Gay*, 694 F.2d at 550. There is no hard statistical cut off above which discriminatory intent is inferred as a matter of law or below which discriminatory intent cannot be inferred as a matter of law. The element is the intent and determination of intent is not merely a battle of statistics. *Id.* at 551-53. “Simply put, statistics demonstrating that chance is *not* the more likely explanation are not by themselves sufficient to demonstrate that race *is* the more likely explanation for an employer’s conduct.” *Id.* at 553 (emphasis in original). Statistical evidence must be considered together with the other evidence going to discriminatory intent. *See, e.g., Palmer*, 815 F.2d at 98-99.

#### d. OFCCP’s Motion Must be Denied

OFCCP’s motion presses very hard on the proposition that Oracle’s rebuttal burden requires it to come forward with analyses establishing that there is no discrimination. There is some legal support for this proposition, though OFCCP takes that support out of context and in doing so invents a legal rule that is inconsistent with the law governing the use of statistics in pattern or practice cases.

Once a plaintiff has produced statistical evidence of a significant disparity, “the defendant cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff’s statistics.” *EEOC v. General Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 581 (9th Cir. 1989), *cert denied*, 498 U.S. 950 (1990); *see also Sobel v. Yeshiva Univ.*, 839 F.2d 18, 34 (2d Cir. 1988); *Palmer*, 815 F.2d at 101; *Cartlett v. Missouri Highway and Transp. Comm’n*, 828 F.2d 1260, 1266 (8th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1989); *Segar*, 738 F.2d at 1287. But this does not mean that a claim cannot be defended with evidence challenging the statistics.

In response to statistical evidence presented in an effort to establish discriminatory intent, a defendant is always entitled to offer rebuttal evidence. Rebuttal evidence usually includes a[n] explanation of statistical disparities based on neutral factors. It can, however, be limited to (1) a showing that the plaintiffs’ statistics are flawed, (2) a demonstration that the disparities generated or isolated by the statistics are not statistically significant or actionable, or (3) presentation by the defendant of statistical evidence contradicting that of the plaintiffs.

*Penk*, 816 F.2d at 464; *see also Palmer*, 815 F.2d at 99. A defendant may also “challenge the ability of the statistical evidence based on mathematical regressions to approximate the actual determinative factors in the employment decision-making process.” *Penk*, 816 F.2d at 464. “This concern is particularly important where courts examine academic and professional employment and

advancement decisions which properly include a high regard for subjective personnel qualities and characteristics.” *Id.*

Harmonizing *Penk* in *General Tel.*, the Ninth Circuit explained that the statistical flaws “were of a substantially different character” in the cases. “In *Penk*, the plaintiffs’ regression analyses failed to account for arguably the most critical factors” and “were so central to [the] employment decisions that the defendants, by merely pointing out such omissions, could defeat any inference of discrimination.” In *General Tel.* the flaws were merely hypothetical and there had been no indication that the additional factors would have changed the outcome. While a flaw of this sort “may render the regression analyses less precise, merely pointing to such an imperfection does not, without more, defeat a showing of intentional discrimination established by the regression analyses.” *General Tel.*, 885 F.2d at 582. Hence, where a plaintiff offers “regression analyses which showed a disparity in [an employment practice] that correlates with [a protected category], while controlling for the major legitimate factors, raising a strong inference of discrimination,” a defendant “cannot defeat that showing of discrimination simply by pointing out possible flaw in [the plaintiff’s] data.” Instead, a defendant has “to produce credible evidence that curing the alleged flaws would also cure the statistical disparity.” *Id.* at 582-83. A defendant may also defeat an inference of discrimination with its own affirmative evidence. *Id.* at 583. This flexible approach is in line with other cases that discuss rebuttal of statistical evidence. In *Segar*, the D.C. Circuit explained a defendant seeking to rebut statistical evidence may attempt to show that the disparities do not exist or provide explanations for them. Bare articulation of a possible explanation is generally insufficient in a pattern or practice case; rather, it must produce evidence that would, if accepted, lead the fact-finder to decline to draw the inference to intentional discrimination that was established in the *prima facie* case. 738 F.2d at 1267-69.

While “in certain cases an inference of intent may be drawn from statistical evidence,” “statistics must be relied on with caution.” When applied across “dissimilar jobs” statistics can be relevant, but “job evaluation studies and comparable worth statistics alone are insufficient to establish the requisite inference to the disparate treatment theory.” “The weight to be accorded such statistics is determined by the existence of independent corroborative evidence of discrimination.” *American Federation of State, Cty., and Municipal Employees (AFSCME) v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985); *see also Forsberg v. Pacific Nw. Bell Tel. Co.*, 840 F.2d 1409, 1418-19 (9th Cir. 1988). The probative force of statistics depends on the surrounding facts and circumstances in the case. *Spaulding v. University of Washington*, 740 F.2d 686, 703 (9th Cir. 1984). “[T]he weight of statistical proof relies implicitly on ‘the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination.’” *Id.* (quoting *White v. City of San Diego*, 605 F.2d 455, 460 (9th Cir. 1979) (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.), *cert denied*, 404 U.S. 984 (1971))).

The governing law provides for a much more nuanced role to statistical evidence than that proposed by OFCCP. A case cannot be won simply by coming forward with *any* analysis showing a disparity and then requiring the defendant to complete a statistical analysis establishing that there is no discrimination. Rather, the statistics may be used to license an inference to a regular practice of intentional discrimination—the required showing in a pattern or practice case. But that inference might fail, regardless of whether or not Oracle establishes an explanation for the disparity—other evidence may lead a fact-finder to not draw the inference suggested by the statistics. OFCCP’s misunderstanding of the legal landscape confuses the *evidence* and the *element*. The element in a disparate treatment claim is intentional discrimination. The evidence is the disparity. The question is whether the evidence licenses an inference to the element, not whether the evidence has been

found. In challenging that inference, a defendant can point to other evidence or to the infirmity of the evidence supporting the inference.

It would be insufficient for Oracle to simply come forward with hypothetical shortcomings and new-fangled factors that *might* make a difference. But as discussed above in reference to Dr. Saad's reports, that is not what Oracle has done. Dr. Saad's criticism goes to the heart of Dr. Madden's analyses. If I accept those critiques, I will conclude that Dr. Madden's analysis is unreliable because it is not comparing similarly situated employees at the outset and does not control for the variant skills employees have and the sorts of work that they can do. If I accept Dr. Saad's evidence, all of Dr. Madden's controls will be insufficient to make any showing of intentional discrimination and the statistical evidence will be fundamentally unreliable. Moreover, Dr. Saad's analyses, if accepted, would contradict a finding that there is systemic discrimination in the job functions in question over a period of years. Whether these points are taken as a counter to OFCCP's prima facie showing or as a rebuttal to prima facie showing, they create a genuine issue of fact that precludes summary decision.

Contrary to some insinuations OFCCP makes, this line of criticism is decidedly not a claim about inferiority. Dr. Madden's analysis would show that there is a disparity. Indeed, the start of the analysis is a "raw" disparity. That could be due to chance, it could be due to discrimination, or it could be due to things that happened before the employees arrived at Oracle (or outside of their employment with Oracle). Disparities and discrimination in education or societal pressures might produce a situation whereby the "input" to Oracle already contains troubling imbalances. It may be that there are more people of certain races or genders that have been equipped to do certain types of work than others, resulting in skewing of compensation due to the skills that individuals bring to Oracle and the sorts of work they have been trained to perform. This may well be improper and unacceptable, indicating some sort of discrimination to be redressed. But it would not be Oracle's discrimination. Oracle cannot be held liable here for disparities that it cannot control and does not cause or exacerbate. It can only be held liable for *its* discrimination.

OFCCP and Dr. Madden contend that the correct inference from the evidence is that Oracle *is* responsible for the discrimination. But I find that this is not the only inference a reasonable fact-finder could draw. Additionally, if the criticisms of the statistical analyses are given weight, it might be proper to draw no inferences at all from the evidence because it is simply too unreliable. OFCCP's motion for summary judgment on this theory must therefore be denied.

e. OFCCP's "Salary-Only" Claim

OFCCP treats salary compensation as a separate basis for (what would be partial) summary judgment. In its motion, it contends that Dr. Saad did not study salary data and thus cannot refute the evidence of significant salary disparities. PM at 22-23; *see also* PS at 240. Its reply asserts that it properly made claims of salary discrimination and that are unrebutted. It asserts that "salary" discrimination as distinct from total compensation discrimination is part of the complaint because it was used in some of the paragraphs spelling out disparities and salary discrimination is a form of compensation discrimination. It maintains that Oracle chose not to respond to the salary discrimination claims and that as a result it should be awarded summary judgment. PR at 11-13.

Oracle's opposition argues that OFCCP has made a new salary discrimination claim in its motion for summary decision, representing that the SAC stated total compensation claims with only one exception. DO at 23-24. Even if the new claims are considered, Oracle contends that they fail for the same reasons that the total compensation analyses fail—they do not concern similarly

situated employees and do not account for the major factors driving compensation. *Id.* at 24-25. Further, Oracle contends that even if Dr. Madden’s latest analyses on salary discrimination are admissible and considered, the most they could show is statistically significant salary differences in some functions in some years as to some groups, which could not establish a pattern or practice of discrimination. It also contends that the disparities found are insufficient to support an inference to discrimination for the years in question. *Id.* at 25-27.

The failure of this argument is evident from the framing. Salary discrimination is a form of compensation discrimination. If Oracle rebuts the claims of compensation discrimination, it will also have rebutted the claims of salary discrimination. OFCCP may be able to pick out data points that look more significant or were not addressed in as much detail, but if those data points are put into a context where there is no total compensation discrimination, a fact-finder could reasonably decline to infer that the isolated salary disparity is due to any discriminatory intent. This is *not* to say that a fact-finder would reach these conclusions and draw these inferences. Rather, it is only to point out that the compensation case is interrelated and one side or the other cannot prevail by cherry-picking particular individual data points that are most favorable.

OFCCP has lost sight of the ultimate issue. I must determine whether or not Oracle intentionally discriminated against women, Asians, and African Americans in terms of compensation on a systematic basis—as part of its regular practice. As in most cases, there appears to be no “smoking gun,” direct evidence of discriminatory animus or motive. OFCCP has not presented evidence showing a master plan of discrimination. Nor is it required to do so. As it may, it is making its case based on statistical evidence from which the fact-finder will *infer* that intentional discrimination is Oracle’s pattern or practice. To rebut that inference, Oracle only needs to produce evidence that would lead a reasonable fact-finder to draw a different conclusion. It has done so with the evidence of Dr. Saad. It could lead a reasonable fact-finder to conclude that Dr. Madden’s entire approach is too crude and unreliable or that it is not adequate to support the required inference.

Technical points cannot win this case for OFCCP (or Oracle). The complaint is phrased in terms of compensation discrimination with some individual points referring to salary because salary is a part of compensation and apparently those points were more strongly made by OFCCP shifting the component of compensation analyzed. If Dr. Saad’s original report is countenanced, OFCCP did this because it allowed cherry-picking favorable examples. OFCCP cannot parlay its haphazard shifts between “compensation” and “salary” in the complaint into a sort of default judgment because Dr. Saad (and Dr. Madden for what it is worth) adopted a more principled analysis of the underlying issue. Insofar as it would be appropriate to analyze the salary discrimination claim separately, I find that Oracle has produced enough evidence to create a genuine issue of fact regarding the inferences that should be drawn from the evidence in regards to whether Oracle is intentionally discriminating in terms of salary compensation. Summary judgment on the point is denied.

f. Oracle’s Motion and OFCCP’s Opposition

OFCCP’s motion for summary judgment cannot be granted on the compensation discrimination claim since a reasonable fact-finder could find for Oracle after a hearing. Oracle urges more, contending that it is entitled to summary judgment on the discriminatory treatment claim because OFCCP has not met its first step burden of showing that race or gender discriminating was a standard practice or operating procedure such that Oracle had discriminatory intent in respect to the class of individuals at issue. OFCCP has relied on statistical analyses to make

the showing, but Oracle argues that those statistical analyses are fundamentally flawed. DM at 12-14.

Oracle asserts that for the statistical evidence to establish discrimination, the employees grouped together must be similarly situated. *Id.* at 14. It argues that in this case they are not because Dr. Madden did not consider an employee's duties, skills, and experience directly but instead used other measures of education and experience on the grounds that anything else was within Oracle's control. For experience, Dr. Madden looked only to prior work without respect to its relevance to the current work at Oracle. For education, she considered only degree, not the school attended, subject matter, or relation to the job applied for. Oracle also contends that Dr. Madden was missing education data for half of the field of analysis. It argues that even with the late attempts to modify the opinion to include job codes, the analysis still fails to account for skills, experience, and performance. *Id.* at 15-17. Oracle contends that many courts have rejected Dr. Madden's reports because they do not account for relevant factors, as it contends they fail to here. *Id.* at 17-18.

In addition, Oracle argues that OFCCP's pattern or practice claim is peculiar in that it does not allege discrimination across an entire workforce but only localized into particular job functions. It asserts that OFCCP's analyses as to other work group show no significant disparities. It concludes that OFCCP's analyses only demonstrate "the unremarkable fact that when one cherry-picks certain groups of employees and ignores important and common-sense variables affecting compensation, pay disparities may emerge." DM at 18-19. Moreover, Oracle argues that its compensation determinations are decentralized and made on a case-by-case basis and are thus not susceptible to any class or company-wide practice of intentional discrimination. *Id.* at 19. It maintains that OFCCP's analyses inappropriately aggregate thousands of different decisions by different decision makers and thus cannot show intentional discrimination as the reason for any disparity. *Id.* at 19-20. As to OFCCP's anecdotal evidence, Oracle argues that it cannot support a showing of discrimination because OFCCP has conceded that it is not accusing individual managers of wrongdoing and it does not possess anecdotal evidence related to those it is accusing of wrongdoing.<sup>28</sup> *Id.* at 20.

OFCCP's opposition contends that there are disputed facts as to Oracle's compensation policies, which OFCCP contends is centralized and driven by policy. OFCCP points to use of job codes and job families with taxonomies of levels as well as general guidelines/policies. It also argues that the approval process directs the way various job codes are assigned and that higher-level management must approve compensation decisions. It adds that Oracle limits budgets for pay raises, which does not permit correction of inequities. In addition, OFCCP contends that Oracle must have compensation policies to comply with its affirmative action requirements. PO at 4-6.

OFCCP also argues that regardless of whether the discrimination is due to the higher-level managers or the lower-level managers, Oracle is responsible. PO at 6-7. Ordinarily, this point would have force. But OFCCP has already taken the firm position that it is not accusing any lower level managers of wrongdoing. It may now regret that position, but it filed a statement of position very clearly stating that it was not accusing any lower-level managers in the subject job functions of wrongdoing. Having made its choice, OFCCP cannot now claim that Oracle is liable because of discriminatory actions of lower-level managers. OFCCP is committed to the position that there are

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<sup>28</sup> Oracle also asserts that its affirmative defenses must be considered, including differentiating pay based on factors other than race or sex, such as skill or job performance. DM at 21. Oracle bears the burden on its affirmative defenses and the points are not pursued or developed enough to permit analysis, let alone warrant summary judgment.

no such discriminatory actions and any theories that require a finding that low-level managers in the subject job functions engaged in discrimination must be rejected.

More on point, OFCCP's opposition argues that Oracle has misstated the law on the relative burdens of proof in a pattern or practice case. It argues that it must first only present statistical evidence that gives rise to an inference to unlawful discrimination, which it contends it has done with the evidence from Dr. Madden. OFCCP asserts that Oracle therefore has a heightened rebuttal product that cannot be met by calling the statistical evidence into question as to potential omissions or flaws in the evidence. Rather, OFCCP maintains that Oracle must produce evidence showing that omitted factors would eliminate the disparities, which it did not do. PO at 8-12.

Next, OFCCP argues that it has no obligation to identify how Oracle is discriminating, but can rely on a general inference based on a disparity. It asserts that Oracle's budgetary considerations mean that the amount of money for salary increases and adjustments is limited, and the disparities can be used to infer that these budgetary considerations were used in a discriminatory manner to pay women and minorities less than white men for similar work. PO at 14. In a note, OFCCP argues that its limitation of the allegations to particular segments of Oracle's operation does not defeat the inference because it is possible that Oracle discriminates in some areas but not others and that the areas identified are the largest and thus most susceptible to statistical analysis. *Id.* at 14-15 n. 20. OFCCP maintains that Oracle has the burden of explaining the disparities with reference to neutral factors, after which Oracle might then be liable for a disparate impact claim. *Id.* at 15.

As another facet of its disparate treatment claim, OFCCP contends that Oracle's discrimination exists in its failure to correct disparities that exist, which can be treated as a pattern and practice of discrimination and results in a continuing violation with every paycheck. It asserts that because Oracle is a federal contractor, it is under an obligation to study its compensation and to correct disparities. It avers that Oracle is liable because it either did not meet its affirmative action requirements, indicating intentional discrimination, or did not correct disparities, indicating intentional discrimination. PO at 16-18.

In reply, Oracle stresses that this is not a case in which it is asserting that OFCCP's analyses have missing variables. Rather, it is alleging the analyses are fundamentally misconceived by "dumping" too many disparately situated employees into one analysis and then using "rudimentary" controls to complete the analysis. It argues that the presence of the assignment theory indicates that the employees in the analysis are not similarly situated. DR at 1-2. Oracle contends that in order for there to be any showing of discrimination the compared employees must be similarly situated in terms of the legitimate factors that influence pay, such as job duties and skill. It contends that the cases OFCCP cites for a looser standard are inapposite, focusing on different sorts of discrimination or unskilled, entry-level jobs. *Id.* at 4-6. Here, Oracle maintains that Dr. Madden's analyses are so deficient that they cannot make out a prima facie case—because Oracle's job require different skills, an aggregate pool cannot form the basis of a showing of compensation discrimination. *Id.* at 6-8.

Oracle also argues that the evidence shows that it does not possess a set of central compensation policies that dictate pay. DR at 2. Rather, there are central guidelines coupled with significant discretion to front-line managers exercised in broad ranges and subject to review that rarely alters a decision. *Id.* at 12-13. It contends that to establish systemic discrimination there must be some cohesive evidence showing a pattern or practice of discrimination, something it avers is lacking here. *Id.* at 9-10. It deems OFCCP's anecdotal evidence idiosyncratic and its statistics based

on flawed assumptions. As a result, it argues that OFCCP cannot establish systematic discrimination at Oracle and it should thus be awarded summary judgment. *Id.* at 3.

g. Common Proof and Peculiar Procedural Posture

Oracle, in its motion and reply, argues that in order for OFCCP to prevail in the case, it must be able to present some common or cohesive evidence of discrimination. In so doing, it relies on some cases concerning Rule 23 of the Federal Rules of Civil Procedure. OFCCP rejects this reliance, arguing that Rule 23 present an entirely different issue not relevant here because OFCCP is a government agency that is not subject the class certification requirements of Rule 23. Rather, it is invested with the authority to bring the equivalent of an “automatic” class action. PO at 18-19.

Both parties are partially correct and noting the ways in which they are correct explicates how the various issues must be evaluated here. Oracle is correct that in proving its case, OFCCP will need to present cohesive evidence of discrimination. OFCCP is alleging systemic intentional discrimination that is the standard operating procedure of the company and has impacted large groups of people. It will not be enough for OFCCP to establish that some managers discriminated or that some “teams” or “departments” or “lines of business” have endemic discrimination. Plaintiffs who seek to establish intentional discrimination across a broad range undertake a “heavy burden” and the case may fail even where “an attempt to prove a narrower case might have prevailed.” *Penk*, 816 F.2d at 464. Here, OFCCP chose to bring the claim based on the headquarters facility as a whole and with regard to three of sixteen broad job functions. To succeed in that claim, OFCCP will need a common mode of proof. This is not news to OFCCP—it has been seeking out that common mode of proof, arguing that there are common compensation practices or mechanisms of control and relying on the evidence of Dr. Madden related to the broad areas in order to support an inference about discrimination as a whole. So Oracle is right that OFCCP needs a common, cohesive mode of proof, and OFCCP doesn’t really disagree—it has attempted to provide it.

In this light, cases involving Rule 23 do have potential bearing on the ultimate issue post-hearing because questions of commonality (as they arise in both Rule 23(a)(2) and 23(b)) are relevant. The commonality requirement demands that there be some “common contention [] of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). In *Wal-Mart*, this meant that the putative class representatives had to show that the defendant used some common biased test or criterion or operated under a general policy of discrimination. *Id.* at 353. OFCCP will also have to prove that Oracle operated under a general policy of discrimination. It asserted as much by bringing a pattern or practice claim. Rule 23 cases dealing with commonality speak to whether a claim is capable of proof and decision on a common basis. If it turns out that there is no common question that is shared across the groups OFCCP alleges that Oracle has a pattern and practice of intentionally discriminating against, then the proof will fail.

Yet while Rule 23 cases have some relevance for this reason, there is a crucial difference. Certification under Rule 23 is a prerequisite of pursuing a class cation. As a result, the Rule 23 certification question can have considerable overlap with merits question and the proponent may have to make merits showings at a preliminary stage. This is a result that *Wal-Mart* embraced—the plaintiffs had to show part of the merits of their pattern or practice case at the class certification stage in order to satisfy the commonality element of Rule 23. 564 U.S. at 351-52.

OFCCP never needs to satisfy Rule 23, so it never needs to make the showings required for commonality at any preliminary stage. The first time it needs to make those overlapping merits showings is when the case is adjudicated on the merits and an adjudicator must determine if OFCCP has established its claim as to the groups named in the complaint. In opposing summary judgment on the point, OFCCP has the benefit of having the evidence viewed in the light most in its favor and all reasonable inferences being drawn in its favor. So for Oracle to prevail now, it must do more than establish on the merits that Dr. Madden's evidence and facts about Oracle's compensation system fail to make a showing of systematic discrimination—it must make the far stronger showing that no reasonable fact-finder could conclude, viewing the evidence in the light most favorable to OFCCP and drawing reasonable inferences in its favor, that Oracle's compensation scheme and Dr. Madden's evidence cannot make out a showing of systemic discrimination.

#### h. Common Policies

With this understanding, there are at least two issues. One concerns compensation policies, which would go to whether or not Oracle *could* be intentionally discriminating on a systematic basis through the alleged wrongdoers. The second focuses on the statistical analysis and whether it is sufficient to support a prima facie case of a pattern or practice of intentional discrimination.

On the first issues, Oracle contends that decision-making is decentralized, meaning that any systematic discrimination would have to be given by a general pattern or practice among low-level managers. OFCCP argues that this is incorrect, pointing to what it contends are central policies and control mechanisms that are the manner in which Oracle's top-management, executives, board members, and HR managers engage in systemic discrimination. Per OFCCP, many of the cases Oracle relies on are off-point because it is not asserting that broad discretion given to individual managers results in the discrimination. Per OFCCP, "[t]his case involves a single job site, a narrow set of job functions, and most importantly, a set of centralized, written policies that Oracle implemented and was required to study as part of its affirmative action obligations." PO at 18-19.

For Oracle to prevail on the point, it must be the case that no reasonable fact-finder could conclude that Oracle possesses centralized compensation policies or checks that could serve as a mechanism for systemic discrimination. The mere fact that Oracle's compensation decisions have decentralized aspects is not enough for Oracle to prevail. OFCCP is also correct that in a disparate treatment case it need not establish the exact way that the alleged wrongdoers are discriminating—the case is based on an inference of intentional discrimination and while evidence of the mechanism would make the case stronger, it is not essential. Most employers know better than to leave clear evidence of how they are discriminating. But Oracle would be entitled to summary judgment if OFCCP could not establish possible mechanisms of discrimination—OFCCP doesn't need to establish exactly how the discrimination is done, but it does have to establish that it was possible for it to be done.

The briefing, statements of uncontested facts, and the evidence all contain significant disputes over Oracle's compensation policies and system. Oracle points to a great deal of evidence to support its claim that compensation is decentralized and focused on the particular products, teams, skills, etc. involved. *See* DS at 9-12; DOS at 32-124; DRSD at 42-175. But OFCCP is able to point to evidence that indicates some degree of standardization and central control, or at least potential for significant central control. *See* PS at 9-35; POG at 32-124. As is evident from the citations alone, there is a great deal of dispute in this area, with each party maintaining that the other is being unreasonable, misrepresenting the facts, and not creating any genuine disputes.

Some of these disputes are the result of confusions. It is undisputed that Oracle has compensation policies or guidelines of some sort. Both parties have submitted documents indicating as much, including guidelines and trainings. But it is much disputed what exactly “policies” mean in this context. A policy could be a set of rules, it could be a set of guidelines, and it could even be a set of advisory considerations. It could be exhaustive or open-ended. That is, it might give low-level managers a complete list of things to consider or it might give them some points that they should consider, among other unstated and unspecified points. There are policies, and then there are policies. The parties short-change the issue when they attempt to frame it in a manner that assumes that everyone understands the same thing in talking about a “compensation policy.” It is also undisputed that Oracle’s compensation system involves some decentralized aspects. OFCCP has not really argued otherwise and it would be unreasonable to do so. Low-level managers, who have engaged in no wrongdoing, make compensation decisions and have some discretion.

What *is* disputed is the relative balance of the centralized and decentralized aspects. Reviewing the arguments and submissions, I find that both parties have submitted evidence that could support the reasonable inference that Oracle’s compensation system is either very decentralized with little if any way for high-level discriminatory influence or that its centralized features are powerful and important enough to restrict low-level discretion and provide a common mechanism for intentional discrimination. For instance, disputes remain over the exact role of the approval process, the way that budgets for salary increases are doled out (in a perhaps discriminatory manner), and the rigidity of Oracle’s compensation policies or guidelines as they play out in practice. Each party strongly urges different reads of the evidence, but I am not permitted to draw inferences in favor of either moving party. I thus conclude that OFCCP has provided enough evidence from which a reasonable fact-finder could infer that there are enough centralized, common features of the compensation system such that central actors could engage in systemic discrimination. This will remain an issue for hearing.

i. Prima Facie Case and Similarly Situated Employees

The other, and more prominent, issue is Oracle’s contention that Dr. Madden’s evidence is intrinsically insufficient to establish OFCCP’s claims of a pattern or practice of discrimination and thus OFCCP cannot make out its prima facie case. The alleged failure is to not compare similarly situated employees and use appropriate controls, resulting in a fundamentally deficient statistical analysis that does not even raise an inference of intentional discrimination. If the disparity is found between job types and is the result of market forces, there is no Title VII disparate treatment claim against the employer. *See AFSCME*, 770 F. 2d at 1406-07. Hence, it is essential that the claim involve differences between similarly situated employees.

Establishing a *prima facie* case is not onerous “and will be satisfied if [the plaintiffs] introduce evidence ‘showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion.’” *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1301 (9th Cir. 1982) (quoting *Furnco*, 438 U.S. at 576). But though not onerous, “it is a burden nonetheless.” *Gay*, 694 F.2d at 555. There is no “specific test” for the sufficiency of proof in a prima facie case of a pattern or practice of discrimination since the facts are bound to vary from case to case. The plaintiff must present evidence to support the inference to intentional discrimination by showing a disparity in the treatment of a protected group after eliminating the most likely non-discriminatory reasons. *Segar*, 738 F.2d at 1273. Usually this will mean showing disparities among individuals with comparable

qualifications. *Id.* When there is a high degree of homogeneity of qualifications in the relevant pool, a presumption of equal qualifications can be used. *Id.* at 1277. Challenges to the statistical evidence can be treated either as an attack on the sufficiency of the prima facie case or as a rebuttal to it. *Id.* at 1273.

Oracle's argument, generally, is that the compensation claim must fail because Dr. Madden's analysis combines employees without appropriate regard for the work that they do or the skills they possess. It maintains that its decentralized compensation system means that compensation decisions are made on an individual basis and that the highly abstracted analysis cannot evaluate similarly situated employees. Oracle contends that Dr. Madden's controls are insufficient—her experience controls are crude and just measure age and time at Oracle rather than the relevance of the prior experience or the skills possessed; her education control measures only degree earned without regard for the relevance of the degree to the job etc.; and her Oracle-related controls are still too broad in that they fail to locate an employee for analysis based on the particular work done and the particular skills possessed. As it summarizes the point in its opposition, Oracle contends that OFCCP has failed to analyze compensation with respect to similarly situated employees. It argues that OFCCP and Dr. Madden have improperly aggregated employees who hold "highly varied jobs" resulting in a "Potemkin statistical model." DO at 1.

OFCCP's argument is most forcefully stated in its motion. It asserts that the record "establishes as a matter of law that employees within the same job title are similarly-situated with respect to compensation when employees have similar levels of experience and education." PM at 13. OFCCP points to evidence indicating that in setting total compensation package, Oracle managers may consider the salary range based on the external market for the job, the global career level, the salaries of other employees in the same job and location, and the employee's performance. *Id.* at 14-15; *see also* PS at 51, 54, 63-64. OFCCP avers that "Oracle defines similarly-situated employees as employees who work in the same job title and have similar skills, experience, education, and expected level of responsibility. PM at 15; *see also* PS at 62, 73, 93-94, 97. Per OFCCP, within each "job title" at Oracle there is a "hierarchy of Career Levels" that are assigned based on "skill, knowledge and responsibilities and performance expectations," and then within each "Career Level" there is a "salary range" within which salary is set based on "skill knowledge, and experience and perhaps education."<sup>29</sup> PM at 15; *see also* PS at 65, 73, 81, 83, 85, 91, 93. In its reply OFCCP stresses that it is entitled to a looser test for similarly situated employees in line with the applicable regulations. PR at 5-6.<sup>30</sup>

The implementing regulations for EO 11246 provide some guidance on how to determine whether a group of employees is similarly situated:

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<sup>29</sup> OFCCP's opposition accuses Oracle of misstating the law by relying on Equal Pay Act cases, which involve a higher standard of similarity. In this case, 41 C.F.R. § 60-20.4 governs, which involves a looser, malleable standard of similarity. PO at 12-13. Oracle explains in reply that it only relies on the Equal Pay Act cases for the point that similarity looks to actual job duties and content, not to job titles. DR at 10. The affirmative defenses in the Equal Pay Act have been incorporated into Title VII, but Title VII permits claims for discriminatory compensation practices that would not violate the equal pay act because they do not involve substantially equal work. *Gunther v. County of Washington*, 623 F.3d 1303, 1313 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981). Comparability of the jobs can be sufficient—the question in Title VII cases is whether there is a showing of discriminatory intent or animus. *Spaulding*, 740 F.2d at 700-01.

<sup>30</sup> OFCCP's general point is sound, but it overstated its reliance on the preamble. OFCCP contends that I "must" consider the preamble and apply it here, PR at 5, but relies on cases where the adjudicator relied on the preamble but wasn't required to. *Id.* at 5 n.5. The actual preamble states: "in an assessment of pay practices at hire, a key point of comparison *may* be qualifications at entry." 81 FR 39108, 39127 (emphasis added).

For purposes of evaluating compensation differences, the determination of similarly situated employees is case-specific. Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.

41 C.F.R. § 60-20.4(a).

This is a malleable standard, a point confirmed in the regulatory preamble, which also explains that the list of factors “is non-exhaustive, due to the highly case-specific nature of similarly situated inquiry. OFCCP will continue to consider and account for the factors that a particular contractor uses to determine compensation, on a case-by-case basis and in line with Title VII principles.” 81 FR 39108, 39127. To be similarly situated in a Title VII claim, the plaintiff or class must show “at the least, that they are similarly situated to those employees [i.e. employees outside the protected group who are more favorably treated] in all material respects.” *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006) (citing *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 660 (9th Cir. 2002); *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53-54 (2d Cir. 2001); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998); *Lynn v. Deaconess Med. Center-West Campus*, 160 F.3d 484, 487 (8th Cir. 1998)). OFCCP “adheres to title VII case law on compensation discrimination as it develops and does not endorse or advocate for any particular method for contractors to ensure nondiscrimination in compensation.” *Id.* at 39126.

The factors that must be considered, the “material” factors, are those that matter for the determination of compensation. Dr. Madden took a very broad-based approach, using rough measures of experience and education, which she took to derivatively measure skill. Oracle contends that this is insufficient. But at this stage OFCCP can rely on two points. First, there is genuine dispute about Oracle’s compensation system and the factors that matter. This partly overlaps with the point above—since it isn’t fully clear (at the summary judgment stage) what drives compensation outcomes and where important decisions get made, what actually matters for compensation is unclear as well. Oracle has provided ample evidence that it delivers a wide range of products and services and that some skills vary from job to job. The inference that is suggested is that compensation outcomes are entirely “local” to a particular job, situation, product etc. But that inference doesn’t follow straightaway—it depends what actually ends up mattering when compensation decisions are made. And that remains subject to genuine dispute. Viewing the evidence in the light most favorable to OFCCP, Dr. Madden’s approximate approach is still rough, but not so rough that it couldn’t support inferences about compensation disparities at Oracle—it tells us that *something* isn’t right and is in need of further explanation.

Second, Dr. Madden’s rationale for taking quite generalized measures of experience and education without delving into more finely tuned and nuanced details is that things like particular skills developed, work-ethic, natural talents, relevance of education and experience etc. are, unless shown otherwise, evenly distributed by sex and race. As I understand her opinion at this point, in her view this licenses a very macroscopic evaluation. And if that expert opinion is accepted, then Oracle’s complaints about particular individual differences in comparison it can draw are not nearly as important as Oracle makes them out to be—in a large enough sample, they should roughly even out. Oracle disputes this assumption, but neither does it take the position that those unaccounted for factors are somehow naturally or intrinsically more likely to show up in white men. As I understand Oracle’s position, there is no proof that the high-level disparity being measured is the

product of its doing rather than some other social or educational factor that has warped the field. Based on my understanding of the positions, this is a case with parties urging different inferences and attaching different significance to the raw data. Oracle not only disputes the validity of Dr. Madden's approach, but offers what it deems more refined (though still not accurate) analyses that account for additional factors and within which at least systemic statistically significant pay gaps disappear. Those points could be compelling on the record as a whole, but they require weighing evidence and drawing genuinely contested inferences, so summary judgment is inappropriate on the point.

If Dr. Madden's analysis had stopped after her measure of education and experience, Oracle would have a strong argument for summary judgment because the analysis does not consider the work that the employee does. For women, it even combines the three job functions. OFCCP and Dr. Madden's argument that any additional controls are tainted by Oracle is not convincing on a properly understood compensation discrimination case. The data could go to a steering discrimination case, but on its own would not properly reflect the material factors for the purposes of compensation, which include some facts about the individual's job. But Dr. Madden continued her analysis and included several controls that looked to factors that pertain to the work at Oracle: job family, manager/individual contributor, and global career level. This might provide a probative opinion on compensation discrimination because it takes some account of the particular position at Oracle, based on the way that Oracle has chosen to categorize its positions.

Oracle has argued otherwise, maintaining that Dr. Madden's controls are still far too broad to similarly situate employees for the purposes of meaningful comparison because they do not specify particular job, area of the job function, the sort of project being worked on, etc. It has offered Dr. Saad's analysis as better, more finely grained approximations of a proper analysis where the systemic statistically significant disparities fade away. But as with the other factors, at this point genuine disputes of fact start to emerge about Oracle's compensation system and what actually matters. For instance, Oracle suggests that product types and "cost centers" are important, but OFCCP points to evidence that could lead one to conclude that their importance has been overstated. PS at 44-47. Oracle contests this evidence and OFCCP's characterization/inferences. DOS at 158-66. But genuine disputes remain about relative importance of various factors, and derivatively whether a failure to account for the factor in analyses means that the analyses could not support an inference from a large disparity to discriminatory intent.

There is a strain in Oracle's argument that, if sound, would support summary judgment. At times it appears to contend, and OFCCP takes it to contend, that its business and operation is just far too complex to be statistically analyzed. Because the very individual skills matter significantly for the decentralized decision makers, who are given only guidelines and broad ranges, and the nature of the business varies so greatly leading to different compensation, any large-scale analysis must fail. Compensation at Oracle is just too complicated to similarly situate employees for the purposes of analyzing compensation. If this were plausible, summary judgment might follow—indeed, it would follow in *any* systemic discrimination case regardless of any evidence or study that the plaintiff produced. For that very reason, it is not plausible. Neither the technology industry generally nor Oracle in particular gets an exemption from employment discrimination laws by an undifferentiated claim of "complexity." Facets of the operation may make systemic discrimination hard to prove and compensation hard to analyze. But they cannot function as blanket immunity.

Oracle officially denies that it is arguing that its operations are exempt from analysis; rather it is claiming "that in this case, with its workforce, the particular statistical analyses used by [Dr.]

Madden cannot establish discrimination.” DR at 10. That may be the finding after the hearing, but it leads back into the disputed facts regarding Oracle’s compensation system and how much various factors matter. As discussed with reference to OFCCP’s motion, if Dr. Madden is missing something critical in her statistical analysis, a fact-finder might conclude that OFCCP cannot make out a prima facie case or that it has been rebutted and that ultimately it cannot support an inference to intentional discrimination. But viewing the evidence in the light most favorable to OFCCP and drawing reasonable inferences in its favor, Dr. Madden’s reports could be credited. Whether or not she is missing critical points in her analyses or has just omitted details is a point in genuine dispute.

j. Summary: The Difficulty of Inferring Intent on Summary Judgment

The claim in question is for disparate treatment in compensation and requires a showing that Oracle has a pattern or practice of discriminating based on sex and race. The proof proposed is statistical. Statistical proof requires an inference. OFCCP seeks an inference to discriminatory intent; Oracle seeks to defeat that inference by either leading the fact-finder to the conclusion that the evidence does not permit any inferences or that a different inference should be drawn. But since the ultimate issue is about intent and requires drawing inferences, it is not an issue that is well-disposed for decision on a motion for summary judgment. “[Q]uestions of subjective intent can rarely be decided by summary judgment.” *City of New York*, 717 F.3d at 82 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)); see also *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (observing that where an element “calls a defendant’s state of mind into question” it “does not readily lend itself to summary disposition”); *Banks v. Bethlehem Steel Corp.*, 870 F.2d 1438, 1444 (9th Cir. 1989) (“summary judgment is frequently inappropriate where there are material issues of intent, motive, or good faith”); *Suydam v. Reed Stenhouse of Washington, Inc.*, 820 F.2d 1506, 1509 (9th Cir. 1987) (“where the primary issue is one of intent, summary judgment is generally inappropriate”); *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1220 (9th Cir. 1980) (“Cases where intent is a primary issue generally are inappropriate for summary judgment unless all reasonable inferences that could be drawn from the evidence defeat the plaintiff’s claims”).

The Administrative Review Board has cautioned that “summary decisions are difficult in ‘employment discrimination cases, where intent and credibility are crucial issues.’” *Stallard v. Norfolk So. Ry. Co.*, ARB No. 16-028, ALJ No. 2014-FRS-00149, slip op. at 9 (ARB Sept. 29, 2017) (quoting *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1992)); see also *Weil v. Citizens Telecom Servs. Co.*, 922 F.3d 993, 1002 (9th Cir. 2019); *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1220-21 (10th Cir. 2015); *Tolbert v. Smith*, 790 F.3d 427, 434 (2d Cir. 2015); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004). Issues involving causation and intent are not apt for summary decision because they generally require inferences, where the non-moving party is greatly assisted by the summary judgment standard. This is such a case. The parties have produced voluminous submissions that raise any number of disputes. Most notably, there remain genuine disputes about the way Oracle makes compensation decisions, the factors considered, the role of higher-level managers, and how various factors produce an outcome. Both parties have presented opinions from statistical evidence favoring very different conclusions about Oracle, and raising substantial, fundamental issues about the inferences that should be drawn from the analyses of the other. On this record, a reasonable fact-finder could draw different conclusions about causation and intent. Summary judgment is thus inappropriate for OFCCP or Oracle.

## 2. Disparate Treatment: Steering Theory

The disparate treatment steering discrimination theory warrants separate discussion, though given the findings above, this discussion can be somewhat abbreviated. The regulations implementing EO 11246 provide that contractors may not “[s]teer[] women into lower-paying or less desirable jobs on the basis of sex.” 41 C.F.R. § 60-20.2(b)(6). As explained above, this is a different form of discrimination from straightforward compensation discrimination. A basic compensation discrimination claim alleges that the contractor pays different compensation for similarly situated employees based on an impermissible factor. A steering discrimination claim alleges that the contractor *differently* situates employees for the purposes of compensation when those employees are otherwise similarly situated, and does so based on an impermissible factor, with the result that one group receives less compensation than another group. OFCCP is pursuing both sorts of claim.

OFCCP seeks summary judgment on this claim as part of its general compensation discrimination claim. It contends that “unrebutted statistical evidence establishes that Oracle pays women, Asians, and African Americans less than their male and White counterparts, respectively, who are similarly-situated according to the factors Oracle has identified in setting pay.” PM at 15. In the steering aspect of the claim, OFCCP relies on Dr. Madden’s analysis showing stark disparities controlling for education (measured by degree level) and experience (measured by age and tenure) and thus derivatively control for skill as well. OFCCP contends that the results of the analysis far exceed the “standard deviations from the expected value of a non-discriminatory process.” PM at 17-21. OFCCP’s reply echoes these arguments, contending that Oracle cannot rebut the statistical evidence because it simply tries to “poke holes” in the findings. PR at 1-2. As to the steering claim, it maintains that Dr. Madden appropriately compared similarly situated employees and in so doing found significant disparities. It argues that “career level” is a tainted variable that cannot be considered in the analysis because it is the result of discriminatory assignment. *Id.* at 6-9.

In its opposition, Oracle argues that Dr. Madden never conducted an appropriate analysis of whether there were any discriminatory assignments but instead simply reasoned that since there were disparities when an aggregated group of employees was considered, Oracle just must be assigning employees to positions on a discriminatory basis. It points to Dr. Saad’s analysis indicating that most employees are hired after applying for specific jobs and that there is no statistically significant disparities by race or sex affecting differences between job applied to and job hired or promotion rates. DO at 27-28.

Oracle’s motion for summary judgment makes a similar line of argument on the point. In order for statistical evidence to establish discrimination, the employees grouped together must be similarly situated, which Oracle argues they are not because at this stage of her analysis Dr. Madden did not consider an employee’s duties, skills, and experience directly but instead used other measures or education and experience. For experience, Dr. Madden looked only to prior work without respect to its relevance to the current work at Oracle. For education, she considered only degree, not the school attended, subject matter, or relation to the job applied for. Oracle also contends that Dr. Madden was missing education data for half of the field of analysis. DM at 14-17. In addition, Oracle argues that Dr. Madden first assumed that there were discriminatory assignments and then attempted but failed to prove that there is discrimination on this basis. Oracle asserts that the data actually indicates that most applicants are hired into the jobs applied for and deviations up or down

do not show a statistically meaningful pattern of differences as to the classes in question.<sup>31</sup> DM at 17.

In response, OFCCP insists that Dr. Madden did conduct an analysis of assignments and concluded that Oracle did channel women and minorities into lower paying jobs. PO at 7-8. It argues that under the applicable regulations, Oracle has discriminated by steering or assigning employees lower Global Career Levels based on sex and race. PO at 13-14. It deems Oracle's defense of this claim mistaken since Dr. Madden relied on statistical support to conclude that Oracle was steering employees and that this conclusion is consistent with the other evidence. PR at 13-14. Oracle's reply argues that this assignment claim has been "debunked" by Dr. Saad, who showed that there is no support for the claim that Oracle assigns employees to jobs in a disparate manner. DR at 2. It asserts that Dr. Madden's analysis failed to show any systematic pattern of discriminatory assignments and that Oracle does not engage in assignments at all—rather, employees are for the most part hired for the jobs that they apply for. *Id.* at 11-12.

Though OFCCP frames this aspect of its disparate treatment claim as based on "assignment" of employees to positions or global career levels and Oracle accepts this characterization, the nomenclature used is confused.<sup>32</sup> OFCCP (and Dr. Madden) may perceive some advantage in talking about "assignment" of position, but the submissions indicate that no reasonable fact-finder could conclude that Oracle "assigns" employees into positions in any ordinary understanding of "assign" or "assignment." Oracle is not presented with an undifferentiated mass of putative and current employees who are then sorted by high-level managers or HR personnel into particular jobs. Rather, Oracle's employees generally apply and transfer to particular jobs, which are requisitioned, or are otherwise hired to fill particular roles, to a greater or lesser degree depending on the nature of the hire. OFCCP's framing makes the allegations appear to involve quite overt discrimination, but it has the disadvantage of making summary judgment for Oracle seem appropriate because the undisputed facts don't support the existence of such an overt process that Oracle could be using as a means of actualizing its alleged discriminatory intent.

However, this does not mean that the claim fails. The *substance* of the claim differs from its framing, and it is the substance that matters. The claim here is really about "steering," not "assignment." OFCCP is alleging that Oracle employs various mechanisms to guide women, Asian, and African American employees/hires into lower global career levels and/or positions in the company that pay less than others. The foremost evidence for this claim is statistical. When Dr. Madden controls for just the "exogenous" factors, very large disparities remain in compensation. Those disparities reduce significantly—though they persist—when controls related to an employee's role at Oracle are added. Roughly put, OFCCP and Dr. Madden contend that the "exogenous" controls capture the important qualifications and skills that employees bring to Oracle and that other, more fine-grained qualifications and skills can be roughly assumed to be evenly distributed by gender and race. If these points are correct, then from Dr. Madden's statistically significant disparities one could infer to discriminatory intent.

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<sup>31</sup> Oracle also contends that there is a procedural problem in the assignment theory in that over half of the initial assignments for employees that are part of the analysis took place before the 2013 audit window and thus cannot be part of this case. DM at 21-22; *see also* DO at 28-29. Even if this argument is accepted, it would not result in summary judgment for Oracle on the claim—rather, it would reduce the amount of damages that could be awarded based on the claim. As such, I do not consider the point or OFCCP's response further here.

<sup>32</sup> OFCCP seemingly does so to make the allegation appear more noteworthy and generate an argument by repetition that Oracle *does* "assign" employees to positions; Oracle seemingly does so to bolster a defense—if it does not strictly "assign" employees to positions, the implication would be that the claim would fail.

Two basic questions need to be considered with this theory. First, are there mechanisms at Oracle through which high-level management and/or HR managers even *could* steer individuals in this manner? If there are not, and either there is no way at all for new or existing employees to be steered or any steering would have to be done by low-level managers in the subject job functions, OFCCP's theory must be rejected, regardless of what the statistical evidence shows. Even if there were other compelling evidence of discriminatory animus, if there is no way for them to turn that animus into action, Oracle is not responsible for discrimination. Title VII and EO 11246 do not punish "attempted discrimination" or a mere disposition to discrimination.

Second, is the statistical evidence sound enough that, when combined with other evidence of record, it produces an inference that Oracle's high-level managers or HR managers etc. *are* acting out of discriminatory intent to steer women and minorities into lower-paying positions, global career levels, or career paths? OFCCP's case is premised on an inference to the best explanation. If Dr. Madden's statistical evidence is sound, there are large, unexpected disparities that need to be explained. OFCCP contends that the best explanation is intentional discrimination. Oracle contends that the statistical evidence is too flawed to even raise the inference, and that on the totality of the evidence, including that of Dr. Saad, no such inference can or should be made. For OFCCP to prevail, I must ultimately answer both questions in its favor. For Oracle to prevail, it need only succeed on one of these two facets of the claim—if I conclude either that the alleged wrongdoers had no means of discriminating in the way alleged or that the evidence does not support the inference that they did discriminate in the way alleged, I will deny OFCCP's claim.

For essentially the same reasons discussed above, OFCCP's motion for summary judgment on this theory must be denied. Its case is predominately statistical, but Oracle has produced ample evidence that, if believed, would undercut the foundation of Dr. Madden's analysis resulting in a failure of proof at the first stage of the analysis. OFCCP's motion is premised on a basic misreading of the relevant law, and in particular on taking snippets of decisions out of context and extrapolating its own ironclad rules. A plaintiff cannot make out a prima facie case by producing any statistical evidence, no matter how flawed. A defendant can rebut a prima facie case with any evidence that would thwart the suggested inference to intentional discrimination on a systematic basis. Dr. Saad's criticisms go to the heart of Dr. Madden's study and if accepted would lead to the conclusion that Dr. Madden's education and experience controls are far too crude to measure education and experience and wholly incapable of measuring other important factors necessary for any reliable analysis of disparities that even could be due to assignments/steering. That would defeat any inference to discrimination, so this is a point where OFCCP will need to succeed on the merits when the opposing opinions are weighed together with the other evidence, credibility determinations can be made, and inferences can be drawn.

Oracle's motion for summary judgment on the steering theory must be denied as well. I start with the "statistical" or "inferential" question. For Oracle to prevail at this stage, it must be the case that no reasonable fact-finder could draw the inference to intentional discrimination based on Dr. Madden's evidence. Oracle maintains that the evidence is fundamentally flawed, but as discussed above, this is a point that requires weighing credibility and drawing inferences. In addition, it is at this point that distinguishing the "steering" and "compensation" discrimination claims becomes important. What it means to be "similarly situated" for the basis of comparison depends on what is material to the employment actions being considered. For a narrow compensation discrimination claim, that includes the job performed—a point Oracle is keen to highlight in its critiques of Dr. Madden. However, for a steering discrimination claim, the job performed is not a material differentiator—it is the alleged discriminatory act. So Oracle's various

criticisms related to not taking appropriate stock of the location of the employee at Oracle, the product worked-on, etc. do not apply.

The criticisms of propriety of Dr. Madden's proxies for education and experience do apply to the assignment discrimination claim. So do the criticisms that Dr. Madden is not controlling for important differences in skill or other factors that matter. But I have already determined that Oracle is not entitled to summary judgment on this basis. Whether or not Dr. Madden's way of measuring education and experience are good enough to produce credible results involves credibility assessment, weighing evidence, and drawing inferences on genuinely disputed questions. In addition, whether other factors actually do materially matter to Oracle and the propriety of Dr. Madden's assumption that any such other factors are roughly evenly distributed by race and gender are also points where genuine disputes exist, requiring a hearing.

The other facet of Oracle's motion concerns the "opportunity" question, with Oracle maintaining that no reasonable fact-finder could conclude that it does assign or steer employees into positions, global career levels, or career paths. It maintains that employees get their particular positions by applying for those positions, not by a master plan to locate employees in different areas. It also relies on Dr. Saad's evidence indicating that there is no statistically significant disparity by race or gender in the "up-levelling" or "down-levelling" a hire after a requisition has been posted. *See* SER at 112-120; SRR at 54-55, 62-65; DS at 16-17; DOS; 133-34; DRSD at 217-237.

OFCCP, however, has pointed to evidence that, if believed would tend to show that Dr. Saad's analysis is incomplete and unpersuasive and that would tend to show that applicants do not simply come to Oracle of their own accord and apply for jobs. *See* PS at 36-38; POG at 155-68; MRR at 32-37. If OFCCP's evidence is accepted and inferences are made in its favor, employees come to Oracle, or apply to Oracle, based on a referral or after being contacted by Oracle recruiters, who play a somewhat active role in reaching out to candidates for positions. In addition, additional requisitions may be produced during the process to match a candidate. The availability of up-leveling or down-leveling employees, or of directing applicants to apply for different jobs, could lead a reasonable fact-finder to conclude that Oracle's high-level and HR managers have at least the opportunity to engage in some steering. Further, with some hires, like college hires, there is more opportunity for steering putative employees into career paths. The extent of that ability and whether it is actually exercised, let alone exercised on a discriminatory basis, remain open questions.

So the varied evidence about how exactly individuals come to Oracle and the flexibility in the way individuals end up in their jobs create a genuine disputed issue of material fact about the *potential* for discriminatory steering. The parties, accepting the "assignment" descriptor, have taken extreme positions about how employees at Oracle end up in their particular jobs. The submissions, however, indicate that there is more complexity and nuance involved such that conclusions cannot be drawn at the summary judgment stage. Dr. Madden's evidence controlling for her proxies of education and experience create a *potential* inference to discriminatory steering as an explanation of the disparity. Oracle has stridently argued that Dr. Madden's analyses is faulty or too crude to ultimately support such an inference, but I conclude that this is an issue that will need to be denied after a hearing when evidence can be weighed, credibility can be assessed, and inferences can be firmly drawn. Oracle's motion for summary judgment as to the steering discrimination claim must therefore be denied.

### 3. *Disparate Impact Theory*

For OFCCP, a disparate impact theory is an alternative theory and it has not sought summary judgment on that basis.<sup>33</sup> Oracle, however, seeks summary judgment on any disparate impact claim. A disparate impact theory alleges a violation “by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.” *Teamsters*, 431 U.S. at 349; *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited.”). OFCCP’s regulations provide for disparate impact liability: “[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, violate Executive Order 11246, as amended, and this part.” 41 C.F.R. § 60-20.2(c).

To make out a *prima facie* case of disparate impact, a plaintiff must establish the existence of a disparity, the existence of a particular employment practice used by the employer, and a causal connection between the particular employment practice and the disparity: “[a]s a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.” *Wards Cove*, 401 U.S. at 656-57; *see also Smith v. City of Jackson*, 544 U.S. 228, 241 (2005); *Watson v. Fort Work Bank & Trust*, 487 U.S. 977, 992, 994 (1988). More schematically, “[t]o establish a *prima facie* case of disparate impact under Title VII, the plaintiff[] must (1) show a significant disparate impact on a protected class or group; (2) identify the specific employment practices or selection criteria at issue; and (3) show a causal relationship between the challenged practices or criteria and the disparate impact.” *Hemmings*, 285 F.3d at 1190; *see also Stout v. Potter*, 276 F.3d 1118, 1121-22 (9th Cir. 2002); *Bennett v. Nucor Corp.*, 656 F.3d 802, 817 (8th Cir. 2011).

If this is done, the focus shifts to whether or not the challenged practice is justified because it “serves, in some significant way, the legitimate employment goals of the employer.” *Wards Cove*, 401 U.S. at 659. Even if this is so, a plaintiff may prevail by showing that other practices would serve the legitimate interests of the employer without producing the disparate impact. *Id.* at 660-61. As Congress has stated the required showings and burdens in Title VII disparate impact cases,

a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

42 U.S.C. § 2000e-2(k)(1)(A)(i). Even if the respondent shows business necessity, a complaining party may prevail by showing that an employer has refused to adopt an alternative practice that would serve the legitimate needs but result in less disparate impact. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C); *Ricci*, 557 U.S. at 578. A plaintiff must show that “each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for

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<sup>33</sup> In its opposition, Oracle argues that OFCCP did not properly move from summary judgment on the disparate impact claim, though it sought summary judgment on the entire case, and so the claim should be dismissed. DO at 29. OFCCP correctly points out that failure to move for summary judgment on a theory is not a concession that the theory could not be proven at trial. PR at 14.

analysis, the decisionmaking process may be analyzed as one employment practice.” 42 U.S.C. § 2000e-2(k)(1)(B)(i); *see also Stout*, 276 F.3d at 1124-25.<sup>34</sup>

Oracle contends that any disparate impact claim should be dismissed because OFCCP did not give notice of such of claim during the compliance review or in any of the complaints. DM at 22. Substantively, Oracle argues that OFCCP has not identified the element or practice that is alleged to have the disparate impact and so the claim must fail. *Id.* at 23. Insofar as OFCCP is pointing to reliance on prior pay in setting salary, Oracle contends that there was never such a practice and that there is insufficient evidence to license an inference in favor of OFCCP on causation. *Id.* Insofar as OFCCP is arguing that job assignments are the policy in question, Oracle contends that there is insufficient evidence to allow a conclusion that such a policy existed because a majority of applicants were hired into the job that they applied for. *Id.* at 23-24. Next, Oracle argues that it is legally impermissible to mix policies and practices and measure the effects of both. *Id.* at 24. In addition, Oracle contends that the absence of a disparity in 13 of 16 job functions undermines a general disparate impact theory. *Id.* Last, Oracle contends that OFCCP cannot rely on a multitude of policies in a disparate impact claim and that what policies OFCCP can point to are job-related and consistent with business necessity. *Id.* at 24-25.

OFCCP’s opposition seemingly foreswears a disparate impact claim in that it indicates that because Oracle did not identify an explanation for the disparities, the claim remains a disparate treatment claim that would morph into a disparate impact claim if Oracle did explain the disparities with reference to a policy. PO at 15. But OFCCP does add a note that articulates a disparate impact claim based on policies of limiting budgets that do not allow proper correction of disparities, lacking policies to correct disparities, and relying on prior pay to set initial salary and job assignment. *Id.* at 15-16 n.21. Some of these points are actually referenced in OFCCP’s motion. There it asserts that it is undisputed that Oracle did deviate from its stated compensation policies due to budget restrictions that compelled managers to set salary differently for similarly situated employees, resulting in discrimination. It avers that this also led to consideration of prior pay in setting initial strategy, which it contends produced discriminatory results. It points to anecdotal evidence that female employees were preferred because they would work harder for less pay. OFCCP avers that Oracle’s policy of limiting the budget for compensation produced the result that similarly qualified women, Asians, and African Americans were paid less. PM at 25-26; *see also* PS at 156-70. It also alleges that Oracle did not engage in a focal review process that might correct disparities, instead adjusting salary when employees threatened to leave, resulting in ad hoc adjustments limited by budgetary constraints that did not correct for disparities. PM at 26-27.

There are two ways that these points could be taken. OFCCP could be arguing that these policies/high-level actions are the manner in which Oracle intentionally discriminated against women and minorities. That would be part of the disparate treatment claim discussed above. OFCCP could also argue that these are neutral policies—adopted without intent to discriminate—that in fact have a disparate impact on women and minorities. For instance, limiting the budget for salary increases, on its face, is a neutral policy. In the private sector, budgets are generally limited

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<sup>34</sup> Outside of Title VII, the *Wards Cove* framework continues to apply. *See Hardie v. NCAA*, 876 F.3d 312, 319-20 (9th Cir. 2017). Although analysis of claims under EO 11246 generally follow the frameworks adopted for Title VII claims, the text of the regulations do not explicitly invoke the Title VII framework over that of *Wards Cove*, which has been applied to disparate impact theories in statutes that lack the specific provisions Congress added to Title VII to define the relative burdens. One recent decision by an ALJ assumed that the Title VII amendments applied. *See OFCCP v. Analogic Corp.*, ALJ No. 2017-OFC-00001, slip op. at 32-33 (ALJ Mar. 22, 2019). Oracle followed Title VII’s analysis. *See* DR at 22-23. The exact analysis applied would not alter the result here.

and at some point expenditures must answer to the amount of money available. OFCCP, however, is arguing that in actuality this sort of limitation is done with discriminatory intent. For the purposes of this section, I also take OFCCP to be proposing that if that intent is not found, and a disparate treatment claim on that basis fails, it might still prevail on a disparate impact theory. In its reply, Oracle argues that it should be granted summary judgment on any disparate impact claim because OFCCP has not specified a facially neutral practice that is causing a disparate impact or specify some other practice that would serve the same legitimate ends. It acknowledges OFCCP's point that disparate treatment claims can turn into disparate impact claims, but argues that since it is not rebutting a disparity by proffering a facially neutral practice, that has not happened here. DR. at 15.

Oracle's assertion that a disparate impact claim was not properly pled is unconvincing. A disparate impact claim premised on a policy of reliance on prior pay was part of the SAC (§ 32) and Oracle has been on notice that OFCCP was pursuing disparate impact as an alternative theory. Disparate treatment and disparate impact claims are interrelated theories, and it is error to pigeonhole a plaintiff's claim into one or the other—the focus should be on the nature of the claims, not the labels attached. *Sobel*, 839 F.2d at 24-25. In pattern or practice cases, a disparate treatment can become a disparate impact claim based on the proffered explanation for the statistical disparity. *Segar*, 738 F.2d at 1266, 1270-71. Both require the plaintiff to establish a disparity; they differ as to whether the plaintiff needs to establish an inference to intentional discrimination or causation by a specifically identified practice. *Id.* at 1267. Where a policy or practice creates or perpetuates a disparity, the claim is for disparate impact; but where the claim is that a neutral policy or practice perpetuates or aggravates unlawful discriminatory treatment, the claim is for disparate treatment based on the original discriminatory act, with the additional harms caused by the neutral policy remedied by the make whole relief applied to the disparate treatment claim. *Teamsters*, 431 U.S. at 347-49.

At this point OFCCP needs to clearly articulate—and produce evidence to support—any disparate impact claim that it wishes to pursue. Discovery has long been closed and hearing is impending. Summary judgment is the “put up or shut up” point in litigation. *E.g. Johnson v. Cambridge Indus, Inc.*, 325 F.3d 892, 901 (7th Cir. 2003). An “earnest hope” that something may materialize at trial is insufficient. *See Basler v. Int'l Union of Elec., Elec. Salaried, Mach. & Furniture Workers (IUE) Local 201*, 661 F.3d 109, 118 (1st Cir. 2009). A litigant cannot proceed to hearing with the claim that if given the chance it will produce evidence, or on the claim that depending on what happens at hearing, it may decide to properly articulate an alternative claim. If OFCCP has not articulated what its disparate impact claim will be and provided evidence to show a genuine issue of material fact, Oracle should be granted summary judgment. OFCCP's reluctance here appears in part to be due to the worry that Oracle will attempt to explain the disparities supporting the disparate treatment claim with a neutral policy. But again, discovery is closed. If Oracle has not done so, OFCCP's disparate treatment claim might be enhanced. If it has done so, OFCCP should be in a position to articulate and support a disparate impact claim. The focus, then, must be on the particular policies or practices presented by OFCCP as the basis of a disparate impact claim: budget driven limitations that prevent paying similarly-situated employees similarly, failure to have a mechanism to correct for disparities, and reliance on prior pay in setting starting salary. PO at 15-16 n.21.

“[T]he plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged.” *Watson*, 487 U.S. at 994.

Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the [disparate impact] because of their membership in a protected group. Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation.

*Id.* at 994-95. “Nor are courts or defendants obliged to assume that plaintiffs’ statistical evidence is reliable.” *Id.* at 996. A defendant may offer evidence to undermine the *prima facie* causal showing by attacking the validity of statistics as, for example, based on small or incomplete data sets, based on inadequate techniques, not including the right pool of comparators, or any other underlying deficiencies in the facially plausible statistical analysis. *Id.* at 996-97. “Courts have long recognized that statistical evidence may be used to establish a *prima facie* case of disparate impact.” *Hemmings*, 285 F.3d at 1184 (citing *Hazelwood*, 443 U.S. at 307-08). But that evidence “must be drawn from appropriate comparison pools.” *Id.* at 1184-85. “[T]he appropriate comparison pool for statistical analysis is the group from which individuals will be chosen for the job action.” *Id.* at 1185 (discussing *Wards Cove*, 490 U.S. at 650-51).

“Disparate impact analysis is confined to cases which challenge a specific, clearly delineated employment practice applied at a single point in the job selection process.”<sup>35</sup> *AFSCME*, 770 F. 2d at 1405. A plaintiff must also show that the specific policy or practice is causing the disparate impact. “This ‘robust causality requirement ensures that ‘[] imbalance . . . does not, without more, establish a *prima facie* case of disparate impact’ and thus protects defendants from being held liable for racial disparities they did not create.” A *prima facie* case shifts the focus to “any business justification [defendants] offer for their use of these practices,” which looks to “the justifications [a defendant] offers for his use of these practices; and [] the availability of alternative practices to achieve the same . . . ends, with less [] impact [on the protected group].” *Hardie v. NCAA*, 876 F.3d 312, 319-20 (9th Cir. 2017) (quoting *Wards Cove*, 490 U.S. at 657-61; *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518, 2523 (2015)). “Burden shifting serves to limit disparate-impact liability ‘in key respects that avoid the serious constitutional questions that might arise . . . if such liability were imposed based solely on a showing of statistical disparities.” *Id.* at 319 (quoting *Inclusive Cmty.*, 135 S. Ct. 2522). “Disparate-impact liability may only condemn practices or policies that are ‘artificial, arbitrary, and unnecessary.’” *Id.* (quoting *Griggs*, 401 U.S. at 431). Where a plaintiff does not produce evidence identifying the particular employment practice that is responsible for the disparate impact and/or evidence of causation, summary judgment for a defendant is appropriate. *Figueroa*, 923 F.3d at 1086; *Bennett*, 656 F.3d at 817-18; *see also Inclusive Cmty.*, 135 S. Ct. at 2523.

OFCCP has pointed to a variety of practices that might support a disparate impact claim, such as not conducting focal reviews to correct disparities and limiting the amount of money available for salary increases. I find that this constellation of theories—as disparate impact theories—cannot survive summary judgment. A disparate treatment or disparate impact claim can be stated on the basis of a failure to equalize discriminatory compensation, and the proper characterization depends on whether it is framed in terms of a neutral policy that continues the discrimination or decisions not to correct—but at heart both turn on the existence of the

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<sup>35</sup> “[T]he decision to base compensation on the competitive market rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis. *AFSCME*, 770 F. 2d at 1406 (citing *Spaulding*, 740 F.2d at 708).

discrimination to begin with that invokes the obligation to make a correction. *Sobel*, 839 F.2d at 28-29. If these are framed as disparate impact claims, there needs to be a prior showing of discrimination—i.e. a disparity in need of correction. This could show discrimination on a disparate impact or a disparate treatment theory. It would be derivative, then, from the theories discussed above or some other disparate impact showing. The alternative, and what OFCCP may have in mind, is that the “failure to correct” claim is based on disparities caused by discriminatory compensation decisions of low-level managers, with the failure to correct being the hook that makes Oracle responsible.

That claim must fail given OFCCP’s concession. It is not accusing any low-level managers outside of HR of wrongdoing and at the time that OFCCP made its concession it was perfectly clear that discrimination was wrongdoing. If one of OFCCP’s theories *requires* a finding that low-level managers engaged in wrongdoing, then that theory *must* be rejected as inconsistent with its concession. So OFCCP cannot be pursuing a claim based on high-level manager’s failure to correct the discriminatory decisions of low-level managers. Similarly, OFCCP cannot pursue a disparate impact claim that asserts that policies limiting budgets for salary increases means that low-level managers need to make difficult decisions about who gets salary increases and do so in discriminatory ways. This also requires a finding that low-level managers engaged in wrongdoing. OFCCP may include these points as part of its disparate treatment claim as focused on high-level and HR managers—and given its response to Oracle’s statement of uncontested facts, this is actually how OFCCP predominantly sees the point. *See* POG at 171-73, 179; *see also* DRSD at 239-42. But in that light, there is not a separate and distinct disparate impact claim for OFCCP to be pursuing.

Bracketing OFCCP’s concession, any disparate impact claim based on the constellation of alleged policies about compensation corrections, budgets etc. cannot survive summary judgment for another reason. Assuming that there is genuine dispute over whether or not Oracle has policies that could be the basis for a disparate impact claim, OFCCP has not come forward with evidence that could establish causation. Whereas a disparate treatment claim requires an inference to intent from a statistical disparity, a disparate impact claims requires an inference to causation as to the specific policy or practice that is claimed to be responsible for the disparate impact. If I accept Dr. Madden’s analysis, I will find that there are disparities and could draw a number of inferences from them. But I could not reach the conclusion that a particular practice of not conducting focal reviews or limiting budgets for compensation increases/adjustments is causing the disparity—this just isn’t a question that Dr. Madden attempted to study and so not an inference her opinion could support.

That missing piece is not necessary as a component of a disparate treatment claim, but it is a necessary component of a disparate impact claim. OFCCP bears the burden of persuasion on the causal element of a disparate impact claim, but as to the constellation of alleged policies surrounding focal reviews and budgeting, it can only provide speculation about the connections between the policy and the disparate impact that it has on the protected groups. This sort of speculation about possible connections is insufficient to avoid summary judgment. *See, e.g., Mbany Mgmt. v. Cnty of Nassau*, 819 F.3d 581, 621 (2d Cir. 2016); *Flovac, Inc. v. Airvac, Inc.*, 817 F.3d 849, 856 (1st Cir. 2016); *Getz v. Boeing Co.*, 654 F.3d 852 (9th Cir. 2011) (citing *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). As a result, Oracle is entitled to summary judgment on OFCCP’s potential disparate impact claims that look to policies about focal reviews, salary adjustments, and budgeting decisions.

OFCCP’s pled disparate impact claim as to reliance on prior pay leads to a different result. Oracle contends that it had never had such a policy or practice, but I find that OFCCP has pointed

to sufficient evidence to create a genuine dispute on the point. Oracle proffered the non-existence of such a policy as an undisputed fact. DS at 17-18. OFCCP, however, pointed to evidence that, if believed, could be used to infer that there was, until 2017, such a policy in place. POG at 173-76; *see also* PS at 38-40. If this evidence is to be believed, Oracle did standardly seek out information on prior salary and it functioned as a sort of “soft” requirement in the recruitment process. Oracle points to evidence contesting this inference and disagrees, at length, with OFCCP’s reading of the evidence. *See* DRSD at 242-43 (incorporating prior extended responses); DOS at 135-45. But this only serves to highlight the existence of a genuine dispute on the material question of whether, in the past, Oracle had an informal policy or practice of relying on prior pay to make decisions about starting salary.

Dr. Madden also produced analysis that, if accepted, could support an inference to causation. MER at 49-50, 77. Oracle contests these points, both as to the validity of Dr. Madden’s analyses as to any disparities between similarly situated employees and as a basis to support causal inferences. It highlights evidence from Dr. Saad that correspondence between prior pay and starting pay is to be expected, given that employers are determining compensation based on the same skill-set. *See* SRR at 71-73. That could ultimately be convincing, but it is not enough to warrant summary judgment. OFCCP has presented evidence that during the relevant period Oracle collected information on prior pay and evidence showing a correlation. Correlation is not causation, but it can serve as a basis for an inference, and at this stage all reasonable inferences are made in favor of the non-moving party. Given knowledge, opportunity, and correlation, I find that OFCCP has presented enough evidence to survive summary judgment as to a disparate impact theory based on reliance on prior pay in setting starting salaries.<sup>36</sup> Oracle, however, is entitled to summary judgment as to any other disparate impact theory.

### ***C. Other Issues***

#### ***1. Affirmative Action Requirements***

In its motion for summary judgment, OFCCP asserts that the evidence establishes that there is no genuine dispute that Oracle disregarded its affirmative action obligations and did not take the required efforts to identify and redress gender and racial pay inequities in compensation. It alleges that Oracle admits that it did not take action in response to its own pay analyses. In OFCCP’s view, the current analyses show significant disparities and so Oracle’s earlier analyses must have shown them as well. OFCCP avers that Oracle cannot comply with the affirmative action requirements by delegating them to low-level managers, and that there is no evidence that it did not enable them to perform the reviews required by the regulations. In addition, OFCCP contends that it is undisputed now that Oracle did not develop and analyze Internal Audit Reports to assess its compensation. PM at 27-29; *see also* PS at 49-63. Oracle responds that whether or not it complied with 41 C.F.R. § 60-2.17 is not an issue in this case and that, in any event, the ancillary disagreement between OFCCP

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<sup>36</sup> I also reject Oracle’s alternative argument that it has shown that “its practices are job-related and consistent with business necessity to recruit and train top talent” and its derivative argument about the absence of other practices that would serve the same ends. DM at 24. The evidence that Oracle points to, *see* DS at 18, is far too general and focused on other practices. While I tend to agree that OFCCP’s response on this point does not address the underlying facts asserted, *see* POG at 178; DRSD at 249-50, the evidence itself cannot establish that reliance on prior pay was consistent with business necessity because Oracle maintains that it has no such practice. On the merits, that may be the conclusion—it is a disputed issue—and even if such a practice is found, the causal showing may fail. But given Oracle’s position, a generalized claim that its practices are consistent with business necessity cannot provide a defense to the disparate impact claim that survives.

and Oracle about what the substantive requirements of an affirmative action program is not a basis for inferring intentional discrimination. DO at 29-30. The point is not pursued in OFCCP's reply.

After the stay ended, OFCCP announced that it would be seeking leave to file a Second Amended Complaint, which Oracle opposed. On March 6, 2019, I issued an Order Granting Conditional Leave to File Second Amended Complaint. That Order noted that the proposed complaint was not clear as to whether or not OFCCP was adding a new claim based on substantive compliance with the affirmative action requirements in 41 C.F.R. Part 60-2 and worried that this would be a significant expansion in the scope of the litigation. I ordered OFCCP to clarify the reference.

The SAC omitted the general reference, but included several passages touching on affirmative action plan regulations in a section captioned "Refusal to Produce Relevant Data and Records During Compliance Evaluation." OFCCP alleged that Oracle "failed to supply records requested by OFCCP," to include "analyses of Oracle's total employment process as required by 41 C.F.R. § 60-2.17 (including analyses of its compensation system, personnel activity, and selection and recruitment procedures to determine if disparities existed based on race, ethnicity, or gender)." SAC at ¶ 44. It also alleged that Oracle failed to produce or provide evidence that it complied with 41 C.F.R. § 60-2.17. SAC at ¶ 45. And it alleged that

Oracle failed to maintain and make available to OFCCP documentation of its compliance with its obligation to develop and maintain an Affirmative Action Program by failing to maintain and make available documentation of its organizational profile, job group analysis, placement of incumbents in job groups, determination of availability, comparing incumbency to availability, placement goals, and internal audits of its employment processes.

SAC at ¶ 47.

Oracle opposed allowing OFCCP to file the SAC because it believed that ¶ 47 in particular still marked a significant expansion of the scope of the litigation. However, in my March 13, 2019, Order Filing Revised Second Amended Complaint, I overruled this objection, explaining:

I do not understand OFCCP to be attempting to take this litigation in the direction envisioned by Oracle. In the March 6, 2019, order, I was concerned about whether or not OFCCP was attempting to amend the complaint and assert that based on a substantive analysis of the Affirmative Action Program developed and maintained by Oracle, it is deficient in some way because it is inconsistent with the substantive regulatory requirements of an Affirmative Action Program. That sort of amendment would be problematic because it would take the litigation in a new and different direction, requiring assessing compliance with a broad swathe of requirements that were not at issue in the compliance review or in this case up to this point. Oracle's objection focuses on the reference to the various aspects of the required documentation, which viewed alone could seem to be implicating a deficiency claim. But the verbs describing Oracle's alleged violation are more important—in sequence OFCCP alleges a failure to "maintain and make available," to "develop and maintain," and to "maintain and make available." I read and understand this as another compliance claim, which is also consistent with OFCCP's emailed communication to Oracle about ¶ 47 attached to Oracle's letter. I do not understand

this to be a “deficiency” claim that would require examining the substantive merits of the Affirmative Action Program. Therefore, I will allow this proposed amendment.

OFCCP did not contest this reading of the SAC or request reconsideration to clarify its intent.

The issue about the scope of the complaint arose at several points in the parties’ discovery disputes. In a June 19, 2019, order on OFCCP’s motion to compel deposition of Oracle under Rule 30(b)(6) of the Federal Rules of Civil Procedure, I limited the scope of some of the proposed topics where they concerned the Affirmative Action regulations and went beyond recordkeeping and production inquiries and into substantive compliance issues. OFCCP did not seek reconsideration or attempt to argue that the SAC was being misread. More recently, the role of “compensation analyses” in terms of compliance with 41 C.F.R. § 60-2.17 was addressed in reference to OFCCP’s motion to compel production of various documents. Oracle claimed that these analyses and related documents were privileged; OFCCP maintained that they were done to comply with the regulations and could not be privileged. In a September 19, 2019, order the motion was granted in part and denied in part. Based on the detailed privilege log that Oracle was required to submit, I accepted Oracle’s claim that the compensation analyses in question were not part of its regulatory compliance and were instead done in anticipation of litigation. But I granted the motion as to several requests for production that were specifically linked to what Oracle did to comply with the regulations in question. I also made clear that Oracle could not both maintain that the documents in question were privileged and that they represented its compliance with the applicable regulations.<sup>37</sup>

This case does not include substantive analysis of Oracle’s affirmative action compliance. The SAC pleads recordkeeping and access complaints in reference to the affirmative action program, but does not require detailed analysis of the affirmative action regulations. OFCCP’s complaint is not that what Oracle did is deficient in some respect—it is that Oracle did not do anything at all or did not produce the records of what it did to comply, as it was required to do. Put otherwise, the complaint makes recordkeeping and access complaints related to the affirmative action program, not substantive complaints about the affirmative action program. If OFCCP wanted to pursue robust claims, it needed to be clear about that desire and alternative reading of the SAC from the start. It cannot proceed based on one understanding of the claims at issue only to substitute another understanding at the summary judgment phase.

OFCCP’s argument in its motion for summary judgment goes to the substance of an affirmative action program, and claimed implications for Oracle’s alleged failures for the rest of the case. There are two ways this aspect of OFCCP’s briefing could be understood. First, this could be additional argument in favor of summary judgment on the substantive discrimination claims. OFCCP could be arguing that Oracle’s affirmative action deficiencies support some aspect of its claims for compensation discrimination and steering discrimination. Given OFCCP’s conclusion in its motion, it would appear that this is the function of the discussion—OFCCP seeks summary judgment only on the substantive discrimination claims. PM at 29-30. On this understanding, OFCCP may continue to pursue these arguments.<sup>38</sup> Second, this short section could be read as a distinct claim for summary judgment on an affirmative action claim. This reading is supported by the organization of the brief, and the devotion of considerable portions of the statement of undisputed facts to the issue. See PS at 49-53. Summary judgment would not be appropriate since

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<sup>37</sup> In an October 7, 2019, order I struck one of Oracle’s affirmative defenses on this basis.

<sup>38</sup> They do not alter the analysis above. The assertions here are subject to reasonable dispute, with the parties disagreeing over the inferences to be drawn from the evidence as well as the substance of the requirements at issue. See generally DOS at 173-79.

there remain genuine disputes over whether or not Oracle did comply. In any event, there is no distinct substantive affirmative action claim, so there is nothing OFCCP could be granted summary judgment on.<sup>39</sup>

## 2. Refusal to Produce Claims

In addition to the substantive discrimination claim, the SAC contained a series of complaints categorized as “Refusal to Produce Relevant Data and Records During Compliance Evaluation.” See SAC at ¶¶ 43-51. Some of these complaints were settled with the hiring discrimination claim. In those that remain, OFCCP alleges that Oracle was obligated to keep certain records and supply them to OFCCP upon request, but that:

Despite its obligations, during the compliance review, Oracle failed to supply records requested by OFCCP. Specifically, Oracle refused to produce:

a. compensation data for 2013,

...

c. data showing personnel actions providing job and salary information (such as starting job title, starting salary, and wage increases) for employees, [and]

d. analyses of Oracle’s total employment process as required by 41 C.F.R. § 60-2.17 (including analyses of its compensation system, personnel activity, and selection and recruitment procedures to determine if disparities existed based on race, ethnicity, or gender). . .

SAC at ¶ 44. OFCCP also alleges that

Oracle continues to refuse to produce any detailed analysis of its structure, conducted pursuant to 41 C.F.R. § 60-2.17(b)-(d), despite acknowledging that such records exist in response to discovery requests from OFCCP. Moreover, Oracle failed to provide any evidence that it complied with the other requirements of 41 C.F.R. § 60-2.17, or conducted an adverse impact analyses required by 41 C.F.R. §§ 60-3.15A and 60-3.4.

SAC at ¶ 45. And as just discussed, OFCCP alleges that

Oracle failed to maintain and make available to OFCCP documentation of its compliance with its obligation to develop and maintain an Affirmative Action Program by failing to maintain and make available documentation of its organizational profile, job group analysis, placement of incumbents in job groups, determination of availability, comparing incumbency to availability, placement goals, and internal audits of its employment processes.

SAC at ¶ 47. OFCCP contends that the refusal to produce creates a presumption that the information is unfavorable and “constitutes a violation of 41 C.F.R. §§ 60-1.12, 2.32, and generally 41 C.F.R. Parts 2, 3.” SAC at ¶¶ 49-50.

Oracle argues that it is entitled to summary decision on the various refusal of access claims because there is no genuine dispute that it did not refuse to produce anything. It points to evidence

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<sup>39</sup> OFCCP may mean these points to go to the recordkeeping/production complaints, to be discussed next, but has not presented its argument in a way that would permit analysis in that guise.

that it responded or attempted to respond to all requests but that OFCCP ignored its requests for clarification and questions. DM at 25; *see also* DS at 18-22. In addition, Oracle contends that the proper avenue for pursuing these claims would have been a denial of access case, not as part of the case that OFCCP actually brought. It argues the OFCCP's own rules required it to take this path. DM at 26; *see also* DS at 22-23. Moreover, Oracle contends that the remedies sought by OFCCP are not available in this proceeding. It argues that 1) an adverse inference is only available where a contractor destroyed or failed to preserve records, which is not alleged; 2) any penalty for not producing records would come after an order to produce them, which has not yet been made; 3) imposing a penalty for a refusal that wasn't subject to an order would violate due process; and 4) an injunction is not appropriate in this context. Finally, Oracle argues that the material that OFCCP alleges it refused to produce was produced during the litigation, so no relief could be appropriate since there is no prejudice to cure. DM at 26-30; *see also* DS at 22-23.<sup>40</sup>

OFCCP argues that Oracle has admitted not producing the information when requested and instead is maintaining that it would have produced the information eventually. PO at 20-21. As to Oracle's argument that a denial of access action was the proper way to raise these allegations, OFCCP contends that it has discretion to pursue that sort of enforcement or to include it within an enforcement action on the merits, pointing to the use of discretionary language in the applicable regulations. *Id.* at 27-28, 30. OFCCP contests Oracle's factual contentions regarding events during conciliation and points to evidence it believes indicates that its request were reasonable and Oracle refused to honor them. POG at 183-90, 193, 195-98. It also propounds a list of additional allegedly undisputed facts relating to Oracle's alleged refusal. POA at 8-11. Oracle responds in kind, arguing that OFCCP's responses and referenced evidence do not create genuine disputes and contending that, for the most part, OFCCP's additional facts are immaterial or misrepresent the evidence. *See* DRSD at 255-64, 266-73; DRSU at 8-36, 38-41. Sorting through this history and ascertaining which requests were reasonable and drawing conclusions as to whether or not there was a "refusal" would likely require a hearing.

However there is a more fundamental issue with this set of claims. 41 C.F.R. § 60-1.12 generally requires a contractor to preserve certain records and 41 C.F.R. § 60-1.43 requires a contractor to provide access to records. 41 C.F.R. § 60-2.32 requires a contractor to provide OFCCP access to its affirmative action plan records. The record retention requirement includes its own sanction: "Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor," unless "the contractor shows that the destruction or failure to preserve records results from the circumstances that are outside of the contractor's control." 41 C.F.R. § 1.12(e). But OFCCP has agreed with Oracle that the only allegation that Oracle destroyed or failed to preserve records related to the hiring discrimination claims. DS at 23; POG 199. Those claims were resolved and thus there is no further recordkeeping claim at issue and no possibility of an adverse inference on this basis.

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<sup>40</sup> In its opposition, Oracle avers that the refusal to produce claim should be dismissed because OFCCP moved for summary judgment on the entire case without addressing the claim. DO at 29. This argument fails, though it presages some of the below. Failure to move for summary judgment on an issue is not a concession that an opponent is entitled to summary judgment on the issue. Oracle's point is really that OFCCP should have captioned its motion differently. As it turns out, the claims that were included in OFCCP's summary judgment motion would have entitled it to all relief sought, so in a sense it was a proper motion for summary judgment on the whole case, even though it didn't include these ancillary issues.

For the document production/access claims in the SAC, OFCCP's desired remedy is unclear. Administrative enforcement "may be brought to enjoin violations, to seek appropriate relief, and to impose appropriate sanctions." 41 C.F.R. § 60.1-26(b)(1). In such actions, ALJs are provided with a broad set of powers. *See* 41 C.F.R. § 60.3015. As relevant here, in rendering a decision, an ALJ is empowered to "[r]ecommend whether the respondent is in current violation of the order, regulations, or its contractual obligations, as well as the nature of the relief necessary to insure the full enjoyment of the rights secured by the order." 41 C.F.R. § 60-30.15(l); *see also* 41 C.F.R. § 60-30.27. The appropriate relief, action to enjoin the violations, and relief necessary to insure the full enjoyment of the rights of the order in reference to the various document access regulations is an order that the contractor provide access to the relevant documents. That would permit OFCCP to continue its investigation and reach conclusions. It is for this reason that the regulations permit OFCCP to refer these sorts of cases for enforcement without following all of the usual procedural requirements, 41 C.F.R. § 60-1.26(b)(1), and create procedures for those sorts of cases involving expedited proceedings. *See* 41 C.F.R. §§ 60-30.31 *et seq.*

OFCCP asserts that it is not required to choose between pursuing an access to records case and a substantive case and may bring both together. PO at 27-28, 30. But it over-reads its support for this proposition. 41 C.F.R. § 60-1.26(a)(1) enumerates ten avenues to enforcement proceedings. OFCCP reads the use of "may" in the regulation to mean that it may bring all of the various types of cases together. But that doesn't follow—the use of "may" only indicates that the enumerated avenues are all ways to enforcement proceedings, some of which might still exclude others.

The deficiency isn't in the regulations—it is far more pragmatic. I don't know what OFCCP wants me to do if Oracle is found to have violated the record access requirements. Oracle contends that all of the material that was requested in the compliance review that is relevant to the substantive complaint was provided either during the compliance review or during discovery. *See* DM at 29; DS 23-24. OFCCP disputes some of this, contending that although Oracle produced the requested compensation data, it did not do so for the full range of job functions and instead limited it to those at issue in this case. POG at 200. It also disputes that Oracle produced all of the requested affirmative action plan information. *Id.* at 202. Oracle deems the first dispute a quibble and the second as really about whether or not what Oracle produced complied with the regulations. DRSD at 275-78.

Once OFCCP moved this matter out of investigation and into enforcement proceedings, the procedure for gaining access to records changed. OFCCP now had the tools of formal discovery. OFCCP never brought a motion to procure the compensation information for the job functions not at issue in this claim. That is sensible. OFCCP completed its substantive investigation and issued findings, choosing to focus on the three job functions now at issue here. The compliance review is over. Once it made that choice, the compensation information and documents relevant to the proceeding—now in enforcement and not in investigation—was determined by the claims OFCCP chose to bring. By pointing out this deficiency in Oracle's subsequent production, OFCCP is essentially asking me for an order that Oracle produce the missing information. But that would serve no purpose. The investigation is done and we are on the eve of hearing. It is too late to amend the complaint. OFCCP might have chosen to continue the investigation and bring an expedited denial of access claim. Then it might have issued a substantive complaint including other job functions. But it chose otherwise—to bring its investigation to a close and make substantive allegations—and it must accept the consequences of that choice.

OFCCP did bring motions to procure Oracle's affirmative action plan information and those motions were granted in part. In particular, Oracle was ordered to produce the documentation of its compliance with the relevant regulations. It is evident that OFCCP does not believe that what Oracle produced is good enough to comply. But that complaint isn't part of this case. Again, OFCCP had choices about how to pursue its investigation. It chose to move ahead with a substantive claim in enforcement and did not include an affirmative action component. It later attempted to add one surreptitiously, but retreated after questions were raised about the propriety of expanding the complaint in a new and substantively different direction over two years after it was filed. Moreover, the only thing that could be ordered for Oracle's alleged failure to produce the affirmative action related information is production of the information. That was already done.

Tellingly, the SAC does not make clear what remedy should follow from these alleged violations. Even though OFCCP pleads various refusal of access violations, the prayer for relief doesn't even seek a production of or access to *any* documents or records. *See* SAC at 16-17. That again makes sense—since OFCCP decided to end the investigatory phase and move into enforcement on the substantive allegations, access to records could be pursued through discovery and an order granting access at the *end* of the case would serve no purpose. This is also why OFCCP was able to move for summary judgment on the entire case without mentioning the denial of access complaints—they are a wheel that does not turn in the current posture of the case.

OFCCP resists this conclusion. It acknowledges that Oracle provided at least some of the requested information eventually, but contends that a remedy is still available in that I may order debarment or prospective injunctive relief requiring Oracle to comply with the regulations. PO at 28-29. Oracle responds that the case upon which OFCCP relies actually directed that the remedy (there debarment) would end once the documents in question were produced. DR at 14. Debarment would seem to be a rash sanction for denial of access, especially when the still relevant records and documents have now been provided and there is no order compelling access to whatever else was initially requested but became irrelevant as the posture of the matter changed from investigation to enforcement. The executive order allows for cancellation of contracts and debarment. *See* EO 11246 at § 209(a)(5)-(6). But those sanctions are available “only by or with the approval of the Deputy Assistant Secretary.” 41 C.F.R. § 60-1.27(a). There is no indication that the Deputy Assistant Secretary has approved of a debarment remedy for a refusal of access case in the current posture. In fact, per the subsequently filed Joint Pre-Hearing Statement (pp. 6-8), OFCCP is no longer seeking cancellation or debarment in this action *at all*, let alone as a remedy for a historical denial of access.<sup>41</sup>

In any case, debarment is not an appropriate remedy in a refusal of access case in the first instance. OFCCP's support for debarment as a sanction is *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364 (D.D.C. 1979). But Oracle is correct that the case is entirely different from the allegations here. The question in the case was “whether a major government contractor may be debarred from existing and future government contracts for refusing to comply with demands for discovery in the context of an ongoing proceeding in which it is being charged with employment discrimination.” *Id.* at 366. In that case, debarment was recommended after the contractor violated numerous discovery orders. *Id.* at 366-67. OFCCP relies on the holding that debarment was an authorized sanction for violations outside of substantive discrimination. *Id.* at 371-73. But in finding the sanction appropriate, the court stressed that the refusal of discovery concerned the “heart of the matters

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<sup>41</sup> The statement of requested remedies mentions cancellation and debarment only as a consequence if Oracle does not comply with the final order of relief in this action. This is already a function of the regulations. *See* 41 C.F.R. § 60-30.30.

pending before the [ALJ]” and that the contractor’s “recalcitrance and discriminatory policies” were already well documented in prior judicial proceedings in federal court. *Id.* at 374. In the particular circumstances of the case, both the agency and the court were left with “no choice” in vindicating compliance with EO 11246.

This case is entirely different. Oracle has not violated any discovery orders—there hasn’t even been an allegation from OFCCP that Oracle has violated any discovery orders. The allegation, instead, is that in 2015-16, Oracle refused access to some records. OFCCP is not seeking any order for access to those records—it either gained access in this proceeding already or the records were rendered irrelevant by its decisions. There is no order for Oracle to have violated and none of the history that was present in *Uniroyal*. Moreover, in *Uniroyal* the debarment order only persisted until the violation was remedied and the contractor complied with the discovery orders. *Id.* at 376. Oracle has complied with the discovery orders and OFCCP has been given access to all of the records it sought except for those it chose not to pursue in the litigation. *Uniroyal* thus cannot support OFCCP’s new contention that Oracle should be debarred for the refusal of access complaint alleged.

OFCCP’s opposition also points to the availability of injunctive relief, pointing out that the SAC sought an order with “provisions enjoining Oracle from failing to correct its recordkeeping practices and procedures to maintain and supply to OFCCP employment records as required by the Executive Order.” SAC at 16. The recordkeeping violations and practices are no longer at issue. I don’t know what OFCCP means in seeking changes to Oracle’s procedures for supplying records. This appears to be nothing more than complying with the regulations. OFCCP doesn’t seem to know either—facing a motion for summary judgment on the point, it hasn’t explained what it seeks with specificity, other than some general order that Oracle comply with the law in other cases. The Joint Pre-Hearing Statement (p. 8) is only able to specify a general order to keep records and provide them to OFCCP in a timely fashion. This is just an overly general statement of what is already specified in more detail in the regulations.

Injunctive relief is within the broadly stated enforcement powers available in this proceeding, but as Oracle points out, any injunction would have to comply with Rule 65(d), which, in part, requires that “[e]very order granting an injunction [] must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) described in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.”<sup>42</sup> Fed. R. Civ. P. 65(d)(1). Injunctions that simply require a party to “obey the law” do not comply with the specificity requirement of the rule. Rather, such injunctions must specify the type and class of unlawful acts enjoined based on violations in the past. See *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426, 435-36 (1941); *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 504 (7th Cir. 2008) (citing *Int’l Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1316 (Fed. Cir. 2004)); *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (citing *Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983)) (injunctions remedy “only the specific harms shown by the plaintiffs” and may not “enjoin all possible breaches of the law”); *Hughbey v. JMS Development Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996) (“appellate courts will not countenance injunctions that merely require someone to ‘obey the law’”); *S.E.C. v. Lorin*, 76 F.3d 458, 461 (2d Cir. 1996); *Louis W. Epstein Family P’Ship v. Kmart Corp.*, 13 F.3d 762, 771 (3d Cir. 1994)

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<sup>42</sup> Though Rule 65 mostly concerns temporary restraining orders and preliminary injunctions, Rule 65(d) applies to “Every Injunction and Restraining Order.” Fed. R. Civ. P. 65(d); see also *Int’l Longshoremen’s Ass’n, Local 1291 v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 207 (1967) (Rule 65(d) applies to any “equitable decree compelling obedience under the threat of contempt”); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 319-320 (7th Cir. 1995) (applying Rule 65(d) to a permanent injunction).

(citing *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987)) (“Broad, non-specific language that merely enjoins a party to obey the law or comply with an agreement” does not satisfy Rule 65(d)).<sup>43</sup>

OFCCP has not spelled out what injunctive relief it seeks other than an order that Oracle comply with the law in future compliance reviews. Nor do I see how the allegations could lead to a sufficiently specific injunction. OFCCP has not explained some particular change in practice or procedure that is necessary, other than that Oracle provide it access in compliance with the regulations. Oracle is already obliged to do that and if OFCCP believes it is not complying, OFCCP already has a way to bring expedited actions to gain access. The only thing that an “obey the law” injunction might accomplish is to turn this case into a vehicle for OFCCP to pursue parallel enforcement actions in other compliance reviews without having to follow its own regulations and engage in any conciliation.<sup>44</sup> That would be improper and serve no sound purpose, given the other avenues for relief. Injunctive relief might be proper if there was a specific action or practice to enjoin, but OFCCP hasn’t indicated what that action or practice might be beyond a simple recitation of the regulations.<sup>45</sup>

In the current posture of the case and given the undisputed facts, I fail to see any available remedy for what is, at this point, an alleged historical violation that has been entirely overtaken by the subsequent litigation. What actually appears to be at issue here is ongoing quarrels between Oracle and OFCCP about what happened in the compliance review, with each side seeking some validation that it was in the right and the other was unreasonable, in violation of regulations, or non-compliant. However much that sort of historical adjudication might mean to the parties and attorneys, it is not something to be adjudicated here unless it has some bearing on the disposition of the complaint and would result in some order for relief. A refusal of access case becomes largely moot when the records are provided or become irrelevant. That has occurred here and retaining these claims as part of the litigation would only serve to distract from the legitimate and important disputes that remain. Oracle is thus granted summary judgment as to the refusal of access claims.<sup>46</sup>

### 3. *Continuing Violations*

Oracle argues that OFCCP’s continuing violation theory should be dismissed because it cannot establish a violation in the 2013-14 audit period. DM at 25. However, since genuine disputes of material fact exist that prevent summary judgment for Oracle on the discriminatory compensation, discriminatory assignment, and disparate impact via reliance on prior pay theories, this argument derivatively fails as well.

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<sup>43</sup> Violation of a final administrative order results in “immediate cancellation, termination and suspension of the respondent’s contracts and/or debarment of the respondent from further contracts.” 41 C.F.R. § 60-30.30. Hence the need for specificity as to what is and is not required in any injunctive order is imperative in this context—a contractor must be given a sufficiently clear understanding of what it is required to do.

<sup>44</sup> Though denial of access cases can be brought without complying with some of the procedural requirements, OFCCP must still conciliate. See 41 C.F.R. § 60-1.26(b)(2).

<sup>45</sup> OFCCP (PO at 29) points to *Marshall v. Chala Enterprises, Inc.*, 645 F.2d 799, 804 (9th Cir. 1981) for the proposition that even though Oracle may be in present compliance, an injunction would be a proper remedy. That, however, is not the deficiency—the issue discussed here is not the appropriateness of injunctive relief given current compliance, it is the appropriateness of injunctive relief that, as described, is simply a broad mandate to follow the law.

<sup>46</sup> Though I grant Oracle summary judgment on these claims for what is essentially mootness, I do not find, here at least, that evidence concerning what Oracle provided and did or did not do is entirely irrelevant. It still might have bearing on the suggested inference to intentional discrimination. The alleged refusal to produce may be relevant to Oracle’s affirmative defenses surrounding conciliation and the order to show cause, if those issues are not otherwise resolved prior to the hearing.

## ORDER

For the reasons stated above:

1. OFCCP's Motion for Summary Judgment is denied.
2. Oracle's Motion for Summary Judgment is denied, but the alternative Motion for Partial Summary Judgment is granted in part:
  - a. Oracle is granted summary judgment as to the OFCCP's disparate impact claim except of the claim based on an alleged practice of reliance on prior pay to determine starting salaries.
  - b. Oracle is granted summary judgment on OFCCP's refusal of access claims.
  - c. Oracle is denied summary judgment in all other respects.
3. Oracle is ordered to show cause why OFCCP should not be granted summary judgment on Oracle's affirmative defenses involving the Show Cause Notice and conciliation. Oracle must file any responsive pleading not to exceed 10 pages by close of business on December 2, 2019. OFCCP may also file a responsive pleading not to exceed 10 pages, by close of business on December 2, 2019.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge